COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

FACULTY FEDERATION OF COMMUNITY COLLEGE OF PHILADELPHIA LOCAL 2026 AFT, AFL-CIO	:	
v.	:	CASE NO. PERA-C-17-332-E
PHILADELPHIA COMMUNITY COLLEGE	:	

PROPOSED DECISION AND ORDER

On November 27, 2017, the Faculty Federation of Community College of Philadelphia, Local 2026 (Union or Federation) filed a charge of unfair practices with the Pennsylvania Labor Relations Board (Board) alleging that the Community College of Philadelphia (College or CCP) violated Section 1201(a)(1), (3) and (5) of the Public Employe Relations Act (PERA or Act). The Federation specifically alleged that the College, in bad faith and for discriminatory reasons, unilaterally altered terms and conditions of employment for two separate bargaining units, one consisting of full-time faculty, and the other consisting of part-time faculty and visiting lecturers. The Federation alleged that the College unilaterally changed the College calendar by establishing a winter term for 2017-2018, which is not included in the negotiated calendar that is part of the parties' collective bargaining agreements (CBA). The Federation further alleged that College administrators in the past negotiated a winter term with the Federation. The Federation also alleged that the College engaged in unlawful direct dealing by soliciting faculty to teach the 2017-2018 winter term thereby circumventing the Federation.

By letter dated December 6, 2017, the Acting Secretary of the Board issued a letter stating that the Board was unable to process the charge and that it would be necessary for the Federation to specify the date that the winter term commenced. On December 19, 2017, the Federation filed an amended charge which provided the information requested by the Acting Secretary of the Board.

On January 26, 2018, the Secretary of the Board issued a letter stating that no complaint will be issued on the charge. The Secretary of the Board reasoned that the Federation failed to state a cause of action under Section 1201(a)(5) of the Act because case law has established that changing school calendars was a managerial prerogative. The Secretary of the Board also concluded that the Federation failed to state a cause of action under Section 1201(a)(3) of the Act because the charge did not allege adverse employment action against any employes.

On February 15, 2018, the Federation filed exceptions and a supporting brief with the Board to the Secretary's decision declining to issue a complaint. On May 15, 2018, the Board issued an order directing remand to the Secretary for further proceedings. On July 19, 2018, the Secretary of the Board issued a complaint and notice of hearing directing that a hearing be held on November 7, 2018, in Harrisburg. On August 3, 2018, the College filed an answer with new matter. A hearing was held on November 7, 2018, and a second day of hearing was held on February 28, 2019. During the hearings on those dates, both parties were afforded a full and fair opportunity to

present testimonial and documentary evidence and to cross-examine witnesses. On June 19, 2019, the Federation filed its post-hearing brief. The Board received the College's post-hearing brief on August 27, 2019. The Federation filed a reply brief on September 11, 2019. Also on September 11, 2019, the attorney of record for the College submitted notice that the College would not be filing a sur-reply.

The examiner, based upon all matters of record, makes the following:

FINDINGS OF FACT

1. The College is a public employer within the meaning of Section 301(1) of PERA. (N.T. 9)

2. The Federation is an employe organization within the meaning of Section 301(3) of PERA. (N.T. 9)

3. Dr. Donald Generals has been the College's President since July 2014. Based on his experience with winter terms at other institutions, he wanted to offer a winter term at CCP. Victoria Zellers is the General Counsel for the College. (N.T. 39-40, 175-176, 180, 201-202; Federation Exhibit 7)

4. Dr. Judith Gay is the College's Vice President for Strategic Initiatives and Chief of Staff. Dr. Gay was, *inter alia*, involved in the development of the first winter term in 2014-2015, coordinating with faculty and administrators. Dr. Gay had learned that other colleges successfully provided winter terms, otherwise known as "intercession," after evaluating the winter term programs at other institutions. (N.T. 172-174, 176, 183)

5. Dr. Samuel Hirsh is the College's Vice President of Academic and Student Success. Dr. Hirsch oversees enrollment management, student development, athletics, academic programming, curricula, development of new programs, faculty and other student related issues. Dr. Hirsch was part of the 2014-2015 winter-term implementation team, which included staff from various parts of the College, to develop the logistics of offering the winter term. Dr. Hirsch was responsible for deciding whether to have the winter term. (N.T. 217-220)

6. Dr. Chae Sweet is the Dean of Liberal Studies at the College, and she has held that position since January 2016. Dr. Sweet administers the academic functions of the Liberal Studies Division. In that capacity, Dr. Sweet manages the department heads, the programs and the administrative staff. Dr. Sweet is also responsible for ensuring the quality of the courses and programs within the Liberal Studies Division. (N.T. 330-331)

7. The Federation represents three locals with three separate collective bargaining agreements. Stephen Jones is a Co-President of the Federation and an Assistant Professor of English at the CCP. (N.T. 21-24)

8. A winter term is a period of education between the end of the fall semester and the beginning of the spring semester when online educational opportunities are provided for students at the College. Approximately 20 online courses are offered during the winter term currently. The amount of course offerings has increased since the first winter term due to increased interest among the faculty as well as student popularity and demand. (N.T. 173-174)

9. At the time of the hearings, the parties were operating under the status quo of expired CBAs effective September 1, 2011 through August 31,

2016, and the parties were negotiating for successor CBAs. (N.T. 24-27; Federation Exhibits 1 & 2)

10. The College held a winter term for 2014-2015, 2015-2016, 2016-2017 and 2017-2018. Non-CCP students are permitted to enroll in winter-term courses provided by the College. The College's main campus is not completely closed between the end of the fall and the beginning of the spring semesters. Some staff are working during that time and some facilities, such as the library, are available. (N.T. 27, 175, 293, 316-319, 351; Federation Exhibits 4, 5 & 6)

11. The academic year at the College is September 1, through August 31, every year. Article VIII of the full-time faculty CBA provides for hours of work for faculty. Article VIII(I)(5) addresses "Summer Teaching," and provides that "[e]mployes may teach up to two (2) courses per Summer session, provided the sections are available." (N.T. 28-29; Federation Exhibit 1 at 21)

12. Courses taught outside of the fall and spring semesters are "overload," which means teaching beyond the required minimum amount of instruction hours. Faculty are required to teach 12 credits in the fall and 12 credits in the spring. Anything above that minimum requirement either during the spring or fall semesters or beyond those semesters during an academic year is an overload, e.g. summer teaching. (N.T. 336-337)

13. Article VII of the part-time faculty CBA provides that part-time faculty shall submit availability forms for the summer I and summer II terms by February 1 and that full-time faculty shall make their request for overload or summer teaching at least 30 days before the beginning of the term. (Federation Exhibit 2 at 10)

14. Exhibit B of the full-time faculty CBA is the College calendar for the Fall semester of 2011 through the Spring semester 2016 for all faculty. For each year covered by the CBA, the College does not provide physical classes or traditional instruction between Christmas and New Year's Day or between the fall and spring semesters. The calendar specifically references other days during which the College is closed. (N.T. 30-33; Federation Exhibit 1 at 65)

15. Exhibit B of the full-time faculty CBA also includes a schedule for the early summer term and the late summer term for each of the summers encompassed by the term of the CBA. (N.T. 30-31; Federation Exhibit 1 at 65)

16. During negotiations for the 2011-2016 CBA and thereafter, the parties discussed the College calendar to accommodate snow days, professional development days, state mandated increases in class time, length of final exam periods, grade due dates and equal lab and class days for lab courses. The parties agreed on the calendar contained in the expired CBA and thereafter. (N.T. 130-135, 282-283)

17. Neither CBA references a winter term. Nothing in the calendar prohibits a winter term. The winter term falls within the academic pay period between September 1, and August 31. On February 9, 2015, the parties executed a "Letter of Agreement." Paragraph 10 of that agreement provides as follows: "Regarding the College Calendar (Exhibit B to the Collective Bargaining Agreement) the same may be changed to reflect the implementation of mutually agreed upon ideas regarding in-service activities and/or programs, as needed." (N.T. 31-34, 81, 258-262, 299; Federation Exhibit 1 at 21-23, 65, 98; Federation Exhibit 2)

18. The College held its first winter term in 2014-2015 for the period between "the last day of the Fall 2014 semester and the first day of the Spring 2015 semester." On October 31, 2014, the parties entered into an agreement outlining the manner in which that winter term would be conducted. The agreement provides that "[t]he College will offer, on a one-time experimental basis, a pilot test of a Winter Term for 2014-2015, subject to [certain] conditions." (Federation Exhibit 4)

19. The terms of the agreement require, in summary form, that only approved and fully on-line courses with learning, lab, library and other support services be provided; only faculty volunteers will be considered for winter-term assignments; a faculty volunteer will be permitted to teach only one course during the winter term; part-time faculty volunteers must submit an availability form developed for the purpose of volunteering for the winter term; faculty will be paid as they would be paid for teaching a summer course and paid the usual contractual rates for teaching an overload; part-time faculty will earn seniority and credit for health insurance premium contributions; no faculty will be required to work during the winter term on days they normally would not have to work; and the parties will cooperate in assessing the outcomes of the winter term experiment with respect to students, faculty and the College. (N.T. 107-108; Federation Exhibit 4)

20. Mr. Jones testified that, by using the language: "one-time experimental basis," and "pilot test of a Winter Term for 2014-2015," the Union was explicitly conveying to the College that it was not making a winter term a permanent part of the College calendar. (N.T. 37)

21. Online courses are also offered during the fall and spring semesters as well as the summer terms. At no time did the College bargain over whether to hold spring or fall semesters. (N.T. 39, 154-155)

22. At a meeting in the fall of 2015 with Dr. Generals, Dr. Hirsch, Ms. Zellers, Mr. Jones and other Federation members, the parties discussed the conditions for the 2015-2016 winter term. At this meeting, College administrators asserted the College's right to have a winter term without Union agreement. In response, Mr. Jones stated: "That would be the start of World War III." The administrators responded that they intended to proceed with the winter term without Union consent. (N.T. 227-230, 276-277)

23. Also in November 2015, the parties entered into another side agreement outlining the manner in which the College would hold a winter term for 2015-2016. The language and the terms of this agreement are virtually identical to the terms and language of the first agreement for the prior winter term, including the language: "one-time experimental basis" and "pilot test." (Federation Exhibit 5)

24. Bargaining for a new collective bargaining agreement began in January 2016. The College's January 13, 2016 written proposal provided the following notice: "some of the College's proposals may reflect a declaration of the College's existing rights." The College's October 27, 2016 written proposal contained the same language. Throughout 2016, the College proposed changes to the CBA that, *inter alia*, gave the College exclusive control over the calendar. The College made proposals in bargaining that, in its view, reflected matters that were already its existing right to control unilaterally, not because it believed it needed Union approval. (N.T. 195-196, 392; Federation Exhibits 17-20)

25. In August 2016, the parties entered into a third side agreement outlining the manner in which the College would hold a winter term for 2016-2017. The language and the terms of this agreement are virtually identical to

the terms and language of the first two agreements for the prior winter terms including the language: "'one-time' experimental basis" and eliminating the term "pilot test." Also, the manner in which assessments of winter-term courses and student outcomes was to be conducted was more elaborate and detailed. (N.T. 39-40; Federation Exhibit 6)

26. Nothing in any of the three side agreements about winter terms restricts the College from having a winter term without the consent of the Union. (N.T. 223; Federation Exhibits 4-6)

27. The College did not hold a winter term at any time prior to the 2014-2015 winter term. The parties discussed a College calendar after the expiration of the 2011-2016 CBAs. (N.T. 42-43, 98, 268)

28. On September 29, 2016, General Counsel Victoria Zellers sent an email to Neil Wells and Bridget McFadden, who are the two co-chairs of the full-time faculty bargaining unit. (N.T. 45-46, 128-129; Federation Exhibit 7)

29. In the email, Ms. Zellers attached a proposed calendar and stated as follows:

> Attached is the proposed calendar for 2017-2018. Since we have been able to agree to a Winter Term for 3 years, we would like to include it in the calendar for next year.
>
> Let us know if you have any questions or would like to schedule a time to discuss. We would like to reach an agreement as soon as possible for planning purposes.

(Federation Exhibit 7)

30. On October 5, 2016, Union Co-chair Mr. Wells emailed his response to Ms. Zellers as follows:

> Thank you for agreeing to have a joint committee to create the calendar for the 2017-2018 academic year. The Federation's group will consist of Brent Webber, Kristy Shuda McGuire and myself. We have reviewed the administration's draft and have a couple concerns and suggestions we need to discuss. They mainly are about having adequate time for lab classes and final exams during the summer parts of the term.
>
> In addition, the Federation at this time does not agree to allowing a Winter Term for the 2017-2018 academic year.

(N.T. 47-48, 136-137, 282-283; Federation Exhibit 8)

31. At a meeting on October 19, 2016 to discuss the College calendar with Union representatives, the parties discussed the winter term for 2017-2018. The College asserted at that meeting that the 2017-2018 winter term would take place, and the Union asserted that it would not because it was not negotiated and the parties were involved in contract negotiations. (N.T. 238-243)

32. On October 20, 2016, after the expiration of the 2011-2016 CBA, the faculty members voted to refrain from participating in the assessment of Student Learning Outcomes, Program Learning Outcomes, course revisions and "Guided Pathways." (Faculty Federation of Community College of Philadelphia, Local 2026 v. Community College of Philadelphia, 50 PPER 35 at 149, F.F. 34 (Proposed Decision and Order, 2018))

33. On October 21, 2016, Ms. Zellers emailed Federation Co-chairs Mr. Wells and Ms. McFadden stating: "Please see the updated 2017-2018 calendar revised to reflect the discussion from the calendar committee meeting." Ms. Zellers' email further stated: "Please send me an email to confirm your acceptance of this calendar for 2017-2018. (Federation Exhibit 9)

34. On October 26, 2016, the Federation issued a memo stating, in relevant part, as follows:

> Effective immediately, all faculty will refrain from voluntary work on everything having to do with Middle States including General Education Assessment, Student Learning Outcomes (SLOs), Program Learning Outcomes (PLOs), Program Audits, Course Revisions, and all work on Guided Pathways.

(Community College of Philadelphia, 50 PPER at 149, F.F. 35)

35. Also on October 26, 2016, Mr. Wells responded to Ms. Zellers stating: "With this email, the Federation confirms its agreement to the revised calendar (pasted in below) for academic year 2017-2018 that was mutually agreed to at the joint calendar committee meeting on October 19, 2016." The attached calendar, like the one included in the expired CBA, includes holidays, professional development days, beginning days and final days for classes, final exam periods, due dates for grade submissions and College closure between Christmas and the New Year's Day; it does not include a winter term. (N.T. 138-139; Federation Exhibit 9)

36. The College agreed to remove the winter term from the proposed College calendar at this point because administrators wanted to terminate any further wrangling over it and because the College was going to offer the winter term regardless of the Union's position. The administrators did not want to start "World War III" with the Union and continue fighting just to include the winter term in the College calendar. (N.T. 243-244, 284-285)

37. Dr. Sweet oversaw the operations of the 2016-2017 winter term. Dr. Sweet contacted department heads to staff the winter term courses with volunteers based on the courses offered during the prior winter term. In early August 2017, Department Head Osvil Acosta-Morales emailed Dr. Sweet stating that, although his faculty were interested in teaching another winter term, the Union leadership was representing that they should not expect to have a 2017-2018 winter term without a contract. Staffing the 2017-2018 winter term was done in the same way as staffing the 2016-2017 winter term. (N.T. 331-332, 336, 337-340; Federation Exhibit 15 at 27; Employer Exhibit 5)

38. On August 22, 2017, Ms. Zellers emailed Mr. Jones, Ms. McFadden and Mr. Wells and stated that "[t]he College plans to offer an online Winter 2017-2018 term. The College would like to follow the same procedures and terms that were agreed upon for the last three Winter Terms." Ms. Zellers further stated: "Please review the attached agreement and let me know if you would like to meet with Dr. Hirsch and me to discuss." (Federation Exhibit 10)

39. On August 29, 2017, Dr. Sweet forwarded Osvil Acosta-Morales' report of faculty concerns about the Union's position on a winter term to Dr. Hirsch. Dr. Hirsch asked Dr. Sweet to convey to her department heads that "it's the College's intent to run the Winter Term under the same terms that had been previously agreed to by the College and the Federation. (Employer Exhibit 6)

40. Also on August 29, 2017, Dr. Sweet emailed several department heads in response as follows: "If faculty ask you about this you can share

that the College's intent is to run the Winter Term under the same terms that had been previously agreed to by the College and the Federation. (Federation Exhibit 15 at 27)

41. On September 6, 2017, Ms. McFadden responded to Ms. Zellers as follows:

> As a part of the Collective Bargaining Agreement, the Academic Calendar has always been agreed to jointly by the Federation and the Administration. For the previous two years, you have asked the Federation for an agreement to add a Winter Term which is not in the Calendar in the CBA. Each year's agreement had many qualifying stipulations and was made on a one-time, non-precedential basis. At this time we are in the middle of protracted negotiations regarding the CBA, and you have a comprehensive proposal on the Calendar. We feel that negotiations about a Winter Term should take place at the negotiations table and we do not now agree to a one-year agreement on running the Winter Term for the 2017-2018 academic year.

(Federation Exhibit 10)

42. By memorandum addressed to Ms. Zellers dated September 8, 2017, Mr. Jones, Mr. Wells and Ms. McFadden conveyed the Union's position as follows:

> It has come to our attention that members of the administration have approached our Federation members to recruit them for a non-existent Winter Term to take place during the upcoming winter break. Those members were apparently not informed that there is no agreement between the College and the Federation to change the calendar to accommodate a new experimental Winter Term.
>
> While the administration is attempting to bargain for blanket rights to set the College calendar without our agreement, it has not gained that right through collective bargaining. The administration's actions in recruiting our members to teach in a semester that has not been added to the calendar constitute bad faith direct dealing with our members and are also an unfair attempt to change the status quo in negotiations through a unilateral action.
>
> We demand that the College immediately cease direct dealing with our members on its calendar proposals, and that the College inform all faculty that there is not now and has never been an agreement to change the calendar for this purpose, and that such a semester will not be added to the calendar.

(Federation Exhibit 12)

43. On September 11, 2017, Ms. Zellers responded to Ms. McFadden, Mr. Jones and Mr. Wells as follows:

> Respectfully, the College administration disagrees. The College will be moving forward with the Winter Term on the same terms and conditions as last year. Dr. Hirsch and I remain available to meet and discuss with you any issues that may arise.

(Federation Exhibit 10)

44. On September 14, 2017, Mr. Wells, Mr. Jones and Ms. McFadden sent another memorandum to Ms. Zellers further conveying the Union's position on the College's intent to hold a winter term as follows:

> We are in receipt of your September 11, 2017 email stating that, notwithstanding the Federation's decision not to agree to a one-year agreement on running the Winter Term for 2017-2018, the College has decided to move forward with that additional term. The Federation views such a decision and its implementation to be an unlawful unilateral change and a disruption by the College of the *status quo* represented by the expired collective bargaining agreement with the Full Time Faculty. As you know, that agreement does not contain a provision for the College's right to set the calendar unilaterally, nor does it include a Winter Term, although it otherwise outlines the agreed-upon College academic calendar. Further, the Federation and the College have mutually agreed to a 2017-2018 Academic Year calendar as a side agreement which does not include a Winter Term.
>
> Thus the College calendar is not a "meet and discuss" item. Rather, it is a subject over which the parties have previously bargained.
>
> Further, we view any attempt by the College to communicate directly with faculty members represented by the Federation with respect to this proposed Winter Term as unlawful direct dealing and circumvention of the Federation as the exclusive collective bargaining representative of the faculty with respect to terms and conditions of employment. In that regard, we are requesting that you provide us with any and all records and documents relating to any efforts by the College to solicit faculty members to teach during this coming Winter Term. Consider this an ongoing request for information such that any future communications, if they take place over our objection, should be immediately provided to us.

(Federation Exhibit 11)

45. By memorandum dated September 20, 2017, and addressed to Mr. Jones, with copies to Dr. Hirsch, Mr. Wells and Ms. McFadden, Ms. Zellers responded to the Union's September 8, 2017 memorandum as follows:

> As we have noted on many occasions, Act 195 clearly states that "[p]ulbic employers shall not be required to bargain over matters of inherent managerial policy, which shall include but shall not be limited to such areas of discretion or policy as the functions and programs of the public employer…" The Federation appears to believe that it, and not the College, has the right to determine whether or not the College will provide students with an opportunity to enroll in an online winter program. Respectfully, we disagree.
>
> As noted previously, the College plans to run the program under the same terms and procedures that it has for the last three years. Under these terms, participation in the program is strictly voluntary, and any employee who elects to work during the Winter Term and teach an online course will be paid in accordance with the status quo. Making faculty aware of the College's decision in this regard and advising them of the opportunity to participate is perfectly lawful and certainly does not constitute "direct dealing." Given the Winter Term's importance to the College's education mission and its student's educational progress, we are disappointed to see the Federation's concerted efforts to prevent interested faculty from teaching and request you reconsider your position.

(Federation Exhibit 13)(emphasis original)

46. On September 22, 2017, Dr. Sweet sent to the department heads Ms. Zellers' September 20, 2017 memorandum outlining the College's position on its managerial rights under Act 195. Department Head Osvil Acosta-Morales responded that his faculty called an emergency meeting to vote on a possible department resolution to not offer winter courses for 2017-2018. Dr. Sweet responded, in relevant part, as follows: "That's fine, but you must know that it is not the faculty's choice whether or not to offer classes." (N.T. 347-348; Employer Exhibit 8)

47. On September 26, 2017, the Union responded to Ms. Zellers' September 20, 2017, memorandum and stated, in relevant part, as follows:

> We are aware of the provisions of Act 195. The College Calendar has been a topic of bargaining since the formation of the Full-time Faculty bargaining unit, and it remains a topic on which you must bargain with us.
>
> Contrary to the statement in your memo, the Federation believes that that [sic] the College is required to bargain with us over changes in the calendar. The College seems to believe that it can change the status quo in the collective bargaining agreement unilaterally. We object to your efforts to do so.
>
> As for your plans to create a Winter Term for 2017, the "status quo" is that there is no Winter Term in the 2017-2018 calendar. You are fully aware that the terms to which you refer in your paragraph 2 were the terms under which we agreed to a Winter Term on a "one-time, experimental basis."
>
> It's not productive for you to bring into this exchange your self-serving, pious statements about the College's mission and students, and our effort to "prevent interested faculty from teaching." The College may not make changes in the calendar without bargaining for them. We will not reciprocate here by cataloging our "disappointment" with your unlawful behavior.
>
> We repeat our request that you provide us with any and all records and documents relating to any efforts by the College to solicit faculty members to teach during this coming Winter Term. This includes solicitation of both part-time and full-time faculty. Consider this an ongoing request for information such that any future communications, if they take place over our objection, should be immediately provided to us.

(Federation Exhibit 14)

48. On October 5, 2017, and October 10, 2017, Ms. Zellers responded to the Union's information request. Ms. Zellers provided the Federation with two packets of emails indicating that the administration had communicated with department heads and that department heads communicated with faculty regarding the 2017-2018 winter term. The emails indicate that the department heads sought faculty volunteers to build and teach courses during the 2017-2018 winter term and that some faculty members did volunteer to develop and teach courses for the 2017-2018 winter term. The College held a winter term for 2017-2018 under the same terms as the previous winter term without agreement from the Union. Approximately 275 students took fourteen online winter term courses in 2017-2018, none of which took place at the CCP main campus. The College also held a 2018-2019 winter term, to which the Union did not agree, and during which the College offered 18 online courses and during

which faculty volunteered and received overload pay. (N.T. 60-63, 229-230, 254-258, 289, 348; Federation Exhibits 15 & 16)

49. On November 9, 2017, the Federation disseminated a document to answer frequently asked questions for the faculty. In that document, the Federation informed faculty, in relevant part, as follows: "Faculty should refrain from participating in voluntary activities on everything having to do with Middle States including General Education Assessment, Student Learning Outcomes (SLOs), Program Learning Outcomes (PLOs). . .." Faculty did refrain from performing assessment duties. (Community College of Philadelphia, 50 PPER at 149-151, F.F. 36, 40-46)

50. The Union sponsored cessation of mandatory assessment duties constituted a work stoppage and changed the status quo beginning in October 2016. (Community College of Philadelphia, 50 PPER at 154)

51. The College offers programs to provide quality education and improve student success, which is part of the educational mission of the College. The winter term is important to the educational mission of the College. Seventy-five percent of the students receive financial aid. The cost of attendance and the loss of income is important to students who are losing time from work to attend classes for which they pay. Getting these students through a degree or certificate program in a timely manner launches those students into better jobs and promotions more quickly. The winter term helps to expedite degree completion and helps with lowering the cost of degree completion and loss of time from work. (N.T. 184, 252, 332-335)

52. In reaching an agreement on the prior three winter terms, the College was negotiating the terms and conditions of employment, such as pay and load, for the winter terms and the manner in which assessments would be performed; it was not negotiating with the Union the right to hold winter terms. The College and the Union agreed to implementation points for the 2014-2015, 2015-2016, and 2016-2017 winter terms. The College sought the Union's input and agreement regarding working conditions, not for the provision of the winter term itself. Dr. Gay credibly testified that the College at no time represented that they needed agreement from the Union to have a winter term. (N.T. 185-186, 196, 232, 238-241, 314, 418-422; Federation Exhibits 4-6)

53. Dr. Gay also credibly testified that the "one-time, experimental" language in the three winter term agreements, although proposed by the Union, was not agreed to by the College as a limit on the CCP's ability to hold more than one winter term unless agreed to by the Union. The language applied to the terms of the agreement, the manner in which the term would be conducted and the manner in which faculty would be selected. It was always the College's position that it had the right to have a winter term. Dr. Hirsh credibly testified that, in 2015, while it was entering agreements regarding the selection of faculty and conditions of the winter term, the College informed the Union that it has a right to hold a winter term without Union agreement. It was the College's intent to assess the success of the winter term on an experimental basis one winter term at a time. The "experimental" language was not a restriction. It was a commitment to assessing the outcomes from the experiment to justify future winter terms without committing to permanently providing winter terms every year. The College did not want to commit to ongoing winter terms without knowing the outcomes and student success rates. The winter term was the College's experiment and not the

Union's. (N.T. 37, 187-188, 191, 204, 209, 212, 224-225, 227, 271-274, 384-385)[1]

54. The College wanted to evaluate the student success during the winter term and compare those results to student performance in online courses offered during the fall and spring semesters, which had been offered for years, in the interest of helping students rather than hurting student performance. The College also wanted to determine whether the winter term format worked for participating faculty. (N.T. 191-192, 197-198)

55. The College wanted to use volunteer faculty to teach winter terms because the winter term is intense for the participating faculty who would be forfeiting their winter break. Due to the intensity, the College limited faculty to teaching only one course during the winter term. The College did not want to force faculty to work during that time period. The College also had to ensure that the volunteers were qualified to teach an online course. The College solicited and used volunteers to teach during the 2017-2018 winter term. (N.T. 188-189, 289; Federation Exhibit 4)

56. Administrators conducted interviews, focus groups and surveys with the participating faculty to determine whether the first winter term was successful. Although the faculty raised issues to improve the winter term program, the outcomes indicated that the first winter term was successful for the students that the College allowed into the program. The College tried not to allow weaker students into the winter term due to its intensity over the holidays. (N.T. 191-192, 206)

57. The College also conducted a "Winter Term Assessment" for the 2016-2017 and 2017-2018 winter terms. Along with recommended corrective action, the overall conclusion of the assessment was that the winter terms have been a successful aid to student learning and that offering a winter term "appears to be promising." (N.T. 353-354; Employer Exhibit 11)

58. After assessing the first winter term, students reported that the winter term gave them a chance to work another course into their matriculating program enabling them to timely pursue and finish their degree or certificate. Research also shows that students who take online courses finish their certificate or degree programs more quickly. (N.T. 193-194)

59. The College wanted to include the winter term in the College calendar to publicize it for staff and interested winter-term students. Dr. Hirsch credibly testified that the College administrators never believed that the College had to bargain with the Union to schedule or implement a winter term or that the winter term had to be included in the College calendar to take place. (N.T. 230-232, 271-274)

60. Article X of the parties' full-time faculty CBA, "College Calendar," provides: "This provision shall not affect the College's rights at locations other than the Main Campus, or previous agreements between the College administration and the Federation on course sections of different lengths." (Federation Exhibit 1 at 29)

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[1] Although the "one-time," "experimental" and "pilot test" language contained in the winter-term agreements was clear and unambiguous on the face of the agreements, both parties offered parole evidence, without objection from either side, establishing that both parties had the same understanding and reason for using and agreeing to that language, i.e., that the winter term was a non-binding experiment for both parties that would occur one winter term at a time.

61. Dr. Hirsch credibly testified that, pursuant to Article X of the CBA, the College can offer courses of different lengths at locations other than the main campus which includes online winter-term courses that are not located at the main campus. (N.T. 323-324; Federation Exhibit 1 at 29)

62. The College offers programs that are not specifically included in the College calendar. The College and the Union never bargained over the College's right to provide a "Mid-summer" program or an "ACE" program. Normally summer programs are 7 weeks in length. The College also provides 10-week summer programs over which the College did not bargain with the Union. (N.T. 265-268; Employer Exhibit 4)

DICUSSION

The Federation argues that the College's unilateral implementation of the 2017-2018 winter term was an unlawful change to the status quo. (Federation Brief at 12). The Courts and the Board, contends the Union, require an employer to maintain the status quo after contract expiration while bargaining for a successor agreement, citing Philadelphia Housing Police Association v. PLRB, 620 A.2d 594 (Pa. Cmwlth. 1993)(affirming Philadelphia Housing Police Association v. Philadelphia Housing Authority, 22 PPER ¶ 22227 (Final Order, 1991)) (Federation Brief at 12-13). The Union further maintains that "[t]he rule prohibiting unilateral changes by public employers after the expiration of a CBA applies even if the provision in the CBA otherwise deals with a managerial prerogative. This was the explicit holding of the Commonwealth Court in Coatesville Area School District v. Coatesville Area Teachers' Association, 978 A.2d 413 (Pa. Cmlwth. 2009)" (Federation Brief at 14).

In this context, the Federation contends that the expired 2011-2016 CBA sets forth a mutually bargained-for and agreed upon academic calendar which does not include a winter term. (Federation Brief at 15). The CBA includes bargained-for provisions that expressly incorporate the academic calendar including sessions during which academic instruction is provided. The Union further asserts that "[c]ritically, [the] academic calendar does not set forth a winter term." (Federation Brief at 15). Also, other sections of the CBA refer only to the fall, spring and summer terms. The CBA specifically references summer teaching limiting teachers to two courses or sections per summer session and thereby specifically addresses the work that is permissible outside the spring and the fall semesters. (Federation Brief at 16). The Union argues that the College bargained over the academic calendar and incorporated the calendar into the parties' CBA and, under Coatesville, supra, regardless of whether holding a winter term constitutes a managerial prerogative, the College bargained over the academic calendar, the status quo of which must be maintained. (Federation Brief at 16-17).

In its Reply Brief, the Federation re-asserts this position and argues as follows: "The Federation has never contended that the establishment of the winter term is, generally speaking, *not* a permissive subject of bargaining." (Federation Reply Brief at 6)(emphasis original). The Union argues that "[t]he issue is whether the College can change the status quo by creating a winter term when the College calendar is set forth in the expired CBA (and does not include a winter term) and the establishment of such a term has historically been negotiated by the parties on each occasion when the College proposed a winter term." (Federation Reply Brief at 6).

In Philadelphia Housing Authority, supra, the Commonwealth Court held that a public employer may not unilaterally implement its latest proposal in contract negotiations and change terms and conditions of employment unless the parties have exhausted the statutory impasse procedures in PERA and the employes have engaged in a work stoppage. Housing Authority, 620 A.2d at 600-601. The Court quoted and adopted the following language of the Board:

> In our view, it would not serve the legislature's declared goal of promoting orderly and constructive relationships between public employers and their employes through good faith collective bargaining to allow a public employer to implement its final offer when the employes in the unit have not disrupted the continuation of public services by striking. Unilateral action by an employer during a period of no contract while employes continue to work serves to polarize the process and would encourage strikes by employes who otherwise may wish to continue working under the terms of the expired agreement while negotiations continue.

Housing Authority, 620 A.2d at 600.

The Board and the courts have consistently held that an employer may not change the status quo after contract expiration regarding mandatory subjects of bargaining. Pennsylvania State Park Officers Association v. PLRB, 854 A.2d 674 (Pa. Cmwlth. 2004) (holding that the payment of increased wages in the form of longevity increases provided for in the expired contract must stop during the status quo because wages are mandatory subjects of bargaining at issue). Similarly, in United Steelworkers of America, Local 2599 v. Northampton County Gracedale Nursing Home, 47 PPER 85 (Final Order, 2016) the Board held that a union's express waiver to bargain changes to healthcare in a collective bargaining agreement did not survive contract expiration and that the employer could not unilaterally make those changes during the status quo period. Gracedale, supra. The Board opined that its Gracedale decision was consistent with State Park Officers, supra, and that contractual provisions, to the extent that they permit changes to mandatory subjects, must be frozen at contract expiration because those subjects are the issues for bargaining during contract hiatus. To permit a contract provision to allow a change in a mandatory subject of bargaining after expiration is to allow the dynamic status quo which the Board rejected in State Park Officers. Moreover, the Board's law is also well-settled that an employer is bound by an agreement it makes limiting a managerial prerogative during the life of the agreement. Fraternal Order of Police Lodge 27 Delaware v. Springfield Township, 42 PPER 20 (Final Order, 2011).

In Coatesville, supra, the Commonwealth Court expressly held that a school district was bound, during the status quo period, to a collective bargaining agreement provision wherein the employer agreed not to diminish the number of extracurricular activities, which is a managerial prerogative. Coatesville, 978 A.2d at 418. The Court opined that "[w]hile the [employer] is free in the subsequent contract not to negotiate over the [managerial prerogative], it cannot change the status quo by unilaterally stripping from the contract bargained-for provisions." Id. In Springfield Township, supra, the Board adopted the Commonwealth Court's holding in Coatesville, supra, and stated: "As recognized by the Board and the Commonwealth Court, even where the subject matter of the agreement is a managerial prerogative, the employer's statutory obligation is to maintain the status quo with respect to the agreement until the parties negotiate new terms and conditions of employment." Springfield Township, 42 PPER at 64 (citing Coatesville, supra).

In this case, the parties disagree over whether the College bargained away its managerial right to provide a winter term by agreeing with the Union over an academic calendar. The Union posits that the calendar is an exclusive, exhaustive list of sessions, terms and semesters which precludes a winter term unless agreed to by the Union. The College maintains that nothing in the calendar precludes the establishment and implementation of a winter term. There is no dispute that the College agrees with the Union over the academic calendar. The college has the managerial right and authority to determine the level of educational services that it will provide and the manner in which it will provide those services. 43 P.S. § 1101.702. The College has determined, in its managerial discretion, that it will provide fall and spring semesters, along with two summer sessions. The calendar schedules the start and end dates for classes, days off, grading due dates, graduation and professional development days during the academic year.

There is no evidence that, by agreeing with the Union over the academic schedule, the College bargained away its authority to unilaterally determine educational services. There is no clear repudiation of the CBA, and the CBA does not contain an express waiver limiting the College's ability to hold a winter term. Such an express waiver is required under the Commonwealth Court's holding in Coatesville, supra. Similarly, there is nothing in the parties' expired CBA which limits the College to the number of courses or sessions it can make available to students. The Union's argument, that it cannot be expected to include every possible contingency in the academic calendar, is unavailing because implementing the winter term is not a matter of calendar and scheduling. The implementation of the winter term is a new level of service. To conclude that the holding in Coatesville, supra, limits the College's managerial right to implement a new level of educational services during the status quo period would require unequivocal record evidence that the College expressly relinquished the right to add or delete services in the form of increasing or decreasing course offerings or an additional term. Such an unequivocal waiver is not present on this record.

The Federation again emphasizes in its Reply Brief that, under Coatesville, supra, although the collective bargaining agreement in that case provided that the number of extracurricular activities would remain the same, it contained no specific term addressing whether those activities could be eliminated or combined. On this point of fact, the Federation contends that the Commonwealth Court concluded that the specific manner of consolidating or eliminating activities was included in the provision that the school district would ensure that such activities would remain the same. Applying that reasoning here, the Federation contends that, where the calendar is all inclusive but does not specifically address the winter term, such specificity is unnecessary to bind the College to only those terms addressed in the calendar. (Federation Reply Brief at 7).

However, there is no language in the calendar or the CBA in this case under which the addition of a winter term would fall or by which the addition of a winter term would be governed. In Coatesville, supra, the Court's conclusion that collective bargaining agreement language, that the number of extracurricular activities would remain the same also prevents the employer from consolidating or eliminating specific activities, does not govern in this case where there is no language at all in the calendar or the CBA dealing with the winter term or binding the College to a certain level of services either generally or specifically.

A schedule does not impact level of services. In the same manner the Board and the courts require union waivers of bargaining rights to be clear,

express and unequivocal, the Commonwealth Court and the Board require the waiver of or limitations to an employers' managerial right to act unilaterally regarding level of service and the operation of its enterprise to also be clear, express and unequivocal. Coatesville, supra. The CBA and the record, as a whole, contain no evidence of such a waiver by the College limiting its right to determine educational services by adding a winter term. The implementation of a winter term is simply not a matter of calendar or scheduling of terms; it is a decision to add services, which is within the sole discretion of the College. The Union's interpretation of the calendar as excluding a winter term would require an arbitrator's contract interpretation. Here at the Board, an express contractual prohibition is required, which does not exist on this record. Therefore, maintenance of the status quo did not require the College to forego its implementation of a winter term either during the term of the CBA or after its expiration.

The College argues that the academic calendar, as well as curriculum and program adjustments, are inherent managerial prerogatives and that an employer's only obligation is to meet and discuss on those subjects; there is no duty to bargain or obtain Union approval. (College's Post-hearing Brief at 11-14). In Mars Area Educational Support Personnel Association v. Mars Area School District, 32 PPER 32089 (Final Order, 2001), the Board concluded that a public-school employer's calendar adjustments for the purpose of improving or modifying educational services is a managerial prerogative. Id. In this regard, the Mars Board opined as follows:

> As the above-referenced cases consistently demonstrate, a public school has an inherent managerial prerogative to unilaterally adjust the calendar for school personnel where the change effectuates an appreciable and legitimate educational purpose by improving or streamlining the manner and delivery of its educational service and function.

Mars, 32 PPER at 235. Accordingly, even assuming that the addition of a winter term extended or modified the academic calendar, it was a matter of inherent managerial prerogative where the additional online courses added and improved educational services for students in fulfillment of the College's core managerial function, i.e., its educational purpose and mission, after calendar and contract expiration and a new calendar, by its very nature, had to be established. Mars, supra. The nature of a calendar, that it must be reconfigured every year after contract expiration, also releases it from the holding in Coatesville, supra. An employer cannot maintain an agreed upon calendar, which by its very nature must be reconfigured, and which is a managerial prerogative excused from bargaining.

In State System of Higher Education v. Association of Pennsylvania State College and University Faculties, 834 A.2d 1235 (Pa. Cmwlth. 2003), the parties engaged in a 26-year past practice whereby East Stroudsburg University obtained approval from the union's meet-and-discuss committee before establishing new programs. The practice was pursuant to a 1974 agreement that settled a grievance challenging the University's curriculum approval process, which at the time had circumvented the academic departments and the curriculum committee. In 2000, the University unilaterally implemented a chemical biotechnology program and other curriculum changes without committee approval. The union filed a grievance resulting in an arbitration award directing the University to cease and desist. In vacating the arbitration award under the essence test, the Commonwealth Court opined as follows:

> Clearly, under PERA, the University's managerial policy of approving curriculums or making any other program-related decision is not subject to collective bargaining and the University maintains a managerial prerogative of making curriculum changes without the "meet and discuss" committee's approval.

State System, 834 A.2d at 1241. The State System Court further stated that "a past practice is not binding on a public employer unless that practice is subject to mandatory bargaining under a collective bargaining agreement." Id. at 1242. The State System case is controlling here. The CBA does not contain any language that requires the College to bargain to approval with the Union over curriculum changes. Accordingly, the curriculum or program changes are within the sole discretion of the College and are not subject to the Union's approval. Even if the implementation of a winter term as a program of the College were a matter of calendar, where the improvement or addition of educational services is the impetus for the calendar changes, and the agreed upon calendar has expired with the CBA, the College was free to act unilaterally, Mars, supra; State System, 834 A.2d at 1242.

In its Reply Brief, the Union distinguishes Mars, supra and State System, supra. (Federation Reply Brief at 10-12). The Union's distinctions, however, are unavailing. The Union argues that the Commonwealth Court, in State System, noted that the collective bargaining agreement made no mention of the curriculum committee, only the settlement agreement made mention of it and, under the terms of that agreement, final approval over curriculum rested in the hands of the President of the State System. (Federation Reply Brief at 7). These facts from State System, however, are analogous to the case sub judice, rather than distinguishable. The CBA between the parties in this case similarly does not relinquish the College's authority over curriculum and courses, and the record shows that the College never bargained curriculum or courses. In this regard, neither the CBA nor the side agreements limit the College's prerogatives in the field of developing and adding programs and educational services, and the absence of such express limits is why Coatesville, supra, is inapplicable.

The Federation similarly argues that Mars, supra, is inapplicable because the collective bargaining agreement in that case did not contain any provision designating the work calendar for the computer lab paraprofessionals at issue in that case and there was no employer waiver of any Section 702 managerial prerogatives. (Federation Reply Brief at 11). The Union further contends that the fact that the CBA contains an academic calendar, which has been bargained with the Union and which has been explicitly incorporated into the CBA, distinguishes Mars, supra, and to ignore the fact that the calendar is part of the CBA would allow the College to renege on its contractual agreements at its discretion. (Federation Reply Brief at 11-12).

The distinction made by the Union between this case and Mars does not make Mars inapposite. Although the CBA here incorporates a calendar, whether the calendar translates into an exhaustive list of services that the College can provide and whether the calendar constitutes a waiver of the College's prerogative to add educational services at a minimum would require an arbitrator's expertise. Absent an arbitrator's constructive interpretation, there is no clear, express or unequivocal waiver contained in the calendar, or anywhere else in the CBA, demonstrating that the College waived its right to add services. There is no language in the CBA indicating that the calendar provides an exhaustive list of services permitted to be provided by the College. In this regard, the Mars decision, where the calendar was not part of the CBA, is analogous to the facts here where the calendar contains no

language limiting the College's discretion to add services. Also, during contract hiatus, the calendar was agreed to on a year-to-year basis, which means the calendar agreements were temporary and expired every year. Since the calendar is a managerial prerogative under Mars, and the calendar agreements were temporary during contract hiatus, the College was free, if it so chose, to set the calendar unilaterally without Union input during hiatus, which it continued to seek for purposes of collegiality and faculty contribution. Pennsylvania State Troopers Association v. Commonwealth of Pennsylvania, Pennsylvania State Police, 33 PPER 33024 (Final Order, 2001)

Assuming the Union's legal position regarding the calendar, the CBA and the status quo were correct, the Union, not the College, changed the status quo. As early as the fall of 2016, the Federation engaged the faculty in a concerted cessation of mandatory services. Housing Authority, supra, authorizes an employer to implement its last bargaining proposal regarding mandatory and non-mandatory subjects of bargaining placed at issue in bargaining when the parties are at statutory impasse and a union disrupts the status quo by discontinuing the provision of services. After contract expiration, in October 2016, the Federation instructed faculty to refrain from performing any assessment work required by the College's accrediting organization, Middle States, which had been a required and necessary faculty job function for many years. Faculty did refrain from performing those duties. One year later, in November 2017, the Federation again instructed faculty to refrain from performing their assessment duties. The cessation of mandatory services, while at statutory impasse, constituted a change in the status quo initiated by the Union. In this regard, even had the College expressly and unequivocally bargained away its right to add and hold online courses, and it would have been obligated under Coatesville to maintain that agreement during contract hiatus, it was free to exercise its managerial prerogative to increase educational services and hold the 2017-2018 winter term once the Union changed the status quo by engaging in a work stoppage.

The Federation additionally argues that there is no specific provision in the CBA or sound arguable basis authorizing the College to unilaterally change the College calendar by including a winter term. Also, the management rights clause, contends the Union, does not contain any language that could be deemed a clear, express, unequivocal waiver of the Union's right to bargain over the calendar. (Federation Brief at 17-19). The Federation asserts that, just because the calendar does not mention a winter term, does not mean that the College is not prohibited from holding a winter term because the CBA provides that "[t]he number of work days during the academic year shall be as set forth in the calendar attached hereto and made a part hereof as Exhibit B," emphasizing the term "shall." (Federation Brief at 19-20). Language explicitly preventing the College from holding a winter term or altering the calendar is not necessary, contends the Union, and "strains credulity" because it would require the Federation to anticipate and list in the CBA all possible objections to potential unilateral changes. (Federation Brief at 20). The bargained-for calendar, as written, is meant to be an exclusive list of work days limited to the fall and spring semesters and the two summer terms. (Federation Brief at 20). If the calendar is an exhaustive list of mandatory and permissive work days, the exclusion of a winter term, contends the Union, does not have to be specifically articulated. (Federation Brief at 20).

Again, the Federation is characterizing the College schedule for professional development days, days off, starting and ending dates for semesters and terms, graduation and grading due dates with level of service and decisions over number and types of courses the College chooses to

provide. The decision to hold a winter term is not a matter of calendar. Also, as previously concluded herein, there is no express language anywhere in the CBA prohibiting the College from increasing the course offerings and holding a winter term, as would be required if the College were to be deemed to have bargained away that managerial prerogative. The calendar does not expressly bind the College in a manner that restricts the College's decisions over increasing educational services to support students' timely degree completion. The calendar is a schedule for faculty and student attendance at traditional classes. That schedule does not implicitly or expressly prohibit the College from adding a session, solely comprised of online courses, while the College is not offering any physical classes, with volunteer faculty who only participate if they wish to do so.

Additionally, the College does have a sound arguable basis under the terms of the CBA for adding a winter-term program in any given year. Article X of the parties' full-time faculty CBA, "College Calendar," provides: "This provision shall not affect the College's rights at locations other than the Main Campus, or previous agreements between the College administration and the Federation on course sections of different lengths." A sound and reasonable interpretation of this provision yields the inference that the parties arguably bargained for the College to have retained its unfettered managerial authority and freedom to offer courses of different lengths at locations other than the main campus, which includes online winter-term courses that are not located at the main campus. The College does offer programs that are not specifically included in the College calendar, over which the Union and the CCP never bargained, such as the "Mid-summer" program and the "ACE" program. Normally, summer programs are 7 weeks in length, however, the College also provides 10-week summer programs over which the College did not bargain with the Union.

The Federation rejects this position and interprets Article X to govern only those courses of different lengths and at other locations during the course of an existing agreed upon term and that Article X does not cover the establishment of an entirely new winter term. (Federation Reply Brief at 12). The Union's argument, however, only emphasizes that Article X is subject to multiple, reasonable interpretations that should be resolved by an arbitrator. The Union's argument does not undermine the conclusion that Article X provides a sound arguable basis for the College's reasonable interpretation that the parties already bargained over the College's right to add programs of different lengths at different locations. Both parties' interpretations of Article X (i.e., Union's belief that Article X does not authorize the addition of a winter term with online winter-term courses of different lengths from traditional semester or summer classes and the College's belief that it does authorize the winter term) are reasonable, and the Union's argument only makes that point; it does not undermine or prevent a sound arguable basis defense.

The Union also rejects the position that the status quo included the winter term because the College held a winter term with the agreement of the Union for the three consecutive years prior to the 2017-2018 winter term. (Federation Brief at 20-21). The prior winter term side agreements were, by their own terms, one-time deals that did not establish a new status quo or practice. (Federation Brief at 21). The Union further contends that prior agreement to winter terms could not be part of the status quo allowing the College to unilaterally implement a winter term without agreement because that would allow a "dynamic status quo," which has been rejected by the Board and the Commonwealth Court. (Federation Reply Brief at 14).

The record does show that the winter term did not indeed become part of the status quo. The College's witnesses credibly testified that they never bargained over whether to have the winter term. The College bargained only the impact of the winter term on faculty's terms and conditions of employment, in fulfillment of its bargaining obligation. In those side agreements, the College outlined the expectations of faculty and the program, ensuring that assessments would be completed, especially after contract expiration when the Federation was instructing faculty not to perform assessments in other courses.

The College's witnesses credibly testified that the CCP agreed to the "one-time, experimental" language in the three side agreements because it did not want to commit to perennially holding winter terms until it could assess whether the terms were successful. The Union's representatives may have proposed the language, but the College also did not want to be bound to a past practice or committed to providing a winter term in perpetuity. In this regard, the College at no time relinquished its managerial rights over the provision of a winter term implemented to improve the level, standard and quality of educational services either in the CBA or the side agreements. Therefore, the Union is correct that the provision of a winter term is not part of any status quo that must be maintained. Whether to hold a winter term remains within the sole discretion of the College from year to year.

Moreover, a temporary side agreement between a union and an employer authorizing, but not limiting, employer conduct or a practice that is already a managerial prerogative does not limit the employer upon expiration. In Pennsylvania State Troopers Association v. Commonwealth of Pennsylvania, Pennsylvania State Police, 33 PPER 33024 (Final Order, 2001), the Board affirmed a hearing examiner's determination that a temporary side agreement authorizing the employer to give discretionary promotions in place for special duty assignments did not limit the employer from continuing the practice upon the expiration of the temporary side agreement because the agreement did not limit the employer's prerogative in the first place and the union did not have the ability to withhold authorization after the expiration of the agreement. Id. at n. 5.

Under State Police, supra, the winter-term side agreements are distinguishable from the facts in Coatesville, where the employer bargained away its prerogative to eliminate extra-curricular programs in the collective bargaining agreement and where such limitation on its managerial rights survived the status quo. In this case, the record establishes that the College never limited its prerogative to hold a winter term on a year-to-year basis. Indeed, it memorialized its prerogative to make the decision to hold a winter term every year and only bargained the impact of the winter term on wages, hours and terms and conditions of employment. The winter-term agreements, by their very nature, were temporary agreements that expired upon the start of the spring semester. The "one-time," "experimental" language in those agreements did not grant limited permission to the College that could be withheld upon expiration. Rather, that language memorialized the College's existing prerogatives. State Police, supra.

Additionally, the Federation argues that the parties had agreed not to have a 2017-2018 winter term and that the conduct of the parties establishes that the implementation of a winter term must be negotiated each time it is sought. (Federation Brief at 20-30). The College, argues the Union, treated the winter term itself as a mandatory subject of bargaining and not just the terms and conditions of winter-term employment. The Union argues that the record shows the following: Ms. Zellers sought the Union's agreement to a 2017-2018 winter term; the Union did not agree; the parties held a meeting

about the calendar, during which the Union objected to the 2017-2018 winter term; subsequent to that meeting, Ms. Zellers emailed the Union with an updated 2017-2018 calendar that did not include the 2017-2018 winter term; the Union confirmed its agreement to the calendar without the 2017-2018 winter term and copied the agreed-to calendar into the body of the email response. The Union contends that this agreement to the calendar for 2017-2018, where the Union specially objected to the winter term, constituted an agreement that there would be no 2017-2018 winter term. (Federation Brief at 21-22). The Federation re-emphasized this point of argument in its Reply Brief. (Federation Reply Brief at 4-5).

The record, however, does not support the Federation's assertion that the College agreed with the Union not to hold a winter term because it agreed to a calendar for 2017-2018, which did not reference a winter term. None of the academic calendars included the winter term after contract expiration, even though the parties agreed on each academic year calendar and the provision of winter terms. The side agreements during this time period did not amend the post-contract calendars. The winter term has never been part of the calendar. Ms. Zellers did seek to include the winter term for 2017-2018 in the calendar. However, when she agreed to a calendar that did not include the winter term, she was not agreeing that the College would not have a 2017-2018 winter term. She was agreeing to a schedule for traditional classes that did not affect the implementation of the winter term. Since it did not have to be in the calendar and the administrators had decided to move forward with the winter term without Union involvement, it was easier to move forward with an agreement on the calendar because the College did not need an agreement on the winter term. The administrators wanted to stop any further pas de deux over the winter term; they did not want to risk "World War III" with the Union. The fact that the CCP, through Ms. Zellers, sought Union involvement and agreement regarding the winter program, either in 2017 or any other time, did not transform the College's right to provide the program into a mandatory subject of bargaining or place a limit on the College's managerial prerogative to provide the service. Coatesville, supra; State Police, supra.

The Union emphasizes that the first winter term of 2014-2015 resulted from a side agreement between the parties characterizing the winter term as an experiment offered on a one-time basis. The Union argues that this did not just relate to terms and conditions of employment but applied to the existence of the winter term itself. (Federation Brief at 23-24). The Union also emphasizes the same or similar language in the 2015-2016 and the 2016-2017 side agreements applying to those winter terms. (Federation Brief at 24). The Union further maintains that the College conducted itself as if it had a duty to bargain the winter term and then changed its position that the winter term was a meet-and-discuss issue and tried to obtain through fiat what it could not obtain through the bargaining process. The College, contends the Union, treated the winter term as a mandatory subject of bargaining until August 2017, and the bargaining history over winter terms should not be ignored in favor of the College's position that it was only bargaining the employment conditions of the winter terms and that it was only meeting and discussing over implementation to be collegial. (Federation Brief at 27-28).

However, the record evidence of the parties' bargaining history shows that the College never treated the provision of a winter term as bargainable and that the College did understand that it had a duty to bargain terms and procedures for faculty. The side agreements were necessary to establish the conditions of the winter term not the existence of the term itself. The record shows that during the status quo period, the College had to maintain

the status quo regarding mandatory subjects of bargaining and terms and conditions of employment including the terms of employment for the winter term as frozen by the last side agreement. With the status quo in place, the College reached out to the Union to attempt to negotiate terms for the 2017-2018 winter term, but the Union refused. The College satisfied its bargaining obligation and was authorized to proceed with the winter term under the status quo of the latest side agreement. I credit the testimony of Dr. Gay and Dr. Hirsch that the College at no time represented to the Union that it needed agreement from the Union to have the winter term. Furthermore, I credit Dr. Hirsch's testimony that the Union representatives were actually informed that, while it was entering agreements concerning selection of faculty and conditions, it had a right to hold a winter term without agreement from the Union. Accordingly, the College never acted as though, or represented to the Union that, it had an obligation to bargain the provision of any winter terms.

The Union argues that the College made bargaining proposals during negotiations to expand its managerial prerogatives and amend the management rights clause to include language giving the College control over the academic calendar. The Union recognizes that the College proposals included language declaring that some of its proposals reflect a declaration of the College's existing rights. The Union, however, dismisses the disclaimer and questions why the College would bargain at all over matters already within its managerial discretion. The Union argues that "if the College truly believed that it had the right to unilaterally change the academic calendar, it would not have sought revisions to the CBA that would give it the right to make such changes." (Federation Brief at 29). The Federation asserts that "the College has manifested its true understanding that changes to the academic calendar, including implementation of a winter term, must be negotiated under the terms of the expired CBA." (Federation Brief at 30). The Union further claims that the College engaged in self-help when it could not obtain what it wanted through bargaining by transforming what had been historically treated as a mandatory subject of bargaining into a self-proclaimed meet-and-discuss topic. (Federation Brief at 30).

Again, the Union is making the holding of a winter term about the academic schedule. The decision to increase the level of educational services in fulfillment of its educational mission and provide additional online courses during the winter is not a matter of the academic schedule. The Union is not in partnership with the College to determine what services will be provided. The College's agreement with the Union over the academic schedule is separate and distinct from the College's unwaived authority to provide educational services. To permit the Union to interfere with those services by refusing to bargain the impact on terms and conditions of employment regarding the winter term of 2017-2018, like it did in this case, would effectively permit the Union to prevent the College from providing educational services deemed necessary or beneficial, and it would place authority over operations under the shared control of the Union.

The Union throughout this litigation has characterized the implementation of winter term as changing the academic calendar. The two concepts, however, are mutually exclusive. The provision of a winter term is within the College's unique managerial right and discretion as an educational service, and in which the Union is without authority or right to be involved because it is not in partnership with the College over the educational enterprise. The determination to provide, and the actual provision of, a winter term has an impact on terms and conditions of employment which must be bargained, but the provision of the term is not itself a matter of calendar

and scheduling. The winter term already fits within the parties' definition of the academic year. The record in this case demonstrates that the College attempted on multiple occasions to bargain those impact issues, but the Union refused to bargain, and the College reasonably applied the status quo with regard to those impact issues.

The Union further maintains that the College engaged in unlawful direct dealing with faculty regarding the terms and conditions of employment for the 2017-2018 winter term. (Federation Brief at 30-33). The Union argues that, "it is undisputed that the College initiated contact with the bargaining unit members about teaching during the winter term, with full knowledge that the Federation had not agreed to the winter term." (Federation Brief at 32). The Union emphasizes that Dr. Sweet contacted her department heads asking them to inquire among the faculty who taught past winter terms to see if any of them would like to teach during the 2017-2018 winter term. (Federation Brief at 32). The Union further emphasizes that Federation representatives were not included in any of the communications with the department heads about soliciting faculty volunteers for the 2017-2018 winter term. (Federation Brief at 32). Upon failing to obtain an agreement from the Federation regarding the 2017-2018 winter term, the College circumvented the Union and went directly to bargaining unit members seeking their agreement to teach the winter term and, in so doing, undercut the exclusive bargaining agent for the faculty. (Federation Brief at 33). The Union also maintains that, when bargaining unit members raised concerns about the Federation's position, as conveyed by Mr. Acosta-Morales, Dr. Sweet responded: "You can share the College's intent is to run the Winter Term under the same terms that had been previously agreed to by the College and the Federation." This reference to terms that had been previously agreed to, according to the Union, misled faculty suggesting that the Federation had in fact agreed to the 2017-2018 winter term. (Federation Brief at 33).

The College made many attempts to bargain the conditions of the winter session, and the Union consistently refused to bargain over those terms. The College solicited volunteers under the status quo previously agreed to by the Union. Preventing the College from using volunteers from the bargaining unit while maintaining the status quo reqarding their terms of employment would allow the Union to hamstring the College in providing its programs and services. Where an employer is entitled to move forward with a program, the Union cannot prevent the employer from implementing that program by refusing to negotiate the impact of the program on terms and conditions of employment. The employer in such circumstances is entitled to move forward with its program in a timely manner and apply the status quo until the Union is willing to negotiate the impact terms to agreement. The Union's blanket refusal to meet its bargaining obligation cannot now be deemed direct dealing by the College which relied on volunteers to teach the 2017-2018 winter session under terms previously agreed to by the Union. This did not involve a case where the College entered into side agreements with the 2017-2018 winter term faculty regarding the terms of their pay and teaching. The College rather applied the status quo terms to winter faculty's conditions of employment that had been previously agreed to by the Union and the College. Accordingly, the College did not engage in direct dealing with faculty members. The college did not engage in direct dealing with faculty who volunteered to teach winter-term courses anymore than an employer engages in direct dealing with employes who voluntarily choose to cross a picket line and work under the status quo during a strike.

The Union additionally contends that the College engaged in unlawful discrimination. The Union argues that the College was actively involved in

negotiations with the Union at the time that the College implemented the 2017-2018 winter term and, therefore, was aware of the Union's protected activity. The Union claims that the College imposed the 2017-2018 winter term as a result of unlawful animus toward the union based on the Union's bargaining activities.[2] (Federation Brief at 34). The Federation maintains that the timing of the College's establishment of the 2017-2018 winter term, over the Union's objections, after long and protracted negotiations was not coincidental and was in retaliation against the Federation and its members for engaging in contentious negotiations. (Federation Brief at 35).

First, the Union has not explained how providing more educational services and opportunities to students with additional teaching and earning opportunities for **volunteer** faculty constitutes an adverse employment action. The College did not impose the teaching of a winter term or any other additional duties on any faculty members, as the Union suggests in this argument. In this regard, it cannot be deemed retaliatory. The College sought and used strictly volunteers who availed themselves to additional teaching opportunities. Moreover, the College had held three winter terms prior to the 2017-2018 winter term. The Union's argument that the timing of the 2017-2018 winter term amidst contentious negotiations leads to an inference of unlawful motive is belied by the record which shows that the College began holding winter terms well before the CBA expired or the parties entered into "contentious" negotiations. Accordingly, the Federation's claim of discrimination is without merit, and there is no evidence of any unlawful motive, retaliation or adverse employment action on this record.

In its Reply Brief, the Union further challenged the accuracy and record support for certain proposed findings of fact offered by the College in its Response Brief. However, I have not adopted, referenced or incorporated any part of either parties' proposed findings of fact.

Accordingly, the College did not engage in unfair practices under Section 1201(a) (1) or (3) or (5) of the Act, and the charge of unfair practices is dismissed in its entirety.

CONCLUSIONS

The hearing examiner, therefore, after due consideration of the foregoing and the record as a whole, concludes and finds as follows:

1. The Community College of Philadelphia is a public employer under PERA.

2. The Federation is an employe organization under PERA.

3. The Board has jurisdiction over the parties hereto.

4. The Community College of Philadelphia has not committed unfair practices within the meaning of Section 1201(a) (1) or (3) or (5) of PERA.

[2] Although the Union does not reference its work stoppage as a basis for the College's alleged unlawful motivation for implementing the 2017-2018 winter term, it would not affect or change the discrimination analysis herein.

ORDER

In view of the foregoing and in order to effectuate the policies of PERA, the hearing examiner

HEREBY ORDERS AND DIRECTS

That the charge is dismissed and the complaint is rescinded.

IT IS HEREBY FURTHER ORDERED AND DIRECTED

that in the absence of any exceptions filed with the Board pursuant to 34 Pa. Code § 95.98(a) within twenty days of the date hereof, this order shall be and become final.

SIGNED, DATED AND MAILED at Harrisburg, Pennsylvania, this thirteenth day of September 2019.

PENNSYLVANIA LABOR RELATIONS BOARD

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Jack E. Marino, Hearing Examiner