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	:	

FINAL ORDER

On October 2, 2019, the Faculty Federation of Community College of Philadelphia, Local 2026 AFT, AFL-CIO (Federation) filed timely exceptions with the Pennsylvania Labor Relations Board (Board) to a Proposed Decision and Order (PDO) issued by a Board Hearing Examiner on September 13, 2019. On October 30, 2019, the Philadelphia Community College (College) filed a response to the exceptions. Pursuant to extensions of time granted by the Secretary of the Board, the Federation filed a brief in support of its exceptions on November 1, 2019, and the College filed a brief in opposition to exceptions on December 17, 2019.[1]

This matter first arose when the Federation filed a Charge of Unfair Practices on November 27, 2017, as amended on December 19, 2017, alleging a violation of Section 1201(a)(1), (3) and (5) of the Public Employe Relations Act (PERA) over the College's decision to hold a Winter Term for the 2017-2018 academic year. On January 26, 2018, the Secretary dismissed the Charge, reasoning that the Federation had not established a cause of action under Section 1201(a)(5) because the implementation of a Winter term was a managerial prerogative. The Federation's claim under Section 1201(a)(3) was also dismissed for failure to state a cause of action for a discriminatory adverse employment action.

Exceptions to the Secretary's decision were filed by the Federation on February 13, 2018, and on May 15, 2018, the Board issued an Order Directing Remand to the Secretary for further proceedings. On July 19, 2018, the Secretary issued a Complaint and Notice of Hearing scheduling a hearing for November 7, 2018. A hearing was held on that day, and a second day of hearing was held on February 28, 2019, at which all parties in interest were afforded a full opportunity to present testimony, cross-examine witnesses and introduce documentary evidence. For purposes of addressing the exceptions to the PDO in this matter, the relevant facts, as found by the Hearing Examiner, may be summarized as follows.

At the time of the hearings, the parties were still negotiating for a successor agreement to the expired Collective Bargaining Agreement (CBA), effective September 1, 2011 through August 31, 2016, and were operating under the *status quo* of the expired CBA. (N.T. 24-27; Federation Exhibits 1 & 2). The College calendar for the Fall semester of 2011 through the Spring semester of 2016 was attached to the faculty's CBA as Exhibit B. The

[1] The Federation filed a Reply Brief on January 15, 2020, and the College filed a Sur-Reply Brief on January 27, 2020. Although the Board's Rules and Regulations do not provide for the filing of these documents, the briefs have been reviewed and neither raise any additional arguments material to the disposition of the exceptions.

attached calendar had Fall, Spring and Summer semesters. During negotiations for the 2011-2016 CBA, 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, but at no time did the College bargain with the Federation over whether to hold Spring, Fall or Summer semesters. (N.T. 39, 154-155, 130-135, 282-283). Absent from the College calendar attached to the 2011-2016 CBA is any mention of a Winter term.

Article X ("College Calendar") of the parties' expired full-time faculty CBA 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). Dr. Samuel Hirsch, the College's Vice President of Academic and Student Success, testified that, pursuant to Article X of the CBA, the College can offer courses of different lengths at locations other than the main campus. (N.T. 323-324; Federation Exhibit 1 at 29). The College offers programs that are not specifically included in the College calendar. The College and the Federation never bargained over the College's right to provide a "Mid-summer" program or an Advanced College Experience ("ACE") program. 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). Dr. Hirsch testified that the Winter term was such a program under Article X of the CBA and within the College's managerial rights.

The "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.[2] The CBAs do not reference a Winter term, and nothing in the CBA or calendar prohibits a Winter term. (N.T. 31-34; 81, 258-62, 299). Indeed, the College did not hold its first online Winter term until the academic year for 2014-2015.

Prior to the first Winter term being held by the College, the parties entered into an agreement outlining the terms and conditions of employment for the Winter term. Unobjected to Finding of Fact 19, as found by the Hearing Examiner, states as follows:

> The terms of the agreement require, in summary form, that only approved and fully online 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 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

[2] Online courses are also offered by the College during the Fall and Spring semesters, and during the Summer terms.

> 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).

(PDO, p. 4). The agreement further provides that "[t]he College will offer, on a one-time experimental basis, a pilot test of a Winter term for 2014 . . .." The Federation understood that a Winter term was not being made a permanent part of the College calendar. (Federation Exhibit 4).

At a meeting in the Fall of 2015 with College President Dr. Donald Generals, Dr. Hirsch, College General Counsel Victoria Zellers, Co-President of the Federation Stephen 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 and that they intended to proceed with the Winter term without the Federation's consent. (N.T. 227-230, 276-277).

In November 2015, the parties entered into another side agreement outlining the working conditions for 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; FF 19).

In August 2016, the parties entered into a third side agreement outlining the details under 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 faculty and College assessments of Winter term courses and student outcomes was to be conducted in a more elaborate and detailed manner. (N.T. 39-40; Federation Exhibit 6). Nothing in any of the three side agreements about Winter terms restricts the College from having a Winter term without the consent of the Federation. (N.T. 223; Federation Exhibits 4-6).

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

In a follow up email on October 21, 2016, Ms. Zellers emailed Federation Co-chairs of the full-time faculty unit, Neil Wells and Bridget McFadden, stating: "Please see the updated 2017-2018 calendar revised to reflect the discussion from the calendar committee meeting." The Winter term was not included on the proposed College calendar because the College intended to offer the Winter term regardless of the Federation's position. (N.T. 243-244, 284-285). Ms. Zellers' email further stated: "Please send me an email to confirm your acceptance of this calendar for 2017-2018." (Federation Exhibit 9). 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."[3]

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."[4] 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).

On August 29, 2017, Dr. Sweet forwarded Department Head Osvil Acosta-Morales' report of faculty concerns about the Federation'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).

For the prior three Winter terms, in academic years 2014-2015, 2015-2016 and 2016-2017, the College negotiated the terms and conditions of employment for the Winter term, such as pay and hours, as well as the manner in which assessments would be performed; it did not negotiate with the Federation for the right to hold Winter terms. The College sought the Federation's input and agreement regarding working conditions, not for the provision of the Winter term itself. Dr. Judith Gay, the College's Vice President for Strategic Initiatives, testified that the College at no time represented that they needed agreement from the Federation to have a Winter term. (N.T. 185-186, 196, 232, 238-241, 314, 418-422; Federation Exhibits 4-6).

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). 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.

In the PDO, the Board's Hearing Examiner concluded that the College did not commit unfair practices in violation of Sections 1201 (a)(1), (3) and (5) of PERA. The Hearing Examiner determined that the College did not act unlawfully by holding an online "Winter term" between the Fall semester of

---

[3] 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).

[4] 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. The College did not force faculty to work during that time period. As it had in the past, the College solicited and used volunteers to teach during the 2017-2018 Winter term. (N.T. 188-189, 289; Federation Exhibit 4).

2017 and the Spring semester of 2018 at a time when the CBA between the Federation and the College had expired.

In so concluding, the Hearing Examiner reasoned that the College had the statutory right under Section 702 of PERA to determine the educational programs it would offer and that it had not expressly and unequivocally relinquished that right in the CBAs.[5] Further, the Hearing Examiner concluded that the College did not engage in direct dealing by permitting the faculty to teach online courses during the 2017-2018 Winter term on a voluntary basis pursuant to the same terms and conditions which had been negotiated and observed in previous Winter terms.[6]

Initially, the Federation alleges that the Hearing Examiner erred in making numerous findings of fact.[7] The Hearing Examiner's Findings of Fact will be sustained by the Board where there is substantial evidence in the record to support the finding. Pennsylvania State Rangers Association v. Commonwealth of Pennsylvania, Department of Conservation and Natural Resources, 45 PPER 1 (Final Order, 2013). Substantial evidence is such "relevant evidence as a reasonable mind might accept as adequate to support a conclusion." PLRB v. Kaufman Department Stores, 29 A.2d 90 (Pa. 1942). Further, the Hearing Examiner must set forth those findings that are relevant and necessary to support the conclusion reached but need not make findings summarizing all the evidence presented. Page's Department Store v. Velardi, 346 A.2d 556 (Pa. 1975).

Moreover, it is well-settled that the Board defers to the hearing examiner's decision to credit some, all, or none of a witness' testimony because he is best able to observe the manner and demeanor of the witnesses at the hearing. Pennsylvania State Troopers Association v. Commonwealth of Pennsylvania, Pennsylvania State Police, 33 PPER ¶33011 (Final Order, 2001);

---

[5] Section 702 of PERA states:

> Public 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, standards of services, its overall budget, utilization of technology, the organizational structure and selection and direction of personnel. Public employers, however, shall be required to meet and discuss on policy matters affecting wages, hours and terms and conditions of employment as well as the impact thereon upon request by public employe representatives.

43 P.S. §1101.702.

[6] Additionally, the Hearing Examiner found the Federation's discrimination claim was without merit because there was no record evidence of unlawful motive, retaliation or adverse employment action, and the Federation has not excepted to the Hearing Examiner's decision dismissing its Section 1201(a)(3) claim. 34 Pa Code §95.98(a)(3) ("[a]n exception not specifically raised should be waived.").

[7] The Federation excepts to 23 out of 62 Findings of Fact. The challenged factual findings are, as follows: #5, #14, #17, #18, #21, #22, #23, #24, #25, #26, #30, #31, #32, #34, #36, #49, #50, #52, #53, #54, #55, #61, and #62.

Crestwood School District v. Crestwood Education Association, 32 PPER ¶32050 (Final Order, 2001). The Board will not disturb a hearing examiner's credibility determinations absent compelling circumstances. Id. Here, the Hearing Examiner credited the testimony of the College's witnesses and the Federation did not allege any such circumstances to overturn those credibility determinations.

Upon review of the Federation's exceptions to Findings of Fact 32, 34, 49 and 50, the Board finds that these findings are not necessary nor relevant to the outcome of this matter.[8] With regard to the remainder of the challenged findings, upon review of the entire record, the Hearing Examiner cited accurately the testimony and evidence to establish each of the disputed points of fact. As such, the Hearing Examiner's relevant findings are supported by the record, and the Federation's exception thereto is dismissed.

Further, the Federation excepts to the Hearing Examiner's conclusion that the College did not violate its good faith bargaining obligation under Section 1201(a)(5) of PERA. The Federation claims that by offering a Winter term of online classes between the end of the Fall semester 2017 and the beginning of the Spring semester 2018 without the permission of the Federation, the College failed to maintain the required *status quo* with respect to the expired CBAs. In making this argument, the Federation relies heavily upon the lack of a Winter term in the academic calendar which is appended to the parties' CBA as Exhibit B. The Federation contends that the calendar is an exhaustive, mutually bargained-for, and agreed upon list of sessions to be offered by the College, and therefore, the College is prohibited from holding a Winter term because it is not part of the calendar.

In support of this position, the Federation cites to Coatesville Area School District v. Coatesville Area Teachers' Association, 978 A.2d 413 (Pa. Cmwlth. 2009). In Coatesville, although the provision of extracurricular activities is a managerial prerogative, the court held that because the parties specifically included a discussion of extracurricular activities in the CBA, maintenance of the *status quo* during contract negotiations required continuation of the extracurricular activities after expiration of the CBA. The Federation argues that Coatesville is dispositive of the instant case.

Here, however, in stark contrast to the facts in Coatesville, there is no evidence of record that, by agreeing with the Federation to the scheduling details contained in the academic calendar, the College intentionally and expressly bargained away its managerial right under Section 702 of PERA to determine the educational services it would provide to its students. Indeed, the expired 2011-2016 CBA is silent with respect to a Winter term. Moreover, Dr. Hirsch testified that the College never negotiated with the Federation regarding whether to hold any academic term, including a Winter term and that nothing in the expired CBAs mentions a Winter term, much less precludes one. (N.T. 81-84, 86, 223, 258-263). Finally, Dr. Hirsch testified that a Winter term was a managerial prerogative and that under Article X of the expired CBA, the College calendar did not affect the College's rights to hold online courses during a shortened Winter term. This testimony was credited by the Hearing Examiner and is supported by the record evidence. As such, the express and intentional waiver of an inherent managerial prerogative which

[8] Findings of Fact #32, #34, #49 and #50 refer to a prior case involving the same parties. On August 20, 2019, the Board made final a Nisi Order of Withdrawal of the Charge of Unfair Practices at Case No. PERA-C-17-25-E.

was present in the collective bargaining agreement in Coatesville is lacking in the facts of this case.

Moreover, the record evidence does not establish that the parties mutually agreed that the College would not have a Winter term for the 2017-2018 academic year. Indeed, on October 19, 2016, in a meeting with the Federation, the College asserted that it would hold the 2017-2018 online Winter term. Because the College intended to offer the Winter term regardless of the Federation's position, the proposed College calendar sent to the Federation for 2017-2018 did not include a Winter term. Thereafter the College emailed the Federation that it would hold the Winter Term for 2017-2018 under the same wages, hours and working conditions as in 2016-2017. In response to the College's email indicating its intent to offer the 2017-2018 Winter term, the Federation responded that "[a]t 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).

As the Board noted in Radnor Township Education Association v. Radnor Township School District, 40 PPER 44 (Final Order, 2009), to establish that a binding agreement exists, the complainant must prove that the parties reached a meeting of the minds concerning the subject matter at issue. A binding settlement is not present where the parties reach agreement on some terms but are unable to come to a complete resolution of their dispute. Further, in Association of Pennsylvania State College and University Faculties v. Pennsylvania State System of Higher Education, 44 PPER 72 (Final Order, 2013), the Board held that where it appears on the record that one of the parties wanted further review or discussions on the issue, there is no meeting of the minds on all issues, and thus no binding agreement.

Here, the record is clear that the College understood it was not expressly agreeing that it would not offer a Winter term in academic year 2017-2018. Moreover, in its September 6, 2017 email, the Federation expressed its belief that further discussions regarding the Winter term were in order in the negotiations for a successor CBA. Accordingly, on this factual record, and the credibility determinations of the Hearing Examiner, we cannot definitively find that the College and Federation had reached a final binding agreement to not conduct a Winter term during the 2017-2018 academic year.

Before the Hearing Examiner and on exceptions, the Federation mistakenly relies on a purported agreement, and concedes that the College's decision whether to hold a Winter term is a managerial prerogative. (N.T. 250-251). Nevertheless, upon review of the record, the Hearing Examiner did not err in finding that the provision of a Winter term is a managerial prerogative under Section 702 of PERA.

In Mars Area Educational Support Personnel Association v. Mars Area School District, 32 PPER ¶ 32089 (Final Order, 2001), the Board was faced with an unfair practice charge challenging a school district's unilateral increase to the number of work days in a school year due to the implementation of a state-of-the-art computer lab program. The Board

concluded that a public school's unilateral adjustments to its calendar to permit the installation and operation of upgraded computer systems was not a violation of PERA even though it extended the school year because the school was effectuating an appreciable and legitimate educational purpose by improving the manner and delivery of its services in furtherance of its managerial rights pursuant to Section 702 of PERA.

Here, as in Mars, by operating a Winter term during academic year 2017-2018, the College was exercising an inherent managerial right under Section 702 of PERA concerning the provision of services and to improve its educational function. Accordingly, the decision whether to hold the Winter term is a matter of managerial prerogative, and as found here, in the absence of an express agreement waiving the right to hold a Winter term, was not a mandatory subject for bargaining during the *status quo* following expiration of the CBA.

As the College notes, the instant matter is akin to State System of Higher Education v. Association of Pennsylvania State College and University Faculties, 834 A.2d 1235 (Pa. Cmwlth. 2003). In State System of Higher Education, the union challenged a state university's decision to establish and operate a new chemical biotechnology program without obtaining the union's assent. There, the parties had been functioning for twenty-six years under a written agreement pursuant to which new programs had always been reviewed by the union prior to implementation by the university, and thus, argued the union, the university could not implement a new program without the union's approval. Squarely rejecting this argument, the Commonwealth Court stated, "[j]ust because an employer and union engage in constructive dialogue and work out problems over the years . . . does not create a 'past practice' whereby the union will always approve a management proposal." Id. at 1242; *see* South Park Township Police Association v. PLRB, 789 A.2d 874 (Pa.Cmwlth. 2002) (holding that binding "past practices" must be in regard to wages, hours and working conditions).

Thus, on this record, the Hearing Examiner appropriately found that the expired 2011-2016 CBA did not contain an express bar or preclusion of a Winter term, and that the parties had not expressly agreed in 2017 to forego a Winter term for the 2017-2018 academic year. Accordingly, there was no error in determining that the *status quo* existent at all relevant times pertinent to this Charge did not foreclose the College from exercising its managerial right to hold the 2017-2018 Winter term.

Rather, here, as noted by the Hearing Examiner, maintenance of the *status quo* in this case did not require the College to forego the exercise of its managerial right to determine educational services in furtherance of its core mission (provision of a quality education in a timely manner) during the time period between contracts. Although the College agreed with the Federation regarding the starting and ending dates for classes, days off, grading due dates, date for graduation, professional development days and the like, which were memorialized on the academic calendar, this does not mean that the College expressly waived the managerial rights granted to it under Section 702 of PERA to hold a Winter term under the existing wages, hours and working conditions of the previous Winter term.

Notably, in this case, the College had provided a Winter term for the academic years of 2014-2015, 2015-2016 and 2016-2017, and on this record, the Winter term for academic year 2017-2018 reflects no change from prior years. Concerning the negotiable matter of wages, hours and working conditions under

which faculty could participate in the Winter Term, the College expressly stated and maintained the same terms as the previous years. Thus, on this record, as a matter of law, the Federation was unable to establish any change to a negotiable matter of the employes' wages, hours and working conditions. *See* Hazelton Area Education Association v. Hazelton Area School District, 28 PPER ¶28209 (Proposed Decision and Order, 1997). Accordingly, the Federation failed to sustain its burden of proving a violation of Section 1201(a)(1) and (5) for an unlawful unilateral change to wages, hours or working conditions deviating from the *status quo* following expiration of the 2011-2016 CBA.

Finally, although the Federation contends in its exceptions that the College also violated Section 1201(a)(1) and (5) of PERA by engaging in direct dealing with faculty members concerning the 2017-2018 Winter term, no argument has been made in the Federation's exceptions or brief on this issue. Nevertheless, the record indicates that the College made many attempts to bargain with the Federation over the working conditions of the 2017-2018 Winter term. Moreover, as noted above, the College was entitled to move forward as it did, by maintaining the existing terms of permitting volunteers to teach the Winter term under the preceding years' past practices and CBA provisions regarding wages, hours and working conditions.

After a thorough review of the exceptions and all matters of record, the Hearing Examiner properly concluded that the College did not violate its statutory duty to bargain under Section 1201(a)(1) and (5) by holding the 2017-2018 Winter term after expiration of the CBA. Further, the Hearing Examiner properly concluded that the College did not engage in unlawful direct dealing by providing the faculty an opportunity to teach online courses during the 2017-2018 Winter term on a voluntary basis pursuant to the same terms and conditions observed in previous Winter terms. Accordingly, the exceptions filed by the Federation shall be dismissed, in part, and the PDO made absolute and final.

ORDER

In view of the foregoing, and in order to effectuate the policies of the Public Employe Relations Act, the Board

HEREBY ORDERS AND DIRECTS

that the exceptions filed by the Faculty Federation of Community College of Philadelphia, Local 2026 AFT, AFL-CIO, are hereby dismissed, in part, and the Proposed Decision and Order dated September 13, 2019, shall be, and hereby is, made absolute and final, as amended herein.

Pursuant to conference call meeting of the Pennsylvania Labor Relations Board, James M. Darby, Chairman, Robert H. Shoop, Jr., Member, and Albert Mezzaroba, Member, this twenty-first day of April, 2020, the Board hereby authorizes the Secretary of the Board, pursuant to 34 Pa. Code 95.81(a), to issue and serve upon the parties hereto the within Order on April 24, 2020.

Chairman James M. Darby dissents on the ground that the record supports a finding that the "*status quo*" included the obligation to obtain the Federation's agreement prior to implementing a Winter term.