

COMMONWEALTH OF PENNSYLVANIA  
Pennsylvania Labor Relations Board

FACULTY FEDERATION OF COMMUNITY :  
COLLEGE OF PHILADELPHIA LOCAL 2016 :  
AFT, AFL-CIO :  
v. : CASE NO. PERA-C-17-25-E  
PHILADELPHIA COMMUNITY COLLEGE :

**PROPOSED DECISION AND ORDER**

On February 1, 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 Philadelphia Community College (College) violated Section 1201(a) (1), (3) and (5) of the Public Employe Relations Act (PERA or Act). The Federation specifically alleges 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 or adjunct faculty. The Federation alleges that the College required that all full-time faculty attend the Programming during Professional Development days, which are paid work days, instead of allowing them to prepare for upcoming classes, and allegedly required all faculty to participate in performing assessments for student learning outcomes (SLOs), which allegedly was previously encouraged, and not required by practice or the collective bargaining agreement (CBA). The Union further alleged that the College threatened discipline and negative performance evaluations for faculty members who refused to perform the work, which the Union alleges is voluntary.

On February 28, 2017, the Secretary of the Board issued a complaint and notice of hearing, directing that a hearing be held on June 2, 2017, in Harrisburg. The hearing was twice continued at the Union's request. On September 13, 2017, the Union filed an amended charge additionally alleging that, in a memo dated May 11, 2017, Dean Mary Anne Celenza changed past practice and the status quo by directing certain faculty members to complete specified activities as part of the general education assessment or they would be subject to disciplinary action. In the amended charge, the Union further alleged that some faculty were allegedly disciplined even though faculty are not required to work during the summer. On September 20, 2017, the Secretary of the Board issued an amended complaint and notice of hearing, scheduling a hearing for November 9, 2017.

Multiple days of hearing were held. During the hearings on November 9, 2017, January 11<sup>th</sup> and 12<sup>th</sup>, 2018, and February 2, 2018, both parties were afforded a full and fair opportunity to present testimonial and documentary evidence and to cross-examine witnesses. On May 16, 2018, the Union filed its post-hearing brief. The College filed its post-hearing brief on June 18, 2018. The Union filed a reply brief on July 16, 2018. The College filed a sur-reply brief on August 3, 2018.

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. 4)
2. The Union is an employe organization within the meaning of Section 301(3) of PERA. (N.T. 4)
3. The CBAs for both the full-time faculty bargaining unit and the part-time faculty bargaining unit expired on August 31, 2016. The parties have been operating under the status quo since contract expiration. (N.T. 35-37; Federation Exhibits 1 & 2)
4. Full-time faculty members are paid over a 12-month period from September 1<sup>st</sup> to August 31<sup>st</sup>. (Federation Exhibit 1 at 22)
5. Professional Development days are part of the College calendar expressly provided for in the CBA for the full-time faculty. Professional Development days are work days during the week before classes begin for the semester in the fall and spring of each year during which workshops, sessions and training for faculty occur. The College has provided paid Professional Development days at least since 1984. The administration does not take attendance at many of the classes or sessions during Professional Development days. (N.T. 38-40, 42, 44-45, 49-50, 122, 128, 401, 687-688; Federation Exhibit 1, at 22 & 65)
6. The CBA for full-time faculty contains provisions that have been in the contract for many years and contains outdated terminology. What is now called "Professional Development" is called "in-service training" in the CBA. (N.T. 41; Federation Exhibit 1)
7. Attendance at Professional Development days is mandatory. The CBA provides for Professional Development days as part of the College calendar as work days. The College does not mandate faculty members to attend any particular session. Faculty may choose which sessions meet their professional needs. The College expects attendance at the opening session. The College does not take attendance at every session; it does take attendance at required training such as sexual harassment training, which is only necessary when a faculty member is due to take it. (N.T. 689-690, 698)
8. Dr. Samuel Hirsch is the Vice President for Academic and Student Success, and he oversees 6 major divisions. On January 4, 2017, Dr. Hirsch emailed faculty reminding them they are required to attend programs during Professional Development. (N.T. 49-50, 435, 682-684, 692-694; Federation Exhibit 5)
9. Dr. Hirsch's January 4, 2017 email provides as follows:  
  
Happy New Year and welcome back to the Spring 2017 semester. The College has prepared an enriching and valuable week of Professional Development/In-Service programming for next week starting on Monday, January 9, 2017, with breakfast at 8:15 a.m. and programming starting at 8:45 a.m.

. . . . .

Please note that all full-time faculty are required to attend the College's Professional Development/In-Service Program. This week was scheduled as part of the 2016-2017 College Calendar, and all full-time faculty must attend the College's Professional Development Program.

(Federation Exhibit 5)

10. Bridget McFadden is the full-time faculty Federation Co-Chair. On January 5, 2017, she emailed Dr. Hirsch requesting clarification about his faculty directive to attend the In-Service Program beginning on January 9, 2017. Dr. Hirsch responded as follows: "Full-time faculty are expected to attend the opening and related general sessions on Monday and attend relevant sessions on Tuesday and Wednesday (which may include department meetings). Faculty are encouraged to attend sessions that are being offered on Thursday and Friday." Faculty may choose sessions that interest them, and it is not possible to attend all the sessions because many overlap simultaneously. (N.T. 50, 136, 358, 694; Federation Exhibit 7)

11. SLOs are assessments at the course level. SLOs allow administrators to determine whether students and/or teachers are satisfying course objectives. Program Learning Outcomes (PLOs) measure whether the objectives of a particular program have been met, based on aggregated data from SLOs. There are also assessments of learning outcomes at the institutional level. The grading system alone is insufficient for determining whether students have met course objectives. (N.T. 56-57, 227-228, 314, 350, 440, 451, 455)

12. The processes and terminology have changed over the years, and the College may not have used the terms "Student Learning Outcomes" until approximately 2009 or 2010. The College has always had a system and methodology for course assessment to develop course objectives. Assessment does and needs to evolve; it changes constantly. The College maintains an Office of Assessment to track and coordinate assessment needs and compliance activities; it is a resource to assist faculty in conducting assessment. Every course is not assessed every semester. The curriculum coordinator typically determines which courses need assessment. (N.T. 288, 298, 314, 362, 405, 437, 460, 469, 484, 563-564, 601, 655, 734)

13. The assessment process seeks to determine what students are learning and how the College can determine that they learned it at the course, program and institutional levels. Every student, regardless of program or major, must learn and possess general education skills in critical thinking, technology and responsibility. The term "learning outcomes" is the same as the terms "learning goals," "learning objectives" and "course objectives;" they are interchangeable terms. Assessment is essential to the mission of the College. (N.T. 436-437, 712)

14. "Middle States" is the accrediting body for the College. Middle States has established standards that the College needs to meet to maintain its accreditation, which includes requirements that the College develop a system for measuring and assessing student learning. The standards change over time, but Middle States has required the assessment of Student Learning Outcomes since 2002. (N.T. 61-62)

15. The Commonwealth of Pennsylvania, Department of Education promulgated regulations in 1997 and therein required community colleges

to review courses within every five years to determine the mission of the course and how the course is tied to the mission. Chapter 335 of those regulations uses the terms "Learning Goals" and "Learning Outcomes." (N.T. 439, 652; 22 Pa. Code §§ 335.1-335.47)

16. Section 335.2 provides, in relevant part, as follows:

To be eligible for reimbursement by the Commonwealth, each credit and each noncredit course that is offered by a community college shall meet the following criteria:

(1) The course has stated learning goals and consists of a planned sequence of topics or learning activities designed to help students achieve the stated learning goals.

. . . . .

(3) The course is consistent with the college's mission, and is, or was developed, approved and offered in accordance with the policies, standards, guidelines and procedures established by the college for the approval of new courses or programs.

(4) An accurate description of the course is published in the college's catalog or other official publication pertaining to the academic semesters, terms or years in which the course is offered. . . .

(22 Pa Code § 335.2)

17. Section 335.12 further provides, inter alia, that eligibility for Commonwealth reimbursement requires certain criteria for courses:

. . . . .

(3) The course's stated learning outcomes are necessary to enable students to attain the essential knowledge and skills embodied in the program's educational objectives, if the course is a requirement of a degree, certificate or diploma program. The college reevaluates the necessity for the course's learning goals when conducting the academic audit required by § 35.21(b) (relating to curricula).

(22 Pa. Code § 335.12)

18. Section 335.44 provides, in relevant part, as follows:

(a) Each community college shall conduct course evaluations, which for credit courses shall be part of the academic audit specified in § 35.21(b) (relating to curricula). The college shall develop a written program audit and course evaluation policy that specifies the position of the person responsible for program audits. The policy shall also include provisions which require a review of the program's courses to ensure that:

(1) Course materials and content reflect current knowledge in the program's field of study.

(2) Course content is appropriate for both the objectives of the course and the goals of the program.

(3) The catalog description of the course is accurate.

(4) Each required course's stated learning goals are necessary to enable students to attain essential knowledge and skills embodied in the program's educational objectives.

(22 Pa. Code § 335.44)

19. The College's goal is to complete assessments for 20% of the courses each year to comply with the 5-year cycle on assessment required by the Department of Education (Chapter 335) and Middle States. (N.T. 490, 704-706; College Exhibit 20)

20. The Commonwealth has the authority to audit the assessment of outcomes, and the penalty for non-compliance is the return of funding associated with any student enrolled in a class that has not been assessed. (N.T. 439-440)

21. Faculty have a central role in designing instruments and rubrics used in assessment. Faculty have access to the student artifacts and data, to be analyzed during assessment, which they provide to their coordinators or department heads. Assessment cannot be done without faculty controlled and provided data. PLOs and SLOs cannot be performed without data compiled by the faculty members within their disciplines. No one else has access to the data. (N.T. 65-66, 82, 367, 377, 420, 493-494, 702-703)

22. The administration has no way of knowing the outcomes unless faculty members submit the assessment data and meet with department heads to discuss and review the outcomes and recommend necessary changes. The recommendations for improvement are generated from faculty, not the administration. (N.T. 494-498)

23. Since 2003, administrators at the College have been instructing faculty about learning outcomes and compliance with Middle States standards for assessment. Dr. Judith Gay is the Vice President for Strategic Initiatives and Chief of Staff. In 2003, Dr. Gay was the Vice President of Academic Affairs. On January 7, 2003, the College offered courses during Professional Development days to instruct faculty about Middle States standards regarding assessment. At the time, Middle States Standards 12 and 14 pertained to SLOs and General Education Assessments. (N.T. 473-475; College Exhibits 13 & 14)

24. As far back as the 2006-2007 and 2007-2008 academic years, faculty participated in the assessment task force addressing learning outcomes at all three levels. The cycle of assessment must keep moving forward; it must constantly improve and change. (N.T. 475-477, 480; College Exhibit 14)

25. Since at least the 2009-2010 academic year, course catalog objectives have been derived from SLOs. The Commonwealth requires that SLOs be listed for all courses. Some programs, such as Nursing, are separately accredited by outside organizations that require students to meet certain standards established by that organization. (N.T. 481; College Exhibit 15)

26. Faculty have taught to course objectives based on SLOs since 1989. Although not always called "SLOs," SLOs have always been

required even before they were included in the course catalogs. (N.T. 484)

27. Dr. Chae Sweet is the College's Dean of Liberal Studies. She manages 9 departments and 31 programs. Dr. Sweet credibly established that faculty review of student work against established SLOs is critical to, and thereby required for, the mission of the College and the maintenance of College standards. She established that assessment is the backbone of both teaching and learning, and thereby an essential part of the job of a faculty member. (N.T. 620, 623, 630, 646)

28. The College has no starting point for the assessment process without faculty participated and faculty provided data. Without the student work product, there is no data to analyze and no way to determine whether the teaching or the course objectives are effective. (N.T. 646)

29. When a course is not assessed, it could force the College to eliminate the course. The College's level of service becomes compromised when it cannot provide a course due to lack of assessment data from faculty. (N.T. 631)

30. When faculty members are considered for tenure, they are evaluated on their assessment work; assessment is one of the routine responsibilities that faculty members have. (N.T. 625-629; College Exhibit 19)

31. During contract negotiations in 2012, the Federation told faculty not to perform SLOs after a March 22, 2012 faculty vote to withhold assessments of SLOs. In its resolution, the Federation characterized those services as voluntary. (N.T. 68, 84; Federation Exhibit 9)

32. On August 25, 2015, the Federation sent a letter to the faculty acknowledging and emphasizing the significance of collecting data for assessing outcomes. The letter provides, in relevant part, as follows:

As you all know, the College is on warning status with our accrediting body, the Middle States Commission on Higher Education, due to the Commission's finding that we have not been able to demonstrate that we meet the standard for Assessment of Student Learning Outcomes.

Our next opportunity to show that CCP [Community College of Philadelphia] is making good progress in assessing student learning, and using that assessment to make changes in our programs and teaching, is on the monitoring report the College will make to the Commission this December 1. In order to be able to report sufficient progress, faculty and administrators need to be working now to collect data and to use that data to consider changes.

We probably do not need to remind you that if we lose our accreditation, we will no longer be able to accept federal financial aid and other essential funding sources, and this would create a severe impact on our ability to serve students.

In order to begin the work for preparing a successful monitoring report, Dr. General's will be holding a session

Tuesday, September 1 at 9:00 a.m. to detail Improving Teaching and Learning at Community College of Philadelphia. The Faculty and Staff Federation encourages every teaching faculty member to attend this session in order to get essential information that will help us all to be on track for meeting the Middle States Standards by the end of the semester.

The continuation of our accreditation rests on each member of our faculty in understanding the processes for collecting data on how we assess our outcomes and what we can do to close the feedback loop. Please make every effort to attend. Also, if you have been invited by your Department Head to the following session on uploading data to Sharepoint, we encourage you to make every effort to attend this as well.

(College Exhibit 7)

33. In October 2015, the College's Office of Assessment and Evaluation issued its second-edition "Manual for Assessing Student Learning Outcomes at the Course, Program and Institutional Levels." The Manual explicitly explains the College's position that faculty involvement in assessment is a mandatory requirement. At the course and program levels, the College expects faculty to collect data on student learning and participate in analyses of course data and program level data. (N.T. 442, 448-449; College Exhibit 3 at 4-5)

34. On October 20, 2016, after the expiration of the 2011-2016 CBA, the faculty members again voted to refrain from participating in the assessment of SLOs, PLOs, course revisions and "Guided Pathways." (N.T. 89, 196-197; Federation Exhibit 10)

35. The Federation's October 26<sup>th</sup>, 2016 memo provided, 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.

(Federation Exhibit 10)

36. 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) . . . ." (Federation Exhibit 11)

37. Dr. Hirsch oversees assessment. On or about November 10, 2016, Dr. Hirsch issued a memo to all faculty, which provides, in relevant part, as follows:

During the public comment portion of the College's Board of Trustees meeting on November 3, 2016, a faculty member announced that the faculty planned to stop performing assessment-related work which certain members of the faculty considered to be voluntary work. Assessment of student learning is clearly a professional responsibility for faculty

members and the failure to perform assessment has the potential to harm students and the College.

As President Generals reported a few weeks ago, the Middle States Commission on Higher Education ("MSCHE") has made significant changes to the accreditation process, including now requiring institutions to send more in-depth information annually to ensure that institutions meet the standards on an ongoing basis.

The consequences for non-compliance and failure to improve are significant. Because regional accreditors are gatekeepers for federal funding, including Title IV financial aid, institutions that are not in compliance risk their reputations and their ability to function economically.

In 2014 our College was deemed out of compliance on one of the standards, Assessment of Student Learning, and the College was placed on warning status. The threat of losing accreditation was noted in publications and on the MSCHE web site to alert the public as required. The College was turned down for opportunities to participate in federal projects designed to help students, including: a prior learning assessment project, a project to fund students incarcerated in Federal or State penal institutions, and a project to provide funding for dual enrollment.

Faculty, administrators and staff worked hard to demonstrate a serious and ongoing commitment to meeting the standards after insufficient progress by 2014 and statements made to the MSCHE visiting team about the lack of commitment to assessment for improvement. We were required to submit a report in February 2015 and have a MSCHE team visit during spring 2015 to determine whether we were in compliance. That first report after being placed on warning showed progress but the team was not convinced that our efforts would continue without scrutiny, our warning status continued and we were required to submit a second report by November 2015 and have another MSCHE team visit in January 2016. The warning was lifted after the second report and visit but with an additional report due November 2017 to ensure that we continue to make progress in assessing student learning and using the results to improve.

I am pleased that most faculty members seem to recognize that assessing student learning is not only a responsibility but also is an important vehicle for improvement of student learning. That supports my belief that there is a strong commitment at the College to teaching and to learning and to academic excellence. There may be many voluntary activities for faculty members at the institution, but assessment of student learning is not one of them.

(N.T. 435, 510-511, 714-717; Federation Exhibit 13; College Exhibit 22) (emphasis original)

38. Victoria Zellers is the General Counsel for the College. Steve Jones is the Federation Co-President. Ms. Zellers and Mr. Jones exchanged memos disputing whether the faculty's concerted refusal to



perform assessment work constituted a cessation of required duties, i.e., a strike. (Federation Exhibits 14, 15 & 16)

39. Ms. Zellers' January 26, 2017 memo provides, in relevant part, as follows:

Assessment has always been a professional responsibility and something that is required of all faculty members—both full-time and part-time. While the form and substance of Assessment has changed over the years, it is not a new responsibility. The College has never agreed, and does not agree now, that Assessment is voluntary.

Article XVI Working Conditions, Section J of the Full-Time Faculty Collective Bargaining Agreement explicitly provides:

(1) Teachers within a department shall be responsible for course objectives; course design; additions, deletions and other changes within courses; and shall approve such prior to transmission by the Department Head to the Vice President for Academic Affairs by way of the Dean.

\* \* \*

**(5) Teachers within each department shall be responsible for examining and reviewing each course and curriculum within its jurisdiction not less than once every two (2) years. Such review and examination shall be made with a view toward improving and updating courses and curricula and avoiding proliferation.** (emphasis added) (see also Exhibit E). These provisions leave no doubt that faculty participation in Assessment is obligatory.

The Federation's instructions that faculty cease performing Assessment work is unlawful. The faculty who are following the Federation's instructions, and refusing to perform Assessment related to work, are engaged in an unlawful strike under state law. This unlawful behavior is creating a clear and present danger that may affect accreditation for the College and its programs, which would have far reaching negative consequences.

(Federation Exhibit 16) (emphasis original in Exhibit not the CBA) (N.T. 503-505, 670, 704; Federation Exhibit 1, Article XVI (J) (5))

40. Ms. Zeller's January 4<sup>th</sup> and 26<sup>th</sup>, 2017 memos establish the administration's knowledge of the organized, concerted faculty action to withhold assessment data of student learning. There is no evidence that the Philadelphia Court of Common Pleas has declared that the work stoppage presented a clear and present danger. (Federation Exhibits 14, 15 & 16)

41. In April 2017, Dr. Celenza revised the Department Head Evaluation Form to include evaluation of how well the Department Head was "Responsible for faculty engagement with and completion of

assessment planning, data collection and analysis reporting and improvement." (N.T. 393)

42. Article VIII (L) of the full-time faculty CBA provides that the College "may call upon Employees for [among other duties] . . . accreditation." (N.T. 506; Federation Exhibit 1 at 22)

43. Duties pertaining to maintaining the College's accreditation are not always required. It is a special activity that, when required, is mandatory. When the College calls upon faculty to perform accreditation responsibilities, including assessments, "it's all hands on deck." Learning outcomes must be submitted for the College to maintain its accreditation. It is "mission critical." (N.T. 507-508)

44. In August 2012, Dr. Gay issued a memo to all faculty wherein she explicitly informed the faculty members that assessment responsibilities were mandatory. In the memo, Dr. Gay stated as follows: "There may be many voluntary activities for faculty members at an institution, but assessment of student learning is not one of them." (N.T. 524; College Exhibit 18)

45. On May 23, 2017, Dr. Hirsch, for the first time, issued identical written warnings to five employees for failing to perform required assessments. (N.T. 744; Federation Exhibit 17)

46. The warnings provide as follows:

On April 3, 2017, you were requested to complete the Scientific Reasoning Assessment. Several written reminders were sent to you on April 10, April 17, and April 24 informing you that the deadline for submission was May 8, 2017. On May 11, 2017, Dr. Mary Anne Celenza provided you notice that the deadline of May 8, 2017 was extended to May 18, 2017 and that failure to complete the assessment by May 18, 2017 would result in disciplinary action.

Despite the reminders and notice of intended discipline, you have intentionally disregarded your professional duties as a faculty member of the College and failed to comply with your contractual duties. This notice constitutes a formal written warning that will be placed in your human resources and department files. Continued failure to satisfy your professional duties and contractual requirements may result in additional disciplinary action.

(Federation Exhibit 17)

#### **DISCUSSION**

The Federation argues that the College unilaterally changed the provisions of the expired CBA and altered the status quo by requiring faculty to participate in the assessment process, when called upon to do so, or be subject to discipline, and by requiring full-time faculty to attend sessions or workshops during Professional Development days. (Union's Post-hearing Brief at 19). The Union has characterized participation in the assessment process as non-contractual, voluntary activities. As such, the Union has directed faculty to refuse to provide assessment data in concert, and it asserts that refraining from voluntary duties does not constitute a strike. (Union's Post-hearing

Brief at 19). The Union contends that the College recognizes the non-mandatory nature of assessment activities because it has proposed language changes to the CBA to make assessments required. (Union's Post-hearing Brief at 20).

The Union distinguishes from voluntary and mandatory contractual duties. According to the Union, teaching a certain course load, submitting students' grades, maintaining office hours and attending graduation are explicitly provided mandatory contractual duties, the adherence to which the College tries to monitor. (Union's Post-hearing Brief at 21). The Union also contends that there are many time-consuming activities which are encouraged, but not contractually required of faculty, which make them voluntary, such as participating in hiring and other committees. (Union's Post-hearing Brief at 21). The Union further argues that the contract language relied upon by the College, for its position that assessment duties are contractually mandated, predate the establishment of SLOs and, therefore, cannot be interpreted to include assessment, and that the language refers to "teachers within a department" so the responsibility does not fall on individual faculty members but rather the faculty members as a collective part of a voluntary committee. (Union's Post-hearing Brief at 22).

The Federation also maintains that evidence that the College itself recognizes the voluntary nature of assessment duties is that it proposed in bargaining "radical" changes to the language in the CBA to require that faculty fully participate in assessment of student learning outcomes and program assessment, to which the Union has not agreed. (Union's Post-hearing Brief at 24). Further evidence that the assessment activities are voluntary, claims the Federation, is that some faculty members, below the level of department heads, assistant department heads, curriculum coordinators and program supervisors, receive compensation for their work on assessment establishing that the work is voluntary unless additionally compensated in the form of released or extended time.

The Union additionally argues that past practice confirms that assessment activities by individual faculty members are voluntary. (Union's Post-hearing Brief at 25). The Union contends that SLOs and PLOs were not introduced until 2010 or 2011 and later than that in some departments. Accordingly, the old contract language is inapplicable to SLOs and PLOs and history demonstrates that assessment work is voluntary because some faculty chose to participate while other faculty declined. Faculty who declined participation were not tracked, monitored or disciplined. (Union's Post-hearing Brief at 25-27).

The Federation also asserts that Middle States does not require faculty participation in assessments, and it does not specify any particular method of assessment. Different institutions satisfy Middle States standards in different ways. Moreover, contends the Union, the CBA does not reference Middle States, and the contract language relating to the College's ability to call upon faculty for accreditation connotes a voluntary activity on the part of the faculty. (Union's Post-hearing Brief at 27). In a similar vein, the Department of Education regulations do not require SLOs and PLOs. They only require that courses be evaluated and audited. The Union argues that there is a difference between outcomes and assessments and, although the Department of Education regulations require that courses have

learning outcomes, "that is not the same as Assessing those outcomes." (Union's Post-hearing Brief at 29).

The Union claims that the College's unilateral change in the status quo also impacts faculty who decline to perform requested assessment duties by negatively impacting their performance evaluations, receiving written discipline and discriminates against those faculty for following the Federation's call to refrain from voluntary activities. (Union's Post-hearing Brief at 32-33)

The Federation also contends that the College unlawfully altered the status quo by making attendance during Professional Development days mandatory. (Union's Post-hearing Brief at 34). The Union claims that the past practice was that faculty did not have to attend any of the workshops or sessions that are scheduled to occur during those three days. Moreover, under the CBA, the Union argues that there is no requirement that full-time faculty attend any sessions during Professional Development days. (Union's Post-hearing Brief at 34). Faculty, maintains the Union, are only required to engage in professional activities that support their teaching responsibilities. (Union's Post-hearing Brief at 34-35).

The Board will find an employer in violation of Sections 1201(a)(5) of the Act if the employer unilaterally changes a mandatory subject of bargaining under Section 701 of the Act. Appeal of Cumberland Valley School District, 483 Pa. 134, 394 A.2d 946 (1978). If, however, the employer changes a matter of inherent managerial policy under Section 702 of the Act, then no refusal to bargain may be found. PLRB v. State College Area School District, 461 Pa 494, 337 A.2d 262 (1975).

A past practice can only become a term or condition of employment if the practice involves a mandatory subject of bargaining. South Park Township Police Ass'n v. PLRB, 789 A.2d 874, 880-881 (Pa. Cmwlth. 2002) The South Park Court held that "[t]o conclude that an employer must bargain collectively with a bargaining unit over something that may constitute a past practice but is not a mandatory subject of collective bargaining would bind an employer to virtually all practices including matters of managerial prerogative. . . . Therefore, we agree with the PLRB that it is necessary that a practice, in order to be preserved, must also be a subject of mandatory bargaining." Id. at 880-881.

Section 702 of PERA provides, in relevant part, as follows:

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.

43 P.S. § 1101.702 (emphasis added).

In State College Area School District, supra, our Supreme Court addressed the relationship between Sections 701 and 702 and therein developed the analysis that the Board must apply in determining whether a matter is bargainable under Section 701 or a non-bargainable managerial prerogative under Section 702. The Court opined that determinations in this area must strike a balance between employes'

interests in the terms and conditions of their employment on the one hand and the employer's interests in performing managerial functions on the other. State College, 337 A.2d at 268. "In striking this balance the paramount concern must be the public interest in providing for the effective and efficient performance of the public service in question." Id. The Court, in State College, further held as follows:

[W]here an item of dispute is a matter of fundamental concern to the employes' interest in wages, hours or other terms and conditions of employment, it is not removed as a matter subject to good faith bargaining under section 701 simply because it may touch upon basic policy. It is the duty of the Board in the first instance and the courts thereafter to determine whether the impact of the issue on the interest of the employe in wages, hours and terms and conditions of employment outweighs its probable effect on the basic policy of the system as a whole.

State College, 337 A.2d at 268.

At the outset, I have credited the testimony of Dr. Gay, Dr. Sweet and Dr. Hirsch over all other witnesses regarding the contractual requirements and the mandatory nature of faculty's performance of assessment work and providing assessment data, which data only the faculty can generate. The testimony of these three witnesses forms the basis for a significant amount of the findings of fact, analysis and conclusions herein. I credit their testimony that assessment, in one form or another, has always been a required duty of faculty for many years, in fulfillment of the College's mission, even though the methods and procedures have changed, evolved and adapted. I based this determination on the following: their presence; their command, knowledge and understanding of the information; their institutional memory and knowledge; their decisiveness, certainty, assertiveness; the lucidity with which they presented testimony; their conduct and demeanor on the witness stand; and their confidence in providing thorough explanations. Mid Valley Education Association v. Mid Valley School District, 25 PPER ¶ 25138 (Final Order, 1994).

On this record, the need for the College to obtain assessment data from individual faculty members, data that only those faculty members can provide, is essential and critical to the College's mission, its educational enterprise, the maintenance of its accreditation and its funding sources, which individually and cumulatively far outweighs any interest faculty may have in refraining from providing the data and engaging in assessment duties or the impact on the employes' wages, hours and other terms and conditions of employment.

The record supports the College's position that assessment, in various forms and called by different nomenclatures, has always been performed by the College. The record also supports the College's position that assessing student outcomes requires data from individual faculty who teach and observe the courses and the students in those courses selected for assessment. Assessment (whether it is called SLOs, PLOs, General Education Outcomes, course review, course evaluation or course objectives) has existed at the College for time immemorial. The

College cannot be in the business of teaching and learning without assessment. Assessment is as much a part of teaching and faculty responsibility as preparing course materials, syllabi and grading. The post-course responsibility of performing assessment and providing assessment data to department heads and coordinators is as much a teaching responsibility for faculty as pre-course preparation.

Only teaching faculty are in a position to observe, obtain and provide the assessment data needed by the College to evaluate whether the teachers and the College are meeting the stated objectives. The College must constantly evaluate performance against the established goals to determine whether the College is meeting its approved objectives. It is a critical component of the College's mission and enterprise, without which the College cannot adapt its education methods to meet and serve the changing needs of the students. The teachers' obtaining and providing of assessment data is as much at the core of the College's existence as their standing in front of a classroom and presenting course materials.

Moreover, the College is a public institution that is accountable and answerable to the taxpayers, funded by taxpayer dollars, at the state and federal levels. The College qualifies for federal taxpayer funding because it is accredited by Middle States. If the College loses its accreditation, it loses its funding, its reputation and, consequently, its enrollment. The very existence of the College in any respectable form depends on maintaining its accreditation with Middle States, which requires a cycle of assessment activity for courses to be assessed and reassessed every five years. In 2014, the College was placed on warning status and almost lost its accreditation after the Union refrained from providing assessment data during bargaining in 2012. Assessment data, by any name, is critical for the assessment analysis required by Middle States and the Department of Education. The College is audited by the Commonwealth and Middle States.

The significance of assessment for Middle States, and the jeopardy the College faced while it was placed on warning status with Middle States, was recognized by the Union in its letter to its members in August 2015. In fact, the Union therein acknowledged that assessment is required to satisfy the Middle States accreditation process, which undermines its position that Middle States does not specifically require SLOs or PLOs simply because the College chose that form of, or name for, assessment. Precisely because Middle States does not define the methodology for assessment, the onus is on the College, and the College is entitled, to develop methods and procedures for assessment to satisfy the requirements of Middle States.

Requiring individual faculty members teaching courses selected for assessment to provide assessment data is part of their teaching duties, and management has the right and authority to direct those teachers to perform those functions under Section 702 of PERA. The Supreme Court of Pennsylvania has affirmed the Board's conclusion that, after balancing the interests under State College, supra, workload is a managerial prerogative where the record supports that the workload is of vital importance to the function of the employer which outweighs the effect on employees' wages, hours and working conditions. Joint Collective Bargaining Committee of the Pennsylvania Social Services Union v. PLRB, 469 A.2d 150 (Pa. 1983). In this case, the College's

requiring selected individual faculty members to obtain and provide assessment data on a cyclical basis is vital to its existence, its educational mission and function, its funding and its standards and levels of service.

The College chose to exercise its managerial discretion to maintain a collegial, professional environment by not disciplining faculty members, until recently, for refusing to perform assessment duties. This exercise in restraint did not transform those duties into voluntary duties. Assessment duties, by whatever name, have been required of individual faculty members for many years. As a result, the College did not act with discriminatory motive when it required faculty to provide assessment data from 2016 to the present. The College simply needs the work to be done now as it has always needed the work to be done.

The Union argues that the CBA does not expressly address assessment and that assessment did not start until long after the current contract language relied upon by the College was negotiated and therefore cannot be interpreted to apply to assessment. The Union cites Coatesville Area School District v. Coatesville Area Teachers' Association, 978 A.2d 413 (Pa. Cmwlth. 2009) for the proposition that a public employer cannot unilaterally change the status quo even regarding a managerial prerogative. Coatesville involved an appeal from an arbitration award under the "deferential essence test." Coatesville, 978 A.2d at 415, n.2. The Coatesville Court concluded that the arbitrator did not violate the essence test when he concluded that, under the status quo of the expired contract, the employer could not change a managerial prerogative expressly bargained away in that contract. However, as determined above, there is no evidence that the College bargained away its managerial prerogative to require faculty to perform assessment work either by past practice or the CBA. Coatesville, therefore, is inapposite. A past practice cannot arise from a managerial prerogative and the status quo is that the work at issue is mandatory, not voluntary. The CBA does not establish that the College bargained away its managerial prerogative to mandate assessment duties.

On the contrary, a review of the CBA leaves no doubt that the College preserved therein its right to direct individual faculty to perform assessments many years ago, using different verbiage, which clearly mandates that obtaining and providing assessment data was part of every professional faculty member's teaching responsibilities. There is no other way to read the contract, and the College has maintained the contractual status quo regarding duties and workload.

Article XVI of the CBA, Section (J) addresses working conditions. Subpart (1) states that teachers within a department shall be responsible for course objectives; course design; additions, deletions and other changes within courses." Subpart (5) provides that "Teachers within each department shall be responsible for examining and reviewing each course and curriculum within its jurisdiction not less than once every two (2) years. Such review and examination shall be made with a view toward improving and updating courses and curricula and avoiding proliferation." (F.F. 36). Although the Union maintains that this language does not apply to individual faculty working on assessment data because the language applies to faculty working in groups within departments, the plain meaning of the language provides that teachers

are responsible for obtaining and providing data for learning outcomes even if the dated language does not use those express terms. Moreover, teachers engaged in assessment duties are supposed to discuss the data and make recommendations with other faculty and department heads; assessment is supposed to involve groups and discussions.

The language in Article XVI is mandatory. Faculty shall be responsible for examining, reviewing courses, their objectives and designs and propose additions and deletions. This type of evaluation is the nature of assessment of learning outcomes. The whole purpose of examining and reviewing courses is to determine whether the current objectives and designs are working for students and whether the College is meeting its goals and fulfilling its mission to provide a reputable service to students as expected by the taxpayers, the students, the Commonwealth, Middle States, the administration and, hopefully, the faculty.

Additionally, Article VIII (L) of the CBA provides that full-time faculty may be called upon for accreditation. The plain meaning of this language is unequivocal and inescapable. The College may direct individual faculty members to perform whatever duties necessary to satisfy the requirements of Middle States and other program accrediting organizations. Assessment and learning outcomes are necessary to meet the accreditation standards of Middle States, even if Middle States does not use the terms SLOs or PLOs. The assessment methods designed and selected by the College are the College's prerogative in exercising its managerial discretion to design, determine and implement policies that effectuate the goals and objectives of the College as well as the accreditation and legal requirements of the Commonwealth and Middle States. The College has the statutory right and the contractual authority to mandate that individual faculty members collect and provide assessment data when they are teaching courses selected for assessment.

Section 301(9) of PERA provides the following definition of a strike:

(9) "Strike" means concerted action in failing to report for duty, the willful absence from one's position, the stoppage of work, slowdown, or the abstinence in whole or in part from the full, faithful and proper performance of the duties of employment for the purpose of inducing, influencing or coercing a change in the conditions or compensation or the rights, privileges, or obligations of employment.

43 P.S. § 1101.301(9) (emphasis added). The concerted cessation of the required assessment duties at issue here constitutes an abstinence in part from the full performance of the duties of employment and thereby constitutes a strike under Section 301(9) of PERA. Indeed, that is the position held by the College. (College's Post-hearing Brief at 33-40). The Union, not the College, has changed the status quo of the parties' collective bargaining relationship and the terms and conditions of employment that existed at the time of contract expiration and many years prior. The faculty members who refused to provide assessment data did so in concert with other faculty at the direction of the Federation.

Although the College unilaterally declared the faculty strike unlawful (F.F. #39), Article X of PERA vests jurisdiction over determining the lawfulness of a strike in the courts of common pleas,



not the employer or even the Board. 43 P.S. §§ 1101-1001-1101.1005. In Fairview School District v. Fairview Education Association, 28 PPER ¶ 28181 (Final Order, 1997), the Board affirmed a hearing examiner's legal conclusion "that employe strike activity does not lose its protection under PERA until a court enjoins the strike." Fairview School District, 28 PPER at 396. The record in this case does not show that the Philadelphia Court of Common Pleas enjoined the strike. Accordingly, absent a court determination that the strike is unlawful, (either because the parties failed to comply with the mediation requirements in Article VIII of PERA or because the strike presents a clear and present danger) the concerted, and Federation-directed, work stoppage in this case constitutes a lawful, protected strike at this point in time.

The Union presented evidence that faculty members were threatened with discipline and that five faculty members were in fact disciplined for refusing to provide assessment data for their selected courses. The Union claims that the threats and the discipline are coercive and discriminatory. In a discrimination claim, the complainant has the burden of establishing that the employe(s) engaged in protected activity, that the employer knew of that activity and that the employer engaged in conduct that was motivated by the employe's involvement in protected activity. St. Joseph's Hospital v. PLRB, 473 Pa. 101, 373 A.2d 1069 (1977). Motive creates the offense. PLRB v. Stairways, Inc., 425 A.2d 1172 (Pa. Cmwlth. 1981).

At the time that Dr. Celenza's threat of discipline and at the time Dr. Hirsch imposed discipline on five faculty members, in May 2017, those faculty members were engaged in a protected, concerted strike, which was known to them and other administration officials, as evidenced by Dr. Hirsch's November 10, 2016 faculty memo, Ms. Zellers' January 4, 2017 memo to Mr. Jones and the Federation, and Mr. Jones' January 9, 2017 response memo to Ms. Zellers. Dr. Hirsch's imposition of discipline on those five faculty members was motivated by their refusal to respond to repeated requests to provide assessment data, i.e., protected strike activity, while there was no court order enjoining the strike. Accordingly, the threats were coercive and the discipline was discriminatory. "The [College] was expressly required to contest the validity of the strike in common pleas court before it took any retaliatory action." City of Scranton v. PLRB, 505 A.2d 1360, 1363 (Pa. Cmwlth. 1986). The College's remedy for a concerted cessation of work is the procurement of an injunction from the Philadelphia Court of Common Pleas ordering the faculty to return to work. Thereafter, the continued cessation of work would lose its statutory protection, the College could seek a contempt order and discipline then may ensue pursuant to Section 1005 of PERA.<sup>1</sup>

The Union asserts that some faculty were required to work beyond the contractual calendar to perform assessment work and provide assessment data. However, the disciplinary notices issued by Dr. Hirsch make clear that the faculty members involved were clearly informed that the College wanted their data prior to the end of the academic year. Dr. Celenza reminded certain faculty members that they

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<sup>1</sup> When administrative unfair practice proceedings are pending before the Board, a party may seek a status-quo injunction from a court of common pleas, pursuant to Mazzie v. Commonwealth of Pennsylvania, 495 Pa. 128, 432 A.2d 985 (1981).

owed assessment data in early April 2017. The administration gave those faculty members multiple extensions in the face of their refusal to provide the information by the end of the academic year, which concludes with commencement in May. Therefore, the faculty members' refusal to perform required work within the academic calendar caused the administration to extend their deadlines beyond the academic calendar in the hopes of accommodating the faculty members and obtaining needed data. In this manner, the College was not requiring faculty to work beyond the academic calendar; it was allowing faculty to make up for work that was required to be finished during the academic calendar.

There is no dispute that Professional Development days are paid work days designated as such as part of the College calendar. There is no dispute that the College has not required individual faculty members or the faculty as a whole to attend specific courses, sessions or workshops given during that time. The College allows the faculty members to select the sessions or workshops that are most relevant to their discipline. However, the Union claims that the past practice was that faculty did not have to attend any sessions or workshops during professional development days if they chose not to do so. The College expects full attendance from the full-time faculty at the opening session, and it does not take attendance at workshops or sessions, unless the session is required by law or the College (such as sexual harassment training, which is only required if the faculty member is due to take it).

On January 4, 2017, Dr. Hirsch emailed faculty welcoming them back to the Spring 2017 semester and informing them of an enriching week of Professional Development with breakfast and programming beginning Monday morning, January 9, 2017. Dr. Hirsch added that all full-time faculty are required to attend the Professional Development program. In response to Ms. McFadden's request for clarification, Dr. Hirsch stated that "Full-time faculty are expected to attend the opening and related general sessions on Monday and attend relevant sessions on Tuesday and Wednesday (which may include department meetings). Faculty are encouraged to attend sessions that are being offered on Thursday and Friday."

The Union's position is that the CBA provides that Professional Development days are paid workdays but that attendance was never taken or required and that the College changed the past practice and the status quo by requiring attendance. The Union further posits that the CBA does not specify that faculty must attend sessions during Professional Development days and attendance therefore is not mandatory.

The College provides in-service training for its faculty to provide continuing education and to improve professional development as well as the educational experience for its professional teachers and its students. Much time, effort, energy and resources are invested in organizing and providing the sessions and workshops given during Professional Development days. These are paid work days that are part of the academic calendar. The Union's position, that faculty are paid to not attend Professional Development programs is unsustainable. The College is not spending resources and paying faculty during those days to do whatever work they feel like doing. The College has made this part of the work calendar for faculty precisely because it wants faculty to attend. It strains credulity to conclude that the College

would pay faculty during Professional Development days and not require their attendance. Participating in Professional Development days is the whole point of paying them for those days.

Moreover, there are training sessions provided during Professional Development days that are relevant to all teaching faculty but may not be targeted to an individual faculty member's discipline. For example, in 2003, the College provided training courses to instruct faculty about Middle States and its standards for assessments, which pertains to all faculty members. Also, there are department meetings held during the Wednesday during Professional Development days, which are relevant to every faculty member's duties as a department member. Attendance at Professional Development meetings and sessions, therefore, is contractually mandatory. Faculty may choose their sessions, and some sessions or meetings will be more desirable or relevant to their interests and disciplines than others, but they are required to attend something for three days.

The fact that the College does not take attendance or impose discipline for unexcused absences, to promote a respectful, collegial environment, does not transform a paid-for requirement into a personal choice to not attend any sessions at all or into a past practice that attendance is not required. When the College contractually agrees to pay employes during a week of no classes for the purpose of offering expensive, necessary training to its employes, it has the managerial right to require those employes to attend the very program that they are being compensated to attend. The lack of taking attendance or issuing discipline for failing to attend without an excuse is not evidence that the College tacitly or knowingly released faculty from their paid obligation to attend Professional Development sessions or meetings or treated such attendance as voluntary. The faculty members are paid to attend the training; they are not paid to do whatever work they decide to do during those three days.

The College's requirement that faculty attend the opening General Session and sessions relevant to their professional disciplines is not a change in the status quo or a past practice because those requirements and expectations had been in place for many years. There is no change in the contractually mandated condition of employment that bargaining unit employes are paid to attend Professional Development days. They still possess plenty of freedom and latitude with choosing sessions and workshops. For three days of pay, the College merely expects attendance at the opening session and a good-faith effort to find and attend relevant sessions. But the contract cannot be read any other way than to require attendance at Professional Development days, which is a contractually paid for function. This requirement is no different than requiring faculty members to teach the classes that they get paid to teach.

#### **CONCLUSIONS**

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

1. The Philadelphia Community College is a public employer within the meaning of Section 301(1) of PERA.
2. The Federation is an employe organization within the meaning of Section 301(3) of PERA.

3. The Board has jurisdiction over the parties hereto.

4. The College has not committed unfair practices in violation of Section 1201(a) (5) of PERA.

5. The College has committed unfair practices in violation of Section 1201(a) (1) and (3) of PERA.

**ORDER**

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

**HEREBY ORDERS AND DIRECTS**

that the College shall:

1. Cease and desist from interfering, restraining or coercing employes in the exercise of rights guaranteed in Article IV of PERA;

2. Cease and desist from discriminating in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any employe organization;

3. Take the following affirmative action, which the hearing examiner finds necessary to effectuate the policies of PERA:

(a) Immediately rescind the written warnings and any other discipline issued to the five faculty members named in Federation Exhibit 17 and any discipline issued to any other faculty members for refusing to perform assessment duties during the current contract hiatus strike and expunge any and all records of the same;

(b) Post a copy of this decision and order within five (5) days from the effective date hereof in a conspicuous place readily accessible to its employes and have the same remain so posted for a period of ten (10) consecutive days; and

(c) Furnish to the Board within twenty (20) days of the date hereof satisfactory evidence of compliance with this decision and order by completion and filing of the attached affidavit of compliance.

**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 decision and order shall be and become final.

SIGNED, DATED AND MAILED at Harrisburg, Pennsylvania, this thirty-first day of December 2018.

PENNSYLVANIA LABOR RELATIONS BOARD

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JACK E. MARINO, Hearing Examiner

COMMONWEALTH OF PENNSYLVANIA  
Pennsylvania Labor Relations Board

FACULTY FEDERATION OF COMMUNITY :  
COLLEGE OF PHILADELPHIA LOCAL 2016 :  
AFT, AFL-CIO :  
v. : CASE NO. PERA-C-17-25-E  
PHILADELPHIA COMMUNITY COLLEGE :

**AFFIDAVIT OF COMPLIANCE**

The Philadelphia Community College hereby certifies that it has ceased and desisted from interfering, restraining or coercing employes in the exercise of the rights guaranteed in Article IV of PERA; that it has ceased and desisted from discriminating against bargaining unit employes in violation of Section 1201(a)(1) and (3) of the PERA; that it has rescinded the written warnings and any other discipline issued to the five faculty members named in Federation Exhibit 17 and any discipline issued to any other faculty members for refusing to perform assessment duties during the current contract hiatus strike and expunged any and all records of the same; that it has posted a copy of the decision and order as directed therein; and that it has served a copy of this affidavit on the Union at its principal place of business.

\_\_\_\_\_  
Signature/Date

\_\_\_\_\_  
Title

SWORN AND SUBSCRIBED TO before me  
the day and year first aforesaid.

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Signature of Notary Public