UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

In the Matter of	**Cases 13-CA-73486**
	13-CA-73487
COLUMBIA COLLEGE CHICAGO,	**13-CA-76794**
	13-CA-78080
Respondent,	**13-CA-81162**
	13-CA-84369
and	
THE PART-TIME FACULTY ASSOCIATION AT COLUMBIA COLLEGE CHICAGO, IEA-NEA,	
Charging Party	

COLUMBIA COLLEGE CHICAGO'S BRIEF IN OPPOSITION TO EXCEPTIONS OF THE ACTING GENERAL COUNSEL AND THE CHARGING PARTY

Dated: June 14, 2013

Submitted by:

Lisa A. McGarrity
lam@franczek.com
Abizer Zanzi
az@franczek.com
Franczek Radelet, P.C.
300 South Wacker Drive
Suite 3400
Chicago, IL 60606
Phone: 312-986-0300
Fax: 312-986-9192

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

Cases

INTRODUCTION

The General Counsel's ("GC") consolidated complaint ("Complaint") against Respondent Columbia College Chicago ("Columbia" or the "College") arose from six unfair labor practice charges filed by the Charging Party, The Part-time Faculty Association at Columbia College Chicago – IEA/NEA ("P-Fac" or the "Union"), which represents Columbia's adjunct faculty. In the charges, P-Fac alleged dozens of violations of the National Labor Relations Act ("Act"), the great majority of which were dismissed or withdrawn before the Complaint was issued. The remaining allegations were tried before Administrative Law Judge Geoffrey Carter who issued a Decision and Order on March 15, 2013 ("ALJD" or "Decision"). The ALJ found that the GC failed to prove several of the allegations of the Complaint and recommended that they be dismissed. He also rejected the GC's and P-Fac's various requests for special remedies.

The GC and P-Fac filed exceptions to some of the ALJ's rulings. Both appeal the ALJ's findings that the College did not unlawfully change the scope of the bargaining unit represented by P-Fac or repudiate the grievance procedure contained in its collective bargaining agreement ("CBA") with the Union. Similarly, both dispute the ALJ's decision not to award special remedies. Additionally, P-Fac (but not the GC) challenges the ALJ's determination that the College did not discriminate against P-Fac President Diana Vallera by not assigning her a course to teach in the summer 2012 term.

As explained below, the ALJ's findings on these issues are grounded in established Board law and his sound credibility determinations supported by substantial evidence in the record. Accordingly, the GC's and P-Fac's exceptions should be denied.

STATEMENT OF RELEVANT FACTS

I. The Parties

Columbia is a private college focusing on media, communication and the arts, located in Chicago, Illinois. It offers many undergraduate programs and a smaller number of graduate programs (Tr. 452-53). The College is comprised of three schools – Media Arts, Liberal Arts & Sciences, and Fine & Performing Arts – within which there are 23 academic departments. The schools are run by deans; the departments by chairpersons (Tr. 453-54). The College operates on a traditional semester system, with its basic academic year consisting of fall and spring semesters (Tr. 452-53). It also offers a summer term during which fewer courses are offered than in the fall and spring, as well as a short January term during winter break (Tr. 453).

The College employs both full-time and part-time or contingent/adjunct faculty to teach the courses it offers. There are approximately 360 full-time faculty members and 1,250 adjuncts (Tr. 454-55). The full-time faculty is not represented. However, P-Fac has represented the adjuncts for about 14 years (Tr. 455).

Full-time faculty members have preference for course assignments, per the CBA. Full-time tenured and tenure-track faculty are obliged to teach three courses (nine credits) per semester and six courses (18 credits) in an academic year. Full-time lecturers and senior lecturers are obliged to teach four courses (12 credits) per semester and eight courses (24 credits) in an academic year (Tr. 456). In contrast, part-time faculty have no obligation to teach whatsoever. Instead, they are *limited* to teaching a maximum of 18 credit hours per academic year and 12 credit hours per semester, regardless of department (Resp. Ex. 1, Art. VIII(5), p. 11). Accordingly, part-time faculty are assigned the courses that remain after courses have been

assigned to full-time faculty (Tr. 456).

In recent years, enrollment at the College has fluctuated from a high of about 12,000 students to a low of 10,000. Currently, enrollment is at the low end. Each semester the College offers approximately 3,000 courses (Tr. 1063). However, the number of courses offered varies with enrollment. As one might expect, when there are fewer students enrolled, fewer courses are offered and available for part-time faculty to teach (Tr. 457).

II. Nature of Unit Members' Employment

A. The Parties' Collective Bargaining Agreement

The CBA (Resp. Ex. 1), which on its face was due to expire in 2010, was instead extended indefinitely by agreement of the parties pending their successful negotiation of a successor. As of the date of the hearing before the ALJ in this matter, their negotiations were on-going and the CBA remained in effect (Tr. 455).

In Article II of the CBA – Management Rights – the parties agreed that the College has "sole discretion" to exercise a host of rights. Among its management rights, the College has sole discretion to "hire," "assign," "terminate," "appoint," and "reappoint" adjuncts, as well as to "establish, modify, and discontinue . . . policies . . . and practices relating to the performance of work, including workload [and] scheduling of work . . . except as may be modified by this Agreement" (Resp. Ex. 1, Art. II(C), p. 2). Moreover, the CBA prescribes the effect or impact on part-time faculty of course-scheduling changes. That is, under certain circumstances adjuncts with 51 or more accumulated credit hours have a right to "bump" other adjuncts with fewer than 21 accumulated credit hours (Resp. Ex. 1, Art. VII, pp. 8-9). The CBA contains no provision granting members of the P-Fac bargaining unit an exclusive right to perform any work (*i.e.,* there is no such thing as "bargaining-unit work"). Rather, in all instances, the "final decision of who

teaches each course is the sole prerogative of the department Chairperson" (Resp. Ex. 1, Art. VII(2), p. 9). Courses may be assigned to full-time faculty, graduate students, part-time faculty not represented by P-Fac, or represented adjuncts.

B. The Nathan Arbitration Award

On February 11, 2012, Arbitrator Harvey Nathan issued an arbitration award under the CBA (GC Ex. 54; Tr. 925). P-Fac filed the underlying grievance on behalf of Ryan Preston, an adjunct who had been assigned to teach two sections of a course for fall semester 2010, but was removed from the schedule prior to the semester's start because the College believed that he had resigned in a voicemail message. Preston testified that an imposter had left the message in question. P-Fac argued that the College had terminated Preston in violation of the CBA's "just cause" requirement for "termination of employment during a semester" (Resp. Ex. 1, Art. X(1), p. 12; GC Ex. 54, p. 7). The College, on the other hand, argued that the "just cause" provision was inapplicable because, among other reasons, Preston was not removed from the schedule "during a semester" (GC Ex. 54, p. 7-9).

Arbitrator Nathan denied the grievance in its entirety, finding that the grievant was not even covered by the CBA in between semesters for which he had been hired to teach. He wrote: "The parties in composing the [CBA] carefully established that an adjunct, or part-time, instructor is employed only when he or she is teaching a course during a finite period of time. Between teaching assignments the adjunct has no status as an employee. He or she is hired solely for the period of time during which the teaching occurs" (GC Ex. 54, p. 10). He further observed that throughout the CBA, the parties expressed their intent that a part-timer's employment be "intermittent" and "piecemeal" (GC Ex. 54, pp. 10-11). For example, according to Article VII of the CBA, the "structure for unit members to be assigned courses" and again

become "an employee of the College" starts each semester with their submission of a "teaching availability form." However, their submission of the form "does not obligate the College in any way to provide an appointment or a particular assignment to that unit member" (Resp. Ex. 1, Art. VII(4), p. 10; GC Ex. 54, p. 11). Accordingly, Arbitrator Nathan ruled that the "just cause" limitation on adjunct terminations applies only "during teaching periods" and is not applicable to "renewals or rehires for future teaching assignments" (GC Ex. 54, p. 11-12). Because the College removed Preston from the teaching schedule before fall semester 2010 began, he was not covered by the CBA and "had no rights at all." Instead, he was merely an "applicant for employment and the College was not restricted in the way in which it treated his application" (GC Ex. 54, p. 12).

P-Fac did not file a lawsuit to vacate the arbitration award (Tr. 925-26).

C. P-Fac's Publications

P-Fac has repeatedly acknowledged its members' "intermittent" and "piecemeal" employment status, including on its website: "The bad news: we are contingent faculty; that is, our jobs are contingent upon the College's need and desire for our services from semester to semester" (Resp. Ex. 40 (February 2011 publication) and 41 (October 2012 publication), p. 1, first paragraph; Tr. 936-937). Similarly, in a speech in October 2011, at an American Association of University Professors ("AAUP") meeting – which was later republished in an AAUP magazine – P-Fac President Diana Vallera conceded that part-time faculty at Columbia have no "assurance of continued employment" (GC Ex. 67, p. 12, final paragraph). Indeed, in Vallera's opinion, the College has historically treated part-time faculty like "freelancers who can be discarded" (GC Ex. 67, p. 3, paragraph numbered 2).

D. Case No. 13-CA-45973

In 2010, Region 13's Regional Director refused to issue a complaint in Case No. 13-CA-45973, an unfair labor practice charge filed by P-Fac against the College alleging that it changed P-Fac President Diana Vallera's teaching schedule in retaliation for her union or protected activities. P-Fac appealed the Regional Director's decision to the NLRB's Office of the General Counsel. On November 30, 2010, the GC denied P-Fac's appeal, finding that "the evidence indicated no contractual right of part-time faculty to any particular course or schedule. Though Ms. Vallera may have preferred to be assigned studio classes that were scheduled for certain days and times, neither the collective bargaining agreement nor past practice conferred such a right on part-time faculty instructors" (Resp. Ex. 7, pp. 1-2).

III. Scope of Bargaining Unit/Grievance Procedure Allegations

The GC alleged that beginning March 23, 2012, the College failed and refused to bargain in good faith in violation of Sections 8(a)(1) and (5) of the Act by "unilaterally chang[ing] the scope of the [bargaining] Unit . . . by only applying the terms of the [CBA] to individuals currently teaching a course" and by "repudiat[ing] the grievance procedure contained in the parties' [CBA]" (GC Ex. 1(ff), Complaint ¶ X). The ALJ found that the GC failed to prove these allegations and dismissed them (ALJD at 55:31-58:31).

The parties' CBA sets forth the scope of the bargaining unit represented by P-Fac:

> The unit includes all part-time faculty members who have completed teaching at least on semester at Columbia College Chicago, excluding all other employees, full-time faculty, artists-in-residence, and Columbia College Chicago graduate students, part-time faculty members teaching only continuing education, music lessons to individual students or book or paper making classes, Columbia College Chicago full-time staff members, teachers employed by Erickson Institute, the YMCA or Adler Planetarium, and other individuals not appearing on the Columbia College Chicago payroll, managers and confidential employees, guards, and supervisors as defined in the Act.

Resp. Ex. 1, Art. I(A), p. 1; Complaint ¶ VII(a). During the time period of the events alleged in the Complaint, the provision has not changed.[1] To the contrary, all provisions of the CBA have remained in effect by "mutual agreement" of the parties (Tr. 1004). In its June 11, 2012 position statement in response to the underlying charges on this allegation, the College reiterated that it "has never taken the position that PFAC does not represent adjuncts (who have completed at least one semester) in between semesters or that the scope of the bargaining unit has somehow changed" (GC Ex. 94(a) at 2-3). Moreover, at trial, the College's chief negotiator, Len Strazewski, testified that the College's understanding of the scope of the unit has "not [changed] at all" (Tr. 1004-05). Susan Marcus, the College's P-Fac liaison, confirmed that the "bargaining unit is the same [today] as it has always been" (Tr. 935). When asked if the College intended to try to change the scope of the bargaining unit, she testified "[c]ertainly no, certainly not" (Tr. 935).

The GC's evidence of a "unilateral change" consisted of various written communications by College officials citing the Nathan award (discussed in detail above) in support of denying grievances protesting future class assignments and refusing demands for effects bargaining over future class assignments. For example, in a March 23, 2012 communication responding to Vallera's request for an explanation regarding "the loss of my summer class" for summer 2012, Marcus cited the award as well as the GC's finding in Case No. 13-CA-45973 that adjuncts have "no contractual right . . . to any particular course or schedule" (GC Ex. 92, Tr. 928). She wrote: "Please clarify your rationale that there was a 'loss of my' summer class" in light of the Nathan award and the GC's finding (GC Ex. 92, p. 2). Marcus, who was not on the College's bargaining

[1] According to GC Exhibit 2A, the unit description has changed since March 1998, the date of P-Fac's original certification as bargaining representative. However, the record contains no evidence regarding when the change was made, or why. The parties' current CBA was agreed to in 2006, so the change certainly pre-dates the current labor agreement.

team, did not originally understand Vallera's email to be a request to bargain, but in a subsequent email on April 10 instructed Vallera to direct all bargaining issues to Strazewski, the College's lead negotiator (Resp. Ex. 92, Tr. 931-32).

Likewise, in communications in May, June, and July regarding a grievance filed on May 1, 2012, protesting teaching assignments for summer 2012 (GC Ex. 93A), both Marcus and Pegeen Quinn, who succeeded Marcus as P-Fac liaison, cited the award. On May 15, Marcus wrote: "[A] unit member is considered to be an applicant for employment prior to each semester and does not have standing to question or challenge his future employment at the [C]ollege" (GC Ex. 93B). Quinn used similar language on June 8 (GC Ex. 93D) and on July 2, she wrote: "Because you are attempting to grieve class assignments for which you applied and you are also attempting to grieve on behalf of unnamed unit members without providing any evidence, I find that you lack standing and/or there has been no violation of the CBA" (GC Ex. 93E, p. 2, final paragraph).

Similarly, in a May 8, 2012 communication responding to P-Fac's demand for both decisional and effects bargaining over "Prioritization," a comprehensive self-study undertaken by the College, Strazewski cited the award and explained that "[b]ecause . . . decisions over future curriculum do not affect the wages, benefits, and terms and conditions of employment under the express provisions of the CBA, bargaining is not appropriate" (GC Ex. 59, fifth full paragraph). In other words, because adjuncts have no right to employment in future semesters, future curriculum changes cannot affect their terms and conditions of employment. More specifically, due to the contingent nature of adjuncts' employment, the effects or impact of future curriculum changes are too remote or speculative to warrant bargaining.

The College summarized its position in a letter to Region 13 dated June 11, 2012:

> P-Fac seems to be confusing 'scope of the bargaining unit' with 'contract coverage.' Obviously, the concepts are distinct. Arbitrator Nathan's award does not address the scope of the unit, but only the CBA's coverage. Unions routinely agree to carve out certain types of employees from contractual protections (e.g., probationary, part-time and seasonal employees). Because adjuncts are contingent employees who serve at the pleasure of the College on a semester-to-semester basis, it is not surprising that P-Fac agreed that they would not be covered by the CBA in between semesters when they are not even employed. **The College has never taken the position that P-Fac does not represent adjuncts (who have completed at least one semester) in between semesters or that the scope of the bargaining unit has somehow changed. If P-Fac does not like the fact that adjuncts are not covered by the CBA in between semesters, it is certainly free to propose changes to the CBA during bargaining. The College acknowledges its legal duty to bargain with P-Fac in good faith over any such proposals.**

(GC. Ex. 94A, pp. 2-3 (emphasis supplied)).

IV. Summer 2012 Teaching Assignment Allegations

The GC alleged that the College retaliated against Vallera for union and other protected, concerted activities in violation of Sections 8(a)(3), (4) and (1) of the Act by not assigning her a course for summer semester 2012 (GC Ex. 1(ff), Complaint ¶ VI). The ALJ found that the GC failed to prove this allegation (ALJD at 46:31-49:18).

A. Student Enrollment and Curriculum Changes in the Photography Department

Vallera is an adjunct in the College's Photography department, which has experienced a significant drop in student enrollment since 2008. In 2008, approximately 800 students were enrolled. In 2012, there were only 570, almost a 30% decline (Tr. 814-15). As the number of enrolled students declined so did the number of course offerings. In fall semester 2010, the department offered 140 courses (including one-credit workshops). In fall 2012, however, it offered only 100, also almost a 30% drop (Tr. 815-17; Resp. Ex. 2).

According to Peter Fitzpatrick, chair of the Photography department, curriculum and scheduling changes have also affected the number of courses offered. Along with other

departments in the School of Fine and Performing Arts ("SFPA"), Photography reduced its credit-hour requirement for a major to 42 to better meet student needs and contain the costs of a Columbia education. This resulted in a number of previously required courses becoming elective. Because fewer students enroll in electives, student needs can be met with fewer sections. An example is View Camera, a course often taught in the past by Vallera, including during the summer (Tr. 818-19). In fall semester 2010, when View Camera was a required course, 53 students enrolled in the four sections of it that were offered. In fall 2012, however, when View Camera was an elective, only six students enrolled in the one section offered – almost a 90% drop in enrollment and a 75% drop in the number of sections offered (Resp. Ex. 82).

Technology-driven curriculum change has also affected the number of courses offered. Previously, the department's foundational curriculum[2] ran on an analog, or film-based, model. To stay current with changes in the photography industry, the department restructured its basic curriculum to run on a digital model (Tr. 827). This change resulted in two fewer courses in the foundational curriculum, which went from four three-credit courses to two (Tr. 827-28).

Finally, scheduling changes have affected the number of courses offered in the department (Tr. 835-36). In February 2010, SFPA's dean issued a directive to the school's departments that they "not run too many classes/sections . . . build your schedule conservatively and not on history" (Resp. Ex. 20, item 1). As a result, Photography now posts a "lean" schedule rather than a "comprehensive" one, the difference being that instead of opening many courses for enrollment and cancelling ones that do not fill, it opens fewer courses and then adds more if enrollment justifies it (Tr. 835-36).

[2] Foundational courses are required to begin a major and are pre-requisites for more advanced courses (Tr. 828).

As chair of the department, Fitzpatrick decides who teaches the courses offered based in part upon recommendations made by administrative staff. He delegates certain day-to-day duties, but retains ultimate authority and has the final say over assignments (Tr. 812-13, 1203).

B. Summer Term 2012

For several summers (2008-11), Vallera had been assigned a section of View Camera (GC Ex. 90C). However, View Camera was not offered in summer 2012. In an email dated February 24, 2012, addressed to associate chair Kelli Connell, Vallera inquired whether she would "still have my view camera class this summer?" (Resp. Ex. 96). On February 27, 2012, Connell responded that "we are not running View Camera this summer. This course will now be offered only in the fall and spring" (Resp. Ex. 96).

In summer 2012, the department offered only 16 courses, as compared to 18 in summer 2011 and 22 in summer 2010 (GC Ex. 90C). View Camera was one of four courses offered in summer 2010 or 2011 but not in summer 2012 (Tr. 824; GC Ex. 90C).[3] Fitzpatrick explained that he and his academic coordinator analyzed student needs and determined that it was not necessary to offer a section of View Camera that term (Tr. 824-25). In spring semester 2012, two sections of View Camera (each with an enrollment cap of 16 students) were offered, but only 12 students had enrolled, five in one section and seven in the other (Tr. 824; Resp. Ex. 82). The course was not offered again until fall semester 2012, and then only to "help out" a handful of students who needed an elective to round out their schedules (Tr. 825). Even then, only six students enrolled (Tr. 825; Resp. Ex. 82).

The GC offered no credible evidence that a replacement for View Camera was available to Vallera for summer 2012. Indeed, the only course Vallera had ever taught in the summer

[3] The others are Foundations of Photography (23-1120); Darkroom Workshop (23-1121), and a second Darkroom Workshop with a different course number (23-2110) (GC Ex. 90C).

other than View Camera was Photographing History, five years previously in 2007 (GC Ex. 90C). A section of Photographing History was offered in summer 2012, but neither the GC nor the Union offered any evidence about Vallera's qualifications to teach it relative to the faculty member who was assigned, Alison Carey (GC Ex. 90C). In any event, Carey is a full-time faculty member (http://www.colum.edu/ Academics/Photography/faculty/). Accordingly, she had preference for the assignment (Tr. 855-56).

Fitzpatrick provided unrebutted testimony at trial that he did not retaliate against Vallera by not assigning her a course for summer 2012 (Tr. 856).

V. ALJ's Decision

The ALJ made the following pertinent rulings: First, he found that the GC failed to prove the College changed the scope of the bargaining unit (ALJD at 56:42-56:44). Specifically, the ALJ concluded that Marcus's and Strazewski's communications with Vallera did not constitute a position by the College that P-Fac only represents part-time faculty members when they are actually teaching (*Id.* at 57:7-57:10, 57:23-57:29). He also determined that the College did not refuse to process or arbitrate any grievances, and therefore did not repudiate the parties' collectively bargained grievance procedures (*Id.* at 57:42-57:43, 58:19-58:31).

Second, the ALJ determined that the GC failed to prove that discriminatory animus contributed to the College's decision not to offer Vallera a class assignment for the summer 2012 term (*Id.* at 47:18-47:20). He found that the College reasonably decided not to offer View Camera (the course the Vallera historically taught during summers) in summer 2012 for non-discriminatory reasons, namely a dramatic drop in student demand for the course coupled with reclassification of the course as an elective (*Id.* at 47:30-48:3). Moreover, the timing of the College's decision as compared to Vallera's union activities was not suspicious under the

circumstances (*Id.* at 47:21-47:27). In making this ruling, the ALJ specifically rejected the GC's assertion that the College has a past practice of finding replacement courses for faculty who did not receive their usual summer class assignments. The College's class assignment records simply did not support the GC's assertion, and the ALJ did not find Vallera's self-serving, unsupported testimony on the subject credible (*Id.* at 48 n.52).

Furthermore, the ALJ rejected the GC's and the Union's requests for various special remedies (*Id.* at 78:12-81:29). For example, the ALJ declined to issue a broad cease-and-desist remedial order because he did not find that the College has shown a proclivity to violate the Act or that it has engaged in conduct demonstrating a general disregard for employees' rights under the Act (*Id.* at 78:26-79:10). The ALJ did not award bargaining expenses because the College did not engage in "unusually aggravated misconduct" to justify such a remedy (*Id.* at 79:14-79:47). Similarly, the ALJ did not award litigation expenses because he sided with the College on several of the GC's allegations, and the College presented good faith defenses to the other allegations (*Id.* at 80:4-80:19). The ALJ also found no support for the GC's request that the College bargain with the Union for a specific amount of time until the parties reach agreement or impasse (*Id.* at 80:23-80:33).

ARGUMENT

I. The Board Should Adopt the ALJ's Determination That the College Did Not Unilaterally Change the Scope of the Bargaining Unit

The ALJ's ruling that the College did not unilaterally change the scope of the bargaining unit was based on a simple fact: the College has consistently recognized P-Fac as the bargaining representative for all adjuncts who fall within the bargaining-unit description contained in the CBA (Tr. 935, 1004-05). The bargaining unit includes all such adjuncts regardless of whether they are currently employed (Tr. 935, 1004-05; GC Ex. 94(a) at 2-3)). There is simply no record

evidence that the College has ever acted otherwise.[4]

A. GC's Exceptions

The GC's exceptions are based exclusively on the College's written responses to a small number of bargaining demands. Specifically, the College took the position that it did not have an obligation to bargain the effects of certain operational and academic decisions because those decisions did not impact the terms and conditions of P-Fac members' employment and consequently were not mandatory subjects of bargaining. In taking this position, the College cited (among other things) the contingent nature of part-time faculty members' employment, as set forth in the CBA and the Nathan arbitration award. The College *never* made a statement or took a position that P-Fac did not represent adjuncts not currently teaching or that the Union had no right to bargain on their behalf.

The GC's real quarrel is with the College's reliance on the Nathan award to support its position that certain "changes" have had no impact on adjuncts' terms and conditions of employment. Because adjuncts generally are not covered by the CBA in between semesters for which they are hired to teach and because the College has no obligation to re-hire them for future semesters, the College has asserted that adjuncts' terms and conditions of employment are not impacted by future curriculum changes. Because there is no impact, there is no duty to bargain. The GC disagrees, and that dispute is the subject of exceptions filed by the College in this matter with respect to an effects-bargaining allegation of the Complaint (*see* Columbia's May 10, 2013 Brief in Support of Exceptions to the ALJ's Decision).

[4] P-Fac's brief is littered with misstatements and misrepresentations of the record evidence. For example, P-Fac grossly mischaracterizes a May 8, 2012 email by Leonard Strazewski as the College taking a position "that it need not discuss anything with the union other than matters that directly affects [sic] faculty currently assigned to teach a course" (Charging Party Brief at 11 (citing GC Ex. 59)). The College, of course, said no such thing.

The GC's attempt to recast this effects-bargaining dispute as an unlawful unilateral change in the scope of the bargaining unit is conceptually flawed. The College's reliance on the Nathan award is neither a "unilateral" act nor a "change" in the *status quo*. The parties mutually agreed to arbitrate their disputes and to be bound by the results of that process (Resp. Ex. 1, CBA Art. IX §3). By their very nature, arbitration awards are bilateral and no party can commit a "unilateral" act by citing an award as precedent. The Nathan award is merely a bargained-for interpretation of long-standing, agreed-to provisions of the CBA. *Fournelle v. NLRB*, 670 F.2d 331, 344 (D.C. Cir. 1982) ("To put it succinctly: '(a)n [arbitration] award interpreting a collective bargaining agreement usually becomes a binding part of the agreement and will be applied by arbitrators thereafter.'"); *Bethenergy Mines, Inc*., 308 NLRB 1242, 1245 n.11 (1992) ("The arbitrator's interpretation of the agreement is, in law, the agreement of the parties."). Thus, the GC's exceptions have no merit.

B. Charging Party's Exceptions

P-Fac's exceptions are similarly flawed. The Union relies heavily on Marcus's March 23, 2012 email as evidence that the College unilaterally changed the scope of the bargaining unit. Marcus's email did no such thing. Vallera sent an email to the Photography department's associate chair alleging that she had "lost" future class assignments and asking to discuss certain operational changes in the department. In response, Marcus focused on Vallera's inquiry regarding her teaching schedule, questioning her premise that any future class was hers to lose and directing her to the recently issued Nathan award (GC Ex. 92). The ALJ noted that, taken out of context, Marcus's statements could be interpreted as a refusal to bargain (ALJD at 57:1-57:10). However, Marcus testified that she did not initially interpret Vallera's email as a request to bargain and was not, in any event, part of the College's bargaining team (Tr. 931-32). The

ALJ found Marcus's testimony credible, and noted that, as soon as Marcus realized that Vallera was making a bargaining demand, she directed her to Strazewski, the College's lead negotiator (ALJD at 53:31-53:33).

The Union misconstrues the ALJ's assessment of the record as a finding that Marcus refused to bargain in violation of the Act, and then later cured that violation. It argues at great length that "curing" a prior violation does not change the fact that a violation occurred (Charging Party Brief at 19-20). P-Fac misses the point. The ALJ did not find that Marcus "cured" a violation of the Act, and his analysis cannot reasonably be interpreted that way. He simply stated that, when viewed in the context of other evidence, Marcus's March 23 email was not a refusal to bargain (ALJD at 57:1-57:10). For these reasons the ALJ's dismissal of the allegations in paragraph X of the complaint are based on sound evidence and law, and should be upheld.

II. The Board Should Adopt the ALJ's Determination That the College Did Not Repudiate the Grievance Procedure

The GC's allegation that the College repudiated the CBA's grievance procedure is baseless. The GC presented no evidence that the College ever refused to process a grievance or submit to arbitration on any matter. Instead, the record shows that the College substantively responded to every grievance that the GC presented at trial (ALJD at 55 n.59; GC Ex. 93(e)). This fact alone defeats the GC's allegation that the College "repudiated" the grievance procedure.

The GC's allegation is essentially a challenge to the College's substantive responses to P-Fac's grievances regarding class assignments. The College denied a number of these grievances based on its position that the adjunct faculty members lacked standing to pursue the grievances for reasons explained in the Nathan award described above (GC Ex. 93(e)). The GC takes issue with the fact that the College relied on the Nathan award's interpretation of the contract, and that

the Nathan award may impact the viability of future grievances. But, as the ALJ noted, the College was entitled to rely on the award, which "at a minimum . . . supplied a sound arguable basis for the College's position that PFAC did not have standing to pursue its grievance about faculty class assignments" (ALJD at 58:25-58:27). Moreover, federal labor law establishes and protects the College's right to rely on a duly rendered arbitration award. *Fournelle v. NLRB*, 670 F.2d at 334; *Bethenergy Mines, Inc.*, 308 NLRB at 1245 n.11.

P-Fac's arguments on this issue are based on a false assertion that the College "refuse[d] to process grievances" (Charging Party Br. at 21-23). As explained above, there is absolutely no evidence in the record that the College ever refused to process or arbitrate a grievance. P-Fac's repeated insistence that the College refused to process grievances is misleading and disingenuous.

P-Fac makes two other arguments, both of which lack merit. First, P-Fac contends that the College's position regarding P-Fac members' standing to pursue grievances regarding class assignments is tantamount to a wholesale refusal to arbitrate (Charging Party Brief at 22). As the ALJ noted, the relevant inquiry in a refusal to arbitrate allegation is "whether the employer, by its refusal, has thereby unilaterally modified the terms and conditions of employment during the contract term." *See Velan Valve Corp.*, 316 NLRB 1273, 1274 (1995). Putting aside the fact that the College never refused to process or arbitrate a grievance, the College's denials of grievances at the step one stage were based on the terms of contract itself (as interpreted by the Nathan award) and thus not a unilateral modification of the contract.

The central focus of the GC's and P-Fac's exceptions is their distaste for the Nathan arbitration award. If P-Fac disagreed with the Nathan award, it was not without remedy. It could have filed a lawsuit under Section 301 of the Labor Management Relations Act to vacate

the award. *International Marble & Granite, Inc. v. United Order of Am. Bricklayers & Stone Masons Local 21,* 2011 WL 941370, at *2 (N.D. Ill. 2011) (citing *Plumbers' Pension Fund Local 130 v. Domas Mech. Contractors, Inc.*, 778 F.2d 1266, 1268 (7th Cir. 1985)). P-Fac made a strategic decision not to file any such action, likely because it knew there were no grounds. At this stage, if P-Fac wants to change the contractual employment status of its members, it must bargain with the College for a change. It cannot "appeal" the arbitration award through a dressed-up unfair labor practice allegation that the College somehow changed the scope of the bargaining unit.

P-Fac's other argument on this issue is a complete distortion of the record. P-Fac contends that Marcus's March 23, 2012 email (described above) demonstrates that the College's denial of grievances is "dripping with animus" (Charging Party Brief at 22-23). In support of this argument, P-Fac falsely states that Marcus's email was sent in the context of a union grievance relating to Vallera's course assignments, but then points to a portion of the ALJ's decision that refers to a different email (dated May 15, 2012, nearly two months later) between Marcus and Mary Lou Carroll regarding a completely separate matter (Charging Party Brief at 22-23, citing ALJD at 54:29-54:30; GC Ex. 93(c)). In fact, Marcus's email had nothing to do with a grievance, and the ALJ made a credibility determination that Marcus's email was not discriminatory (ALJD at 57:1-57:10). There is no basis for overturning that determination.

III. The Board Should Adopt the ALJ's Determination That the College's Summer 2012 Class Assignments Were Not Retaliatory

The ALJ correctly concluded that the College had legitimate non-discriminatory business reasons not to offer Diana Vallera a course assignment for summer 2012. The facts concerning the summer 2012 course assignments are straightforward. For four years in a row, between 2008 and 2011, Vallera taught View Camera in the summer, which had been a required foundational

course for students completing a photography major (GC Ex. 90(b); Tr. 270, 1219-20). The Photography department did not offer the class in summer 2012 due to declining enrollment in the course, precipitated by substantial curriculum overhauls described above, most pertinently the reclassification of View Camera and other courses as electives. As a result, the course that Vallera historically taught in the summer was not available for her or anyone else to teach. A substantial amount of evidence and testimony, which the ALJ properly credited as reasonable, supports the College's explanation of its summer 2012 course-assignment decisions (ALJD at 47:32-48:3). In contrast, the GC presented no evidence other than mere timing that the decision was infected by discriminatory animus. As the ALJ explained, the timing of the College's course assignment decisions was merely coincidental to the timing of Vallera's union activity because the College did not deviate from its customary scheduling processes (ALJD at 47:15-47:30).

P-Fac (but not the GC) appeals this determination on two grounds. First, the Union contends that it presented "overwhelming evidence" of discriminatory intent at trial, and that the ALJ did not properly credit this evidence. In particular, the Union points to several communications from the College's interim provost, Louise Love, and Susan Marcus, which it describes as circumstantial evidence of discrimination. Putting aside P-Fac's mischaracterizations of these emails, they are immaterial to Vallera's retaliation allegation. Neither Love nor Marcus had any responsibility for Vallera's class assignments. Those decisions were made by Vallera's department chair, Peter Fitzpatrick, in consultation with department administrators. Accordingly, the ALJ properly found that no reasonable connection could be drawn between Love's and Marcus's words and actions and Vallera's lack of a summer 2012 course assignment.

P-Fac also cites as evidence of discrimination a March 19, 2012 email from Elizabeth Ernst, a Photography department administrator, to Fitzpatrick in which Ernst referred to Vallera as a "problem maker" in the context of discussing her class assignments for fall 2012 (GC Ex. 106). The ALJ found that this email improperly influenced Fitzpatrick's course-assignment decisions for fall 2012. P-Fac insists that the ALJ was compelled to find that the Ernst email also improperly influenced Fitzpatrick's assignments for summer 2012. P-Fac's logic fails, however, because Vallera was informed of the fact that she would not be teaching a summer course on February 27, several weeks *before* Ernst's March 19 email (Resp. Ex. 96). Obviously, Fitzpatrick's course-assignment decisions for summer 2012 could not have been influenced by a view that Ernst had not yet expressed.

Second, P-Fac contends that the ALJ ignored evidence showing that the College found replacement courses for all adjunct faculty who had taught a course in summer 2011 that was not being offered in summer 2012. P-Fac's purported evidence consisted of Vallera's testimony that the College had a past practice of finding replacement courses, and a spreadsheet identifying summer course assignments in the Photography department between 2006 and 2012 (Charging Party Brief at 15; Tr. 1291-96; GC Ex. 90(c)). However, the ALJ did not ignore this evidence; he simply found that it was unpersuasive. Regarding Vallera's trial testimony, the ALJ did not find credible Vallera's statements that there existed a past practice of accommodating adjunct faculty who did not receive teaching assignments they had received in the past. Her assertions were not based on personal knowledge and were not supported by evidence in the record. They were based on speculation and were therefore unreliable (ALJD at 48 n.52). Moreover, Vallera identified three faculty members in the class assignment records whom she claimed received better treatment than she: R. Herman, W. Johnson and A. Cohen (Tr. 1291-96). Of the three,

only R. Herman was assigned a course in summer 2012, even though the course he taught in summer 2011 was no longer offered in the summer. W. Johnson did not teach a course in summer 2012, and A. Cohen did not teach a course in summer 2011 (GC Ex. 90(c)). Therefore, the ALJ correctly concluded that neither Vallera's testimony nor the College's class-assignment records supported the GC's disparate-treatment allegation (ALJD at 48 n.52).

IV. The Board Should Adopt the ALJ's Decision Not to Award Special Remedies.

The GC's and the Union's insistence on special remedies has no merit. The GC argues that the ALJ should have ordered the College to bargain with the Union once a week and periodically report their progress, presumably until the parties reach agreement on a successor collective bargaining agreement. In this case, the ALJ found that the College's strategic bargaining decisions during a discrete period of time -- between February 16 and June 13, 2012 -- amounted to unlawful refusals to bargain in violation of the Act (ALJD at 16:6-16:8, 72:41-72:43). He recognized that the parties resumed bargaining by June 13, 2012 (ALJD at 15:29-15:30). The GC contends that the College continued to violate the Act after June 13, 2012, by agreeing to meet less frequently than the parties had met in the past. The ALJ found no such violation, however, and the GC does not explain why weekly meetings are necessary or required under the law.

As the ALJ correctly determined, there is no support for a time-and-reporting bargaining order under Board law (ALJD at 80:23-80:33). *See, e.g., Myers v. Investigative & Security Servs.*, 354 NLRB 367, 368 n.2 (2009); *Monmouth Care Ctr.*, 354 NLRB 11, 11 n.3 (2009). The GC's only legal support for this remedy is *Gimrock Construction, Inc.*, 356 NLRB No. 83 (2011), where the Board ordered an employer to bargain for 16 hours a week and to submit a progress report every 30 days for violating its previous bargaining order. Not only is that decision inapplicable here (the College has not violated any Board order), but the NLRB's time-

and-reporting order in *Gimrock* was reversed on appeal. *NLRB v. Gimrock Constr., Inc.*, 695 F.3d 1188 (11th Cir. 2012).

The Union's arguments for special remedies are similarly unavailing. P-Fac contends the ALJ should have (a) required the College to issue a broad remedial order, and (b) awarded P-Fac its bargaining and litigation expenses. First, a broad cease-and-desist order is warranted only in unique circumstances where an employer has engaged in egregious and widespread misconduct that demonstrates a proclivity to violate the Act and a general disregard for employees' fundamental statutory rights. *Five Star Mfg.*, 348 NLRB 1301, 1302 (2007). P-Fac has not offered any rationale for issuance of such an order other than the fact that the ALJ found a number of violations of the Act and that some of the violations were in bad faith. This is not enough to justify the broad remedial order P-Fac is seeking. Despite his rulings against the College, the ALJ properly noted that circumstances requiring a broad remedial order were not present in this case (ALJD at 78:26-79:10). In fact, ALJ dismissed several of the Complaint's allegations, and the violations he did find were based on specific decisions by the College that occurred during a limited period of time in 2012 and which did not evince a disregard for the Act.

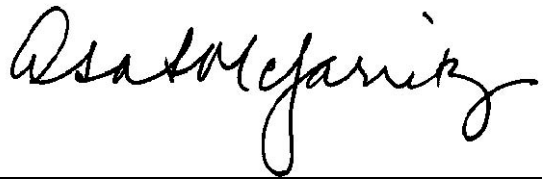
Second, for similar reasons, the ALJ's rejection of P-Fac's demand for bargaining and litigation expenses was appropriate (ALJD at 79:14-80:19). This is not a case involving egregious or extreme behavior designed to stifle employees' collective bargaining rights. The ALJ found that the College presented credible and good faith arguments at trial and ultimately agreed with the College on several issues. The Board relies on traditional remedies in these types of cases, and P-Fac has not demonstrated the level of unusually aggravated misconduct meriting extraordinary remedies such as the award of expenses.

CONCLUSION

For all of the foregoing reasons, the GC's and the Union's exceptions should be denied.

Respectfully submitted,

Columbia College Chicago



By: _____
Lisa A. McGarrity

Lisa A. McGarrity
Abizer Zanzi
FRANCZEK RADELET P.C.
300 South Wacker Drive, Suite 3400
Chicago, Illinois 60606-6785
(312) 986-0300

Dated: June 14, 2013

CERTIFICATE OF SERVICE

The undersigned attorney certifies that she caused a copy of the foregoing to be served via electronic mail 14th day of June 2013, as follows:

Laurie M. Burgess
Burgess Law Offices, P.C.
One South Dearborn
Suite 2100
Chicago, IL 60603
lburgess@burgess-laborlaw.com

Daniel Murphy
Counsel for the General Counsel
NLRB Region 13
209 S. LaSalle Street, 9th floor
Chicago, IL 60606
Daniel.Murphy@nlrb.gov

Lisa A. McGarrity