

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

<b>COLUMBIA COLLEGE CHICAGO,</b>	)	
	)	
<b>Respondent,</b>	)	<b>Cases 13-CA-073486</b>
	)	<b>13-CA-073487</b>
<b>and</b>	)	<b>13-CA-076794</b>
	)	<b>13-CA-078080</b>
<b>THE PART-TIME FACULTY</b>	)	<b>13-CA-081162</b>
<b>ASSOCIATION AT COLUMBIA</b>	)	<b>13-CA-084369</b>
<b>COLLEGE CHICAGO, IEA-NEA</b>	)	
	)	
<b>Charging Party</b>	)	

**COLUMBIA COLLEGE CHICAGO’S STATEMENT OF POSITION ON REMAND**

Columbia College Chicago (“Columbia”), by and through its undersigned attorneys, hereby submits the following Statement of Position on Remand pursuant to Board Rule 102.46(h).

**INTRODUCTION**

This case is on remand from the United States Court of Appeals for the Seventh Circuit (“Seventh Circuit”) after it vacated the Board’s award of reimbursement of the Part-time Faculty Association at Columbia College Chicago’s (“PFAC”) bargaining expenses for the period of March 31, 2011, until June 13, 2012. The Seventh Circuit has instructed the Board to consider whether the extraordinary remedy of bargaining expenses is appropriate in this case involving non-egregious conduct during the course of collective bargaining negotiations that did not “infect the core” of the negotiation process. As explained on appeal and further herein, awarding PFAC reimbursement of its bargaining expenses is not warranted in this case.

First and foremost, in granting the special remedy of bargaining expenses, the Board substantially relied on its erroneous conclusion that Columbia violated the National Labor

Relations Act (the “Act”) when it imposed preconditions to bargaining over the effects of decisions it had made to modify credit hours for certain courses. The Seventh Circuit has now ruled that those effects were covered by the applicable collective bargaining agreement (“CBA”), that there was no obligation to bargain over these effects and, thus, no violation of the Act in that respect.

Further, as elaborated upon herein, the other conduct upon which the Board relied in granting bargaining expenses does not rise to the level of “unusually aggravated” conduct typically present when special remedies are awarded. Indeed, Columbia believed it was acting in good faith with respect to the conduct ultimately deemed to be unlawful. Even the ALJ in this case who, incidentally, had also found violations of the Act based on Columbia’s imposition of preconditions to bargain over effects bargaining, went out of his way to emphasize that Columbia’s conduct in this case, even with the alleged effects bargaining violations, did not justify an award of bargaining expenses, and the Board’s own General Counsel (“G.C.”) did not file exceptions to the ALJ’s findings on this point.<sup>1</sup>

In short, bargaining expenses are not warranted in this case and the Board should not grant them on remand.

## **STATEMENT OF FACTS**

### **I. The General Counsel’s Allegations**

The General Counsel’s consolidated complaints in this case allege, in relevant part, that Columbia violated Section 8(a)(5) and (1) of the Act by: failing and refusing to provide PFAC with information that PFAC requested in separate requests dated December 20, 2011, May 13,

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<sup>1</sup> The G.C. has waived his right to argue on remand that an award of bargaining expenses is appropriate because he failed to file exceptions to ALJ’s rejection of this remedy. *See* Board Rule 102.46(b) (“Any exception to a ruling, finding, conclusion or recommendation which is not specifically urged shall be deemed to have been waived.”).

and May 17, 2012; failing and refusing, since February 21, 2012, to bargain collectively about the impact and effects of Columbia's decision to reduce the number of credit hours awarded for certain courses; failing and refusing, since February 16, 2012, to meet and bargain with PFAC to negotiate a successor collective bargaining agreement; and failing and refusing, by its overall conduct, to bargain in good faith with PFAC as the exclusive collective-bargaining representative of the bargaining unit. (Exhibit 1, ALJ Decision pp. 1-2.)

## **II. Overview Of The Parties' Bargaining History**

By way of background, in January 2010, PFAC and Columbia began negotiations for a successor collective bargaining agreement. (ALJ Decision p. 6.) In order to keep track of contract language or clauses where the parties were at or near agreement (but where further negotiation might still occur), the parties kept a list of contract items that were not in dispute, referred to as "NIDs". (*Id.*) The ALJ found that the parties came up with this term because NIDs were *not* meant to rise to the level of tentative agreements. (*Id.*) The ALJ further found that Columbia "consistently maintained that all NIDs remain open for further negotiation." (*Id.* p. 6, n.6.) There were no exceptions to these findings.

On October 27, 2010, Columbia sent PFAC a contract proposal that included a modified management rights clause which was similar to the existing management rights clause, but proposed adding language to clarify that the clause extended to the effects or impact of any management decisions that Columbia might make in the designated areas in an effort to avoid future disputes over effects bargaining. (*Id.* p. 7.)

On November 10, 2011, Columbia informed PFAC that it would prepare and submit a new written contract proposal for PFAC to review before the parties resumed face-to-face negotiations. (*Id.* p. 10.) Columbia did this because it believed it would be beneficial for the

parties to discuss specific, concrete proposals. (*Id.*) On December 19, 2011, Columbia sent PFAC its new contract proposal for review as promised. (*Id.* p. 10.) Among other things, Columbia's December 2011 proposal retained the modified language to the management rights clause clarifying that PFAC did not have a legal right to bargain over the effects of curriculum changes. (*Id.* p. 13.)

On February 13, 2012, PFAC demanded that the parties resume face-to-face bargaining picking up from where they left off in October 2011, asserting it intended to disregard Columbia's December 2011 proposal. (*Id.* p. 14.) PFAC also claimed that no bargaining had taken place since October 28, 2011, when Columbia had submitted a written proposal in December. (ALJ Decision p. 14.) In response, Columbia asked PFAC to provide comments to the December proposal or submit a counter-proposal in order to resume face-to-face negotiations. (*Id.*)

After this, the parties came to a stalemate, with PFAC insisting that Columbia pick up negotiations from where the parties left off in October 2011, and with Columbia pointing out that it had attempted to bargain in writing since then and asking PFAC to respond to its written proposal. (*Id.*)

The parties resumed face-to-face negotiations on or about June 25, 2012. (*Id.*) There is no allegation or finding that Columbia engaged in bad faith bargaining after this date.

### **III. The ALJ's Findings**

The ALJ issued his Recommended Decision and Order on March 15, 2013. With respect to the G.C.'s allegation that starting on February 16, 2012, the College unlawfully refused to meet and bargain with PFAC about a successor collective bargaining agreement, the ALJ found that after receiving and reviewing the College's December 2011 contract proposal, PFAC

contacted the College on February 13, 2012 to schedule dates to resume face to face negotiations. In the same communication, PFAC rejected the College's December 2011 contract proposal and asserted that the parties should pick up negotiations from where they stood in October 2011. The ALJ found that, instead of proposing dates for a face to face meeting as PFAC requested, on February 16, 2012, the College set a precondition that PFAC either respond to its December 2011 contract proposal or make a counterproposal before the parties resumed face to face negotiations. The College maintained its precondition until June 13, 2012. The ALJ concluded that Columbia's decision to set a precondition for PFAC to satisfy before it would resume face to face negotiations was unlawful. (ALJ Decision p. 15.)

The ALJ further concluded that Columbia violated the Act by refusing to engage in bargaining over the effects of its decision to reduce course credit hours and imposing preconditions to such bargaining when it asked PFAC to identify the bargaining unit members it believed were affected by the decision to reduce such course credit hours. (*Id.* pp. 20-23.)

The ALJ also found that Columbia engaged in overall bad faith bargaining by submitting what PFAC and the ALJ believed were regressive bargaining proposals in October and December 2011, proposed changes to the management rights' provision to clarify that the Union has waived its right to effects bargaining, and declining to engage in face to face negotiations until the Union responded in writing to its December 2011 contract proposal. (*Id.* pp. 74-75.) Nevertheless, the ALJ rejected the G.C.'s request for special remedies, including reimbursement of PFAC's bargaining expenses, noting, "I cannot find, however, that Respondent's misconduct was so aggravated as to infect the bargaining process to the point where traditional remedies would not be effective." (*Id.* 79.) Columbia, PFAC and the G.C. each filed timely exceptions to the ALJ's Decision on May 10, 2013. PFAC lodged exceptions to the ALJ's finding that

bargaining expenses were inappropriate. (Exhibit 2, PFAC's Exceptions.) The G.C., for his part, did not lodge any exceptions to the ALJ's denial of special remedies. (Exhibit 3, General Counsel's Exceptions.)

#### **IV. The Board's Decision**

Three years after the ALJ issued his Recommended Decision and Order, on March 24, 2016, the Board, through a three-member panel with Member (now Chairman) Miscimarra dissenting, issued its Decision and Order affirming the ALJ's Recommended Decision and Order insofar as he found, among other things, that Columbia violated Section 8(a)(5) of the Act by "failing to bargain with PFAC from February to May 2012 about the effects of its decision to reduce the number of credit hours awarded for certain courses and by setting unlawful preconditions to bargaining;" "engag[ing] in overall bad-faith bargaining;" and "failing to meet and bargain with PFAC for a successor agreement from February to June 2012." (Exhibit 4, March 24, 2016 Board Decision (hereinafter "Board Decision") p. 1.)

The Board also concluded that Columbia violated the Act by setting unlawful preconditions to bargaining. (*Id.* p. 5.) This ruling was related to the fact that Columbia asked PFAC to provide it with a list of unit employees who claimed to be affected by the course credit reductions before agreeing to bargain over those reductions. (*Id.*) Thus, the Board concluded, by requesting the information about the affected bargaining unit members, Columbia imposed unlawful preconditions to bargaining. (*Id.*)

The Board majority went on to modify the ALJ's decision that bargaining expenses were not appropriate in this case. (*Id.* pp. 5-6.) In its Decision and Order, the Board majority acknowledged its own precedent that the special remedy of reimbursing the charging party for negotiating expenses is warranted only in "cases of unusually aggravated misconduct." (*Id.* pp.

5-6.) Yet, despite the fact that the ALJ had specifically concluded that Columbia's conduct did not rise to that level, the Board majority ordered Columbia to reimburse PFAC for its negotiating expenses primarily on the basis that Columbia: (1) imposed preconditions to bargaining over course-credit reductions by requesting a list of names of affected unit members (even though Columbia believed in good faith that it had no obligation to bargain over this issue which was clearly covered by its management rights clause); (2) imposed preconditions to bargaining by requesting a response to their December 2011 written contract proposal before scheduling a face-to-face bargaining session; (3) proposed that the management rights provision in the successor agreement be revised to state that PFAC does not have a legal right to bargain over the effects of curriculum changes; and (4) allegedly submitted regressive proposals in its December 2011 written proposal. (Board Decision pp. 4-5.)

Dissenting member Miscimarra opined that Columbia did not have an obligation to bargain over the effects of the credit-hour reductions. (*Id.* p. 8.) He also stated that because Columbia had no duty to bargain regarding the effects of its course credit-hour reductions, Columbia did not violate the Act based on the alleged "precondition" relating to effects bargaining. (*Id.*) He went on to state that, even assuming Columbia committed an effects bargaining violation, the overall conduct at issue cannot be said to have "infected the core of a bargaining process to such an extent" as to warrant the "extraordinary remedy" of requiring Columbia to reimburse PFAC for its bargaining costs. (*Id.*) In the dissenting member's view, this remedy was inconsistent with the Board's own precedent. (*Id.* p. 13.)

## **V. Appellate Proceedings**

On May 4, 2016, the Board filed an Application for Enforcement of its Order with the United States Court of Appeals for the Seventh Circuit. On May 10, 2016, Columbia filed a

Cross-Petition for Review of the Board's Order with the Seventh Circuit with respect to the aspects of the Board's Order that found that Columbia had a duty to bargain over the effects of its course credit hour reductions decisions, and its decision to award PFAC the reimbursement of its negotiation expenses. Columbia did not seek review of the other aspects of the Board's Order. The Court consolidated the two appeals and the matter was fully briefed and the parties presented oral arguments.

On February 2, 2017, the Seventh Circuit issued an Opinion granting Columbia's Petition for Review, and granting in part and denying in part the Board's Application for Enforcement. Specifically, the Seventh Circuit summarily enforced the parts of the Board's order on which Columbia did not seek review, and reversed the Board's decision that Columbia had a duty to bargain over the effects of its course credit reduction decisions. In so doing, the Seventh Circuit reaffirmed its longstanding adoption of the "contract coverage analysis," under which parties have no duty to bargain over the effects of decisions covered by the applicable contract where the parties had already bargained over their respective rights and duties, and indicated no intent to treat effects bargaining and decision bargaining separately. *Columbia College Chicago v. N.L.R.B.*, 847 F.3d 547, 554 (7th Cir. 2017).

Having concluded that Columbia did not have a duty to bargain over the effects of the course credit reductions, the Seventh Circuit vacated the award of bargaining expenses and remanded to the Board to determine whether such a remedy is still warranted in this case. In doing so, the Court specifically noted that, for "the vast majority of bad-faith bargaining violations," the traditional remedies of a bargaining order, "cease-and-desist order[,] and the posting of a notice[] will suffice to induce a respondent to fulfill its statutory obligations." *Frontier Hotel & Casino*, 318 NLRB 857, 859 (1995). The Court also noted that in

ordering the extraordinary remedy of bargaining expenses, the Board partially relied on Columbia's behavior during the effects-bargaining negotiations, and urged the Board to reconsider in light of the Court's rulings on the effects bargaining issue.

## **ARGUMENT**

### **I. Bargaining Expenses Are Only Awarded In Cases Of Unusually Aggravated Conduct**

The Board's standard remedies for an unlawful failure to bargain are an order to cease and desist, to bargain, and to post an appropriate notice. These are the remedies the Board applies "[i]n most circumstances." *Frontier Hotel & Casino*, 318 NLRB 857, 859 (1995). In rare cases, the Board may impose the extraordinary remedy of requiring the respondent to reimburse the charging party for its negotiation expenses. However, this remedy is warranted only "[i]n cases of unusually aggravated misconduct, ... where it may fairly be said that a respondent's substantial unfair labor practices have infected the core of a bargaining process to such an extent that their effects cannot be eliminated by the application of traditional remedies." *Id.* (internal quotations omitted). As the Board's own precedent makes clear, the rationale underpinning the award of bargaining expenses is to "restore the economic strength that is necessary to ensure a return to the status quo ante at the bargaining table." *Frontier Hotel and Casino*, 318 NLRB 857, 859 (1995).

The ALJ in this case specifically noted that when the Board has awarded bargaining expenses, it has been able to cite misconduct "well beyond" that which Columbia is alleged to have engaged in here. (*Id. citing Santa Barbara New Press*, 358 NLRB 1415, 1417-1418 (2012)) (bargaining expenses award based not only on the respondent's insistence on a broad management rights clause, but also the insistence on the right to unilaterally identify disciplinary offenses and the appropriate level of discipline, as well as the respondent's misconduct away

from the bargaining table that demonstrated a calculated strategy to reduce negotiations to a sham).

For example in *Fallbrook Hospital Corp. v. NLRB*, for example, a case in which the D.C. Circuit affirmed the Board's decision to order reimbursement of negotiation expenses, the Board's decision was based on an extensive list of unfair labor practices found by the ALJ and uncontested by the Hospital. 785 F.3d 729, 736 (D.C. Cir. 2015). Specifically, the Board found (and Fallbrook did not dispute) that it "deliberately acted to prevent any meaningful progress during bargaining sessions" because its:

bargaining team failed to provide any proposals or counterproposals during the first eight bargaining sessions until it received a full set of proposals from the Union, left the September 12 bargaining session abruptly and without explanation, and left the October 11 bargaining session 3 minutes after arriving. In addition, although the Respondent proffered some proposals during the next three bargaining sessions, it subsequently threatened that it would not continue bargaining if the Union persisted in encouraging employees' use of the Union's assignment despite objection (ADO) form. At a bargaining session held on January 8, 2013, the Respondent falsely claimed that the nurses' use of the ADO forms caused the parties to be at impasse, refused to bargain further, and left the meeting after about 15 minutes. Thereafter, the Respondent reaffirmed its refusal to bargain when it refused to respond to the Union's requests for future bargaining dates.

*Id.* In other words, in *Fallbrook* there were specific factual findings that Fallbrook's misconduct constituted deliberate attempts to prevent any actual bargaining from taking place, and Fallbrook did not dispute those findings. *Id.*

## **II. Columbia's Conduct Did Not Warrant The Bargaining Expenses Remedy**

The circumstances under which the Board might award bargaining expenses as set forth in *Frontier Hotel and Casino* and *Fallbrook Hospital* are not present here and the ALJ's decision not to award of bargaining expenses should be upheld on remand.

### **A. Columbia's Decision to Assert Preconditions to Bargaining Over Effects of Course Credit Hours, Such Conduct Cannot Support an Award of Bargaining Expenses**

One of the central violations relied upon by the Board majority as the basis for the bargaining expense remedy is the alleged refusal to bargain over the effects of course credit hour reductions, and the imposition of preconditions to bargaining over these reductions. The Seventh Circuit has since held that this alleged conduct did not even constitute a violation of the Act. Thus, it cannot be a basis for the award of bargaining expenses.

**B. The Remaining Conduct Relied Upon By the Board to Award Bargaining Expenses Was Not “Unusually Aggravated Misconduct”**

The Board majority also relies in part on additional findings of conduct that do not begin to approach the type of “unusually aggravated conduct” that is typically present to justify an award of bargaining expenses. Apart from imposing preconditions to effects bargaining, which the Seventh Circuit has ruled was lawful, the Board relied on Columbia’s request that PFAC respond in writing to its December 2011 written contract proposal; that Columbia proposed changes in items that had been designated “NID,” or “not in dispute;” and relied on Columbia’s proposal that PFAC waive its effects bargaining rights in its modified management rights clause. However, such conduct, even if unlawful, does not warrant bargaining expenses because, unlike in *Fallbrook*, the ALJ did not find that Columbia’s conduct was deliberately calculated to preclude negotiations or reduce them to a sham.

With regard to Columbia’s request that PFAC respond in writing to its December 2011 proposal, such a request was not done maliciously, but rather, because Columbia sincerely believed that would be a more productive way of negotiating given the bargaining history between the parties. What is more, this request did not have the effect of reducing the negotiations to a sham; at worst, it merely resulted in a delay of face-to-face negotiations which resumed several months later, in June 2012.

Further, the majority claimed that proposing changes to “NID” items “forced the Union

to expend resources bargaining anew on those items – resources that could have been devoted to addressing open items.” However, as noted above, the ALJ specifically found, “the parties and the Federal mediator came up with the term NID precisely because NIDs were not meant to rise to the level of tentative agreements,” and Columbia “consistently maintained that all NIDs remain open for further negotiation.” There were no exceptions to these findings.

With regard to Columbia’s proposals about effects bargaining in the management rights’ clause, which were intended to memorialize a long-standing practice and to effectuate Columbia’s mission to serve its student needs, there is nothing unlawful in such a proposal. The Board majority argues that this proposal “would have left bargaining unit employees with fewer rights and less protection than they would have under the Act without a contract.” But, as the dissenting member reminded, employers are not prohibited from proposing a contract term that would have such an effect. Columbia had not crossed any impermissible line by proposing a waiver of effects bargaining rights.

Even assuming all of the above-described conduct violated the Act, as pointed out in the dissent and by the ALJ, this does not rise to the level of “unusually aggravated misconduct” to warrant the extraordinary remedy of reimbursing PFAC for its bargaining expenses. “I *cannot* find,” the ALJ wrote, “that Respondent’s misconduct was so aggravated as to infect the bargaining process to the point where traditional remedies would not be effective” (ALJ Decision p. 79) (emphasis added). Thus, he concluded that Columbia’s conduct “falls short of the aggravated level required to justify an award of bargaining expenses.” Indeed, these actions in no way precluded negotiations from taking place. Once the parties resumed face to face bargaining in June 2012, negotiations were productive, and there were no violations of the Act after that date. Therefore, Columbia’s conduct cannot be said to be so aggravated as to infect the

bargaining process to the point where traditional remedies would not be effective. The ALJ agreed with this proposition when he declined to impose special remedies, and the G.C. conceded that point as well because he chose not to file exceptions to that part of the ALJ's decision.

Despite the ALJ's findings that special remedies were not justified by the facts of this case, the Board majority nevertheless concluded that Columbia's conduct was so aggravated that it infected the core of the bargaining process. This conclusion simply is not supported by the ALJ's findings or the G.C.'s position for that matter. Indeed, in stark contrast to *Fallbrook Hospital, supra*, where the Hospital was deemed to have deliberately prevented negotiations, Columbia's conduct in imposing preconditions to bargaining over, for example, the course credit reduction decisions, were based on a good faith belief that it was not required to bargain over those decisions or their effects, a belief which has now been endorsed by the Seventh Circuit. Furthermore, unlike Fallbrook, Columbia did not refuse to negotiate; rather, it simply asked that PFAC respond to its written proposal in writing before meeting face-to-face based on a sincere belief that this approach would be a more productive way of bargaining. Far from deliberately preventing bargaining from taking place, Columbia's conduct merely resulted in a delay of a few short months in what otherwise were protracted albeit good faith negotiations. Thus, under Board precedent, the bargaining expenses remedy is not appropriate.

Simply put, this is not a case involving egregious or extreme behavior designed to stifle employees' collective bargaining rights and the Board should not impose the special remedy of reimbursement of PFAC's negotiating expenses.

### **III. Even If Bargaining Expenses Were Appropriate, The Timeframe For Which They Were Awarded Is Not Supported By The Evidence**

The timeframe for which the Board awarded the bargaining expense remedy in its now

vacated order (March 31, 2011, until June 13, 2012) is not supported by the evidence. The G.C. alleged in the Complaint that Columbia's refusal to bargain began on February 16, 2012, not on March 31, 2011. Even the Board's Decision and Order, at its outset, asserts "We agree with the judge's finding that the Respondent violated Section 8(a)(5) and (1) of the Act by failing to bargain with PFAC from February to May 2012 about the effects of its decision to reduce the number of credit hours awarded for certain courses and by setting unlawful preconditions to bargaining." (Board Decision at p. 1) (Emphasis added.) Thus, even if the Board still determines that bargaining expenses are appropriate (which they are not, as explained above), there is no evidentiary basis to award reimbursement as a remedy dating back to March 31, 2011, as opposed to beginning on February 16, 2012.

The remedies ordered must be consistent with the Act's essentially remedial and not penal purposes. *NLRB v. Mars Sales & Equip. Co.*, 626 F.2d 567, 574 (7th Cir. 1980). By ordering Columbia to pay PFAC's bargaining expenses dating back to before any allegations of failure to bargain or bad faith bargaining purportedly began, the Board would be going beyond the remedial purposes of the Act. *Id.*

### **CONCLUSION**

For the reasons elaborated upon herein, the award of bargaining expenses in this case is not warranted by the ALJ's factual findings or the Board's own precedent regarding special remedies. Columbia's conduct was not so egregious or extreme as to infect the "core" of the bargaining process. Thus, the Board should not award PFAC reimbursement of its bargaining expenses.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I, Jenny R. Goltz, state under oath that I caused a copy of the **Columbia College Chicago's Statement of Position on Remand** to be e-filed with the National Labor Relations Board on June 22, 2017. Copies of this filing have been served on the following individual by e-mail.

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