

**AMERICAN ARBITRATION ASSOCIATION**

In the Matter of Arbitration Between:

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**FACULTY AFFAIRS COUNCIL**

“Union,”

-and-

**UNIVERSITY OF SCRANTON,**

“Employer.”

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**OPINION  
AND  
AWARD**

Case No. 01-24-0000-4322  
(Daniel Haggerty)

**Before  
Felice Busto  
Arbitrator**

**Appearances:**

**For the Union:**

Jonathan G. Axelrod, Esq.  
Beins, Axelrod & Keating, P.C.

**For the University:**

Christopher J. Moran, Esq.  
Leigh H. McMonigle, Esq., on the Brief  
Troutman Pepper Hamilton Sanders, LLP

The University of Scranton (the “University”) and the Faculty Affairs Council (the “Union” or “FAC”) are parties to the Faculty Contract. Jt. Ex. 1. Article 3 of the Faculty Contract provides that the Faculty Contract, along with its companion document, the Faculty Handbook will constitute the Master Agreement between the parties. Jt. Ex. 2. The Faculty Contract and the Faculty Handbook constitute the collective bargaining agreement (“CBA”).

On November 21, 2023, Dr. Haggerty filed a grievance alleging that the University violated the CBA when it removed two of his courses from the Master Schedule for Intercession 2024. Jt. Ex. 5. The University denied the grievance on November 27, 2023. Jt. Ex. 6. The unresolved dispute was submitted to arbitration pursuant to the Voluntary Labor Arbitration Rules of the American Arbitration Association and the CBA. Thereafter, I was designated to serve as arbitrator.

A hearing in this matter was held at the University in Scranton, Pennsylvania on May 31, 2024. At the hearing, the parties were afforded a full opportunity to present testimony, evidence and argument in support of their respective positions. Testimony was received from Daniel Haggerty, Ph.D., Chair, Department of Philosophy; Stacey Muir, Ph.D., Chair, Faculty Affairs Council; Michael Jenkins, Ph.D., Vice-Chair Faculty Affairs Council, David Dzurec, Ph.D., Interim Dean College of Arts and Sciences, and Michelle Maldonado, Ph.D., Provost. The proceedings were transcribed and a certified transcript was prepared.<sup>1</sup> The record was closed upon receipt of post-hearing briefs on August 2, 2024.

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<sup>1</sup> Citations to the transcript will be denominated as T.\_\_\_\_. Joint exhibits will be denominated as Jt. Ex. \_\_\_\_\_. Union exhibits will be denominated as to Union. Ex. \_\_\_\_ and University exhibits will be denominated as University Ex. \_\_\_\_\_.

**ISSUE**

At the hearing, the parties stipulated that the issue to be decided is as follows:

Whether the University violated the Collective Bargaining Agreement by prohibiting Daniel Haggerty from teaching more than two courses in the 2024 Intersession and if so, what is the remedy?

**RELEVANT CONTRACT PROVISIONS**

**Article 6**

- A. Compensation for teaching special sessions and overload teaching during the spring and fall semesters will be paid in accordance with the dollar per credit hour amount shown below. For special sessions, courses may be cancelled by the administration when the enrollment does not meet a minimum of six students; in every case, however, such cancellations will occur in accordance with the procedures specified in Section 8.1.c of the Faculty Handbook. If, on the other hand, the Dean determines that a class must be offered even if it does not meet the minimum of six, then it will be offered at full pay.

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Jt. Ex. 1.

**FACULTY HANDBOOK**

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5.3 Academic Freedom

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“Teaching” refers to the activity in which faculty members discuss their subject matter with the intention of fostering learning. “Teaching” is not limited to the normal teaching loads described in Sections 5.5 and 6.0.C, nor is it limited to instructional activities that take place within the four walls of a traditional classroom. “Teaching” includes, but is not limited to, the instructional activities that take place when faculty members engage in classroom instruction, distance-learning courses, student conferences, academic

presentations to colleagues or students, clinical instruction, supervision of internships, service-learning experiences, and civic engagement activities.

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### 5.5 Normal Teaching Load

The normal teaching for full-time faculty is described as follows:

A. The normal teaching load for full-time faculty for the Fall and Spring semesters will be twenty-one credit hours (twenty-four credit hours for faculty specialists), with no more than twelve credit hours per semester. In the College of Arts and Sciences and the Kania School of Management, alternate distributions of the normal teaching load for the academic year must have the agreement of the faculty member and the concurrence of FAC. Such alternate distributions cannot exceed one course per semester. FPC will inform FAC of any variances of Section 5.5.A.A that occur within the Panuska College of Professional Studies.

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### 5.7 Overload Teaching

An exception from the normal teaching load can be made by the administration as follows: Where programmatic considerations allow, a faculty member may be permitted to carry no more than six credits over the normal load in any given semester. Extra compensation, in accordance with the collective bargaining agreement, will be paid for these credits. Appropriately qualified full-time faculty will be given preference over part-time faculty in the assignment of uncovered courses in the fall or spring semester. Overloads should be distributed equally among interested, appropriately qualified faculty within a department. A faculty member cannot be required to teach an overload. The appropriate chair will be consulted before decisions are made.

For programmatic reasons, faculty teaching in certain online programs with irregular semesters (Online MBA and Online HR) may be permitted to carry no more than nine credits over the normal load in any academic year. However, the total overload credits being taught at any point in time during a regular semester is limited to three.

## 5.8 Summer School and Intersession Teaching

Any full-time faculty member who teaches a graduate or undergraduate course in the summer school or during the intersession will be considered to be teaching in the special session and will be compensated in accordance with the collective bargaining agreement. A faculty member cannot be required to teach in the summer school or in intersession. Teaching assignments should be distributed equally among interested, appropriately qualified faculty in a department. Those persons holding full-time faculty rank will be given first preference in the assignment of intersession and summer courses. Those holding faculty rank who are not full-time will be given second preference.

### Section 8.1 - Scheduling of Courses:

Academic departments, program directors, and individual faculty members have the initial responsibility for the development of programs and courses although the University reserves as its administrative prerogative the final choices of courses to be offered. It is essential, however, that collegiality pervade the whole process from the proposal of courses and programs to their actual delivery.

- A. Accordingly, the University assignment of course offerings will be based upon the Master Scheduling Process described below:
  - 1. The Registrar guides the Master Scheduling Process (MSP). The Registrar will develop a calendar of MSP events and deadlines, and distribute the calendar, as well as the MSP tool, course data and reports and student data and reports to the deans, department chairpersons, and directors of interdepartmental programs by August 1st. The Registrar will make available to deans, department chairpersons, and directors of interdepartmental programs the data they request (e.g., copies of previous years' course schedules, reports of the number of majors by class, admissions reports, etc.) and other appropriate data they need to accommodate program needs for general education requirements as well as cognate and major requirements of other departments. Each chairperson, in consultation with the department faculty and the directors of all relevant interdepartmental programs, will prepare and submit a preliminary draft of the

master schedule to the Registrar's Office by the deadline in the published MSP calendar.

2. Courses should be offered in accordance with the standard block schedule established by the University. Exceptions to the block schedule must be approved by the Provost's Committee on Academic Policy and Compliance (PCAPC). Exceptions to block scheduling are normally made annually; however, continuing exceptions can be made with the approval of PCAPC at the explicit request of an academic department. Classes within each department should be distributed evenly between the MWF and TR sequences and between the morning and afternoon periods. The Registrar in consultation with the deans and the chairpersons (who will consult with the faculty involved and the directors of all relevant interdepartmental programs) will re-assign classrooms and times when, for example, the number of courses proposed for a given time period exceeds classroom availability.
3. The respective deans will review the preliminary draft of the master schedule and will suggest recommendations and revisions to the chairpersons by the deadline in the published MSP calendar (within two weeks of receiving the draft from the Registrar). The chairpersons, consulting with their faculty and the directors of all relevant interdepartmental programs, will make proposed adjustments to the master schedule in light of the deans' recommendations and departmental and individual faculty concerns and constraints. The chairpersons will submit the revised draft of the master schedule to the deans for approval.
4. By the date in the published MSP calendar, always before the end of the fall semester, the Registrar, through the department chairpersons, will provide each faculty member with a copy of the faculty member's tentative course assignments for the coming academic year (summer, fall, intersession, and spring). Additionally, at this time the Registrar will forward a copy of departmental and program master schedules to the relevant department chairs and directors of interdepartmental programs. Within four weeks, faculty members should submit requests for course changes to the chairperson. The chairperson, after consulting

with the directors of any relevant interdepartmental programs, will forward the department's requests to the appropriate dean for approval or disapproval. The draft at the end of this stage is the final draft of the master schedule.

5. Additional corrections may, with sufficient reason, be made up to (but no later than) the deadline for the promulgation of the class schedule. Such proposed corrections should be submitted, with a rationale and after consultation with the appropriate faculty and the directors of any relevant interdepartmental programs, by the chairperson to the dean for approval.
  6. Changes to the master schedule after promulgation will be made by the appropriate dean's office in consultation with department chairpersons, directors of all relevant interdepartmental programs, and affected faculty.
- B. the formulation of course offerings and schedules according to the procedures outlined above should be guided by considerations including, but not necessarily limited to, the following:
1. Student needs and interests;
  2. Curricular and Programmatic requirements, including those mandated by external accrediting agencies;
  3. The appropriate allocation of faculty resources in terms of teaching expertise, professional responsibilities, staffing needs of the various colleges, and equity. When an allocation cannot be made on the basis of these criteria, the senior faculty member (in years of service at the University) will be given preference.
  4. Past and projected enrollments.
  5. Principles of rational scheduling and institutional resources such as instructional time and classroom space.
- C. Interession and Summer Sessions. Once a course has been listed as a final offering in any of these sessions, registration has taken place, and the enrollment for the course has

reached the minimum number specified in the collective bargaining agreement, it is the responsibility of the offering department to staff the course or to arrange for a suitable replacement. If the enrollment for the course is less than the minimum specified in the collective bargaining agreement, then the administration may cancel the course no later than 14 days prior to the start of the special session. The cancellation can be postponed to a later date, but only if the faculty member waives one's assignment right and places it on a contingent basis.

- D. Changes before the semesters. If, within two weeks of the start of a semester, there is an emergency due to the unforeseen inability of a full-time or part-time faculty member to meet a course commitment, any full-time faculty member who agrees to assume an additional preparation will receive a bonus of one-half overload salary above regular salary for that course and will have the option to exclude a mandatory course evaluation from the faculty member's evaluation file.

### **Appendix XI – Distance Learning**

A. Introduction

1. The faculty of the University has the responsibility to play a significant and meaningful role in determining the appropriate implementation of distance learning.
2. It is agreed that the provisions of this appendix constitute an agreement separate and distinct from all other agreements entered into by FPC and FAC and that the terms and conditions stipulated herein shall not provide precedent nor be used to interpret any other agreement between FAC and FPC; similarly, the interpretation of this agreement shall be based solely on the provisions set forth herein, except that when alleging a violation or misapplication of this agreement a faculty member shall have full recourse to the grievance procedure set forth in this handbook.

B. Definition

Advances in technology allow for the development of innovative methods of instruction. The terms "*Distance Education*" and "*Distance Learning*" as used herein refer to instruction where the teacher and the student are usually



separated geographically; communication is accomplished instead by one or more technological media: live or recorded visual presentations, materials using direct signal or cable, transmission by telephone line, fiber-optic line, digital and/or analog videotape, print, audio-tape, CD-ROM, computer or Internet technology, e-mail or other electronic means now known or hereafter developed, utilized to teach a course originating from or sponsored by the University. "Course" refers to any credit-bearing class offered through the University.

C. Quality Control of the Curriculum

1. Distance Learning Courses

Distance learning courses shall comply with the University's procedures, standard practices, and criteria, which have been established for traditional classroom courses and in accordance with the *Faculty Handbook*. A distance learning course which constitutes a new course offering must be presented to the full-time members of the academic department in which it is offered for recommendation of approval. Such departmental review of a distance learning course shall occur even when the proposed course is a section of an already existing and approved course.

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D. Working Conditions

1. Teaching Assignments

- a. The assignment of a University faculty member to teach a distance learning course is voluntary, not mandatory, but otherwise subject to the usual procedures for course assignment in accordance with Section 8.1 of the *Faculty Handbook*. Faculty who have accepted a stipend for the development of a distance learning course are expected to teach that course as needed but not to exceed three times in five years. The faculty member may voluntarily offer the course more than three times in five years if it fits programmatic needs.

- b. The precise terms and conditions of these arrangements shall be stated in a written contract signed by the faculty member and the University before the faculty member begins teaching the course. The availability of distance learning course development funding and the amount thereof will be announced during the spring semester of each year.

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### 3. Workload/Teaching Responsibility

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- c. Workload Issues. Courses taught via distance learning may be included as part of the University faculty member's regular load or may constitute in whole or in part an overload. The teaching responsibilities as they relate to assignments, scheduling, syllabi, papers, tests, and grades shall be equivalent to those of the corresponding traditional course sections.

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## G. Online Programs

### 1. Definition

The term "online program" refers to any academic program through which the majority of courses leading to a degree are offered as Distance Learning courses (usually through the Internet), even if such courses are also available in a traditional classroom setting. Unless specified below, the terms and conditions of a faculty member's participation in an online program are identical to the provisions of Appendix X, Sections A-F above.

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### 3. Enrollment

Enrollment in sections of courses in online programs is capped at 20 students per section. Until one week before the first day of class, if the enrollment in a given section goes beyond 20, the University will open a new

section. Within one week of the first day of class, a section may be overloaded up to a limit of 22 students per section. Under extraordinary circumstances, should a faculty member agree that pedagogical considerations warrant increasing enrollment over 22 students rather than splitting the course into two sections, then the faculty member may develop, with the dean, a compensation plan to include a special overload payment, ranging from 1-2 Overload credits, for the faculty member teaching such a course. Should enrollment reach 28 students, then the course will be converted to two sections.

Jt. Ex. 2.

### **RELEVANT STATUTE**

34 C.F.R. § 600.2 Definitions.

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#### *Distance Education*

- (1) Education that uses one or more of the technologies listed in paragraphs (2)(i) through (iv) of this definition to deliver instruction to students who are separated from the instructor or instructors and to support regular and substantive interaction between the students and the instructor or instructors, either synchronously or asynchronously.
- (2) The technologies that may be used to offer distance education include—
  - (i) The internet;
  - (ii) One-way and two-way transmissions through open broadcast, closed circuit, cable, microwave, broadband lines, fiber optics, satellite, or wireless communications devices;
  - (iii) Audio conference; or
  - (iv) Other media used in a course in conjunction with any of the technologies listed in paragraphs (2)(i) through (iii) of this definition.

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- (4) For purposes of this definition, substantive interaction is engaging students in teaching, learning, and assessment, consistent with the content under discussion, and also includes at least two of the following—
  - (i) Providing direct instruction;
  - (ii) Assessing or providing feedback on a student's coursework;
  - (iii) Providing information or responding to questions about the content of a course or competency;
  - (iv) Facilitating a group discussion regarding the content of a course or competency; or
  - (v) Other instructional activities approved by the institution's or program's accrediting agency.
  
- (5) An institution ensures regular interaction between a student and an instructor or instructors by, prior to the student's completion of a course or competency—
  - (i) Providing the opportunity for substantive interactions with the student on a predictable and scheduled basis commensurate with the length of time and the amount of content in the course or competency; and
  - (ii) Monitoring the student's academic engagement and success and ensuring that an instructor is responsible for promptly and proactively engaging in substantive interaction with the student when needed on the basis of such monitoring, or upon request by the student.

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University Ex. 3.

## **BACKGROUND**

The University, founded in 1888, is a private Jesuit University located in Scranton, Pennsylvania. The Union represents all full-time faculty at the University. The University is composed of three colleges: the College of Arts and Sciences, Leahy College of Health Sciences and the Kania School of Management. The College of Arts and Sciences includes 16 academic departments including the Department of Philosophy.<sup>2</sup> There are approximately 11 full-time faculty in the Department. Dr. Haggerty is a full-time Professor of Philosophy and has been the Chair of the Department since 2019.

Each Department Chair reports directly to the Dean of the College of Arts and Sciences, who in turn reports to the Provost. The Provost reports to the President of the University. In addition to fall and spring academic semesters, the University offers classes for students during the summer and during Intersession. Intersessions are courses compressed into 4-5 weeks between the end of the fall semester and the beginning of the spring semester. Intersessions occur primarily in January but in some years they have included days at the end of December. Full-time faculty may volunteer to teach the summer session or intersession but are not required to do so.

During the fall and spring semesters, most classes are currently taught in a classroom. This is known as synchronous learning. Synchronous learning involves students interacting with a teacher in real time either in a classroom or on Zoom. By contrast, asynchronous learning involves students accessing course

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<sup>2</sup> The Philosophy Department is the second largest major and the largest minor at the University.

materials online that were prepared in advance by instructors and reviewing them on their own schedule.

In 2017, Dr. Haggerty received a grant to develop online courses for nurses who were not able to attend classes at the University due to their schedules on different shifts. Dr. Haggerty prepared three online courses – Introduction to Philosophy, Ethics and the Seven Deadly Sins.

In 2018, Dr. Haggerty was able to offer these courses online to University students who would interact by listening to his lectures on videos. Union Ex. 1. Dr. Haggerty prepared videos and assigned reading for these courses and he distributed quizzes and exams which were graded and returned to students. Students were also able to contact Dr. Haggerty by email or Zoom.

This grievance arose after the University removed two of Dr. Haggerty's four online courses from the Master Schedule for Intersession 2024. As Chair of the Department of Philosophy, Dr. Haggerty consulted with department faculty regarding the Intersession 2024 schedule of courses. Dr. Haggerty testified that he scheduled himself to teach four courses during Intersession 2024 which were included in the final Master Schedule in October 2023. Union Ex. 3.

On September 28, 2023, David Dzurec, Interim Dean of the College of Arts and Sciences, informed Dr. Haggerty that Provost Maldonado had directed him to request that Dr. Haggerty cancel one of his scheduled Intersession 2024 courses. Dr. Haggerty testified that Dean Dzurec told him "they want you to drop one of your intersession courses." T. 60. When Dr. Haggerty asked why, Dean Dzurec pointed upstairs to the Provost's office and also said that when courses are taught

in person, the University's faculty contract limits them to two online classes. When Dean Dzurec asked Dr. Haggerty which class he wanted to remove from the Master Schedule, Dr. Haggerty told him he needed time to think about it.

After this conversation, Dr. Haggerty consulted with Michael Jenkins his FAC representative, about his Intersession 2024 course being removed. Dr. Haggerty met again with Dean Dzurec on October 4, 2023. At this meeting, Dean Dzurec told Dr. Haggerty that the Provost now wanted Dean Dzurec to remove two of his courses from the Intersession 2024 schedule. When Dr. Haggerty asked Dean Dzurec for the reason for the University's decision the Dean told him that the Provost had mentioned contact hours with students.

After Dr. Haggerty's two meetings with Dean Dzurec, he learned from a colleague on October 24, 2023 that two of his Intersession 2024 classes had been removed from the Master Schedule. That same day Dr. Haggerty filed a Notification of Complaint regarding the University's removal of two of his Intersession 2024 courses from the schedule. The Notification stated that he had informed Dean Dzurec on October 3, 2023, after consulting the FAC grievance officer that he "did not support cancelling one of my scheduled courses for Intersession 2024," and that the Dean informed him that the Provost had "directed him to cancel or remove two of my scheduled courses for Intersession 2024." Jt. Ex. 3.

On November 21, 2023 Dr. Haggerty filed a grievance which alleged as follows:

I am hereby alleging a violation of the CBA regarding changes in my Intersession teaching. As noted in the complaint, on October 24,

2023, three days before registration for Intersession 2024 opened, a colleague asked me if I knew that two of my scheduling courses for Intersession 2024 had been removed from the schedule. I replied that I did not. I immediately checked and discovered it to be true. Jt. Ex. 5.

The grievance referenced violations of Sections 5.8, 8.1, Appendix XI of the Faculty Handbook and Article 6 of the Faculty Contract. Jt. Ex. 5.

At the hearing, Dr. Haggerty testified that in the past he had not been limited to teaching two classes during intersessions by the University. Dr. Haggerty taught three classes during Intersession 2016, three classes (one in person and two online) in Intersession 2018, three classes online in Intersessions 2019, and four online courses during Intersessions 2020, 2021, 2022 and 2023. Union Exs. 1 & 2.

During his testimony, Dr. Haggerty acknowledged that he had very little contact with students who take his asynchronous classes during intersessions. He testified that for the online courses offered during intersessions he had discontinued the use of discussion posts as a means of interactions between himself and students. He also testified that he did not maintain regular, in person office hours or online office hours during intersessions; however, students could and did contact him by email.

Dr. Muir, in her capacity as FAC Chair, testified that she conducted extensive research in connection with this grievance on the number of classes faculty taught during summer and intersessions. After analyzing the data, Dr. Muir concluded that during intersessions and summer sessions faculty members routinely taught more than two courses. Union Exs. 5, 6 & 11. Dr. Muir testified



that her research established that the University had a practice or pattern that did not limit a faculty member to six credits or two courses per session.

Dean Dzurec testified that Appendix XI of the Faculty Handbook requires distance learning courses to comply with the University's procedures and practices that have been established for traditional classroom courses. He testified that the Faculty Handbook permits faculty to teach two in person classes because they are each three hours of lecture. He testified that because of new federal Department of Education regulations requiring regular substantive interaction ("RSI") with students, the Provost determined that online courses should be limited to two to comply with these guidelines. Dean Dzurec testified that watching pre-recorded videos does not constitute contact hours with students under the new regulations.

Dean Dzurec further testified that on September 28, 2023, he advised Dr. Haggerty that the regulations were discussed in a recent Deans group and that "we were limiting the teaching to try to comply with these federal guidelines that were going to be enforced." T. 167. He testified that the federal regulations correlate directly to the University's eligibility for federal funding and financial aid.

Dean Dzurec testified that he met again with Dr. Haggerty on October 4, 2023 to discuss the Intersession 2024 schedule of courses. Dean Dzurec testified that he made it clear to Dr. Haggerty that two of his four Intersession 2024 courses were going to be removed. He also testified that changes are often made to the Master Schedule due to retirements, resignations, lack of enrollment and for other reasons. Dean Dzurec testified that he met and consulted with Dr. Haggerty twice

regarding the removal of two classes but that Dr. Haggerty did not agree with the University's decision.

Provost Maldonado testified that in September 2020 the Department of Education amended regulations related to online learning or "distance education." University Ex. 3. The Provost testified that the regulations had been on hold during the pandemic but that she was advised in the summer of 2023 by Assistant Provost Kate Yerkes that the Department of Education intended to enforce the amended regulations by October 2023. She testified that the University was also planning for the Middle States accreditation self-study which was scheduled to begin in 2025. She also testified that the University was advised that it needed to respond directly to how it would address RSI in all asynchronous online courses in connection with the Middle States accreditation process.

The Provost testified that the amended regulations included a provision that an institution must ensure that its distance education involves RSI between a student and an instructor. She testified that the regulations require that the substantive interaction be initiated by the instructor in order for it to qualify as "distance education." At a meeting with the Faculty Personnel Committee ("FPC") in September 2023, Assistant Provost Yerkes provided a handout summarizing the new regulations and the criteria to satisfy the RSI requirement.<sup>3</sup> The handout stated that RSI must be instructor-initiated and occur on a frequent scheduled and predictable basis. The handout also stated that pre-recorded video lectures

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<sup>3</sup> The FPC includes the Provost, Associate Provost, the four academic deans, the General Counsel, the Vice-President for Human Resources, the Chief Financial Officer and the Executive Director of the Office of Equity and Diversity.

available for students to watch at their own pace not associated with an assignment, discussion, quiz, etc., would not meet the requirement. University Ex. 4.

Provost Maldonado testified further that shortly thereafter the four academic deans of the University met with her to develop a compliance plan. They agreed to limit the number of online intersession courses that faculty could teach to two courses because faculty are only able to teach two in person courses during intersession. Dr. Maldonado explained that this would allow faculty and instructors to have more time for direct contact with students during the intersession.

### **POSITIONS OF THE PARTIES**

The Union argues that the University violated the Faculty Handbook when it changed the Master Schedule and limited Dr. Haggerty to teaching two courses during Intersession 2024. The Union emphasizes that the Handbook does not impose a two course limit for intersessions.

The Union acknowledges that the University, under Sections 8.1. and 8.1.B.5, has the final say over which courses will be offered. However, the Union maintains that the Handbook expressly limits the authority of the University to remove a faculty member from an assigned course.

According to the Union, Section 8 of the Faculty Handbook does not give the University control over which faculty will teach those courses. The Union observes that the University provided no evidence that allowing Dr. Haggerty to teach four asynchronous courses in Intersession 2024 would be inconsistent with

“principles of rational scheduling in institutional resources such as instructional time and classroom space.” Union Ex. 4.

The Union also contends that the University did not comply with Handbook Section 8.1.A.6 which provides that “[c]hanges to the master schedule after promulgation will be made by the appropriate dean’s office in consultation with department chairpersons, directors of all relevant interdepartmental programs, and affected faculty.” Thus, the University falsely equates the September 28 and October 4 discussions between Dean Dzurec and the Dr. Haggerty as “consultation.” The Union maintains that Dr. Haggerty’s version of the discussions with Dean Dzurec should be credited and that no consultation took place during their discussions. Dean Dzurec did not explain why Provost Maldonado wanted to limit Dr. Haggerty to two courses in Intersession 2024 and an ultimatum is not consultation as required by the Handbook.

The Union also argues that Appendix XI, Section C regarding distance learning does not support the University’s position. The Union contends that the University has never required faculty teaching during intersessions and summer sessions to conduct on campus office hours because neither faculty nor students are required to be on campus. Although Dean Dzurec and Provost Maldonado testified that the two course limitation was based on the requirement that faculty be available to conduct office hours in addition to conducting two asynchronous three-hour classes a day, students are not required to take asynchronous courses at a fixed time or as a group.

The Union asserts that the University's reliance upon the Department of Education's regulations is misplaced. Even assuming that compliance with the regulations is now required, the Union submits that negotiations are required before changes are imposed. The Union notes that the University did not mention the regulations during the grievance process, nor did it mention "regular and substantive interaction" to the faculty committee until shortly before or at the May 2023 meeting. The Union contends that the DOE regulation does not impose a two course limitation and it expressly permits asynchronous education. Although the University relies upon the definition of distance education and RSI between students and instructors, Dr. Haggerty's unrebutted testimony demonstrated that his asynchronous pedagogy satisfies the regulation by including graded quizzes, exams and feedback. Dr. Haggerty's testimony also demonstrated that he was available for interaction with students on the request of a student and was always available by email. Because the regulation requires the "opportunity" for interaction, Dr. Haggerty's availability is sufficient to comply with it.

Finally, the Union argues that the University disparately enforced its two course limit. The evidence demonstrated that the University did not apply the two course limit to all other faculty in Intersession 2024. The Union relies upon Dr. Muir's analysis and the University's documents that demonstrated that three faculty members were assigned more than two courses for Intersession 2024 and numerous faculty were assigned more than two course during Summer 2024.

The University disagrees. The University argues that it did not violate the Agreement or the Handbook by limiting Dr. Haggerty to two courses during

Intersession 2024. The University properly exercised its contractually reserved rights when it limited the number of courses to be taught by faculty during Intersession 2024. Section 8.1 of the Handbook codifies this reservation of rights providing the University with the necessary discretion to determine which courses serve the needs of the students while complying with applicable federal guidelines maintaining the University's accreditation.

The University determined that all faculty members should be limited to two online courses during the Intersession 2024 which would allow faculty instructing those online courses to have adequate time to initiate and have direct contact with the students. The University's decision was reasonable and motivated by its need to come into compliance with the Department of Education's regulations regarding substantive interaction for distance education and the upcoming Middle States 2025 accreditation process. Thus, the University acted within its contractually reserved rights and followed the contract in removing two of Dr. Haggerty's courses for Intersession 2024.

The University maintains that the Union has failed to meet its burden by establishing a violation of the Agreement. Although the Union relies upon Faculty Handbook Sections 5.8, 8.1, Appendix XI and Faculty Contract Article 6, none of these provisions were violated by the University. Appendix XI regarding distance learning refers back to Section 8.1 of the Handbook and confirms that the University reserves the right to make the final courses to be offered to its students.

Moreover, the University submits that Section 5.8 provides that full-time faculty teaching courses during the intersession will be compensated in

accordance with the Agreement and further provides that faculty member cannot be required to teach in the summer session or intersession. There is no evidence that Dr. Haggerty was required to teach during a special session or that any faculty member was not compensated and the Union has failed to establish a violation of Section 5.8.

The University also contends that Dean Dzurec consulted with Dr. Haggerty regarding the removal of two of Dr. Haggerty's online courses when they met on September 28 and October 4, 2023 because he informed him that there were concerns about student contact hours during the intersession.

The University further argues that evidence of a past practice is inapplicable because the contract language is clear and unambiguous. Alternatively, the University asserts that the Union has failed to establish a binding past practice which must be 1) unequivocal, 2) clearly enunciated and acted upon, 3) readily ascertainable over a reasonable period of time and accepted by both parties. The Union has failed to satisfy any of these elements. The evidence established that not all faculty teach during intersessions and that those who did taught varying amounts of courses during those intersessions. There was not a specific number of courses or course credits which every faculty member taught even though there was evidence that some faculty taught more than two courses during intersession. The University asserts that where a past practice has not been followed for a sufficiently long period of time or occurs infrequently over a long period of time a necessary past practice element has not been established.

Finally, the University argues that even if a past practice existed, the University was free to change it as it deemed necessary due to changed circumstances that arose with the Department of Education's new distance learning regulation. To the extent that there was a past practice related to the number of courses to be taught during the intersession the University insists that it was not binding because it was subject to the University's reserved rights and discretion.

### **DISCUSSION**

I have thoroughly reviewed and carefully considered the arguments and evidence submitted into the record by the University and the Union in support of their respective positions. The Union has the burden to prove that the University violated the CBA by prohibiting Dr. Haggerty from teaching more than two online courses in Intersession 2024. For the reasons set forth below, I have concluded that the University has not violated the CBA.

I address below the specific provisions that the Union relies upon in support of its position that the University violated the CBA by limiting Dr. Haggerty to two online classes during Intersession 2024.

#### **Section 5.8 Faculty Handbook (Summer School and Intersession Teaching)**

This provision states that faculty members cannot be required to teach in the summer school or in intersession and that teaching assignments should be distributed equally among interested and qualified faculty in a department. This is not a situation where the University offered the course and replaced Dr. Haggerty with another faculty member. Nor was he required to teach the four online courses



in Intersession 2024. To the contrary, he volunteered to teach four online courses. The Union has not established that the University violated Section 5.8 of the Handbook.

Section 8.1 Faculty Handbook (Scheduling of Courses)

This provision provides a process for scheduling courses. This section provides that “[a]cademic departments, program directors and individual faculty members have the initial responsibility for the development of programs and courses although *the University reserves as it administrative prerogative the final choices of courses to be offered.*” (emphasis supplied). This provision is clear and unambiguous and provides a reservation of rights to the University to determine the final choice of courses. The Union recognizes that the University has the final say with respect to which courses will be offered to students. (Union Brief at 17).

Moreover, the Union acknowledges that Sections 8.1.B and 8.1.B.5 of the Handbook “codify the factors the University must consider in determining which courses to offer to students.” (Union Brief at 17). Section 8.1.B.5, which was cited by the University in its denial of the grievance, refers specifically to “instructional time” which directly relates to the issue of how much a time a faculty member will have to have substantive contact with students. Section 8.1.B.2 also refers to programmatic requirements “including those mandated by external accrediting agencies.”

In addition, Section 8.1.C of the Faculty Handbook regarding Intersession and Summer Sessions provides that the University may cancel a course due to a lack of enrollment. Dean Dzurec also testified that classes may be cancelled for a host of other reasons such as the retirement or illness of a faculty member.

The Union also argues that the Faculty Handbook does not impose a two course limit. This is true but it begs the question. The fact that the Handbook does not contain a limitation on the number of courses taught online does not mean that the University violated it by deciding that it should limit faculty members to two courses during Intersession 2024 in order to comply with the distance learning provisions of the Department of Education regulations that required RSI between professors and students.

The Union also contends that by removing two of the four courses the University violated Section 8.A.6 of the Faculty Handbook which requires that “[c]hanges to the master schedule after promulgation will be made by the appropriate dean’s office *in consultation with department chairpersons, directors of all relevant interdepartmental programs, and affected faculty.*” Jt. Ex. 1. (emphasis supplied). Dr. Haggerty was both the Chair of the Department of Philosophy and the affected faculty member.

With respect to the issue of “consultation”, it is not disputed that Dean Dzurec met with Dr. Haggerty on two occasions, September 28 and October 4, 2024, to discuss the number of courses that he was scheduled to teach online during Intersession 2024. Dr. Haggerty testified that when he asked for the University’s rationale the Dean told him it was about contact with students. Dr.

Haggerty also testified that the Dean referenced the University's policy limiting in person courses to two per semester. Although Dr. Haggerty did not recall any reference to the Department of Education regulations, Dean Dzurec credibly testified that he did inform Dr. Haggerty of the distance learning requirements and RSI in the new regulations. Regardless of the degree of details that Dzurec imparted to Dr. Haggerty, it is undisputed that they met on two occasions *and* that the Dean advised Dr. Haggerty of the rationale for the University's position, namely to afford a professor sufficient time to have substantive and regular contact with individual students.

It is understandable that Dr. Haggerty viewed these two meetings as a "fait accompli" and not a "consultation;" however, consultation is not synonymous with negotiation. There is also no basis on this record to conclude that the discussions between Dean Dzurec and Dr. Haggerty lacked the requisite collegiality. The Union has not established that the University violated Section 8.1.A.6 the CBA by failing to consult with him regarding the number of courses he was scheduled for in Intersession 2024.

#### Appendix 11 - Distance Learning

Appendix 11 provides that "[d]istance learning courses shall comply with the University's procedures, standard practices, and criteria, which have been established for traditional classroom courses and in accordance with the *Faculty Handbook*." Jt. Ex. 1 (emphasis in original).

The Union argues that the University's reliance on Appendix 11 as a justification for its decision is misplaced. The University's witnesses testified that after a series of meetings it determined to limit the number of online courses to two, consistent with the University's policy for in person courses.. Contrary to the Union's assertion, the University's position was not merely based on a professor's availability to students through office hours. Rather, as Provost Maldonado testified, the University's decision to decrease the number of online courses for Dr. Haggerty during Intersession 2024 from four to two would enable him to have sufficient time to initiate regular substantive contact with his students. This makes sense given that the majority of students enrolled in online courses are not residing in the Scranton, Pennsylvania area.

Moreover, both Dean Dzurec and Provost Maldonado testified regarding the University's concerns with conforming its courses with the new Department of Education regulations requirements for RSI and the upcoming Middle States accreditation process in 2025. When asked by the Union how teaching two online classes would increase RSI Dr. Maldonado testified that:

It's a first step because if you have to grade—or if you're not grading, then you're demonstrating that you aren't regularly and substantive interaction. If you are doing the grading, that's a first step. But if you have four times or two times the number of courses you would normally have in person, then how can you give the same amount of attention in your instruction and grading when you're—when you have double your normal course load.

...I think part of our hope was that we needed to demonstrate if there was any question from the federal government or Middle States, if they said to us, what have you done to attempt to meet these guidelines, we could at least point to that first step....

T. 191-192.

In addition, the administration had received an opinion from the Assistant Provost that passive watching of pre-recorded videos, which Dr. Haggerty was able to do in four online courses, would not comply with the regulations requirement for RSI and allow time for frequent professor-initiated contact with students. Although students were free to contact their professors in their courses many chose not to. Indeed, Dr. Haggerty acknowledged that he did not initiate contact with students and that students often did not contact him through emails:

Q. Other than by e-mail, have you had meaningful contact with the students in the online courses?

A. Typically, no. As I said sometimes by Zoom and at least one occasion in person. It was a local student.

T. 75.

The Union also argues that the University erred in interpreting the federal regulations because they do not impose a two course limit. This argument misses the point because the regulations impose new criteria for RSI and the University's decision that four online courses would not allow for sufficient RSI was reasonable and not in violation of any provision of the CBA.

Further, to the extent the Union argues that there were some exceptions to the two course limit during Intersession 2024, I am not persuaded that this rendered its actions vis a vis Dr. Haggerty to be discriminatory or arbitrary. The fact that a few professors in other departments were permitted to teach more than two courses during Intersession 2024, (the circumstances of which are not in the record), has not established that the University violated the CBA.

### Past Practice

Finally, the evidence that, in the past seven years, some faculty members including Dr. Haggerty, taught more than two online courses during intersessions and summer school, did not meet the criteria for a past practice. Instead of a clear unequivocal pattern established over many years, the evidence established that *some* faculty members at various times taught more than two courses during intersessions. However, this varied with each department, course and professor and is not sufficient to establish a binding past practice that the University was required to permit faculty to teach more than two online courses during Intersession 2024.

For the foregoing reasons, the Union has not met its burden to establish that the University violated the CBA by prohibiting Dr. Haggerty from teaching four online courses during Intersession 2024.

**AWARD**

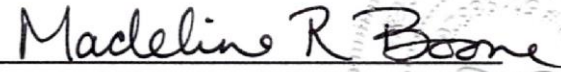
The grievance is denied. The University did not violate the CBA by prohibiting Dr. Haggerty from teaching more than two courses during Intersession 2024.

Dated: September 16, 2024  
Ocean Grove, New Jersey

  
Felice Busto

State of New Jersey        }  
County of Monmouth       } ss:

On this 16<sup>th</sup> day of September, 2024, before me personally came and appeared Felice Busto to me known and known to me to be the individual described in and who executed the foregoing instrument and she acknowledged to me that she executed same.

  
\_\_\_\_\_

Madeline R Boone  
NOTARY PUBLIC  
State of New Jersey  
ID # 50198320  
My Commission Expires 6/23/2027

