

APPEARING AS WITNESSES FOR THE UNION:

Honora NiAodanain, Association President
Jim Proctor, Lewis and Clark College Professor
Willy Hughes, Faculty - Math
Susan Rochester, Faculty - Art
Suzanne Schultz, Faculty - Psychology
Vicky Dodge, Faculty - Dental Hygiene
Ken Carloni, Faculty - Biology

EXHIBITS

Union

1. 2008-2011 Collective Bargaining Agreement between UCC and UCCFA
2. Grievance Documents
3. 9/16/09 Ross Tomlin Letter to Ken Carloni regarding Directives regarding "MOODLE"
4. 10/21/09-10/22/09 E-mails between Jim Proctor and Greg Fishwick
5. 11/9/09 Ross Tomlin E-mail regarding LMS Issue
6. 12/16/09 Ross Tomlin E-mail to Ken Carloni regarding Directive
7. 12/16/09 Ross Tomlin E-mail regarding Learning Management System at UCC
8. December 2009 Statement to the Board
9. 1/3/10-1/7/09 E-mails between Ken Carloni and Ross Tomlin
10. 2/8/10 E-mails between Ken Carloni and David Williams
11. Distance Learning Recommendations dated 5/10/08
12. February 2008 E-mails regarding Hacking of MOODLE
13. 2008 Article XII Bargaining History
14. MOODLE Documents
15. Remote Learner Documents
16. E-mail Exchange between Ken Carloni and Remote Learner
17. Dental Hygiene Program Page from UCC Website
18. My Math Lab Documents
19. Course Compass Documents
20. Example of Maestro LMS Used Through Textbook
21. Guidelines for Non-College Supported Online Technologies - MiraCosta College
22. MOODLE/Angel List
23. James Proctor CV

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Employer

1. Instructional Authority Bargaining Proposal of 8/17/06
2. Distance Learning Recommendations
3. MOODLE Taskforce

BACKGROUND

Umpqua Community College (hereafter "the College" or "the Employer") and the Umpqua Community College Faculty Association (hereafter "the Association" or "the Union") agreed to submit a dispute to arbitration. A hearing was held before Arbitrator Timothy Williams in Roseburg, Oregon on October 28, 2010. At the hearing the Parties had full opportunity to make opening statements, examine and cross examine sworn witnesses, introduce documents, and make arguments in support of their positions. The Arbitrator made a digital audio recording as a part of his notes and a copy of the recording was provided to both Parties.

At the close of the hearing, the Parties were offered an opportunity to give closing oral arguments or to provide arguments in the form of post-hearing briefs. Both parties chose to submit written briefs and the briefs were timely received by the Arbitrator. Thus the award, in this case, is based on the evidence and arguments presented during the hearing and on the arguments found in the written briefs.

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SUMMARY OF THE FACTS

The grievance in this case is between Umpqua Community College and the Umpqua Community College Faculty Association. The Parties are bound by a Collective Bargaining Agreement effective 2008 through 2011. The following is a brief summary of the events that led up to the filing of the grievance. It is based on both documentary and testimonial evidence presented during the hearing.

This grievance concerns the right of faculty members to implement a different Learning Management System (LMS) than that purchased and supported by the College. An LMS consists of software which allows instructors to deliver course content on-line. Currently, some classes are taught exclusively on-line, others exclusively in a physical classroom, and many are conducted in both a physical and a virtual learning environment.

In or around 2002, the College selected to host and support the Modular Object-Oriented Dynamic Learning Environment or MOODLE, a non-proprietary LMS.

In Spring of 2007 the College chose to purchase Angel, a different LMS sold by Blackboard, Inc. It continued to support MOODLE concurrently.

In January 2008, MOODLE was hacked apparently due to the College's failure to provide full hosting and security support.

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Beginning in March 2008, the College contracted with a third party, Remote Learner, to provide hosting and security support. The contract lasted through March 2009 and was renewed through March 2010.

Also in or about early 2008, the College formed a Distance Learning Task Force to address, among other issues, how to proceed with MOODLE and Angel. By memorandum dated May 30, 2008, the Task Force recommended that "Both Angel and MOODLE will be adequately supported. (U 11)"

In June of 2008 the College voiced its intention to not adopt the above cited recommendation, stating:

MOODLE is approved for use in 2008-09, using the same model of support and approved courses as this year. No new courses can be put up on MOODLE next year, but the current MOODLE classes will remain in place with the third party vendor used this spring. No additional IT support will be given to MOODLE. We will review this situation again next year, involving the new IT Director, to determine the use of MOODLE for the 2009-20 academic year.

The College subsequently decided and communicated to faculty that it would not support MOODLE beyond the 2009 Fall Term.

Biology instructor Ken Carloni decided to use his own money to enter into a contract with Remote Learner to continue providing hosting and security support services so that MOODLE would remain available to faculty.

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On September 16, 2009 Vice President of Instruction, Ross Tomlin issued a warning to Mr. Carloni. A similar warning was apparently issued to another faculty member, Suzanne Schultz. The letter to Mr. Carloni states:

I am directing you to not use MOODLE in your UCC courses after fall 2009.. Angel is the approved and fully supported learning management system for UCC, and all course enhancements, hybrid or fully online courses will utilize Angel and only Angel. The college will not allow UCC faculty to utilize a non-supported learning management system for any UCC course where online course materials are to be presented for student access.. If you do continue to use MOODLE as part of any of your UCC courses after the end of fall 2009 term.. it will be viewed as insubordination, and I will initiate disciplinary procedures against you. (U 3)

On September 23, 2009 Ms. Schultz filed a grievance alleging that "The directive I received on Sept 16 violates both my contractual and constitutional rights." The grievance requests "I would prefer to have a joint conference with my also-affected colleague, Ken Carloni."

A meeting was held on October 6, 2009. Via e-mail dated October 13, 2009 to Mr. Tomlin (and confirmed by Mr. Tomlin the following day), Association President Honora NiAodagain summarized the meeting results as follows:

...we agreed that you would pursue the possibility of drawing up language that would protect the college from any liability re: faculty using alternate technology platforms..

If the answer is yes, (and I am affirming that outcome) we faculty and admin would work together to

Comment [TW1]:

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draft appropriate language that would "allow the continuation of faculty to use/choose the method of presentation, including alternate course management systems." (language we agreed on as a whole.)

If the answer is no, then we have notified you as of your meeting, Oct 6, 2009, that the association would then file a grievance, citing violation of Instructional Authority, Article XII of the contract.

By e-mail dated November 9, 2009, Mr. Tomlin communicated the College's position stating "the administration has decided to stay with the previous decision to not allow use of any non-supported Learning Management System in UCC courses."

On November 23, 2009, Ms. NiAodagain filed a grievance stating the nature of the concern as:

The Administration's rejection of the proposal to find suitable language to protect instructors' rights to use appropriate technology as they are guaranteed by the CBA, results in violation of Art. XII, Instructional Authority.

The Parties were subsequently unable to resolve the matter and it came to be heard by Arbitrator Timothy Williams on October 28, 2010. The Parties acknowledged that the matter was properly before the Arbitrator to be heard and decided on its merits.

STATEMENT OF THE ISSUE

The Parties were unable to agree on a statement of the issue and stipulated that the Arbitrator would frame the issue as a part of this opinion and award. The Association advanced the following:

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1. Did the College violate Article XII (Instructional Authority) when it prohibited faculty members from continuing to use the learning management system of their choice?
2. If so, what is the appropriate remedy?

The College advanced the following:

Did the College violate Article XII (A) when it prohibited faculty members from continuing to use the learning management system of their choice?

As part of his opinion and award, the Arbitrator frames the issue as follows:

1. Did the College violate Article XII when it prohibited professors Ken Carloni, Suzanne Schultz and other faculty from using MOODLE as a learning management system?
2. If so, what is the appropriate remedy?

The Parties stipulated that the grievance was timely and properly before the Arbitrator, and that the Arbitrator may retain jurisdiction for sixty (60) days following issuance of his Award to resolve any issues over remedy.

APPLICABLE CONTRACT LANGUAGE

COLLECTIVE BARGAINING AGREEMENT

ARTICLE III - EMPLOYER RIGHTS

The Association recognizes that the College has the responsibility and authority to manage and direct and otherwise control, on behalf of the public, all of the operations and activities of the College. The College retains all rights and prerogatives not specifically restricted by this Agreement.

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However, the Association maintains its right under ORS 243.698 if the College considers changing a mandatory subject of bargaining during the life of this agreement that has not been previously negotiated.

ARTICLE XII - INSTRUCTIONAL AUTHORITY

A. INSTRUCTIONAL METHODOGY

Each employee will be given the responsibility to determine classroom discussion and method of presentation of the subject he/she teaches, consistent with the course outcomes approved by the College, subject to the evaluation procedures as outlined in Article X of this Agreement.

B. SELECTION OF TEXTBOOKS AND MATERIALS

Employees will select the appropriate textbooks and other instructional or information materials for their subjects or areas of concern in accordance with College policies and procedures as developed by the department/program's bargaining unit members. Upon approval of the immediate administrator, alternate textbooks and other instructional or informational material may be utilized.

C. DETERMINATION OF STUDENT GRADES

The Employee shall maintain the first right and responsibility to determine grades and other evaluations of students. No grade or evaluation shall be changed without a good faith attempt to consult with the employee. No administrator shall change a grade or evaluation unless there has been a miscalculation or misapplication of course grade criteria as specified in the course syllabus resulting in the assignment of an incorrect grade.

D. CURRICULLUM AND PROGRAM REVIEW

Representatives of the bargaining unit shall be included on any committee or task force established by the College to review curriculum, program, or course changes. Such assignments shall be equitably distributed among department or program areas.

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ARTICLE XXIII - GRIEVANCE PROCEDURE

D. STEPS

3. Step 3

d. The arbitrator shall have no power to add to, subtract from, modify or amend any terms of this Agreement, nor reach a decision contrary to public policy of the State of Oregon or the United States as clearly defined in statutes and/or judicial decisions, or make any decision on any matter not specifically addressed by the Agreement, and his/her decision shall be based on whether or not the Agreement has been violated.

e. A decision of the arbitrator shall, within the scope of his/her authority, be binding upon the parties.

E. COSTS OF ARBITRATION

The College and the Association will share equally any joint costs of the arbitration procedure such as the fee and expense of the arbitrator and the cost of the hearing room.

POSITION OF THE UNION

The Association's position is that an LMS is both a method of presentation and an item of instructional material. The College violated the plain language of Article XII when it prohibited instructors from utilizing the method of presentation and instructional materials of their choice. In so doing, the College's action undermines the principles of instructional authority and academic freedom. None of the arguments made by the College in support of its action justify this violation.

The Association opens its arguments by reminding the Arbitrator that Article XII of the Parties' Agreement, Instructional Authority, is the embodiment of the deeply valued

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core principle of academic freedom. The Association cites the United States Supreme Court's position that academic freedom is "of transcendent value to all of us" and that it does not tolerate rules that "cast a pall of orthodoxy over the classroom." The Association's position is that by prohibiting faculty from selecting the learning tools they deem best, the College is creating precisely what the Supreme Court warned against - an atmosphere of suspicion and distrust which stifles inquiry. Contrary to the College's position, the American Association of University Professors has made clear its belief that the principle of academic freedom encompasses emerging on-line technologies stating "The 'classroom' must indeed encompass all sites where learning occurs - Web sites, home pages, bulletin boards, listserves, etc.. Individual faculty members should have the same responsibility for selecting and presenting materials in courses offered through distance education technologies that they have in those offered in traditional classroom settings."

The Association takes issue with the College's position that Article XII is not about technology and that an LMS is a tool like a computer or a video projector which the College has the discretion to choose. This position misses the core of the instant dispute. LMSs are not akin to a computer or a video projector in that they do much more than deliver pre-packaged

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content which is separate from the technology itself. The reason faculty maintains on its right to choose the technology is that it is inextricably linked to the methodology of how courses may be taught and content delivered. MOODLE and Angel are built on different philosophies of teaching. Selecting one or the other amounts to selecting a pedagogy. The faculty believes its members are best qualified to determine the means by which their students are to be instructed.

The issue in dispute is not whether the College can purchase and support Angel, it is whether instructors and departments are permitted to use alternate LMSs if they believe those best fit with their pedagogical approach. The Association does not seek to limit the College's choice of an LMS. It only seeks to protect the right of the faculty to use what is best and most cutting edge instructional material in their fields to deliver content in the way they believe is most effective. According to the Association:

By prohibiting faculty from choosing these instructional materials and methods of presentation, the College is dictating how instructors present their material to their students what pedagogy they use, and what instructional materials they use to deliver content. In doing so, the administration has ripped that instructional authority away from the faculty, inhibiting the free spirit of teachers, and undermining the core values of academic freedom.

The Association argues that the language protecting the faculty's right to employ an LMS of their choice is plain and

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clear. The *Instructional Methodology* section of Article XII provides that it is the employee's responsibility to determine the "method of presentation." Just as an instructor's choice regarding whether to hold a lecture or a discussion and whether to employ any LMS at all implicates instructional methodology, an instructor's choice regarding which on-line method of presentation to use likewise implicates instructional methodology. By specifically granting faculty members "the responsibility to determine... method of presentation", Article XII Section A clearly gives them the authority to determine what, if any, LMS to use.

The *Selection of Textbooks and Materials* section of Article XII is even more clear. Even should the Arbitrator find that selection of a particular LMS does not constitute a "method of presentation" under Article XII Section A, there can be no question that LMSs do constitute "instructional or informational materials" under Article XII Section B. According to the Oregon Department of Education, "instructional materials" are defined as

any organized system which constitutes the major instructional vehicle for a given course of study, or any part thereof. Instructional Material may include digital content or software in a format such as electronic and internet or web-based materials or media.

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While some LMSs are packaged with textbooks so that the choice of the textbook dictates the choice of an LMS, they need not be so packaged to fall under Section B because the language grants faculty the right to select textbooks and other materials.

The Association recognizes that, under Section B, the faculty's selection must be consistent with College policies and procedures. Currently, there is no policy in place which prohibits the use of LMSs other than Angel. Rather, the prohibition was issued ad hoc, without reliance on any policy. Moreover, the College cannot unilaterally implement a policy which prohibits the faculty from using textbooks and other instructional materials other than those it selects itself without eviscerating the meaning of Section B. The Association is fully agreeable to policies which aim to address adequate hosting, security and support requirements - it would even contract with the MOODLE partner previously selected by the College. The College has presented no arguments or evidence to the effect that this would be unworkable. The Association also agrees that an individual instructor's choice of an LMS is to be consistent with the procedures developed by the department, as per Section B, because it makes sense for the department to determine whether consistency is important and, if it is, which particular LMS is best to deliver the course content. The

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College's action in prohibiting faculty members from selecting which LMS to use, consistent with procedures developed by their department/program's bargaining unit members violates the plain language of Article XII Section B.

During the 2008 negotiations, the Association sought to strengthen the language of both sections of Article XII to secure the right of faculty members to have the final right to select the methods and materials they would utilize for instruction. The Association was successful in taking away any right the College formerly had to veto a determination as to method of presentation and in placing the responsibility to develop policies and procedures regarding the selection of textbooks and materials with the department/program's bargaining unit members rather than administrators. The Association asks that the Arbitrator's decision honor the gains it made at the bargaining table.

The Association anticipates arguments made by the College in favor of using Angel to the exclusion of all other LMSs.

The College attempted to argue for the first time at hearing that using only one LMS somehow improves the accreditation process. However, some instructors use no LMS, so they do not enter data for accreditation purposes using Angel anyway. The Association has no objection to entering required data into the College's system through whatever tool the College

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selects. However, doing so is not mutually exclusive with instructors using an LMS other than Angel to deliver course content to students. This argument is a red herring.

The College attempts to justify using Angel to the exclusion of all other LMSs by claiming that uniformity is important for students who may be less technologically savvy. This argument is flawed for a number of reasons. First is the lack of evidence or testimony to the effect that using multiple LMSs, such as the College permitted for two years while Angel and MOODLE were simultaneously supported, presents difficulties for students. Rather, the student survey conducted by Mr. Carloni indicated that using two systems was not problematic and that MOODLE was preferred. The College refused to conduct its own student survey. In addition, Mr. Hughes, whose students use both Angel and MyMathLabs/CourseCompass, testified that they do so with ease.

Second, even College witnesses admitted that becoming fluent with a variety of technologies and systems would better prepare students for the job market. If student ease was truly the issue for the college, it would have selected MOODLE as the system with which students are more likely to be familiar because it is employed through ORVSD in public high schools throughout the state and the system more widely used by businesses than Angel. The College's argument that adults

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returning to retrain are exceedingly challenged by having to learn more than one LMS is likewise undermined by the fact that the program specifically aimed at these students, Green Technology, will be using an LMS other than Angel. The Arbitrator should reject the argument that faculty may be prohibited from using LMSs other than Angel because learning more than one LMS is too difficult for students.

The College's argument that uniformity in the use of LMS is necessary should be rejected by the Arbitrator for other reasons as well. The fact is that, despite its purported prohibition of all LMSs other than Angle, the College continues to permit their use. The Dental Hygiene Program continues to use MOODLE and has not been directed to stop. The Math Department uses MyMathLab, offered through CourseCompass. Foreign Language faculty use Maestro. And the upcoming Green Technology Program will be using Intellitech. This multiplicity of LMSs is present because, given the rapid pace with which technology is evolving today, it is simply unfeasible to enforce uniformity. Nor, in the Association's view, is it desirable. We know that there will continue to be an ongoing race to invent better on-line learning tools. We know that textbooks are no longer merely physical books, but increasingly utilize an LMS technology as well. The College offers no explanation as to why MOODLE should be prohibited for all but the Dental Hygiene

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department, even as other LMSs are continuing to proliferate at the College despite its pro-uniformity position.

For all of the reasons presented above, the Association requests that the grievance be sustained and that the Arbitrator order the College to cease its interference with instructional authority and permit instructors to select LMSs and other on-line learning tools in accordance with procedures developed by their department/program's bargaining unit members.

POSITION OF THE EMPLOYER

The College opens its arguments by reminding the Arbitrator that the Association bears the burden of proving a violation of contract language. In this case, it must prove that the relevant provision was mutually intended by the Parties to apply to instructional technology, specifically that it was intended to prohibit the College from dictating the LMS to be used.

The relevant terms in Article XII Sections A and B are "method of presentation" and "other instructional or informational materials", neither of which are defined by the CBA nor are they susceptible to a dictionary definition. Thus, the first task before the Arbitrator is to determine whether the Parties were in agreement that the terms would apply to LMSs, as the Association contends. The College's position is that there is no evidence to support the contention that a LMS would be

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understood to constitute a "method of presentation" or "instructional or informational material." Rather, when Ms. Rochester testified regarding "method of presentation", she listed lectures, discussion, and clickers for feedback. Her testimony regarding materials included only potential sources of information. By contrast, a LMS is a software application or a framework for the delivery of a course.

Consideration of the context of the disputed terms may be necessary to arrive at the interpretation. In both cases, the disputed term is the second of a two-part series, the first of which is a specific. Thus, in accordance with the doctrine of *ejusdem generis*, the general words must be interpreted to include only items of the same general nature as the specific. The term "method of presentation" follows "classroom discussion" and the common characteristic recognized in Article XII Section A is that both relate to "the subject [the instructor] teaches." Accordingly, "method of presentation", like "classroom discussion", must be a matter of pedagogy. By contrast, an LMS is a matter of the means and mechanics of presentation, not a matter of pedagogy. An LMS is a tool which is capable of supporting a wide range of methods of presentation like a computer, not a method of presentation in itself. The College has the right to choose an LMS like it does other tools and to make that equipment consistent. It is especially important that

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it be able to enforce consistency with regard to use of LMSs because students need training to communicate using the system.

Other contextual clues support the College's interpretation that an LMS does not constitute a "method of presentation." Section A mandates that the choice of "method of instruction" be "consistent with the course outcomes approved by the College." It is undisputed that "course outcomes" refers to the knowledge or skills intended to result from taking the course. Thus, "method of instruction" is reasonably related to pedagogical decision-making by the instructor.

The term "other instructional or informational materials" follows the term "appropriate textbooks." According to the principle of *ejusdem generis*, "other instructional or informational materials", like "appropriate textbooks", must clearly have content and knowledge to impart. It is not the technological or mechanical means by which that content is made accessible to students.

The fact is that neither of the two faculty members who initiated this grievance, Mr. Carloni or Ms. Schultz, were able to identify a pedagogical choice that was precluded by the prohibition against using MOODLE. The only perceived superiority of MOODLE over Angel seemed to be its capacity for building a glossary, which, as explained by Julia Mendiguren, is also possible in Angel. Neither Carloni nor Schultz testified

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about any limitation in Angel that dictated a change in pedagogy or in the instructor's choice of content.

In arriving at the appropriate interpretation of the disputed terms, the Arbitrator must also consider the limitations and conditions that contextualize those terms. Article XII as a whole cannot be read to mean that the faculty's control is absolute and unlimited. Rather, instructional authority is carefully conditioned and balanced by College authority. Section A indicates that the selection of pedagogy may be overruled if it is not consistent with course outcomes approved by the College, or if the methods of presentation are found to be inferior through the evaluation procedure.

Similarly, Section B indicates that the selection of course materials must be in accordance with College policies and the procedures put in place by the department, with the immediate administrator responsible to approve alternate textbooks. These limitations of instructional authority are important because, in accordance with the Management Rights clause, the College retains all authority not specifically restricted by the Agreement. Nothing in Article XII or any other provision specifically restricts the College's discretion as to the brand or type of technology to be used.

Lastly, the Association's interpretation of Article XII is not supported by bargaining history which establishes only that

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the Parties never made explicit any understanding regarding the applicability of that language to LMS choice. At the time that bargaining began in the spring of 2008, the Association was aware that the College was considering choosing a single LMS. While the Association's testimony is that it expected implementation of the Taskforce recommendations, it was clear that these were only "recommendations" and not binding on the College. Thus, had the Association wished to restrict the College's managerial right to drop MOODLE, it had the obligation to present that position at the bargaining table. Instead, the Association sought changes to Article XII without communicating what it intended for those changes to mean in connection with the choice of an LMS. The terms "LMS", "MOODLE", or "Angel" were never used in negotiations over Article XII.

Even after the Parties signed a tentative agreement for Article XII, bargaining continued for another nine or ten months, during which time it was clear that the College was moving forward with dropping MOODLE. Had the Association considered this a change in working conditions, it had the opportunity to bargain the change before the final agreement was reached.

The College takes the position that in designating Angel as the LMS to be used by the entire campus, it was reasonably exercising its managerial discretion. The College did not act

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precipitously. It first assembled a group of faculty and administrators to review the available LMS choices. Then it formed a taskforce to look specifically at the issue of using "MOODLE." Lastly, it adopted a lengthy period of phase-out, providing faculty with time and support to make the switch to Angel.

The College's decision to allow only one LMS was based on the findings that additional LMSs create costs for training and support infrastructure and staffing. The less technologically savvy students especially need support to access on-line or hybrid courses. The ISS is better able to meet these needs when it is able to concentrate on teaching only one LMS. Rather than providing no support for students and staff using non-designated LMS, the College chose to save money and guarantee its ability to provide comprehensive assistance through the ISS. Additionally, the LMS has administrative applications, as well as instructional ones, and these are diminished when a multiplicity of LMS is used.

The College summarizes its position as follows:

The Association's interpretation of Article 12 yields this result: Any faculty member could claim the right to use any LMS.

A College where students potentially had to learn Blackboard and Angel and MOODLE and a potential plethora of other LMS options is not well-designed for students, whatever the preferences of faculty. Given the College's retained rights in Article III, the

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Association's interpretation of Article 12 should not be reached without significantly more proof than provided by the Association that the parties had reached a mutual intent to hand over that much control over LMS choice to unit members.

ANALYSIS

The Arbitrator's authority to resolve a grievance is derived from the Parties' Collective Bargaining Agreement (CBA) and the issue that is presented to him. The issue before the Arbitrator is whether the College violated the Instructional Authority provision of the CBA, Article XII, when it prohibited Ken Carloni, Suzanne Schultz and other faculty from using MOODLE. The pertinent language is found in Sections A and B and it states:

A. INSTRUCTIONAL METHODOGY

Each employee will be given the responsibility to determine classroom discussion and method of presentation of the subject he/she teaches, consistent with the course outcomes approved by the College, subject to the evaluation procedures as outlined in Article X of this Agreement.

B. SELECTION OF TEXTBOOKS AND MATERIALS

Employees will select the appropriate textbooks and other instructional or information materials for their subjects or areas of concern in accordance with College policies and procedures as developed by the department/program's bargaining unit members. Upon approval of the immediate administrator, alternate textbooks and other instructional or informational material may be utilized.

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The Arbitrator begins his analysis by focusing on the statement of the issue. As previously noted, the Parties were unable to agree on a statement of the issue and thus empowered the Arbitrator to frame the issue as part of the award. The Arbitrator is in agreement with the Association that the issue is to properly encompass both Sections A and B of Article XII, and should not be limited to Section A as the Employer submits. The Arbitrator's decision on this point is based on the following three considerations.

First, the Grievance submitted on behalf of the Association by its president Ms. NiAodagain and dated November 23, 2009 cites Article XII as that portion of the contract allegedly violated. Because the entire Article is cited, the Arbitrator believes it is inappropriate to limit the grievance to only one portion of that Article when other sections may be relevant. Likewise, The Association's written Statement of the Grievance dated January 12, 2010 cites Article XII in its entirety "and/or other sections of the Collective Bargaining Agreement as applicable."

Second, the Arbitrator rejects the Employer's argument that the grievance be limited to Section A because the Association's written Statement of the Grievance explicitly quotes that section only. The Arbitrator notes that the second paragraph of the statement references Section B as well by using the exact

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wording found in that section, specifically in the statement “We are, however, insisting on our right to choose the method of presentation and/or other instructional or informational material as guaranteed in our contract” [emphasis added].

Third, nothing on the record suggest that the College has been placed at a disadvantage as a result of the Association’s wording of its grievance. The College was not unaware that Section B is a relevant part of the contract for the matter in dispute. Rather, the record indicates that the questions of whether the use of an LMS constitutes selection of “instructional or informational material” has been addressed by both Parties in the course of their discussion of this grievance from the outset.

The Arbitrator’s framing of the issue, however, differs from those proposed by both the College and the Association in that it more narrowly focuses the matter in dispute. This decision by the Arbitrator was driven by the fact that the original grievance arose out of a specific action of the College to deny professors the right to use MOODLE and the fact that the vast majority of the evidence on the record specifically focuses on the series of events all surrounding the original adoption by the College of MOODLE and the subsequent change to the use of Angel. These changes ultimately lead to the specific directive to professors Carloni and Schultz barring them from using MOODLE

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under threat of disciplinary action. While the Arbitrator recognizes that there are larger issues than just MOODLE, the original grievance was about whether the College violated the agreement when it prohibited professors Carloni and Schultz from using MOODLE. It is the Arbitrator's conclusion that this is the issue he is empowered to address.

The Arbitrator continues his analysis by noting that in a grievance arbitration proceeding, the employer is generally assigned the burden of proof in any matter involving the discipline or discharge of an employee. In all other matters, the union is assigned the burden of proof. The instant grievance does not involve the issue of discipline but rather concerns the application and interpretation of contract language as it relates to the right of professors Carloni and Schultz to continue to use MOODLE and the burden of proof, therefore, lies with the Association.

As is typical with a contract language interpretation case, the Arbitrator determines that the level of proof required of the Association is preponderance of the evidence. In order to prevail, the Association must establish by a preponderance of the evidence that Article XII prohibits the College from barring professors Carloni and Schultz as well as other faculty members from using MOODLE.

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After careful review of all arguments, testimony, and documentary evidence on the record, the Arbitrator has arrived at the conclusion that that Association has met its burden of proof. Given the facts of this case, contract language regarding Instructional Authority protects the right of professors Carloni and Schultz to choose to use MOODLE. Thus the College's directive that Carloni and Schultz use Angel and only Angel as the LMS selected by the administration improperly impinged on their Instructional Authority under Article XII. The Arbitrator's conclusion is based on the following multi-point analysis.

First, it is uncontested that when the College first began to embrace the extensive use of an LMS in 2002, MOODLE was the LMS adopted and supported by the College. It is also not contested that while faculty are encouraged to take advantage of the LMS, there are no requirements to do so. Some faculty continue their instruction without the use of an LMS and others make extensive use of this technology. The Arbitrator likens this situation to an afternoon at the swimming pool. Some are content to dabble their toes in the water, others wade around in the shallow end and still others dive into the deep end.

The evidence convinces the Arbitrator that professors Carloni and Schultz dove into the deep end and completely committed themselves to utilizing the full power of MOODLE as an

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LMS. In this regard, the Arbitrator is reminded of the old humorous story about the conversation between the pig and the chicken as to which one contributed the most to breakfast. The point being that there are different levels of commitment and that those who had the highest level of commitment when the College was promoting MOODLE are the ones most negatively impacted by the decision to prohibit its usage.

There are two points of significance here. The first is that under the blessing and encouragement of the College, these two professors and others invested a significant amount of personal time; time not contributed by those professors who chose not to take advantage of an LMS, building class materials into the MOODLE structure. The second is that this investment of time resulted in a product, anchored in MOODLE, of substantial value to both the College and students. Also, a byproduct of this investment of time was that professors Carloni and Schultz became expert in using MOODLE.

Second, much of the disagreement between the two Parties focuses on whether the choice of MOODLE v Angel is: 1) similar to choosing a brand of computer or video projector or 2) whether the choice of LMS significantly influences the manner in which a professor can present instructional material. The Arbitrator finds that the best answer to this point of dispute has a very practical, common sense dimension. Clearly, for those

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professors who dabbled their toes in the waters of LMS usage, changing the LMS would be exactly like going from a Dell computer to an HP; putting a course syllabus on one brand of LMS is certainly little different than putting the same syllabus on a different brand. However, this Arbitrator is convinced that for those professors that dove into the deep end the small differences between the capabilities of different LMSs can be highly significant.

The Arbitrator paid close attention to the testimony of Dean Mark Williams. The Dean testified that in his expert opinion all of the fully developed LMSs were capable in the big picture of providing the same benefits and doing similar tasks - MOODLE and Angel perform similarly. But, the Dean also acknowledged that each software program had its own unique nuances. Most importantly, at the Arbitrator specifically focused on the fact that Dean Williams never outright disagreed with the claims of professor Carloni as to some specific benefits of the nuances found in MOODLE.

Many years ago this Arbitrator was confronted in his own office with the need to select a word processing program and the choices came down to *Microsoft Word* or the program *Word Perfect*. An article reviewing the capabilities of both programs was reviewed and the closing sentence of that article has been

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retained in memory. That sentence reads, "Ultimately the best program is the one you know the best."

The bottom line to all of this discussion is the simple conclusion that professors Carloni and Schultz are able to provide to their students the best possible learning experience because their expert knowledge of MOODLE allows them to use its unique features to advantage and they put in the work needed to create dynamic LMS based classes. The Arbitrator emphasizes that this conclusion is unique to professors Carloni and Schultz and to other professors at UCC who dove into the deep end of the MOODLE pool prior to the College adopting Angel. The Arbitrator questions whether those professors who waded in the shallow end can find any pedagogical advantage to MOODLE over Angel.

Third, Article XII protects the faculty's right to hold substantial authority over their classes. Section A provides that "Each employee will be given the responsibility to determine classroom discussion and method of presentation." Section B provides that "Employees will select and the appropriate textbooks and other instructional or information materials." The Employer correctly points out that employee rights under each of these sections are not unlimited, but conditioned on being consistent with course outcomes, evaluation procedures, and College policies. The Arbitrator is unable to find anything in the Union's arguments which disagree with this

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point. Rather, the Union is clear in indicating the willingness of faculty to fully comply with these assertions.

The Arbitrator emphasizes that there is absolutely no dispute over the question of whether or not classes taught using MOODLE by professors Carloni and Schultz are in full compliance with the above requirements. In fact, the Union's entire case rests on the basic assertion that, in the judgment of professors Carloni and Schultz, being forced to use angel and abandon MOODLE has diminished the quality and effectiveness of their classes. Moreover, the Union strongly contends that Article XII protects the right of these professors to make that judgment.

Fourth, the College in asserting the right to bar professors Carloni and Schultz from using MOODLE emphasizes that the use of a LMS and specifically MOODLE involves expenditures of financial resources and potential liabilities. The Employer points to the management rights clause to establish that with regard to matters of College liability and financial expenditures it has retained sole discretion and authority. Moreover, the College sets forth what it believes to be very good business reasons for acquiring and supporting a single primary LMS.

The Arbitrator finds this argument by the College very persuasive. The evidence clearly establishes that in many ways the selection of an LMS is significantly different than the

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selection of a College textbook or some other body of instructional material. The Union acknowledges this fact in its brief when it states, "The Association does not seek to force the College to purchase any particular LMS" (U Br 26); or, to state it in another way, students by textbooks but the College has to pay for the LMSs. Also, there was considerable discussion over the events that led to the hacking of MOODLE at the time that the College was not adequately supporting it. The Arbitrator simply notes that, regardless of who was at fault, the fact of the hacking clearly establishes that there are issues around liability; issues that the College is properly concerned about.

Fifth, a review of the evidence convincingly establishes for the Arbitrator that prohibiting professors Carloni and Schultz from using MOODLE diminished the instructional value of their classes and interfered with their authority as protected under Article XII. On the other hand, mandating that professors Carloni and Schultz be given the right to use MOODLE raises issues of financial expenditure and liability; questions over which the CBA grants sole discretion to the Employer.

Thus the Arbitrator arrives at the conclusion that this case must be decided applying a balance test. That is, do the facts of this case support the conclusion that overall the right of professors Carloni and Schultz to use MOODLE is more a matter

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of instructional authority under Article XII then it is a matter of management rights. If so, then the grievance must be upheld. If not and the Arbitrator determines that it is more a matter that falls under the sole discretion of the Employer, then the grievance must be denied.

As has already been set forth, the Arbitrator finds that on balance the facts of this case support the conclusion that the right of professors Carloni and Schultz to use MOODLE is more an issues subject to the instructional authority clause than it is an issues subject to the management rights clause. The facts that are specifically important include the extensive work completed by professors Carloni and Schultz on developing programmatic material using the MOODLE platform when it was the platform supported by the College and the fact that the College's distance learning task force recommended continuing to support both MOODLE¹ and angel.

Fifth, in arriving at his conclusion that the College did violate Article XII when it directed Carloni, Schultz and other faculty to use Angel and only Angel, the Arbitrator took into consideration what he considered to be a significant change in the College's position where originally it set forth that the

¹ The Arbitrator notes that the College is concerned that a decision upholding the grievance opens the door to a plethora of different LMS. The Arbitrator is convinced that this will not be a significant problem since the facts of this case are so unique and that the Arbitrator at no time is attempting to say that faculty have carte blanche with regard to LMSs.

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College would have but one LMS ("Angel and only Angel" U 3). Dean Williams, who was not on campus at the time the grievance arose, testified to the current intent of the College to have one primary LMS. To the Arbitrator, Dean Williams' testimony is a realistic and appropriate assessment of the overall situation. The Union has effectively evidenced the fact that there is not nor can there reasonably be only one LMS.

The Math Department should be able to continue using MyMathLabs and Course Compass if it so chooses. The Dental Hygiene Program should be able to continue using MOODLE. The Green Technology Program should be able to use Intelletech. Foreign Language instructors should be able to select textbooks that use Maestro. And Carloni should be able to continue to deliver his award-winning biology classes and build his wikis and linked glossaries through MOODLE. (U Br 26)

The Arbitrator carefully emphasizes that nothing in this decision should be read as taking away from the College the right to establish a primary LMS. Nor should this decision be read in such a fashion as to take away from the College the right to work with faculty and departments to encourage as appropriate the use of the primary LMS. But, the fact of a primary does not negate the reality that a primary does not rule out in every case the use of an alternative. In his testimony, Dean Williams called MyMathLabs and Course Compass an evil necessity and the Arbitrator would emphasize the word necessity. In any regard, where class content and the LMS are closely themselves.

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Finally, in reaching his decision the Arbitrator is aware that there are matters of liability and financial expenditures that must be resolved. The Arbitrator is also aware that the College and the Association have a longstanding collegial relationship through which they have worked out such matters in the past. The Arbitrator is convinced, based on the discussion and evidence at hearing, that the Parties will be able to successfully implement the remedy in a manner that addresses the interests of both Parties. If the Parties find it difficult to do so, the Arbitrator retains jurisdiction to fashion a final remedy.

CONCLUSION

The Arbitrator is tasked with the job of determining whether or not the decision by the College to bar professors Carloni, Schultz and others from using MOODLE violated Article XII of the collective bargaining agreement. While this decision does not extend to the UCC faculty the right under Article XII to use any LMS of choice, the Arbitrator did find that under the specific facts of the case, the decision by the College to prohibit professors Carloni and Schultz from using MOODLE did violate Article XII.

An award is entered consistent with these findings and conclusions.

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IN THE MATTER OF THE ARBITRATION)	ARBITRATOR'S
)	
BETWEEN)	OPINION AND AWARD
)	
UMPQUA COMMUNITY COLLEGE)	
FACULTY ASSOCIATION)	
)	
"THE ASSOCIATION" OR "THE UNION")	
)	
AND)	
)	
UMPQUA COMMUNITY COLLEGE)	
)	Instructional Authority
"THE COLLEGE" OR "THE EMPLOYER")	Grievance

After careful consideration of all arguments and evidence, and for the reasons set forth in the Opinion that accompanies this Award, it is awarded that:

1. The College did violate Article XII when it prohibited professors Ken Carloni, Suzanne Schultz and other faculty from using MOODLE as a learning management system.
2. To remedy this violation the Arbitrator directs the College to restore to professors Ken Carloni and Suzanne Schultz the right and the ability to use MOODLE as an LMS. This remedy is intended to require the College to act consistent with the recommendation of the Distance Learning Task Force (U 11). The remedy is also extended to other UCC professors who developed course material under MOODLE prior to the time that the College adopted Angel as its primary LMS.
3. The Arbitrator retains jurisdiction for a period of sixty days to resolve any issues over the implementation of this award.
4. Article XXIII Section E provides that "The College and the Association will share equally... the fee and expense of the Arbitrator..." Accordingly, the Arbitrator assigns his fees 50% to the Union and 50% to the Employer.

Respectfully submitted on this, the 11th day of January, 2011 by

Timothy D.W. Williams
Arbitrator