

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

IN THE MATTER OF THE EMPLOYES OF :
 :
 : Case No. PERA-R-17-355-W
 :
 UNIVERSITY OF PITTSBURGH :

FINAL ORDER

On December 15, 2017, the United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, AFL-CIO-CLC (Petitioner) filed a Petition for Representation pursuant to Section 603 of the Public Employe Relations Act (PERA) with the Pennsylvania Labor Relations Board (Board), as amended on January 8, 2018, alleging a thirty percent showing of interest and seeking to represent a unit of all full-time and regular part-time workers of the University of Pittsburgh (University), including but not limited to all salaried and hourly graduate employe teaching assistants, teaching fellows, graduate student assistants, and graduate student researchers employed by the University at all campuses. On January 25, 2018, the Secretary of the Board issued an Order and Notice of Hearing, and hearings were held on October 1 through 5, October 30 and 31, and November 1, 2018.

On March 7, 2019, an Order Directing Submission of Eligibility List was issued resolving all outstanding issues and finding that the unit appropriate for the purpose of collective bargaining is a unit comprised of all full-time and regular part-time professional employes who are graduate students on academic appointment who serve as teaching assistants, teaching fellows, graduate student assistants and graduate student researchers; and excluding graduate students on fellowship and traineeship, management level employes, supervisors, first level supervisors, confidential employes and guards as defined in PERA. That list of eligible voters was received by the Board on March 18, 2019.

On March 29, 2019, an Order and Notice of Election was issued directing that a secret ballot election be held on April 15, 16, 17 and 18, 2019. An election, by secret ballot, was held as scheduled among graduate assistants of the University to ascertain the exclusive representative, if any, for the purpose of collective bargaining with respect to wages, hours and terms and conditions of employment. On April 26, 2019, the Board canvassed the ballots with the result of the election being 675 votes for the Petitioner, 712 votes for No Representative and 153 challenged ballots. With respect to the challenged ballots, the parties agreed that 139 ballots should not be canvassed, 3 ballots should be canvassed, but could not agree on the remaining 11 ballots. The fourteen remaining challenged ballots could not have affected the outcome of the election at that time.

Pursuant to Sections 95.57 and 95.58(a) of the Board's Rules and Regulations, on May 2, 2019, the Petitioner filed objections to the Board's conduct of the election and a Charge of Unfair Practices seeking a new

election.¹ On September 18, 2019, the Board's Hearing Examiner issued a Proposed Decision and Order (PDO) addressing the Petitioner's challenges to the conduct of the election and the alleged unfair practices during the election. In the PDO, the Hearing Examiner concluded that the Board did not engage in misconduct with respect to the election and that the University did not commit an unfair practice under Section 1201(a)(7) of PERA. However, the Hearing Examiner held that the University committed unfair practices in violation of Section 1201(a)(1) of PERA and ordered a new election be held.

On October 7, 2019 and October 8, 2019, respectively, the University and the Petitioner filed timely exceptions to the Hearing Examiner's PDO. Following a thorough review of the exceptions and all matters of record, the Board issued an order dismissing the exceptions filed by the Petitioner alleging misconduct of the Board during the conduct of the election. Regarding the exceptions of the University, the Board dismissed the exceptions in part and sustained them in part. In particular, the Board concluded that the April 17, 2019 email sent by Dr. Steven Little to the graduate assistants in the chemical engineering department amounted to an unfair practice by the University under Section 1201(a)(1) of PERA.

Further, the Board determined that Dr. Little's email could have affected 34 graduate assistants in the chemical engineering department, which may or may not have affected the outcome of the election depending on the outstanding fourteen challenged ballots. Therefore, the Board directed the canvassing of the challenged ballots to ascertain whether the University had satisfied its burden under Western Psychiatric Institute v. PLRB, 330 A.2d 257 (Pa. Cmwlth. 1974), of establishing that the unfair practice would have had no effect on the election. See 34 Pa. Code § 95.59(a). Accordingly, on August 21, 2020, the Board issued an Order Directing Remand to the Hearing Examiner for Further Proceedings to determine the validity of the fourteen outstanding challenged ballots.

A hearing was held on the validity of the challenged ballots on October 29, 2020. During the proceedings on remand, the Petitioner filed a Motion with the Hearing Examiner for a New Election. On November 20, 2020, the University filed a Brief in Opposition to the Motion for a New Election. On December 4, 2020, the Petitioner filed a Reply in Support of its Motion for a New Election. On January 6, 2021, the Hearing Examiner found that Patricia Campbell, Jianan Jian, Tianyu Zhao, Henrique Alberto Brittes Potter, Alireza Amiri Margavi and Ritesh Dinkar Pawar were eligible to vote in the election and issued an Order Returning the Matter to the Board Representative to canvas these six challenged ballots.

On January 22, 2021, the Board Representative issued an Order Directing the Canvassing of Challenged Ballots directing that the 6 challenged ballots be opened, canvassed, and counted. On February 3, 2021,² the 6 challenged ballots were canvassed by an election officer assigned by the Board with the results being 2 votes for representation by the Petitioner and 4 votes for No Representative for a total of 677 votes for the Petitioner and 716 votes for

¹ The Petitioner's Charge of Unfair Practices alleged that the University engaged in unfair practices during the election in violation of Section 1201(a)(1) and (7) of PERA. The Charge was docketed by the Board at Case No. PERA-C-19-95-W.

² The canvassing of the challenged ballots was rescheduled from February 1, 2021 to February 3, 2021, due to an office closure for inclement weather.

No Representative. Thereafter, on February 26, 2021, the Board Representative issued a Nisi Order of Dismissal holding that a majority of the valid ballots cast in the election were for No Representative and dismissing the Petition for Representation.

In so holding, the Board Representative determined that it was reasonable to infer that the 28 chemical engineering graduate assistants who cast ballots after receiving Dr. Little's email were coerced into going to the polls and, therefore, those 28 votes should be subtracted from the No Representative tally. However, the Board Representative held that those 28 votes should not be added as votes for the Petitioner because it was pure speculation that, in the absence of Dr. Little's email communication, those 28 voters had intended to go to the polls and cast their ballot in favor of representation by the Petitioner. Concerning the 6 eligible voters who received Dr. Little's email and chose not to go to the polls to vote, the Board Representative concluded that Dr. Little's email coerced those voters from going to the polls and casting a secret ballot for or against representation and that those six potential votes should be added to the tally of votes cast for the Petitioner. After subtracting the 28 votes from No Representative and adding the potential votes of the 6 graduate assistants to representation by the Petitioner, the total vote tally was 683 votes for representation by the Petitioner and 688 votes for No Representation. Accordingly, pursuant to Western Psychiatric Institute, the Board Representative concluded that the University's unfair practice did not affect the results of the representation election.

DISCUSSION

The Petitioner alleges in its exceptions that the Board Representative erred in concluding that the University's unfair practice did not affect the results of the election and dismissing its Petition for Representation. Section 605(6) of PERA sets forth the procedure to be followed when an unfair practice charge has been filed in connection with an election and whether a new election is required stating, in relevant part, as follows:

If the board determines that the outcome of the election was affected by the "unfair practice" charged or for any other "unfair practice" it may deem existed, it shall require corrective action and order a new election. If the board determines that no unfair practice existed or if it existed, did not affect the outcome of the election, it shall immediately certify the election results.

43 P.S. § 1101.605(6). In interpreting the language of Section 605(6) of PERA, the Commonwealth Court in Western Psychiatric Institute set forth the burden to be applied in instances where unfair practices are found to have occurred during an election, stating as follows:

Our reading of Section 605(6) compels the conclusion that if, as here, an unfair practice is proved, the guilty party thereupon has the burden to prove that its conduct had no effect on the outcome of the election, not that the innocent party must prove not only the offense but also that the outcome of the election was thereby affected.

330 A.2d at 262.

The record shows that Dr. Little's April 17, 2019 email affected 34 potential voters in the chemical engineering department and, out of those 34 chemical engineering graduate assistants, 28 voted the last two days of the election and 6 students did not vote. The University argues that Dr. Little's email could not affect the outcome of the election because the number of chemical engineering graduate assistants impacted by the email (34 potential voters) was less than the margin of victory (39 votes)³. The Petitioner asserts that the University was required to present evidence of how the 34 chemical engineering graduate assistants would have voted in the absence of Dr. Little's email in order to meet its burden under Western Psychiatric Institute.

The University's argument that the number of voters impacted by Dr. Little's email was less than the margin of victory is sufficient to show that its unfair practice did not affect the outcome of the election. See Kaolin Mushroom Farms, Inc. v. PLRB, 702 A.2d 1110 (Pa. Cmwlth. 1997), *appeal dismissed*, 720 A.2d 763 (Pa. 1998) (it is a firmly established labor law principle that the number of successfully challenged votes must be sufficient to affect the outcome of the election). Indeed, to require the University to present evidence of how each of the 34 chemical engineering graduate assistants voted or would have voted would destroy the secrecy of the ballot as required under Section 605(2) of PERA.

Citing to National Labor Relations Board (NLRB) decisions as persuasive authority, the Petitioner further argues that the 28 chemical engineering graduate assistants who voted after receiving Dr. Little's email should have been subtracted from the tally of No Representative and added to the tally for representation by the Petitioner in order to determine whether the University's unfair practice affected the results of the election.⁴ The University asserts that the Petitioner has waived this argument because the Petitioner did not present it during the unfair practice proceedings before the Hearing Examiner in Case No. PERA-C-19-95-W. However, the Petitioner has not waived its right to contest whether the University met its burden to prove that its unfair practice did not affect the outcome of the election.⁵

In determining whether the University's unfair practice affected the outcome of the election, the Board must make findings and draw reasonable

³ After canvassing of the 6 challenged ballots, the results of the election was 677 votes for representation by the Petitioner and 716 votes for No Representative.

⁴ The Petitioner does not except to the Board Representative's decision with respect to adding the 6 votes of the graduate assistants who did not vote as votes for representation by the Petitioner in determining whether the University's unfair practice affected the election.

⁵ The University further asserts that the Petitioner is improperly attempting to relitigate the Board's decision in its August 21, 2020 Order Directing Remand to the Hearing Examiner for Further Proceedings that the 34 potential votes impacted by Dr. Little's email could not affect the outcome of the election. Contrary to the University's assertion, the Board only determined that the challenged ballots could affect the outcome of the election and that canvassing of those ballots was necessary before it could determine whether the University's unfair practice affected the results of the election.

inferences from those findings that are supported by substantial evidence of record. PLRB v. Kaufmann Department Stores, Inc., 29 A.2d 90 (Pa. 1942); Shive v. Bellefonte Area Board of School Directors, 317 A.2d 311 (Pa. Cmwlth. 1974). Mere suspicion or speculation as to a fact, without more, is not sufficient to support a finding that the University's unfair practice affected the outcome of the election. Shive, supra.

Here, Dr. Little stated in his April 17, 2019 email, in relevant part, as follows:

I just wanted to send you a note to encourage you to vote in the graduate student unionization election. The polling location is the O'Hara Student Center. I was actually a little surprised to see that only 81 students from the School of Engineering (whole school) have voted so far.

(Order Directing Remand to the Hearing Examiner at 5). It is reasonable to infer from this language that Dr. Little's email coerced the 28 chemical engineering graduate assistants who voted into going to the polls instead of exercising their right not to vote. However, it is not reasonable to conclude from the statement made by Dr. Little that all 28 graduate assistants would have voted for representation by the Petitioner absent receipt of his email. Indeed, Dr. Little's email does not indicate for whom the graduate assistants should cast their ballot, but only encourages them to vote in the election. Therefore, the Board Representative properly found that the record supported subtracting the 28 votes from the No Representative tally, but did not support adding those same votes to the tally for representation by the Petitioner.

Further, the NLRB decisions relied upon by the Petitioner are unavailing in that they concerned factual situations where employes were threatened with adverse employment actions if they did not vote for or against a particular party. In those instances, it would be reasonable to infer from the facts of those cases that the employes were coerced into voting for a particular party, which is in stark contrast to the facts here.⁶ Indeed, the facts in this case do not support the conclusion that all 28 graduate assistants would have voted for representation by the Petitioner nor that all 28 graduate assistants voted for No Representative. Therefore, to apply the NLRB policy, as urged by the Petitioner, of subtracting votes from No Representative and adding them to representation by the Petitioner (i.e. "vote swing") to determine whether the Board should order a new election would make it difficult for the University to meet its burden under Western Psychiatric Institute as it overinflates the potential tally of votes for representation by the Petitioner. The Board is mindful that it must not, under the guise of promoting fair elections, "succumb to the temptation of using whatever means available ... in order to direct a new election."

⁶ The Petitioner also cites to the NLRB decision in Fessler & Bowman, Inc., 341 NLRB 932 (Decision and Order 2004), which is distinguishable from the facts in this case. In Fessler, the NLRB concluded that the union engaged in objectionable conduct when it handled two voters' mail ballots, which casted doubt on the validity of the ballots. Again, as in the other NLRB decisions cited by the Petitioner, it would be reasonable to infer that the union had the opportunity to tamper with the ballots during the time they were in the union's possession. That is simply not the case here.

Teamsters Local Union No. 384, IBT, AFL-CIO v. Central Bucks School District,
33 PPER ¶ 33084 at 188 (Final Order, 2002).

The Board agrees with the Board Representative's determination that the record supports adding the votes of the 6 graduate assistants that did not vote to the tally for representation by the Petitioner and to subtract the 28 votes of the graduate assistants that voted in the election from the tally of No Representative for a potential total vote tally of 683 votes for representation by the Petitioner and 688 votes for No Representation. Based upon the potential vote tally results, the Board concludes that the University's unfair practice did not affect the outcome of the election. Therefore, the results of the election (677 votes for representation by the Petitioner and 716 votes for No Representative) establish that a majority of the valid ballots cast by eligible voters was for No Representative by a margin of 39 votes. Accordingly, after a thorough review of the exceptions, the briefs of the parties, and all matters of record, the Board shall dismiss the exceptions filed by the Petitioner and affirm the Nisi Order of Dismissal.

ORDER

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

HEREBY ORDERS AND DIRECTS

that the exceptions filed by the United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, AFL-CIO-CLC are hereby dismissed and the Nisi Order of Dismissal be and the same is hereby made absolute and final.

SEALED, DATED and MAILED at Harrisburg, Pennsylvania pursuant to conference call meeting of the Pennsylvania Labor Relations Board, James M. Darby, Chairman, Albert Mezzaroba, Member, and Gary Masino, Member this twenty-first day of September, 2021. The Board hereby authorizes the Secretary of the Board, pursuant to 34 Pa. Code 95.81(a), to issue and serve upon the parties hereto the within Order.