

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

UNITED STEEL, PAPER AND FORESTRY, :
RUBBER, MANUFACTURING, ENERGY, :
ALLIED INDUSTRIAL AND SERVICE :
WORKERS INTERNATIONAL UNION, AFL- :
CIO-CLC :
 :
v. :
 :
THE UNIVERSITY OF PITTSBURGH :
 :

Case No. PERA-C-19-95-W

IN THE MATTER OF THE EMPLOYEES OF :
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 :
 :
 :
THE UNIVERSITY OF PITTSBURGH :

Case No. PERA-R-17-355-W

PROPOSED DECISION AND ORDER

On May 2, 2019, the United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, AFL-CIO-CLC (United Steelworkers or Union) filed a charge of unfair practices with the Pennsylvania Labor Relations Board (Board) alleging that the University of Pittsburgh (University or Employer) violated Section 1201(a)(1) and (7) of the Public Employee Relations Act (PERA).

On May 6, 2019, the Secretary of the Board issued a Complaint and Notice of Hearing in matter PERA-C-19-95-W and designated May 14 and 15, 2019, in Pittsburgh, as the time and place of hearing.

On May 2, 2019, the Union filed an Objection to the conduct of the Board during the election in the matter PERA-R-17-355-W.

On May 6, 2019, the Secretary of the Board issued an Order and Notice of Hearing on Objections to the Conduct of the Election in matter PERA-R-17-355-W and designated May 14 and 15, 2019, in Pittsburgh, as the time and place of hearing.

A consolidated hearing on both matters as held on May 14 and 15, 2019, in Pittsburgh, before the undersigned Hearing Examiner. All parties in interest were afforded a full opportunity to present testimony, cross-examine witnesses and introduce documentary evidence. The Union filed its post-hearing brief on July 12, 2019. The University filed its post-hearing brief on August 12, 2019. The Union filed a reply brief on August 26, 2019.

The Hearing Examiner, based upon all matters of record, makes the following:

FINDINGS OF FACT

1. The University is a public employer within the meaning of Section 301(1) of PERA. (N.T. 9).

2. The Union is an employe organization within the meaning of Section 301(3) of PERA. (N.T. 9).

3. On December 15, 2017, the Union filed a petition for representation with the Board alleging a sufficient showing of interest and seeking to represent Teaching Assistants, Teaching Fellows, Graduate Student Assistants and Graduate Student Researchers employed by the University. This matter was docketed as PERA-R-17-355-W. (PLRB Exhibit 1).

4. After multiple days of hearing in October and November, 2018, the undersigned Hearing Examiner issued an Order Directing Submission of Eligibility List (ODSEL) on March 7, 2019, which found that graduate students on academic appointment who serve as teaching assistants, teaching fellows, graduate student assistants and graduate student researchers share a community of interest. The ODSEL also found that the unit appropriate for the purpose of collective bargaining is a subdivision of the employer 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 the Act. Finally, the ODSEL ordered the University to submit to the Board a current alphabetized list of the names and addresses of the employes eligible for inclusion in the unit set forth above with in 10 days. (N.T. 23; PLRB Exhibit 1).

5. The University timely submitted an eligibility list pursuant to the ODSEL. (N.T. 23).

6. After receiving the ODSEL, Dennis Bachy, the Board Agent in charge of the election, contacted the parties to discuss time, date and location for an election. Bachy has been an Administrative Officer for the Board and in charge of the Board's Pittsburgh office since 2002. Bachy discussed the election with Brad Manzolillo, Esquire, who represents the Union and Shannon Farmer, Esquire, who represents the University. The parties agreed to holding an election on April 15, 16, 17, and 18. (N.T. 21-24).

7. On March 29, 2019, the Board issued an Order and Notice of Election for an election to occur on April 15, 16, 17 and 18. The Order and Notice of Election designated Posvar Hall as the election location on April 15 and 16 and O'Hara Student Center as the election location on April 17 and 18. These locations were selected by Bachy after he toured potential sites on campus. (N.T. 24-25; PLRB Exhibit 2).

8. The first day of the election began as scheduled on April 15 in Posvar Hall. About 15 minutes prior to the election beginning at 9 a.m., Bachy led a pre-election briefing. The parties had representatives present at the pre-election briefing. Bachy told the parties how the elections would proceed. Voters would enter the room, they would take a ballot, they would mark their ballot in one of three polling booths, then would deposit the ballot in a ballot box. Bachy also met with the parties' poll watchers at that time. The Union raised concerns to Bachy that the Union believed that the University's watchers were managers or supervisors. Bachy questioned the University's watchers and determined that they were not supervisors of graduate students and that they were senior clerical employees for administrators of the University. (N.T. 26-28, 75, 274).

9. On April 15, the following Board employees were present: Bachy, Joe Gralewski, Rebecca McClincy and Kathy Owens. Board employees greeted voters as they entered the room and directed them to the polling area. One Board employee ran the sign-in book and issued ballots to voters on the eligibility list. Another Board employee ran the challenge station who would issue ballots to any voter who was challenged. (N.T. 29-30).

10. On the first two days of the election, April 15 and 16, Owens and Gralewski would ask for someone's name as they approached the ballot area to find that name on the eligibility list. Owens and Gralewski sometimes asked to see the University-issued ID of a voter when they had trouble finding the voter's name on the eligibility list. Board employees would also occasionally ask people to spell their name if they were still having trouble finding the name on the eligibility list. Bachy and McClincy asked for IDs for every voter. Starting on Tuesday afternoon, and for the last two days of the election, April 17 and 18, Bachy told all Board employees to just ask for everyone's ID as they approached. The reason Bachy chose this method is because it was easier since the University IDs had large, printed names that were easy to see and just looking at the IDs was faster than asking for a name and asking for a spelling of a name. The IDs were placed on the table such that they could be viewed by the PLRB employee and the University watcher who was also checking names in their list. A few students did not have their University IDs and instead showed their driver's license. (N.T. 31-32, 85-86, 111-114, 173-174, 276-277).

11. PLRB agents often had trouble with the spelling of some eligible voters' names. The names they had trouble with were often for voters of visibly Hispanic, Asian or Middle Eastern background. Therefore, PLRB agents asked for their IDs more than other voters before the process was changed on Tuesday to requiring all voters to show IDs. (N.T. 110-111, 152, 200-201, 276-277, 293-294).

12. No eligible voter objected to showing identification. No one was turned away for not showing identification. At most one eligible voter left without voting. (Tr. 135, 161-162, 176, 213, 277-78, 306, 311).

13. The Union poll watcher sat to one side of the ballot table and the University's poll watcher sat on the other side. The parties had a series of watchers that rotated every few hours. (N.T. 34, 99-100).

14. The Board's eligibility list was in a small binder that had a list of every employe on the eligibility list double spaced with alphabetical tabs. (N.T. 63).

15. The University's watchers were Amy Tuttle, Peggy King, Amanda Brodish and Victoria Lancaster. Neither of these four women supervise graduate students or regularly interact with graduate students. (N.T. 47-48, 273, 288, 304, 309).

16. The University's watchers were not recognized or known by the Union's watchers. (N.T. 132-133, 148, 176, 211).

17. Victoria Lancaster is the Director of Faculty Actions for the University. She does not report to Dr. Urban, the Vice Provost for graduate affairs. She does not interact with graduate students as part of her duties and does not have any role in making any decisions related to graduate students. (N.T. 272-273).

18. Amy Tuttle is a Senior Assistant to the Provost. Tuttle works for the Vice Provost in charge of faculty affairs. She does not report to Urban. She does not interact with graduate students as part of her duties and does not have any role in making any decisions related to graduate students. (N.T. 303-307).

19. Peggy King is a Senior Assistant to the Provost. She does not report to Urban. She works directly for Ann Cudd, Provost and Senior Vice Chancellor. She does not interact with graduate students as part of her duties and does not have any role in making any decisions related to graduate students. (N.T. 309, 314; Union Exhibit 22).

20. Amanda Brodish is the Director for Data Analytics and Pathways for Students' Success. She does not report to Urban. She does not interact with graduate students as part of her duties and does not have any role in making any decisions related to graduate students. (N.T. 288-289).

21. The University watchers kept a list of voters from the beginning of the election. It was a paper list and they made marks by pen. The Union did not keep any list tracking who voted. (N.T. 63-64, 100-101, 149-150, 197, 310).

22. During the election, approximately 15 voters expressed concern about giving their name and expressed that they thought the vote was an anonymous process. The Board employes would tell these voters that they needed to offer up their name to verify that they were eligible for a ballot. (N.T. 106-107).

23. After the first election day on April 15, Mazolillo sent an email to Bachy in the evening of April 15 which states in relevant part:

I checked in with our watchers/observers for a few minutes after the vote. They seemed to think things ran smoothly for the most part and that there were only a limited number of challenged

ballots. However, one concern was raised. I'm told that the University watcher appeared to be keeping a list of every person who voted and was asking voters how to spell their names so she could put them down on the list We are very concerned this practice is going to intimidate voters, especially given that the University's watchers are all managerial level and at least two of them work for the Provost's office.

Perhaps there is a different system for the PLRB, but I know that creating that clear of an appearance of tracking who is voting would be objectionable under the NLRB's rules. . . .

Bachy did not read this email until Friday April 19, but Mazolillo approached Bachy the morning of Tuesday April 16 and said the same thing as put forth in his email. Bachy told Mazolillo that the PLRB did not have a rule which prevented a party from having a list during an election. Bachy was surprised that the Union was not keeping a list of who voted as in his experience it was common for both parties to keep track. (N.T. 37-38, 55, 79; PLRB Exhibit 3B).

24. The PLRB commonly allows parties to keep lists during an election. (N.T. 79).

25. The second day of the election was on Tuesday April 16 and had the same set-up as April 15 also in Posvar Hall. (N.T. 37-38).

26. On Tuesday April 16, in the afternoon, Bachy was approached by a Union watcher who told him that she felt Grawlewski was treating the watcher for the University better than the watcher for the Union. The Union watcher said she asked a question similar to a question asked by the University watcher and that Grawlewski told her to be quiet. Bachy apologized to the Union watcher and moved Grawlewski off of the ballot area and to greeting voters as they walked in. (N.T. 39-40, 57-58, 204-205).

27. The third day of the election, on April 17, moved to O'Hara Student Center. Due to the set-up of the room, Bachy determined that a greeter was not needed at this location and that only three Board employees were needed to run the election. He then sent Grawlewski back to the PLRB office in downtown Pittsburgh for the rest of the election. Bachy, McClincy and Owens were the Board employees working the election. The Board Secretary, Nathan Bortner, did arrive at around 1 p.m. to observe and assist. (N.T. 40-41).

28. Day four of the election occurred on April 18 also in the O'Hara Student Center. Bachy, McClincy and Owens continued working the election with assistance from Bortner. Bortner left for Harrisburg around 1 p.m.. During the fourth day, Bachy told Pitt News reporters that they could not take pictures or ask questions in the polling area. (N.T. 41-43, 59).

29. The University kept daily totals of the number of eligible voters who had voted per day for each day of the election. (PLRB Exhibit 6).

30. On April 26, the Board canvassed the ballots. Mazolillo and Farmer were present. The result of the election was 675 votes for the Union, 712 votes for no representative, and 153 challenged ballots. There were 2016 names on the eligible voter list. (N.T. 43-45; PLRB Exhibit 4).

31. With respect to the challenged ballots, the parties agreed that 139 ballots should not be canvassed, three ballots should be canvassed, and could not agree on the remaining 12 ballots which would need a hearing if necessary. (N.T. 45-46; PLRB Exhibit 5).

32. Steven Little, the Department Chair of Chemical Engineering sent an email to graduate students in his department the morning of April 17, 2019, before the polls opened for the third day of the election. The email states in part:

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.

(N.T. 223-224; Union Exhibit 20).

33. There are between 46 and 48 eligible voters in the Chemical Engineering Department that would have received Steven Little's email. Of the 46-48 eligible student voters in Chemical Engineering to whom the email was sent, twelve had already voted during the first two days, 28 voted that last two days, and approximately six did not vote. (N.T. 334-6; Union Exhibit 21).

34. During the early afternoon of April 17, 2019, the third day of the election, the President of the Engineering Graduate Student Organization ("EGSO"), a University-sponsored group, sent an email to graduate students in the School of Engineering, stating: "[a]s of this morning, only approximately 30% of eligible engineers had voted." (N.T. 222, 419; Union Exhibit 19).

35. Between late March 2019 and the end of the election on April 18, 2019, the University sent out approximately 50-60 different emails relating to the Union and election to all eligible voters and maintained several web pages which many of the emails linked to. Most of the emails were sent from Nathan Urban, who is the Vice-Provost of Graduate Studies for the University. Other emails were sent to eligible voters in Science, Technology, Engineering, and Medical ("STEM") related departments, in addition to department and school specific emails. (N.T. 121-24, 129-130, 339, 383, 429; Union Exhibit 18; University Exhibits 21, 23).

36. On April 5, 2019, Urban sent out an email to all eligible voters that read, in part:

Again: Nothing is guaranteed.

There is no guarantee that the union will obtain improvements in any area. What we do know is that while a contract is being negotiated - which typically takes months or more than a year - under PA law, stipends would be frozen under "status quo" and annual stipend increases would not occur. For reference; The University has increased stipends by more than 13% over the last five years

(N.T. 121; Union Exhibit 5).

37. On March 29, 2019, Urban sent out an email to all eligible voters that read, in part:

Over the last five years, stipend levels for Pitt graduate student TAs have increased by 13.2 percent, which is faster than the rate of inflation (7.4 percent), and more than increases in Pitt faculty and staff salaries during this time period. These stipend increases are also larger than those seen at a number of universities with graduate student unions, such as the University of Michigan, Michigan State University, the University of Illinois, the University of Washington, and others.

(N.T. 121; Union Exhibit 3).

38. On March 27, 2019, Urban sent out an email to all eligible voters in STEM-related departments that read, in part:

Union research performed while in the bargaining unit might not count towards academic milestones, including dissertations.

Under a union, students not in the bargaining unit (e.g. fellows and trainees) might not be eligible to teach or guest lecture in classes for educational experience.

The union could require separate assistantship research from dissertation research. As a result, you may have to perform more research to meet current academic requirements.

(Union Exhibit 18).

39. Urban specifically provided the Temple example because Temple is the only other public university in Pennsylvania that has a graduate-student union, and thus was most relevant. (N.T. 374).

40. On April 4, 2019, Urban sent out an email to all eligible voters that read, in part:

Under Pennsylvania law, there are only three issues that the University can bargain over:

stipend, benefits, and working conditions. That's it.

Despite claims you may have heard, the union cannot bargain over the University's budget, programs offered, admissions decisions, selection of students for academic appointments, how many academic appointments are offered, or class assignments.

In addition, the Pennsylvania Labor Relations Board and Pennsylvania courts have never defined what's covered under 'working conditions' for graduate students who teach and conduct research as part of their academic experience. We don't know how a union could affect research hours or other core components of the educational experience, because this is uncharted territory.

(N.T. 121; Union Exhibit 6).

41. From March 2019 through the election and beyond, the University maintained several Union-related web pages. Several of these web pages were set up in a manner where questions were laid out and if a visitor clicked them an answer would pop up below the question. Most of the University's Union-related emails sent out to all eligible voters linked directly to the Union-related web pages. (N.T. 122-24, 129-30).

42. From late March through the conclusion of the election, Urban and Provost Ann E. Cudd also sent out numerous emails linking to the University's Union-related webpages. (N.T. 121; Union Exhibits 4, 7, 8, 9, and 10).

43. For the period leading up to the election and throughout the conclusion of the election on April 18, 2019, the University maintained a Union-related web page titled "Collective Bargaining Basics" that included the following chart:

Union Can Bargain Over:	Union Cannot Bargain Over:
Stipends Benefits Working conditions* *The PLRB and Pennsylvania courts have never defined this for graduate students whose teaching and research are part of their academic training	Budget and allocation of funds Technology use Programs offered Management rights Selection of students for academic appointments Direction of students with academic appointments Standards of service Admissions decisions Academic requirements and academic decisions The number of academic appointments Programmatic decisions

(N.T. 129; Union Exhibit 11).

44. For the period leading up to the election and throughout the conclusion of the election on April 18, 2019, the University maintained a Union-related web page titled "Frequently Asked Questions" that listed multiple questions each of which could be clicked by a visitor so that an answer would pop up below the question. One of the sections of the web page was titled "Are you Covered and What Can be Bargained?" Within this section, one of the questions was: "What can be bargained?" When this question was clicked on the following answer would pop up:

A union can bargain over stipends, hours, and working conditions
Unions cannot bargain over management rights including: the selection and direction of personnel, standards of service, budget, technology use, employee counts, and the programs offered.

(Union Exhibit 12).

45. Another section on this same web page read: "What Could Change as a Result of Collective Bargaining?" One of the specific questions under this section was: "Could a union impact my ability to work with my faculty advisor to tailor my graduate school experience?" When this question was clicked on the following answer would pop up:

Yes. Unions negotiate contracts on behalf of the entire bargaining unit- not on behalf of its individual members. A union may limit the ability of the University and its faculty to work directly with graduate students and agree upon individualized conditions, accommodations or experiences that are the hallmarks of a graduate education.

(Union Exhibit 12).

46. Another specific question under this same section of the web page was: "Will a union give students more say in how decisions about academic appointments are made?" When this question was clicked on the following answer would pop up:

Currently, students can work with their faculty advisor and their program to make decisions about their own academic appointments.

With a union, the University is not permitted to discuss academic appointments directly with students, and as a result, students lose the ability to have an individual say in their specific program when it comes to appointments. The union has the exclusive right to speak on the behalf of graduate students when it comes to academic appointments and assignments could be determined in ways that are less adaptive to individual student needs.

It's useful to note that the union cannot negotiate how many academic appointments the University offers.

(Union Exhibit 13).

47. Under this same section of the web page another specific question read: "Could a union result in students having to keep track of their hours?" When this question was clicked on the following answer would pop up:

Yes. A CBA could require students to track their hours, including lab hours. Students may also be asked to distinguish time spent on activities for an academic appointment versus academic research. For many graduate students, especially those in STEM fields, discerning between these two types of academic hours is not always possible.

(Union Exhibit 15).

48. Another specific question under this same section of the web page read: Will a union give me the right to decide what tasks are part of my academic appointment? When this question was clicked the following answer would pop up:

A union might seek to bargain over assignments, but the courts may have to decide whether they would have the ability to do so. The graduate union at Temple University does not have the right to bargain over assignments. Even the unionized faculty at Temple University do not have a say in how their classes are assigned.

(Union Exhibit 15).

49. For the period leading up to the election and throughout the conclusion of the election on April 18, 2019, the University maintained a Union-related web page titled "Fact Check" that included a section titled "A contract is a contract" that read as follows:

Most graduate student union contracts like Temple and U of Washington specify a maximum number of hours that students can work per week. Contract terms can't be circumvented by you or the University, despite what the Steelworkers have claimed. If you tried to work more than the delineated hours, the University would have to stop you or breach the agreement and potentially face consequences.

(Union Exhibit 14).

50. Part of the University's goal in sending out emails and setting up the web pages was to discourage eligible voters from voting for union representation. (N.T. 431).

51. The Union had the ability to communicate with all eligible voters prior to the election. (N.T. 187).

DISCUSSION

This is a consolidated matter over the Union's objections to the election for a unit of graduate students at the University which was held in April, 2019. The Union narrowly lost the election and subsequently filed objections to the conduct of the Board during the election (which was docketed under the case number for the original petition for representation: PERA-R-17-355-W) and also filed unfair practice charges against the University (which received a new docket number PERA-C-19-95-W). Although these two matters were consolidated for scheduling and logistical reasons, the legal analysis of the Union's claims against the Board on the one hand and the University on the other hand are distinct.

Alleged Misconduct by the Board

As a general principle, the Board will not lightly overturn the results of an election conducted by its agents:

Otherwise, the choice already made by a majority of affected employes would be set aside and their right to collective bargain, if they chose to exercise it, would have to be postponed. To set aside an election on less than adequate grounds would enable any losing party routinely to seek a second chance to convince employes of their mistake. Such a policy might well lead to repeated attempts to impeach the results of an election.

Woodland Hills School District, 13 PPER ¶ 13298 (Final Order, 1982).

With respect to the Union's objections to Board conduct of the election, the controlling case on this issue Kaolin Mushroom Farms, Inc. v. PLRB, 702 A.2d 1110 (Pa. Commw. Ct. 1997) ("Kaolin"). In Kaolin, the Commonwealth Court adopted numerous federal court and NLRB decisions to set the following legal standard for challenging based on misconduct by the Board. The theoretical concept of laboratory conditions must be realistically applied and the Board has broad discretion to determine whether the circumstances of the election are sufficiently close to laboratory conditions such that the voters were able to exercise free choice in their decision. Id. at 1116; Montgomery County v. PLRB, 769 A.2d 554 (Pa. Cmmwlth. 2001). The party challenging an election carries a heavy burden: to show by specific evidence not only that improprieties by the Board occurred, but also that they interfered with employees' exercise of free choice to such an extent that they materially affected the election results. Kaolin, supra. An indispensable part of asserting a successful challenge to a representation election is to establish that, but for the alleged objectionable conduct or procedural irregularities, the result of the election would have been different. Id. However, the cumulative impact of several incidents may not be used to turn a number of insubstantial objections to an election into a serious challenge. Id.

Turning to this matter, in its Objections to the PLRB's Conduct During an Election, the Union writes:

On April 15-18, 2019 during the entirety of the Election, the agents of the PLRB who conducted the Election engaged in conduct which interfered with the rights of public employes under PERA to a free and uncoerced election by knowingly allowing the Employer's Election Watcher (all of whom were Employer supervisors seen by employees as closely aligned with management) to keep an independent list of every person who voted during the election. . . .

It is undisputed that the Board in this election allowed the University watchers to keep a list of who voted at the ballot table. As noted by the Union in its Brief, it is also clear that the NLRB generally prohibits such a practice.¹ Notwithstanding NLRB decisions, it is also undisputed that neither the PLRB nor Pennsylvania courts have held that keeping a list is prohibited. See Centre County, 11 PPER ¶ 11050 (Decision and Order, 1980) ("The second allegation suggests that this Board's long standing policy of permitting poll watchers to keep a running tally of the number and names of voters during an election is improper We have not heretofore followed NLRB policy in this regard, and we shall therefore not set aside the results of the election because the poll watchers' conduct in the instant case was in conformity with this Board's precedent.").

The PLRB has commonly allowed parties to an election to keep voter lists during the election. I will not adopt and apply NLRB precedent to overturn regular and common Board practice that the University relied on during the election. Even if I adopted and applied NLRB precedent, and found that allowing the University to keep an independent list of voters was misconduct by the Board, there is insufficient evidence in this record to support the follow-up conclusion that the misconduct interfered with employes' exercise of free choice to such an extent that they materially affected the election results. The record shows that at most one eligible voter left the voting area without voting and there is no other evidence in

¹The Union cites: Sound Refining, Inc., 267 NLRB 1301 (1983); Belk's Dep't Store of Savannah, Ga., 98 NLRB 280, 281 (1952) ("[i]n the interest of free elections . . . it is the policy of the [NLRB] to prohibit anyone from keeping any list of persons who have voted, aside from the official eligibility list used to check off the voters as they receive their ballots."); Masonic Homes of California, Inc., 258 NLRB 41, 48 (1981) (ordering a new election when an election observer visibly wrote down names of voters in the polling area); Cross Pointe Paper Corp., 330 NLRB 658 (2000) (union observer was openly keeping a list of who he thought voted yes and no in view of voters and the NLRB set aside the election results); Piggly-Wiggly, 168 NLRB 792 (1967) (setting aside election results and ordering a new election when union representatives stood near the polling area and kept a list of eligible voters and visibly tracked who entered the polling area.)

this record showing that any other voter was restricted in their ability to vote. As there is no evidence in this record that any eligible voters were intimidated or threatened when they saw that an election watcher was keeping a list of voters, I conclude that the Board's policy of allowing the University to keep a list of independent voters did not materially interfere with eligible voters' franchise.

The Union also objects to the Board acceptance of certain University employees as election watchers. As fully discussed below in the context of an unfair practice by the University, the record in this matter shows that the University's election watchers were not in any way supervisors of eligible votes or known to be closely related to management. Allowing them to be watchers was not misconduct by the Board.

Continuing with the Union's objections to the PLRB's conduct, the Union writes in its Objections:

On April 15-18, 2019 during the entirety of the Election the agents of the PLRB who conducted the Election engaged in conduct that interfered with the rights of public employes under PERA to a free and uncoerced election by using inconsistent practices in checking voters IDs. The procedure for asking for IDs carried throughout the Election, but there appeared to be a disproportionate emphasis on requesting IDs from International Graduate Students. . . . Even if unintentional, the appearance to multiple voters and to Union observers was that International Graduate Students were being singled out in an intimidating manner. . . ."

The record is clear in this case that the Board did apply inconsistent methods for checking IDs during the election. On the first two days of the election, April 15 and 16, Board employes asked for someone's name as they approached the ballot area to find that name on the eligibility list. Board employes then sometimes asked to see the ID of a voter when they had trouble finding the voter's name on the eligibility list. PLRB agents often had trouble with the spelling of some eligible voters' names. The names they had trouble with were often of visibly Hispanic, Asian or Middle Eastern background. Starting on Tuesday afternoon, and for the last two days of the election, April 17 and 18, Bachy told all Board employes to just ask for everyone's ID as they approached. The reason Bachy chose this method is because it was easier since the University IDs had large, printed names that were easy to see and just looking at the IDs was faster than asking for a name and asking for a spelling of a name. I do not find that the above actions by the Board were misconduct. The procedure followed by the Board with respect to IDs, while not perfect, was sufficiently close to laboratory conditions such that the voters were able to exercise free choice in their decision. The fact that Board employes initially seemed to be asking for IDs from apparently-foreign students is understandable due to their required task of matching spoken names to written names on a list. I do not infer any discriminatory animus on the part of Board employes. Furthermore, the

Board's reasons for altering the policy mid-election was sound and did not interfere with any voter's ability to freely vote.

As above, the record shows that at most one eligible voter left the voting area without voting and there is no other evidence in this record showing that any other voter was restricted in their ability to vote. Therefore, I conclude that no eligible voter's right to vote was interfered with by the Board's ID policy.

Conclusion with Respect to the Alleged Misconduct by the Board

I therefore conclude that there is no evidence in this record that the Board committed any misconduct and also conclude that there is no evidence that any eligible voters' franchise was interfered with by Board policies to such an extent as to materially effect election results.

The University's Alleged Unfair Practices

With respect to the Union's unfair practice charges against the University, the analysis is different from the analysis regarding allegations of Board misconduct as discussed above. In the case of an unfair practice by a party to an election, the innocent party need not prove that the unfair labor practice affected the outcome of the election and the burden shifts to the charged party to establish that the election's outcome was not materially affected. Western Psychiatric Institute, 330 A.2d. 257 (Pa. Cmmwth. 1974); Woodland Hills, supra.; Philadelphia Joint Board, 41 PPER ¶ 55 (Final Order, 2010). The Board will set aside an election if it is reasonable to conclude that the unlawful conduct of a party to an election designed to coerce the election result tended to prevent the free formation and expression of the employes' choice. Kaolin Mushroom Farms, PERA-R-93-9-E (Order Directing Remand to Board Representative, 1996) ("Kaolin Remand Order"). Where the employer or the union engages in coercive unlawful behavior and subsequently prevails in the election, the Board will not further require the victim of unlawful conduct to demonstrate prejudice in the election outcome and a new election is to be ordered to remedy any such unfair practice. Id.; Western Psychiatric, supra.; Central Bucks School District, 33 PPER ¶ 33082 (Proposed Decision and Order, 2002).

Generally, an employer commits an unfair practice within the meaning of section 1201(a)(1) of the Act if it engages in conduct that has a tendency to coerce employes in the exercise of their rights guaranteed under the Act. Clarion County, 32 PPER ¶ 32165 (Final Order, 2001). Section 401 of the Act expressly provides that employes have the right "to bargain collectively through representatives of their own free choice[.]" 43 P.S. § 1101.401.

In this matter, the Union alleged in its Specification of Charges twelve specific charges against the University with respect to the election. In its Brief, the Union consolidated its charges and I will address them as they are presented in the Union's Brief. The Union first argues that the University's decision to use supervisors as election watchers is an unfair practice warranting a new election. Section 95.52 of the PLRB's Rules and Regulations states:

Each party to the election will be entitled to be represented by one watcher at each polling place or by additional watchers as the parties may agree, subject to such limitations as the Board or its duly authorized agent may prescribe. Watchers for all parties shall be employees eligible to vote. However, if the employer is unable to find an individual on the list of eligible voters who is willing to serve as a watcher, the employer may choose a nonsupervisory or other appropriate person. If the unit includes supervisors, the parties may use as watchers persons who function at the same level of supervision.

34 Pa. Code § 95.52. The Union argues that "Here, it is undisputed that each of the four Watchers selected by the University and used throughout the election were admittedly supervisors, which the Union objected to, and which was inconsistent with "PLRB policy." (Union's Brief at 17.) I disagree. The record is clear that the University's four watchers had absolutely no role supervising any eligible voters.

The Union further argues:

Following the Court of Common Pleas decision in Washington Township Municipal Authority, the employer appealed to the Commonwealth Court, which again upheld the decision, stating: "the Board has routinely prohibited management level employees from acting as watchers in representation elections so that the Board may conduct these elections free from the possible coercive effect of the presence of an individual closely associated with management." Washington Township Municipal Authority v. PLRB, 21 PPER ¶ 21051 (Pa. Commw. Ct. 1990). Likewise, in Chester County, the PLRB held that it was not improper for the employer to be prohibited from using its manager of personnel as an election watcher. Chester County, 20 PPER ¶ 20135 (Final Order, 1989). As the PLRB explained, "[t]he Board has previously prohibited persons closely associated with management from serving as watchers in a representation election." Id., citing McKeesport Area School Dist., 3 PPER ¶ 48 (Order and Notice of Election, 1973); Washington Township Municipal Authority, 19 PPER ¶ 19073 (Final Order, 1988), aff'd, 20 PPER ¶ 20031 (Court of Common Pleas of Franklin County, 1988). The PLRB further explained:

[t]he purpose of prohibiting such persons from acting as watchers in an election is so that the Board may conduct representation elections in an air free of the possible coercive effect of the presence of those individuals. The

requirement that the watcher be a non-authority figure is to avoid the impression that the employees are casting their ballots under the watchful eye of the employer.

Chester County, 20 PPER ¶ 20135.

(Union's Brief at 19.) I conclude from this record that the University's watchers were not "closely associated with management". Importantly, none of the watchers were known or recognized by the Union's watchers. There is also no additional evidence in this record that they were known or recognized by any eligible voter. The watchers also do not participate in forming any policies with respect to graduate students. I therefore conclude the University did not commit an unfair practice pursuant to Section 1201(a)(7) with respect to its watchers.

The Alleged Tracking of Voters by the University

The Union next alleges that the University committed an unfair practice through its open tracking of voters during the Election. The Union argues:

The University committed an unfair labor practice by interfering, restraining, or coercing employees in the exercise of their right to vote for or against the Union in the representation election by keeping an independent list tracking every person who voted in the election, and then by creating the impression of surveillance by telling a significant number of graduate students that the University knew how many of them voted during the first two days of the election, thereby, creating the widespread "impression that the employees are casting their ballots under the watchful eye of the employer." Chester County, 20 PPER ¶ 20135.

(Union's Brief at 29-30.) In particular, the Union argues the following with respect to the University's actions:

Finally, the Department Chair of Chemical Engineering [Steven Little] sent an email to graduate students in his department the morning of April 17, 2019, before the polls opened for the third day of the election, making it clear he was aware of how many eligible voters in the School for Engineering had actually voted during the first two days of the election. . . . The email states, in part:

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.

. . . Later that day, the president of EGSO, a University-sponsored group, sent an email to graduate students in the School of Engineering indicating that "[a]s of this morning, only approximately 30% of eligible engineers had voted." . . .

Even if potential voters had not been aware that the list was being kept in the polling area, the emails made it apparent that agents of the University were keeping track of who voted.

(Union's Brief at 27-28.) (Citations omitted.) I agree with the Union and find that the email by Little to be an unfair practice by the University under Section 1201(a) (1) of the Act with respect to the election because it created the impression of close monitoring by the University by telling a number of graduate students that the University knew exactly who voted during the first two days of the election. In other words, the email from Little had the effect of expressing to the eligible voters in the Chemical Engineering Department that their votes were under close scrutiny and observation by the management of the University including the Chair of their department, the author of the email. I infer from the record that the Little email shows that the University agents were precisely tracking voters by department during the election and shared that information directly with Little and others. This inference is supported by the fact that it is clear from University's list (PLRB Exhibit 6) that University watchers kept daily totals of the number of eligible voters who had voted. The inference that University agents were sharing voting numbers during the election is also directly supported by the email from the President of the EGSO, which also contains a reference to the number of voters that had voted from the School of Engineering. I also infer that Little, as Department Chair for Chemical Engineering, would appear to serve as a supervisory or managerial role to eligible-voter graduate students in that department. The problem is not that the University kept a list: the unfair practice is what the University did with that information.

While a review of Board cases does not show any cases with these exact facts, I find that the Board's cases on election surveillance to be analogous. The Board will find an employer in violation of Section 1201(a) (1) of the Act if it surveils employees engaged in organizational activity. Western Pennsylvania Hospital, 3 PPER 221 (Nisi Decision and Order, 1973). The Board has found that the mere presence of a supervisor within a polling area might intimidate voting participants and destroy the laboratory conditions essential for fair representation. McKeesport Area School District, 3 PPER 48 (Board Order, 1973). This case is analogous as, even though Little was not at the polling place, his email gave the impression that the polling place was under such close observation and scrutiny by University management that intimate details of the voting were immediately known by and shared by University management during the election and then used in election communications with eligible voters. It is expressly the

Board's Policy "to avoid the impression that employees are casting their ballots under the watchful eye of the employer." Chester County, 20 PPER ¶ 20135 (Final Order, 1989). Little's email showed concretely to eligible voters that they were under the watchful eye of the employer.

In finding that the University committed an unfair practice I am persuaded by National Board law on the subject which has found that creating the impression of surveillance is unlawful. United Charter Service, 306 NLRB 150 (1992) ("In determining whether a respondent has created an impression of surveillance, the Board applies the following test: whether employes would reasonably assume from the statement in question that their union activities have been placed under surveillance."); Tres Estrellas de Oro, 329 NLRB 50 (1999) ("The Board's test for determining whether an employer has created an impression of surveillance is whether the employee would reasonably assume from the statement in question that his union activities had been placed under surveillance.")

The University's Alleged Coercive Statements

The Union next argues that the University committed unfair practices by sending out emails and maintaining websites which contain "unlawful threats that under both PLRB and NLRB standards would serve as the basis for setting aside the election results and directing a new election." (Union's Brief at 30.)

In Upper Merion School District, 3 PPER 386 (Nisi Decision and Order, 1973), the Board expressed its rule for communications by a party in the explicit context of an election. The Board writes:

In the cases that have been previously decided, the Board has adopted the logic contained in the National Board's Hollywood Ceramics Co., Inc., 140 NLRB 221, 224 (1964) which stated:

We believe that an election should be set aside only where there has been a misrepresentation or other similar campaign trickery, which involves a substantial departure from the truth, at a time which prevents the other party or parties from making an effective reply, so that the misrepresentation, whether deliberate or not, may reasonably be expected to have a significant impact on the election. However, the mere fact that a message is inartistically or vaguely worded and subject to misinterpretation will not suffice to establish such misrepresentation as would lead us to set the election aside. Such ambiguities, like extravagant promises, derogatory statements about the other party, and minor distortions of some facts, frequently occur in communications

between persons. But even where a misrepresentation is shown to have been substantial the Board may still refuse to set aside the election if it find upon consideration of all the circumstances that the statement would not likely to have had a real impact on the election. (Emphasis added.)

The Board, in its decisions on this issue has intended to make it clear that the alleged misstatements must constitute substantial departure from the truth before the Board will find an unfair practice. Furthermore, in determining whether the accused party is guilty of an unfair practice, the Board must balance the rights of the parties to express themselves on the issues and the rights of the voters to be free from coercive influence. Additionally, the Board does not intend to become a censor of noncoercive campaign propaganda, but rather will leave the task to the common sense and intelligence of the voters.

Upper Merion School District, supra. See Pennsylvania Social Services Union, 11 PPER ¶ 11075 (Nisi Decision and Order, 1980); Monongahela Valley Hospital, Inc., 3 PPER 374 (1973); Unionville-Chadds Ford School District, 3 PPER 178 (Nisi Decision and Order, 1973). The Board enunciated a similar standard in Williamsport Area Community College, 8 PPER 143 (Nisi Decision and Order, 1977):

The Board is of the opinion that an election should be set aside only where there has been misrepresentation or other similar campaign trickery which involves a substantial departure from the truth. However, the mere fact that a message is vaguely worded and subject to different interpretation will not suffice to establish such misrepresentation as would require an election to be set aside. To set an election aside, there must be misrepresentation which has substantial impact upon an election. Obviously, in any campaign exaggeration, inaccuracies, half truths and name callings occur and although they are not condoned, they will not be grounds for setting aside elections.

8 PPER at 145.

The NLRB's test, which is cited in Pennsylvania case law, for determining when employer statements are threats is set forth in the historic Gissel Supreme Court case:

An employer is free to communicate to his employees any of his general views about unionism or any of his specific views about a particular

union, so long as the communications do not contain a threat of reprisal or force or promise of benefit. He may even make a prediction as to the precise effects he believes unionization will have on his company. In such a case, however, the prediction must be carefully phrased on the basis of objective fact to convey an employer's belief as to demonstrably probable consequences beyond his control or to convey a management decision already arrived at to close a plant in case of unionization. If there is any implication that an employer may or may not take action solely on his own initiative for reasons unrelated to economic necessities and known only to him, the statement is no longer a reasonable prediction based on available facts but a threat of retaliation based on misrepresentation and coercion, and as such without the protection of the First Amendment.

NLRB v. Gissel Packing Co., 395 U.S. 575, 618-19 (1969). See Berks v. PLRB, 79 A.3d 8, 18 (Pa. Commw. Ct. 2013) (citing Gissel); PLRB v. Stairways, Inc., 425 A.2d 1172, 1175 (Pa. Commw. Ct. 1981) (citing Gissel).

I turn now to statements by the University that the Union believes to be unfair practices. The Union argues:

One of the biggest threats the University made was if graduate student employees voted to form a union, the University would freeze their wages. This was done most clearly on April 5, 2019, less than two weeks before the election, when Urban sent an email to all eligible voters that read, in part:

Again: Nothing is guaranteed.

There is no guarantee that the union will obtain improvements in any area. What we do know is that while a contract is being negotiated - which typically takes months or more than a year - under PA law, stipends would be frozen under "status quo" and annual stipend increases would not occur. For reference; The University has increased stipends by more than 13% over the last five years.

[Union Ex. 5].

(Union's Brief at 30.) (Emphasis in original.) I do not find this statement by the University to be an unfair practice as the statement is not a substantial departure from the truth and was made at a time which allowed the Union to make an effective reply. The truth of the statement is supported by the fact that the PLRB has held that

maintenance of the status quo during contract negotiations does not include the continuation of periodic wage adjustments. Upper Leacock Township, 43 PPER ¶ 72 (Final Order, 2011) ("In any event, federal labor law differs from our law in that the National Labor Relations Board follows the dynamic status quo that mandates implementation of announced wage increases even after the certification of an exclusive bargaining representative. This Board and our courts have consistently adhered to the static status quo, which freezes wages pending negotiation of a collective bargaining agreement."). This statement was also made on April 5, 2019, which is approximately ten days before the election. This is enough time for the Union to have made a response.

The Union next argues the following:

Urban also sent an email implying if graduate student employees voted to form a union they would end up negotiating lower wages than they would have otherwise received. On March 29, 2019, Urban sent an email to all eligible voters that read, in part:

Over the last five years, stipend levels for Pitt graduate student TAs have increased by 13.2 percent, which is faster than the rate of inflation (7.4 percent), and more than increases in Pitt faculty and staff salaries during this time period. These stipend increases are also larger than those seen at a number of universities with graduate student unions, such as the University of Michigan, Michigan State University, the University of Illinois, the University of Washington, and others.

[Union Ex. 3].

"Union's Brief at 35." I do not find this statement by University to be an unfair practice as the statement is not a substantial departure from the truth and was made at a time which allowed the Union to make an effective reply. The Union has not asserted that any part of this March 29, 2019, email is false and the record does not support a conclusion that anything in it is false. Certainly nothing in this record would support a conclusion that anything in this message is a "substantial departure from the truth". This statement was also made on March 29, 2019, which is approximately sixteen days before the election. This was enough time for the Union to have made a response.

The Union continues its argument against the communications by the University:

On March 27, 2019, Urban sent out an email to all eligible voters in STEM-related departments that read, in part:

Union research performed while in the bargaining unit might not count towards academic milestones, including dissertations.

Under a union, students not in the bargaining unit (e.g. fellows and trainees) might not be eligible to teach or guest lecture in classes for educational experience.

The union could require separate assistantship research from dissertation research. As a result, you may have to perform more research to meet current academic requirements.

[Union Ex. 18].

The Employer also maintained several anti-Union webpages focusing on these same types of threats of more onerous working conditions, including one titled **Frequently Asked Questions** that listed multiple questions, each of which could be clicked by a visitor so that an anti-Union answer would pop up below the question. One Section on this same web page read: **What Could Change as a Result of Collective Bargaining?** One of the specific questions under this section was: **Could a union result in students having to keep track of their hours?** When this question was clicked the following answer would pop up:

Yes. A CBA could require students to track their hours, including lab hours. Students may also be asked to distinguish time spent on activities for an academic appointment versus academic research. For many graduate students, especially those in STEM fields, discerning between these two types of academic hours is not always possible.

[Union Ex. 15].

(Union's Brief at 36-37.) I do not find these statements by University to be an unfair practice as the statements are not a substantial departure from the truth and were made at a time which allowed the Union to make an effective reply. Furthermore, the predictions in these statements about the probable consequences of unionization are carefully phrased and drawn on the basis of objective fact. There is no evidence in this record that the statements above are false or even a substantial departure from the truth. Moreover, the record shows that Urban reasonably relied on his interpretation of the Temple

University graduate-student unit in interpreting a probable effect of unionization. (N.T. 373-374).

The Union continues its argument that University statements were unfair practices:

Another specific question under the **What Could Change as a Result of Collective Bargaining?** section of the web page was: **Will a union give students more say in how decisions about academic appointments are made?** When this question was clicked the following answer would pop up:

Currently, students can work with their faculty advisor and their program to make decisions about their own academic appointments.

With a union, the University is not permitted to discuss academic appointments directly with students, and as a result, students lose the ability to have an individual say in their specific program when it comes to appointments. The union has the exclusive right to speak on the behalf of graduate students when it comes to academic appointments and assignments could be determined in ways that are less adaptive to individual student needs.

It's useful to note that the union cannot negotiate how many academic appointments the University offers.

[Union Ex. 13].

A similar question under this Section of the webpage was: **Could a union impact my ability to work with my faculty advisor to tailor my graduate school experience?** When this question was clicked the following answer would pop up:

Yes. Unions negotiate contracts on behalf of the entire bargaining unit—not on behalf of its individual members. A union may limit the ability of the University and its faculty to work directly with graduate students and agree upon individualized conditions, accommodations or experiences that are the hallmarks of a graduate education.

[Union Ex. 12].

(Union's Brief at 37-38.) I find the sentence "With a union, the University is not permitted to discuss academic appointments directly with students, and as a result, students lose the ability to have an individual say in their specific program when it comes to appointments" to be a substantial departure from the truth, not carefully drawn, and not based on objective fact. Nothing in the record supports the University's *definitive conclusion* that graduate students within the bargaining unit would be prohibited from speaking directly to University agents about academic appointments (i.e. job placements). Nothing in the record supports the University's *definitive conclusion* that graduate students would lose the ability to have an individual say in their specific program if the union prevailed in the election. The impact of this definitive prediction of union interference in a graduate student's ability "to have an individual say in their specific program when it comes to appointments" is magnified by its inclusion with other conditional statements predicting a negative impact of unionization on graduate students. Based on the record as a whole, I find that this misstatement would grossly impact and coerce potential voters about the impact of a unionization of graduate students at the University.

Furthermore, this statement was maintained on a University webpage for an extended period of time, including through the conclusion of the election on April 18, 2019, and referenced in numerous University emails to eligible voters. The maintenance of this statement on the University webpage through the entire election defeats any ability of the Union to respond or rebut effectively. Unlike statements made through traditional means such as letters to eligible voters, or management speeches during informational sessions, made well before an election with enough time to be thoughtfully considered by an eligible voter and potentially rebutted by union communications, the contents of the University's webpages, including the statements in question, were continuously published anew each day and were available to the entire universe of eligible voters immediately before the election and through-out the entire election, presumably when interest by eligible voters would be intense. See Unionville-Chadds Ford School District, supra. (" . . . the Board will not allow misrepresentations to be made to the employes at that eleventh hour which will prevent a fair election by informed employes."). These statements were not only made at the eleventh hour, but also the proverbial twelfth hour: during the actual election.

I further conclude, based on the record as a whole², that this misstatement would reasonably have an impact on the election because it was made in the middle of an extremely close election and the issue, a graduate student's individual say in his or her academic appointment, is of core importance to a graduate student whose academic career is, in part, dependent on the academic appointments he or she participates in as a graduate student. The University's statement at Union Exhibit 13 is therefore an unfair practice under Section 1201(a)(1) of the Act.

² My conclusion is also informed by the record before me in the earlier proceeding in PERA-R-17-355-W including, specifically, ODSEL Findings of Fact 11, 12, 13, 15.

The Union continues its argument that University statements were unfair practices:

On April 4, 2019, Urban sent an email to all eligible voters that read, in part:

Under Pennsylvania law, there are only three issues that the University and Union can bargain over: stipend, benefits, and working conditions. That's it.

Despite claims you may have heard, the union cannot bargain over the University's budget, programs offered, admissions decisions, selection of students for academic appointments, how many academic appointments are offered, or class assignments.

In addition, the Pennsylvania Labor Relations Board and Pennsylvania courts have never defined what's covered under 'working conditions' for graduate students who teach and conduct research as part of their academic experience. We don't know how a union could affect research hours or other core components of the educational experience, because this is uncharted territory.

[Union Ex. 6].

In an almost identical threat, the University maintained an anti-Union web page titled **Collective Bargaining Basics** that included a chart listing items the Union could or could not bargain over.

(Union's Brief at 38-39.) The chart referenced by the Union is the following:

Union Can Bargain Over:	Union Cannot Bargain Over:
Stipends Benefits Working conditions* *The PLRB and Pennsylvania courts have never defined this for graduate students whose teaching and research are part of their academic training	Budget and allocation of funds Technology use Programs offered Management rights Selection of students for academic appointments Direction of students with academic appointments Standards of service Admissions decisions

	Academic requirements and academic decisions The number of academic appointments Programmatic decisions
--	---

(Union Exhibit 11.) I find these statements by the University to also to be a substantial departure from the truth, not carefully drawn, and not based on objective fact. First, in the case of the chart at Union Exhibit 11, these statements glaringly contain the following essential contradiction: The statements claim that the PLRB and Pennsylvania courts have never defined what constitutes bargainable working conditions in the case of graduate students *while at the same time declaring definitively* that certain broad and general topics such as "selection of students for academic appointments", "direction of students with academic appointments", "admissions decisions", and "academic requirements and academic decisions" cannot be bargained. The University's definitive declarations that these topics cannot be bargained are wholly at odds with the proximate statement in the immediately preceding column that the PLRB and Pennsylvania courts have not yet determined or defined bargainable working conditions in the case of graduate students. A statement so paradoxical cannot be true and is a substantial departure from the truth.

Urban's April 4 email at Union Exhibit 6 is a similarly incongruous enigma and substantial departure from the truth. On the one hand Urban definitively claims that a prospective union cannot bargain over "admissions decisions", "selection of students for academic appointments", or "class assignments" while on the other hand claiming that "the Pennsylvania Labor Relations Board and Pennsylvania courts have never defined what's covered under 'working conditions' for graduate students who teach and conduct research as part of their academic experience. We don't know how a union could affect research hours or other core components of the educational experience, because this is uncharted territory." These statements are completely at odds. It is duplicitous to claim definitively that a union may not bargain over certain topics while at the same time recognizing that the Board has never had an opportunity to define bargainable topics in the context of graduate-student employes.

Based on the record as a whole, I find that these misstatements would grossly impact and coerce potential voters about the potential impact of a unionization of graduate students at the University. The chart was maintained on a University webpage for an extended period of time through the conclusion of the election on April 18, 2019, and referenced in numerous University emails to eligible voters. Urban's email was sent on April 4, 2019. While the Union did have an opportunity to reply to Urban's email of April 4, 2019, the maintenance of the chart (Union Exhibit 11) on the University webpage through the entire election defeats any ability of the Union to respond effectively. (I here follow the same reasoning as I followed in the discussion of Union Exhibit 13 above.) I further conclude, based on the record as a whole, that this misstatement in Union Exhibit 11 would reasonably have an impact on the election because the misstatements concern certain topics which would have the tendency to impact whether an eligible voter would or would not support unionization during an

extremely close election. I am persuaded by the following argument by the Union with respect to these statements:

The University's message is clear—if you vote to form a union, you will not be able to bargain over much of anything except maybe stipend rates, and we plan to freeze those and will likely take a position that your raise rates should be lower than they are without a union or collective bargaining. These threats include no explanation of the give and take of bargaining. They simply state as fact the alleged limitations over what the Union can bargain over. The threatened limitations are legally inaccurate, which implies that the University is threatening that it will not bargain over mandatory subjects, such as the allocation of funds to pay for stipends or the use of and access to technology necessary for performing the work of most graduate assistants. It even more overtly implies that the University will not even consider discussing permissive subjects of bargaining.

(Union's Brief at 40.) The University's statement at Union Exhibit 11 is therefore an unfair practice under Section 1201(a)(1) of the Act.

Finally, the Union highlights the following three statements by the University which appeared on the University's webpage:

A union can bargain over stipends, hours, and working conditions
Unions cannot bargain over management rights including: the selection and direction of personnel, standards of service, budget, technology use, employee counts, and the programs offered.

[Union Exhibit 12].

A union might seek to bargain over assignments, but the courts may have to decide whether they would have the ability to do so. The graduate union at Temple University does not have the right to bargain over assignments. Even the unionized faculty at Temple University do not have a say in how their classes are assigned.

[Union Exhibit 16].

Most graduate student union contracts like Temple and U of Washington specify a maximum number of hours that students can work per week. Contract terms can't be circumvented by you or the University, despite what the Steelworkers have claimed. If you tried to work more than the delineated hours, the University would have to

stop you or breach the agreement and potentially face consequences.

[Union Exhibit 14].

I do not find these statements to be substantial departures from the truth and find them to be carefully phrased and based on objective fact.

Conclusion with Respect to the University's Alleged Unfair Practices

Based on the above and the record as a whole, I find that the University committed unfair practices in violation of Section 1201(a)(1) of the Act. Specifically, I find the following coercive acts and statements to be unfair practices:

1. The Steven Little email at Union Exhibit 20.
2. The University statement at Union Exhibit 13.
3. The University statement at Union Exhibit 11.

The University's Burden to show the Election was not Materially Affected

As discussed above, an innocent party need not prove that the unfair labor practice affected the outcome of the election and the burden shifts to the charged party to establish that the election's outcome was not materially affected. Western Psychiatric Institute v. PLRB, 330 A.2d. 257 (Pa. Cmmwth. 1974); Woodland Hills, supra.; Philadelphia Joint Board, 41 PPER ¶ 55 (Final Order, 2010).

The University argues that the burden shift under Western Psychiatric is no longer good law and should not be applied:

The Union does not dispute this standard as it relates to its objections to the conduct of the election by the PLRB, but alleges that a different standard, one that shifts the burden to the University, should govern its unfair labor practices against the University, relying on the 1974 decision in W. Psychiatric Inst. & Clinic of Univ. of Pittsburgh of Com. Sys. Of Higher Ed. v. Com. Labor Relations Bd., 330 A.2d 257 (Pa. Commw. Ct. 1974) and the 1982 hearing examiner decision in Woodland Hills School Dist., 13 PPER 13214 (Hearing Examiner Decision, 1982), for the proposition that the objecting party need only prove that an unfair practice occurred, and then the burden shifts to the responding party to show that even if such conduct occurred, it did not materially affect the election. However, the cases on which the Union relies are more than thirty five years old and are not consistent with the language of PERA itself, which makes no reference to shifting the burden to the respondent to, in effect, prove a negative. The Kaolin and [Montgomery County, 769 A.2d 554 (Pa. Commw. Ct. 2001)] cases also make clear that

the Pennsylvania courts no longer apply the burden shifting approach of W. Psychiatric.

(University's Brief at 26-27.) However, the Board as recently as 2010 applied Western Psychiatric to an election case and upheld a Hearing Examiner's decision which applied the burden shifting analysis. Philadelphia Joint Board, 41 PPER ¶ 55 (Final Order, 2010); Philadelphia Joint Board 41 PPER ¶ 37 (Proposed Decision and Order) ("The legal standard for the Board's ordering a new election is that once the complaining party has proved an unfair practice, the burden shifts to the charged party to establish that the election's outcome was not materially affected."). The law under Western Psychiatric has not changed and will be applied here.³

Although the University argues that it has no burden under Western Psychiatric, it does assert, assuming *arguendo*, that its conduct had no effect on the outcome of the election. (University's Brief at 66-67.) The University's argument there overlooks, however, one dispositive fact: the election was extremely close. 1,387 voters were counted. Out of those 1,387 votes cast, the margin was only in favor of the University by a margin of 37 votes (712 to 675). The University did not show that the audience to its unfair practices discussed above was limited to a small subset of eligible voters such that the election could not have been affected. See Philadelphia Joint

³ This same argument was raised in Central Bucks School District, 33 PPER ¶ 33082 (Proposed Decision and Order, 2002). The Hearing Examiner in that case wrote:

Citing Kaolin Mushroom Farms, Inc. v. PLRB, 702 A.2d 1110 (Pa. Cmwlth 1997), *appeal dismissed as having been improvidently granted*, 554 Pa. 171, 720 A.2d 763 (1998), the District contends that no new election should be ordered by way of remedy because the Teamsters did not show that the outcome of the election was materially affected by the District's unfair practice. Kaolin Mushroom Farms holds that a party seeking a new election based on misconduct by the Board during an election has the burden of showing that such misconduct materially affected the election results. Misconduct by the Board is not at issue here, however; rather, an unfair practice by the District is. **Western Psychiatric Institute and Clinic, supra**, holds that a party committing an unfair practice has the burden of proving that the results of an election were not thereby affected in order to avoid the remedy of a new election. Because neither the District nor the Association established that the District's unfair practice did not affect the outcome of the election, a new election must be ordered by way of remedy.

Id. (Emphasis added.) Notably this case is after Montgomery County, 769 A.2d 554 (Pa. Commw. Ct. 2001), cited by the University.

Board, 41 PPER ¶ 55; Philadelphia Joint Board 41 PPER ¶ 37. Indeed, the University statements made at Union Exhibit 13 and at Union Exhibit 11 were available to be viewed by anyone in the world with internet access and the amount of eligible voters who viewed that content could have included a substantial number of the voting pool. It is reasonable to assume that more than 37 eligible voters may have viewed and been affected by such content. It is clear, under Western Psychiatric, that is the University's burden to show a limited number of eligible voters were affected and the University did not do so.

With respect to the Steven Little email at Union Exhibit 20, the University does argue that

Of the 46 eligible student voters in Chemical Engineering to whom the email was sent, twelve had already voted during the first two days and six did not vote. (Tr. 334-36). . . . Nevertheless, the potential impact on 28 voters out of more than 1,500 who voted does not justify setting aside the election, even if the Union had proven an unfair labor practice by the University, as it would not have altered the outcome of the election which was decided by more than 28 votes. (PLRB-4).

(University's Brief at 44.) The 28 voters remaining are less than the current margin of 37 voters, however the current margin of 37 voters does not include currently outstanding challenged voters which have not been canvassed. As such, the 28 potential votes affected by Steven Little's email may have been enough to cause a material difference in the election if the challenged votes are included.

On a whole, the University's coercive acts potentially affected a large enough pool of eligible voters for the affect on the election to be manifest due to the extreme narrowness of the result.

Conclusion and Remedy

Where the employer engages in coercive unlawful behavior and subsequently prevails in the election, the Board will not further require the victim of unlawful conduct to demonstrate prejudice in the election outcome and a new election is to be ordered to remedy any such unfair practice. Kaolin Remand Order, supra; Western Psychiatric, supra; Central Bucks School District, supra. The University committed unfair practices. The University prevailed in the election. Therefore, I order a new election.

CONCLUSIONS

The Hearing Examiner, therefore, after due consideration of the foregoing and the record as a whole, concludes and finds:

1. The University is a public employer within the meaning of Section 301(1) of PERA.
2. The Union is an employe organization within the meaning of Section 301(3) of PERA.

3. The Board has jurisdiction over the parties hereto.
4. The Board has not committed misconduct with respect to the election.
5. The University has **not** committed unfair practices in violation of Section 1201(a) (7) of PERA.
6. The University has committed unfair practices in violation of Section 1201(a) (1) of PERA.

ORDER

In view of the foregoing and in order to effectuate the policies of PERA, the Hearing Examiner

HEREBY ORDERS AND DIRECTS

that the University shall:

1. Cease and desist from interfering, restraining or coercing employees in the exercise of the rights guaranteed in Article IV of the Act.
2. Take the following affirmative action which the Hearing Examiner finds necessary to effectuate the policies of PERA:
 - (a) Post a copy of this Decision and Order within five (5) days from the effective date hereof in a conspicuous place readily accessible to the bargaining unit employees and have the same remain so posted for a period of ten (10) consecutive days;
 - (b) Furnish to the Board within twenty (20) days of the date hereof satisfactory evidence of compliance with this Decision and Order by completion and filing of the attached Affidavit of Compliance; and
 - (c) Serve a copy of the attached Affidavit of Compliance upon the Union.

IT IS HEREBY FURTHER ORDERED AND DIRECTED

that a new election is to be held in Case No. PERA-R-17-355-W and the University shall within twenty (20) days from the date hereof submit to the Board a current alphabetized list of the names and addresses of the employees eligible for inclusion in the unit set forth in the Order Directing Submission of Eligibility List dated March 7, 2019.

IT IS HEREBY FURTHER ORDERED AND DIRECTED

that in the absence of any exceptions filed pursuant to 34 Pa. Code § 95.98(a) within twenty (20) days of the date hereof, this decision and order shall become and be absolute and final.

SIGNED, DATED AND MAILED at Harrisburg, Pennsylvania, this
eighteenth day of September, 2019.

PENNSYLVANIA LABOR RELATIONS BOARD

STEPHEN A. HELMERICH, Hearing Examiner

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

UNITED STEEL, PAPER AND FORESTRY, :
RUBBER, MANUFACTURING, ENERGY, :
ALLIED INDUSTRIAL AND SERVICE :
WORKERS INTERNATIONAL UNION, AFL- :
CIO-CLC :
 :
 : Case No. PERA-C-19-95-W
 :
v. :
 :
 :
THE UNIVERSITY OF PITTSBURGH :
 :
 :

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

AFFIDAVIT OF COMPLIANCE

The University of Pittsburgh hereby certifies that it has ceased and desisted from its violation of Section 1201(a)(1) of the Public Employe Relations Act; that it has complied with the Proposed Decision and Order as directed therein; that it has posted a copy of the Proposed Decision and Order as directed therein; and that it has served an executed copy of this affidavit on the Union at its principal place of business.

Signature/Date

Title

SWORN AND SUBSCRIBED TO before me
the day and year first aforesaid.

Signature of Notary Public