COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

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

NISI ORDER OF DISMISSAL

On December 15, 2017, United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, AFL-CIO, CLC (Petitioner), filed a Petition for Representation with the Pennsylvania Labor Relations Board (Board), as amended on January 8, 2018, alleging that it represented thirty percent or more of all salaried and hourly graduate employe teaching assistants, teaching fellows, graduate student assistants and graduate student researchers employed by the University of Pittsburgh (Employer), and requesting that a hearing be scheduled and an Order be issued for an election to determine the exclusive representative for collective bargaining pursuant to the provisions of Section 603 of the Public Employe Relations Act (Act).

On January 25, 2018, the Secretary of the Board issued an Order and Notice of Hearing, directing a telephone pre-hearing conference on February 27, 2018, and scheduling a hearing on June 4 through June 8, 2018, if necessary. The hearing was necessary and was continued by the Board's Hearing Examiner at the request of the Employer and over the objection of the Petitioner. Eight days of hearing were held on October 1-5, October 30-31, and November 1, 2018, at which time all parties in interest were afforded a full opportunity to present testimony, cross-examine witnesses and introduce documentary evidence. Post-hearing briefs were filed by the Petitioner on December 24, 2018, and the Employer on January 25, 2019. The Petitioner also filed a reply brief on February 9, 2019.

On March 7, 2019, the Hearing Examiner issued an Order Directing Submission of Eligibility List (ODSEL) resolving all outstanding issues and finding 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. The Hearing Examiner directed the Employer to submit a list of names and addresses of the employes in the unit found appropriate. That list was received by the Board on March 18, 2019.

On March 29, 2019, the Board Representative issued an Order and Notice of Election directing an on-site secret ballot election take place on April 15, 16, 17 and 18, 2019, among the eligible voters in the unit as deemed appropriate in the ODSEL. The election was conducted, as directed, by a group of election officers assigned by the Board.

The results of the election were inconclusive in that one hundred and fifty (150) ballots were challenged by the Board agent because the voters' names were not on the eligibility list and three (3) ballots were challenged by the employer and the inclusion of those one hundred fifty three (153) votes could affect the outcome of the election. Thereafter, the parties stipulated that one hundred thirty-nine (139) of the challenged ballots should not be canvassed, leaving fourteen (14) challenged ballots in the election.

On May 2, 2019, pursuant to Sections 95.57 and 95.58 of the Board's Rules and Regulations, the Petitioner filed objections to the Board's conduct of the election and a Charge of Unfair Practices[1] seeking a new election. The Petitioner's objections to the Board's conduct of the election and the Charge of Unfair Practices were consolidated and assigned for a hearing. On September 18, 2019, the Hearing Examiner issued a Proposed Decision and Order (PDO). In the PDO, the Hearing Examiner concluded that the Board has not committed misconduct with respect to the election and that the Employer has not committed an unfair practice in violation of Section 1201(a)(7) of PERA. However, the Hearing Examiner concluded the Employer had committed unfair practices in violation of Section 1201(a)(1) of PERA. To remedy the unfair practices, the Hearing Examiner's proposed order directed a new election.

On October 7, 2019 and October 8, 2019, respectively, the Employer and Petitioner filed timely exceptions to the Hearing Examiner's Proposed Decision and Order. 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 Employer, the Board dismissed the exceptions in part and sustained them in part. The Board agreed with the Hearing Examiner's conclusion that an 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 Employer under Section 1201(a)(1) of PERA. Based on the Findings of Fact and review of the record evidence, the Board determined that Dr. Little's email could have affected a finite number of eligible voters, specifically 34 graduate assistants in the chemical engineering department. Because the votes of the 34 graduate assistants who received Dr. Little's email may or may not have affected the outcome of the election depending on the outstanding fourteen challenged ballots, the Board directed the canvassing of the challenged ballots to ascertain whether the Employer 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 (14) outstanding challenged ballots.

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

On October 29, 2020, a hearing was held on the validity of the challenged ballots.[2] 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 so that these six (6) challenged ballots could be canvassed.[3]

January 22, 2021, the Board Representative issued an Order Directing the Canvassing of Challenged Ballots, directing that the six challenged ballots of Patricia Campbell, Jianan Jian, Tianyu Zhao, Henrique Alberto Brittes Potter, Alireza Amiri Margavi and Ritesh Dinkar Pawar, be opened, canvassed and counted.[4] On February 3, 2021, the six challenged ballots were canvassed by an election officer assigned by the Board in accordance with the January 22, 2021 Order.

The Board Representative, from all matters and documents of record, makes the following:

FINDINGS OF FACT

That FINDINGS OF FACT numbers 1 through 30 inclusive, as set forth in the Order and Notice of Election dated March 29, 2019, are hereby affirmed and incorporated by reference herein and made a part hereof.

31. That the Board conducted an election, by secret ballot, on April 15, 2019; April 16, 2019; April 17, 2019; April 18, 2019; among the employes of the Employer within the heretofore-defined appropriate unit in accordance with the Order and Notice of Election issued March 29, 2019.

32. That the question voted on was whether the eligible employes in the appropriate unit wished to be represented by the United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, AFL-CIO, CLC, or whether said employes wished no representative.

33. That one thousand five hundred and forty (1,540) ballots were cast at the election.

34. That of the one thousand five hundred and forty (1,540) ballots, six hundred and seventy-five (675) ballots were cast in favor of representation by the United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International

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[2] During the proceedings on remand, the Petitioner filed a Motion with the Hearing Examiner for a New Election. On November 20, 2020, the Employer 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.

[3] The Hearing Examiner also concluded that Mohammed Alharbi, Salem Alkhateeb, Stephanie Ander, Joseph Gabriel, Jialin Hou, Rachael Richter, Michelle Spicer and Steven Suway were not eligible to vote and their eight (8) ballots should not be canvassed.

[4] Due to an office closure because of inclement weather, the canvassing of challenged ballots was rescheduled from February 1, 2021 to February 3, 2021.

Union, AFL-CIO, CLC; seven hundred and twelve (712) ballots were cast for No Representative; and one hundred fifty-three (153) ballots were cast by persons whose votes were challenged. Three (3) ballots were void.

35. That the original tabulation of ballots resulted in an inconclusive election because one hundred and fifty-three (153) ballots were challenged by the Board or the Employer, and those ballots could have affected the outcome of the election.

36. That the parties stipulated and agreed that Jianan Jian, Patricia Campbell and Tianyu Zhao were eligible to vote in the election.

37. That the parties stipulated that they disagree as to whether or not the challenged ballots of Stephanie Ander, Steve Suway, Salem Aikhateeb, Mohammed Alharbi, Joseph Gabriel, Jialin Hou, Rachel Richter, Michelle Spicer, Alireza Amiri Margavi, Ritesh Dinker Pawar and Henrique Alberto Brittes Potter should be canvassed.

38. That the parties stipulated that the remaining one hundred thirty-nine (139) challenged ballots should not be canvassed.

39. That on January 6, 2021 the Board Hearing Examiner issued an Order Returning the Matter to the Board Representative concluding 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 that these six (6) challenged ballots should be canvassed. The Hearing Examiner also concluded that Mohammed Alharbi, Salem Alkhateeb, Stephanie Ander, Joseph Gabriel, Jialin Hou, Rachael Richter, Michelle Spicer and Steven Suway were not eligible to vote and their eight (8) ballots should not be canvassed.

40. That after canvassing the challenged ballots, a recapitulation of the ballots cast in the election is as follows: six hundred seventy-seven (677) ballots were cast for representation by United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, AFL-CIO, CLC; seven hundred sixteen (716) ballots were cast for No Representative; and zero (0) ballots were cast by persons whose votes remain challenged. One hundred forty-seven (147) ballots were properly challenged and excluded from the vote count herein. Three (3) ballots were void or blank.

DISCUSSION

Based on the above Findings of Fact, the Board's August 21, 2020 Order Directing Remand to the Hearing Examiner for Further Proceedings, all other matters of record, and the canvassing of the six challenged ballots, the results of the Board conducted representation election are as follows: six hundred seventy-seven (677) ballots were cast for representation by United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, AFL-CIO, CLC; seven hundred sixteen (716) ballots were cast for No Representative. Thus, a majority of the valid votes cast in the election were for "No Representative" by a margin of 39 votes. Accordingly, on this record, the Employer has satisfied its burden under Western Psychiatric Institute, *supra.*, of establishing that the unfair practice affecting a finite number of 34 eligible voters did not affect the outcome of the Board's representation election in this matter.

Petitioner argues that for the 28 ballots that were cast by the graduate assistants in the chemical engineering department after they received Dr. Little's email, the Board must subtract 28 votes from "No Representative" and add those same 28 votes to be in favor of representation by Petitioner. Under Article IV of PERA, eligible voters have the statutory right to decide first and foremost whether or not to even go to the polls and cast a ballot. Thus, the Board stated in the Order Directing Remand to Hearing Examiner for Further Proceedings that "Dr. Little's statement in his April 17, 2019 email made directly to the graduate assistants during the election would have the tendency to coerce the graduate assistants in going to the polls or for whom to cast their secret ballot in the election" (emphasis added). It is reasonable to assume that the 28 engineering graduate assistants who cast ballots after Dr. Little's email were coerced from exercising their right not to vote and were coerced into going to the polls. It is further reasonable to subtract those 28 votes as presumably cast for "No Representative." On this record, however, it is 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. A finding of fact that the outcome of a representation election could have been affected by an unfair practice must be based on reasonable inferences from the evidence of record and may not be based on pure speculation of voter intent. *See* Shive v. Bellefonte Area Board of School Directors, 317 A.2d 311 (Pa. Cmwlth. 1974). Accordingly, on this record, to determine whether the outcome of the election could have been affected by the 28 voters who cast ballots after Dr. Little's email, the record supports subtracting 28 votes from "No Representative," but does not support adding 28 votes to the Petitioner. Accordingly, the potential tally of valid votes cast in the election would become 677 for representation by Petitioner, and 688 for "No Representative."

As for the six eligible voters who received Dr. Little's email and chose not to go to the polls to vote in the representation election, the reasonable inference from the record is that the Employer's unfair practice of Dr. Little's April 17, 2019 email coerced those six eligible voters from going to the polls and casting a secret ballot either for or against representation. For purposes of determining whether the outcome of the election could have been affected by the Employer's unfair practice on these six non-voters, those six potential votes should be added to the tally of votes cast for the objecting party, which here would be for representation by the Petitioner. Accordingly, the six graduate assistants who were coerced from voting are added as votes in favor of representation by Petitioner, and thus, the potential vote tally becomes 683 for representation by Petitioner and 688 for "No Representative."[5]

The Employer previously established on the record in this case that for purposes of the analysis under Western Psychiatric Institute, *supra*, the Employer's unfair practice involving Dr. Little's email had affected a finite number of 34 eligible voters in the chemical engineering department. The tally of the valid votes cast in the election on April 15, 16, 17 and 18, 2019, plus the opened and canvassed challenged ballots, resulted in "No

[5] A Board conducted representation election is determined by the number of valid votes cast in the election. Accordingly, removing the 28 votes from "No Representative" lessens the total number of valid votes casts in the election. Similarly, to account for the six non-voters, the number of valid votes casts would increase, and it is not necessary to subtract six valid votes from either "No Representative" or the Petitioner.

Representative" receiving the majority of votes cast by a margin of 39 votes. Indeed, factoring in all reasonable inferences of the coercive effects of Dr. Little's April 17, 2019 email on the 34 eligible voters, as found by the Board in the August 21, 2020 Order Directing Remand to the Hearing Examiner for Further Proceedings, the potential result of the election would have been 683 possible votes for representation by Petitioner, and 688 votes for "No Representative." As such, the Employer's unfair practice under Section 1201(a)(1) of PERA as found by the Board did not affect the results of the representation election among the graduate assistants in favor of "No Representative." *See* Western Psychiatric Institute, *supra.*

Accordingly, the Board Representative, after due consideration of the foregoing and the record as a whole, and more particularly in consideration of the election conducted on April 15, April 16, April 17, and April 18, 2019, and the canvassing of the challenged ballots on February 3, 2021, therefore concludes as follows:

CONCLUSIONS

That CONCLUSIONS numbers 1 through 7 inclusive, as set forth in the aforesaid Order and Notice of Election, are hereby affirmed and incorporated by reference herein and made a part hereof.

8. That a majority of the valid ballots cast by eligible voters of the Employer within the heretofore-defined appropriate unit have not selected the United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, AFL-CIO, CLC, as their exclusive representative for the purpose of collective bargaining.

9. That the majority of votes cast in the Board representation election were for "No Representative" by a margin of 39 votes.

10. That in the August 21, 2020 Order Directing Remand to the Hearing Examiner for Further Proceedings, the Board found and concluded that Dr. Little's April 17, 2019 email was an unfair practice under Section 1201(a)(1) of PERA, affecting 34 eligible voters.

11. The final margin of 39 votes is greater than the 34 eligible voters who received Dr. Little's April 17, 2019 email.

12. That the results of the Board conducted representation election were not affected by the Employer's April 17, 2019 unfair practice.

In view of the foregoing and in order to effectuate the policies of the Act, the Board Representative hereby

ORDERS AND DIRECTS

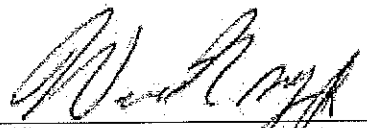
that the petition heretofore filed to the above case number be and the same is hereby dismissed, and

IT IS HEREBY FURTHER ORDERED AND DIRECTED

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

SIGNED, DATED and MAILED this twenty-sixth day of February, 2021, pursuant to 34 Pa. Code § 95.96(b).

PENNSYLVANIA LABOR RELATIONS BOARD



WARREN R. MOWERY, JR.
Board Representative