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

ORDER DIRECTING REMAND TO HEARING EXAMINER FOR FURTHER PROCEEDINGS

On October 7, 2019, the University of Pittsburgh (University) filed timely exceptions and a supporting brief with the Pennsylvania Labor Relations Board (Board), challenging the Hearing Examiner's conclusion in Case No. PERA-C-19-95-W that it violated Section 1201(a)(1) of the Public Employe Relations Act (PERA) and ordering a new election.[1] On October 8, 2019, the United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, AFL-CIO-CLC (Petitioner) filed exceptions to the Hearing Examiner's dismissal of its objection to the Board's conduct during the election at Case No. PERA-R-17-355-W and his conclusion in Case No. PERA-C-19-95-W that the University did not commit unfair practices by maintaining a voter list during the election, utilizing certain University employes as watchers and sending an email to graduate assistants indicating that stipends would be frozen under "status quo" during negotiations for an initial collective bargaining agreement. On October 28, 2019, the Petitioner filed a response to the University's exceptions. On that same date, the University filed a response to the Petitioner's exceptions and a supporting brief.

This matter arose on December 15, 2017, when the Petitioner filed a Petition for Representation with the Board, as amended on January 8, 2018, alleging a thirty percent showing of interest and seeking to represent a unit of all full-time and regular part-time workers of the University, including but not limited to all salaried and hourly graduate employe teaching assistants, teaching fellows, graduate student assistants, and graduate student researchers employed by the University at all campuses. On

[1] The University has requested oral argument in this matter. On February 18, 2020, the Board issued an Order Directing Oral Argument, scheduling argument for May 28, 2020 in Pittsburgh. On April 24, 2020, an Order Cancelling Oral Argument was issued by the Board.

January 25, 2018, the Secretary of the Board issued an Order and Notice of Hearing, and hearings were held on October 1 through 5, October 30 and 31, and November 1, 2018.

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

On March 29, 2019, an Order and Notice of Election was issued directing that a secret ballot election be held on April 15, 16, 17 and 18, 2019. An election, by secret ballot, was held as scheduled among graduate assistants of the University to ascertain the exclusive representative, if any, for the purpose of collective bargaining with respect to wages, hours and terms and conditions of employment. A majority of the valid ballots cast in the election were for no representative.

Pursuant to Section 95.58(a) of the Board's Rules and Regulations, on May 2, 2019, the Petitioner filed a Charge of Unfair Practices with the Board, requesting a new election on the alleged basis that the University violated Section 1201(a)(1) and (7) of PERA.[2] The Charge of Unfair Practices was docketed at Case No. PERA-C-19-95-W. The Petitioner also filed an objection to the conduct of the election under Section 95.57 of the Board's Regulations at Case No. PERA-R-17-355-W. On September 18, 2019, the Board's Hearing Examiner issued a Proposed Decision and Order (PDO) addressing the Petitioner's challenges to the conduct of the election and the alleged unfair practices during the election.

Timely exceptions to the Hearing Examiner's September 18, 2019 PDO were filed by the Petitioner and the University. For purposes of addressing the cross-exceptions to the PDO in this matter, the relevant facts, as found by the Hearing Examiner, may be summarized as follows.

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[2] Section 1201 of PERA provides, in pertinent part, as follows:

> (a) Public employers, their agents or representatives are prohibited from:
>
> (1) Interfering, restraining or coercing employes in the exercise of the rights guaranteed in Article IV of [PERA].
>
> …
>
> (7) Violating any of the rules and regulations established by the board regulating the conduct of representation elections.

43 P.S. § 1101.1201(a)(1) and (7).

Between late March 2019 and the end of the election on April 18, 2019, the University, through Dr. Nathan Urban, the Vice Provost for graduate affairs, sent out approximately 50 to 60 different emails to all eligible voters relating to the Petitioner and the election. The University also maintained several web pages containing University statements about the Petitioner, the election, and collective bargaining. Links to those University web pages were included in Dr. Urban's emails. Many of these web pages were set up in a manner where questions were laid out and an answer would pop up below the question if a visitor clicked on them.

On April 5, 2019, Dr. Urban sent an email to all eligible voters stating, in relevant part, as follows:

> **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.

Prior to and during the election, the University maintained a union-related web page entitled "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

The University also maintained a union-related web page entitled "Frequently Asked Questions" ("FAQs") which was accessible prior to and during the election. One question on this web page was "Will a union give students more say in how decisions about academic appointments are made?" The following answer would pop up when this question was clicked:

> 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.

The University's website and "FAQs" remained publicly accessible prior to and throughout the conduct of the Board's secret ballot election.

The first day of the election began as scheduled on April 15, 2019, in Posvar Hall. Dennis Bachy, the Board agent in charge of the election, held a pre-election briefing approximately 15 minutes prior to the beginning of the election. The parties had representatives present at the pre-election briefing. Mr. Bachy told the parties how the election would proceed and met with the parties' poll watchers. The Petitioner raised concerns to Mr. Bachy that it believed the University's watchers were managers or supervisors. Mr. Bachy questioned the University's watchers and determined that they were not supervisors of graduate assistants and that they were senior clerical employes for University administrators.

The University's watchers were Amy Tuttle, Peggy King, Amanda Brodish and Victoria Lancaster. Amy Tuttle is a Senior Assistant to the Provost and works for the Vice Provost in charge of faculty affairs. Peggy King is a Senior Assistant to the Provost and works directly for Ann Cudd, the Provost and Senior Vice Chancellor of the University. Amanda Brodish is the Director for Data Analytics and Pathways for Students' Success. Victoria Lancaster is the Director of Faculty Actions for the University. The University's watchers do not report to Dr. Urban, interact with graduate assistants or have any role in making decisions related to graduate assistants. Mr. Bachy testified that throughout the entirety of the election it did not appear that the University's watchers were recognized or known by the voters or the Petitioner's watchers.

On April 15, 2019, four Board employes, including Mr. Bachy, were present during the election. The Board employes greeted voters as they entered the room and directed them to the polling area. One Board employe ran the sign-in book and issued ballots to voters on the eligibility list. Another Board employe ran the challenge station and issued ballots to any voter who was challenged.

The Petitioner's 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. The University's watchers maintained a paper list of voters from the beginning of the election and kept daily totals of the number of eligible voters who voted each day of the election. The Petitioner did not keep a list tracking who voted.

In the evening of April 15, 2019, Brad Manzolillo, Esquire, counsel for the Petitioner, sent an email to Mr. Bachy, expressing the Petitioner's concern that the University watchers were keeping a list of people who voted. Mr. Bachy did not read this email until Friday, April 19, 2019. However, Attorney Manzolillo approached Mr. Bachy the morning of April 16, 2019, and stated the same concerns as put forth in the email. Mr. Bachy explained to Attorney Manzolillo that the Board did not have a rule preventing a party from having a list during the election and that it was common and routine

practice for both parties at Board elections. Mr. Bachy was surprised that the Petitioner thereafter was not keeping a list of who voted especially since it was common knowledge that the Board has, for decades and without incident, allowed parties to keep voter lists during elections.

The second day of the election was held in Posvar Hall on April 16, 2019, with the same set-up as the previous day. The third day of the election was held on April 17, 2019, in the O'Hara Student Center.

On the morning of April 17, 2019, before the polls opened for the third day of the election, Steven Little, the Department Chair of Chemical Engineering, sent an email to the graduate assistants in his department. Dr. Little stated, in relevant part, as follows:

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

The final day of the election was held in the O'Hara Student Center on April 18, 2019. There are between 46 and 48 eligible voters in the Chemical Engineering Department that would have received Dr. Little's email. Of the eligible voters in Chemical Engineering, 12 had voted during the first two days of the election, 28 voted the last two days of the election, after receiving Dr. Little's email, and approximately 6 students did not vote.

On April 26, 2019, the Board canvassed the ballots with the result of the election being 675 votes for the Petitioner, 712 votes for no representative and 153 challenged ballots. There were 2016 names on the eligible voter list. With respect to the challenged ballots, the parties agreed that 139 ballots should not be canvassed, 3 ballots should be canvassed, but could not agree on the remaining 11 ballots. The fourteen remaining challenged ballots could not have affected the outcome of the election.

Concerning the Petitioner's objection to the conduct of the election, the Hearing Examiner concluded in the PDO that the Board did not engage in misconduct by allowing the University to maintain a list of voters, by permitting certain University employes to be election watchers or by its procedure in checking voter identification. The Hearing Examiner further concluded that the Petitioner failed to present evidence that any eligible voters' franchise was interfered with by Board policies to such an extent as to materially affect the election results.

With regard to the Petitioner's allegations in its Charge of Unfair Practices against the University's conduct during the election, the Hearing Examiner concluded that the University's use of clerical supervisors as election watchers was not a violation of Section 1201(a)(7) of PERA because they did not supervise or form policies with respect to graduate assistants and there was no evidence that the watchers were recognized by any eligible voter. The Hearing Examiner further concluded that the University's maintenance of a voter list during the election and statement that stipends would be frozen under "status quo" (Union Exhibit 5) were not coercive and

therefore, did not violate Section 1201(a)(1) of PERA.[3] However, the Hearing Examiner held that the April 17, 2019 email from Dr. Little to graduate assistants in his department (Union Exhibit 20), the statement made on the University's web page that graduate assistants would lose the ability to have an individual say in their specific program (Union Exhibit 13), as well as the University's chart indicating that specific topics could not be bargained (Union Exhibit 11) were coercive in violation of Section 1201(a)(1) of PERA. Because the University failed to establish that the outcome of the election was not materially affected by its conduct, the Hearing Examiner ordered that a new election be held.

DISCUSSION

The Petitioner alleges in its exceptions that the Hearing Examiner erred in concluding that the Board did not commit objectionable conduct by permitting the University to keep a list of voters during the election. The Board endeavors to achieve "laboratory conditions" in representation elections; however, the theoretical concept of laboratory conditions must be realistically applied. 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. Kaolin Mushroom Farms, Inc. v. PLRB, 702 A.2d 1110 (Pa. Cmwlth. 1997), *appeal dismissed*, 720 A.2d 763 (Pa. 1998). Representation elections are not to be set aside lightly. A party objecting to the Board's conduct of the election has a heavy burden to show by specific evidence not only that improprieties by the Board occurred, but also that they interfered with the employes' exercise of free choice to such an extent that they materially affected the election results. Id.; Montgomery County v. PLRB, 769 A.2d 554 (Pa. Cmwlth. 2001). Therefore, an indispensable part of asserting a successful challenge to the Board's conduct in 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. Kaolin Mushroom Farms, *supra*.

It has been the Board's long-standing policy to permit parties to maintain voter lists during an election. Centre County, 11 PPER ¶ 11050 (Decision and Order, 1980). Therefore, we must determine whether permitting the University to have a voter list interfered with the graduate assistants' exercise of free choice to such an extent that it materially affected the election results. Here, in conformance with this policy, the University was allowed to keep a voter list. The Petitioner had the opportunity to do the same, but chose not to keep such a list. A review of the record shows that only one eligible voter left the voting area without casting a ballot, which is not substantial evidence to establish that the Board's conduct in this instance interfered with the graduate assistants' exercise of free choice to such an extent to materially affect the results of the election. Therefore, the Petitioner failed to demonstrate that the results of the election would

[3] The Hearing Examiner additionally determined that the University's statements in Union Exhibits 3, 6, 12, 14, 15, 16 and 18 were not unfair practices under Section 1201(a)(1) of PERA. The Petitioner has not filed exceptions to the Hearing Examiner's conclusion concerning these statements nor did it except to his decision that the Board did not engage in misconduct with regard to the University's election watchers and procedure utilized to check voter identification. 34 Pa Code § 95.98(a)(3) ("[a]n exception not specifically raised should be waived.").

have been different absent the University's keeping of a voter list and its exception on this issue is dismissed.

The Petitioner further alleges that the Hearing Examiner erred by concluding that the University did not violate Section 1201(a)(1) of PERA by visibly maintaining a voter list during the election. The Petitioner urges the Board to adopt the National Labor Relations Board's (NLRB) policy prohibiting a party from visibly maintaining a voter list during an election and setting aside election results if that occurs. It is well-settled that decisions of the NLRB may be considered for guidance, but are not binding on the Board in determining questions of state law under PERA. PLRB v. State College Area School District, 337 A.2d 262 (Pa. 1975); AFSCME, District Council 83, AFL-CIO v. PLRB, 553 A.2d 1030 (Pa. Cmwlth. 1989). In Board election proceedings, the watchers for both parties are responsible for identifying eligible voters and challenging those voters that they believe to be ineligible to vote. (Employer Exhibit 1). The Board's policy permitting the parties to keep a voter list during the election facilitates the watchers' identification of and challenge to voters. Indeed, in an election such as this one with over 2000 eligible voters, it would be impossible for a watcher to know all the eligible voters without having access to a voter list. Therefore, the Board finds that the mere maintaining of a voter list during an election, in and of itself, is not *per se* coercive.

The Board's policy to permit parties to keep a voter list during an election has existed for decades without incident or concern. The University cannot be found to have committed an unfair practice where its conduct was in conformity with the Board's long-standing policy of permitting such conduct. Centre County, *supra; see also* PLRB v. Jeannette District Memorial Hospital, 315 A.2d 917 (Pa. Cmwlth. 1974)(employer did not commit an unfair practice by failing to provide eligibility list to union where Board did not have a policy requiring provision of list). Moreover, here the record is devoid of substantial evidence to support a finding that under the totality of the circumstances, the mere maintenance of a list of voters, standing alone, would have a tendency to coerce a reasonable employe in violation of Section 1201(a)(1). As such, the Hearing Examiner properly concluded that the University did not violate Section 1201(a)(1) of PERA.

The Petitioner next asserts that the Hearing Examiner erred in concluding that the University did not violate Section 1201(a)(1) and (7) of PERA by designating supervisory employes as its election watchers. Section 95.52(a) of the Board's Rules and Regulations provides as follows:

> Each party to the election will be entitled to be represented by one watcher at each polling place or 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 employes 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.

34 Pa. Code § 95.52(a). The purpose of Section 95.52(a) is to prevent management level employes with the power to determine policy and approve or disapprove any changes in conditions of employment to influence employes during the election. Additionally, supervisory employes with authority to

hire, fire and discipline voting employes are in a position to influence employes by being present at the polls during an election.

However, it is within the Board's discretion to determine the appropriateness of the choice of election watchers by the parties. Washington Township Municipal Authority, 19 PPER ¶ 19073 (Final Order, 1988), *aff'd sub nom.*, Washington Township Municipal Authority v. PLRB, 569 A.2d 402 (Pa. Cmwlth. 1990), *appeal denied*, 581 A.2d 577 (Pa. 1990). In Pittston Hospital v. PLRB, 1 PPER 89 (Decision of PLRB, 1971), the union alleged that the employer committed unfair practices during the election by having two direct supervisors of the employes be present as election watchers. The Board concluded that the employer did not commit an unfair practice because the Board's election officer permitted the supervisory employes to be present as watchers during the election and there was no evidence that any voter was affected by the presence of the supervisors.

Here, the Board Election Officer determined that the University's watchers were senior clerical supervisors who did not supervise graduate assistants or interact with them. Based on this information, the Election Officer permitted them as the University watchers during the election. As in Pittston Hospital, the University has not violated Section 1201(a)(1) or (7) of PERA where the Board allowed the clerical supervisors to be watchers for the University during the election among graduate assistants, and no evidence was presented to establish that the presence of the University's watchers had any effect on the voters. Accordingly, the Petitioner's exception on this issue is dismissed.

The Petitioner additionally alleges that the Hearing Examiner erred in concluding that the University's April 5, 2019 email (Union Exhibit 5) did not violate Section 1201(a)(1) of PERA because it was a threat to withhold wage increases if the graduate assistants unionized. Concerning communications to employes during the election process, the Board has stated as follows:

> [A]n 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 different interpretations 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 communication 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 finds upon consideration of all the circumstances that the statement would not be likely to have had a real impact on the election.

PLRB v. Upper Merion Area School District, 3 PPER 386, 387 (Nisi Decision and Order, 1973)(emphasis in original), *quoting* Hollywood Ceramics Co., Inc., 140 NLRB 221, 224 (1962); *see also* Williamsport Area Community College, 8 PPER 143 (Nisi Order of Dismissal, 1977), 8 PPER 334 (Final Order, 1977); Pennsylvania Social Services Union, 11 PPER ¶ 11075 (Final Order, 1980). An employer is free to communicate to the employes its general views about unionism or the factual probabilities and circumstances related to union representation, as long as the communications do not contain a threat of reprisal or promise of benefit. County of Berks v. PLRB, 79 A.3d 8 (Pa. Cmwlth. 2013), *citing* NLRB v. Gissel Packing Co., 395 U.S. 575 (1969); Williamsport Area Community College, *supra*.

Here, the University's statement that "under PA law, stipends would be frozen under 'status quo' and annual stipend increases would not occur" is not a threat, but merely an accurate explanation of Board policy that maintenance of the status quo during contract negotiations does not include the continuation of periodic wage adjustments. Pennsylvania State Park Officers Association v. PLRB, 854 A.2d 674 (Pa. Cmwlth. 2004), *appeal denied*, 871 A.2d 194 (Pa. 2005); Neshaminy Federation of Teachers Local Union 1417 v. PLRB, 986 A.2d 908 (Pa. Cmwlth. 2009); International Brotherhood of Electrical Workers Local 743 v. Upper Leacock Township, 43 PPER 72 (Final Order, 2011); *see also* Erie County Technical School v. PLRB, 169 A.3d 151 (Pa. Cmwlth. 2017)(holding that an employer's statement to its employes that retroactive wage increases were not guaranteed if they failed to ratify its final offer did not constitute a threat as it was an objective and factual statement of the employer's bargaining position). Indeed, the University's statement was in response to a student's question concerning status quo to clarify the Petitioner's assertion that the University would be compelled to provide stipend increases during negotiations for an initial contract. (N.T. 381-382). The Board finds that the University's April 5, 2019 email is not a substantial departure from the truth and therefore, the Petitioner's exception is dismissed.

Turning to the University's exceptions, the University alleges that the Hearing Examiner erred in concluding that it violated Section 1201(a)(1) of PERA through the statements in its chart (Union Exhibit 11) concerning what topics can and cannot be bargained. In finding that the University's statements were a substantial departure from the truth, the Hearing Examiner stated, in relevant part, as follows:

> First, in the case of the chart at Union Exhibit 11, these statements glaringly contain the following essential contradiction: The statements claim that the [Board] 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 [Board] 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.

(PDO at 26)(emphasis in original). The Hearing Examiner further determined that the Petitioner did not have the ability to effectively respond to the chart because it was maintained on the University's web page throughout the election. Because the Hearing Examiner found that these statements would impact and coerce potential voters, he held that the University violated Section 1201(a)(1) of PERA.

As stated above, the Board will set aside an election only where there has been a threat, interference, coercion, or a substantial departure from the truth that would have a significant impact on the election. Upper Merion School District, *supra*. The University's chart shows 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

The Hearing Examiner determined that the contradiction between the University's statement that working conditions had not been defined for graduate assistants in conjunction with the subjects that could not be bargained was a substantial departure from the truth. However, the Board does not find these statements to be a substantial departure from the truth.

To begin with, the subjects listed by the University that it claims cannot be bargained is supported by Section 702 of PERA which provides, in relevant part, that public employers shall not be required to bargain matters of inherent managerial policy including "the functions and programs of the public employer, standards of services, its overall budget, utilization of technology, the organizational structure and selection and direction of personnel." 43 P.S. § 1101.702. Further, although the Board has determined what working conditions are mandatory subjects of bargaining, it has not done so in the context of the working conditions that are specific to graduate assistants. Those subjects of bargaining for graduate assistants which touch upon the University's managerial prerogatives under Section 702 must be determined by the Board under the balancing test outlined by the Pennsylvania Supreme Court in State College Area School District, *supra*. Therefore, the statement by the University that working conditions have not been defined for graduate assistants, while ambiguous and subject to differing interpretations, is not a substantial departure from the truth. *See* Pennsylvania Social Services Union, *supra* (union's ambiguous statements concerning salary and benefits provided by employer did not warrant setting

aside election). Accordingly, the University's exception is sustained and the Hearing Examiner's decision on this issue is reversed.

The University next asserts that the Hearing Examiner erred in concluding that its statement concerning graduate assistants' loss of the ability to have input into their academic appointments (Union Exhibit 13) violated Section 1201(a)(1) of PERA. Specifically, the University alleges that this statement is not coercive because it is an accurate explanation regarding the Board's prohibition on direct dealing. To support its argument, the University cites to Tri-Cast, Inc., 274 NLRB 377 (Decision and Certification of Results of Election, 1985) and Overnite Transportation Company, 296 NLRB 669 (Decision and Order, 1989). In those cases, the NLRB concluded that the employers' statements that the employes would no longer be able to personally resolve issues with management once a union was elected was not coercive, but clarification that the relationship between the employes and the employer will change. Rather than being a threat of loss of rights, the NLRB stated that it is a fact that employes will deal with the employer indirectly through a shop steward once a union has been selected to represent the employes.

Here, in response to the question "Will a union give students more say in how decisions about academic appointments are made?", the University's website had the following answer:

> 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). The Hearing Examiner concluded that 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 that would coerce potential voters about the impact of unionization. However, when viewed as a whole, the University's statement explains that a union has the exclusive right to speak on behalf of graduate assistants concerning the terms and conditions of employment, which would result in the graduate assistants losing the ability to individually deal with the University and their academic advisors concerning wages, hours and working conditions. *See* 43 P.S. § 1101.606 ("[r]epresentives selected by public employes … shall be the exclusive representative of all the employes in such unit to bargain on wages, hours, and terms and conditions of employment"); *see also* Temple Association of University Professional, AFT Local 4531 v. Temple University, 38 PPER 156 (Final Order, 2007)(public employers are prohibited from bypassing the

exclusive employe representative and negotiating directly with its employes over wages, hours and terms and conditions of employment). The University's statement describes the change that will occur in its relationship with the graduate assistants with regard to unionization and having an exclusive collective bargaining representative. As such, the University's statement regarding its relationship with an exclusive employe representative is not a substantial departure from the truth. Accordingly, the University's exception is sustained and the Hearing Examiner's decision on this issue is reversed.

The University alleges that the Hearing Examiner erred in concluding that the April 17, 2019 email from Dr. Little to graduate assistants in the chemical engineering department (Union Exhibit 20) violates Section 1201(a)(1) of PERA because no evidence was presented demonstrating that any graduate assistants were intimidated by the email. A violation of Section 1201(a)(1) of PERA may arise if the actions of the employer, in light of the totality of the circumstances, would tend to be coercive, regardless of whether employes have, in fact, been coerced. AFSCME District Council 88 v. Lehigh County, 36 PPER 159 (Final Order, 2005). Based on the record evidence, the Petitioner established that Dr. Little's email was coercive toward the exercise of employe rights under PERA.

The University alleges however, that the purpose of Dr. Little's email was to encourage graduate assistants to vote in the election. Dr. Little stated in his April 17, 2019 email that he was "actually a little surprised to see that only 81 students from the School of Engineering (whole school) have voted so far." (Union Exhibit 20). The Hearing Examiner found this statement to be coercive. Indeed, the email to voters at the start of day three of the election, implied a warning directly to eligible voters that the University was closely monitoring voters during the first two days of the election. The Hearing Examiner further found from the record that Dr. Little's email showed that the University was improperly using the employe list to track voters by department and sharing that information with Dr. Little and other Department heads.

The Board agrees 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. Indeed, regardless of whether Dr. Little's intentions were pure or his information was inaccurate, when viewed in the totality of the circumstances, this statement would have a coercive effect on the chemical engineering graduate assistants that the voters were being surveilled at the polls by the Chair of their department and supervisors of their graduate program. Northwestern Education Association v. Northwestern School District, 16 PPER ¶ 16092 (Final Order, 1985)(improper motivation need not be established and even an inadvertent act may constitute a violation of Section 1201(a)(1)).

Nevertheless, the University argues that, because Dr. Little was not present at the polling area, it was error for the Hearing Examiner to conclude that the University engaged in surveillance. As stated by the Hearing Examiner, Dr. Little's email showed the chemical engineering graduate assistants that they were under the watchful eye of the University and created the impression of surveillance. Further, as Chair of the Chemical Engineering Department, Dr. Little would have been involved with the graduate program and have an influence over the voters in his department. Therefore, it is of no moment that Dr. Little was not physically present at the election

because his email was an indication that the polling place was under close observation and scrutiny by the University who was relaying that information to the Department Chairs and supervisors of the graduate assistants. *See* Montgomery County Geriatric and Rehabilitation Center, 13 PPER ¶ 13242 (Final Order, 1982)(employer's creation of impression of surveillance is coercive even absent actual surveillance).

The University asserts that the Hearing Examiner erred in making the inference that the University was tracking voters by department and sharing that information with others because it is contrary to the testimony of Stephanie Hoogendoorn, senior assistant to the provost, and Dr. Urban. The Supreme Court of Pennsylvania has long recognized the Board's authority to determine the facts in controversy and to draw reasonable inferences and conclusions therefrom. PLRB v. Kaufman Department Stores, 345 Pa. 398, 29 A.2d 90 (1942). Further, it is the function of the hearing examiner, who is able to view the witnesses' testimony first-hand, to determine the credibility of the witnesses and to weigh the probative value of the evidence presented at the hearing. Mt. Lebanon Education Association v. Mt. Lebanon School District, 35 PPER 98 (Final Order, 2004). The hearing examiner may accept or reject the testimony of any witness in whole or in part. Pennsylvania State Corrections Officers Association v. Commonwealth of Pennsylvania Department of Corrections Pittsburgh SCI, 34 PPER 134 (Final Order, 2003). The Board will not disturb the hearing examiner's credibility determinations absent the most compelling of circumstances. Id. The Hearing Examiner did not credit the testimony of Ms. Hoogendoorn or Dr. Urban that the University only tracked the names of voters and that they did not provide information to faculty members concerning who voted. Indeed, the Hearing Examiner's credibility determination and findings are buttressed by the fact that Dr. Little, without having been present at the election, was able to specifically reference the number of graduate assistants within the engineering department who had cast ballots in the election. Because the University failed to present any compelling reasons to warrant reversal of the Hearing Examiner's credibility determinations, the Board must reject the University's exception.

The University next alleges that the Hearing Examiner erred in applying Western Psychiatric Institute v. PLRB, 330 A.2d 257 (Pa. Cmwlth. 1974), and shifting the burden to the University to prove that its unfair practices did not materially affect the outcome of the election. Pursuant to Section 605(6) of PERA, the Board will order a new election if it determines that an unfair practice occurred that affected the outcome of the election. 43 P.S. § 1101.605(6). In interpreting the language of Section 605(6) of PERA, the Commonwealth Court in Western Psychiatric Institute set forth the burden to by applied in instances where unfair practices are found to have occurred during an election, stating as follows:

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

330 A.2d at 262. For over 45 years, the Board has consistently applied the Court's burden shifting analysis in Western Psychiatric Institute in cases where an unfair practice was found to have occurred during an election. *See*

Philadelphia Joint Board Workers United SEIU v. Philadelphia School District, 41 PPER 55 (Final Order, 2010); Teamsters Local 312 v. Upland Borough, 25 PPER ¶ 25195 (Final Order, 1994); Chartiers-Houston School District, 14 PPER ¶ 14056 (Final Order, 1983); Centre County, *supra*; Teamsters Local Union No. 384, IBT, AFL-CIO v. Central Bucks School District, 33 PPER ¶ 33082 (Proposed Decision and Order, 2002); Amalgamated Transit Union, Local 85 v. Port Authority of Allegheny County, 25 PPER ¶ 25157 (Proposed Decision and Order, 1994); Woodland Hills School District, 13 PPER ¶ 13214 (Proposed Decision and Order, 1982). Contrary to the University's allegation, the Hearing Examiner's determination is consistent with the Court's interpretation of Section 605(6) of PERA. Further, the Board agrees with the Court's decision in Western Psychiatric Institute and finds it reasonable to place the burden on the party who committed the unfair practice to prove that it did not affect the election.

Nevertheless, the University asserts that the Board should apply the burden in Kaolin Mushroom Farms, *supra*. However, the burden in Kaolin Mushroom Farms cited by the University concerned objections to the Board's conduct in the election, and not any alleged unfair practices or misconduct by any of the parties to the election. *See* 34 Pa. Code § 95.57. Where, as here, one of the parties to the election has engaged in misconduct during the election and was found to have committed an unfair practice, the free and fair election has been destroyed by the offending party's unlawful activity, and the appropriate remedy under PERA is a new election free of unfair practices. *See* 43 P.S. §1101.605(6). It is only fitting for the offending party who committed the unfair practice to establish that their misconduct did not affect the outcome of the election, and Western Psychiatric Institute places the burden of convincing the Board that there is no need for a new election squarely on the party who committed the unfair practices. The University fails to present any persuasive arguments warranting reversal of the Board's burden shifting analysis under Western Psychiatric Institute. Therefore, the Hearing Examiner did not err in applying the burden shifting analysis under Western Psychiatric Institute to this matter.

The University further alleges that the Hearing Examiner erred in concluding that it failed to prove that Dr. Little's email did not materially affect the outcome of the election because the number of chemical engineering graduate assistants who had not voted at the time of receipt of Dr. Little's email is not sufficient to change the outcome of the election. The result of the election was 675 votes for the Petitioner and 712 votes for no representative. There are 3 unopened challenged ballots and 11 challenged ballots that the parties could not come to an agreement on. At the time Dr. Little sent his email on April 17, 2019, 12 chemical engineering graduate assistants had voted during the first two days of the election and 34 had not voted. Out of those 34 chemical engineering graduate assistants, 28 voted the last two days of the election and approximately 6 students did not vote. As stated by the Hearing Examiner, this was an extremely close election where the Petitioner lost by only 37 votes. Therefore, the Board agrees with the Hearing Examiner that adding the 14 challenged ballots along with the 28 votes of the chemical engineering graduate assistants and 6 potential voters, could have materially affected the outcome of the election.[4]

[4] Relying on Philadelphia School District, *supra*, the University alleges that the Board found that more egregious behavior, the alleged holding of "ballot parties", than that engaged in by Dr. Little would not significantly affect the outcome of the election. Unlike the facts here, in Philadelphia School

However, what is revealed by our disposition of these exceptions is that the challenged ballots that were cast in the election could now, in light of our decision above, affect the outcome of the election. Section 95.59 addresses this very issue and directs as follows:

> (a) In elections where challenged ballots affect the election outcome and objections under § 95.57 (relating to objections to the Board's conduct of election) or unfair practices under § 95.58 (relating to unfair practices in connection with election), or both, have been filed, the Board will first resolve the challenged ballots which may render moot charges of unfair practices or election objections.

34 Pa. Code § 95.59(a).

In light of the disposition of the exceptions, there are 14 unopened challenged ballots which were cast during the election unaffected by the University's unfair practice, which could resolve the outcome of the election. Accordingly, the Board finds that it must remand this matter to the Hearing Examiner for a determination of the validity of 11 of the 14 challenged ballots cast during the election. Thereafter, the Board Representative shall issue an order directing the time and place for canvassing of the valid challenged ballots.

If, upon canvassing the valid challenged ballots, sufficient challenged ballots are cast for "no representative", such that "No Representative" would have received a majority of votes, notwithstanding the unfair practice, then the University would therefore have established that its unfair practice potentially affecting only 34 of the votes, did not affect the outcome of the election under the standards of Western Psychiatric Institute. Under such circumstances, in accordance with Section 95.59 of the Board Regulations, the Petition for Representation must be dismissed notwithstanding the University's unfair practices found herein.

Whereas, if upon opening the valid challenged ballots, it is determined that the votes of the 34 affected graduate assistants in the chemical engineering department who received Dr. Little's April 17, 2019 email before deciding to vote, could have materially affected the outcome of the election, Section 605(6) of PERA requires a new election be held. 43 P.S. § 1101.605(6)(if the Board determines that the outcome of an election was affected by "the 'unfair practice' charged or for any other 'unfair practice' it may deem existed, it **shall** require corrective action and order a new election."). Accordingly, under those circumstances in accordance with Section 605(6) of PERA and Western Psychiatric Institute, the Board Representative must order a new election.

After a thorough review of the exceptions, the briefs of the parties, and all matters of record, the Board shall dismiss the exceptions filed by the Petitioner. The Board further shall sustain in part and dismiss in part the exceptions filed by the University and affirm the Proposed Decision and Order as modified.

District no unfair practice was found and the rival union lost the election by over 500 votes.

Based on the disposition of the exceptions, we find that canvassing of the challenged ballots is necessary. Accordingly, we shall remand this matter to the Hearing Examiner for a determination as to the validity of 11 of the 14 challenged ballots. Thereafter, the Board Representative shall order the canvassing of the challenged ballots, at a time and place to be determined by the Board Representative.

ORDER

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

HEREBY ORDERS AND DIRECTS

that the exceptions filed by the United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, AFL-CIO-CLC are hereby dismissed. It is further directed that the exceptions filed by the University of Pittsburgh are hereby sustained in part and dismissed in part and the Hearing Examiner's Proposed Decision and Order be and the same is hereby made absolute and final as modified.

IT IS HEREBY FURTHER ORDERED AND DIRECTED

that the matter is remanded to the Hearing Examiner for a determination of the validity of the challenged ballots cast in the April 2019 election.

SEALED, DATED and MAILED at Harrisburg, Pennsylvania pursuant to conference call meeting of the Pennsylvania Labor Relations Board, James M. Darby, Chairman, Robert H. Shoop, Jr., Member, and Albert Mezzaroba, Member this eighteenth day of August, 2020. The Board hereby authorizes the Secretary of the Board, pursuant to 34 Pa. Code 95.81(a), to issue and serve upon the parties hereto the within Order on August 21, 2020.