

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

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In the Matter of \*  
\*  
HARVARD GRADUATE \*  
STUDENT UNION – UAW \*  
\*  
Petitioner \*  
\*  
and \*  
\*  
PRESIDENT AND FELLOWS \*  
OF HARVARD COLLEGE \*  
\*  
Employer \*  
\*  
\*\*\*\*\*

Case No. 01-RC-186442

**EMPLOYER PRESIDENT AND FELLOWS OF HARVARD COLLEGE  
REQUEST FOR REVIEW OF THE REGIONAL DIRECTOR’S DECISION  
AND DIRECTION OF SECOND ELECTION**

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## **I. INTRODUCTION AND STANDARD OF REVIEW**

Pursuant to 29 C.F.R. § 102.69(c)(2), of the National Labor Relations Board's ("NLRB") Rules and Regulations, President and Fellows of Harvard College ("Harvard" or "University") submits this request for review of the Regional Director's Decision and Direction of Second Election ("Decision"), dated July 7, 2017. The Board will grant review of a Regional Director's decision where compelling reasons exist, including, *inter alia*, (1) that a substantial question of law or policy is raised because of (i) the absence of, or (ii) a departure from, officially reported Board precedent; and (2) that there are compelling reasons for reconsideration of an important Board rule or policy. This request satisfies this standard in all respects. Harvard seeks Board review of three findings in the Decision:

- 1) Even though the Union lost the graduate student election by nearly 200 votes, the Decision ignores the overwhelming evidence that Harvard substantially complied with its obligation under *Excelsior Underwear Inc.*, 156 NLRB 1236 (1966), and departs from established Board precedent when analyzing whether omissions from an *Excelsior* list should result in the direction of a second election;
- 2) There are compelling reasons for the Board to reconsider outdated case law regarding voter list compliance and to permit parties to present evidence concerning the prejudicial effect, if any, of *Excelsior* deficiencies;
- 3) Lastly, the Decision improperly assessed the status of numerous challenged voters.

Because of these fundamental infirmities, and for the reasons stated below, Harvard respectfully requests that the Board grant its Request for Review. Harvard is simultaneously filing herewith a Motion to Stay Proceedings at the Region.

## **II. RELEVANT PROCEDURAL HISTORY**

On November 16 and 17, 2016, Region One of the NLRB conducted an election at Harvard pursuant to a Petition for Representation filed on October 18 by the Harvard Graduate Students Union – United Auto Workers (hereinafter, "Union"), for a unit of certain students enrolled in degree programs who perform instructional or research services. On December 22,

2016, after prolonged efforts by the University, the Union, and Board Agents to resolve the status of nearly 1,200 voters who cast provisional challenged ballots, the Region counted the votes. The Union lost the election 1,456 ballots to 1,272 ballots-- a margin of 184 votes.<sup>1</sup> There remained 314 unresolved challenged ballots.

On December 29, 2016, the Petitioner filed Objections to the Election in which it contended that the election should be set aside and a new election ordered because the University “failed to substantially comply with the Board’s *Excelsior* rule, 29 C.F.R. Section 102.62(d) by failing to provide an accurate list of all eligible voters.” Hearing Officer Thomas Miller, Region Three, was assigned to hear the matter. The hearing took place over 11 days in February and March and the parties filed post-hearing briefs on April 3, 2017. On April 19, 2017, the Hearing Officer issued his Report and Recommendations, recommending that certain ballots be opened and, if the Union does not prevail, that a new election be held. Harvard filed Exceptions on May 3, 2017. On July 7, 2017, the Regional Director issued his Decision, substantially affirming the findings and recommendations of the Hearing Officer. Harvard seeks review of the Decision.

### **III. SUMMARY OF THE FACTS**

#### **A. Harvard’s Organizational Structure Is Unique And Dissimilar To Other Employers**

Harvard was established in 1636 and is the oldest institution of higher education in the country. Today, Harvard employs approximately 2,400 faculty members and enrolls more than 15,000 graduate students and nearly 7,000 undergraduate students. (Tr. 1199).<sup>2</sup> Among these

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<sup>1</sup> Harvard filed an Objection to the election concerning the Region’s rejection of a single ballot that the Region concluded was improperly defaced and should be considered a spoiled ballot. The Union did not challenge the Objection and the Region counted the vote, increasing the margin to 185.

<sup>2</sup> Citations to the transcript shall be identified as “(Tr. \_\_)” followed by the page number. Citations to Board exhibits shall be “(Bd Ex. \_\_)”. Citations to joint exhibits shall be “(Jt. Ex. \_\_)”. Citations to employer exhibits shall be “(Er. Ex. \_\_)”. Citations to Union exhibits shall be “(Pet. Ex. \_\_)”.

22,000 students, thousands engage in activities that the Board recently determined constitutes “work” under the National Labor Relations Act, 29 U.S.C. § 151-169 (“NLRA”), pursuant to the Board’s decision in *The Trustees of Columbia University*, 364 NLRB No. 90 (Aug. 23, 2016), while others are employed to perform various administrative tasks on an hourly basis. (Tr. 1201-02). Still others perform no services, but receive financial aid from Harvard to support their studies.

Being an academic institution, Harvard is not organized like a typical employer with regard to its student employees.<sup>3</sup> Rather than one overarching system and set of policies that apply uniformly to all student employees, there are 14 separate schools within the University, (Er. Ex. 1), that employ their own distinct policies and procedures with regard to student employment and appointments of faculty and staff. (Tr. 1211). In addition to the 14 schools, Harvard has six separate allied institutions, 26 different interfaculty initiatives, over 100 research centers and academic initiatives, and hundreds of academic programs within the schools, spread out across the University, all likewise operating with their own policies and procedures. (Er. Ex. 1; Tr. 1195).

**B. Change In The Law And Harvard’s Actions In Response To The Columbia Decision**

In late August 2016, the Board’s decision in *Columbia* overruled *Brown University*, 342 NLRB 483 (2004) and held that certain categories of students were now statutory employees, conferring upon them the right to unionize under the NLRA for the first time in over a decade.

Aware that the Union had been campaigning on its campus for over one year and a half, Harvard had already begun to coordinate with administrators at its various schools to identify

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<sup>3</sup> The Board and courts have long recognized and attempted to accommodate the unique issues that arise at the intersection of higher education and the Act, which from its inception in the 1930s was based on an industrial model of employment. *See also*, Footnote 15, *infra*.

students who might be included in a petitioned-for unit. As explained, however, by Meredith Quinn, Chief of Staff to the Provost, who would ultimately be tasked with overseeing the list creation,

[Harvard] had no idea if [the proposed unit] was going to be only teaching fellows, only Graduate School of Arts & Sciences. Looking at the only other private university that had a graduate student union, it was a very different scope of unit than we have now, and I'm referring to NYU. At Yale, there was discussion of micro units. So we thought there were many possible scenarios.

(Tr. 1233). After *Columbia* was issued, Harvard contacted the Union “to begin conversations about potentially agreeing on an appropriate bargaining unit,” (Tr. 1119). On September 9, 2016, representatives from both Harvard and the Union met to discuss a variety of issues including the make-up of a potential bargaining unit. (Tr. 1120).

Although Harvard was proactive with regard to the list creation and sought insight about the possible unit makeup, Joshua Gilbert, a member of the Union’s National Organizing Department, testified that the Union did not provide *any* specific information about the scope of the unit it sought to represent, stating only that it was generally “seeking the same type of unit that *Columbia* has” including “student employees performing teaching and research.”

(Tr. 1058,1121). The Union did not present any official documents to the University at that meeting, (Tr. 1120), nor did it discuss any job titles or the interpretation thereof. (Tr. 1122).

**Q.** ... did you bring up the fact that you are interpreting the title of research assistant in a certain way as you organized the Harvard campus?

**A.** We did not discuss job titles in the initial meeting.

(Tr. 1122). Indeed, the Union did not discuss any specific eligibility or unit issues at the September meeting, and accordingly, it was not until October 14, 2016, when the Union gave

Harvard a proposed Stipulated Election Agreement, that Harvard was aware of the actual scope of the unit sought by the Union.<sup>4</sup>

### **C. Harvard's Preliminary Work Creating The Voter List**

A difficulty Harvard faced immediately was the lack of uniformity across the campus, with many of the 14 schools applying the same job titles to students performing different work, while others applying different job titles to students performing the exact same work.<sup>5</sup> Thus, the primary burden was in determining who among the 22,000 enrolled students were “employees” under *Columbia*, and then determining how to locate them within a payroll system that did not differentiate among students who receive financial aid stipends unconnected to any “work,” students who perform “work” *not* included in the bargaining unit, and students who perform what was newly considered to be “bargaining unit work” pursuant to *Columbia*.

Under normal circumstances, employers can create a voter list simply by reviewing a Petition’s unit description and identifying in their payroll system those who performed unit work during the relevant period. This option, however, was not available to Harvard because its payroll system, PeopleSoft, was designed for employees, not for students. PeopleSoft could only identify that a student received money from the University, not whether they fit *Columbia*’s definition of a statutory employee. Ms. Quinn explained:

All students who receive any sort of money from the university, it goes through PeopleSoft...But our challenge is that PeopleSoft is so capacious...because it includes all faculty staff and students who receive money that we needed to narrow it down...You

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<sup>4</sup> The final petitioned-for unit was broadly described as including: “[a]ll students enrolled in Harvard degree programs employed by the Employer who provide instructional services at Harvard University, including graduate and undergraduate Teaching Fellows (teaching assistants, teaching fellows, course assistants); and all students enrolled in Harvard degree programs (other than undergraduate students at Harvard College) employed by the Employer who serve as Research Assistants (regardless of funding sources, including those compensated through Training Grants)[;]” excluding, *inter alia*, “[a]ll undergraduate students serving as research assistants.” This was different than the original unit description proposed by the Union only days earlier.

<sup>5</sup> Mr. Gilbert acknowledged this problem, “[m]y understanding of how teaching assistants operated was that the term was used in different schools in different ways.” (Tr. 1063).

need to carve out students who are receiving payments for fellowship. Like my first two years as a history graduate student, Harvard just paid me to study Ottoman history. I didn't have to do any work in return. That's not a covered position ... [but] I would have been on PeopleSoft ... You have to carve out students who are being paid...for working for the university but not in a *Columbia* type of position ... And our challenge was that...you can't press a button to get teaching and research. These people had never been thought of that way before by the university ....

(Tr. 1201-02). Consequently, Harvard took additional steps, beyond simply using PeopleSoft, to create the list.

**D. Additional Information Gathered From The 14 Individual Schools**

Recognizing some of shortfalls with its payroll system, Harvard engaged in a coordinated effort to obtain localized information from each school. Ms. Quinn, designated as the administrator "who would coordinate among Harvard schools in order to create a list[,]"

(Tr. 1193), assembled a team including the Associate Director of Institutional Research, John Scanlon, members of the Labor Relations and General Counsel's offices, as well as several senior administrators, (Tr. 1196), or "point persons," from the 14 schools. (Tr. 1215).

I asked the school point people to inform us...of all research and teaching positions to which they appointed students within their school. And ...to let us know how you can find these positions in PeopleSoft, what was the title of the position, if there was a job code or other sort of identifier, and some basic parameters ...how do you get selected, how often do they work, how much are they paid, how many people...do you have in this position in a given semester.

(Tr. 1197). The point person in each school was instructed to seek additional help from individuals with more specific knowledge and a template was designed to assist in those conversations. (Tr. 1198-99). At this point, Harvard sought information about the PeopleSoft job codes associated with the different positions occupied by student employees in the different schools; whether all of the student employees with a particular job code specifically held teaching or research appointments; the various business titles used in each school; and, any other relevant information like the number of hours students work each week. (Tr. 1200). Harvard

then refined the list further, grouping students into three broad categories: (1) teaching fellows and those who perform other forms of instructional services; (2) hourly research assistants; and, (3) science research assistants. (Tr. 1203).

None of these categories was easily identifiable. “Each school [has its] own conventions for making these appointments, its own naming conventions as we know in terms of the titles and then its own conventions for actually making the appointments in PeopleSoft.” (Tr. 1211). For example, certain schools may not call a student a “teaching fellow,” even though he or she is “doing comparable functions if you look between schools[.]” (Tr. 1211-12).

Additionally, student employees categorized as hourly research assistants were even further removed from any type of consistent categorization across the 14 schools due to the nature of their work and their relationships with individual faculty members. Ms. Quinn described the individualized nature of an hourly research assistant’s employment and the creation of the ad hoc relationship:

A student and faculty member agree that the student will go off and do some research. The faculty member might say can you please look into this particular problem and see if you can find...relevant articles, let’s meet in a couple of weeks; oh, please speak with my assistant to get entered into payroll ... They say speak with the assistant, speak with the department administrator. The student then has to go to the department administrator or the assistant and say I need to do my paperwork or later on I need to enter my hours ... And this is not a semester-long appointment, either. This is ... hourly. So it could be that in November, faculty member and student agree that they are going to work together.

(Tr. 1213-14).<sup>6</sup> These one-on-one employment engagements, both informal and very local, resulted in the student commencing work for a professor at random times during a semester (as opposed to a teaching fellow who normally started at the beginning of a semester), which

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<sup>6</sup> Mr. Gilbert acknowledged the many hourly employees and the difficulty them. “[W]hat we did not realize is the expansive use of hourly employees, and how difficult it would be to find all of them.” (Tr. 1118).

presented unique challenges in identifying and tracking these relationships with precision. (Tr. 1213).

The third category of potential employee/voters were science research assistants.<sup>7</sup> The major problem the University faced was that all graduate students in these science programs “look the same” in PeopleSoft because they all receive a stipend from the University every semester they are enrolled, regardless of whether or not they are performing bargaining unit work.

[W]hen someone is in one of those programs as a doctoral student from the point of view of our payment system, they look the same on the first day that they arrive as they do in the middle of their program, as they do at the end ... That’s because they get a stipend semester in and semester out ... it’s the same amount and it looks the same ... in general a science student comes and spends some time in an exploratory phase where they are taking course work, they are doing lab rotations with different faculty members ... and then at some point they move from that exploratory phase into a more focused phase where they are working intensively, usually full-time, with a particular faculty member or principal investigator as part of their lab ... And as I understood *Columbia*, the definition of a research assistant under *Columbia* is when they are in that focused phase, not when they’re in the exploratory phase.

(Tr. 1204-05). Because the payroll system was not designed to ascertain when a science doctoral student moved from the “exploratory phase into the focused phase,” (and Harvard had no reason to do so before the *Columbia* decision), Ms. Quinn’s team needed to gather that additional information from each individual school. (Tr. 1206-07). Harvard soon discovered that there was not a set pattern or common practice. For example, the School of Engineering and Applied Sciences considered anyone who is a G2 or above to be in the focused phase; in the School of Public Health, it was G1s or above; in the Medical School, it was G3s or above. (Tr. 1207-08).<sup>8</sup>

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<sup>7</sup> This group includes graduate students in (1) the School of Engineering and Applied Sciences, (2) the FAS Division of Science, (3) doctoral students in programs located at the Medical School, and (4) some programs within the School of Public Health.

<sup>8</sup> “G1, G2, G3, etc.” refers to individuals who are graduate students in years 1, 2, 3, etc. Accordingly, a first year graduate student is a “G1,” and second year graduate student is “G2,” and so on.

The local information from the 14 schools was next provided to Mr. Scanlon, whose role was to take “the definition of who [Harvard] understood to be covered positions for the bargaining unit and to apply that definition to the data that we had on hand in order to produce the list of eligible voters.” (Tr. 1269). As those updated lists were created, Mr. Scanlon would “share them with the working group[.]” (Tr. 1271). Harvard also took a variety of additional measures to ensure that PeopleSoft captured all of the eligible voters.<sup>9</sup> The list-making process took place early in the 2016 fall semester, a time when large numbers of students are moving into new “employment” positions, resulting in delay in processing some appointments for a variety of reasons, leading to the “retroactive” appointment situation described more fully below.

#### **E. Union Filing Of The Petition, Ferpa Issues, And The Final List**

Upon the Union’s filing of the Petition on October 18 (approved by the Regional Director on October 21), Harvard was now facing a deadline by which to produce a list.<sup>10</sup> At that point, Harvard sent a final draft list of voters to each school along with explanatory information. (Er. Ex. 33; Tr. 1218-19). The various school point people were asked to review the list and the explanatory information and complete one final check to ensure there were no groups of eligible

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<sup>9</sup> Some examples include the following: (1) If a job code for a position normally held by a faculty member, but Harvard thought there may be occasions where a student performed in the role, it was included in the template; (2) In the Department of Continuing Education, there are two specific titles used, “instructor” and “teaching support.” Because Harvard thought it might encompass a bargaining position, it was included; (3) The template included “a set of school, generally school specific inclusion of exclusion criteria that were a result of the iterative communication with the schools about how...we should understand and quantify their appointments in PeopleSoft.” (Er. Ex. 33; Tr. 1273-74).

<sup>10</sup> Once the Petition was filed, Harvard faced an additional obstacle in the form of its conflicting obligations under the Family Educational Rights and Privacy Act (“FERPA”) (20 U.S.C. § 1232g; 34 CFR Part 99), the Federal law that protects the privacy of student education records. Harvard needed to ensure compliance with its students’ rights under FERPA; violations of which result in significant consequences, including the potential loss of Federal funding. *See* 20 U.S.C. § 1232g. Acknowledging this requirement, the Board served a subpoena on Harvard, (disclosure of FERPA protected information is permitted if required under a lawfully issued subpoena. *See* 34 C.F.R. § 99.31(a)(9)(i)), and allowed Harvard 10 days to produce the list. This provided Harvard the requisite time to send out “FERPA notices” to the students on the voter list, informing them that the Board had subpoenaed information that Harvard was now required to produce, allowing them the opportunity to object to disclosure of their private information. (Tr. 1070-71).

voters missing from the list. (Tr. 1219). It was only after this exhaustive process, involving scores of individuals, over a short amount of time, that Harvard was able to produce the voter list to the Region and the Union.

#### IV. ARGUMENT

##### A. The Board Has Long Held That NLRB Elections Should Not Be Lightly Set Aside

The Regional Director's Order to set aside an election and to invalidate the votes of nearly 3,000 voters deviates from long established Board precedent. It is well settled that "the results of a secret ballot, conducted under Government sponsorship and with all the safeguards which have been developed throughout the years, should not be lightly set aside." *Liberal Market, Inc.*, 108 NLRB 1481 (1954).<sup>11</sup> "[T]he burden is not on the Board to establish the validity of the election; rather, the objecting party has the burden of proving by specific evidence that the election was unfair. *Isaacson-Carrico Mfg.*, 200 NLRB 788, 803 (1972), citing *N.L.R.B. v. Mattison Machine Works*, 365 U.S. 123, 124 (1951). Accordingly, "the burden of proof on parties seeking to have a Board-supervised election set aside is a 'heavy one.'" *Safeway, Inc.*, 338 at 525, citing *Kux Mfg. Co. v. NLRB*, 890 F.2d 804, 808 (6th Cir. 1989). This principle is applied with equal vigor to cases dealing specifically with omissions and other deficiencies with an *Excelsior* list. See Footnote 21, *infra* (cases cited where the Board refused to overturn an election, despite a high error rate with regard to the voter list).

The Board has not previously been tasked with an *Excelsior* deficiency case involving the confluence of factors present here. See pp. 2-10, *supra*. Despite the litany of unique challenges present in a graduate student election, Harvard did all that was reasonably possible to create a

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<sup>11</sup> See also, *Safeway, Inc.*, 338 NLRB 525 (2002); *NLRB v. Hood Furniture Mfg. Co.*, 941 F.2d 325, 328 (5th Cir. 1991).

substantially compliant list.<sup>12</sup> As demonstrated below, when balancing the factors required by *Woodman’s Food Mkts., Inc.*, 332 NLRB 503 (2000), and taking into account that there has been no allegation of misconduct by Harvard during the nearly two years the Union was active on Harvard’s campus, the Board should recognize the University’s substantial compliance with its *Excelsior* obligations and reject the Regional Director’s determination that the votes of nearly 3,000 students be cast aside.

**B. The Regional Director Departed From Established Board Precedent In Finding That Harvard Failed To Comply With Its Obligations In Creating The Voter List**

**1. Harvard’s Extraordinary Efforts In Meeting The Voter List Requirements Exceeded Its Duty Of “Reasonable Diligence”**

Harvard met its obligation to produce a valid voter list under the Board’s existing precedent. The Board has long held that an employer is required to simply exercise “a reasonable amount of diligence” in its efforts to meet the voter list requirements. *Texas Christian Univ.*, 220 NLRB 396, 398 (1975).

Harvard’s diligence in approaching the creation of the voter list was not just reasonable, but indeed was extraordinary, and it is difficult to conceive of very much else Harvard could have done to ensure the creation of a more accurate list. The University faced daunting challenges at the outset in identifying which of its over 22,000 students fit the category of newly recognized “employees,” and in numerous other obstacles not present in a traditional election setting.

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<sup>12</sup> Notably, the other elections involving graduate students since *Columbia* clearly demonstrate that voter eligibility confusion and a significant number of challenges is the norm, not the exception. *See e.g., Duke Univ.*, 10-RC-187957 (Feb. 24, 2017)(398 votes for, 691 against, with a total of **502 challenges; 32%** of all votes cast); *Brandeis Univ.*, 01-RC-196695 (May 2, 2017)(the SEIU 88-34, but there were **48 challenges, 28%** of all votes cast); *Yale Univ.*, 01-RC-183014 (March 2, 2017)(elections for two of the eight units had a determinative number of challenges, delaying the certification of the election). Even at Columbia University itself, where the union obtained a clear majority of 1602-623, there were some **647 ballots cast under challenge – 22.5%** of the total votes cast.

The University's system of tracking students paid by the University well preceded the *Columbia* decision and was not designed to permit the simple sorting of students, some of whom were now also seen as statutory employees. PeopleSoft includes students who simply received stipends but did no "work" as defined by the Board in *Columbia*, but these students would at some point begin performing recognized "work" with no change in PeopleSoft designation. Further complicating matters, the definitions in the proposed unit description (e.g., research assistant), were not titles that could be uniformly referenced in each separate school – or, consequently, easily pulled from PeopleSoft.

Faced with these issues, as described more fully above, Harvard employed a team of senior level administrators, who each had their own teams within the 14 different schools to assist in creating the most accurate list possible. Harvard centrally analyzed the responses provided by the schools, created initial lists, and then returned to the schools with additional search criteria. It was a daunting task for the University to coordinate detailed information from those schools and to use such information to create a definitive voter list, while simultaneously complying with Union demands, Board procedures, and competing federal privacy laws, all under tight time constraints, and in the context of a student population that moves in and out of covered positions with rapidity.

Moreover, while the Union had multiple opportunities to provide guidance to the University and help shape the list prior to filing its Petition, it generally declined to engage. Thus, while Harvard had a general sense of Union intentions in early September, it did not receive definitive information about the make-up of the unit from the Union until 10 days before

the showing of interest list was due.<sup>13</sup> For the Union to raise objections concerning the list now, having declined the overtures by the University designed to improve the list prior to the election, is unfair and should not be rewarded.<sup>14</sup>

Further, the impact of *Columbia*, both in terms of the timing and the wide scope of the Board's groundbreaking ruling, created difficulties unprecedented in any other NLRB election setting. The short timing between *Columbia* and the Union's Petition in this case, is an additional relevant consideration in determining whether Harvard substantially complied with its *Excelsior* obligations. The Decision's apparent view that the moment *Columbia* changed the law, Harvard should have been able to seamlessly develop a flawless voter list of employees who were heretofore simply students is unrealistic and untenable.<sup>15</sup> The efforts made to create an accurate list, which both the Hearing Officer and Regional Director acknowledged were in good faith, demonstrate that the University did everything it reasonably could to comply with the rule. The Regional Director not only failed to appreciate the unique facts involved in this case, but his Decision reaches conclusions concerning Harvard's diligence that are simply not supported by the record and essentially hold Harvard to a strict liability standard. On this basis alone, the Decision should be overturned.

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<sup>13</sup> Harvard faced further time pressures by the need to comply with FERPA and provide reasonable notice to nearly 4,000 students of the information being shared, further reducing the time to prepare the voter list by a week.

<sup>14</sup> While acknowledging it is the employer's responsibility to create the voter list, one purpose of the voter list requirement is resolve differences ahead of the election and to enable "the parties on the ballot to avoid having to challenge voters based solely on lack of knowledge as to the voter's identity." Representation—Case Procedures, 79 FR 74308-01, citing *Excelsior*, 156 NLRB at 1240-41, 1242-43, 1246. The Union's actions frustrated this purpose.

<sup>15</sup> Notably, both the Board and the Supreme Court have recognized the reality that a university, "does not square with the traditional authority structures with which this Act was designed to cope in the typical organization of the commercial world." *Adelphi Univ.*, 195 NLRB 639, 648 (1972); *Syracuse Univ.*, 204 NLRB 641, 643 (1973) (the "industrial model cannot be imposed blindly on the academic world."); *NLRB v. Yeshiva Univ.*, 444 U.S. 672, 680 (1980) ("the authority structure of a university does not fit neatly within the statutory scheme" set forth in the Act.); see also *Columbia Univ.* (Member Miscimarra, dissenting), slip op. at 22-34.

**2. The Regional Director Failed To Correctly Apply The Board's Analysis In *Woodman's* By Failing To Consider Harvard's Explanations For The Omissions**

The Board should review and overturn the Decision because the Regional Director engaged in a mechanical application of *Excelsior* that has been rejected by *Woodman's* and its progeny. The Decision relies almost exclusively on the percentage of omissions and improperly disregards, without support, Harvard's legitimate justifications for the omissions. Because the Regional Director failed to properly apply established Board precedent, the Decision should be overturned.

Understanding the reality that “omissions may occur, notwithstanding an employer’s reasonable good-faith efforts to comply, due to uncertainties about who is an eligible unit employee or other factors[,]” *Woodman's*, 332 NLRB at 504-05, the Board in *Woodman's* reexamined its case law and clarified the test for whether the omission of names of eligible voters from the *Excelsior* list will be grounds for setting aside an election. Focusing on whether the electorate was able to make a “fully-informed” choice in the election, the Board held that,

in determining whether an employer has substantially complied with the *Excelsior* requirements, the Board must consider not only the number of names omitted from the *Excelsior* list as a percentage of the electorate, but also other factors, including the potential prejudicial effect on the election as reflected by whether the omissions involve a determinative number of voters and the employer’s reasons for omitting the names.

*Woodman's*, 332 NLRB at 503.<sup>16</sup> Shifting its focus from a purely numerical analysis, the Board updated its test by considering among other factors “the employer’s explanation for the omissions.” *Woodman's*, 332 NLRB at 505. The Board also reaffirmed its longstanding position that the *Excelsior* rule “is not to be ‘mechanically applied.’” *Woodman's*, 332 NLRB at 504,

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<sup>16</sup> See also, *Automatic Fire Sys.*, 357 NLRB 2340, 2340-41(2012) (the Board in *Woodman's* “eschewed th[e] overly simplistic analysis” in *Excelsior* deficiency cases of looking solely at the percentage of omissions, and instead opted “for a more comprehensive approach,” including the consideration of “other factors.”).

citing *Telonic Instruments*, 173 NLRB 588, 589 (1968). While the Union argues that *Woodman's* merely expands the ways in which an employer's efforts might be found lacking, this is a cramped reading at odds with *Woodman's* broad mandate -- to focus on the employer's explanation and the requirement that list deficiencies be "prejudicial" in the election.

Although the Regional Director correctly states that "[b]efore *Woodman's*, the Board generally decided voter omission objections based on the percentage of the unit omitted[,]" and that, "*Woodman's*...broadened the factors to include whether the omissions were determinative and the employer's explanation[,]" (Decision at 28), he ultimately failed to properly consider the additional *Woodman's* factors. This is reversible error. While the Board makes clear that no one factor is weighted more heavily than another, the unique circumstances of Harvard's efforts to ensure as accurate a list as possible must be considered in determining whether there was substantial compliance and whether the Board should take the extraordinary step of overturning the vote of nearly 3,000 students and ordering a new election.

In the Decision, the Regional Director concluded that "there was no legal justification for the Employer's omissions." (Decision at 28). The overwhelming evidence in this record is contrary to this finding. Given the powerful justifications for the categories of omissions described below, as well as the other categories of voters that the Regional Director has post-hoc concluded should have been included (such as the those discussed in Section IV.E below), the Regional Director erred in counting all of the omitted votes in applying the *Woodman's* percentage test. This misapplication of Board law should persuade the Board that a second election should not be directed.

a. **Voters Holding Retroactive Appointments Could Not Have Been Included On The Voter List And Should Not Have Been Counted As Omissions**

Individuals with retroactive appointments consisted mostly of hourly research assistants who did not have an appointment in Harvard's payroll system as of the eligibility cutoff date, but who were subsequently appointed "retroactively" to an earlier date. These students created individual "employment relationships" with faculty members for the purpose of performing research-related work (*e.g.*, edit a chapter in a book). These employees were transient, commencing and ceasing employment at various points during the fall of 2016, and when the voter list was created, these students **did not appear in the payroll system** or in any other official record of employment. By the date of the election, however, the student might well have begun to work, or been entered with an active retroactive appointment, or both.

Disregarding this explanation, the Regional Director held that, applying a "reasonable amount of diligence" would have enabled Harvard to identify all of the 175 individuals in this group. (Decision, p. 25). Notably, the Regional Director fails to explain what "reasonable" steps Harvard could have taken during the 10-day list-preparation period to identify these individuals, given there was no record of them in any Harvard system. Indeed, because the reporting of the "work relationship" was left in the hands of the individual students and faculty member themselves, there was no systematic method of identifying these "employees" at the time that Harvard created the voter list.

The natural consequence of the Regional Director's conclusion is that Harvard would have been required to individually contact all of its 22,000 students and 2,400 faculty members to inquire as to whether a particular student might be performing the type of work defined in the election agreement, even though they had not yet been given a formal appointment – all within the 10-day period after receiving the petition. This cannot be considered reasonable in any sense

of the word, and query whether such *ad hoc* method could even create a more accurate list. Instead, Harvard reasonably relied on the fact that students and faculty understood that paperwork should be submitted in a timely fashion and there was no reason prior to the election to conclude that that was not generally the case. (Tr. 1260).

The Regional Director held that because Harvard was generally aware that a retroactive appointment might occur, it did not exercise reasonable diligence in locating all of them. In support of this tenuous conclusion, the Regional Director cites to the existence of an on-line PeopleSoft “How-To” guide that provided instructions on how to enter retroactive pay if the situation ever arose. However, the Board has considered a similar argument in the past, and expressly rejected it. *See Texas Christian Univ.*, 220 NLRB 396 (1975)(after failing to provide correct addresses on the *Excelsior* list, the Board did not overturn the election, despite the fact that addresses changed frequently and the employer’s handbook contained instructions that changes of address should be promptly reported).<sup>17</sup>

Because there was no reasonable way for Harvard to have included the retroactively-appointed voters on the voter list, it was error for the Regional Director to have included these ballots as “omitted” for purposes of analyzing Harvard’s substantial compliance with the *Excelsior* list rule.

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<sup>17</sup> Curiously, the Decision also cites the factual circumstances of two individuals, [REDACTED] and [REDACTED], in support of its conclusion that the retroactive appointments should be included in the omission calculation; however, neither of these two students were in the group of retroactive appointments, and their circumstances do not support the Regional Director’s conclusions. In Ms. [REDACTED]’s case, a faculty member sent a letter in December, a month after the election, stating that Ms. [REDACTED] had performed work during the semester, but did not specify if she commenced work prior to the cutoff date. (*See* Pet. Ex 16. The Hearing Officer’s Report, accepted by the Regional Director, found that “**the dates of [her] employment are unclear[.]**” (Hearing Officer’s Report, p. 52). The circumstances involving Mr. [REDACTED] simply demonstrate that there are multiple possible causes of a delay in the paperwork and the commencement of work. Reminding a faculty member to submit his paperwork would not have resolved the problem of getting the appointment entered into PeopleSoft in a timely fashion. (*See* Pet. Ex 17). Significantly, neither Ms. [REDACTED] nor Mr. [REDACTED] were one of the 175 retroactive appointments.

**b. G1s And G2s Assigned To Fixed Labs In The Division Of Medical Science Should Not Have Been Counted As Omissions Because They Could Not Reasonably Have Been Identified By The Employer**

With regard to the PhD students in the Division of Medical Science (DMS), the Regional Director again erred by finding that Harvard’s conduct “showed ‘a lack of diligence and due care[,]’” when these students were omitted from the voter list due to a good faith miscommunication between the team assembling the voter list and school. This error – which the Regional Director specifically held was *not* made in bad faith – does not provide support for overturning the election, and these omitted ballots should not be used against Harvard for purposes of *Excelsior* list compliance.

In *West Coast Meat Packing Company, Inc.*, 195 NLRB 37 (1972), the Board conducted an election which the union lost by two votes. The Board found that 22% of the addresses on the voter list were incorrect and 4% of the names were omitted from the *Excelsior* list. The employer’s reason for the omissions was its belief that the employees were either not in the unit or ineligible to vote for other reasons. Thus, in good faith, the employer had not put them on the voter list, and it was only later determined that the individuals were indeed eligible. The Board noted that “[a]lthough the Employer was wrong on both counts, we do not believe these mistakes constitute gross negligence or indicate bad faith.” The Board overruled the petitioner’s objections related to those omissions. This case directly applies to the present matter.

Failing to distinguish *West Coast*, the Regional Director instead cited the factual circumstances in *Woodman’s* in support of his conclusion that the omissions of the DMS G1s and G2s warrant the overturning of the election; however, the circumstances in that case are distinguishable. In *Woodman’s*, the employer explained that certain omissions were based on its misunderstanding of the *payroll eligibility requirement* (while *Woodman’s* did not provide

specific facts, the payroll eligibility is generally as simple as, is an individual in the payroll system on a certain date?), and for the remaining omissions, the employer did not provide any explanation. Unlike the apparent slipshod approach by the employer in *Woodman's*, here, Harvard exercised care in making the nuanced assessment of when a student transitions from the exploratory phase of his or her lab rotations into the focused phase, in the context of *Columbia's* analysis of "employment status." Harvard administrators reasonably understood that students in the DMS program were in their exploratory phase until the middle or end of their G2 year – that is, until well after the October 15 list cut-off date, based on information provided by senior administrators in that school. In fact, the lab assignment takes place at the level of individual faculty member and student, and it was subsequently learned that the majority of the DMS students have a lab assignment by the start of the G2 year, and some are assigned during the G1 year. Given the reasonableness of this error, coupled with the extreme diligence exercised by Harvard in creating the list, the limited omissions described here should not have been included in the count of omitted ballots, and do not support the decision to order a second election.<sup>18</sup>

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<sup>18</sup> It should not be lost on the Board that the Union now seeks to benefit from its elusiveness in responding to specific questions prior to the election regarding the eligibility of certain employees which could have helped to reduce the number of omissions. Beyond the lack of information provided at the September meeting, on November 10, Elizabeth Seaman, an attorney in Harvard's General Counsel's office, emailed representatives of the Union and its outside counsel and invited a discussion regarding the G1s and G2s in the Harvard Medical School. While Harvard's position at the time was that those students were not eligible, it reached out to the Union to discuss their status because the University was informed that the organizers were directing those students to vote.

Please let us know the union's position with respect to the G1 and G2 science students who were not included on our voter list. As we mentioned, we have heard the student organizers telling those students that they should vote. (Pet. Ex. 31(a)).

The Union never responded to this inquiry nor did it follow up on these individuals until after losing the election, when it first argued that these voters had been wrongly omitted from the list. Significantly, information submitted in Harvard's Offer of Proof (Rejected Bd. Ex. 11), which Harvard argues below should have been accepted, confirms that the Union was contacting students in this group *prior to* the election and telling them to vote (indeed, the majority did vote). Whether this goes to prejudice, or simply fundamental fairness, it is a factor that should certainly be considered by the Board.

c. **The Employer Should Not Be Penalized For Having Agreed In Good Faith To The Counting Of The Post-Election, Pre-Hearing Resolved Challenged Ballots And Stipulated Eligible Ballots In This Proceeding**

The Regional Director also came to contradictory and unsupportable conclusions with regard to the 67 individual ballots (“ones offs”) the parties agreed to count prior to the hearing and those additional ballots the parties agreed to count during the hearing.<sup>19</sup> The Regional Director supports his conclusion by stating “the Employer offered no evidence that the Employer resolved challenges without prejudice or otherwise reserved any rights to later dispute eligibility.” (Decision, p. 26). This misunderstands the context in which the ballots were discussed. After the election, the parties and the Board were faced with nearly 1,200 challenged ballots. Rather than immediately schedule a hearing to resolve the challenges, the Region directed the parties to confer in good faith and resolve as many challenges as they could. In the spirit of compromise, the parties were able to resolve close to 900 challenged ballots. At no time did either party do so with or without prejudice or with the expectation that those compromises would be held against them. The Director’s conclusion is fundamentally flawed as the resolution discussions were intended to provide a non-adversarial off-the-record process for reducing the number of challenges and potentially alleviating the need for a hearing. There was no official “record” of these discussions, which were more akin to settlement talks, and there would have been no discernible method for a party to “reserve its rights.”

Further, as a policy matter, the Decision in this regard will dissuade employers from engaging in similar compromise in the future – with substantial implications to the Board itself,

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<sup>19</sup> The arguments against including these voters as “omissions” applies with equal force to the other ballots Harvard agreed to open during the period after the election when the Board encouraged the parties to work through the nearly 1,200 challenged ballots. Harvard engaged in these discussions in good faith with the mutual goal of avoiding a hearing. Harvard’s good faith decision to agree to *count* many of the ballots should not now be held against it.

which will be forced to make legal judgments on issues that the parties might have resolved more informally. Each and every challenged ballot (close to 1,200 in this case) will need to be adjudicated by the Board as the Decision removes any incentive for an employer to agree to resolve challenges informally when a union can subsequently turn around and add each one to an alleged omission count.

**d. The Remaining Categories Of Challenged Ballots Should Not Have Been Considered List Omissions Not Omissions**

Lastly, for the reasons explained in Section VII, *infra*, the remaining categories of challenged ballots<sup>20</sup> should be deemed ineligible and therefore, should not be included in the omissions count. However, even if, *arguendo*, the Board finds they were eligible, they nevertheless should not be included as part of the omissions count based on the Board's decisions in *Texas Christian University* and *West Coast Meat Packing*, where the Board found that the employers had a good faith basis for purposely excluding certain employees from the *Excelsior* list, and the Board refused to order a new election. The Regional Director's attempt to distinguish *West Coast* was unavailing, (*see* Decision, p. 24 ("The hearing officer noted, and I agree, that the issue is not one of good faith or bad faith, but rather that the Employer purposely chose to exclude students.")). Harvard left certain students off the *Excelsior* list because of its good faith belief that they were not eligible – *the exact same justification* provided in *West Coast Meat Packing* and *Texas Christian University* where the Board did not order new elections.

Further, the Regional Director's apparent view that employers should simply put every single employee on the challenge list (Decision, p. 24) is untenable and the Board has never held employers to this standard. Harvard's decision not to include certain students (students whom

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<sup>20</sup> These remaining challenge categories are: Individual Meeting the Look Back Criteria; Teaching Assistants in GSD; First-Year Students in the OEB Department; and Individuals with Challenged Ballots Deemed Eligible

this Board may still ultimately determine were not eligible) was made in good faith, which the Board considers when determining whether to take the extraordinary step of overturning an election.

The Board in *Woodman's* recognized the shortcoming of applying a mechanistic approach to *Excelsior* deficiency cases and properly directed that it would consider facts beyond the simple numbers in determining *Excelsior* list compliance. The Regional Director's Decision disregards *Woodman's* updated analysis. Indeed, the Decision amounts to the Region forcing the proverbial square peg in a round hole – reverting back to the pre-*Woodman's* approach by focusing solely on numbers and giving short shrift to the third *Woodman's* factor which the Board recognized nearly two decades ago. This is a clear departure from Board precedent that should be overruled.

### **3. The Percentage Of Omissions Did Not Warrant The Directing Of A Second Election**

While the Board may consider the number of omissions as a percentage of the electorate in coming to judgment about the conduct of the election, it has not established a specific percentage or bright line rule where it will presumptively find that an employer has or has not substantially complied with *Excelsior*, nor has it held that a determinative number of omissions automatically results in overturning an election. Instead, the Board analyzes the specific facts involved in each individual case and the specific challenges or factors facing an employer when creating the list. As argued above, the Regional Director grossly overstated the number and percentage of omitted ballots by including those as to which the Employer had legitimate and powerful justifications for the omission. But even if the percentage of omissions determined by the Regional Director –11.91% – is accurate, it is not significant enough to support the Union's objection. Indeed, elections have been upheld even with similar or larger percentages of

omissions or deficiencies. *See e.g., Tractor Co.*, 359 NLRB No. 67 (2013)(Board refused to overturn an election despite the **employer omitting 15.4% of the electorate**; finding there was no showing of bad faith or that the employer “intentionally omitted an entire segment of its work force.”).<sup>21</sup> In these cases, which involve situations far less novel and fluid than that presented here, the Board has not overturned the election.

**4. Even The Limited Evidence Allowed In The Record Demonstrates That The Election Was Not Prejudiced By The Omission Of Names From The Voter List**

Woodman’s directs that prejudice to the election is a relevant consideration in analyzing *Excelsior* list deficiencies. In this case, even without the Hearing Officer allowing evidence cited in the Offer of Proof and additional subpoenaed information that would have been introduced at the hearing (incorrect evidentiary decisions that are addressed in further detail below) it is evident from the record that *was* created that the Union’s ability to reach the electorate was not affected in this election by the omission of certain names.

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<sup>21</sup> *See also, Days Inns of Am., Inc.*, 216 NLRB 384 (1975)(Board refused to overturn the election despite incorrect addresses constituting **an error rate of 13.2%** and preventing the union from being able to provide written communications); *Kentfield Med. Hosp.*, 219 NLRB 174 (1975)(Board refused to overturn an election despite a **7% error factor** due to omissions and incorrect contact information); *Texas Christian Univ.* (Board refused to overturn an election despite an *Excelsior* list containing **26 incorrect addresses and eight omissions, a 21% error rate**, and the employer purposely omitting names on the advice of counsel); *West Coast Meat Packing Co., Inc.* (Board refused to overturn the election despite finding that **22%** of the addresses were wrong and **4%** of the names were omitted, **(26% error rate)** and that the employer purposely omitted names based on the “belief that the employee was not in the unit” and that another employee was ineligible to vote); *Singer Co.*, 175 NLRB No. 28 (1969)(Board refused to overturn the election despite the voter list containing only the initials and surnames of the employees and that the **list contained “squeezed type,” causing the petitioner to misread some of the names listed.**); *Telonic Indus., Inc.* (Board refused to overturn the election despite the fact the employer **omitted four names and the vote margin was only one**, as there was no showing that the omissions were attributable to gross negligence and the employer gave the union full access to all the eligible employees); *see also, Bear Truss, Inc.*, 325 NLRB 1162 (1998)(Board refused to overturn the election despite assuming **an error rate of about 14%**); *LeMaster Steel Erectors*, 271 NLRB 1391(1984)(Board did not overturn the election despite the company’s failure to provide temporary addresses for **9%** of electorate.); *Program Aids Co., Inc.*, 163 NLRB 145 (1967)(Board refused to overturn the election even though the employer failed to furnish the voter list of the names and addresses of its employees within the period required by the Board); *Taylor Publ’g Co.*, 167 NLRB 228, 228-29 (1967)(Board did not overturn the election despite the late submission of voter list).

Witnesses for the Union acknowledged at the hearing that the Union hired students as paid organizers as far back as 2015. (Tr. 266-67). The student organizers (enrolled graduate students), and the Union by extension, had access to the graduate student directory, which put them in touch with *all* graduate students via email. (See e.g., Tr. 1135-36). Further, [REDACTED], a PhD student in the Graduate School of Arts & Sciences, was **not** on the voter list, and she testified that she nevertheless received emails from the HGSU-UAW prior to the election that provided information about, *inter alia*, the voting process. (Tr. 1173-75). This evidence demonstrates that the Union was sending campaign and voting information to all graduate students and not just those on the voter list. The significance of these facts, which demonstrate lack of prejudice to the election campaign, cannot be understated, and the Board should certainly consider them in the overall context of this case.<sup>22</sup>

In addition to email communications, the HGSU-UAW set up several websites and social media for students to access further information about the campaign. (Pet. Ex. 45). The HGSU-UAW's website offered students the opportunity to "chat with an organizer" if they had questions, provided the opportunity to "get involved" with the campaign, and provided an email and telephone number to contact organizers. (Pet. Ex. 45). This activity was extensively covered by the *Harvard Crimson*, the campus newspaper. In addition, throughout the year and one-half long campaign, the HGSU-UAW and its organizers enjoyed unfettered access to Harvard's campus and students, and there was no evidence presented at the hearing that the campaign was restricted by Harvard in any way. Indeed, in communications to its students, Harvard often directed students to the HGSU-UAW's website to obtain information about the campaign and the

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<sup>22</sup> Indeed, the documentary evidence rejected by the Hearing Officer would have further demonstrated that the Union was sending the same campaign materials to *all* students, including those on the *Excelsior* list, and that it was reaching the entire electorate – students who are accustomed to using electronic devices as their primary means of communication --through such efforts.

election. (Pet. Ex. 45). In *Excelsior*, the lack of access to the voters at the employer's site was one of the critical elements justifying the voter list requirements. Certainly, the complete freedom that the Union had in organizing activity on campus and in reaching the voters personally – coupled with the technological means and other voter information at its disposal -- provides considerable evidence that established that the Union's campaign was not at all harmed by any omissions from the voter list.<sup>23</sup>

**C. There Are Compelling Reasons For The Board To Reconsider Its Policy Not To Allow Inquiry As To Whether A Union Was Prejudiced By The Employer's Omission Of Names From The Voter List**

As set forth above, Harvard contends that a correct application of *Woodman's* permits consideration of actual prejudice suffered by a Union in a case alleging insufficiency of a voter list, and that the Union has failed to demonstrate such prejudice in this case. However, even if the Board determines that the Regional Director correctly applied current law, the Employer contends, as a further basis for granting this Request for Review, that to the extent it is Board policy not to allow inquiry into whether a union was prejudiced by voter list omissions, such a policy is woefully outdated and needs to be reconsidered and revised in light of the original purpose of the *Excelsior* voter list; the dramatic technological advancements in the means of communications in the workplace over the past fifty years; and the reality of modern day union campaigning, especially in the context of an election involving graduate student workers on a university campus. Furthermore, the Board's stance on this issue as determined by the Regional

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<sup>23</sup> The record also demonstrated that the Union conducted a campaign over a year and a half period. (Decision, p. 21). Over that period, it dispersed its own employees throughout Harvard's campuses and buildings to meet with and discuss the campaign with other students, and utilized modern technology such as websites, emails and social media to further spread information. (Pet. Ex. 45; Tr. 266-67; 551; 579; 1175). In addition to UAW employees working on campus, the Union similarly hired and paid Harvard students, at least as far back as the fall 2015, to assist in its organizing efforts, (Tr. 266-67), and similarly utilized unpaid student organizers as well. Those students were tasked with meeting one-on-one and in groups with students around campus and in the buildings – including classrooms, lab spaces, dining halls, and residences – to discuss the organizing campaign. (Tr. 551; 579).

Director would be logically inconsistent with the Board's contrasting view that union prejudice *can indeed be examined in other situations where addresses are omitted from the voter list or where there are delays in receipt of the list*. Finally, in this particular case, the Union had unfettered access to the electorate and could, and did, contact all the voters by using its own sources of email addresses, including the University's on-line directory. While there is some evidence on the record regarding the manner in which the campaign was conducted and the access of the Union to the voters, the Hearing Officer excluded any direct evidence by the Employer that would have shown that the Union's campaign was not harmed by the name omissions. In addition, the Hearing Officer refused to admit the Employer's Offer of Proof in this regard. Had Harvard been allowed to submit direct evidence of how the Union was not prejudiced by the omission of names, the conclusion that any list deficiencies were utterly irrelevant to the election campaign and outcome would be even more compelling. (*See Decision*, pp. 17-21 (Regional Director's discussion of the Hearing Officer's ruling on the Subpoena issue)).

In a case where the Union directed its campaign message to *all* students and did not need or appear to use the list provided by the Employer in order to reach potential voters, the Board should reverse the Regional Director's Decision and remand the case to the Region to allow such evidence into the record.

In this Request for Review, the Employer proposes that, if the Board determines that an employer has not "substantially complied" with the *Excelsior* rule, and assuming no other objectionable conduct, the employer should have the right to rebut the *presumed prejudice* to the union caused by list deficiencies by being allowed to prove that the union was not materially prejudiced by the omissions. The Employer does *not* seek a reversal of the *Excelsior* rule, or the

recent Board rules that expanded the voter list requirements, but rather, for reasons of fundamental fairness, seeks to accommodate the purposes for which the rule exists with the modern world of union campaigning.

**1. The Regional Director's Rejection Of Evidence As To Union Prejudice Was Erroneous**

The Regional Director relied on *Sonfarrel, Inc.*, 188 NLRB 969 (1971) and *Thrifty Auto Parts, Inc.*, 295 NLRB 1118 (1989), in ruling that the question of whether the Union's ability to reach voters was prejudiced by omissions from the voter list is a "non-litigable" matter. In *Sonfarrel*, an early post-*Excelsior* list case, the Board rejected arguments by the employer that, because four of the five employees omitted from the voter list had signed written statements that they had received and read union literature, it should be apparent that the union was not materially prejudiced by the inadvertent omission of names from the *Excelsior* list.

To look beyond the question of substantial completeness of the lists, however, and into the further question of whether employees were actually "informed" about the election issues despite their omission from the list, would spawn *an administrative monstrosity*.... We shall therefore presume, as the *Excelsior* case intended, that the Employer's failure to supply a substantially complete eligibility list has a prejudicial effect upon the election without inquiring into the question of whether the Union might have obtained some additional names and addresses of eligible employees prior to the election or whether the omitted employees might have garnered sufficient information about the issues to make an intelligent choice.

*Sonfarrel* at 970 (emphasis added). With its dire warning that opening that door would create an "administrative monstrosity," *Sonfarrel* has been cited as the basis for a refusal to even entertain the question of whether a union's campaign was actually prejudiced by voter list omissions. *See e.g., Women in Crisis Counseling & Assistance*, 312 NLRB 589 (1993). The Hearing Officer rejected the introduction of any evidence on this question and further rejected the Employer's Offer of Proof in this regard (Hearing Officer's Report, p. 67). The Regional Director affirmed the Hearing Officer's rulings, including the latter's reliance on *Sonfarrel, Inc.* and *Thrifty Auto*

*Parts, Inc.*, and stated that the Employer was seeking to change “established Board law” but that he was “obligated to follow Board law.” (Decision, at 20-21). Such cramped application of this rule, especially following *Woodman’s*, must be rejected.

**2. The Basis Of The *Excelsior* Rule Has Been Undermined By Changing Technology**

To understand how changes in technology have affected union campaigns, it is important to consider the limited forms of communication available at the time that *Excelsior* was decided and what the Board was seeking to overcome in requiring employers to provide lists of voter names and addresses. In *Excelsior*, the Board, in dealing with an election objection case, asked the parties to focus on the following questions:

- I. Can a fair and free election be held when the union involved lacks the names and addresses of employees eligible to vote in that election, and the employer refuses to accede to the union's request therefor?
- II. If such information should be made available, should the requirement be limited to situations in which the employer has utilized his knowledge of these names and addresses to mail antiunion letters or literature to employees' homes?
- III. If some requirement that the employer make addresses available is to be imposed, how should this be implemented? For example, should such names and addresses be furnished to a mailing service with instructions to mail, at the union's expense, such materials as the union may furnish? Or, should the union be entitled to have the names and addresses?

In its ultimate ruling in which these questions were addressed, the Board established that, henceforth, in any union election the employer would be required to submit a listing of the names and addresses of eligible voters to the Regional Director who would then forward the list to the union.

The considerations that impel us to adopt the foregoing rule are these: The control of the election proceeding, and the determination of the steps necessary to conduct that election fairly [are] matters which Congress entrusted to the Board alone. In discharging that trust, we regard it as the Board's function to conduct elections in which employees have the opportunity to cast their ballots for or against representation under circumstances that are free not only from interference, restraint, or coercion violative of the Act, but also

from other elements that prevent or impede a free and reasoned choice. ***Among the factors that undoubtedly tend to impede such a choice is a lack of information with respect to one of the choices available. In other words, an employee who has had an effective opportunity to hear the arguments concerning representation is in a better position to make a more fully informed and reasonable choice. Accordingly, we think that it is appropriate for us to remove the impediment to communication to which our new rule is directed.***

*Excelsior* at 1240 (emphasis added). The Board explained,

...without a list of employee names and addresses, a labor organization, ***whose organizers normally have no right of access to plant premises, has no method by which it can be certain of reaching all the employees with its arguments in favor of representation, and, as a result, employees are often completely unaware of that point of view.***

*Excelsior*, at 1240. The Board acknowledged that the union “might” be able to reach voters by other means, but this was far from certain. In that era, there was simply no effective means to reach employees other than having a list of names and home addresses.

A union that does not know the names or addresses of some of the voters may seek to communicate with them by distributing literature on sidewalks or street corners adjoining the employer's premises or by utilizing the mass media of communication. The likelihood that *all* employees will be reached by these methods is, however, problematical at best.

*Excelsior*, at 1241 n.10 (citations omitted). The Board went out of its way to explain that the situation would be quite different if the union could make personal appeals *on the employer's premises*.<sup>24</sup> But, employers could routinely keep the organizers off the premises altogether.

Personal solicitation on plant premises by employee supporters of the union, while vastly more satisfactory than the above methods, suffers from the limited periods of nonworking time available for solicitation (generally and legally forbidden during working time, *Peyton Packing Company, Inc.*, 49 NLRB 828, 843)

*Excelsior*, at 1241 n.10. Almost 30 years later, the Board in *North Macon Health Care Facility*, 315 NLRB 359, 360, n.7 (1994), still stressed this lack of access to the employer's property and

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<sup>24</sup> As noted below in discussion of Employer's Offer of Proof, in the context of a university campus, there are few physical barriers to access, a fact which further reduces or eliminates one of the main concerns underlying *Excelsior*.

cited the then-recent decision in *Lechmere Inc. v. NLRB*, 502 U.S. 527 (1992) in which the Supreme Court strictly limited union access to employer property.

Clearly, then, the Board was primarily concerned in *Excelsior* with providing a union with a regularized means of reaching the electorate in a time when there were no reliable methods of reaching employees short of visiting or mailing to their homes.

### **3. Changes In Workplace Communications Since *Excelsior* Warrant Revisiting The Evidentiary Restrictions On Examining The Question Of Union Prejudice**

Today, five decades after *Excelsior*, there are new and sophisticated means for unions to reach employees. These include email communication via computer or cell phone, text messages, union web sites, Twitter, Facebook and other rapidly emerging social media, now all commonly used in union organizing campaigns. But first among these new technologies is the ubiquitous use of email.

#### **a. Email Has Revolutionized Election Campaign Communications**

Obviously, the very existence of email was not even a budding idea in 1966. Today, it is the primary means of communications in the workplace. The fact that this has changed all modes of communication, including those in union campaigns, is self-evident. Significantly, the Board itself, in its 2014 revision of the rules for representation and election cases, specifically compared the times in which *Excelsior* was decided with the modern election campaign and set forth its own brief for the importance of email in union campaigns. In explaining the rationale for its revamping of the representation case procedures, the Board defended its final rules:

**Changed Technology:** Society changes rapidly, and new technology can quickly make old rules obsolete. Of particular relevance here, communications technologies developed in the last half-century have changed the way litigation, workplace relationships, **and representation campaigns function.** As the Supreme Court has stated in another context, ‘the responsibility to adapt the Act to changing patterns of industrial life is entrusted to the Board,’ and we would be remiss in leaving unchanged procedures which

are predicated on out-of-date facts or assumptions, even where there is no consequent delay. *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251, 266 (1975). 79 Fed. Reg. No. 240 (December 15, 2014) p.74315 (emphasis added)

In highlighting the need to expand the voter list requirements in the new rule, and comparing today with the time when *Excelsior* was decided, the Board further wrote:

Fifty years ago, email did not exist; and communication by United States mail was the norm. For example, the union in *Excelsior* requested a list of names and home addresses to answer campaign propaganda that the employer had mailed to its employees. *See Excelsior*, 156 NLRB at 1246–47. **Indeed, if a union wanted to reach employees with its arguments in favor of representation, it frequently resorted to the United States mail or visited employees at their homes because, as the Board recognized in *Excelsior*, the union, unlike the employer, “normally ha[s] no right of access to plant premises” to communicate with the employees.** *Id.* at 1240. (emphasis added)

The Board continued:

Communications technology and campaign communications have evolved far beyond the face-to-face conversation on the doorstep imagined by the Board in *Excelsior*... . [I]n *J. Picini Flooring*, 356 NLRB No. 9, slip op. at 2–3 (2010) (footnotes omitted), the Board recently observed,

While ... traditional means of communication remain in use, email, postings on internal and external websites, and other electronic communication tools are overtaking, if they have not already overtaken, bulletin boards as the primary means of communicating a uniform message to employees and union members. **Electronic communications are now the norm in many workplaces**, and it is reasonable to expect that the number of employers communicating with their employees through electronic methods will continue to increase. .... **In short, “[t]oday’s workplace is becoming increasingly electronic.”** 79 Fed. Reg. No. 240 (December 15, 2014) p.74337 (Emphasis added)

The Board wrote such language in support of its proposed rule that would require the employer to provide email addresses as part of the *Excelsior* requirements, but its perspective on the changing workplace environment and modes of communication is no less pertinent to the question at bar. For indeed, given the growth of email as the primary means of communication, a union which has independent access to employee emails (not to mention social media, as is discussed below), as was the case here, has all it needs to make its case to the electorate.

The Board is well aware of the value of this tool, and it has formed the basis for a recent and critical decision on union solicitation rights. The Board has now required the employer, with very limited exceptions, to allow employees to use the employer's email system to solicit other employees for union representation. *Purple Commc'ns, Inc.*, 361 NLRB No. 126 (2014). Clearly, this decision, is one of the most remarkable developments in the entire arena of union solicitation.<sup>25</sup> In *Purple Communications, supra*, the Board noted:

In many workplaces, email has effectively become a **“natural gathering place,”** pervasively used for employee-to employee conversations. Neither the fact that email exists in a virtual (rather than physical) space, nor the fact that it allows conversations to multiply and spread more quickly than face-to-face communication, reduces its centrality to employees' discussions, including their Section 7-protected discussions about terms and conditions of employment. **If anything, email's effectiveness as a mechanism for quickly sharing information and views increases its importance to employee communication.**

The effect of *Purple Communications* was to immediately broaden an organizing union's reach to the electorate. Now, long before they even receive a voter list, unions can usually communicate their message through a handful of pro-union employees utilizing email address lists of their fellow employees.<sup>26</sup> The impact of this decision, and what it can do for union organizational efforts, cannot be overstated.

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<sup>25</sup> The Board overturned *Register Guard Publishing Co.*, 351 NLRB 1110 (2007). In *Register Guard*, the Board ruled that restrictions on the use of the company email system were allowed. Members Liebman and Walsh, presaging *Purple Communications*, strongly dissented, writing:

Today's decision confirms that the NLRB has become the “Rip Van Winkle of administrative agencies.” *NLRB v. Thill, Inc.*, 980 F.2d 1137, 1142 (7th Cir. 1992). **Only a Board that has been asleep for the past 20 years could fail to recognize that e-mail has revolutionized communication both within and outside the workplace...National labor policy must be responsive to the enormous technological changes that are taking place in our society.** (emphasis added)

<sup>26</sup> In the context of a student union election, student organizers are not only fellow employees of the voters, but also fellow students, a fact which greatly expands the union's ability to reach and communicate with the voters as university email directories are readily available to students. (Tr. 1135-36).

**b. Websites, Facebook, Twitter And Other Social Media Diminish The Need For Employer-Provided Contact Information**

In addition to the extensive use of email, unions are using web site communication, Facebook, Twitter and other social media platforms and apps in an unprecedented manner today. Indeed, in the present case, as in many others, both the employer and the union will typically create a website and inform the electorate about its posting. Websites only emerged into common usage during the last 20 years but since then have become one of the predominant sources of information. Unions especially have utilized this tool and also now use Facebook, Twitter, Instagram, and other modern modes of communication.<sup>27</sup> With social media tools, there is no longer the need for employer-provided home and email addresses in order for a union to get its message out among the electorate. Once again, such information, easily found on an employees' work computer, personal computer or cell phone, without any need for information provided to the union by the employer, would have been unthinkable in the times when *Excelsior* was decided upon or for that matter when *Sonfarrel* (and even *Thrifty Auto Parts*) were issued in the early 1970s and late 1980's respectively. Social media is a continuing source of communications, not limited in time or scope or place, and as such, has become a powerful tool in union organizing, even more so than the web site.

**c. The Underpinnings Of *Excelsior* Must Be Examined In Light Of Campaign Realities And Technologic Advances In Union Campaigning**

The basic premise of *Excelsior* is that employer-provided contact information was necessary in order for unions to reach employees in their homes and provide them with the

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<sup>27</sup> <https://www.goiam.org/news/social-media-leads-organizing-victory-toronto-airport/> (Campaign by International Association of Machinists and Aerospace Workers entirely by social media); <http://www.laboremploymentreport.com/2015/06/19/labor-organizing-theres-about-to-be-an-app-for-that/>

(development of an app for union campaigning); <http://www.bergermarks.org/download/NewApproachestoOrganizingWomenandYoungWorkers.pdf>

arguments concerning union representation. But today's world is radically different, and, as such, it calls for some loosening of that standard. While the Board in 1966 could rightfully reject the often-thin employer arguments that an organizing union *might be able* to reach the voters without the employer supplying their names and addresses, such is no longer the case. The reality is that in some elections in today's world, the union's ability to reach voters is not at all harmed by not having an employer-provided list of every voter's name and address. The employer-provided contact information has become at most redundant, and possibly even irrelevant. In some elections, such as this one, the union has the ability to easily reach the entire electorate through electronic means that do not rely on an individual names and contact information provided by the employer. It is because of these realities that the Employer urges the Board to take a different approach before overturning an otherwise valid election.<sup>28</sup>

Importantly, the current Board policy on election list omissions is not only outdated, but it can indeed do violence to the democratic will of the voters. Assuming for the moment that a valid election has been held, and that the majority of voters rejected the union -- why should the Board nullify that democratic choice because some names were missing from the voter list if the union has reached employees with its message anyway? Why should the Board automatically, without considering any evidence on the matter, assume that the union's campaign was harmed by list omissions? Why shouldn't the employer be permitted to present evidence that establishes no harm to the union's ability to reach the voters? And if there was no harm to the union's ability to campaign, why shouldn't the voters' decision be upheld?

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<sup>28</sup> To be clear, the employer's position in this matter is limited to those cases where there is no other objectionable conduct by the employer and the only basis for ordering a new election is due to substantial non-compliance with *Excelsior*. Employers that commit unfair labor practices or other objectionable conduct do so at their peril and should not be allowed to submit evidence that the union was not harmed by its actions.

It has long been held that *Excelsior* should not be applied mechanically. *Telonic Instruments; Program Aids Co., Inc.*, 163 NLRB at 146 (“...we find nothing in our Decision in *Excelsior* which would require the rule stated therein to be mechanically applied.”). As the Hearing Officer in this very case stated, “there is a strong presumption that ballots cast under specific NLRB safeguards reflect the true desires of the employees.” (Hearing Officer’s Report, p. 56). In that spirit, then, and especially in light of the changes in communications highlighted herein, the Employer argues that it is appropriate to consider whether there was material prejudice to the union’s ability to provide information to the voters in cases where an employer has not substantially complied with voter list requirements.

**4. A Rebuttable Presumption Model Is Fair And Workable**

**a. Overview Of Proposed Approach**

In light of the foregoing sea change in technology and modes of communication, along with the reality that in any campaign a union may or may not be compromised by some missing names on the voter list, the Employer submits that the Board should adopt a reasonable shifting burden approach to cases where there has not been substantial compliance with *Excelsior* due to voter list omissions. Under this approach, if a union establishes that the employer did not substantially comply with *Excelsior* voter list requirements despite reasonably diligent efforts, and assuming no other objectionable conduct, then the employer in turn would be able to submit evidence to rebut the presumption of prejudice to the union and show that in fact the union’s ability to reach potential voters was not materially prejudiced by the list deficiencies, as the Board already allows in cases where, for example, the list contained “squeezed type” which

prevents a union from identifying a voter.<sup>29</sup> The employer would bear the burden of proof on this issue.

In many cases, this may be an insurmountable burden. But in some cases (including the case at bar), the employer may have ample evidence to show that the union was not materially prejudiced by the omissions and had the ability to reach the electorate through other means. The union would not have to show that its ability to reach voters was harmed; it would be *the employer* who would bear the burden of proof to demonstrate that there was no harm.

Such an approach would neither overturn *Excelsior* or the current Board voter list rules nor would it diminish their importance. This approach would honor the purpose of the voter list requirements but at the same time the Board would recognize that the will of the electorate in an otherwise full and free election should not be subverted on a technicality where the losing party was not harmed by such error. It is an approach anchored in fundamental fairness.

**b. Adoption Of A Rebuttable Presumption Analysis Would Not Create An “Administrative Monstrosity”**

It was claimed in *Sonfarrel, supra* that delving into the issue of union prejudice would create an “administrative monstrosity.” The Board in considering this matter should not be entranced or intimidated by this hyperbolic comment from a single case from half a century ago. For indeed, the Board regularly deals with much more difficult issues than considering evidence that a union suffered no harm by the omission of some names from a voter list.

To begin with, the Board *already allows inquiry into the question of whether a union was prejudiced* when it deals with other types of voter list errors, such as incorrect or missing addresses; delays in delivering the list; and other technical problems with creating the list. The

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<sup>29</sup> *Singer Co.*, (the list contained “squeezed type,” causing the petitioner to misread some of the names listed),

Hearing Officer, noting the Employer's contention that union prejudice is examined in a wide range of cases dealing with voter list irregularities, wrote:

This is accurate to an extent; the Board has, for example, taken into account whether a petitioning union was prejudiced by a one-day delay in receipt of the *Excelsior* list, a submission that was four days late, and an employer's refusal to provide temporary physical addresses to a petitioning union. (Hearing Officer Report, pp. 65-66)

The Hearing Officer cited *Taylor Publishing Company*, 167 NLRB at 228-29 (Union had sufficient time to communicate with voters despite late submission of voter list); *Program Aids Co., Inc.*, 163 NLRB at 146 (list submitted four days late; union only had list for 10 days. Board finds that "the Union was afforded sufficient opportunity to communicate with employees prior to the election."); and, *LeMaster Steel Erectors*, (Union not harmed by company failure to provide temporary addresses for 9% of electorate.), which the Regional Director subsequently cited with approval (Decision, p. 18). The Hearing Officer's examples in his Report, however, were by no means exhaustive.<sup>30</sup>

The Employer submits that it is completely illogical for the Board to entertain the question of union prejudice in this wide variety of cases where unions did not get the list on time or where they could not find the employees because of missing or incorrect addresses or where

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<sup>30</sup> See e.g., *Red Carpet Building Maint. Corp.*, 263 NLRB 1285 (1982)(the union received the Excelsior list late. In refusing to overturn the election, the Board held that "**the Petitioner has not established that it was prejudiced materially in its ability to communicate with employees** by this minor delay[.]" (emphasis added); *Bon Appetit Mgmt Co.*, 334 NLRB 1042 (2001)(the employer omitted the first names of the eligible voters and submitted an untimely list. The employer argued there was "no evidence that the Union was prejudiced as a result of [omitting first names from the Excelsior list] or by the slight delay in receiving the corrected list." The Board agreed, stating that "[t]he relevant inquiry in cases where there has been a delay in providing the Excelsior list is **whether the delay interfered with the purposes behind the Excelsior rule, i.e., to provide employees with the full opportunity to be informed of the arguments concerning representation.**" (emphasis added)); see also *Singer Co.*, (the union filed objections based upon, inter alia, the election list containing only the initials and surnames of the employees and that the list contained "squeezed type," causing the petitioner to misread some of the names listed. After reviewing whether the union was prejudiced by failure to provide the complete names for the eligible voters, the Board held that "supplying the full first names would not have been a material benefit in assisting delivery of the Petitioner's communications.").

incomplete or illegible names were provided, but not allow the same level of inquiry when names are missing.

Further, inquiry into whether or not a union was prejudiced by voter list errors is hardly an insurmountable challenge for the Board, nor would it create the “administrative monstrosity” about which the *Sonfarrel* Board was concerned in 1971. Simply put, the Board has shown itself quite capable of assessing the question of union prejudice in election objection cases. This is not *terra incognita* for the Board. The Employer submits that there is nothing substantially different between cases involving missing addresses, incorrect names and delays in receiving the list in which union prejudice is examined and those cases in which names were left off the voter list.

The Board has similarly shown itself to be able in other settings to examine the question of a union’s ability to reach voters. For example, in the general legal arena of solicitation by non-employee union organizers, both the Board and the courts have a long history of sorting out the facts to answer the question of whether or not a union had “reasonable access” to the employees. *See Lechmere, Inc. v. NLRB*, 502 U.S. 527 (1992)(affirming employer private property rights during union campaign); *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105 (1956)(same). While certainly *Lechmere* presented a different legal question, the decision – along with many comparable cases over the years – demonstrates the historical ability of the Board and the courts to examine facts dealing with union access to voters. Clearly, reviewing specific evidence on the question of union access is hardly beyond the competence of the Board.

##### **5. Narrow Scope Of The Employer’s Proposed Rule**

In asking the Board to reconsider its policy in this area, the Employer is mindful of not creating an opportunity for an employer to be negligent or cavalier in its adherence to voter list requirements. The Employer’s proposed approach is a narrow one, designed to effectuate a reasonable balance between union, employee and employer rights. It begins with the recognition

that the will of a majority of those employees who voted in a Board-supervised first election should be honored. Elections should not be overturned lightly.

Further, the Employer's approach would not reward any employer who engages in unfair labor practices or other objectionable conduct, or those who were careless (or worse) in compiling the voter list. The narrow evidentiary window that the Employer seeks would only open for those employers whose only error was some modicum of non-compliance with *Excelsior* list requirements. For those otherwise blameless employers, the approach would allow them to show that the list non-compliance was essentially harmless error, *i.e.*, that the organizing union suffered no material prejudice in its ability to reach voters as a result of the omissions. The burden of proof would remain on the employer in these cases. If it can prove that there was no material prejudice to the union's campaign, then the original will of the majority in the first election will be upheld. If on the other hand, it fails in proving that the union was not prejudiced, then, a second election can be ordered.

Finally, as to any concern about the dangers in such a hearing of exposing an employee's views on unionization, an employer would be precluded from asking about a particular employee's views but instead would be focused on evidence that centered on the organizing union's ability to access the voters, nor would the employer be entitled to the identities of individual students who may have provided the union with directory access. An employee's personal opinion of unionization would be irrelevant. Instead, in this particular case, the critical issue to be resolved is actually very simple: was the Union able to reach voters directly without an Employer-provided *Excelsior* list? The Employer submits that the evidence would show that the Union had both its own sources of voter email addresses, as well as the ability to contact

students in-person on Harvard's campus and through various electronic means, making any *Excelsior* list deficiencies inconsequential.

**D. The Hearing Officer's Evidentiary Rulings Were Erroneous**

**1. The Hearing Officer Erred In Rejecting The Employer's Offer Of Proof And In Quashing The Subpoena**

The Hearing Officer in this case would not allow evidence of any prejudice and, accordingly, the Employer submitted an Offer of Proof on the question of whether the Union was prejudiced by the omission of certain names from the voter list. The Hearing Officer rejected the Offer of Proof, and the Regional Director affirmed that ruling. (Tr. 1187-88; Decision, pp. 19-20). These rulings were in error. In that rejected Offer, the Employer presented ample evidence to show that the Union was not prejudiced by the omission of certain names from the voter list, citing the broad assertions (backed up by proposed evidence) of:

1. The Union's general unfettered access to the students on campus and access to voters, physically and electronically via email lists that were available to student organizers;
2. The Union sending campaign materials and information about the election to **all** students and not just those on the voter list;
3. The absence of enforcement of any non-solicitation rule or policy by the Employer;
4. The number of Union rallies and events actually held on campus throughout the 18-month campaign;
5. The Union's ubiquitous social media campaign, demonstrated in part by its well-publicized web site, its Facebook page and other social media platforms;
6. The Employer directing all students to visit the Union's social media sites so that students would be well informed of all points of view;
7. The regular coverage of the Union through *The Harvard Crimson*.

All such assertions were supported by an identification of witnesses who would have addressed such matters under oath at the hearing.

In addition to the Offer of Proof, the Employer had subpoenaed information from the Union with regard to its communications with the voters; its campaign materials and other information relating to the campaign. The Union moved to quash the subpoena, and the Hearing Officer agreed. The Regional Director affirmed the Hearing Officer's ruling. (Decision, pp. 17-21). Those decisions were also in error, and the Employer should have been allowed to subpoena the information.

The decisions were in error because the Hearing Officer (later confirmed by the Regional Director) made his decision on quashing the subpoena on the basis that any such subpoenaed information was "irrelevant" to the issues because such information went to the question of union prejudice and thus would not have been admitted in any event. That decision was technically in error for applying the wrong standard to a subpoena issue and substantively in error because the issue of whether or not the union suffered prejudice should have been allowed to be litigated. *The Guide for Hearing Officers in NLRB Representation and Section 10(K) Proceedings* issued by the Office of the General Counsel, states:

Subpoenaed information should be produced if it relates to any matter in question or if it can provide background information or lead to other evidence potentially relevant to the inquiry.

The Guide cites *Perdue Farms*, 323 NLRB 345, 348 (1997). In this case, the Hearing Officer did not follow the *Guide* and simply applied an admissibility standard, citing an outdated case of *Stokely Van Camp, Inc.*, 102 NLRB 131 (1953) for support and just a general statement that the subpoena did not meet the standard. (Tr. 787-88, 793-94). However, the documents the Employer sought met the standards for a subpoena and at the very least would have provided background information and might have led to other evidence potentially relevant to the inquiry. Because the Hearing Officer failed to provide any lawful support for revoking the Employer's

Subpoena, and because the Regional Director affirmed his ruling, the Decision and Direction of Election should be overturned and the case remanded for a new hearing.

Had the Offer of Proof been accepted, and had the Employer been allowed to subpoena and later introduce the Union's communications with the student employees, the record would be replete with evidence showing that the Union's ability to reach the electorate was not harmed at all by the omission of a small percentage of the electorate. Ultimately, the vote against the union was a fair and lawful expression of the intent of the employees. The Union wishes to have the expression of the voters overturned ultimately for no reason other than that it lost.

**E. The Board Should Overturn The Regional Director's Determinations Related To Challenged Ballots**

**1. Lookback Voters Have No Reasonable Likelihood Of Continued Employment And These Votes Should Not Be Counted**

The Regional Director improperly determined that votes cast by students who were not employed in covered positions on the payroll cutoff -- but who were working in such positions for a semester in the previous academic year (referred to as "Lookback" voters) -- should be counted. The Board should reject inclusion of these votes. Although the Board has previously permitted workers who are not employed on the payroll cutoff date (but who work in industries with cyclical employment periods) to cast votes in union elections, such rules are particularly ill-suited for graduate students who progress in a linear manner toward departure from the University. The Regional Director failed even to acknowledge this unique context, an error which requires reversal of the Decision.

The Notice of Election described that "[t]he parties have agreed that doctoral students who have been employed in the bargaining unit for at least one semester during the past academic year and who are not currently in their Dissertation Completion year (or final year of their program) may vote subject to the Board's challenge procedures." (Bd. Ex. 4, at p.3). By

definition, these putative voters were *not* employed on the October 15, 2016 payroll cutoff date established by Regional Director, and therefore would not have been eligible voters without the inclusion of the Lookback category. It was left to the post-election hearing to determine whether the Lookback ballots should be counted. The Regional Director, with slight modification, adopted the Hearing Officer's conclusion that Lookback votes should be counted. (*See* Decision, pp. 4-8).

At the hearing, Harvard presented extensive evidence to show why it is inappropriate for any student not employed on the payroll cutoff date to be considered an eligible voter. The testimony and record evidence showed that the employment life for a graduate student is fundamentally different from the situations where the Board has recognized that employees with cyclical, recurring patterns of off-and-on employment with the employer (such as adjunct faculty or those in the construction industry) should be permitted to vote because there is a likelihood of continued employment in the future.<sup>31</sup> The Regional Director failed to recognize and address the

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<sup>31</sup> By traditional criteria for voter eligibility, "an employee's eligibility to vote is determined by whether he was employed and working in the bargaining unit on the eligibility date and date of the election." *Magic Beans, LLC*, 352 NLRB 872, 872 (2008)(citing *Roy N. Lotspeich Publishing Co.*, 204 NLRB 517, 517-18 (1973)). Although there are a number of specific exceptions to this general rule that are not relevant to the current matter, in *Columbia University, supra.*, the Board stated:

We observe that the unique circumstances of student assistants' employment manifestly raise potential voter eligibility issues. The student assistants here tend to work for a substantial portion of their academic career, but not necessarily in consecutive semesters; thus, during any given semester, individuals with a continuing interest in the terms and conditions of employment of the unit may not be working.

*Id.*, slip op. at 21. In *Columbia University*, the Board encouraged the parties to determine a formula before the election by which it could be concluded whether the potential voters who were not employed and working on the payroll eligibility could be determined to be valid voters eligible to participate in the election. Specifically, the Board opined:

We have traditionally devised these formulae by examining the patterns of employment within a job or industry, and determining what amount of past employment serves as an approximate predictor of the likelihood of future employment.

For example, in a case involving adjunct faculty, the Board noted the importance of preventing an arbitrary distinction which disenfranchises employees with a continuing interest in their employment within the unit but who happen not to be working at the time of the election. In the particular circumstances of that case, the Board looked at factors including whether adjuncts had signed teaching contracts and the extent to which they had actually taught over previous semesters. *Id.*, slip op. at 22 (internal citations and footnotes omitted).

essential difference between “up and out” graduate student employment and those employed on an ongoing but irregular basis, in seasonal or intervallic industries. Harvard presented un rebutted evidence and argument demonstrating that a graduate student’s time with the University is not recurrent, cyclical, or periodic; rather, it steadily progresses toward completion over just several years. Accordingly, the likelihood of future employment – which is the *sine qua non* of whether a current non-employee should be permitted to be an eligible voter – steadily decreases with each semester as a student moves toward completion of the requirements for a degree. The earlier in an academic program a student is (a G1 or G2) the more likely it is that the student will be “employed” in the future, while the later a student is in the student’s studies (e.g. a G5 or G6), the less likely it is that he or she will work again. This linear progress toward graduation, after which there is no prospect of future unit employment (because only enrolled students are included in the bargaining unit), makes graduate students fundamentally different from the adjunct faculty or construction workers who engage in cyclical work where there is a discernable likelihood of working again. Because of the way that individuals progress through their studies as graduate students, any mechanism to predict potential future “employment” -- once a student has stopped working -- is inherently flawed and speculative. The Board should apply its longstanding tenet (seeking to determine if there is a reasonable likelihood of future employment for an individual who is not currently employed) and adopt Harvard’s position that no Lookback group is appropriate under these circumstances.

For the above reasons, the Employer submits that the Regional Director should not have counted the “Lookback” votes. At a minimum, however, the Board should exclude from the “Lookback” group the votes of those graduate students who have used up their allotment of “guaranteed teaching.” As Harvard alternatively presented to the Regional Director, in the case

of students who have used all four of their guaranteed teaching semesters, there is no reasoned method by which one could ascertain whether they will teach again in their time as a graduate student. Indeed, although students in their fifth or greater year of graduate study may sometimes seek out and obtain a teaching fellowship assignment after they have used the four guaranteed semesters of teaching fellowships (Tr. 66, 122), it is inherently unknowable whether or when such students will seek out such assignments and/or whether these assignments will be obtained.

Simply put, exhaustion of guaranteed teaching provides the most reasonable proxy concerning the likelihood that a student is at or near the completion of the student's "employment" during the student's graduate studies. For students in this status, it is reasonable to conclude that the likelihood of again teaching in the future is merely speculative, and there is no *reasonable likelihood* of employment in the future. *Columbia Univ.*, slip op. at 22. The Employer submits that none of the Lookback votes should be counted; but in the alternative, that only those votes cast by students who have not exhausted their teaching have a continued interest in the bargaining unit.

## **2. GSD Teaching Assistants Should Be Excluded From The Bargaining Unit**

The Regional Director incorrectly adopted the Hearing Officer's recommendation that ballots cast by students holding positions as "Teaching Assistants" at Harvard's Graduate School of Design ("GSD") should be counted. Because by GSD policy the GSD Teaching Assistants provide only technical, clerical, and administrative assistance in classes they support, the Board should reject the Regional Director's conclusion and exclude this group.

Under the *Columbia* standard adopted by the parties, the Board recognized that the University's instructional officers,

take on a role akin to that of faculty, the traditional purveyors of a university's instructional output. The teaching assistants conduct lectures, grade exams, and lead

discussions. Significant portions of the overall teaching duties conducted by universities are conducted by student assistants. The delegation of the task of instructing undergraduates, one of a university's most important revenue-producing activities, certainly suggests that the student assistants' relationship to the University has a salient economic character.

*Columbia Univ.*, slip op. at 16.

The record evidence clearly demonstrates that GSD Teaching Assistants do not perform sufficient teaching to bring them within the orbit of "instructional services" as contemplated in the Stipulated Election Agreement. The fundamental flaw in the Regional Director's adoption of the Hearing Officer's analysis is giving priority to the anecdotal testimony by three GSD students, over the documentary evidence and the testimony of senior GSD administrators with comprehensive knowledge of GSD policy and practice pertaining to the 116 GSD Teaching Assistants in Fall 2016. The Regional Director improperly gave no weight to departmental records regarding the responsibilities of GSD Teaching Assistants, which demonstrate that these positions are not instructional. The description of GSD Teaching Assistant responsibilities as non-instructional is clearly stated:

Teaching Assistant (TA) assists faculty in preparing course materials and provides logistical support or coordination as needed for coursework, course/AV set up, room scheduling, transportation, etc. They may not assign grades or serve as substitute Instructors in the absence of the instructor of record.

(Er. Ex. 17). Moreover, the GSD Teaching Assistants guide clearly reiterates that Teaching Assistants "may **NOT** assign grades or serve as substitute instructors..." (Er. Ex. 18)(emphasis original).

The University presented testimony from administrators with direct responsibility for and knowledge of the issue in question (GSD Assistant Dean for Academic Services Jacqueline Piracini, and Patricia Roberts, GSD's Executive Dean who has been at the School for 27 years). As described by Dean Piracini, the GSD Teaching Assistants:

support the faculty with logistical work for their courses, which can be copying handouts, preparing materials. The course web site is very much a tool where students communicate with the faculty, and the TAs are really instrumental in kind of helping managing that and make sure that the information that's supposed to be on there is on there, all the students who have questions or need more information, kind of updated syllabus, class lists, schedules, that sort of thing. (Tr. 400-01).

Because the GSD does not provide members of its faculty with staff members employed to perform administrative tasks, the GSD relies on these student Teaching Assistants to provide administrative services for the faculty. (*Id.*)

Although neither Dean Roberts nor Dean Piracini sat in each classroom while every GSD Teaching Assistant performed duties, their decades of knowledge, experience and oversight was dismissed by the Regional Director, (Decision, at p. 13), while the anecdotal recitations of three graduate students was fallaciously elevated as proof that all GSD Teaching Assistants performed instructional services sufficient to be included in the bargaining unit. In sum, the job description documents that apply to all GSD Teaching Assistants and the consistent testimony of the GSD Executive Dean and Administrative Dean for Academic Services, all show that the GSD Teaching Assistant position has never been viewed as an instructional role at the School.

The Regional Director further failed to sufficiently recognize the fact that approximately 25% of the GSD Teaching Assistants were simultaneously enrolled in the same class for which they acted as Teaching Assistants. (*See* Decision, p. 13). Although the Decision merely notes that “there is no disqualification in the Election Agreement of teaching assistants who simultaneously are enrolled in the course,” it absolutely fails to grapple with the absurdity that a course’s “instructor” would at the same time be one of its students.

Given the unrebutted documentary evidence and the testimony of long-serving decanal witnesses, the only supportable conclusion is that GSD Teaching Assistants serve as administrative support personnel to GSD faculty, who unlike the faculty in other areas of the

University, do not have departmental staff support to assist them in the administrative aspects of their classes. The incidental work described by the Union’s witnesses in no way rise to the level of “instructional services” as contemplated by *Columbia University*.

**3. The Ballots Of Six OEB G1 Students Who Voted Should Not Be Counted**

The Regional Director’s inclusion of the ballots of six first-year graduate students from the Department of Organismic and Evolutionary Biology (“OEB”) was improper. Like the circumstances in the GSD, the Regional Director merely relied upon anecdotal testimony of two graduate students in place of the unrebutted testimony of an experienced dean in order to include that all of the OEB G1 votes should be counted. Rebecca Chetham, the Executive Director for the OEB Department, explained the unique nature and diversity of OEB programs and how, unlike in other science departments, the first-year graduate students are admitted into the labs of individual faculty members. The affiliation of the student with a faculty member’s lab during the first G1 year of the program was purely introductory, largely devoid of performance of research on behalf of the faculty member or the institution. In their first year, OEB Ph.D. students generally take between three and five courses to make up their workload. In their assigned labs, students may either “be finishing up projects that they had as undergraduates or otherwise merely become familiar with working in the lab in the field.” (Tr. 687-88). There is no requirement that the OEB G1 students perform research services in exchange for receipt of their stipend. (*See* Er. Ex. 28 (citing no work requirements to receive stipend)). They are not, therefore, common law employees, performing services for compensation under the employer’s direction and control. (*See* Tr. 719-33). Ignoring the unrebutted testimony of Ms. Chetham, the Regional Director merely endorsed the Hearing Officer and relied on the testimony of two OEB students describing

their own personal experience in the department – neither of which are representative of the OEB as a whole.<sup>32</sup>

The OEB G1 students are identical to other G1 students in the Science division who, by agreement of the Union were generally excluded from voter eligibility. In short, the Regional Director’s conclusions regarding the structure of first year doctoral study in OEB are unsupported by the record and should be rejected.

#### 4. Two Museum Interns Ballots Should Be Excluded

The conclusion that ██████████ ██████████ and ██████████ ██████████, interns in the Harvard Art Museum, were eligible voters is likewise without proper foundation and should be rejected. Mr. ██████████ is a Ph.D. candidate in History of Art and Architecture, and in Fall 2016, he worked in a position as a part-time Graduate Intern providing some assistance for a class, preparing materials and answering student questions.<sup>33</sup> The Decision concluded that certain aspects of Mr. ██████████’s role were “instructional.” It is axiomatic, however, that not every Ph.D. student at the University who is paid to work is included in the bargaining unit definition, and reference to the *Columbia* description of “instructional services” (*see* p. 47, *supra*), makes it clear that the role filled by Mr.

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<sup>32</sup> First was ██████████ ██████████, a G4 OEB student who explained his experience as an OEB G1 *three years* before. Mr. ██████████’s entry into the program was atypical, beginning in the Spring semester rather than the Fall. He also entered with a Master’s Degree, meaning he took fewer of the initial “prescriptive” courses that are required of most G1 students. This gave him more free time available to spend on research. (Tr. 737-40). Moreover, Mr. ██████████ indicated that he did not start to do research “work” until his second semester in the department. (Tr. 764). This testimony fails to support that all OEB G1s should be eligible to vote in their *first* semester in the program – which is when the election at issue here took place. Further, the testimony of ██████████ ██████████, a first-year student in the OEB Department in the fall of 2016, similarly failed to support the Regional Director’s conclusions. Ms. ██████████ merely testified that during her first semester as a G1 student in OEB, she helped a fellow graduate student (a G4 student) with research involving frogs. This research is precisely the “shadowing” and orientation described by Ms. Chetham; it is not required research work, nor service performed for compensation, and thus not the type of work covered by the bargaining unit.

<sup>33</sup> He also coordinated Museum workshops for the public at the Museum. No other Harvard Teaching Fellows (or similar titles) assisted in workshops with non-Harvard students, and this work otherwise does not qualify as sufficient “instructional services” as intended in the Stipulated Election Agreement (and recognized by *Columbia University*).

■■■■ is unlike the instructional positions contained in the bargaining unit as it only involved instruction in an incidental way. (Tr. 1012; 1017-18).

Similarly, Ms. ■■■■, a Ph.D. student in the American Studies program, also held a position as a “Graduate Student Intern” in Fall 2016, assisting a curator at the Museum. Ms. ■■■■ produced unpublished memos to support a museum exhibition. The Regional Director found that Ms. ■■■■ conducted “research [which] added to the institutional knowledge of the Employer,” qualifying her as a Research Assistant eligible to vote. (*See* Decision, p. 17). This conclusion, that adding to “the institutional knowledge of the Employer” means that an individual is employed as a Research Assistant, and therefore should be included as a voter in the bargaining unit, is unfounded -- all Harvard graduate students are expected to “add to the institutional knowledge.” It would swallow the entire population of Harvard graduate students, effectively eliminating any distinction between student and employee.

## V. CONCLUSION

For the reasons set forth above, the Employer respectfully requests that the Board review and reverse the Decision of the Regional Director in this case, and allow the valid election results to stand, respecting the ballots cast by nearly 3,000 well-informed voters.

Respectfully submitted,

PRESIDENT AND FELLOWS OF  
HARVARD COLLEGE  
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**CERTIFICATE OF SERVICE**

I hereby certify that on August 4, 2017, a true and accurate copy of the above document was served, by electronic mail, upon counsel for Petitioner and the Regional Director for Region One:

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