UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION ONE

PRESIDENT AND FELLOWS OF HARVARD COLLEGE

EMPLOYER

and

Case 01-RC-186442

HARVARD GRADUATE STUDENTS UNION – UAW (HGSU-UAW)

PETITIONER

HEARING OFFICER'S REPORT ON CHALLENGED BALLOTS AND OBJECTIONS AND RECOMMENDATIONS

I. INTRODUCTION

This report contains my findings and recommendations regarding the 314 determinative challenged ballots and two objections to the conduct of the election set for hearing by the Regional Director of Region One via an Order Directing Hearing and Notice of Hearing on Challenged Ballots and Objections dated February 10, 2017.

As set forth in more detail below, I recommend that the challenges to the ballots of the following 195 individuals be overruled, and that their ballots be opened and counted: Anastasia Aguiar, Munazza Alam, Christopher Anderson, Heather Artinian, Jennifer Austiff, Megan Bailey, Isabel Baker, Jonathan Baker, Eli Banks Schachar, Seth Berliner, Regan Bernhard, Jean Biniek, Laura Blattner, Sarah Blum-Smith, Valentin Bolotnyy, James Bondarchuk, Vitaly Bord, Colin Bossen, Shawna Brown Leung, Sergine Brutus, Abagail Burrus, Joan Chaker, Emily Chan, Rohit Chandra, Amy Chandran, Juan Chauvin Rodriguez, Brian Chen, Michael Chieffalo, David Choi, Yin Kwan Chung, Matthew Clair, John Coglianese, Hannah Cohen, Gwendolyn Collaco, Karen Connor McGugan, Oren Danieli, Jamie Daw, Julian De Freitas, Omar De La Riva, Dalia Deak, Charlene Deming, Ellora Derenoncourt, Alicia DeSantola, Barbara Dickerman, Kyle Dillon, Stefan Dimitriadis, Katherine Donato, Maria Duarte, Martha Elmore, Samuel Ewing, Jacob Fay, Siobhan Feehan, Dena Fehrenbacher, Jessica Fei, Kelley Fong, Lindsey Franklin, Zuzanna Fuchs, Andrew Garin, Madeleine Gelblum, Blythe George, John Going, Emma Goldhammer, Mary Gorski, Benjamin Green, Jesse Gubb, Yipei Guo, Benjamin Halpern, David

Hamm, Emma Harrington, Christopher Haverkamp, Christopher Healy, Bobby Herrera, Andrew Hillis, Nathaniel Hipsman, Mark Hirschboeck, Jordan Hoffman, Robert Holland, Polina Ivanova, Yizhou Jin, Danube Johnson, Madeleine Joseph, Ha Ryong Jung, Yosub Jung, Ariella Kahn-Lang, Gurnasheen Kalkat, Jennifer Kao, Dana Kash, Helen Kim, Jeongho Kim, Barbara Kiviat, Samuel Klug, Dominika Kruszewska, Claire Jing Kuang, Ohchan Kwon, Amanda Lamothe-Cadet, Frank LaNasa, Regina Larrea Maccise, Audrey Latura, Malcolm Lavoie, Eben Lazarus, Wei Fu Li, Gordon Liao, Weiling Liu, Yueran Ma, Luca Maini, Anju Manandhar, Rebecca Mandt, Camran Mani, Patricia Marechal, Brian Marinelli, Justin Martin, Timothy Matthews, Ana Mayoral Moratilla, Bryan McAllister-Grande, Katherine Miller, Elizabeth Mishkin, Samantha Molsberry, Eduardo Montero, Emerson Morgan, Farida Mortada, Kenta Mosallanejad, Niki Murata, Matthew Okazaki, Joshua Olszewski-Jubelirer, Kevin Pan, Abbey Parker Stockstill, Cassandra Peitzman, Casey Petroff, Elizabeth Phillips, Cynthia Pollard, Katherine Prater, Daniel Quesada Lombo, Ana-Maria Raclariu, Renugan Raidoo, Natalie Ramirez, Madonna Ramp, Alexis Redding, Brianna Rennix, Christopher Reznich, Kristofer Rhude, Whitney Robles, Alexandra Rodman, Jared Rosenfeld, Nicholas Roth, Stuart Ruedisueli, Elizabeth Santorella, Phillip Saynisch, Peter Schmidt, Anne Schneider, Keith Scott, Priya Shanmugam, Ben Sherwood, Andy Shi, Jee Eun Shin, Andreja Siliunas, Niharika Singh, Clinton Smith, Lauren Stanley, Anna Stansbury, Rachel Steely, Kimberly Stevens, Jonah Susskind, Daniel Svirsky, Mike Teodorescu, Neil Thakral, Kai Thaler, Lee Ling Ting, Imani Tisdale, Margaret Torrence, Margaret Troyer, Cori Tucker-Price, Julian Urrutia, Gia Velasquez, Kate Vredenburgh, Lydia Walker, Micah Walter, Stella Wang, Yong Wang, Anna White-Nockleby, Luke Willert, Alix Winter, Rebecca Wolf, Matthew Wong, Lindsay Woodson, Yanwen Xie, Tianzhu Xiong, Joshua Yardley, Darrick Yee, Anna Yermakova, Maxwell Yurkofsky, Mengdie Zhao, Xiaolin Zhuo, Yevgeniy Zhuravel, Christina Zlogar, and Erik Zuckerman.

I further recommend that the challenges to the ballots of the following 119 individuals be sustained: Hena Ahmed, Adriana Altamirano, Sara Arfaian, Georgios Avramides, Eun Se Baik, Pooja Bakhai, Alexander Bell, Aaron Bembenek, Chelsea Boccagno, Jeremy Bowles, Adria Boynton, Benjamin Bromberg Gaber, Jeremy Burke, Nicolas Campos, Eugenia Chan, Ruth Chang, Gabriella Chavez, Lucy Chen, Shani Cho, Aubrey Clark, Lars Clark, Colin Conwell, Hannah Cory, Byron Davies, Christina Desert, Maria Devlin, Ruodi Duan, Alexander Duffy, Aileen Fitzke, Jeremy Fix, Emma Foley, Ryan Gelly, Hannah Goldberg, Krista Goldstine-Cole,

Max Goplerud, Matthew Griffith, Jonathan Haefner, Sinn Won Han, John Harpham, Ernest Hartwell, Florian Hase, Ghazal Jafari, Jessica Jean-Francois, Diana Jih, Rutdow Jiraprapasuke, Payton Jones, Emile Josephs, Niangiao Ju, Young Eun Ju, Kutay Karatepe, Smriti Khanal, Do Yoon Kim, Taehoon Kim, Yusung Kim, Dustin Klinger, Yurina Kodama, Amy Koenig, Caroline Laurent, Soo Mi Lee, Won Lee, Andrew Lewis, Yijing Lu, Jacob Maat, Marek Majer, Marisa Mandabach, Jonathan Mason, Adam Mastroianni, Jared McCormick, Alexandra McDowell, Caitlin McMurtry, Gregoire Menu, Amanda Miller, Elizabeth Miller, Milos Mladenovic, Jason Nemirow, Brian Oco, Felipe Oropeza, Anthony Otay Hernandez, Samuel Parker, Pooja Paul, Hans Pech, Casey Peterson, Harris Pirie, Julian Pokay, Tony Qian, Brendan Roach, Cara Roberts, Yoshini Rupasinghe, Carolina San Miguel, Mira Schwerda, Armaan Siddiqui, Lisa Simon, Scott Smith, Humbi Song, Rephael Stern, Galen Stolee, Weifeng Sun, Aleksy Tarasenko-Struc, Leyla Tarhan, Susan Taylor, Jessica Tollette, Jacqueline Trudeau, Catherine Tsai, Alexis Turner, Christine Twicken, Gabriel Unger, Ruben Van Genugten, Rachel Van Horn, Daniel Volmar, Xingyi Wang, Tatiana Webb, Dorothy Wei, Georgia Whitaker, Matt Whittaker, Yau Yam, William Yuan, Han Zhang, Yingshuo Zhang, and Yueron Zhang.

Regarding the objections, I recommend that the objection filed by the President and Fellows of Harvard College ("the Employer") be sustained, and that the ballot previously ruled void by a Board agent in the initial tally of ballots be included as a "No" vote in a revised tally of ballots. Finally, regarding the objection filed by the Harvard Graduate Students Union – UAW (HGSU-UAW) ("the Petitioner"), I find that the Employer has not substantially complied with the voter list requirements set forth in Section 102.62(d) of the Board's Rules and Regulations. Accordingly, I recommend that the Petitioner's objection be sustained and that, if a revised tally of ballots does not result in the Petitioner receiving a majority of the valid votes cast, the results of this election be set aside and a new election be directed.

II. PROCEDURAL HISTORY

Pursuant to a petition filed on October 18, 2016,[1] and a Stipulated Election Agreement approved by the Acting Regional Director on October 21, a secret ballot election was conducted on November 16 and 17 to determine whether the following unit of employees of the Employer wished to be represented for the purposes of collective-bargaining by the Petitioner:

[1] All dates hereinafter are in 2016 unless otherwise indicated.

> All 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). This unit includes students employed by Harvard University and enrolled in the Harvard Graduate School of Arts and Sciences, Harvard Business School, the Division of Continuing Education, Harvard Graduate School of Design; Harvard Graduate School of Education, the Harvard John A. Paulson School of Engineering and Applied Sciences, the John F. Kennedy School of Government at Harvard University, Harvard Law School, Harvard Divinity School, Harvard Medical School, the Harvard T.H. Chan School of Public Health, and Harvard College, excluding all undergraduate students serving as research assistants, and all other employees, guards and supervisors as defined in the Act.

The Stipulated Election Agreement also contained the following language:

> The 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.

Pursuant to this Stipulated Election Agreement, an election was held on November 16 and 17. On December 22, a count was conducted and the Tally of Ballots completed that day revealed the following:

Approximate number of eligible voters	3,556
Void ballots	3
Number of votes cast for the Petitioner	1,272
Number of votes cast against participating labor organization	1,456
Number of valid votes counted	2,728
Number of challenged ballots	314
Number of valid votes counted plus challenged ballots	3,042

The challenged ballots are sufficient in number to affect the results of the election.

On December 29, the Petitioner and the Employer each timely filed an objection. On February 10, 2017, the Regional Director issued an Order Directing Hearing on Objections and Determinative Challenged Ballots and Notice of Hearing in which he determined that the issues of the challenged ballots and the allegations of objectionable conduct raised substantial and material questions of fact which could best be resolved by hearing. On February 22 to 24, February 27 to March 3, and March 14 to17, 2017, in Boston, Massachusetts, a hearing was held before the undersigned, a duly designated hearing officer of the National Labor Relations Board.

The Employer and the Petitioner were represented by counsel during the hearing. All parties present at the hearing were afforded a full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence on the issues to be considered. The Employer and the Petitioner timely submitted briefs summarizing their positions on the issues.

III. CREDIBILITY

In assessing the credibility of witnesses, I have taken into account all relevant factors, including the demeanor and interests of the witnesses; inherent probabilities; whether the witnesses' testimonies are corroborated or consistent with documentary evidence and/or admitted facts; and reasonable inferences that may be drawn from the record as a whole. See, e.g., *Daikichi Corp.*, 335 NLRB 622, 633 (2001), enfd. 56 Fed. Appx. 516 (D.C. Cir. 2003); *Roosevelt Memorial Medical Center*, 348 NLRB 1016, 1022 (2006) and *New Breed Leasing Corp. v. NLRB*, 111 F.3d 1460, 1465 (9th Cir. 1997), cert. denied 522 U.S. 948 (1997). Unless otherwise specified, my summary of the record evidence is a composite of the testimony of all witnesses, including in particular testimony by witnesses that is consistent with other witness testimony, documentary evidence, or undisputed evidence, as well as testimony that is uncontested. Omitted testimony or evidence is either irrelevant or cumulative.

A total of 25 witnesses testified over the course of this hearing. As a whole, I found the witnesses to be credible insofar as their testimonies appeared to be truthful answers to the questions asked; I generally detected no deception in witness responses to questions asked on either direct or cross examination. That being said, there are several instances where the testimony of witnesses conflicts; in those cases, I give more weight to certain witnesses' testimony than others. I discuss my reasons for doing so in the relevant sections below.

IV. THE CHALLENGED BALLOTS[2]

A. The Resolved Challenges:

During the course of the hearing, the parties resolved a number of the outstanding challenges. Specifically, the parties stipulated that Anastasia Aguiar, Munazza Alam, Christopher Anderson, Heather Artinian, Regan Bernhard, Sarah Blum-Smith, Sergine Brutus, Yin Kwan Chung, Martha Elmore, Yipei Guo, Christopher Healy, Bobby Herrera, Jordan

[2] The Regional Director's Order Directing Hearing and Notice of Hearing on Challenged Ballots and Objections listed some individuals by that person's first and last names, and others by first, middle, and last names. For the sake of simplicity and to avoid further lengthening an already substantial report, I have generally chosen to use the voters' first and last names only. This should cause little confusion insofar as none of the challenged voters have identical first and last names.

Hoffman, Jeongho Kim, Malcolm Lavoie, Rebecca Mandt, Brian Marinelli, Samantha Molsberry, Kenta Mosallanejad, Casey Petroff, Madonna Ramp, Kristofer Rhude, Ben Sherwood, Niharika Singh, Margaret Torrence, Alix Winter, Yanwen Xie, and Xiaolin Zhuo were employed by the Employer in the bargaining unit set forth in the Stipulated Election Agreement and were thus eligible to vote in this election. Therefore, I recommend that the ballots of these 28 individuals be overruled.

Further, the parties stipulated that Alexander Bell, Aaron Bembenek, Chelsea Boccagno, Jeremy Bowles, Eugenia Chan, Ruth Chang, Lucy Chen, Colin Conwell, Maria Devlin, Hannah Goldberg, Krista Goldstine-Cole, Max Goplerud, Florian Hase, Payton Jones, Emile Josephs, Niangiao Ju, Do Yoon Kim, Taehoon Kim, Won Lee, Andrew Lewis, Jacob Maat, Adam Mastroianni, Caitlin McMurtry, Elizabeth Miller, Brian Oco, Anthony Otay Hernandez, Harris Pirie, Leyla Tarhan, Jacqueline Trudeau, Christine Twicken, Ruben Van Genugten, Tatiana Webb, Georgia Whitaker, Yau Yam, and William Yuan were not employed by the Employer in the bargaining unit set forth in the Stipulated Election Agreement and were ineligible to vote in this election. Additionally, in its post-hearing brief, the Petitioner conceded that Carolina San Miguel was ineligible to vote in this election. As the above stipulations and the Petitioner's concession regarding San Miguel do not contradict any record evidence regarding the eligibility of these 36 individuals, I recommend that the challenges to their ballots be sustained.

B. The Disputed Classification

1. Statement of Fact:

a. Overview of Challenged Ballots

The largest group of unresolved challenged ballots involves a disputed classification which the parties agreed could vote subject to challenge. The Stipulated Election Agreement (henceforth referred to as "the Agreement") defines this classification as follows:

> The 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.

The parties refer to this group of individuals as the "look back," group, a term I will also use sporadically throughout this report. [3] The Employer submitted a Challenged Voter List to the

[3] The term "look back" group refers to the propriety of looking back in time to determine eligibility of students not currently employed in the bargaining unit.

Petitioner and the Region after approval of the Agreement containing the names of 386 individuals it believed fell within the disputed classification. A total of 125 individuals in this group ultimately cast challenged ballots.[4] The parties further stipulated at the hearing that these 125 voters were not employed in a bargaining unit position during the Fall 2016 semester in which both the payroll cutoff date and the election fell, but were employed in a bargaining unit position during the 2015-2016 academic year. The parties further stipulated that none of these individuals were in the final year of their programs or in their Dissertation Completion Year during the Fall 2016 semester. Accordingly, these 125 individuals met the criteria to fall in the disputed "look back" group.

b. Structure of GSAS, Sources of Student Funding, and Description of Teaching Fellow Role

To understand the characteristics of the disputed "look back" group, , it is necessary to discuss the structure of Harvard and, in particular, the role of the Graduate School of Arts & Sciences ("GSAS") within the University. GSAS is a school within the larger entity of the Faculty of Arts and Sciences ("FAS") and is by far the largest graduate school at Harvard. GSAS is the only school at Harvard empowered to confer Doctor of Philosophy ("Ph.D.") degrees to students. The Ph.D. programs at GSAS fall into three divisions: Arts & Humanities, Sciences,

[4] These individuals are: Megan Bailey, Jonathan Baker, Eli Schachar Banks, Seth Berliner, Jean Biniek, Laura Blattner, Valentin Bolotnyy, James Bondarchuk, Vitaly Bord, Colin Bossen, Shawna Brown Leung, Joan Chaker, Emily Chan, Rohit Chandra, Juan Chauvin Rodriguez, Brian Chen, David Choi, Matthew Clair, John Coglianese, Gwendolyn Collaco, Karen Connor McGugan, Oren Danieli, Jamie Daw, Julian De Freitas, Charlene Deming, Ellora Derenoncourt, Alicia DeSantola, Kyle Dillon, Stefan Dimitriadis, Katherine Donato, Samuel Ewing, Jacob Fay, Dena Fehrenbacher, Jessica Fei, Kelley Fong, Lindsey Franklin, Zuzanna Fuchs, Andrew Garin, Madeleine Gelblum, Blyth George, Mary Gorski, Jesse Gubb, Emma Harrington, Andrew Hillis, Nathaniel Hipsman, Mark Hirschboeck, Robert Holland, Polina Ivanova, Yizhou Jin, Madeleine Joseph, Ha Ryong Jung, Yosub Jung, Ariella Kahn-Lang, Gurnasheen Kalkat, Jennifer Kao, Helen Kim, Barbara Kiviat, Samuel Klug, Dominika Kruszewska, Ohchan Kwon, Amanda Lamothe-Cadet, Frank LaNasa, Regina Larrea Maccise, Audrey Latura, Eben Lazarus, Wei Fu Li, Gordon Liao, Weiling Liu, Yueran Ma, Luca Maini, Patricia Marechal, Justin Martin, Timothy Matthews, Bryan McAllister-Grande, Elizabeth Mishkin, Eduardo Montero, Emerson Morgan, Farida Mortada, Joshua Olszewski-Jubelirer, Kevin Pan, Abbey Parker Stockstill, Cassandra Peitzman, Elizabeth Phillips, Cynthia Pollard, Katherine Prater, Ana-Maria Raclariu, Natalie Ramirez, Alexis Redding, Brianna Rennix, Alexandra Rodman, Jared Rosenfeld, Nicholas Roth, Elizabeth Santorella, Phillip Saynisch, Peter Schmidt, Priya Shanmugam, Andy Shi, Jee Eun Shin, Clinton Smith, Lauren Stanley, Rachel Steely, Kimberly Stevens, Daniel Svirsky, Mike Teodorescu, Neil Thakral, Kai Thaler, Lee Ling Ting, Imani Tisdale, Margaret Troyer, Cori Tucker-Price, Julian Urrutia, Gia Velasquez, Kate Vredenburgh, Lydia Walker, Micah Walter, Stella Wang, Yong Wang, Anna White-Nockleby, Luke Willert, Joshua Yardley, Darrick Yee, Anna Yermakova, Maxwell Yurkofsky, Mengdie Zhao, and Christina Zlogar. A number of these individuals were originally challenged by Board agents during the election because their names did not appear on either the Voter List or Challenged Voter List submitted by the Employer. However, at the hearing, the parties agreed that a number of these individuals should have been on the Challenged Voter List and that their ballots should be challenged on that basis instead.

and Social Sciences. Additionally, two Ph.D. programs – American Studies and Social Policy – are unaffiliated with any division at GSAS.

While GSAS is the only school at Harvard that provides doctoral degrees to students, it partners with other schools at Harvard to confer doctoral degrees. For instance, GSAS partners with the Graduate School of Education in offering a Ph.D. in Education; while the students in this program are enrolled in GSAS, the faculty who teach the students belong to the Graduate School of Education. Harvard offers a total of 16 such partnered Ph.D. programs. The disputed classification largely consists of students pursuing Ph.D. programs offered either solely by or in partnership with GSAS.

Harvard generally does not require students to take out loans or pay out-of-pocket for Ph.D. programs. Rather, students finance their studies through financial aid and stipends from various sources. The term "financial aid," as it applies to Harvard doctoral students, refers to monies the Employer disburses to cover doctoral students' tuition, fees, and living expenses. Doctoral students also receive stipends for the first five years of the Ph.D. program. These stipends can come from Harvard or from outside funding sources, though external sources for funding are more common in science programs than programs in the humanities and social sciences at GSAS. In addition, GSAS offers stipends to doctoral students in exchange for teaching courses or performing laboratory research at Harvard.

To satisfy degree requirements and in exchange for their stipends, GSAS students take classes, teach, and engage in laboratory and/or research work. Typically, students in the Sciences Division at GSAS primarily engage in laboratory or research work, while students in the Division of Humanities and the Division of Social Sciences typically teach courses.

Harvard provides humanities and social sciences doctoral students with a "guarantee of teaching," as Allen Aloise, the Dean for Administration and Finance at GSAS, described it. Specifically, Harvard guarantees four semesters of teaching to most doctoral students studying in the Arts & Humanities and Social Sciences Divisions of GSAS. When a student utilizes one of these guaranteed teaching options, the professors in that student's department work with the student to ensure that he or she is stationed as a Teaching Fellow. Generally, Humanities and social science doctoral students teach during their third and fourth years of study. However, the Employer's witnesses identified several exceptions to this policy, including for students who

choose to study abroad in their third or fourth year.[5] Indeed, in August 2016, the Employer changed its policy so that, beginning in the 2016-2017 academic year, Ph.D. students can exercise their guaranteed teaching options at any point through their sixth year in their degree program.

Students may continue to teach classes after they have exhausted their four guaranteed semesters. Aloise explained that although students with remaining options for guaranteed teaching are accorded preference for Teaching Fellow positions, other doctoral students seeking to teach can "usually" find a teaching assignment. Mohan Boodram, the Dean for Admissions and Financial Aid at GSAS, elaborated that advocacy by a professor can result in a de facto secondary preference for certain students who have exhausted their guaranteed teaching allotment.

Not all students with teaching appointments have full-semester assignments. Multiple witnesses testified that certain bargaining unit positions, in particular Teaching Fellows, occasionally work less than a full semester. For instance, certain courses in the Graduate School of Design are split into two "modules" or sections. Other assignments simply end before the semester is over. For example, Hannah Cohen, who cast a challenged ballot, served as a Teaching Fellow for a Fall 2016 class; the term of this position ended on October 1. Whitney Robles attested that she was paid for a two-fifths time commitment. She testified without contradiction that, although she was technically employed as a curatorial intern and not as a Teaching Fellow, this two-fifths arrangement was the same time commitment and pay rate as that of a Teaching Fellow. Robles' payroll records reflect that during a one-month period covering the period of October 1–October 31, she worked 151.47 hours.

c. Additional Notes on the Bargaining Unit and "Look Back" Group

It is undisputed that the parties' intent in crafting the bargaining unit appearing in the Agreement was to mirror the unit sought by the petitioning union in *Columbia University*, 364 NLRB No. 90 (2016). To that end, the bargaining unit includes doctoral students serving in instructional positions and as research assistants. The disputed "look back" classification includes those who did not hold instructional or research roles during the traditional eligibility period, excluding those who have received Dissertation Completion Fellowships.

[5] Mohan Boodram, the Dean for Admissions and Financial Aid at GSAS, gave a non-exhaustive list of the programs in which students study abroad during their third and fourth years. These programs include Anthropology, History, History of Art and Architecture, and Middle Eastern Studies.

At the hearing, John Scanlon, Assistant Director of the Employer's Office of Institutional Research, presented a list of 27 challenged voters who have exhausted their four semesters of guaranteed teaching. He presented this list as a proxy for doctoral students who do not hold teaching roles in the relevant timeframe and are ostensibly unlikely to again. However, Andrew Donnelly, a fourth-year Ph.D. student in the English Department and student organizer for the Petitioner, identified three voters on Scanlon's list who met the "look back" criteria and who had already utilized their four semesters of guaranteed teaching but who were nonetheless teaching in the Spring 2017 semester. Donnelly also testified that students frequently seek and hold teaching positions after they have exhausted their guaranteed teaching allotment; however, he admitted that his knowledge regarding this practice is limited to the English department.

In addition, Boodram testified that 28 individuals challenged based on their inclusion in the "look back" group have since applied for Dissertation Completion Fellowships during the Spring 2017 semester; applications for this fellowship are due in February each year. A Dissertation Completion Fellowship is offered to doctoral students to facilitate finishing their dissertations. Harvard does not permit students who receive these fellowships to hold employment, including instructional positions, during their fellowships' term. Boodram offered the caveat that the Employer had not yet acted on these applications as of the time of the hearing. Further, Donnelly testified that an incomplete review of these 28 challenged voters revealed that at least 15 were engaged in bargaining unit work, either teaching or research, during the Spring 2017 semester.

2. Positions of the Parties

The Employer contends that none of the individuals in the "look back" group should be included in the bargaining unit, and that none of the ballots challenged on that basis should be counted. The Employer alternatively asserts that, at a minimum, those who have completed their four semesters of "guaranteed teaching" should be deemed ineligible to vote. It argues that those students are unlikely to perform bargaining unit work in the future.

The Petitioner asserts that the disputed classification set forth in the Agreement is appropriate as currently phrased. It further argues that doctoral students within the disputed classification have a continuing interest in the terms and conditions of employment of the bargaining unit. The Petitioner also claims that there should be no carve-out for students who have exhausted their guaranteed teaching, arguing that these students regularly return to the

bargaining unit and thus exhibit the continuing interest required by the Board in its *Columbia* decision.

3. Analysis

In *Columbia University*, the Board reversed its previous decision in *Brown University*, 342 NLRB 483 (2004) and held that "student assistants who have a common-law employment relationship with their university are statutory employees under the Act." 364 NLRB No. 90, slip op. at 2. In this decision, the Board specifically left undecided the issue of the eligibility of student employees who, "on account of intermittent semester appointments, may not be eligible to vote under the Board's traditional eligibility date approach…" Id., slip op. at 21. In doing so, the Board noted that the "unique circumstances of student assistants' employment manifestly raise potential voter eligibility issues." Id. The Board, recognizing the need for an eligibility formula, stated as follows:

> The Board attempts to strike a balance between the need for an ongoing connection with a unit and concern over disenfranchising voters who have a continuing interest notwithstanding their short-term, sporadic, or intermittent employment…[s]uch eligibility formulas attempt to include employees who, despite not being on the payroll at the time of the election, have a past history of employment that would tend to signify a reasonable prospect of future employment.

Id., slip op. at 21-22 (footnotes omitted). The Board remanded the case to the Regional Director of Region 2 to "take appropriate measures…to establish an appropriate voting eligibility formula." Ibid.

On remand and after a hearing, the Regional Director for Region 2 issued a Supplemental Decision and Direction of Election on October 31, 2016.[6] In this supplemental decision, the Regional Director stated that the following group of individuals would be eligible to vote:

> All unit employees who:
>
> (1) hold an appointment or a training grant in a unit position in the fall semester 2016, or
> (2) are course assistants, readers or graders who are on the casual payroll and who worked 15 hours per week or more in the fall semester 2016, or
> (3) have held a unit position for either the fall, spring and summer terms during the prior academic year.

[6] *Columbia University*, Supplemental Decision and Direction of Election, 02-RC-143012 (Issued October 31, 2016). For simplicity's sake, I shall refer to this decision as the Regional Director's supplemental decision and the Board's decision as *Columbia University*.

Ibid. The Regional Director's supplemental decision adopted the petitioning union's proposed eligibility formula and not the employer's proposed formula. The latter proposal contemplated no "look back" eligibility for undergraduate and masters' student employees; that doctoral students in their second, third, or fourth years of study with a past appointment should be permitted to vote; and that doctoral students in their fifth year of study or later not currently in unit positions should be excluded. Id.

Although Region 2 conducted an election pursuant to the eligibility formula set forth in the Regional Director's supplemental decision, the Board has not ruled on the matter and has therefore not yet addressed the eligibility formula as set forth by the Regional Director in her supplemental decision. While the Regional Director's supplemental decision does not carry precedential weight, I find it useful to compare the factual situation there with the instant situation for the purposes of devising an eligibility formula, as discussed in further detail below. The supplemental decision is particularly useful given that the Board has never before set forth an eligibility formula for student assistants.

The Board's aim in devising eligibility formulas is "to permit optimum employee enfranchisement and free choice, without enfranchising individuals with no real continuing interest in the terms and conditions of employment offered by the employer." *Trump Taj Mahal Casino*, 306 NLRB 294, 296 (1992), enfd. 2 F.3d 36 (3d. Cir. 1993). Thus, the Board has developed eligibility formulas in various contexts to account for the vagaries of the unique employment situations present therein. A commonly utilized eligibility formula is that devised by the Board for use in the construction industry, set forth in *Daniel Construction Co.*, 133 NLRB 264 (1961), as modified in 167 NLRB 1078 (1967), and *Steiny & Co.*, 308 NLRB 1323 (1992). The Board, in recognizing the need for an eligibility formula in that industry, stated that the construction industry "is different from many other industries in the way it hires and lays off employees." *Steiny & Co.*, 308 NLRB at 1324. The Board has regularly utilized eligibility formulas in other industries, such as in entertainment productions,[7] musical engagements,[8] bargaining units of auto shuttlers,[9] and even units of groundfish and shellfish observers.[10]

[7] *American Zoetrope Productions*, 207 NLRB 621, 623 (1973). See also *DIC Entertainment, L.P.*, 328 NLRB 660 (1999), enfd. 238 F.3d 434 (D.C. Cir. 2001).
[8] *The Julliard School*, 208 NLRB 153, 155 (1973).
[9] *Avis Rent-A-Car System, Inc., Rent-A-Car Division*, 173 NLRB 1368 (1968).
[10] *Saltwater, Inc.*, 324 NLRB 343 (1997).

This use of formulas to determine eligibility also extends to academia. For instance, in *C. W. Post Center*, 198 NLRB 453, 454 (1972), the Board held that adjunct professors who were not teaching in the semester in which the election was held "nevertheless possessed a reasonable expectation of future employment." The Board stated that, in devising a formula for eligibility, it was attempting to "prevent an arbitrary distinction which enfranchises adjuncts who happened to be teaching at the time of the election while disenfranchising all others." Id. Similarly, in *Berlitz School of Languages of America*, 231 NLRB 766, 767 (1977), the Board determined that, with respect to teachers who worked "on call," a "1-year cutoff to eligibility…appears appropriate here." The Board also noted:

> To be sure, the above eligibility formula will enfranchise some teachers who have not taught nearly as much as others. However, given the vagaries of the Employer's employment structure, the formula will also not disenfranchise those who have a reasonable expectancy of future employment.

Id. This standard regarding potential future employment is echoed by the Board in its 2016 *Columbia* decision: "[E]ligibility formulas attempt to include employees who, despite not being on the payroll at the time of the election, have a past history of employment that would tend to signify a reasonable prospect of future employment." 364 NLRB at slip op. 22 (footnote omitted).

I also find the Board's discussion of clinical teaching assistants ("CTAs") in *University of San Francisco*, 265 NLRB 1221 (1982) to be illuminating.[11] In that case, the employer had argued that CTAs, part-time clinical nursing instructors employed for one semester or academic year at a time, be excluded from the bargaining unit, claiming that the CTAs did not have a "reasonable expectation of future employment." 265 NLRB at 1224. However, the Board noted that of the twenty-seven CTAs that were employed at the time of the hearing, five had taught in previous years; of those five, one had taught for three years prior and two others had at least two years of previous employment in that position. Id. In so noting, the Board stated as follows:

> [I]t is clear that the employer has no policy of refusing to reappoint CTAs so as to limit systematically their employment to a single year. While CTAs may choose to seek other employment following a year with the Employer rather than seek reappointment, this does not render them temporary employees, or destroy their community of interest with the other part-time employees.

Id.

[11] Although the issue in that case involved whether CTAs were temporary employees, I believe the Board's discussion of reasonable expectancy to be analogous to the eligibility issue the Board contemplated in *Columbia*.

As stated above, the Petitioner, as with the petitioning union in *Columbia*, is seeking a one-year eligibility period. That is, it contends that any individual who held a bargaining unit position during the preceding academic year should be eligible. The Employer argues that no "look back" group is appropriate, and that only employees who meet the Board's traditional eligibility standard should be able to vote. Alternatively, the Employer asserts that students who have exhausted their semesters of guaranteed teaching should be excluded.

I find that the Petitioner's approach, as slightly modified below, strikes the best balance between shielding from disenfranchisement those voters who have an ongoing interest in the terms and conditions of employment of the bargaining unit and limiting the inclusion of individuals who have no real expectation of future employment with the Employer. The Employer's approach of having no "look back" classification would disenfranchise a significant number of individuals who have a continuing interest in the bargaining unit's terms and conditions of employment. For the reasons discussed below, I find that the following formula should apply to the bargaining unit in this proceeding:

Eligible to vote are:

(1) all unit employees who held a bargaining unit position during the payroll period ending October 15, 2016, including employees who did not work during that period because they were ill, on vacation, or were temporarily laid off; or
(2) doctoral students who were employed in the bargaining unit during the 2015-2016 academic year, and who were not, during the Fall 2016 semester, in their Dissertation Completion year (or final year of their program); or
(3) doctoral students who were employed as Teaching Fellows during the Fall 2016 semester, but whose employment in that regard concluded before November 16, 2016, and who were not, during the Fall 2016 semester, in their Dissertation Completion year (or final year of their program).

I concede that it is likely that some number of the almost four hundred individuals who meet this eligibility formula may never again perform bargaining unit work before completing their studies or leaving the university; however, it is at least equally likely that a substantial percentage of the students in question will do so. The Board has been clear that its goal in devising eligibility formulas is not to perfectly cleave a division between persons who will continue to be interested in the bargaining unit and those who will not; rather, the primary intent is to "strike a balance between the need for an ongoing connection with a unit and concern over disenfranchising voters who have a continuing interest notwithstanding their short-term, sporadic, or intermittent employment," and the secondary goal of "avoiding protracted post-

election litigation over challenges to individual voters." *Columbia University*, supra, slip op. at 26.

The parties introduced little empirical evidence during the hearing related to how often graduate assistant employees return to bargaining unit positions.[12] Although the Employer's witnesses testified that, with respect to doctoral students in GSAS, the general preference is to have these students perform teaching duties during their third and fourth years of study, those same witnesses and others identified a number of exceptions to this preference, including opportunities for students to study abroad or to otherwise defer teaching to a later semester. Moreover, the Employer does not contend, and the record evidence does not suggest, that its preference for doctoral students to teach in their third and fourth years is a hard and fast rule.

The need for an eligibility formula which takes into account graduate assistants who are not currently working in the bargaining unit is more evident when one considers the guaranteed teaching aspect of the Employer's operations. The record evidence is clear that doctoral students in the humanities and social sciences at Harvard are generally offered four semesters of guaranteed teaching; however, the evidence is also clear that students are not required to avail themselves of these teaching opportunities on a set schedule. While the Employer's general Ph.D. track has these teaching positions occurring during the third and fourth years of a student's study, there were numerous departments identified in which variations on this pattern existed.

I am unconvinced by the Employer's argument that students who have exhausted their guaranteed teaching semesters should be excluded from the bargaining unit. The phrase "guaranteed teaching" is somewhat misleading; while students who have not exhausted these opportunities are given first preference for teaching assignments, the uncontroverted testimony of Aloise is that other students looking for teaching positions can "usually" find such opportunities. The Employer also employs non-enrolled individuals to fill open teaching positions at its undergraduate Harvard College, indicating that the Employer's supply of teaching positions is higher than the demand for these positions by doctoral students. I find no reason to carve out students who otherwise meet the "look back" criteria but have already utilized all of their guaranteed teaching allotments. I also note that while Donnelly's testimony is admittedly limited to the English Department, he testified that students teaching courses in excess of the

[12] Although the Employer initially adduced some testimony regarding students' return to bargaining unit positions, the Employer withdrew the relevant testimony and an exhibit regarding recurring employment, and I do not rely on the withdrawn testimony or exhibit in reaching my conclusions.

four guaranteed semesters was quite common. No testimony contradicted Donnelly's testimony, and the Employer presented no evidence that Donnelly's experience was markedly different from students in other Ph.D. programs at GSAS.

I note that the parties, in crafting and agreeing to language in the Agreement with respect to the "look back" group, have already addressed a major concern regarding the future expectancy of employment of certain students. I refer, of course, to the caveat that doctoral students "currently in their Dissertation Completion year (or final year of their program)" are ineligible for inclusion in the disputed classification. The obvious conclusion to draw, and one with which I agree, is that students who will likely complete their degrees in the 2016-2017 academic year and were not employed in the bargaining unit in the Fall 2016 semester have no reasonable likelihood of future employment in a bargaining unit position. This distinction serves to drastically reduce the population of potential voters who would have "no real continuing interest in the terms and conditions of employment offered by the employer" as cautioned against by the Board in *Trump Taj Mahal*, supra.

Although the Employer presented evidence that 28 of the individuals who voted subject to challenge in this classification had applied for Dissertation Completion Fellowships for the 2017-2018 academic year, it does not follow, as the Employer suggests, that these individuals no longer possessed a continuing interest in the terms and conditions of the bargaining unit at the time of the election. The election took place in mid-November 2016, and applications for Dissertation Completion Fellowships for the 2017-2018 academic year were not due until February 2017. That some of the students meeting the "look back" criteria applied for these fellowships is of no moment; at least half of the 28 individuals identified by the Employer as having applied for Dissertation Completion Fellowships were employed in the bargaining unit during the Spring 2017 semester. This more immediate return to bargaining unit work underscores these students' continued interest in the terms and conditions of employment of the bargaining unit after the election occurred.

A final issue arising with respect to other challenged individuals, and thus one that needs to be addressed by any eligibility formula, is whether the length of service in a bargaining unit position is a relevant consideration. The language in the Agreement with respect to the "look back" group makes reference to individuals "who have been employed in the bargaining unit for at least one semester" during the 2015-2016 academic year. The parties disagree as to the

meaning of "at least one semester"; the Employer contends that it means a full semester, and the Petitioner interprets this language as simply requiring some work to be performed during a semester. Because I do not fully rely on either party's proposed eligibility formula, I need not interpret that language. However, the record contains sufficient evidence that the work students perform in this bargaining unit includes appointments to Teaching Fellow positions lasting less than a full academic semester due to the course itself lasting less than a full semester. The Employer did not proffer evidence as to why Teaching Fellows who perform work in the first section or module of a class should be excluded from the bargaining unit because they did not also teach in the second section or module.[13] Thus, I believe that a codicil to the eligibility formula is required which specifies that doctoral students who worked as Teaching Fellows during the Fall 2016 semester, but whose assignment concluded before the start of the election, should also be eligible to vote.[14]

Applying this eligibility formula to the group of voters involved herein, I find that each of the 125 challenged voters are eligible to cast ballots in this election. I therefore recommend that the challenges to the ballots of those voters[15] be overruled. I will also identify, in the pertinent section of this report, individually challenged voters who are eligible to vote under this formula.

C. Individual Voters in Dispute Appearing on the Challenged Voter List

During the hearing, the Employer presented a list of individuals whose names appeared on the Challenged Voter List and who, during the Fall 2016 semester, were in the first year of their Ph.D. programs. This list, which includes 13 names, contains nine individuals whose votes remain challenged because of their inclusion in the list of "look back" voters.[16] According to Scanlon, who created this list, he investigated the situations involving these individuals at Harvard's behest and found that each of them were, during the Fall 2016 semester, in their first

[13] I recognize that, in *Columbia University*, the Board was concerned with the "less-than-semester-long intervals" worked by some Course Assistants. However, the Board made no determination as to the eligibility of these individuals, remanding that issue to the Regional Director. Id, slip op. at 15 fn. 99. In the eligibility formula I have devised, the inclusion of Teaching Fellows who taught courses during the Fall 2016 semester, which sections ended prior to the election date of November 16, 2016 is a recognition that their work is paid by stipend and less intermittent than the hourly research assistant work or teaching assistant work which does not involve full instruction of courses. Moreover, even in courses lasting less than the full semester, Teaching Fellows have a two-fifths time commitment. The only evidence submitted regarding that time commitment was the records of Robles, who worked 151.47 hours in one month. I find this to be sufficient work to warrant inclusion in the bargaining unit.
[14] While this formula expands on those proposed by the parties, the Board has discretion to set its own eligibility formulas, and thus I am not beholden to either party's proposal. See *Berlitz School of Languages*, supra.
[15] See fn. 4 above for a list of these individuals.
[16] Through stipulations of exclusion, the parties whittled these unresolved challenges from 13 to nine.

year of their various doctoral programs.[17] The academic and employment situations of these individuals during the relevant time frame are as follows:

1. Amy Chandran
Dalia Deak
Barbara Dickerman
Danube Johnson
Anna Stansbury

a. Statement of Fact:

Amy Chandran was enrolled in the Masters of Public Policy Program at the Harvard Kennedy School of Government during the 2015-2016 academic year, and was also employed as a Research Assistant and Course Assistant during that time frame. Chandran began taking courses in a Political Science Ph.D. program in the Fall 2016 semester.

Dalia Deak and Barbara Dickerman were enrolled in the Masters of Science program at the Harvard T.H. Chan School of Public Health during the 2015-2016 academic year and served as Teaching Fellows in the School of Public Health during the same timeframe. Deak began taking courses at the Harvard Law School in the Fall 2016 semester, and Dickerman began a Population Health Sciences Ph.D. program in the Fall 2016 semester.

Danube Johnson was enrolled in the Harvard Divinity School as a Masters of Theological Studies and was engaged as a Research Assistant in the Divinity School during the 2015-2016 academic year. Johnson started a Ph.D. program in the Study of Religion in the Fall 2016 semester.

Finally, Anna Stansbury was enrolled in the Masters of Public Policy Program at the Harvard Kennedy School of Government during the 2015-2016 academic year, and was also a Teaching Assistant in the Department of Economics during that time. Stansbury began a Ph.D. program in the Economics Department in Fall 2016.

b. Positions of the Parties:

The Petitioner contends that these individuals meet the criteria of the "look back" group because they were doctoral students at the time of the election and had performed bargaining unit work during the previous academic year, and should therefore be included in the bargaining unit. Conversely, the Employer contends that, to be included in the "look back" group, individuals must have been doctoral students during the previous academic year, not just at the time of the

[17] Scanlon's testimony with respect to these individuals is uncontroverted.

election. Under this interpretation, the Employer claims that all five challenged voters are ineligible to vote in this election because they were enrolled in Masters, not doctoral, programs during the prior academic year.

c. Analysis:

Chandran, Deak, Dickerman, Johnson, and Stansbury are similarly situated; all five were students in Masters' degree programs at Harvard during the 2015-2016 academic year, and each of them performed bargaining unit work at various times during that academic year. The dispute between the parties is based on their differing interpretations of the language regarding the "look back" group set forth in the Agreement. As I have devised an eligibility formula, the question relates to that formula as opposed to the Agreement. However, the issue remains the same, and I find myself in the somewhat unusual position of interpreting my own formula.

In so doing, I find that the eligibility formula does not require exclusion of these voters. All five were undisputedly employed in bargaining unit positions during the 2015-2016 academic year. They are each also now doctoral students at Harvard, and were as of the time of the election. Although each was pursuing a Masters' degree during the previous academic year, I see no logic in excluding them; the entire purpose of the eligibility formula is to identify a cohort of individuals who maintain an interest in the terms and conditions of the bargaining unit.

Chandran, Johnson, and Stansbury are all enrolled in Ph.D. programs in the Arts and Humanities and Social Sciences Divisions at GSAS; as discussed above, students in these areas are entitled to guaranteed teaching during their time in a Ph.D. program. It is therefore not only likely, but virtually certain, that each will perform bargaining unit work in the future. I therefore find that Amy Chandran, Danube Johnson, and Anna Stansbury are eligible voters, and recommend overruling the challenges to their ballots.

Deak is beginning a three-year stint at Harvard Law School, and it is also reasonable to conclude, in the absence of evidence demonstrating otherwise, that she will perform bargaining unit work in the future. Although there is little record evidence regarding the length of study in the Population Health Services Ph.D. program in which Dickerman is enrolled, there is no record evidence differentiating this interdisciplinary Ph.D. program with respect to future employment from programs falling solely within the scope of GSAS. For those reasons, I find that Dalia Deak and Barbara Dickerman were eligible voters for the purposes of this election, and recommend that the challenges to their ballots be overruled.

2. Ryan Gelly
Jonathan Haefner

a. Statement of Fact:

Ryan Gelly and Jonathan Haefner were appointed to Research Assistant positions in the Physics Department during the summer of 2016, but did not begin taking classes in the Physics Ph.D. program to which they had been accepted[18] until the Fall 2016 semester. The record indicates no other relationship with Harvard for either individual during the relevant timeframe.

b. Positions of the Parties:

The Employer asserts that Gelly and Haefner were not enrolled as defined in the Agreement during the 2015-2016 academic year and are therefore ineligible voters. Meanwhile, the Petitioner argues that Gelly and Haefner were enrolled at Harvard by virtue of having been accepted to the Physics program, and are therefore eligible to vote in this election. The Petitioner also claims that these two students will have a continuing interest in the bargaining unit, as they are in the first years of their Ph.D. programs and will likely perform bargaining unit work in the future.

c. Analysis:

Both Gelly and Haefner worked as Research Assistants beginning in the summer of 2016, prior to the start of the Fall 2016 semester. The record indicates that, prior to beginning their classes in Fall 2016, neither student had a previous enrollment or employment relationship with Harvard. It is undisputed that the common acceptance date for Ph.D. students is April 15, and thus, Gelly and Haefner had likely been accepted into the Physics Ph.D. program before they began working in the summer of 2016. No record evidence exists regarding what distinctions, if any, Harvard draws between admitted and enrolled students. The Employer contends that neither Haefner nor Gelly were enrolled until the Fall semester when they began taking classes; the Petitioner asserts that they were hired into the bargaining unit insofar as they had already been admitted into the programs in question.

I find that Gelly and Haefner should not be considered eligible voters under these circumstances. Although both individuals had been admitted to Harvard by the time they began working for the Employer, they had not begun attending classes and would not begin doing so until the Fall 2016 semester began. The Agreement places a two-step process for inclusion in the

[18] The nationwide acceptance date for Ph.D. students is April 15.

bargaining unit: a student must be a) enrolled and b) performing research or instructional work. I cannot agree that they were properly enrolled at the time they performed this work.

I analogize this situation, where the students have been admitted but not begun classes, to those in which an applicant has been informed of their hiring but has not yet begun working in the bargaining unit. In such situations, the Board has consistently held that merely being accepted into a position within the eligibility period is insufficient; to be eligible, employees must be "employed and working." *Ra-Rich Mfg. Corp.*, 120 NLRB 1444, 1447 (1958).[19] For instance, in *Schick, Inc.*, 114 NLRB 931, 934 (1955), the Board refused to deviate from this standard despite a large number of applicants being informed that they would be needed at a future date, holding that these individuals were ineligible even though they had already been informed of their hire and, in some cases, given a date to report. Both Gelly and Haefner had been admitted (hired, as this analogy goes) as of April 15, but neither would not start taking classes (working) until the Fall 2016 semester. As such, I cannot conclude that they qualify under the eligibility formula set forth above. I therefore find that neither is eligible to vote in this election, and recommend that the challenges to the ballots of Ryan Gelly and Jonathan Haefner be sustained.

3. Hans Pech

b. Statement of Fact:

Hans Pech was not enrolled at Harvard during the 2015-2016 academic year, but was employed as a Teaching Assistant in the German department of the Arts & Humanities Division of GSAS during that timeframe. The record indicates that, inside GSAS, the Employer uses the term "Teaching Assistant" to refer to non-enrolled individuals who are nonetheless performing teaching services for Harvard.[20] Pech began his first year as a Ph.D. student in the German department in the Fall 2016 semester.

b. Positions of the Parties:

The Employer contends that Pech does not meet the "look back" criteria insofar as he was not enrolled in Harvard during the 2015-2016 academic year. The Employer claims that this

[19] See also *American Chemical Corporation*, 215 NLRB 94, 94 (1974), citing *Roy N. Lotspeich Publishing Co.*, 204 NLRB 517 (1973).

[20] The distinction of Teaching Assistant as a non-enrolled individual is strictly followed in GSAS; however, as discussed in the section regarding the Graduate School of Design, other schools at Harvard are more lax in their use of the Teaching Assistant job title.

fact renders him ineligible to vote in this election. The Petitioner asserts that Pech, like Gelly and Haefner, have a continuing interest in the terms and conditions of employment of the bargaining unit, and should therefore be eligible to vote.

c. Analysis:

The factual situation involving Pech is similar to that of Gelly and Haefner insofar as he also performed work for the Employer during the 2015-2016 academic year while not being an enrolled student. However, unlike Gelly and Haefner, Pech was employed as a Teaching Assistant in GSAS during that timeframe. The undisputed testimony regarding the use of the term "Teaching Assistant" in GSAS is that it is reserved for non-enrolled employees performing teaching functions. I conclude that Pech was not enrolled in a Harvard degree program when performing his role as a Teaching Assistant. He therefore does not meet the criteria for inclusion in the bargaining unit, as there is no evidence he previously performed bargaining unit work. Accordingly, I find that Hans Pech is not an eligible voter, and recommend that the challenge to his ballot be sustained.

4. Lisa Simon

a. Statement of Fact:

Lisa Simon was enrolled in the Harvard School of Dental Medicine through the 2014-2015 academic year, but was not enrolled at Harvard during the 2015-2016 academic year; however, during the latter year, Harvard appointed Simon as an instructor.

b. Positions of the Parties:

The Union and the Employer's positions with respect to Simon are the same; that she was not enrolled in a degree program during the 2015-2016 academic year, and is therefore ineligible for inclusion in the bargaining unit under any eligibility formula.

c. Analysis:

I concur with the parties' contentions that Lisa Simon is not an eligible voter, as the record evidence reveals that she was not enrolled during the "look back" period and as such does not meet the eligibility formula established above. I therefore find that she was ineligible to vote in this election, and recommend that the challenge to her ballot be sustained.

D. Potential "Look Back" Voters

In addition to the above-discussed individuals who were ultimately challenged based on their inclusions in the "look back" group, four students' ballots were challenged because their

names did not appear on either the Voter List or Challenged Voter List. Those students are: Benjamin Green, Renugan Raidoo, and Andreja Siliunas. The Petitioner contends that they should be included in the disputed classification. The Employer takes the position that they do not meet the requirements of the "look back" group and are therefore excluded from the bargaining unit.

1. Benjamin Green:

a. Statement of Fact:

Benjamin Green is a third-year Ph.D. student in the Department of Applied Mathematics, which is located in the School of Engineering and Applied Sciences. It is undisputed that Green performed bargaining unit work during the 2015-2016 academic year. Green is currently on a leave of absence from Harvard and is performing work for the City of Boston's Department of Innovation and Technology. This leave of absence covers the entire 2016-2017 academic year. In his role with the City of Boston, Green works on an analytics team, performing data analysis. According to Green, this work is in line with his doctoral work at Harvard, which is geared toward how cities use data and technology. This assignment was arranged for Green by, and funded through, the Harvard Kennedy School of Government.

Green, who testified in this proceeding, described the process he followed in order to secure this leave of absence. Green secured approval to take this leave of absence from his dissertation advisor, the Department of Applied Sciences, an administrator within the School of Engineering, and an administrative official at GSAS. During this approval process, he was required to explain to these officials the purpose of the leave of absence and how it would benefit his studies. He also was required to provide assurances that he intended to return to Harvard after the leave of absence ended. Green asserted that he has stayed in regular contact with the faculty in his department, chiefly to complete a paper that he and his advisor had started before Green took his leave of absence. Green also testified that he was planning to return to Harvard for the Fall 2017 semester, and stated that he would be employed as a Research Assistant at that time.

Green also testified that even though he was on a leave of absence, he still paid the facilities' fee for access to gyms and libraries at Harvard. The Employer's policy regarding leaves of absence for students notes the following regarding monies owed to Harvard by a student on a leave of absence:

> Students who go on a leave of absence are charged tuition and any applicable fees, including rent, to the end of the period for which they are on leave.
>
> …
>
> Degree candidates on leave of absence in the Boston/Cambridge area ordinarily are charged the facilities fee, which gives them the ability to access Harvard facilities and to receive unlimited library privileges...[a]ny student charged full or reduced tuition, or the facilities fee, is entitled to an active University student identification card and use of University facilities. All students on leave of absence, irrespective of the fees paid, will continue to have email access.

Lisa Thomas, a Project Manager in the Provost Office at Harvard, testified that her review of the Employer's records also showed that Green was on a leave of absence for the 2016-2017 academic year, and that he was earning no credits for this year. She also stated that Green was not working toward his degree during the 2016-2017 academic year.[21]

b. Positions of the Parties:

The Employer contends that because Green is on a leave of absence for the 2016-2017 academic year, he is not enrolled at Harvard and by extension was not enrolled during the Fall semester. Thus, the Employer claims, Green is ineligible to vote in this election. Conversely, the Petitioner argues that Green is an eligible voter because he remains enrolled in Harvard, the employment for which he took a leave of absence is compensated by Harvard, and the work he is performing on this leave of absence is in furtherance of Green's field of study.

c. Analysis:

Green undisputedly is a doctoral student who performed bargaining unit work during the 2015-2016 academic year. The only unresolved issue is whether Green's leave of absence during the 2016-2017 academic year renders him ineligible. I find that Green's leave of absence did not render him ineligible. I note that the parties' agreed-upon language regarding the "look back" group excluded non-doctoral students and students who were "in their Dissertation Completion year (or final year of their program)…" Green is a doctoral student and is not in his Dissertation Completion year or the final year of his program. The Employer's characterization of Green as not enrolled is unpersuasive. Green testified credibly, and the Employer's own policy regarding leaves of absence requires, that he still pay facilities fees for access to Harvard gyms and

[21] Although counsel for the Employer asked Thomas whether Harvard considered Green a graduate student while he was on a leave of absence, this question was not answered directly by Thomas. Indeed, on cross examination, Thomas stated that she was not sure whether the Provost's office considered a student on a leave of absence not to be enrolled.

facilities. He also maintains his Harvard email address and an active student identification card. Moreover, while Green is earning no course credits for his work for the City of Boston, the fellowship through which he is being compensated originated from Harvard and is pertinent to Green's course of study at the university. Therefore, contrary to the Employer's contention, the evidence does not establish that Green was not enrolled at Harvard during the Fall 2016 semester.

Additionally, even assuming that Green's leave of absence is unrelated to furtherance of his studies, the Board has long held that employees on leaves of absence are permitted to vote in Board elections absent evidence that these employees do not intend to return to work. *Air Liquide America Corp.*, 324 NLRB 661, 663 (1997). The evidence here reveals that Green's leave of absence is of a definite duration. Moreover, he has already committed to resume performing bargaining unit work upon his return from his leave of absence in the Fall 2017 semester. For these reasons, I find Benjamin Green to be an eligible voter pursuant to the eligibility formula set forth above, and recommend that the challenge to his ballot be overruled.

Additionally, the factual situation involving Green serves as an excellent example of a situation that the eligibility formula set forth above is intended to address. Green performed bargaining unit work during the 2015-2016 academic year but, due to his leave of absence, will not perform work during the 2016-2017 academic year. However, he has already evinced an intent to assume a bargaining unit position as a research assistant upon his return to Harvard's campus in the Fall 2017 semester. Thus, although he had a year-long break in his performance of bargaining unit work, Green clearly maintains an interest in the terms and conditions of employment of the bargaining unit.

2. Renugan Raidoo

a. Statement of Fact:

Renugan Raidoo is a second-year Ph.D. student in the Anthropology Department within the Social Sciences Division of GSAS. It is undisputed that Raidoo did not perform any bargaining unit work during the Fall 2016 semester. However, Raidoo did perform research work on behalf of Professor George Meiu during the Spring 2016 semester. The dispute therefore centers on the length of time Raidoo was employed during the Spring 2016 semester. The Employer produced records indicating that Raidoo was entered into its system as an hourly worker for a period of February 1 to May 15, 2016, the Spring 2016 semester at Harvard.

However, the payroll records produced by the Employer show that hours recorded for this assignment were first submitted on April 4, and that Raidoo has worked a total of 75 hours in this position.

Raidoo, who testified in this proceeding, produced copies of emails between himself and Meiu. In these emails, dated January 14 and 15, Meiu requested that Raidoo assist him with editing chapters for a book on which Meiu was working. Raidoo agreed to perform this work, but cautioned Meiu that he needed to straighten out some documentation in order to be eligible for federal work-study. Meiu instructed Raidoo to keep track of his hours to ensure he was properly compensated once he completed the requisite paperwork. In addition, Meiu emailed FAS administrator Monica Munson on March 31 and asked that Raidoo be paid retroactively for work performed, mentioning that "it took…a long time to obtain the work-study clearance."

Raidoo testified that he began working on this assignment when Meiu offered it to him on January 14, and continued working with Meiu through finals week in May. He further testified that the issue involving his work-study eligibility centered on the fact that he had not filed taxes in the United States during 2015, as he was working in South Africa. Raidoo stated that because of this complication, his application for federal work study required more documentation, and that it took several months to compile the proper documentation. He stated that the payments he received in April and May were, in part, back payments for the work he had performed in January, February and March.

b. Positions of the Parties:

The Employer contends that because Raidoo was only on the Employer's payroll records for a portion of the semester, he is not eligible for inclusion in the bargaining unit. The Employer argues that the Agreement requires that a student perform bargaining-unit work for at least a full semester to satisfy the "look back" criteria. Conversely, the Petitioner asserts that Raidoo was employed for a full semester and should be included in the look back group, arguing that delays in paperwork and reimbursement are insufficient to exclude him.

c. Analysis:

It is undisputed that Raidoo was performing research work while enrolled in a Harvard degree program during the 2015-2016 academic year. The Employer disputes that this work lasted an entire semester. However, the uncontroverted evidence is that Raidoo was performing work for the Employer from January 14 through the end of the Spring 2016 semester; thus, even

assuming a full semester of work is necessary for inclusion, Raidoo meets that standard. It is of no moment that Raidoo was not paid for this work until April and May. The Board has held that employees who are working in the bargaining unit during the requisite timeframe are eligible to vote, regardless of whether an employer has proper paperwork from these employees. See, e.g., *Concrete Form Walls, Inc.*, 346 NLRB 831 (2006) (undocumented workers are employees under the Act and thus eligible to vote in Board-supervised election); and *Dyncorp/Dynair Services, Inc.*, 320 NLRB 120 (1995) ("A subsidiary Board rule defines 'working' as the actual performance of bargaining unit work."). With that guidance in mind, it is clear that Raidoo was undisputedly performing bargaining unit work from January 14 until the end of the Spring 2016 semester. Therefore, I find that he is an eligible voter, and recommend that the challenge to his ballot be overruled.

2. Andreja Siliunas
Yevgeniy Zhuravel:

a. Statement of Fact:

Andreja Siliunas is a second-year Ph.D. student in Department of Social Policy in the Harvard Kennedy School of Government at Harvard. Lisa Thomas testified that Siliunas was a research assistant in the Spring of 2016. More specifically, according to Thomas, Siliunas was employed as a Research Assistant beginning in January and concluding in early April. Payroll records submitted by the Employer showed only two payments to Siliunas for her work as a Research Assistant. These payments, dated May 6 and May 13, were for 21 and 40 hours of work, respectively. However, Thomas testified that these payments were for time worked earlier in the semester, and that Siliunas submitted her hours worked at the end of the semester in bulk.

Yevgeniy Zhuravel is a second year Ph.D. student in the Anthropology program in the Division of Social Sciences in GSAS. During the hearing, the parties entered into a factual stipulation regarding the relevant employment history of Yevgeniy Zhuravel. They stipulated that Zhuravel held an appointment as a Research Assistant in the Weatherhead Center for the period of February 8, 2016 through April 8, 2016. The parties did not enter into a stipulation resolving Zhuravel's eligibility. No further evidence was submitted regarding the number of hours worked by Zhuravel in that capacity; similarly, there was no evidence that Zhuravel worked in a bargaining unit position during the Fall 2016 semester.

b. Positions of the Parties:

The Employer contends that, even if an eligibility formula including the "look back" group is adopted, Siliunas and Zhuravel are not eligible because they did not work a full semester in the previous year. The Petitioner claims that the wording of the disputed classification in the Agreement should be read inclusively and that a full semester of work is not required for inclusion.

c. Analysis:

I recognize that the parties agreed to language in the Agreement regarding the "look back" classification. However, the eligibility formula is the governing standard here. The eligibility formula provides that "doctoral students who were employed in the bargaining unit during the 2015-2016 academic year, and were not, during the Fall 2016 semester, in their Dissertation Completion year (or final year of their program)" were eligible to vote in this election. Both Siliunas and Zhuravel are currently doctoral students and were also enrolled students when they performed their respective tasks as Research Assistants, and neither is currently in their Dissertation Completion Year or final year of their programs. Finally, they performed what is undisputedly bargaining unit work by virtue of their Research Assistant assignments.

The Employer would have me exclude these individuals because neither worked the entirety of a semester. However, under the eligibility formula, there is no requirement that a full semester's work need be done. I recognize that the Board, in *Columbia*, supra, raised eligibility concerns regarding assignments lasting less than a full semester. However, the Board made no finding as to eligibility of those individuals, remanding that issue to the Regional Director. The Regional Director's supplemental decision set forth an eligibility formula that allowed any individual who "held a unit position for either the fall, spring and summer terms during the prior academic year." Supra. Thus, the Regional Director apparently felt no need to specify that individuals must work a full semester to be eligible.

Moreover, at least with respect to Siliunas, the record shows that she worked 61 hours during her employment in the Spring 2016 semester. Raidoo, a student who worked as a Research Assistant for the entire semester, worked a total of 75 hours. Although Siliunas worked fewer hours than Raidoo, the difference between the two is insufficient to render Siliunas ineligible to vote in this election. The record is silent with respect to the number of hours worked

by Zhuravel during the Spring 2016 semester. However, it is the burden of the party seeking exclusion to prove a challenged voter is ineligible. *Regency Service Carts, Inc.*, 325 NLRB 616, 627 (1998). I find that the Employer has not met its burden to show that Zhuravel should not be included in the bargaining unit.

In sum, I find that Andreja Siliunas and Yevgeniy Zhuravel were eligible voters in this election. I therefore recommend that the challenges to their ballots be overruled.

E. The Graduate School of Design:

The largest subset of remaining challenged ballots relates to individuals in the Graduate School of Design ("the GSD"). These individuals serve as Teaching Assistants and Technical Assistants. There are 22 individuals with challenged ballots categorized as Teaching Assistants[22] and nine challenged ballots cast by individuals holding the title of Technical Assistant.[23]

1. Teaching Assistants:

a. Statement of Fact:

Within GSAS, the term "Teaching Assistant" consistently refers to persons who are not enrolled as students at Harvard but who nonetheless provide similar services as Teaching Fellows. While this use is uniform throughout GSAS, other schools at Harvard do not consistently apply this title. At issue in this respect are individuals who serve as Teaching Assistants at the Graduate School of Design (herein referred to as "TAs").[24] The Graduate School of Design ("the GSD") is a school within Harvard that includes three departments; Architecture, Landscape, and Urban Planning and Design. The Employer offers a variety of Masters' degree programs through the GSD, as well as several post-professional and doctoral degree programs. One thing on which both parties agree is that the "Design" aspect of the GSD is largely dependent on the use of computer software and programming.

According to Jacqueline Piracini, the Administrative Dean for Academic Services at the GSD, the school employs very few administrative staff to assist faculty. In that regard, Piracini

[22] The 22 challenged individuals fitting this description are Michael Chieffalo, Omar De La Riva, Siobhan Feehan, John Going, Benjamin Halpern, David Hamm, Christopher Haverkamp, Dana Kash, Claire Jing Kuang, Ana Mayoral Moratilla, Katherine Miller, Niki Murata, Matthew Okazaki, Daniel Quesada Lombo, Christopher Reznich, Stuart Ruedisueli, Anne Schneider, Keith Scott, Jonah Susskind, Matthew Wong, Lindsay Woodson, and Eric Zuckerman.

[23] The nine Technical Assistants at issue are Georgios Avramides, Benjamin Bromberg Gaber, Shani Cho, Diana Jih, Young Eun Ju, Milos Mladenovic, Cara Roberts, Scott Smith, and Humbi Song.

[24] Unless otherwise indicated, further references to "TAs" or "Teaching Assistants" in this section should be taken to mean individuals holding those positions within the Graduate School of Design. Elsewhere in this report, I shall refer to these Teaching Assistants as "TAs in the GSD."

stated that the role of the TAs is to provide logistical support for faculty. More specifically, she identified the following duties assigned to Teaching Assistants: maintenance of the course-specific website for the class, copying of handouts, preparation of course materials, and generally serving as a conduit between the course's instructor and students taking the class in question. A form provided to prospective TAs contains both a link to a self-registration site on Harvard's website as well as the following statement:

> 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 language in the absence of the instructor of record.

According to Piracini, she added the latter sentence after periodically receiving complaints from other GSD students that TAs were overstepping their bounds by attempting to instruct students. Piracini estimated that she receives an average of one complaint per semester about this issue and that she received such a complaint as recently as the Spring 2017 semester. The Employer also produced a guide for TAs which repeated that TAs "may **NOT** assign grades or serve as substitute instructors…" (emphasis in original). In addition, a document introduced by Harvard during the hearing indicates that within the inner workings of Canvas, TAs in the GSD are specifically prohibited from viewing or editing grades.

All TAs at the GSD are paid fifteen dollars per hour, and the money to pay these students comes out of the course's budget. However, Piracini was clear that the day-to-day supervision of TAs is left to the faculty to whom the TA is assigned, and she does not observe the TAs in the course of their duties. She stated that her awareness of the activities of TAs is generally limited to the aforementioned complaints from students who were resentful that the TAs were attempting to teach them.

Patricia Roberts, the Executive Dean at the GSD, also testified during this proceeding regarding the role of TAs at the school. She related that a number of TAs at the GSD during the Fall 2016 semester were also enrolled in the classes in which they were serving as TAs. The Employer produced a list of 116 TAs,[25] including 29 who were serving as TAs for classes in which they were simultaneously enrolled. Roberts also testified that she believed that the TAs were providing technical instruction and not what she described as "pedagogical" instruction.

[25] There are actually 135 entries on the list provided by the Employer; however, 19 of these individuals served as TAs for multiple classes. A reconciled list includes 116 TAs.

Roberts sent an email to all students in the GSD on November 10, approximately a week before the start of the election on November 16. This email stated in pertinent part:

> I have received questions about whether Teaching Assistants at the GSD are eligible to vote in the forthcoming union election, and whether they would be included in the bargaining unit in the event that the union is voted in. In making determinations about which students were included, Harvard was guided by the bargaining unit definition, which states that the unit includes Harvard students who "provide instructional services at Harvard University, including graduate and undergraduate Teaching Fellows (Teaching Assistants Teaching Fellows, Course Assistants)." At GSD, the position of "Teaching Assistant" does not provide instructional services. Our "Teaching Assistants" provide administrative support to the instructional faculty. We understand that the title of "Teaching Assistant" is used differently elsewhere in the University – often to describe non-Harvard students serving in an instructional capacity – but at GSD it is not an instructional position. For that reason, GSD students holding Teaching Assistant positions are not included on the list of eligible voters.

Upon being asked about the source of the questions regarding TA eligibility, Roberts testified that Lane Ruben, the student forum president at GSD, had posed the question and that her response was meant to clarify the issue for all GSD TAs.[26]

Several individuals who served as TAs during the Fall 2016 semester also testified during the course of the hearing.[27] Jonah Susskind, a third-year student in the Masters of Landscape Architecture program at the Graduate School of Design, testified regarding his experience as a TA in the Fall 2016 semester. Susskind served as the sole TA for Professor Rosetta Elkin in a course titled Ecologies, Techniques, and Technologies. In that respect, Susskind explained that in addition to serving as a TA during the class itself, he collaborated with Elkin in developing the curriculum and adding workshops to the course. Susskind also testified that during one of the first sessions of the course,[28] Elkin identified Susskind to her class and told the students that Susskind would be available to answer questions throughout the course. In addition, Susskind held regular weekly office hours and assisted students during the aforementioned workshops; in

[26] Roberts admitted that she was aware that Ruben was publicly opposed to the Petitioner's unionization effort.
[27] Rachel Vroman, the Manager of the GSD's Fabrication Lab, also testified in this proceeding regarding her experience as a student in the GSD. However, Vroman's testimony is based on her experiences in 2006 and 2007, approximately a decade prior to the election. Therefore, I give her testimony on this issue no weight, as the witnesses who testified regarding their roles as TAs during the Fall 2016 semester provide more relevant testimony about the duties and assignments of the TAs in the GSD. See, e.g., *Nordam, Inc.*, 173 NLRB 1153, 1154 fn. 5 (1968) (little or no weight given to testimony which did not "look to events at the time of the election)."
[28] While Susskind did not regularly attend the lecture sessions, he testified that he did so on this occasion.

that regard, Susskind stated that his job was to assist individual students with questions while Elkin dealt with multiple students simultaneously.

Susskind was also one of five TAs for a studio course taught by multiple professors in the Fall 2016 semester. Christopher Reznich, the lead TA for that course, also testified in this proceeding regarding his experience for this course. Each Masters' program has "core" studio classes that students are required to take. These studio courses are work-intensive; the one for which Susskind and Reznich served as TAs, titled "The Adaptive City," met twice a week for five and a half hours each time. Reznich testified that students taking this course would find that the studio course takes up all of the students' time in that semester.

Students taking this studio course also attended workshops, including a weeklong pre-semester workshop held by one of the professors teaching the course. TAs were present for these pre-term workshops. In these workshops, Reznich testified that the professor would spend the morning giving a lecture regarding geographic imaging systems ("GIS") and a short walkthrough with the students. However, in the afternoons, the professor would leave the room and allow the students to work on an assigned project with the TAs remaining to answer questions. Reznich testified that the point of having the professor leave was to garner a more relaxed atmosphere and permit students to ask questions of the TAs that the students may believe to be beneath the professor's station to answer.

In addition to these pre-term workshops, students attend in-semester lessons designed around specific types of software and the applications of this software. Prior to the start of the Fall 2016 semester, the TAs for this studio course were assigned different areas on which to hold tutorials for students. The syllabus for this course stated as follows with respect to these tutorials:

> Digital tutorials will be held every Wednesday evening 7-9 pm in room 111 (War Room) and will be taught by the studio teaching assistants. The content of these tutorials…will be coordinated by the studio faculty in relation to the specific workshop assignments. Some will focus on software packages, others on fabrication techniques, and others on specific workflows. It is highly recommended that all students take advantage of all these tutorials in order to continue to build skills with the tools at hand.

Susskind taught a workshop on MasterCAM, a software program that Susskind testified was essential in converting files necessary for use in the studio class. Similarly, Reznich taught a tutorial for the use of ArcMap, another type of architectural software.[29] While these tutorials

[29] The other TAs assigned to the course also held tutorials for areas in which they had personalized expertise.

were voluntary, Susskind testified that the tutorials were well-attended, particularly those occurring in the beginning of the semester.

Stuart Gavin Ruedisueli, a student in the GSD who served as a TA for Professor Pat McCafferty in Structural Design I and II (referred to colloquially as "Structures"),[30] as well as a course called Megatronic Optics, also testified in this proceeding. He testified that, with respect to his experience as a TA in the Structures courses, McCafferty tended to want at least one of the TAs assigned to his class to attend each lecture. According to Ruedisueli, the intent of this was to serve as a sounding board for the professor or to phrase issues in another way for students to understand. Ruedisueli also stated that on the first day of class, McCafferty identified the TAs as resources for students to use if they have questions. In the Fall 2016 semester, five TAs were assigned to the Structural Design I course.

Regarding his role as a TA in this course, Ruedisueli attested that, like other TAs in the GSD, he helped maintain the Canvas website for the course, work largely consisting of the uploading of documents and distribution of homework assignments. The TAs were also responsible for taking attendance at each lecture and holding office hours for students. In addition to these duties, Ruedisueli testified that the TAs were also responsible for grading homework assignments and quizzes; in that respect, he stated that the TAs for the course agreed upon a grading rubric to ensure that papers were graded evenly among the students. For instance, a student who made a conceptual error would receive fewer points than a student who made a simple mathematical error. While the TAs were responsible for doling out points on homework assignments, ultimately McCafferty assigned the final grade.

Ruedisueli also testified that the TAs would assist McCafferty in grading exams. Specifically, the group would meet and each TA would be assigned a single question to grade to ensure quality control. While the qualitative questions involving conceptual interpretation were graded by the professor, the TAs were responsible for grading questions that had a quantitative answer.

On January 24, 2017, a visiting professor within the GSD named Paul Kassabian sent an email to Ruedisueli and several other Structures TAs regarding their roles in the Structures courses. This email forwarded a message from Professor Martin Bechthold regarding a

[30] The Structures courses were described as more quantitative and math-driven than many other courses offered at the GSD.

conversation that Bechthold had with Roberts about the GSD TAs. This email stated as follows, in pertinent part:

> - Role of the TAs: The University /GSD is in the process of figuring this out, so no final conclusions are possible at this point. The responsibilities of TAs are outlined under [hyperlink to handbook]. In the conversation with Pat it seemed reasonable to expect the TAs to do the following:
>
> Quiz and homework grading: they can grade work by students in the class as long as there is no room for interpretation of design or engineering choices (that type of work should be graded by the instructor) but the grading is limited to checking the conceptual and numerical accuracy of mathematical solutions to common structures problems. Other acceptable levels of grading are word problems where the answers are simple and can be clearly considered right or wrong based on an answer key. The TA grading should be based on an answer key that can be generated by the TAs, but should be checked and released to TAs by the instructor.
>
> TAs can hold office hours (considered similar to tutoring) where they answer questions of individual students or student groups. TAs should not hold review sessions for the whole class where they work through problems provided to them by the instructor…
>
> …
>
> In the long run, and provided the union vote count comes out in favor, we might have to create a different title for the structures TA to recognize that they do more than making photocopies… Their role is actually quite instrumental in the structures courses…and the TAs are much appreciated by the students that are enrolled.

Roberts corroborated that she had a conversation with Bechthold about the Structures TAs, but stated that some of the content of the above email, particularly the discussion in the last paragraph, was Bechthold's thoughts which she had not specifically discussed.

In addition to the TAs from the GSD, the Petitioner presented several witnesses from other schools at Harvard to testify regarding their job responsibilities.[31] Suzanne Schlossberg, a second-year student at Harvard Law School, testified that she served as one of twelve Teaching Assistants in the Fall 2016 semester for a course named Civil Procedure, taught by a Professor Grenier. This class met twice per week, but the TAs did not attend the classes. Schlossberg testified that her main role as a Teaching Assistant was to act as a test student for assignments Grenier planned to given to students taking his course. In that regard, Schlossberg completed a draft assignment and gave the professor feedback as to the assignment's suitability for the

[31] Schlossberg does not appear on the Voter List submitted by the Employer and cast a challenged ballot in the election; the parties subsequently stipulated she was an eligible voter.

students taking the course. Additionally, she drafted model answers and, once the assignment was completed by students, provided comments to students on these assignments. She was also responsible for holding office hours after the completion of the assignment for students to address questions or concerns about that particular assignment. Schlossberg had no role in grading the final exam in the class or otherwise assigning grades to students. On an as-needed basis, she also held one-on-one sessions with a student who was having difficulty with a certain concept.

Thomas Traill also testified in this proceeding regarding his experiences as a Course Assistant. Traill, a second-year student in the Masters of Public Administration at the Harvard Kennedy School of Government, served as a Course Assistant for two courses during the Fall 2016 semester: American Presidents, Politics, and Economic Growth taught by Richard Parker, and Global Food Policy and Politics, taught by Robert Paarlberg.[32] He testified that his job as a Course Assistant for Paarlberg's class was to handle the logistics of the course, including organizing a field trip and helping students set up for presentations. He testified that he was not responsible for presenting material to the class, grading submissions or commenting on papers. Regarding the course taught by Parker, Traill testified that he and the other Course Assistant assigned to the class led two review sessions with Parker present. He also held formal office hours to answer questions for courses and was responsible for uploading material to the course's website.

b. Positions of the Parties:

The Employer contends that the TAs in the GSD do not provide instructional services and are therefore ineligible for inclusion in the bargaining unit. Specifically, the Employer relies on the parties' goal of crafting a unit coextensive with that in *Columbia University* and contends that the TAs at the GSD do not meet the qualifications set forth in that unit.

The Petitioner asserts that the work performed by the TAs in the GSD is instructional. Further, the Petitioner argues that TAs would be eligible even if the Employer was accurate in claiming that they performed technical, not pedagogical, instruction. The Petitioner claims that the inclusion of individuals performing comparable work at other schools, such as Schlossberg and Traill, merit a finding that the TAs should be included in the bargaining unit.

[32] Traill, like Schlossberg, does not appear on the Voter List. As with Schlossberg, however, the parties stipulated after the election that Traill was an eligible voter.

c. Analysis:

In *Caesar's Tahoe*, 337 NLRB 1096 (2002), the Board set forth its test regarding whether a disputed classification should be included in a bargaining unit. To that end, the Board stated as follows:

> [T]he Board must first determine whether the stipulation is ambiguous. If the objective intent of the parties is expressed in clear and unambiguous terms in the stipulation, the Board simply enforces the agreement. If, however, the stipulation is ambiguous, the Board must seek to determine the parties' intent through normal means of contract interpretation, including the examination of extrinsic evidence. If the parties' intent still cannot be discerned, then the Board determines the bargaining unit by employing its normal community-of-interest test.

337 NLRB at 1097. If the intent of the parties can be determined, the Board gives this intent effect unless in doing so is "inconsistent with any statutory provision or established Board policy." *Bell Convalescent Hospital*, 337 NLRB 191 (2001). Regarding the first prong of the *Caesar's Tahoe* test, the Board has stated as follows:

> In order to determine whether the stipulation in clear and ambiguous, the Board will compare the express language of the stipulated bargaining unit with the disputed classifications, finding a clear intent to include those classifications matching the description and a clear intent to exclude those classifications not matching the stipulated unit description.

Northwest Community Hospital, 331 NLRB 307, 307 (2000), citing *Viacom Cablevision*, 268 NLRB 633 (1984).

The Agreement expressly includes the description of "teaching assistant." However, this term does not appear in a vacuum; other conditions are attached thereto. Merely holding of the title of Teaching Assistant is insufficient. An individual must also be a "student[] enrolled in Harvard degree programs employed by the Employer who provide[s] instructional services…" Therefore, in order to be eligible, an individual must a) be an enrolled student in a Harvard degree program and, b) provide instructional services at Harvard University. There is no dispute that the TAs in the GSD are enrolled in Harvard degree programs; thus, the remaining issue is whether the work TAs perform is "instructional."

As the Employer correctly notes, the parties, in crafting the bargaining unit description, sought to create a unit similar to that in *Columbia University*. The Employer urges me to consider the Board's description of the Teaching Assistants at that university. The Board stated as follows in that regard:

> Teaching assistants frequently 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.

Supra, slip op. at 16. Although the Board's description of teaching assistants more closely mirrors the role of Teaching Fellows at Harvard, the unit the Board found appropriate in *Columbia* also included course assistants, among other roles.[33] The role of the course assistants petitioned for in *Columbia* were to "assist faculty with administering classes by performing clerical tasks that may include proctoring exams, printing and collecting homework, answering students' questions, and occasionally grading assignments." Id., slip op. at 14.

Testimony from multiple TAs at the GSD demonstrates that they perform the above-mentioned tasks. Specifically, Susskind and Reznich testified about their roles in clerical activities such as maintenance of course-specific websites, as well as the devotion of time to office hours in order to answer students' questions. Ruedisueli testified that he and other TAs in the Structures courses regularly assisted in grading assignments and exams.[34] On these bases and in light of the parties' express goal of crafting a unit similar to that in *Columbia University*, sufficient evidence exists that the TAs perform work similar to course assistants at Columbia and therefore should be included in the bargaining unit.

Moreover, a wealth of other evidence supports the conclusion that the TAs perform instructional services, including for example, the digital tutorials that TAs hold in the GSD studio courses. While these courses are voluntary, they teach skills necessary for success within the GSD and most students in the studio courses attend these tutorials. No evidence exists on the record that the parties intended to give force to the Employer's distinction between "technical"

[33] Although the Board was concerned with whether the "increments of [Course Assistants]' employment – they may work less-than-semester-long intervals," would raise eligibility issues, the Board's decision states that the petitioned-for unit, which includes course assistants, was an appropriate one insofar as the individuals in that unit shared a sufficient community of interest. Id, slip op. at 20.

[34] Although the Employer contends that TAs in the GSD are not permitted to engage in grading work, the first-hand knowledge of Ruedisueli carries significantly more weight than the testimony of Roberts and Piracini, neither of whom oversee or otherwise supervise the work of the TAs. In situations involving differences between an employer's stated policy and the actual practice at that employer, the Board has consistently held that the latter is dispositive. See, e.g., *Luck Cab Company*, 360 NLRB No. 43, slip op. at 3 (2014), citing *Schnurmacher Nursing Home v. NLRB*, 214 F.3d 260, 265 (2d Cir. 2000) (where actual practice differed from employer policy, improper to rely on "paper authority"); *Avante at Wilson, Inc.*, 348 NLRB 1056, 1057-1058 (job descriptions did not accurately reflect duties actually performed by employees; latter consideration deemed controlling).

and "pedagogical" instruction. Rather, the record is clear that the digital tutorials impart critical information to students.

The testimony regarding bargaining unit positions at other schools within Harvard also supports the finding that TAs at the GSD properly fall within the bargaining unit. Schlossberg and Traill testified credibly that their job duties in the bargaining unit positions of Teaching Assistant and Course Assistant, respectively, largely mirror and are, in some ways, less complicated than those performed by the TAs at the GSD. Traill's chief duties for his courses at the Harvard Kennedy School are largely logistical, such as setting up a field trip and providing technical support to students making class presentations. Schlossberg's responsibilities of critiquing and providing model answers for the professor's draft exams are comparable to the grading rubric drafted by Ruedisueli and other TAs in the Structures course, though Ruedisueli also included the grading of exams. As a whole, the evidence shows that the work performed by TAs at the GSD is at least equivalent to that performed by students at other schools at Harvard in roles which have been designated bargaining unit positions.

For the above reasons, I find that the TAs at the GSD are engaged in instructional work as contemplated by the Agreement. I therefore find that they are eligible to vote in this election, and recommend that the challenges to the ballots of the following individuals be overruled: Michael Chieffalo, Omar De La Riva, Siobhan Feehan, John Going, Benjamin Halpern, David Hamm, Christopher Haverkamp, Dana Kash, Claire Jing Kuang, Ana Mayoral Moratilla, Katherine Miller, Niki Murata, Matthew Okazaki, Daniel Quesada Lombo, Christopher Reznich, Stuart Ruedisueli, Anne Schneider, Keith Scott, Jonah Susskind, Matthew Wong, Lindsay Woodson, and Eric Zuckerman.[35]

2. Technical Assistants:

a. Statement of Fact:

Contained within the GSD is the Digital Fabrication Laboratory, or "FabLab," which students and faculty use to create physical representations of design concepts. A printout of a section of the GSD's website introduced during the hearing describes the FabLab as follows:

> [T]he FabLab features a wide range of equipment, ranging from cutting edge robotic arms, CNC routers and milling machines, 3D printers, and laser-cutters, to a well-equipped 'traditional' wood-and-metal-working shop. The shop is

[35] Zuckerman also appears on the Challenged Voter List. Therefore, he is eligible on two bases: his status as a TA in the GSD and his qualification under the eligibility formula set forth in this report.

> structured as an open environment for material-based learning and research, using a wide range of materials from foam and wood, metal and plastics to composites and smart materials. Scale models and full-size prototypes are produced by students and faculty of all departments and all study programs at the GSD.

is the parties do not dispute that most, if not all, students taking courses in the GSD will need to make use of the FabLab at some point during their studies. Some courses, such as those in the Architecture programs at the GSD, require extensive use of the FabLab.

Rachel Vroman is the Manager of the Digital Fabrication Laboratory, and supervises two full-time, non-student employees in the FabLab: Christopher Hansen and Burton LeGeyt, both of whom hold the title of Digital Fabrication Technical Specialist. In addition, the FabLab employs Technical Assistants, the job title at issue here.

Vroman testified that she developed the term "Technical Assistant" approximately six or seven years ago when she wrote job descriptions for each of the student positions, although several student employee witnesses testified that they were unaware of this term until recently. Technical Assistants are required to work in the FabLab for at least one four-hour shift per week, although some work more shifts as their schedules allow. Upon hire, the Technical Assistants are assigned to a specific area of the FabLab based on their skillsets and work experience.[36] The pay rates for Technical Assistants vary slightly based on the area of the FabLab in which the student is working, ranging from $14.50 per hour to $15.50 per hour.

The FabLab is subdivided into multiple sections based on the equipment contained within them. The first of these areas is the wood/metal shop, where traditional woodworking and metalworking activities occur. Vroman stated that the Technical Assistants employed in this area are generally there to serve as safety monitors. She also stated that the Technical Assistants in the wood/metal shop are responsible for maintaining the equipment and perform weekly tasks such as replacement of a band saw blade. A job description created by Vroman stated that the Technical Assistants in this area are "expected to offer guidance to shop users upon request."

The FabLab also includes an area for 3D printing and laser cutting. This portion of the FabLab consists of several types of 3D printers as well as laser cutters. Students use two types of 3D printing machines in the FabLab. The first is a self-service printer, which students and faculty can use to make smaller, less precise items. The Employer has a number of these self-service

[36] Vroman testified that it was important for Technical Assistants to have some background in the area in which they work. While, for instance, first-hand experience with 3D printers is not a requirement, the student should be familiar with the processes necessary to create items using a 3D printer.

printers in both the FabLab and elsewhere in the building. The Employer also has four larger 3D printers that only Vroman and her staff, including the Technical Assistants, are authorized to operate these machines. The Employer also maintains a number of laser cutters which students who have completed proper safety training may operate.

The Technical Assistants assigned to the 3D printing/laser cutting area are responsible for reviewing student designs before these designs are printed on the large 3D printers.[37] The review performed by the Technical Assistants is to ensure that the object, be it a prototype, model, or other fabrication, can actually be printed. Students who are unfamiliar with the process of 3D printing may have inadvertently created an object which cannot be printed by the FabLab printers or that is too cumbersome or expensive to create. In those situations, it is the responsibility of the Technical Assistant to make contact with the student, advise the student of the reasons that the project is unworkable, and make suggestions as to how best resolve the issue. Smith testified that students sometimes seek review of their designs outside his regular shift in the FabLab, and that his friends and other students in the program request his advice. Smith stated that, under these circumstances, Technical Assistants were permitted to submit work hours for this assistance.

In addition, the Technical Assistants in the 3D printing/laser cutting area of the FabLab are responsible for cleaning and maintenance of the printers and laser cutters. Scott testified that cleaning the machines can entail a large time commitment, depending on whether the equipment was heavily used during the previous shift. They are also responsible for "excavating" the printed designs, which can involve a paleontological brushing of the finished object or other cleaning depending on the nature of the 3D printer.

The third and final area in which Technical Assistants work in the FabLab is the CNC router area.[38] The operation of the CNC router section is similar to the 3D printing area insofar as students send a file of the item they wish to have fabricated to a shared drive. Technical Assistants are responsible for reviewing these files and determining whether the CNC router can produce the object that the student is attempting to fabricate and, if so, whether producing the object is otherwise feasible. The students serving as Technical Assistants in this area also

[37] Technical Assistants are also responsible for troubleshooting issues students may have with the self-service printers, but Technical Assistant Scott Smith testified that this was a minor portion of the job.
[38] The Employer also has a robotics section of the FabLab, but no Technical Assistants were employed in that area during the Fall 2016 semester.

perform similar cleaning and maintenance of machines as the 3D printing/laser cutting employees.

b. Positions of the Parties:

The Petitioner takes the position that Technical Assistants perform instructional services and should therefore be included in the bargaining unit. The Petitioner specifically maintains that Technical Assistants' instructional duties include the assistance they provide to students in the 3D printing/laser cutting and CNC router areas during the fabrication process. Conversely, the Employer contends that Technical Assistants are not providing instruction to students; rather, they are "helpers" whose main job is to ensure that students are using the sophisticated equipment in the FabLab in a safe and appropriate manner. The Employer urges that this class of individuals be excluded from the bargaining unit.

c. Analysis:

As with the TAs in the GSD described above, the *Caesar's Tahoe* test applies to the Technical Assistant position. To prevent needlessly duplicative analysis, I shall proceed directly to the issue at hand: whether the Technical Assistants are performing "instructional services" as set forth in the Agreement.[39] Unlike the TAs at the GSD, the Technical Assistants have no direct counterpart at other schools within Harvard. Moreover, the Board's decision in *Columbia* provides no guidance, as the decision did not include a discussion of a role similar to Technical Assistants.

The parties largely agree as to the duties and responsibilities of the Technical Assistants. Thus, the issue is whether the assistance rendered to students with respect to 3D printing, laser cutting, and CNC routing is "instructional." The term "instructional," as defined by Merriam-Webster, is "the action, practice, or profession of teaching."[40] I cannot conclude that the work as performed by the Technical Assistants is instructional based on that definition.

Initially, I note that scant evidence exists that the Technical Assistants in the woodworking and metalworking areas of the FabLab provide the kind of assistance that the Petitioner contends is instructional. Indeed, the uncontroverted testimony of Vroman establishes that the chief responsibility of Technical Assistants in those areas is to ensure the safety of the

[39] There is no dispute that the other conditions of the Agreement are met; the Technical Assistants at issue were enrolled graduate students during the relevant time frame.
[40] "instructional." 2017. In *Merriam-Webster.com*. Retrieved April 11, 2017. https://www.merriam-webster.com/dictionary/instructional

individuals using the equipment, rather than to impart knowledge or otherwise instruct those individuals.

Whether Technical Assistants' responsibilities related to the 3D printing, laser cutting, and CNC routing areas of the FabLab are instructional poses a more complicated question. These student employees perform more targeted functions, and undisputedly must possess or, shortly after hire, gain specialized knowledge regarding the operation of these advanced machines. However, their work in reviewing students' submitted designs is generally limited to whether the student in question can produce the desired object. If the object is workable and cost-effective, the Technical Assistant's role is to run the machine and create the object. If an issue arises that would preclude production of the object, the Technical Assistant's must inform the student of the problem and help the student address it.

As described above, the TAs in studio courses at the GSD are responsible for conveying knowledge regarding the software necessary to render objects digitally to students. Thus, the TAs in the GSD are specifically charged with teaching other students how to use the computer programs necessary to complete objects in the class and in future. However, at least with respect to the large 3D printers, the goal of the Technical Assistants' collaboration is not to teach students how to use the 3D printer itself; these machines are operated exclusively by FabLab staff. Rather, the end goal when a Technical Assistant engages with a student regarding a project is to produce a project that is able to be printed and is cost-effective.

I also note the difference in working conditions between TAs and Technical Assistants at the GSD. TAs are assigned to a particular class and have extensive responsibilities that are exclusive to that class. Technical Assistants, conversely, are not assigned to a class or course, and are defined by the FabLab area for which they are responsible. While the two classifications' wage rates are similar, their schedules are vastly different. Technical Assistants work in four-hour shifts on a weekly basis, whereas the schedules of TAs vary depending on the work necessary for the class or classes in which they are serving as TAs. Moreover, a not-insignificant amount of the work performed by Technical Assistants involves cleaning and maintenance of the equipment in the FabLab. TAs, based on the record evidence, do not perform such work.

For the above reasons, I conclude that the work performed by the Technical Assistants is not instructional in nature and should not be included in the bargaining unit. I therefore recommend that the challenges to the ballots of the following Technical Assistants be sustained:

Georgios Avramides, Benjamin Bromberg Gaber, Shani Cho, Diana Jih, Young Eun Ju, Milos Mladenovic, Cara Roberts, Scott Smith, and Humbi Song.

F. The Department of Organismic and Evolutionary Biology

1. Statement of Fact

Several students in their first years of study in the Department of Organismic and Evolutionary Biology ("OEB Department"), which is part of the Sciences Division of GSAS, cast challenged ballots in this election. The six individuals at issue[41] were challenged on the basis that they did not appear on the Voter List which the Employer submitted for this election.

Rebecca Chetham, the Executive Director for the OEB Department, testified for the Employer regarding what she described as the unique structure of the OEB Department.[42] OEB's focus, as a department, is on biological diversity, and as such, covers a wide scope of research, from cellular level to ecosystem-wide study. The areas of study, though they fit into general areas of examination, are not fixed and largely project-based. The OEB Department provides for financial support of students through their sixth year of study in the program; students are also expected to teach for six semesters before the conclusion of their studies. The laboratory habits of Ph.D. students in this program are particularly germane here.[43]

Unlike other science departments at Harvard, new students in the OEB Department do not have a laboratory rotation. Rather, prospective Ph.D. students identify specific faculty members or research projects on which they would like to work if admitted. Thus, at the time of admission, the student has already been matched with a professor or a laboratory in which this student will likely work for the entirety of his or her enrollment in the program. What is in dispute, and where the testimony of several witnesses conflict, is when a student actually begins working in his or her assigned laboratory.

According to Chetham, when students are admitted, the OEB Department reviews their previous courses and experiences and sets forth certain "prescriptions" that the student needs to complete to meet the department's core qualifications. Examples of these prescriptions are

[41] These individuals are Jennifer Austiff, Isabel Baker, Abigail Burrus, Anju Manandhar, Rebecca Wolf, and Tianzhu Xiong.
[42] Chetham's testimony in this regard is uncontroverted.
[43] The Voter List submitted by the Employer contained the names of fifty-five individuals from the OEB Department. Only four of these individuals were classified as "Research Assistants." For the remainder, the Employer stated that each had "no formal business title; performing research." This squares with the parties' representations that essentially every student in the OEB Department, other than the first-year students discussed herein, were otherwise eligible to vote in this election.

courses in statistics and calculus, as well as a mix of biology courses. If students have not taken these courses prior to enrolling in the OEB Department, the first year of study is devoted to taking these courses. However, Chetham cautioned that the number of courses required of each student varies based on the student's academic history. Some students already have met the prescriptions prior to admission, while others need to take a number of classes before proceeding. Chetham stated that the prescribed courses ready students for qualifying exams, which occur at the end of the students' second year in the program.[44]

Chetham testified that, while students in their first year are assigned to a dissertation advisor, they focus on taking the prescribed courses, attending various social functions, and generally getting to know the department. Students are generally not permitted to teach in the first year of their program.[45] However, Chetham also stated that she had limited direct knowledge of what first-year students in the OEB Department were doing, elaborating that her knowledge in this respect is generally concerned with departmental compliance or travel issues. She described her knowledge regarding particular work performed by students in the OEB program as "informal."

Two students in the OEB Department also testified during this hearing. Zachary Morris is a fourth-year student in the OEB Department. Morris testified regarding his experience upon entering the program. He stated that because he had a Masters' degree before entering the OEB Department, he only had to take two prescribed courses. He also stated that he spent a good deal of time his first year discussing his research "question," or dissertation topic, with his advisor.

Regarding laboratory work, Morris asserted that there were three or four research projects occurring in his dissertation advisor's laboratory when he arrived on campus. At the end of his first semester, the Spring semester, and continuing through the summer and into the following Fall semester, Morris began assisting another graduate student with experiments related to that student's dissertation. Morris described this work as serving both to advance the other student's project and to help Morris acclimate to working in his dissertation advisor's lab. The project on which Morris assisted during his first year in the program was ultimately published in a scientific journal in 2015; Morris was listed as one of the co-authors of this paper. Morris also described

[44] The qualifying exams serve to codify the student's dissertation focus; in addition, students are required to devise syllabi for three prospective courses as a part of these exams.
[45] Chetham testified that the sole exception to this policy, Manandhar's service as a Teaching Fellow in the Spring 2017 semester, was erroneously authorized; GSAS policy prohibits students from teaching in their first year.

his first-year experience, in which he assisted in current projects while developing his own dissertation topic, as "common" in the OEB Department. Morris mentioned that some faculty in OEB have begun having first-year students perform short-term projects during their inaugural year to help familiarize new students with the methodology and techniques of that particular laboratory.

Jennifer Austiff, a first-year student in the OEB Department and one of the challenged voters in this case, also testified during the hearing. Austiff started the program in the Fall 2016 semester, and stated that she came to this program specifically to work with her dissertation advisor, Dr. James Hanken, in the field of developmental biology. She was one of three graduate students in Hanken's laboratory in the Fall 2016 semester, but the only first-year student. During her first semester, in addition to taking four courses, she began assisting Mara Laslo, a fourth-year graduate student, with an experiment related to a certain species of frog. Austiff stated that when she began in the program, Hanken encouraged her to talk to the other graduate students in his laboratory. As a result of these conversations, Laslo requested Austiff's assistance in conducting experiments. Austiff stated that she intended to continue to assist Laslo with future projects as well.

2. Positions of the Parties:

The Employer contends that students in the OEB Department focus largely on coursework and social acclimatization during their first year in the program and are generally not performing laboratory work. Therefore, the Employer contends that the first-year OEB students should be excluded from the bargaining unit. Conversely, the Petitioner, pointing to the testimonies of Austiff and Morris, asserts that first year OEB students perform research work in the laboratory of their dissertation advisors and should therefore be included in the bargaining unit.

3. Analysis:

As discussed above, the Board applies the *Caesar's Tahoe* test in determining whether disputed individuals should be included or excluded from a bargaining unit. In applying the first prong of that test to the first-year students in OEB, I find that the Stipulated Election Agreement is ambiguous as to whether they are included in the unit. In so doing, I note no provision in the Agreement governing OEB students and similarly no language speaking to the eligibility of first-

year students in any program. Thus, I proceed to the second step of the *Caesar's Tahoe* test and address whether extrinsic evidence is dispositive of the issue.

The issue here is whether any of the first year OEB students were engaged as research assistants during the Fall 2016 semester. Neither party contends that any of the challenged individuals taught during the Fall semester. Moreover, the undisputed positions of the parties are that graduate students need not hold the title of "Research Assistant" to be eligible to vote; this is evidenced by the inclusion of some 46 individuals from the OEB Department whose titles were listed as having "no formal business title; performing research." Thus, the extrinsic evidence clearly indicates that the parties intended to include any graduate student in the OEB Department engaged in laboratory research.

The Employer does not argue that first-year OEB students should be ineligible simply because of their status as first-year students. Rather, it argues that first-year students do not engage in research during their first years. The Employer relies on Chetham's testimony to support its position. However, while I generally found Chetham to be a credible witness insofar as she seemed to give truthful answers to the questions asked, I do not give her testimony regarding the habits of first year OEB students much weight. Her answers with respect to first-year students were vague and general, and she admitted during her testimony that her knowledge of the individual activities of first-year OEB students was informal at best. She also testified that her only official role regarding research work at OEB is to ensure compliance with various internal and governmental guidelines.[46] Thus, I cannot give her testimony weight over that of Morris and Austiff, who both testified credibly and described with particularity their first-year experiences in the OEB Department.[47]

Austiff in particular had the most relevant testimony as she was a first-year student during the Fall 2016 semester in which the election took place. Austiff gave a detailed account of her experiences in Hanken's laboratory and her collaboration on a research project with fellow student Laslo. She also testified that, to her knowledge, the other students who began at the same time were engaged in similar work. The Employer presented no evidence to rebut Austiff's

[46] I do, however, give weight to Chetham's testimony regarding the history, admissions process, and structure of the OEB Department, as her answers in that respect were much more specific and detailed.
[47] See *Hudson Waterways Corp.*, 193 NLRB 378, 380 fn. 6 (1971) ("little weight [given] to…generalized testimony").

testimony and has not otherwise demonstrated that Austiff's work should not qualify as bargaining unit work.

Similarly, Morris testified that he was engaged in research work in his advisor's lab during his first year in the OEB Department. Although he testified that this work did not begin in earnest until the summer following his first semester, his testimony was that he was engaged in this work in the summer and well into the fall semester, his second full semester on the project. Moreover, Morris' work on this project resulted in him being listed as an author on a published paper in a scientific journal. Morris' testimony further established that faculty in the OEB Department commonly have first-year students perform short-term research work on projects unrelated to their dissertation work. For example, Austiff assisted Laslo with an experiment involving hormone manipulation of frogs.

The relevant testimony establishes that first-year students in the OEB Department are commonly engaged in research work that would otherwise qualify them for inclusion in the bargaining unit.[48] I find that first-year students in the OEB Department are eligible to vote in this election. I therefore recommend that the challenges to the ballots of Jennifer Austiff, Isabel Baker, Abigail Burrus, Anju Manandhar, Rebecca Wolf, and Tianzhu Xiong be overruled.

G. The Remaining Challenges

The remaining seventy-five ballots were challenged because the voters' names did not appear on the Voter List. As it has for all the challenge ballots, the Employer takes the position that these individuals are not eligible voters and that the challenges to their ballots should be sustained. In its brief, the Petitioner stated that "[o]f these individual challenges, the Petitioner contends that only Whitney Robles and Camran Mani were eligible to vote." For the vast majority of these challenged ballots, the record evidence supports the Employer's position and the Petitioner's acquiescence regarding their ineligibility.

Based both on the parties' matching positions regarding the eligibility of these voters and the record evidence regarding the individuals in question, I find that the following 70 individuals were not employed in the bargaining unit as set forth in the Agreement, do not otherwise meet

[48] While Austiff referenced another first-year student who did not begin performing research work until the Spring 2017 semester, this individual was not identified. It is similarly unclear whether this individual voted in this election. Certainly there is insufficient particularized evidence that any of these six individuals were not engaged in research work during the Fall 2016 semester. Austiff testified credibly that she was. Morris also described such work as common, and even described a semi-formal mechanism (the first-year project) by which faculty members engage first-year students in research work.

the above eligibility formula, and are therefore ineligible to vote in this election: Hena Ahmed, Adriana Altamirano, Sara Arfaian, Eun Se Baik, Pooja Bakhai, Adria Boynton, Jeremy Burke, Nicholas Campos, Gabriella Chavez, Aubrey Clark, Lars Clark, Hannah Cory, Byron Davies, Christina Desert, Ruodi Duan, Alexander Duffy, Aileen Fitzke, Jeremy Fix, Emma Foley, Matthew Griffith, Sinn Won Han, John Harpham, Ernest Hartwell, Ghazal Jafari, Jessica Jean-Francois, Rutdow Jiraprapasuke, Kutay Karatepe, Smriti Khanal, Yusung Kim, Dustin Klinger, Yurina Kodama, Amy Koenig, Caroline Laurent, Soo Mi Lee, Yijing Lu, Marek Majer, Marisa Mandabach, Jonathan Mason, Jared McCormick, Alexandra McDowell, Gregoire Menu, Amanda Miller, Jason Nemirow, Felipe Oropeza, Samuel Parker, Pooja Paul, Casey Peterson, Julian Pokay, Tony Qian, Brendan Roach, Yoshini Rupasinghe, Mira Schwerda, Armaan Siddiqui, Rephael Stern, Galen Stolee, Weifeng Sun, Aleksy Tarasenko-Struc, Susan Taylor, Jessica Tollette, Catherine Tsai, Alexis Turner, Gabriel Unger, Rachel Van Horn, Daniel Volmar, Xingyi Wang, Dorothy Wei, Matt Whittaker, Han Zhang, Yingshuo Zhang, and Yueron Zhang. I therefore recommend that the challenges to their ballots be sustained.

For three of the remaining challenged ballots, those of Hannah Cohen, Maria Duarte, and Emma Goldhammer, the record evidence contradicts the parties' shared position that these individuals are not eligible. While the parties did not enter into formal stipulations regarding these individuals, the Employer and Petitioner independently represented that these prospective voters are ineligible, creating a de facto stipulation. It is well established that the Board will generally hold parties to stipulations, provided that the stipulation in question "does not contravene any Board policy or statutory prescription." *Cruis Along Boats*, 128 NLRB 1019, 1020 (1960). For instance, in *Dunham's Athleisure Corp.*, 311 NLRB 175 (1993), the Board held that the parties' stipulation of two allegedly casual employees as excluded was contradicted by evidence showing that those individuals worked similar hours to unit employees. Id. The Board stated that it was "not willing to go so far as to knowingly allow eligible regular part-time employees to be disenfranchised by the parties' unfounded stipulations." 311 NLRB at 176. Similarly, in *Vent Control, Inc. of Ohio, Etc.*, 126 NLRB 1134, 135 (1960), the Board found that, despite a stipulation by the parties that a foreman was included in the bargaining unit, the record evidence demonstrated that he was a supervisor within the meaning of Section 2(11) of the Act.

Because I find that the record evidence conflicts with the parties' stated positions on the following challenged ballots, I will discuss the factual situations underlying each of these eight

challenged ballots on a case-by-case basis and provide the rationale for my findings with respect to each individual. I will also address the ballots of Mani and Robles, on which the parties do not agree.

1. Hannah Cohen:

a. Statement of Fact:

Hannah Cohen is a third-year graduate student in the Film and Visual Studies Ph.D. program at Harvard. Boodram testified that Cohen was employed as a Teaching Fellow, a bargaining unit position, during the Fall 2016 semester. However, he asserted that her appointment to this position ended on October 1, and that she had no other employment with Harvard during the Fall 2016 semester.

b. Position of the Employer:

The Employer contends that because Cohen's tenure as a Teaching Fellow ended before the payroll cutoff date of October 15, she is an ineligible voter.

c. Analysis:

It is undisputed that Cohen was employed in a bargaining unit position until October 1, two weeks prior to the payroll cutoff date. Under a traditional standard of eligibility, which the Employer has urged me to adopt, Cohen would not be eligible. However, as discussed above, I have already found that a look back period is appropriate, and that it should also include doctoral students such as Cohen, who were Teaching Fellows during the Fall 2016 semester but whose employment ended prior to the date of the election. As the eligibility formula establishes, students who served as Teaching Fellows for a portion of the semester ending prior to the election date should be eligible to vote in this election.

Although Cohen's employment as a Teaching Fellow only lasted for four or five weeks, the hours she worked are sufficient to render her eligible. There is no evidence in the record regarding the actual number of hours worked by Cohen in this role; however, Robles, who was hired under an identical time commitment, worked 151.47 hours during a one-month period of time. If Cohen worked similar hours, she would be eligible for inclusion. Moreover, I note that the Board's traditional standard for eligibility of regular part-time employees is an average of four hours per week over the 13 weeks preceding the payroll cutoff date.[49] In this instance, the thirteen weeks prior to October 15 would be the period from July 17 – October 15, encompassing

[49] *Davison-Paxson Co.*, 185 NLRB 21 (1971).

the entirety of Cohen's employment as a Teaching Fellow. Cohen only needed to work 52 hours in the course of her employment to be considered a regular part-time voter under *Davison-Paxson*. Given the two-fifths time commitment required of Teaching Fellows, and the 151.47 hours worked by Robles over a similar time frame in a comparable role, I conclude that Cohen's employment as a Teaching Fellow during that time period was a sufficient period of employment to warrant inclusion in the bargaining unit.

In this case, Cohen was employed in a bargaining unit position as a Teaching Fellow until October 1 and thus squarely falls within the eligibility criteria established above. Therefore, I find that she is an eligible voter and recommend that the challenge to her ballot be overruled.

2. Maria Duarte:

a. Statement of Fact:

Maria Duarte is a fifth-year medical student at the Harvard Medical School. According to Boodram, Duarte is currently completing a research fellowship with funding from the Harvard Medical School Scholars in Medicine Office and Dr. Daniel Lee, Duarte's research sponsor and Associate Professor of Otolaryngology at the Harvard Medical School. The term of the project is from July 1, 2016 until May 30, 2017.

b. Position of the Employer:

The Employer takes the position that Duarte was not a "common law employee, working under the direction and control of a faculty supervisor" during the relevant time frame. It therefore contends that she cannot be included in the bargaining unit.

c. Analysis:

The evidence regarding Duarte reveals that she was working on a research project during the relevant timeframe. No evidence in the record exists to differentiate her project from those conducted by research assistants who were otherwise considered eligible voters. The sources of her funding are also immaterial to my analysis; the Agreement specifically provides that the funding source of student research is not a relevant consideration. However, that Duarte's funding comes, at least in part, from her research sponsor supports the conclusion that her research does not advance her individual work alone.

I am puzzled by the Employer's contention that Duarte was not a common law employee. The evidence suggests that she is receiving compensation for services provided to the Employer, which the Board in *Columbia* found to sufficiently constitute a common-law employment

relationship. Id. The Employer has not shown that Duarte's research is different from other research projects for which other students in the bargaining unit receive funding. I reiterate that, as the challenging party, the Employer bears the burden of affirmatively proving that the challenged individual is not an eligible voter.

In sum, the record evidence contradicts the parties' positions that Duarte is not an eligible voter. I find that the Employer has not met its burden of demonstrating that Duarte was ineligible to vote in this election. Thus, I recommend that the challenge to her ballot be overruled and that her ballot be opened and counted.

3. Emma Goldhammer:

a. Statement of Fact:

Emma Goldhammer is a second-year Ph.D. student in the Regional Studies – Russia, Eastern Europe, and Central Asia program. Additionally, Goldhammer is receiving a stipend from the US Department of Education Foreign Language and Area Studies Program. On cross-examination, however, Boodram admitted that he was aware of internal communications in the department in which Goldhammer was enrolled in the Fall 2016 semester. Boodram recalled Professor Timothy Colton initiating these conversations and requesting that a position be set up in the Employer's system for Goldhammer. While Boodram was aware Goldhammer had performed work for Colton in that position, he testified that he did not believe Goldhammer had, to date, submitted the necessary paperwork, such as an I-9 form, and that she had therefore not been paid for any work she had performed. Boodram also asserted that he was unaware of the dates Goldhammer had worked.

The Petitioner also proffered a letter from Colton dated December 13, 2016, which stated that Goldhammer had worked as a Research Assistant during the Fall 2016 semester. The letter did not state the dates on which Goldhammer had worked.[50]

b. Position of the Employer:

The Employer contends that Goldhammer is an ineligible voter because she did not log any hours worked during the relevant time frame.

[50] The Employer objected to this document being offered, asserting that it was not and could not be properly authenticated by Boodram. Although I permitted the exhibit to be entered into the record, I have given it no weight in making my findings with respect to Goldhammer's ballot.

c. Analysis:

It is the Employer's burden, as the challenging party, to provide sufficient evidence of a voter's exclusion from the bargaining unit.[51] I find, with respect to Goldhammer, that the Employer has not met this burden. It is clear from the record evidence that Goldhammer was employed by the Employer as a research assistant, although the dates of this employment are unclear. I find it immaterial that Goldhammer has apparently not, to date, received payment for her work. The parties do not dispute that Goldhammer is entitled to remuneration as a result of the work she performed, and thus was an employee during the relevant timeframe. Compare *WBAI Pacifica Foundation*, 328 NLRB 179 (1999) (inappropriate to include unpaid staff in a bargaining unit because these individuals were not entitled to any compensation for their work). Thus, though Goldhammer has not yet been paid for the work she performed, she was still an employee when she was performing that work.[52] Clearly, the work performed by Goldhammer renders her eligible for inclusion in the bargaining unit, provided that she performed such work during the relevant time frame.

Regarding the timing of Goldhammer's work, I find that the Employer has not met its burden to show that Goldhammer was not employed during the relevant timeframe. Boodram testified that he was aware that Goldhammer had performed work, but was unaware of the dates that this work had occurred. I find his uncertain testimony to be insufficient to warrant excluding Goldhammer from the bargaining unit.[53] I therefore find that Goldhammer was an eligible voter and recommend that the challenge to her ballot be overruled.

4. Camran Mani:

a. Statement of Fact:

Camran Mani is a fifth-year Ph.D. student in the History of Art and Architecture program in the Arts & Humanities division of GSAS. He served as a graduate intern in the Materials Lab of the Harvard Art Museums during the Fall 2016 semester. Mani was awarded this position via a letter dated May 11. This letter described the duties and compensation of the graduate internship position as follows:

[51] *Hallandale Rehabilitation and Convalescent Center*, 313 NLRB 835, 836 (1994) ("…heavy burden borne by the party urging exclusion…").
[52] Moreover, evidence in the record regarding other challenged individuals established that it was common for individuals to perform work and submit hours for that work in bulk later on.
[53] See *CHS, Inc.*, 357 NLRB 514, 514 fn. 3 (2011), wherein the Board found that the evidence supporting a union's challenge of a prospective voter was "too vague and general" to meet the challenging union's burden, and overruled the challenge to that voter's ballot.

> Your work will focus on Materials Lab programs, developing hands-on experiments with artists' materials and techniques, creating related presentations for public audiences, and supporting workshops and your supervisor will be Francesca Bewer. The stipend per semester is $10,600 based on a 2/5 time commitment.

The Materials Lab is an educational area within the Harvard Art Museums in which students and members of the public work artistically to enhance their understanding of art history. Brewer is a professor at Harvard and teaches a course in the Materials Lab for undergraduates titled "The Making of Art and Artifacts." Mani testified that this class was divided into two sections, a "looking" session and a "making" session, and that he attended each session of the class. For the "making" sessions, Mani was responsible for setting up materials, going through exercises with students, and answering students' questions.

Mani also testified that he was responsible for helping Bewer develop the syllabus for this class, including assisting in devising assignments for students. An email conversation between Bewer and Mani shows revisions made by Mani, at Bewer's request, to a homework assignment. While Mani had conversations with Bewer regarding an appropriate grading scale, he testified that all grades in the course were given by the professor. In addition, Mani testified that he was also responsible for uploading all coursework assignments and other documents to the course website for the course and answering questions submitted by students through the site.

Mani's testimony demonstrated that he had additional duties as a graduate intern which were unrelated to Bewer's class. Principally, he assisted with a class offered to the public in which participants were given the opportunity to replicate classic art techniques. This class met approximately seven times during the Fall 2016 semester. For example, Mani assisted with a class in transfer technique by researching the history of these techniques[54] and setting up the tools for the course in question.

For this position, Mani was paid for a two-fifths time commitment, equivalent to that of a Teaching Fellow. Indeed, the paystub issued to Mani categorized his pay as that of a Teaching Fellow. Mani estimated that he worked approximately twenty hours per week and was present in the Art Museum at least two and a half days a week. He also worked remotely several days per week.

[54] Transfer techniques include the copying of a sketch from one surface to another with carbon paper or to increasing the scale of a drawing.

b. Positions of the Parties:

The Petitioner contends that, even though Mani was categorized as a "graduate intern" and worked at the Harvard Art Museums, the work performed by Mani is instructional in nature and similar to others included in the bargaining unit. The Petitioner emphasized that Mani was compensated at the same level as a Teaching Fellow and was in fact categorized as such on his paystub. The Employer, on the other hand, contends that Mani was an intern and that Mani admitted he was not a Teaching Fellow. The Employer also asserts that the work performed by Mani was not instructional as required by the Agreement, and that he should therefore be excluded from the bargaining unit.

c. Analysis:

The issue of Mani's challenged ballot requires revisiting the *Caesar's Tahoe* test. Regarding the first prong of this test – whether a stipulation is ambiguous as to a classification's inclusion or exclusion – I note that the term "Graduate Student Intern" appears nowhere in the Agreement. Thus, I find that the Agreement is ambiguous as to Mani's inclusion. Moving to the next prong, there is no extrinsic evidence in the record that the parties discussed the eligibility of Graduate Student Interns prior to the approval of the Agreement. However, as discussed above, extrinsic evidence supports the finding that the parties meant to include all enrolled graduate students receiving compensation in exchange for instructional or research work at the University.

I find that Mani's work is instructional in nature. Mani's duties with respect to the undergraduate class taught by Bewer are similar to those of the Teaching Assistants in the Graduate School of Design whom I have already deemed eligible voters. Moreover, Mani performed extensive work adapting homework assignments to the class in question, similar to the work performed by Schlossberg in her role as Teaching Assistant at Harvard Law School. In addition, Mani performed logistical setup work for the courses offered to the public through the Art Museums, which mirrors the logistical work performed by Traill in his role as a Course Assistant. Given the similarities between what have already been established as bargaining unit positions and the work performed by Mani, I must conclude that he is properly included in the bargaining unit.[55] I therefore recommend that the challenge to his ballot be overruled.

[55] That Mani did not have a title of Teaching Fellow, Teaching Assistant, or Course Assistant as set forth in the Agreement is immaterial. The parties have clearly indicated that the actual title of an individual is not dispositive as to that individual's inclusion in the bargaining unit.

5. Whitney Robles:

a. Statement of Fact:

Whitney Robles is a third-year student in the American Studies Ph.D. program in the Social Sciences Division of GSAS. Robles served as a Graduate Student Intern at the Harvard Art Museums during the Fall 2016 semester. Robles testified during this proceeding, describing her job title as that of a curatorial intern. Robles was informed that she received this position via a letter dated May 10, 2016, which stated that her work "will focus on the museums' forthcoming workshop, the Maneuvers Project, as well as the exhibition 'The Philosophy Chamber: Harvard's Lost Collection'…"

Robles testified that the bulk of her time in this position was spent on the latter exhibition and that she spent much time tracing the histories of various objects that were going to be displayed in it. She also was responsible for drafting research memos regarding both the history of the objects and the general history of these types of objects. While these memos are not published, Robles testified that Harvard keeps them on file for the ease and reference of future researchers. Robles was also responsible for drafting the labels for various objects in the exhibition. Her supervisor for this work was Ethan Lasser, a curator at the museum. [56] Robles testified that although Lasser is not a professor at Harvard, he has "co-taught" classes with professors at the university.

Regarding compensation, Robles, like Mani, was paid based on a two-fifths time commitment, equivalent to that of one of the Employer's Teaching Fellows. A May 10 email Robles received from Alison VanVolkenburgh, an Admissions and Financial Aid Officer responsible for the Social Sciences at GSAS, made clear that the compensation from Robles' internship would be equivalent to that of a Teaching Fellow.

b. Positions of the Parties:

The Petitioner asserts that the work performed by Robles fits within the broad definition of Research Assistant that the parties have utilized and that she should be eligible to vote in this election. The Employer, meanwhile, contends that Robles was not eligible because her work was not performed under the supervision of a professor, that the memos she wrote in her capacity as a

[56] The Petitioner also introduced a February 2, 2017 email from Lasser, in which he stated that Robles had "performed the duties of a research assistant" during the Fall 2016 semester. However, as with the letter sent by Colton on behalf of Goldhammer discussed infra, I do not rely on this email, as there was no evidence adduced regarding Lasser's understanding of the term "research assistant," and Lasser did not testify in this proceeding.

curatorial intern were not published or part of her curriculum vitae, and that her work is not "academic research."

c. Analysis:

Robles is undisputedly enrolled in a Harvard graduate degree program and was engaged in compensated work for the Employer during the relevant timeframe. Neither party contends that Robles' work is instructional in nature. Thus, the sole remaining issue is whether Robles' duties as a curatorial intern constitute research work within the meaning of the Agreement. For the following reasons, I find that they do.

Robles' work, particularly with respect to the memos she wrote regarding the objects in the Lost Collection exhibition, were undisputedly based on her research into the history and origin of these objects. Moreover, these memos, while not published in journals, are kept by Harvard in its' museums for future use by researchers. Thus, it is clear that Robles' research added to the institutional knowledge of the Employer, and thus falls within the purview of the bargaining unit.[57]

While the Employer attempts to distinguish this work because Robles did not perform this work for a professor, no evidence in the record suggests work needs to be performed under the supervision of a professor at Harvard to be considered bargaining unit work. The Agreement merely states that Research Assistants must be "enrolled in Harvard degree programs…employed by the Employer who serve as Research Assistants." The only limitation regarding research assistants in the Agreement is that "undergraduate students serving as research assistants" were excluded. Robles is clearly not an undergraduate student and, as discussed above, was engaged in research on behalf of the Employer in her capacity as a curatorial intern. I therefore find that Whitney Robles is an eligible voter and recommend that the challenge to her ballot be overruled.

V. THE OBJECTIONS

Representation elections are not lightly set aside. On the contrary, "there is a strong presumption that ballots cast under specific NLRB procedural safeguards reflect the true desires of the employees." *Safeway, Inc.*, 338 NLRB 525, 525-526 (2002), quoting *NLRB v. Hood*

[57] The Employer takes the position that because this work does not become part of Robles' curriculum vitae, it is not bargaining unit work. However, it presented no evidence that such a standard is required for inclusion in the bargaining unit. As discussed elsewhere in this report, the term "research assistant" has been employed generously by the parties throughout this process.

Furniture Mfg. Co., 941 F.2d 325, 328 (5th Cir. 1991). Accordingly, the burden of proof on the objecting party is a "heavy one." *Nor-Cal Ready Mix, Inc.*, 327 NLRB 1091, 1092 (1999), quoting *Kux Mfg. Co. v. NLRB*, 890 F.2d 804, 808 (6th Cir. 1989). At all stages of post-election proceedings, the objecting party bears the burden of proof. *Frontier Hotel*, 265 NLRB 343 (1982). The standard for objectionable conduct is an objective one. *Lancaster Care Center, LLC*, 338 NLRB 671, 671-672 (2002). Conduct will be found objectionable if it has "the tendency to interfere with the employees' freedom of choice." *Cambridge Tool & Mfg. Co.*, 316 NLRB 716 (1995).

A. The Employer's Objection:

1. Statement of Fact

The Employer has challenged the Board agent's interpretation of a ballot as void. On the ballot in question, the voter clearly marked an "X" in the "NO" box of the ballot. The voter made no marks on or near the "YES" section of the ballot, which is divided from the "NO" portion by a perpendicular line. The only other markings on the ballot in question were a handwritten message that stated as follows:

> Hello Counter!
> Have a good
> day

The handwritten message concluded with a smiley-face drawn by the voter. The parties presented no further evidence regarding the circumstances under which the ballot was cast.

2. Positions of the Parties

The Petitioner did not take a position on this issue or submit any argument regarding the purportedly void ballot. However, the Employer asserts that the Board agent erred in ruling this ballot void, contending that the intent of the voter was clear and therefore the ballot cast by this individual should be counted.

3. Analysis

In cases involving whether a voter's ballot should be declared void, the Board has long held that, in order to avoid such a fate, "the intent of the voter in marking his ballot must be clearly expressed." *Mercy College*, 212 NLRB 925, 925 (1974). The Board considers a marking in either one of the designated squares on the ballot, standing alone, to constitute clear intent. Ibid. This axiom remains true even where a voter writes a message rather than making a mark in the designated boxes. See, e.g., *Horton Automatics*, 286 NLRB 1413 (1987) (the letters "NON"

covering both the "YES" and "NO" squares indicated clear intent) and *Hydro Conduit Corp.*, 260 NLRB 1352 (1982) ("si" written on the back of a ballot, absent other markings on the ballot, was sufficient to express voter's intent). However, "[a] ballot that clearly expresses voter preference will still be rejected if the mark identifies the voter." *Daimler-Chrysler Corp.*, 338 NLRB 982, 984 fn. 8 (2003), citing *A.G. Parrott Co.*, 237 NLRB 191 (1978), enf. denied on other grounds 630 F.2d 212 (4th Cir. 1980) and *Standard-Coosa-Thatcher Co.*, 115 NLRB 1790 (1956).

Where the issue, as here, turns on whether the markings are sufficient to disqualify a voter's ballot, the Board examines whether these markings make it possible for the voter to be identified. *General Photo Products*, 242 NLRB 1371 (1979), citing *Ebco Manufacturing Company*, 88 NLRB 983 (1950); *George K. Garrett Company Inc.*, 120 NLRB 484 (1958); and *J. Brenner & Sons, Inc.*, 154 NLRB 656 (1965). In *Bridgeton Transport*, 124 NLRB 1047, 1048 (1959) (citations omitted), the Board stated as follows:

> Under our precedents, a ballot will not be invalidated by reason of its marking if the marking clearly indicates the voter's choice in the election and does not inherently identify the voter, or is not such a departure from the usual ways in which people mark ballots to warrant the conclusion that it is an identifying mark, unless it can be shown that the marking was used for identification purposes at the suggestion or urging of the participating Union or the Employer.

See also *F. Strauss & Son, Inc.*, 195 NLRB 583, 583 fn. 2 ("[i]n the absence of evidence indicating that the ballot was deliberately marked for the purpose of identification, we will not disenfranchise a voter").

Here, neither party presented evidence that the voter wrote the message at the Employer or Petitioner's behest. The handwritten message on the ballot is innocuous, does not detract from the intent of the voter, and thus is insufficient to render the ballot void. Accordingly, I recommend that the Employer's objection be sustained and that this vote be properly counted as a "No" vote during the next tally of ballots.

B. The Petitioner's Objection:

Like the Employer, the Petitioner filed a single objection to the conduct of the election. The Petitioner's objection is that the Employer failed to substantially comply with the voter list requirements as set forth in *Excelsior Underwear*, supra.

1. Statement of Fact:

The Petitioner's organizing campaign at Harvard has been underway for at least two years. Harvard has been aware of this campaign since its inception. The Board issued its decision in *Columbia University* on August 23. On August 26, Paul Curran, the Employer's Director of Labor and Employment Relations, contacted the Petitioner to discuss next steps in the organizing process at Harvard. The parties met on September 9 on Harvard's campus, and the Petitioner expressed its desire for a unit similar to that sought in the *Columbia* petition. In the wake of this meeting, a team of administrators, which included Meredith Quinn, the Chief of Staff in the Office of the Provost at Harvard, was tasked with compiling a list of eligible voters.

On September 12, in her efforts to compile a proper list, Quinn, a witness in this proceeding, emailed "point people" from each of Harvard's schools. In this email, she asked each point person to identify all students performing teaching and research work in their respective schools, how these students are compensated, the duration of the research or teaching assignment, the hours per week worked in these positions, and the PeopleSoft "code" for each job title.[58] Quinn testified that the challenge in producing a Voter List through PeopleSoft was that Harvard, at any time, has approximately 15,000 enrolled graduate students and 7,000 undergraduate students; any individual who received payment from Harvard, whether a graduate student stipend or pay for hourly work, would have an entry in PeopleSoft. Moreover, even non-enrolled individuals, such as faculty, staff and administrators, have entries in PeopleSoft, further complicating the Employer's efforts. Additionally, Quinn described Harvard as highly decentralized with each school choosing how best to process its appointments and designate its student employees.

Nonetheless, Quinn testified that via the responses from the various point people, the identification of Teaching Fellows and other individuals providing instruction was relatively straightforward, as was the identification of hourly research assistants. However, she noted that research assistants in the sciences were more difficult to identify, as the Employer's systems were not set up to distinguish between those doctoral students in the sciences who are still on laboratory rotations versus those who have been assigned to a permanent laboratory. Therefore, in approaching this latter group, the Employer attempted to identify when a student in a certain field of study moves from the rotation phase of their education to the fixed, assigned phase. As

[58] PeopleSoft is the Employer's human resources system, which reflects any payment from Harvard to an individual.

an example, Quinn was informed by the School of Engineering and Applied Sciences that students in their first year in the program are still in the exploratory phase, but by their second year are usually assigned to the more focused phase of laboratory research. Thus, the Employer took the position that students in the School of Engineering and Applied Sciences in their second year or later were eligible to vote and compiled its voter list accordingly.

However, it is undisputed that the Employer erred with respect to students in the Division of Medical Sciences at the Harvard Medical School. The Employer initially took the position that students performing medical research in that school were not assigned to laboratories until their third year. However, it became evident after the election that most, if not all, second-year students in that program were permanently assigned to laboratories, and that a number of first-year students were as well.[59]

The Petitioner filed its petition in this matter on October 18, and the Acting Regional Director approved a stipulated election agreement on October 21. In addition to setting forth the appropriate unit and the mechanical details of the election itself, the Agreement included the following language:

> **6. VOTER LIST.** Within 2 business days after the Regional Director has determined that there is a sufficient showing of support for an election to proceed, pursuant to the subpoena described in paragraph 1 above, the Employer will provide to the Regional Director and the Petitioner a voter list of the full names, work locations, shifts, job classifications, and home addresses, available personal email addresses, and available personal home (local residential) and cellular telephone numbers of all eligible voters. The Employer must also include, in a separate section of that list, the same information for those individuals whom the parties have agreed should be permitted to vote subject to challenge. The list must be filed in common, everyday electronic file formats that can be searched. Unless otherwise agreed to by the parties, the list must be provided in a table in a Microsoft Word file (.doc or docx) or a file that is compatible with Microsoft Word (.doc or docx). The first column of the list must begin with each employee's last name and the list must be alphabetized (overall or by department) by last name. The font size of the list must be the equivalent of Times New Roman 10 or larger. That fond does not need to be used by the font must be that size or larger. When feasible, the list must be filed electronically with the Regional Director and served electronically on the parties. The Employer must file with the Regional Director a certificate of service of the list on all parties.

[59] Quinn testified that Harvard made a mistake due to "miscommunication" between the team assembling the Voter List and the school in which these students were working.

The Region issued the subpoena mentioned in the preceding paragraph because the Employer took the position that it needed to comply with the Family Educational Rights and Privacy Act, a statute protecting the privacy of student educational records, and that issuance of a subpoena would satisfy those requirements.

The Employer submitted the first Voter List and Challenged Voter List in this matter to the Petitioner and the Region on November 1. However, the Petitioner identified a number of missing categories in the Employer's initial submission, such as missing phone numbers and the failure to identify departments in which the student worked. The Employer submitted a supplemental Voter List and Challenged Voter List (collectively, "the lists") to both the Region and the Petitioner on November 4.[60] There were 3,556 individuals on this Voter List and 386 individuals on the Challenged Voter List.

The Voter List did not include the following groups of individuals discussed in the challenges section above, whom the Employer contends are not eligible voters: TAs in the GSD, Technical Assistants in the GSD, and first-year students in the OEB Department. It similarly did not include first and second-year students in the Harvard Medical School. The parties did not add names to either of the lists between November 4 and the election, held on November 16 and 17.

However, the parties corresponded via email after the Employer submitted the lists regarding individuals the Petitioner believed should have appeared on the lists. On November 10, apparently in response to questions from the Petitioner regarding certain individuals in the Harvard Law School and the GSD who did not appear on the Voter List, the Employer provided two lists of individuals with a short description of the individuals' relevant employment history. The Employer agreed that six of the individuals from the GSD were eligible voters and two from Harvard Law School were as well. Also on November 10, apparently in reference to an earlier phone call between the parties, the Employer agreed to include two individuals whose names did not appear on the Voter List but who were otherwise eligible voters. Also in this email, the Employer's attorney stated that there were 37 individuals who "were placed in appointments after the October 15 cut-off date, but with retroactive start dates." The parties discussed this issue further but did not add these so-called "retroactive appointments" to the Voter List.

[60] The Petitioner does not contend that information missing from the initials lists is objectionable; its objection is limited to the Employer's alleged omission of individuals from the final Voter List and Challenged Voter Lists.

On November 11, the Petitioner, via its attorney, voiced its position that the TAs at the GSD should be included on the Voter List. The Employer disagreed with this position, contending that these individuals were not providing instructional services. Obviously, that dispute was not resolved prior to this hearing.

The election was held on November 16 and 17. At the conclusion of the election, approximately 1,200 challenged ballots remained. The parties therefore engaged in a series of meetings in an attempt to resolve a number of the challenged ballots. A Board agent from the Regional office assisted the parties and urged them to reach resolution on as many challenged ballots as possible. Eventually, as a result of these efforts, the number of challenged ballots was whittled down to the 314 which are the subject of this report. In so doing, the parties resolved a total of 265 of the challenged ballots in favor of inclusion.

Of these 265 resolved challenges, 102[61] were individuals falling into the aforementioned "retroactive" category. According to Quinn, these individuals were students who, at the time the lists were created, were not listed in PeopleSoft as active employees. However, they were retroactively appointed to these positions after the lists were created. As was the case with Renugan Raidoo, these were individuals whose employment paperwork had been delayed, and who had actually begun working prior to the paperwork being processed by Harvard. According to Quinn, the Employer decided that individuals who had been retroactively appointed to bargaining unit positions as of November 17, and that the work in question had been backdated to before the cutoff date of October 15, would be eligible. Under those guidelines, 102 of the challenged ballots were opened and counted. Quinn testified the Employer reached this decision as an effort of good faith. She also stated that, in addition to the 102 voters who met the above criteria, approximately 73 individuals who had not voted in this election were similarly situated.

The Petitioner presented a portion of the Employer's PeopleSoft how-to guide regarding "Effective Dating," available on Harvard's website. This guide addresses the retroactive pay issue insofar as it provides instruction on how to enter payments in to the PeopleSoft system for individuals "whose retroactive pay relates solely to unpaid hours from prior periods." Additionally, in testimony regarding the challenged ballot of Yijing Lu, Mohan Boodram stated that the Institute of Quantitative Social Science often kept students in open, multi-year

[61] There is some confusion in the record as to whether the actual number of voters with retroactive appointments was 101 or 102. I use 102 as the correct number although, as shown below, whether this number is 101 or 102 does not affect my analysis and recommendation regarding the Petitioner's objection.

employment appointments despite not actively having a paid work assignment and that this was done to avoid the delays in processing employment paperwork for student employees.

Another large group of individuals whose challenges were resolved in favor of inclusion were the aforementioned first and second-year students in the Division of Medical Sciences. The parties agreed that 96 of these voters who were challenged because they did not appear on the Voter List were eligible to vote. The parties based their agreement on the fact that these 96 had completed laboratory assignment forms which designated a specific laboratory in which they would continue to work. Most of these individuals were second-year students, although four were first-year students. In addition, there were 10 first-year students in the Division of Medical Sciences who had voted in the election but whose ballots the parties agreed not to open and count.[62] Finally, there were an additional 24 first and second-year students in the Division of Medical Sciences who had been assigned to permanent laboratories whose names did not appear on the Voter List and who did not vote in this election.

The remaining 67 challenged ballots that the parties agreed were eligible based on the individual circumstances of those individuals. In addition, during the course of this hearing, the parties agreed that 19 other individuals whose names did not appear on the lists were eligible to vote in this election; five of these individuals' names and contact information appear on the Challenged Voter List.[63] Finally, the parties agreed that there were five students in the Astronomy Ph.D. program during the Fall 2016 semester who had been assigned to a laboratory advisor; it is unclear how many of these individuals voted in this election.

2. Positions of the Parties:

The Employer contends that it has substantially complied with the Voter List requirements, and that setting aside the election preferences of almost 3,000 undisputedly eligible voters would be inappropriate. More specifically, the Employer argues that the maximum number of eligible voters whose names were omitted from the Voter List is 120, the number of first and second-year students the parties agreed should have been included. However, the Employer claims that the true number of omissions from the Voter List is only 24, as the other 96 voted in this proceeding. Regarding the 101 retroactive appointments whose ballots the

[62] A factual stipulation entered into by the parties in this regard stated that these ten students were assigned to fixed laboratories during the Fall 2016 semester, but that a "disagreement between the parties regarding the sufficiency of the evidence with respect to…those individuals" led the parties to agree that their votes should not be counted.
[63] These five are Anastasia Aguiar, Sarah Blum-Smith, Niharika Singh, Alix Winter, and Zhuo Xiaolin.

parties agreed should be opened and counted, the Employer contends that these individuals did not appear in Harvard's payroll systems at the time the lists were created and therefore, the Employer had no way of knowing that they were performing bargaining unit work. The Employer also claims that it agreed to open the ballots of these retroactive individuals as a show of good faith and at the urging of the Board agent. It maintains that it should not be punished for working collaboratively with the Petitioner to resolve open challenged ballots. The Employer repeats this argument regarding the other 68 individual challenges that it resolved before the Notice of Hearing issued in this matter, as well as the additional 19 voters whom the parties stipulated were eligible throughout this proceeding.

The Employer makes several legal arguments as well. It contends that the Petitioner is relying on outdated Board law in asserting that the omissions rose to the level of objectionable conduct. The Employer repeated the argument that it attempted to raise during the hearing that the Petitioner suffered no prejudice as a result of any potential omissions from the lists and that no basis exists for setting aside the election. Additionally, the Employer contends that under *Woodman's Food Markets*, 322 NLRB 503 (2000), the Board takes a holistic approach, and that a simple percentage of omissions, long held by the Board as the appropriate standard, is no longer applicable. Thus, the Employer urges me to consider the difficulties associated with a unit of this size and character. The Employer argues that the circumstances of Harvard's decentralized organizational structure and lack of experience with compiling a Voter List from across its schools weigh against a finding that it did not substantially comply with the Voter List requirements. To that end, the Employer highlighted the testimony of Quinn and Scanlon regarding Harvard's efforts to create a list of this magnitude.

The Petitioner also cites *Woodman's Food Markets*, supra, in support of its objection. The Petitioner claims that all three prongs of the standard set forth in *Woodman's* are met in the instant case. That is, the Petitioner contends that a large percentage of voters were omitted, that the number of omissions is significant enough to be determinative, and that the Employer's justification for omitting these voters is lacking. More specifically, the Petitioner contends that potentially 14.5% of potential voters were omitted from the Voter List and that the Board has found lesser percentages of omissions to constitute objectionable conduct. The Petitioner further contends that, by any metric, the number of omitted individuals who have not voted is sufficient to be determinative. Finally, the Petitioner asserts that the Employer had adequate time to create

a proper list and was well aware of the scope of the unit the Petitioner was seeking. The Petitioner claims that the Employer was aware of retroactive appointments as a common part of university life but took no steps to ensure that those individuals were included in the bargaining unit. In sum, the Petitioner claims that the Employer has not sufficiently complied with the Voter List requirements and that the results of the election should be set aside if it does not receive a majority of votes cast in a revised tally.

3. Analysis:

The Employer's Subpoena and Offer of Proof:

Prior to the hearing, the Employer served upon the Petitioner a subpoena seeking information to support its argument that the Petitioner suffered no actual prejudice as a result of any potential omissions from the Voter List. The Petitioner timely filed a petition to revoke the Employer's subpoena alleging, inter alia, that the issue of whether the Petitioner suffered any actual prejudice as a result of any omissions from the Voter List was irrelevant. The Regional Director referred the petition to revoke to me for ruling. After giving both parties the opportunity to submit additional briefs regarding whether this issue was litigable, I granted the Petitioner's petition to revoke the Employer's subpoena, ruling that the information sought was not relevant to this proceeding.

After I granted the petition to revoke, the Employer correctly surmised that I likely would not permit it to introduce evidence regarding whether the Petitioner suffered actual prejudice as a result of omissions from the Voter List and requested the opportunity to submit an offer of proof as to what it intended to present in that regard. I permitted the Employer to make its written offer of proof, but rejected this offer. The Employer, in its brief, reiterates its argument that it should have been permitted to litigate this issue. I disagree, and explain my rationale for granting the petition to revoke and for rejecting the Employer's offer of proof below.

The Employer contends that the Board takes into account the issue of prejudice to the other party in *Excelsior* list cases. 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,[64] a submission that was four days late,[65] and an employer's refusal to provide temporary physical addresses to a petitioning union.[66]

Unlike those situations, however, the Petitioner's objection relates solely to the omission of the names of voters. "[T]he Board has consistently viewed the omission of names as more serious than inaccuracies in addresses." *Women in Crisis Counseling & Assistance*, 312 NLRB 589, 589 (1993). In cases involving omissions from the *Excelsior* list, the Board's decision in *Thrifty Auto Parts*, 295 NLRB 1118, 1118 (1989) is instructive. In that case, the Board stated as follows:

> In this regard, the Board has long held that the issues of a union's actual access to employees, or the extent to which employees from the *Excelsior* list are aware of the election issues and arguments, are not litigable matters in applying the *Excelsior* rule when there are omissions from the eligibility list. The Board presumes that an employer's failure to supply a substantially complete eligibility list has a prejudicial effect on the election, without inquiry into the question of whether the union may have obtained some additional names and addresses of eligible employees or whether omitted employees might have garnered sufficient information about the issues to make an intelligent choice.

Id (footnotes omitted). A case relied upon by the Board in *Thrifty Auto Parts* further underscores the Board's position on this issue. In *Sonfarrel, Inc.*, 188 NLRB 969, 970 (1971), the Board, in discussing the issue of actual prejudice with respect to the omission of names from an *Excelsior* list, stated as follows:

> To look beyond the question of the 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. The *Excelsior* rule imposes a simple duty upon employers which can be satisfied by the application of a reasonable amount of diligence. We perceive no sound basis for granting the opportunity of prolonged litigation to an employer whose more attentive concern with the rule would have obviated the need for such litigation in the first place. We shall therefore presume, as the *Excelsior* case intended, that the Employer's failure to supply a substantially complete eligibility list had a prejudicial effect upon the election, without inquiry 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 have made an intelligent choice.

[64] *Taylor Publishing Co.*, 167 NLRB 228, 228-229 (1967).
[65] *Program Aids Company, Inc.*, 163 NLRB 145, 146 (1967).
[66] *LeMaster Steel Erectors*, 271 NLRB 1391, 1391 (1984) (employer's refusal to provide temporary addresses for six out-of-state workers not objectionable insofar as permanent addresses were provided and the record reflected that the out-of-state workers were at their permanent addresses for a significant period of time prior to the election).

Thus, the Board's precedent is clear that the issue of actual prejudice to a party due to omissions from an *Excelsior* or voter list is simply not a consideration in determining substantial compliance. See also *Rocketdyne Division of North American Space Operations*, 235 NLRB 1159, 1160 (1978) ("…the efficacy of the Petitioner's literature or its diligence in seeking to overcome the handicap willfully imposed by the Employer is not in issue").

The Employer correctly notes that in *Woodman's Food Markets*, supra, the Board modified its approach regarding what constitutes substantial compliance with the *Excelsior* requirements, and established a more comprehensive analysis, which will be described in further detail below. However, the Board's decision in that case did not disturb the holdings of *Sonfarrel* and *Thrifty Auto Parts*. This is borne out by the Board's decision in *Automatic Fire Systems*, 357 NLRB 2340, 2340 (2012), a case issued after the Board's *Woodman's* decision in which the Board cited *Thrifty Auto Parts* for the proposition that substantial omissions from the *Excelsior* list are presumed to be prejudicial. Moreover, the Employer has submitted no evidence that the adoption of the Final Rule on representation case procedures, 79 Fed. Reg. 74308 (December 15, 2014) ("the Final Rule"), disturbed Board's precedent in this area.

The Employer also argues that the particular circumstances of this case, including the Petitioner's lengthy organizing campaign, require a revisiting of the Board's standard. However, I am bound by current Board precedent unless such precedent is reversed by the Board itself or by the Supreme Court. See, e.g., ALJ Bench Book, § 13-100, as revised November 2016, and cases cited there. See also *Waco, Inc.*, 273 NLRB 746, 749 fn. 14 (1984) ("We emphasize that it is a judge's duty to apply established Board precedent which the Supreme Court has not reversed…[i]t is for the Board, not the judge, to determine whether that precedent should be varied."). Accordingly, it is not my place to consider whether the Board's standard enunciated in *Sonfarrel* and *Thrifty Auto Parts* is proper; rather, my role is to apply established Board law to the instant situation. Accordingly, I find that the standard articulated in those cases is applicable to the instant case and reject the Employer's argument that the issue of actual prejudice as a result of omissions from the Voter List can be litigated in this proceeding. I turn now to the substance of the Petitioner's objection.

The *Excelsior* rule, so called due to the name of the case in which the Board first enunciated its standard for the production of employee information prior to an election, was codified by the Board's adoption of the Final Rule. Implementation of the Final Rule resulted in

the amendment of Section 102.62(d) of the Board's Rules and Regulations. The amended Rules and Regulations now state as follows regarding the production of a voter list:

> (d) *Voter list*. Absent agreement of the parties to the contrary specified in the election agreement or extraordinary circumstances specified in the direction of election, within 2 business days after the approval of an election agreement…or issuance of a direction of election…the employer shall provide to the regional director and the parties named in the agreement or direction of list of the full names [and other information] of all eligible voters. The employer shall also include in a separate section of that list the same information for those individuals whom the parties have agreed should be permitted to vote subject to challenge…

In the instant case, although the actual production of the Voter List and the Challenged Voter List was altered from the two-day requirement set forth in the Rules & Regulations, the parties do not dispute that the Employer submitted the Voter List and Challenged Voter List in question to the Petitioner and the Region on November 4. Moreover, the Petitioner does not contend that any information included in that list is objectionable. Its sole objection is to the Employer's omission of a significant number of names from the Voter List.

The Employer correctly notes that the Board historically predicated its decisions regarding omissions from voter lists on the percentage of the unit omitted. See, e.g., *Kentfield Medical Hospital*, 219 NLRB 174, 175 (1975). However, in *Woodman's Food Markets*, the Board stated that "this approach fails to adequately effectuate the statutory purposes underlying the *Excelsior* rule by failing to also consider other factors." 332 NLRB at 504. The Board therefore stated that it would apply the following standard:

> [W]hile we will continue to consider the percentage of omissions, we will consider other factors as well, including whether the number of omissions is determinative, i.e., whether it equals or exceeds the number of additional votes needed by the union to prevail in the election, and the employer's explanation for the omissions.

Id. The Board also stated that evidence of bad faith in omitting individuals from a voter list would end the inquiry and result in a finding of noncompliance with the *Excelsior* rule. Id at fn. 12. The Employer is also correct that the Board's rule is not to be mechanically applied. See, e.g., *Gamble Robinson Co.*, 180 NLRB 532 (1970), citing *Program Aids Company*, supra.

Applying that standard to the instant case, however, I find that the Employer has not substantially complied with the voter list requirement. For the reasons discussed above, I have found that the 116 TAs at the GSD and 12 first-year students in the OEB Department, are eligible to vote. Moreover, as discussed throughout this recommendation, I have found, for

various reasons, that a number of individuals who did not appear on the Voter List or the Challenged Voter List were nonetheless eligible to vote.

The Employer admits that 120 first and second-year students in the Division of Medical Sciences were eligible to vote but did not appear on the Voter List. However, the Employer claims that because only 24 failed to vote in this election, only 24 voters were actually omitted from the list. I do not follow the Employer's logic in this regard. It seems to be a restatement of its already-rejected argument that the omissions did not in fact prejudice the Petitioner. Regardless, it is immaterial that 96 omitted voters cast ballots in this election. The issue is whether they were omitted from the Voter List. In this case, the parties agree that these individuals should have been on the Voter List and were not. To delve further into this situation would be to invite the sort of "administrative monstrosity" against which the Board cautioned in *Sonfarrel*. Also, in *Automatic Fire Systems*, supra, when confronted with a situation similar, the Board's calculations included those voters who were eligible but whose names had been omitted from the *Excelsior* list in determining that the employer had not substantially complied with the *Excelsior* requirement.

I further agree with the Petitioner that the individuals with retroactive appointments should have been on the Voter List. It is undisputed that these approximately 175 individuals were working in bargaining unit positions during the relevant timeframe and thus were eligible to vote. I am not persuaded by the Employer's contention that it had no way of knowing that these individuals were potential voters. The factual situations of Renugan Raidoo and Emma Goldhammer, as discussed above, illustrate that there is often a delay in the processing of paperwork for hourly research assistants. Boodram's testimony buttressed this fact. He stated he was aware of the retroactive pay issue and noted that at least one research institute at Harvard had devised a strategy to circumvent that issue. Moreover, the Employer's own PeopleSoft how-to guide discusses the possibility of retroactive pay issues. Still, the Employer took no effort in its compilation of the lists to address the possibility that such employees existed.

While I do not believe this omission resulted from bad faith, the Board has held that a finding of bad faith is unnecessary and that the *Excelsior* requirement is one which "can be satisfied by the application of a reasonable amount of diligence." *Sonfarrel*, supra. Here, the Employer was clearly aware that retroactive appointments were a fact of life within certain areas of Harvard and took no steps to ensure that they were captured within the lists.

I am also unconvinced by the Employer's argument that it acted in good faith and should not be penalized for its resolution of the challenged ballots of the retroactively appointed individuals and of the 67 individual challenges. The Employer's agreement to open and count the ballots of these individuals essentially confirms that these individuals were eligible voters and therefore included in the bargaining unit. There is no evidence in the record that the Employer, in agreeing to count these individuals, somehow reserved the right to argue that they were not eligible voters. Moreover, the Employer's position was to count the votes of those with retroactive appointments to bargaining unit positions if their working dates fell within the relevant timeframe. Therefore, it is clear that those individuals were employed and working in the bargaining unit as required by the Board, and were therefore eligible to vote. Thus, those individuals, as well as the 73 similarly situated individuals who did not vote, should have appeared on the Voter List.

In addition, a number of other categories include individuals who should have appeared on the lists. These categories include individuals who should have appeared on the Challenged Voter List, TAs in the GSD, first-year students in the OEB Department, and other individuals whom the parties stipulated should be eligible. The following chart sets forth the numerical totals of the individuals who were improperly omitted from the Voter List and the Challenged Voter List, with appropriate footnotes explaining certain vagaries in several categories:

Category	Voters	Non-Voters	Total
Individuals Meeting the Look Back Criteria[67]	18	N/A	18
Teaching Assistants in the GSD[68]	21	94	115
First and Second-Year Students Assigned to Fixed Labs in the Division of Medical Science	96	24	120
First-Year Students in the OEB Department	6	6	12
Retroactive Appointments	102	73	175
Post-Election, Pre-Hearing Resolved Challenged Ballots	67	N/A	67
Stipulated Eligible in this Proceeding[69]	23	N/A	23
Individuals with Challenged Ballots Deemed Eligible[70]	5	N/A	5
Total			**535**

[67] This number includes Benjamin Green, Renugan Raidoo, Andreja Siliunas, and Yevgeniy Zhuravel, all of whom I have concluded have met the eligibility formula in this matter, as well as other individuals whom the parties stipulated were eligible to vote subject to challenged but who did not appear on the Challenged Voter List.
[68] Although 22 individuals were challenged on the basis of their status as TAs at the GSD, one, Eric Zuckerman, appears on the Challenged Voter List, and thus was not omitted from the lists.
[69] Of the 28 individuals the parties stipulated were eligible, five names appear on the Challenged Voter List. The remainder were challenged because they did not appear on the Voter List and are therefore included herein.
[70] This row includes to Hannah Cohen, Maria Duarte, Emma Goldhammer, Camran Mani, and Whitney Robles.

As noted above, there were 3,556 names appearing on the Voter List and an additional 386 appearing on the Challenged Voter List, for a total of 3,942 individuals appearing on both lists. As demonstrated by the above chart, 535 individuals were omitted from the lists, constituting 8.37% percent of the unit in this case.[71] While the Board, in the wake of its decision in *Woodman's*, does not deal only in percentages when dealing with omissions from voting lists, the Board has considered similar percentages to constitute sufficient grounds to set aside an election. See, e.g., *Thrifty Auto Parts*, supra (9.5 percent omission rate sufficient to set aside election) and *Woodman's*, supra (6.8 percent).

The tally issued by the Region on December 22 revealed a 184-vote margin in favor of the Employer. Once the formerly voided ballot is included in the tally as a "No" vote, the margin increases to 185 votes. Thus, adding the 195 challenged ballots to the existing margin reveals that, at most, the margin would be 380 votes in favor of the Employer, still well short of the 535 individuals whose names were omitted from the Voter List and Challenged Voter List. Thus, the number of omitted individuals is potentially determinative, one of the factors to take into account under the guidance of *Woodman's*. Indeed, the Board in *Woodman's* set forth its more flexible test, at least in part, with the goal of including this aspect. As the Board stated therein:

> Obviously, the potentially prejudicial effect on the election is most clear whether the number of omissions may have compromised the union's ability to communicate with a determinative number of voters. To ignore this circumstance, therefore, is not only inconsistent with the rule's purpose but makes little sense.

332 NLRB at 504. Thus, the fact that a potentially determinative number of voters were omitted from the lists in this case is clearly an important consideration.

However, the Board in *Woodman's* was sympathetic to concerns regarding an employer's good-faith effort that nonetheless may fall short of total compliance. As the Board stated, "omissions may occur, notwithstanding an employer's reasonable good-faith efforts to comply, due to uncertainties about who is an eligible unit employee and other factors." 332 NLRB at 505. The Board in that case, however, found that the employer's miscalculation of the payroll eligibility requirement and errors by the payroll department showed a "lack of diligence and due care" by the employer, and which did not constitute a "legally sufficient justification" for the omissions. Id.

[71] This percentage is calculated by adding 3,942 (the number of persons appearing on both lists) and 535 (the number of omissions from the list), and then dividing that number (4,477) by the 535 omissions. This is in keeping with Board precedent in such calculations. See *Texas Christian University*, 220 NLRB 396, 397 fn. 7 (1975).

Here, the Employer's omissions from the lists are not substantially justified. I have already discussed the Employer's failure to attempt to address retroactive appointments in its compilation of the lists. Additionally, while I have no reason to doubt Quinn's explanation that the omission of certain first-year and all second-year students from the Division of Medical Sciences stemmed from an internal miscommunication, such an error is similar to those in *Woodman's* which the Board did not excuse. Other omissions from the lists, such as the TAs at the GSD and the first-year students at the OEB Department, were based on the Employer's position that those individuals were not eligible to vote in this election. While the Employer can hold the position that these individuals were not eligible, this is not a justifiable explanation under *Woodman's*. In *Woodman's*, the Board mentioned "uncertainties" in eligibility. Here, the Employer purposefully chose not to include these individuals on the Voter List and is now reaping the consequence of that decision.[72] I find that the Employer has not offered substantial justification for its omissions.

Based on the above, and based particularly on the potentially determinative number of omitted voters comprising a significant percentage of the bargaining unit, I find that the Employer has not substantially complied with the Voter List requirement and recommend that the Petitioner's objection be sustained. As the count stands, the Petitioner trails by a 184-vote margin. In the event that the tally of ballots issued after opening and counting the challenged ballots found here to be cast by eligible voters[73] reveals that a majority of votes were cast for the Petitioner, a certification of representative should issue. However, if a revised tally of ballots reveals that the Petitioner has not received a majority of votes cast, I recommend that the results of this election be set aside and a re-run election be directed.

Conclusions and Recommendations:

For the foregoing reasons, I recommend that the challenges to the ballots of 195 individuals be overruled, and that the challenges to the ballots of 118 individuals be sustained. Additionally, I recommend sustaining the Employer's objection and including in a revised tally of ballots the previously voided ballot in question as a valid "No" vote. I also recommend that the Petitioner's objection be sustained, and that a new election be directed in the event that the

[72] Indeed, taking such an argument to its logical endpoint, an employer could omit a significant number of voters from a voter list under the guise that it believed those individuals to be ineligible and suffer no consequence. There is no evidence, nor do I intend to suggest, that the Employer in this case was attempting to take such action; I am merely pointing out the lack of tenability of such an argument.

[73] As well as including the previously voided ballot which I have found to be a valid "No" vote.

determinative challenges of the 195 eligible employees do not result in the Petitioner receiving a majority of the valid votes counted plus challenged ballots.

Appeal Procedure:

Pursuant to Section 102.69(c)(1)(iii) of the Board's Rules and Regulations, any party may file exceptions to this Report, with a supporting brief if desired, with the Regional Director of Region One by **Wednesday, May 3, 2017**. A copy of such exceptions, together with a copy of any brief filed, shall immediately be served on the other parties and a statement of service filed with the Regional Director.

Exceptions may be E-Filed through the Agency's website but may not be filed by facsimile. To E-File the request for review, go to www.nlrb.gov, select E-File Documents, enter the NLRB Case Number, and follow the detailed instructions. If not E-Filed, the exceptions should be addressed to the Regional Director, National Labor Relations Board, Region One, Thomas P. O'Neill Jr. Federal Building, 10 Causeway St., Fl. 6, Boston, MA 02222-1001.

Pursuant to Sections 102.111 – 102.114 of the Board's Rules, exceptions and any supporting brief must be received by the Regional Director by close of business (5:00 PM) on the due date. If e-Filed, it will be considered timely if the transmission of the entire document through the Agency's website is accomplished by no later than 11:59 p.m. Eastern Time on the due date.

Within 7 days from the last date on which exceptions and any supporting brief may be filed, or such further time as the Regional Director may allow, a party opposing the exceptions may file an answering brief with the Regional Director. An original and one copy shall be submitted. A copy of such answering brief shall immediately be served on the other parties and a statement of service filed with the Regional Director.

Dated at Buffalo, NY, this 19th day of April, 2017.

/s/ Thomas A. Miller
Thomas A. Miller, Hearing Officer
National Labor Relations Board
Region Three
Buffalo, NY 14202-2465