

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION 01**

**PRESIDENT AND FELLOWS OF  
HARVARD COLLEGE,**

**EMPLOYER**

**and**

**Case 01-RC-186442**

**HARVARD GRADUATE STUDENTS  
UNION – UAW (HGSU-UAW),**

**PETITIONER**

**DECISION AND DIRECTION OF SECOND ELECTION**

Pursuant to a Stipulated Election Agreement between President and Fellows of Harvard College (Harvard or Employer), and Harvard Graduate Students Union – UAW (Union or Petitioner), an election was conducted on November 16 and 17, 2016<sup>1</sup> among a unit of Harvard student employees. The tally of ballots showed that of the approximately 3,556 eligible voters, 1272 cast ballots for the Petitioner, 1456 cast ballots against representation, and there were 314 challenged ballots, a determinative number.

The Petitioner and the Employer each timely filed an objection. Following a hearing on the challenged ballots and the objections, the hearing officer issued a report in which he recommended that certain challenges be sustained and others overruled, that both objections be sustained and that, if a revised tally of ballots does not result in the Petitioner receiving a majority of valid votes case, the result of the election be set aside and a new election directed. The hearing officer additionally explained his rationale for granting at hearing Petitioner's Petition to Revoke Subpoena and denying Employer's Offer of Proof. The Employer filed exceptions and a brief regarding some of the challenges, the Petitioner's objection,<sup>2</sup> and the denial of its Subpoena and Offer of Proof; the Petitioner filed a brief in answer to the Employer's exceptions.

I have carefully reviewed the hearing officer's rulings made at the hearing and find that they are free from prejudicial error. Accordingly, they are hereby affirmed, as discussed below. I have considered the Employer's exceptions to the hearing officer's rulings on Petitioner's objection and challenged ballots, the Employer's supporting brief

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<sup>1</sup> All dates hereinafter are in 2016 unless otherwise indicated.

<sup>2</sup> Neither party filed an exception to the hearing officer's ruling regarding the Employer's objection. Accordingly, the hearing officer's findings and conclusions thereto are hereby affirmed.

and the Petitioner's answering brief, and I affirm the hearing officer's findings, conclusions and recommendations only to the extent consistent with this decision.

### Background

The Employer operates a large university with many schools, departments and programs. About 7,000 students are enrolled in undergraduate degree programs and 15,000 in graduate degree programs.

On October 21, 2016, the parties entered into a Stipulated Election Agreement (Election Agreement) which includes in part 5, titled "UNIT AND ELIGIBLE VOTERS," the following unit description:

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.

Part 5 includes the following payroll cutoff date:

Those eligible to vote in the election are employees in the above unit who were employed during the **payroll period ending Saturday, October 15, 2016**, including employees who did not work during that period because they were ill, on vacation, or were temporarily laid off.

Part 5 also includes the following provision, referred to herein as the "look back formula":

The parties have agreed that doctoral students who have been been [repetition in original] 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.

## I. THE CHALLENGES

The 314 challenged ballots fall into several categories: 64 challenged ballots that the parties resolved during the hearing;<sup>3</sup> 125 ballots cast by individuals whose names appeared on a challenge list and regarding which the parties stipulated satisfied the Election Agreement's look back formula criteria;<sup>4</sup> thirteen ballots cast by individuals whose names appeared on the challenge list and who were first year graduate students during the Fall 2016 semester, which the parties reduced to nine;<sup>5</sup> four individuals whose names did not appear on the voter list or challenge list and who the Petitioner contends should be included in the look back voters;<sup>6</sup> 22 Teaching Assistants<sup>7</sup> and nine Technical Assistants<sup>8</sup> in the Graduate School of Design (GSD); six first year graduate

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<sup>3</sup> The parties resolved 28 challenges for inclusion (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 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). The parties resolved 36 challenges for exclusion (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 Genukten, Tatiana Webb, Georgia Whitaker, Yau Yam, and William Yuan); rulings to overrule the challenges of ballots cast by Amy Chandran, Dalia Deak, Barbara Dickerman, Danube Johnson, Anna Stansbury, Benjamin Green, Renugan Raidoo, Andreja Siliunas and Yevgeniy Zhuravel; rulings to sustain the challenges of ballots cast by Ryan Gelly, Jonathan Haefner and Hans Pech).

<sup>4</sup> Megan Bailey, Jonathan Baker, Eli Schachar Banks, Seth Berliner, Jean Biniak, 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 Kiviati, Samuel Klug, Dominika Kruszezwska, 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, Camran Mani, 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, Whitney Robles, 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.

<sup>5</sup> The parties resolved for exclusion four challenges in this group, leaving the following nine unresolved: Amy Chandran, Dalia Deak, Barbara Dickerman, Danube Johnson, Anna Stansbury, Ryan Gelly, Jonathan Haefner, Hans Pech and Lisa Simon.

<sup>6</sup> Benjamin Green, Renugan Raidoo, Andreja Siliunas and Yevgeniy Zhuravel.

<sup>7</sup> 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.

<sup>8</sup> Georgios Avramides, Benjamin Bromberg Gaber, Shani Cho, Diana Jih, Young Eun Ju, Milos Mladenovic, Cara Roberts, Scott Smith, and Humbi Song.

students in the Department of Organismic and Evolutionary biology (OEB);<sup>9</sup> seventy-five other graduate students,<sup>10</sup> including two employed by Harvard Art Museums,<sup>11</sup> whose names did not appear on the voter list or the challenge list. Each group is discussed below.<sup>12</sup>

In this decision, I will address the disposition of ballot challenges first, then discuss the hearing officer's ruling on the Petition to Revoke Subpoena and Offer of Proof, and will finally treat Petitioner's objection.

A. Resolved Challenges

The hearing officer recommended overruling the 28 challenges the parties agreed to include in the ballot count and sustaining the 36 challenges the parties agreed to exclude. I affirm the hearing officer's recommended rulings.

B. Look Back Challenges

1. Look Back Formula Background

An overview of Harvard's academic structure is important to understand the characteristics of the disputed "look back" group of voters. The Graduate School of Arts & Sciences (GSAS) is the only school at Harvard that awards Doctor of Philosophy (Ph.D.) degrees. GSAS partners with 16 other programs outside GSAS to confer doctoral degrees. The disputed look back classification largely consists of students pursuing Ph.D. programs offered either solely by or in partnership with GSAS.

Doctoral students finance their studies through financial aid and stipends from various sources. 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 GSAS Division of Humanities and the Division of Social Sciences teach courses. Harvard guarantees four semesters of teaching to most doctoral students studying in the Arts & Humanities and Social Sciences Divisions of

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<sup>9</sup> Jennifer Austiff, Isabel Baker, Abigail Burrus, Anju Manandhar, Rebecca Wolf, and Tianzhu Xiong.

<sup>10</sup> Hena Ahmed, Adriana Altamirano, Sara Arfaian, Eun Se Baik, Pooja Bakhai, Adria Boynton, Jeremy Burke, Nicholas Campos, Gabriella Chavez, Aubrey Clark, Lars Clark, Hannah Cohen, Hannah Cory, Byron Davies, Christina Desert, Ruodi Duan, Maria Duarte, Alexander Duffy, Aileen Fitzke, Jeremy Fix, Emma Foley, Emma Goldhammer, Matthew Griffith, Sinn Won Han, John Harpham, Ernest Hartwell, Ghazal Jafari, Jessica Jean-Francois, Rutdow Jirapapasuke, Kutay Karatepe, Smriti Khanal, Yusung Kim, Dustin Klinger, Yurina Kodama, Amy Koenig, Caroline Laurent, Soo Mi Lee, Yijing Lu, Marek Majer, Marisa Mandabach, Camran Mani, 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, Whitney Robles, 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.

<sup>11</sup> Camran Mani and Whitney Robles.

<sup>12</sup> The hearing officer's enumeration of challenged voters actually tallies 318, which differs from the tally of 314. I do not find this variance to be of consequence.

GSAS. All doctoral students may apply for Dissertation Completion Fellowships for their final year. Harvard does not permit students who receive these fellowships to hold employment, including instructional positions, during the term of their fellowship. These students are expressly excluded under the Election Agreement's look back formula.

As anticipated pursuant to the Election Agreement, the Employer challenged all the ballots cast by students who met the criteria of the look back formula. The Employer argued that there was no pattern or cycle that would predict whether students who were not serving in a bargaining unit position as of the fall of 2016 but had done so during the prior academic year were likely to return to a bargaining unit position at a later point during their enrollment. The Employer alternatively challenged ballots cast by students who had completed their guaranteed teaching semesters, claiming that students who have completed the four semesters of teaching and did not work during the fall of 2016 have likely reached the end of their graduate student teaching, given the exclusion for students in their final year.

The hearing officer, however, found both that an eligibility formula was required for the proposed unit and that a modified version of the Election Agreement's look back formula should apply to the bargaining unit. The hearing officer's formula, referred to herein as the "modified look back formula," provides:

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).

The modified look back formula changed the look back length of service in paragraph (2) from "at least one semester" to "employed in the bargaining unit during the 2015-2016 academic year" and added paragraph (3). For the reasons discussed below, I affirm the hearing officer's finding that an eligibility formula that looks back to employment in the prior academic year is appropriate; however, I disagree with the hearing officer's substitution of the modified look back formula for the formulation articulated by the parties in their election agreement.

2. Applicability of a look back eligibility formula.

Based on his review of the record, the hearing officer found many situations in which a semester or academic year without employment in instruction or research is both preceded and followed by such employment. Examples include students who study abroad during their graduate studies and students who continue to teach after having exhausted their guaranteed teaching options. The hearing officer also found that not all students with teaching appointments have full-semester assignments. In particular Teaching Fellows occasionally work less than a full semester, and certain courses in the Graduate School of Design are split into two “modules” or sections, while other assignments end before the semester is over. The Employer does not except to these findings.

I agree with the hearing officer that *Columbia University*, 364 NLRB No. 90 (2016), provides the basis for a look back eligibility formula for Harvard. In *Columbia University*, which held that “student assistants who have a common-law employment relationship with their university are statutory employees under the Act,” *Id.*, slip op. at 2., the Board recognized the need for an eligibility formula because students with “intermittent semester appointments, may not be eligible to vote under the Board’s traditional eligibility date approach.” *Id.*, slip op. at 21. The Board remanded the case to the Regional Director to “establish an appropriate voting eligibility formula.” By Supplemental Decision and Direction of Election,<sup>13</sup> the Regional Director of Region 2 ordered an election according to the following eligibility formula:

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.

Eligibility formulas include employees who are not on the payroll at the election date but have a “past history of employment that would tend to signify a reasonable prospect of future employment.” *Id.*, slip op. 22 (2016) (footnote omitted). The Board has a long-established practice of devising eligibility formulas in varying fields, including education, to account for the vagaries of unique employment situations<sup>14</sup> so as to

<sup>13</sup> 02-RC-143012 (October 31, 2016).

<sup>14</sup> See *Daniel Construction Co.*, 133 NLRB 264 (1961), as modified in 167 NLRB 1078 (1967), and *Steiny & Co.*, 308 NLRB 1323 (1992) (together, the construction industry); *American Zoetrope Productions, Inc.*, 207 NLRB 621, 623 (1973) (entertainment productions); *DIC Entertainment, L.P.*, 328 NLRB 660 (1999), *enfd.* 238 F.3d 434 (D.C. Cir. 2001) (entertainment productions); *The Julliard School*, 208 NLRB 153, 155 (1974) (musical engagements); *Avis Rent-A-Car System, Inc., Rent-A-Car Division*, 173 NLRB 1368, 1369 (1968) (auto shuttlers); *Saltwater, Inc.*, 324 NLRB 343 (1997) (groundfish and shellfish observers); *C. W. Post Center*, 198 NLRB 453, 454-455 (1972) (adjunct professors); *Berlitz School of Languages of America*, 231 NLRB 766, 767 (1977) (on-call teachers); *University of San Francisco*, 265 NLRB 1221, 1224 (1982) (clinical teaching assistants).

“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), enf. 2 F.3d 36 (3d. Cir. 1993).

The hearing officer cited the uncontroverted evidence of students who exercise Harvard’s offer of four semesters of teaching in a pattern other than the preferred third and fourth year sequence, students who return to teaching after completing their four teaching semesters to support his conclusion that an eligibility formula is appropriate for Harvard. He rejected the Employer’s argument that students who have completed their four semesters of teaching should be carved out, citing further evidence of Harvard’s demand for doctoral students to fill teaching positions. The hearing officer assented to the look back formula’s exclusion of students in their final or Dissertation Completion year, observing that such students are in their last year and therefore unlikely to have a reasonable likelihood of future employment in the bargaining unit.

The Employer excepts to the hearing officer’s finding that any type of look back eligibility formula is appropriate for Harvard graduate students. The Employer argues that graduate student employment is unlike that of construction workers or adjunct faculty in that it “is not recurrent, cyclical, or periodic” and the likelihood of future employment steadily decreases with each semester.

The Employer’s argument does not take into account the record evidence that students leave bargaining unit work and then return during later semesters, thereby creating a continuing interest in the bargaining unit work. Accordingly, I affirm the hearing officer’s finding that an eligibility formula that looks back to prior employment is appropriate.

### 3. The Modified Look Back Formula.

The hearing officer’s report states that the parties disagreed as to the meaning of “at least one semester” in the Election Agreement’s look back formula, with the Employer contending it means a full semester and the Petitioner’s assertion that it requires only that some work be performed during a semester. Based on this disagreement and record evidence that bargaining unit work includes appointments that last less than a full semester due to shorter course or module length, the hearing officer found that a formula allowing any length of employment in the prior academic year was the appropriate formula. Using the same reasoning, the hearing officer added paragraph 3, to include students who were employed for part of the Fall 2016 semester.

The Employer excepts to the hearing officer’s modified look back formula on the grounds that the parties agreed to the definition of potential look back voters who would be subject to challenge, and that agreed-upon definition must be enforced. I sustain the Employer’s exception.

No party points to any record evidence of a different interpretation of the phrase “at least one semester.” The Petitioner in its opening statement repeats the phrase without comment (Tr. 17), and later continues to state, “[s]o if someone has worked for a semester in the past year, then they should be counted as eligible.” (Tr. 20) Certainly on its face, in the context of an institution that operates largely on a semester basis, and lacking any clarifying words, the plain meaning of the phrase is that one semester means a complete semester. The only indication of a different interpretation appears in Petitioner’s post-hearing brief, where it argues that a challenged student who worked less than a full semester in the prior academic year should be eligible.

Well established Board principles call for enforcing stipulated election agreement provisions that are not inconsistent with any statutory provision or established Board policy and where the intent is unambiguous. *Caesar’s Tahoe*, 337 NLRB 1096, 1097 (2002). If the stipulation is ambiguous, the Board determines the parties’ intent through the application of normal contract interpretation methods, including examination of extrinsic evidence. *Id.* Here, the Employer’s intent is undisputed and the Petitioner’s intent is clarified in its opening statement noted above. The intent of both parties is that the look back formula requires employment for a full semester. The post-election realization that some students were disenfranchised by the formula does not constitute ambiguity. The parties could easily have articulated eligibility for any student who had worked any portion of a semester in the previous year, but they agreed to “at least one semester.” Accordingly, I find the look back formula requires a full semester of employment to establish eligibility.

#### 4. Challenged Ballots Cast Pursuant to Look Back Formula

The Employer challenged 125 individuals<sup>15</sup> pursuant to the look back formula. During the hearing, the parties stipulated that these individuals met the election agreement’s look back formula criteria. Having ruled that the modified look back eligibility formula applies to the unit, and given that the modified formula is broader than the agreement’s formula, the hearing officer overruled the 125 challenges. The Employer excepted to the hearing officer’s modified look back formula and in doing so, excepted to the overruled 125 challenges. For the reasons discussed above, affirming the applicability of the Election Agreement’s look back formula, I now affirm the hearing officer’s ruling to count the 125 look back challenged ballots based on the formula adopted by the parties in the Stipulated Election Agreement.

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<sup>15</sup> The individuals are named in footnote 4.



5. Nine individuals whose names appeared on the challenge list and who were first year doctoral program students during the Fall 2016 semester

a. At the election, nine first year doctoral program students, whose names appeared on the challenge list as look back voters, voted under challenge. During the 2015-2016 academic year, five of the individuals had been students in master's degree programs and also employed as Research Assistants, Teaching Fellows or Teaching Assistants.<sup>16</sup> The Employer claimed that only students enrolled in doctoral programs during the previous academic year should be included in the look back group, while the Petitioner claimed that the look back group includes students who were doctoral students at the time of the election and performed bargaining unit work during the previous academic year. The hearing officer adopted the Petitioner's reasoning, found that the formula did not require the exclusion of these voters and recommended that the challenges be overruled. The Employer filed no exceptions. Although I have rejected the hearing officer's modified look back formula, the modifications have no bearing on the question presented by these challenges. Accordingly, I affirm the hearing officer's recommendation to overrule the challenges of the five students.

b. Three students<sup>17</sup> voted who were not enrolled in a degree program during the 2015-2016 academic year, became enrolled starting in Fall 2016, yet held teaching or research positions before they were enrolled. The parties disagreed over whether the students must have commenced their programs when they worked during the prior academic year to be eligible under the look back formula. The hearing officer ruled that the students were not eligible because they did not satisfy the unit description requirements that they be both enrolled and performing research or instructional work. Neither party filed exceptions. I note that this recommendation did not rely on the modified look back formula and I affirm the hearing officer's recommendation to overrule the challenges of these three students.

c. Another student<sup>18</sup> had been enrolled in a graduate program through the 2014-2015 academic year, was not enrolled, but was employed as an instructor during the 2015-2016 academic year. The parties agreed the student was not eligible. The hearing officer concluded that because the student was not enrolled in a degree program during the look back period, she did not meet the eligibility formula. I agree and sustain the challenge.

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<sup>16</sup> These five students are Amy Chandran, Dalia Deak, Barbara Dickerman, Danube Johnson and Anna Stansbury.

<sup>17</sup> Ryan Gelly, Jonathan Haefner, Hans Pech.

<sup>18</sup> Lisa Simon.

6. Four individuals who did not appear on either list, disputed as look back eligible.

a. Another student<sup>19</sup> who voted under challenge had performed bargaining work during the prior academic year and was on a leave of absence for the 2016-2017 academic year. The parties disagreed over whether the leave of absence rendered the student unenrolled and ineligible. Relying on Board law that employees on leaves of absence are permitted to vote in Board elections absent evidence they do not intend to return,<sup>20</sup> the hearing officer recommended overruling this challenge. Neither party filed exceptions. Again, here the hearing officer did not rely on the modified look back formula. Accordingly, I affirm the hearing officer's recommendation to overrule this challenge.

b. One student<sup>21</sup> who voted under challenge performed research during the spring 2016 semester but was not listed on Harvard's payroll until April 2016. The hearing officer concluded that the evidence showed the student had performed work during the entire semester, and based on Board law that lack of proper paperwork does not exclude voters who work during the requisite timeframe,<sup>22</sup> recommended overruling the challenge. Neither party filed exceptions. Again, here the hearing officer did not rely on the modified look back formula. Accordingly, I affirm the hearing officer's recommendation to overrule this challenge.

c. Two students<sup>23</sup> who voted under challenge were employed during the spring 2016 semester but did not work the complete semester. The hearing officer recommended overruling these challenges based on the modified look back formula. Because I have determined that the modified look back formula is not applicable, I do not accept the recommendation to overrule the challenges on this basis. However, the hearing officer found independent grounds for counting Siliunas's ballot. Record evidence showed Siliunas worked a total of 61 hours during the semester, compared with 75 hours worked by Renugan Raidoo, deemed eligible above, who had worked a complete semester. Neither party filed exceptions. I affirm the recommendation to overrule the Siliunas ballot challenge.

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<sup>19</sup> Benjamin Green.

<sup>20</sup> *Air Liquide America Corp.*, 324 NLRB 661, 663 (1997).

<sup>21</sup> Renugan Raidoo.

<sup>22</sup> *Concrete Form Walls, Inc.*, 346 NLRB 831, 833-834 (2006); *Dyncorp/Dynair Services, Inc.*, 320 NLRB 120 (1995) ("working" is "the actual performance of bargaining unit work.").

<sup>23</sup> Andreja Siliunas and Yevgeniy Zhuravel.

7. Graduate School of Design (GSD)

The Employer challenged ballots cast by twenty-two GSD students holding the position title Teaching Assistant (TA)<sup>24</sup> and nine holding the position title Technical Assistant.<sup>25</sup> The hearing officer recommended overruling the TA challenges and sustaining the Technical Assistant challenges. The Employer excepted to the TA recommendation only. I affirm the hearing officer on both counts. Below I review only the contested recommendation, concerning the TAs.

The hearing officer report reviews testimony from GSD's Administrative Dean for Academic Services Jacqueline Piracini that the TAs provide logistical support for faculty with these duties: 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. GSD on-line and print TA guides state TAs "may not assign grades or serve as substitute instructors." Piracini testified that faculty provide day-to-day supervision of TAs, she does not observe TAs and that her awareness of TA activities is limited to complaints from students that TAs were attempting to teach them. GSD Executive Director Patricia Roberts testified that 29 of the 116 TAs were enrolled in the classes in which they served as TAs and that she believed TAs provided technical instruction and not "pedagogical" instruction. In an e-mail that Roberts sent to GSD students shortly before the election, she stated that at GSD TAs do not provide instructional services, they provide administrative services.

The hearing officer report reviews testimony from three GSD TAs, Jonah Susskind, Christopher Reznich, and Stuart Gavin Ruedisueli. Susskind testified that he served as the sole TA for a professor in a course titled, "Ecologies, Techniques, and Technologies." He helped develop the curriculum and added workshops to the course; during one of the course's first sessions, the professor introduced Susskind as being available to answer questions throughout the course, Susskind held regular weekly office hours and he assisted students individually during the course workshops. Susskind was also a TA, along with lead TA Reznich, who were among five TAs for a studio course taught by multiple professors. The studio course met for five and one-half hours twice a week. Lead TA Reznich attended pre-term workshops held by a professor in which he remained during the afternoons to answer student questions. Susskind and Reznich both taught tutorials during the semester in which they taught software applications needed for the studio courses. Ruedisueli served as a TA for two courses. In one, the professor wanted at least one TA to attend each lecture and identified the TAs as resources for students with questions. Ruedisueli testified that

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<sup>24</sup> 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.

<sup>25</sup> Georgios Avramides, Benjamin Bromberg Gaber, Shani Cho, Diana Jih, Young Eun Ju, Milos Mladenovic, Cara Roberts, Scott Smith, and Humbi Song.

TAs were responsible for grading assignments and quizzes and for assisting the professor in grading exams.

The hearing officer also relied on testimony from two other students from other schools, whom the parties stipulated were eligible voters. Susanne Schlossberg, a second-year student at the law school, served as a “Teaching Assistant” for one course. She did not attend the classes or assign grades. She completed draft assignments and gave the professor feedback on their suitability, drafted model answers, commented on student assignments, held office hours and held one-on-one sessions with students. Thomas Trail, a second-year student in the Kennedy School of Government, served as a “Course Assistant” for two courses. He handled course logistics, including organizing a field trip and assisting students with presentation set-up, led review sessions with the professor, held office hours to answer questions and uploaded material onto the course’s website. He did not present material to the class, grade submissions or comment on papers.

The parties disagreed that the TAs provided instructional services.

The hearing officer applied the Board’s disputed classification test,<sup>26</sup> and found that the Election Agreement was ambiguous regarding the requirement that a teaching assistant provide “instructional services.” To determine the parties’ intent as to “instructional services,” the hearing officer referenced the *Columbia University* unit description, noting it was undisputed that the parties sought to create a similar unit. The hearing officer found the description of “course assistants” in the *Columbia University* unit to be similar to the duties the student TA witnesses described, and on that basis recommended their inclusion in the count.

The hearing officer also cited testimony of specific instructional services the TAs provide. He rejected the Employer’s distinction between “technical” and “pedagogical” as lacking an evidentiary basis. He noted the conflict between TA testimony that they assisted with grading and the GSD publications stating TA do not grade, crediting the TA testimony as to practice over the evidence as to policy.<sup>27</sup> Finally, the hearing officer found that the TA tasks were at least equivalent to those of the law school and government school assistants, whom the parties had previously stipulated for inclusion in the unit, and who testified at the hearing.

The Employer excepts to the hearing officer’s conclusion that TAs provide instructional services and are therefore eligible voters. The Employer does not except to the hearing officer’s findings of fact regarding TA duties; rather, it claims that the hearing officer erred by crediting “anecdotal testimony” from TAs over un rebutted documentary evidence and senior administrative witnesses. The Employer faults the

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<sup>26</sup> See *Bell Convalescent Hospital*, 337 NLRB 191 (2001); *Caesar’s Tahoe*, 337 NLRB 1096, 1097 (2002).

<sup>27</sup> See *Luck Cab Company*, 360 NLRB 271, 272 (2014) (rejecting evidence of handbook provisions in light of contrary evidence of actual practice); *Avante at Wilson, Inc.*, 348 NLRB 1056, 1057-1058.

hearing officer's report for not considering the un rebutted evidence that about 25% of the TAs were enrolled in the very courses in which they served as TAs. The Employer further claims that TAs are not analogous to *Columbia University* course assistants who have some grading responsibilities and because on remand, the Regional Director limited course assistants to those who worked at least 15 hours per week. Finally, the Employer rejects the finding that TAs are equivalent to the law school and government school assistants.

The Employer's exceptions do not support rejection of the hearing officer's recommendation. The hearing officer correctly placed more weight on the first-hand experiences of actual TAs than on documents describing policy and witnesses lacking direct knowledge of the TAs actual duties. I note that the Employer did not call any witnesses who were the TAs' direct supervisors or any GSD course students. As to the *Columbia University* course assistants' minimum hour requirement, while that may be a *Columbia University* eligibility requirement,<sup>28</sup> there is no such hours requirement anywhere in the parties' Election Agreement. Similarly, there is no disqualification in the Election Agreement of teaching assistants who simultaneously are enrolled in the course. Finally, comparison to the duties of other eligible voters is a legitimate method for determining the eligibility of disputed voters. For these reasons, I affirm the hearing officer's findings regarding GSD TAs and overrule these challenges.

8. Department of Organismic and Evolutionary Biology (OEB)

The Employer challenged ballots cast by six first-year OEB graduate students who voted but were not on the eligible voter or challenged voter list. The hearing officer recommended overruling the challenges and the Employer filed exceptions. I affirm the hearing officer's reasoning and adopt his findings and recommendation.

The hearing officer reviewed undisputed evidence of the unique nature of OEB. It is an interdisciplinary Department that conducts project-based research. Unlike other science departments at Harvard, OEB has no laboratory rotation.<sup>29</sup> Instead, students are matched with a professor or laboratory when admitted rather than later in their studies. OEB funds students for their first six years and does not permit first-year students to teach.

The hearing officer's report reviewed testimony regarding OEB first-year students' activities. OEB Executive Director Rebecca Chetham testified that first-year OEB students take varying number of prescribed courses, most between three and five courses, depending on the student's academic background, attend social functions and

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<sup>28</sup> The hours requirement appears in the Regional Director's eligibility formula, presented in the Supplemental Decision and Direction of Election, dated October 31, 2016. The parties' Election Agreement, dated October 21, 2016, clearly predates this eligibility requirement.

<sup>29</sup> In other departments, students begin with laboratory rotations and are later assigned to a particular laboratory. It is undisputed that while a student is in laboratory rotations, the student is not eligible for the bargaining unit.

generally get to know the department. She testified to limited direct knowledge of first year student activities, describing her knowledge of the particular work they perform as “informal” and that her knowledge was limited generally to departmental compliance and travel issues.

Two OEB students, Jennifer Austiff and Zachary Morris, described their own first-year experiences and those of classmates. Austiff is a first year student who came to the program to work with a particular advisor. In Fall 2016, she was one of three students in that advisor’s lab. During her first semester, in addition to taking four courses, she assisted a fourth-year graduate student with an experiment and she expected to continue to assist that graduate student. All 12 students in her first-year cohort were working in advisor’s labs in collaboration with other laboratory members. Morris was a fourth year student who started in the spring semester, having already completed a master’s degree. He took only two prescribed courses his first semester. He began working another graduate student’s project in his advisor’s lab toward the end of his first semester and that project was ultimately published with Morris listed as a co-author. It was common for first-year students to assist in current projects while developing their own dissertation topic and some faculty had first-year students perform short-term projects to familiarize the students with the particular laboratory.

The Employer challenged these first-year voters on the grounds that they were generally not performing laboratory work; rather, they focused on coursework and social acclimatization. The Petitioner contended that these students perform research work in the dissertation advisor’s laboratory and should be included in the bargaining unit.

The hearing officer determined that the Election Agreement was ambiguous as to whether to include first-year OEB students, noting the absence of language regarding first-year graduate students. Therefore, he concluded the issue was whether these OEB students worked as research assistants in accordance with the parties’ intent. The extrinsic evidence included evidence that upper-class OEB students whose titles were listed as having “no formal business title; performing research”<sup>30</sup> were included in the eligible voter list. The hearing officer concluded that holding the title of “Research Assistant” per se was not a requirement of the Election Agreement.

The hearing officer did not question the credibility of Executive Director Chetham’s testimony; however, he gave it little weight due to her admitted lack of direct knowledge of individual first-year student activities. Instead, he gave more weight to the OEB students’ testimony, noting that they testified with particularity, in contrast to Chetham’s more generalized testimony, and that the Employer offered no rebuttal testimony to the student testimony. He found that the student testimony established that first-year students are commonly engaged in research work that would otherwise qualify them for inclusion in the bargaining unit, noting there was insufficient

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<sup>30</sup> 46 OEB students listed as “no formal business title; performing research” are included in the eligible voter list.

particularized evidence that any of the six first-year students were not engaged in research work during the Fall 2016 semester.

The Employer excepts to the hearing officer's reliance on student testimony, which it faults as "anecdotal" and unrepresentative of first-year students overall, at the expense of the executive director's testimony. The Employer points to the lack of any departmental requirement that research be performed in exchange for the stipend, the testimony of the number of prescriptive courses most first-year students take and that students were merely familiarizing themselves with laboratories in their first year. The Petitioner answers that the Employer sets a higher standard for OEB first-year students than other graduate students engaged in research, noting that both parties had testified that the test for unit inclusion as a science research assistant was that the graduate student had been assigned to and was conducting research in the advisor's lab. Moreover, more senior OEB students were included regardless of their funding source.

The Employer carries the burden of proof to establish that these students are not eligible. *Golden Fan Inn*, 281 NRLB 226, 230 fn. 24 (1986) ("A party seeking to exclude an individual from voting has the burden of establishing that the individual is, in fact, ineligible to vote."). As the hearing officer correctly concluded, the Employer's reliance on general testimony from a witness who admittedly lacked first-hand knowledge of individual first-year student activities is accorded less weight in the face of specific testimony from actual students, including a current first-year student.<sup>31</sup> None of the student testimony was rebutted. I find that the Employer failed to meet its burden and adopt the hearing officer's recommendation to overrule the challenges to the first-year OEB students.

#### 9. Harvard Art Museum Interns

Of the remaining 75 challenges, according to the hearing officer's report, the Petitioner did not dispute the Employer's position that 73 voters were not eligible, and the Petitioner contended that two voters, Whitney Robles and Camran Mani (referred to herein as the Museum Interns), were eligible. The hearing officer recommended overruling the challenges to the Museum Interns. In addition, the hearing officer found that the evidence supported his conclusion that three others of the 73 voters, Hannah Cohen, Maria Duarte and Emma Goldhammer were eligible, notwithstanding that neither party advocated for their inclusion. Of these three voters, the hearing officer found one, Cohen, to be eligible based on paragraph 3 of the modified eligibility formula.<sup>32</sup> Having determined not to accept the modified look back formula, I sustain the challenge to Cohen. I now turn to the Museum Interns.

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<sup>31</sup> I note that the executive director's testimony that the first-year students focus on course work, taking three to five courses is undercut by Austiff's testimony that she took four courses her first semester and worked in her advisor's lab. There was no evidence that course work prevented students from engaging in laboratory research.

<sup>32</sup> Paragraph 3 makes eligible Teaching Fellows whose Fall, 2016 employment ended earlier in the semester, before the election date.

a. Graduate Student Intern

Camran Mani is a fifth-year graduate student in the History of Art and Architecture program who was employed as a graduate student intern at the Harvard Art Museums Materials Lab. The hearing officer found that the Election Agreement was ambiguous in that it does not include “graduate student intern” as included in or excluded from the bargaining unit. The hearing officer found that the extrinsic evidence establishes that the parties intended to include all enrolled graduate students receiving compensation for instructional or research work at Harvard, thereby presenting the issue of whether Mani was engaged in instructional work.

The hearing officer relied on the following evidence to find that Mani’s activities constituted instructional work as intended by the parties. Mani worked 2/5 time, equivalent to a Teaching Fellow,<sup>33</sup> his pay stub listed him as a “Teaching Fellow,” he was supervised by Professor Brewer and assisted Brewer in an undergraduate course Brewer taught in the Materials Lab, an educational arm of the Harvard Arts Museum. Mani attended all class sessions, set up materials for the class, went through exercises with students, answered student questions, helped develop the syllabus, revised homework assignments, uploaded course documents. He did not grade student work. Aside from Brewer’s course, he set up tools for a class open to the public that met about seven times and researched the history of techniques being taught in that class.

The Employer excepts to the hearing officer’s finding, arguing that Mani’s instructional duties were “incidental,” unlike those of Teaching Fellows and other positions in the bargaining unit, and did not qualify as “instructional services” as intended by the parties. The Employer further notes the lack of evidence that any Teaching Fellows assisted with classes open to the public and that Mani acknowledged he was an intern, not a Teaching Fellow. The Petitioner answers that the Employer does not dispute the factual findings and points to no evidence of any hourly or percentage threshold for instructional services.

I affirm the hearing officer’s findings and conclusions. Mani’s duties related to Brewer’s course are clearly instructional, particularly when compared to others stipulated or ruled to be eligible. That Mani’s duties as intern also concerned a course open to the public is immaterial, given the Election Agreement’s requirement, “instructional services at Harvard University,” without distinction between courses open to the public or to Harvard students.<sup>34</sup> Accordingly, the challenge to Mani is overruled.

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<sup>33</sup> Teaching Fellow is one of the titles expressly named in the Election Agreement as included in the bargaining unit.

<sup>34</sup> I also note that the evidence suggests the bulk of Mani’s time was devoted to Professor Brewer’s course. Nevertheless, as the Petitioner points out, the Election Agreement does not establish a minimum hours requirement for instructional services, even assuming only those services provided to Harvard students qualify.



b. Curatorial Intern

The Employer challenged the ballot cast by Whitney Robles, a third-year student in American Studies who worked at the Harvard Art Museum as a “curatorial intern.” As with Mani, the hearing officer found the Election Agreement to be ambiguous, having no reference to “curatorial intern.” In the Robles case, however, the question was whether Robles was engaged in research work within the meaning of the Election Agreement. Based on the evidence of Robles’ duties, the hearing officer concluded she was eligible. The Employer excepted. I affirm the hearing officer’s conclusion.

Robles testified that her position was for a 2/5 time commitment and she was supervised by the Museum curator. She spent the bulk of her time as curatorial intern researching and drafting research memos on the histories of objects to be displayed in a certain forthcoming exhibition. Harvard retains such research memos on file for use by future researchers.

The hearing officer noted that the term “research assistant” had been used “generously” by the parties throughout the election process and the only limitation in the Election Agreement to researchers is that they may not be undergraduate students. Moreover, Robles’ research, retained by Harvard and available for future research, contributed to the “institutional knowledge of the Employer.” Based on these considerations, the hearing officer found that Robles’ position as curatorial intern qualified her to vote in the election.

The Employer excepts, arguing that the hearing officer created an overly broad standard for Research Assistant that would encompass all graduate students and noting that Robles’ research memos were unpublished. The Petitioner observes that the Employer does not except to the finding that Robles performed research work, just that the research did not qualify because it was not published. In addition, fears of an all-encompassing standard are addressed by the Election Agreement’s compensation requirement.

I find that the hearing officer’s conclusion is based on the evidence and that Robles meets the elements of unit eligibility: a graduate student conducting research for compensation. The Employer’s proposed publication requirement appears nowhere in the Election Agreement and is cited during the hearing as evidence of research, not a required element of qualifying research. I overrule the challenge and include Robles’ ballot in the count.

**II. RULINGS AT HEARING: PETITION TO REVOKE SUBPOENA, OFFER OF PROOF**

The Petitioner’s Objections alleged that the Employer failed to substantially comply with the Board’s voter list requirements due to, in part, the omission of a potentially determinative number of individuals. In connection with the Petitioner’s

objection, the Employer served upon the Petitioner a subpoena seeking documents related to whether the Union was prejudiced by list deficiencies and to whether the Union raised concerns about the voter list before the election. Petitioner filed a petition to revoke the Employer's subpoena, alleging that prejudice to the Union was irrelevant. I referred the petition to revoke to the hearing officer for ruling. After receiving briefs from both parties, the hearing officer granted the petition to revoke subpoena during the hearing, stating his reasoning on the record and providing further analysis in his report. For the same reasons, the hearing officer rejected the Employer's offer of proof at the hearing. The Employer excepts to the grant of the petition to revoke subpoena and the denial of its offer of proof as unsupported by Board law. For the reasons set forth below, I affirm the hearing officer's rulings.

The hearing officer rejected the Employer's argument that prejudice was relevant to the Petitioner's objection. While prejudice to the union in *Excelsior*<sup>35</sup> cases is relevant to failings such as one-day delay in receipt of list,<sup>36</sup> four-day late submission,<sup>37</sup> and refusal to provide temporary physical addresses,<sup>38</sup> the "Board has consistently viewed the omission of names as more serious than inaccuracies in addresses" because "[t]he omission of names from an *Excelsior* list is far more likely to frustrate the Board's purposes...." *Women in Crisis Counseling*, 313 NLRB 589 (1993). As to the question of prejudice to the union where names are omitted from the eligibility list, the Board reaffirmed in *Thrifty Auto Parts*, 295 NLRB 1118, 1118 (1989), that "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." (emphasis added) With such a failure to supply a substantially complete eligibility list, the Board "**presumes that [the deficiency] has a prejudicial effect on the election, without inquiry** into the question of whether the union may have obtained ... addresses of eligible employees or whether omitted employees might have garnered sufficient information about the issues to make an intelligent choice." *Id.*, 295 NLRB at 1118 (1989) (emphasis added). This principle is reiterated in citations to *Thrifty Auto Parts* by Board decisions *Mod Interiors, Inc.*, 324 NLRB 164, 164 (1997) and *Automatic Fire Sys.*, 357 NLRB 2340 (2012).

The Employer excepts to the hearing officer's ruling to grant the petition to revoke subpoena on the grounds that the hearing officer incorrectly applied a standard of admissibility rather than relevance. The standard for revocation of a subpoena appears in 29 C.F.R. §102.66(f): a hearing officer "shall revoke [a] subpoena if, in his opinion, the evidence whose production is required does not relate to any matter under investigation or in question in the proceedings...." The Employer points to a portion of

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<sup>35</sup> *Excelsior Underwear Inc.*, 156 NLRB 1236 (1966).

<sup>36</sup> *Taylor Publishing Co.*, 167 NLRB 228, 228-229 (1967).

<sup>37</sup> *Program Aids Company, Inc.*, 163 NLRB 145, 146 (1967).

<sup>38</sup> *LeMaster Steel Erectors*, 271 NLRB 1391 (1984).

the hearing officer's statement at the hearing in which he explained his reason for revoking the subpoena with reference to admissibility. The hearing officer, earlier in his explanation, clearly stated his reliance on the relevance principle articulated in *Thrifty Auto Parts* to find that the subpoena seeks documents that go toward the non-relevant consideration of the Union's actual access to employees and the extent of employee awareness of issues and arguments (Tr. 787-788). In view of the Board's declaration that issues of actual employee knowledge or actual union access to employees are not litigable, the Employer's subpoena could not lead to relevant evidence.

The Employer excepts to the hearing officer's reliance on *Thrifty Auto Parts* as an error of law in rejecting its offer of proof.<sup>39</sup> The Employer argues that the hearing officer applied outdated law in a "mechanical" fashion. The Employer claims that *Thrifty Auto Parts* is no longer Board precedent in light of subsequent decisions in which the Board has held it will consider prejudice to a union in deciding whether to direct a new election, even where there are omissions from the *Excelsior* list. The cases the Employer cites do not, however, support its position. *Avon Products, Inc.*, 262 NLRB 46 (1982), cited by the Employer, not only pre-dates *Thrifty Auto Parts*, it concerns a highly unusual set of facts. In *Avon*, the Board ordered the election set aside because it found that omitted names were due to the Board's "own procedural oversight"<sup>40</sup> and not any error on the part of the employer and that the petitioner had suffered substantial prejudice. Further, based on the number of omissions (292) alone, the Board was compelled to "find that the Petitioner suffered substantial prejudice." *Id.* at 48. The Employer cites *Keeler Brass Automotive Group*, 301 NLRB 769 (1991), a post-*Thrifty Auto Parts* decision, as support for its claim that evidence of prejudice to the union is relevant. However, the Board in *Keeler Brass Automotive Group* granted the union's request to withdraw its election petition, rendering the underlying ALJ decision on the *Excelsior* list issue moot.<sup>41</sup>

The hearing officer correctly rejected the Employer's argument, raised post-hearing and again now in its exceptions, that *Woodman's Food Markets*, 332 NLRB 502 (2000), changed Board law on the question of relevance. The Employer contends that *Woodman's* established a broader analysis for voter list deficiency issues to include whether the other party was prejudiced, and in so doing overturned *Thrifty Auto Parts* with respect to the non-litigability of prejudice where names are omitted from the voter list. Until *Woodman's*, absent a showing of bad faith by the employer, the Board

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<sup>39</sup> Employer's offer of proof detailed anticipated testimony regarding, among other issues, the Union's electronic and physical access to students on campus, and the Union's activities on campus. The hearing officer stated that he applied the same reasoning to the offer of proof as to the subpoena, that, in short, the Board does not permit the hearing officer to look into whether or not actual prejudice occurred. See Tr. 1187.

<sup>40</sup> The Employer had fully complied with the *Excelsior* requirements before the election. One day before the election, the Board granted a request for review of a Decision and Direction of Election, and rather than stay the election, eight months after the election the Board found that some 292 employees had been erroneously excluded from the unit.

<sup>41</sup> The ALJ dismissed the union's *Excelsior* list omissions objection in part because the union had and used means of communication with employees other than mailings from the *Excelsior* list. Aside from being moot, this ALJ decision alone is of no precedential value.

measured substantial compliance with *Excelsior* requirements generally by considering the size of the percentage of names omitted from the total electorate, even if a small percentage of omitted names were determinative. *Id.*, 322 NLRB at 504. *Woodman's* broadened the analysis by adding the consideration of "other factors as well, including whether the number of omissions is determinative, ..., and the employer's explanation for the omissions." *Id.* The Employer, in my view, misreads *Woodman's*. The Board did not open the door to consideration of actual prejudice; instead, it increases the likelihood that prejudice will be presumed by expanding the situations in which the Board may find *Excelsior* lists to be deficient. "Obviously, the potentially prejudicial effect on the election is most clear where the number of omissions may have compromised the union's ability to communicate with a determinative number of voters." *Id.* at 504.

The Employer also cites *Tractor Co.*, 359 NLRB 603 (2013), a post-*Woodman's* decision, as support for its position that *Woodman's* now allows consideration of prejudice where voters are omitted. The Employer asserts that in *Tractor Co.*, the Board held that the union was not prejudiced by omissions, overturning the hearing officer's conclusion that "the omissions sufficiently prejudiced the election so that a second election was required." I do not agree with the Employer's view of the Board's holding. The Board overruled the hearing officer's conclusion cited above, then applied the three *Woodman's* factors, and relying "most importantly" on the fact that omissions were not determinative, found the employer had substantially complied with the *Excelsior* requirements. *Id.*

Not only does *Woodman's* not upset in any way *Thrifty Auto Parts*, its non-litigable rule is a logical outgrowth of prior decisions, beginning with *Excelsior* itself. The *Excelsior* rule, requiring employers to provide an eligible voter list, rests on a rejection of the argument that unions could reach prospective voters by means other than the employer's voter list. 156 NLRB at 1241. In *Murphy Bonded Warehouse*, the Board affirmed a hearing officer's ruling that the employer was not permitted to litigate the union's need for the *Excelsior* list by producing evidence of its ability to communicate with employees. 180 NLRB 463, 464 (1969). The Board decided *Sonfarrel, Inc.* in 1971, a case which *Thrifty Auto Parts* and later cases frequently cite. In *Sonfarrel, Inc.*, 188 NLRB 969, 970 (1971), the Board first articulated its non-litigation rule regarding prejudice:

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.

The Board further stated,

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.

Id.

The Employer finally argues there is no logical distinction between cases where the Board reviews prejudice resulting from incorrect names and addresses and cases dealing with omissions. In essence, the Employer seeks to change established Board law. As the hearing officer stated, I am obligated to follow Board law.

With respect to the Employer’s subpoena request no. 4, correspondence from the Union to Harvard in which the Union raised concerns or objections to the voter list prior to the election, I affirm the implied revocation of this element.<sup>42</sup> As discussed further below in connection with the omission of certain Harvard Medical School PhD students, the Employer relied on *Keller Brass Automotive* for the proposition that the union has an obligation to raise omission concerns pre-election. This issue was referenced by the ALJ decision, which, as discussed above, was rendered moot by the Board’s approval of withdrawal of the election petition, and has no precedential value. The Employer has cited no case law to support the relevance of its request no. 4. Therefore, the request is not relevant to the hearing and is properly revoked.

### III. OBJECTIONS

The Employer and the Petitioner each filed one election objection.

The Employer objected to a ballot which the Board agent ruled void. The hearing officer recommended the objection be sustained and the Petitioner filed no exception. I affirm the hearing officer’s recommendation for the reasons stated in his report.

The Petitioner objected on the grounds that the Employer “failed to substantially comply with the Board’s Excelsior rule, 29 C.F.R. § 102.62(d), by failing to provide an accurate list of all eligible voters.” The Employer excepted to the hearing officer’s recommendation to sustain the objection. To the extent described below, I agree with and affirm the hearing officer’s recommendation.

The Union’s campaign at Harvard began at least one and one-half years before the November 16 – 17 election. Just days after the Board, on August 23, issued *Columbia University*, Harvard contacted the Union and the two parties met on September 9. The Union expressed its desire to represent a unit similar to that reviewed in *Columbia University*. The Petitioner filed its petition on October 18, the

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<sup>42</sup> The hearing officer’s report does not expressly address this request.

parties signed a Stipulated Election Agreement, and I approved the Election Agreement on October 21.

Paragraph 6, "VOTER LIST," of the Election Agreement provided:

Within 2 business days after the Regional Director has determined that there is a sufficient showing of support for an election to proceed,<sup>43</sup> ... the Employer will provide to the Regional Director and the Petitioner a voter list with [required information] 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....

By mid-September, the Employer had begun to assemble its voter list. Meredith Quinn, Harvard's Chief of Staff in the Office of the Provost led a team of administrators to compile a list of eligible voters. To prepare the list, on September 12, she contacted "point people" from each of Harvard's schools and requested names of all students performing teaching and research work, how they were compensated, the duration of the assignment, the hours worked per week and the PeopleSoft code for each job title. Each school determines how to process its appointments and designate its student employees. The PeopleSoft system is a human resources system that reflects any payment from Harvard to any individual, including graduate student stipends and payments to faculty, staff and administrators. Because of its breadth, it could not be relied on alone to produce the voter list. The Employer's systems were not designed to distinguish between doctoral students in the sciences who were on a laboratory rotation versus assigned to a permanent laboratory, and so the Employer attempted to identify in the different schools when students moved into their fixed, assigned laboratory phase.

The Employer submitted a Voter List and Challenged Voter List on November 1, 2016, and on November 4, 2016, the Employer submitted a "supplemental" Voter List and Challenged Voter List. The November 4 list Voter List contains 3,556 names and the Challenged Voter List contains 386 names. The November 4 Challenged Voter List contains the names of students whom the Employer determined met the Election Agreement's look back formula, and whose ballots were automatically subject to challenge. It is the November 4 lists together (referred to hereinafter as the "Voter List") that are the subject of the Petitioner's objection. Between November 4 and the election, the parties corresponded about certain groups of graduate students who did not appear on the Voter List, but the Employer made no changes to the Voter List.

The hearing officer examined a number of categories of students whose names did not appear on the Voter List. By the hearing officer's analysis, a total of 535 names

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<sup>43</sup> The parties by agreement altered the voter list production requirement of Section 102.62 of the Board's Rules and Regulations, "within 2 business days after the approval of an election agreement...."

were improperly omitted from the Voter List. Those 535 individuals constituted 8.37% of the unit<sup>44</sup> and were far more than the election tally's 184-vote margin in favor of the Employer.

The hearing officer's report included the following table of eligible voters whom the Employer omitted from its Voter List:

Category	Voters	Non-Voters	Total
Individuals Meeting the Look Back Criteria	18	N/A	18
Teaching Assistants in the GSD	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	23	N/A	23
Individuals with Challenged Ballots Deemed Eligible	5	N/A	5
<b>Total</b>			<b>535</b>

The Employer argues that only the 120 first and second-year Division of Medication Science (DMS) students could be true omissions for the purposes of an *Excelsior* analysis and disputes the inclusion of the other categories on the grounds that the omissions should be excused. Below I review each category of omitted graduate students and determine whether they count as omissions for the purpose of determining substantial compliance with *Excelsior*.

#### Individuals Meeting the Look Back Criteria

This group consists of 14 individuals the parties stipulated were eligible to vote subject to challenge. The hearing officer included another four individuals whom he determined were eligible under the modified look back formula. I have already determined that the Election Agreement's look back formula applies to this election petition. Therefore, only the 14 stipulated individuals are properly included in the omissions count.

#### Teaching Assistants in the GSD

As discussed above, the hearing officer determined, and I have affirmed, that the GSD TAs are eligible voters. The hearing officer rejected the Employer's defense that it

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<sup>44</sup> The hearing officer misstates the formula used by the Board as the sum of the number of persons appearing on the combined voter lists and the omissions, divided by the omissions. The correct formula is number of omissions divided by the sum of the combined voter lists and the omissions. *Texas Christian University*, 220 NLRB 396, 397 fn.7 (1975). Using the hearing officer's numbers the percentage is 11.95% (535 omissions divided by sum of 3556 voting list, 386 challenged voter list and 535 omissions).

used good faith when it decided to exclude these students.<sup>45</sup> The hearing officer noted, and I agree, that the issue is not one of good or bad faith, but rather, that the Employer purposely chose to exclude these students. The Employer further argues that the hearing officer's "call" was close as to whether the students were engaged in instructional activities, and so the Employer should not be penalized for reaching a different conclusion. That argument overlooks that the Employer could have added to the challenged voter list all students whose eligibility it thought was a close call.

#### First and Second-Year Students Assigned to Fixed Labs in the Division of Medical Science (DMS)

Between the election and the hearing, the parties resolved for inclusion 96 first and second-year students from the DMS who voted under challenge. Another 24 first and second-year DMS students were not on the Voter List and did not vote. The Employer conceded that these DMS omissions were due to an internal "miscommunication" when it assembled the voter list, and argues that absence of bad faith should excuse the omission, again citing *West Coast Meat Packing*. In response, the Petitioner asserts that the error was not inadvertent. The hearing officer, relying on a similar type of error in *Woodman's*, found the error did not excuse the omission. In *Woodman's*, the employer incorrectly interpreted the payroll eligibility requirement and its payroll department may have committed errors. The Board held that although the conduct did not fall to the level of bad faith, it showed "a lack of diligence and due care" and therefore was an insufficient legal justification for the omissions. *Woodman's* at 505. The Employer also asserts that the hearing officer's improper evidentiary rulings prevented the Employer from presenting evidence that the DMS students were fully informed of the election issues. Having affirmed the hearing officer's rulings, I need not address this argument.<sup>46</sup> For the reasons stated in the hearing officer's report, I affirm the inclusion of these DMS students in the omissions count.

#### First-Year Students in the OEB Department

OEB first-year students are discussed above in the challenges, where I affirm the hearing officer's finding that they are eligible voters. Although the Employer took exception to the hearing officer's recommendation to overrule the OEB first-year challenges, the Employer did not except to their inclusion in the omissions count. I affirm the hearing officer's finding that they are improperly omitted voters for the same reasons as with the GSD and DSM students.

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<sup>45</sup> The Employer relies on *West Coast Meat Packing Co.*, 195 NLRB 37 (1972) for the proposition that where the employer omitted names in a good faith belief they were not eligible, with 4% omissions and 22% incorrect addresses, the employer substantially complied with *Excelsior* rule. However, *West Coast Meat Packing Co.* is one of many pre-*Woodman* decisions that, in the absence of employer bad faith, the Board's analysis focused on the number of errors, not the employer's good faith effort.

<sup>46</sup> The Employer also argues that, based on the record evidence, the Union was aware of this omission before the election and yet failed to raise it with the Employer's, citing *Keeler Brass Auto. Group*, 301 NLRB at 775 for the proposition that the Board's dismissal of an objection was due in part to the union failing to complain about omissions it knew of until after the election. As discussed above, the Board's action in *Keeler* mooted the underlying ALJ decision, on which the Employer relies.



### Retroactive Appointments

Of the 265 challenges that the parties resolved for inclusion before the hearing, 102 fell into the Retroactive Appointments category. Based on Chief of Staff Quinn's testimony, cited in the hearing officer's report, these students started work before the October 15 cut-off date but processing their paperwork was delayed.<sup>47</sup> Quinn also testified that there were another 73 similarly situated individuals who had not voted. The hearing officer noted evidence of the Employer's PeopleSoft website that contained a "how-to" guide with instructions for entering payments into PeopleSoft for individuals "whose retroactive pay relates solely to unpaid hours from prior periods." The hearing officer cited two examples of retroactive appointments<sup>48</sup> whose challenged ballots he found to be eligible. The hearing officer also cited testimony by Dean for Admissions and Financial Aid, Graduate School of Arts and Sciences, Mohan Boodram, that the Institute of Quantitative Social Science often kept students in open, multi-year employment appointments despite not actively having a paid work assignment, in order to avoid the delay in processing employment paperwork for student employees. From this evidence, the hearing officer concluded that the Employer had knowledge of the existence of retroactive appointments. He determined that failing to take steps to locate the retroactive appointments was comparable to the employer oversights that the *Woodman's* Board found did not excuse omissions.

In its exception, the Employer disputes the hearing officer's finding that Harvard did not exercise a "reasonable amount of diligence." The Employer contends that although Harvard was generally aware of processing delays, the hearing officer did not have grounds to find that Harvard should have been able to identify these students. The Employer highlights that it had only ten days to create the voting list and restates the administrative complexities associated with these students. Because the hearing officer relied on record evidence that the Employer knew of the existence of retroactive appointments, I affirm the finding that the omissions are not excusable.

The Employer also claims that the hearing officer relied on evidence that the Employer agreed to *count* these retroactive appointment ballots as evidence that the Employer agreed they were *eligible*, despite the absence of any evidence from the Petitioner regarding these individuals. The Employer notes testimony from Quinn that the Employer's agreement to resolve ballots for inclusion was not based on an investigation of each retroactive appointee who voted, but because "the right thing to do would be to allow their votes to count in a good faith effort to keep things moving along." (Tr. 1262-1263) The Employer asserts that it should not now be punished for agreements made to help streamline the election resolution process.

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<sup>47</sup> There is no evidence the delays were deliberate.

<sup>48</sup> Renugan Raidoo and Emma Goldhammer.

The record facts indicate the Employer did agree the voters were eligible. According to the Employer's Statement of Position Concerning Challenged Ballots (Jt. Ex. 2),

On December 22, 2016, after prolonged efforts ... to resolve the status of numerous voters who cast provisional challenged ballots because they did not appear on the voter list, the Region counted the votes that the parties **agreed were eligible**. (emphasis provided)

Moreover, the Employer offered no evidence that the Employer resolved challenges without prejudice or otherwise reserved any rights to later dispute eligibility. The Board includes voluntarily resolved challenges in its omissions count. See *Woodman's*, 332 NLRB 503, 503 (2000) (four resolved challenges included in the omissions); *EDM of Texas*, 245 NLRB 934, 940 (1979) (six resolved challenges included in the omissions count).

Accordingly, I concur with the hearing officer that the 102 retroactive appointments which the Employer voluntarily resolved for inclusion should be included in the omissions count.<sup>49</sup> Based on the admission that another 73 individuals were similarly situated, I affirm the hearing officer's finding regarding those individuals.

#### Post-Election, Pre-Hearing Resolved Challenged Ballots

Sixty-seven individuals whose names were not on the Voting List cast ballots under challenge that the parties later resolved for inclusion in the count, based on the individual circumstances of each individual. The Employer excepts to their inclusion in the omissions count on the grounds that the Petitioner presented no evidence regarding the circumstances of these individuals and the Employer, in resolving the challenges for inclusion, never agreed they were eligible. For the reasons noted above regarding the retroactive appointments, I affirm the inclusion of these 67 individuals.

#### Stipulated Eligible in this Proceeding

The parties stipulated during the hearing that 28 individuals were eligible to vote. Five of the individuals already appeared on the Challenged Voter List, leaving 23 to be included in the omissions count. Neither party excepted to the inclusion of these 23 individuals. Accordingly, I affirm their inclusion in the omission count.

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<sup>49</sup> The Employer's attempts to resolve many of the challenges before the hearing are commendable, however, they do not take precedence over the requirement to protect employees' Section 7 rights. I also note that removing these voters from the omission list would not change the outcome.

Individuals with Challenged Ballots Deemed Eligible

In this final category appear five omitted individuals who voted under challenge and whose challenges the hearing officer overruled.<sup>50</sup> Neither party excepted to the inclusion of these five individuals in the omissions count. However, having sustained the challenge to Hannah Cohen, whose inclusion was based on the modified look back formula, I do not include this individual. Accordingly, I affirm the hearing officer's inclusion of four of these five individuals in the omission count.

Total Omitted Voters

Having affirmed all the hearing officer's findings regarding categories of omitted voters, except the five individuals deemed eligible under the modified look back formula, I find that the number of omitted voters is 530. This number is 11.85% of the total electorate, 4472.

Employer's compliance with *Excelsior* requirements

The hearing officer concluded that the Employer did not substantially comply with the voter list requirement and recommended that the Petitioner's objection be sustained. He based his conclusion on the number of omissions exceeding the determinative number of votes, the significant percentage that the omissions were of the electorate,<sup>51</sup> combined with the Employer's failure to present a substantial justification for its omissions. The hearing officer noted that while the Board post-*Woodman's* no longer considers only the percentage of omissions as justification for setting aside an election, the Board has considered similar omission percentages as sufficient grounds, citing *Thrifty Auto Parts*, 295 NLRB at 1118 (9.5 percent omission rate was sufficient to set aside election). The hearing officer relied on the *Woodman's* decision in which a 6.8 percent omission rate, combined with determinative omissions<sup>52</sup> and lack of justification for the omissions were sufficient to direct a new election. 332 NLRB at 505.

The hearing officer carefully reviewed the developing law as to voting list requirements. The so-called *Excelsior* rule, requiring the employer to produce employee information before an election, became codified and implemented as Section 102.62(d) of the Board's Rules and Regulations.

(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

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<sup>50</sup> The five individuals are the two museum interns Camran Mani and Whitney Robles, and graduate students Hannah Cohen, Maria Duarte and Emma Goldhammer.

<sup>51</sup> As discussed above, the hearing officer understated the percentage of omissions at 8.37%, compared with nearly 12%.

<sup>52</sup> *Woodman's* had the narrowest of possibly determinative omissions: one.

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...

Before *Woodman's*, the Board generally decided voter omission objections based on the percentage of the unit omitted. *Woodman's*, as discussed above, broadened the factors to include whether the omissions were determinative and the employer's explanation.

The Employer, in its exceptions, contends that the 8.37% error rate is not high enough, absent a finding of bad faith, to warrant a finding that the Employer did not substantially comply with the *Excelsior* rule. The Employer relies on cases that may all be distinguished because they do not involve determinative omissions, they include determinative omissions but pre-date *Woodman's*, or the omissions rate is smaller than here.<sup>53</sup>

The Employer argues that the hearing officer erred in finding it did not substantially comply with voting list requirements by failing to give consideration to factors other than the percentage of omissions, citing the Board's consideration of the employer's explanation for its omissions, *Woodman's* at 332 NLRB at 504, and *Automatic Fire Systems*, supra, 357 NLRB at 2341. The Employer relies on a defense that it operated in good faith in the face of limited time, unit size, decentralized operations and a payroll system not designed to segregate the individuals the Employer needed to identify. The Employer further argues that it exercised a reasonable amount of diligence in compiling its voter list, citing testimony of several senior administrators.

I agree with the hearing officer that there was no legal justification for the Employer's omissions. As discussed above, the hearing officer found that the Employer knew of the different categories of omitted employees and could have taken steps to examine those individuals more closely, or, included them on the challenged voter list. The complaint regarding new law and lack of time is unpersuasive.

Having affirmed the hearing officer's omissions count, with the exception of five individuals,<sup>54</sup> for the foregoing reasons, I affirm the hearing officer's finding that the Employer failed to substantially comply with the voter list requirement. I adopt the

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<sup>53</sup> The Board found the employer substantially complied with *Excelsior* in these pre-*Woodman's* cases with the noted characteristics: *Texas Christian Univ.* 220 NLRB 396 (1975) (18% incorrect addresses, 3% omissions, omissions not determinative); *Telonic Indus., Inc.*, 173 NLRB 588 (1968) (less than 4% omissions, determinative); *Kentfield Med. Hosp.*, 219 NLRB 174 (1975) (6% error rate combining omission and incorrect addresses, determinative omissions), cited by *Woodman's* as an example of misapplication of *Excelsior* rule. In *Keeler Brass Auto. Group*, 310 NLRB 769 (1991), the Board mooted the ALJ decision on determinative omissions by its approval of Union's request to withdraw the election petition. The post-*Woodman's* decision *Tractor Co.*, 359 NLRB 603 (2013) concerned 15.4% rate of omissions that was not determinative.

<sup>54</sup> Thus, the omissions count drops from 535 to 530.

recommendation that the eligible challenged ballots be counted, and if a revised tally of ballots reveals that the Petitioner has not received a majority of votes cast, I direct that the election be set aside and a new election be run.

#### **IV. CONCLUSION**

##### **A. Ruling on Challenges, Hearing Rulings and Objections**

Based on the above, and having carefully reviewed the entire record, the hearing officer's report and recommendations, and the exceptions and arguments made by the parties, I affirm the hearing officer's findings and adopt his conclusions as to the challenges, hearing rulings and objections, to the extent described above.

IT IS HEREBY ORDERED that the ballots whose challenges I have overruled be opened and counted, 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, 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 the November 16 and 17, 2016 election is set aside and a new election shall be conducted.

#### **DIRECTION OF SECOND ELECTION**

In the event a revised tally does not result in the Petitioner receiving a majority of valid votes cast, the National Labor Relations Board will conduct a second secret ballot election among the employees in the same unit as in the first election. Employees will vote whether or not they wish to be represented for purposes of collective bargaining by Harvard Graduate Students Union – UAW. The date, time and place of the election will be specified in the Notice of Second Election that will issue shortly following a revised tally. That Notice shall also contain the following language:

#### **NOTICE TO ALL VOTERS**

The election conducted on November 16 and 17, 2016 was set aside because the National Labor Relations Board found that the Employer's failure to provide a complete Voter List interfered with the employees' exercise of a free and reasoned choice. Therefore, a new election will be held in accordance with the terms of this Notice of Second Election. All eligible voters should understand that the National Labor Relations Act, as amended, gives them the right to cast their ballots as they see fit and protects them in the exercise of this right, free from interference by any of the parties.

Eligible to vote in the second election are those employees in the unit who were employed during the payroll period ending immediately before the date of the Notice of Second Election, including employees who did not work during that period because they

were ill, on vacation, or temporarily laid off. Also eligible to vote are 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). Employees engaged in any economic strike, who have retained their status as strikers and who have not been permanently replaced are also eligible to vote. In addition, in an economic strike which commenced less than 12 months before the date of the first election, employees engaged in such strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements are eligible to vote. Unit employees in the military services of the United States may vote if they appear in person at the polls.

Ineligible to vote are: (1) employees who have quit or been discharged for cause since the designated payroll period; (2) striking employees who have been discharged for cause since the strike began and who have not been rehired or reinstated before the election date; and (3) employees who are engaged in an economic strike that began more than 12 months before the date of the first election and who have been permanently replaced.

Voters will be required to show their Harvard student identification card or another form of identification in order to be permitted to vote.

### **Voter List**

Within two business days after the issuance of the Notice of Second Election, the Employer must provide to the Regional Director and the parties named in the decision an alphabetized list of the full names, work locations, shifts, job classifications, and contact information (including home addresses, available personal email addresses, and available home and personal cell telephone numbers) of all eligible voters, accompanied by a certificate of service on all parties. When feasible, the Employer must electronically file the list with the Regional Director and electronically serve the list on the other parties.

The list must be accompanied by a certificate of service showing service on all parties. **The Region will no longer serve the voter list.** The Employer's failure to file or serve the list within the specified time or in the proper format is grounds for setting aside the election whenever proper and timely objections are filed. However, the Employer may not object to the failure to file or serve the list in the specified time or in the proper format if it is responsible for the failure.

Unless the Employer certifies that it does not possess the capacity to produce the list in the required form, 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. Because the list will be used during the election, the font size of the list must be the equivalent of Times New Roman

10 or larger. That font does not need to be used but the font must be that size or larger. A sample, optional form for the list is provided on the NLRB website at [www.nlr.gov/what-we-do/conduct-elections/representation-case-ruleseffective-april-14-2015](http://www.nlr.gov/what-we-do/conduct-elections/representation-case-ruleseffective-april-14-2015).

When feasible, the list shall be filed electronically with the Region and served electronically on the other parties named in this decision. The list may be electronically filed with the Region by using the E-filing system on the Agency's website at [www.nlr.gov](http://www.nlr.gov). Once the website is accessed, click on **E-File Documents**, enter the NLRB Case Number, and follow the detailed instructions.

No party shall use the voter list for purposes other than the representation proceeding, Board proceedings arising from it, and related matters.

### **Notice Posting**

The Employer must post copies of the Notice of Election in conspicuous places, including all places where notices to employees in the unit are customarily posted, at least 3 full working days prior to 12:01 a.m. on the day of the election which will be set forth in the Notice of Second Election, and must also distribute the Notice of Election electronically to any employees in the unit with whom it customarily communicates electronically. The Employer's failure to timely post or distribute the election notices is grounds for setting aside the election if proper and timely objections are filed. However, a party is stopped from objecting to the nonposting or nondistribution of notices if it is responsible for the nonposting or nondistribution.

## **IV. REQUEST FOR REVIEW**

Pursuant to Section 102.69(c)(2) of the Board's Rules and Regulations, any party may file with the Board in Washington, DC, a request for review of this decision. The request for review must conform to the requirements of Sections 102.67(e) and (i)(1) of the Board's Rules and must be received by the Board in Washington by **July 21, 2017**. If no request for review is filed, the decision is final and shall have the same effect as if issued by the Board.

A request for review 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.nlr.gov](http://www.nlr.gov), select E-File Documents, enter the NLRB Case Number, and follow the detailed instructions. If not E-Filed, the Request for Review should be addressed to the Executive Secretary, National Labor Relations Board, 1015 Half Street SE, Washington, DC 20570-0001. A party filing a request for review must serve a copy of the request on the other parties and file a copy with the Regional Director. A certificate of service must be filed with the Board together with the request for review.

President and Fellow of Harvard College  
Case 01-RC-186442

Dated: July 7, 2017

A handwritten signature in black ink, appearing to read "John J. Walsh, Jr.", written in a cursive style.

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John J. Walsh, Jr., Regional Director  
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