

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 3**

MARIST COLLEGE

Case **03-RC-127374**

EMPLOYER

and

**SERVICE EMPLOYEES INTERNATIONAL
UNION, LOCAL 200**

PETITIONER

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

I. INTRODUCTION

This report contains my findings and recommendations regarding the determinative challenged ballots of eighty-seven individuals and eleven objections to conduct affecting the results of the mail ballot election filed by the Petitioner.

The ballots of the following sixty-two employees were challenged by the Petitioner on the grounds that these employees are not part of the appropriate collective bargaining agreement: James Baumann, Ian Becker, Christopher Bowser, Jurgis Brakas, Geoffrey Brault, Irene Buccueri, Stephanie Calvano, Cassie Chapman, Peter Colaizzo, Sarah Colomello, Toni Constantino, Richard Cusano, Katherine Decker, Christopher Delcampo, Kathryn DiCorcia, Stewart Dutfield, Joseph Ellman, Thomas Farruggella, Amanda Greco, Justin Giuliano, John Herring, Julia Hughes, Natalie Jackson, Camilia Jones, Marcia Kennedy, Chester Kobos, Roberta Kyle, Melissa Lulay, Julie Martyn-Donato, Nicholas Mauro, John McAdam, Colin McCann, Sharon Murray-Cohen, Michael Napolitano, Richard Nuzzo, Jane O'Brien, Peter

O'Keefe, Theodore Petersen, Adam Porter, Thomas Quinn, Douglas Richard, Adam Ritter, William Robelee, Kevin Ronk, Joseph Ross, Deidre Sepp, Kevin Sheamon, Eric Sheffler, Sasha Shivers, Edward Sickler, Timothy Smith, Roberta Staples, Deborah Stein, Melinda Storey-Weisberg, Robert Tendy, Karen Tomkins-Tinch, Laura Toonkel, Teresa Tyce, John White, Glenda Williams, Michele Williams, and Irene Yozzo.

The ballots of Anthony Decandia, Renee Estabrook, Lawrence Lewis, Perry Liberty, Sarah Nowlin, Renee Pabst, and Janice Parker were challenged by the Petitioner on the grounds that these employees did not timely return their ballots to the Board's offices.

The ballots of Patricia Burns and Mary Elena Griffith were challenged by the Petitioner on two bases: first, that these two employees are not included in the appropriate bargaining unit, and second, that their ballots were not timely returned to the Board's offices.

The Petitioner challenged the ballots of James Coghlan, Hsin-Hua Lee, and Nichole Wolter because it questioned the identities of these voters.

The Petitioner challenged the ballot of Shahram Seneshua on the basis that this individual voted in such a manner as to identify his ballot.

The ballots of Carl Jensen, Elyse Joy, and James Teneyck were challenged by the Employer on the basis that these employees were no longer employed by the Employer in the appropriate bargaining unit.

The ballots of Katie Castell, Brian Childs, James Duryea, Dawn Essig, Pam Giraud, John Harbison, Rena Hill, Maria Otte, and Lee Walis were challenged by the Board agent because these individuals did not appear on the eligibility list.

The Petitioner's eleven objections set for hearing allege that the Employer engaged in various acts and conduct that coerced employees, destroyed the laboratory conditions of the

election, and warrant setting aside the election. The Employer denies engaging in any conduct that would provide a basis for setting aside the election.

As described in further detail below, I recommend overruling the challenges to the ballots of these 39 individuals: James Baumann, Jurgis Brakas, Geoffrey Brault, James Coghlan, Sarah Colomello, Anthony Decandia, Katherine Decker, Stewart Dutfield, Renee Estabrook, Thomas Farruggella, Roberta Kyle, Hsin-Hua Lee, Lawrence Lewis, Perry Liberty, Julie Martyn-Donato, John McAdam, Sharon Murray-Cohen, Sarah Nowlin, Richard Nuzzo, Jane O'Brien, Peter O'Keefe, Renee Pabst, Janice Parker, Theodore Petersen, Thomas Quinn, Douglas Richard, Kevin Ronk, Joseph Ross, Kevin Sheamon, Eric Sheffler, Sasha Shivers, Deborah Stein, Melinda Storey-Weisburg, Robert Tendy, Teresa Tyce, John White, Glenda Williams, Nichole Wolter, and Irene Yozzo.

Additionally, I recommend sustaining the challenges to the ballots of these 47 individuals: Ian Becker, Christopher Bowser, Irene Buccieri, Patricia Burns, Stephanie Calvano, Katie Castell, Cassie Chapman, Brian Childs, Peter Colaizzo, Toni Constantino, Richard Cusano, Christopher Delcampo, Kathryn DiCorcia, James Duryea, Joseph Ellman, Dawn Essig, Pam Giraud, Justin Giuliano, Amanda Greco, Mary Elana Griffith, Jon Harbison, John Herring, Rena Hill, Julia Hughes, Natalie Jackson, Carl Jensen, Camilia Jones, Elyse Joy, Marcia Kennedy, Chester Kobos, Melissa Lulay, Nicholas Mauro, Colin McCann, Michael Napolitano, Maria Otte, Adam Porter, Adam Ritter, William Robelee, Deidre Sepp, Edward Sickler, Timothy Smith, Roberta Staples, James Teneyck, Karen Tomkins-Tinch, Laura Toonkel, Lee Walis, and Michele Williams.

Finally, I recommend that the ballot of Shahram Seneshua be disposed of as a void ballot.

With respect to the objections, I recommend that Objections 1, 2, 3, 4, 5, 6, 9, and 11 be overruled, but that Objections 7, 8, and 10 be sustained. I further recommend that the ballots of the 39 eligible employees listed above be opened and counted, and that a revised tally of ballots issue. In the event that the revised tally of ballots reveals that a majority of votes were cast for the Petitioner, a certification of representative should issue. However, in the event that the revised tally of ballots shows that a majority of votes were not cast for the Petitioner, I recommend that the election be set aside and a second election directed.

II. PROCEDURAL HISTORY

Pursuant to a petition filed on April 28, 2014, and a Stipulated Election Agreement approved by the Regional Director on May 12, 2014,¹ a mail ballot election was conducted in the following appropriate collective-bargaining unit:

All adjunct faculty² employed by the Employer who teach undergraduate and/or graduate level courses, who teach in the classroom and/or online, and who teach courses at either the Employer’s Poughkeepsie, New York campus or its Fishkill, New York campus, and Student Teaching Supervisors; but excluding all other faculty, tenured and tenure eligible faculty, full-time faculty and faculty who only teach in the classroom at locations other than the Poughkeepsie Campus or the Fishkill Campus, administrators, coaches, librarians, directors, managers, guards, supervisors and professional employees as defined in the Act, and all other employees whether or not they have teaching responsibilities.

Pursuant to this Stipulated Election Agreement, ballots were mailed to voters on June 13. On June 30, the ballots were counted in the Board’s Resident Office in Albany, New York. The Tally of Ballots made available to the parties that day reveals the following:

Approximate number of eligible voters.....	500
Void ballots.....	12
Number of Votes cast for Petitioner.....	154
Number of Votes cast against participating labor organization....	165
Number of Valid votes counted.....	319

¹ All dates hereinafter are 2014 unless otherwise indicated.

² The parties agreed that for the purposes of this election, to be eligible to vote the employees must have taught at least one credit hour in any given semester in the twelve months preceding the eligibility date.

Number of Challenged Ballots..... 87
Number of Valid Votes counted plus challenged ballots.....406

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

On July 7, the Petitioner filed timely objections. On July 21, the Regional Director issued an Order Directing Hearing on Objections and Determinative Challenged Ballots and Notice of Hearing in which she determined that the issues of the challenged ballots and the allegations of objectionable conduct raised substantial and material questions of fact which could best be resolved by hearing.

On August 13, 14, 15, September 8, 9, 10, 11, 16, and 25 in Albany, New York, and via telephone on October 2, a hearing was held before the undersigned, a duly designated hearing officer of the National Labor Relations Board. The Employer and the Petitioner were represented by counsel during the hearing. All parties present at the hearing were afforded a full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence on the issues to be considered. The Employer and the Petitioner timely submitted briefs summarizing their positions on the issues.

Pursuant to Section 102.69(e) of the Board’s Rules and Regulations, Series 8, as amended, the undersigned has prepared this report to be served on the parties. The report contains findings of fact and my recommended dispositions on the issues to the Board in Washington, D.C. These resolutions, findings, and recommendations are based upon consideration of the entire record and my observation of the demeanor of the witnesses.

III. BACKGROUND

The Employer, a not-for-profit corporation with its principal place of business at 3399 North Road, Poughkeepsie, New York, is engaged in the operation of a college. At the time of the election, there were approximately 500 employees in the above-described unit.

IV. THE CHALLENGED BALLOTS³

A. The Resolved Challenges

During the course of the hearing, the parties resolved a number of the outstanding challenges. The parties stipulated that Jurgis Brakas, Sarah Colomello, Katherine Decker, Sharon Murray-Cohen, Richard Nuzzo, Theodore Petersen, Kevin Ronk, Kevin Sheamon, Deborah Stein, Melinda Storey-Weisberg, Robert Tendy, Glenda Williams, and Irene Yozzo were employed by the Employer only as adjuncts during the eligibility period and were thus eligible to vote. I recommend that the ballots of these 13 individuals be opened and counted.⁴

Further, the parties stipulated that Katie Castell, Brian Childs, James Duryea, Dawn Essig, Pam Giraud, Jon Harbison, Maria Otte, and Lee Walis were not employed by the Employer in the bargaining unit during the eligibility period. I recommend that the ballots of these 8 individuals be opened and counted.

The parties also stipulated that the ballot of Shahram Seneshua was void, as this voter did not use the blue envelope as required to protect his identity. I therefore recommend that the ballot of this employee be treated as a void ballot.

The parties also agreed during the hearing that Chester Kobos was an ineligible voter and stipulated that the challenge to his ballot be sustained. I recommend that the challenge be sustained.

The Petitioner initially challenged the ballots of James Coghlan, Hsin-Hua Lee, and Nichole Wolter on the basis that it questioned these individuals' identities. At the hearing, the

³ In making my findings of fact regarding the challenged ballots, I rely almost solely on the exhibits provided by the Employer in connection with the challenged ballots. In this respect, I also rely on the credible testimony of Michelle Stokes, the Employer's Assistant Dean for Academic Affairs. I do so because I give the Employer's records considerable weight given that the documents are primary sources of information. I credit Stokes' testimony in this regard because of her familiarity with these documents.

⁴ The Petitioner also withdrew its challenge to the ballot of Geoffrey Brault. Although I do agree that Brault is an eligible voter and recommend that the challenge be overruled, I discuss below the circumstances surrounding Brault's eligibility, which vary slightly from those of the other resolved challenges.

Petitioner withdrew its challenges to these employees' ballots. As such, I will recommend that these ballots be opened and counted.

In its brief, the Petitioner conceded that the ballots of Anthony Decandia, Renee Estabrook, Lawrence Lewis, Perry Liberty, Sarah Nowlin, Renee Pabst, and Janice Parker arrived at the Region's offices in time to be counted. The parties had previously stipulated that the ballots of these individuals had arrived at the Board's office on the day of the election, prior to the opening of any envelopes. Accordingly, I will recommend that these ballots be opened and counted.⁵

Also in its brief, the Petitioner concedes that James Baumann, Stewart Dutfield, Roberta Kyle, Julie Martyn-Donato, John McAdam, Peter O'Keefe, Thomas Quinn, Douglas Richard, Joseph Ross, Eric Sheffler, Teresa Tyce, and John White were employed by the Employer only as adjuncts during the eligibility period, and are thus eligible voters. I find nothing contradictory in the record regarding these employees' positions, and as such, I recommend that the ballots of these individuals be opened and counted.

B. The Petitioner's Grounds for Challenges

During the hearing, the Petitioner, at my request, enunciated its position on its unresolved challenges. Several of these positions were somewhat different from those stated during the vote count held on June 30.⁶ The Employer asserts that the Petitioner should be foreclosed from advancing any grounds for challenge other than those given on June 30. The Employer argues

⁵ I base this recommendation not only on the parties' stipulation but also on established Board precedent that allows for the Board to open and count late-arriving ballots, provided that the ballots in question have arrived prior to the counting of ballots. See *Kerrville Bus Co., Inc.*, 257 NLRB 176 (1981). See also my discussion of the ballots of Patricia Burns and Mary Elana Griffith below.

⁶ For example, on June 30, the Petitioner challenged the ballots of Patricia Burns and Mary Elana Griffith on the basis that their ballots were received late. However, at the hearing, the Petitioner also argued that these two individuals are not employed by the Employer in the appropriate bargaining unit.

that allowing alternative grounds for challenges would be tantamount to improperly allowing post-election challenges.

The Board has long held that post-election challenges are generally not permitted. *Solvent Services*, 313 NLRB 645, 646 (1994). The Board will, in rare cases, allow post-election challenges where “the party that would benefit from the Board’s refusal to consider such a challenge knows that a voter is ineligible and conceals that ineligibility.” *CHS, Inc.*, 357 NLRB No. 54, slip. op at 2 (2011), citing *NLRB v. A.J. Tower Co.*, 329 U.S. 324, 333 (1946) and *Soylent Services*, supra.

The Board only requires challenges to be made “prior to the actual casting of ballots, so that all uncontested ballots are given absolute finality.” *NLRB v. A.J. Tower Co.*, supra. There is no contention by the parties in this case that challenges were not made at the proper time; rather, the Employer’s argument is that the Petitioner’s assertion of alternative grounds for challenge after the June 30 count is not permitted. I cannot agree. The Board has held that “a party may raise and litigate at a hearing an alternative ground for a properly challenged ballot, even if that alternative ground was not raised in a timely challenge.” *CHS, Inc.*, supra. See also *Coca-Cola Bottling Co. of Miami*, 237 NLRB 936, 952 (1978). Accordingly, I find nothing improper in the Petitioner’s assertion of alternative grounds for challenge at the hearing.

C. The Stipulated Election Agreement

As noted above, this election was conducted pursuant to a stipulated election agreement which was approved by the Regional Director on May 12 (“the Agreement”). In the Agreement, the parties agreed that the appropriate collective bargaining unit would be:

All adjunct faculty⁷ employed by the Employer who teach undergraduate and/or graduate level courses, who teach in the classroom and/or online, and who teach

⁷ The parties agreed that for the purposes of this election, to be eligible to vote the employees must have taught at least one credit hour in any given semester in the twelve months preceding the eligibility date.

courses at either the Employer's Poughkeepsie, New York campus or its Fishkill, New York campus, and Student Teaching Supervisors; but excluding all other faculty, tenured and tenure eligible faculty, full-time faculty and faculty who only teach in the classroom at locations other than the Poughkeepsie Campus or the Fishkill Campus, administrators, coaches, librarians, directors, managers, guards, supervisors and professional employees as defined in the Act, and all other employees whether or not they have teaching responsibilities.

1. Relevant Board Precedent

The Board applies a three-prong test to determine whether challenged voters are properly included in a stipulated unit. The Board's express adoption of this test is set forth in *Caesar's Tahoe*, 337 NLRB 1096, 1097 (2002), in which the Board stated the following:

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

Applying this test to the instant case, I find that the Agreement is clear and unambiguous.

2. The Agreement is Clear and Unambiguous

The Petitioner asserts that the stipulation is clear and unambiguous, and that the clear meaning of the Agreement only permits employees whose only employment with the Employer is as an adjunct faculty member to be eligible to vote. The Employer also argues that the stipulation is free from ambiguity; however, the Employer's interpretation of the Agreement is the opposite of the Petitioner's. The Employer's argument is that the Agreement clearly includes all employees who taught in adjunct roles, regardless of any other position these employees held with the Employer. The Employer asserts that the inclusion of "all adjuncts" is not negated by any of the exclusionary language, and as such, any employee who served as an adjunct is eligible

to vote. According to the Employer, the Petitioner’s interpretation of the Agreement requires the reader to improperly imply language that is not present in the Agreement.⁸

The Board has held that “in order to determine whether the stipulation is clear and unambiguous, the Board will compare the express language of the stipulated bargaining unit with the disputed classification.” *Bell Convalescent Hospital*, 337 NLRB 191 (2001), citing *Viacom Television*, 268 NLRB 633 (1984). “If the classification is not included, and there is an exclusion for “all other employees,” the stipulation will be read to clearly exclude that classification.” *Halsted Communications*, 347 NLRB 225 (2006). See also *Kim/Lou, Inc.*, 337 NLRB 191 (2001) (“if the classification is not included, and there is an exclusion for ‘all other employees,’ the stipulation will be read to clearly exclude that classification”).

I find that the Agreement is clear and unambiguous. The stipulated unit includes all adjuncts teaching at the Employer’s Poughkeepsie and Fishkill, New York campuses, as well as Student Teaching Supervisors, but excludes “all other faculty, tenured and tenure eligible faculty, full-time faculty and faculty who only teach in the classroom at locations other than the Poughkeepsie Campus or the Fishkill Campus, administrators, coaches, librarians, directors, managers, guards, supervisors and professional employees as defined in the Act, and all other employees whether or not they have teaching responsibilities.” The language of the Agreement is carefully tailored to exclude all individuals whose primary role with the Employer is not an adjunct. This becomes even clearer when one reaches the end of the exclusionary language. The

⁸ In its brief, the Employer argues that the Petitioner’s version of the Agreement would result in the following unit description (the implied words are in bold): “[Including] [a]ll adjunct faculty employed by the Employer who **do not hold any other position with the Employer and who** teach undergraduate and/or graduate level courses, who teach in the classroom and/or online, and who teach courses at either the Employer’s Poughkeepsie, New York campus or its Fishkill, New York Campus, and Student Teaching Supervisors excluding all other faculty, full-time faculty and faculty who only teach in the classroom at locations other than the Poughkeepsie Campus or the Fishkill Campus, **adjuncts who also hold positions as** administrators, coaches, librarians, directors, managers, guards, supervisors, and professional employees as defined in the Act, **and adjuncts who hold any other position with the Employer**, and all other employees whether or not they have teaching responsibilities.

phrase “whether or not they have teaching responsibilities” is clearly intended to exclude employees who also teach. If the intent of the parties was to include employees who also served as adjuncts, the inclusionary language would have referred to adjuncts who also served in another capacity with the Employer. The only mention of employees with multiple roles comes via the exclusions, where the parties agreed that “all other employees whether or not they have teaching responsibilities” were excluded. Accordingly, I find that the Agreement clearly and unambiguously includes only those adjuncts who were not otherwise employed with the Employer during the eligibility period and on the date they mailed their ballots.⁹

With respect to the term “managers,” I find that it applies to individuals who have the title of manager and not to managerial employees as defined in the Act. I base this on the wording of the Agreement itself. Section 2(3) of the Act excludes supervisors from the definition of “employee,” Section 2(12) defines professional employee, and Section 9(b) segregates units of guards from other employees and, in so doing, defines “guard.” However, as a matter of policy, the Board has also determined that “managerial employees” are excluded from protection under the Act. *NLRB v. Yeshiva University*, 444 U.S. 672 (1980). See also *Lemoyne-Owen College*, 345 NLRB 1123 (2005). Here, the parties excluded “guards, supervisors and professional employees as defined in the Act.” I note that the parties did not use the term “managerial employees,” but rather stated that “managers” were excluded. As the Employer has a number of individuals who have the title of “manager” (see below), I must conclude that the parties intended to exclude individuals with the title of manager.

⁹ The Board has held that “individuals are deemed to be eligible voters if they are in the unit on both the payroll eligibility cutoff date and on the date they mail in their ballots to the Board’s designated office.” *Dredge Operators*, 306 NLRB 924 (1992), citing *Sadler Bros. Trucking & Leasing Co.*, 225 NLRB 194, 195-196 (1976), *Eck Miller Transportation Corp.*, 211 NLRB 251 fn. 2 (1974), and *Plymouth Towing Co.*, 178 NLRB 651 (1969).

D. The Petitioner's Remaining Challenges

1. Geoffrey Brault

a. Statement of Fact

The Petitioner originally challenged the eligibility of Geoffrey Brault on the grounds that he was not part of the appropriate bargaining unit. At the hearing, the Petitioner withdrew its challenge to Brault's ballot. However, as the parties did not enter into a stipulation of fact resolving his eligibility, I requested that the parties submit evidence regarding his employment status. There is no dispute that Brault was employed as an adjunct during the eligibility period. Stokes testified that Brault was temporarily employed by the Employer as a sports broadcaster in a "couple week assignment" for a very short time frame during the Spring of 2014 semester.¹⁰

b. Analysis of Brault's Ballot

Pursuant to my interpretation of the Agreement as discussed above, an employee is not eligible to vote if he or she was employed with the Employer in a position other than adjunct at the time of the election. As noted above, the timing of Brault's tenure as sports broadcaster is unclear. However, given the short tenure of this assignment (lasting only a few weeks), as well as the parties' agreement that Brault is an eligible voter, I recommend that the Petitioner's withdrawal of the challenge to Brault's ballot be approved and that his ballot be opened and counted.

2. Ian Becker

a. Statement of Fact

Ian Becker was challenged by the Petitioner on the grounds that he was employed in a position other than adjunct during the eligibility period. Becker taught two classes each in the

¹⁰ The record does not reflect the actual dates that Brault served as broadcaster for the Employer.

Spring and Fall of 2013, as well as one class in the Spring of 2014.¹¹ Becker also held the position of Oracle Database Manager for the Employer, but retired from that position effective May 3, 2013. Additionally, Becker received two temporary appointments from the Employer in the position of Database Administrator (“DBA”). The first was a short, two-day assignment for December 13 and 14, 2013, for a total of 10 hours. The second of these appointments has effective dates of March 31, 2014 – September 30, 2014, at an average of 10 hours per week.¹²

b. Analysis of Becker’s Ballot

Ian Becker taught as an adjunct at Marist during both the eligibility period and during the election. The Petitioner argues that Becker should be excluded because of his position as Oracle Database Manager. It is clear that Becker resigned from that job prior to the election with no expectation to return to that position. I also note that Becker’s 2-day appointment for December 13-14, 2013 had concluded prior to the payroll cutoff date of April 30. However, Becker’s March 31 – September 30, 2014 appointment as DBA meant that he was employed as a DBA during the eligibility period and through the election itself. I therefore find that his position as a DBA during the election precludes him from being an eligible voter. I recommend that the challenge to Becker’s ballot be sustained.

3. Christopher Bowser

a. Statement of Fact

The Petitioner asserts that Bowser is disqualified from voting because he held a Director position during the eligibility period.¹³ Bowser taught one class each in the Fall 2013 and Spring

¹¹ Unless otherwise indicated, I will only list the courses taught during the eligibility period, which includes the semesters of Spring 2013, Summer 2013, Fall 2013, Winter 2013, and Spring of 2014.

¹² The Employer’s assertion that Becker’s 2014 appointment as a DBA was for only a total of ten hours is contradicted both by the Request for Temporary Hire regarding this appointment as well as Stokes’ testimony that the appointment was for 10 hours per week.

¹³ The Petitioner alternatively asserts that Bowser held a position other than adjunct during the eligibility period and is ineligible on those grounds.

2014 semesters. He also taught an online class during the Summer 2013 semester. At issue is Bowser's role as Director of the Employer's Environmental Institute. According to Stokes,¹⁴ the Environmental Institute program is a three-credit class for high school students. This program runs for two weeks each summer. Stokes testified that Bowser is the sole instructor for the Environmental Institute program. The program itself consists of two components: an in-class lecture as well as an overnight camping excursion near the Hudson River. As the program was co-ed, Bowser would be accompanied on the overnight camping trip by a female Resident Assistant.

With respect to compensation, Bowser was paid via two separate employment contracts for the Environmental Institute program. A contract submitted into evidence show that Bowser received \$5,000 for instruction of the class itself during the Summer 2013 semester. The "contract type" identified on this contract is "Part Time adjunct onground." However, under a separate contract, Bowser received \$5,250 via a contract identified as "Admin Non Instructional." Stokes testified that the \$5,250 contract was compensation for Bowser's role as Environmental Institute Director.

b. Analysis of Bowser's Ballot

The Agreement specifically excludes "directors" from the bargaining unit. I am satisfied, based on the fact that Bowser receives "Non Instructional" compensation for his role as Environmental Institute Director, that Bowser is properly excluded as a director and is therefore ineligible to vote. As the Board stated in *Butler Asphalt, LLC*, 352 NLRB 189 (2008), "where a stipulation expressly excludes a classification, the Board will find a clear intent to exclude it." I therefore recommend that the challenge to Bowser's ballot be sustained.

¹⁴ Although adjunct employee Dean Goddard also testified about the nature of the Environmental Institute Director position, I give Stokes' testimony considerably more weight than I do Goddard's. Goddard testified that his knowledge of Bowser's role in the Environmental Institute program "is not very extensive."

4. Irene Buccieri

a. Statement of Fact

The Petitioner challenged Buccieri's ballot on the grounds that she holds the position of Assistant Director for Strategic Recruitment. According to the Petitioner, this makes Buccieri ineligible to vote, as she holds a "director" title or, alternatively, that Buccieri falls into the excluded category of "all other employees." Buccieri taught one course each in the Spring 2013, Fall 2013, and Spring 2014 semesters. Buccieri also has a full-time position with the Employer as Assistant Director of Strategic Recruitment. According to Stokes, Buccieri's role as Assistant Director of Strategic Recruitment is a human resource position which includes everything from deciding where to advertise about job openings with the Employer to screening of applicants to the processing of contracts for new hires. In her position of Assistant Director of Strategic Recruitment, Buccieri reports to the Human Resources Manager.

b. Analysis of Buccieri's Ballot

As noted above, the Agreement specifically excludes directors. I find that Buccieri's role as Assistant Director of Strategic Recruitment falls into that classification. Based on this finding, I recommend that the challenge to Buccieri's ballot be sustained.

5. Patricia Burns

a. Statement of Fact

Patricia Burns' ballot was challenged by the Petitioner on two grounds; first, that her ballot did not arrive timely at the Board's offices to be counted,¹⁵ and second, that she is employed full-time as a director, manager, or other employee.

¹⁵ Although the Petitioner withdrew its challenges to seven other employees whose ballots arrived at the Board's offices at the same time as Burns', the Petitioner did not expressly withdraw the timeliness argument with respect to Burns. Therefore, I must reach a conclusion on the timeliness issue as well as the eligibility issue.

With respect to the timeliness of the ballot's arrival, the parties stipulated that Burns' ballot (as well as the ballots of 8 other voters) arrived at the Board's office at approximately 11:00 AM on June 30. At the time the ballots arrived, the process of reviewing the yellow outer envelopes against the eligibility list had begun, but none of the yellow outer envelopes had yet been opened.

With respect to Burns' eligibility as a voter, the record reflects that Burns taught one class in the Fall of 2013. Additionally, Burns holds a full-time position as an Associate Director of Adult Enrollment GAE¹⁶ in the Employer's Human Resources department. According to her job description, Burns' role is to "[r]ecruit, counsel, mentor, and advise prospective graduate and adult students through the application and enrollment process." Burns reports to the Director, Admission GAE.

b. Analysis of Burns' ballot

The facts surrounding the timing of Burns' ballot arriving at the Board's office is undisputed. While the process of checking the envelopes against the *Excelsior* list¹⁷ had commenced, there had been no commingling of ballots and none of the votes had yet been counted. The Board's policy is "to afford the employees the broadest possible participation in the Board elections," provided "the election procedures are not unduly interfered with or hampered."¹⁸ The election procedure will not be hampered here, as the ballot in question was received prior to the commingling and counting of ballots. Accordingly, I find that Burns' ballot arrived timely.

¹⁶ The record is not clear as to what GAE stands for, although I would assume that it is an acronym for Graduate & Adult Education.

¹⁷ *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966).

¹⁸ *Kerrville Bus Co., Inc.*, supra, quoting *New England Oyster House*, 225 NLRB 682 (1976).

Turning next to whether Burns was an eligible voter, there is insufficient evidence to establish that Burns is a manager. However, Burns is excluded as a director, as her title is Associate Director of Adult Enrollment. As such, I recommend that the challenge to Burns' ballot be sustained on the grounds that directors are ineligible to vote.

6. Stephanie Calvano

a. Statement of Fact

The Petitioner challenged Calvano's ballot on the basis that she is specifically excluded as a director or, alternatively, as an "other employee." Calvano taught one class each in the Spring 2013, Fall 2013, and Spring 2014 semesters. She is also employed by the Employer in a full-time capacity as the Director of Data Management and Technology. The job description for her position summarizes her duties thusly:

The Director of Data Management and Technology will coordinate the development and maintenance of data systems for the collection (including mixed modes), testing, analysis, and dissemination of survey information, and online instruction. The director will be a resource and work collaboratively with the survey team on both public and client projects.

Calvano reports to the Director of Marist's Institute for Public Opinion. According to Stokes, Calvano has been the Director of Data Management and Technology since 2004.

b. Analysis of Calvano's Ballot

Calvano was employed by the Employer as Director of Data Management and Technology during the eligibility period and during the election. Directors are expressly excluded from the bargaining unit. Accordingly, I recommend that the challenge to Calvano's ballot be sustained.

7. **Cassie Chapman**
8. **Adam Porter**¹⁹

a. Statement of Fact

Cassie Chapman's and Adam Porter's ballots were challenged by the Petitioner on the grounds that they are a full-time administrative assistant and are thus excluded as an "other employee." The Petitioner also challenged Chapman's ballot on the basis that she was no longer planning to teach as an adjunct for the Employer. The Petitioner's evidence with respect to the latter is a screenshot of a LinkedIn page²⁰ for Chapman. This page lists "Adjunct Faculty at Marist College" under Chapman's "Past" employment. This screenshot was taken by organizer-in-training Ashley Dryzmala on June 10, 2014.

Records provided by the Employer show that Chapman taught one course during the Fall 2013 semester, and Stokes testified that her research into Chapman's teaching history revealed that although Chapman has taught courses since at least 2008, she teaches exclusively in the fall semesters. No evidence was presented that showed Chapman had informed the Employer of any intent to cease teaching for the Employer. As with Chapman, Porter also taught one class in the Fall 2013 semester. There is no contention by the Petitioner that Porter has no intent to teach as an adjunct in the future.

Chapman is employed by the Employer as an administrative assistant in the Center for Advising and Academic Services. Porter is employed in the same capacity in the School of Social Behavior and Sciences. The secretarial and clerical employees of the Employer are represented by the Communications Workers of America, AFL-CIO. Chapman and Porter are included in this bargaining unit due to their positions as administrative assistants.

¹⁹ As the facts surrounding Porter and Chapman's challenges are similar, I shall address them simultaneously.

²⁰ LinkedIn is a third-party social media website.

b. Analysis of Porter and Chapman's Ballots

Porter and Chapman were employed both as adjuncts and administrative assistants during the eligibility period. With respect to Chapman's purported intention to cease adjunct teaching, I find that there is insufficient evidence that she had evinced her intent to do so. Although the Petitioner presented a screenshot of a LinkedIn profile for Cassie Chapman, I cannot consider this, standing alone, to constitute conclusive proof that she did not intend to continue teaching. However, given her full-time position as an administrative assistant, she is excluded from the unit as an "other employee," and I recommend that the challenge to her ballot be sustained. Similarly, I recommend that the challenge to Porter's ballot be sustained, given that he is an "other employee" as excluded by the Agreement.

9. Peter Colaizzo

a. Statement of Fact

The Petitioner challenged the ballot of Peter Colaizzo on the basis that he holds positions with the Employer as a director and a coach, and that alternatively, he is excluded as an "other employee." Colaizzo taught one course for the Employer in the Spring of 2014. In the Spring 2013, Fall 2013, and Spring 2014 semesters, he served as a writing specialist in the Employer's Center for Student-Athlete Enhancement. These were part-time administrative staff appointments. Colaizzo also serves as the Director of Men's and Women's Cross Country/Track Program, which Stokes testified was a part-time position. According to the job description supplied by the Employer regarding the latter position, one of his responsibilities is to "[a]ccompany and coach the Men's and Women's Cross Country/Track and Field team during any local or national competition."

b. Analysis of Colaizzo’s Ballot

The record clearly reflects that Colaizzo, in addition to his teaching responsibilities, held staff positions as a writing specialist during several semesters, including the Spring 2014 semester during which the eligibility period ended. As such, he is ineligible as he was in the excluded classification of “other employee” during the requisite time period. Additionally, Colaizzo’s position as Director of the Men’s and Women’s Cross Country/Track Program, which involves coaching duties, further disqualify him on the basis that he serves as director and coach, two job descriptions that are expressly excluded from the bargaining unit. Accordingly, I am recommending that the challenge to Colaizzo’s ballot be sustained.

10. Toni Constantino

a. Statement of Fact

The Petitioner challenged Constantino’s ballot on the grounds that Constantino was employed as a manager or, alternatively, as an “other employee” during the eligibility period. Constantino taught one class during the Spring 2013 semester. She also is employed by the Employer as Manager of Online Programs.²¹ According to Stokes, this is a full-time position in the Employer’s School of Global and Professional Studies. The job description accompanying this position states that “[t]he person in this position will act as the primary point of contact for information about online learning, and oversee and manage all aspects of distance learning courses and programs, including year round scheduling.”

b. Analysis of Constantino’s Ballot

Although Constantino did teach within the requisite time period, she also served as the Employer’s Manager of Online Programs during the eligibility period continuing through the

²¹ Prior to August 26, 2013, the Manager of Online Programs was referred to as Coordinator of Online Programs.

election. Managers are specifically excluded from the bargaining unit.²² Accordingly, I find that Constantino is excluded from the bargaining unit and recommend that the challenge to her ballot be sustained.

11. Richard Cusano

a. Statement of Fact

The Petitioner challenged Cusano's ballot, arguing that Cusano is an administrator or, alternatively, an "other employee." Cusano taught two courses in the Spring 2013 semester and three courses each in the Fall 2013 and Spring 2014 semesters. Cusano also serves as a Coordinator of Tutoring. In this role he supervises student tutors. Stokes testified that while most of the tutors that fall under Cusano's supervision are unpaid, several are work study students and receive compensation for their tutoring.

b. Analysis of Cusano's Ballot

As an initial matter, I note that Cusano's undisputed supervision of unpaid tutors and work study employees does not render him a supervisor within the meaning of Section 2(11) of the Act. I note that the Board has traditionally held that the work of such students is "incidental to their academic objectives." *Saga Food Service of California, Inc.*, 212 NLRB 786, 787 (1974) and cases cited therein. See also *San Francisco Art Institute*, where the Board held that a unit of student janitors was inappropriate given the "very tenuous secondary interest that these students have in their part-time employment."²³ See also the Board's decision in *Fordham University*, 214 NLRB 971, 974 (1974), where the Board found a Director of Field Instruction and Teacher Certification was not a supervisor within the meaning of Section 2(11), despite her supervision

²² See my discussion above which establishes that "managers" are excluded. As I find that the specific title of manager is excluded from the bargaining unit, I do not pass on whether Constantino is a managerial employee.

²³ 226 NLRB 1251, 1252 (1976).

of students who were “practice-teaching in the community.” I find there is insufficient evidence that Cusano is a supervisor within the meaning of the Act.

That being said, Cusano is undisputedly employed by the Employer as Coordinator of Tutoring. I therefore find that he is excluded from the bargaining unit on the basis that “all other employees” are ineligible to vote. I recommend that the challenge to his ballot be sustained.

12. Kathryn DiCorcia

a. Statement of Fact

The Petitioner’s challenge to DiCorcia’s ballot is that DiCorcia is an administrator and is thus ineligible to vote. Alternatively, the Petitioner alleges that DiCorcia is an “other employee” and should be excluded on those grounds. DiCorcia taught one class in the Spring 2013 semester, two classes each in the Summer 2013 and Fall 2013 semesters, and one class in the Spring 2014 semester. DiCorcia is also the Coordinator of Linguistic Studies in the Academic Learning Center. According to Stokes, this is a full-time position. The job description entered into evidence for this position states that DiCorcia supervises tutors “in the Linguistic area.” Stokes testified that these tutors are a combination of unpaid and paid student workers.

b. Analysis of DiCorcia’s Ballot

Although DiCorcia taught during the eligibility period, she also serves as Coordinator of Linguistic Studies for the Employer. This full-time position disqualifies her from being eligible to vote. As with Richard Cusano, I make this determination solely based on her status as an “other employee,” as there is insufficient evidence that she is a supervisor within the meaning of Section 2(11) of the Act. I recommend that the challenge to DiCorcia’s ballot be sustained.

13. Joseph Ellman

a. Statement of Fact

The Petitioner challenged Ellman's ballot on the grounds that he is a guard. The Petitioner also argues that if Ellman is not found to be a guard, he should be excluded as an "other employee." Ellman taught one class in the Spring 2013 semester, a total of eight classes in the Fall 2013 semester, and a total of seven classes in the Spring 2014 semester.²⁴ Stokes also testified that Ellman is an investigator in the Employer's security department. According to Stokes, this is a full-time position. As part of his duties as an investigator, Ellman is required to wear a polo shirt which identifies him as security. Goddard testified that when a flash drive was stolen out of Goddard's mailbox, Ellman was the investigator assigned to look into its theft.

b. Analysis of Ellman's Ballot

The Petitioner argues that Ellman's status as a campus investigator is equivalent to that of a guard, that guards are excluded from the unit. The Petitioner cites *Howard University*, 224 NLRB 385, 387 (1976) for the proposition that campus investigators are considered to be guards. Section 9(b)(3) of the Act provides, in pertinent part, that:

[The Board shall not] decide that any unit is appropriate for such purposes if it includes, together with other employees, any individual employed as a guard to enforce against employees and other persons rules to protect property of the employer or to protect the safety of persons on the employer's premises...

In *Howard University*, supra, the Board directed an election in a unit of guards which included "investigators." However, the issue addressed by the Board in that case was whether the Board had jurisdiction over Howard University. The parties in that case had stipulated that the unit was appropriate. That being said, the Board has held that investigators are properly included in guard units. See *Republic Aviation Corp.*, 106 NLRB 91, 93 (1953) (investigators who report and

²⁴ In the Fall 2013 semester, Ellman taught three sections of two separate classes and two sections of a third class. Similarly, in the Spring 2014 semester, Ellman taught three sections of one class and four sections of another class.

investigate violations of company rules and regulations are guards). The Board considers an employee to be a guard if “they are charged with guard responsibilities that are not a minor or incidental part of their overall responsibilities.” *Boeing Co.*, 328 NLRB 128, 129-130 (1999), citing *Rhode Island Hospital*, 313 NLRB 343, 347 (1993). In the instant case, Ellman is undisputedly a campus investigator responsible for conducting investigations into incidents such as Goddard’s stolen flash drive. As such, I find that it would be inappropriate to include him in a unit of non-guards. I recommend that the challenge to Ellman’s ballot be sustained.

14. Thomas Farruggella

a. Statement of Fact

The Petitioner challenged Farruggella’s ballot on the grounds that Farruggella was employed in a non-adjunct capacity during the eligibility period. Farruggella taught two courses each in the Fall 2013 and Spring 2014 semesters. Prior to that, Farruggella served as a “Visiting Teaching Associate” under two separate, one-year contracts. The first contract in this respect had effective dates of August 25, 2011 – May 31, 2012. The second was effective from June 1, 2012 until May 31, 2013. Stokes testified that visiting professors are not eligible for tenure and can only serve as a visiting professor for two consecutive years, pursuant to the Employer’s faculty handbook.

b. Analysis of Farruggella’s Ballot

The record is clear that Farruggella last worked as a visiting professor in the Spring 2013 semester. This semester does fall within the eligibility period. However, it is immaterial that Farruggella was not employed in the bargaining unit early in the eligibility period.²⁵ A voter is eligible if he or she is employed in the bargaining unit on the payroll cutoff date and during the election. See *Brown Wood Preserving Co. Inc.*, 116 NLRB 438, 438-439 (1956). I find that

²⁵ This is especially true given the lengthy eligibility period in this case.

Farruggella was employed only as an adjunct during the Fall 2013 and Spring 2014 semesters, and as such, is eligible to vote. I recommend that the challenge to Farruggella's ballot be overruled.

- 15. Justin Giuliano**
- 16. Amanda Greco**
- 17. Marcia Kennedy²⁶**

a. Statement of Fact

The Petitioner challenged the ballots of Giuliano, Greco, and Kennedy on the grounds that these employees have other positions with the Employer and are thus excluded as "other employees." Giuliano taught one course in the Spring 2014 semester. Greco taught one class in both the Fall 2013 and Spring 2014 semesters. Kennedy taught one class in the Spring 2014 semester. All three employees are also Assistant Athletic Trainers in the Employer's Athletic Department. Stokes testified that this is a full-time position. Job descriptions submitted for these employees show that their job duties are to "[a]ssist the Coordinator of Sports Medicine in providing quality care in all aspects of athletic training, for all 23 varsity sports programs." While Assistant Athletic Trainers are responsible for supervision of student athletic trainers, Stokes testified that the student athletic trainers are not work study students, but rather are required to complete a clinical assignment to receive certification as trainers.

b. Analysis of Giuliano, Greco, and Kennedy's Ballots

All three employees taught during the eligibility period. I do not find, and neither party argues, that the Assistant Athletic Trainers are supervisors. However, these individuals were all employed in a position other than adjunct during the eligibility period and during the election.

²⁶ As Giuliano, Greco, and Kennedy are similarly situated, I choose to address the challenges to their ballots collectively.

Accordingly, I recommend that the Petitioner's challenges to the ballots of Giuliano, Greco and Kennedy be sustained.

18. Mary Elana Griffith

a. Statement of Fact

The Petitioner challenged Griffith's ballot on the dual grounds that her ballot was not returned to the Board's offices in time to be counted, and that she was a director for the Employer during the eligibility period. The facts surrounding Griffith's ballot are undisputed, and the parties stipulated that her ballot, as with the ballot of Burns and the other seven employees about whom the Petitioner withdrew its challenges, arrived at the Board's offices at approximately 11:00 AM. While the parties and the Board agent were checking the yellow outer envelopes against the eligibility list, none of the envelopes had yet been opened.

With respect to the Petitioner's latter argument, Griffith taught one class in the Spring of 2014. Additionally, Griffith serves as the Employer's Director of Interactive Media Systems. The Employer's job description corresponding to this position summarizes the duties of that job as follows:

Coordinate the development of communications technology for both the collection and testing of survey information as well as the public dissemination and communication of survey results. Serve as a resource for, and work collaboratively with, the survey team on content development, media production, and public presentation and communication.

b. Analysis of Griffith's Ballot

As I found above in the discussion of Burns' eligibility, I find that Griffith's ballot arrived in time to be counted at the Board's offices, and I would not sustain the challenge on those grounds. However, Griffith's position as Director of Interactive Media Systems is grounds

for sustaining the Petitioner's challenge, given that the Agreement expressly excludes directors. Accordingly, I recommend that the challenge to Griffith's ballot be sustained.

19. John Herring

a. Statement of Fact

The Petitioner challenged Herring's ballot on the grounds that he was employed as a part-time employee in a position other than adjunct during the eligibility period. Alternatively, the Petitioner challenged his ballot on the grounds that Herring was a regular faculty member during the eligibility period.

Herring was employed by the Employer as a full-time faculty member until his retirement which became effective on August 31, 2013. Stokes testified that Herring's service to the Employer as a full-time faculty member actually ended in May of 2013, at the conclusion of the Spring 2013 semester, although his benefits continued until August 31, 2013. Herring served as a Criminal Justice Internship Program Assistant for the Employer for the period of August 23, 2013 – December 13, 2013. The contract for this appointment states that it is a "temporary, part-time, administrative staff position." Herring's adjunct teaching duties during the eligibility period consisted of four classes of internships in the Summer 2013 semester.

Stokes also testified that Herring runs the Employer's Criminal Justice Summer Institute. This program is similar to the Environmental Institute discussed above in relationship to Christopher Bowser. The Criminal Justice Summer Institute is a two-week program held during July of each year. Stokes asserted that in addition to running this program during the Summer of 2013, Herring also was in charge of the Criminal Justice Summer Institute in the Summer of 2014.

b. Analysis of Herring's Ballot

The record is clear that Herring's resignation from his full-time faculty position became effective on August 31, 2013. Therefore, despite being a full-time faculty member during the eligibility period, he had clearly abdicated this position prior to the end of the eligibility period. Similarly, I find that his position as Criminal Justice Program Assistant ended on December 13, 2013, and cannot serve to bar him from eligibility. Herring's role in running the Employer's Criminal Justice Summer Institute is an ongoing one, as evidenced by his participation in the Summer 2014 program. There is insufficient evidence as to whether or not Herring's title in this regard is "Director."²⁷ This position with the Criminal Justice Summer Institute renders Herring ineligible to vote in the election, as he is an "other employee" as excluded by the Agreement. As such, I recommend that the challenge to his ballot be sustained.

20. Julia Hughes

a. Statement of Fact

The Petitioner challenged Hughes' ballot on the grounds that Hughes holds a position of librarian and is thus excluded from the bargaining unit. Hughes taught one course in the Spring 2013 semester and two courses each in the Fall 2013 and Spring 2014 semesters. Hughes is also employed by the Employer as a full-time Assistant Librarian for Digital Content Services. Stokes testified that this position involves liaising with certain schools within Marist College to provide library assistance. Hughes reports to the Senior Librarian of Digital Content Services.

b. Analysis of Hughes' Ballot

Hughes was indisputably employed by the Employer as a librarian on the eligibility cutoff date as well as during the election. The Agreement specifically excludes librarians.

²⁷ Herring's payroll records, unlike Bowser's, only indicate that Herring's assignment is with the Criminal Justice Summer Institute.

Accordingly, I find that Hughes is ineligible to vote, and recommend that the challenge to her ballot be sustained.

21. Natalie Jackson

a. Statement of Fact

The Petitioner challenged Jackson's ballot on the grounds that Jackson held a full-time position with the Employer during the eligibility period, rendering her ineligible to vote. Jackson taught one course in the Fall 2013 semester. Also during the eligibility period, Jackson served as the Employer's Senior Analyst at the Marist Institute for Public Opinion. Via letter dated March 21, 2014, Jackson stated that she was resigning from that position, and that the effective date of her resignation was April 30, 2014. The letter made no mention of whether or not Jackson would continue to teach for the Employer as an adjunct, as it only addressed her position as Senior Analyst.

b. Analysis of Jackson's Ballot

As discussed above, it is well established that an employee is only eligible to vote if he or she is employed in the bargaining unit on the payroll cutoff date as well as the date of the election.²⁸ There is no evidence in the record that Jackson resigned from her adjunct duties; rather, her resignation letter is exclusive to her position as Senior Analyst. Therefore, it is clear that Jackson was employed only as an adjunct after her resignation became effective on April 30. I am thus satisfied that Jackson was employed in the bargaining unit on the date she mailed her ballot to the Board's offices. However, the payroll cutoff date, as agreed to by the parties, is April 30. Jackson's resignation became effective on April 30, meaning that she was still employed as a Senior Analyst on the payroll cutoff date. I find that Jackson was employed as an

²⁸ See also *Sweetener Supply Corp.*, 349 NLRB 1122 (2007), citing *Dynacorp/Dynair Services*, 320 NLRB 120 (1995).

“other employee” on the payroll cutoff date. As “all other employees” are excluded from the bargaining unit, I recommend that the challenge to Jackson’s ballot be sustained.

22. Camilia Jones

a. Statement of Fact

The Petitioner challenged Jones’ ballot on the grounds that she was employed in a capacity other than adjunct during the eligibility period. Jones taught two courses in the Spring 2014 semester. Jones was also employed by the Employer as Assistant Director for Student Athlete Enhancement. However, via letter dated May 15, 2014, Jones informed the Employer that she was resigning from the latter position effective May 30, 2014. As with Jackson’s resignation letter discussed above, Jones made no mention of whether or not she planned to continue teaching in an adjunct capacity. Stokes testified that the Employer had received no communication from Jones that indicated she no longer wished to be an adjunct professor for the Employer.

b. Analysis of Jones’ Ballot

The situation presented by the challenge to Jones’ ballot is strikingly similar to that presented by the challenge to Jackson’s. In both cases, the individual was employed as only an adjunct during the election itself.²⁹ However, as with Jackson, Jones was not employed in the bargaining unit on the payroll cutoff date. As discussed, the payroll cutoff date is April 30, and Jones’ resignation did not become effective until May 30, one month after the cutoff date. As such, I find that Jones was employed as an “other employee”³⁰ on the payroll cutoff date, and is therefore ineligible to vote. I recommend that the challenge to her ballot be sustained.

²⁹ As with Jackson, I base this on the absence of evidence that Jones intended to resign from her adjunct position.

³⁰ Although Jones’ job title was Assistant Director for Student Enhancement, the Petitioner only argues that she be excluded as an “other employee.” My role as hearing officer does not grant me the authority to consider bases for challenge not properly before me. See *Iowa Lamb Corp.*, 275 NLRB 185 (1985). I therefore do not pass on whether

23. Melissa Lulay

a. Statement of Fact

The Petitioner challenged Lulay’s ballot on the grounds that she holds a full-time position with the Employer which renders her ineligible to vote as an “other employee.” Lulay taught one course in the Fall 2013 semester. Lulay additionally serves as a Coordinator for First Year Programs and Leadership Development in the Employer’s Student Affairs department. The job description submitted in connection with this position summarizes Lulay’s duties as requiring her to “provid[e] assistance with orientation, first-year student transition, and program development” and “[f]acilitate the adjustment of students academically, socially, and personally to Marist College.” Lulay reports to the Director of First Year Programs and Leadership Development.

b. Analysis of Lulay’s Ballot

The uncontroverted evidence shows that, at all relevant times, Lulay has been employed by the Employer in a position other than adjunct. This renders her ineligible to vote. The Petitioner argues in its brief that Lulay should be excluded as a director or alternatively as an “other employee.” I do not find that she is a director, as her job position is Coordinator. In finding that Lulay is ineligible, I rely only on the basis that she was employed as an “other employee” during the payroll eligibility period and during the election.

24. Colin McCann

a. Statement of Fact

The Petitioner challenged McCann’s ballot on the grounds that he held a position with the Employer as a director and should be excluded on those grounds; alternatively, the Petitioner argues that McCann is ineligible as he was employed in a position other than adjunct and is thus

Jones is a director as excluded by the Agreement, and base my recommendation on her status as an “other employee.”

ineligible as an “other employee.” McCann taught two courses each in the Spring 2013, Fall 2013, and Spring 2014 semesters. Additionally, McCann holds a position with the Employer as Assistant Director of First Year Programs/Leadership Development. In this position, McCann supervises student workers in the Employer’s Commuter Lounge. Stokes testified that this is a lounge dedicated to students who commute to the Employer’s campus and is set up to facilitate a “sense of community” amongst those students. McCann reports to the Director of First Year Programs/Leadership Development.

b. Analysis of McCann’s Ballot

It is uncontroverted that McCann was employed as the Assistant Director of First Year Programs/Leadership Development during the eligibility period and through the election. I find that McCann is ineligible as a director and recommend that the challenge to his ballot be sustained.

25. Nicholas Mauro

a. Statement of Fact

The Petitioner challenged Mauro’s ballot on the basis that Mauro holds a position as an administrator or alternatively, as an “other employee,” and is thus ineligible to vote. Mauro taught one class during the Spring 2014 semester. This course was titled “SHRM Essentials of Human Resources Management.” It was a continuing education class from which students did not receive credit. Stokes testified that this was the first class which Mauro had taught for the Employer.

Mauro is also employed by the Employer as an HR Generalist in the Employer’s Human Resources department. In this capacity he reports to the Manager of Human Resources. An

email sent from Mauro to Gary Kenton³¹ and Goddard requested that the Petitioner's representatives not visit him at home. In this email, Mauro stated that he was "a member of the HR team at the college and I am a full-time administrator as well as an adjunct in the School of Global and Professional Studies."

b. Analysis of Mauro's Ballot

Mauro was clearly employed by the Employer as an HR generalist during the requisite time period. Mauro described himself as both an adjunct and an administrator to Goddard and Kenton. I find that Mauro is an administrator, that administrators are excluded from the bargaining unit, and I recommend that the challenge to Mauro's ballot be sustained.³²

26. Michael Napolitano

a. Statement of Fact

The Petitioner challenged Napolitano's ballot on the grounds that he is a manager and thus excluded from the bargaining unit. Alternatively, the Petitioner argues that Napolitano should be excluded as an "other employee." Napolitano taught four courses in the Spring 2013 semester and two courses each in the Fall 2013 and Spring 2014 semesters. Napolitano is also employed by the Employer as its Manager of Music Operations. Stokes testified that this is an office manager position. The Employer's job description for this position states that Napolitano reports directly to the Director of Music and that Napolitano's job duties include "[managing] the

³¹ Kenton is an adjunct for the Employer as well as a member of the Petitioner's organizing committee.

³² I have doubts as to whether Mauro meets the Agreement's definition of "adjunct," as the Agreement requires that "to be eligible to vote the employees must have taught at least one credit hour in any given semester in the twelve months preceding the eligibility date." Mauro's only course taught during the eligibility period was a zero-credit class in the Spring 2014 semester. Although the Petitioner raised the issue of Mauro not being an adjunct during the hearing, it made no mention of that issue in its brief; rather, the Petitioner's brief focused only on whether Mauro's position as HR generalist precluded him from being included in the bargaining unit. I am precluded from considering any basis for challenge not properly before me. *J.K Pulley Co.*, 338 NLRB 1152, 1153 (2003). As I have determined that Mauro is otherwise ineligible, I do not pass on whether Mauro's teaching experience is sufficient to render him an adjunct as defined by the parties in the Agreement.

day-to-day operations of a comprehensive music program that includes more than 25 performance groups and involves more than 300 students.”

b. Analysis of Napolitano’s Ballot

Based on the uncontroverted evidence that Napolitano is the Employer’s Manager of Music Operations, I find that he is excluded from the bargaining unit as a manager. As discussed above, I find that the parties’ use of the term “manager” in the Agreement refers to employees holding the title of manager, and not to managerial employees as defined by the Board. I recommend that the challenge to Napolitano’s ballot be sustained.

27. Jane O’Brien

a. Statement of Fact

It is undisputed that O’Brien taught one class each in the Spring 2013, Fall 2013, and Spring 2014 semesters. However, the Petitioner challenged O’Brien’s ballot on the grounds that she was employed by the Employer as the Director of Health Services during the eligibility period. The Petitioner argued that O’Brien should be excluded as a director, a professional employee, or as an “other employee.” In support of its position, the Petitioner presented a portion of an article from the Employer’s website, although the date and the remainder of the article were not provided. This article identified O’Brien as the Employer’s Director of Health Services. The Petitioner also presented an undated page of the Employer’s catalogue which identifies O’Brien as the Director of Health Services.³³

Stokes testified that her research into O’Brien’s work history revealed that O’Brien had retired from her position as Director of Health Services in August of 2007. According to Stokes, Mary Dunn is the Employer’s current Director of Health Services. Stokes also testified that a number of individuals on the catalogue presented by the Petitioner were no longer in those roles.

³³ The catalogue also identified O’Brien as an RN.

The Employer also presented a payroll record for O'Brien which showed that she only received pay as an adjunct during the pay period of May 16 – May 31, 2014.

b. Analysis of O'Brien's Ballot

I find that O'Brien had left her position as Director of Health Services prior to the eligibility period. In doing so, I credit Stokes' testimony over the documents submitted by the Petitioner. I note that both the article and the catalogue submitted by the Petitioner were incomplete and undated, making it difficult to ascertain the time frame in which these documents were originally published. Moreover, Stokes was able to identify the current Director of Health Services, and testified credibly that Mary Dunn, and not Jane O'Brien, currently held that position.

RNs have been generally considered by the Board to be professional employees. See *Centralia Convalescent Center*, 295 NLRB 42 (1989), citing *Mercy Hospitals of Sacramento*, 217 NLRB 765 (1975). However, as the Board stated in *Chrysler Corporation – Space Division*, 154 NLRB 352, 354 (1965), “the principal test depends not so much on the individual qualifications of each employee as on the predominant character of the work in which they are engaged.” The record is not clear as to whether O'Brien remains an RN. However, what is clear that she was employed only as an adjunct during the eligibility period, and thus her credentials as an RN are immaterial. I find that O'Brien is properly included in the bargaining unit, and recommend that the challenge to her ballot be overruled.

28. Adam Ritter

a. Statement of Fact

The Petitioner challenged Ritter's ballot on the grounds that he was employed as a director by the Employer during the requisite time period. Alternatively, the Petitioner argues

that Ritter should be excluded as an “other employee.” Ritter taught two courses for the Employer in the Spring 2013 semester and taught one course each in the Fall 2013 and Spring 2014 semesters. Ritter is also employed as the Associate Director of Enrollment Marketing and Communications. The corresponding job description for this position requires Ritter to be “[r]esponsible for supporting the implementation and oversight of enrollment area online marketing materials.” Ritter reports to the Executive Director of Enrollment Marketing and Communications.

b. Analysis of Ritter’s Ballot

I find that Ritter’s role as Associate Director of Enrollment Marketing and Communications precludes him from being eligible to vote in this election. Consistent with my findings of similarly situated employees, I find that directors are excluded from the bargaining unit. I recommend that the challenge to his ballot be sustained.

29. William Robelee

a. Statement of Fact

The Petitioner challenged Robelee’s ballot on the grounds that he was employed by the Employer in positions other than adjunct during the eligibility period. Robelee taught one class each in the Spring 2013, Fall 2013, and Spring 2014 semesters. For the period of January 22 – May 17, 2013, Robelee served as the Employer’s School Psychology Internship Coordinator as well as its School Psychology Portfolio Coordinator. The contracts for these positions identified each as a “temporary part-time administrative staff position.” From August 26 – December 13, 2013, Robelee reprised his role as School Psychology Portfolio Coordinator. For the period of January 21 – May 16, 2014, Robelee again served as both School Psychology Portfolio Coordinator and School Psychology Internship Coordinator.

b. Analysis of Robelee’s Ballot

The Petitioner’s basis for this challenge is that these coordinator positions serve to exclude Robelee. I again note that the Board’s standard for inclusion is that the employee in question must be employed in the bargaining unit on both the payroll cutoff date and the date that the employee mailed his ballot to the Board’s offices. I find that Robelee was employed in the bargaining unit as of the date he mailed his ballot to the Board’s offices. I base this on the 2014 coordinator positions detailed above ending on May 16. However, I find that Robelee was not employed in the bargaining unit on the payroll cutoff date of April 30. At that time, Robelee was employed as a School Psychology Portfolio Coordinator and a School Psychology Internship Coordinator. I conclude that he had other employment with the Employer and is thus ineligible as an “other employee.” I recommend that the challenge to Robelee’s ballot be sustained.

30. Deidre Sepp

a. Statement of Fact

The Petitioner challenged Sepp’s ballot on the grounds that she is employed as a director for the Employer and is thus excluded on those grounds. Alternatively, the Petitioner alleges that Sepp’s full-time role with the Employer makes her ineligible as an “other employee.” Sepp taught one course during the Summer 2013 semester and two courses each in the Fall 2013 and Spring 2014 semesters. In addition to those duties, Sepp is employed as the Director of Career Development. The job description accompanying her position states that she is responsible for “[providing] a comprehensive career development program that operates efficiently and effectively in conjunction with the College’s mission and strategic plan. To achieve excellence in career services designed to assist students and alumni in career planning and resume

development.” Sepp is responsible for supervising student workers and interns in that role, and her direct report is the Executive Director of Career Services.

b. Analysis of Sepp’s Ballot

I find that Sepp is employed by the Employer as a director during the eligibility period as well as during the election. As the title of director is explicitly excluded from the Agreement, I conclude that she is not an eligible voter. As such, I recommend that the challenge to her ballot be sustained.

31. Sasha Shivers

a. Statement of Fact

There is no dispute between the parties that Shivers was employed in the appropriate bargaining unit during the eligibility period. However, the Petitioner challenged Shivers’ ballot on the grounds that she would be leaving the bargaining unit shortly after the election, and thus does not share a community of interest with the rest of the bargaining unit.

The record reflects that Shivers taught one course for the Employer in during the Spring of 2013, two courses during the Fall 2013 semester and two courses in the Spring of 2014. However, on June 12, 2014, Shivers was offered a position with the Employer as a Teaching Associate. This offer was a "term" appointment which ran from August 28, 2014 until August 31, 2015. Shivers accepted this offer on July 15, 2014. Stokes testified that the Teaching Associate position is a full-time position, although she noted that it was a tenure-ineligible position. Stokes further testified that Shivers has no expectation of continued employment in this Teaching Associate position after August 31, 2015, and that Shivers could return to teaching in an adjunct capacity thereafter. However, Stokes noted that Shivers was unable to serve as an adjunct during her employment as a Teaching Associate.

b. Analysis of Shivers' Ballot

The Petitioner argues that Shivers' ballot should be considered ineligible because her Teaching Associate position will remove her from the unit on a certain date, and as such, she no longer shares a sufficient community of interest with the remaining employees. The Employer notes that Shivers did not begin her job as a Teaching Associate until after the conclusion of the vote and asserts that Shivers did not indicate her willingness to accept this new position until July 15, after the conclusion of the election. The Employer further argues that Shivers is likely to return to adjunct teaching after the conclusion of her Teaching Associate appointment.

As an initial matter, I find that the Board's "date certain" test is inapplicable with respect to Shivers. The "date certain" test applies only to temporary employees. See *St. Thomas – St. John Cable TV*, 309 NLRB 712, 712-713 (1992), citing *Pen Mar Packaging Corp.*, 261 NLRB 874 (1982). Generally speaking, an employee is eligible to vote if he or she is employed "both during the payroll eligibility period and on the election date to be eligible to vote in the election."³⁴ In this case, while Shivers had been offered a position as a Teaching Associate on June 12, she did not accept this assignment until July 15, and this assignment did not commence until August 28. The Board has held that even if an employee announces his or her intention to leave the bargaining unit after an election, the employee is eligible to vote provided that he or she is employed both during the eligibility period and on the date of the election. See *Personal Products Corp.*, 114 NLRB 959, 961 (1955) (Board overruled challenge to employee who had announced intent to quit two days after election), *Amoco Oil Corp.*, 289 NLRB 280 (1988) (Board found eligible an employee who had announced a resignation date and took unused vacation time for the last four weeks of his employment, including the election date), and *Mercy College*, 231 NLRB 315 (1977) ("only the period preceding the election...is determinative of

³⁴ *Apex Paper Box Co.*, 302 NLRB 67, 68 (1991).

eligibility, we do not rely on...evidence concerning...postelection work schedule and functions”). As Shivers was undisputedly employed by the Employer in the appropriate bargaining unit during the eligibility period and during the election, I recommend that the challenge to her ballot be overruled and her ballot be opened and counted.

32. Edward Sickler

a. Statement of Fact

The Petitioner challenged the ballot of Sickler on the basis that he is ineligible as an “other employee.” Sickler taught two courses each in the Spring 2013 and Fall 2013 semesters, and also taught one course in the Spring 2014 semester. In addition to these duties, Sickler was appointed as a Writing Center Tutor on two separate occasions in the relevant time frame. The first was effective from September 3, 2012 through May 17, 2013. The contract proffered with respect to this appointment described it as a “temporary, part-time, nine-month, administrative staff position.” Sickler’s second appointment as a Writing Center Tutor had effective dates of August 26, 2013 – May 16, 2014. In addition to being described as a “temporary, part-time, nine-month, administrative staff position,” the contract associated with respect to this appointment stated that “[t]he hours of work for this position are up to 20 per week.”

b. Analysis of Sickler’s Ballot

Sickler’s 2012-2013 position as Writing Center Tutor does not disqualify him from being eligible to vote, as it ended prior to the payroll cutoff date. However, the second appointment to that position did not end until May 16, 2014, which was after the April 30 payroll cutoff date. As Sickler was employed in a position other than adjunct at the end of the payroll eligibility period, I recommend that the challenge to his ballot be sustained.

33. Timothy Smith

a. Statement of Fact

The Petitioner challenged Smith's ballot on the grounds that he was employed as a coach, which disqualifies him from being an eligible voter. Alternatively, the Petitioner argues he should be excluded as an "other employee." Smith taught one class each in the Spring 2013, Fall 2013, and Spring 2014 semesters. Stokes testified that Smith is also employed as the Employer's Head Men's Tennis Coach. According to Stokes, this is a part-time position and Smith is the Employer's only tennis coach. The contract proffered to Smith in the relevant time frame has effective dates of August 15, 2013 – June 30, 2014. The contract also states that his appointment is a "temporary, part-time, eleven-month, administrative staff position."

b. Analysis of Smith's Ballot

As Smith's appointment as Head Men's Tennis Coach had effective dates of August 15, 2013 – June 30, 2014, I find that he was employed as a coach on the payroll cutoff date as well as during the election itself.³⁵ As coaches are expressly excluded from the bargaining unit, I recommend that the challenge to his ballot be sustained.

34. Roberta Staples

a. Statement of Fact

The Petitioner challenged Staples' ballot on the grounds that Staples is a director or an administrator and should be excluded on that basis. Alternatively, the Petitioner argues that Staples should be excluded as an "other employee." Staples taught one class in the Spring 2014 semester. She also serves as the Employer's Director of Professional and Student Development. The job description submitted in connection with this position states that Staples is responsible

³⁵ Again, I note that the date of election for mail ballot elections is the date that a voter mails his or her ballot to the Board's offices. The count and tally of ballots occurred on June 30, 2014, the same date that Smith's administrative appointment ended.

for “[p]rovision of staff training and professional development opportunities and coordination of initiative projects within the Division of Student Affairs.

b. Analysis of Staples’ Ballot

It is undisputed that Staples served as the Employer’s Director of Professional and Student Development in addition to her teaching responsibilities. As directors are excluded from the bargaining unit, I find that Staples is ineligible to vote, and recommend that the challenge to her ballot be sustained.

35. Karen Tomkins-Tinch

a. Statement of Fact

The Petitioner challenged Tomkins-Tinch’s ballot on the grounds that she is an administrator and thus barred from voting. Alternatively, the Petitioner argues that Tomkins-Tinch is ineligible because she is an “other employee.” Tomkins-Tinch taught one course each in the Spring 2013 and Fall 2013 semesters. She also serves as the Employer’s Coordinator for International Student Programs. The job description for this position states that Tomkins-Tinch job is to “[a]dminister the orientation program for international graduate and undergraduate students” and that she is “[r]esponsible for managing the international visiting students and providing counseling and advisement to students.” Under the “Skills and Experience” section of the job description, the Employer requires “[a]dministrative experience and two to three years of educational training and/or experience related to international students...” In this position she supervises International Student Orientation Assistants.

b. Analysis of Tomkins-Tinch’s Ballot

I find that Tomkins-Tinch is an administrator, based on the requirements for her position and that the position itself is administrative in nature. As administrators are specifically

excluded from the bargaining unit, I recommend that the challenge to Tomkins-Tinch's ballot be sustained.

36. Laura Toonkel

a. Statement of Fact

The Petitioner challenged Toonkel's ballot on the grounds that she was a manager and/or director during the relevant time frame. Alternatively, the Petitioner argues that Toonkel is ineligible as an "other employee." Toonkel taught two courses each in the Spring 2013, Summer 2013,³⁶ Fall 2013, and Spring 2014 semesters.

Toonkel also had a number of Administrative Staff Appointments during that time frame. From September 4, 2012 – May 17, 2013, Toonkel served as Director of Art Internships for the Marist in Manhattan Program. This was a part-time administrative staff position. For the period of September 3, 2012 – May 31, 2013, Toonkel had two part-time, administrative staff positions with the Employer. The first was as Director of Art Internships at the Employer's main campus in Poughkeepsie, and the second was as Co-Studio Manager at the Employer's main campus.

Toonkel received another three part-time administrative staff appointments for the period of August 26, 2013 – December 13, 2013. One was as Director of Art Internships for the Marist in Manhattan Program with effective dates of August 26, 2013 – December 13, 2013. The contract accompanying this offer stated that "[t]he hours of work for this position are not to exceed 3 per week." Toonkel also reprised her role as Co-Studio Manager, with the relevant contract providing that the hours for this position were "not to exceed 7 per week." She also served as the Employer's Director of Art Internships at its main campus, working no more than 5 hours per week.

³⁶ Stokes testified that the two classes for which Toonkel received payment in the summer were internships that Toonkel supervised.

For the period of January 21, 2014 – May 16, 2014, Toonkel again reprised her roles as Director of Art Internships for the Marist in Manhattan Program, Co-Studio Manager, and Director of Art Internships at the Employer’s main campus. The hours per week for these assignments remained three, seven, and five, respectively.

b. Analysis of Toonkel’s Ballot

Again I am presented with a scenario in which an employee was properly in the bargaining unit on the date of the election, but not on the payroll cutoff date. Toonkel’s three administrative staff appointments for 2014 all ended on May 16. The payroll cutoff date is April 30. She was ineligible as she served as Director of Art Internships in two locations as well as Co-Studio Manager. I find that she is both a manager and a director, and as both are excluded from the bargaining unit, I recommend that the challenge to Toonkel’s ballot be sustained.

37. Michele Williams

a. Statement of Fact

The Petitioner challenged Williams’ ballot on the grounds that she is an administrator, manager, and/or director and is thus disqualified from voting. Williams taught one course each in the Spring 2013, Fall 2013, and Spring 2014 semesters. She is also employed as the Employer’s Assistant Director of Student Activities. According to the job description corresponding to her position, Williams is expected to “[a]ssist in administering and managing operations of the Student Center working with services, facilities, student staffing, programs, and events.” She reports to the Director of Student Activities.

b. Analysis of Williams' Ballot

The uncontroverted evidence shows that Williams is employed as an Assistant Director for the Employer. Directors are expressly excluded from the bargaining unit. Accordingly, I recommend that the challenge to Williams' ballot be sustained.

E. The Employer's Challenges

1. Carl Jensen

a. Statement of Fact

The Employer challenged the ballot of Jensen on the grounds that his employment with the Employer ended prior to the election and he is thus ineligible to vote. Dr. Della Lee Sue is Department Chairperson of the Department of Accounting and Finance for the Employer. She testified that Jensen taught two courses of Principles of Microeconomics during the Fall 2013 semester. According to Sue, beginning in October of 2013, multiple students complained to her about Jensen's teaching style. Sue also testified that she and Lawrence Singleton, Dean of the Employer's School of Management, held a meeting with Jensen in mid-November. On November 17, after the meeting with Jensen, Sue sent Jensen an email in which she stated, in pertinent part, the following:

With respect to continuing employment at Marist, the usual process is that part-time faculty let me know of their interest and availability. You have explained to me your teaching philosophy and demonstrated your enthusiasm to try new pedagogical techniques at Marist. However, Dean Singleton and I agree that Marist probably not a good fit for you at this point.

Jensen then followed up by emailing Singleton directly on December 2, 2013 and requested a meeting. In an email response dated December 10, 2013, Singleton responded that "[w]hile we don't see a continuing role for you in the near term, we will keep your materials on file. Should a need arise we will certainly reach out to you."

b. Analysis of Jensen's Ballot

Jensen clearly satisfies the initial eligibility requirements insofar as his adjunct teaching in the Fall 2013 semester is inside the eligibility period. However, the Employer argues that he had no reasonable expectation of continued employment and is therefore ineligible. The Petitioner argues that the statements to Jensen regarding his future employment were equivocal and not definitive enough to dispel the prospect of employment with the Employer.

As discussed above, the Board requires employees to be employed in the bargaining unit on the payroll cutoff date as well as the date of the election. The issue here is whether or not the Employer's December 2 and 10, 2013 communications to Jensen regarding his future status as an employee are sufficiently clear to dispel any future prospect of employment. I find this situation akin to a layoff.³⁷ In such situations, the Board has held that an employee is eligible to vote provided he or she has a reasonable expectation of recall. *Tomadur, Inc.*, 196 NLRB 706, 707 (1972).

I find the Board's decision in *Foam Fabricators*, 273 NLRB 511 (1984) instructive. In that decision, the Board held the following:

Absent any employer past experience or future plans, where an employee is given no estimate as to the duration of the layoff or any specific indication as to when, if at all, he will be recalled there is no reasonable expectancy. Vague statements by the employer as to the "chance" or "possibility" of the employee being rehired do not provide an adequate basis for concluding that the employee had a reasonable expectancy of reemployment.

273 NLRB at 512.

Applying this analysis to the facts surrounding Jensen's employment, I find that he had no reasonable expectation of future employment with the Employer. Sue's December 2, 2013 email which informed Jensen that the Employer was "probably not a good fit" is sufficiently

³⁷ I therefore find the cases cited by the Petitioner to be distinguishable. *Marian Medical Center*, 339 NLRB 127 (2003) and *St. Thomas-St. John Cable TV*, supra are applicable to temporary employees.

clear as to establish that Jensen had no expectation of return. Singleton's December 10, 2013 email was similarly clear, as he stated to Jensen that "we don't see a continuing role for you in the future." Singleton's statement that the Employer would "reach out to" Jensen and keep his materials on file is the sort of platitude held by the Board in *Foam Fabricators* to be "nothing more than a vague implication" that an employee might be recalled.

Accordingly, I find that Jensen had no reasonable expectation of future employment with the Employer, and I recommend that the challenge to his ballot be sustained.

2. James Teneyck

a. Statement of Fact

The Employer challenged Teneyck's ballot on the grounds that he never taught as an adjunct for the Employer. According to Stokes, Teneyck is a retired faculty member for the Employer. Stokes testified that in the Spring 2013 semester, a full-time faculty member suffered a heart attack midway through the semester and was unable to complete the semester. Teneyck agreed to teach the last six weeks of the semester. Stokes characterized Teneyck's status as that of a substitute rather than an adjunct. The contract regarding Teneyck's appointment to that position was offered on April 11, 2013 and signed by him on April 23, 2013, which Stokes testified is about two-thirds of the way through the semester.

b. Analysis of Teneyck's Ballot

The Employer argues that Teneyck's teaching of one class in the Spring of 2013 was an emergency stopgap measure, that Teneyck was not an adjunct during the requisite time period or at any other time, and thus the challenge to his ballot should be sustained.³⁸ The uncontroverted evidence is that Teneyck only taught six weeks of one course, and only did so because the original instructor suffered a heart attack. Based on the limited nature of his teaching duties and

³⁸ The Petitioner, in its brief, stated that Teneyck was an eligible voter.

the extraordinary circumstances from which they arise, I agree that Teneyck is not an eligible voter. I therefore recommend that the challenge to his ballot be sustained.

F. The Board Agent's Challenge

1. Rena Hill

a. Statement of Fact

The Board agent challenged Hill's name as it did not appear on the eligibility list. However, the Employer claims this was an inadvertent error and that Hill should be eligible to vote. Hill taught three classes in the Spring 2013 semester and one class in the Summer 2013 semester. For the period of September 4, 2012 through May 17, 2013, Hill served as an Academic Advisor in the Employer's School of Management. The contract signed by Hill with respect to this position stated that it was a "temporary, part-time, nine-month, administrative staff position."

Beginning in the Fall 2013 semester, Hill signed several successive contracts to be a full-time Visiting Lecturer for the Employer. The first of these had effective dates of August 23 – December 31, 2013. The next was for the period of January 21 – May 31, 2014. The most recent is effective from June 1, 2014 until May 31, 2015. According to Stokes, this Visiting Lecturer position can only be held by an individual for two consecutive years, per the Employer's Faculty Handbook. Stokes testified that she spoke with Hill via telephone during the election. Hill asked Stokes if she should have received a ballot.

There was no evidence submitted that Hill taught as an adjunct during the period that she was a Visiting Lecturer.

b. Analysis of Hill's Ballot

The Employer argues that Hill taught as an adjunct during the requisite time period, that her Visiting Lecturer position will end on May 31, 2015, and she will thereafter continue teaching as an adjunct. The Petitioner argues that Hill's position as Visiting Lecturer renders her ineligible as "other faculty" as excluded from the bargaining unit. The Petitioner also argues that Hill's Academic Advisor position renders her ineligible, as she would be an "other employee" as excluded from the Agreement.

Again, I note that an employee's status on the payroll cutoff date and on the date of the election is dispositive of his or her eligibility. On both April 30 and during the election itself, Hill was employed as a Visiting Lecturer. This title is undisputedly a full-time faculty position. The Agreement excludes "all other faculty, tenured and tenure eligible faculty, [and] full-time faculty." Hill's position as Visiting Lecturer renders her a full-time faculty member. I find that she is excluded from the bargaining unit on that basis.³⁹ Accordingly, I recommend that the challenge to her ballot be sustained.

V. THE OBJECTIONS

Representation elections are not lightly set aside. On the contrary, "there is a strong presumption that ballots cast under specific NLRB procedural safeguards reflect the true desires of the employees." *Safeway, Inc.*, 338 NLRB 525, 525-526 (2002), quoting *NLRB v. Hood Furniture Mfg. Co.*, 941 F.2d 325, 328 (5th Cir. 1991). Accordingly, the burden of proof on the objecting party is a "heavy one." *Nor-Cal Ready Mix, Inc.*, 327 NLRB 1091, 1092 (1999), quoting *Kux Mfg. Co. v. NLRB*, 890 F.2d 804, 808 (6th Cir. 1989). At all stages of post-election

³⁹ I do not rely on Hill's position as Academic Advisor as a basis for exclusion, as I note that she only held that title until May 13, 2013. I also do not agree with the Employer's assertion that Hill stated to Stokes during their phone call that Hill intended to return as an adjunct after her Visiting Lecturer position had ended. I find no basis in the record to support this assertion.

proceedings, the objecting party bears the burden of proof. *Frontier Hotel*, 265 NLRB 343 (1982).

Here, the Petitioner is the sole objecting party; therefore, it bears the burden of proof. Generally speaking, the Board will only consider conduct occurring within the so-called “critical period” to serve as the basis for setting aside an election. *Gibraltar Steel Corp.*, 323 NLRB 601 (1997). That period begins on the date a petition is filed and ends on the date of the election. In this case, petition was filed on April 28 and the election period ended with the tally of ballots on June 30. The standard for objectionable conduct is an objective one. *Lancaster Care Center, LLC*, 338 NLRB 671, 671-672 (2002). Conduct will be found objectionable if it has “the tendency to interfere with the employees’ freedom of choice.” *Cambridge Tool & Mfg. Co.*, 316 NLRB 716 (1995).

The factors to be considered in determining whether this interference has occurred was summarized thusly by the Board in *Cedars-Sinai Medical Center*, 342 NLRB 596, 597 (2004):

...[T]he Board considers (1) the number of incidents of misconduct; (2) the severity of the incidents and whether they were likely to cause fear among employees in the bargaining unit; (3) the number of employees in the bargaining unit subjected to the misconduct; (4) the proximity of the misconduct to the election date; (5) the degree of persistence of the misconduct in the minds of the bargaining unit employees; (6) the extent of the dissemination of the misconduct among bargaining unit employees; (7) the effect, if any, of misconduct by the opposing party to cancel out the effects of the original misconduct; (8) the closeness of the final vote; (9) the degree to which the misconduct can be attributed to the party. See, e.g., *Taylor Wharton Division*, 336 NLRB 157, 158 (2001); *Chicago Metallic Corp.*, 273 NLRB 1677, 1704 (1985), *enfd.* 794 F.2d 527 (9th Cir. 1986).

Based on the above precedent, I make the following recommendations:

A. Objection 1 – During the critical period, Steven M. Ralston, Dean of the School of Communications and the Arts, sent a communication to adjunct faculty stating that if the Union won the election and represented the adjunct faculty, bargaining would be from “scratch,” thereby threatening the adjunct faculty with reprisals and loss of pay and benefits as a result of selecting the Union as their bargaining representative.

Objection 4 – During the critical period, Steven M. Ralston, Dean of the School of Communication and the Arts, sent a communication to adjunct faculty soliciting grievances and thereby implicitly promising to remedy those grievances.

1. Statement of Fact:⁴⁰

On May 21, Stephanie Smith, a secretary in the office of the School of Communication and the Arts at Marist, sent an email to approximately 50-75 adjunct faculty members in the School of Communication and the Arts on behalf of Steven Ralston, then-Dean of the School of Communication and the Arts.⁴¹ This email states:⁴²

Colleagues,

I am Steven Ralston, Dean of the School of Communication and the Arts.

I am writing to follow up on Thom Wermuth's recent letter to you regarding SEIU. I am available to provide clarification and answer any questions you might have about Thom's letter, the College's position on SEIU, and to the extent that I can, SEIU itself. In addition, I am eager to learn about your concerns and take note of any suggestions you might have for improving the way in which we work together.

I would like to make two important points in the meantime. First, please be aware that should the June vote favor SEUI [sic], everything related to adjunct faculty employment at Marist will be subject to negotiation, that is, we start from "scratch." You should not assume that what you have now, including salary, will be the same following the conclusion of negotiations. Second, as Thom indicated previously, be certain to cast your vote. Your voice is important to ensure adequate representation among our adjunct faculty.

Feel free to contact me and your department chair/program director about any matter associated with SEIU at Marist College.

Cheers,
Steve R

⁴⁰ Objections 1 & 4 arise from the same document and will thus be addressed concurrently.

⁴¹ The record reflects that Ralston left this position with the Employer during July or August of 2014.

⁴² In the exhibit that was offered, apostrophes and quotation marks appear as question marks for unknown reasons. For the sake of clarity, I have replaced these question marks with quotation marks and apostrophes where appropriate.

Adjunct Gary Kenton's uncontroverted testimony was that Ralston's email was the first instance in Kenton's six years as an adjunct for the Employer that Ralston had voiced an interest in having adjuncts approach him with suggestions or concerns.

2. Analysis of Objection 1:

Employer statements that bargaining will start from "scratch" have been long considered by the Board to be "dangerous phrase[s]," as they carry "the seed of a threat that the employer will become punitively intransigent in the event the union wins the election." *Economy Fire & Casualty Corp.*, 264 NLRB 16, 21 (1982), quoting *Coach and Equipment Sales Corp.*, 228 NLRB 440 (1977). While considered dangerous, telling employees that bargaining will start from scratch is not per se unlawful. *Federated Logistics & Operations*, 340 NLRB 255 (2003). As the Board stated in *BP Amoco Chemical-Chocolate Bayou*, 351 NLRB 614, 617 (2007) (citations omitted):

Such statements are unlawful and objectionable when, in context, they effectively threaten employees with the loss of existing benefits and leave them with the impression that what they may ultimately received depends in large measure on what the Union can induce the employer to restore. On the other hand, such statements are permissible when they merely describe the bargaining process and/or are made in direct response to union promises. Similarly, statements that employees could lose benefits as a result of bargaining have been found lawful where they merely [state] what could lawfully happen during the give and take of bargaining.

See also *Bi-Lo*, 303 NLRB 749, 749-750 (1991), where the Board acknowledged that "an employer may in certain circumstances lawfully describe the bargaining process as 'bargaining from scratch' and refer to the possible negotiated loss of existing benefits."

Ralston's email, while employing this "dangerous" language, does not meet the above-stated standard for objectionable conduct. The email does not threaten the loss of pay or benefits; rather, it simply states that employees' terms and conditions of employment are subject

to change in the event the Petitioner prevailed in the election. The Board has found comparable statements not to constitute objectionable conduct. For example, see *Bi-Lo*, supra, where the Board found a statement by an employer that a union would be “bargaining basically from nothing” to be a lawful statement insofar as it did not “threaten to strip away benefits prior to bargaining and force the Union to negotiate restoration of those benefits.” See also *Mediplex of Connecticut, Inc.*, 319 NLRB 281, 287-289 (1995), where the Board found a statement that “in most cases the Union must bargain from scratch” to be lawful. Similarly, Ralston’s email did not threaten the loss of pay or benefits. Rather, the portion of the email related to Objection 1 merely stated the reality of a collective-bargaining relationship. Accordingly, I recommend that Objection 1 be overruled.

3. Analysis of Objection 4:

The Board has long held that, “in the absence of a previous practice of doing so, an employer’s solicitation of grievances during an organizing campaign is objectionable when the employer expressly or impliedly promises to remedy those grievances.” *Mandalay Bay Resort & Casino*, 355 NLRB 529 (2010). As the Board stated in *Reliance Electric Co.*, 191 NLRB 44, 46 (1971):

Where, as here, an employer, who has not previously had a practice of soliciting employee grievances or complaints, adopts such a course when unions engage in organizational campaigns seeking to represent employees, we think there is a compelling inference that he is implicitly promising to correct those inequities he discovers as a result of his inquiries and likewise urging on his employees that the combined program of inquiry and correction will make union representation unnecessary.

However, a solicitation of grievances is not per se unlawful. This solicitation of grievances presents a rebuttable presumption of unlawful conduct. In *Uarco, Inc.*, 216 NLRB 1, 2 (1974) the Board articulated its rationale for approaching such cases by stating that:

[I]t is not the solicitation of grievances itself that is coercive...but the promise to correct grievances or a concurrent interrogation or polling about union sympathies that is unlawful; the solicitation of grievances merely raises an inference that the employer is making such a problem, which inference is rebuttable by the employer.

Kenton's uncontroverted testimony is that the Employer had no previous practice of asking adjuncts about their suggestions and concerns. However, I find Ralston's remarks similar to those found by the Board to be lawful in *National Micronetics*, 277 NLRB 993 (1985) and *Noah's New York Bagels, Inc.*, 324 NLRB 266, 267 (1997). In *National Micronetics*, the Board found an employer's request to give him more time to be "too vague" to rise to the level of objectionable conduct. In *Noah's New York Bagels, Inc.*, the request from an employer for a second chance was found not to constitute objectionable conduct. Similarly, the statements from Ralston that he was "eager to learn of [employees'] concerns and take note of any suggestions" are too vague to constitute a solicitation of grievances. Accordingly, I recommend that Objection 4 be overruled.

B. Objection 2 – During the critical period, Deborah Raikes-Colbert, Associate Vice President for Human Resources, sent a communication to adjunct faculty stating that if the Union won the election and represented the adjunct faculty, "negotiations can start from scratch," thereby threatening the adjunct faculty with reprisals and loss of pay and benefits as a result of selecting the Union as their bargaining representatives.

Objection 3 – During the critical period, Deborah Raikes-Colbert, Associate Vice President for Human Resources, sent a letter dated June 6, 2014, to adjunct faculty stating that if the Union won the election and represented the adjunct faculty, "negotiations can start from scratch," thereby threatening the adjunct faculty with reprisals and loss of pay and benefits as a result of selecting the Union as their bargaining representative.

1. Statement of Fact:⁴³

The facts surrounding Objections 2 and 3 are virtually undisputed. On May 30, Deborah Raikes-Colbert sent an email to adjunct employees via the Employer's MARFACA system.

⁴³ Objection 2 relates to the May 30 email and Objection 3 involves the June 6 letter. While the messages themselves are not identical, the language objected to by the Petitioner is. Therefore, these two objections will be analyzed together.

MARFACA is a distribution list for adjunct faculty only. On June 6, Raikes-Colbert mailed a letter to adjunct faculty. The topic of both the May 30 email and the June 6 letter was the Petitioner's organizing effort. In these messages, Raikes-Colbert stated that "[c]ollective bargaining is not about just deciding what you want, asking for it, and getting it. It is an inherently adversarial process of give-and-take with each side making proposals to the other." Raikes-Colbert further stated that "negotiations can start from scratch," in the following context:

...[T]here has been some talk about how things "can only get better" and part-time faculty have "nothing to lose" though [sic] collective bargaining. This is not true. Your existing terms and conditions of employment would remain in place until bargaining is completed, but negotiations can start from scratch. In collective bargaining things can get better, worse, or stay the same. If they stay the same, employees actually do worse because dues are deducted from their paychecks.

...

While I cannot predict what the outcome of collective bargaining would be (no one can), I can tell you from my experience that Marist does not agree to union proposals that are irresponsible, do not make sense economically, and do not keep us competitive with other schools.

Raikes-Colbert's messages also stated that she did not think unionization was the correct path for employees to choose, and urged employees not to vote for the Petitioner.

2. Analysis of Objections 2 and 3:

As with Objection 1, "[w]here...the clearly articulated thrust of the bargaining-from-scratch statement is that the mere designation of a union will not automatically secure increases in wages and benefits, and that all such items are subject to bargaining, no violation will be found." *Coach and Equipment Sales Corp*, 228 NLRB at 441 (citations omitted). Here, even more so than in Ralston's email which forms the basis of Objection 1, Raikes-Colbert clearly and unambiguously stated that any loss in pay or benefits would come through the normal course of bargaining. Specifically, she asserted that "in collective bargaining, things can get better, worse,

or stay the same.” The Board has held other statements to this effect to be lawful. See, for instance, *Bi-Lo*, supra, where an employer official’s statement that bargaining was “like horse trading back and forth. You could win, you could lose, you know, you could be the same” was considered protected speech by the Board under Section 8(c). Likewise, her statement that the Employer would not agree to proposals that it found “irresponsible” is not unlawful. I therefore recommend that Objections 2 and 3 be overruled.

C. Objection 5 – During the critical period, Martin Shaffer, Dean of the School of Communications and the Arts, sent a communication to adjunct faculty soliciting grievances and thereby implicitly promising to remedy those grievances.

1. Statement of Fact:

This objection is based on an email sent from Martin Shaffer, Dean of the School of Liberal Arts, to adjunct Heather McIntosh. The first email was sent by Shaffer on May 27. This email contained the following passages:

As always, especially now that semester grading is finished, I invite you to provide any feedback regarding your teaching experience at Marist and any thoughts you may have regarding the ways that we might work together to improve the academic environment for you and our students.

...

As a member of the Marist College administration and a faculty member for twenty years, I can honestly say that while there are many benefits to teaching at Marist we are always looking for ways to improve all aspects of the college. I am happy to discuss any questions or concerns that you may have regarding part-time faculty unionization at Marist and, most importantly, it is essentially that you exercise your right to vote since the results will affect all part-time faculty.

McIntosh testified that this was the first time in her four years as an adjunct with the Employer that she had received an email from Shaffer asking for feedback. McIntosh also stated that she had not forwarded or otherwise shared this email with other employees.

2. Analysis of Objection 5:

Shaffer's statements to McIntosh in the May 27 email are of the same order of magnitude of those found not to be objectionable in the discussion of Ralston's May 21 email. I find Shaffer's invitation for "feedback" and openness to "discuss any questions or concerns" to be innocuous statements rather than an unprecedented solicitation of grievances. Additionally, McIntosh's testimony is that this was an email directly from Shaffer to herself, and there is no evidence that it was otherwise shared or disseminated to any other bargaining unit members. Even assuming that the email in question constituted a solicitation of grievances, there is no evidence that this email was shared or distributed amongst the bargaining unit. The Board does not presume dissemination; rather, the objecting party bears the burden of proof of showing that the misconduct was widely disseminated. *Dairyland USA Corp.*, 347 NLRB 310, 313 (2006), *enfd. sub nom. NLRB v. Food & Commercial Workers Union Local 348-S*, 273 Fed. Appx. 40 (2d. Cir. 2008). Here, the Petitioner has not met this burden. Accordingly, I recommend that Objection 5 be overruled.

D. Objection 6 – During the critical period and in response to the Union's organizing campaign, Respondent raised the base pay of the adjunct faculty in an amount that was more than a regular raise, thereby granting benefits in order to dissuade employees from supporting the Union.

Objection 7 – During the critical period, Respondent announced that it was going to raise the adjunct faculty in an amount that was more than a regular raise and published anti-Union literature containing information about such raise, thereby promising to grant benefits in order to dissuade employees from supporting the Union.

1. Statement of Fact:

The Petitioner alleges that the wage increase for the 2015 fiscal year⁴⁴ was “unprecedented” and that the wage increase for this year was in response to the Petitioner’s organizing effort. The Employer’s records reveal the following starting salaries for adjunct employees:⁴⁵

Academic Year	Starting Salary
2005	\$1,850
2006	\$2,000
2007	\$2,100
2008	\$2,250
2009	\$2,350
2010	\$2,400
2011	\$2,400
2012	\$2,500
2013	\$2,600
2014	\$2,750
2015	\$3,000

Wermuth, the Employer’s Vice President for Academic Affairs/Dean of Faculty, testified that he is responsible for devising the pay levels for adjunct faculty, although the Employer’s Board of Trustees is responsible for final approval of all salaries. Wermuth stated that, in his six years in his current position, one of his goals was to consistently increase the salaries of adjunct faculty. According to Wermuth, the lack of increase between the 2010 and 2011 fiscal years was due to the recession in the U.S. economy that began in 2008 and continued into 2010 and 2011.

Wermuth stated that, while he does take into account the national market for adjunct faculty, he relies more heavily on the regional marketplace as a guide for setting salaries. Specifically, Wermuth mentioned that he regularly relies on both Dutchess Community College (“DCC”) and SUNY New Paltz’s adjunct salaries to come up with a suitable number for the

⁴⁴ The Employer’s fiscal year begins on July 1 and ends on June 30. The 2015 fiscal year, then, begins on July 1, 2014 and ends on June 30, 2015. Accordingly, all references to the Employer’s fiscal year in this report shall follow that pattern.

⁴⁵ The amounts listed correspond to the salary for a 3-credit course.

Employer.⁴⁶ In the course of doing so for the 2015 fiscal year, he emailed Susan Lewis, the deputy chair of SUNY New Paltz's History Department. Wermuth's email, sent on February 10, asked Lewis what the starting salaries for adjuncts were. Lewis' response, also via email on February 10, stated that starting salaries for adjuncts at SUNY New Paltz were \$3,100 for a 3-credit class. Wermuth testified that, at approximately the same time as his correspondence with Lewis, he also contacted Joe Allen, the chair of DCC's English department, and received the salary levels of adjuncts at that school. Although Wermuth did not remember the exact amount, he stated it was in the \$2,900 range.

Wermuth further testified that he instructed the Associate Vice President of Academic Affairs, John Ritschdorff, prepare templates for starting salary levels of \$2,950 and \$3,000. These templates were prepared on February 13. According to Wermuth, he ultimately chose the \$3,000 starting salary level because he thought the boost up to \$3,000 would have a significant psychological impact. He equated this jump to when the Employer first raised adjunct salaries to \$2,000 approximately 10 years prior. Wermuth stated that he decided on the \$3,000 figure prior to learning about the Petitioner's organizing campaign.

On April 8, Wermuth sent an email to adjunct faculty via the MARFACA distribution list. This email stated that "[n]ext years [sic] compensation package, still under development, will include yet another annual increase." During the Board of Trustees meeting on May 3, the Employer approved its budget for the 2014-2015 fiscal year with the \$3,000 figure proposed by Wermuth.

On June 3, Wermuth mailed a letter to all part-time faculty regarding the Petitioner's organizing campaign. This letter contained the following passage:

⁴⁶ Dutchess Community College is a community college located in Dutchess County, New York. SUNY New Paltz offers both undergraduate and graduate programs.

Over the last six-and-a-half years, SEIU's contract with George Washington has resulted in average annual pay raises of less than one percent. Over that same period, Marist part-time faculty members have seen their pay increase an average of 24 percent, and the budget recently approved by the College's Board of Trustees for the coming academic year, with starting salaries set at \$3,000 for a three-credit course and \$4,000 for a four-credit course, will increase that to an average of almost 30 percent during the last seven years.

The letter also contained a chart comparing the various terms and conditions of employment for part-time faculty of Marist with those of George Washington University and American University, two institutions at which SEIU represents part-time faculty. Under a section titled "Compensation Per Course," the amounts of \$3,000 and \$4,000 for three and four-credit courses, respectively, appeared under the Marist column.

Wermuth testified that he was motivated to send the June 3 letter because of "misinformation" about the Employer's salary range. He referenced two different MARFAC-distributed emails in his testimony.⁴⁷ One was sent on April 5, from adjunct and organizing committee member Karen Comstock. This email stated, in part, that "at GW unionizing lead to a wage increase of 32%, which translates to an increase from \$2,500 to \$3,300 per course. Part-time faculty at GW secured further wage increases of 6%." In an email distributed by MARFAC on May 26, adjunct and organizing committee member Veroli listed a number of statistics from colleges and universities with unionized part-time faculty. He stated that "median pay per course is 25% higher for adjuncts where part-time faculty have union representation (\$3,100 on average, compared to \$2,475)." He also stated that union-represented part-time faculty received healthcare, retirement, and other benefits at a higher rate than non-represented part-time faculty.

⁴⁷ MARFAC, similar to MARFACA, is a list-serve system operated by the Employer. Unlike MARFACA, MARFAC-distributed emails are sent to all faculty members of the Employer. Further discussion of the MARFAC system can be found in the discussion of Objection 8 below.

Wermuth admitted that he had never previously announced the starting salaries for part-time faculty as he did in his June 3 letter. However, he further testified that by using the term “starting salary,” he was referring only to those adjuncts who would be starting employment with the Employer in the Fall 2014 semester, and not to those returning faculty who were eligible to vote. Wermuth testified that he was aware he was sending this letter to a “voting population,” and that he did not want to send this voting population information related to them.

Kenton and Goddard testified that their 2014 salaries were \$2,850 per course, and Comstock testified that her salary was \$2,899 per course. Veroli testified that he received \$2,799 per course in 2014. Kenton testified that upon seeing the June 3 letter from Wermuth, it was his understanding that he would be receiving a raise to at least \$3,000 per course.

2. Analysis of Objection 6:

The Petitioner’s objection is not to the Employer’s grant of a wage increase to adjunct faculty; rather, the objection is limited to the amount of the wage increase, which the Petitioner argues is “larger than usual.” In cases involving unusually large raises, the Board will find such an increase unlawful if an employer is not able to provide an “adequate business justification” for the raise. *St. Francis Hospital*, 263 NLRB 834 fn. 2 (1982). See also *San Lorenzo Lumber Company*, 238 NLRB 1421, 1422 (1978), citing *The Savings Bank Company*, 207 NLRB 269, 272 (1973).

In this case, it must first be determined whether the Employer’s raise of the starting salary for part-time faculty was unusually large. As noted above, it is undisputed that starting salaries for adjuncts was raised from \$2,750 in the 2014 fiscal year to \$3,000 in the 2015 fiscal year.⁴⁸ This equates to a 9.17% wage increase. It is true that the increase from 2014 to 2015 is a larger

⁴⁸ As noted above, the dollar figures used herein represent payment for teaching a 3-credit course.

increase, percentage-wise, than any previous year.⁴⁹ However, as noted by the Board in *Virginia Concrete Corp.*, 338 NLRB 1182, 1184 fn. 6 (2003), an employer's practice is shown "not by focusing on 1 or 2 particular years or on particular amounts, but rather by considering the overall pattern and range over the longer period of several years." In the instant case, given the variances in percentage change each year, including one-year wage freeze, such an analysis is unwieldy. There is no discernible pattern to be gleaned from the recent changes in adjunct pay, other than a general increase in the overall amount. Again, I note that the Employer had not granted a wage increase, either percentage or dollar-wise, of this amount in the past 10 years.

Having found that the wage increase was uncharacteristically large, it falls to the Employer to show that it had valid business reasons for implementing this change. I find that the Employer has sufficiently shown that it would have otherwise granted this increase. I credit Wermuth's testimony that he endeavored to increase the adjunct salaries to \$3,000 in mid-February. In crediting this portion of his testimony, I note that he was able to recall with relative specificity the dates that he asked his subordinate to prepare the salary progressions for \$2,950 and \$3,000 amounts, as well as his contemporaneous conversations with Lewis, the SUNY New Paltz faculty member, and Allen, the DCC faculty member. Wermuth testified that he did not become aware of the Petitioner's organizing drive until late February, and there is no evidence in the record to contradict that assertion.

Moreover, I find that the Employer had a business justification for implementing the \$3,000 level of adjunct pay. Wermuth testified that the increase from \$1,850 to \$2,000 per course between the 2005 and 2006 fiscal years resulted in a significant psychological boost. It is logical to assume that a similar psychological boost would occur when receiving an increase

⁴⁹ From fiscal year 2005 to fiscal year 2006, the increase was 8.1%, 2006 to 2007 was 5%, 2007 to 2008 was 7.14%, 2008 to 2009 was 4.44%, 2009 to 201 was 2.12%, 2010 to 2011 and 2011 to 2012 were 0% increases, 2012 to 2013 was 4%, and 2013 to 2014 was 5.77%.

from \$2,750 to \$3,000. I note that the second-largest increase in adjunct pay occurred under similar circumstances, as the increase between the \$1,850 and \$2,000 pay levels resulted in an 8.1% increase, only slightly smaller than the 9.1% increase at issue here. SUNY New Paltz, the Employer's chief regional competitor, pays adjuncts a minimum of \$3,100 per course. Wermuth's explanation that the Employer wanted to remain competitive with that university is a plausible one. As such, I find that the Employer has shown it would have granted the \$3,000 wage increase absent the Petitioner's campaign. The Board has held that, under these conditions, such conduct is not objectionable. *Meier's Wine Cellars, Inc.*, 188 NLRB 153, 154 (1971). As such, I recommend that Objection 6 be overruled.

3. Analysis of Objection 7:

As found above, the Employer's wage increase itself was not unlawful. A separate issue is whether the announcement of this wage increase constitutes objectionable conduct. The Board has held that an announcement of a wage increase can be unlawful, even if the wage increase itself is lawful, if this announcement is intended to dissuade employees from supporting a union. *K-Mart Corp.*, 336 NLRB 455, 456-457 (2001), citing *Waste Management of Palm Beach*, 329 NLRB 198 (1999). The Board stated the following in *Speco Corp.*, 298 NLRB 439, 443 (1990):

If the employees were anticipating the benefit, its production, even as a last-minute preelection announcement, would not necessarily have an untoward effect upon the election. Furthermore, it is clear that an employer's right to recite for employees the benefits bestowed upon them prior to the union's appearance includes the right to announce the culmination of any nonunion related efforts to improve those benefits when such efforts come naturally to term, even in the period of an organizing campaign. The announcement becomes perilous, however, when the employer has, and exercises, discretion in choosing the time for announcement; timing may not be manipulated to heighten the impact of a new benefit, a subject to which employees are keenly sensitive. (citation omitted).

It is undisputed in the instant case that Wermuth's June 3 announcement of starting salaries for part-time faculty was unprecedented. I am not persuaded by Wermuth's explanation that the

“starting salaries” did not apply to eligible voters. I note the lack of clarification on that matter in his letter, which was sent exclusively to eligible voters. Moreover, I find his statement that his intent was to send the voting population information that did not pertain to them to be incredible and thus do not credit his testimony in that respect.⁵⁰

I also note that Goddard, Kenton, Veroli, and Comstock all testified that their salaries were less than \$3,000 during the 2014 fiscal year, and that this announcement of an increase in the starting salaries would result in a raise for these employees. I base this conclusion not on the subjective impressions of the witnesses, as the “proper test for evaluating conduct is an objective one.”⁵¹ Rather, I rely on the simple arithmetic truth that the minimum salary of \$3,000 is more than the \$2,850 that Kenton and Goddard had previously received, and that the \$3,000 figure is similarly more than the \$2,899 and \$2,799 figures received by Comstock and Veroli, respectively, during the previous year.

I find the Employer’s argument that Wermuth’s June 3 letter was sent to combat “misinformation” distributed by pro-union employees during the organizing campaign unpersuasive. Neither Veroli nor Comstock communicated salary levels at Marist in their emails. Veroli’s email offered statistics regarding pay and other benefits unionized workplaces versus those in non-unionized settings. Comstock’s email noted the gains in salary realized at George Washington University after SEIU began representing adjunct faculty. The cases cited by the Employer in its brief to this point are distinguishable. *Suburban Journals of Greater St. Louis, LLC*, 343 NLRB 157, 159-160 (2004) involves a scenario where an employer, in response to an employee’s request, provided *current* benefit levels for its represented and non-represented

⁵⁰ It is not contradictory that I have credited Wermuth’s testimony with respect to the wage increase itself but not credited his testimony with respect to the timing of the announcement. In fact, “nothing is more common in all kinds of judicial decision than to believe some and not all.” *NLRB v. Universal Camera Corp.*, 179 F.2d 749, 754 (2d Cir. 1950). See also *J. Shaw Associates, LLC*, 349 NLRB 939, 939-940 (2007).

⁵¹ *Taylor Wharton Division Harsco Corporation*, supra at 158.

employees. In the instant case, the Employer provided a future salary level. There is no evidence that Wermuth distributed this information pursuant to the request of one or more employees. The Employer's reliance on *International Baking Co.*, 342 NLRB 136 (2004), affd. 185 Fed. Appx. 691 (9th Cir. 2006), is similarly misplaced.⁵² In that case, the Board did not find objectionable an employer's postponing of an announcement of improved benefits for four weeks. The Board noted that the four-week postponement did not occur "in close proximity" to the election. Here, Wermuth's letter was mailed only ten days prior to the beginning of the election, and was an unprecedented and unanticipated announcement. I therefore find merit to Objection 7.

F. Objection 8 – During the critical period, Respondent, by its agents, representatives, and/or administrators, disparately prevented access to its list-serve system to adjunct faculty who were Union supporters by rejecting postings from said adjunct faculty favorable to the Union or delaying such postings, thereby discriminating against them because of their support for the Union, discriminatorily preventing the dissemination of Union messages and literature, and disparately enforcing solicitation and/or distribution or other policies relating to list-serve postings.

1. Overview of Objection:

Objection 8 relates to the Employer's conduct with respect to the operation of its MARFAC list-serve system. There are essentially three allegations contained within this objection. The first allegation is that the Employer rejected emails from pro-union adjuncts during the critical period. The second allegation is that the Employer delayed the distribution of emails from pro-union employees during the critical period. The third allegation is that the Employer disparately enforced a no solicitation/distribution policy during the critical period.⁵³

⁵² The Employer cited the 9th Circuit's unpublished decision in its brief; however, the court's decision was merely an affirmation of the Board's decision.

⁵³ The Petitioner's argument in its brief with respect to Objection 8 is limited to the third allegation. However, absent a withdrawal of the first two allegations, it is necessary for me to reach a finding on those issues.

2. Statement of Fact:

As discussed briefly above, emails distributed via MARFAC are delivered to all faculty members. There is no option to opt-out of MARFAC; all faculty members receive these emails regardless of whether or not the individual faculty member wishes to receive them. The Employer owns and administers the list-serve system.

a. The Alleged Rejection of Pro-Union Emails:

In support of this allegation, adjunct and organizing committee member Veroli testified that on four separate occasions, he received responses from the Employer's email system rejecting the email he was attempting to distribute via MARFAC. These emails were all related to and in favor of the Petitioner's organizing effort. The first incident occurred on June 8, the second and third incidents occurred on June 9, and the fourth occurred on June 11. On each occasion he attempted to send these emails to the address marfac.vm@marist.edu. Each time, Veroli received a response from the Employer's Postmaster which states as follows:

An error was detected while processing the enclosed message. A list of the affected recipients follows. This list is in a special format that allows software like LISTSERV to automatically take action on incorrect addresses; you can safely ignore the numeric codes.

-- > Error description:
Error-For: MARFAC.VM@MARIST.EDU
Error-Code: 3
Error-Text: No registered user by that name

Veroli testified that he was eventually able to send these emails by slightly changing the message itself and then re-sending it.

Harry Williams, the Employer's Chief Technology Officer, testified that the issue with Veroli's attempted emails was that Veroli had incorrectly entered the email address for the MARFAC distribution list. Williams testified that the proper addresses for MARFAC were

either marfac@marist.edu or marfac@vm.marist.edu, rather than the marfac.vm@marist.edu. According to Williams, marfac.vm@marist.edu is not a valid Marist email address. As such, the Employer's email system immediately and automatically rejected this email because it was not deliverable.

b. The Alleged Delay in Distribution of Pro-Union Emails:

The Petitioner presented multiple witnesses who testified that, as the election drew closer, they experienced delays in their emails being distributed by MARFAC. Kenton, specifically, testified that he sent an email at 12:16 PM on June 13, in which he urged employees to vote for the Petitioner. He testified that this message was not distributed via the MARFAC system. Kenton sent a second email, at 3:46 PM on June 13, in which he repeated the body of the first email but changed the subject of the email slightly.⁵⁴ At 7:42 AM on June 15, Kenton received an email from the MARFAC server informing him that his first email was being returned. The MARFAC server email stated that Kenton's email was being rejected as another email with identical text had already been posted. According to Kenton, at approximately the same time as he received this email from the MARFAC server, his second email was distributed via MARFAC.

Williams testified that, on either June 9 or 10, he installed an "aggressive spam filter" on a non-MARFAC email system in order to combat Russian spammers. According to Williams, this filter was automatically applied to all of the Employer's email systems, including MARFAC, on Saturday, June 14. Williams stated that this had the effect of bottlenecking emails from distribution. According to the testimony of Wermuth, he received an email from adjunct John McAdam at 10:54 AM on June 14. McAdam referenced a MARFAC email that Wermuth had not yet received. Wermuth emailed Williams on June 14 at 5:08 PM and asked if there was an

⁵⁴ Both emails were sent to the valid marfac@vm.marist.edu address.

issue. According to Williams, he read that email at approximately 7:30 AM on June 15 and removed the problematic filter immediately.

Williams further testified that the MARFAC system compares the body of an email to the previous 50 emails sent by that user, and will automatically reject any postings that have identical content. According to Williams, this process is entirely automated.

c. The Allegedly Disparate Enforcement:

This allegation refers to the allegedly disparate enforcement of a rule related to the MARFAC distribution system. The administrator of MARFAC is Bill Thirsk, the Employer's Vice President of Information Technology and Chief Information Officer. On December 23, 2013, Thirsk sent an email via the MARFAC system which set forth the purpose and policies related to the Employer's various list-serves. This email stated that employees could not opt out of receiving MARFAC emails, and further stated that "[m]essages sent via the listserv must be the writer's own work and must not violate any copyright or other regulation or law." Thirsk's email also stated that "[m]embership of any College provided list is not a right of the individual."

On May 3, adjunct William Paccione sent an email via MARFAC with the subject line "[MARFAC] worth knowing the other side?" The body of this email was an article written by Jillian Kay Melchior. The article, dated May 2 from an unidentified publication, was titled "The SEIU's Money Grab" with a subheading of "How people caring for elderly or disabled relatives were classified as public employees." The article made up the entirety of the body of Paccione's email; there were no remarks from Paccione himself, other than the subject of the email.

At 11:01 AM on June 5, adjunct and organizing committee member Comstock sent an email via MARFAC with the subject heading "[MARFAC] Adjuncts: A letter from your colleagues at Tufts and Lesley." The body of this email contained no editorial content from

Comstock; rather, it contained a message from 34 adjuncts and bargaining committee members at Tufts University and Lesley University. The message stated that being represented by the Petitioner had been a positive experience for them and urged employees to vote for the Petitioner.

At 6:53 AM on June 6, Thirsk sent an email via the MARFAC system titled “[MARFAC] MARFAC Usage.” This email stated as follows:

Please be advised and reminded that the use of MARFAC is not a right of the individual and may be only used according to policy. Recently, some MARFAC members have posted (or forwarded) messages from individuals who are not members. Messages sent via MARFAC must be the writer’s own work.

Thirsk did not testify in this proceeding. However, Williams testified that Thirsk’s email was sent in response to a MARFAC post by an individual named Daryl Amor. Amor’s email only identified himself as Daryl, but made numerous mentions of “our college” and was pro-union in nature. Amor’s post was distributed by MARFAC at 6:56 PM on June 5. According to Williams, Amor does not have direct access to MARFAC, as Amor is not employed by the Employer. In this situation, Amor’s email would be held in abeyance until either allowed through the system or dismissed. Williams’ testimony is that he erroneously allowed Amor’s email to be distributed through the MARFAC system. James Luciana, a full-time faculty member, responded via MARFAC at 1:04 AM on June 6, taking issue with Amor’s email, including questioning whether Amor was actually employed by the Employer.

Williams testified that he did not have a conversation with Thirsk regarding Thirsk’s reason for sending his June 6 email. Williams explained that his rationale for believing that Thirsk’s email was sent in reaction to Amor’s email was based on being Thirsk’s subordinate for six or seven years. According to Williams, Thirsk would have immediately taken action on

Comstock's email on June 5, and would not have waited until the next day to issue this policy reminder.

3. Analysis of Objection 8:

a. Analysis of the Alleged Rejection of Pro-Union Emails:

A review of all emails distributed via MARFAC during the critical period reveals that none contained the MARFAC email address utilized by Veroli in his rejected emails. I am persuaded by that, as well as by Williams' testimony and the rejection message as undeliverable, that Veroli had incorrectly entered the MARFAC email address. I found Williams to be a credible witness. He was able to directly answer difficult questions regarding the Employer's software programs on both direct and cross examination. His answers were succinct and I was particularly impressed with his ability to distill information about the Employer's software programs into easily understood layman's terms. Based on the foregoing reasons, I find no merit to the Petitioner's allegation that pro-union emails were rejected from the Employer's MARFAC list-serve.

b. Analysis of the Alleged Delay in Distribution of Pro-Union Emails:

The evidence is clear that the delay in processing of MARFAC posts was not unlawful; rather, I credit Williams' testimony that the bottlenecking of emails was an inadvertent side effect of the installation of a spam filter. I further note that there is no evidence that this delay was discriminatory in nature; in fact, Williams' credited testimony is that the delay was system-wide. As such, I find no merit to this allegation.

c. Analysis of the Allegedly Disparate Enforcement:

I find implausible the Employer's position that Thirsk's June 6 MARFAC policy reminder was in response to the June 5 posting by Amor. As noted above, Thirsk was not called

as a witness during this proceeding; the sole rationale for his actions was provided by Williams. While Williams was generally a credible witness, he admitted that he had not spoken to Thirsk about Thirsk's June 6 email. Accordingly, Williams' explanation of Thirsk's actions is pure speculation and I give that portion of Williams' testimony no weight.

Thirsk's email specifically stated that MARFAC members had "posted (or forwarded) messages from non-members." Nowhere in Thirsk's email did he make mention of an imposter or reference direct posting by outside members. Nor can his statement that "[m]essages sent via MARFAC must be the writer's own work" be construed to refer to Amor's email. Indeed, the issue with Amor's email was not that it was not his own work; rather, it was that Amor should not have had access to MARFAC to begin with. Additionally, the parenthetical reference to forwarded messages belies Thirsk's intent. I find that, contrary to Williams' testimony, Thirsk's email was sent as a response to Comstock's June 5 email. In doing so, I also note that Thirsk's email made specific reference to forwarding of messages. There was no evidence of a forwarded message or messages in Amor's email; however, Comstock's email was clearly a forwarded message.

I turn next to the issue of whether Thirsk's email was discriminatory in nature. The Board has held that an otherwise lawful policy may become unlawful if it is applied in a discriminatory manner. See, e.g., *The Lawson Co.*, 267 NLRB 463 (1983) and *Reno Hilton Resorts*, 320 NLRB 197 (1995). Here, there is no dispute that the Employer's MARFAC policy was promulgated prior to the commencement of the Petitioner's organizing campaign. However, the record clearly reflects that the Employer unevenly enforced this policy. This is clearly exhibited via the Employer's responses to Paccione's May 3 email and Comstock's June 5 email.

Paccione's May 3 email contained no editorial content of his own, absent the subject line.⁵⁵ Nor, either, did Comstock's. The Employer did not issue a reaffirmation of its MARFAC policy after Paccione's email; it did so only after Comstock's email. The only tangible difference between the two was that Comstock's email was supportive of the Petitioner and Paccione's was critical of SEIU.

The Employer correctly notes that Comstock was not issued a reprimand or other discipline for her June 5 email. This is immaterial, as the application of an otherwise lawful rule in a discriminatory manner is unlawful on its own. See *Fremont Medical Center*, 357 NLRB No. 158, slip op. at 6 (2011).⁵⁶ I am forced to conclude that Thirsk's June 6 email was a discriminatory application of the Employer's MARFAC policy. I therefore find merit to Objection 8 insofar as it alleges a discriminatory application of the Employer's MARFAC policy.

G. Objection 9 – During the critical period, Respondent, by Thomas S. Wermuth, Vice President of Academic Affairs/Dean of Faculty, threatened adjunct faculty with loss of their statutory rights and threatened to penalize faculty for supporting the Union by stating that they would not be able to directly communicate with Respondent if the Union won the election.

1. Statement of Fact:

During the campaign, Wermuth sent several communications to the adjunct faculty that the Petitioner claims to be objectionable. At issue to with respect to Objection 9 are a letters to adjuncts dated March 27, May 12 and May 16. The March 27 letter stated as follows, in pertinent part:

⁵⁵ I am not persuaded by the Employer's argument that Paccione's subject line constituted enough originality to distinguish the email as "the author's own work" under the Employer's MARFAC policy. The body of the email consisted exclusively of the article discussed above.

⁵⁶ I find it unnecessary to make a credibility determination as to Comstock's testimony with respect to her post-June 6 MARFAC use or whether or not she was "intimidated" by Thirsk's June 6 email. As noted multiple times, the standard for objectionable conduct is an objective, not subjective, one.

We believe that the College's culture of direct communication is important to our future and the ability of Marist faculty, administration, and students to work together to address the difficult challenges facing all institutions of higher education, including Marist. While I am sure there are things all of us would like to change about higher education in general and Marist in particular, I would ask you think carefully about any such issues and ask yourself whether this union, and the elimination of the direct communication and dialogue, is the answer to any of those issues. A union will change the dynamics and bring in a whole new set of challenges, including the wholesale loss of our ability to engage in direct communication and dialogue with you and your colleagues.

The relevant portion of the May 12 letter states:

...Marist will continue to improve communication and understanding between the administration and these important members of our college community. This effort will, of course, be made more challenging for all if the College is precluded from communicating directly with its part-time faculty. Such would be the consequence of a vote in support of the union, where the part-time faculty voice would be ceded to SEIU Local 200United.

This letter also announced that the Employer was created a website dedicated to the issues regarding unionization. This website was titled "Union Facts" and the May 12 letter was posted on the Employer's website.

With respect to the May 16 letter, which was also sent to adjunct faculty, the language at issue is as follows:

Unionization is a drastic step that would fundamentally change the nature of your relationship with Marist College. Instead of maintaining a direct working relationship with the College that affords individualized interaction, the union would become the exclusive spokesperson for all adjuncts and would deal with the College on your behalf as part of a monolithic collective.

2. Analysis of Objection 9

In *Tri-Cast, Inc.*, 274 NLRB 377 (1985), the Board overruled existing precedent and enunciated the following:

There is no threat, either explicit or implicit, in a statement which explains to employees that, when they select a union to represent them, the relationship that existed between the employees and the employer will not be as before...Section 9(a) thus contemplates a change in the manner in which employee and employee

deal with each other. For an employer to tell its employees about this change during the course of an election campaign cannot be characterized as an objectionable retaliatory threat to deprive employees of their rights, but rather is nothing more or less than permissible campaign conduct. (footnote omitted)

Since the issuance of *Tri-Cast*, the Board has consistently held that “an employer’s statement explaining a change in the manner in which employees and employers deal with each other when a union is elected [is] not an objectionable threat.” *United Artists Theatre*, 277 NLRB 115 (1985). See also *John W. Galbreath & Co.*, 288 NLRB 876 (1988) and *United Merchants*, 284 NLRB 135 (1987), petition for review granted on other grounds sub nom. *Clothing & Textile Workers v. NLRB*, 850 F.2d 688 (4th Cir. 1988). In *Pembrook Management*,⁵⁷ the Board found a supervisor’s statement that employees would have to go through a shop steward to constitute a “mere fact of industrial life” and was thus unobjectionable.

Based on the standard enunciated in *Tri-Cast*, I find that Wermuth’s May 12 and May 16 letters are not objectionable.⁵⁸ The cases cited by the Petitioner in its brief were exclusively issued prior to the Board’s decision in *Tri-Cast* and therefore do not reflect current Board precedent. Accordingly, I recommend that Objection 9 be overruled.

H. Objection 10 – During the critical period, Respondent, by its President Dennis J. Murray, in a letter dated June 10, 2014, told adjunct faculty that the Respondent promoted the creation of a faculty committee to represent the interests of part-time faculty to the administration, thereby promoting such committee as an alternative to the Union, which interfered with employees’ free choice and restrained and coerced employees in the exercise of their rights to choose Union representation.

⁵⁷ 296 NLRB 1226, 1226-1227 (1989).

⁵⁸ I find it unnecessary to reach the issue of whether the wording of Wermuth’s March 27 letter is unlawful. This communication was distributed well outside the critical period, which began on April 28. The Board has held that, unless prepetition conduct “lends meaning and dimension to related postpetition conduct,” the Board will not consider such conduct as grounds for objecting to an election. *Flamingo Las Vegas Operating Company, LLC*, 360 NLRB No. 41, slip op. at 5 (2014), quoting *Parke Coal Co.*, 219 NLRB 546, 547 (1975). Here, the Petitioner has made no argument, and I do not find, that this exception should apply.

1. Statement of Fact:

This objection is related to a letter sent by Dennis Murray to adjunct faculty. Murray is the President of Marist College. This letter was dated June 10, and the parties stipulated that this letter was mailed to a large majority of voters. This letter contained the following passage which is at issue:

I will say that the recent conversation about unionization has illuminated areas in which the administration could do a better job supporting and communicating with part-time faculty. Several voices have suggested forming an internal group to represent the interests of part-time faculty to the administration. Thom Wermuth and our academic administrators have expressed openness to this idea, but we cannot make promises at this time, and there may be legal restrictions on what we can do.

The “internal group” that Murray referenced in his letter refers to a suggestion made by several adjuncts during the Petitioner’s organizing campaign. These employees suggested that the part-time faculty establish an employee committee to bring concerns of the adjunct faculty to the attention of the Employer.

2. Analysis of Objection 10:

At the outset, I note that the facts of this case distinguish it from the sort of situation presented in *Alley Construction Co.*, 210 NLRB 999, 1005 (1974) and other cases where an employer, in a multi-union campaign, states its preference for one union over another. The Board has held that an employer’s promotion of an employee committee in place of an outside union can constitute objectionable conduct. *Black Hills & Western Tours, Inc.*, 321 NLRB 778, 789 (1996). It is immaterial whether such a committee actually is established; rather, it is the promotion of this alternative that has a coercive effect. See *Westek Fabricating*, 293 NLRB 879, 991 (1989).⁵⁹

⁵⁹ The Board in *Westek* stated that the formation of the committee itself was not necessary for the finding of a violation. *Supra* at fn. 2.

I find the Board's decision in *House of Mosaics, Inc.*,⁶⁰ to be instructive. There, the Board reversed the administrative law judge insofar as the judge had found an employer's support for a grievance committee to be lawful. As in the instant case, the idea for an employee committee had been raised by a rank-and-file member and not by the Employer. However, as the Board stated in *House of Mosaics, Inc.*:

We recognize that the Respondent was in a difficult position with regard to the formation of the grievance committee when the idea for the committee was initiated by an employee. Nevertheless, [President] Billet endorsed the idea and fostered its development by suggesting the election of grievance spokesmen and indicating its willingness to work with them.

Id.

Although in the instant case the Employer did not "foster the development" of the employee committee, Murray did announce the Employer's approval of such a committee. His statement that "Thom Wermuth and our academic administrators have expressed openness to this idea" clearly conveys the message that the Employer would be willing to work with such a committee in the future. By noting that Wermuth, a high-ranking official, approved of such an idea underscores the Employer's endorsement of this committee in lieu of the Petitioner.

Murray's statement that "we cannot make promises at this time...and there may be legal restrictions on what we can do" is insufficient to cure the coercive nature of the preceding endorsement of the employee committee. The Board has held that an employer statement that it could not make promises does not serve to negate the objectionable effects of such a statement. *Lutheran Home of Northwest Indiana, Inc.*, 315 NLRB 103, 104 (1994), citing *Michigan Products*, 236 NLRB 1143, 1146 (1978). Moreover, in the instant case, Murray made little effort to negate the objectionable statement. While he did state that the Employer "cannot make

⁶⁰ 215 NLRB 704 (1974).

promises at this time,” he couched this stance by adding that “there *may* be legal restrictions on what we can do” (emphasis added).

I therefore conclude that Objection 10 has merit.

I. Objection 11 – During the critical period, security guards who were agents of Respondent, refused to permit an adjunct faculty member and a non-employee to have access to employee mailboxes because of the adjunct faculty’s support for the Union, and ejected them from the Steel Plant building because of his support for the Union, thereby disparately enforcing a non-solicitation or distribution rule and/or non-access rule or promulgating such rules in response to the organizing campaign.

1. Statement of Fact:

This objection is related to an incident that took place at a building on the Employer’s campus referred to as the Steel Plant. Nicholas Veroli, an adjunct and member of the Petitioner’s organizing committee, testified that he and Dorothy Straub, an organizer for the Petitioner,⁶¹ were distributing letters from the Catholic Scholars Association into the mailboxes of adjuncts on May 7. According to Veroli, prior to visiting the Steel Plant, he first placed letters into the mailboxes of 30-50 employees in the Employer’s Fontaine Building, which houses the School of Liberal Arts.

a. The First Encounter

Veroli testified that, after distributing the letters to mailboxes in the Fontaine Building, he met Straub near the Steel Plant. The two entered the building for the first time at approximately 7:00 PM. According to Veroli, he and Straub reached the entrance at the same time as students and simply followed these students inside. Veroli testified that, once inside, they were approached by a man who said he worked in the Steel Plant, and asked Veroli and Straub what they were looking for. Veroli introduced himself as an adjunct professor of philosophy and Straub introduced herself as an organizer. Veroli then told this man that he and Straub were

⁶¹ Straub did not testify in this proceeding.

looking for faculty mailboxes so that he could put the letter in those mailboxes. The as-yet unidentified man told them the mailboxes were in the student union. Straub and Veroli then left the building. Veroli described this man's demeanor during this encounter as affable.

Ed Smith,⁶² the man encountered by Veroli and Straub, testified that he encountered two people, a man and a woman, in the Steel Plant at approximately 9:00 PM on a Wednesday night. Smith described these two people as unkempt. According to Smith, the man identified himself as an adjunct and said his name was Nick, but that the woman did not identify herself. Smith testified that although these people did not identify themselves as being union representatives, he thought that they were affiliated with the Petitioner. Veroli said he was looking to leave some things for Communications, and Smith responded that Communications was located in a building called Lowell-Thomas. Smith gave Veroli directions to Lowell-Thomas and escorted them towards the exit, although he did not see them actually walk out of the building.

b. The Second Encounter

According to Veroli, he and Straub left the building without protest. They then immediately called Kenton, who was familiar with the building. Kenton informed them that the man who had stopped them was Ed Smith, who was responsible for materials supply in the Art Department.

Veroli and Straub then re-entered the building, again following a group of students into the building. They then encountered Smith a second time and informed him that they had heard the mailboxes were indeed located in the Steel Plant and they were going to put the letters in the mailboxes. Smith responded that doing so would be "a very bad idea" and that if Straub and Veroli didn't leave immediately, he would call security. Smith then walked Straub and Veroli to

⁶² Smith is a tenured professor for the Employer, and a more detailed discussion of his various duties for the Employer can be found below.

the exit, where a security guard opened the door for them. Veroli clarified that this guard was on his way into the building and was not waiting at the exit for them. According to Veroli, during this second encounter, Smith was no longer affable and seemed angry.

Smith testified that seeing Veroli and Straub back in the building made him very uncomfortable. He told them that this was making him uncomfortable and that they would have to leave. Veroli and Straub left without further incident. Smith testified that he was not confrontational during this exchange with Veroli and Straub.

The next day, Smith sent an email to John Gildard in the Employer's security department. This message reads as follows, in pertinent part:

Hi John,
Last night I found 2 adjuncts, so they said, in the Steel Plant. They are not in our department and I have never seen them before. They said they were looking for the mail room.

I escorted them from the building as I did not recognize them, they are not in our dept., have no reason to be in the Steel Plant, they may or may not have been affiliated w/ Marist and student safety is most important to me. I believe they wanted to leave union literature in our building.
Your officers were alerted and I thanked them.

c. Ed Smith's Duties at Marist

Smith is a tenured professor of art and art history for the Employer. In addition to his faculty duties, he is also Director of the Marist College Art Gallery and Director of Marist's Biennale Program. Smith does not supervise anyone in his capacity as professor.⁶³ With respect to his directorship of the Art Gallery, Smith supervises a group of work study students.

⁶³ According to Smith, the Art and Art History departments technically have an administrative assistant who reports to them. However, this employee does not work in the Steel Plant, does not perform any duties for the Art and/or Art History Department, and works exclusively for the Employer's Fashion department.

Additionally, Smith is responsible for overseeing a student organization known as SPAWN.⁶⁴ Although Smith does not receive remuneration for supervising these students, the students are paid via work study. SPAWN is responsible for cleaning the Steel Plant during the evening hours. Smith testified that these students also act as a first line of security in the event something is amiss.

The Biennale Program is a biannual, four-week art exhibition run by Marist and Lorenzo De Medici Institute (“LDM”) in Venice, Italy. Smith, in his role as director, is responsible for organizing the event, including recruiting students from the United States and Europe to attend the program. According to Smith, while the program itself lasts four weeks, he spends up to six weeks in Venice preparing for the program. In the course of conducting this program, Smith supervises an employee of LDM. Smith testified he also works with the Employer’s International Programs department, although he has no direct control over any employees in that department.

2. Analysis of Objection 11:

a. My Ability to Consider the Objection:

It is well settled that, in my role as hearing officer, my authority to consider issues affecting the election is limited to those set for hearing, and I am thus precluded from considering any issues that are not reasonably encompassed within the specific objections set for hearing by the Regional Director. *Precision Products Group*, 319 NLRB 640 (1995). The record evidence with respect to Objection 11 reveals that the Employer’s security personnel were only involved in a limited role during the May 7 incident. Rather, it is the conduct of Smith on May 7 which is at issue.

⁶⁴ SPAWN stands for Steel Plant Art Workers of the Night.

I find that Objection 11 reasonably includes Smith's conduct on May 7. In doing so, I note that the issue was fully litigated at the hearing, as both parties presented evidence regarding the May 7 incident and argued the merits of the Petitioner's objection in their briefs.⁶⁵ Finally, I note that neither party has argued that I do not have the authority to determine the legality of the Employer's conduct.

b. Supervisor Status of Smith

It is well established that the party asserting supervisory status of an individual bears the burden of proof. *Pan-Oston Co.*, 336 NLRB 305, 305-307 (2001). In order to meet this burden, "the party must show that the individual possesses at least one of the listed categories of authority and that his or her exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment." *Hauster Hard-Chrome of KY, Inc.*, 326 NLRB 426 (1998). The party claiming supervisory status must do so via a preponderance of the evidence, and any lack of specific evidence is construed against the party asserting supervisory status. *Dean & Deluca New York, Inc.*, 338 NLRB 1046, 1047-1048 (2003).

The record is clear that Smith does not possess any supervisory status in his role as professor. Smith does supervise a group of work study students in his capacity as Gallery Director, as well as in his role related to SPAWN. However, as discussed earlier in this report, the Board does not consider work study students to be employees, as their employment is incidental to their academic objectives.⁶⁶ As Smith does not supervise any employees in his roles as Gallery Director and SPAWN Director, these job duties cannot be relied upon to support a finding of supervisory status. See *Holiday Inn of Perrysburg, Ohio*, 243 NLRB 280, 289 (1979), citing *Montgomery Ward & Co., Incorporated*, 198 NLRB 52, 58 (1972).

⁶⁵ See *Virginia Concrete Corp., Inc.*, 334 NLRB 796 (2001).

⁶⁶ *Saga Food Service of California, Inc.*, supra. See also *Westbridge*, 172 NLRB 1789, 1789-1790 (1968) and *The Macke Company*, 211 NLRB 90, 90-91 (1974).

Smith did testify that he supervises one employee of LDM during the Biennale Program. The employee in question is employed by LDM, not the Employer. Given that this employee works in Italy, that she is not employed by the Employer, and that Smith's supervision of her is limited to a six-week period every two years, I find that the Petitioner has not met its burden to show that Smith is a supervisor within the meaning of Section 2(11) of the Act.

c. Agency Status of Smith

The burden of proof for establishing agency, as with that of supervisory status, falls on the party asserting it. *Wometco-Lathrop Company*, 225 NLRB 686, 688 (1976). The Board applies common law principles in examining whether an employee is an agent of the employer. As stated by the Board in *Southern Bag Corp.*, 315 NLRB 725 (1994) (citations omitted):

Apparent authority results from a manifestation by the principal to a third party that creates a reasonable basis for the latter to believe that the principal has authorized the alleged agent to perform the acts in question...[t]he test is whether, under all the circumstances, the employees would reasonably believe that the employee in question [the alleged agent] was reflecting company policy and speaking and acting for management. As stated in Section (913) of the Act, when making the agency determination, "the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling."

The Board will consider whether the allegedly unlawful conduct is related to the duties of the employee in question. *Pan-Osten Co.*, supra. However, where an employee's statements or actions are outside the scope of his or her actual duties, the Board may decline to find agency. *Waterbed World*, 286 NLRB 425, 426-427 (1987).

At issue is the second encounter on May 7, during which Veroli and Straub informed Smith that they were going to place letters in faculty mailboxes. Smith's responded that doing so would be a "very bad idea" and stated he would call security if they did not leave the facility.⁶⁷

⁶⁷ To the extent that the testimonies of Smith and Veroli differ, I credit Veroli's testimony. Veroli struck me as a generally credible witness. Despite his difficulty in identifying the date of the incident, he otherwise testified in a

There is no evidence that Smith had the authority to bar the distribution of union literature in the Steel Plant. Turning next to the issue of apparent authority, I find that the Petitioner has not established that the Employer had cloaked Smith with apparent authority to act as its agent. Veroli and Straub were unfamiliar with Smith prior to encountering him on May 7. However, in the intervening time between the incidents, they were informed by Kenton that Smith was in charge of material supply for the Steel Plant. Kenton was incorrect as to Smith's actual role; however, neither as a material supply employee nor as a faculty member would Smith project the impression that he was "speaking with management's voice" as required for a finding of agency.⁶⁸ Moreover, while security guards have been held to be agents of an employer in certain circumstances,⁶⁹ there can be no contention that Smith appeared to Veroli as a guard or a member of the Employer's security staff. Indeed, via Veroli's own testimony, Smith's request that Veroli and Straub leave the Steel Plant was accompanied by Smith's statement that he would call security if they did not leave.

Based on the above, I cannot conclude that Smith was acting as an agent of the Employer during the May 7 incident. As the Petitioner has not met its burden of showing that Smith was the Employer's supervisor or agent within the meanings of Section 2(11) and 2(13) of the Act, respectively, I recommend that Objection 11 be overruled.

J. The Employer's Objectionable Conduct Warrants Setting Aside the Election Results

As discussed above, the Employer has engaged in conduct which I have found objectionable. Specifically, I have found that the Employer's announcement of a wage increase

direct and detailed manner about his actions on May 7. His answers, both on direct and cross examination, were consistent and direct. Smith was the less credible witness. He was, at times, argumentative with Petitioner's counsel during cross examination. I also note that the testimony of his encounters with Straub and Veroli was not as detailed as Veroli's.

⁶⁸ *Waterbed World*, supra.

⁶⁹ See, e.g., *Publix Super Markets, Inc.*, 347 NLRB 1434 (2006).

on June 3, its discriminatory application of its MARFAC policy, and its endorsement of an internal committee as an alternative to the Petitioner are all objectionable. I must then decide whether the Employer, by this conduct, interfered with the “laboratory conditions” of the election and denied its employees the ability to make a “free and untrammelled choice.” *Fred Meyer Stores, Inc.*, 355 NLRB 541, 543 (2010), citing *General Shoe Corp.*, 77 NLRB 124, 126 (1948), *enfd.* 192 F.2d 504 (6th Cir. 1951), *cert. denied* 343 U.S. 904 (1952). I find that the Employer’s conduct does warrant setting aside the results of this election.⁷⁰

With respect to Objection 7, the Employer’s unprecedented announcement of a wage increase via Wermuth’s June 3 letter was issued only 10 days prior to the beginning of the election. It is undisputed that this letter was mailed to a large contingent of voters and was thus disseminated throughout the bargaining unit. The unlawful announcement of a wage increase is egregious to the point of prohibiting employee free choice. See *Leisure Lodge*, 279 NLRB 327 (1986), where the Board set aside the results of an election based solely on an employer’s announcement of a wage increase.

Turning next to Objection 8, I similarly find that the Employer’s disparate application of its MARFAC policy is grounds for setting aside the election. The record is clear that most, if not all, eligible employees receive MARFAC emails. Thus, Comstock’s June 5 email and Thirsk’s June 6 response were received by a large proportion of the bargaining unit. Additionally, Thirsk’s admonition of Comstock occurred only one week prior to the mailing of ballots on June 13. I also note that MARFAC was used heavily throughout the campaign to advance the debate regarding unionization at Marist. Therefore, cases such as *Clark Equipment Co.*, 278 NLRB 498, 505 (1986) are inapplicable. In that case and its progeny, the Board has held that although an

⁷⁰ In addition to the specific reasons for sustaining each objection, I note the lack of misconduct attributed to the Petitioner during the campaign, which is one of the factors considered by the Board in determining whether or not to set aside an election. *Taylor Wharton Division Harsco Corporation*, *supra*.

employer had engaged in numerous violations of Section 8(a)(1), it was “virtually impossible” that those violations had affected the results of the election and thus that conduct alone did not warrant setting aside election results.

Finally, Objection 10 also requires a finding that the election be set aside. Murray’s letter supporting the establishment of an internal committee as an alternative to the Petitioner was sent on June 10, which was immediately prior to the commencement of the voting period. I also note that Murray is the Employer’s highest-ranking official, and his letter was mailed to most, if not all, of the eligible voters. Given the proximity in time of Murray’s letter to the voters’ receipt of their ballots, his urging of employees to support an internal committee was severe enough conduct to disturb the laboratory conditions of the election.⁷¹

In addition to these findings, I note that there is no evidence of misconduct committed by the Petitioner, and thus there cannot be any mitigation of the Employer’s objectionable conduct on those grounds. While “[t]he Board gives great weight to the closeness of the election in deciding whether conduct is objectionable,”⁷² given the large number of challenged ballots, the closeness of the election is not yet known. However, given the wide dissemination of the Employer’s objectionable conduct, I find that the results of the election, via any possible mixture of the challenged votes, will not be so lopsided as to meet the Board’s “virtually impossible” exception regarding objectionable conduct. Compare this case with *Bon Appétit Management Co.*, 334 NLRB 1042, 1043-1044 (2001), where the Board found that a coercive statement by a low-level supervisor to one employee in a 200-person unit was insufficient to set aside the election. Here, the conduct found objectionable was disseminated by the Employer to the entire bargaining unit.

⁷¹ Obviously, having found that each of the three sustained objections are enough individually to warrant setting aside the election, the combination of the three objections is clearly grounds for setting aside the election.

⁷² *Hopkins Nursing Care Center*, 309 NLRB 958, 959 fn. 8 (1992).

Given that there remain challenged ballots in sufficient number to affect the results of the election, I recommend that the challenged ballots of the 39 employees discussed above first be opened and counted, and a revised tally of ballots be issued. If the revised tally of ballots shows that the Petitioner has received a majority of votes cast, then a certification of representative should issue. However, if the revised tally of ballots shows that the Petitioner has not received a majority of votes cast, then the election should be set aside and a second election be conducted.⁷³

⁷³ This is consistent with the Board's handling of cases involving both determinative challenges and objectionable conduct. See *Southern Labor Services, Inc./Florida Transp. Services, Inc.*, 336 NLRB 710 (2001).

Conclusions and Recommendations:

For the foregoing reasons, I recommend that the challenges to 47 individuals be sustained, that the challenges to 39 individuals be overruled, and that 1 challenged ballot be declared void. Additionally, I recommend overruling Objections 1, 2, 3, 4, 5, 6, 9, and 11. I further recommend that Objections 7, 8, and 10 be sustained, and that a new election be directed in the event that the determinative challenges of the 39 eligible employees do not result in the Petitioner received a majority of the votes cast.

Any party, within 14 days of the issuance of this report, may file exceptions with the Board in Washington, D.C. Exceptions may be filed electronically through E-File on the Agency's website, www.nlr.gov.⁷⁴ A copy of such exceptions shall immediately be served on the other parties and a copy with the undersigned. If no exceptions are filed, the Board may adopt the recommendations of the Hearing Officer or make other dispositions of the case.

Dated at Buffalo, NY, this 17th day of November, 2014

/s/Thomas A. Miller
Thomas A. Miller, Hearing Officer
Region 3
Buffalo, NY, 14202

⁷⁴ To file exceptions electronically, go to www.nlr.gov and select File Case Documents, enter the NLRB Case Number, and follow the detailed instructions.