

March 26, 2018

**Via Hand Delivery**

Nathan F. Bortner, Secretary  
Pennsylvania Labor Relations Board  
Department of Labor & Industry  
651 Boas Street, Room 418  
Harrisburg PA, 17121

Legal Division  
400 North Third Street  
P.O. Box 2225  
Harrisburg, PA 17105-2225  
  
(717) 255-7000 Ext. 7056, 7046 or 7029  
(800) 944-PSEA (7732)  
Fax: (717) 255-7132  
www.psea.org

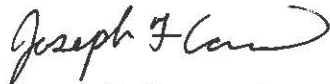
Dolores McCracken, *President*  
Richard W. Askey, *Vice President*  
Jeffrey D. Ney, *Treasurer*  
James G. Vaughan, *Executive Director*

**Re: Pennsylvania State University  
PERA-R-17-40-E**

Dear Mr. Bortner,

Please find enclosed for filing an original and three copies of the response of the Coalition of Graduate Employees, PSEA/NEA, to a recent filing in the above-captioned matter.

Thank you,



Joseph F. Canamucio

cc: Meredith Swartz-Dante, Esquire (via email and regular mail)  
Shannon D. Farmer, Esquire (via email and regular mail)  
David Osborne, Esquire (via email and regular mail)  
Nathan McGrath (via email and regular mail)

**COMMONWEALTH OF PENNSYLVANIA**  
**Pennsylvania Labor Relations Board**

IN THE MATTER OF THE EMPLOYES OF :  
 :  
 : Case No. PERA-R-17-40-E  
 :  
 THE PENNSYLVANIA STATE UNIVERSITY :

**RESPONSE TO FILING STYLED**  
**“MOTION TO INTERVENE OR PARTICIPATE AND ADVANCE REQUEST FOR**  
**REVIEW AND STAY”**

The Coalition of Graduate Employees, PSEA/NEA, by and through undersigned counsel, files this response to a March 23, 2018 filing styled “Motion to Intervene or Participate and Advance Request for Review and Stay,” and respectfully asserts as follows:

1. To the extent the appropriate representative(s) of the Board entertain Mr. Cronin’s request to intervene or participate, the request should be denied because the Board’s regulations do not permit such intervention or participation in this type of case at this time, and any relevant right or interest of Mr. Cronin will be satisfied by his ability to vote in any election that may be ordered by the designated Board Representative.

2. To the extent the appropriate representative(s) of the Board entertain Mr. Cronin’s requests for review and stay of a decision or order that has not yet been issued by the designated Board Representative, the requests must be denied because: (i) they are premature and meritless insofar as they claim that a non-existent decision or order is clearly erroneous; and (ii) even if the designated Board Representative issues a decision or order that comports with Mr. Cronin’s expectations, such a decision would not be clearly erroneous and would not prejudicially affect Mr. Cronin’s rights.

## ARGUMENT

**1. Mr. Cronin's intervention request should be denied because the relevant regulations do not allow such intervention in this matter at this time.**

Though Mr. Cronin purports to submit his filing pursuant to section 35.28(a) of the General Rules of Administrative Practice and Procedure, the GRAPP "is not applicable to a proceeding before an agency to the extent that the agency has promulgated inconsistent regulations on the same subject." 1 Pa. Code §31.1(c). The Board has promulgated specific, unique regulations on the processes and rights surrounding intervention in representation proceedings and their attendant elections. Therefore, the GRAPP is inapplicable.

The Board has promulgated a regulation regarding intervention in an election proceeding.

That regulation states in relevant part:

A 1% showing of interest among employes within the requested unit is required before another employe representative may be placed on the ballot. A 10% showing of interest among employes within the requested unit is required before another employe representative may be permitted to intervene as a party.

34 Pa. Code §95.14(10). The regulation contemplates that only employe representatives – whose right to potentially represent an interested workforce might be impacted by conducting an election – can intervene in an election.

The Board has also promulgated a regulation regarding intervention in representation cases more generally. That regulation states in relevant part:

(b) In representation proceedings, the hearing examiner may, subject to §95.11 (relating to request for certification) permit public employers, public employes and employe organizations to participate as parties without formal intervention, upon a showing of good cause which reasonably prevented them from having filed a timely motion to intervene.

(c) The Board or a member of the Board, or the hearing examiner, as the case may be, may, by orders, permit the intervention in person, by counsel, or by other representative to such extent and upon the terms as they may deem proper.

34 Pa. Code §95.44. That regulation, promulgated in the portion of the Board's regulations titled "Prehearing Provisions," contemplates that interested persons will intervene prior to any hearing. (This is why the Board requires that notice of a hearing be posted "where employees in the requested unit work" prior to a hearing. 34 Pa. Code §95.43(c); Attachment A at page 2.) In addition, the regulation requires good cause to be shown when an intervention request is untimely.

Under this framework, Mr. Cronin's motion to intervene or participate should be denied. Mr. Cronin is not an employe organization, does not speak for an employe organization (or any public employe besides himself), and has provided no acceptable form of a showing of interest. Therefore, intervention should not be granted under 34 Pa. Code §95.14(10). Moreover, through the Board's standard processes, Mr. Cronin was notified of these proceedings by his employer in March 2017, more than a year ago. *See* Attachment A at page 2. Nonetheless, he failed to request intervention prior to the hearing (which was not held until September 2017) and should not now be allowed to rely on 34 Pa. Code §95.44, which contemplates that intervention will be requested prior to any hearings. Finally, his filing does not even attempt to provide the good cause that would have to exist under section 95.44 to justify waiting until *two weeks prior to a tentatively scheduled election of 3,800 employes* to attempt to intervene and single-handedly block the election. This election has already been delayed more than a year by legal proceedings generated by the University's use of Mr. Cronin's same legal arguments, and it is respectfully suggested that any "good cause" allowing intervention at this time would have to be truly compelling. Here, no cause whatsoever has been offered.

There is precedent for the denial of this type of request. In *Forest Hills Sch. Dist.*, 15 PPER ¶ 15085 (Pa. LRB. Board Representative Crawford, May 2, 1984), an individual in a proposed bargaining unit that was the subject of a joint certification petition (a type of representation

petition) wrote to the Board to oppose the certification. Regarding the individual's request, Board Representative Crawford held:

It is clear in the instant case that Ms. Puruczky, and other employes within the unit she alleges to represent, cannot attain the status of a party or intervenor as contemplated by the Board's rules and regulations by producing a 15% showing of interest. She is neither the employer the employer nor an employe organization which would, through intervention, be placed on a ballot for purposes of an election. Rather, Ms. Puruczky is an employe in a unit petitioned-for claiming that the employe organization jointly requesting certification with the Employer does not represent a majority of the employes.

*Forest Hills Sch. Dist.*, 15 PPER ¶ 15085 (Pa. LRB. Board Representative Crawford, May 2, 1984).

In that case, Board Representative Crawford gave Ms. Puruczky the chance to produce acceptable proof of a 15% showing of interest. Had she been able to do so, Board Representative Crawford would have honored her rights by ordering an election to

allow a question of representation to be answered by the best method provided by the Act to protect the employes' "freedom of choice" (i.e., an election following an appropriate showing of interest) in selecting their bargaining representative or choosing no representative.

*Id.*

Here, Mr. Cronin has provided no acceptable showing of interest. Even if he had done so, his interest in the outcome of this representation proceeding would also best be respected by way of his participation in an election. Mr. Cronin, like all employes in the proposed bargaining unit, will have the choice to vote for "No Representative" in any election. 34 Pa. Code §95.51(b). Despite stating in his affidavit that he does not wish to be represented by the Coalition or any other employe organization, Mr. Cronin bizarrely seeks to oppose his ability to exercise his right to vote against representation. It is respectfully suggested that such intervention, through which Mr. Cronin will attempt to deny himself and approximately 3,799 of his colleagues the only right on

which his intervention could conceivably be based, would contravene the purposes of the Public Employee Relations Act.

In sum, because the Board has promulgated specific regulations about intervention, and because Mr. Cronin has not met the requirements of any of those regulations, the appropriate representative(s) of the Board should deny his request. His right to oppose representation is preserved through his ability to vote his conscience in any relevant election that might be ordered by the Board Representative.

**2. Mr. Cronin’s request for review and stay of the Board Representative’s not-yet-issued decision or order must be denied.**

There is no need for the Board to receive or otherwise reach the requests associated with Mr. Cronin’s intervention request. However, if his intervention request is granted, the Board must deny his request for review and especially his request for a stay.

**A. Mr. Cronin’s requests are premature and meritless because they seek review of a decision or order that does not exist.**

The Board’s regulations do permit “an aggrieved party” to request review of an order or direction of the Board Representative. 34 Pa. Code §95.91(k)(2)(iii). Such a request will only be granted “where the order or direction of the Board Representative is clearly erroneous and prejudicially affects the rights of the party seeking review.” *Id.* Furthermore, a stay will not occur unless explicitly ordered by the Board. *Id.* This extremely high standard, which is a prerequisite for the Board to even take up review of a pre-election order of a Board Representative, will be discussed in detail below in an abundance of caution. However, this standard obviously cannot be applied at this time *because there has been no order or direction of the Board Representative.* The absence of any decision, direction, or order of the Board Representative must be the beginning and end of this portion of Mr. Cronin’s request.

**B. If the Board indulges Mr. Cronin’s request to review its representative’s future decision, the request must be denied because such a decision would not be clearly erroneous or prejudicially affect Mr. Cronin’s rights.**

Despite Mr. Cronin’s apparent disagreement with the Hearing Examiner’s conclusion that graduate assistants at the University are public employes under the Act’s definition, this conclusion is not clearly erroneous, nor is it novel. Graduate assistants have been recognized by the Board as a class of employees for almost twenty years, and the Board has already certified a unit comprised of graduate assistants employed by another institution in the Commonwealth System of Higher Education. *See Temple Univ.*, 32 PPER ¶ 32164 (Pa. LRB 2001). The Board has explicitly held:

We agree with the Association that the graduate assistants are factually distinguishable from the residents, interns and clinical fellows at issue in *PAIR* . . . Accordingly, the Supreme Court’s decision in *PAIR* is not dispositive of the status of the graduate assistants at Temple and we subscribe to the analysis set forth in the NLRB’s decision in *Boston Medical Center*, which is even more persuasive when applied to the graduate assistants here.

*Temple Univ.*, 32 PPER ¶ 32044 (Pa. LRB 2000). The notion that the Board Representative’s potential acceptance of a proposed decision and order that obeys this holding is “clearly erroneous” is self-evidently wrong.

Nor has Mr. Cronin identified any right that will be prejudicially affected by the order he anticipates. His entire filing seeks to deprive himself and his colleagues of the only relevant right he has: his statutory right to vote for an exclusive representative or for no exclusive representative. He does raise the specter of an unidentified “associational right” of apparent federal constitutional dimension that seems – in his view – to be violated by exclusive representation itself, but he utterly fails to explain:

- how the Board Representative’s future order will affect that right;
- how the Board Representative’s future order will do so in a prejudicial way; or
- any relevant authority supporting the existence of that right.

In fact, Mr. Cronin's filing omits that the U.S. Supreme Court denied certiorari in *Hill v. SEIU*, 850 F.3d 861 (7th Cir. 2017), casting doubt on the validity of the dicta he cites from a 2010 opinion of a panel of the Eleventh Circuit Court of Appeals (which is the only legal support he provides for his unidentified associational right).

Therefore, even if Mr. Cronin is permitted to intervene, the Board should not grant review of the Board Representative's potential order based on Mr. Cronin's claims.

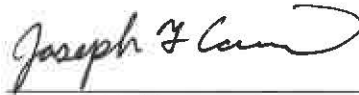
**C. The Board must not stay the election.**

The election that Mr. Cronin anticipates, if ordered, would be the result of years of organizing and more than a year of legal proceedings made necessary by legal arguments raised by the University (and now Mr. Cronin) which seek to ignore or explicitly overturn Board law. There are no legitimate reasons to stay any election that is ordered, and there are a great number of reasons to order an election with haste, including: the high turnover of the employees in the proposed bargaining unit, the already lengthy 14-month delay between the filing of the representation petition and the tentatively scheduled election; the upcoming end of the academic year; and the vast resources already spent by the parties. There is simply no basis in law or fact to take the rare step of staying the election, and the Board should refrain from doing so.

WHEREFORE, the Coalition of Graduate Employees, PSEA/NEA, respectfully requests that the appropriate representatives of the Board deny the filing styled "Motion to Intervene or Participate and Advance Request for Review and Stay" in its entirety.



Respectfully,



---

Joseph F. Canamucio  
Pennsylvania State Education Association  
400 North Third Street  
P.O. Box 2225  
Harrisburg, PA 17105-2225

*Attorney for the Coalition of Graduate Employees,  
PSEA/NEA*

Dated: March 26, 2018

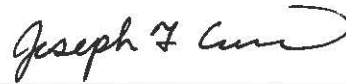
**CERTIFICATE OF SERVICE**

I, Joseph F. Canamucio, hereby certify that on this date, I served by e-mail and U.S. mail the foregoing document upon the following:

Shannon D. Farmer, Esquire  
Meredith Swartz Dante, Esquire  
Ballard Spahr LLP  
1735 Market Street, 51<sup>st</sup> Floor  
Philadelphia, PA 19103  
[DanteM@ballardspahr.com](mailto:DanteM@ballardspahr.com)  
[FarmerS@ballardspahr.com](mailto:FarmerS@ballardspahr.com)

David R. Osborne  
Nathan J. McGrath  
The Fairness Center  
500 North Third Street, Floor 2  
Harrisburg, PA 17101  
[david@fairnesscenter.org](mailto:david@fairnesscenter.org)  
[nathan@fairnesscenter.org](mailto:nathan@fairnesscenter.org)

Dated: March 26, 2018



---

Joseph F. Canamucio

# Attachment A

COMMONWEALTH OF PENNSYLVANIA  
Pennsylvania Labor Relations Board

IN THE MATTER OF THE EMPLOYES OF :  
:  
:  
:  
: Case No. PERA-R-17-40-E  
:  
PENNSYLVANIA STATE UNIVERSITY :

ORDER AND NOTICE OF HEARING

WHEREAS, on February 22, 2017, the Pennsylvania Labor Relations Board received a petition for Representation filed by:

COALITION OF GRADUATE EMPLOYEES, PSEA

a copy of which is attached hereto.

NOW, THEREFORE, the Pennsylvania Labor Relations Board, by and through its duly designated agent and, pursuant to the authority of the Board,

HEREBY ORDERS AND DIRECTS

that a pre-hearing telephone conference for the purpose of resolving the matters in dispute by mutual agreement of the parties will be held on **Thursday, April 6, 2017 at 10:00 A.M.**, initiated by Dennis Bachy (412) 565-5319. In the event the parties are unable to agree on the matters raised in the petition, it is hereby

FURTHER ORDERED AND DIRECTED

that a hearing to determine the issue raised in the aforementioned petition will be held on:

**Monday, May 15, 2017 at 10:00 A.M.**  
**HEARING ROOM 3**  
**NORTH OFFICE BUILDING**  
**401 NORTH STREET, GROUND FLOOR**  
**HARRISBURG PA 17120**

before **STEPHEN A. HELMERICH, ESQUIRE**, or such other agent of the Board as the Board may designate for the purpose of taking testimony relative to the aforesaid matter.

CONTINUANCES WILL NOT BE GRANTED UNLESS THE PARTY OR PARTIES DESIRING SUCH CONTINUANCE CLEAR WITH EACH OTHER AND AGREE ON A DATE WHEN ALL PARTIES INCLUDING THE HEARING EXAMINER ARE AVAILABLE. REQUESTS FOR CONTINUANCE OF A PRE-HEARING CONFERENCE MUST BE PRESENTED TO THE PENNSYLVANIA LABOR RELATIONS BOARD, 651 BOAS STREET, ROOM 418, HARRISBURG, PENNSYLVANIA 17121-0750, TELEPHONE NUMBER (717) 787-1091. REQUESTS FOR CONTINUANCE OF THE HEARING MUST BE PRESENTED TO THE ABOVE-NAMED HEARING EXAMINER.


THIS ORDER SHALL BE POSTED AND CERTIFICATION OF SUCH POSTING SHALL BE MADE TO THE BOARD AS REQUIRED BY 34 PA. CODE SECTION 95.43(b) AND (c).

Subpoenas may be requested pursuant to the provisions of 1 Pa. Code Section 35.142(a).

If you require a reasonable accommodation under the Americans With Disabilities Act to attend this hearing, please telephone STEPHEN A. HELMERICH, ESQUIRE, at 717-787-1091 to discuss your needs. (If hearing impaired, call TDD 1-800-654-5984.)

SIGNED, DATED AND MAILED, March 10, 2017, pursuant to 34 Pa. Code Section 95.81(c).

PENNSYLVANIA LABOR RELATIONS BOARD



Larry D. Cheskawich, Secretary