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IN THE COMMONWEALTH COURT OF PENNSYLVANIA

MICHAEL CRONIN,	:	
Petitioner	:	
	:	
v.	:	No. 537 C.D. 2018
	:	
PENNSYLVANIA LABOR RELATIONS BOARD,	:	
Respondent	:	
	:	

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 COMMONWEALTH COURT  
 OF PENNSYLVANIA  
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**APPLICATION TO QUASH PETITION FOR REVIEW**

NOW COMES the Pennsylvania Labor Relations Board (PLRB), in accordance with Pennsylvania Rules of Appellate Procedure 123 and 1532, and files this Application to Quash the Petition for Review filed by Michael Cronin. In support thereof, the PLRB, by and through counsel, avers as follows:

1. On February 22, 2017, the Coalition of Graduate Employees, PSEA/NEA (Coalition or CGE) filed a Petition for Representation seeking an election pursuant to Section 603(c) of the Public Employe Relations Act (PERA), 43 P.S. §1101.603(c), and Section 95.14 of the PLRB’s Rules and Regulations, 34 Pa. Code §95.14, among “full-time and part-time Graduate Workers including Teaching Assistants and Research Assistants as well as all other Graduate Assistants and Fellows” of the Pennsylvania State University (University or PSU),

which was docketed by the PLRB as Pennsylvania State University, Case No. PERA-R-17-40-E. (C.R.<sup>1</sup> 1-2).

2. Seven days of hearing on the Petition for Representation were held before a Hearing Examiner on September 5, 6, 7, 8, 11, 12 and 13, 2017 in State College, Pennsylvania, and both the Coalition and PSU filed post-hearing briefs.

3. On February 6, 2018, the Hearing Examiner issued an Order Directing Submission of Eligibility List (ODSEL), directing PSU to supply the names and addresses of “all full-time and regular part-time professional employees who are graduate students on graduate assistantship or traineeship and who perform services as teaching assistants, research assistants, or administrative support assistants and excluding graduate students on fellowship...”, who the Hearing Examiner found to be eligible to vote in a representation election under Section 605 of PERA, 43 P.S. §1101.605. (C.R. 159-188).

4. On March 23, 2018, Michael Cronin filed with the Board a motion entitled “Motion to Intervene or Participate and Advance Request for Review and Stay”.<sup>2</sup> (C.R. 228-282).

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<sup>1</sup> “C.R.” refers to the certified record filed with the Commonwealth Court on May 29, 2018.

<sup>2</sup> Section 95.91(k)(2)(iii) of the Board’s Rules and Regulations provides that “[p]rior to the conduct of a representation election, an aggrieved party may file a written request for review with the Board accompanied by a statement of service. A request for review will be granted only where the order or direction of the Board

5. On March 28, 2018, Peter Lassi, Board Representative, issued a letter stating as follows:

The Board's Rules and Regulations permit another employe representative to intervene as a party in a representation election proceeding with a ten percent showing of interest, and to intervene for the purpose of being placed on the ballot with a one percent showing of interest. 34 Pa. Code § 95.14(10).<sup>3</sup> However, individual employes lack standing to intervene in representation election proceedings before the Board. Official Court Reporters of Court of Common Pleas of Philadelphia County v. PLRB, 502 Pa. 518, 467 A.2d 313 (1983). Here intervention is sought by an individual, and not by an employe representative, and no showing of interest has been provided. Accordingly, Mr. Cronin lacks standing to intervene in this matter. Because Mr. Cronin lacks standing to intervene or participate as a party, he also lacks standing to file his motion for review and stay. Therefore, his motion is hereby denied.

(C.R. 357).

6. On March 28, 2018, the Board Representative also issued an Order and Notice of Election, directing a secret ballot election under Section 605 of

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Representative is clearly erroneous and prejudicially affects the rights of the party seeking review. The filing of a request for review with the Board will not operate, unless otherwise ordered by the Board, as a stay of any order or direction of the Board Representative.” 34 Pa. Code §95.91(k)(2)(iii).

<sup>3</sup> Section 95.14(10) of the PLRB’s regulations provides that “[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); *see also* National Labor Relations Board Case Handling Manual, Part Two, Representation Matters, §11194.4 (“[m]otions to intervene made by employees ... not purporting to be labor organizations should ordinarily be denied by the regional director).

PERA be conducted on April 10, 11, 12 and 13, 2018 at Penn State's University Park campus, on April 16, 2018 at Penn State's College of Medicine in Hershey, and on April 17, 2018 at Penn State's Harrisburg campus. April 23, 2018 was set as the deadline for mail ballots from Penn State Great Valley and Penn State Behrend. (C.R. 307-356).

7. The Order and Notice of Election was posted by PSU (C.R. 358), pursuant to Section 95.43 of the PLRB's Rules and Regulation, 34 Pa. Code §95.43, and the secret ballot election pursuant to Section 605 of PERA, 43 P.S. §1101.605, was conducted by the PLRB as scheduled in the Order and Notice of Election.

8. On April 17, 2018, Michael Cronin filed exceptions with the PLRB to the March 28, 2018 decision of the Board Representative denying the Motion to Intervene. (C.R. 359 – 578).

9. On April 17, 2018, Michael Cronin filed with the Commonwealth Court a Petition for Review of the Board Representative's March 28, 2018 decision denying the Motion to Intervene.

10. Pursuant to the Order and Notice of Election, the public canvassing and tallying of ballots took place on April 24, 2018 at 10:00 a.m. in Harrisburg, Pennsylvania. At the conclusion of the canvassing and tallying of ballots on April

24, 2018, it was publicly announced by the PLRB election officer that the majority of valid votes cast were for “No Representative.” (C.R. 579).

11. Following the public announcement of the results of the election, on April 24, 2018, Michael Cronin filed with this Court an Application for Relief Seeking Expedited Consideration of Appeal.

12. By Order dated April 26, 2018, this Court directed the Board to respond to the motion to expedite by May 4, 2018.

13. On May 2, 2018, the Board Representative issued a Nisi Order of Dismissal certifying the results of the election as required by Section 605(6) of PERA, 43 P.S. §1101.605(6), and dismissed the Representation Petition. (C.R. 580-582).

14. By Order dated May 2, 2018, this Court, referring to Pa. R.A.P. 313 (collateral orders), directed that the parties address the appealability of the Board Representative’s March 28, 2018 letter.

15. On May 4, 2018, the PLRB filed with the Court an Answer to the Application for Relief Seeking Expedited Consideration of Appeal, noting, in part, that the Representation Petition in Pennsylvania State University, Case No. PERA-R-17-40-E, had been dismissed by the May 2, 2018 Nisi Order of Dismissal.

16. On May 15, 2018, this Court denied Mr. Cronin's application to expedite the appeal, in part on the basis that a Nisi Order of Dismissal had been issued dismissing the Petition for Representation.

17. No exceptions to the Nisi Order of Dismissal have been filed with the PLRB. 34 Pa. Code §95.98 (a) and (b).

18. Pursuant to Pa. R.A.P. 1952, the Board filed the Certified Record of the proceedings in Pennsylvania State University, Case No. PERA-R-17-40-E with this Court on May 29, 2018.

19. Pursuant to the briefing schedule issued by the Court, Michael Cronin's Reproduced Record and Brief are due July 9, 2018.<sup>4</sup>

20. The March 28, 2018 letter of the Board Representative denying intervention in the election proceeding is not a final order of the PLRB agency head under Pa. R.A.P. 341. *See* 1 Pa. Code §31.3 (defining "agency head"); 43 P.S. §211.4(a) (establishing the three-member board of the PLRB).

21. Michael Cronin has not sought permission to appeal an interlocutory order under Chapter 13 of the Rules of Appellate Procedure. Pa. R.A.P. 312.

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<sup>4</sup> The PLRB is simultaneously filing an Application to Stay the Briefing Schedule pending disposition of this Motion to Quash.

**COUNT I**  
**COLLATERAL ORDER**

22. Paragraphs 1 through 21 are incorporated herein as if set forth at length.

23. An appeal may be taken from a collateral order that is (1) separable from and collateral to the main cause of action; (2) where the right involved is too important to be denied review; and (3) the question presented is such that if review is postponed until final judgment in the case, the claim will be irreparably lost. Pa. R.A.P. 313; Adams v. Department of Health, 967 A.2d 1082 (Pa. Cmwlth. 2009), *see also* Jefferson County v. Department of Environmental Protection, 703 A.2d 1063 (Pa. Cmwlth. 1997) (the merits of the petition to intervene are a necessary consideration of whether the claim is “too important to be denied review”).

24. Michael Cronin sought to intervene as an individual during the election (after the evidentiary hearing and issuance of the ODSEL, and prior to the issuance of a nisi order certifying the results of the election), without having obtained the required showing of interest to represent other eligible voters, 34 Pa. Code §95.14(10), and only to individually challenge the ODSEL and Order and Notice of Election directing the statutorily-required secret ballot election under Section 605 of PERA. *See* 43 P.S. §1101.605.

25. Michael Cronin sought to intervene before the Board to disrupt and stop the representation election. However, whether the Board conducts a secret

ballot election as required by Section 605 of PERA, with or without Michael Cronin casting a ballot, does not involve any harm to, or interest of, Michael Cronin that is too important to be denied review.

26. Michael Cronin's alleged interest in intervening in the representation election to challenge the ODSEL, because he does not wish to be represented for purposes of collective bargaining, is not a claim that will be irreparably lost if review is postponed until after the results of an election are known and a certification of representative issued by the PLRB. *See Cogan v. County of Beaver*, 690 A.2d 763 (Pa. Cmwlth. 1997), *see also Hopewell School District*, 11 PPER ¶11241 (Order Denying Request for Review, 1980) (an employer may file a challenge to an ODSEL or Order and Notice of Election on exceptions to a Nisi Order of Certification).<sup>5</sup>

27. The March 28, 2018 letter of the Board Representative denying Michael Cronin's Motion to Intervene does not meet the criteria for an appealable collateral order, and thus the Court lacks jurisdiction over the Petition for Review.

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<sup>5</sup> Indeed, PSU presented an extensive factual record during the seven days of hearing, and submitted a thorough post-hearing brief, (C.R. 36 – 143), preserving issues for exceptions in the event of a nisi order of certification. 34 Pa. Code §95.98(a)(2) (“[n]o reference may be made in the statement of exceptions to any matter not contained in the record of the case”); *Hopewell School District*, *supra*.

**COUNT II**  
**STANDING**

28. Paragraphs 1 through 21 are incorporated herein as if set forth at length.

29. Under the Administrative Agency Law, standing to appeal extends to “[a]ny person aggrieved by an adjudication of a Commonwealth agency who has a direct interest in such adjudication ....” 2 Pa.C.S. §702. “A direct interest requires a showing that the matter complained of caused harm to the person's interest.”

Citizens Against Gambling Subsidies, Inc. v. Pennsylvania Gaming Control Bd., 591 Pa. 312, 319, 916 A.2d 624, 628 (2007).

30. Michael Cronin sought intervention, as an individual, during the election, and for the stated purpose of requesting dismissal of the Representation Petition filed in Pennsylvania State University, PERA-R-17-40-E.

31. The Representation Petition filed in Pennsylvania State University, PERA-R-17-40-E has been dismissed by the May 2, 2018 Nisi Order of Dismissal following an election in which a majority of valid ballots were cast for “No Representative”.

32. Michael Cronin’s appeal of the Board Representative’s March 28, 2018 letter denying him intervention is contingent on the May 2, 2018 Nisi Order of Dismissal (to which no exceptions have been filed) and the outstanding dismissal of the Representation Petition in Pennsylvania State University, PERA-

R-17-40-E. *See Cogan, supra.* (if intervention were granted on appeal, remedy would include a demand for new proceedings). So long as there is a dismissal of the Representation Petition, Mr. Cronin has no live case or controversy in which to intervene.

33. Michael Cronin's position and status vis-à-vis PSU is the same after the Nisi Order of Dismissal as it was prior to the filing of the Petition for Representation. *See Official Court Reporters of the Court of Common Pleas of Philadelphia v. PLRB*, 502 Pa. 518, 467 A.2d 311 (Opinion Announcing the Judgement of the Court, 1983).

34. Michael Cronin is not aggrieved by the dismissal of the Representation Petition filed in Pennsylvania State University, PERA-R-17-40-E, and thus suffered no direct harm by the Board Representative's March 28, 2018 letter denying him intervention in the election procedure. *See Official Court Reporters of the Court of Common Pleas of Philadelphia, supra.; see also, Police Pension Fund Association Board v. Hess*, 562 A.2d 391, 394 n.5 (Pa. Cmwlth. 1989), *petition for allowance of appeal denied*, 524 Pa. 614, 569 A.2d 1371 (1989)(mere disagreement with legal reasoning does not confer standing to appeal).

35. Michael Cronin lacks standing to appeal the March 28, 2018 letter of the Board Representative denying the Motion to Intervene, or the Nisi Order of Dismissal, and thus the Court lacks jurisdiction over the Petition for Review.

**COUNT III**  
**MOOTNESS**

36. Paragraphs 1 through 21 are incorporated herein as if set forth at length.

37. Michael Cronin sought intervention as an individual, to request dismissal of the Representation Petition filed in Pennsylvania State University, PERA-R-17-40-E prior to the election.

38. On May 2, 2018, the Board Representative certified the results of the election, and issued a Nisi Order of Dismissal, dismissing the Representation Petition in Pennsylvania State University, PERA-R-17-40-E.

39. No exceptions to the Nisi Order of Dismissal have been filed with the PLRB.

40. Michael Cronin's purported interest in seeking to intervene to file a Request for Review in the election procedure to request dismissal of the Petition for Representation, has been rendered moot by the May 2, 2018 Nisi Order of Dismissal dismissing the Petition for Representation in Pennsylvania State University, PERA-R-17-40-E. Pennsylvania State Police, Bureau of Liquor Control Enforcement v. Bernie's Inc., Nos. 2604 C.D. 2009 and 2605 C.D. 2009,

2010 WL 9520677 (Memorandum Opinion, Pa. Cmwlth., 2010), *petition for allowance of appeal denied*, 610 Pa. 612, 20 A.3d 1214 (2011) (appeal was moot because the agency had revoked petitioner's license on other grounds).

41. Because the Representation Petition is now dismissed by a Nisi Order of Dismissal certifying the results of the election, a new election on a Petition for Representation involving any configuration, in whole or in part, of the petitioned-for unit at PSU is not capable of repetition until at least sometime after April 24, 2019. 43 P.S. §1101.605(7)(i) (barring another election for a period of twelve months).

42. Even after April 24, 2019, a new Petition for Representation would proceed anew through the PLRB's representation procedures, and thus any issues with respect to participation or intervention, or the purported employment relationship between persons in any petitioned-for bargaining unit and the University, would not necessarily evade review. *See Official Court Reporters of the Court of Common Pleas of Philadelphia, supra.*

43. Michael Cronin's appeal of the March 28, 2018 letter of the Board Representative denying the Motion to Intervene is rendered moot by the May 2, 2018 Nisi Order of Dismissal, and thus the Court lacks jurisdiction over the Petition for Review.

**COUNT IV**  
**EXHAUSTION OF ADMINISTRATIVE REMEDIES**

44. Paragraphs 1 through 21 are incorporated herein as if set forth at length.

45. On April 17, 2018, Michael Cronin filed exceptions with the PLRB to the March 28, 2018 decision of the Board Representative denying the Motion to Intervene.

46. Michael Cronin's exceptions to the March 28, 2018 letter of the Board Representative are pending with the PLRB.

47. On April 17, 2018, Michael Cronin filed with the Commonwealth Court a Petition for Review of the Board Representative's March 28, 2018 decision denying the Motion to Intervene.

48. This Court lacks jurisdiction to entertain a direct appeal from an order of a Hearing Examiner or the Board Representative. *See Daniel Angelucci v. PLRB*, 169 C.D. 2017 (Memorandum and Order, April 3, 2017 (quashing petitioner's appeal filed from a Proposed Decision and Order).

49. Pennsylvania Rule of Appellate Procedure 1701 precludes the Board from addressing Michael Cronin's exceptions to the March 28, 2018 letter of the Board Representative.

50. Because the Board is unable to proceed on the exceptions to the March 28, 2018 letter of the Board Representative, the PLRB is unable to issue a

final determination on Michael Cronin's motion to intervene or to comply with Pa. R.A.P. 1951(c) and provide the agency head's (PLRB's) reasons for its order.<sup>6</sup>

51. Michael Cronin has failed to exhaust available administrative remedies, and thus the Court lacks jurisdiction over the Petition for Review.

**COUNT V**  
**FAILURE TO PRESERVE ISSUES**

52. Paragraphs 1 through 21 are incorporated herein as if set forth at length.

53. On March 28, 2018, the Board Representative issued a letter denying Michael Cronin's Motion to Intervene.

54. On April 17, 2018, Michael Cronin filed with the PLRB exceptions to the March 28, 2018 decision of the Board Representative.

55. Section 95.98(a) of the PLRB's Rules and Regulations, 34 Pa. Code §95.98(a), provides for filing of exceptions to a proposed decision issued under §95.91(k)(1) (relating to hearings) or to a nisi order issued under §95.96(b)

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<sup>6</sup> Michael Cronin did not request to intervene or participate during the hearing prior to the ODSEL, nor on exceptions to a nisi order of certification. Instead, Michael Cronin requested to intervene as a party to the election, solely for the election process (that is but one part of a representation proceeding), as indicated by Mr. Cronin's filing of a purported Advance Request for Review and Stay. The Board Representative's March 28, 2018 letter was not necessarily a "blanket prohibition", but an interlocutory order denying an individual intervention to disrupt the PLRB from conducting the statutorily-required "election proceeding". However, due to Mr. Cronin's pending appeal, the PLRB is unable to address the Board Representative's March 28, 2018 letter.

(relating to exceptions) certifying a representative or the results of an election, within twenty days.

56. A letter (or an order) denying a Motion to Intervene by either a Hearing Examiner or the Board Representative, is neither a proposed order under §95.91(k)(1) nor a nisi order issued under §95.96(b) of the Board's Rules and Regulations.

57. Section 35.20 of the General Rules of Administrative Practice and Procedure (GRAPP) provides that “[a]ctions taken by a subordinate officer under authority delegated by the agency head may be appealed to the agency head by filing a petition within 10 days after service of notice of the action.” 1 Pa. Code §35.20.

58. Michael Cronin's exceptions requesting the PLRB's review of the Board Representative's letter denying intervention were filed twenty-days after March 28, 2018.<sup>7</sup>

59. Absent the PLRB's undertaking of review of Michael Cronin's exceptions pending before the PLRB, Michael Cronin failed to preserve any issues for appeal by not timely filing a petition to the Board from the Board

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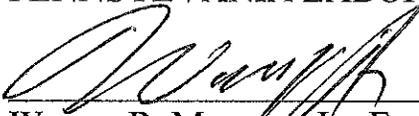
<sup>7</sup> *But see, Donatucci v. PLRB*, 547 A.2d 857 (Pa. Cmwlth. 1988) (noting that no exceptions to Hearing Examiner's denial of intervention were filed, but citing in *dicta* to 34 Pa. Code §95.98(b)); and 34 Pa. Code §95.42 (a) (that exceptions to the timely filing of papers with the PLRB, is at the discretion of the PLRB).

Representative's March 28, 2018 letter denying intervention. 1 Pa. Code §35.20; Eastern Pennsylvania Citizens Against Gambling v. Pennsylvania Gaming Control Board, 2389 C.D. 2011, 2013 WL 3542685 (Pa. Cmwlth., Memorandum Opinion, 2013).

60. Michael Cronin has not preserved any issues for appellate review with regard to the Board Representative's March 28, 2018 letter, and thus, the Court lacks jurisdiction over the Petition for Review.

WHEREFORE, for each and all of the foregoing reasons, the PLRB respectfully requests that the Court issue an Order quashing the Petition for Review at No. 537 C.D. 2018.

RESPECTFULLY SUBMITTED,  
PENNSYLVANIA LABOR RELATIONS BOARD

  
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Attorney No. 81922

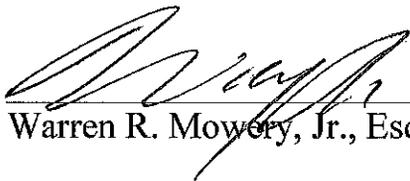
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Dated: June 11, 2018

CERTIFICATE OF COMPLIANCE PURSUANT TO PA. R.A.P. 127

Counsel for the Pennsylvania Labor Relations Board hereby certifies that the foregoing Motion to Quash Petition for Review does not contain any confidential information and documents and complies with the provisions of the *Case Records Public Access Policy of the Unified Judicial System of Pennsylvania* that require filing confidential information and documents differently than non-confidential information and documents.



Warren R. Mowery, Jr., Esquire

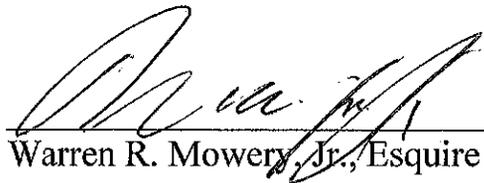
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PROOF OF SERVICE

I hereby certify that I am this day serving the foregoing Motion to Quash upon the persons and in the manner indicated below:

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Date: June 11, 2018