IN THE

UNIVERSITY ELECTIONS COMMISSION

No. UEC-2016-W-003
No. UEC-2016-W-010

JACOB PEARLMAN, in his official capacity as Student
General Counsel, Complainant

v.

JOSEPH AMBROSE, and

JAKOB HABER, Respondents

[March 11, 2016]

Appearances: JACOB PEARLMAN and NICK LOUKIDES appeared
before the Commission on behalf of the Complainant. SARAH
BRENNER appeared on behalf of Mr. Ambrose. LILLIANA LIN
appeared on behalf of Mr. Haber.

Heard Before: REESE, Election Director, PODRYGULA, Backup
Election Director, ANDREWS, BENNETT, BROWN, CELENTINO,
COLELLA, REAVES and ROSENTHAL Commissioners

Opinion of the Commission

COMMISSIONER CELENTINO delivers the opinion of the
Commission, which ELECTION DIRECTOR REESE (ex officio),
BACKUP ELECTION DIRECTOR PODRYGULA, and
COMMISSIONERS ANDREWS, BENNETT, BROWN, REAVES, and
This matter comes before the University Elections Commission on the complaint of Complainant, Jacob Pearlman, against Respondents, Joseph Ambrose and Jakob Haber for violations of Article VI of the CSG Compiled Code (“the Election Code”). Complainant alleges that Respondents failed to attend the Mandatory Candidates’ Meeting held on Monday, March 7th, in violation of § B(7)(e)(iv) of the Election Code.

The complaint was filed with the Election Director on March 7, 2016. Respondents were advised of the complaint on the same day and given twenty-four hours’ time to file a response. Through their appointed counsels, Respondents filed a response and appeared before the Commission at a hearing on March 9, 2016.

Pursuant to Rule 5.04 of the UEC Rules of Practice and Procedure, the Commission FINDS that the “facts, evidence, and arguments” in these matters are “substantially similar in nature,” and ORDERS them consolidated for joint disposition.

I.

The facts in this case are not contested. Accordingly, we FIND the following facts proved beyond a reasonable doubt:
1. A Mandatory Candidates’ Meeting within the meaning of the Election Code was held on March 7, 2016.

2. Notice of said meeting was circulated via email at least one week prior to the meeting. All applications for candidacy distributed to potential candidates listed the date, time and place of the meeting. Those materials also indicated that sanctions could be imposed upon any candidate for failing to appear.

3. A sign-in sheet was positioned at the entrance to the meeting, and attendees were warned multiple times that failure to sign in would likely result in the filing of a complaint against them. Respondents’ names do not appear on the sign-in sheet.

4. Respondents did not physically attend the Mandatory Candidates’ Meeting.

5. Respondents used either Skype or FaceTime to remotely observe substantially all of the Mandatory Candidates’ Meeting.

6. Respondents filed applications for candidacy and will appear on the ballot in the upcoming election.

7. During this election cycle, Respondents have not previously been found in violation of § B(7)(e)(iv) of the Election Code.
II.

We have previously held that “a failure to attend the Mandatory Candidates’ Meeting for any reason results in a violation of § B(7)(e)(iv).” In re Petition of Joseph Ambrose, UEC-2016-W-001, at 2–3 (February 11, 2016) (hereinafter “Ambrose Advisory Opinion”) (emphasis in original). As we noted in Ambrose Advisory Opinion, “[t]he Code lists no exceptions and provides no qualifications to its imperative that a candidate who fails to attend the meeting ‘shall be in violation.’” Id. at 3. That holding is binding on this Commission, Rule 6.02(a), UEC Rules of Practice & Procedure, and we remain firmly committed to its rationale.

Although the bright line rule announced in Ambrose Advisory Opinion would seem to resolve this case, counsel for Respondent Haber argued that we should instead find no violation of § B(7)(e)(iv) because the word “attend” should be construed to include the use of video-chatting technology. Under this reasoning, a candidate who Skypes into the Mandatory Candidates’ Meeting “attend[s]” that meeting. As described above, this argument flies in the face of our binding precedents. That would be reason enough to reject this argument and close the case, but there are also compelling reasons to believe that Skype was deliberately excluded.

Skype has been around since 2003. Doug Aamoth, A Brief History of Skype, Time (May 10, 2011), http://techland.time.com/2011/05/10/a-brief-history-of-
The Central Student Government itself was founded in 2011, so the modern Election Code has always existed with Skype as a background. Moreover, the Election Code has been amended numerous times, as recently as this academic year. See Assembly Resolution 5-006, A Resolution to Amend the Election Code (October 14, 2015). In light of the prevalence of Skype and similar video chatting services, we think the conspicuous absence of any Code provision allowing remote attendance demonstrates the Assembly’s deliberate choice not to create one. And even if the Assembly’s silence indicates failure to consider the permissibility of remote attendance, rather than a considered decision to forbid it, we do not think it is our place to create an exception when a more straightforward construction of the Code is available. The common sense meaning of “attend” in § B(7)(e)(iv) is “attend in person.”

Counsel for both Respondents advance definitions of the word “attend” that are broad enough to include presence via remote video. But it is not enough to point to some possible definition of a statutory term that supports the party’s desired outcome. See Dolan v. Postal Service, 546 U.S. 481, 486 (2006) (“A word in a statute may or may not extend to the outer limits of its definitional possibilities.”); see also FCC v. AT&T, Inc., 131 S.Ct. 1177, 1184 (2011) (“[C]onstruing statutory language is not merely an exercise in ascertaining the outer limits of [a word’s] definitional possibilities.” (internal quotation marks omitted; second alteration in original)). Our
opinion that “attend” should not encompass virtual attendance is informed by the unbroken practice of in person attendance that candidates and parties have observed heretofore.

We are not unsympathetic to Respondents, who took the time, although they were not physically in Ann Arbor, to Skype into the meeting. Their commitment to the Election Code’s requirements is admirable. Indeed, it became clear during our deliberations that some members of this Commission, if they could amend the Code, would be inclined to allow attendance at the Mandatory Candidates’ Meeting via Skype. But, as even those Commissioners recognize, that is a policy decision that the Assembly must make. We are bound to enforce the Code as written. And the Election Code, as it stands today, clearly contains no “Skype exception.”

We hold that a candidate cannot use Skype, FaceTime, or any similar remote video chatting technology to “attend” the Mandatory Candidates’ Meeting within the meaning of the Election Code. We thus find that Respondents Ambrose and Haber violated § B(7)(e)(iv), since they admittedly were not physically present at the Mandatory Candidates’ Meeting.

III.

The Election Code provides that failing to attend the Mandatory Candidates’ Meeting is a “Minor Infraction” that “shall result in the assessment of 1 to 2 demerits.” Election Code § B(7)(e) (emphasis removed). “[E]ach
demerit assessed includes a penalty revoking of 3% of the guilty candidate[s] . . . total weighted votes.” Id. at § B(6)(c).

A.

This Commission can, in its discretion, issue a “warning” rather than assessing demerits. Election Code § B(8)(c)(iii). In order to issue a warning, however, the Commission must find sufficient mitigating factors to deviate from the standard sanction of demerits. And, as we have previously held, “the Assembly intended for this Commission to exercise [its discretion to issue warnings] narrowly, and only in truly exceptional circumstances.” Ambrose Advisory Opinion, at 5.

We have previously held that a candidate who fails to attend the Mandatory Candidates’ Meeting “due to his or her participation in an internship or study abroad program endorsed by the University of Michigan” will be assessed demerits. Ambrose Advisory Opinion, at 3. That decision is controlling here. The only question that remains, therefore, is whether use of Skype is a mitigating circumstance.

B.

For the same reasons we held that a candidate cannot use Skype, FaceTime, or any similar remote video chatting technology to “attend” the Mandatory Candidates’ Meeting, we will not consider a candidate’s use of Skype to be a sufficient mitigating circumstance. A
contrary rule would effectively read the very Skype exception into § B(7)(e)(iv) that we have found does not exist. A sanction of 1 demerit is therefore appropriate for both Respondents Ambrose and Haber.¹

We therefore FIND the Respondents, JOSEPH AMBROSE and JAKOB HABER, to be GUILTY of a violation of § B(7)(e)(iv) of the Election Code.

It is ORDERED that one (1) demerit be assessed against each of the Respondents, JOSEPH AMBROSE and JAKOB HABER, and that the total weighted votes for each Respondent be reduced by three (3) percent accordingly. Respondents’ demerits totaling less than five, they both remain eligible for election.

¹ Although we are empowered to assess up to two demerits for minor infractions, this Commission usually reserves the full two-demerit sanction for more egregious violations. See Pearlman v. Chawan et al., 2016-UEC-W-008 and others (March 11, 2016).
Concurring Opinion

ELECTION DIRECTOR REESE (ex officio), with whom COMMISSIONER ANDREWS joins, concurring.

I join this opinion because both Respondents expressly declined to ask us to overrule this Commission’s decision in In re Petition of Joseph Ambrose, UEC-2016-W-001 (February 11, 2016).

For the reasons I have set forth previously and the reasons Commissioner COLELLA sets out in his dissent, I continue to maintain that that decision’s interpretation of our authority to depart downward from the Code’s sentencing guidelines or issue a warning was incorrect. Post, at 11–14; Ambrose (REESE, dissenting); Third Party Spending Opinion, UEC-2016-W-002 (March 7, 2016) (REESE, concurring).

Thus, I would vote to overrule Ambrose if that question were properly presented. But it would be inappropriate for this body to address an argument in a contested case that was not briefed or argued by the parties. Courts\(^1\)

\(^1\)As I have previously argued, analogizing the Commission to a Court is not always appropriate, given that it is an administrative agency that serves a policymaking as well as an adjudicative function. Third Party Spending Opinion, supra at *15–24 (REESE, concurring). But when the Commission sits in its adjudicative capacity to resolve complaints initiated, briefed, and argued by parties as part of an adversarial process, I believe the analogy is appropriate. It is not appropriate when this Commission acts under its authority to issue Advisory Opinions sua sponte. This distinction is neither novel nor unprincipled: federal administrative agencies operate under different rules when they are adjudicating cases in a court-like manner than
generally only consider arguments not raised by the parties in “exceptional circumstances,” *c.f. Duignan v. United States*, 274 U.S. 195 (1927), and even then they generally only do so after ordering reargument on the question, *United States v. O’Brien*, 391 U.S. 367, 391 (1968) (Harlan, J., concurring). This Commission has no comparable power to order reargument due to the abbreviated timeframe in which we must issue a decision. *CSG Compiled Code*, Art. IV, §(C)(5)(f). Moreover, when given the opportunity to argue that we should overrule *Ambrose* at hearing, both parties declined. Under these circumstances, I do not believe that the question is properly before us.

Accordingly, *stare decisis* compels me to join the majority today even though I agree with the substance of Commissioner COLELLA’s dissent.

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the rules that govern when they are engaged in pure policymaking. *Compare* 5 U.S.C. § 553 (2012) (establishing the procedures federal agencies must follow when engaging in rulemaking) with 5 U.S.C. § 554 (establishing the procedures federal agencies must follow “in every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing . . .”).
Dissenting Opinion

COMMISSION COLELLA dissenting in part.

I write as the sole dissent in the case of Pearlman v. Ambrose et al. as to Part III.A. I think this Commission is mistaken to assess either Respondent Jakob Haber or Joseph Ambrose¹ any demerits. The UEC should have used this case as an opportunity to overrule our decision in In re Petition of Joseph Ambrose (hereafter Ambrose Advisory Opinion) sua sponte.

This is because I believe there is an ample and compelling rationale for issuing a warning due to the academic nature of their reasons for not attending the meeting: their study abroad trips. To be clear, I still do find them guilty of violating § B(7)(e)(iv) of Election Code, but believe there is sufficient mitigating circumstances for warnings.

II.

In Pearlman v. Bayley, UEC-2016-W-005 (March 11, 2016), the Commission concludes that Respondent Bayley’s class was a sufficient mitigating factor to allow the Commission to issue a warning rather than demerits. Both Respondents Ambrose and Haber would undoubtedly have to miss their classes in an effort to

¹ There are domestic off campus programs as well such as Michigan in Washington or Semester in Detroit. For the sake of simplicity I will refer to these as well as “study abroad programs.” Respondent Ambrose is in Michigan in Washington. Respondent Haber, however, is overseas in Spain.
travel to campus for the meeting, which does not even take into account the financial or logistical burden this unnecessary trip to Ann Arbor would incur. Thus, the same rationale for excusing others for academic reasons\textsuperscript{2} should have been applied to Respondents Ambrose and Haber.

Furthermore in \textit{Keeney v. Liebshutz}, UEC-2014-W-020 (March 12, 2014), this Commission gave Respondent Liebshutz a warning rather any demerits for violating § B(7)(e)(iv) of Election Code, failing to attend the Mandatory Candidates’ Meeting. What was the mitigating circumstances for this decision? It was the fact that she was studying abroad in India. While I acknowledge that we are not bound to cases from previous years, “persuasive precedent” is given to those decisions (Rule 5.06, UEC Rules of Practice & Procedure). I do not see any reason why that was a valid reason for mitigation in the Winter 2014 Semester, but it is not now. The world has not changed that dramatically; the only thing that changed was the opinion of a majority of this unelected body.

\textsuperscript{2} Excusing people for Academic reasons has precedent in multiple cases including in \textit{Pearlman v. Bayley}, UEC-2016-W-005, (March 11, 2016) which is binding for this semester. Last Winter in \textit{Lin v. Campbell}, UEC-2015-W-001 (March 17, 2015), multiple candidates were also given warnings for “compelling academic reasons.”
III

The decision to award demerits to the two Respondents will discourage students studying abroad from running for a seat on the CSG Assembly as a singular demerit can easily cost a candidate the election. This is an affront to the idea that this body’s main missions: enforcing the Election Code and ensuring that the CSG election is democratic and fair. This is in agreement with argument made in Election Director REESE dissent in In Re Petition of Joseph Ambrose, UEC-2016-W-001, *10 (REESE, dissenting) in which he writes, “moreover, we should not discourage students who pursue study abroad opportunities from participating in CSG . . . we should not penalize them for putting their academic requirements or career goals ahead of their ability to attend a mandatory candidates meeting. College is, after all, not forever.” No student should be disadvantaged in their attempt to run in CSG Elections due to what they sincerely believe is best for their academics.

The only fact that prevents this decision from unfairly ruining the Respondents’ chance of winning a seat on the Assembly is the chance occurrence that they are the only two candidates for the Ford School of Public Policy. So, they are both equally disadvantaged by the findings of this Commission.

IV

While I do recognize that the Ambrose Advisory Opinion is binding for UEC this semester (Rule 6.02 a, UEC Rules
of Practice & Procedure), and while I do acknowledge the importance of *stare decisis*, I cannot in good conscience let this miscarriage of justice go unaddressed.

I respectfully dissent.