NORTON H. BRAINARD, III

ATTORNEY AT LAW
2833 COTTMAN AVENUE
PHILADELPHIA, PA 19149

(215) 335-2626
FACSIMILE (215) 333-4146

August 3, 2009

Lester A. Heltzer, Executive Secretary
National Labor Relations Board
1099 14th St. N.W.
Washington, DC 20570-0001

Re: Council of Chapters of AAUP at University of Medicine
and Dentistry of New Jersey
Case 22-RC-13014

Dear Mr. Heltzer:

Attached for filing, please find the Brief on Review of the Decision and Direction of Election on behalf of Petitioner, Teamsters Union Local No. 115, a/w IBT in the above matter. Attached is a Certification of Service showing service via e filing to J. Michael Lightner, Regional Director of Region 22 and Mark D. Schorr, counsel for the Employer via e-mail delivery.

Sincerely,

Norton H. Brainard, III

Cc: J. Michael Lightner, Regional Director of Region 22 (via e-file)
Mark D. Schorr, Esquire (via e-mail)

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

Council of Chapters of AAUP
At UNIVERSITY OF MEDICINE
AND DENTISTRY OF NEW JERSEY

EMPLOYER

AND **CASE NO. 22-RC-13014**

TEAMSTERS LOCAL UNION NO. 115 A/W
INTERNATIONAL BROTHERHOOD OF TEAMSTERS

PETITIONER

Petitioner's Brief on Review on Behalf of Teamsters Union Local No. 115, Petitioner

I. Preliminary Statement

This brief is submitted on Review of the Decision and Direction of Election issued June 23, 2009 in which the Regional Director determined that none of the employees sought by the Petitioner should be considered as confidential. The Petitioner urges the Board to dismiss the Request for Review after fully examining the entire record and the decision of the regional director.

The Council for Chapters of AAUP at the University of Medicine and Dentistry (the Employer) employs just three individuals which Teamsters Union Local No 115(the Petitioner) seeks to represent. The employees are Amy Reed, Senior Staff Representative, Robert Witkowski, Labor Relations Representative, and Vatrice George, Administrative Assistant. The Employer has two offices one is located in Piscataway New Jersey and the other is locate in

Newark New Jersey. (N.T. 7-8)[1]. Vatrice George works in the Newark office and Amy Reeder and Robert Witkowski work in the Piscataway office. There is a fourth individual of the Employer's staff, which the Petitioner does not seek to represent, Alex Bernstein, the Executive Director for the Employer. The Employer in its Brief of Review asserts that if the decision of the Regional Director is allowed to stand it is virtually impossible for an employer to establish that an employee in a proposed unit is confidential. In addition the Employer in its Brief for Review is attempting at this stage of the procedure to raise new issues that were not before the Region at the Representation hearing, specifically that Amy Reeder is not only a confidential employee but is impliedly a managerial employee. This was not the issue before the Region for consideration (Bd. Ex.-2)[2]. There was stipulation entered by the parties at the hearing wherein it was agreed that the only issue raised by the Employer was whether the three employees should be classified as confidential employees (Bd Ex 2). Petitioner was not aware of any other issues at the hearing; n fact the Employer's counsel stipulated the only issue before the Region regarding the status of the employees is that all of the three previously mentioned employees are confidential. (N.T. 7)

Now, however in its Brief for on Review, the Employer is attempting to litigate new issues concerning the status of Amy Reeder as not only being a confidential employee but also a managerial employee. This issue should not now be considered by the Board on Review.

As noted in the Employer's brief, the Employer happens to be a public employee labor organization that represents various faculty members on five campuses of the University of Medicine and Dentistry of New Jersey. The three employees in question Vatrice George, Amy Reeder and Robert Witkowski are employed by the Council of Chapters of the AAUP. Their primary job function is to represent the 1500 members of the Council in New Jersey.

---

[1] N.T. refers to the notes of testimony followed by the page number.

[2] Bd Ex. refers Board Exhibits followed by the exhibit number.

Alex Bernstein has been employed by the Employer in his current position since February 2007.

The Employer maintained below that three employees should be considered confidential and their excluded from any proposed unit sought by the Petitioner.[3]

The Employer in its brief mischaracterizes the testimony and documentary evidence in order to have the Board the reverse the decision of the Regional Director in this matter. Further, Petitioner would submit there has been no departure from the Board's past precedent in this matter. If indeed the Board did adopt the position of the Employer it would be reversing some 60 years of past precedent the Board as adhered to since its holding in Ford Motor Co., 66 NLRB 1317 (1946).

First, Petitioner would assert the Employer's organization bears some examination. The Employer is a labor organization, which represents other employees; it derives its revenues from the dues of its members. Unlike a private employer, the yearly budgets of the Employer have in been posted on the Internet for all of the public and its members to have access on its website. (www.aaupumdnj.org)(N.T.-63). Alex Bernstein testified on cross-examination that he did not have any problem with anyone viewing the Employer's budget even if they were not a full time member (N.T.64). From this openness of the Employer's budget, the Employer's main argument in this proceeding is that Ms. Reeder should be classified as a confidential employee since she assists in the preparation of the Employer's budget. Preparation of the Employer's payroll has been outsourced (NOT 116-117). Ms. Reeder also keeps records for the employees' 401 K program, however she is not involved in the decision as to what amount the Employer will contribute on the employees' behalf. The Employer made a decision to change the amount of the

[3] Interesting to note the Employer has dropped its argument concerning the confidential status of Robert Witkowski in this proceeding.

contribution back in 2001, Ms. Reeder and the past Executive Director of the Employer were asked to leave the Council meeting, while the council discussed the matter in executive session (N.T. 119). Ms. Reeder was not privy to, nor was she present when the decision was made by the Council concerning this matter was discussed. This has also been the case in other labor relations matters involving the staff and individual situations, such as discussions from the Executive Board about the staff's salaries (N.T.-133)

Ms. Reeder back in December 2006-February 2007 served as the Employer's acting Executive Director based on her years of employment. When Alex Bernstein was hired, she did not have any input on the decision to hire him. The Council of the Employer made the decision.(N.T.127)

Sometime after Mr. Bernstein was hired, he informed Ms. Reeder that Council had would allow the staff employees to establish employee only contributed accounts for flexible spending accounts for health, child care and transportation.(N.T. 119-120). There was approval from the council to establish these FSA accounts, there was a minimal charge involved with setting up the accounts from an outside provider. (N.T. 120). Ms. Reeder was not at the Employer's Council meeting when this matter was discussed. Ms. Reeder does oversee how the employees are reimbursed for their various expenses but the nature of her work is clerical, not confidential.

Ms. Reeder's involvement with the preparation of the budget is also clerical in nature. She has been doing this for the past twenty years (N.T. 122), based on years of experience rather than any independent judgment submits the preliminary budget to the Employer's two treasurers. She does not have any input into whether the budget will be approved. Nor does she attend any of the meetings of the Employer's Council where the matter of the budget is discussed. This is how the council behaves when it discusses matters involving staff labor issues. (N.T. 126)

Ms. Reeder testified that she does not have any access to the personnel files, including matters involving discipline or employee evaluation maintained by the Employer (N.T.129).

Ms. Reeder did testify, she and Robert Witkowski have been asked to attend negotiations advisor committee meetings. These meeting concern the Employer preparing for its upcoming negotiations involving the members represented by the Employer, not the staff members (N.T. 140) .

The Employer in its Brief for Review characterizes Ms. Vatrice George as Mr. Bernstein's confidential aide (E.B.-5)[4]. Petitioner would assert this is total mischaracterization of her title and job duties. The determination of employee's status as a confidential is based on the employee's total job duties not the employee's job classification.

The Employer takes to job duties of Ms. George and attempts to elevate these job duties as cloaking her with confidential status, yet there is no testimony in the record that shows Ms. George is confidential. For instance the Employer places a great deal of reliance on Ms. George's involvement with the collection and recording of dues money paid the members of the Employer. The dues money involves the members of the Employer, not the staff. Secondly as noted above the revenue from dues collection is used to determine the Employer's operating budget. The budget, however, is approved by the Employer's secretary treasurers.

Ms. George's day-to-day job duties are secretarial. Despite the assertion that Ms. George denies she has never taken any notes of the Employer's executive board meetings where staff labor relations (N.T. 102). The Employer has the burden of proof to show beyond a preponderance of the evidence that Ms. George is a confidential employee, and it has failed to do this.

[4] Employers Brief for Review followed by the page number..

When the Employer decided to reply to the Petitioner's demand for recognition, there were preliminary e-mails and telephone conferences in which the Employer discussed it labor strategy relating to the staff in the instant case. (U-3)[5]. Alex Bernstein sent emails to the Employer's Council and participated in a conference call. Ms. George was excluded from participating in these discussions. The Employer prepared a letter, which cannot be considered confidential since it was sent to the Union. The letter was signed and mailed by Ms. George, but this is only clerical in nature. The important thing to note is that Ms. George was not privy to any of the discussions or involved with the decision to not recognize the Petitioner or even what the decision of the Employer would be vis a vis the three staff members. The only person involved was Alex Bernstein and according to the testimony, he excluded Ms. George from this process. Although there is no evidence in the record that Mr. Bernstein either formulated determine" and effectuated this labor relations policy on behalf of the Employer.

Simply because business mail is marked confidential does make the material contained in the envelope confidential for purposes of Board Law. When Ms. George has opened, mail marked as confidential it did not contain any matters involving labor relations matters pertaining to the staff. (N.T. 111).

When Ms. George was asked by the Hearing Officer at the hearing if she had ever seen performance valuations for the other staff members she replied, "No." (N.T. 112). In fact, Alex Bernstein testified that he had prepared these evaluations by himself. Once again, as is the case with Ms. Reeder, Ms. George's job duties are clerical in nature not confidential.

II. Argument:

The Act does not define "confidential employee." For over fifty years, the Board has, on policy grounds, excluded from collective-bargaining units those employees who assist and act in

[5] Petitioner's Exhibits are referred to as U followed by the exhibit number.

a confidential capacity to persons who formulate, determine and effectuate management policy with regard to labor relations (i.e., "qualifying persons"). B.F. Goodrich Co., 115 NLRB 722, 724 (1956). The test set forth in B.F. Goodrich is commonly referred to as the "labor nexus test." The Board also excludes from bargaining units, for the same policy reasons, those individuals who have regular access to confidential information concerning anticipated changes that may result from collective bargaining, irrespective of whether they assist a qualifying person. Pullman Standard Division of Pullman, Incorporated, 214 NLRB 762, 762-763 (1974); Inland Steel Company, 308 NLRB 868, 872, 877 (1992). Confidential employees, though they may be excluded from bargaining units, enjoy the protections of the Act. Peavey Co., 249 NLRB 853, fn. 3 (1980). For this reason, the Board's guidelines for excluding employees asserted to be "confidential" are very strict; a broader test would operate to needlessly deprive many employees of their right to bargain collectively under Section 7. Dun & Bradstreet, Inc., 240 NLRB 162, 163 (1979); Ryder Student Transportation Services, Inc., 336 NLRB 882, 889 (2001). The burden of establishing that an employee should be excluded as confidential is on the party asserting confidential status. Crest Mark Packing, 283 NLRB 999 (1987).

The Employer in the instant case seeks to have the Board reverse this past precedent and in effect expand the coverage of what a confidential employee is. In addition, Petitioner would assert a close reading of the record reveals that the Employer did not meet its burden.

The indicia of a qualifying person, under the labor nexus test, are stated in the conjunctive: one must "formulate," "determine" *and* "effectuate" labor relations policy. Weyerhaeuser Co., 173 NLRB 1170, 1172 (1969); Holly Sugar Corp., 193 NLRB 1024, 1025 (1971). Mr. Bernstein is simply a conduit of the decisions made by the Executive Council of the Employer. He does job evaluations, yet it is the Council that determines the merit wage

increases give to the staff. Mr. Bernstein merely recommends changes but he does not have the final approval. Even if it is assumed that Mr. Bernstein "effectuates" labor relations policy, the evidence does not support a finding that he either "formulates" or "determines" labor relations policy. The Council does this. Therefore, applying the conjunctive test set forth above to Mr. Bernstein is clear he is not a "qualifying person" under the labor nexus test.

If Mr. Bernstein is not a "qualifying person" than neither Ms. George nor Ms. Reeder can be considered confidential. A point to be noted in the instant case is that there has never been an instance of collective bargaining between the staff and the Employer.

The one thing clear from the record is the Executive Board of the Employer through its elected officers will formulate the bargaining strategies and proposals with the Petitioner. There is not sufficient evidence in the record to even establish that Mr. Bernstein will even be involved in the decision making process when it comes to establishing a the labor policies involving the staff. Mr. Bernstein's signature does not even appear on the letter to the Petitioner wherein it informed the Petitioner that all three employees sought by the Petitioner are confidential employees. The letter is signed by the Employer's President and Vice President. (U-3)

The Board in the past has been reluctant to rest a finding that someone presently has or will have, authority to formulate, determine and effectuate labor relations policy in regard to collective bargaining. See: Curt Gowdy Broadcasting, Inc., d/b/a KOWB Radio, et al., 222 NLRB 530, 531 (1976) (mere possibility that the individual will become involved in formulating, determining and effectuating labor relations policy too speculative to satisfy the labor nexus test). Cf. Firestone Synthetic Latex Corp., 201 NLRB 347 (1973) and E and L Transport Company, 327 NLRB 408 (1998)

The mere handling and working with information that may be considered confidential in the everyday sense of the word, which the Employer seeks to have the Board as the law, does not warrant the finding of an employee a confidential. Handling of or access to confidential business or labor relations is insufficient to render an employee "confidential" "Instead, the Board will look not to the confidentiality of information within the employee's reach, but to the confidentiality of the relationship between the employee and persons who exercise "managerial" functions in the field of labor relations". Ernst & Ernst National Warehouse, 228 NLRB 590 (1977). Even regular access to confidential information with not exclude and employee under Pullman, supra and Inland Steel, supra, unless that information concerns anticipated changes that may result from collective bargaining.

The current job duties of Ms. Reeder and Ms. George have been considered by the Board in Los Angeles New Hospital, 244 NLRB 960, 961 (1979) and not been deemed to make them confidential employees.

The argument in the instant seeks to persuade to the Board somehow include considering the potential future duties of an employee to determine whether the employee should be considered a confidential employee. The Board in American Radiator Corp., 119 NLRB 1715 (1958) dismissed this consideration.

In Air Line Pilots Ass'n , 97 NLRB 929 (1951), the Board noted that in its then 16 years of experience had never had to decide a case involving the employees of a labor union. The Board held that the employees sought by the petitioner were not confidential, since the confidential information possessed by the office and clerical employees pertains to personnel or to matters of a business nature, rather than to the field of labor relations, the Board found that the

employees in question were not confidential employees. See also Republic Steel Corporation, 94 NLRB 1294 (1951)

Petitioner submits the test is quite simple but the Employer in the instant case is making the application quite difficult. None of the employees in the current have regular access to information relating to their own labor relations matters. It is not disputed that the staff employees have access to the members represented by the Employer at University of Medicine and Dentistry, but this information does not involve information that will be used in their collective bargaining negotiations with the Petitioner.

Both Ms. Reeder and Ms. George's roles with Employer are clerical. In their clerical roles, they cannot determine from the data, for instance the budget that is being prepared what labor policies will result. American Radiator Corp., 119 NLRB 1715, 1720-21 (1958)

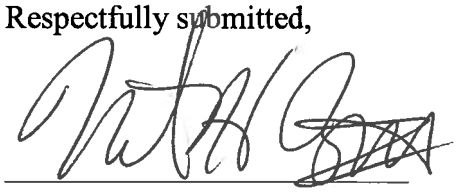
The Employer in its brief argues that based on the Regional Director's reasoning, "no person in a proposed would ever be confidential for yet another reason, An employer would always be left with the unfair, unprecedented, choice of changing responsibilities if its employees, and perhaps begin forced to take on additional employees in order to preserve the confidential of its information, or simply disclosing such information to the employees, which would certainly give them the advantage in negotiations the terms and conditions of their employment." (EB-2-3). The argument does not take into consideration the policy and purpose of the National Labor Relations Act. The Employer in its argument overlooks the basic premise of the Act, which stated in section 7 of the Act giving employees the right to self-organization, to form, join or assist labor organizations. There is nothing in the Act that says employees shall have the right to organize **but** only at the convenience of their Employer.

Currently making documents and files protected is much different from even 40 years ago. Bargaining strategies, e-mails and other confidential correspondence can be protected by the use of computer passwords. The file cabinet containing hard copies of this information are from a day gone by. The world has changed a great deal since Ford Motor Co., supra was decided. However, the one thing that has endured throughout all of these years has been the basic premise of the Board to recognize that there is a need to classify employees as confidential. But, since the classification of confidential employee deprives the employee(s) from being represented by a union for collective bargaining purposes as set forth in Section 7, is should not be broadly interpreted. The Employer in the instant case wants the Board to expand the coverage of confidential to include new classes of employees and deprive these employees of the right to organize. The industrial sector in the United States 60 years ago no longer exists. Employees who are organized today are in the service sector and what used to be called "white collar' jobs. At this juncture in United States labor, history the last thing needed is to expand the term confidential employee. Therefore, Petitioner urges the current Board to dismiss this matter entirely and allow the election and the ballots of all of the employees to be counted.

III. Conclusion

For the reasons set forth herein, Petitioner requests the Board to deny the Employer's Request for Review in this matter.

Respectfully submitted,



Norton H. Brainard, III
Counsel for Petitioner
2833 Cottman Avenue
Philadelphia, PA 19149
215-335-2626

Date: August 3, 2009

CERTIFICATION

I, Norton H. Brainard, III do hereby certify that I have filed via e-filing a true copy upon the Employer's counsel, the foregoing Teamsters Union Local No. 115 Brief on Review pursuant to the requirements of the Board's Rules and Regulations on August 3, 2009.

FILED VIA Electronic Filing

Lester A. Heltzer
Executive Secretary,
National Labor Relations Board
1099 14th St. N.W.
Washington, DC 20570-0001

J. Michael Lightner, Regional Director
National Labor Relations Board
Region 22
20 Washington Place, 5th Floor
Newark, NJ 07102-3110

And

SERVED VIA EMAIL
Mark D. Schorr, Esquire
Counsel for the Employer
33 State Road, Suite F
Princeton, NJ 08540
mschorr@ccrow.com

Norton H. Brainard, III
Counsel for Petitioner