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July 30, 2009

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

Re: University of Medicine and Dentistry Council of AAUP Chapters ("AAUP") and
Teamsters Union Local No. 115
Case No. 22-RC-13014

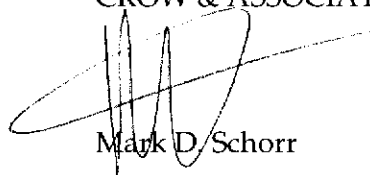
Dear Mr. Heltzer:

Enclosed for filing please find Brief on Review of Decision and Direction of Election on Behalf of University of Medicine and Dentistry New Jersey Council of American Association of University Professors Chapters and Certification of Service.

By copy of this letter, a copy of this Request for Review is being served by e-mail on the Regional Director and counsel for the Petitioner.

Yours very truly,

CROW & ASSOCIATES



Mark D. Schorr

cc: Norton H. Brainard, III, Esq. (by e-mail)
J. Michael Leitner (by e-mail)

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

UNIVERSITY OF MEDICINE AND DENTISTRY OF
NEW JERSEY COUNCIL OF AMERICAN ASSOCIATION
OF UNIVERSITY PROFESSORS CHAPTERS,

Employer,

Case No. 22-RC-13014

and

TEAMSTERS UNION LOCAL NO. 115,
INTERNATIONAL BROTHERHOOD OF TEAMSTERS,

Petitioner.

**BRIEF ON REVIEW ON BEHALF OF UNIVERSITY OF MEDICINE
AND DENTISTRY NEW JERSEY COUNCIL OF AMERICAN
ASSOCIATION OF UNIVERSITY PROFESSORS CHAPTERS**

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PRELIMINARY STATEMENT

This brief is submitted on the Review of the June 23, 2009 Decision and Direction of Election (hereafter referred to as "DD") on behalf of the employer, the University of Medicine and Dentistry Council of American Association of University Professors Chapters (the "AAUP"). The Regional Director concluded that the AAUP employees at issue were not confidential employees.

The AAUP employs four persons: Alex Bernstein, a managerial employee; Vatrice George, an administrative assistant who serves as Mr. Bernstein's confidential secretary; Amy Reeder, who manages the AAUP's office and, among her other duties, prepares the organization's budgets; and Robert Witkowski, whose title is labor relations representative. This matter involves review of the Regional Director's determination as to two of them, Ms. George and Ms. Reeder.

The Regional Director's decision represents a departure from the Board's policy and would, if permitted to stand, render it virtually impossible for an employer to establish that an employee in a *proposed* unit is confidential. As we will demonstrate, the decision is based upon a number of logical flaws and turns on its head the very notion of what information and employees are confidential in the case of employees not yet organized.

Significantly, the Regional Director found that the AAUP "does not keep budgetary, financial and other records confidential from the staff, even though access to that information might assist the employees in negotiations with the Employer regarding their terms and conditions of employment." Access to the information, he continues, would not give these employees an unfair advantage "because all Unit employees will continue to have access to the same information they had in the past." (DD 9 to 10).

That the employees "will continue to have access to" information which "might assist the employees in negotiations" with the AAUP was the reason for the AAUP's claim that the employees are confidential. The Regional Director's reasoning is fatally flawed. He has rejected the claim that these employees are confidential *because* they have had access to confidential information.

Stated otherwise, if the reasoning of this decision stands, employees who are not yet members of a unit can never be confidential employees based on their access to confidential information. They would be entitled to membership in a unit and could use the confidential information to their advantage when they sit across the bargaining table from their employer.

The Regional Director also reasoned that Ms. Reeder's early access to the AAUP's confidential financial information she uses to prepare the organization's budget--she is privy to such information even before members of the AAUP's governing body--is "irrelevant" and that the AAUP could in any event "exclude" her from preparing the AAUP budget, which has always been her responsibility (DD 10). In other words, in an implicit acknowledgment that Ms. Reeder does have access to confidential information; the Regional Director would have the AAUP alter her duties, so that she would no longer have access.

The timing of access to confidential information is indeed relevant. And the AAUP should not be forced to find Ms. Reeder a new job so she may properly be in a bargaining unit. There is no logical rationale for the Regional Director's suggestion in this connection.

Moreover, based on the Regional Director's reasoning, no person in a proposed unit would ever be confidential for yet another reason. An employer would always be left with the unfair, and unprecedented, choice of changing the responsibilities of its employees, and perhaps being forced to take on additional employees in order to preserve the confidentiality of its information, or simply disclosing such information to the employees, which would certainly

give them an advantage in negotiating the terms and conditions of their employment. The AAUP then would essentially be unable to employ confidential employees.

We are mindful that the Board will exclude employees as confidential in limited circumstances. That policy, however, is not an invitation to simply manufacture any rationalization to justify rejecting a claim of confidentiality. That is just what the Regional Director did here.

STATEMENT OF FACTS

A. The AAUP

The AAUP is a public sector labor union representing approximately 1500 faculty on five campuses of the University of Medicine and Dentistry of New Jersey ("UMDNJ"). The AAUP negotiates and administers a collective bargaining agreement and serves as an advocacy group for its members, whose employer is UMDNJ (T12).

The AAUP's offices are in Newark and Piscataway, New Jersey (T13 to 14). The AAUP's principal sources of income are dues and agency fees. The AAUP's only other income source is interest on its reserve (T14).

The AAUP is comprised of two local chapters, one for the Newark campus, the second representing the other campuses (T15). The Newark Chapter has a Board of Governors, and the Chapter representing the other schools an Executive Committee. Each deals with issues arising on the local campuses (T16).

Certain representatives of the Board of Governors and the Executive Committee make up the Council, the AAUP's governing body. The Council meets every other month, and at those meetings, makes major operating decisions for the AAUP, including decisions bearing on contract administration, the disposition of grievances, budgets, dues, and salary and benefits for the AAUP's four employees (T17 to 18).

AAUP Council meetings are attended by members of the Council and all four AAUP employees: Alex Bernstein, Vatrice George, Amy Reeder and Robert Witkowski (T18). We will deal with each one separately.

The Council, of course, would be the body responsible for making decisions related to collective bargaining and contract administration for AAUP employees. As already noted, the

Council is the AAUP's sole governing body. The Council conducts AAUP business and sets AAUP policy at its meetings.

B. Alex Bernstein

Charged with carrying out AAUP policy, Alex Bernstein is the AAUP's Executive Director, a position he has held since February 2007. The parties agree that Mr. Bernstein is a managerial employee who should be excluded from the proposed unit. His responsibilities include overseeing the three other employees, making recommendations to the Council as to how to deal with various issues, developing rules with respect to the AAUP's operations, including work rules for employees, and negotiation and administration of the AAUP's contract with UMDNJ (T21).

Mr. Bernstein's office is in Newark. Across the hall from him, because of her role as his assistant in all matters, is Vatrice George, the AAUP's administrative assistant (T22).

The petitioner in the present matter, Teamsters Local No. 115, has not, as noted above, asserted that Mr. Bernstein should be a member of the collective bargaining unit, and he could not be. Mr. Bernstein, as Executive Director, is charged with the responsibility for carrying out AAUP policies, and he would be the employer representative for dealing with a staff union. Nevertheless, employees of the AAUP work closely together, share many responsibilities and have access to the very same information, which the Director has all but acknowledged is confidential. The AAUP office is a small one, and AAUP employees interact in a collegial manner.

C. Vatrice George

Ms. George reports directly to Mr. Bernstein and serves as his confidential aide in all matters affecting the AAUP. Ms. George is his "right-hand person," and they jointly run the AAUP office (T23). She is also generally responsible for: (1) day-to-day clerical work of the

AAUP office (T37 to 43; Exhibits E¹-5, E-6 and E-7); (2) tracking the AAUP membership (T25); and (3) faculty outreach (T26). Located across the hallway from Mr. Bernstein's office in Newark because she works so closely with him (T22), Ms. George has access to all AAUP documents, both confidential and non-confidential (T28 to 29). She is responsible for drafting some AAUP documents, and for reviewing and editing the others Mr. Bernstein drafts (T25; T87 to 88; T106).

Ms. George's day-to-day responsibilities include a range of duties, requiring that she: read and file, and sometimes edit, documents which pass through the AAUP's offices, including those Mr. Bernstein prepares; answer the AAUP office phone; open correspondence, including correspondence marked "confidential" (*e.g.*, from the AAUP president's office); access and review the preliminary budget (Exhibit E-2); assemble packets for distribution and record attendance at Council meetings; arrange for the meetings; and attend meetings of both the Council and local governing bodies; take notes at such meetings; and transcribe minutes of the meetings (T24 to 26; T28 to 29; T38; T105; T107 to 108; T111). Ms. George has only once been excluded from a portion of a Council meeting--that which dealt with Ms. Reeder's maternity leave (T104 to 105).

AAUP governance meetings include Council meetings at which the budget is discussed (T108). Prior to such a meeting, Ms. George would have received and reviewed a preliminary budget. Thus, she is aware of the preliminary forecast of expenditures and deficits, payroll and benefits, and dues collections. She advises Ms. Reeder as to dues collections and is aware of the amount of dues receipts deposited (T109).

¹ Employer exhibits will be designated by "E," for example, E-1. Union exhibits will be designated by "U."

Ms. George's title is administrative assistant. But the title does not fairly describe her role. All AAUP correspondence--letters which come in and those going out--is routed through her; she reviews and edits Mr. Bernstein's correspondence; she handles all documents in the AAUP office; and by virtue of her position, Ms. George is aware of all business Mr. Bernstein transacts for the AAUP, including that related to the petitioner, as we will discuss below. Ms. George thus has a close working relationship with Mr. Bernstein by virtue of her proximity to him and the fact that they collaborate on all matters (T22 to 23).

What happened in connection with the instant representation petition is typical. After the filing of the petition, Mr. Bernstein asked Ms. George to organize a conference call for Drs. Lepore and Kumar, the AAUP Chapter Presidents. Following the call, Mr. Bernstein drafted a letter to the petitioner for Drs. Lepore and Kumar to sign and asked that Ms. George review the letter and confirm the agreement of Drs. Lepore and Kumar to its terms, so she could sign on their behalf. Ms. George reviewed, signed, initialed and faxed the letter (T103 to 104; T106; Exhibit U-3).

In the context of the letter to the union in connection with the union's representation petition, Ms. George explained her role:

Q. Did you review the letter (Exhibit U-3) before you sent it out?

A. I read it.

Q. And do you typically read correspondence that Mr. Bernstein prepares?

A. Yeah. I read almost everything I send out.

Q. ...And that's part of your job, correct?

A. Yeah, because later on he might discuss it with me and that's why I start reading it because I have to know what he's talking about.

...

Q. Now I take it that you, you see the documents that Mr. Bernstein prepares himself.

A. Yes. [T106 to 107].

In connection with the AAUP's dealings with the petitioner in the present matter, Ms. George also saw the performance appraisals of Ms. Reeder and Mr. Witkowski. She was responsible for sending them on to the AAUP's counsel (T111).

Since Mr. Bernstein, as the AAUP's managerial employee, would handle its relations with a staff union, Ms. George's close interaction with him in connection with the letter to the petitioner (Exhibit U-3) and the employee performance appraisals illustrates the role she plays in such matters. That role is one of confidential assistant. As Mr. Bernstein testified, there is no confidential communication that passes through his office that Ms. George does not see. As noted above, she not only sees all of Mr. Bernstein's correspondence, she sometimes edits his letters (T87 to 88). Ms. George has access to every document created in connection with AAUP business (T28).

Ms. George is also privy to Council decisions on personnel issues. In connection with her role as, in effect, secretary at the Council meetings, she has been apprised of the Council's decisions on staff salaries (including her own) (T110).²

D. Amy Reeder

Amy Reeder's office is in Piscataway, New Jersey. She is effectively the AAUP's office manager. She is in charge of the financial, personnel and budgetary functions of the AAUP. Ms. Reeder oversees the AAUP's human resources activities, and she has an integral role in the hiring process (T44 to 45).

² Ms. George was absent from the meeting, but obtained the information as to staff salaries from Ms. Reeder afterward (T110).

Ms. Reeder handles certain administrative matters on a day-to-day basis. She is in charge of payroll, oversees employee benefits, such as health insurance, makes the 401(k) contributions and implements salary increases (T45 to 46). She was instrumental in recruiting, hiring and orienting Vatrice George and Robert Witkowski, the AAUP's labor relations representative (T44; Exhibit E-9).

Ms. Reeder has overseen expansion of AAUP staff and office space. She coordinated an office move and set up a cost effective computer system (Exhibit E-7). She is also responsible for ensuring that the AAUP meets all of its annual requirements, including financial reporting requirements (Exhibit E-9). Ms. Reeder is aware of all of the AAUP's obligations and pays all bills, including employee expense reimbursement (T45).

Ms. Reeder has for some 20 years been responsible for overseeing the AAUP's budget process. She prepares and transmits the initial draft of the AAUP's budget with input from Mr. Bernstein (T33 to 36). In the course of the process, Ms. Reeder will calculate the amounts in the budget, in preliminary form, for payroll, benefits, anticipated revenues and other items of expense and income (T34; Exhibits E-2 and E-3). In preparing the draft budget, Ms. Reeder gets some guidance, but exercises independent judgment as to individual budget lines based on her knowledge of AAUP operations and the discretion afforded to her (T36).

After preparing the initial draft of the budget, Ms. Reeder consults with the Chapter Treasurers, participates in Council meetings on the budget and provides the draft to the members of the Council for their review (T33). The draft includes explanatory notes which, in effect, anticipate questions on the document (T35). For example, in the 2007-08 draft, Ms. Reeder explained, in note 1 under "Expenses," that payroll expenses were lower in fiscal 2007 on account of staff vacancies (Exhibit E-3, under "Explanatory Notes"). She needs unlimited access to confidential information to prepare the explanatory notes. Thus, Ms. Reeder's

budgetary role is central. She is aware of budget issues even before members of the AAUP's governing body and is responsible for educating members of the Council on budgetary matters (T35).

Employee expenses are not confined to the payroll and benefits lines of the budget. Amounts attributable to other expenses are embedded in the various budget lines--for example, the costs of travel to conferences. Ms. Reeder is the AAUP employee knowledgeable about how such expenses are allocated in the budget, and the Council and Mr. Bernstein depend on her knowledge in such matters (T35 to 36).

While the Regional Director has suggested that Ms. Reeder's responsibilities involve limited discretion, it is clear she is an integral part of the AAUP's administrative structure in general and indispensable to its budgetary process in particular. As noted above, she often uses her independent judgment to calculate the line items on the first draft (T36), which, of course, influence the final budget. In fact, the preliminary budget is available only to AAUP employees and two Chapter Treasurers (T124).

Ms. Reeder has also been involved in AAUP personnel decisions. For example, she interviewed and made recommendations on the hiring and salary of Vatrice George (T135 to 136). She participated in posting the position for which Robert Witkowski was ultimately hired and for screening and interviewing the candidates (T143 to 144).

Another of Ms. Reeder's responsibilities centers on the AAUP's filing of its annual tax return. She is the one who serves as point person for the returns when a question arises within the AAUP, and she works directly and independently with the AAUP's auditors (T142 to 143).

Ms. Reeder served as Acting Executive Director when the previous Executive Director departed, as she had in the past (Exhibit E-7). Like the other staff members, Ms. Reeder attends and participates in all of the meetings of the AAUP's elected bodies, including the Council. She

is therefore aware of all of the Council's actions and activities, as well as the rationale for Council decisions. At its meetings, the Council determines what actions to take as to grievances and other matters of contract administration (T17).

E. Robert Witkowski

Having joined AAUP in 2007 as labor relations representative, Mr. Witkowski reports directly to Mr. Bernstein and has primary responsibility for increasing membership (T21; T94 to 95). Mr. Witkowski was hired to service faculty in New Brunswick and Stratford (T55). Ms. Reeder and Mr. Bernstein together wrote the job advertisement for the position which Mr. Witkowski ultimately filled (Exhibit E-12; T55). Ms. Reeder posted the job advertisement in various places, as she did for the administrative assistant position (T56). As noted above, she was also involved in the interviewing and hiring process for Mr. Witkowski.

ARGUMENT

POINT I

AMY REEDER REGULARLY HAS ACCESS TO, AND INDEED, CREATES CONFIDENTIAL INFORMATION

There was no dispute about Amy Reeder's access to information utilized to prepare the AAUP's draft budgets; in fact, she annually authors the AAUP's preliminary budgets (T33 to 36). There is no dispute that she is in charge of personnel and learns of the AAUP's human resources related decisions both from that responsibility and from her attendance at all meetings of the Council (T17; T44), the AAUP's governing body, which would set collective bargaining policy for the AAUP as an employer at those meetings. She also has intimate knowledge about the AAUP's revenues, expenditures and any expected surplus or deficit, since she handles dues monies and is in charge of AAUP finances (T34 to 36; T44 to 46). Ms. Reeder has direct input and influence with the Chapter Treasurers, with whom she meets prior to presentation of the budget to the Council.

Such information as Ms. Reeder possesses, in the hands of a union prior to a collective bargaining session, provides a significant strategic advantage in negotiations. The draft budget contains lines for the AAUP's anticipated expenditures for employee salaries and benefits and its anticipated dues receipts, among others. It indicates whether a surplus or deficit is anticipated. From such figures, the union could predict with precision the size of the raises management plans to offer.

Ms. Reeder is not just one who has access to confidential information. She generates such information and uses it in the course of her responsibilities, a crucial factor in the analysis (T33 to 36).

Ms. Reeder (along with Ms. George) sees and generates confidential information pursuant to her everyday responsibilities, and she has access to it even before members of the AAUP's Council and long before the budget is published--assuming it will in the future be published. Moreover, the salary figures Ms. Reeder develops for the draft budgets include a discretionary raise for employees, which Mr. Bernstein recommends (T123). Therefore, Ms. Reeder would also have access to this information before the union would.

There is, we submit, no precedent for union membership for a person with Ms. Reeder's access to and use of confidential information. In fact, the AAUP and its Executive Director would rely heavily on her in putting together information for collective bargaining. The Regional Director could only reach a conclusion contrary to the one he reached by finding, in effect, that the AAUP maintains no confidential information and, if it does, the AAUP's only recourse is to change Ms. Reeder's job description, so that she no longer has access to such information.

The Board excludes from collective bargaining units individuals who function as "confidential" employees. The Supreme Court has identified, and excluded from the units, two classes of confidential employees: First, those who "assist and act in a confidential capacity to those who formulate, determine and effectuate management policies in the field of labor relations"; and second, those who "regularly have access to confidential information concerning anticipated changes which may result from collective-bargaining negotiations." NLRB v. Hendricks County Rural Elec. Membership Corp., 454 U.S. 170, 189 (1981) (quoting from Pullman Standard Div. of Pullman, Inc., 214 NLRB 762, 762-63 (1974)) (footnote omitted) (hereafter referred to as "Hendricks County").

The rationale for the rule is important, and fully applicable to this matter. Management should not be required to negotiate with a union which includes employees "who in the normal

performance of their duties *may* obtain advance information of the [employer's] position with respect to contract negotiations, the disposition of grievances and other labor relations matters." Hendricks County, at 179 (quoting from Hoover Co., 55 NLRB 1321, 1323 (1944) (emphasis supplied). Persons who have access to or are involved in creating data which would enable a union to understand or evaluate an employer's proposals or the positions it may take at the bargaining table are therefore excluded from the unit.

Under Hendricks County, therefore, timing is important in the calculus. If Ms. Reeder has access to confidential information before the union would, she should not be in the unit, even if the union later obtained the information. Premature disclosure would provide advance knowledge of the employer's ultimate settlement position and thus prejudice its bargaining strategy. Pullman Standard Div. of Pullman, Inc., *supra*, 214 NLRB at 763.

In NLRB v. Meenan Oil Co., 139 F.3d 311 (2d Cir. 1998), one employee, Gabriel, had the responsibility for assisting in the preparation of the employer's annual profit plan by filling out forms which showed current salaries and recent raises, including those of supervisors and some managers. Gabriel thus had access to the proposed salary for employees months before they were implemented. Another employee, Gould, typed the initial draft of the profit plan and so had an early look at the figures as well.

The Second Circuit found that these two employees had *advance* knowledge of salary data for company employees, both union and non-union, which would be of value in collective bargaining:

Because Gabriel and Gould assist [the general manager] with the preparation of the Company's annual profit plan, they have access to projected wage and salary data for both union and non-union employees. This information, in the hands of the Union, would give it a significant strategic advantage in negotiations. The Union could predict the size of the raises that management already planned to give both union and non-union employees, prior to any collective-bargaining session, and use that level of compensation as a floor for its demands. At the

same time, information about the present and projected compensation of managers would afford leverage in bargaining for comparable raises for union members. Even if this information is never mentioned, it would enable the Union to anticipate and gauge management's resistance to its demands.

In summary, the projected wage and salary data contained in the profit plan influences and signals "the [c]ompany's position with regard to contract negotiations." See Hendricks County, 454 U.S. at 179, 102 S.Ct. at 223 (citation and internal quotation marks omitted). Meenan is not required to bargain with a union whose members have this advantage. [139 F. 2d at 318].

In Pullman Standard Div. of Pullman, Inc., *supra*, an employee who had access to labor rates to which the employee would be willing to agree in pursuit of its labor policy was denied eligibility for a representation election. Such information would enable the Union to determine the terms to which the employer would agree to negotiations. It was enough that she had such information in advance of the union. 214 NLRB at 763. Furthermore, the information need not reveal the exact terms an employer would accept, so long as it is "a particularly sensitive matter with respect to contract negotiations." Bakersfield Californian, 316 NLRB 1211, 1213 (1995).

The Regional Director sidestepped the central issue projected here by finding that Ms. Reeder had access to only "non-confidential" information (DD 10). The basis for that characterization, however, begs the question. Since Ms. Reeder has access to the information, the Regional Director reasons, it must not be confidential. In fact, other findings not only suggest that the information in question is confidential, they fairly compel that conclusion.

The Regional Director acknowledges that Ms. Reeder (and Ms. George) has regular access to "budgetary, financial and other records," which "information might assist the employees in negotiations with the employer regarding their terms and conditions of employment." (DD 9 to 10). The AAUP affords Ms. Reeder such access in connection with her job responsibilities, and the information would undoubtedly provide a union with an unfair advantage.

The Regional Director's answer to this is an exercise in circular reasoning. Because the employees will have access to information they have had access to in the past, he suggests, the information is not confidential, and the union would not have an unfair advantage because these employees will have the same access once in a union (DD 10). The difference, of course, is that these employees never used the information to bargain with the AAUP, since their pay was unilaterally established. Now they will.

In making these findings, the Regional Director is in effect claiming that the AAUP has *no* confidential information because its employees are privy to all AAUP records. This claim is untenable. Information is confidential because of its character and not based on which AAUP employees utilize it to do their jobs. Moreover, that these employees, Ms. Reeder included, have such access is a reason to exclude them from the unit, not include them.

Of course, the Regional Director's finding that the information to which Ms. Reeder has access "might assist the employees in negotiations" is a virtual acknowledgement that it is confidential information. It is nothing short of astounding that he would casually cede such an advantage to the petitioner. This result then, on the one hand, deprives the AAUP of the ability to have confidential information and, on the other, forecloses the possibility of its having confidential employees.

In some instances, mere access to confidential information may be insufficient to confer confidential status. This is readily distinguishable from a situation such as Ms. Reeder's, where the employee has regular and prolonged access to and a hand in creating the information or making substantive contributions to the documents in question. Such an employee will be excluded from the unit. See United States Postal Serv., 232 NLRB 556, 590 (1979).

Amy Reeder not only has advance notice of the AAUP's budget, she is solely responsible for generating the initial draft (T33 to 35). In the course of carrying out this responsibility, she

learns from Alex Bernstein what salary figures to plug in. The salary numbers include not only a cost of living increase governed by the AAUP's contract with UMDNJ, but also a discretionary merit raise which Mr. Bernstein determines and which is unrelated to the automatic increase. In preparing the draft budget, Ms. Reeder would therefore have first-hand knowledge of the payroll figures, and total pool of money, the AAUP has available for staff. She would also be able to calculate Mr. Bernstein's projected salary. Ms. Reeder then would know, in advance of the union, what all employees, union and non-union, earned and what the AAUP had in mind for them in the future. The strategic importance of such information would be incalculable in a union's hands. Pullman Standard Div. of Pullman, Inc., *supra*, 214 NLRB at 763.

That Ms. Reeder learns of the total payroll amount, and not necessarily the amount allocated to other employees (DD 6), is beside the point. Knowledge of the total an employer has available for raises is information that would be crucial to a union's bargaining strategy. The suggestion that this is not confidential information is incomprehensible, as is the companion suggestion that only "proposals and bargaining strategy" are confidential (DD 11). In many cases, including this one, an employer's salary projections are data that are vital and confidential to an employer. See Bakersfield Californian, *supra*, 316 NLRB at 1213 ("any sensitive matter with respect to negotiations" renders information confidential).

Ms. Reeder is a participant in the AAUP's budget process from beginning to end. She meets with the Chapter Treasurers and with the Council. They continually seek her input. Ms. Reeder is essential to the process through approval of the budget.

The budget Ms. Reeder develops likewise has a line for employee benefits. In developing that line, she would gain knowledge, also in advance of the petitioner's learning, about what the AAUP intended to expend on benefits. That information as well would be strategically invaluable to a union.

Virtually all of the AAUP's revenues consist of member dues and non-member agency fees. Ms. Reeder has specific knowledge of AAUP revenues by virtue of her position and needs it in order to formulate budget figures and to perform her day-to-day functions, such as paying bills and ensuring that payroll is met. She would necessarily learn what the AAUP's expected growth (or decline) of its membership was and how this forecast would impact on revenues, and by extension how this would impact salary increases and staffing decisions.

Ms. Reeder knows the AAUP's complete financial picture better than any other AAUP employee, Mr. Bernstein included. This picture encompasses the bottom line information as to whether the AAUP expected a surplus or deficit for the coming year, information that is closely held by management. She is thus in a position comparable to the employee in Meenan Oil who was aware of the company's projected profits.

As Mr. Bernstein noted, Ms. Reeder also has unique knowledge of how other expenses related to employees, such as for travel, are embedded in lines in the budget other than for salary and benefits. In fact, no one connected with the AAUP has the depth of knowledge she does on such matters. AAUP management thus would, if Ms. Reeder were part of the unit, sit across the table from an employee whose knowledge of the organization's budget and finances exceeded their own.

As an AAUP employee of 20 years, Ms. Reeder has unparalleled knowledge of the workings of the organization and its administration. She is thus able to include explanatory notes in the budget document to demonstrate to the Council what is behind her judgments (Exhibits E-2 and E-3). Ms. Reeder needs, and has, unlimited access to confidential information to prepare these notes. As part of the budget process, she also uses that knowledge to exercise independent judgment, and make substantive decisions, in developing budget lines which of course influences the final budget.

In all of this, there is no warrant for the Regional Director's suggestion that all Ms. Reeder does is to perform a "mechanical calculation" of figures that go into the budget. He reasons that "preliminary estimated payroll costs is not the same as access to the Employer's bargaining strategy and budgetary matters regarding Unit compensation" (DD 10).

Even if the Regional Director had fairly characterized Ms. Reeder's role, his conclusion would be unwarranted, since an employer's preliminary salary data signal its "position with regard to contract negotiations." Hendricks County, at 179. It is information that would give the petitioner a "significant strategic advantage in negotiations." NLRB v. Meenan Oil Co., *supra*, 139 F. 3d at 318. Any conclusion to the contrary is a wholesale departure from Board precedent and from common sense.

But Ms. Reeder is not an employee who merely has occasion to view confidential information in the course of her responsibilities. There is un rebutted evidence in the record that she creates that information, using her special experience and expertise with AAUP finances and thus exerts an important influence on budgetary matters by her unique role in the budgetary process, an influence she could bring to bear on the petitioner's behalf. This, in combination with her role in the AAUP's financial affairs generally and her position as what amounts to the AAUP's human resources officer, creates what is in effect a conflict of interest. Ms. Reeder can help make management policy and then use such policy across the table from the AAUP.

That Ms. Reeder has ongoing knowledge of, and includes in her preliminary budgets, information as to the dues and agency fees that flow into the AAUP's treasury only exacerbates the conflict. She is uniquely situated to know how much the AAUP is in a position to pay its employees.

The Regional Director has suggested that none of this is important, because the AAUP's budget at some point becomes publicly available. Even assuming the AAUP would publish its budget for members in the future, that suggestion misses the point. The point is that no part of the budget is publicly available until it has been approved by the AAUP's Council, at a meeting Ms. Reeder attends. Therefore, during the time--a process that takes many months--between Ms. Reeder's development of the draft budget and the point at which the Council ultimately adopts it, the preliminary document would be a confidential one, but fully available to Ms. Reeder.

Ms. Reeder is an employee who has much more than access to confidential information in the course of her responsibilities. In preparing the preliminary budget, Ms. Reeder generates confidential information, which includes salary increases, cost of benefits, revenues and the bottom line--the expected surplus or deficit--of the budget. Moreover, she has discretion on what to include in many budget lines. It is difficult to imagine circumstances in which an employee could have greater access to and knowledge of an organization's financial information that is undoubtedly of strategic value to the union with which it bargains.

Ms. Reeder would evidently be aware of other confidential information in the course of her responsibilities. She falls into the second class of confidential employees--those who have regular access to confidential information--listed in Hendricks County for that reason alone. And she falls into the first because of her unique access to confidential information. But in her case there is much more.

Ms. Reeder attends all AAUP Council meetings where Council members discuss such things as the AAUP budget, personnel matters, employee grievances and contract administration issues (T17; T26 to 27; T29; T32 to 37). As head of the AAUP's budget, finance and personnel functions, she often makes presentations at these meetings (T32 to 33; T48).

Given her role as head of human resources and as the person who reports to the Council on human resources issues, Ms. Reeder is in a position to influence the AAUP's human resources policy in ways that would benefit an AAUP staff union, as evidenced by her participation and input in connection with the hiring of Ms. George and Mr. Witkowski.

By virtue of Ms. Reeder's attendance at governance meetings, Ms. Reeder not only hears what the Council has decided, but also learns the rationale for its decisions. If there were a union representing AAUP employees, the Council would deal with collective bargaining and contract administration issues for them as well. Ms. Reeder also screens candidates, including for the positions Ms. George and Mr. Witkowski filled, for AAUP staff positions, interviews them and makes recommendations on hiring and compensation.

Ms. Reeder oversees the AAUP's finances and is responsible for all of the AAUP's financial reporting requirements. She is aware of each item of revenue and expenditure. She is responsible for payment of all of the AAUP's bills. No other AAUP employee shares her responsibility for or knowledge of the AAUP's financial affairs (T44 to 45).

In Hotel Employees Ass'n of San Francisco, 159 NLRB 143, 151 (1966), the assistant personnel manager screened, interviewed and tested job applicants, handled minor grievances in the manager's absence, issued reports and performed clerical duties. See also Sears, Roebuck & Co., 193 NLRB 330, 331 (1971). She was excluded from the unit.

Ms. Reeder's duties present a close parallel. In fact, she alone oversees the AAUP's personnel functions (T46). Ms. Reeder administers benefits, interviews and makes recommendations on candidates for employment and their salaries, and has in the past been responsible for payroll (T34; T44 to 45). She oversees the AAUP's self-administered flexible spending accounts, including screening of employee claims and also insurance forms (T28; T48). Additionally, Ms. Reeder is the 401(k) plan administrator (T46 to 47).

In the course of her attendance at Council meetings, Ms. Reeder would also learn of the Council's actions with respect to grievances and its policies on fringe benefits and other personnel related issues. These matters qualify as confidential, since they would give a union a significant advantage in its own contract administration activities.

The Regional Director's suggestion that Ms. Reeder could be "excluded" from her budgetary responsibilities, so that she would not have access to confidential information (DD 10) is an implicit acknowledgement that Ms. Reeder does handle confidential information, and would, more importantly, be an answer to any claim of confidentiality. A union could merely respond that a particular employee's job should be changed, with the result that no one qualifies for exclusion from its unit on this basis. The employer would have to hire another employee to handle confidential responsibilities, and the union would then make the same claim with respect to that employee.

The point of this proceeding is to determine the status of the AAUP's employees based upon what they do, not what they might do under a different job description. The Regional Director cites no authority for his extraordinary suggestion that the AAUP alter Ms. Reeder's duties, and we believe none exists.

Ms. Reeder's very responsibilities--those connected with the budget, those connected with dues (which she continuously monitors) and finances, and those connected with personnel issues--bring her into contact with confidential matters on an ongoing basis, and she has a depth of knowledge on such matters no one in the organization, including Mr. Bernstein, shares. Ms. Reeder also assists Mr. Bernstein and the AAUP Council in every conceivable way. By virtue of her budget-related activities alone, Ms. Reeder must be deemed a confidential employee. If the petitioner were to have access to her knowledge, it would have an enormous strategic advantage, an advantage which the Board and our courts have never permitted.

In sum, if input to and development of an annual budget, the hiring of staff, input for and implementing salary increases, and service as the head of finance and personnel functions do not amount to the type of assistance that qualifies an employee as confidential, it is unclear what functions would. And if being privy to a budget, which includes proposed staff increases and to staff salaries does not constitute access to confidential information, then the concept of confidentiality is rendered meaningless. For that reason and the others set forth above, Ms. Reeder is clearly a confidential employee.

POINT II

VATRICE GEORGE ASSISTS THE AAUP'S EXECUTIVE DIRECTOR IN ALL MATTERS, HAS A CLOSE WORKING RELATIONSHIP WITH HIM AND THUS IS A CONFIDENTIAL EMPLOYEE

Apart from her complete access to the AAUP's confidential information, Vatrice George is the paradigm of a confidential secretary. She sees every document which passes through Mr. Bernstein's office. He confides in her on all matters, including those involving the petitioner. She is precisely the type of employee the Board has historically excluded as confidential. If she is not deemed to be confidential, then truly the AAUP could never have such an employee.

Under Hendricks County, employees are deemed "confidential" and excluded from the protection of the National Labor Relations Act if they "assist and act in a confidential capacity to persons charged with effectuating management's labor relations policy." Hendricks County, at 189.

The Board has alternatively identified confidential employees as those who, like Vatrice George, have a "close working relationship with an individual who decides and effectuates management labor policy and is entrusted with decisions and information regarding the policy before it is made known to those affected by it." Communications Workers of America, 303 NLRB 264, 271 (1991). Key to designating such an employee confidential is the relationship between the employee and the person who serves as manager of an employer's labor relations.

In NLRB v. Meenan Oil Co., *supra*, the executive secretary of the general manager was responsible for such clerical duties as opening mail (including mail marked "confidential"), completing some internal documents on personnel (not labor) issues and typing (although not herself developing) the annual company profit plan, in which every salary increase or decrease was forecast. The Court found it telling that the secretary reported directly to the general

manager largely responsible for conducting the employer's labor relations and for the annual company profit plan, which included advance salary projections for all employees and supervisors and perhaps some managers. On these facts, the Court found that the secretary was an employee who would "assist and act in a confidential capacity to persons who formulate, determine, and effectuate management policies in the field of labor relations." 139 F.3d at 318.

Decisions of the Board are to the same effect. In Reymond Baking Co., 249 NLRB 1100, 1101 (1980), the Board considered the status of a typist who, while not a confidential secretary, typed correspondence to the unions, a letter to the Board and the employer's collective bargaining proposals. Finding that she was a confidential employee, the Board sustained a challenge to her ballot. That the typist spent "a relatively small percentage of her working time" on such responsibilities was irrelevant. The test is not a quantitative one. See also The Grocers Supply Co., 160 NLRB 485, 489 (1966) (secretaries who prepared documents related to labor relations matters excluded as confidential).

And in Associated Day Care Serv., 214 NLRB 762, 763 (1974), administrative assistants in a day care center typed confidential material, were responsible for maintaining personnel files, had access to minutes of weekly management meetings where employee matters arose and played a role in the investigation of grievances. The administrative assistants spent relatively little time discharging these responsibilities, but, as in Reymond Baking Co., the quantum of time was not determinative. They were excluded from the unit because of their connection to labor relations matters, however slight.

Alex Bernstein, the AAUP's Executive Director and sole managerial employee, would be its lead in negotiations and point of contact with a union representing AAUP employees. In other words, he would be responsible for formulating, determining effectuating the AAUP's labor relations policies. His responsibility for formulating, determining and effectuating labor

affairs having been established, the analysis then centers on Ms. George's responsibilities in general and her working relationship with Mr. Bernstein in particular. See Emanuel Lutheran Charity Bd., 268 NLRB 1344, 1347 (1984).

There is a close working relationship. Mr. Bernstein and Ms. George sit in close proximity to each other and share responsibility for all work that comes out of the AAUP office. She is privy to all confidential matters in the office, including correspondence from counsel and communications from the Presidents of the AAUP Chapters. Ms. George testified that she typically reads correspondence that Mr. Bernstein prepares, not only because she is responsible for filing it, but "because later on he might discuss it with me and that's why I have to start reading it because I have to know what he is talking about." (T106).

Ms. George is more than just a clerical employee who answers the phone and types routine correspondence. She works closely with Alex Bernstein and collaborates with him, and Amy Reeder, in all matters. As noted above, she opens correspondence marked "confidential" (T111); she reviews, edits and finalizes Mr. Bernstein's correspondence on all subjects; and she has access to, and utilizes, information in the AAUP's file (T87 to 88; T106; T111). As Ms. George acknowledged, Mr. Bernstein regularly discusses AAUP business with her, so that she is required to read and become familiar with the documents he prepares with Ms. George's help.

Ms. George prepares agendas for the meetings of the Council, the AAUP's governing body, takes notes during the meetings and prepares the minutes afterward, all in conjunction with Mr. Bernstein (T25; T108). In connection with her role of what amounts to Mr. Bernstein's, and the Council's, secretary, she has gained information as to staff salaries (T110). As a participant at governance meetings, Ms. George, like the other AAUP employees, learns not only what the Council has decided, but its rationale for those determinations (T48).

What Ms. George would do in connection with the AAUP's relations with a staff union is well illustrated by the part she played in the AAUP's correspondence to the petitioner (Exhibit U-3) in connection with this representation petition. This is a crucial element of the evidence because it shows more than how Ms. George's responsibilities might touch on labor relations issues; it demonstrates *how they have*.

Ms. George organized a conference call to deal with the issue. She reviewed the letter Mr. Bernstein drafted to the petitioner and dealt with Drs. Lepore and Kumar, the AAUP Chapter Presidents, in order to get their agreement to the terms of the letter. Ms. George actually signed the letter for them and initialed the signature to show she had done so (T103 to 106). Other correspondence to the petitioner would be handled in a similar fashion.

In connection with the present proceeding, Ms. George had occasion to see the performance appraisals of Ms. Reeder and Mr. Witkowski when Mr. Bernstein entrusted them to her. She then forwarded them to AAUP counsel. This is consistent with her serving as Mr. Bernstein's confidential assistant.

The undisputed evidence thus shows that not only does Ms. George have access to personnel-related information, in budgets and other AAUP documents, she is privy to confidential communications between Mr. Bernstein and the members of the AAUP's governing body. These communications include confidential issues touching on labor relations.

To say that Mr. Bernstein and Ms. George have a close working relationship is an understatement. Mr. Bernstein described her as his "right-hand person" (T23), a characterization she does not dispute. Again, she is privy to, and often helps to draft, all correspondence and other documents which pass through the AAUP office (T106). Ms. George would be privy to correspondence in connection with the AAUP's relations with a staff union,

just as she was privy to Mr. Bernstein's letter to the petitioner in connection with this petition. She would see all documents related to future negotiations.

If Ms. George were a member of the unit, Mr. Bernstein would surely have to replace her with another employee with whom he could work on confidential matters and then fundamentally change Ms. George's job so that it did not encompass the type of communications she is used to handling. The AAUP simply could not bargain across from such an employee.

Simply put, the Regional Director's decision as to Ms. George is a wholesale departure from Board precedent, including the cases discussed above, which holds as confidential clerical and administrative employees who assist a person who has responsibility for management policies in labor relations. As already noted, in the course of this very proceeding, she handled correspondence to the petitioner and the personnel records of her fellow employees.

The Regional Director found at one point that staff members "do not have access to personnel files and evaluations of fellow Unit members." (DD 11). Yet, in contradiction of his own finding, he acknowledges Ms. George saw personnel records in connection with the present case (DD 8 n.8). This is entirely consistent with the close working relationship between Mr. Bernstein and Ms. George. They collaborate on all matters which come through the AAUP office and both play a part in all communications which the office generates. It is also consistent with the level of trust and reliance Mr. Bernstein places in Ms. George.

As noted above, Ms. George sees all materials that cross Mr. Bernstein's desk and would see materials related to the AAUP's collective bargaining with a staff union, including its bargaining proposals. The Regional Director did not directly address the AAUP's claims as to Ms. George, and so we cannot be sure what the precise basis for his conclusions as to her, except that she does not handle confidential information, a matter we have dealt with elsewhere.

Again, Ms. George has an exceptionally close working relationship with Mr. Bernstein and serves as his right hand, none of which the Regional Director disputes. If she is not a person whose job is to "assist and act in a confidential capacity with persons charged with effectuating management's labor relations policy" (Hendricks County, at 189), it is hard to imagine what would qualify an employee as confidential under this standard. If Ms. George is not deemed confidential, then the AAUP can never have such an employee. She is a confidential employee and should be excluded from the unit as such.

CONCLUSION

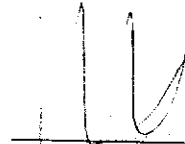
For all of the foregoing reasons, we respectfully submit that the Board should find that Amy Reeder and Vatrice George are confidential employees and exclude them from a staff union of the AAUP.

Respectfully submitted,

CROW & ASSOCIATES

Attorneys for the Council of Chapters of the
AAUP of the University of Medicine and
Dentistry of New Jersey

By:



Mark D. Schorr

BEFORE THE NATIONAL LABOR RELATIONS BOARD
CASE No. 22-RC-13014

COUNCIL OF CHAPTERS OF AAUP AT
UNIVERSITY OF MEDICINE AND DENTISTRY OF
NEW JERSEY (AAUP-UNIVERSITY OF MEDICINE
AND DENTISTRY OF NEW JERSEY

Employer,

Case No. 22-RC-13014

and

TEAMSTERS UNION LOCAL NO. 115,

Petitioner.

CERTIFICATION OF SERVICE

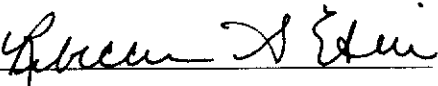
I HEREBY CERTIFY:

1. That I am an employee of the law firm of CROW & ASSOCIATES, attorneys for the Employer.
2. On this date, pursuant to NLRB e-filing Rules and Regulations, Section 102.114(i), I served on following at the direction of Mark D. Schorr a copy of the Employer's revised Brief on for Review on Behalf of the University of Medicine and Dentistry Council of American Association of University Professors Chapters in the above-captioned matter to the email accounts detailed below:

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Rebecca G. Esmi