

UNITED STATES OF AMERICA
BEFORE THE
NATIONAL LABOR RELATIONS BOARD

In the Matter of:

ANHEUSER-BUSCH, LLC,

Employer,

and

TEAMSTERS LOCAL 1149

Petitioner.

Case No. 03-RC-185455

EMPLOYER'S REQUEST FOR REVIEW

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I. INTRODUCTION

On October 26, 2016, the Regional Director of Region 3 issued a Decision and Direction of Election (the “Decision”). Therein, the Regional Director incorrectly determined that Administrative Office employee, Stacy Olson (“Ms. Olson”), is not a confidential employee and thus was eligible to vote in the November 1, 2016 representation election. Thereafter, immediately before and during the election, the Board Agent refused to permit Anheuser-Busch, LLC (the “Employer”) to challenge Ms. Olson’s ballot without good cause. Pursuant to Sections 102.67 and 102.69 of the Rules and Regulations of the National Labor Relations Board (the “Board”), the Employer, by and through its undersigned counsel, hereby submits this Request for Review as compelling reasons exist for the Board’s intervention on the following grounds:

1. A substantial question of law and policy is raised because of the Regional Director’s departure from officially reported Board and judicial precedent in determining that Ms. Olson is not a confidential employee;
2. The Regional Director’s decision on substantial factual issues is clearly erroneous on the record and such error prejudicially affects the Employer’s rights; and
3. The Regional Director’s decision refusing to permit the Employer to challenge Ms. Olson’s ballot prejudiced the Employer by denying the Employer its right to due process.

II. STATEMENT OF THE CASE

On October 4, 2016, Teamsters Local 1149 (“Union”) filed a petition for an election at the Employer’s Baldwinsville facility. On October 14, 2016, a hearing was held in Syracuse, New York before Hearing Officer Thomas Miller. The sole issue before Hearing Officer Miller was whether Ms. Olson, who holds the position of Administrative Office, should be excluded from the bargaining unit because she is a confidential employee. Shannon Hack (“Ms. Hack”), the

Baldwinsville facility's Senior People Manager, testified on behalf of the Employer. Ms. Olson and Steven Richmond testified on behalf of the Union.

On October 26, 2016, the Regional Director issued the Decision finding that Ms. Olson is not a confidential employee. Specifically, the Decision found that Ms. Olson's "mere access to employee's payroll, attendance, and leave information is not enough to render her confidential." (Decision, at 6). The Decision also ruled that Ms. Olson's knowledge of disciplinary notices before the Union or affected employees "does not render her confidential, because that information is in the process of being made known to the concerned employee and the Union." (Decision, at 6-7). In reaching these conclusions, the Regional Director ignored that Ms. Olson is firmly entrenched in the Employer's decision making with respect to its disciplinary processes and is not merely a messenger. Additionally, the Decision determined Ms. Olson did not contribute to the formulation of the Employer's bargaining proposals. (Decision, at 7). However, the Regional Director disregarded Ms. Hack's clear testimony that, during recent collective bargaining negotiations, she explicitly sought Ms. Olson's input and requested that Ms. Olson retrieve data specifically for the purpose of formulating the Employer's bargaining proposals. In fact, it is undisputed that Ms. Olson lent her exclusive expertise with respect to the Employer's payroll systems to ensure the Employer's proposals would be feasible to manage.

The Regional Director also disregarded other clear indicia that Ms. Olson is a confidential employee. To this end, the Regional Director failed to consider Ms. Olson's involvement in the administration of the Employer's bonus program and layoff procedure for bargaining unit employees. The Regional Director also ignored that Ms. Olson trains managers about how to enforce the Employer's disciplinary procedures pertaining to absenteeism. Based on

these incorrect determinations, the Regional Director improperly directed an election in the following voting unit:

All full-time and regular part-time Lead Labor Schedulers and Administrative Office employees employed at the Employer's Baldwinsville, New York facility; excluding guards, confidential employees, professional employees and supervisors as defined in the Act, and all other employees.

(Decision, at 8).

On November 1, 2016, the election was held at the Employer's Baldwinsville facility. During the pre-election hearing, Board Agent Thomas Miller refused to permit the Employer to challenge Ms. Olson's ballot. Board Agent Miller likewise refused to permit the Employer's observer to challenge Ms. Olson's ballot. Of the three votes cast, two were for the Union and one was against the Union.

On November 8, 2016, the Employer timely filed an objection to the conduct of the election on the grounds that Board Agent Miller's refusal to permit the Employer to challenge Ms. Olson's ballot denied the Employer its due process rights. Specifically, the Employer contended that in the event the Board ultimately concludes Ms. Olson is a confidential employee, there is no way to extract Ms. Olson's ballot because it was improperly comingled with the other two ballots.

On November 15, 2016, the Regional Director issued a Report on Objection and Certification of Representative ("Report") which overruled the Employer's objection. The Regional Director's Report found that the "Employer was not prejudiced by the Board agent's refusal to permit a challenge to [Ms. Olson's] ballot ... [because] ... [i]f the Board grants review and ultimately decides that [Ms. Olson] is a confidential employee, it can, and will, declare the election a nullity and direct a re-run election." (Report, at 4).

The Report ignores this finding does prejudice the Employer because had the challenge been permitted and at least one of the other ballots cast was against the Petitioner, the

Union could not have prevailed in the election, thereby eliminating the necessity to direct a re-run election. Additionally, the Report found that the Board Agent's refusal to challenge Ms. Olson's ballot was proper in light of the concern that the secrecy of her ballot would be compromised. (Report, at 4). This conclusion ignores that any Board-supervised election can result in a tie with one outcome-determinative challenged ballot, thus necessitating the revelation of both the identity of a voter and how he or she voted if the challenge is overruled. The Employer's due process rights should not yield in these circumstances.

As a result, the Employer requests that the Board: (1) grant its Request for Review of both the Decision and the Report; (2) reverse the Regional Director's finding that Ms. Olson is not a confidential employee; and (3) because of the Regional Director's refusal to permit the Employer to challenge Ms. Olson's ballot, apply the customary one-year election bar and direct that a re-run election be held no earlier than one year from the date of the initial November 1, 2016 election.

III. FACTS SUPPORTING THE CONCLUSION THAT MS. OLSON IS A CONFIDENTIAL EMPLOYEE

A. Background Regarding the People Department At The Employer's Baldwinsville Facility

The Employer operates a brewery in Baldwinsville, New York ("Baldwinsville Brewery"). In addition to unrepresented employees, the Baldwinsville Brewery is staffed by employees who are members of two bargaining units, both of which are represented by the Union. (Tr. 31).¹ One unit covers maintenance technicians, production employees, and utilities operators, and the other covers quality assurance ("QA") analysts. (Tr. 31).

¹ References to ("Tr. __") are to the transcript of the October 14, 2016 hearing. References to ("E-__") are to the Employer's exhibits entered into evidence at the October 14, 2016 hearing. References to ("Jt. Ex. __") are to the joint exhibits entered into evidence at the October 14, 2016 hearing.

Shannon Hack is the Senior People Manager at the Baldwinsville Brewery (Tr. 13). In this role, Ms. Hack is at the helm of the day-to-day labor relations issues at the Baldwinsville Brewery. (Tr. 27). Ms. Hack oversees enforcement of the Employer's policies for both represented and unrepresented employees. (Tr. 20-22). Managers consult with Ms. Hack regarding whether notices of violations of these policies should be issued, specifically to ensure discipline is fairly administered. (Tr. 23-24). In addition to managing the staffing headcount to ensure that labor cost expenditures stay within budget, Ms. Hack serves as the Baldwinsville Brewery's lead recruiter. (Tr. 27-28). Ms. Hack also has oversight over performance management, training and development, and strategic planning. (Tr. 27-28).

Ms. Olson holds the Administrative Office title. In this role, as set forth in the applicable job description, Ms. Olson is required to have the "ability to work with all levels of employee, and handle and protect highly confidential information." (Tr. 35; Er. Ex. 1). Additionally, she is required to "handle processing, inquiries, tracking and reporting for HR related programs ([Family Medical Leave Act ("FMLA")], absenteeism, discipline, grievances, payroll, pension, recruitment and selections..."). (E-1). Ms. Olson directly reports to Ms. Hack. (Tr. 29).²

B. Ms. Olson Assists Ms. Hack With Respect to Confidential Matters During Collective Bargaining Negotiations

In her Senior People Manager role, Ms. Hack is the Employer's lead negotiator in collective bargaining negotiations with the Union. (Tr. 13). To prepare for collective bargaining negotiations with the Union, Ms. Hack consults with managers at the Baldwinsville Brewery to obtain feedback regarding existing policies and practices and reviews employee data. (Tr. 14-15).

² The People Department is also comprised of the following individuals who report directly or indirectly to Ms. Hack: Gina McAllister, Assistant People Manager; Angela Pazer, People Supervisor; Joanna Blaisdell, Lead Labor Scheduler; and Mary Beth Pupchek, Lead Labor Scheduler. (Tr. 29).

During the course of bargaining, Ms. Hack reviews Union counterproposals and subsequently prepares new proposals consistent with the Employer's bargaining strategy. (Tr. 17).

During the most recent QA analyst collective bargaining negotiations in 2015, Ms. Hack asked Ms. Olson to retrieve certain payroll data and advised Ms. Olson why she was requesting the information, specifically to formulate economic proposals predicated on current pay baselines and future trends. (Tr. 102-103). Notably, before the QA analysts were organized, they were paid on a salaried basis. (Tr. 40). However, as a result of collective bargaining negotiations, these employees would now be paid on an hourly basis. (Jt. Ex. 2, at 20-21). By virtue of requesting this information, Ms. Hack wanted a firm understanding as to what these employees' hourly rates would be and advised Ms. Olson that this data was necessary to formulate the Employer's economic proposals in this regard. (Tr. 40).

Additionally, during this same round of negotiations, Ms. Hack relied on Ms. Olson's exclusive subject matter expertise with respect to the Employer's leave and attendance policies to prepare the Employer's bargaining proposals. To this end, Ms. Hack solicited Ms. Olson's opinions regarding how the Employer's FMLA process worked and how the Employer could ensure it would be able to properly administer its FMLA protocols for this group of employees. (Tr. 66-67). Further, the Employer planned to reduce QA analysts' annual sick day accrual from ten to six days and wanted to ensure a smooth transition with respect to this change. (Tr. 66-67). Given Ms. Olson's sole familiarity with the payroll systems which tracked this information, Ms. Hack requested that Ms. Olson retrieve absentee quota and annual salary data so the Employer could have a better idea as to what the average sick day payout was for that group of employees. (Tr. 69). Ms. Hack advised Ms. Olson she was requesting this information in connection with the Employer's leave-related bargaining proposals and sick leave policies. (Tr.

69). Additionally, given Ms. Olson's unique expertise with respect to the Employer's payroll systems, Ms. Hack relied upon Ms. Olson's guidance to best position the Employer to prospectively manage employee sick leave in light of the Employer's plan to freeze sick leave banks. (Tr. 69-70). In fact, Ms. Olson created a sick leave tracking tool specifically designed to effectuate this purpose. (Tr. 69-70).

C. Ms. Olson Assists Ms. Hack In Enforcing The Employer's Attendance Policies and Disciplinary Procedures

The Baldwinsville Brewery does not have a written absence policy. (E-11). Instead, employees are expected to work when scheduled. (E-11). The Employer maintains disciplinary tracks for absenteeism and all other infractions, including what are known as white card violations. (E-10). Employees are subject to discipline in the event their absences are unqualified (i.e. not for an approved reason). (E-10). A white card violation occurs if an employee fails to adhere to the Employer's call-in procedure in the event the employee will be either absent or tardy. (E-10). There are separate progressions for each disciplinary track. (E-10). Notably, excessive amounts of unqualified absences and white card violations could lead to severe discipline, including termination. (Tr. 64).

One of Ms. Olson's key responsibilities is to monitor employee absenteeism. (Tr. 63). To this end, Ms. Olson gathers data to determine whether employees have incurred an unqualified absence. (Tr. 63, 65; E-8). Ms. Olson also directs managers to conduct investigations of both unqualified absences and white card violations before the employee in question is notified of potential discipline. (Tr. 64, 175; E-8). With respect to white card policy infractions, Ms. Olson notifies Ms. Hack when a white card should be issued and provides the specific rationale prompting its issuance. (Tr. 26). Ms. Olson directly communicates with managers because she is the one who

is monitoring those issues. (Tr. 24-25). In this regard, Ms. Olson is privy to whether an employee will receive a notice of violation before the employee does. (Tr. 25).

Ms. Olson also advises managers when a decision must be made to investigate a particular policy violation and when a notice of violation must be sent. (Tr. 25). Ms. Olson provides her input regarding whether a particular circumstance qualifies as a notice of violation or whether an absence is to be considered qualified or unqualified. (Tr. 105). For example, on March 23, 2016, Ms. Olson e-mailed managers Thomas Evanowski and Linda LeBlanc, directing them to hold an investigatory meeting regarding a particular employee's excessive unqualified absences and white card violations. (E-8). Similarly, on May 27, 2015, Ms. Olson e-mailed Ms. McAllister to advise that an employee was due to be disciplined and specifically directed Ms. McAllister to prepare the notice of violation form. (E-9).

Ms. Olson also manages the Employer's disciplinary database. As such, she has knowledge about the circumstances surrounding ensuing discipline to determine the level of penalty to issue. (Tr. 108). Ms. Olson views the notice of violation forms before they are transmitted to the Union. (Tr. 168).³

D. Ms. Olson's Role With Respect To Medical Leaves of Absences

Ms. Olson is Ms. Hack's "right-hand person" for purposes of managing employee requests pursuant to the FMLA. (Tr. 48). Ms. Olson exercises discretion in initially determining whether an employee's FMLA request should be approved or denied and conducts research to confirm these conclusions. (Tr. 48, 118-120). For example, an employee's FMLA request was

³ In August 2016, the Employer imposed an employee draft to perform mandatory work when an insufficient number of employees volunteer to work. (Tr. 51-52; E-5). Ms. Hack consulted with Ms. Olson regarding the appropriate method to code the absences of employees who did not willingly participate in the draft. (Tr. 52). Ms. Olson was then privy to what form of absence (qualified or unqualified) the Employer would issue an employee before the employee was made aware. (Tr. 53).

recently denied. (Tr. 48). However, Ms. Olson advised Ms. Hack that such a conclusion did not appear to be correct based on certain discrepancies contained within the employee's FMLA paperwork. (Tr. 48). Ultimately, the denial was corrected based upon Ms. Olson's assistance.

Ms. Olson also sends correspondence under her signature to employees notifying them that their requests for medical leaves of absence pursuant to the applicable collective bargaining agreement have been denied. (Tr. 58-59; E-7). For example, on June 29, 2015, Ms. Olson signed and sent a letter to an employee explaining that the employee's leave request had been denied because each of the employee's absence occurrences required a separate medical certification. (E-7). Accordingly, Ms. Olson was privy to the Employer's decision-making prior to the employee. (Tr. 59).

E. Ms. Olson's Involvement With Grievances

It is uncontroverted that Ms. Olson maintains the Baldwinsville Brewery's grievance log system and that she attends grievance meetings. (Tr. 113-114). Ms. Olson testified that she places grievances in their own respective grievance files. Ms. Hack testified to the fact that Ms. Olson has an opportunity to see the Employer's responses to grievances before they are transmitted to the Union. (Tr. 113-114). Ms. Olson also testified to being present at grievance meetings. (Tr. 114).⁴

F. Ms. Olson's Role With Respect To Brewery Excellence Program

The Employer offers a Brewery Excellence Program ("BEP") which is a bonus structure for bargaining unit employees. (Tr. 60). The BEP is calculated based off of the Employer's key performance indicators. (Tr. 60). Ms. Olson influenced the Employer's

⁴ By contrast, Ms. Olson's testimony on this point appeared evasive. Although she refused to acknowledge that she ever saw a response to a particular grievance, she did acknowledge she saw the Union's response to the Employer's denial of a particular grievance. Given the fact that Ms. Olson is the individual who maintains the grievance file, the suggestion that she never saw a grievance response is suspect.

formulation of the bonus payout program by noting which sorts of absences should be included in the bonus payout formula. (Tr. 61). Ms. Olson also contributed during discussions regarding which kinds of straight time hours would be considered part of the bonus calculations. (Tr. 171). Ms. Olson was thus aware of the bonus payouts employees would receive before the employees and the Union. (Tr. 61). Additionally, during this process, Ms. Olson discovered an error as to what the Employer planned to pay utilities employees in connection with the BEP. Specifically, Ms. Olson recognized this group of employees worked a different schedule than other employees and recommended adjustments accordingly. (Tr. 172-173).

G. Ms. Olson Trains Managers Regarding Enforcement of the Employer's Absence Practices

Ms. Olson also conducts training sessions with managers regarding absence reporting, discipline tracking, and whether absences should be considered unqualified or qualified absences. (Tr. 71; E-10-12). As a result, Ms. Olson is made aware of how the Employer enforces its attendance policies and what type of misconduct will qualify as a white card violation. As noted above, the Baldwinsville Brewery does not have a written absence policy. (E-11). Thus, Ms. Olson's training sessions instruct managers how to implement discipline to employees for absenteeism-related issues. (E-11). Ms. Olson acknowledged providing guidance to managers with respect to these policies. (Tr. 174). Significantly, with respect to white card absences, the training materials discuss where a manager may use discretion to implement discipline and how to handle tardy employees (i.e. to send an employee home or keep the employee at work because of workflow requirements). (E-12).

H. Ms. Olson's Role With Respect To Layoffs and Separated Employees

The Employer maintains a supplemental insurance fund which is designed to supplement employees' incomes in the event of a layoff. (Tr. 83). Although there have been no

layoffs during Ms. Hack's tenure at the Baldwinsville Brewery, she testified that if an involuntary layoff became necessary, she would instruct Ms. Olson to initiate the supplemental insurance fund procedures for those affected employees. (Tr. 83). As a result, Ms. Olson would be aware of a layoff (specifically how many employees would be affected) prior to the employees and the Union. (Tr. 83, 126). Ms. Olson also calculates vacation payout sums for separating and retiring employees and is aware of those totals before the employees. (Tr. 61-62).

I. Ms. Olson's Role In Staffing

During People Supervisor Angela Pazer's maternity leave, Ms. Olson assumed Ms. Pazer's responsibilities with respect to work force increases (such as which positions the Employer would fill or not fill) and reductions. (Tr. 95). Ms. Olson also assisted the Employer with reviewing candidates' background checks. (Tr. 89). Additionally, Ms. Olson acknowledged provided feedback to others in the People Department regarding candidates for employment. (Tr. 166).

VI. BASED ON CLEAR BOARD AUTHORITY, THE REGIONAL DIRECTOR ERRED IN CONCLUDING MS. OLSON IS NOT A CONFIDENTIAL EMPLOYEE.

Confidential employees are excluded from bargaining units because "management should not be forced to negotiate with a union that includes employees 'who in the normal performance of their duties may obtain advance information of the company's position with regard to contract negotiations, the disposition of grievances and other labor relations matters.'" NLRB v. Meenan Oil Co. LLP, 139 F.3d 311, 317-318 (2d Cir. 1998) quoting NLRB v. Hendricks County, 454 U.S. 170, 179 (1981) (other internal citations omitted). Accordingly, "[a]n individual who routinely sees data which would enable the union to predict, understand or evaluate the bargaining position of the employer is therefore excluded from union membership." Meenan Oil, 139 F.3d at 317-318.

The Supreme Court and the Board define an employee as a confidential and thus excluded from a unit if the position of the employee has a “labor nexus” such that the employee “assist[s] and act[s] in a confidential capacity to persons who formulate, determine, and effectuate management policies in the field of labor relations.” Hendricks County, 454 U.S. at 189; B.F. Goodrich Co., 115 NLRB 722 (1956). In order to satisfy the labor nexus test an employee must be “involved in a close working relationship with an individual who decides and effectuates management labor policy and is entrusted with decisions and information regarding this policy before it is made known to those affected by [such decisions].” Intermountain Rural Electric Assn., 277 NLRB 1, 4 (1985).

In the present case, the Decision *properly* held “[t]he record supports the finding – which the Union does not contest – that Hack formulates, determines, and effectuates management policies in the field of labor relations.” (Decision, at 6). However, as discussed below, the Decision ignored clear and controlling authority establishing the requisite “labor nexus” demonstrating Ms. Olson is a confidential employee on the grounds she acts and assists in a confidential capacity to Ms. Hack.

Conspicuously absent from the Decision is any reference to E & L Transport Co., 327 NLRB 408, 409 (1998) which is particularly instructive to the present case. In that case, the Board described the duties of a secretary to the transportation company’s terminal manager as follows:

[the secretary] handled reports involving accidents, injuries, workers’ compensation claims, and maintained the personnel files of the drivers and mechanics represented by the Union. She handled correspondence between [the terminal manager] and the Union, assisted in processing grievances, and prepared documentation of the processing of the grievances at the local level hearings. She also typed the minutes of the local level hearings on grievances. The record shows that [the secretary] prepared numerous labor-related documents at [the terminal manager’s] direction, **including correspondence from [the terminal manager]**

to employees and management personnel at the Chicago facility and to the Union regarding labor and policy matters; correspondence concerning Company policy with upper management; disciplinary notices and correspondence concerning discipline of drivers; documentation of grievances and grievance proceedings; and other management and labor related matters.
(Emphasis added).

Based on this description, the Board held the secretary was a confidential employee, finding “the record also is clear that [the secretary] both prepared confidential documents and had regular access to confidential information regarding reports or correspondence documenting the Respondent’s position in collective bargaining and labor relations policy matters **before this information was transmitted to the Union or to the employees at issue.**” *Id.* (Emphasis added). As a result, the Board held “in light of [the secretary’s] ongoing access to labor relations information before the Union or the employees involved became aware of such information, we find that the [secretary] position ... was that of a confidential position with a labor nexus.” *Id.*

Associated Day Care Services, 269 NLRB 178 (1984) is also particularly apt. There, a day care center’s administrative assistants collected personal data from unit employees and from outside sources (such as educational credentials and licensing certifications), typed disciplinary letters, and “routinely collect[ed] payroll, attendance, and scheduling data from unit employees.” *Id.* at 180. Additionally, the record showed these administrative assistants “assisted in the hiring process for new employees by typing and posting job vacancy notices, helping applicants fill out the application forms, and collecting data such as references.” *Id.* The employer also held weekly management meetings and shared the minutes of those meetings with the administrative assistants. *Id.* However, during the pertinent time frame, there was no discussion of management proposals for collective bargaining or other confidential labor relations matters. *Id.* Further, no collective bargaining proposals were either formulated or presented during the pertinent time frame. *Id.* Notably, with respect to grievances, although none were filed during the

applicable time frame, “the director of administrative services testified that if a center director wished to do so she could ask her administrative assistant to investigate the facts underlying an employee’s grievance, e.g., by checking the employee’s personnel file to determine whether the employee was actually entitled to more time off as claimed.” Id.

In finding the individuals in question were confidential employees, the Board ruled the employer’s administrative assistants “are expected to play a role in the investigation of grievances which will affect the decision made by management on the merits of a grievance and that this is sufficient to render them confidential employees.” Id. The Board also noted that “[w]hile the administrative assistants may spend relatively little of their working time performing these duties, the amount of time devoted to labor relations matters is not the controlling factor in determining confidential status.” Id. (internal citations omitted). See also Mega Van and Storage, Inc., 294 NLRB 975, 975 n. 1 (1989)(finding individual was confidential employee because she “researches and relies on information contained in employee personnel files in composing discipline letters to employees and the Union, on [the company president’s] behalf, and appears to play a role in the investigation of grievances for the [company president].”) See also Meenan Oil, 139 F.3d at 311.

The above-referenced authority applies with equal force to the present case. As discussed below, Ms. Olson acts and assists the Employer in a confidential capacity and thus should have been excluded from the bargaining unit.

A. Ms. Olson Assists Ms. Hack On A Confidential Basis With Respect To Collective Bargaining Negotiations

The Decision noted “[t]he fact that Olson pulled pay and attendance data for Hack that Hack may have used in contract negotiations does not render Olson confidential, because Olson did not know what labor policy proposals would have resulted from the data provided.”

(Decision, at 7). Additionally, the Decision found the Employer “provided no detail about the nature of the consultations, the information provided or how it related to bargaining.” (Decision, at 7). These findings are not supported by the record.

First, during the most recent QA analyst negotiations, Ms. Hack asked Ms. Olson to pull certain payroll data and advised Ms. Olson why she was requesting the information, specifically to formulate economic proposals predicated on current pay baselines and future trends. (Tr. 102-103). The Regional Director erroneously failed to consider Ms. Hack’s testimony to this effect.

Second, during this same bargaining, Ms. Hack relied on Ms. Olson’s unique subject matter expertise with respect to the Employer’s leave and attendance policies to prepare the Employer’s proposals. Given Ms. Olson’s familiarity with the payroll systems which tracked this information, Ms. Hack requested that Ms. Olson retrieve absentee quota and annual salary data so the Employer could have a better idea as to what the average sick day payout was for that group of employees. (Tr. 69-70). Once again, Ms. Hack advised Ms. Olson she was requesting this information in connection with the Employer’s leave-related bargaining proposals and sick leave policies. (Tr. 69-70). Further, given Ms. Olson’s exclusive expertise with respect to the Employer’s payroll systems, Ms. Hack relied upon Ms. Olson’s guidance to best position the Employer to prospectively manage employee sick leave. (Tr. 69-70). As a result, given Ms. Hack’s clear directives to Ms. Olson as to why she was requesting the specific information, the Regional Director’s conclusion that Ms. Olson did not have an idea as to what labor policies were being formulated defies credulity. To the contrary, Ms. Olson’s involvement with the collective bargaining process would put the Employer at a disadvantage if she is not considered a confidential employee. See Hendricks County.

B. Ms. Olson Assists in the Enforcement of the Employer's Disciplinary Policies

Relying on RCA Communications, 154 NLRB 34, 37 (1965) and Ladish Co., 178 NLRB 90 (1969), the Decision found “Olson’s ability to bring attendance violations and white card violations to Hack’s attention, which may result in employee discipline, does not render Olson confidential.” (Decision, at 6). However, unlike the present case, those decisions cited by the Regional Director stand for the proposition that merely being able to bring information to management which may ultimately lead to discipline is insufficient to render confidential employee status.

The Regional Director oversimplifies the record and places more emphasis on this authority than it can possibly bear. In the present case, Ms. Olson is not merely supplying information to management. Rather, she is directing investigatory meetings to take place and is exercising discretion as to whether disciplinary action is warranted based on an individualized assessment of the circumstances. See E & L Transport, Associated Day Care and Mega Van and Storage, Inc. For example, Ms. Olson has explained to management that an employee’s “current medical certification *does not* excuse white card violations.” (E-8)(emphasis in original). Accordingly, Ms. Olson’s involvement in this regard is much more than clerical in nature.

Similarly, relying upon Bakersfield Californian, 316 NLRB 1211 (1995)(which pre-dates E & L Transport) the Decision ruled “Olson’s knowledge, prior to employees or the Union, of pending issuance of notices of violation for absenteeism and white card violations does not render her confidential, because that information is in the process of being made known to the concerned employee and the Union.” (Decision, at 6-7). The Decision misinterprets the record. The key quote in Bakersfield Californian the Decision presumably relied upon is “[t]hat information, however, is in the process of being forwarded to the interested parties and her mere

exposure to the information does not make her a confidential employee.” Id. at 1212. As noted above, Ms. Olson is integrally involved in the decision making process as to whether discipline is warranted in the first instance. As a result, such information is not yet in the process of being forwarded to the interested parties and there is no evidence to the contrary. Moreover, given this involvement, Ms. Olson is not merely exposed to the information and, contrary to the Decision, she is not merely a messenger.

The Regional Director also improperly afforded no weight to the fact that Ms. Olson assists Ms. Hack by training managers about how to handle attendance-related issues. The fact that “Olson has not formulated any of the policies covered in these trainings” is irrelevant to the question as to whether Ms. Olson is a confidential employee. (Decision, at 2). The Employer is not suggesting that Ms. Olson is a managerial employee. Rather, the dispositive issue is whether Ms. Olson assists Ms. Hack in confidential matters. To this end, given that there is no written attendance policy in place at the Baldwinsville Brewery, Ms. Olson is privy to how the Employer’s managers should administer discipline in response attendance-related infractions. The Employer should not need to fear that its confidential information will end up in the Union’s hands by virtue of Ms. Olson’s involvement with these processes. See Hendricks County.

C. Ms. Olson Is Integrally Involved In The Employer’s Medical Leave and Benefits Administration

The Decision likewise failed to consider that Ms. Olson is Ms. Hack’s “right-hand person” for purposes of managing employees’ FMLA requests and that Ms. Olson exercises discretion in initially determining whether an employee’s FMLA request should be approved or denied and conducts research to confirm these conclusions. (Tr. 48, 118-120). The Regional Director also ignored the fact that Ms. Olson signs and sends correspondence to employees when their medical leave requests have been denied pursuant to the applicable collective bargaining

agreement. Because of Ms. Olson's involvement in the decision-making leading up to these determinations, she has more than mere access to confidential information which will eventually be disseminated to the affected employee and Union if applicable. See E & L Transport.

Similarly, the Regional Director incorrectly ignored Ms. Olson's involvement in determining which unqualified absences would enable employees to qualify for certain bonus payments in connection with the Brewery Excellence Program. Ms. Hack testified that Ms. Olson was involved in the decision making as to which hours should and should not be included in connection with determining which employees should qualify for benefits. See E & L Transport, Associated Day Care and Mega Van and Storage, Inc. The fact that Ms. Olson may not have been the final decision maker in this regard is irrelevant to the issue as to whether Ms. Olson is a confidential employee. Rather, because Ms. Olson assisted Ms. Hack in these determinations about a confidential matter not known to the Union or employees, Ms. Olson is a confidential employee.

D. Ms. Olson Is Aware of Unit Layoffs Before They Happen And Is Integrally Involved in Other Staffing Decisions

It is undisputed that Ms. Olson would be aware of the Employer's decision to lay off employees before the Union given her involvement with the Employer's supplemental insurance fund. It is irrelevant that no layoffs have been implemented during Ms. Hack's tenure given her uncontradicted testimony of what Ms. Olson's involvement would be in the event a layoff was necessary. See Associated Day Care and E&L Transport.

The Decision likewise failed to address that Ms. Olson has evaluated job applicants' candidacies, reviewed candidates' background checks, and provided her input to other members of the People Department regarding her impressions of the candidate. (Tr. 88-90, 166). As a result, Ms. Olson's responsibilities in this regard render her a confidential employee. See Associated Day Care.

* * *

Thus, given the clear record evidence establishing Ms. Olson is a confidential employee, the Employer respectfully requests that the Board grant the Request for Review of the Decision and find Ms. Olson is a confidential employee who should be excluded from the bargaining unit.

V. **THE BOARD SHOULD GRANT THE EMPLOYER'S REQUEST FOR REVIEW OF THE REGIONAL DIRECTOR'S ERRONEOUS CONCLUSIONS CONTAINED IN THE NOVEMBER 15, 2016 REPORT.**

As noted above, the Board Agent refused to permit the Employer to challenge Ms. Olson's ballot either immediately before or during the November 1, 2016 election. (Report, at 2-3). As a result, the Board Agent denied the Employer its right to due process by causing the three ballots cast during the November 1, 2016 election to be comingled. The Report explained that the Board Agent properly exercised discretion not to challenge Ms. Olson's ballot on the grounds the issue of her eligibility to vote had already been litigated. As discussed below, the Regional Director abused her discretion in refusing to permit the Employer to challenge Ms. Olson's ballot.

Section 102.69(a) of the NLRB's Rules and Regulations explicitly states that "[a]ny party and Board agents may challenge, for good cause, the eligibility of any person to participate in the election." Similarly, the Board has held that "[a]ny observer may, for good cause, insist upon the right to challenge and the Board agent is obliged to accept the challenge." Fulton Bag and Products, 121 NLRB 268, 270 (1958); see also Stokely Foods, Inc., 81 NLRB 449, 450 (1949)(noting the employer's observer was improperly denied the right to challenge an employee's ballot).

Here, the Employer had good cause to challenge Ms. Olsen's ballot on the grounds she is a confidential employee, notwithstanding the Regional Director's Decision reaching a

contrary conclusion. It is beyond cavil that the Regional Director's Decision is not a final decision and, as such, should not have foreclosed the Employer's ability to challenge Ms. Olson's ballot. By improperly failing to permit the Employer's challenge to Ms. Olson's ballot on the basis she is a confidential employee, the Employer was denied its due process rights. Specifically, the Employer would have prevailed in the November 1, 2016 election if: (1) the challenge to Ms. Olsen's ballot was ultimately sustained because the Board determines she is a confidential employee; (2) one unchallenged ballot was cast in favor of the Union; and (3) the other unchallenged ballot was cast against the Union. In this case, it is noteworthy that at least one ballot was cast against the Union. The Regional Director's Report thus prejudiced the Employer by necessitating the direction of a re-run election regardless of whether the Employer ultimately prevails before the Board with respect to its contention that Ms. Olson is a confidential employee. Given the fact that the Union filed its petition for an election in October 2016, the ultimate decision in this case should have reflected the employees' sentiment about unionization based on the election held November 1, 2016, not at a later unspecified time when circumstances may have changed.

The Report also states that "Section 102.65(e)(3) of the Board's Rules and Regulations suggests that the only circumstances in which a challenge might be permitted after a Regional Director has determined that an employee is eligible occurs when the party asserting the challenge has pending a motion to reopen the record or a motion for reconsideration based on changed circumstances or newly discovered evidence." (Report, at 3)(Emphasis added). The Regional Director's interpretation of Section 102.65(e)(3) is erroneous. That provision reads:

The filing and pendency of a motion under this provision shall not unless so ordered operate to stay the effectiveness of any action taken or directed to be taken nor will a regional director or the Board delay any decision or action during the period specified in paragraph (e)(2) of this section, except that, if a motion for

reconsideration based on changed circumstances or to reopen the record based on newly discovered evidence states with particularity that the granting thereof will affect the eligibility to vote of specific employees, the Board agent shall have discretion to allow such employees to vote subject to challenge even if they are specifically excluded in the direction of election and to challenge or permit the moving party to challenge the ballots of such employees even if they are specifically included in the direction of election in any election conducted while such motion is pending. A motion for reconsideration, for rehearing, or to reopen the record need not be filed to exhaust administrative remedies.

Nothing in Section 102.65(e)(3) stands for the proposition that merely because the Employer did not file a motion to reopen the record or a motion for reconsideration it is somehow foreclosed it from challenging Ms. Olson's ballot. The Board should ensure the Regional Director is not attempting to re-write the Board's Rules and Regulations.

Finally, the Report's reliance upon "significant policy considerations" is baseless and ignores the practical reality that elections may result in ties with one outcome determinative challenge. See Benjamin Realty Corp., 361 NLRB No. 103 (2014)(where six votes were cast for union and six votes cast against union, Board was required to resolve the one outcome determinative ballot of an employee whose identity had been revealed); see also U.S. Soil, 235 NLRB 762, 769 (1978) (same).

In light of the fact that, given the Regional Director's error, a re-run election must be unnecessarily directed even if the Employer prevails with respect to its argument that Ms. Olson is a confidential employee, the Employer requests that the Board impose an election bar such that another election cannot be held until, at the very earliest, November 1, 2017. See Section 9(c)(3) of the Act.

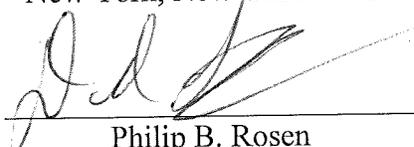
VI. CONCLUSION

For the foregoing reasons, the Board should grant the Employer's Request for Review of the Regional Director's Decision and summarily find that Ms. Olson is a confidential employee. Additionally, the Board should grant the Employer's Request for Review of the Regional Director's Report and direct that a re-run election be held no earlier than November 1, 2017.

* * * * *

Respectfully submitted,
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ATTORNEYS FOR ANHEUSER-BUSCH, LLC

Dated: December 6, 2016

CERTIFICATE OF SERVICE

I hereby certify that on December 6, 2016, I caused a true and correct copy of the foregoing **EMPLOYER'S REQUEST FOR REVIEW** to be filed with the Executive Secretary via the National Labor Relations Board's electronic case filing system and to be served upon Teamsters Local 1149's counsel of record, Mimi Satter, as well as Regional Director of Region 3, Rhonda Ley, via electronic mail, at the following address of record:

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