

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

VIDA CHARTER SCHOOL

Employer

and

Case 05-RC-197557

VIDA EDUCATION ASSOCIATION &  
SUPPORT PROFESSIONALS, PSEA/NEA

Petitioner

**PETITIONER'S RESPONSE IN OPPOSITION TO EMPLOYER'S  
REQUEST FOR REVIEW**

The Petitioner, Vida Education Association & Support Professionals, PSEA/NEA, pursuant to Section 102.67(f) of the Board's Rules and Regulations, hereby submits this Response in Opposition to Employer's Request for Review, as follows.

On April 16, 2017, the Petitioner filed the Petition in this matter seeking to represent certain employees of Vida Charter School (hereinafter the "Employer"). Pursuant to a Stipulated Election Agreement, an election was conducted on May 25, 2017. There were four ballots challenged, sufficient to affect the outcome of the election.

A hearing was held on June 27, 2017, in Baltimore, Maryland, before a Hearing Examiner. The Petitioner and the Employer were present and represented by counsel. The Hearing Examiner thereafter issued a Report and Recommendations dated August 11, 2017, in which he recommended overruling the challenges to the ballots of Andrew Phillips, Maria Maldonado and Melissa Turner and sustaining the challenge to the ballot of Analy Blanco.

The Employer filed Exceptions to the Hearing Officer's Report. On September 22, 2017, the Acting Regional Director for Region Five issued his Decision and Direction on Challenges.

The ARD adopted the recommendation of the Hearing Officer with respect to three of the four rulings, but the ARD found that as to the fourth challenged ballot (that of Maria Maldonado) the challenge was sustained. The consequence of the ARD's Decision and Direction on Challenges was that the ballots of Turner and Phillips would be counted, while the ballots of Maldonado and Blanco would not be counted.

On October 6, 2017, the Employer filed its Request for Review<sup>1</sup> and accompanying Emergency Motion to Stay All Proceedings and Impound the Ballots (hereinafter referred to as the "Emergency Motion"). The Employer challenged two of the ARD's holdings; more particularly, the Employer contends that the ARD erred in overruling the challenge to Turner's ballot and sustaining the challenge to Blanco's ballot. The remaining rulings set forth in the Decision and Direction on Challenges were not contested by the Employer.

The Petitioner, relying on the ARD's reasoning as well as the arguments set forth herein, respectfully submits that the Employer did not, and cannot, meet its burden to demonstrate that the ARD's decisions regarding the ballots of Turner and Blanco should be reversed. On the record developed in this case, the Board must affirm the ARD's holdings pertaining to the ballots of Turner and Blanco<sup>2</sup>.

#### **A. The Employer's Challenge Regarding the Ballot of Melissa Turner**

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<sup>1</sup> The document filed by the Employer is titled, "Employer's Request for Review of the Regional Director's Decision and Direction of Election." It is respectfully submitted that the Request for Review actually challenges the Acting Regional Director's Decision and Direction on Challenges, and the Petitioner will assume as much.

<sup>2</sup> The Emergency Motion is based solely and exclusively on the Employer's arguments regarding the ARD's decisions on the two challenged ballots (Turner and Blanco). The Emergency Motion simply asserts that the Board should impound the ballots at issue pending a final determination on the Request for Review. Inasmuch as the Request for Review is without merit, the accompanying Emergency Motion cannot stand separately or apart from the Request for Review and should be denied as well.

The Employer asserts three grounds upon which to challenge the ARD's decision overruling the challenge to the ballot of Melissa Turner: (1) the Employer asserts that the ARD made erroneous factual findings regarding the credibility of Turner, (2) the ARD erred in concluding that Turner was not a confidential employee, and (3) the ARD erred in concluding that Turner was not a managerial employee. The Petitioner will address each contention.

The Employer frames its argument regarding the AR's credibility determination on the contention that the ARD disregarded certain testimony and exhibits in crediting Turner. One aspect of the Employer's contention was that the ARD erred in concluding that Turner should be deemed lacking in credibility because she had contact with counsel for the Petitioner prior to the hearing. The Employer noted that at one point in Turner's testimony she acknowledged that she had spoken to counsel for the Petitioner prior to the hearing. However, as the ARD pointed out in his Decision and Direction on Challenges, at pages 13 and 14, there is no record evidence of what was or was not discussed between Turner and the Petitioner's counsel<sup>3</sup>.

The Petitioner relies on, and adopts, the reasoning set forth by the ARD in response to these contentions. The Petitioner further points out that the Employer never attempted to question Turner in regard to what she discussed with counsel for the Petitioner. In addition, despite Employer's counsel acknowledging in its Brief in Support of Exceptions (at page 5) that Turner was observed repeatedly conferring with counsel for the Petitioner during breaks in the hearing, the Employer never availed itself of the opportunity to question Turner about what she may have discussed. The

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<sup>3</sup> The Employer attempted to rely on a June 15, 2017 letter from the Petitioner's counsel to Turner. The letter conveyed the subpoena ad testificandum to Turner requiring her attendance at the hearing. The letter was never introduced into the record, and the ARD properly excluded the letter from consideration when reviewing the Employer's Exceptions. The fact that the ARD responded to the Employer's exceptions by referring to the letter is absolutely insufficient to bring that letter into the record developed at the hearing, and the Employer's assertion to that effect (Request for Review, p. 8) should be rejected. See, *Electro-Tec, Inc.*, 310 NLRB 131, fn. 1 (1993), en'f'd, 993 F.2d 1547 (6<sup>th</sup> Cir. 1993); *Accurate Health & Hospitals Corp., d/b/a Advocate Medical Group*, 2017 NLRB LEXIS 459 (employer precluded from relying on evidence not in record, and statements of counsel did not constitute facts in the record).

Employer had the opportunity to do so and chose not to make that inquiry. The Employer should be foreclosed from pursuing that contention before the Board.

In terms of the ARD's determination that Turner was not confidential, the Employer argues that the ARD erred in holding that Turner was not "aligned with management (Request for Review, p. 11).

The ARD applied longstanding Board caselaw holding that in order for an employee to qualify as "confidential" the employee must "assist and act in a confidential capacity to persons who formulate, determine and effectuate management policies in the field of labor relations." (Decision and Direction on Challenges, p. 19, citing *Lincoln Park Nursing Home*, 318 NLRB 1160, 1164 (1995)). The ARD accurately stated that the inquiry focuses as much on the person whom the alleged confidential employee is assisting as on the alleged confidential employee, and the above-quoted standard is strict. The ARD went on to analyze the record with respect to Turner's position as well as the position and authority of Martha Davis, the Executive Director of the Employer. The ARD analyzed the record in terms of whether Davis formulated, determined and effectuated management policies in labor relations.

The ARD listed several concrete examples where the record indicated that Davis did not go beyond effectuation of policies (Decision and Direction on Challenges, p. 20). The ARD noted that the evidence introduced at the hearing failed to demonstrate that Davis went beyond the effectuation of labor relations policies. For instance, although Davis signs off on employment agreements, she admitted that she did not have the authority to set or change an employee's compensation. Similarly, Davis' acknowledged role in approving time-off requests was limited to approving the requests and did not demonstrate any real authority to set limits or grant leave that would exceed the limits of the Employer's policy (Decision and Direction on Challenges, p. 20).

Ultimately, the Employer's primary argument in favor of confidential status narrowed down to Turner's supposed access to personnel files and other records. The Employer's reliance on this factor is insufficient to meet its burden on the issue of confidential status. The Employer did not refute the caselaw cited by the ARD in this regard, but instead the Employer cited to cases standing for the general proposition that the Board recognizes the need for a line between management and rank-and-file (see, Employer Request for Review, p. 17).

The Employer cited to the decision of the Board in Hendricks County Rural Electric Membership Corp., 236 NLRB 1616 (1978), in support of its criticism of the ARD's decision. The Employer cited Hendricks County for the proposition that the Board favors drawing a distinct line between management and rank-and-file. The Employer relied on Hendricks County Rural Electric Membership Corp. to suggest that an employee with "knowledge of sensitive labor relations information or who assists and acts in a confidential capacity would meet the standard for "confidential" status under the Act. However, the decision of the Board in Hendricks County Rural Electric Membership Corp., as well as the subsequent appellate history of that case, support the ARD's analysis, which focused on: (1) whether Turner had access to confidential material in the labor-relations sense, and (2) whether Turner acted in a confidential capacity to someone who formulates, determines and effectuates labor relations policies.

The 1978 Board decision in Hendricks County Rural Electric Membership Corp., was appealed to the Seventh Circuit Court of Appeals. The Seventh Circuit, in Hendricks County Rural Electric Membership Corp. v. NLRB, 603 F.2d 25 (7<sup>th</sup> Cir. 1979), remanded on the issue of the confidential status of the employee in question. The Board, in Hendricks County Rural Electric Membership Corp., 247 NLRB No. 68 (1980), affirmed its earlier decision on the standard that applied to the test of confidential status. The case was again appealed to the Seventh Circuit in

Hendricks County Rural Electric Membership Corp. v. NLRB, 627 F.2d 766 (7<sup>th</sup> Cir. 1980). The Court of Appeals concluded that the analysis employed by the Board had been unduly restricted (the Board had restricted the analysis such that the employer had to prove the labor-relations nexus to the confidential records accessible by the employee).

On further appeal, the United States Supreme Court took up the issue and reversed the Court of Appeals on this issue. NLRB v. Hendricks County Rural Electric Membership Corp., 454 US 170 (1981). The Supreme Court established the standard that there has to be a labor-relations nexus as part the analysis of confidential status, rather than accepting a broader focus on access to confidential material generally. Thus, the Employer's citation to the first Board decision in Hendricks County Rural Electric Membership Corp. is in conflict with the ultimate holding of the Supreme Court, as noted herein.

The caselaw cited by the ARD at page 21 of the Decision and Direction on Challenges is consistent and well-established on the point that mere access to confidential documents does not convert a rank-and-file employee to confidential status. The Employer cannot overcome that analysis by picking isolated points over which the Employer's reading of the factual record differs with that of the ARD.

The Employer also repeated its earlier contentions that Turner's job description established her as managerial. The ARD analyzed the claim of managerial status under the standard enunciated by the US Supreme Court in NLRB v. Bell Aerospace Co., 416 US 267, 288 (1974), that a managerial employee "formulates and effectuates management policies by expressing and making operative the decisions of their employer." (quoting Palace Laundry Dry Cleaning Corp., 75 NLRB 320, 323 fn. 4 (1947)). The ARD analyzed the record and concluded that Turner did not control or implement policies, but rather that she operated within defined limits set by management

(see, Decision and Direction on Challenges, p. 15). In that regard, the ARD accurately characterized Turner's testimony that she spent a large portion of her work time in duties that were clearly non-managerial in nature (Id., at pp. 15-16). The Employer's Request for Review attempts to create a conflict between Turner's testimony and the job description that was instituted for her job. The ARD credited Turner's testimony over any potential conflict with the job description, and the Employer is not entitled to reverse that determination simply because the Employer would have reached a different conclusion.

The Employer failed to prove at the hearing that Turner was confidential or managerial. Inasmuch as the ARD accurately weighed the record evidence and correctly applied the burden of proof, the Employer's request to review the decision of the ARD overturning the challenge to Turner's eligibility should be dismissed.

#### **B. The Employer's Claim Regarding the Eligibility of Analy Blanco**

The Employer seeks review of the ARD's conclusion that the ballot of Analy Blanco should not be counted. As noted by the ARD the Employer raises an ill-defined argument that Blanco became a dual-function employee. The Employer's argument in this regard is utterly without support in the record and must be disregarded.

The Employer entered into the Stipulated Election Agreement wherein it was agreed that: (a) the unit would exclude office clerical employees, and (b) Blanco was an office clerical employee. The Employer entered into this Agreement two weeks prior to the election. As the ARD accurately noted, the Employer did not revise this position at any time prior to or during the election. This issue arose after the Employer recognized that Blanco's ballot could be potentially

determinative. The post hoc effort to now characterize Blanco as dual-function is nothing more than an improper effort to disrupt the election process in this case.

In addition, the ARD correctly characterized the lack of evidence to support the Employer's claim. The Employer pointed to duties that Blanco undertook *after* the election, and the Employer offered only the broadest and most imprecise evidence about what or how much Blanco began to do outside of her office clerical duties. Never mind that these changes took place after the election, the Employer carried the burden to establish Blanco's eligibility to vote. *Circo Bar*, 2015 NLRB LEXIS 300, \*4 (NLRB April 24, 2015); see, also, *Sweetener Supply Corp.*, 349 NLRB 1122 (2007) and *Golden Fan Inn*, 281 NLRB 226, 230 fn. 24 (1986). To suggest that Blanco suddenly became a dual-function employee less than two weeks after the Employer expressly stated that she was an office clerical employee (and should be excluded from voting) should require much more convincing evidence than the Employer proffered at the hearing.

## Conclusion

The Petitioner respectfully submits that the Employer's Request for Review, and its accompanying Emergency Motion, offer no basis to disturb the Decision and Direction on Challenges or to delay the ballot opening and count in this matter. Accordingly, the Employer's Request for Review, and its accompanying Emergency Motion should be denied in their entirety.

Respectfully submitted,

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**UNITED STATES OF AMERICA  
NATIONAL LABOR RELATIONS BOARD  
REGION FIVE**

VIDA CHARTER SCHOOL,	:	
	:	
Employer,	:	
	:	
and	:	Case No. 05-RC-197557
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VIDA EDUCATION ASSOCIATION & SUPPORT PROFESSIONALS, PSEA/NEA,	:	
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Petitioner.	:	

**CERTIFICATE OF SERVICE**

I, Robert A. Eberle, Esquire, do hereby certify that a true and correct copy of the Petitioner's Response in Opposition to the Employer's Request for Review was served upon the following individuals on this day, October 13, 2017:

**By U.S. First Class Mail:**

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Robert A. Eberle, Esq.

Date: 10/13/2017