

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

**G&E REAL ESTATE MANAGEMENT  
SERVICES, INC. d/b/a NEWMARK GRUBB  
KNIGHT FRANK**

**and**

**Case 28-CA-178893**

**PATRICK THURMAN, an Individual**

**GENERAL COUNSEL'S BRIEF  
IN SUPPORT OF LIMITED EXCEPTIONS  
TO ADMINISTRATIVE LAW JUDGE'S DECISION ON REMAND**

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## I. STATEMENT OF THE CASE

On March 21, 2017, Administrative Law Judge Robert A. Ringler (the ALJ) heard this case and on May 10, 2017, issued a decision and recommended order. The ALJ, in large part, found that G&E Real Estate Management Services, Inc. d/b/a Newmark Grubb Knight Frank (Respondent) violated the National Labor Relations Act (the Act), 29 U.S.C. § 151 *et seq.*, as alleged in the Complaint by maintaining overly-broad and discriminatory rules in Respondent's Employee Handbook. Subsequently, Counsel for the General Counsel (CGC) filed exceptions with the National Labor Relations Board (the Board) requesting the Board find that Respondent also violated the Act by maintaining a rule marking Respondent's Employee Handbook confidential on each page of the handbook.<sup>1</sup>

On December 14, 2017, before the Board considered the parties' exceptions, the Board issued a decision in *The Boeing Company*, 365 NLRB No. 154 (2017) (*Boeing*), establishing a new standard for assessing the lawfulness of rules that do not explicitly prohibit employees' exercise of their rights under the Act. Thereafter, on November 21, 2018, the Board issued an Order remanding this case to the ALJ.

On April 1, 2019, after the parties agreed that taking judicial notice of the records in *BGC Partners, Inc.*, Case 28-CA-195500 and *Cantor Fitzgerald, LP*, Case 28-CA-195506 (*BGC/Cantor* records) was appropriate and to proceed with supplemental briefing, the ALJ issued an Order taking judicial notice of the BGC and Cantor records, closing the record, granting the CGC's unopposed motion to amend the Complaint to withdraw and modify certain allegations,<sup>2</sup> and setting a due date for supplemental briefing.

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<sup>1</sup> Respondent also filed exceptions to the Board requesting the Board dismiss the allegations.

<sup>2</sup> CGC sought to withdraw complaint paragraphs 4(a)(3), 4(a)(6), 4(a)(8), 4(a)(11), 4(a)(14), 4(a)(16) and 4(b), and modify complaint paragraphs 4(a)(12) and 4(a)(18).

On November 8, 2019, the ALJ issued a supplemental decision and recommended order based on the parties' supplemental briefs. The ALJ again found that Respondent violated the National Labor Relations Act (the Act), 29 U.S.C. § 151 *et seq.*, as alleged in the Complaint, as amended, by maintaining overly-broad and discriminatory rules in Respondent's Employee Handbook. In particular, the ALJ found Respondent violated Section 8(a)(1) of the Act by maintaining seven overly-broad and discriminatory rules in its Employee Handbook.<sup>3</sup> CGC supports these findings.

However, pursuant to Section 102.46(e) of the Board's Rules and Regulations, CGC respectfully takes limited exception to the ALJ's failure to address in his decision Respondent's maintenance of a footnote marking each page of its Employee Handbook confidential and to include a remedy for this unfair labor practice in his recommended Order. CGC respectfully requests that the Board grant CGC's limited exceptions and provide a full and appropriate remedy for all of Respondent's unfair labor practices.

## **II. QUESTIONS INVOLVED AND TO BE ARGUED**

CGC's exceptions present the following questions:

- (a) Did the ALJ err by failing to find that Respondent's confidentiality notice footnoted on each page of its Employee Handbook interfered with, restrained, and coerced employees in the exercise of their rights under Section 7 of the Act, in violation of Section 8(a)(1) of the Act? (Exception 1, addressed in Section III.A below)
- (b) Did the ALJ err by failing to include in his recommended Order a remedy for Respondent's designation of its Employee Handbook and each page therein confidential? (Exception 2, addressed in Section III.B below)

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<sup>3</sup> The ALJ also found that four of the alleged rules were lawful under *Boeing*.

### III. ARGUMENT

#### A. Respondent's Confidentiality Notice on Each Page of Respondent's Employee Handbook Unlawfully Restricts Section 7 Activity

Respondent's confidentiality notice footnoted on the title page and each page of Respondent's Employee Handbook states:

*Cantor/BGC/NGKF Handbook effective as of May 1, 2014 (as amended from time to time)*  
*Confidential—For Internal Use Only*<sup>4</sup>

CGC respectfully excepts to the ALJ's failure to find Respondent's maintenance of this confidentiality notice a violation of the Act. It is well-established that employees have the right to communicate with third parties, including labor organizations, government agencies, and the public, about their wages, hours, and other terms and conditions of employment in furtherance of the exercise of their Section 7 rights. *Kinder-Care Learning Centers*, 299 NLRB 1171, 1171 n. 1 (1990), citing *Eastex, Inc. v. NLRB*, 437 U.S. 556 (1978). Work rules prohibiting discussion of confidential information are unlawful if they define "confidential" so broadly as to cover terms and conditions of employment. *See, e.g., Double Eagle Hotel & Casino*, 341 NLRB 112, 115 (2004) (unlawful rule "specifically define[d] confidential information to include wages and working conditions such as disciplinary information"), *enforced*, 414 F.3d 1249 (10th Cir. 2005); *see also Flex-Frac, LLC v. NLRB*, 746 F.3d at 207, 209-10 (unlawful rule defined confidential information to include "personnel information"); *cf. Bigg's Foods*, 347 NLRB 425, 436 (2006) (distinguishing invalid confidentiality rule from valid one on the grounds that the former "specifically mentions salaries"). Restrictions on disclosure of handbooks are unlawful. *See Quicken Loans, Inc.*,

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<sup>4</sup> GC Exh. 2, *passim*.

359 NLRB No. 141, slip op. at 8 (Jun. 21, 2013), *set aside in view of NLRB v. Noel Canning*, 134 S. Ct. 2550 (2014), *reaffirmed in relevant part* 361 NLRB No. 94 (Nov. 3, 2014) (finding unlawful rule prohibiting disclosure of “*Personnel Information* including, but not limited to, all personnel lists, rosters, personal information of co-workers, managers, executives and officers; handbooks, personnel files, personnel information such as home phone numbers, cell phone numbers, addresses, and email addresses”). Moreover, when the rule fails to present “accompanying language that would tend to restrict its application,” employees reasonably could assume that protected concerted activities, such as discussing wages, hours and terms and conditions of employment, are included in the prohibition. *Lily Transportation Corp.*, 362 NLRB No. 54, slip op. at 1 and fn. 3 (2015).

Respondent’s designation of its entire employee handbook as “Confidential—For Internal Use Only” directly interferes with the right of employees to disclose the employee handbook and its many provisions governing their terms and conditions of employment to third parties in furtherance of Section 7 activities. When reasonably read, the policy would prohibit employees from disclosing the handbook or the policies therein to a labor organization seeking to organize or assist them, to the Board as part of an unfair labor practice investigation, to any other government agency investigating concerted claims, or to the media for the purpose of publicizing a labor dispute. Although Respondent contends that its Employee Handbook does not contain confidential information and was merely marked confidential as an “administrative note,” *BGC/Cantor* records at Tr. 50, 85, and marked as such out of habit, Tr. 114, there is no indication anywhere in the handbook that communicates any limits to the blanket confidentiality requirement. Moreover, employees would not be free

to interpret such language loosely and risk discipline or termination. *BGC/Cantor* records at Tr. 68.

Respondent fully acknowledges that the purpose behind marking a document confidential, as footnoted throughout the Employee Handbook, is to prevent the disclosure of said document. *BGC/Cantor* records at Tr. 60. Moreover, regarding confidential documents, Respondent requires employees to sign confidentiality agreements. *BGC/Cantor* records at Tr. 51-52. Similarly, employees must sign that they have received, read, and agreed to Respondent's Employee Handbook. *BGC/Cantor* records at Tr. 61. *BGC/Cantor* records at Tr. 61. Thus, the designation of the Employee Handbook as "Confidential—For Internal Use Only" directly interferes with employee Section 7 rights.

On the other side of the balance, Respondent has not asserted any legitimate business interest justifying its apparent blanket prohibition on disclosure of its Employee Handbook. In fact, Respondent's admission that the Employee Handbook does not contain confidential information and was merely marked confidential as an "administrative note" conclusively demonstrates that. In this regard, Respondent cannot identify any legitimate business interest that outweighs the Section 7 interests directly impacted by the rule. *BGC/Cantor* records at Tr. 50, 85.

**B. The ALJ Erred in Failing to Include a Remedy for Respondent's Designation of Its Employee Handbook and Each Page Therein as Confidential**

Because Respondent's designation of its Employee Handbook and each page therein as confidential is an unfair labor practice for the reasons explained above, the ALJ erred in failing to include a remedy for that conduct. Accordingly, CGC respectfully requests that the Board order that Respondent: (1) cease and desist from designating its Employee Handbook and each

page therein as confidential and for internal use only; (2) rescind its designation of those materials as confidential and for internal use only; (3) furnish employees with inserts for the Employee Handbook advising employees that the Employee Handbook and each page and policy therein is not confidential or for internal use only, or publish a new employee handbook not including the designation of the Employee Handbook and each of its pages as confidential and for internal use only; (4) post a notice to employees addressing the unfair labor practice at each of its facilities nationwide, *Longs Drug Stores California*, 347 NLRB 500, 501 (2006); *Guardsmark, LLC*, 344 NLRB 809, 812 (2005); and (5) nationally distribute notices to employees electronically, *J. Picini Flooring*, 356 NLRB 11 (2010).

#### **IV. CONCLUSION**

For the foregoing reasons, CGC respectfully requests that the Board grant the CGC's limited exceptions and provide a full and appropriate remedy for all of Respondent's unfair labor practices.

Dated at Phoenix, Arizona, this 6<sup>th</sup> day of December 2019.

Respectfully submitted,



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## CERTIFICATE OF SERVICE

I hereby certify that a copy of **GENERAL COUNSEL'S BRIEF IN SUPPORT OF LIMITED EXCEPTIONS TO ADMINISTRATIVE LAW JUDGE'S DECISION ON REMAND** in *G&E Real Estate Management Services, Inc. d/b/a Newmark Grubb Knight Frank*, Case 28-CA-178893 was served by E-Gov, E-Filing, and E-mail on this 6<sup>th</sup> day of December 2019 on the following:

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*/s/ Dawn M. Moore*

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