

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

Curran, Berger & Kludt,)
the Employer;)
– and –) Case No.: 01-RC-269805
United Auto Workers Local 2322,)
the Petitioner.)

**CURRAN, BERGER & KLUDT’S REQUEST FOR REVIEW OF THE REGIONAL
DIRECTOR’S DECISION AND DIRECTION OF ELECTION**

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I. Introduction

Pursuant to Section 102.67(c) of the Board's Rules and Regulations, Curran, Berger and Kludt, ("CBK," "CBK Immigration," or the "Employer") files this request for review of the Regional Director's January 19, 2021 Decision and Direction of Election ("DDE"), within ten business days of the decision. This request for review should be granted because (i) this case raises substantial questions of law and policy not fully addressed by Board precedent, (ii) the DDE contains a prejudicial, factual error, and (iii) there are compelling reasons to reconsider Board precedent. The underlying legal issues are (a) whether the United Auto Workers Local 2322 ("UAW Local 2322" or the "Union") has a disabling conflict of interest in simultaneously representing both CBK employees and the employees of CBK clients, and (b) if UAW Local 2322 is able to overcome the conflicts of interest, whether CBK paralegals should be excluded from the unit as confidential employees.

II. Summary of the Case

This case is not just about conflicting loyalties or the risk of revealing confidential information. Though these concerns are real and legitimate. This case is about irreconcilable differences – where the promotion of one interest directly conflicts with another interest. UAW Local 2322 cannot represent both the interests of CBK employees while also representing the interests of employees at a CBK client organization.

Examples of these irreconcilable differences span all aspects of UAW Local 2322's work, from the grievance arbitration process, to collective bargaining, to strike preparation. This specific example illustrates the inherent conflict: if UAW Local 2322 becomes the certified bargaining representative of CBK employees, then UAW Local 2322's duty of fair representation owed to post-doctoral employees of a CBK client, UMass Amherst, will directly

conflict with the duty of fair representation owed to CBK employees. A number of post-doctoral employees represented by UAW Local 2322 are authorized to work in the United States on nonimmigrant work visas. According to the collective-bargaining agreement between the CBK client and UAW Local 2322, the post-doctoral employees have a contractual right to the timely processing of immigration work authorization paperwork. That paperwork is prepared and filed by CBK employees, including petitioned-for paralegals. If CBK employees fail to do the work or make a mistake that delays the process, they are subject to discipline. When post-doctoral employees come to UAW Local 2322 to complain about delays in processing, the UAW Local 2322 representative will be placed in an impossible situation: pursue a grievance to the detriment of a Union member at CBK, or drop the grievance to the detriment of a post-doctoral Union member.

There are similar conflicts with respect to collective bargaining and with respect to when a union makes the difficult decision as to whether to threaten and/or actually go on strike or engage in another form of work stoppage. These conflicts of interest are amplified by UAW Local 2322's organizational structure, which utilizes a Joint Council of representatives from each of its bargaining units, including representatives from CBK's clients and from CBK itself (if UAW Local 2322 becomes the certified bargaining representative). The Joint Council is tasked with making decisions on critical strategy issues, including when to take a grievance to arbitration. Joint Council representatives from CBK will not be able to make proper decisions on grievances involving a CBK client employee. CBK representatives will be limited both by their ethical duties as law firm employees and by disagreement with the substance of allegations that question the work product of their CBK colleagues. Similarly, Joint Council representatives from CBK's clients will not be able to make proper decisions on grievances involving discipline

for a CBK employee when the facts of their own grievance resulted in the discipline. These situations illustrate that UAW Local 2322 cannot simultaneously represent the employees at CBK and the employees at CBK's clients.

Even if UAW Local 2322 overcomes these irreconcilable differences, the proposed unit is not appropriate because it includes confidential employees. CBK paralegals are familiar with and communicate advice to CBK clients on labor relations matters directly adverse to UAW Local 2322. This is exactly the concern raised in *Foley, Hoag*, 229 NLRB 456 (1977), when the Board first recognized the right of law firm employees to organize and acknowledged circumstances where "self-organization of a law firm's staff employees may in some way conflict with [the attorney-client] relationship." *Id.* at 458, n.12. The Board specifically recognized that employees of law firms could be confidential employees within the meaning of Board precedent. *Id.*

The underlying rationale for the confidential employee exception and the unique privileged, confidential and fiduciary attorney-client relationship between CBK paralegals and CBK clients distinguish this situation from other cases where the Board has declined to apply the confidential exception to law firm employees. Here, CBK paralegals provide assistance to and act in a fiduciary capacity when they work for CBK clients. Unlike the other cases, CBK paralegals work directly with management clients, helping them manage an adversarial relationship with UAW Local 2322 – the same union that seeks to represent them. The CBK paralegals cannot zealously represent CBK clients while at the same time participate in UAW Local 2322 Joint Council sessions to determine whether to advance a grievance to arbitration against the CBK client. The avoidance of this conflict of interest is the rationale for the exclusion. CBK's clients should not have to bargain or settle grievances with a union that also

represents CBK paralegals who in the normal performance of their duties obtain advance information of their positions. To prevent this situation, the Board created the confidential employee exception. Because CBK immigration paralegals play an integral role in directly providing legal advice to CBK clients on labor relations issues with UAW Local 2322, they are confidential employees and should be excluded from the proposed unit.

III. Request for Review

CBK requests review of the Regional Director decision. The Board should grant the Employer's request for review for the following reasons:

- Substantial questions of law and policy are raised because of the absence and departure from officially reported Board precedent (102.67(d)(1)):
 - This case raises a substantial question of both law and policy on whether it is a disabling conflict of interest for UAW Local 2322 to attempt to serve the interests of CBK employees while at the same time serving the interests of employees of CBK clients.
 - The Regional Director's decision departs from Board precedent by requiring CBK to demonstrate that a disabling conflict of interest is present only if the Union would receive direct pecuniary gain.
 - The Regional Director's decision imposes an unrealistic evidentiary standard, essentially requiring actual harm to demonstrate a disabling conflict of interest, which departs from Board precedent.
 - The Board has never decided whether paralegals act as excluded confidential employees when they have access to and participate in

confidential information that has a labor nexus to the relationship between management clients and the exact same union.

- The Regional Director’s decision improperly focuses the analysis of the confidential employee exclusion only on the likelihood of divulging confidential client labor relations information, ignoring that such knowledge, even if not disclosed, impacts judgment and decision-making.
- The Regional Director’s decision on a substantial factual issue is clearly erroneous on the record and such error prejudicially affects the rights of CBK (102.67(d)(2)):
 - The Regional Director’s decision erroneously states that CBK has done only approximately ten H-1B visa applications for UMass Amherst in the last two years. DDE at 4. In fact, the transcript clearly states that CBK has done twice as many – “probably at least ten *a year*” in the last two years or so. (Tr. 66:3-5) (Emphasis added.) This error is prejudicial because the Regional Director’s decision concludes that CBK’s conflict of interest scenarios are speculative. Since each application creates a new opportunity for conflicts of interest, this change in facts should turn the tide away from speculative to a clear and present danger.
- There are compelling reasons for reconsideration of an important Board policy (102.67(d)(3)):
 - This case presents a unique situation where the confidential employee exception should apply even when the employee has access to confidential labor relations information of a third party. The underlying rationale for

the confidential employee exception and the unique privileged, confidential and fiduciary attorney-client relationship between CBK paralegals and CBK clients distinguish this situation from other cases where the Board has declined to apply the confidential exception to law firm employees.

Each of these reasons is addressed below, together with the Employer's request that the Regional Director's decision be reversed.

IV. Factual Background

A. CBK Immigration

CBK is a law firm with three partner attorneys. (Tr. 49:10-12). The firm practices exclusively in immigration law. (Tr. 49:20). Most of its work is employer-sponsored, meaning CBK works with employers to sponsor employees either for temporary or permanent immigration status. (Tr. 49:20, 50:7-10). CBK also works on family and humanitarian immigration cases. (Tr. 50:9-10). At the representation hearing, CBK identified a number of representative clients, including healthcare facilities and institutions of higher education, such as UMass Amherst. (ER Ex. 1, CBK Representative Clients).

The immigration work is organized into four teams, each led by a case manager who oversees a team of paralegals and writers that work with different types of clients and cases. (Ex. 2, CBK Organization Chart; Tr. 52:16-17). One team works with CBK's largest corporate and university clients, a second team manages smaller academic institutions, another team works on family and humanitarian cases, and a fourth team manages smaller to midsize employers. (Tr. 53:5-16). Notwithstanding this team structure, all employees have access to each other's matters, including confidential client information. (Tr. 101:11-14).

B. Paralegals Are the Eyes and Ears of CBK’s Immigration Law Practice

CBK’s paralegals serve as the firm’s “point person” for an individual case; they gather information, interact with clients, prepare visa applications, and identify for the case managers and attorneys whether there are issues, questions, or concerns. (Tr. 54:7-15). In effect, paralegals are CBK’s “eyes and ears” on each case. (Tr. 54:14-15). At an immigration law firm like CBK, the work of a paralegal can differ from that of a paralegal working in other fields, as the immigration paralegal is integrally involved in managing and moving a case forward, thinking about case strategy, conducting research and writing, and engaging in direct client interactions. (Tr. 54:17-20). Indeed, paralegals are “often in daily contact with the client.” (Tr.57:3). Moreover, while paralegals are not able to provide legal advice, they are involved in receiving requests or identifying the need for legal advice, often drafting the response for an attorney to review, and then relaying that response back to the client. (Tr. 55:2-7).

C. Business Immigration Work Is Inextricably Linked with Labor Issues

At the representation hearing, the testimony of CBK Attorney Dan Berger focused on the firm’s work for a variety of public and private colleges and universities. Attorney Berger explained how CBK’s work for these clients tends to be within two parts; one involving the preparation of visa applications, and a second part involving general advice to an employer client. (Tr. 58:21-25). With respect to visa applications, the firm most commonly assists with achievement-based visas or temporary non-immigrant visas, such as an H-1B visa. (Tr. 59:4-7).

The H-1B visa is a common professional working visa that is frequently relied upon in higher education. (Tr. 59:19-21). The H-1B visa application processing involves filings with two different agencies of the federal government: (1) the U.S. Department of Labor (“DOL”); and (2) U.S. Citizenship and Immigration Services (“USCIS”). (Tr. 59:21-22). The DOL is tasked with receiving a document known as a labor condition application (“LCA”), which

requires that the employer attest to paying a fair wage, to treating the non-immigrant similarly to other workers, and to there being no strike or work stoppage. (Tr. 60:2-9). If there is a strike, for example, the government will not issue H-1B visas in that area of employment. (Tr. 78:23-25). The LCA also requires that the employer prove they have given notice of the H-1B application to an employer's employees or, if applicable, the employees' union. (Tr. 60:8-9).

Particularly applicable to this matter is the process of notifying the union of the H-1B application. (See ER Ex. 5, Sample Union Notice). The purpose of providing this notice is to offer the union an opportunity to raise concerns or object to the application. (Tr. 60:18-24). Oftentimes, the CBK paralegal is personally responsible for providing this notice to the union and, in that process, the paralegal is in direct contact with union representatives. (Tr. 61:3-12, 67:21-24). After receiving the notice, the union representative is responsible for providing written acknowledgement of its receipt prior to CBK submitting the LCA to the DOL. (Tr. 68:14-19). Once the LCA is certified by the DOL, it is filed with USCIS along with other paperwork necessary to secure the H-1B visa. (Tr. 60:10-14). Throughout the LCA certification process, CBK and its paralegals maintain a public access file of all related documentation, which is provided to the employer client. (ER Ex. 4, Example Public Access File; Tr. 63:3-14). If a visa application takes too long on account of a paralegal's performance, or if the paralegal makes a mistake in the visa application process, the paralegal may be subject to discipline or reprimand by CBK. (Tr. 79:21-25).

When processing an individual's H-1B visa application, CBK dually represents both the employer and the employee applicant. (Tr. 64:10-12). In this dual representation relationship, confidential information received from one party regarding a visa application is not generally kept from the other. (Tr. 64:14-17). Both parties work towards the common goal of securing the

employee's work authorization. (Tr. 64:16-17). When CBK is called upon to provide general advice to an employer client, CBK attorneys and paralegals work only with the employer. (Tr. 64:20-25).

An employee's H-1B status can be approved for up to three years. (Tr. 66:17-18). During that period, however, it is important that both the employer client and the individual visa holder keep CBK updated as to any proposed changes for the employee, such as a change of title, a change in location, or any other modification to terms and conditions of employment, which need to be evaluated to determine whether they may have an impact on the employee's visa status. (Tr. 67:1-5). In some cases, the H-1B visa application needs to be amended or withdrawn. (Tr. 67:4-5).

D. CBK Clients Have a Legally Adverse Relationship with the UAW

A number of CBK's employer clients have employees represented by the UAW, including UMass Amherst, UMass Boston, Mount Holyoke College, Connecticut State Colleges and Universities, New York University, and Providence Behavioral Health Hospital. (Tr. 65:3-17). At UMass Amherst, graduate and post-doctoral employees belong to UAW Local 2322. (Tr. 65:3-6). For a number of these represented employees at UMass Amherst, CBK is responsible for securing their work authorization status, typically through an H-1B visa, and as noted above, the represented employee becomes an individual client of CBK. (Tr. 64:10-12, 65:18-25, 66:1-2). For UMass Amherst and its employees, CBK is responsible for preparing approximately ten H-1B applications per year. (Tr. 66:3-5).¹ In processing these applications,

¹ The Regional Director's decision erroneously states that CBK has done only approximately 10 H-1B visa applications in the last two years. DDE at 4. In fact, the transcript clearly states that CBK has done twice as many – "probably at least *ten a year*" in the last two years or so. (Tr. 66:3-5) (Emphasis added.)

the employer points of contact for CBK and its paralegals are managers in Human Resources, the General Counsel's Office, and the International Program Office. (Tr. 67:7-15).

At the representation hearing, Attorney Berger identified a number of circumstances where CBK's ethical responsibilities to its clients may be compromised by a paralegal joining the same union as that representing its clients. Attorney Berger testified that while he could not breach client confidences, the scenarios outlined below are not hypothetical and have actually occurred. (Tr. 76:12-16). On occasion, CBK will be asked to advise on possible outcomes that do not comport with an employee's collective-bargaining agreement ("CBA"). (Tr. 77:8-12). In its dual representation relationship with clients, CBK and its paralegals may also receive questions from individual employees seeking guidance on matters that may not be technically permitted under their CBA. (Tr. 77:21-25). Attorney Berger recalled one example where a unionized employee was no longer being paid by their employer but wanted to find a way to continue working, to maintain their work authorization status, even though such circumstances may breach the terms of the CBA. (Tr. 78:1-6).

As another example, Attorney Berger recalled circumstances where a visa holder taught a class at another academic institution, which was not permitted by the H-1B visa. (Tr. 84:1-3). In this case, CBK had to advise its employer client to immediately take the employee off payroll and terminate their employment. (Tr. 84:5-7). When an H-1B visa holder is terminated under these circumstances, an employer is required to offer to pay the employee's plane fare back to their home country, to withdraw the LCA filing with the DOL, and to withdraw the immigration filing from USCIS. (Tr. 84:7-11). The immediacy of these requirements does not accommodate for any grievance or appeal process, which often surrounds a represented employee's discipline. (Tr. 84:11-13).

Attorney Berger recalled another recent situation where a university wanted to move its employee to a new department, potentially requiring another H-1B application. (Tr. 84:14-20). The employee did not want to pay for the new petition, however, and there was a question as to how to best proceed. (Tr. 84:20-23). A CBK paralegal was integrally involved in the communications to resolve this situation. (Tr. 85:1-4). A similar example may involve a particular visa holder's position being funded with grant monies that are running out, and an employer client with questions for CBK as to whether they can move their employee to a part-time position, switch them to a different visa, or move them into a different job classification. (Tr. 77:1-12).

The post-doctoral employees at UMass Amherst are parties to a collective-bargaining agreement ("CBA") with their employer. (ER Ex. 6, UMass Amherst CBA). CBK is aware of the UMass Amherst CBA because a copy is provided to the firm each time it is updated. (Tr. 70:7-9). Various provisions of the CBA expressly provide for the timely processing of a union member's visa work authorization paperwork. (ER Ex. 6, UMass Amherst CBA, Article 8, "Work Authorization"). For example, one part of the CBA requires that:

The University will ensure that no post doctoral employee shall suffer a loss in pay due to the University's failure to timely process work authorization paperwork, if there is a resulting delay in the post doc's beginning date of employment.

(*Id.* Section 6). In effect, this provision requires that CBK and its paralegals "timely process" work authorization paperwork. (Tr. 71:14-19).

Another section of the UMass Amherst CBA sets forth expectations as to what will occur if a visa holder leaves the country and is delayed in their return. (ER Ex. 6, UMass Amherst CBA, Article 8, Section 7). Attorney Berger testified at the representation hearing to scenarios where employers may want to prevent a visa holder from traveling. (Tr.85:6-14). Again, in

these circumstance, CBK paralegals would work directly with the employer and employee to receive details regarding the surrounding circumstances and to draft responses from CBK. (Tr. 72:8-15).

The UMass Amherst CBA further provides circumstances under which an employee may be disciplined or dismissed. (ER Ex. 6, UMass Amherst CBA, Article 9, “Discipline / Dismissal”). The CBA also sets forth provisions on employee layoffs. (*Id.*, Article 14, “Layoffs”). Because work authorization status depends on an individual continuing to do their job, suspension, termination, or layoff may impact on visa status. (Tr. 73:2-7). In the event of such circumstances, CBK would receive an update from UMass Amherst or the individual employee, perhaps to the end of collaborating on a plan that fits a disciplinary situation while also maintaining the employee’s work authorization status. (Tr. 73:10-17). The CBK paralegal would be among the firm’s points of contact for such communications. (Tr. 73: 18-24).

Article 23 of the UMass Amherst CBA is the section that defines salaries for members of UAW Local 2322. (ER Ex. 6, UMass Amherst CBA, Article 23, “Salaries”). CBK paralegals rely on the information in this section in completing the LCA to be submitted to the union, and then the DOL. (Tr. 78:7-15).

While the UMass Amherst CBA provides a clause on “No Strike/No Lockout,” CBK has advised clients on circumstances surrounding potential or actual strikes. (Tr. 79:8-16). As an example, in the area of immigration law, there are very specific rules precluding the use of H-1B visa petitions for replacement workers in the event of a work stoppage. (Tr. 79:14-16).

E. The Structure and Operations of UAW Local 2322

The Union’s overall mission in the workplace is set forth in the UAW Constitution, which per the testimony of UAW Local 2322 President Anais Surkin, is “the supreme law of the

Union,” and “applies to every Local UAW Union.” (Tr. 30:16-19). Article 2 of the UAW Constitution more specifically sets forth the following union objectives:

Section 1. To improve working conditions, create a uniform system of shorter hours, higher wages, health care and pensions; to maintain and protect the interests of workers under the jurisdiction of this International Union.

Section 2. To unite in one organization, regardless of religion, race, creed, color, sex, political affiliation or nationality, age, disability, marital status or sexual orientation, gender identity or gender expression, all employees under the jurisdiction of this International Union.

Section 3. To improve the sanitary and working conditions of employment within the workplace and in the accomplishment of these necessary reforms, we pledge ourselves to utilize the conference room and joint agreements; or if these fail to establish justice for the workers under the jurisdiction of this International Union, to advocate and support strike action.

(ER Ex. 11-A, UAW Constitution).

The UAW constitution goes on to declare that “[i]t shall be the duty of each member to ... acquit her/himself as a loyal and devoted member of the International Union.” (*Id.*).

Moreover, under the UAW Constitution, a union member may be put on trial for “conduct unbecoming.” (*Id.*). With particular respect to conflicts of interest, the UAW Constitution provides that:

No member shall be allowed to hold membership in more than one (1) Local Union of the International Union at the same time, except by permission of the International Executive Board. No member of the Union who is fully employed in one (1) workplace under the jurisdiction of the UAW shall accept work in any other workplace under the jurisdiction of the UAW. Any member violating this Section may be subjected to charges of conduct unbecoming a union member.

(*Id.*, Article 6, Section 10). Interestingly, at the representation hearing, CBK learned for the first time that paralegal Jonah Vorspan-Stein is already a member of UAW Local 2322, as a graduate employee at UMass Amherst. (Tr. 110:19-23).

The UAW Local 2322 Bylaws separately require that “the membership shall . . . do all in its power to strengthen and promote the labor movement.” (ER Ex. 10, UAW Local 2322 Bylaws). The Bylaws also establish the organizational structure by which UAW Local 2322 operates, which includes the use of a Joint Council, composed of representatives from each worksite, with a minimum of two representative from each site. (*Id.*, Article 6.2). The Joint Council meets monthly. (*Id.*, Article 6.4). The Joint Council is “an important forum for communication and decision making with representatives from all shops.” (ER Ex. 9).

Members with broader interests are encouraged to participate in the Joint Council:

If you want a chance to be involved with the Local on a higher level, if you want to learn more about the role our Local plays in a larger context, and see how your workplace fits into that picture, this is where to come.

(*Id.*). In between annual or semi-annual membership meetings, the Joint Council is the highest authority of UAW Local 2322, and it is tasked with the following, among other things: “(i) Help formulate the direction of the Local, (ii) Help make decisions affecting the Local and its members, including approving arbitration requests and funding proposals, and (iii) Help the union achieve its overall mission within the workplace.” (ER Ex. 6, Section 6.7; ER Ex. 9).

This organizational structure, particularly with respect to arbitration decisions, was affirmed through the testimony of UAW President Surkin and UAW Representative and Organizer Anna-Claire Steffen. (Tr. 22:12-19, 47:6-8). UAW President Surkin also testified that in the event a constituent or fellow bargaining unit was on strike or picketing, UAW Local 2322 would “encourage” its members to join the picket line in solidarity. (Tr. 38:6-12).

V. Legal Argument – Reasons for Granting the Request for Review and Reversing the Regional Director’s Decision.

A. UAW Local 2322 Is Not a Proper Bargaining Representative for CBK Employees Because Inherent Conflicts of Interest Prevent It from Effectively Representing Them in All Aspects of the Relationship.

It is well established that unions must act “with the single-minded purpose of protecting and advancing the interests of the employees who have selected it as their bargaining agent, and there must be no ulterior purpose.” *Bausch & Lomb Optical Co.*, 108 NLRB 1555, 1559 (1954). When unions have an interest that conflicts with advancing the interests of the unit employees, they have created a “dual status [that] is fraught with potential dangers.” *Id.* In *Bausch & Lomb*, the conflict of interest was the union’s competing business. But, the Board has made it clear that “[t]he principles underlying the conflict-of-interest doctrine are not limited to a factual situation in which the employer and the union are in the same business.” *St. John’s Hospital & Health Center*, 264 NLRB 990, 992 (1982) (customer relationship creates “an ‘ulterior purpose’ that conflicts with the requirement that a collective-bargaining agent have a ‘single-minded purpose of protecting and advancing the interests’ of unit employees.”). The Board has confirmed that internal union conflicts are sufficient to constitute a disabling conflict of interest. *Oregon Teamsters*, 119 NLRB 207, 211-212 (1957) (union is not the proper representative of employees where numerous unfair labor practice charges between competing factions of the same union create conflicts of interest).

In this case, UAW Local 2322’s desire to represent CBK employees creates a conflict of interest with UAW Local 2322’s existing duties of fair representation owed to employees of CBK clients. UAW Local 2322 cannot effectively represent both CBK employees and the

employees of CBK's clients. Conflicts would be present throughout the bargaining relationship, including the grievance arbitration process, good faith negotiations during collective-bargaining, and in developing the strategy to threaten or actually undertake the ultimate economic weapon of a strike.

1. Conflicts in the Grievance Arbitration Process

While there is a potential conflict at every CBK client with UAW-represented employees, the situation at UMass Amherst is the clearest example of a disabling conflict of interest. UAW Local 2322 represents post-doctoral employees at UMass Amherst. The collective-bargaining agreement between UAW Local 2322 and UMass Amherst contains specific provisions regarding immigration requirements. (ER Ex. 6, UMass Amherst CBA, Article 8, "Work Authorization"). For example, the CBA creates a penalty if there is a "failure to timely process work authorization paperwork." (*Id.*, Article 8, Section 6). CBK employees are responsible for performing the immigration work on behalf of UMass Amherst, including filing applications and providing advice with respect to post-doctoral employees. (Tr. 54:17-20). If there is a delay in processing the paperwork, UAW Local 2322 is put into an impossible situation. On the one hand, they have a duty to raise those concerns through the grievance process for the benefit of the post-doctoral employee. UAW Local 2322 Union Representative and Organizer Steffen, who is the assigned representative to the post-doctoral unit, testified that she monitors compliance with the CBA and that she would initiate the grievance process if there was a violation. (Tr. 45:18 – 46:3). On the other hand, by raising the issue, UAW Local 2322 is calling attention to the possible failures of CBK employees, subjecting them to discipline. Attorney Berger testified that if there is a delay or a mistake in an application, a CBK employee will be subject to discipline or reprimand. (Tr. 79:21 – 25). The conflict is irreconcilable. By filing the grievance to support the post-doctoral employee, UAW Local 2322 adversely impacts

the CBK employee. By refusing to file the grievance, UAW Local 2322 adversely impacts the rights of the post-doctoral employee.

The conflict of interest becomes more pronounced if the grievance advances through the process and the post-doctoral bargaining unit wants to advance it to arbitration. According to UAW Local 2322's Bylaws, the Joint Council has the ultimate say on whether to proceed to arbitration. (ER Ex. 9; ER Ex. 10, UAW Local 2322 Bylaws, Section 6.7). But, if CBK employees elect UAW Local 2322 as their representative, CBK employees will have the right to have at least two members on the Joint Council. (ER Ex. 10, UAW Local 2322 Bylaws, Section 6.2). The CBK employees will be called upon to consider an arbitration that highlights mistakes in their own work performance. In fact, they will undoubtedly disagree with the underlying substance of the grievance, claiming there was no mistake or undue delay, as admitting to such will jeopardize their employment at CBK and hamper any likelihood of succeeding on an associated grievance.

Moreover, if the grievance does advance to arbitration, CBK employees may be called as witnesses to testify about the underlying facts of the grievance. At this point, the conflict will be created with testimony under oath. The record in the post-doctoral employee's arbitration would be used in any arbitration over the CBK employee's discipline. Any testimony that helps the post-doctoral employee's claim to establish an undue delay will be automatically detrimental to the CBK employee's claim that discipline was unwarranted. UAW Local 2322 cannot act in a dual capacity as both the representative of CBK employees and the representative of CBK client employees. As the Board has recognized, such "dual status" is "fraught with potential dangers." *Bausch & Lomb*, 108 NLRB at 1559.

Similar concerns arise if the delayed processing results in discipline of the CBK employee. UAW Local 2322 would represent the CBK employee in any grievance against CBK. CBK would be in the unusual position of explaining that UAW Local 2322 raised the issue at UMass Amherst. When any grievance remains unresolved, the Joint Council, with numerous representatives from UMass Amherst bargaining units on the Council, would not be able to provide a fair and impartial review of the grievance filed by the CBK employee. Given all of these issues, UAW Local 2322 would not be able to effectively represent the CBK employee in this grievance.

Timely processing of applications is just one issue. Similar issues arise with the H-1B process where CBK employees have to obtain UAW Local 2322's consent to proceed with the application. Or, when CBK employees are involved with the application of other aspects of the CBA to non-immigrant post-doctoral employees, such as the articles on wages, benefits, discharge, travel or layoff. Any of these issues will lead to a dispute, invoking the grievance arbitration process. UAW Local 2322's dual status as the representative of both post-doctoral employees and CBK employees interferes with the union's single-minded purpose of protecting and advancing the interests of each unit's employees. Since UAW Local 2322 is already the representative of the post-doctoral employees, it cannot also be a proper bargaining representative of the CBK employees.

2. Conflicts in Collective Bargaining

Because UAW Local 2322 is the representative of employees at multiple CBK clients, any union proposal during bargaining with CBK will be viewed with concerns about ulterior motives. At the negotiating table, CBK will be left to wonder whether a proposal is solely for the benefit of CBK employees, or for the benefit of employees who work for CBK clients. For example, as the bargaining representative for CBK employees, how will UAW Local 2322

approach issues such as the appropriate workload for staff, the number of hours in a work day or week, the availability of staff to expedite work on emergency cases, requests for overtime or premium pay, or the procedures for layoffs? All of these issues directly impact the ability of CBK to provide effective immigration services to CBK clients. UAW Local 2322 will be conflicted when CBK employees want arrangements that make it more difficult for CBK to provide services to individuals in other UAW-represented units. *See Bausch & Lomb*, 108 NLRB at 1560 (“[I]t would not be conducive to collective bargaining to impose upon the Respondent the difficult burden of attempting to disentangle the Union’s conflicting interests in order to determine, at all times during negotiations, the Union’s motivation for each demand made.”).

In *St. John’s Hospital*, the Board worried that the union had a conflicting interest in maintaining and enhancing its customer relationship with the employer, creating an ulterior motive. 264 NLRB at 993. Here, UAW Local 2322 has a conflicting interest in maintaining and enhancing the provision of immigration services to its members. In fact, those requirements are already specifically spelled out in a collective-bargaining agreement with one of CBK’s clients. (ER Ex 6, UMass Amherst CBA, Article 8, “Work Authorization”). In *St. John’s Hospital*, the Board worried that the union might demand that requests for private duty nurses be directed to the union’s agency, or that the union’s agency would be used for staff shortages. 264 NLRB at 993. Here, UAW Local 2322 might demand that immigration petitions for its members receive priority, or they might be less willing to propose articles that make it more difficult or expensive for CBK to perform its immigration services.

The Board’s concerns about collective bargaining in *Bausch & Lomb* are also present in this case. Just like the union in *Bausch & Lomb* might be tempted to favor its other business

interests, UAW Local 2322 might be tempted to favor the interests of its members with immigration needs. 108 NLRB at 1560 (“the Union might be sorely tempted in negotiations to make intemperate demands upon [Bausch & Lomb] with respect to wages, hours, and working conditions of the [Bausch & Lomb’s] employees, under the guise of performing its function as bargaining agent, which would redound to the benefit of its company at [Bausch & Lomb’s] expense”). Because UAW Local 2322 already represents employees of CBK clients who need CBK’s immigration services, it will have ulterior motives during bargaining; therefore, the Regional Director’s decision should be reversed and the petition must be dismissed. *St. John’s Hospital*, 264 NLRB at 993 (petition dismissed when union might have ulterior motives during bargaining).

3. Conflicts in Exercising the Ultimate Economic Weapon of Strike

While UAW Local 2322 claims that strikes are rare, it is considered the union’s ultimate economic weapon in private industry if the employer and the union cannot reach agreement. *See NLRB v. Allis-Chalmers Mfg. Co.*, 388 U.S. 175, 181 (1967) (“The economic strike against the employer is the ultimate weapon in labor’s arsenal for achieving agreement upon its terms”). The UAW has a detailed procedure before a Local can authorize a strike, including approval by the UAW International Executive Board or the International President. (ER Ex 11-A, UAW Constitution Article 50; see also ER Ex 10, UAW Local 2322 Bylaws, Article 22). If CBK employees ever decide to go on strike, it will have a detrimental impact on the employees of the other units who rely on the immigration advice provided by CBK employees. But, before CBK employees can go on strike, they have to obtain authorization from the UAW International. Because the UAW has conflicting interests, it cannot provide the CBK employees with “the single-minded purpose of protecting and advancing their interests.” *Bausch & Lomb*, 108 NLRB at 1559. The UAW also has an obligation to the UAW employees at CBK clients who will be

adversely impacted if the CBK employees are not available to address their immigration needs. Again, this situation puts the UAW into a disabling conflict of interest.

4. The Local's Internal Structure Creates the Inherent Conflict of Interest Between CBK Employees and CBK Client Employees.

(a) Local 2322's Joint Council

The U.S. Supreme Court recognizes that a union must avoid internal conflicts of interest, stating that the “bargaining representative, whoever it may be, is responsible to, and owes complete loyalty to, the interests of all whom it represents.” *Ford Motor Co. v. Huffman*, 345 U.S. 330, 338 (1953) (quoted in *Bausch & Lomb*, 108 NLRB at 1559). Here, the structure of UAW Local 2322 shows that it cannot satisfy this requirement with respect to both the employees of CBK and the employees of CBK's clients.

UAW Local 2322's Joint Council is the highest governing body of the Local in between annual or semi-annual membership meetings. (ER Ex. 9). It “is an important forum for communication and decision making with representatives from all shops.” (Id.). It allows members “to be involved with the Local on a higher level, . . . learn more about the role [the] Local plays in a larger context, . . . [and] how [their] workplace fits into that picture.” (Id.). The Joint Council currently has room for up to 14 representatives from existing CBK clients. (ER Ex. 8) (this includes representatives from the Graduate Employee Organization, Mount Holyoke College, Postdoctoral Employees – UMass, Providence Hospital, and Resident Assistants - UMass). If the CBK employees vote in favor of UAW Local 2322, the CBK employees will have at least 2 representatives on the Joint Council.

As the highest governing body of Local 2322 outside of membership meetings, the Joint Council has input on the grievance arbitration process, negotiations strategy and strike planning

for each of the bargaining groups. But, the Joint Council will be conflicted for any decision that relates to the CBK employees or any decision that relates to employees of CBK clients.

(b) Local 2322's Joint Council Cannot Effectively Represent CBK Employees.

Assuming the CBK employees elect Local 2322 as their designated representative, the Union will not be able to single-mindedly pursue their best interests. Instead, the Joint Council, that is the highest governing body of Local 2322 outside of the membership meetings, will have up to 14 members with interests differing from those that are solely in the best interests of CBK employees. As explained in more detail above, Joint Council representatives from CBK clients will be asked whether they want to pursue a grievance filed by CBK employees to arbitration, even if it negatively impacts a claim they have against one of CBK's clients. Specifically, by supporting a grievance that discipline of a CBK employee is not appropriate, the representative of a CBK client undermines the grievance of an employee of the CBK client that there was an undue delay in processing of an immigration visa. Similarly, the Joint Council representatives from CBK clients will not want to support bargaining strategies and proposals that negatively impact the ability of CBK to provide immigration services to CBK client employees. This same conflict will exist when CBK client representatives consider whether to support the use of a strike or other work stoppage at CBK, which will delay or hinder the provision of immigration services to their fellow members.

CBK employees will be at a distinct disadvantage if their designated representative is constantly having to juggle the competition between their interests and the interests of CBK client employees. With these conflicts, UAW Local 2322 does not have a single-minded loyalty to the interests of CBK employees, and it cannot comply with the U.S. Supreme Court's mandate that the union be responsible to and owe complete loyalty to the interests of all members.

(c) UAW Local 2322's Joint Council Cannot Effectively Represent Employees of CBK Clients if CBK Employees Are on the Joint Council.

If two CBK employees join as members of the Joint Council, the Union will not be able to single-mindedly pursue the best interests of the employees of CBK clients. The CBK representatives will, as a result of their daily work responsibilities and their legally-imposed ethical duties toward CBK clients, have conflicting interests with the interests of the employees of CBK clients. As discussed in more detail above, the CBK representatives will be conflicted in considering whether to pursue a grievance filed by the employees of a CBK client against a CBK client to arbitration when it negatively impacts a CBK employee's discipline grievance. Similarly, the CBK representatives will be conflicted in considering whether to support a bargaining strategy that seeks to impose additional penalties when the CBK client delays immigration processing. Finally, the CBK representatives will be conflicted in considering whether to support a work stoppage (or similar actions, depending on what is permissible) at CBK clients because it will negatively impact the work done by CBK employees. In addition, CBK employees will have insider knowledge about considerations a CBK client has that do not comport fully with the collective-bargaining agreement between UAW Local 2322 and the CBK client. Even if the CBK employee preserves those confidences, this knowledge will weigh on their decision-making and impact their judgment as Joint Council members.

The conflicts are exacerbated because CBK employees, as employees of a law firm, have ethical duties to CBK clients. See Massachusetts Rules of Professional Conduct ("MRPC") Rule 5.3 (requiring lawyers to ensure nonlawyers comply with the professional obligations of the lawyer). CBK employees have a fiduciary relationship with CBK clients. "The relationship between lawyer [and nonlawyer employee] and client is a fiduciary one in which the lawyer [and nonlawyer] occupies the highest position of trust and confidence." MRPC 1.7 cmt 12. As

fiduciaries, CBK employees act on behalf of the CBK client and must focus exclusively on the best interests of the CBK client. But, in their role on the Joint Council, CBK employees cannot possibly represent both the interests of the CBK client and the interests of the CBK client employee in an adversarial labor context. There is an inherent conflict of interest, and CBK employees cannot simultaneously fulfill the obligations of both roles.

(d) The Regional Director's Decision Fails to Consider All of the Potential Conflicts.

The Regional Director's decision recognizes the conflicts of interest but dismisses the claim with the suggestion that recusal of the two CBK employee representatives from the Joint Council would be sufficient to address the conflict. DDE at 17. First, there is no way to enforce this suggestion. Second, even if enforceable, it does not address the real harm to CBK employees. The harm to CBK employees is that many of the other Joint Council representatives have conflicts and are therefore not able to single-mindedly pursue the best interests of CBK employees. There is no way to recuse all of the other CBK client representatives (up to 14 members of the Joint Council). Recusal is not a proper solution to address these significant conflicts.

In short, UAW Local 2322's Joint Council will not be able to adequately represent the interests of CBK employees. Therefore, UAW Local 2322 does not have a single-minded loyalty to the interests of CBK employees, and it cannot comply with the U.S. Supreme Court's mandate that the union be responsible to and owe complete loyalty to the interests of all members.

5. The Regional Director's Decision Applied the Wrong Test – Focusing Improperly on the Need to Demonstrate Direct Pecuniary Gain.

The Board has specifically rejected the notion that disabling conflicts of interest need to demonstrate direct pecuniary gain. The Regional Director's decision concluded that the conflicts of interest identified by CBK lacked "the component of the union having a direct pecuniary interest adverse to its representation of CBK employees." DDE at 16. The decision went on state that "[s]uch an interest is the common thread in Board decisions that took the step of overriding employees' statutory right to free choice of bargaining representative," and that "CBK has therefore failed to sustain its burden that the Union should be disqualified as bargaining representative for the unit at issue here." *Id.* It is a departure from Board precedent, however, for the decision to conclude that the "common thread" in conflict-of-interest cases is "the union having a direct pecuniary interest adverse to its representation of [petitioned-for] employees."

In the matter of *Sierra Vista Hosp., Inc.*, 241 NLRB 631 (1979), the Board rejected the argument that conflicts of interest require a direct pecuniary interest. In that case, the Board clarified that the "potential for disqualification stems from an inherent statutory concern that [e]mployees have the right to be represented in collective-bargaining negotiations by individuals who have a single-minded loyalty to their interests." *Id.* at 632-33 (quotation omitted). More specifically, the Board in *Sierra Vista Hosp.* considered whether a disqualifying conflict of interest was presented by supervisors participating in labor organizations. Preliminarily, the Board noted that when an employer's own supervisors actively participate in labor organizations, this "can give rise to question [sic] about the labor organization's ability to deal with the employer at arm's length." *Id.* at 633. "Central factors involved in considering this issue are the employees' right to a collective-bargaining representative whose undivided concern is for their interests and the employer's right to expect loyalty from its own supervisors." *Id.*

The Board in *Sierra Visa Hosp.* then proceeded to consider whether a disqualifying conflict of interest is also presented by “[t]he active, internal union participation of supervisors of a third-party employer (i.e., an employer other than the one with whom the labor organization seeks to bargain).” *Id.* The Board found that while there is no inherent danger than an employer may be “bargaining with itself,” these circumstances “may operate, nonetheless, to disqualify a labor organization from acting as a bargaining representative for particular employees.” *Id.* “Although, in such cases, the legitimate interest of an employer in the loyalty of its supervisors is not in issue (the active supervisors are not its own), the presence of supervisors of third-party employers may impinge upon the employees’ right to a bargaining representative whose undivided concern is for their interests.” *Id.*

In reaching this conclusion, the Board specifically refused to limit the breadth of its holding to only those matters where the union has a direct pecuniary interest adverse to that of employer. Instead, the Board noted more generally that a conflict-of-interest analysis involves the “employees’ rights to a bargaining representative whose undivided concern is for their interests” against “interests a bargaining representative may have outside its employee representative capacity.” *Id.*

In a dissenting opinion to the *Sierra Vista Hosp.* decision, former Member Truesdale espoused a more limited view, like that now adopted in the Regional Director’s decision in the instant matter, and noted that he would “readily join” in disqualifying a bargaining representative only when alleged that “the union or its agents have financial or other business interests which compete with those of the employer whose employees the union represents.” *Id.* at 638 n. 43 (Truesdale, dissenting). Former Member Truesdale referred to such allegations as “the classic economic conflict of interest as expressed in *Bausch & Lomb Optical Company.*” *Id.* The

majority opinion of the Board expressly rejected the Truesdale dissent, however, unequivocally stating that the term “conflict of interest” is “broader in scope than Member Truesdale suggests.” *Id.* at 634.

This broader scope has been reflected in the Board’s reported cases on conflicts of interest, which generally fall into two categories. Admittedly, in one category, unions typically possess financial interests that are directly adverse to the employer’s. *See, e.g., Garrison Nursing Home*, 293 NLRB 122 (1989); *Bausch & Lomb*, 108 NLRB at 1555. In a second category, however, cases such as *Sierra Vista Hosp.* involve circumstances where union officials are called upon to wear two hats; one as representative for the petitioned-for employees and another as representative for a separate entity. For example, in the matter of *Child Day Care Center*, 252 NLRB 1177 (1980), the Board considered a Union Health and Welfare Fund that operated multiple childcare facilities. The Fund was managed by a ten-member board of trustees, with five trustees appointed by the employers of employees participating in the Fund and five trustees appointed by an affiliation of 30 local unions, collectively referred to as the “Joint Board.” *Id.* at 1179. One of the Joint Board’s constituent bargaining units, Local 1080A, organized employees of a Fund-managed childcare facility. *Id.* at 1180. Thereafter, the Fund determined to lay off a Local 1080A employee as a cost-saving measure. *Id.* The employee proceeded to file a grievance, which was handled by a Joint Board business agent. *Id.* The Joint Board business agent also happened to be among the five Fund trustees appointed by the Joint Board. *Id.* In effect, this placed the Joint Board business agent in the irreconcilable position of having to choose between representing the interests of the Local 1080A employee or representing the interests of the Fund. The Board agreed that this dual role created a disabling conflict of interest. *Id.* at 1177.

Similarly, in the matter of *Teamsters Local 668 Insurance and Welfare Fund*, 298 NLRB 1085 (1990), a Union Insurance and Welfare Fund employed a number of individuals represented by a union with a chief executive officer who was dually appointed to serve as a trustee of the Fund. *Id.* at 1087. In its decision, the Board reiterated the standard that unions must operate with “the single-minded purpose of protecting and advocating the interests of employees.” *Id.* Where the union had “allegiances which conflict with that purpose, ... it [cannot] be a proper representative of employees.” *Id.* (quotation omitted). The “dual role” played by the Union CEO and Fund trustee presented a “disabling conflict of interest,” even though the conflict did not involve diverging financial interests. *Id.*

The conflicts of interest for CBK employees are similar to this second category of conflict-of-interest cases. Just like in *Child Day Care Center* and in *Teamsters Local 668 Insurance and Welfare Fund*, UAW Local 2322 will be placed in a disabling conflict of interest by having to wear two conflicting hats – to represent the best interests of CBK employees and to represent the best interests of CBK Client employees. *See also Kaplan, Sicking, Hessen, Sugarman, Rosenthal & Zientz*, 250 NLRB 483 (1980) (disabling conflict of interest when the employer served as the union’s legal counsel); *Oregon Teamsters*, 119 NLRB at 211-212 (disabling conflict when the union sought certification to represent its own employees).

6. The Regional Director’s Conclusion that These Conflicts Are Speculative Is Based on Erroneous Facts and Creates an Unwarranted Standard of Actual Harm.

(a) The Regional Director’s Decision Relies on Erroneous Facts.

Without any analysis, the Regional Director’s decision summarily dismisses all of the potential conflicts outlined above as “plainly too speculative and indirect to satisfy the requirement that a conflict be ‘clear and present.’” DDE, at 16. As described above in Footnote 1, however, the Regional Director’s decision contains a factual error, reducing by 50% the actual

H-1B visa applications CBK prepares for UMass Amherst every year for the last two years. Since each of these applications creates a new opportunity for conflicts of interest, this change in facts should turn the tide away from speculative to a clear and present danger. This is a logical explanation, given that there is no further analysis in the decision to support a conclusion that CBK's concerns are merely speculative and given the substantial, real evidence of potential conflicts in the record.

(b) The Regional Director's Decision Imposes an Unrealistic Standard.

Even if the correction of the factual error would not change the outcome of the Regional Director's decision, the decision imposes an impossibly high burden. By claiming that the examples are "plainly too speculative and indirect," the decision implies that the only way to satisfy the test is to have actual harm. But, there is no way CBK could demonstrate actual harm in this case because the CBK employees are not represented by UAW Local 2322 at this time. In the same decision the Regional Director's decision relies on for its conclusion that the scenarios presented by CBK are too speculative, the Board specifically states that the "employer need not demonstrate that mischief already resulted from a conflict, however, but only that its potential exists." *Garrison Nursing Home*, 293 NLRB at 122. CBK has provided substantial evidence that potential conflicts exist in the grievance arbitration process, in bargaining, and in possible strike situations. In the words of former Member Walther, "it is not necessary that the fire of conflict of interest be blazing. It is enough that the wood is gathered, the kindling sprinkled, and the matches available." *Anchorage Community Hospital, Inc*, 225 NLRB 575, 576-77 (1976) (Walther, dissenting)

The actual overlap of employees represented by UAW Local 2322 is sufficient evidence of a conflict of interest. CBK employees have actually worked on immigration petitions for

employees represented by UAW Local 2322. (Tr. 65:3-17). CBK employees have interacted with UAW Local 2322 in a legally adversarial process when working on H-1B applications for UMass Amherst. (Tr. 66:3-5). The UAW Local 2322 collective-bargaining agreement with UMass Amherst contains specific immigration-related obligations that are performed by CBK employees. (ER Ex 6, UMass Amherst CBA, Article 8, “Work Authorization”). CBK has provided substantial evidence for the potential of disabling conflicts of interest. See *Bausch & Lomb*, 108 NLRB at 1559 (no evidence of specific abuse or bad-faith dealing necessary to determine existence of a disabling conflict of interest).

(c) The UAW Constitution Recognizes that the Conflict Is Not Speculative.

The UAW itself recognizes the inherent conflict of interest when one member is part of two different UAW bargaining units. The UAW Constitution, the supreme law of the union, prohibits a member from working in more than one workplace that is under the jurisdiction of the UAW. In the article on membership, the UAW Constitution states:

No member shall be allowed to hold membership in more than one (1) Local Union of the International Union at the same time, except by permission of the International Executive Board. *No member of the Union who is fully employed in one (1) workplace under the jurisdiction of the UAW shall accept work in any other workplace under the jurisdiction of the UAW.* Any member violating this Section may be subjected to charges of conduct unbecoming a union member.

(ER Ex 11-A, UAW Constitution, Article 6, Section 10) (Emphasis added.). The language of the Constitution is strict, recognizing the significant potential for conflicts. Unlike the restriction in the first sentence on holding membership in more than one Local, the restriction on working in more than one workplace does not appear to allow an exception with permission of the International Executive Board. The UAW Constitution recognizes the importance of avoiding conflicts by making it a mandatory, non-waivable restriction.

In this case, CBK learned at the hearing that one of its employees is already a member of UAW Local 2322. The Union did not provide any explanation as to how it would reconcile this employee's situation with the conflict of interest restriction in the UAW Constitution. While the employee testified that he did not feel his membership in UAW Local 2322 interfered with his work at CBK, his personal opinion appears to contradict the clear restriction in the UAW Constitution.²

UAW Local 2322 cannot effectively represent both the employees of a CBK client and the employees of CBK; therefore, the Regional Director's decision should be reversed and the petition should be dismissed.

B. CBK Paralegals Are Confidential Employees Because They Assist CBK Clients with Labor Relations Issues Directly Adverse to UAW Local 2322 – the Petitioner in this Case.

The Regional Director's decision erroneously concludes that paralegals should not be treated differently than law firm clerical employees, even though the paralegals are the eyes and ears of the firm and have consistent contact with clients about their labor relations with UAW Local 2322. The Regional Director's decision also fails to acknowledge the strong policy considerations and the unique privileged, confidential and fiduciary relationship between CBK paralegals and CBK clients that support application of the confidential employee exception in this unusual circumstance, even when the employee acts in a confidential capacity to a third-party.

² The Regional Director's decision states that this employee "also attested, without contradiction, that his union membership has not interfered with his work for CBK." DDE at 6. This comment completely ignores that on cross examination, the employee admitted that, unlike other CBK paralegals, he has never been in a position to have to discuss or email with the Union on work-related matters. (Tr. 111:21-24) The experience of this one paralegal does not necessarily apply to the other paralegals.

1. Both Labor-Nexus Standards for Determining Confidential Employee Status Support Excluding the CBK Paralegals.

CBK paralegals are confidential employees under both labor-nexus tests established by Board precedent. The first test is that confidential employees “assist and act in a confidential capacity to persons who formulate, determine, and effectuate management policies in the field of labor relations.” *Intermountain Rural Electric Assn.*, 277 NLRB 1, 3-4 (1985) (citations omitted); *NLRB v. Hendricks County Rural Electric Corp.*, 454 U.S. 170, 188-89 (1981). The CBK paralegals provide assistance to and act in a confidential, attorney-client capacity with numerous labor relations managers of CBK clients.

At UMass Amherst, the paralegals regularly communicate with managers in Human Resources, including Compensation Supervisor Peggy March, and the General Counsel’s Office. (Tr. 67:7-15). The subject of their communication is directly related to labor relations issues, like proper payment of wages and benefits. For example, CBK paralegals work with Compensation Supervisor March on determining the proper salary for H-1B professionals and then work together to provide the legally-required notice to the Union. (ER Ex 4, pages 8-9; Tr. 78:7-15). At other times, the paralegals, on behalf of UMass Amherst, will communicate directly with UAW Local 2322 about wages and benefits compliance. (Tr. 67:21-24; 88:17 – 89:1)

The work of the CBK paralegals is incorporated in the collective-bargaining agreement between UAW Local 2322 and the CBK client, which contains an entire article devoted to Work Authorization, specifically requiring that the processing of work authorization be done timely. (ER Ex 6, UMass Amherst CBA, Art. 8, Section 6). By performing this work on behalf of UMass Amherst, CBK paralegals are acting as confidential employees.

The CBK paralegals are also part of attorney-client communications to help clients formulate, determine, and effectuate the labor relations policy when they are dealing with the labor relations impact of employees who may have violated their immigration status or who want a different position. (Tr. 83:24 to 85:20). The complicated nature of immigration petitions and the critical importance of maintaining appropriate status require clients to stay in touch with CBK paralegals for “any change in terms and conditions of employment.” (Tr. 66:17 – 67:5). The nature of the paralegals’ work involves them in a confidential capacity to help the clients formulate, determine, and effectuate labor relations policies.

Under the second Board test, confidential employees “have ‘regular’ access to confidential information concerning anticipated changes which may result from collective-bargaining negotiations.” *Crest Mark Packing Co.*, 283 NLRB 999, 999 (1987); *Hendricks County Rural Electric Corp.*, 454 U.S. at 189. As shown above, CBK paralegals have regular access to the planning and consideration of employment options relating to bargaining unit employees represented by UAW Local 2322. Topics of consideration include advice on possible outcomes that may not comport with the collective-bargaining agreement. (Tr. 77:8-12). Specific topics include not being paid the appropriate wage, the impact of teaching at another location and taking an employee off payroll, moving a post-doctoral employee to another department, traveling abroad, and payment of the immigration processing fees. (Tr. 78:1-6; 83:21 – 85:20). Clients will seek advice from CBK before they talk with the union. (Tr. 77:16 – 78:6). So, CBK paralegals are aware of information before the union is aware of that information; and, that information will be used to formulate an appropriate communication with the union. This kind of participation in labor relations issues is exactly why the CBK paralegals should be excluded as confidential employees. *See Grocers Supply Co.*, 160, NLRB 485, 488-89

(1966) (employees who are present at confidential meetings to discuss grievances and union negotiations and who are responsible for preparing orders and documents in labor relations matters are excluded as confidential employees).

CBK paralegals have access to and participate in confidential communications that have a labor-nexus to CBK's clients' relationship with the same union that seeks to represent the paralegals; therefore, they should be excluded from the unit as confidential employees.

2. Because Paralegals Have Very Different Roles Than Clerical Employees and Union-Side Attorneys, CBK Paralegals Should Be Excluded As Confidential Employees.

The Board has never decided whether paralegals act as excluded confidential employees when they have access to and participate in confidential information that has a labor nexus to the relationship between management clients and the exact same union. In contrast, the Board has determined that clerical employees would not be considered confidential employees. See *Stroock & Stroock & Lavan*, 253 NLRB 447, 447 (1980) (clerical and support staff are not confidential employees); *Kleinberg, Kaplan, Wolff, Cohen & Burrows, P.C.*, 253 NLRB 450 (1981) (four executive secretaries, an administrative secretary, a receptionist, a file clerk, and a mail/xerox operator are not confidential employees).

The CBK paralegals have very different functions in the law firm than the clerical employees in *Stroock* and *Kleinberg* – they are the primary contact with the client, assisting and acting in a confidential capacity to the client's representative who formulates, determines and effectuates management policies in the field of labor relations. In *Stroock*, there is no indication that the clerical and support staff had any connection to the client. The law firm was just worried that the inclusion of its clerical and support staff “would inevitably lead to damaging leaks of client confidences.” *Stroock*, 240 NLRB at 447. In *Kleinberg*, there was also no evidence that the clerical employees had any contact with the clients. Instead, the law firm argued that the

confidential relationship was established between the clerical employee and the attorneys. The Board rejected that argument. *Kleinberg*, 240 NLRB at 457.

The relationship to confidential labor relations in this case is much more direct. CBK paralegals are the main contact *directly with management clients*, discussing labor relations issues that directly impact the bargaining relationship with the exact same union. This is precisely what the Board was worried about when it asserted jurisdiction over law firms. See *Foley, Hoag*, 229 NLRB at 458, FN12 (“[A]ttorneys – whether presenting management or labor – who participate in the formulation and effectuation of their clients’ labor relations policies perform the same function for their clients as would labor relations officials employed directly by clients. Therefore, when employees of attorneys assist in such matters, they – no less than aides of labor relations officials – are arguably ‘confidential employees’ within the meaning of Board precedent.”)

The situation in this case also sharply contrasts to the position of union-side labor lawyers. The Board has held that union-side labor lawyers are not confidential employees because “they may have access to confidential information relating to the labor relations of a third party who is not their employer.” *Kaplan, Sicking, Hessen, Etc.*, 250 NLRB at 486. The critical distinction is the noticeable lack of an adversarial relationship. The access to union-side confidential labor relations information does not give them access to confidential information of management. In contrast, when CBK paralegals gain access to the confidential labor relations information of CBK clients, they will have information that is directly adverse to UAW Local 2322 – the same union which seeks to represent them.

3. The Board's Rationale for Excluding Confidential Employees Supports Excluding the CBK Paralegals.

The Board has long recognized that employees who participate in labor relations issues should be excluded as confidential employees. This rule is generally applied when the employees act in a confidential capacity to their own employer. *See Dunn & Bradstreet, Inc.*, 240 NLRB 162, 163 (1979) (refusing to apply the exception to employees who have confidential labor information of a third party). But, the Board's rationale for the exclusion and the unique privileged, confidential, and fiduciary attorney-client relationship between the CBK paralegals and CBK clients warrants application of the doctrine in this case.

The Board's articulated rationale is that:

. . . in negotiating and in the settlement of grievances, the interests of a union and the management are ordinarily adverse. Consequently, we have adhered to the opinion that the management should not be required to handle labor relations matters through employees who are represented by the union with which the Company is required to deal and 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, or other labor relations matters.

Hoover Co., 55 NLRB 1321, 1323 (1944). In *Hoover*, the Board determined that the proposed unit was inappropriate because the employees:

. . . prepare reports dealing with confidential instructions regarding employees' overtime allowances, earning adjustments, rate change requests, etc. They also prepare and have access to correspondence between members of management and the supervisory groups herein, and confidential memoranda and reports arising from the investigation of grievances or pertaining to other labor relations matters.

Id. at 1322-23.

The United States Supreme Court agrees with the Board that the confidential employee exclusion should not be unlimited and requires a labor nexus. *Hendricks County Rural Electric*

Corp., 454 US at 189-90 (rejecting a challenge for a much broader definition of “confidential employee”). Application of the confidential employee exception in this case is consistent with that precedent.

Applying the Board’s rationale, CBK’s paralegals must be excluded. They have access to and participate in the formulation of confidential labor relations advice for CBK’s clients. Those clients rely on CBK’s paralegals to navigate their labor relations with UAW Local 2322, the Petitioner in this case. CBK’s clients should not have to bargain or settle grievances with a union that also represents CBK paralegals who in the normal performance of their duties obtained advance information of their positions.

The confidential nature of the work performed by CBK’s paralegals is similar to the work performed by the excluded *Hoover* employees. The confidential employees in *Hoover* prepared “reports dealing with confidential instructions regarding employees’ overtime allowance, earning adjustments, rate change requests, etc.” *Hoover*, 55 NLRB at 1322. Similarly, the CBK paralegals work on labor condition applications as part of the H-1B visa process, certifying wage rates and benefits. (ER Ex 4, pages 8-9; Tr. 61:3-12, 67:21-24, 78:7-15). At times, they may be involved in discussing the feasibility of alternatives to those wages rates and benefits. (*Id.*). The confidential employees in *Hoover* prepared and had “access to correspondence between members of management . . . and confidential memoranda and reports arising from the investigation of grievances or pertaining to other labor relations matter.” *Hoover*, 55 NLRB at 1323. Similarly, the CBK paralegals are the eyes and ears on the case, with primary responsibility for client communications regarding labor matters such as work authorization, proper compensation levels, impact of travel, impact of discipline, impact of layoffs and other

related items. (Tr. 54:14-15; 77:16 – 78:6; 78:1-6; 83:21 – 85:20). Just like the *Hoover* employees, CBK paralegals should be excluded from the unit as confidential employees.

The only difference is that CBK paralegals are not directly employed by the client. But, that distinction is irrelevant because the CBK paralegals are acting on behalf of CBK's clients, as fiduciaries and authorized representatives. See *Foley, Hoag*, 229 NLRB 56, 458 FN12 (1977) (“attorneys [and paralegals] – whether presenting management or labor – who participate in the formulation and effectuation of their clients’ labor relations policies perform the same function for their clients as would labor relations officials employed directly by clients.”). Most importantly, all of the same policy concerns justifying the confidential employee exemption still apply. In *Hoover*, the Board held the exemption was appropriate because the Hoover Co. cannot manage its relationship with the union if those employees are both in the same union and have access to labor relations information. Similarly, CBK's clients cannot effectively manage their relationship with the union if the CBK paralegals are both in the same union and have access to confidential labor relations information. Therefore, CBK paralegals should be excluded from the unit as confidential employees.

4. The Privileged, Confidential, and Fiduciary Relationship Between Paralegals and CBK Clients Supports Excluding the CBK Paralegals.

Ever since the Board asserted jurisdiction over law firms, it has known this precise issue would one day come up. The Board recognized that because of the special nature of the privileged and confidential relationship that exists between an attorney and their client, there may be “certain unusual situations [where] self-organization of a law firm’s staff employees may in some way conflict with that relationship.” *Foley, Hoag*, 229 NLRB at 458, n.12. Two of the Board’s members were more specific: “attorneys – whether presenting management or labor – who participate in the formulation and effectuation of their clients’ labor relations policies

perform the same function for their clients as would labor relations officials employed directly by clients. Therefore, when employees of attorneys assist in such matters, they – no less than aides of labor relations officials – are arguably ‘confidential employees’ within the meaning of Board precedent.” *Id.*

This case presents exactly that unusual situation where self-organization conflicts with the privileged and confidential relationship between CBK and its clients. CBK’s attorneys and their paralegals are subject to the Massachusetts Rules of Professional Conduct (“MRPC”). Attorneys are mandated by the MRPC “to ensure that the [paralegals’] conduct is compatible with the professional obligations of the lawyer[s].” MRPC 5.3(b).³ Paralegals employed by CBK “act for the lawyer in rendition of the lawyer’s professional services.” MRPC 5.3 cmt 2.

Unlike the credit reporters in *Dunn & Bradstreet*, who were not deemed confidential employees because of their access to confidential client information, the CBK paralegals have a fiduciary relationship with CBK clients. “The relationship between lawyer [and paralegal] and client is a fiduciary one in which the lawyer [and paralegal] occupies the highest position of trust and confidence.” MRPC 1.7 cmt 12. As a fiduciary, the CBK paralegal acts on behalf of the CBK client and must focus exclusively on the best interests of the CBK client. They cannot comply with their ethical obligations to CBK clients and also participate in Local 2322’s Joint Council, which decides actions, including the decision to proceed with arbitration, adverse to CBK’s clients. (ER Ex. 6, Section 6.7; ER Ex. 9). The special nature of this relationship warrants exclusion as a confidential employee for a different employer – one to which the employee has a fiduciary duty.

³ See *Neighborhood Legal Services, Inc.*, 236 NLRB 1269, 1272 (1978) (“All bar-admitted attorneys are, in addition, ultimately responsible for the work of non-admitted legal assistants and paralegals These bar admitted attorneys are, of course, ethically required to assume professional responsibility for work products and work performed by the nonattorneys.”)

Unlike the credit reporters in *Dunn & Bradstreet*, CBK paralegals have a legal duty to provide “zealous” representation:

[The] lawyer [and, by extension, paralegal,] should pursue a matter on behalf of a client despite opposition, obstruction or personal inconvenience to the lawyer [or paralegal], and take whatever lawful and ethical measures are required to vindicate a client’s cause or endeavor. A lawyer [or paralegal] must also act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client’s behalf.

MRPC 1.3 cmt 1. Through zealous representation, CBK paralegals have access to and participate in confidential labor relations decisions. In this role, they are directly adverse to Local 2322 and should appropriately be excluded as confidential employees.

Unlike the credit reporters in *Dunn & Bradstreet*, CBK paralegals have a legal duty “not to reveal confidential information relating to the representation of a client.” MRPC 1.6(a). This case is not about business confidences. It is about a legal obligation to maintain attorney-client confidences. Because the confidential information has a strong labor nexus, the CBK employees should be excluded from the unit.

Unlike the credit reporters in *Dunn & Bradstreet*, CBK paralegals also have a legal duty to avoid conflicts of interest. A conflict of interest exists if “there is a significant risk that the representation of one of more clients will be materially limited by . . . a personal interest of the [paralegal].” MRPC 1.7(a)(2). Here, the conflict is between the obligations in the MRPC and the obligations in the UAW Constitution and UAW Local 2322 Bylaws. Where the MRPC demands that the paralegal “act with commitment and dedication to the interests of the [employer] client,” rule 1.3 cmt 1, the UAW Local 2322 bylaws require that “the membership shall . . . do all in its power to strengthen and promote the labor movement,” (ER Ex 10, UAW Local 2322 Bylaws, Article 4.4).

CBK paralegals should be excluded as confidential employees. In this case, access to confidential labor relations information of a CBK client has the same impact as a position that has access to confidential labor relations information for the same employer because the CBK paralegal is in a confidential, privileged and fiduciary relationship with the client and is subject to legally-mandated ethical obligations.

5. The Regional Director's Decision Improperly Focuses Only on the Likelihood of Divulging Client Confidences.

The Regional Director's decision focuses exclusively on the risk of an employee with access to confidential information disclosing that information improperly to the union. DDE at 13-14. The rationale for the confidential employee exception, however, is broader than just the fear of improper disclosure. Even if confidences are preserved, the individual will have knowledge of this confidential information. Such knowledge impacts the employee's judgment and their ability to make decisions. That is precisely why the Board, in *Hoover*, clarified that it would not be appropriate for an employer to have to negotiate with a person who, in the regular performance of their duties, has access to such knowledge. 55 NLRB at 1323. The Board said nothing about improper disclosure. While improper disclosure is certainly one factor, it should not be determinative. Even if there is no disclosure, it would still be inappropriate to ask an employer to negotiate with someone who had access to insider information.

In this case, CBK paralegals have detailed knowledge of labor relations considerations directly impacting employees represented by UAW Local 2322. These same CBK paralegals could participate in the UAW Local 2322 Joint Council and participate in decisions impacting the negotiations strategy of the Union with the CBK client. CBK clients should not have to sit across the table from UAW Local 2322 if their decisions have been influenced by people who, as

part of their regular duties, participate in and have access to confidential labor relations information.

VI. Conclusion

For the reasons set forth above, CBK requests review of the Regional Director's decision. The decision should be reversed. The Petitioner is not a proper bargaining representative of the employees at CBK, and the Petition should be dismissed. If the Petitioner is deemed appropriate, the Team Leader / Senior Paralegal, the Senior Paralegal, and the Paralegals should be excluded from the proposed unit as confidential employees.

Dated at Burlington, Vermont
February 1, 2021

Respectfully submitted,
DOWNS RACHLIN MARTIN PLLC

By: 

Johan W.E. Maitland

CERTIFICATE OF SERVICE

I certify that the foregoing *Employer's Request for Review of the Regional Director's Decision and Direction of Election* was electronically filed with the Board through the Board's website and was served electronically, on:

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This the 1st day of February, 2021.



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