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THE RIGHTS AND PROTECTIONS OF CONFIDENTIAL EMPLOYEES

E. J. Holland, Jr.* and Georgann H. Eglinski**

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I. INTRODUCTION

Since 1935, with the passage of the Wagner Act,1 most private sector employees have enjoyed the right to engage in collective bargaining and other concerted activities under the protection of federal law. Since 1965, with the passage of the Missouri Public Sector Labor Law,2 certain public employees in the state have enjoyed similar, but not identical, rights and protections. In both systems, issues have arisen as to the status of "confidential employees."3

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3. The definitions of "confidential employee" and the implications of such definitions are the focus of this article. In general, the concern is with the employees who have a confidential relationship with management employees or access to information regarded by the employer as confidential.
Two recent cases, one decided by the United States Supreme Court and one decided by the Missouri Supreme Court, have resolved some of these issues. In National Labor Relations Board v. Hendricks County Rural Electric Membership Corp., the United States Supreme Court approved the labor-nexus test for confidential employees. The Court included a number of arguably confidential but not "labor-nexus" employees in a bargaining unit and determined that the personal secretary to the chief executive officer of an employer was not a confidential employee and was entitled to protection against discharge for engaging in concerted activity. In Missouri National Education Association v. State Board of Mediation, the Missouri Supreme Court approved the State Board of Mediation's broader test for confidential employees. The state court excluded twelve secretaries in the Belton Missouri School District from a bargaining unit of support staff employees.

At first glance it would appear that the two courts have put to rest the interpretation and application of confidential status. However, both courts will face a number of issues in future cases. For example, neither court has resolved the question of whether "confidential employees," although excluded from a bargaining unit of other employees, are entitled to other protections of the law when they engage in some concerted activities.

This article examines the Belton decision and Hendricks, the treatment of confidential employees under both schemes in the context of bargaining unit determinations, and the protection of employee concerted activity under both systems, and considers the appropriateness of a dual system whereby confidential employees will be excluded from bargaining units but enjoy other protections of federal or state law.

II. STATUTORY BACKGROUND

The National Labor Relations Act, the Missouri Constitution, and the Missouri Revised Statutes all guarantee certain employees the right to form and join labor organizations and protect those employees against discrimi-

5. The labor-nexus test to determine whether an employee is confidential and its formulations over the years are discussed in detail below. In general, the test involves consideration of an employee's confidential activities or access to confidential information by virtue of a confidential relationship with a manager or supervisor who has a special role in the employer's labor relations. Under this test an employee who has a confidential relationship with a manager or supervisor not involved in labor relations will not be a "confidential employee."
6. 695 S.W.2d 894 (Mo. 1985) (en banc).
nation as a result of having exercised those rights. Alone among those enactments, the National Labor Relations Act contains a definition of "employee" and it defines the term primarily in terms of exclusions from the category.10

The National Labor Relations Act provides a detailed procedure and mechanism whereby employees may establish labor organizations and bargain through them.11 The Missouri Revised Statutes, though less precise, contain a parallel procedure whereby public employees may establish organizations for purposes of presenting proposals to their public employers.12 The federal law establishes a separate procedure whereby employees may seek protection from retaliation for their concerted activities.13 Although Missouri has no similar administrative procedure, protection is provided by statute14 and, absent an administrative scheme, the courts are empowered to enforce that protection.15

Nowhere in these statutory or administrative schemes is there a mention of "managerial" or "confidential" employees. Nevertheless, from its earliest days, the National Labor Relations Board, charged by statute with administration of the National Labor Relations Act,16 recognized that certain employees were so closely aligned with the employer that they should be considered, in some ways, more in the nature of "supervisors" who are defined specifically in the Act.17 Generally speaking, the theory is that labor relations practice in this country is adversarial in nature and that the employer, generally a corporate creature, acts not only through supervisors but also through some other categories of employees and has a right to expect their undivided loyalty.

Drawing upon jurisprudence developed under the National Labor Relations Act, the Missouri State Board of Mediation and the Missouri courts have adopted a similar analysis and have excluded managerial and confidential employees from the operation of the Missouri Public Sector Labor Law.18

Except to mention its parallel existence, we do not, in this article, intend to deal with or analyze the concept of a managerial employee. Rather, our

11. Id. § 159.
12. Mo. REV. STAT. § 105.525.
15. See State ex rel. Missey v. City of Cabool, 441 S.W.2d 35 (Mo. 1969).
17. Id. § 152(11).
attention will be devoted to confidential employees and their status under the current case law.

The Missouri Supreme Court approval of a definition for "confidential" employees different from that previously adopted by the United States Supreme Court raises the question of what other directions this analysis might take. In order to understand the different approach of the Missouri Supreme Court, we first must examine the history of the analysis of confidential employees under the federal law. While the leading case in the area, and the one which must be juxtaposed with the Belton decision, is Hendricks, the cases decided prior to Hendricks also are instructive.

III. History of the Hendricks Test

Section 2(3) of the National Labor Relations Act (the "Act") was part of the Wagner Act passed in 1935. Employees covered by the Act were defined broadly in Section 2(3): "the term 'employee' shall include any employee . . . but shall not include any individual employed in agricultural labor, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse." 20

The National Labor Relations Board ("NLRB" or the "Board"), charged with determining appropriate bargaining units under Section 9 of the Act, soon was faced with arguments that employees who had access to confidential information of their employer should be excluded, as a matter of policy, from the definition of "employee" and thus from bargaining units of other employees. Although unwilling to adopt such a broad exclusion, 21 the NLRB adopted a special rule excluding certain employees who had access to confidential labor relations information from bargaining units composed of rank and file workers. The Board perhaps best expressed the rationale for this conclusion in Hoover Company: 22

[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 and other labor relations matters. 23

In the early 1940's, the Board applied the test of access to confidential labor relations information in numerous unit determination cases. 24

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22. 55 N.L.R.B. 1321 (1944).
23. Id. at 1323.
24. Citations to fifty of these cases decided in the 1941-45 period are collected in Hendricks, 454 U.S. at 179 n.11.
In 1946, the Board in *Ford Motor Company*,\(^25\) refined its definition of confidential employee, articulating a concern that its prior definition was too broad and prevented too many employees from bargaining collectively with other workers with whom they shared a common interest. Employees would be excluded as "confidential" only if they acted "in a confidential capacity to persons who exercise 'managerial' functions in the field of labor relations."\(^26\)

The 1947 Taft-Hartley Act, amending the National Labor Relations Act, changed the definition of employee in Section 2(3) explicitly to exclude supervisors but made no mention of confidential employees.\(^27\)

After the passage of Taft-Hartley, the Board routinely continued to employ the labor-nexus test in determining whether individuals were to be excluded from bargaining units. In *B.F. Goodrich*,\(^28\) decided in 1956, the Board reaffirmed its *Ford Motor Company* ruling and refined the labor-nexus test indicating its intention "[i]n future cases . . . to limit the term 'confidential' so as to embrace only those employees who assist and act in a confidential capacity to persons who formulate, determine, and effectuate management policies in the field of labor relations."\(^29\) The Board has continued to apply the *B.F. Goodrich* version of the labor-nexus test consistently to the present.\(^30\)

Nevertheless, the full meaning of the Taft-Hartley legislation still is subject to debate. In *Hendricks*, the Supreme Court majority saw nothing in the legislative history of Taft-Hartley to suggest that Congress disapproved the Board's labor-nexus test as articulated in *Ford Motor Company* and other cases.\(^31\) In contrast, the dissenters saw Taft-Hartley as expressing the "clear intent of Congress to exclude from the coverage of the Act *all individuals allied with management*."\(^32\) They viewed the amending act as an effort to sharpen the dividing line between labor and management. They expressed


\(^{26}\) *Id.* at 1322.

\(^{27}\) See the extensive discussion of the legislative wranglings relating to change in the definitions section of the Act in *Hendricks*, 454 U.S. at 181-87. One draft included a definition of confidential employees. *Id.* at 181.

\(^{28}\) 115 N.L.R.B. 722 (1956).

\(^{29}\) *Id.* at 724 (footnote omitted and emphasis deleted).

\(^{30}\) On occasion, the Board has excluded employees who did not assist persons "who formulate, determine and effectuate management policies" in labor relations, but who "regularly [had] access to confidential information concerning anticipated changes which may result from collective-bargaining negotiations." *Pullman Standard Div. of Pullman, Inc.*, 214 N.L.R.B. 762, 762-63 (1974). This deviation was noted by the majority in *Hendricks* as consistent with the *purpose* of the test. 454 U.S. at 189.

\(^{31}\) 454 U.S. at 185.

\(^{32}\) *Id.* at 193 (emphasis in original) (citing *Swift & Co.*, 115 N.L.R.B. 752, 753-54 (1956)).
their approval of what they regarded as early recognition by the Board that employees "who by their duties, knowledge, or sympathy were aligned with management policies in the field of labor relations" were "confidential em-
"[i]n the adversary system which our labor laws envision, neither manage-
ment nor labor should be forced to accept a potential fifth column into its ranks."33

IV. THE HENDRICKS CASE

In Hendricks, the Supreme Court reviewed two cases arising in the Sev-
enth Circuit, both concerning the question of "confidential" employees and
their status under the National Labor Relations Act. Although both cases
required decisions by the NLRB and the Court of Appeals as to whether
employees were confidential, they arose from very different circumstances.

In the Hendricks case itself, the personal secretary to the General Man-
ger and Chief Executive Officer of Hendricks County Rural Electric Mem-
bership Corporation was terminated after she signed a petition seeking
reinstatement of a friend who had been dismissed. The secretary filed a charge
with the NLRB alleging that her discharge violated Section 8(a)(1) of the
Act,34 because she was, with her petition, engaging in protected concerted
activity. The employer defended by claiming that the secretary was not an
"employee" within the Act's definition in Section 2(3)35 because she was a
"confidential" secretary and such employees long had been impliedly ex-
cluded from the protections of the Act.36

The second case grew out of a petition filed by the Office and Profes-
sional Employees International Union seeking to represent employees of the
Malleable Iron Range Company. Malleable objected to the inclusion of eight-
een employees in the unit sought by the Union on the ground that these
employees had access to confidential business information and, therefore,
were "confidential" employees, impliedly excluded from the Act.37

In both cases, the National Labor Relations Board applied the labor-
nexus test and held that the employees were not "confidential."38 Under the
then current version of that test only employees who "assist and act in a
confidential capacity to persons who formulate, determine and effectuate
management policies in the field of labor relations" were "confidential em-

33. 454 U.S. at 193.
34. 29 U.S.C. § 158(a)(1).
35. Id. § 152(3).
36. 454 U.S. at 173.
37. Id. at 175.
39. 115 N.L.R.B. at 724.
Both cases made their way to the Court of Appeals for the Seventh Circuit, the Hendricks case arriving first. That court held that a broader definition of confidential employees was necessary and remanded the case to the Board for a determination of whether the secretary was "by the nature of [her] duties... given by the employer information that is of a confidential nature, and that is not available to the public, to competitors, or to employees generally, for use in the interest of the employer." 40

On remand the Board reaffirmed its conclusion that the secretary was an employee under the Act. 41 The case was appealed again to the Seventh Circuit, which in turn reaffirmed its position and denied enforcement. 42 Meanwhile, the Malleable case was appealed to the Seventh Circuit and remanded to the Board for reconsideration consistent with the court's decision in Hendricks. 43

The NLRB petitioned for certiorari in both cases and the Supreme Court accepted them "to resolve the conflict among the Courts of Appeals respecting the propriety of the Board's practice of excluding from collective bargaining units only those confidential employees with 'labor nexus,' while rejecting any claim that all employees with access to confidential information are beyond the reach of [The National Labor Relations Act] § 2(3)'s definition of 'employee.'" 44 The Court held that "there is a reasonable basis in law for the Board's use of the 'labor nexus' test," 45 reversing the court of appeals both in Hendricks and in Malleable.

The majority opinion of the Court is technical in tone, relying on a careful reading of the legislative history of the Act and demonstrating the Court's usual deference 46 to the expertise of the Board. In contrast, Justice Powell's opinion, concurring in part and dissenting in part, 47 focused on the "basic philosophy of the labor relations laws" 48 and the "larger effort to keep the line between management and labor distinct." 49 The dissenters argued that the confidential secretary in the Hendricks case, because of the broad policy considerations at stake, should have been deemed a "confidential employee" and thus outside the protection of the Act. Apparently, there was no disagreement as to the inclusion of the eighteen Malleable employees

40. Hendricks County Rural Elec. Membership Corp. v. NLRB, 603 F.2d 25, 30 (7th Cir. 1979) (citing H.R. 3020 § 2(12)(C), 80th Cong., 1st Sess. (1947)).
42. 627 F.2d 766 (1980).
43. The court of appeals decision was not reported. See 454 U.S. at 176.
44. Id.
45. Id.
46. Id. at 177.
47. Chief Justice Burger, Justice Rehnquist, and Justice O'Connor joined Justice Powell. Id. at 192.
48. Id. at 200.
49. Id. at 194.
in the unit of office, clerical, technical, and professional personnel from which the employer argued they should have been excluded as confidential employees.

V. THE BELTON CASE

Even as Hendricks was pending, the Missouri National Education Association filed a petition seeking to represent certain administrative and support personnel of the Belton, Missouri School District, whose teachers it already represented.50

In the Belton case, Missouri National Education Association v. Missouri State Board of Mediation, the Supreme Court of Missouri reviewed a decision of the Missouri State Board of Mediation excluding twelve secretaries assigned to principals, assistant principals, and central office administrators from a bargaining unit of Belton, Missouri school district support staff employees. The Board of Mediation determined that the secretaries were "confidential employees" and impliedly excluded from the coverage of the Missouri Public Sector Labor Law. The Board of Mediation took the position that "an employee must be considered confidential, and, thus, not an 'employee' under section 105.510 if there exists a confidential relationship between the employee and managerial or supervisory employees."51

The union urged inclusion of the secretaries in the unit. Inclusion was opposed by the school district. The Union appealed the Board of Mediation's decision first to the circuit court and then to the court of appeals. Both courts deferred to the Board of Mediation and upheld its decision. The Missouri Supreme Court ordered transfer of the case to review the Board's decision.52

In its decision, the Board of Mediation had specifically rejected the labor-nexus test for confidential employees, recently approved by the United States Supreme Court in Hendricks, and said it was "too narrow to provide a workable basis by which the Board can identify those employees whose interests are more closely allied to the public employer than to the rank and file employees."53 The Board held that a public employee in Missouri ought

50. Although teachers technically are not covered under Mo. Rev. Stat. § 105.510, they have, as a practical matter, formed bargaining units in many Missouri school districts to deal with their school boards. Although many school boards refuse to call these dealings negotiations, the differences between "negotiations," "meeting and conferring," and "professional discussions" that the districts frequently have with their teachers, are primarily semantical.

51. 695 S.W.2d at 898.

52. Id. at 896. Under City of Cabool v. Missouri State Bd. of Mediation, 689 S.W.2d 51, 53 (Mo. 1985) (en banc), the supreme court did not review the decision of the circuit court but rather the decision of the Board of Mediation itself.

to be considered confidential if there exists a confidential relationship between the employee and a managerial or supervisory employee.

The Missouri Supreme Court first considered the appropriateness of the exclusion in general. The court long had held that, although the Missouri statute uses the word "employees" in describing the composition of a bargaining unit, "the legislature did not intend for all persons on the public payroll to be considered employees for bargaining purposes."54 The court recognized that, in the area of labor relations, "someone must act on behalf of the public employer and it is the responsibility of the Board to exclude from an otherwise appropriate bargaining unit 'those employees, if any, whose duties involved acting directly or indirectly in the interest of the employer in relation to other employees.'"55 The court was satisfied that confidential employees, as defined by the Board of Mediation, acted in the interest of the public employer.

The court viewed the work of limiting the definition of "employees" (which it had previously identified as the responsibility of the Board of Mediation) as a matter of "administrative policy" and not a matter to be resolved by "court-declared law."56 The Board of Mediation was free to exclude confidential employees from the definition and free to develop its own standards for determining which would be deemed confidential.

In deciding to defer to the agency's expertise, the court quoted at length a decision of the United States Supreme Court in which the rationale for such deference was expressed:

It is not necessary in this case to make a completely definitive limitation around the term 'employee.' That task has been assigned primarily to the agency created . . . to administer the Act. . . . Everyday experience in the administration of the statute gives it familiarity with the circumstances and backgrounds of employment relationships in various industries, with the abilities and needs of the workers for self-organization and collective action, and with the adaptability of collective bargaining for the peaceful settlement of their disputes with their employers. The experience thus acquired must be brought frequently to bear on the question of who is an employee under the Act. Resolving that question, like determining whether unfair labor practices have been committed, 'belongs to the usual administrative routine' of the Board.57

The Missouri court's deference to the state administrative agency charged with determining appropriate bargaining units extended to recognition that,

54. 695 S.W.2d at 897 (citing City of Columbia v. Missouri State Bd. of Mediation, 605 S.W.2d 192, 194 (Mo. Ct. App. 1980)); Golden Valley Memorial Hosp. Dist. v. Missouri State Bd. of Mediation, 559 S.W.2d 581, 583. 55. 695 S.W.2d at 897 (citing Golden Valley, 559 S.W.2d 581). 56. Id. at 899. 57. NLRB v. Hearst Publications, Inc., 322 U.S. 111, 130, (1944) (quoted at 695 S.W.2d at 899).
if the standards employed by the Board of Mediation in this case should prove to be unworkable, the Board would be free to "modify or discard them."\textsuperscript{58}

Having approved the Board of Mediation's approach, the court then examined the question of whether there was factual support for finding the secretaries confidential employees under the test and concluded that there was.\textsuperscript{59}

The decision of the Missouri Supreme Court was not without dissent. Judge Blackmar, with whom Judge Rendlen agreed, was unwilling to accord the Board of Mediation policy-making authority.\textsuperscript{60} Although expressing a willingness to defer to the Board of Mediation's expertise on "the numerous judgment calls which must be made in determining the appropriateness of a bargaining unit and on the propriety of including particular employees," Judge Blackmar viewed the Board as limited to effectuating policies recognized by the legislature and saw the Board's decision in this case as "[flying] in the face of the policies of the statute."\textsuperscript{61} Furthermore, Judge Blackmar saw the denial of inclusion of the secretaries as contrary to the policy of the Missouri Constitution which provides that employees have the right to organize and bargain collectively through representatives of their own choosing. Because the collective bargaining rights afforded by Missouri's public sector law are "very limited" and "the bargaining agent has no real clout," Judge Blackmar could perceive no harm to the school district had the secretaries been allowed to join a bargaining unit with other support staff employees.\textsuperscript{62}

Thus, there is a conflict between the National Labor Relations Board's labor-nexus test and the State Board of Mediation's somewhat broader test. The inquiry as to where the law proceeds from these two cases arises from an analysis of their origins. The \textit{Belton} case arose in the context of organizing activity or, put more technically, in the context of definition of an appropriate bargaining unit, and the \textit{Hendricks} case arose in the context of protection of an employee's right to engage in concerted activity. In order to understand the alternatives remaining before the courts it is instructive to examine these origins.

\textbf{VI. Appropriate Bargaining Units}

First let us examine the process of determining appropriate bargaining units under the National Labor Relations Act. The 1935 Wagner Act provided

\begin{itemize}
  \item \textsuperscript{58} 695 S.W.2d at 899.
  \item \textsuperscript{59} \textit{Id.} at 899-900. The court also considered the question of whether the presence of a union employee as an election observer tainted the process, making certification of the election unlawful. Because that issue is completely separate from the issue of confidential employees, the court's holding will not be discussed here.
  \item \textsuperscript{60} \textit{Id.} at 902.
  \item \textsuperscript{61} \textit{Id.}
  \item \textsuperscript{62} \textit{Id.}
\end{itemize}
that "[r]epresentatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit . . . ." 63

The Act vested discretion to determine "appropriateness" in the Board, and the Supreme Court recognized the Board's latitude in *NLRB v. Hearst Publications, Inc.*: 64

Wide variations in the forms of employee self-organization and the complexities of modern industrial organization make difficult the use of inflexible rules as the test of an appropriate unit. Congress was informed of the need for flexibility in shaping the unit to the particular case and accordingly gave the Board wide discretion in the matter. 65

When the National Labor Relations Act was amended in 1947, the same basic language for unit determination was included, but some specific limi-

63. Ch. 372 § 9, 49 Stat. 453. Section 9 provided in full:
(a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: *Provided*, that any individual employee or a group of employees shall have the right at any time to present grievances to their employer. (b) The Board shall decide in each case whether, in order to insure to employees the full benefit of their right to self-organization and to collective bargaining, and otherwise to effectuate the policies of this Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof. (c) Whenever a question affecting commerce arises concerning the representation of employees, the Board may investigate such controversy and certify to the parties, in writing, the name or names of the representatives that have been designated or selected. In any such investigation, the Board shall provide for an appropriate hearing upon due notice, either in conjunction with a proceeding under section 10 or otherwise, and may take a secret ballot of employees, or utilize any other suitable method to ascertain such representatives. (d) Whenever an order of the Board made pursuant to section 10(c) is based in whole or in part upon facts certified following an investigation pursuant to subsection (c) of this section, and there is a petition for the enforcement or review of such order, such certification and the record of such investigation shall be included in the transcript of the entire record required to be filed under subsections 10(e) or 10(f), and thereupon the decree of the court enforcing, modifying, or setting aside in whole or in part the order of the Board shall be made and entered upon the pleadings, testimony, and proceedings set forth in such transcript. In the absence of an agreement as to the appropriate unit between the parties, the National Labor Relations Board determined whether a petition for unit employees was an "appropriate union" for collective bargaining.

*Id.*

64. 322 U.S. 111 (1944). This case was quoted extensively by the Missouri Supreme Court in the *Belton* case. See text accompanying *supra* note 57.

65. *Id.* at 134 (footnote omitted).
tations were added. The Board was to decide the appropriate unit for purposes of collective bargaining

provided, That the Board shall not (1) decide that any unit is appropriate for such purposes if such unit includes both professional employees and employees who are not professional employees unless a majority of such professional employees vote for inclusion in such unit; or (2) decide that any craft unit is inappropriate for such purposes on the ground that a different unit has been established by prior Board determination, unless a majority of the employees in the proposed craft unit vote against separate representation or (3) decide that any unit is appropriate for such purposes if it includes, together with other employees, any individual employed as a guard to enforce against employees and other persons rules to protect property of the employer or to protect the safety of persons on the employer's premises; but no labor organization shall be certified as the representative of employees in a bargaining unit of guards if such organization admits to membership, or is affiliated directly or indirectly with an organization which admits to membership, employees other than guards.66

Questions of which employees should be included in a bargaining unit most commonly arise when a union files a representation petition with the National Labor Relations Board alleging that a substantial number of employees wish to be represented for purposes of collective bargaining by the union and that the union desires to be certified as representative of the employees. The union defines the unit as including certain employees and excluding others. Prior to filing the petition, the union will have secured, from as many employees as possible, authorization cards on which employees indicate a desire to be represented by the union. The employer is notified of the petition and the Board begins its investigation process.

When faced with a representation petition, an employer generally begins by trying to determine which employees would fall within the proposed unit definition. Because a union may not be familiar with the employer's job titles and organization, that may not be an easy task. An employer which does not look favorably on having its employees represented by the union, once it has determined parameters of the unit sought, will begin exploring the possibilities of winning the election in the unit sought or enlarging or paring down the unit based on projections of how employees are likely to vote. The process is commonly long on pragmatism and short on the kind of principled reasoning upon which courts rely. For example, an employer may believe that its personnel assistants will vote against the union and may wish to include them even though a good argument could be made that they "assist and act in a confidential capacity to persons who formulate, determine and effectuate management policies in the field of labor relations" and, as such, are "confidential employees." As the union counts its cards, the em-

employer juggles job classifications and projected votes and the union and employer negotiate.

If the parties can come to an agreement acceptable to the Board as to the job classifications to be included in the unit, there may be no need for the Board to make any determination of the appropriateness of the unit.

In the absence of agreement between the parties, a hearing will be conducted and evidence will be taken as to the propriety of including or excluding individual job classifications or groups of employees from voting. In any case, either the union or the employer may be arguing for inclusion or exclusion of "confidential employees." Upon the record made at the hearing, the Regional Director issues a Decision and Direction of Election setting out, normally by job classification, the employees to be included in and excluded from the unit. The standards employed by the Regional Director are discussed below.

Either party, at the time of the issuance of the order, may file a request for review by the NLRB of the unit determination or, at the time of election, may challenge the ballots of employees in classifications at issue. After the election, the party losing may file objections with the Board arguing that the Regional Director's unit determination was not proper. If, after any of these procedures, the Board agrees with the Regional Director as to the composition of the unit, the unit is certified and there is, at that time, no recourse to the courts.

If a unit is certified over the objections of an employer, the employer may refuse to bargain with the union, which will then file an unfair labor practice charge under Section 8(a)(5) of the Act. That charge may work its way through the Board to a court of appeals which then may examine the question of whether the unit certified by the Board was appropriate under the Act.

In resolving unit issues, "[t]he Board's primary concern is to group together only employees who have substantial mutual interest in wages, hours, and other conditions of employment." In Kalamazoo Paper Box Corp., the Board enumerated the factors to be considered in determining community of interest apart from other employees:

[A] difference in method of wages or compensation; different hours of work; different employment benefits; separate supervision; the degree of dissimilar qualifications, training and skills; differences in job functions and amount of working time spent away from the employment or plant situs . . . ; the infrequency or lack of contact with other employees; lack of integration

67. "It shall be an unfair labor practice for an employer . . . to refuse to bargain collectively with the representatives of his employees . . . ." Id. § 158(a)(5).
with the work functions of other employees or interchange with them; and
the history of bargaining.\textsuperscript{70}

Assuming that a job classification does not call into play one of the provisions of Section 9(b) of the Act, the Board will analyze the case in terms of these factors. A job classification allegedly inappropriate for a unit because of its "confidential" nature might be excluded because of "differences in job functions," "the infrequency or lack of contact with other employees," or "lack of integration with the work functions of other employees or interchange with them" without the need for any recourse to other doctrines of exclusion outside the statute. On the other hand, when wages, hours of work, and benefits all are similar, the party urging exclusion normally will turn to one of the doctrines developed in the case law. Depending upon the practicalities (where the votes are), either the union or the employer may argue vigorously that, for example, personnel assistants or the executive secretary to the president are confidential employees.

VII. APPROPRIATE BARGAINING UNITS—MISSOURI

A similar history has occurred and a similar analysis has been applied in the State of Missouri, although the statutory framework for determining the appropriate bargaining unit differs somewhat from the federal scheme. "Appropriate unit" is defined as "a unit of employees at any plant or installation or in a craft or in a function of a public body which establishes a clear and identifiable community of interest among the employees concerned."\textsuperscript{71} There are some specific statutory exclusions: "police, deputy sheriffs, Missouri state highway patrolmen, Missouri national guard, [and] all teachers of all Missouri schools, colleges, and universities . . . ."\textsuperscript{72} The State Board of Mediation is charged with resolving issues with respect to the appropriateness of bargaining units and majority representative status.\textsuperscript{73} Unlike the federal scheme, however, a Missouri party aggrieved by a unit determination may appeal to the circuit court immediately after an election.\textsuperscript{74}

As in the federal scheme, a petition for certification may be filed with the State Board. A hearing will be held, "[i]f, after the filing of a valid petition, the petitioner, the public employer and all intervenors are unable to resolve the matter through an agreed-upon method of adjustment approved by the chairman."\textsuperscript{75} Thus, the secretaries excluded after a hearing by the State Board in the Belton case would have been included in the bargaining unit had the school district not objected.

\textsuperscript{70} id. at 137.
\textsuperscript{71} Mo. Rev. Stat. § 105.500(1).
\textsuperscript{72} id. § 105.510.
\textsuperscript{73} id. § 105.525.
\textsuperscript{74} id.
VIII. PROTECTION VS. BARGAINING UNIT

Running parallel to the National Labor Relations Board’s charge to certify appropriate bargaining units, is its charge to protect the rights of employees to engage in concerted activity. Since the statute protects “employees,” the Board has been faced with the task in this second context of defining “employees.”

Although the Board has excluded labor-nexus confidential employees from bargaining units, it has not defined them out of a classification as employees and it has not denied them protection of the Act other than in the bargaining unit context. Unlike supervisors, who are excluded specifically from the definition of “employee,”76 the Board long has held that labor-nexus confidential employees have the right to engage in concerted activity.77

The result in Wheeling Electric Co.78 illustrates this process. There the employer discharged its operations manager’s personal secretary because she refused to cross a picket line. The union contract, the expiration of which preceded the strike, excluded confidential employees from its coverage and the secretary’s position was regarded by the employer as confidential. The employer argued that the Taft-Hartley Act withdrew from confidential employees the Act’s protection of their rights to engage in concerted activities. The Board rejected that argument and found that the employer, in discharging the secretary, had engaged in an unfair labor practice. Similarly, in Southern Greyhound Lines,79 the employer’s discharge of the confidential secretary to the employer’s terminal manager was held unlawful.

The courts of appeals, however, have not always been willing to defer to the Board in this area. In the Wheeling Electric Co. case, the Fourth Circuit denied enforcement of the Board’s order. The court read the legislative history of the Taft-Hartley Act to include confidential employees in the definition of “supervisor.”80 Thus, the concerted activity, for the benefit of rank-and-file employees, engaged in by the confidential secretary, was held “unprotected by the Act.”81 On the other hand, in National Labor Relations Board v. Southern Greyhound Lines,82 the Fifth Circuit enforced the Board’s order without any discussion of the secretary’s confidential status.

76. 29 U.S.C. § 152(3).
77. See, e.g., Southern Colorado Power Co., 13 N.L.R.B. 699 (1939) wherein the Board found that the employer violated Section 8(a)(3) of the Act by coercing and discriminatorily discharging certain employees alleged to be confidential. See also the decision of the Hendricks case in the text at infra notes 84-85.
81. Id. at 786.
82. 426 F.2d 1299 (5th Cir. 1970).
The administrative law judge in the *Hendricks* case had held that, although the Board excluded labor-nexus confidential employees from bargaining units, it afforded them the other protections of the Act and that, even if the secretary were excludable from a bargaining unit, the employer still was barred from discharging her for engaging in protected concerted activity.83 Because the Supreme Court held that the Board had properly determined that the secretary was not a labor-nexus employee, the Court was not presented with the question of the propriety of the Board’s practice of excluding confidential, labor-nexus employees from bargaining units while affording them the other protections of the Act.84

Other classifications of employees excluded from bargaining units still may enjoy protection from interference with or discrimination because of concerted activity. Under the federal statute itself, guards, who must be excluded from units including non-guard employees, may be organized into a separate unit and clearly are employees entitled to Section 7 protection.85

Supervisors who will be excluded from bargaining units certified by the Board and who are excluded from the definition of “employee,”86 nevertheless have been accorded in some circumstances protection from discharge or other discipline for engaging in union or concerted activity. The Board has held that an employer may violate Section 8(a)(1) of the Act87 by disciplining a supervisor for refusing to commit unfair labor practices88 or for having given testimony adverse to the employer’s interest.89

The Board has recognized that discipline or discharge of a supervisor may be appropriate because of an employer’s need to assure the loyalty of its management personnel, even though an incidental effect of such discipline may be that employees fear discipline or discharge for engaging in protected activity. On the other hand, the Board has protected supervisors discharged for failing to prevent unionization.90

Until 1982, the Board had held that, where there is a widespread pattern of misconduct by the employer against employees motivated by the employee’s desire to discourage union activities among its employees in general, actions taken against supervisors may violate Section 7.91 In 1982, in *Parker-

83. 454 U.S. at 173; 236 NLRB at 1616.
84. *Id.* at 185-86 n.19.
85. 29 U.S.C. § 159(b).
86. *Id.* § 152(3).
87. *Id.* § 158(a)(1).
88. See, e.g., Miami Coca-Cola Bottling Co., 140 NLRB 1359 (1963), enforced in part, 341 F.2d 524 (5th Cir. 1965).
Robb Chevrolet, Inc., the Board overruled previous cases and held that all supervisory discharge cases should be resolved by a different analysis:

The discharge of supervisors is unlawful when it interferes with the right of employees to exercise their rights under Section 7 of the Act, as when they give testimony adverse to their employers' interest or when they refuse to commit unfair labor practices. The discharge of supervisors as a result of their participation in union or concerted activity—either by themselves or when allied with rank-and-file employees—is not unlawful for the simple reason that employees, but not supervisors, have rights protected by the Act.

In the federal government's separate statutory scheme involving collective bargaining for federal employees, the question of confidential employees is dealt with specifically. The Federal Labor-Management and Employee Relations Act, by its terms, appears to provide "dual status" for confidential employees. Section 701 of the Act sets out federal employees' rights. The definitions section of the Act defines "employee" broadly and specifically excludes supervisors or management officials. "Confidential employee" is defined to mean "an employee who acts in a confidential capacity with respect to an individual who formulates or effectuates management policies in the field of labor-management relations." In giving the Federal Labor Relations Authority the power to determine the appropriateness of a bargaining unit, the Act specifically provides that a unit shall not be determined to be appropriate if it includes a "confidential employee." An example of the Authority's application of the statute in a unit determination context may be found in U. S. Army Communications Systems Agency, Fort Monmouth, New Jersey. Further, employees "engaged in personnel work in other than a purely clerical capacity" are not to be included in bargaining units. The unfair labor practices portion of the federal employees act, however, contains no such limitation and speaks merely of interfering with an employee's rights or disciplining or otherwise discriminating against an employee.

Like federal law, Missouri law protects public employees from discharge or discrimination because of their exercise of rights under the Public Sector

93. 262 N.L.R.B. at 404.
95. Id. § 7102.
96. Id. § 7103.
97. Id. § 7103(13).
98. Id. § 7112(b)(2).
100. 5 U.S.C. § 7112(b)(3) (emphasis added).
101. Id. § 7116.
Labor Law. Unlike the federal system, neither the State Board of Mediation nor any other state agency is charged with handling charges of such discrimination. Rather, recourse is to the circuit court.\textsuperscript{102} Furthermore, the statute itself contains an exclusion: "[e]mployees except police, deputy sheriffs, Missouri state highway patrolmen, Missouri national guard, all teachers of all Missouri schools, colleges and universities."\textsuperscript{103} Because the statute creating the right to be free of discrimination specifically enumerates those employees excluded from its coverage, it would seem that other employees simply excluded by the State Board of Mediation from bargaining units would not necessarily be denied protections of the discrimination portions of the law. Thus, the confidential employees in the \textit{Belton} case, as well as other employees excluded from bargaining units, may be protected from discharge or discrimination unless they fall within one of the enumerated classes.

The Missouri scheme of enforcement is different from the federal scheme. The statute\textsuperscript{104} charges the State Board of Mediation with determining the appropriateness of bargaining units, but not with determining whether an employer has interfered with employees' rights to join and form labor organizations or whether it has discharged or discriminated against employees because of their exercise of rights under the statute. That is a matter for the state courts.

In \textit{State ex rel. Missey v. City of Cabool},\textsuperscript{105} a number of employees alleged that the city laid them off and reduced their pay because of their union activities and because they had signed authorization cards.\textsuperscript{106} They brought a proceeding in mandamus to have city officials directed to rescind the actions and to reinstate the employees to their jobs and make them whole for their losses. Although the circuit court dismissed the action, the supreme court reversed that ruling and remanded the case for a determination on the merits.

In a later case, \textit{State v. Kansas City Firefighters Local No. 42},\textsuperscript{107} the Court of Appeals for the Western District dealt more fully with the question of enforcement of Missouri's public sector labor law. In \textit{Kansas City Firefighters}, the state brought an action against members of the firefighters association to recover damages caused by the activation of the National Guard to perform the functions of the firefighters during an illegal strike. The statute denies Missouri public employees the right to strike.\textsuperscript{108} The state contended that the public sector labor law implied a private remedy in tort.

\begin{thebibliography}{99}
\bibitem{102} See \textit{State ex rel. Missey v. City of Cabool}, 441 S.W.2d 35 (Mo. 1969) (en banc).
\bibitem{103} \textit{Mo. Rev. Stat.} § 105.510.
\bibitem{104} \textit{Id.} § 105.525.
\bibitem{105} 441 S.W.2d 35 (Mo. 1969).
\bibitem{106} \textit{Id.} at 38.
\bibitem{107} 672 S.W.2d 99 (Mo. Ct. App. 1984).
\bibitem{108} \textit{Mo. Rev. Stat.} § 105.530.
\end{thebibliography}
to a party damaged by public employee activity in violation of law. The firefighters contended that there was no civil remedy for damages because the public sector labor law provided none. The court of appeals applied the common law maxim "Ubi ius, ibi remedium—Where there is a right, there is a remedy." The lower court's judgment for compensatory damages as to twelve individual defendants was affirmed by the court of appeals. 109

In assessing a claim of discrimination because of protected activity by an "employee" of a public body in Missouri, a Missouri court, presumably, would have to make an initial determination of whether the employee was protected and would, necessarily, begin with the statute:

Employees, except police, deputy sheriffs, Missouri state highway patrolmen, Missouri national guard, all teachers of all Missouri schools, colleges and universities, of a public body shall have the right to form and join labor organizations and to present proposals to any public body relative to salaries and other conditions of employment through the representative of their own choosing. No such employee shall be discharged or discriminated against because of his exercise of such right, nor shall any person or group of persons, directly or indirectly, by intimidation or coercion, compel or attempt to compel any such employee to join or refrain from joining a labor organization, except that the above excepted employees have the right to form benevolent, social, or fraternal associations. 111

A court may not be bound in any respect to a decision of the Board of Mediation excluding an employee from a bargaining unit, at least if the exclusion was not because the employee was specifically excepted in the statute.

An employee whose job clearly fell within the definition of confidential employees articulated by the Board and approved by the Missouri Supreme Court in the Belton case or even who had been excluded specifically from a bargaining unit by the Board of Mediation would be free to argue, under the common law rule of statutory construction which provides that the express mention of one thing implies the exclusion of another, that he or she was entitled to protection from discharge or discrimination because of concerted activities. That rule of construction has a substantial history in Missouri courts. 112 The rule is not, however, to be applied automatically. In Reorganized School District No. R-8 v. Roberson, 113 the court, citing two earlier cases, noted that the "maxim states an auxiliary rule of statutory construction which is sometimes followed and sometimes held inapplicable,

109. 672 S.W.2d at 109.
110. Id. at 127.
112. See, e.g., Brown v. Morris, 365 Mo. 946, 955, 290 S.W.2d 160, 166 (1956) (en banc); Harrison v. MFA Mut. Ins. Co., 607 S.W.2d 137, 144 (Mo. 1980) (en banc).
113. 262. S.W.2d 847 (Mo. 1953).
depending on the facts” and that the rule’s purpose is “to ascertain the intention of the law makers” and “must be applied with caution.” 114

The Missouri courts long have recognized that the legislature did not intend that all persons on the payroll of the public body be considered employees for collective bargaining purposes “because someone must act for the interest of the [public] employer.” 115 [Although such reasoning has been applied in appropriate bargaining unit cases, where deference to the State Board of Mediation is logical because of the Board’s statutory charge, it could be used to justify a refusal to follow the rule that the express mention of one thing implies the exclusion of another in an “unfair labor practice” case beginning in the court system.] It is interesting to note that in Belton, the Missouri Supreme Court observed the differences between the approach of the National Labor Relations Board and the Missouri State Board of Mediation:

The NLRB has recognized that certain ‘confidential’ employees should be excluded from the bargaining unit even though the NLRA, like the Public Sector Labor Law, does not expressly exclude ‘confidential’ employees from its coverage. However, in contrast to the position taken by the [State] Board [of Mediation], that ‘confidential’ employees are not ‘employees’ within the meaning of the Public Sector Labor Law, the NLRB has adopted the position that ‘confidential’ employees are not impliedly excluded from the definition of ‘employee’ under the NLRA. 116

This could be interpreted as an indication on the part of the Missouri Supreme Court that, if faced with the question, it would imply an exclusion of confidential employees from all the protections of the Act, just as the Board of Mediation had implied an exclusion from a collective bargaining unit.

There may be legitimate reasons to differentiate between the test applied in the assertion of the right to organize and the test applied in the protection of the right to be free from discrimination.

Once the difference between providing a right to organize on one hand and protection from discrimination on the other is recognized, then the practical realities surrounding organizing activities should be reexamined. Unfortunately, as indicated above, the forces which impact on confidentiality determinations in an organizing context are far removed from the careful legal analysis done by courts. This arises because of the adversarial nature of the labor relations system. Both sides wish to win the upcoming election

114. Id. at 850 (citing State ex rel. Fawkes v. Bland, 357 Mo. 634, 210 S.W.2d 31 (1948)); Springfield City Water Co. v. City of Springfield, 353 Mo. 445, 182 S.W.2d 613 (1944).


116. 695 S.W.2d at 898.
and, absent some clear violation of public policy, the appropriate agencies are likely to accept the parties' compromise determinations as to who should be eligible to vote.

This situation is further exacerbated by a definitional problem which is all but assumed away in virtually every judicial analysis applied to this question: defining the very word "confidential." Unfortunately, "confidential employee" under both the Hendricks case and the Belton case is defined in terms of a "confidential relationship." This falls far short of an appropriate Socratic definition whereby a word is defined in terms of genus and specific difference. Fortunately, the Missouri courts have, in fact, defined "confidential" in several non-labor relations contexts.

In Hedrick v. Hedrick, the Missouri Supreme Court found that "confidential" and "fiduciary" are synonymous in general application. Later in Horn v. Owens and Doll v. Frick, the court found that a confidential relationship exists when one trusts and relies upon another, whether relations are technically fiduciary or merely informal. This concept was taken one step further by the Supreme Court of Oregon. In Patterson v. Getz, that court found that a confidential relationship exists where one has special confidence in another who in equity and good conscience is bound to act in good faith and with due regard to the interests of the one reposing the confidence. An early New York case takes the analysis further. In People v. Palmer, the court of appeals found that a confidential relationship is one in which a person is bound to act for the benefit of the other and may take no personal advantage from his acts relating to the interest of the other.

Thus, we have in a "confidential employee" one who bears a special relationship to the employer (either through a manager or a supervisor) even though that relationship is informal, and should be bound to act in the interest of the employer, while being forbidden to use his or her position for personal gain. As a practical matter, such an analysis requires a substantially broader definition than the labor-nexus test applied by the National Labor Relations Board. Certainly, even without reference to multiple judicial opinions, the common understanding of "confidential" (relevant in a jurisprudence relying upon the common law) is much broader than the labor-nexus test.

One may argue that, while an employer ought to be prohibited from discriminating against employees because of their concerted activity, it ought, on the other hand, to be able to expect their undivided loyalty in the collective bargaining context and ought to be able to prohibit conflicts of interest from

117. 350 Mo. 716, 726, 168 S.W.2d 69, 74 (1943).
118. 171 S.W.2d 585, 591 (Mo. 1943).
120. 166 Or. 245, 287, 111 P.2d 842, 858 (1941).
121. 152 N.Y. 217, 46 N.E. 328, 329 (1897).
arising in that context. It is difficult for an employee to serve two masters, the employer and the union, particularly in our adversarial labor relations system.

The Missouri Supreme Court has, at least implicitly, provided the public sector in Missouri with an opportunity to draw a distinction between collective bargaining and freedom from discrimination. Application of a similar dichotomy could lead to reevaluation of the Hendricks labor-nexus test under federal law and a careful analysis of the principles underlying the confidential employee designation may result in an application of different tests in the different contexts.

IX. UNRESOLVED ISSUES

As is the case frequently, a careful analysis of the Hendricks and Belton decisions indicates that they leave more questions unanswered than they have answered. Both the federal courts and the state courts face a variety of options before the status of confidential employees finally can be established.

The federal agency and courts could, for example, apply careful definitional analysis and reexamine the concept of confidential employees in light of practical business realities. This could lead to a result like that in the Belton case.

Assuming the federal system is not prepared to reexamine its basic definitional determination, it faces a variety of unresolved problems. It could decide not to provide protection from discrimination to employees who fall under the labor-nexus test either because sound policy requires absolute loyalty of such people or because Congress has provided such separate treatment when it wanted to in the Federal Labor-Management and Employee Relations Act but has not provided such special treatment in the National Labor Relations Act. On the other hand, the Supreme Court of the United States might simply defer to the National Labor Relations Board and protect labor-nexus confidential employees in all situations without any redefinition. Further, the federal agency and courts might draw a distinction as has been done in the case of managers and supervisors and protect labor-nexus confidential employees only when discrimination against them interferes with the rights of other employees to exercise their Section 7 rights.

Obviously, if the federal agency and courts would decide to reexamine the definition of confidential employee and apply a broader test such as that used in Missouri, they would face more possible permutations and combinations of resolution of the protection issue.

Those permutations and combinations already face the state court. The state court could again redefine its concept of confidential employee and adopt the labor-nexus test. Such a redefinition could narrow the scope of options it now faces on the protection side of the issue. Assuming that the
Missouri court does not undertake such a redefinition, it may decide not to provide protection from discrimination to any confidential employee because, as it found in its own analysis, such people are not employees or simply because sound policy requires absolute loyalty to the employer. The court also might reason that judicial symmetry and analytic simplicity make such a result desirable.

On the other hand, the court might decide to provide protection from discrimination to all confidential employees except those who meet the labor-nexus test, on the theory that those particular limited confidential employees bear a higher level of necessary identification with and loyalty to management.

If it chooses to focus on the conduct rather than the employee involved, the state court might decide to protect either all confidential employees or only labor-nexus employees but to do so only in the context in which discrimination against either group of employees would interfere with the right of other employees to exercise their rights to self-organization. Finally, the court might decide to protect all confidential employees of whatever type and to do so not because of the public employee bargaining law but because of the law and constitutional principles which have developed in other areas according special rights to public employees.

All of these options available to the federal and state systems are subject to substantial competing policy analyses. The decisions in *Hendricks* and *Belton* merely bring the courts to the edge of these analyses and additional scholarly attention should be given to these concepts before the two courts are required to face them in an adversarial context.