

**55 Confidential employee**

“Confidential employee” is defined in Section 7103(a)(13) of the Statute as:

... 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.

A unit is not appropriate if it includes confidential employees [section 7112(b)(2)].

An employee is a "confidential" if (1) there is evidence of a confidential working relationship between an employee and a supervisor or manager and (2) the supervisor or manager is significantly involved in labor-management relations. This two-part, labor-nexus test is used to examine the nature of an employee's confidential working relationship. *See U.S. Department of Labor, Office of the Solicitor, Arlington Field Office, 37 FLRA 1371 (1990)*. Both factors must be present for an employee to be considered "confidential" within the meaning of section 7103(a)(13).

At a hearing the Hearing Officer explores not only the work of the employee whose status as a confidential is in dispute, but also the work of the person with whom or for whom the disputed employee works. It is also important to focus on the stage at which this confidential employee is involved in the process by which management labor-relations policies are developed (i.e., is the employee present during the development of the policies, or does the employee's involvement occur after the management policy has been developed and decided).

***For guidance on “confidential employees,” see RCL 19.***

***Relevant information:***

- 1) Documentation, such as the mission statement, organizational and functional charts of the Activity, locating not only where the alleged confidential employee is found on the chart, but also the individual(s) for whom the employee works in a confidential capacity.

- 2) Testimony and documentation as to the actual duties of the employee, focusing especially upon the employee's assigned tasks that result in the employee being involved in labor-management relations.
  - a) Obtain testimony from the individual about his/her daily routine (obtain a copy of the position description and performance standards).
  - b) Obtain testimony from the individual about his/her participation and attendance at management meetings where discussions ensue concerning labor relations issues, contract negotiations strategies and proposals and personnel policies. Determine the involvement of the employee at these meetings: note taker, etc.
  - c) Obtain testimony from the individual about his/her participation in the preparation of management's responses for grievances, unfair labor practices, negotiation demands, proposed disciplinary actions and other personnel actions that may result in the filing of grievances under the negotiated grievance procedure.
  - d) Obtain testimony from the individual about the nature and extent of the employee's access to confidential information concerning other employees and management labor relations policies and plans.
  - e) Obtain testimony from the individual about the types of advice or assistance the employee gives to other employees or supervisors or managers in labor relations/personnel matters.
  - g) What is the percentage of time employee spends in above activities?
  - h) Percentage of time that the employee spends doing other activities such as typing, filing documentation constituting labor-management materials?
- 3) Testimony and documentation regarding the individual who formulates or effectuates management policies in the field of labor-management relations.

- a) Obtain a copy of the position description and performance standards.
- b) Obtain testimony from the individual about his/her responsibility for establishing, interpreting, or implementing personnel/labor relations policies.
- c) Obtain testimony from the individual about his/her actual participation in contract negotiations and development of contract proposals.
- d) Obtain testimony from the individual about his/her participation in handling grievances/arbitrations and disciplinary and adverse actions, and obtain examples of grievance decisions, replies to proposed disciplinary actions, etc.
- e) Obtain testimony from the individual about his/her participation in labor-union meetings?
- f) Obtain testimony from the individual about his/her participation and involvement in Equal Employment Opportunity Complaints, Merit Systems Protection Board Proceedings, awards, and promotions.
- g) What is the nature of this person's attendance and participation at Agency meetings at which sensitive labor relations matters are discussed and deliberated? To what extent does this person advise, develop, and/or implement negotiating positions or proposals?
- h) To what extent is this person involved in preparing arbitration cases for hearing?
- i) To what extent does this person consult with management regarding the handling of unfair labor practice cases?
- j) What is the extent of this person's participation in the formulation and development of the Agency's labor relations policies?
- k) Describe the involvement of the alleged confidential

employee's involvement in above matters, obtaining documents when possible.

- l) To what extent does the employee, in the normal performance of his/her duties, obtain advance information of management's position with regard to contract negotiations, the disposition of grievances, and other labor relations matters?
- 4) Obtain specifics from the Activity concerning the potential disruption to or conflict within the Agency's operations which will result if the alleged confidential employee(s) is included in the bargaining unit.