

19 **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). See *U.S. Army Plant Representative Office, Mesa, Arizona*, 35 FLRA 181 (1990). Thus, a determination of confidential status is dependent upon the work performed by the individual with whom the employee works. This individual may be the employee's supervisor or may be another manager.

An individual who actually formulates or effectuates management policies in the field of labor-management relations is considered a confidential employee. *U.S. Department of Housing and Urban Development, Washington, D.C.*, 35 FLRA 1249, 1255-57 (1990). Other responsibilities identified by the Authority in this regard include:

- a. advising management on or developing negotiating positions and proposals,
- b. preparing arbitration cases for hearing, and
- c. consulting with management regarding the handling of unfair labor practice cases.

U.S. Department of Justice, Federal Bureau of Prisons, U.S. Penitentiary, Marion, Illinois (DOJ), 55 FLRA 1243 at 1247 (2000).

- d. engaging in partnership activities that includes the formulation and effectuation of labor relations policies. *See U.S. Department of Transportation, Federal Aviation Administration, Standiford Air Traffic Control Tower, Louisville, Kentucky*, 53 FLRA 312, 319 (1997) (collective bargaining may occur in a variety of ways, including the use of collaborative or partnership methods). *DOJ*, 55 FLRA 1246 at n.5

Other individuals who are privy to labor-management relations policies as they are developed are excluded on the basis of confidential status, because their inclusion in a bargaining unit would create a conflict of interest between the employee's work duties and unit membership.

Therefore, at a hearing it is necessary to explore 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). An employee's mere access to labor relations material does not justify unit exclusion.

See HOG 55 for specific guidance about this topic at hearing.

Other references:

Department of Veterans Affairs, Regional Office, Waco, Texas, 50 FLRA 109, 111-12 (1995).

Department of Interior, Bureau of Reclamation, Yuma, Arizona, 37 FLRA 239 (1990).

U.S. Department of Labor, 33 FLRA 265 (1988). (Authority rejected union's argument that a limited amount of actual confidential labor relations work does not provide a substantial basis for excluding employees from a bargaining unit.)

Tick Eradication Program, Veterinary Services, Animal and Plant Inspection Service, United States Department of Agriculture, 15 FLRA 250 (1984).

Red River Army Depot, Texarkana, Texas, 2 FLRA 659, 660 (1980).

Associated Day Care, 269 NLRB 178, at 181(1984) (“It is well established that mere access to confidential labor relations material such as personnel files, minutes of management meetings, and grievance responses is not sufficient to confer confidential status; even the typing of such material does not, without more, warrant a finding of confidential status. Thus, unless it can be shown that the employee has played some role in creating the document or in making the substantive decision being recorded, or that the employee regularly has access to labor relations policy information before it becomes known to the union or employees concerned, the Board will not find the employee to have confidential status. Based on the record evidence, we find that the Employer’s administrative assistants are expected to play a role in the investigation of grievances which will affect the decision made by management on the merits of a grievance and that this is sufficient to render them confidential employees. Furthermore, we find that they are expected to have regular access to, and on occasion to type, memoranda concerning management proposals for collective bargaining before these proposals are presented to the Union; we also note that they will regularly see the minutes of the weekly management meetings at which management proposals for collective bargaining will be discussed. While the administrative assistants may spend relatively little of their working time performing these duties, the amount of time devoted to labor relations matters is not the controlling factor in determining confidential status.”)

NLRB v. Hendricks County Rural Electric Membership Corp., 454 U.S. 170, at 189 (1981) (The Supreme Court upheld “labor nexus” test for excluding confidential employees, i.e., that the Board will exclude confidential secretaries from bargaining units only if those employees “assist and act in a confidential capacity to persons who formulate, determine, and effectuate management policies in the field of labor relations.”)

