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**GOVERNMENT OF THE DISTRICT OF COLUMBIA  
PUBLIC EMPLOYEE RELATIONS BOARD**

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In the Matter of:	)	
	)	
American Federation of Government Employees, Local 2725, AFL-CIO,	)	
	)	
Petitioner,	)	
	)	
and	)	
	)	
District of Columbia	)	
Department of Housing and	)	
Community Development,	)	
	)	PERB Case No. 97-UC-01
	)	Opinion No. 532
Agency.	)	
	)	
	)	
	)	

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DECISION AND ORDER ON UNIT CLARIFICATION

On December 13, 1996, the American Federation of Government Employees, Local 2725, AFL-CIO (AFGE), in accordance with Section 506 of the Rules of the Public Employee Relations Board (Board), filed a Petition for Clarification of Unit (Petition). The Petitioner is the certified exclusive representative of a unit consisting of "[a]ll employees of the Department of Housing and Community Development" (DHCD).<sup>1/</sup> The Petitioner seeks to clarify the scope of the unit with respect to four employee positions, i.e., home purchase assistance program specialist (DS-1101-13); program analyst (DS-343-13); clerical assistant (DS-303-06); and clerk (DS-303-04). The Office of Labor Relations and Collective Bargaining (OLRCB), on behalf of DHCD, filed a Response to the

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<sup>1/</sup> See, AFGE, Locals 2725, 1649, and 3524 and DHCD, BLR Case No. 8R013 (1980) as clarified and amended in AFGE, Local 2725 and Department of Housing and Community Development and Department of Public and Assisted Housing, 35 DCR 4071, Slip Op. No. 180, PERB Case No. 88-R-05 (1988).

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Petition. OLRCB states that changes in the duties of these four employees --previously included in the bargaining unit-- have rendered them statutorily excluded as management officials or supervisors, confidential employees or an employees engaged in personnel work in other than a purely clerical capacity.

Pursuant to Board Rule 506.2, the Petition was referred to a Hearing Examiner. A hearing was held on August 12, 1997, and a Report and Recommendation (R&R) was issued on September 23, 1997, containing her findings, conclusions and recommendations.<sup>2/</sup>

The Hearing Examiner found that the Board has jurisdiction over the issues presented by the Petition notwithstanding DHCD's contentions to the contrary. She proceeded to find that the home purchase assistance program specialist and clerk are properly excluded from the bargaining unit as a management official and confidential employee, respectively.

In addition, the Hearing Examiner found that the program analyst's duties were neither supervisory or confidential. Also, she found that the clerical assistant's duties were neither confidential or consisted of personnel work in other than a purely clerical capacity. Consequently, she concluded that these two positions continue to maintain their bargaining unit status and, therefore, were improperly excluded from the unit by DHCD. The case is now before the Board on exceptions filed by AFGE to the Hearing Examiner's findings and conclusions with respect to the two excluded employees.

AFGE contends that the record reflects that the duties of the clerk are purely clerical in nature and have not changed since DHCD treated this position as part of the bargaining unit. Ex. at 5. AFGE further contends that the record supports that the incumbent does not act in a confidential capacity with respect to labor relations. Id.

Categories of employees excluded under the CMPA include both "confidential employee[s]" and employees "engaged in personnel work in other than a purely clerical capacity". D.C. Code Sec. 1-618.9(b)(2) and (3). The Hearing Examiner's found that the clerk's duties are essentially clerical; however, she further found that "within the parameters of [the clerk's] daily activities ... she comes into contact with adverse actions, personnel documents, and confidential information." (Emphasis added; R&R at 12.) While this finding alone does not properly

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<sup>2/</sup> The Hearing Examiner's Report and Recommendation is attached as an appendix to this Opinion.

exclude the clerk on the basis of her personnel work, the Hearing Examiner found the record supported the exclusion based on the confidential aspects of the position.

The PERB's lead case defining the basis for excluding employees as confidential is AFGE, Local 12 and D.C. Dep't of Employment Services and AFSCME, 28 DCR 3943, Slip Op. No. 14, PERB Case No. OR006 (1981). There, the Board held that an employee is properly excluded as confidential when his or her confidential role is "sufficiently involved in labor relations and policy formation matter." Slip Op. at 3. In AFGE, Local 2978 and Dep't of Human Services, 36 DCR 8207, Slip Op. No. 236, PERB Case No. 89-R-04 (1989), the Board further clarified the nature of this statutory exclusion when it held that confidential employees are determined by the extent of their relationship to "labor relation policy matters or to negotiations to a collective bargaining agreement". The controlling factor is whether the employee's relationship to labor relation policy and collective bargaining matters would create, between management and the union, a conflict of interest for the incumbent of the position at issue. A duty to refrain from divulging information that does not otherwise give rise to such a conflict is not, standing alone, sufficient. Id.

The record does not support the clerk's exclusion as a confidential employee based on the above criteria. The Hearing Examiner's findings that the clerk has complete access to documents pertaining to confidential labor relations documents and related policy matters is not supported by the record. R&R at 13. A review of the transcript reveals that the incumbent may have complete access to personnel matters in a clerical capacity, i.e., routing and filing correspondence. However, there is no evidence to support that the incumbent's duties necessarily affords her access to matters regarding labor relation policy or matters of collective bargaining that would create the requisite conflict necessary to properly exclude the position from the collective bargaining unit.<sup>3/</sup> See, e.g., National Association of

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<sup>3/</sup> Illustrative examples of confidential positions and duties would be support staff who, as a part of their job, handle or are privy to the work product or deliberations of management officials that are responsible for the agency's labor relation policy or collective bargaining strategy. Our review of the record reveals that the only access the clerk has to information that is of a labor relations and collective bargaining nature consist of receiving, logging and distributing (1) correspondence from the union; (2) "information regarding policy  
(continued...)

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Government Employees, SEIU, AFL-CIO and Dep't of Public Works, Slip Op. 399, PERB Case No. 94-R-02 (1994). In view of the above, we sustain AFGE's exception with respect to the "clerk" position and find that this position was improperly excluded from the bargaining unit.

With respect to the home purchase assistance program specialist, AFGE argues that the Hearing Examiner failed to make a proper distinction between professional and managerial duties in reaching her conclusion that the position is excluded as managerial. AFGE asserts that the duties found to be managerial are actually professional and professional employees are properly included within the scope of the bargaining unit. There is no dispute that the unit as currently established includes both professional and non-professional employees. While the duties of the "home purchase assistance program specialist" may also make this position professional in nature --an issue not presented by the Petition-- the record supports the Hearing Examiner's findings and conclusion that the position is managerial.

The Hearing Examiner found that the incumbent home purchase assistance program specialist operates with virtual autonomy with respect to analyzing, evaluating, and effectively recommending action to be taken concerning broad agency policy objectives and program goals. R&R at 10. This finding sufficiently supports the Hearing Examiner's conclusion that the "employee who encumbers this position is one who formulates and effectuates management policies". This criteria is critical to finding that a position should receive status as a management official.<sup>4/</sup> Therefore, we

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<sup>3</sup>(...continued)

changes from the Office of Personnel"; (3) "requests for grievances"; and (4) "results from arbitration hearings [and] grievance hearings". (Tr. 100.) The clerk's current role with respect to these matters does not necessarily place the incumbent in a position that gives her access to the kind of labor relation and/or collective bargaining information that management would have a reasonable expectation of confidentiality with respect to the union. In this regard the requisite conflict does not exist. The duties that may be accorded the clerk position at some later time is not relevant to a determination of proper unit placement at this time.

<sup>4/</sup> The Hearing Examiner based this criteria on the standard promulgated by the Supreme Court in N.L.R.B. v. Bell Aerospace Co., 416 U.S. 267 (1974). AFGE provides no authority, (continued...)

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deny this exception by AFGE.

In all other respects, we adopt the Hearing Examiner's findings, conclusions and recommendations that the bargaining unit be clarified to include the positions of program analyst and clerical assistant and exclude the position of home purchase assistance specialist.

ORDER

IT IS HEREBY ORDERED THAT:

The bargaining unit as described in BLR Case No. 8R013, as amended in PERB Case No. 88-R-05, is clarified to include the employee positions of program analyst (DS-343-13), clerical assistant (DS-303-06) and clerk (DS-303-04); and exclude the employee position of home purchase assistance program specialist (DS-1101-13).

BY ORDER OF THE PUBLIC EMPLOYEE RELATIONS BOARD

Washington, D.C.

January 28, 1998

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<sup>4</sup>(...continued)

nor do we find any, to support its assertion that "[a] manager is distinguished from a professional employee in that the former participates in agency-wide management meetings and supervises employees." (Emphasis added) Ex. at 3. If supervisory authority is a requirement to find "managerial official" status, then its specifically expressed inclusion under D.C. Code Sec. 1-618.9(b)(1), together with "supervisor", would be redundant and meaningless. Such a statutory interpretation is unwarranted without a substantial basis --not demonstrated by the Petitioner-- to support it.

### Certificate of Service

I hereby certify that the attached Decision and Order in PERB Case No. 97-UC-01, Slip Opinion No. 532, was sent (via U.S. Mail) to the following parties on the 28th day of January, 1998.

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