19. CATEGORIES GOVERNED BY BOARD POLICY

Apart from the categories excluded by the statute, or as to which statutory limitations require specific treatment, several other special categories are governed by Board policy. There are established rules based on policy considerations which apply to these categories, which include confidential employees, managerial employees, plant clerical employees, office clerical employees, and technical employees. Another category is that of relatives of management which, except to the extent of the exclusion of "any individual employed by his parent or spouse" under Section 2(3), is also the subject of Board policy.

All of these are treated here.

19-100 Confidential Employees

177-2401-6800

460-5033-5000

"Confidential employees" are defined as employees who assist and act in a confidential capacity to persons who formulate, determine, and effectuate management policies with regard to labor relations, or regularly substitute for employees having such duties. Under Board policy, they are excluded from the bargaining unit. *Waste Management de Puerto Rico*, 339 NLRB 262 (2003); *Ladish Co*., 178 NLRB 90 (1969); *Chrysler Corp*., 173 NLRB 1046 (1969); *Eastern Camera Corp*., 140 NLRB 569, 574 (1963); *B. F. Goodrich Co.*, 115 NLRB 722, 724 (1956); and *Hampton Roads Maritime Assn.*, 178 NLRB 263 (1969).

Historical note: The policy relating to confidential employees is known as the "labor nexus test" and was described in *B. F. Goodrich Co*., supra, in which the Board stated:

> Upon further reexamination our holdings in the instant connection, we are still of the opinion expressed in the *Ford Motor Co*. case [66 NLRB 1317 (1946)] that any broadening of the definition of the term "confidential" as adopted in that decision needlessly precludes employees from bargaining collectively together with other employees sharing common interests. Consequently it is our intention herein and in future cases to adhere strictly to that definition and thus 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.

Affirmed: *NLRB v. Hendricks County Electric Membership Corp*., 454 U.S. 170 (1981).

These considerations are to be "assessed in the conjunctive." *Weyerhaeuser Co*., 173 NLRB 1170 (1969).

The parties' agreement in the past to exclude clerks as confidential is not necessarily binding in a subsequent representation proceeding. *Chrysler Corp*., supra, and the party asserting confidential status has the burden of proof. *Crest Mark Packing Co*., 283 NLRB 999 (1987).

The Board dealt with the issue of confidential status of secretaries to the employer's negotiating team and to management officials responsible for formulating the employer's contract proposals. Since these secretaries assisted in the preparation of and/or had access to confidential labor relations information such as the employer's data in preparation for contract negotiations, minutes of negotiating sessions, and grievance investigation reports, they were found to be confidential employees. So were two other employees who substituted for the regular secretaries. *Firestone Synthetic Latex Co*., 201 NLRB 347 (1973). See also *National Cash Register Co*., 168 NLRB 910, 912–913 (1968), and *Bakersfield Californian*, 316 NLRB 1211 (1995).

The Board denied review of two Regional Director's decision on cases that presented a number of confidential issues and listed a number of recent cases *PTI Communications*, 308 NLRB 918 (1992); and *Inland Steel Co*., 308 NLRB 868 (1992).

The secretaries to vice presidents and the secretary to the secretary-treasurer of the employer were found to be confidential employees. These employees were present on occasion when labor

relations matters were discussed by their supervisors, including confidential meetings between the officers and supervisors at which the employer's policy as to grievances and union negotiations were discussed. They were also responsible for preparing orders and documents in labor relations matters. *Grocers Supply Co.*, 160 NLRB 485, 488–489 (1966). See also *Triangle Publications*, 118 NLRB 595 (1957); and *Santa Fe Trail Transportation Co.*, 119 NLRB 1302 (1958). See also *Low Bros. National Market*, 191 NLRB 432 (1971).

However, secretaries to factory managers, agricultural managers, plant controllers, and sales managers were held not to be confidential employees. *Holly Sugar Corp.*, 193 NLRB 1024 (1971). The factory and agricultural managers in this case merely made administrative determinations with regard to the collective-bargaining agreement; they did not formulate, determine, and effectuate the labor relations policies of management. They participated in only a limited advisory way in the bargaining process. The mere fact that they were involved in the handling of routine grievances was not sufficient to impart confidential status to their secretaries. *B. F. Goodrich Co.*, supra; *Weyerhaeuser Co.*, supra. As the plant controllers and the sales managers had less responsibility in the field of labor relations than the factory and agricultural managers, a fortiori, their secretaries could not properly be classified as confidential employees. See also *Greyhound Lines*, 257 NLRB 477 (1981); and *Waste Management de Puerto Rico*, supra.

An employee's access to personnel records and the fact the employee can bring information to the attention of management, which may ultimately lead to disciplinary action by management, is not enough to qualify an employee as confidential. *RCA Communications*, 154 NLRB 34, 37 (1965); *Ladish Co.*, supra; *Hampton Roads Maritime Assn.*, supra. See also *S. S. Joachim & Anne Residence*, 314 NLRB 1191 (1994); and *Lincoln Park Nursing Home*, 318 NLRB 1160 (1995).

Thus, an employee who has access to confidential matters dealing with contract negotiations is a confidential employee (*Kieckhefer Container Co.*, 118 NLRB 950, 953 (1957)), but a clerk who prepares statistical data for use by an employer during contract negotiations is not confidential because the clerk cannot determine from the data prepared by him what policy proposals may result (*American Radiator Corp.*, 119 NLRB 1715, 1720–1721 (1958)).

Employees who handle material dealing only with the financial matters of the employer are not confidential. *Dinkler-St. Charles Hotel*, 124 NLRB 1302 (1959). *Brodart, Inc.*, 257 NLRB 380, 384 fn. 1 (1981).

Those who may at some time in the future function as confidential employees but who are not doing so at the time the determination is made do not belong to this normally excluded category. *American Radiator & Sanitary Co.*, supra. This is also true of employees who spend only a small proportion of their time substituting for those who act in a confidential capacity. *Waste Management de Puerto Rico*, supra; *Meramec Mining Co.*, 134 NLRB 1675 (1962); and *Swift & Co.*, 129 NLRB 1391, 1393 (1961).

Single incidents of note-taking or isolated occasions of confidential duties have been held insufficient to exclude an employee from a bargaining unit. *Crest Mark Packing Co.*, supra; *International Electric Assn.*, 277 NLRB 1 (1985). But, generally, the amount of time devoted to labor relations matters is not a controlling factor in establishing confidential status. *Reymond Baking Co.*, 249 NLRB 1100 (1980).

Contentions have been made that an employee who may be in a position to overhear conversations relating to labor relations due to his job location in the plant or because of his operation of the switchboard should be excluded as a confidential employee. These contentions have been uniformly rejected. See, for example, *Swift & Co.*, 119 NLRB 1556, 1567 (1958).

The Board has not deemed "the mere possession of access to confidential business information by employees sufficient reason for denying such employees representation as part of any appropriate unit of work-related employees." *Fairfax Family Fund*, 195 NLRB 306, 307 (1972).

The fact that some employees may be entrusted with business information to be withheld from their employer's competitors or that their work may affect employees' pay scales does not render such employees either confidential or managerial. *Swift & Co*., supra.

Timekeepers were not excluded from a multiemployer unit as confidential employees where the record showed that, to the extent they had access to information of their employers, the information pertained to the performance of their duties as timekeepers and had nothing to do with the employers' labor policies. Moreover, there was no evidence that the timekeepers otherwise participated in the formulation or effectuation of the employers' general labor policies. *Hampton Roads Maritime Assn*., supra.

Like employees of labor organizations who are not "confidential" unless they meet the standard test for confidentiality prescribed by the Board *Air Line Pilots Assn*., 97 NLRB 929 (1951), only employees of a management association who act in a confidential capacity in relation to persons who formulate, determine, and effectuate management labor relations policy affecting directly the association's own employees are excluded as "confidential." *Pacific Maritime Assn*., 185 NLRB 780 (1970). See also *Kleinberg, Kaplan, Wolff, Cohen & Burrows, P.C*., 253 NLRB 450 (1981), in which the Board reaffirmed the requirement that the duties relate to the employers' *own* employees (law firm), and *Dun & Bradstreet, Inc*., 240 NLRB 162 (1979) (credit reporters).

19-110 Status of Confidentials

460-5033-5000

Under Board precedent, confidential employees enjoy the protection of the Act. *Peavey Co.*, 249 NLRB 853 (1980). But see *NLRB v. Hendricks County Electric Corp*., 454 U.S. 170 fn. 19 (1981). In *E & L Transport Co*., 315 NLRB 303 (1994), the Board held that applicants for confidential positions are employees within the meaning of Section 2(3) and are protected by Section 8(a)(3).

19-200 Managerial Employees

177-2401-6700

460-5033-7500

Although the Act makes no specific provision for "managerial employees" under Board policy, this category of personnel has been excluded from the protection of the Act. See *NLRB v. Yeshiva University*, 444 U.S. 672 (1980); *Ladies Garment Workers v. NLRB*, 339 F.2d 116, 123 (2d Cir. 1964); *Ford Motor Co*., 66 NLRB 1317 (1946); and *Palace Dry Cleaning Corp*, 75 NLRB 320 (1948).

"Managerial employees" are defined as employees who have authority to formulate, determine, or effectuate employer policies by expressing and making operative the decisions of their employer and those who have discretion in the performance of their jobs independent of their employer's established policies. *Tops Club, Inc*., 238 NLRB 928 fn. 2 (1978), quoting *Bell Aerospace*, 219 NLRB 384 (1975), on remand from the Supreme Court's decision 416 U.S. 267 (1974). The decisions must be made in the interest of the employer. *Allstate Insurance Co*., 332 NLRB 759 (2000), discussed supra at 17-501.

In *NLRB v. Yeshiva University*, 444 U.S. 672 (1980), Supreme Court described managerial employees:

> Managerial employees are defined as those who "formulate and effectuate management policies by expressing and making operative the decisions of their employer." These employees are "much higher in the managerial structure" than those explicitly mentioned by Congress which "regarded [them] as so clearly outside the Act that no specific exclusionary provision was found necessary." Managerial employees must exercise discretion within, or even independently of, established employer policy and must be aligned with management.

> Although the Board has established no firm criteria for determining when an employee is so aligned, normally an employee may be excluded as managerial only if he represents management interests by taking or recommending discretionary actions that effectively control or implement employer policy. [Id. at 682–683.]
>
> Thus, the duties of "final credit analysts" were compared with those of employees engaged as security brokers, insurance claim adjusters, bank tellers, and note collectors, whom the Board has found to be nonmanagerial. *Fairfax Family Fund*, supra at fn. 5. See also, for example, *Dun & Bradstreet, Inc.*, 194 NLRB 9 (1971) (brokers); *Banco Credito y Ahorro Ponceno*, 160 NLRB 1504 (1966) (bank collectors, loan officers, loan adjusters).

The exclusionary practice with respect to individuals found to be "managerial" within the confines of the definition in *North Arkansas Electric Cooperative*, supra, rests on the premise that the functions and interests of such individuals are more closely allied with those of management than with production workers and, therefore, they are not truly "employees" within the meaning of the Act. However, it should be made clear at the outset that "supervisory status is specifically defined in Section 2(11) of the Act and is not equitable with managerial status." *Howard Cooper Corp*., 121 NLRB 950, 951 (1958).

The Board in *North Arkansas Electric Cooperative*, supra, and *Bell Aerospace Co*., 190 NLRB 431 (1971); and *Bell Aerospace Co*., 196 NLRB 827 (1972), had determined that "managerial" employees are "employees" within the meaning of the Act, and directed elections in units of managerial employees. However, in *NLRB v. Bell Aerospace Co*., 416 U.S. 267 (1974), the Supreme Court reversed this decision on the basis of prior Board precedent and legislative history.

District supervisors responsible for dealing with newspaper circulation have in some cases been held to be managerial because they exercise independent judgment in entering into and canceling contracts as well as in determining compensation. *Eugene Register Guard*, 237 NLRB 205 (1978). But see *Washington Post Co*., 254 NLRB 168, 183 (1981); *Long Beach Press-Telegram*, 305 NLRB 412 (1991); and *Reading Eagle Co*., 306 NLRB 871 (1992).

In *NLRB v. Yeshiva University*, supra, the Supreme Court concluded that university professors who can take or recommend discretionary actions that effectively control or implement employer policy were managerial employees. See *Lewis & Clark College*, 300 NLRB 155 (1990), and cases cited therein. See also *University of Great Falls*, 325 NLRB 83 (1997), rejecting an argument that the professors were management and that the college was outside the Board's jurisdiction under *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490 (1979).

In *Carroll College, Inc.*, 350 NLRB No. 30 (2007), the Board, after considering all of the faculty's duties, held that faculty are not managerial because they determine admission of those who fall below traditional admissions standards. But in *LeMoyne-Owen College*, 345 NLRB 1123 (2005), the Board found the faculty to be managerial where inter alia, they control decisions on curriculum, courses of study and course content, degrees and degree requirements, tenure standards and selections, and faculty evaluation procedures.

In finding timekeepers not to be managerial employees, the Board stated that an employee does not acquire managerial status by making some decisions or exercising some judgment "within established limits set by higher management." A conclusion is arrived at in each case based on the degree of discretion and authority exercised by the disputed employee. *Holly Sugar Corp*., supra; see also *Sampson Steel & Supply*, 289 NLRB 481 (1988); *Central Maine Power Co*., 151 NLRB 42, 45 (1965); and *American Radiator & Sanitary Corp*., supra. See also *Case Corp*., 304 NLRB 939 (1991), in which the Board found industrial engineers are not managerial even though they participate in grievance handling and bargaining. In neither case did the record show that they had extensive authority to make employer policy. Accord: *George L. Mee Memorial Hospital*, 348 NLRB 327 (2006) (utilization review nurse whose duty is to insure that hospital provides care consistent with established utilization guidelines is not managerial).

In addition see *Bakersfield Californian*, 316 NLRB 1211 (1995) (certain newspaper duties not managerial); and *S. S. Joachim & Anne Residence*, 314 NLRB 1191 (1994) (decision of social workers not those of managers).

The definition of a managerial employee, as developed by the Board, has been urged as to union organizers and field representatives. The Board has held that the fact that such organizers do not work under close supervision but exercise wide discretion, represent their employer (which is the union) to the public, pledge their employer's credit to a limited extent, and sign agreements on its behalf is not determinative of managerial status as they fail to meet the Board's view that managerial employees are those who formulate, determine, and effectuate the employer's policies. *American Federation of Labor*, 120 NLRB 969 (1958); and *Textile Workers UTWA*, 138 NLRB 269 fn. 2 (1962). Compare *Retail Clerks Local 428*, 163 NLRB 431 (1967); and *Retail Clerks Local 880*, 153 NLRB 255, 258 (1965).

19-210 Stock Ownershp

Employee shareholders who are able to influence management policy by selecting members of the board of directors are managerial. See *Sida of Hawaii, Inc*., 191 NLRB 194 (1971); and *Florence Volunteer Fire Department*, 265 NLRB 955 (1982) (firefighter members of nonprofit fire company). See also *Science Applications Corp*., 309 NLRB 373 (1992). Compare *Upper Great Lakes Pilots*, 311 NLRB 131, 132 (1993), "stock ownership alone does not deprive an employee from the protection of the Act" and *Centurion Auto Transport*, 329 NLRB 394 (1999). See also *Citywide Corporate Transportation, Inc.*, 338 NLRB 444 (2002).

19-300 Relatives of Management

177-2484-3700

362-6798

460-5033-2550-2900 et seq.

The statutory definition of an employee in Section 2(3) of the Act specifically excludes "any individual employed by his parent or spouse." This definition is clear on its face and one would not anticipate a need for further amplification. However, in view of developments in the cases in relation to this category, special consideration here is necessary.

In *Scandia*, 167 NLRB 623 (1967), the Board announced a policy of excluding from bargaining units the children and spouses of individuals who have substantial stock interests in closely held corporations. See *Campbell-Harris Electric*, 263 NLRB 1143 (1983), and *Ideal Elevator Corp*., 295 NLRB 347 (1989). Clearly, the child of a sole shareholder is excluded. *Bridgeton Transit*, 123 NLRB 1196 (1959). So also are children of majority shareholders. *Cerni Motor Sales*, 201 NLRB 918 (1973).

When the ownership is less than 50 percent, the Board applies a different test for determining eligibility. In *NLRB v. Action Automotive*, 469 U.S. 490 (1985), the Supreme Court affirmed the Board's practice of excluding from a bargaining unit close relatives of the owners of a closely held corporation even in the absence of special job related benefits. The individuals involved in *Action Automotive Inc*., were the wife of the corporate president and one-third owner of the employer and the mother of the three brothers who owned the corporation.

The court also endorsed the Board's policy requiring that eligibility of relatives in a nonclosely held corporation depend on whether or not the employee enjoys "special status."

Thus, although the standard for inclusion in the bargaining unit is community of interest, in cases of relatives of corporate shareholders the inquiry as to community of interest is expanded to include consideration of the amount of stock owned by the relative shareholders, whether the employee is a dependent on the stockholder, and similar considerations. The individual in question may also be excluded if his or her job duties reflect a special relationship. See *Blue Star Ready-Mix Concrete Corp*., 305 NLRB 429 (1991), in which the Board found that the nephew of

one owner and the grandson of the another did not enjoy any special status. Compare *Luce & Son, Inc*., 313 NLRB 1355 (1994), finding special status under different circumstances than those in *Blue Star*, supra. See also *R & D Trucking*, 327 NLRB 531 (1999), and *M. C. Decorating*, 306 NLRB 816 (1992).

The special status test is also applied to determine the eligibility of relatives of nonowner managers, who are not subject to the expanded community-of-interest test. *Cumberland Farms*, 272 NLRB 336 (1984); and *Allen Services Co*., 314 NLRB 1060 (1994). In *Peirce-Phelps, Inc.*, 341 NLRB 585 (2004), a divided Board found no special relationship distinguishing *Novi American Inc.–Atlanta*, 234 NLRB 421 (1978), which found special relationship.

19-400 Office Clerical and Plant Clerical Employees

440-1760-1900 et seq.

440-1760-2400

440-1760-2900

Generally

As a general rule, absent agreement of the parties, office clerical and plant clerical employees are not joined in a single unit. *Kroger Co*., 204 NLRB 1055 (1973); *L. M. Berry & Co*., 198 NLRB 217 (1972). *Fisher Controls Co*., 192 NLRB 514 (1971); *Weyerhaeuser Co*., 173 NLRB 1170 (1969); *Rudolph Wurlitzer Co*., 117 NLRB 6 (1957); *Republic Steel Corp*., 131 NLRB 864 (1961); and *Vulcanized Rubber & Plastics Co*., 129 NLRB 1256 (1961). As noted, an exception is made where there is an agreement of the parties. See *Eljer Co*., 108 NLRB 1417, 1423–1424 (1954); and *Otis Hospital*, 219 NLRB 164, 166 (1975). For the same reason, plant clerical employees are excluded from a unit of office clerical employees where any party objects to their inclusion. *Mosler Safe Co*., 188 NLRB 650 (1971); *Copeland Refrigeration Corp*., 118 NLRB 1364 (1957).

Under normal circumstances, a distinct difference exists between office employees and plant clerical employees. See, e.g., *Dunham's Athleisure Corp*., 311 NLRB 175 (1993).

19-410 Definitions

401-7500

440-1760-1900

440-1760-2400

As the Board has stated, "the distinction between office clericals and plant clericals is not always clear." *Hamilton Halter Co*., 270 NLRB 331 (1984). The test generally is whether the employees' duties are related to the production process (plant clericals) or related to general office operations (office clericals). The distinction is grounded in community-of-interest concepts. *Cook Composites & Polymers Co*., 313 NLRB 1105 (1994).

Typical plant clerical duties are timecard collection, transcription of sales orders to forms to facilitate production, maintenance of inventories, and ordering supplies. *Kroger Co.*, 342 NLRB 202 (2004); *Caesars Tahoe*, 337 NLRB 1096 (2002); and *Hamilton Halter*, supra. In contrast, typical office clerical duties are billing, payroll, phone, and mail. *Dunham's Athleisure Corp*., supra; *Mitchellace, Inc*., 314 NLRB 536 (1994); *Virginia Mfg. Co*., 311 NLRB 992 (1993); and *PECO Energy Co*., 322 NLRB 1074 (1997) (public utility P & M unit).

Plant clerical employees are customarily included in a production and maintenance unit because they generally share a community of interest with the employees in the plantwide unit. *Kroger Co.*, supra; *Caesars Tahoe*, supra; *Raytec Co*., 228 NLRB 646 (1977); and *Armour & Co*., 119 NLRB 623 (1958). *Brown & Root, Inc*., 314 NLRB 19 (1994). For this reason, in *Fisher Controls Co*., supra, where the plant clericals were sought to be represented by a union recognized as the representative of the production and maintenance employees, the plant clericals

were afforded a self-determination election to indicate whether or not they wished to become part of the existing unit. See also *Columbia Textile Services*, 293 NLRB 1034, 1037 (1989). Compare *Avecor, Inc*., 309 NLRB 59 (1992).

Office clerical employees on the other hand, although they may be under the same supervision as plant clerical employees and share the same mode of compensation, are nonetheless excluded from the production and maintenance unit while the plant clerical employees are included. *Lilliston Implement Co*., 121 NLRB 868, 870 (1958); and *PECO*, supra.

Although the Board has recognized that plant clericals may, in some circumstances, be separately represented in a unit apart from all other categories of employees, it has declined to establish such a unit, in the absence of agreement by the parties, in which plant clericals are sought to be represented by a union which enjoys recognized status as the representative of work-related and commonly supervised production employees. This was the factual situation in *Weyerhaeuser Co*., supra. See also *Swift & Co*., 119 NLRB 1556 (1958); *Robbins & Myers, Inc*., 144 NLRB 295, 299 (1963); *Armstrong Rubber Co*., 144 NLRB 1115, 1119 (1963); and *Swift & Co*., 131 NLRB 1143 (1961). In these special circumstances, observed the Board, it "has made a practical judgment that the interests of all concerned would best be served by adding related plant clericals to the established unit of production and maintenance employees if they desire to be represented by the same union."

Under Board policy, office clerical employees are customarily excluded from the production and maintenance unit. *Hygeia Coca-Cola Bottling Co*., 192 NLRB 1127, 1129 (1971); and *Westinghouse Electric Corp*., 118 NLRB 1043 (1957).

Similarly, the Board excludes office clerical employees from a residual unit of production and maintenance employees (*California Steel & Supply Corp*., 104 NLRB 787, 789 (1953)), and from a previously unrepresented fringe group of production and maintenance employees which a labor organization seeks to add to an existing production and maintenance unit (*Minneapolis-Honeywell Regulator Co*., 115 NLRB 344, 348 (1956). Thus, in *Swift & Co*., 166 NLRB 89 (1967), the Board found appropriate a separate unit of office clericals, refusing to include them in a unit of currently unrepresented production employees working in the stockyards. But see *Montgomery Ward & Co*., 259 NLRB 280 fn. 4 (1981), in which the Board suggests, in the absence of a request for review on that issue, that it would approve inclusion of office clericals in a residual warehouse unit. In *United Parcel Service*, 258 NLRB 223 (1981), the Board designated separate units of office clericals and operating clericals.

This policy holds even when a prior bargaining history on an overall basis exists. *Westinghouse Electric Corp*., supra. However, when, in addition to a long bargaining history for all employees in a single unit, there is also a high degree of functional integration and identity in terms and conditions of employment, resulting in a community of interest of all employees, a historical unit which includes office clerical employees is appropriate. *Townley Metal & Hardware Co*., 151 NLRB 706, 708–709 (1965).

As with production and maintenance units, the Board stressed lack of community of interest as the basis for including office clericals from a sales unit, despite the fact that the clericals were engaged in daily work tasks which necessarily brought them into contact with the sales employees and which were related to the sales campaign. *L. M. Berry & Co*., supra. See also *Fireman's Fund Insurance Co*., 173 NLRB 982 (1969).

19-420 Clerical Units Generally

As is invariably the rule in unit matters, a unit limited to a segment of the office clerical employees or of the plant clerical employees is inappropriate. *Aurora Fast Freight*, 324 NLRB 20 (1997); *Olin Mathieson Chemical Corp*., 117 NLRB 665 (1957); *Beech Aircraft Corp*., 170 NLRB 1595 (1968); and *California Blue Shield*, 178 NLRB 716 (1969).

19-430 Clericals—Warehouse Units

One difficult area concerns the placement of clericals in warehouse-type integrated operations. See, e.g., *Esco Corp*., 298 NLRB 837 (1990); cf. *Scholastic Magazines*, 192 NLRB 461 (1971); *Jacob Ash Co*., 224 NLRB 74 (1976); and *Gustave Fischer, Inc*., 256 NLRB 1069 (1981), order takers and others involved in the ordering process have proved particularly troublesome. *ABS Corp*., 299 NLRB 516 (1990); *Hamilton Halter Co*., 270 NLRB 331 (1984); *Cincinnati Bronze*, 286 NLRB 39 (1987); and *John N. Hansen Co*., 293 NLRB 63 (1989).

Customarily, separate units of office clerical employees alone and plant clerical employees alone are appropriate. *Carling Brewing Co*., 126 NLRB 347 (1960). But see Montgomery *Ward & Co*., supra at fn. 4, in which office and plant clericals were included in a residual warehouse unit. See also *Fleming Foods*, 313 NLRB 948 (1994), involving the breadth of a warehouse clerical unit and a finding this petitioned unit was residual. In *United Parcel Service*, 258 NLRB 223 (1981), the Board designated separate units of office clericals and operating clericals. But see *Kalustyans*, 332 NLRB 843 (2000), where office workers were included in a unit of shipping clerks.

19-440 Self-Determination Elections—Clericals

When there was only one office clerical employee in an employer's industrial engineering department and the Board found that this employee did not have a sufficient community of interest with the industrial engineers to be included with them in a departmental unit, the Board gave the employee the opportunity to vote for representation by the petitioner as an indication that she wished to be included in the plantwide office clerical unit currently represented by the petitioner. Otherwise, the employee would remain unrepresented. *Chrysler Corp*., 194 NLRB 183 (1972).

Where electronic data processors were found to constitute a homogeneous and identifiable group, the Board called for a self-determination election because they might constitute a separate appropriate unit, as petitioner requested or, because of their functional integration, they might appropriately be part of the intervenor's unit of office and clerical employees. *Safeway Stores*, 174 NLRB 1274 (1969).

For full discussion of self-determination elections, see chapter 21.

19-450 Multiplant Clerical Units

440-3300

In a case which presented a clerical unit issue in a multiplant situation, the Board found a unit of office clerical employees at the employer's three branches an appropriate unit in the following circumstances: The hiring and firing of clericals for all three locations was handled through a central personnel department; there were common policies at the three locations with respect to wages, hours, and working conditions; there was frequent interchange of personnel among the three locations, both temporary and permanent; and supervision was structured primarily along departmental rather than plant lines, so that an employee working at one location might be supervised from another location. *Dean Witter & Co*., 189 NLRB 785 (1971).

See also chapter 13.

19-460 Business Office Clerical—Health Care

470-6700

Business office clericals are an appropriate unit in acute care hospitals under the Board's Health Care Unit Rule. 284 NLRB 1515, 1562.

For a discussion of business office clericals, see *Charter Hospital of Orlando South*, 313 NLRB 951 (1994). See also *Lincoln Park Nursing Home*, 318 NLRB 1160 (1995), including nursing department secretaries and payroll clerks in a business office unit. Note that this case also

rejected the contention that these nursing department secretaries are confidential employees and that receptionists are business office clericals.

See also section 15-170, Health Care Institutions.

19-500 Technical Employees

177-2401-2500

440-1760-3400

440-1760-3800 et seq.

470-3300

Technical employees are defined as employees who do not meet the strict requirements of the term "professional employees" as defined in the Act but whose work is of a technical nature, involving the use of independent judgment and requiring the exercise of specialized training usually acquired in colleges or technical schools, or through special courses. *Folger Coffee Co*., 250 NLRB 1 (1980); *Augusta Chemical Co*., 124 NLRB 1021 (1959); *Dayton Aviation Radio & Equipment Corp*., 124 NLRB 306 (1959); *Container Corp. of America*, 121 NLRB 249, 251 (1958); *Design Service Co*., 148 NLRB 1050 (1964); *Avco Corp*., 173 NLRB 1199 (1969); and *Fisher Controls Co*., 192 NLRB 514 (1971). See also *Audiovox Communications Corp*., 323 NLRB 647 (1997).

Initially, the policy had been automatic exclusion of technical employees from a production and maintenance unit if either party objected to their inclusion. See, for example, *Litton Industries*, 125 NLRB 722, 724–725 (1960). However, in *Sheffield Corp*., 134 NLRB 1101, 1103–1104 (1962), this per se rule was eliminated. The Board concluded that automatically excluding all technical employees from production and maintenance units whenever their unit placement was in issue was not a salutary way of achieving the purposes of the Act. "To do so is to give primacy in unit placement to the parties' disagreement rather than to the overriding consideration of the community of interests." For a discussion of the history of Board policy on "technical employee" in the research and development industry, see *Aerospace Corp*., 331 NLRB 561 (2000) (unit of maintenance employees at research and development facility held not to warrant facilitywide unit).

The Board announced that henceforth a "pragmatic judgment" would be made in each case based on, among other things, the following considerations: (a) bargaining history, (b) common supervision, (c) similarity of skills and job functions, (d) contracts or interchange with other employees, (e) type of industry, (f) location of employees within the plant, (g) the desires of the parties, and (h) whether any union seeks to represent the technical employees separately. See also *Virginia Mfg. Co*., 311 NLRB 992 (1993).

The Sheffield policy was applied where the petitioner did not dispute the technical status of "planners" and "estimators" but adduced no evidence to support the claim that these technical employees shared a special community of interest with the plant clerical employees. The Board found no warrant for combining them in the same voting group with such employees. *Weyerhaeuser Co*., supra. See also *Meramec Mining Co*., 134 NLRB 1675 (1962); *Hazelton Laboratories*, 136 NLRB 1609 (1962); and *Robertshaw-Fulton Controls Co*., 137 NLRB 85 (1962). Compare *Livingstone College*, 290 NLRB 304, 306 (1988), in which the petitioner sought an all nonprofessional unit including technicals.

"Systems analysts" and "programmers" were included in a unit comprised mainly of office clericals because most of the employees sought to be represented were data processors, the employer's operations were highly integrated, equipment was shared by employees with different classifications, and there was frequent contact among all data processing employees. The demonstrated close community of interest between the disputed systems analysts and programmers and the other data processing employees and the absence of a labor organization seeking to represent the disputed employees separately outweighed the significance of the

geographical separation of the systems analysts and programmers from the other employees. *Computer Systems*, 204 NLRB 255 (1973). The same technical categories (systems analysts and programmers) were in issue in *Ohio Casualty Insurance Co.*, 175 NLRB 860 (1969). They were excluded from a requested unit consisting mostly of office clerical employees because of significant differences between them and the latter in regard to "job functions, responsibilities, use of initiative, and independent judgment, immediate supervision, wages, and hours." See also *Postal Service*, 210 NLRB 477 (1974); and *Lundy Packing Co.*, 314 NLRB 1042 (1994), involving timestudy employees/industrial engineers.

When community of interest exists among all the employer's technical employees, a unit including some, but not all, of such employees is inappropriate. *Whitehead & Kales Co.*, 196 NLRB 111 (1972); *General Electric Co.*, 173 NLRB 399 (1969); *Boeing Co.*, 169 NLRB 916 (1968); *Bendix Corp.*, 150 NLRB 718, 720–721 (1965); *Allis-Chalmers Mfg. Co.*, 117 NLRB 749 (1957); and *Solar Aircraft Co.*, 116 NLRB 200 (1957). See also *Pratt & Whitney*, 327 NLRB 1213 (1999). But if, in the more unusual case, there are several independent, identifiable groups of technical employees, separate units may be appropriate. *Federal Electric Corp.*, 157 NLRB 1130 (1966). In that case, the petitioner's unit request, which the Board granted, limited the technical employees in the proposed unit to those working aboard ships as distinguished from those who were land based.

A unit of technical, plant clerical, and office clerical employees will be found appropriate if no party objects. *Otis Elevator Co.*, 116 NLRB 262 (1957). But even where several factors support such a unit finding, a unit of technical employees alone is found where these employees have a community of interest in terms and conditions of employment separate from the other employees. *Worthington Corp.*, 155 NLRB 59 (1965). See also *American Motors Corp.*, 206 NLRB 287 (1973); and *Fisher Controls Co.*, supra. See also *Siemens Corp.*, 224 NLRB 1579 (1976), in which the Board permitted a self-determination election in which office clerical employees could vote for inclusion in a technical unit.

19-510 Technical Employees—Health Care

470-3300

Technical employees are an appropriate unit in acute care hospitals under the Rule, 284 NLRB 1515, 1553. For a discussion of technical units under the health care Rule see *Park Manor Care Center*, 305 NLRB 872 (1991); *Meriter Hospital*, 306 NLRB 598 (1992); and *Faribault Clinic*, 308 NLRB 131 (1992). See also *San Juan Regional Medical Center*, 307 NLRB 117 (1992), in which a divided panel found biomedical technicians not to be technical employees. Accord: *Mercy Health Services North*, 311 NLRB 1091 (1993).

In *Hallandale Rehabilitation Center*, 313 NLRB 835 (1994), the Board found a diet technician to be a technical employee. Citing *Sheffield*, supra, for the need to make "pragmatic judgments," the Board included that technician is a unit that included, inter alia, all dietary employees.

In *Virtua Health, Inc.*, 344 NLRB 604 (2005), the Board found that a unit of the employer's paramedics was too limited and that the paramedics should be included in a technical unit. The employer was a health care institution and the employer contended that it was an acute care facility and, thus, within the Board's Health Care Unit Rule. The Board found it unnecessary to decide coverage under the Rule because even under the broader standard of *Park Manor Care Center*, 305 NLRB 872 (1991), the community-of-interest test, a paramedic unit was not appropriate.

For a discussion of a technical employees' unit in a psychiatric hospital, see *Brattleboro Retreat*, 310 NLRB 615 (1993).

Whether or not technical employees will be included in a nontechnical unit depends on the facts of the case. In *Hillhaven Convalescent Center*, 318 NLRB 1017 (1995), the Board excluded

technicals from an overall nonprofessional unit distinguishing a contrary holding in *Brattleboro Retreat*, supra. Accord: *Lincoln Park Nursing Home*, supra.

19-600 Quality Control Employees

401-7500

440-1760-0500 et seq.

Quality control employees are generally included in a production and maintenance unit based on traditional community-of-interest standards. *Blue Grass Industries*, 287 NLRB 274 (1987). See also *Lundy Packing Co*., supra, where a divided Board excluded those employees from a production and maintenance unit.