

**OFFICE OF COMPLIANCE**  
**LA 200, John Adams Building, 110 Second Street, S.E.**  
**Washington, D.C. 20540-1999**

<b>U.S. Capitol Police Board,</b>	)	
<b>Employing Office,</b>	)	
	)	
<b>and</b>	)	
	)	<b>Case No. 96-LM-1</b>
<b>Teamsters Local Union No. 246, International</b>	)	
<b>Brotherhood of Teamsters,</b>	)	
<b>Petitioner,</b>	)	
	)	
<b>and</b>	)	
	)	
<b>Fraternal Order of Police, D.C. Lodge No. 1, U.S.)</b>	)	
<b>Capitol Police Labor Committee,</b>	)	
<b>Intervenor,</b>	)	
	)	
<b>and</b>	)	
	)	
<b>International Union of Police Associations,</b>	)	
<b>AFL-CIO, and its Local 1776,</b>	)	
<b>Intervenor.</b>	)	

**Before the Board of Directors: Glen D. Nager, Chair; James N. Adler; Jerry M. Hunter; Lawrence Z. Lorber; Virginia A. Seitz, Members.**

**DECISION AND DIRECTION OF ELECTION**

**I.**

Teamsters Local Union No. 246, International Brotherhood of Teamsters (“Petitioner”), has duly filed with the Board a petition to represent employees of the United States Capitol Police Board (the “Employing Office”). Two other unions, the Fraternal Order of Police, D.C. Lodge No.1, U.S. Capitol Police Labor Committee (“FOP”), and the International Union of Police Associations, AFL-CIO, and its Local 1776 (“IUPA”), intervened in the case. In response to the petition, the Board of Directors of the Office of Compliance (the “Board”), acting pursuant to its authorities under Chapter 71 of title 5 of the United States Code, as applied by section 220(c)(1) of the Congressional Accountability Act of 1995 (the “CAA”), 2 U.S.C. § 1351, and the Board’s regulations, has investigated the petition and, finding that there was a question concerning

representation, has held a pre-election investigatory hearing to develop a record upon which to make a decision as to disputed representation issues. The Employing Office has also raised several collateral issues relating to the conduct of the hearing. Some of those issues have been decided previously by order. The Board now disposes of the rest.

## II.

### A. Appropriate Unit

The parties agree that a unit consisting of all police officers, defined as sworn members of the United States Capitol Police who are authorized to carry a gun and to make arrests, except those employees excluded by statute, is appropriate. Record at I:46-47; II:235-240; III:7-8. (All Record references are to the Official Transcript of the Pre-Election Investigatory Hearing, Volumes I-V, referring to the transcript of the hearing conducted on November 12 and 13 and December 2, 3, and 4, 1996, respectively.) However, the parties have different views concerning the point at which probationary police officers, during their probationary period, have a clear and identifiable community of interest with other police officers and are therefore appropriately included in the bargaining unit, as well as whether a number of employees meet the statutory criteria for exclusion.

The parties agree that, once probationary employees complete their approximately twenty weeks of processing and classroom training, and graduate as sworn police officers, they have the same police powers as other police officers, and should be included in the bargaining unit. *See* Employing Office Post-Hearing Brief at 53-54; Petitioner Post-Hearing Brief at 14; FOP Post-Hearing Brief at 8, 12; IUPA Post-Hearing Brief at 5-6, 8. However, Petitioner contends that all probationary employees are properly included in the bargaining unit from their initial date of employment. FOP agrees, but argues in the alternative that probationary employees are appropriately included in the unit when they graduate from their academic training and are sworn in as officers of the United States Capitol Police. IUPA argues for inclusion from the date that the probationary officers are sworn, but takes no position as to the inclusion in the unit of probationary employees before their swearing-in ceremony. In its brief, the Employing Office argues that, until probationary employees are sworn in as U.S. Capitol Police Officers, they do not fall within the agreed-upon definition of the bargaining unit, do not share a community of interest with other police officers, and do not have a reasonable expectation of continued employment; further, the Employing Office notes that, even after they are sworn, probationary employees are evaluated more frequently than non-probationary employees and may be dismissed without being given a due process hearing during their probationary year. Therefore, the Board must determine whether the agreed-upon unit of all sworn police officers is appropriate; whether probationary employees, before they are sworn, share a community of interest with that unit; and whether, once they are sworn, probationary employees have a clear and identifiable community of interest with other sworn officers within the meaning of the statute such that they are appropriately included in the bargaining unit.

Under section 7112(a)(1) of title 5, as applied by section 220(c)(1) of the CAA, the Board “shall determine the appropriateness of any unit.” A unit is appropriate only if it “will ensure a clear and identifiable community of interest among the employees in the unit and will promote effective dealings with and efficiency of the operations of the agency involved.” *Id* All three statutory criteria must be met. *See Red River Army Depot Texarkana, Tex.*, 17 F.L.R.A. 216, 218 (1985) (failure to satisfy any one of the three criteria must result in a finding that the unit sought is inappropriate); *Dep’t of Health and Human Services Pub. Health Serv. Food and Drug Admin. Bureau of Drugs*, 11 F.L.R.A. 687, 688 (1983).

The determination of shared community of interest is made on a case-by-case basis. *See U.S. Dep’t of the Interior Nat’l Park Serv. Rocky Mountain Nat’l Park Estes Park, Colo.*, 48 F.L.R.A. 1404 (1994). While no single factor is dispositive, where employees are subject to the same management structure, the same personnel policies, the same pay structure, and receive the same benefits, there is ordinarily a clear and identifiable community of interest. *See U.S. Dep’t of the Air Force Air Force Materiel Command Wright-Patterson Air Force Base*, 47 F.L.R.A. 602, 610-11(1993) (community of interest found where employees shared common mission and organizational structure, performed similar duties and functions, had common conditions of employment, and were subject to same labor relations policies administered by a single personnel office); *Nat’l Treasury Employees Union Chapter 243*, 39 F.L.R.A. 96 (1991).

Generally, once a clear and identifiable community of interest is found, and there is no evidence that the unit will hinder effective dealings with and efficiency of the operations of the agency, the bargaining unit will ordinarily be found to satisfy the latter two statutory criteria as well. *See, e.g., U.S. Dep’t of the Air Force Air Force Materiel Command Wright-Patterson Air Force Base*, 47 F.L.R.A. 602, 610-11(1993). Further, the bargaining unit will generally be found to promote effective dealings and efficiency of operations within the meaning of the statute, if the described unit is rationally related to the operations and organizational structure of the agency. *See Defense Logistics Agency, Defense Contract Management Command, Defense Contract Management District, North Central, Defense Plant Representative Office-- Thiokol Brigham City, Utah*, 41 F.L.R.A. 316, 330 (1991).

It is well established that probationary employees may be included in bargaining units along with non-probationary employees, even though they do not have the same procedural protections against termination as other employees in the unit. *See U.S. Dep’t of Hous. and Urban Dev.*, 41 F.L.R.A. 1226, 1237-38 (1991) (*citing Dep’t of the Navy, Navy Exchange, Mavport, Fla.*, 1 A/SLMR 143 (1971)). Where probationary employees have a clear and identifiable community of interest with other permanent employees their inclusion in a bargaining unit is appropriate. *See Dep’t of the Navy, Navy Exchange, Mavport, Fla., supra*.

All sworn police officers, including sworn probationary employees, are subject to the same chain of command and general orders, have similar duties and work assignments, work the same hours, are bound by the same personnel and other policies, and have the same health, pension, and other benefits. *See, e.g. Record at II:385, 391-99, 406-07*. In addition, there is no difference between the authorities of a sworn probationary officer and those of other sworn police officers. When a probationary employee graduates from academic training and is duly sworn in as a U.S.

Capitol Police officer, “that employee on that particular day is, in fact, a police officer and has the authority to make arrests, carry firearms, and all that sort of thing.” Record at II:398-99. These commonalities demonstrate a clear community of interest with other sworn police officers.

Moreover, the differences to which the Employing Office points between sworn probationary officers and sworn non-probationary officers do not affect this shared community of interest. Although probationary officers are evaluated more frequently than non-probationary officers, these evaluations use the same forms and are based on the same criteria as those of other sworn officers. Record at II:402-403. Although probationary officers may be dismissed without a statement of reasons or any right of appeal, in practice probationary employees are only dismissed for good cause like other non-probationary officers, Record at II:373-374, 396, and the vast majority make satisfactory progress through the probationary period. Record II:405. Therefore, all sworn officers, probationary and others, share a clear and identifiable community of interest.

In contrast, when probationary employees are students going through their approximately twenty weeks of classroom training, they do not have a community of interest with other police officers. At that point, their duties are solely academic; they do not participate in the regular police work of the Capitol Police; and they do not exercise the authorities of police officers. Record at II:357-70.

In sum, based on the evidence presented and the pertinent legal authorities, the Board finds that a unit consisting of all sworn police officers with the authority to carry a gun and to make arrests is an appropriate unit for exclusive recognition within the meaning of the statute. The Board further finds that it is appropriate to include probationary officers in the unit only upon their swearing-in, because it is only at that point that they have the same community of interest as other police officers. In light of the strong community of interest, and in the absence of any suggestion in the record that this unit will hinder effective dealings with and efficiency of the operations of the agency, the Board concludes that the bargaining unit satisfies the three statutory criteria.

## **B. Statutory Exclusions**

### **1. Sergeants and Special Technicians**

Although none of the parties now seeks to include sergeants or special technicians in the unit, there remains a fundamental disagreement as to whether sergeants or special technicians are supervisors, and are therefore statutorily excluded from the unit under section 7112(b)(1) of title 5, as applied by the CAA. The Employing Office established, without objection, that special technicians, a category that is being phased out, have the same supervisory responsibilities as sergeants and are their rank equivalents. Record at III:36-38. The Board’s conclusions as to

sergeants therefore also apply to the four special technicians. Thus, when the discussion refers to sergeants, it should be understood to include special technicians as well.

The Employing Office maintains that sergeants are statutory supervisors and, therefore, must be excluded from the unit. *See* Employing Office Post-Hearing Brief at 36; Record at V:94. The FOP, although no longer seeking to include sergeants in this unit, believes that sergeants are not supervisors within the meaning of the statute. Record at V:94. Neither Petitioner nor IUPA seeks to include sergeants in the unit, or takes a position on the issue of whether or not they are supervisors. *Id* at 94-95. However, sergeants are the incumbents of a number of positions for which the Employing Office seeks a statutory exclusion under section 7112(b)(3), as applied by the CAA. In those cases, the Employing Office relies as well on the theory that the incumbent sergeants are excluded from the bargaining unit because they are supervisors. The Board therefore reaches the issue of whether sergeants are supervisors and finds that sergeants are supervisors within the meaning of the statute.

Section 7112(b)(1) of title 5, as applied by the CAA, provides that a bargaining unit is not appropriate if it includes a supervisor. Section 7103(a)(10) defines a “supervisor” as:

an individual employed by an agency having authority in the interest of the agency to hire, direct, assign, promote, reward, transfer, furlough, layoff, recall, suspend, discipline, or remove employees, to adjust their grievances, or to effectively recommend such action, if the exercise of the authority is not merely routine or clerical in nature but requires the consistent exercise of independent judgment  
.....

An employee need only exercise any one of the supervisory criteria set forth in the statute to be found to be a supervisor. *See e.g., U.S. Dep’t of the Navy, Portsmouth Naval Shipyard, Portsmouth, N.H.*, 38 F.L.R.A. 764, 766, 768 (1990); *Veterans Admin. Medical Ctr., Allen Park, Mich.*, 35 F.L.R.A. 1206, 1211(1990). Further, an employee may be found to be a supervisor when the employee effectively “recommends subordinates” for one of the actions set forth in 5 U.S.C. § 7103(a)(10). *See, e.g., Portsmouth Naval Shipyard, supra*. Finally, an employee who consistently exercises independent judgment in connection with the exercise or recommendation of any one of the supervisory criteria may be found to be a supervisor even if another individual also exercises or makes recommendations concerning the same statutory criterion. *See, e.g., Veterans Admin. Medical Ctr., supra*.

The record amply supports the conclusion that sergeants are supervisors within the meaning of 5 U.S.C. § 7103(a)(10), as applied by the CAA. Sergeants of the Capitol Police consistently use independent judgment and discretion in evaluating, assigning, disciplining, recommending for promotion, demotion, and dismissal, scheduling, adjusting grievances, suspending, and participating in the hiring and promotion process of Capitol Police Officers. *See, e.g., Record at III:42-99*.

For example, sergeants are the first line supervisors for resolving a number of employee grievances. An employee grievance will only go up the chain of command if a sergeant is unable to resolve it. Record at II:343-44. Similarly, in the area of discipline, sergeants have a wide degree of latitude and discretion. They may issue anything from a verbal reprimand to a CP-535, which is a serious personnel charge, depending on how severe the sergeant deems the infraction. Any disciplinary action above a verbal reprimand becomes part of the employee's personnel record. Record at II:320-328, II:333; III:52-64. The sergeant conducts the investigations and interviews witnesses, and the sergeant's investigatory findings are generally not revisited by the sergeant's superiors. Record at II:331-33; III:31-32, 59-61. The sergeant's recommendations as to level of discipline are only rarely not followed by his or her superiors. Record at III:94-95, 118-19. Sergeants similarly exercise independent judgment in scheduling duty and granting leave. They administer employee evaluations that can be the basis for transfer and promotion decisions as well.

In view of these indicia of supervisory status, the Board finds that sergeants are supervisors within the meaning of 5 U.S.C. § 7103(a)(10), as applied by the CAA, and must, as a statutory matter, be excluded from the unit under 5 U.S.C. § 7112(b)(1), as applied by the CAA.

## **2. Employees of the Recruiting Section of the Personnel Division**

The Employing Office contends that six employees -- five police officers (investigators) and one sergeant -- in the Recruiting Section of the Personnel Division should be excluded from the bargaining unit because they are "engaged in personnel work in other than a purely clerical capacity," under 5 U.S.C. § 7112(b)(3), as applied by section 220(c)(1) of the CAA. The sergeant is excluded from the bargaining unit on the basis that he is a supervisor within the meaning of 5 U.S.C. § 7112(b)(1), as applied by the CAA, but the status of the five other officers remains in dispute. The Employing Office contends that, because these employees recruit applicants for sworn and civilian positions, conduct background investigations, and make hiring recommendations to management, their work has a "direct impact on employment decisions made by the Department." *See* Employing Office Post-Hearing Brief at 50-51. The Petitioner and Intervenors disagree and argue that the recruit investigators do not perform duties requiring exclusion from the bargaining unit. *See, e.g.* IUPA Post-Hearing Brief at 9-10.

Employees "engaged in personnel work in other than a purely clerical capacity" must be excluded from bargaining units under 5 U.S.C. 7112(b)(3), as applied by the CAA, because employees who perform work "relating directly to the personnel operations of their own employing agency would be faced with a conflict of interest between their jobs and union representation if included in the unit. . . ." *See Office of Personnel Management*, 5 F.L.R.A. 238, 246 (1981). Recruit investigators who regularly exercise independent discretion and judgment, which necessarily affects hiring decisions and other personnel matters, must be excluded from the unit. *See, e.g., Dep't of Health and Human Services, Region X, Seattle, Wash.*, 9 F.L.R.A. 518, 524-25 (1982) (employee who worked with supervisors and management officials in recruitment and selection process in which he helped screen applicants and made effective recommendations found to be directly involved in performing personnel work that may affect unit within meaning of §7112(b)(3)); *see also, Penn. Air Nat'l Guard*, 13 F.L.R.A. 538, 540 (1983) (employee who assisted in recruitment by traveling to meet with individuals with

Hispanic backgrounds to interest them in joining technician program was engaged in personnel work in other than purely clerical manner).

The record demonstrates that all of the recruit investigators, including the polygraphers, conduct background investigations of applicants for employment with the Capitol Police, and use independent discretion to make determinative judgments as to the depth necessary for their investigations. Record at IV:7-11, 48-50. Upon the discovery of negative information, they may recommend termination of the investigation prior to its completion, which usually results in an applicant not receiving an offer of employment. *Id.* Such recommendations are infrequently overturned. *Id.* at 12. In addition, the investigator who administers polygraph tests performs an evaluation of the polygraphs to determine the validity of information provided to the Capitol Police. *Id.* at 22-23, 48-50. Such evaluations influence the decision to investigate certain areas further, and potentially may make an investigator stop an investigation altogether. *Id.* at 22-23. Because the recruit investigators independently determine how to conduct their background investigations, evaluate the results, and effectively recommend that some investigations be terminated prior to completion, the Board finds that the officers who function as recruit investigators are engaged in internal personnel work within the meaning of the statute and are therefore excluded from the unit.

### **3. Officer in the Vehicle Maintenance Section of the Property Management Division**

The parties also dispute the status of Officer Mutter, an officer in the vehicle maintenance section of the Property Management Division. The Employing Office contends that Officer Mutter assigns work duties and exercises other supervisory responsibilities in areas including discipline, grievances, and performance recommendations including position upgrades and awards. The Employing Office contends that he should therefore be excluded from the unit because he is a supervisor. FOP contends that there is no evidence on the record to support the Employing Office's contention that Officer Mutter consistently exercises independent judgment with regard to any of the indicia of supervisory authority. *See* FOP Post-Hearing Brief at 14-15.

As noted above, a “supervisor” within the meaning of section 7103(a)(10) is an employee “having authority in the interest of the agency to hire, direct, assign, promote, reward, transfer, furlough, layoff, recall, suspend, discipline, or remove employees, to adjust their grievances, or to effectively recommend such action, if the exercise of such authority is not merely routine or clerical in nature but requires the consistent exercise of independent judgment.” To satisfy this definition, it is not enough that the employee have the authority to take or effectively to recommend any of the listed actions; the employee must also be found to “exercise” such authority in a manner that “requires the consistent exercise of independent judgment.” *See Veterans Admin. Medical Ctr., Allen Park, Mich.*, 34 F.L.R.A. 423, 426 (1990) (foreman's assignment of work that is “primarily routine in nature” does not support a finding that the foreman is a supervisor).

From the record, it is apparent that Officer Mutter has no independent supervisory authority. Record at III:214. His responsibilities with regard to the garage mechanics to whom he assigns work are more analogous to those of a lead person than a supervisor. Accordingly, Officer Mutter will not be excluded from the bargaining unit as a supervisor.

#### **4. Employees in the Training Division**

The parties also dispute the status of eight officers below the rank of sergeant and seven sergeants in the Training Division who create and develop internal lesson plans and train employees. *See* Employing Office Post-Hearing Brief at 25. The training personnel at the rank of sergeant are excluded from the unit as supervisors, but the status of the eight officers below the rank of sergeant remains in dispute. The Employing Office contends that these Training Division employees should be excluded from the bargaining unit because they “perform non-routine work and exercise independent judgment and discretion in making recommendations to management on training policies and other personnel actions,” and because the instructors “plainly have an inherent conflict of interest between union affiliation and job responsibilities.” *Id.* at 52. IUPA contends that the employer has not come forth with evidence sufficient to support the exclusion. *See* IUPA Post-Hearing Brief at 10-12.

As discussed above, a position is excluded under section 7112(b)(3) when the character and extent of involvement of the employee in personnel work is more than clerical in nature and the duties of the position in question are performed in a non-routine manner or are of such a nature as to create a conflict of interest between the incumbent's union affiliation and job duties. Trainers are excluded under this standard when they rate the performance of other employees in the unit who participate in the training program, or review, analyze, or make recommendations with regard to individual personnel actions. *See Tick Eradication Program, Veterinary Serv. Animal and Plant Health Inspection Serv. USDA*, 15 F.L.R.A. 250, 252 (1984); *Health and Human Servs., Region X, Seattle, Wash.*, 9 F.L.R.A. 518, 522 (1984). Trainers may also be excluded if they conduct training sessions for supervisors on personnel-related matters, *see Defense Mapping Agency, Hydrographic/Topographic Ctr., Providence Field Office*, 13 F.L.R.A. 407 (1983), or if the training work would create a conflict of interest between their jobs and union representation. *See U.S. Dep't of the Army Headquarters, 101st Airborne Div. Fort Campbell, Ky.*, 36 F.L.R.A. 598, 602 (1990); *Defense Mapping Agency, supra*. However, trainers who have only a superficial involvement in course development, and who have no authority to perform employee evaluations or otherwise make recommendations about individual personnel actions, have been included in bargaining units. *See Tick Eradication Program, supra; Health and Human Servs., supra*.

The Training Division interprets the policies and procedures of the Capitol Police, develops and teaches courses of instruction for police officers from recruits to supervisors, and makes recommendations to management regarding training programs. Record at III:164-167, 203. However, the record does not provide a basis for determining which of the particular officers below the rank of sergeant, if any, exercises substantial discretion in making recommendations regarding training, or which, if any, of these disputed training instructors performs employee evaluations or otherwise makes recommendations about individual personnel actions. Moreover, while the Training Division provides training to supervisors and managers and



includes personnel issues in the training program, Record at III:198, 204, the record affords no basis for concluding which, if any, particular officers in the Training Division below the rank of sergeant has significant responsibilities for such training. Indeed, the record suggests that training sessions on personnel-related and other specialized matters might be taught by the sergeants and lieutenants in the Division or by experts from outside of the Division. Record at III:198-199, 203-204.

The Training Division is diverse -- divided into separate sections for entry-level and in-service training and for firearms training -- and is heavily staffed with supervisory personnel at the rank of sergeant and higher. Record at III:195-196. Statements concluding generally that upper management grants deference to the recommendations of the Training Department on personnel-related subjects do not establish which, if any, of the eight officers below the rank of sergeant, whose status is in dispute, performs these functions such that he or she is engaged in personnel work in other than a purely clerical capacity within the meaning of section 7112(b)(3), as applied by the CAA.

Despite the best efforts of the parties and the pre-election investigative hearing officer to create a complete record, there is insufficient evidence in the record to determine the status of each of the individual non-supervisory officers in the training division. In view of the small number of positions involved relative to the size of the unit, resolution of the status of each at this point is not essential to the election process. *See, e.g., Dep 't of the Air Force HQ, 24th Combat Support Group (TAC), Panama Activity*, 7 F.L.R.A. 499, 508 n. 6 (1981); *Veterans Admin. Medical Ctr., Brooklyn, N.Y.*, 8 F.L.R.A. 289, 295 n. 6 (1982). In the event the parties cannot agree upon the appropriate status of the employees in question in light of the guidance set forth above, the Board's regulations governing the election process allow a challenge to any ballot cast, (§ 2422.24, 142 Cong. Rec. S12062, S12068 (daily ed. Oct. 1, 1996)), and permit a petition for clarification in the event a determination by the Board should subsequently become necessary. *Id.* at § 2422.1, 142 Cong. Rec. at S12065. Under such circumstances, if a labor organization is certified as the exclusive representative of an appropriate unit, the incumbents of the specific classification at issue here will neither be deemed to be included in nor deemed to be excluded from the bargaining unit pending agreement by the parties or determination through a unit clarification proceeding.

##### **5. Officers in the Planning Section of the Planning and Inspection Division**

The Employing Office also contends that the four officers within the Planning Section of the Planning and Inspection Division should be excluded from the unit because their responsibilities as staff writers involve internal personnel work within the meaning of 5 U.S.C. § 7112(b)(3), as applied by section 220(c)(1) of the CAA. *See* Employing Office Post-Hearing Brief at 49-50. The Petitioner and Intervenors disagree. IUPA contends that the writers do not exercise independent judgment and discretion in the exercise of their duties, but merely carry out the instructions of their superiors, and should therefore be included in the unit. *See* IUPA Post-Hearing Brief at 12-13.

Section 7112(b)(3), as applied by the CAA, provides that a unit is not appropriate if it includes employees "engaged in personnel work in other than a purely clerical capacity." An

employee is excluded under section 7112(b)(3) when the character and extent of his or her involvement in personnel work is more than clerical in nature and the duties of the position are performed in a non-routine manner or are of such a nature as to create a conflict of interest between the employee's union affiliation and job duties. *See U.S. Dep't of the Army Headquarters, 101st Airborne Div. Fort Campbell, Ky.*, 36 F.L.R.A. 598, 602 (1990); *Dep 't of the Treasury, Internal Revenue Serv., Washington, D.C. and Internal Revenue Serv., Cincinnati District, Cincinnati, Ohio*, 36 F.L.R.A. 138, 144 (1990). Researchers have been excluded from a bargaining unit under this standard where their functions involved internal personnel work, *e.g.*, where they “draft and analyze personnel programs affecting the bargaining unit and make recommendations to management concerning such programs.” *Health and Human Serv., Region X, Seattle, Wash.*, 9 F.L.R.A. 518, 523. Researchers have also been excluded under this standard where their recommendations “have a significant effect on personnel decisions” or “can have a direct impact on the elimination of jobs, the creation of positions and the overall work environment with regard to the bargaining unit.” *Fort Campbell, supra* at 603-604.

The Planning and Inspection Division is a part of the Administrative Services Bureau, which provides personnel and ancillary administrative support services to the Capitol Police. Record at III:153-154. The planning group is primarily responsible for recommending policy changes on general orders and other procedures and policies. Record at III:154-155, 159-160. The record suggests, however, that the responsibilities of the planning section may include development of personnel policies: Q: “Do they develop police policies, or do they develop personnel policies or both?” A: “Both.” Record at III:204. The deference afforded recommendations of the planning section demonstrates that independent judgment and discretion are exercised at some level below upper management.

However, the testimony describes the work of the planning section in general terms. There is no discussion of how the responsibilities for personnel-related work are allocated among the various personnel in the section. The record is also silent regarding which, if any, of the four writers makes recommendations that have a significant effect on personnel-related decisions or an impact on the work environment.

The testimony therefore does not provide a basis for ascertaining which, if any, of the four writers on the planning staff meets the statutory criteria for exclusion under section 7112(b)(3), as applied by the CAA. Accordingly, as explained in the Board's discussion of officers in the training division, *supra*, resolution of the status of each of the planning officers at this point is not essential to the election process. Under these circumstances, if a labor organization is certified as the exclusive representative of an appropriate unit, the incumbents of the specific classification at issue here will neither be deemed to be included in nor deemed to be excluded from the bargaining unit pending agreement by the parties or determination through a unit clarification proceeding.

## **6. Employees Excluded by Stipulation**

The parties stipulated to the exclusion of the following categories of employees: all officers in the immediate Office of the Chief, all officers in the Office of the General Counsel, all

officers in the Office of Financial Management, all officers in the Public Information Office, all officers in the Internal Affairs Division, the five permanent assistants to the Watch Commanders, and any individual who serves as an assistant to the Assistant Chief or assistant to a Bureau Commander. Accordingly, they are excluded from the unit.

**7. Part-Time Assistants to the Watch Commanders**

Based on the record, it appears that the status of part-time assistants to the Watch Commanders is still in contention. Record at V:96-97. Although the parties agreed by stipulation to exclude the full-time assistants to the Watch Commanders, no decision was reached with respect to the part-time assistants to the Watch Commanders and little or no evidence was presented as to their functions or duties. However, since there is nothing in the record to suggest that when they are functioning in the capacity of assistants to the Watch Commanders, the duties of the part-time assistants differ significantly from those of the full-time assistants, the Board will exclude these employees as supervisors.

**C. Other Issues Raised by the Parties**

**1. Employing Office's Request for a Remand to Develop Record Evidence Supporting Exclusions under Section 7112(b)(6)**

In its post hearing-brief, the Employing Office has asked the Board to remand the case to allow the Employing Office now to develop support in the record for its contention that certain unidentified employees of the Capitol Police should be excluded from the unit because they are employees engaged in “national security activities” within the meaning of section 7112(b)(6) of title 5, as applied by section 220(c)(1) of the CAA. *See* Employing Office Post-Hearing Brief at 29. The Employing Office further requests that such evidence be received in a confidential hearing, and that the Board promulgate procedural rules under section 304 of the CAA to govern the conduct of the requested confidential hearing. *See id.* at 30. The Board has already denied the request for a confidential hearing and for special procedural rules to govern the receipt of such evidence. *See Orders* of December 12, 1996 and February 5, 1997. Moreover, the record reflects that the pre-election investigatory hearing officer offered the Employing Office numerous opportunities to present any such section 7112(b)(6) evidence to the Board (including appropriate in camera, under seal presentations); and the Employing Office apparently chose not to do so. Accordingly, the Board declines to reopen the record.

The Board notes that pursuant to the exercise of its executive authorities under section 7103(b) of title 5, as applied by section 220 of the CAA, the Board has taken evidence in a confidential *ex parte* proceeding respecting the need for a national security exclusion under that

statutory provision. As a result of that proceeding, the Board has excluded from coverage on national security grounds a number of employees of the Capitol Police -- the employees of the Physical Security Division of the Office of the Chief as well as the employees of the Protective Intelligence Division, the Technical Security Division, and the Dignitary Protection Division (with the exception of the Reserve Corps of such division) of the Protective Services Bureau. *See Order 7103(b)-1* (January 31, 1997). That confidential, ex parte proceeding is in contrast to national security exclusions under section 7112(b)(6), which are determined in the same manner as all other exclusions under section 7112(b) of title 5, as applied by the CAA -- as part of the determination of the appropriate unit, based upon evidence submitted at a pre-election investigatory hearing.

## **2. Allegation of Bias in the Conduct of the Pre-election Investigatory Hearing**

In its post-hearing brief the Employing Office contends that the alleged bias of Deputy Executive Director Talkin against the Employing Office tainted the pre-election investigatory hearing. The Employing Office asks for both a remand to develop the record anew before a supposedly “neutral” fact-finder and a ruling that Deputy Executive Director Talkin not be designated to conduct any parts of the case. Upon full and careful review of the record, the Board finds that these charges are without merit and rejects them.

The Employing Office's contention that the Deputy Executive Director had a “disregard for the Employing Office's position regarding the security interest in this case” amounts to a disagreement with the Deputy Executive Director's administration of the hearing. In fact, the record demonstrates that the Deputy Executive Director made strenuous efforts to accommodate the Employing Office's concerns. That she did not acquiesce in all of the Employing Office's demands is not evidence of bias, but rather is an indication of her control over and neutrality in the conduct of the proceedings.

## **DIRECTION OF ELECTION**

An election by secret ballot shall be conducted among employees in the following unit, as early as possible, but not later than 40 days from the date of this decision:

All police officers, including probationary employees from the time that they are sworn in as officers of the United States Capitol Police, **excluding** the employees of the Physical Security Division of the Office of the Chief the employees of the Protective Intelligence Division, the Technical Security Division, and the Dignitary Protection Division (with the exception of the Reserve Corps of such division) of the Protective Services Bureau; all supervisors, including officers at and above the rank of sergeant and special technician; confidential employees; and employees engaged in personnel work in other than a purely clerical capacity; and all officers in the immediate office of the Chief, all officers in the Office of the General Counsel, all officers in the Office of Financial Management, all officers in the Public Information Office, all

officers in the Internal Affairs Division, all assistants to the watch commanders, and any individual who serves as an assistant to the Assistant Chief or assistant to a Bureau Commander.

The Executive Director of the Office (or her designee) shall supervise and conduct the election, subject to the Office's rules and regulations. Eligible to vote are those in the unit who were employed during the payroll period immediately preceding the date below, including employees who did not work during that period because they were out ill, or on vacation, or on furlough, including those in military service who appear in person at the polls. Ineligible to vote are employees who have quit or were discharged for cause since the designated payroll period and who have not been rehired or reinstated before the election date. Those eligible to vote within the appropriate unit shall vote whether or not they wish to be represented for the purpose of exclusive recognition by Teamsters Local Union No.246, International Brotherhood of Teamsters; the Fraternal Order of Police D.C. Lodge No.1, U.S. Capitol Police Labor Committee; the International Union of Police Associations, AFL-CIO and its local 1776; or no labor organization.

Issued, Washington, D.C., February 24, 1997

I certify that I have served the persons listed below a copy of the attached Decision and Direction of Election by Hand Delivery:

John T. Caulfield, Esq.  
General Counsel  
U.S. Capitol Police  
119 D Street, N.E.  
Washington, DC 20510

Jeffrey C. Poll, Esq.  
Office of House Employment Counsel  
433 Cannon House Office Building  
Washington, DC 20515-5532

Jean Manning, Esq.  
Senate Chief Counsel for  
Employment  
103 Senate Hart Office Building  
Washington, DC 20510-7130

Geraldine Gennet, Esq.  
Acting General Counsel  
U.S. House of Representatives  
219 Cannon House Office Building  
Washington, DC 20515

Elizabeth J. Head, Esq.  
Richard W. Gibson, Esq.  
John R. Mooney, Esq.  
Mooney, Green, Baker, Gibbon  
& Saindon, P.C.  
The Colorado Building, Suite 700  
1341 G Street, N.W.  
Washington, DC 20005-3105

Stephen G. De Nigris, Esq.  
Counsel for the Fraternal Order of Police  
Washington, DC 20037-1524

Michael T. Leibig, Esq.  
Zwerdling, Paul, Leibig, Kahn  
Thompson & Wolly, P.C.  
City Square Building, Suite 200  
1060 Page Avenue  
Fairfax, VA 22030

Aaron Nisenson, Esq.  
Counsel for the International Union  
of Police Associations, AFL-CIO  
1421 Prince Street, Suite 330  
Alexandria, VA 22314

Dated this 5th day of February 1997, at Washington, D.C.