GLOSSARY OF FEDERAL SECTOR LABOR-MANAGEMENT RELATIONS TERMS[1]

ABROGATION TEST. A test the **Federal Labor Relations Authority** (FLRA or Authority) formerly applied in determining whether an arbitration award enforcing a contract provision affecting management's § 7106 rights is deficient. Under that test (which was in existence for 12 years), an award enforcing a contractual provision that is an "arrangement" for employees adversely affected by the exercise of management's § 7106 rights would not be set aside unless it "abrogated" those rights--i.e., unless it left management no discretion at all with respect to the management right(s) at issue. For lead cases see 37 FLRA Nos. 20, 67, 70, 103 and 38 FLRA Nos. 3 and 21.

In 58 FLRA No. 21 the Authority, in a split decision, replaced the abrogation test with the "excessive interference" balancing test. Under that test FLRA weighs (a) the extent to which the contractual provision, as interpreted by the arbitrator, provides a "balm" to employees adversely affected by the exercise of a management right against (b) the extent to which it interferes with the exercise of management's rights and determines whether that interference is "excessive."

ACCRETION. When some employees are transferred to another employing entity whose employees are already represented by a union, FLRA will often find that those employees have "accreted" to (i.e., become part of) the existing **unit** of the new employer, with the result that the transferred employees have a new **exclusive representative** along with a new employer. See, e.g., 52 FLRA No. 97, where FLRA found an accretion and compare it with 56 FLRA No. 174, where it didn't. Also see 57 FLRA No. 111 where employees who were geographically separated from the employees in an existing unit were nonetheless found to have accreted to that unit because computer technology enabled the geographically separated employees to work closely together with the unit employees.

- **ACCRETION vs SUCCESSORSHIP**. When employees are transferred to different organizations and it is claimed that both "successorship" and "accretion" principles apply, the Authority will first determine whether the transferred employees are in separate appropriate unit(s)--i.e., whether they have a community of interest *separate and distinct from* that of employees in the gaining employer's existing unit(s). *If so*, and provided other requirements are met, "successorship" applies and the unit accretion petition will be dismissed. *If not*, FLRA will determine if the transferred employees have accreted to the gaining employer's existing unit(s). See 52 FLRA No. 97.

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[1] Last revised June 2003. For copies of cited FLRA decisions, contact the Authority and/or go to its webpage at http://www.flra.gov/.

ACTIONS DURING EMERGENCIES. A right reserved to management by § 7106(a)(2)(D). Management's right "to take whatever actions may be necessary to carry out the agency['s] mission during emergencies" doesn't come up in negotiability disputes very often. In all but one of the cases decided thus far, FLRA has held that this right is interfered with by proposals attempting to define "emergency" because such definitions would be inconsistent with management's right to independently determine whether an emergency exists. See, e.g., 22 FLRA No. 13, 29 FLRA No. 84, 30 FLRA No. 52, and 49 FLRA No. 84, #1. However, in 55 FLRA No. 42, it said that it would no longer follow this precedent. It there found that a proposed "definition" that was interpreted as not limiting the situations in which the agency could take actions in an emergency did not interfere with the right to take actions during emergencies. For additional decisions on this right, see, e.g., 25 FLRA No. 61, #4 (proposal requiring management to negotiate on the changes it will make in the rotational system during an emergency interferes with the right to "take whatever actions may be necessary"). See also 14 FLRA No. 91, #2 (proposal requiring three days notice of changes in hours of work , even during emergencies, interferes with this right).

AGENCY. Section 7103(a)(3) defines "agency" as "an Executive agency (including a nonappropriated fund instrumentality described in section 2105(c) of [title 5 of the United States Code] and the Veterans' Canteen Service, Department of Veterans Affairs), the Library of Congress, the Government Printing Office, and the Smithsonian Institution, but does not include" the General Accounting Office, the Federal Bureau of Investigation, the Central Intelligence Agency, the Tennessee Valley Authority, the Federal Labor Relations Authority, the Federal Service Impasses Panel, or the United States Secret Service and the United States Secret Service Uniformed Division.

AGENCY HEAD REVIEW. Requirement that negotiated agreements be reviewed for legal sufficiency by the head of the agency (or his/her designee). § 7114(c)(1). This must be accomplished within 30 days from the date the agreement is executed. § 7114(c)(2). If disapproved, the union can challenge those determinations by filing a **negotiability** petition or an **unfair labor practice** (ULP) charge with FLRA. If not approved or disapproved within that time, the agreement goes into effect and the legality and enforceability of its terms is decided in other forums (e.g., grievance or unfair labor practice proceedings). § 7114(c)(3). During the 30-day period the incumbent union is protected from challenge by a rival union. 5 CFR 2422.12(c).

AGENCY SHOP. A requirement that all employees in the **unit** pay dues or fees to the union to defray the costs of providing representation. In 1 FLRA No. 64 the Authority held that § 7102 prohibits agency shop requirements. See also, 22 FLRA No. 57, 38 FLRA No. 57, and 44 FLRA No. 8. Compare with 56 FLRA No. 157 (requiring the agency to deduct $2.00 from each biweekly paycheck of each bargaining unit employee who has not joined the union unless the employee requests that a deduction not be made is contrary to 5 CFR 550.312(a)).

AGREEMENT, NEGOTIATED. A collective bargaining agreement (CBA). CBAs take many forms, e.g., term agreements, midterm agreements, memoranda of

understanding (MOU), basic agreements, supplemental agreements, oral agreements, side agreements, and **past practices**. Section 7103(a)(9) defines a collective bargaining agreement as "an agreement entered into as a result of collective bargaining pursuant to the provisions of this chapter."

CBAs set forth some of the conditions of employment of **unit** employees, various rights and obligations of the parties to the agreement (i.e., the **exclusive representative** and the activity or agency), the **negotiated grievance procedure**, **dues withholding** provisions, reopeners, as well as the duration of the agreement. CBAs cannot contain provisions that interfere with **management rights** (unless they are § 7106(b)(3) "**appropriate arrangements**," or § 7106(b)(1) "**permissive subjects of bargaining**" on which management has "elected" to bargain), nor even restate agency or **Governmentwide regulations** that interfere with (i.e., place restrictions on the exercise of) management rights, for that would give them an existence independent of the regulations. (See, e.g., 19 FLRA No. 24, #3 (RIF regulations) and 47 FLRA No. 79, #1 (performance regulations)). However, see 38 FLRA No. 89, #1, where the Authority held that a proposal requiring the agency to establish and administer a drug testing program in accordance with the Constitution, laws, rules, regulations, and the contract, interfered with the right to determine **internal security practices**, but still was negotiable because it was an **appropriate arrangement** under § 7106(b)(3).

Since the most important **conditions of employment** for most employees covered by the **Federal Service Labor-Management Relations Statute** are established by laws and regulations, many of the **conditions of employment** one finds in CBAs are paraphrases, restatements, and/or selected quotations of those laws and regulations and, to the extent the laws and regulations give the agency discretion over the matter and the matter is otherwise negotiable (e.g., not in conflict with management rights), agreed-upon supplements to those laws and regulations. Negotiated agreements are subject to **agency head review** for legal sufficiency. § 7114(c)(1).

Refusing to put an agreement into writing is a **unfair labor practice** (ULP). § 7103(a)(12). Although disputes over the meaning and application of the CBA normally are processed through the agreement's grievance-arbitration procedures, some types of violations can also be processed by the Authority under its unfair labor practice procedures. See, e.g., 21 FLRA No. 117; 22 FLRA No. 25; compare with 15 FLRA No. 132. See 51 FLRA No. 72 for a description of the analytical framework that FLRA uses to determine whether there has been a repudiation of the agreement--i.e., whether (1) the breach was clear and patent and (2) the provision breached went to the heart of the agreement. Also see 52 FLRA Nos. 22 and 42. Under section 7116(d), "issues which can be raised under a grievance procedure may, in the discretion of the aggrieved party, be raised under the grievance procedure or as an unfair labor practice under [§ 7116], but not under both procedures." See 52 FLRA No. 62 (grievance barred because the issue was the same as in an earlier-filed ULP charge) and compare with 52 FLRA No. 37 (no bar because the **unfair labor practice** issue is not the same as the **negotiated grievance procedure** issue).

An expired agreement's provisions dealing with mandatory subjects of bargaining remain in effect. Provisions dealing with "permissive" subjects, on the other hand, can be unilaterally terminated. See 4 FLRA No. 100, 6 FLRA No. 9, 14 FLRA No. 89, and 15 FLRA No. 21. In 55 FLRA No. 37, FLRA said the following about terminating permissive subjects: "A party's right to terminate unilaterally a permissive bargaining subject is not contingent on first satisfying a bargaining obligation as to the substance, impact or implementation of the change."

AMENDMENT OF CERTIFICATION PETITION. That portion of FLRA's multipurpose petition not involving a **question concerning representation** that may be filed at any time in which the petitioner asks FLRA to amend the certification or recognition to, e.g., reflect changes in the names of the employer or the union. See 5 CFR 2422.1(b). See 54 FLRA No. 40 regarding the conditions under which FLRA will amend a certification to reflect a change of union affiliation.

AMERICAN ARBITRATION ASSOCIATION (AAA). A private nonprofit organization that, among other things, provides lists of qualified arbitrators to unions and employers. It is on the WEB at http://www.adr.org/

APPLICABLE LAWS. In *Treasury v. FLRA*, 494 U.S. 922 (1990), the Supreme Court said that only those external limitations on management's § 7106(a)(2) rights that are contained in "applicable laws" can be enforced by the union under the **negotiated grievance procedure**. In 42 FLRA No. 31, the Authority said that "applicable laws" within the meaning of § 7106(a)(2) include statutes, the Constitution, judicial decisions, certain Presidential executive orders, and regulations "having the force and effect of law"--i.e., regulations that (1) affect individual rights and obligations, (2) are promulgated pursuant to an explicit or implicit delegation of legislative authority by Congress, and (3) satisfy certain procedural requirements, such as those of the Administrative Procedures Act. In 53 FLRA No. 27, it held that 5 CFR 430 was an "applicable law."

It should be emphasized that the "applicable laws" requirement does not apply to § 7106(a)(1) rights. See, e.g., 38 FLRA No. 89, #1, where the Authority held that a proposal requiring the agency to establish and administer a drug testing program in accordance with the Constitution, laws, rules, regulations, and the contract, interfered with the right to determine internal security practices. (However, the proposal was nonetheless negotiable because FLRA held that it was an **appropriate arrangement** under § 7106(b)(3).)

In 43 FLRA No. 46, the Authority held that the reference to law in "**applicable laws**" under § 7106(a)(2) and "**to the extent not prohibited by law**" under § 7114(b)(4) were coextensive: therefore "law" in section 7114(b)(4), like "laws" in § 7106(a)(2), "includes . . . regulations having the force and effect of law."

APPROPRIATE ARRANGEMENT. One of three § 7106(b) exceptions to § 7106(a) management rights. Under § 7106(b)(3) a proposal that interferes with management's

rights can nonetheless be mandatorily negotiable if the proposal constitutes an "arrangement" for employees adversely affected by the exercise of a management right and if the interference with the management right isn't "excessive" (as determined by an "**excessive interference**" balancing test). See, e.g., *American Federation of Government Employees v. Federal Labor Relations Authority*, 702 F.2d 1183 (D.C. Cir. 1983) and 21 FLRA No. 4. For more on this exception, see the remarks under **management rights**.

APPROPRIATE UNIT (sometimes referred to as a bargaining unit). A grouping of employees that a union represents or seeks to represent and that the FLRA finds appropriate under the criteria of § 7112 (community of interest, effective dealings, efficiency of operations) for **collective bargaining** purposes.

Certain types of employees cannot be included in units--e.g., management officials, supervisors, and employees engaged in security work affecting national security. See § 7112(b). (Regarding the security work exclusion, see 52 FLRA No. 111, where the Authority revised its definition of "security work" to include access to classified information.)

Distinguish between **unit** member and **union** member. The latter is a matter of individual choice; the former is not.

ARBITRATION. See **arbitrator**.

ARBITRATOR. An impartial third party to whom the parties to an agreement refer their disputes for resolution. Section 7121(b)(1)(C)(iii) mandates that **negotiated grievance procedures** provide for **binding arbitration** of unsettled grievances.

Most commonly labor arbitrators perform **grievance arbitration**--i.e., they interpret and apply the terms of the agreement (including established practices) and, in the Federal sector, laws and regulations (see **applicable laws,** above) bearing on **conditions of employment**. But they are also occasionally asked to perform **interest arbitration**--i.e., they resolve bargaining impasses by dictating the terms of the agreement.

Lists of qualified labor arbitrators are provided, upon request and for a fee, by the American Arbitration Association (AAA) and the Federal Mediation and Conciliation Service (FMCS). Nothing, however, prevents the parties to an exclusive recognition relationship from creating their own panels of arbitrators from whatever sources they agree are appropriate.

ASSIGN EMPLOYEES. A right reserved to management by § 7106(a)(2)(A). This right, often confused with the § 7106(a)(2)(B) right to **assign work**, relates to the assignment of employees to positions, shifts, and locations. This right includes discretion to determine "the personnel requirements of the work of the position, i.e., the qualifications and skills needed to do the work, as well as such job-related individual characteristics as judgment and reliability." 2 FLRA No. 77. It also includes discretion to determine the duration of the assignment. 28 FLRA No. 66, #5.

Ž The use of seniority procedures in selecting employees for assignments to shifts, details, etc., doesn't normally interfere with the right to assign employees where the seniority criteria are applied to employees that management has already determined are qualified to perform the work. See, in this connection, 44 FLRA No. 1, #1 (assignment of overtime), 41 FLRA No. 58 (assignment to details), 30 FLRA No. 80, #1 (assignment to shifts), and 25 F 9, #4 (shifts, work areas).

ASSIGN WORK. A right reserved to management by § 7106(a)(2)(B). This right, often confused with the § 7106(a)(2)(A) right to **assign employees**, relates to the assignment of work to employees or positions. In 3 FLRA No. 119--affirmed by the District of Columbia Circuit Court of Appeals (D.C. Circuit) in *National Treasury Employees Union v. Federal Labor Relations Authority*, 691 F.2d 553 (1982)-- the Authority said the following about this right:

> The right to assign work to employees or positions. . . is composed of two discretionary elements: (1) the particular duties and work to be assigned, and (2) the particular employees to whom or positions to which it will be assigned. Furthermore, management discretion in this regard includes the right to assign general continuing duties, to make specific work assignments to employees, to determine when such assignments will occur and to determine when the work which has been assigned will be performed. [3 FLRA at 775.]

The right to assign work includes discretion to determine who (6 FLRA No. 106) is to perform the work, the kind (29 FLRA No. 61) and amount (16 FLRA No. 27, #3) of work to be performed, the manner (12 FLRA No. 26) in which it is to be performed, as well as when (32 FLRA No. 146, #12) it is to be performed. It also includes "[t]he right to determine the particular qualifications and skills needed to perform the work and to make judgments as to whether a particular employee meets those qualifications." 32 FLRA No. 144, #1. When combined with the section 7106(a)(2)(A) right to **direct employees**, it reserves to management the right to establish performance standards (13 FLRA No. 50), the number of rating levels (13 FLRA No. 96), and the identity of performance elements (13 FLRA No. 49).

Ž In 56 FLRA No. 134, the Authority said that it "has long held that proposals that set forth a method or criteria for assignment, including seniority, do not affect the right to assign work where management has determined that employees are 'equally qualified' for an assignment to a particular position."

Ž Work jurisdiction proposals, such as proposals barring the agency from assigning work performed by unit employees to employees outside the unit, normally interfere the right to assign work. (See, e.g., 56 FLRA No. 96, which also discusses the conditions under which such a proposal, if it applies only to certain prevailing rate employees, might nonetheless be negotiable.)

AUTHORITY. See **FEDERAL LABOR RELATIONS AUTHORITY**.

AUTOMATIC RENEWAL CLAUSE. Many, perhaps most, collective bargaining agreements in the Federal sector have a provision, usually located at the end of the agreement, stating that if neither party gives notice during the agreement's 105-60 day **open period** of its intent to reopen and renegotiate the agreement, the agreement will automatically renew itself for a period of x number of years. An automatically renewed agreement, under certain circumstances, can also serve as a **contract bar**. See, in this connection, 47 FLRA No. 89.

BACK PAY. Pay awarded an employee for compensation lost due to an unjustified personnel action is governed by the requirements of the Back Pay Act, 5 U.S.C. § 5596. For examples of awards set aside because they violated the Back Pay Act, see, e.g., 15 FLRA No. 146, 15 FLRA No. 164, 17 FLRA No. 125, and 56 FLRA No. 64. Back pay remedies for violations of the overtime provisions of the Fair Labor Standards Act (FLSA) are governed by the FLSA. See 53 FLRA No. 134.

BARGAINING (NEGOTIATING). A ubiquitous process--sometimes informal and spontaneous, sometimes formal and deliberate--of offer and counteroffer whereby parties to the bargaining process try to reach agreement on the terms of exchange. Deliberateness and a concern for barga ining strategy and tactics usually rise to the fore only when the stakes make such efforts worthwhile. Formal bargaining processes with associated rituals and bargaining routines vary, depending on their political, economic, and social context. Sometimes the formal requirements facilitate the process of reaching agreement; sometimes they become an end in themselves; and sometimes they are deliberately used in order to avoid or delay agreement. The process, as far as negotiations between collectivities is concerned--e.g., firms, unions, nations, and branches of government (e.g., budget negotiations between the President and the Congress)--has been analyzed into four subprocesses by Walton and McKersie in *A Behavioral Theory of Labor Negotiations*, 1965: distributive ("fixed pie") bargaining; integrative ("variable pie") bargaining (cf. "interest-based bargaining"); attitudinal structuring (cf. "partnering"); and intra-organizational bargaining, with real-world bargaining usually being a variable mixture of all four subprocesses.

BARGAINING AGENT. The union holding exclusive recognition for an **appropriate unit.**

BARGAINING IMPASSE (IMPASSE). When the parties have reached a deadlock in negotiations they are said to have reached an impasse in negotiations.* The statute provides for assistance by **Federal Mediation and Conciliation Service** (FMCS) mediators and the **Federal Service Impasses Panel** (FSIP) to help the parties settle impasses. If nothing avails, the FSIP can resolve the impasse by telling the parties what they are to put in their agreement or by ordering the use of interest arbitration by an agreed-upon private arbitrator. See § 7119. It is not, however, a ULP to refuse to comply with a FSIP order dealing with a permissive subject of bargaining. See 15 FLRA Nos. 65 and 100 - 104.

*Note: If the parties reach a bargaining impasse and the union timely invokes the services of the Impasses Panel, the agency must maintain the *status quo* to the maximum extent possible, consistent with the necessary functioning of the agency, in order to allow the Panel to take whatever action it deems appropriate. 18 FLRA No. 61. Failure to do so is an unfair labor practice and may result in a "make-whole" and/or *status quo ante* remedy. Regarding the "necessary functioning of the agency" exception to the duty to maintain the *status quo*, in 51 FLRA No. 69, the Authority said that when an agency relies upon this exception and alters the *status quo*, it must be prepared to provide affirmative support for the assertion that the action taken was consistent with the necessary functioning of the agency. The Authority has also indicated that the phrase "consistent with the necessary functioning of the Agency," may be accurately paraphrased as "necessary for the [agency] to perform its mission." See 23 FLRA No. 10. Also see 16 FLRA Nos. 31 and 32 on acting after bargaining to impasse and giving notice.

In 41 FLRA No. 1, the Authority made clear that although awards resulting from FSIP-directed interest arbitration under § 7119(b)(1) are subject to agency (and, ultimately, court) review, awards resulting from voluntary interest arbitration under § 7119(b)(2) can be challenged only by filing exceptions under § 7122. In 41 FLRA No. 72, the Authority held that an agency does *not* forfeit its right of agency head review of an interest arbitration award if it agrees to interest arbitration *suggested* by FSIP as a result of a § 7119(b)(1) request for assistance.

BARGAINING UNIT. See **appropriate unit**.

BARGAINING UNIT STRUCTURE. The distribution of bargaining units by, e.g., size and location. It is often said that the bargaining unit structure in the Federal sector is "fragmented." Two additional appropriate unit criteria--effective dealings and efficiency of government operations--were among the changes Executive Order (EO) 11491 made over EO 10988 in order to combat the problem of fragmentation. EO 11491 was later amended to provide for unit consolidation procedures as another means of coping with unit fragmentation. See **unit consolidation**.

BEP TEST. A 2-prong test, articulated in *Bureau of Engraving and Printing*, 53 FLRA No. 21, that FLRA applies to arbitration awards that affect management's section 7106 rights to determine whether the award nonetheless is enforceable. Under the first prong, the Authority asks if the award provides a remedy for a violation of either an "applicable law" (see **APPLICABLE LAWS**, above) or a section 7106(b) (exceptions to management's rights) contract provision. If so, it then considers, under the second prong of the BEP test, whether the remedy constitutes a reconstruction of what management would have done had it not violated the applicable law or section 7106(b) contract provision.

- In 58 FLRA No. 21 the Authority, in a split decision, said that in determining whether an arbitrator's enforcement of a contractual § 7106(b)(3) "arrangement" is

> authorized, it would apply an "excessive interference," rather than an "abrogation," standard.

BINDING ARBITRATION. Under § 7121(b)(2)(A), a requirement that arbitration of grievances be binding (as opposed to advisory--which was permitted under Executive Order 11491).

BUDGET. A core right reserved to management by § 7106(a)(1). In 2 FLRA No. 77, #I, the Authority fashioned a two-prong test that it has since used to determine whether a proposal interferes with an agency's right to determine its budget: namely, the proposal either has to prescribe particular programs, operations or amounts to be included in an agency's budget, or the agency can substantially demonstrate that the proposal would result in significant and unavoidable cost increases that are not offset by compensating benefits. Regarding the first part of its budget test, FLRA said the following in 48 FLRA No. 128:

> We find that the first part of the budget test encompasses the specific process that is dedicated to formulating: (1) the budget estimate for an agency that is incorporated in the budget of the United States Government; (2) estimates for funding the operations and programs of an agency that are produced within the agency to provide the groundwork for the budget estimate that is incorporated in the budget of the United States Government; and (3) an agency's plan for allocating funds among its operations and programs once presidential and congressional action on the budget of the United States Government has occurred. Thus, the first part of the budget test removes from bargaining any mandated inclusion of programs, operations, and amounts in the estimates and plans that comprise an agency's budget process. As a practical matter, the first part of the test includes the prescription of the "line items" that will be contained in the budget estimates that are incorporated in the budget of the United States. It also encompasses the prescription of the items and amounts that will be included in the funding estimates and plans that are developed by the agency in conjunction with formulating and executing the budget of the United States.

Regarding the second part, in 47 FLRA No. 95 the Authority said that it would no longer consider nonmonetary intangible benefits when applying the cost/benefit balancing test. Also, in determining whether a cost is “significant,” FLRA views the projected increase in costs in relation to the agency’s budget. For example, in 49 FLRA No. 89, #4, involving a commuter subsidy proposal, FLRA concluded that a projected cost of $3.628 million would not constitute a significant increase in costs because such a cost represented less than 1 per cent of the agency’s budget. Compare this with 47 FLRA No. 95, involving a salary adjustment proposal, where FLRA concluded that the projected cost increase of the proposal was significant because it would constitute 12 per cent of the agency’s appropriated budget.

BYPASS. Dealing directly with employees rather than with the **exclusive representative** regarding negotiable **conditions of employment** of bargaining **unit**

employees. A bypass is an unfair labor practice prohibited by section 7116(a)(5). See, e.g., 57 FLRA No. 38. It is not, however, a bypass to solicit information that would assist management in making a nonnegotiable determination. See, e.g., 10 FLRA No. 24, 19 FLRA No. 48, and 19 FLRA No. 56.

CARVEOUT. An attempt, usually unsuccessful under the **Federal Service Labor-Management Relations Statute** because it fosters unit fragmentation, to carve out (or sever)--usually along occupational lines (firefighters, nurses)--a subgroup of employees in an existing bargaining **unit** in order to establish a separate, more homogenous unit with a different union as **exclusive representative**. See 16 FLRA No. 67 and 40 FLRA No. 23.

CERTIFICATION. FLRA's determination of the results of an election or the status of a union as the **exclusive representative** of all the employees in an appropriate unit.

CERTIFICATION BAR. One-year period after a union is certified as the **exclusive representative** for a unit during which petitions by rival unions or employees seeking to replace or remove the incumbent union will be considered untimely. § 7111(f)(4) and 5 CFR 2422.12(b). The bar is designed to give the certified union an opportunity to negotiate a substantive agreement, after which the contract can become a bar, except during the contract's 105-60 day **open period**, to a representation petition. Also see **contract bar** and **election bar**.

CHALLENGED BALLOTS. Ballots that are challenged by election observers on the ground that the person casting the ballot isn't eligible to vote because, e.g., he or she is excluded from a unit by § 7112(b). Challenged ballots usually are kept separate and if, after tallying the uncontested ballots, it is determined that there are enough challenged ballots to affect the outcome of the election, the Authority's agents will rule on each challenged ballot to see whether it should be counted.

CHIEF STEWARD. A union official who assists and guides shop stewards. The roles he or she plays within the union are determined by the union. The roles he or she plays in administering the contract are determined by the contract. For example, the **negotiated grievance procedure** may provide that the chief steward becomes the union representative if the grievance reaches a certain step in the grievance procedure.

CIVIL SERVICE REFORM ACT OF 1978 (CSRA). Legislation enacted in October 1978 for the purpose of improving the civil service. It includes the **Federal Service Labor-Management Relations Statute** (FSLMRS), Chapter 71 of title 5 of the U. S. Code.

CLARIFICATION OF UNIT PETITION. That portion of FLRA's multipurpose petition *not* involving a **question concerning representation** that may be filed at any time in which the petitioner (union or management) asks FLRA to determine the bargaining unit status of various employees. 5 CFR 2422.1(b). Arbitrators may not determine the bargaining unit status of an employee in order, e.g., to determine whether a

grievance by a particular employee is arbitrable under the negotiated grievance procedure. See, e.g., 32 FLRA No. 125. In 56 FLRA No. 153, as the result of the 9th Circuit's decision in *Eisinger v. FLRA*, 218 F.3rd 1097 (9th Cir. 2000), FLRA vacated its decision in 54 FLRA No. 58 (where it held that individuals did not have standing to file CU or AC petitions).

CLASSIFICATION ACT EMPLOYEES. Federal employees--typically professional, administrative, technical, and clerical employees (i.e., "white collar" employees)--sometimes referred to as "General Schedule" employees, to distinguish them from Federal Wage System (blue collar, Wage Grade) employees.

COLLECTIVE BARGAINING. Literally, bargaining between and/or among representatives of collectivities (thus involving internal as well as external bargaining); but by custom the expression refers to bargaining between labor organizations and employers. See § 7103(a)(12) for a statutory definition..

COLLECTIVE BARGAINING AGREEMENT (CBA). See **AGREEMENT, NEGOTIATED**.

COMPELLING NEED. A requirement, under § 7117(b), that a discretionary agency regulation that doesn't involve the exercise of § 7106 management rights must meet in order to be a valid limitation on the **scope of bargaining**. There are three "illustrative criteria" of compelling need: (1) the regulation is essential to the effective and efficient accomplishment of the mission of the agency, (2) the regulation is necessary to insure the maintenance of basic merit principles, and (3) the regulation implements a mandate of law or other authority (e.g., a regulation) in an essentially nondiscretionary manner. 5 CFR 2424.50. Compelling need determinations may not be made by the Federal Labor Relations Authority in an **unfair labor practice** proceeding. *FLRA v. Aberdeen Proving Ground*, 108 S.Ct. 1261 (1988). FLRA rarely finds a compelling need for agency regulations that impose requirements beyond those already established by laws or Governmentwide regulations.

CONCILIATION. See **MEDIATION**.

CONDITIONS OF EMPLOYMENT (COE). Under § 7103(a)(14), COE "means personnel policies, practices, and matters, whether established by rule, regulation, or otherwise [e.g., by custom or practice], affecting working conditions, except that such term does not include policies, practices, and matters--(A) relating to political activities prohibited under subchapter III of chapter 73 of this title; (B) relating to the classification of any positions; or (C) to the extent such matters are *specifically provided for by Federal statute*[.]" (Emphasis added.) The fact that a statute deals with a matter doesn't mean that everything related to that matter isn't a condition of employment. In 55 FLRA No. 18, the Authority said the following: "The appropriate inquiry . . . is whether a statute at issue provides the Agency with the discretion to agree to the proposal."

The duty to bargain is limited to the mandatorily negotiable conditions of employment of bargaining unit employees. In FLRA's words: "[M]atters concerning conditions of employment are subject to collective bargaining when they are within the discretion of an agency and are not otherwise inconsistent with law or applicable rule or regulation." 53 FLRA 625, 648; 21 FLRA 61, 10-11. Unilateral changes in COE are **unfair labor practices**. For examples of what doesn't constitute a COE, see: 3 FLRA No. 8 (appeal system for military appraisals), 7 FLRA No. 18 (hunting and fishing on military reservation), 8 FLRA No. 75, #1 (management access to investigatory files), 11 FLRA No. 99 (classification of positions), and 13 FLRA No. 73 (recycling discarded paper).

CONFIDENTIAL EMPLOYEE. Under § 7103(a)(14), "an employee who acts in a confidential capacity with respect to an individual who formulates or effectuates management policies *in the field of labor-management relations*[.]" (Emphasis added.) Under § 7112(b)(2), confidential employees must be excluded from bargaining units. Disputes over whether an employee is a confidential employee are resolved by FLRA, usually via a 5 CFR 2422.1(b) petition. Examples: 31 FLRA No. 6, 33 FLRA No. 30, 37 FLRA No. 16, 37 FLRA No. 112, 47 FLRA No. 48, and 50 FLRA No. 21.

CONSULTATION. To be distinguished from **negotiation**. The FSLMRS provides for two types of consultation: between qualifying unions and agencies concerning agency-wide regulations (§ 7113, National consultation rights) and qualifying unions and those agencies issuing **Governmentwide regulations** (§ 7117(d)(1)).

CONTRACT BAR. The incumbent union is protected from challenge by a rival union if there is an agreement in effect having a term of not more than three years, except during the agreement's **open period**"--i.e., 105 to 60 days prior to the expiration of the agreement. See § 7111(f)(3) and 5 CFR 2422.12(d) and (e) regarding contracts of 3 years or less or contracts of more than 3 years, respectively. Compare with **election bar** and **certification bar.**

CONTRACTING OUT. A right reserved to management by § 7106(a)(2)(B). It includes the right to determine the criteria governing the exercise of the right. For example, a proposal permitting contracting out only if the agency can demonstrate that contracting out would be "economically efficient, effective to the mission, or in the best interest of the Federal Government" directly interferes with the right to contract out. 45 FLRA No. 122. Similarly, prohibiting the contracting out of a function that had undergone a RIF for a year after the effective date of the RIF interferes with the right to contract out. 49 FLRA No. 84, #10.

Attempts to enforce the contracting-out requirements of Office of Management and the Budget (OMB) Circular A-76 through the **negotiated grievance procedure** have been found to be prohibited by the Circular, a **Governmentwide regulation**, in *IRS v. FLRA*, 996 F.2d 1246 (D.C. Cir. 1993), 48 FLRA No. 15 (#17), 52 FLRA No. 70, and 52 FLRA No. 125. Also see 57 FLRA No. 176 (the activity's countervailing interests in not furnishing the MEO before the activity announced its contracting out decision outweighed any legitimate interests the union may have had in pre-decisional disclosure).

"COVERED BY" DOCTRINE. A doctrine under which an agency does not have to engage in **midterm bargaining** on particular matters because those matters are already "covered by" the existing agreement.

At one time FLRA adopted a "clear and unmistakable" test in determining whether a matter was "covered by" the contract--see, e.g., 39 FLRA No. 91. However, that test was criticized by the D.C. Circuit in *Marine Corps v. FLRA*, 962 F.2d 48 (1992) on the ground it nullified the terms of agreements and required endless bargaining. The Authority consequently adopted a *three-prong test* to determine whether there is no need to bargain on a particular subject because it already is covered by the existing agreement in 47 FLRA No. 96. Under the *first prong* it asks whether the express language of the contract "reasonably encompasses the subject in dispute." See, e.g., 47 FLRA No. 116, 48 FLRA No. 89, and 49 FLRA No. 1. Under the *second prong* (which comes into play only if the express language doesn't encompass the matter), it asks whether the subject in dispute is "inseparably bound up with" and thus an "aspect" of a subject expressly covered by the contract. See, e.g., 48 FLRA No. 10, 49 FLRA No. 130, and 51 FLRA No. 103. In 52 FLRA No. 2, the Authority said that "the third prong applies in cases where it is difficult to determine whether the subject matter sought to be bargained is an aspect of matters already negotiated. In such cases, the Authority will give controlling weight to the parties' intent." It went on to say that "[i]n making these determinations, the Authority will, 'examine all record evidence[,]' including the parties, bargaining history and prior agreements, to determine whether 'the parties reasonably should have contemplated that the agreement would foreclose further bargaining in such instances.'" In 56 FLRA No. 136 it emphasized that the third prong was not a separate, independent criterion, but rather "an integral component of that part of the 'covered by' analysis to determine whether the matter sought to be bargained is inseparably bound up with and thus is plainly an aspect of a subject covered by the contract."

See 58 FLRA No. 56 for a discussion of the circumstances under which the "covered by" doctrine also applies to the terms of an expired agreement.

DECERTIFICATION. FLRA's withdrawal of a union's **exclusive recognition** because the union no longer qualifies for such recognition, usually because it has lost a representational election. However, in 7 FLRA No. 10, the Professional Air Traffic Controllers Organization (PATCO) was decertified because it engaged in a strike.

DECERTIFICATION PETITION. A petition filed by employees in an existing unit (or an individual acting on their behalf) asking that an election be held to give unit employees an opportunity to end the incumbent union's exclusive recognition. 5 CFR 2422.1(a)(2). Such a petition must be accompanied by a 30% showing of interest and be timely filed (i.e., not barred by election, certification or contract bars).

DIRECT EMPLOYEES. In 3 FLRA No. 119 the Authority defined this right to include discretion "to supervise and guide [employees] . . . in the performance of their duties on the job." In *NTEU v. FLRA*, 793 F.2d 371 (DC Cir. 1986), the court held, among other

things, that the right to direct did not encompass the right to reward. The right to direct, *by itself*, rarely is used as the basis for finding a proposal nonnegotiable. However, when combined with the right to assign work, it is the basis for finding proposals establishing performance standards nonnegotiable. See, e.g., 49 FLRA No. 25.

DISCIPLINE. A right reserved to management under § 7106(a)(2)(A). The FLRA has said that the right to discipline includes the right "to investigate to determine whether discipline is justified[,]" 34 FLRA at 1156, and it "encompasses the use of the evidence obtained during the investigation." 34 FLRA at 1157. For example, a proposal requiring that complaints against an employee be in writing and identify the complainant in order to be valid excessively interferes with the right to discipline. See 47 FLRA No. 2, #27.

Also see *Dep't of the Air Force, 315th Airlift Wing v. FLRA*, No. 01-1275 (D.C. Cir. July 12, 2002) in which the court reversed the Authority's application of its "flagrant misconduct" rule in 57 FLRA No. 25. "No employee, including a union official acting in a representational capacity, has the right to put another in fear of being struck or to commit a battery in order to 'present the views of the labor organization' and 'engage in collective bargaining.'" Compare this with 58 FLRA No. 11, where the Authority agreed with the ALJ that the activity committed a ULP when it suspended an employee for allegedly making false statements at a grievance meeting.

DISCRETION. Not all agency discretion over conditions of employment of unit employees is subject to bargaining. As the Authority noted in 55 FLRA No. 1, # 3, "[w]here law or applicable regulation vests an agency with *sole and exclusive discretion* over a matter, it would be contrary to law to require that discretion to be exercised through collective bargaining . . . ." For an example of a case in which FLRA found that the agency had sole and exclusive discretion, see 47 FLRA No. 84, *aff'd AFGE, Local 3295 v. FLRA*, 46 F.3d 73 (D.C. Cir. 1995). For a case where FLRA held that Congress did not intend the agency's pay-setting authority to be sole and exclusive, see 50 FLRA No. 87, petition for review denied, 88 F.3d 1279 (D.C. Cir. 1996).

Certain types of discretion are reserved to management by § 7106(a)--i.e., the so-called "management rights." However, there are several exceptions to those reserved rights, including those mentioned in § 7106(b).

DUES WITHHOLDING. § 7115 deals with dues withholding services provided by the agency to unions that win exclusive recognition or dues withholding recognition. If the former, the services must be provided without charge to the union. Employee dues assignments must be voluntary (no union or agency shop arrangements permitted under the **Federal Service Labor-Management Relations Statute**) and may not be revoked except at yearly intervals (see, e.g., 11 FLRA No. 101), but must be terminated when the agreement ceases to be applicable to the employee (as when the employee is temporarily promoted to a supervisory position or is detailed outside the unit--see, e.g., 25 FLRA No. 14) or when the employee is expelled from membership in the union. (Not all details to nonunit positions remove detailed employees from the unit. See, in this connection, 54 FLRA No. 34.) Agencies cannot use setoff to recoup erroneously withheld dues. See 31

FLRA No. 54. Under 5 CFR 550.312(a), an employee may only make an allotment if he or she "specifically designate[s] the allottee and the amount of the allotment." See 56 FLRA No. 157 (requiring the agency to deduct $2.00 from the bi-weekly paychecks of unit employees who are not members of the union unless they have requested that such a deduction not be made violates 5 CFR 550.312(a)).

DUES WITHHOLDING RECOGNITION. § 7115(c)(1) and 5 CFR 2422.3(d). A very limited form of recognition, introduced by the statute, under which a union that can show that it has 10% of employees in an appropriate unit as members can qualify for the right only to negotiate a dues deduction arrangement. Such recognition becomes null and void as soon as a union is certified as the **exclusive representative** of the unit.

DURATION CLAUSE (TERM OF AGREEMENT). Clause in a collective bargaining agreement that specifies the time period during which the agreement is in effect. Where an agreement has a term greater than three years, the agreement serves as a contract bar only during the first three years. See 5 CFR 2422.12(e). An agreement can have an automatic renewal provision, in which case the bar also would be renewed. Duration clauses may provide for automatic renewal for a specified period of time if neither party exercises its right to reopen the agreement for renegotiation during the 190-60 day **open period**.

DUTY OF FAIR REPRESENTATION. § 7114(a)(1): "An exclusive representative is responsible for representing the interests of all employees in the unit it represents without discrimination and without regard to labor organization membership." See *NTEU v. FLRA*, 800 F.2d 1165 (D.C. Cir. 1986), where the court held that the union's duty of fair representation is limited to matters as to which the union is the exclusive representative. Also see 28 FLRA No. 118, where FLRA said the following: "Where the union is acting as the exclusive representative of its unit members, we will continue to require that its activities be undertaken without discrimination and without regard to union membership under section 7114(a)(1). We will not, however, extend those statutory obligations to situations where the union is not acting as the exclusive representative . . . ." See 49 FLRA No. 71 for an example of a violation of this duty (members-only poll regarding seniority-based benefit system administered by union) and 46 FLRA No. 81 where FLRA found no violation because the nonmember employee against whom discipline was proposed had a right to have a representative of her own choice.

DUTY TO BARGAIN. Broadly conceived, it refers to both (1) the *circumstances* under which there is a duty to engage in bargaining (see, e.g., **MIDTERM BARGAINING**) and (2) the *negotiability* of specific proposals. Disputes over the former usually are processed through the Authority's **unfair labor practice procedure** and frequently involve make-whole and *status quo ante* remedies. Disputes over the latter usually are processed through the Authority's no-fault **negotiability** procedure in which the Authority determines whether proposals (or provisions disapproved by the agency head) are nonnegotiable because inconsistent with laws and regulations. In changes to 5 CFR Part 2424, effective April 1, 1999, the Authority distinguished between "bargaining disputes" and "negotiability disputes."

ELECTION AGREEMENT. Agreement entered into by the agency and the union(s) competing for exclusive recognition dealing with campaign procedures, election observers, date and hours of election, challenge ballot procedures, mail balloting (if used), position on the ballot, payroll period for voter eligibility, and the like. Such an agreement is subject to approval by the appropriate FLRA Regional Director. See 5 CFR 2421.20.

ELECTION BAR. One-year period after FLRA has conducted a secret-ballot election for a unit of employees, where the election did not lead to the certification of a union as exclusive representative. During this one-year period FLRA will not consider any representation petitions for that unit or any subdivisions thereof. § 7111(b) and 5 CFR 2422.12(a). See **CERTIFICATION BAR** and **CONTRACT BAR**.

EMPLOYEE. Under the Federal Service Labor-Management Relations Statute, the term "employee" includes an individual "employed in an agency" or "whose employment in an agency has ceased because of any unfair labor practice," but does not include supervisors and management officials or anyone who participates in a strike or members of the uniformed services or employees in the Foreign Service (who have a separate labor-management relations program--see 22 USC 4101 ff) or aliens occupying positions outside the U.S. See 5 USC § 7103(a)(2).

EQUIVALENT STATUS. Status given a union challenging the incumbent union that entitles it to roughly equivalent access during the period preceding an election to facilities and services (bulletin boards, internal mail services, etc.) as that enjoyed by the incumbent union. At one time the FLRA adopted a *per se* rule under which it would find an activity guilty of illegal assistance to a labor organization (see § 7116(a)(3)) if it gave the raiding union access to such facilities and services before FLRA notifies the activity that the raider has equivalent status. "[A] petitioning union acquires equivalent status . . . when an appropriate Regional Director determines, and notifies the parties, that the petition includes a *prima facie* showing of interest and merits further processing." See 44 FLRA No. 36. However, because of Constitutional difficulties, in 52 FLRA No. 114 the Authority replaced the *per se* rule with a "totality of circumstances" approach.

EXCEPTIONS TO ARBITRATION AWARDS. A claim that an arbitration award is deficient "on . . . grounds similar to those applied by Federal courts in private sector labor-management relations," or because it violates law, rule or regulation. § 7122(a). Some of the "grounds similar to those applied by Federal courts" are: the award doesn't draw its essence from the agreement, the award is based on a nonfact, the arbitrator didn't conduct a fair hearing, or the arbitrator exceeded his authority. Exceptions involving the latter are claims that the award violates some law or regulation. FLRA's rulings on exceptions to arbitration awards are not normally subject to court review if the arbitration award doesn't involve resolution of an unfair labor practice processed under the **negotiated grievance procedure**. *NTEU v. FLRA*, 824 F.2d 61 (D.C. Cir. 1987). The Authority has no jurisdiction to consider exceptions to awards involving major adverse or performance-based actions. See, e.g., 55 FLRA Nos. 130 and 50. Compare with 49

FLRA No. 90 involving an award dealing with an unsatisfactory rating (but not a performance-based action).

EXCESSIVE INTERFERENCE. A balancing test that FLRA applies to proposals that are arrangements for employees adversely affected by the exercise of management's rights in order to determine whether they are negotiable **appropriate arrangements** within the meaning of § 7106(b)(3). The test involves balancing the extent to which the proposal ameliorates anticipated adverse effects against the extent to which it places restrictions on the exercise of management's rights. In 58 FLRA No. 21 the Authority, in a split decision, said that in determining whether an arbitrator's enforcement of a contractual § 7106(b)(3) "arrangement" is authorized, it would apply an "excessive interference," rather than an "abrogation," standard.

EXCLUSIVE RECOGNITION. Under the **Federal Service Labor-Management Relations Statute**, 5 USC §§ 7101 ff, exclusive recognition is normally obtained by a union as a result of receiving a majority of votes cast in a representational election. (Exclusive recognitions obtained under Executive Order 10988, which didn't require secret-ballot elections, are preserved via a "grandfather" clause.)

The rights a union is accorded as a result of being certified as the **exclusive representative** of the employees in a bargaining unit include, among other things, the right to *negotiate* bargainable aspects of the conditions of employment of bargaining unit employees, to be afforded an opportunity to be present at *formal discussions*, to free *checkoff* arrangements and, at the request of the employee, to be present at *Weingarten* examinations of unit employees.

EXCLUSIVE REPRESENTATIVE ("of employees in an appropriate unit"--see § 7103(a)(16)). The union that is certified as the exclusive representative of a unit of employees either by virtue of having won a representation election or because it had been recognized as the exclusive representative before passage of the CSRA. It is an unfair labor practice for an agency to deal with other unions or organizations or special interest groups (or, for that matter, directly with unit employees--see **BYPASS** and **FORMAL DISCUSSION**) regarding the conditions of employment of unit employees. See **EXCLUSIVE RECOGNITION**. A union holding exclusive recognition is sometimes referred to as the exclusive bargaining agent of the unit.

EXECUTIVE ORDER 12871, as amended. This order, signed October 1, 1993 and reaffirmed six years later in a Presidential Memorandum, was revoked on February 17, 2001 by Executive Order 13203. EO 12871 had established, among other things, a National Partnership Council (NPC) that was made up of representatives of labor, agency, and managerial/supervisory organizations. The mission of the NPC was to advise the President on labor-management relations, support and foster labor-management partnerships, and collect and disseminate information on partnerships. EO 12871 also directed agencies to establish partnerships, provide training in alternative dispute resolution techniques, bargain on section 7106(b)(1) matters, and "evaluate

progress and improvements in organizational performance resulting from the labor-management partnerships."

In 54 FLRA No. 43, where the Authority dismissed a ULP complaint involving an agency's refusal to bargain on section 7106(b)(1) matters, the Authority held that the EO 12871 directive to bargain on section 7106(b)(1) matters was not an "election" within the meaning of section 7106(b)(1). "Questions concerning the Respondent's compliance with the Executive Order, " said FLRA, "are properly resolved as a matter involving the internal management of the Executive branch." The D.C. and 9th Circuits have affirmed the Authority's reasoning and conclusions.

EXECUTIVE ORDER 13203. EO 13203, signed February 17, 2001, revoked EO 12871 (as well as the Presidential Memorandum of October 28, 1999 that had reaffirmed EO 12871), dissolved the National Partnership Council, and ordered the Director of OPM and heads of executive agencies to promptly rescind "any orders, rules, regulations, guidelines, or policies implementing or enforcing" EO 12871 or the Presidential Memorandum "to the extent consistent with law." It also provided that nothing in the order abrogated "any collective bargaining agreements in effect on the date of this order."

EXTERNAL LIMITATIONS ON THE EXERCISE OF MANAGEMENT'S RIGHTS. The types of discretion reserved to management by § 7106 are not unfettered. Quite apart from any limitations that may be found in the collective bargaining agreement (such as an **appropriate arrangement** provision), its discretion must also be exercised in accordance with the laws and regulations that set limitations on management discretion (for example, OPM's reduction-in-force regulations, 5 CFR 351). Only those external limitations on the exercise of § 7106(a)(2) rights can be enforced by the union under the **negotiated grievance procedure**. See **APPLICABLE LAWS**.

FAIR REPRESENTATION, DUTY OF. The union's duty to represent the interests of all unit employees without regard to union membership. However, in *NTEU v. FLRA*, 800 F.2d 1165 (D.C. Cir. 1986), the court held that the union's duty of fair representation is limited to matters as to which the union is the exclusive representative. (In that case, the union, which provided the services of an attorney to members in Merit Systems Protection Board (MSPB) proceedings, told an employee facing removal that the union wouldn't provide him with attorney services because he wasn't a member of the union.) The court dismissed the ULP because the right to appeal to MSPB does not arise out of the collective bargaining agreement and the employee was free to designate non-union representatives. Also see 28 FLRA No. 118, where FLRA said the following: "Where the union is acting as the exclusive representative of its unit members, we will continue to require that its activities be undertaken without discrimination and without regard to union membership under section 7114(a)(1). We will not, however, extend those statutory obligations to situations where the union is not acting as the exclusive representative."

FEDERAL LABOR RELATIONS AUTHORITY (FLRA, AUTHORITY). The independent agency responsible for administering the **Federal Service Labor-**

Management Relations Statute (FSLMRS). As such, it decides, among other things, representation issues (e.g., the bargaining **unit** status of certain employees), **unfair labor practice**s (violations of any of the provisions of the FSLMRS), **negotiability disputes** (i.e., **scope of bargaining** issues), **exceptions to arbitration awards**, as well as resolves disputes over consultation rights regarding agency-wide and Governmentwide regulations.

The Authority's General Counsel investigates unfair labor practice (ULP) charges and decides whether to issue and prosecute ULP complaints, and the Authority's Federal Service Impasses Panel resolves bargaining impasses. See § 7105 for a complete listing of the Authority's powers and duties and 5 CFR Parts 2422, 2423, 2424, 2425, and 2426 for its regulations.

For more information on FLRA, see its webpage at http://www.flra.gov/.

FEDERAL MEDIATION AND CONCILIATION SERVICE (FMCS). An independent agency that provides mediators to assist the parties in negotiations. Although the bulk of its work is in the private sector, it also provides its services to the Federal sector--see § 7119(a). FMCS also maintains a roster of qualified private arbitrators, panels of which are referred to the parties upon joint request. See **MEDIATION**.

For more information on FMCS, see http://www.jalmc.org/thefmcs.htm.

FEDERAL SERVICE IMPASSES PANEL (FSIP or Panel). Entity within FLRA that resolves bargaining impasses, chiefly by ordering the parties to adopt certain contractual provisions relating to the conditions of employment of unit employees. It was created as a strike-substitute (strikes are prohibited in the Federal sector--see 7 FLRA No. 10, where the Authority decertified the Professional Air Traffic Controllers Organization (PATCO) because it had engaged in a strike) or other economic tests of strength that frequently determine bargaining outcomes in the private sector. The Panel uses many procedures for resolving impasses, including factfinding, med-arb, final-offer interest arbitration, either by the Panel, individual members of the Panel, the Panel's staff, or by ordering the parties to refer their impasse to an agreed-upon private arbitrator who is to provide interest-arbitration services. Under section 7119(c)(5)(B)(iii), FSIP may "take whatever action is necessary and not inconsistent with this chapter to resolve the impasse." For example, if the parties can't agree on particular provision(s)--i.e., contractually determined conditions of employment, FSIP has authority to tell them what to put (or not put) in their contract. However, it is not a ULP to refuse to comply with a FSIP order dealing with a permissive subject of bargaining. See 15 FLRA Nos. 65 and 100 - 104. See 5 CFR 2470 ff for FSIP's regulations.

For more information on FSIP, see http://www.flra.gov/.

FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS STATUTE (FSLMRS).

5 U.S.C. §§ 7101 - 7135. The basis of the labor-management relations program for most non-postal Federal employees. See **AGENCY** and **EMPLOYEE**, above. The statute can be downloaded from: www.law.cornell.edu/uscode/5/ch71.html.

FINAL-OFFER INTEREST ARBITRATION. A technique for resolving bargaining impasses in which the arbitrator is forced to choose among the final positions of the parties--rather than order adoption of some intermediate position (i.e., "split the difference"). It can apply to individual items or "packages" of items. The theory is that each party, expecting that the interest arbitrator will pick the most reasonable of the two final offers, will have an incentive to move closer to the position of the other party in order to increase the odds that the arbitrator will select its final offer as the more reasonable of the two. This in turn narrows the gap between the parties: if the gap is narrow enough it can be bridged by the parties themselves (by, e.g., splitting the difference).

FORMAL DISCUSSION. Under § 7114(a)(2)(A), the **exclusive representative** must be given an opportunity to be represented at "any formal discussion between one or more representatives of the agency and one or more employees in the unit or their representatives concerning any *grievance* (see next paragraph) or any personnel policy or practices or other *general condition of employment*[.]" (Italics added.) For a discussion and application of the four elements of "formal discussion," see 15 FLRA No. 87. For some of the factors FLRA considers in determining the "formality" of a meeting, see 10 FLRA No. 24. For other examples of formal discussion **unfair labor practices**, see 5 FLRA No. 58 (employee orientation sessions are formal discussions), 21 FLRA No. 96 (the right to be represented includes the right to "comment, speak and make [nondisruptive] statements"), and 41 FLRA No. 106 (telecon interviews of potential witnesses by agency attorney preparing for an MSPB hearing are formal discussions).

In its review of 57 FLRA No. 65, a case involving the issue of union presence at the mediation of an EEO complaint, the D.C. Circuit reaffirmed its view that § 7103(a)(9)'s broad definition of "grievance" encompasses both complaints filed under the negotiated grievance procedure and those filed under alternative statutory procedures. It did not find, in the case at bar, a direct conflict between the "formal discussion" rights of the union under § 7114(a)(2)(A) and the rights of an employee victim of discrimination, given that there was no evidence that the employee objected to union presence at the mediation proceeding. But it added that "[w]e do not foreclose the possibility that an employee's objection to union presence could create a 'direct' conflict that should be resolved in favor of the employee as described in footnote 12 of *NTEU*, 774 F.2d at 1189, n. 12. As there is no conflict present in the case before us, the FLRA's construction is permissible." *Dept. of the Air Force, Dover Air Force Base v. FLRA* No. 01-1373 (D.C. Cir. January 17, 2003).

FREE SPEECH. Under § 7116(e), the expression of personal views or opinions, even if critical of the union, is not an **unfair labor practice** if such expression is not made in the context of a representational election and if it "contains no threat of reprisal or force or promise of benefit or was not made under coercive conditions." During the conduct of an

election, however, management officials must be neutral. See, e.g., 14 FLRA No. 42, 9 FLRA No. 69, and 6 FLRA No. 32.

This limited right of free speech applies to agency representatives (see 9 FLRA No. 36). It should be distinguished from **employee** rights under § 7102. Under § 7102 employees have the protected right to "form, join, or assist any labor organization" or refrain from such activity and are therefore under no obligation to be neutral but can openly express their views, pro or con, regarding the unions seeking or holding exclusive recognition.

GENERAL COUNSEL. The General Counsel of the **Federal Labor Relations Authority** investigates **unfair labor practice** (ULP) *charges* and files and prosecutes ULP *complaints*. He/she also supervises the Authority's Regional Directors who, in turn, have been delegated authority by FLRA to process representation petitions.

GOOD FAITH BARGAINING. Defined by § 7114(b) as the duty to approach negotiations with a sincere resolve to reach a collective bargaining agreement, to be represented by properly authorized representatives who are prepared to discuss and negotiate on any **condition of employment**, to meet at reasonable times and places as frequently as may be necessary and to avoid unnecessary delays, and, in the case of the agency, to furnish upon request data necessary to negotiation. (There have been no FLRA decisions in which the Authority has addressed the issue of whether the refusal to explain or justify or otherwise discuss the meaning of proposals constitutes bad faith bargaining. However, in 54 FLRA No. 134, then Chairperson Segal, in a separate concurring opinion, took the position that the duty to bargain in good faith includes a duty to communicate). Violations of the duty to bargain in good faith are unfair labor practices. See, e.g., 6 FLRA No. 100 (refusal to bargain on a proposal substantially the same as a proposal FLRA has already found negotiable) and 18 FLRA No. 69 (surface bargaining).

GOVERNMENTWIDE REGULATIONS. Regulations issued by an agency bearing on conditions of employment that must be complied with by other agencies. Such regulations are a major limitation on agency discretion and therefore on the **scope of bargaining**, which presupposes agency discretion. Agencies chiefly involved in issuing such regulations are the **Office of Personnel Management** (on personnel management) and the General Services Administration (on property management).

Absent agreement to the contrary (see, e.g., 52 FLRA No. 128), section 7116(a)(7) makes it an unfair labor practice to enforce a midcontract change in a rule or regulation that comes into conflict with the agreement provision that was consistent with the rule or regulation in effect at the time the agreement was executed.

With respect to Governmentwide regulations, see 37 FLRA No. 104 and *Legislative History of the Federal Service Labor-Management Relations Statute, Title VII of the Civil Service Reform Act of 1978*, 96th Congress, 1st Session, Committee Print No. 96-7, p. 823.) See, also 46 FLRA No. 147, and the cases cited therein, where the Authority distinguishes between proposals that paraphrase or set forth the terms of a

Governmentwide regulation and proposals merely requiring compliance with existing Governmentwide regulations. The former, by imposing an independent, contractual limitation on the agency, directly interfere with management's § 7106 rights, whereas the latter do not.

See, also, *IRS v. FLRA*, 996 F.2d 1246 (D.C. Cir. June 29, 1993), adopted by the Authority in 48 FLRA No. 15, where the court said the following:

> We hold that if a government-wide regulation under section 7117(a) is itself the only basis for a union grievance . . . and the regulation precludes bargaining over its implementation or prohibits grievances concerning alleged violations, the Authority may not require a government agency to bargain over grievance procedures directed at implementation of the regulation. . . .

GRIEVANCE. Under § 7103(a)(9) a grievance "means any complaint--(A) by an employee concerning any matter relating to the employment of the employee; (B) by any labor organization concerning any matter relating to the employment of any employee; or (C) by an employee, labor organization, or agency concerning--(I) the effect or interpretation, or a claim of breach, of a collective bargaining agreement; or (ii) any claimed violation, misinterpretation, or misapplication of any law, rule, or regulation affecting conditions of employment[.]"

In *Treasury, Customs Service v. FLRA*, 43 F.3d 682 (D.C. Cir. 1994), the court said that the reference to any law, rule, or regulation "can be only interpreted . . . to confine grievances to alleged violations of a statute or regulation that can be said to have been issued for the very purpose of affecting the working conditions of employees--not one that merely incidentally does so."

GRIEVANCE ARBITRATION. See **ARBITRATOR**.

GRIEVANCE PROCEDURE. A systematic procedure, devised by the parties to the agreement, by which a grievance moves from one level of authority to the next higher level until it is settled, withdrawn, or referred to arbitration. Under § 7121, a collective bargaining agreement must contain a grievance procedure terminating in final and binding arbitration. Apart from matters that must by statute be excluded (such as grievances relating to retirement, health and life insurance and the classification of positions), the scope of the grievance procedure is to be negotiated by deciding what matters are to be *excluded* from an otherwise "full scope" procedure---i.e., a procedure that covers all the matters that it can legally cover. See **NEGOTIATED GRIEVANCE PROCEDURE**.

HIRE EMPLOYEES. A right reserved to management by § 7106(a)(2)(A). As the Authority noted in footnote 5 of 52 FLRA No. 106, the term “hire” had not yet been defined by the Authority. (In his dissenting opinion, former Member Armendariz defined the term as “relating to the specific process that results in the establishment of the employment relationship.”)

Because an agency's use of personal services contracts is inseparable from the decision to hire, proposals stating that employees won't be required to enter into personal services contracts as a **condition of employment** interfere with the right to hire. 30 FLRA No. 69, #2; 29 FLRA No. 123, #1. Proposals affecting the right to hire have been found to also affect other rights related to the filling of vacancies. For example, in 25 FLRA No. 9, #35, the Authority, after noting that "the decision whether to fill vacant positions is encompassed within an agency's rights to hire and assign employees under section 7-106(a)(2)(A)," went on to find that a proposal obligating the agency to hire a specific number of applicants responding to certain agency vacancy announcements violated management's rights to hire and assign employees. See **SELECT** for a discussion of the much more frequently utilized right of management, in filling positions, to make selections for appointments from any appropriate source.

IMPASSE. See **BARGAINING IMPASSE**.

I&I (IMPACT AND IMPLEMENTATION) BARGAINING. Even where the decision to change conditions of employment (including established practices) of unit employees is protected by management's § 7106(a) rights, there is a duty to notify the union and, upon request, bargain on the § 7106(b)(2) **procedures** that management will follow in implementing its protected decision as well as on § 7106(b)(3) **appropriate arrangements** for employees expected to be adversely affected by the decision. Such bargaining is commonly referred to as "impact and implementation," or "I&I" bargaining, which is the commonest variety of **midterm bargaining**. For examples of I&I **unfair labor practices** cases, see 50 FLRA No. 40 (use of covert electronic surveillance), 50 FLRA No. 51 (creating a team of unit employees to eliminate a backlog), and 49 FLRA No. 139 (changing an unlawful past practice).

There is, however, no duty to give notice if the agreement already contains provisions dealing with procedures and appropriate arrangements related to the type of change at issue. Suppose, e.g., that the agreement contains an article on details which sets forth the procedures management is to follow when detailing employees and on arrangements for employees adversely affected by details. If management changes the conditions of employment of certain employees by detailing them in accordance with the agreement's requirements, there is no duty to give notice and bargain. This important exception to the duty to give notice of greater than *de minimis* changes in conditions of employment is sometimes referred to as the "**covered by**" doctrine, described above. See, e.g., 47 FLRA No. 114, 48 FLRA No. 10, 48 FLRA No. 89, 49 FLRA No. 130, and 56 FLRA No. 136. Also see 58 FLRA No. 56 where the Authority, in holding that a provision on details in an expired agreement qualifies as a "covered by" exception to the duty to bargain, said the following: "the Judge correctly applied to the facts of this case the general principle that parties to an expired agreement continue to be bound by the provisions of that agreement until otherwise agreed or the provisions are modified in a manner consistent with the Statute. This principle affords stability to the parties' relationship and at the same time allows parties the flexibility to change those provisions if they so desire."

INFORMATION. Under § 7114(b)(4), the union, to the extent not prohibited by law (e.g., the Privacy Act), is entitled, under certain circumstances (see **PARTICULARIZED NEED**, below), to data "for full and proper discussion, understanding, and negotiation of subjects within the **scope of bargaining**[.]" The agency must provide that information free of charge. 10 FLRA No. 78. Moreover, "the scope of the information entitlement under section 7114(b)(4) . . . extends to the full range of representational activity, not just the context of pending negotiations between labor and management." 55 FLRA No. 44, citing *AFGE Local 1345 v. FLRA*, 793 F.2d 1360 at 1363 (D.C. Cir. 1986). See 50 FLRA No. 86 and 51 FLRA No. 26 for the analytical approach the Authority takes in dealing with union requests for information under section 7114(b)(4)--i.e., on whether the union has established a "particularized need" for the information and whether the agency has asserted any "countervailing interests," such as the Privacy Act. Also see 56 FLRA No. 19 on the consequences of failing to assert a countervailing interest *in response to the union request* for information. Also see 57 FLRA No. 176 (the activity's countervailing interests in not furnishing the MEO before the activity announced its contracting out decision outweighed any legitimate interests the union may have had in pre-decisional disclosure).

INTEREST ARBITRATION. The arbitrator, instead of interpreting and applying the terms of an agreement to decide a grievance, determines what provisions the parties are to have in their collective bargaining agreement. Also see **ARBITRATION**.

INTEREST-BASED BARGAINING (IBB). A bargaining technique in which the parties start with (or at least focus on) interests rather than proposals; agree on criteria of acceptability that will be used to evaluate alternatives; generate several alternatives that are consistent with their interests, and apply the agreed-upon acceptability criteria to the alternatives so generated in order to arrive at mutually acceptable contract provisions. The success of the technique depends, in large measure, on mutual trust, candor, and a willingness to share information. (Compare with the duty to bargain in good faith.) But even where these are lacking, the technique, with its focus on interests and on developing alternatives, tends to make the parties more flexible and open to alternative solutions and thus increases the likelihood of agreement.

IBB often is contrasted with "position-based" bargaining, in which the parties start with proposals (which implicitly are solutions to known or inferred problems). However, even in position-based bargaining the parties normally are expected to justify their proposals in terms of their interests by identifying the problems to which the proposals are intended as solutions. Once the interests are on the table, the parties are in a position to evaluate their initial and subsequent proposals--whether generated by group brainstorming (a common method of generating alternatives in IBB) or by more customary methods--in terms of the extent they are likely to effectively and efficiently solve problems without creating additional problems. For an analytical treatment of the process, see Walton and McKersie's discussion of "integrative" bargaining in *A Behavioral Theory of Labor Negotiations*. For a popular treatment of the process, see *Getting to Yes*, by Fisher and Ury.

INTERNAL SECURITY PRACTICES. A core right reserved to management by § 7106(a)(1). The right to determine the internal security practices of an agency isn't limited to establishing "those policies and actions which are part of the Agency's plan to secure or safeguard its physical property against internal and external risks, to prevent improper or unauthorized disclosure of information, or to prevent the disruption of the Agency's activities." 14 FLRA No. 2. It also extends to safeguarding the agency's personnel. See, e.g., 52 FLRA No. 2 (use of covert video cameras), 56 FLRA No. 56 (videotaping investigative interviews), 57 FLRA No. 9 (wander guard bracelets for mentally impaired patients), 58 FLRA No. 24 (investigative technique that includes the element of surprise), and 58 FLRA No. 66 (imposing an inflexible staffing requirement on prison management).

INTERVENTION/INTERVENOR. The action taken by a competing labor organization (intervenor) to place itself as a contender on the ballot for a recognition election originally initiated by another union (petitioner). Non-incumbent intervenors need only produce a 10 per cent showing of interest to be included on the ballot.

INVESTIGATORY EXAMINATION. See ***WEINGARTEN* RIGHT**.

LABOR ORGANIZATION. A union. See § 7103(a)(4) which reads in part as follows: "'labor organization' means an organization composed in whole or in part of employees, in which employees participate and pay dues, and which has as a purpose the dealing with an agency concerning grievances and conditions of employment . . . ."

LAYOFF EMPLOYEES. Right reserved to management by § 7106(a)(2)(A). Proposals assuring employment security for certain employees violate this right (9 FLRA No. 108 #2; 10 FLRA No. l , #3). Proposals prescribing the order in which employees are to be laid off (e.g., requiring that part-timers be the first to be laid off and trainees to be laid off before journeymen, 25 FLRA No. 9, ##30 & 31) also violate this right, as do proposed layoff ratios (e.g., requiring that an equal proportion of supervisory/nonsupervisory and part-time/full-time employees be laid off, 25 FLRA No. 83, #3). Because the right to layoff includes the right to place employees in a no-pay status, a proposal requiring that employees be placed on administrative leave during brief seasonal curtailments of operations interferes with the layoff right. *Naval Underwater Systems Center v. FLRA*, 854 F.2d 1 (lst Cir. 1988). (Review of 29 FLRA No. 47.)

MANAGEMENT OFFICIAL. Under § 7103(a)(11), an individual who formulates, determines, or influences the policies of the agency. Under § 7112(b)(1), such individuals are to be excluded from **appropriate units**. Because management officials are not "employees" within the meaning of the **Federal Service Labor-Management Relations Statute (FSLMRS)** (§ 7103(a)(2)(iii)), they do not, among other things, have the FSLMRS-protected right to represent unions. See §§ 7102 and 7120(e). In *AFGE Local 2513 v. FLRA*, 834 F.2d 174 (D.C. Cir. 1987), the court said the following about supervisors, which probably would also apply to management officials:

Congress has not prohibited supervisor's from joining unions. It is inconceivable that supervisor-members' right to belong to a union includes nothing more than paying dues and participating in various health plans. While Congress expressly prohibited supervisors from assuming policy-making and representative functions within the union, § 7120(e), there is no evidence that Congress intended to deny supervisors one of the most essential vestiges of union-membership, the right to cast a vote in the election of their union's officials.

MANAGEMENT RIGHTS. Refers to types of discretion reserved to management officials by § 7106(a) which, with the important exception of matters falling within § 7106(b), are not subject to collective bargaining. In 34 FLRA No. 55, the Authority said that "[m]anagement rights under section 7106(a) cannot be waived or relinquished through collective bargaining."

? ***Core rights***. Rights reserved to management under § 7106(a)(1), referred to as "core" management rights in the National Partnership Council's 1994 *Report to the President*, consist of the rights "to determine the mission, budget, organization, number of employees, and internal security practices of the agency[.]" **"Applicable laws"** affecting these core rights *cannot* be enforced through the **negotiated grievance procedure.** See *Treasury v. FLRA*, 494 U.S. 922 (1990).

? ***Operational rights***. Rights reserved to management under § 7106(a)(2), sometimes referred to "operational" rights, consist of the rights "(A) to hire, assign, direct, layoff, and retain employees in the agency, or to suspend, remove, reduce in grade or pay, or take other disciplinary action against such employees; (B) to assign work, to make determinations with respect to contracting out, and to determine the personnel by which agency operations shall be conducted; (C) with respect to filling positions, to make selections for appointments from--(I) among properly ranked and certified candidates for promotion; or (ii) any other appropriate source; and (D) to take whatever actions may be necessary to carry out the agency mission during emergencies."

? ***Three exceptions***. The three § 7106(b) exceptions to the above involve (1) **§ 7106(b)(1) permissive (or "elective") subjects** of bargaining (e.g., staffing patterns, methods and means of performing work) on which, under the statute, agencies can elect to bargain, (2) **procedures** management will follow in exercising its reserved rights, and (c) **appropriate arrangements** for employees adversely affected by the exercise of management rights.

1. "Permissive" subjects exception. The § 7106(b)(1) "permissive" subjects deal with, firstly, "staffing patterns" (see 52 FLRA No. 106)--i.e., with "the numbers, types, and grades of employees or positions assigned to any organizational subdivision, work project, or tour of duty" and, secondly, "the technology, methods, and means of performing work." Under the statute such matters are, moreover, negotiable "at the election of the agency" even if the proposal also directly interferes with the exercise of a § 7106(a) right. See 51 FLRA No. 36.

2. Procedural "exception." Section 7106(b)(2), dealing with procedures, really isn't an exception to management's rights as the Authority has held that a proposed "procedure" that "directly interferes" with a management right is not a procedure within the meaning of § 7106(b)(2). See *Customs Service v. Federal Labor Relations Authority*, 854 F.2d 1414, 1418 (D.C. Cir. 1988). The Authority has given indications that it wants to reexamine this doctrine. See, e.g., 54 FLRA No. 81, footnote 8 and 56 FLRA No. 185, footnote 3.

3. Appropriate arrangement exception. Section 7106(b)(3) applies only if the proposal is intended to ameliorate the adverse effects of the exercise of a management right. (It doesn't apply if the adverse effect is caused, e.g., by a regulation.) Where such is the intent of the proposal, the Authority applies a balancing test in which it weighs the extent to which the proposal ameliorates the expected adverse effects against the extent to which it interferes with the management right and determines whether or not the specific proposal "excessively" interferes with management rights. If the interference is "excessive," the proposal isn't an "appropriate arrangement" and therefore is nonnegotiable. If otherwise, the proposal is a negotiable appropriate arrangement, even though it interferes with management's rights.

To qualify as an "arrangement" to which it would be proper to apply the excessive interference balancing test, the proposal has to be "tailored" so that it applies only to those employees who would be adversely affected by the proposed management decision. See, in this connection, *Interior, Minerals Management Service v. FLRA*, 969 F.2d 1158 (D.C. Cir. 1992). "Prophylactic" proposals that are intended to eliminate the possibility of an adverse effect where it is impossible to predict which employees would be adversely affected by the decision reserved to management by § 7106(a) also qualify as "arrangements" (but not necessarily as *appropriate* arrangements) within the meaning of § 7106(b)(3). See 53 FLRA No. 59 and 56 FLRA No. 161.

MEDIATION. Use of a third party, usually a neutral without authority to impose a settlement, to assist the parties to reach agreement. Mediation techniques vary, but one common practice is for the labor mediator to separate the parties (in order to control communications) and meet with them separately and, in effect, engage in interest-based bargaining with them. Because the mediator usually is a neutral who cannot impose a settlement and because he or she is expected to keep confidences, each party is assumed to be more willing to be open with the mediator than with the other party (or with an interest arbitrator). Because of this greater openness, the mediator often is able to see areas of possible agreement that the parties are unable to see in direct, unmediated, negotiations. Under § 7119(a), labor mediation services are provided by the Federal Mediation and Conciliation Service (FMCS). Some writers have distinguished between conciliation and mediation in terms of the degree to which the mediator is expected to be an active participant in the process, with the conciliator playing a more passive role than that played by a mediator.

MED-ARB (mediation followed by interest arbitration). A process in which a neutral with authority to impose (or to recommend the imposition of) a settlement, first resorts to mediation techniques in an attempt to get the parties to voluntarily agree on unsettled matters, but who can later impose a settlement if mediation fails. The theory behind it is that the parties will be more receptive to the med-arb's suggestions for settlement if they know that the med-arb has authority to impose a settlement. It could, however, be argued that med-arb is a contradiction in terms: since the parties know the med-arb has authority to impose a settlement, they are not going to be as open regarding their interests and priorities as they would before a mediator who has no authority to impose a settlement, but will instead dissimulate, posture, be guarded and, in effect, resort to advocacy-by-exaggeration.

METHODS AND MEANS of performing work. Along with **STAFFING PATTERNS** and **TECHNOLOGY**, a § 7106(b)(1) exception to management's § 7106(a) rights. FLRA construes the term "method" to refer to the way in which an agency performs its work. The term "means" refers to "any instrumentality, including the agent, tool, device, measure, plan, or policy used by an agency for the accomplishment or furtherance of the performance of its work." 47 FLRA No. 26, #1. In 56 FLRA No. 10, FLRA found 9 proposals dealing with methods and means to be mandatorily negotiable 7106(b)(3) appropriate arrangements. In 55 FLRA No. 73 the Authority said the following: "Proposals concerning the number and designation of rating levels do not concern how an agency performs its work or what an agency uses to accomplish its work. Rather, such proposals concern how an agency evaluates the manner in which its employees perform the work to which they have been assigned. The Authority has consistently held that an agency's determinations as to performance standards and rating levels concern the work objectives for employees. . . . An agency's determination of the methods and means of performing work, on the other hand, concerns how employees will do their work, and what they will use, to accomplish those objectives." In 54 FLRA No. 136, the Authority held that a provision dealing with contracting out did not deal with methods and means because contracting out deals with *who* will do the agency's work, not with the *way* in which it will be done. Although EO 12871 had directed agencies to bargain on (b)(1) matters, that order was revoked by EO 13203.

MIDTERM BARGAINING. Literally, all bargaining that takes place during the life of the contract. See, e.g., 51 FLRA No. 68. Usually contrasted with term bargaining--i.e., with the renegotiation of an expired (or expiring) contract. Midterm bargaining includes **I&I bargaining**, **union-initiated midterm bargaining on new matters**; and bargaining pursuant to a **reopener** clause. It excludes matters that are already "**covered by**" the term agreement. In *NFFE v. Interior*, 526 U.S. 86 (1999), the Supreme Court, finding that the statute was ambiguous on the matter of midterm bargaining, held that FLRA's interpretation was entitled to considerable court deference. After the Court's remand, the Authority, in 56 FLRA No. 6, in effect reaffirmed the position it held before the 4th Circuit held that a union had no right to initiate midterm bargaining. That is, FLRA held that "agencies are obligated to bargain during the term of a collective bargaining agreement on negotiable union proposals concerning matters not 'contained in or covered

by' the existing agreement unless the union has waived its right to bargain about the subject matter involved."

MISSION OF THE AGENCY. A right reserved to management by § 7106(a)(1). Although illustrative case law on this particular right is meager, it is generally recognized that the right encompasses the determination of the products and services of an agency. For example, a proposal prescribing when the agency would provide its services to the public was found to directly interfere with this right. See, e.g., 22 FLRA No. 92, #1; 29 FLRA No. 123, #3; and 30 FLRA No. 69, #8.

NATIONAL CONSULTATION RIGHTS (NCR). Under § 7113, the right of a union accorded such recognition to be consulted on *agency-wide* regulations before they are promulgated. NCR is to be distinguished from § 7117(d)(1) consultation rights with respect to *Governmentwide* regulations, under which a union accorded such recognition must be consulted on proposed Governmentwide regulations before they are promulgated.

NEGOTIABILITY DISPUTES. Disputes over whether a proposal is nonnegotiable because (a) it is inconsistent with laws, rules, and regulations establishing conditions of employment and/or (b) it interferes with, and does not constitute a § 7106(b) exception to, the exercise of rights reserved to management by § 7106.

Negotiability disputes normally are processed under FLRA's "no fault" negotiability procedures--see § 7117(c)(1) and 5 CFR Part 2424. They can also be processed under FLRA's **unfair labor practice** procedures (5 CFR Part 2423) if they are associated with changes in conditions of employment in which management has refused to bargain on the union's proposals on the ground they are nonnegotiable. (If the union files under both procedures, FLRA will dismiss, without prejudice, the negotiability petition for review. See 5 CFR 2424.30(a).) In 58 FLRA No. 88, the Authority made clear that, in negotiability appeals, it determines only whether there is a statutory (not a contractual) obligation to bargain.

Negotiability disputes have played a prominent role in Federal sector negotiations because of the extent to which conditions of employment of Federal employees are determined by laws and regulations, with the result that there is far less room for bargaining than there is, e.g., in the private sector. The parties are, in effect, limited to bargaining in the interstices. Lack of clarity as to the meaning of management's § 7106 rights, as well as the complications brought about by § 7106(b)'s exceptions to those rights, also contribute to the high incidence of negotiability disputes.

Finally, when union-management relations are adversarial, there is a temptation to avoid bargaining by alleging that proposals are nonnegotiable rather than finding out what concerns or problems prompted the proposals and using the bargaining process as an attempt to find mutually satisfactory solutions to real problems. When the legal constraints are numerous, unclear, complicated (because, e.g., of exceptions and the need to use fact-sensitive balancing tests) and constantly changing, opportunities to make use

of such tactics are abundant. Even when these constraints are not exploited to avoid bargaining, good faith assertions of nonnegotiability cannot help but create frustration and distrust. One of the virtues of interest-based bargaining is that issues of negotiability come at the end of the process, when evaluating alternatives, rather than at the beginning of the process, before interests and exploration of ways in which they can be met, are discussed.

NEGOTIATED GRIEVANCE PROCEDURE (NGP). Section 7121 requires that the collective bargaining agreement (CBA) contain a grievance procedure terminating in final and binding arbitration. The NGP, with a few exceptions involving statutory alternatives (e.g., adverse and performance-based actions), is the exclusive administrative procedure for grievances falling within its coverage. Apart from the matters excluded from the coverage of the NGP by § 7121(c)--e.g., retirement, life and health insurance, classification of positions--the NGP covers those matters specified in the definition of grievance in § 7103(a)(9) (see **GRIEVANCE**, above), minus any of those matters that the parties agree to exclude from the NGP. That is, under the FSLMRS program, the parties negotiate to determine what matters to *exclude* from the procedure rather than what matters it is to *include*--just the opposite from pre-FSLMRS and private sector practices.

In *Carter v. Gibbs*, 883 F.2d 1563 (Fed. Cir. 1990), the Federal Circuit held that, because of the **exclusivity** of the NGP, Fair Labor Standards Act (FLSA) claims covered by the NGP could only be processed under the NGP. In subsequent court decisions it was made clear that it would be assumed that the NGP covered FLSA claims unless the NGP expressly excluded such claims from the NGP's coverage. However, § 7121 was amended in 1994 to provide, among other things, that the reference to "exclusive procedures" be changed to "exclusive administrative procedures," which resulted in the Federal Circuit abandoning *Carter v. Gibbs* in *Mudge v. U.S.*, No 02-5024 (Fed. Cir. Oct. 17, 2002).

It should be noted that the scope of the NGP is broader than the **scope of bargaining**. Although, e.g., a proposal inconsistent with a law or a Governmentwide regulation is nonnegotiable, alleged misapplications of laws or Governmentwide regulations relating to conditions of employment, with a few exceptions and qualifications, can be grieved under the NGP. Regarding grievances alleging misapplication of laws, in *Treasury, Customs Service v. FLRA*, 43 F.3d 682 (D.C. Cir. 12/30/94), the court held that the NGP can't be used to enforce laws that only incidentally affect employee working conditions. Regarding Governmentwide regulations, in *Department of Treasury, IRS v. FLRA, et al*, 996 F.2d 1246 (D.C. Cir. 1993), the court held that alleged violations of OMB Circular A-76 can't be grieved under the NGP because the Circular prohibited such grievances.

NUMBER OF EMPLOYEES OF AN AGENCY. A right reserved to management by § 7106(a)(1). There have been no FLRA decisions in which a proposal has been found nonnegotiable because it interfered with this right. In 46 FLRA No. 27, where FLRA held that a placement program for employees losing security clearances didn't abrogate this right, FLRA said that this right "relates to the number of employees actually

employed by an agency." For other cases in which management unsuccessfully invoked this right, see 44 FLRA No. 1, 32 FLRA No. 127, 31 FLRA No. 30, and 23 FLRA No. 30.

OBJECTIONS TO ELECTION. Charges filed with FLRA contesting election results because of alleged irregularities in the conduct of a representational election. If the objections are sustained, FLRA could set aside the election results and order that the election be rerun.

OFFICE OF PERSONNEL MANAGEMENT (OPM). Issues **Governmentwide regulations** on personnel matters that may have a substantial impact on the **scope of bargaining**; consults with labor organizations, pursuant to 5 U.S.C. § 7117(d), on those regulations; provides technical advice and assistance on labor-management relations matters to Federal agencies; also provides information on personnel matters to Federal agencies and the general public (e.g., this annotated glossary); and exercises oversight with regard to statutory and regulatory requirements relating to personnel matters.

OFFICIAL TIME. At one time treated as a term of art created by § 7131, involving paid time for employees serving as union representatives. However, in 39 FLRA No. 44 the Authority said the following:

> [S]ection 7131(d) relates only to the granting of official time in connection with labor-management relations activities. . . . However, . . . section 7131(d) does not preclude parties to a collective bargaining agreement from agreeing to provide official time [sic] for other matters; that is, matters other than those relating to labor-management relations activities. . . . Consistent with an agency's broad discretion to grant paid time in a variety of circumstances, parties may agree in their collective bargaining agreements to provide official time for other matters. . . . To the extent that earlier Authority decisions suggest that all collective bargaining agreement provisions dealing with official time must relate solely to labor-management relations activities, they will no longer be followed.

Under § 7131(a), union negotiators (no more than the number of management negotiators) who also are unit employees are statutorily entitled to official time to negotiate agreements (but not to travel and per diem--see *BATF v. FLRA*, 104 S.Ct. 439 (1983)). Section 7131(b) prohibits use of official time for the performance of internal union business. Section 7131(c) provides for official time for employees "participating for, or on behalf of, a labor organization" in FLRA proceedings. See, e.g., 47 FLRA No. 48. And § 7131(d) allows the parties to negotiate the amount of official time that shall be granted to specified union representatives for the performance of specified representational functions.

OPEN PERIOD. The 45-day period (105 - 60 days prior to expiration of agreement) when the union holding exclusive recognition is subject to challenge by a rival union or by unit employees who no longer want to be represented by the union. The open period is an exception to the **contract bar** rule.

ORGANIZATION. A right reserved to management by § 7106(a)(1). In 53 FLRA No. 58, the Authority said the following about this management right:

> Management's right to determine its organization under section 7106(a)(1) encompasses an agency's authority to determine its administrative and functional structure, including the relationship of personnel through lines of control and the distribution of responsibilities for delegated and assigned duties. [See 52 FLRA No. 79 and 46 FLRA No. 147.] That is, the right includes the authority to determine how the agency will structure itself to accomplish its mission and functions. . . . This determination includes such matters as where organizationally certain functions shall be established and where the duty stations of the positions providing those functions shall be maintained. [See 32 FLRA No. 128] (a proposal that would preclude management from moving the work of employees' positions from one location to another found to violate management's right to determine its organization, including the right to determine where, organizationally, certain functions shall be established and where the duty stations of the positions in those units shall be maintained).

See, e.g., 58 FLRA No. 43, where the Authority set aside an award in which the arbitrator enforced an agency order specifying the supervisory relationships or lines of authority on the midnight shift at certain locations because the award affected the agency's right to determine its organization.

PANEL. See **FEDERAL SERVICE IMPASSES PANEL**.

PARTICULARIZED NEED. In 50 FLRA No. 86 and 51 FLRA No. 26, the Authority adopted a new analytical approach in dealing with union requests for information under § 7114(b)(4). Under this approach, the union must establish a "particularized need" for the information and the agency must assert any countervailing interests. The Authority then balances the one against the other to determine whether a refusal to provide information is a **unfair labor practice**. Regarding particularized need, FLRA said the following:

> [A] union requesting information under [§ 7114(b)(4)] must establish a particularized need for the information by articulating, with specificity, why it needs the requested information, including the uses to which the union will put the information and the connection between those uses and the union's representational responsibilities . . . . [This] requirement . . . will not be satisfied merely by showing that [the] requested information is or would be relevant or useful to a union. Instead, a union must establish that [the] requested information is "required in order for the union adequately to represent its members." *Justice v. FLRA*, 991 F.2d at 290.

PAST PRACTICE (ESTABLISHED PRACTICE). Existing practices sanctioned by use and acceptance, that are not specifically included in the collective bargaining agreement. Arbitrators use evidence of past practices to interpret ambiguous contract

language. In addition, past practices can be enforced under the **negotiated grievance procedure** because they are considered part of the agreement. See, e.g., 5 FLRA No. 35 and 7 FLRA No. 125. Unilateral changes in past practices dealing with conditions of employment (see 24 FLRA No. 96, 27 FLRA No. 44, and 34 FLRA No. 104) can constitute **unfair labor practices (ULP)**. See, e.g., 6 FLRA No. 127, 9 FLRA No. 11, and 21 FLRA No. 103. Indeed, it is a ULP to unilaterally change a practice that is at odds with the express terms of the agreement. See, in this connection, 36 FLRA No. 65, where FLRA said the following:

> The fact that the negotiated agreement addressed the matter is not conclusive, if it is shown, in fact, that over a period of time the parties had engaged in a practice regarding the [matter] that differed from the contractual procedure. If this showing is made, and the practice satisfies the statutory requirements of section 7103(a)(14), it is a condition of employment that cannot be unilaterally altered. *Letterkenny Army Depot*, 34 FLRA 606, 610-11 (1990).

As the ALJ noted in 42 FLRA No. 7, "[t]o find that a condition of employment has been established by past practice . . . there must be a showing that the practice was consistently exercised for an extended period of time, with the agency's knowledge and express or implied consent. *Norfolk Naval Shipyard*, 25 FLRA No. 19 [25 FLRA 277 at 286].

See, e.g., 58 FLRA No. 129, where FLRA turned down exceptions to an award in which the arbitrator found that the parties had established, by past practice, a compressed work schedule for unit employees. "We find the Agency's claim that, under 5 U.S.C. § 6130, compressed work schedules can only exist in collective bargaining units through negotiation to be unavailing."

PAY. For agencies and employees covered by the Federal Service Labor-Management Relations Statute (FSLMRS--see 5 U.S.C. 7101 ff) pay is a negotiable condition of employment *unless* (1) it is specifically provided for by Federal Statute (see 5 U.S.C. § 7103(14)(C)), which is the case for most Federal employees, or (2) the agency is given sole discretion over the setting of pay. Where an agency is given discretion over pay and there is no indication that Congress intended that the discretion be "sole and exclusive," pay is a negotiable condition of employment.

See, in this connection, the Supreme Court's decision in *Fort Steward Schools v. FLRA*, 110 S.Ct. 2043 (1990), where the Court upheld FLRA's determination that where an agency has discretion to set pay and that discretion is not "sole and exclusive," it is a bargainable condition of employment.

For an example of where the Authority found that the agency had sole discretion in the setting of pay, see *Office of Thrift Supervision*, 47 FLRA No. 84, upheld by the D.C. Circuit in *AFGE, Local 3925 v. FLRA*, 46 F.3d 73 (1995). In that case, FLRA found that the Director of the Office of Thrift Supervision (OTS) was granted sole and exclusive authority to set pay and benefits for OTS employees, and therefore union proposals related to the compensation and health benefits of OTS employees are nonnegotiable.

PERMISSIVE SUBJECTS OF BARGAINING. There are, as the Authority noted in 44 FLRA No. 4, at least three types of proposals dealing with so-called "permissive subjects of bargaining": proposals dealing with (1) matters covered by § 7106(b)(1)--i.e., with staffing patterns, technology, and methods and means of performing the agency's work, (2) matters that are not conditions of employment of bargaining unit employees (e.g., procedures for filling supervisory positions; employee recreational access to agency launch), and (3) other (such as permitted waivers of statutory rights).

Regarding 7106(b)(1) permissive subjects, it should be noted that although, under the statute, an agency can "elect" not to bargain on a (b)(1) matter, agencies had been directed to bargain on (b)(1) matters by § 2(d) of EO 12871. This requirement was rescinded when EO 12871 was revoked by EO 13203.

Regarding waivers of statutory rights, see 34 FLRA No. 55, where FLRA said that "[m]anagement rights under section 7106(a) cannot be waived or relinquished through collective bargaining."

Regardless of type, once agreement is reached on a permissive subject of bargaining, that agreement cannot be disapproved by the agency head during a § 7114(c) review of the agreement, and is enforceable under the negotiated grievance procedure. See 45 FLRA No. 43 and 53 FLRA No. 60, # X.

Such a provision can, however, be unilaterally terminated when the contract expires. See 14 FLRA No. 89 and 55 FLRA No. 37, where FLRA said: "A party's right to terminate unilaterally a permissive subject is not contingent on first satisfying a bargaining obligation as to the substance, impact or implementation of the change." Nor is it a ULP to refuse to comply with a FSIP order dealing with a permissive subject of bargaining. See 15 FLRA Nos. 65 and 100 - 104.

PERSONNEL BY WHICH AGENCY OPERATIONS ARE CONDUCTED. A right reserved to management by § 7106(a)(2)(B). In 25 FLRA No. 9, #36, the Authority said this right was violated by a provision requiring the agency to negotiate concerning the *kinds* of personnel (journeyman or apprentice printers) by which its future operations would be conducted. In 24 FLRA No. 40, #4; 30 FLRA No. 137, #8; and 32 FLRA No. 86, #5, it said that this right (and the right to assign work) were violated by proposals barring supervision by people *who aren't Federal employees*. Compare with the § 7106(a)(1) right to determine the **number of employees** of the agency and with the § 7106(b)(1) "right" to determine **staffing patterns**.

PROCEDURES. Under § 7106(b)(2), the procedures observed by management in exercising its reserved rights are negotiable. To qualify as a negotiable (b)(2) procedure, the proposed "procedure" must not require the use of standards that, by themselves, directly interfere with management's reserved rights or otherwise have the effect of limiting management's reserved discretion. See, in this connection, *Department of Defense, Army-Air Force Exchange Service v. Federal Labor Relations Authority*, 659

F.2d 1140 (D.C. Cir. 1981). The Authority has given indications that it wants to reexamine this doctrine. See, e.g., 54 FLRA No. 81, footnote 8 and 56 FLRA No. 185, footnote 3.

QUESTION CONCERNING REPRESENTATION (QCR). Refers to a petition in which a union seeks to be the **exclusive representative** of an **appropriate unit** of employees, or in which employees in an existing unit want to decertify the incumbent union. The filing of such a petition is said to raise a question concerning representation--i.e., whether, and by whom, unit employees are to be represented. Such petitions are distinguished from petitions seeking to clarify the composition of existing units (e.g., whether certain individuals are in or out of the unit) or to amend the names of the parties to the exclusive bargaining relationship. See § 7111(b) and 5 CFR 2422.34.

REOPENER CLAUSE. Provisions in the CBA specifying the conditions under which one or either party can reopen for renegotiation the agreement or designated parts of the agreement. Although some agreements provide for mutual consent reopeners, such reopeners are unnecessary as the parties can of course *agree* to reopen and renegotiate their agreement at any time, notwithstanding the contents of the agreement. The purpose of a reopener is to enable one party to *compel* the other party to renegotiate the provisions covered by the reopener.

REPRESENTATION ELECTION. Secret-ballot election to determine whether the employees in an appropriate unit shall have a union as their **EXCLUSIVE REPRESENTATIVE**. § 7111(a)

REPRESENTATIONAL FUNCTIONS. Activities performed by union representatives on behalf of the employees for whom the union is the **exclusive representative** regarding their conditions of employment. It includes, among other things, negotiating and policing the terms of the agreement, being present at (1) **formal discussions** and, upon employee request, (2) ***Weingarten* examinations**.

REPRESENTATION ISSUES. Issues related to how a union gains or loses **exclusive recognition** for a bargaining unit, determining whether a proposed unit of employees is appropriate for the purposes of exclusive recognition, and determining the unit status of various employees. See §§ 7111 and 7112.

REPUDIATION OF AGREEMENT. See last paragraph under **AGREEMENT, NEGOTIATED**.

RETAIN EMPLOYEES. In 58 FLRA No. 82 the Authority defined this right as "the right to establish policies or practices that encourage or discourage employees from remaining employed by the agency."

SCOPE OF BARGAINING. Matters about which the parties can negotiate. See **NEGOTIABILITY DISPUTES**.

SECURITY WORK. Under 5 USC § 7112(b)(6), appropriate units may not include employees engaged in "security work which directly affects national security[.]" See 57 FLRA No. 180 where the Authority, citing 52 FLRA No. 111, affirmed a Regional Director's determination that 177 employees were engaged in security work because they had access to classified material.

SELECT (WITH RESPECT TO FILLING POSITIONS). A right reserved to management by § 7106(a)(2)(C) to make selections for appointments from any appropriate source. The right to select includes discretion to determine what knowledges, skills and abilities are necessary for successful performance in the position to be filled, as well as to determine which candidates possess these qualifications. Consequently, a proposal requiring management to fill vacancies in a RIF situation only with affected employees who meet *minimum* X-118 standards excessively interferes with the right to select. 23 FLRA No. l, #1.

FLRA has held that a career-ladder promotion isn't a "selection for appointment" under § 7106(a)(2)(C). 11 FLRA No. 58, #2. Such a promotion is, instead, "merely . . . a ministerial act implementing the Agency's earlier decision made pursuant to its discretion under section 7106(a)(2)(C) to select and place the employee involved in a career ladder position, with the intention of preparing the employee for successive noncompetitive promotions when [certain conditions are met]." 8 FLRA No. 97. Thus, FLRA has found proposals requiring that such promotions be made as soon as employees have demonstrated the ability to perform at the higher level and have met time-in-grade requirements to be negotiable (or, more commonly, it has sustained arbitration awards enforcing career-ladder promotion provisions). Proposals requiring management to *create* career-ladder positions, on the other hand, excessively interfere with the agency's right to determine its **organization**. 25 FLRA No. 21, #11.

Proposals requiring that unit positions be filled only via competitive procedures affect the right to select. See 58 FLRA No. 100, where FLRA noted that it "has found that contractual requirements that agencies use competitive procedures in filling vacancies are not procedures under § 7106(b)(2) if the requirements 'prevent management from considering other applicants . . . or using any other appropriate source' in actually 'filling such vacancies.' *ACT I*, 56 FLRA at 1048."

SHIFTS. The right to establish and abolish shifts is a 7106(b)(1) staffing patterns right. See 16 FLRA No. 1. Also see 57 FLRA No. 70, #4(1), where FLRA held that a proposal requiring that "there shall be a minimum of two (2) officers on duty at all times on all shifts," although it affects internal security practices, is nonetheless electively negotiable under 7106(b)(1). Assigning employees to shifts is a 7106(a)(2)(A) right to assign employees. But see 55 FLRA No. 192, where the Authority said that it "has consistently held that proposals or provisions that prescribe the manner [e.g., assign on the basis of seniority] in which equally qualified employees will be assigned to shifts constitute procedures under section 7106(b)(2). . . ."

SHOWING OF INTEREST (SOI). The required evidence of employee interest supporting a representation petition. The SOI for a petition seeking exclusive recognition is 30% (5 CFR 2422.3(c)); 10% to intervene in the election (5 CFR 2422.8(c)(1); and 10% when petitioning for dues allotment recognition (5 CFR 2422.3(d)). Evidence of such a showing can consist of, e.g., signed and dated authorization cards or petitions.

STAFFING PATTERNS. A short-hand expression used to refer to § 7106(b)(1)'s long-winded reference to "the numbers, types, and grades of employees or positions assigned to any organizational subdivision, work project, or tour of duty[.]" Under the statute, agencies can elect not to bargain on such matters. Although EO 12871 had directed agencies to bargain on (b)(1) matters, that order was revoked by EO 13203.

Distinguish between § 7106(a)(1)'s reference to number of employees *of an agency* and § 7106(b)(1)'s reference to "numbers . . . of employees . . . *assigned to* any agency subdivision, work project, or tour of duty." (Emphasis added.) The former refers to the size of the agency's workforce; the latter to the allocation of that workforce among agency subdivisions, etc. Keep in mind that § 7106(b)(1) is an exception to § 7106(a), including § 7106(a)(1). Consequently a staffing patterns proposal affecting the numbers of employees of an agency would still be, under the statute, an electively negotiable matter.

See 58 FLRA No. 113 where FLRA noted that where a union claiming that its proposal is a 7106(b)(1) permissive subject of bargaining does not dispute that the proposal also affects management's rights, FLRA first addresses whether the proposal is a (b)(1) matter. If it does, that ends the matter.

STANDARDS OF CONDUCT FOR LABOR ORGANIZATIONS. Standards regarding internal democratic practices, fiscal responsibility, and procedures to which a union must adhere to qualify for recognition. The Department of Labor has responsibility for making known and enforcing standards of conduct for unions in the Federal and private sectors. See 53 FLRA No. 85.

STEWARD. Union representative to whom the union assigns various representational functions, such as investigating and processing grievances and representing the union at various meetings, such as § 7114(a)(2)(A) **formal discussions** and § 7114(a)(2)(B) ***Weingarten*** meetings.

SUCCESSORSHIP. Where, as the result of a reorganization, a portion of an existing unit is transferred to a gaining employer, the latter will be found to be the successor employer (thus inheriting, along with the employees, the **exclusive representative** of those employees and the collective bargaining agreement that applied to those employees) if: (a) the post-transfer unit is appropriate, (b) the transferred bargaining unit employees are a majority in the post-transfer unit, (c) the gaining employer has "substantially" the same mission as the losing employer, (d) the transferred employees perform "substantially" the same duties under "substantially" similar working conditions in the gaining entity, and (e) it is not demonstrated that an election is necessary to

determine representation. See *Port Hueneme*, 50 FLRA No. 56.

In 56 FLRA No. 47, the Authority indicated that where there are competing claims of successorship, it would first evaluate proposed units that most fully preserve the *status quo* regarding the bargaining structure and the employees' relationship to its chosen exclusive representative. It also indicated that a change in chain of command, by itself, doesn't render a unit inappropriate. Compare with **ACCRETION**, discussed above.

SUPERVISOR. Under § 7103(a)(10), a supervisor is "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, except that, with respect to any unit which includes firefighters or nurses, the term 'supervisor' includes only those individuals who devote a preponderance of their employment time to exercising such authority[.]" In 45 FLRA No. 57 the Authority also held that a person exercising independent judgment in preparing performance appraisals is a supervisor.

The individual need exercise only one of the indicia of supervisory authority, not a majority of them, to qualify as a supervisor under the FSLMRS, provided it involves the consistent exercise of independent judgment. See, e.g., 35 FLRA No. 137. Moreover, it is sufficient if that individual exercises supervisory authority over a single employee (rather than three employees as required by classification requirements). Job titles are not determinative, as FLRA bases its determinations on what the individuals do, not on what the positions they occupy are called or how they are classified. For example, sometimes **team leaders** are found to be supervisors, and sometimes they are not, depending on what they actually do. See, e.g., 8 FLRA No. 10 (where 2 of 15 team leaders were found to be supervisors), 11 FLRA No. 37 (where FLRA found 6 team leaders to be supervisors), and *SSA and AFGE*, Case No. WA-RP-60063, February 26, 1997 (where a Regional Director with FLRA found that 49 team leaders in 10 regions were both supervisors and confidential employees).

Although supervisors can join unions and vote in union elections, they may not represent the union in its dealings with management. See court case quoted under **MANAGEMENT OFFICIAL**, above.

TECHNOLOGY, METHODS AND MEANS OF PERFORMING WORK. Along with **STAFFING PATTERNS**, proposals prescribing the **technology, methods and means of performing the agency's work** would be § 7106(b)(1) "elective" exceptions to management's § 7106(a) rights. **Technology** includes not only obvious equipment--e.g., telephones (22 FLRA No. 34, #14; 22 FLRA No. 77), respirators for employees with beards (22 FLRA No. 53, #7), computer terminals (30 FLRA No. 83), two-way radios (32 FLRA No. 135, #6), drug testing equipment such as gas chromatography/mass spectrometry devices (42 FLRA No. 37, #4), calculators (13 FLRA No. 73)--but also textbooks (19 FLRA No. 99, ## 2, 4, 5) where it can be shown that the technology is to

be used by employees in the performance of their official duties. (Textbooks are a part of the technology that the Department of Defense Dependent's School uses to perform its educational function.) Providing the union with telephones, by contrast, would *not* deal with technology because the union would not be using the telephones for the conduct of *agency* business. Similarly, a requirement that the agency provide secure smoking shelters does not deal with a § 7106(b)(1) matter where the agency couldn't establish a connection between the shelters and the agency's performance of its work. See, also, 7 FLRA No. 89, #4, where FLRA held that proposals requiring the provision of showers and lockers did not deal with technology within the meaning of § 7106(b)(1). See, also, **METHODS AND MEANS**, above. Although EO 12871 had directed agencies to bargain on (b)(1) matters, that order was revoked by EO 13203.

UNFAIR LABOR PRACTICE (ULP). A violation of any of the provisions of the Federal Service Labor-Management Relations Statute. It is a term of art (see § 7116) that is narrower in scope than the misleading adjective "unfair" suggests. ULP *charges* are filed with the Authority by an individual, a union, or an activity. They are investigated by the General Counsel who issues a ULP *complaint* if the General Counsel concludes the charge(s) have merit, and who prosecutes the matter before an Administrative Law Judge in a factfinding hearing and before the Authority, which decides the matter.

The most common agency ULPs are **duty-to-bargain** ULPs (usually a failure to give the union notice of proposed changes in conditions of employment and/or engage in **impact and implementation bargaining**), **formal discussion** ULPs, ***Weingarten*** ULPs, and failure-to-provide-**information** ULPs. The most common ULP committed by a union is a failure to fairly represent (see **fair representation**) all unit members without regard to union membership.

UNION. A labor organization within the meaning of § 7103(a)(4)--i.e., "an organization composed in whole or in part of employees, in which employees participate and pay dues, and which has as a purpose the dealing with an agency concerning grievances and conditions of employment . . . ."

UNION-INITIATED MIDTERM BARGAINING ON NEW MATTERS. Absent a bargaining waiver, the union has the right to initiate bargaining on matters not **"covered by"** the CBA. In *NFFE v. Interior*, 526 U.S. 86 (1999), the Supreme Court, disagreeing with the "absolutist" views of both the D.C. and the 4th Circuits and instead finding that the statute was ambiguous on the matter of midterm bargaining, held that FLRA's interpretation was entitled to considerable court deference. After the Court's remand, the Authority, in 56 FLRA No. 6, in effect reaffirmed the position it held before the 4th Circuit held the union had no right to initiate **midterm bargaining**.

UNIT. See **APPROPRIATE UNIT**.

? Distinguish between "union" and "unit" (or "bargaining unit"). A "unit" is a grouping of employees (occupying certain types of positions) for collective bargaining purposes. A "union" is an organization that either is, or seeks to be, the

exclusive representative (for collective bargaining purposes) of all the employees in a bargaining unit.

? Do not confuse "unit" member and "union" member. Whether one is in, or not included in, a unit depends on the unit description (in terms of types of positions) and whether the position one occupies is encompassed by the unit description. An employee cannot elect to be in or out of an existing unit: inclusion or exclusion depends on the position the employee occupies. Being a union member, on the other hand, is a matter of choice. Although, e.g., management officials and supervisors cannot be included in units (see 5 USC § 7112(b)(1)), nothing prevents them from becoming members of unions. Similarly, there is no obligation--at least in the Federal sector's labor-management relations program--for employees in a unit to join a union. See 5 USC § 7102.

UNIT CONSOLIDATION. A no-risk procedure for combining existing units into one or more larger appropriate units. § 7112(d).

UNIT DETERMINATION ELECTION. When several petitioners seek to represent different parts of an employer and the proposed units overlap, and when FLRA finds that more than one of the proposed units are appropriate, it lets the employees vote for units as well as unions. See, e.g., 5 FLRA No. 20. (Keep in mind that the statute does not require that the proposed unit be the "most" appropriate unit, but only that the unit be "an" appropriate unit.)

"VITALLY AFFECTS" TEST. This test applies only when union proposals directly, not indirectly, affect the conditions of employment of nonunit employees. The test is an exception to the rule that proposals aimed at the conditions of employment of nonunit employees are outside the scope of bargaining. The "vitally affects" test applies to third-party matters that don't *normally* fall within the scope of bargaining, such as the employer's relationship with non-employees and unorganized employees. "To satisfy the test," said the D.C. Circuit in *Naval Aviation Depot, Cherry Point, North Carolina v. Federal Labor Relations Authority*, 952 F.2d 1434 (D.C. Cir. 1992), " the union must show that the 'third party matter' about which it seeks to negotiate *vitally affects* the conditions of employment of bargaining unit members." (Emphasis by court.) The test doesn't apply to proposals that otherwise are within the mandatory scope of bargaining merely because they would have *some* impact on persons not in the unit. See, e.g., 54 FLRA No. 119.

***WEINGARTEN* RIGHT**. Under § 7114(a)(2)(B), a bargaining unit employee being examined in an investigation (an investigatory examination or interview) is entitled to union representation if the examination is conducted by a representative of the agency, the employee reasonably believes that the examination may result in disciplinary action, and the employees asks for representation. A performance evaluation is not a *Weingarten* exam--see 5 FLRA No. 53. In resolving a split in the circuits, the Supreme Court held that Inspector General agents are representatives of the agency for the purposes of section 7114(a)(2)(B). *NASA et al. v. FLRA, et al.*, 527 U.S. 229 (1999). Also see *Office of*

Inspector General, Dept of Justice v. FLRA, 266 F.3d 778 (D.C. Cir. 2001) where the court, in upholding the Authority's decision in 56 FLRA No. 87, rejected the agency's contention that an OIG agent isn't a "representative of the agency" when conducting a criminal investigation.

WORKING CONDITIONS. See **CONDITIONS OF EMPLOYMENT**.