

A Guide to the Federal Service Labor-Management Relations Program



Federal Labor Relations Authority

Table of Contents

	<i>Page</i>
Introduction	VII
• The Purpose of the Guide	VII
• The FLRA—Mission and Customers	VIII
Chapter 1—The Statute—General Provisions	1
• Findings and Purpose	1
• Administration	1
• The Authority	1
• The General Counsel	2
• The Federal Service Impasses Panel	2
• Statutory Definitions	3
Chapter 2—Employees’ Rights Under The Statute	5
Chapter 3—Recognition of Labor Organizations and Appropriateness of Units	6
• Criteria	6
• Exclusions	6
Chapter 4—Representation Petitions	9
Chapter 5—Representation Proceedings	12
• Intervention	12
• Election	13
• Bars	14
• Investigation and Hearing	14
Chapter 6—Exclusive Representative’s Rights and Obligations ...	16
Chapter 7—Collective Bargaining	18
• The Obligation to Negotiate	18
• Negotiated Grievance Procedure	19
• Exceptions to the Duty to Bargain	19
• Federal Law	19
• Government-wide Rule or Regulation	19
• Management’s Rights	19
• Negotiable Exceptions	20
• Approval of Collective Bargaining Agreement	21

Chapter 8—Negotiability Appeals	22
• Time Limits for Filing	23
• How the Authority Calculates the Time Period for Filing the Petition for Review	23
• Where to File; How the Authority Determines the Date of Filing	23
• Content of Petition, Service	24
• Incomplete Petition for Review	24
• Post-petition Conference	24
• Statement of Position of the Agency; Time Limits for Filing	25
• Union's Response to the Agency's Statement of Position	26
• Agency's Reply Brief	26
• Statement of Service	27
Chapter 9—Resolution of Negotiation Impasses	28
• Bilateral Arrangements of the Parties	28
• Federal Mediation and Conciliation Service	28
• Procedures of the Federal Service Impasses Panel	28
• Decisions of the Federal Service Impasses Panel	30
Chapter 10—Negotiated Grievance Procedures	31
• Statutory Requirements	31
• Coverage of the Grievance Procedure	31
• Grievance Resolution Under the Statute	32
• Section 4303 or section 7512 Matter	33
• Discrimination Cases	34
• Prohibited Personnel Practice Case	35
• Unfair Labor Practice Case	35
Chapter 11—Exceptions to Arbitration Awards	36
• Time Limits for Filing	36
• How the Authority Calculates the Time Period for Filing the Exception	36

- Where to File; How the Authority Determines the Date of Filing37
- Contents of Exception37
- Statement of Service37
- Compliance Provisions of section 7122(b)37
 - No Exceptions Filed or No Timely Exceptions Filed38
 - Exceptions Denied38
 - Exceptions Pending38
- Review under section 7122(a)38

Chapter 12—Request for General Statements of Policy or Guidance41

- Standards Governing Issuance of General Statements of Policy or Guidance 41
- Content of Request42
- Submissions from Interested Parties42

Chapter 13—Unfair Labor Practices Defined43

- Unfair Labor Practices of Agencies43
- Unfair Labor Practices of Labor Organizations46
- Bars to Raising Unfair Labor Practice Charges48

Chapter 14—Processing Unfair Labor Practice Cases49

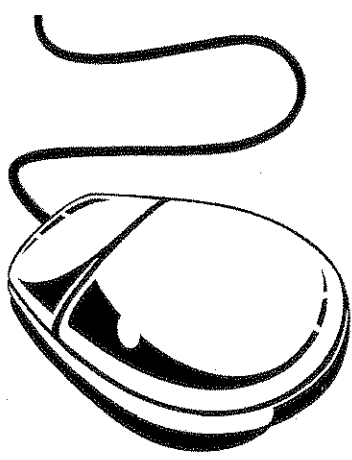
Chapter 15—The Collaboration and Alternative Dispute Resolution (CADR) Program52

Chapter 16—Judicial Review-Enforcement-Petition For Temporary Relief or Restraining Order54

Chapter 17—Foreign Service Labor-Management Relations Program55

- Foreign Service Labor Relations Board55
- Foreign Service Impasses Disputes Panel55

Appendices57



The FLRA Internet Website

The Federal Labor Relations Authority's (FLRA) INTERNET website is located at <http://www.flra.gov/>.

Any references to the FLRA website in the text of the Chapters that follow may be accessed through this site. The FLRA's website lists current updates to any forms referenced in the Guide and other information that is not available in the Guide. For example:

- ★ FLRA Forms and Checklists
- ★ Decisions of the FLRA
- ★ FLRA Regulations
- ★ Office of the General Counsel Guidance and Policies:
1994-present
- ★ Federal Service Impasses Panel Final Actions:
1995-present

Remember to Check the FLRA Internet Website For the Most Current Information on the Authority, the Office of the General Counsel, and the Federal Service Impasses Panel.



The right of Federal employees to organize, bargain collectively, and participate through labor organizations in decisions which affect them, with full regard for the public interest and the effective conduct of public business, should be specifically recognized in statute.

Civil Service Reform Act of 1978, § 3(10)

Introduction

• The Purpose of the Guide

The Guide to the Federal Labor Relations Authority (FLRA) Program is designed to assist readers, in a nontechnical way, to improve their understanding of the rights and obligations of Federal agencies, employees, and labor organizations under the Federal Service Labor-Management Relations Statute (Title VII of the Civil Service Reform Act of 1978, 5 U.S.C. §§ 7101-7135) (the Statute).

The Guide is not an official interpretation of the Statute, nor is it a statement of official FLRA policy. Because the law is continually evolving, often fact-sensitive, and in many cases, untested, the Guide is not intended and should not be used as legal advice for particular fact situations.

In such an environment, there is no substitute for reading the Statute and decisions which interpret and apply its provisions. It is important to keep abreast of decisions of the FLRA, Federal Service Impasses Panel, and courts, as well as General Counsel guidance issuances. This and other information is available through the continually updated FLRA INTERNET website: <http://www.flra.gov/> and through other sources.

Finally, the Guide does not deal with issues arising under other labor laws. The reader is encouraged to seek appropriate legal assistance in regard to such issues or laws.

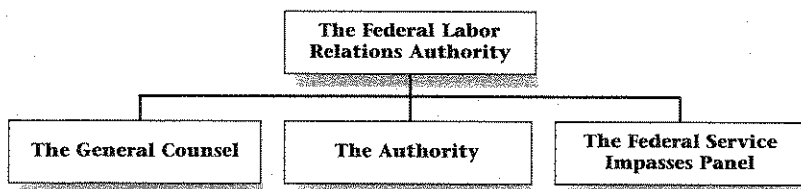
• The FLRA—Mission and Customers

Congress established the **FLRA** as an independent agency of the Executive Branch of the Federal Government in January 1979, upon enactment of the Statute. The Statute sets forth labor-management relations rights and obligations for agencies and labor organizations within the Federal Service. Implementing regulations, including special procedures designed to address the special needs of the Government, are published in 5 C.F.R. Chapter XIV, Sections 2420-2472.

The *Mission of the FLRA* is as follows:

The FLRA exercises leadership under the Federal Service Labor-Management Relations Statute to promote stable, constructive labor relations that contribute to a more effective and efficient Government.

In order to perform the many and varied functions in administering and enforcing the Statute, the FLRA is organized into three distinct components, as illustrated below:



(See Appendix A for FLRA organizational Structure.)

Although each component is described in greater detail later in the Guide, the components' general functions are as follows: the **Authority** adjudicates disputes concerning negotiability of collective bargaining proposals, unfair labor practice allegations and representation petitions, and exceptions to grievance arbitration awards; the **General Counsel** investigates unfair labor practice charges and prosecutes unfair labor practice complaints and is delegated authority to process representation petitions; the **Federal Service Impasses Panel** resolves bargaining impasses arising from negotiations-over conditions of employment.

All components support and engage in collaborative and alternative dispute resolution (ADR) activities as an integral part of their programs.

The Statute defines the universe of organizations that most directly rely on the FLRA: the *Federal agencies* that employ workers eligible to be represented by labor organizations and the *labor organizations* that have been recognized as the exclusive representatives of these employees. The agencies, labor organizations, and Federal employees accorded rights by the Statute, comprise the individual "customers" of the FLRA.

Agency employers subject to the Statute include not only the Executive Branch agencies and the Executive Office of the President, but also various independent agencies and certain legislative branch agencies, for instance, the Library of Congress and the Government Printing Office. More than one million non-postal Federal employees world-wide are exclusively represented in more than 2,000 bargaining units. More than 90 labor organizations serve as the exclusive representatives of these units.

Chapter 1

The Statute—General Provisions

Findings and Purpose

(Sections 7101-7106)

Section 7101 of the Statute sets forth the congressional findings and statement of purpose. Here, Congress has recognized that it is in the public interest to protect the right of public sector employees, as it has private sector employees, to organize, bargain collectively, and participate through labor organizations that the employees themselves select. 5 U.S.C. § 7101(a)(1) and (a)(1)(A). Congress has recognized that such statutory protection contributes to the effective conduct of public business. 5 U.S.C. § 7101(a)(1)(B).

Congress has further determined that high standards of employee performance and continuous development and implementation of modern and progressive work practices to facilitate and improve employee performance and efficient Government operations are also in the public interest. 5 U.S.C. § 7101(a)(1)(C). Therefore, Congress has set forth certain rights and obligations for Federal Government employees, management, and the FLRA, and has established procedures to meet the needs of the Government. 5 U.S.C. §§ 7101-7106.

Administration

(Sections 7104, 7105, 7119)

The Authority

Sections 7104(a), (b), (c), (d), and 7105 of the Statute delineate the structure, powers, and duties of the Authority. The Authority consists of three full-time members who serve 5-year terms. The President appoints the members with the advice and consent of the Senate. No more than two members may belong to the same political party. The President designates one of the members to serve as Chairman of the Authority and as the chief executive and administrative officer of the FLRA. The President may remove a member only upon notice and hearing and only for inefficiency, neglect of duty, or malfeasance in office.

The Authority provides leadership in establishing policies and guidance relating to Federal service labor-management relations. The Authority also provides leadership in ensuring compliance with the statutory rights and obligations of Federal employees, labor organizations representing Federal employees, and Federal agencies.

The Authority adjudicates disputes by conducting hearings and resolving complaints of unfair labor practices; resolving exceptions to arbitrators' awards; and determining the appropriateness of units for labor organization representation. In addition, the Authority supervises or conducts elections to determine whether a labor organization has been selected as an exclusive representative by a majority of the employees in an appropriate unit; dictates criteria and resolves issues relating to determining "compelling need" for agency rules or regulations; and resolves issues relating to the duty to bargain in good faith. The Statute also empowers the Authority to take other actions as necessary and appropriate to effectively administer the provisions of the Statute.

The General Counsel

Section 7104(f)(1) of the Statute establishes the Office of the General Counsel (OGC). The President appoints the General Counsel, with the advice and consent of the Senate, for a 5-year term. The General Counsel has direct authority over, and responsibility for, all employees of the OGC, including the regional offices of the FLRA. (*See Appendix B for the General Counsel's Organizational Structure.*) The President retains authority to remove the General Counsel at any time.

The General Counsel has independent responsibility for investigating alleged unfair labor practices and filing and prosecuting such complaints before the Authority. The Authority has delegated its statutory authority for the processing of representation cases to the Regional Directors of the General Counsel, under the direction and supervision of the General Counsel. (*See Appendix C for a listing of current addresses, telephone and fax numbers of the Regional Offices and areas served and Appendix D for a map of the areas served by the Regional Offices.*)

The Federal Service Impasses Panel

Section 7119 of the Statute establishes the Federal Service Impasses Panel (the Panel). The Panel consists of seven part-time members who serve staggered, 5-year terms. The President appoints each member based solely on his or her ability to perform the duties and functions involved, familiarity with Government operations, and knowledge of labor-management relations. The President also designates the Chair of the Panel.

The Panel assists agencies and exclusive representatives in resolving negotiation impasses. When the parties exhaust their own efforts and the efforts of a third party mediator to reach a voluntary settlement, the Panel has statutory authority to impose an agreement on them.

See Appendix E for current addresses, telephone, and fax numbers of the FLRA, the Panel, and the Office of General Counsel.

Statutory Definitions

(Section 7103)

Section 7103 of the Statute provides a number of definitions that clarify the scope of the Statute. In general, the Statute applies to Federal sector employers, employees, and labor organizations. Specifically, the Statute applies to employees of all Executive agencies, various independent agencies as well as the Library of Congress, the Government Printing Office, and the Smithsonian Institution. 5 U.S.C. § 7103(a)(3). Coverage of the Statute also extends to the Executive Office of the President.

Specifically not included as an *agency* for purposes of the Statute are the following: the General Accounting Office; the Federal Bureau of Investigation; the Central Intelligence Agency; the National Security 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. 5 U.S.C. § 7103 (a)(3). Under the authority of the Statute, the President has also issued Executive Order 12171, which excludes from the Statute's coverage certain agencies or subdivisions. 5 U.S.C. § 7103(b).

Section 7103(a)(2) of the Statute defines the term "*employee*" to include those individuals employed in an agency or who are no longer so employed due to an unfair labor practice, as defined under section 7116 of the Statute and who have not obtained other "regular and substantially equivalent employment," as determined by the FLRA.

Individuals who are not "employees" for purposes of section 7103, include, but are not limited to, the following: supervisors or management officials; members of the uniformed services; aliens or non-citizens of the United States who occupy positions outside the United States; and officers or employees of the United States Foreign Service, employed in the Department of State. 5 U.S.C. § 7103(a)(2)(i)-(iv). In addition, persons who participate in a strike in violation of 5 U.S.C. § 7311, are not considered "employees" for purposes of this Statute.

Section 7103 (a)(4) of the Statute defines "*labor organization*" as 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. This definition does not include any organization which, for whatever reason, denies membership because of race, color, creed, national origin, sex, age, preferential or nonpreferential civil service status, political affiliation, marital status, or handicapping condition; advocates the overthrow of the United States government; is sponsored by an agency; or participates in the conduct of a strike against the Government or imposes a duty or obligation to conduct, assist, or participate in such a strike.

Chapter 2

Employees' Rights Under the Statute

(Sections 7102 and 7114)



Section 7102 of the Statute sets forth the principal rights of employees:

Each employee shall have the right to form, join, or assist any labor organization, or to refrain from any such activity, freely and without fear of penalty or reprisal, and each employee shall be protected in the exercise of such right.

This right includes acting as a representative of a labor organization and, in that capacity, presenting the views of the labor organization to heads of agencies and other officials of the Executive Branch of the Government, the Congress, or other appropriate authorities. 5 U.S.C. § 7102(1).

Employees also have the right to engage in collective bargaining with respect to conditions of employment through representatives chosen by employees under the Statute. 5 U.S.C. § 7102(2).

In addition, section 7114 provides that an employee is not prevented from either securing an attorney or other representative, of the employee's own choosing, who is different from the exclusive representative, for purposes of any grievance or appeal action; or from exercising grievance or appellate rights established by law, rule, or regulation; ***except*** in the case of specific grievance or appeal procedures that have been negotiated pursuant to the Statute. 5 U.S.C. § 7114(a)(5).

Chapter 3

Recognition of Labor Organizations and Appropriateness of Units

(Sections 7103 and 7112)

Before a labor organization can be certified as the representative of a group of employees, the FLRA must find that the unit (group of employees) the labor organization seeks to represent is appropriate for recognition under the Statute.

Three criteria must be met for a unit to be found "appropriate" under the Statute:

- The unit must ensure a clear and identifiable community of interest among the employees in the unit;
- The unit must promote effective dealings with the agency involved; and
- The unit must promote efficiency of the operations of the agency involved.

Issues as to the appropriateness of units can arise in several situations; for example, when a proposed bargaining unit is initially sought to be represented by an exclusive representative; when two or more existing bargaining units are sought to be consolidated; and when an exclusive representative seeks to be designated as a successor union after a reorganization. (See Chapter 4 for discussion on filing of representation petitions with respect to these issues and others.)

Further, several categories of individuals cannot be included in a bargaining unit. These categories are as follows:

1. Management officials or supervisors, unless they have historically been included in the unit. A management official is someone whose duties and responsibilities require or authorize the individual to formulate, determine, or influence the agency's policies. A supervisor is someone who can hire, direct, assign, promote, reward, transfer, furlough, lay off, recall, suspend, discipline, or remove employees, adjust their grievances, or effectively recommend such action, as long as

the exercise of the authority is not merely routine or clerical in nature but requires the consistent exercise of independent judgment. However, if the individual is in a 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.

2. Confidential employees. Confidential employees are employees who act in a confidential capacity with respect to an individual who formulates or effectuates management policies in the field of labor-management relations.
3. Employees engaged in personnel work in other than a purely clerical capacity.
4. Employees engaged in administering the provisions of the Statute.
5. Both professional and other employees, unless a majority of the professional employees vote for inclusion in the unit. A professional employee is an employee who performs work that: (1) requires knowledge of an advanced type in a field of science or learning and requires the consistent exercise of discretion and judgment in its performance; (2) is predominantly intellectual and varied in character (as distinguished from routine mental, manual, mechanical, or physical work); and (3) is of such character that the output produced or the result accomplished by such work cannot be standardized in relation to a given period of time; or an employee who has completed the courses of a specialized intellectual instruction and study described above and is performing related work under an appropriate direction or guidance to qualify the employee as a professional employee described above.
6. Any employee engaged in intelligence, counterintelligence, investigative, or security work which directly affects national security; and
7. Any employee primarily engaged in investigation or audit functions relating to the work of individuals employed by an agency whose duties directly affect the internal security of the agency, but only if the functions are undertaken to ensure that the duties are discharged honestly and with integrity.

In addition to these categories of individuals who cannot be included in a bargaining unit, the Statute authorizes the President to exclude agencies from coverage of the Statute in two situations. First, the President may issue an order excluding any agency or subdivision of any agency from coverage of the Statute if the President determines that the agency or subdivision has as a primary function intelligence, counterintelligence, investigative, or national security work, and that the provisions of the Statute cannot be applied to that agency or subdivision in a manner consistent with national security requirements and considerations. Second, the President may issue an order suspending any provision of the Statute with respect to any agency, installation, or activity located outside the 50 States and the District of Columbia, if the President determines that the suspension is necessary in the interest of national security.

Chapter 4

Representation Petitions

(Sections 7111, 7112, 7113, and 7117)



Representation petitions must be filed with the Regional Director for the region in which the unit or employees affected by the issue raised in the petition are located. (See Appendix F for appropriate form.) If the units or employees are located in two or more regions of the FLRA, the petitions must be filed with the Regional Director for the region in which the headquarters of the agency or activity is located.

A representation petition may be filed for the following purposes:

1. Elections or eligibility for dues allotment.

Specifically, a petition may be filed to request an election:

- to determine if employees in an appropriate unit wish to be represented for the purpose of collective bargaining by an exclusive representative.
- to determine eligibility for dues allotment in an appropriate unit without an exclusive representative.
- to determine if employees in a unit no longer wish to be represented for the purpose of collective bargaining by an exclusive representative.

The petitions described above must be accompanied by an appropriate **Showing of Interest**, which means:

evidence of membership in a labor organization; employees' signed and dated authorization cards or petitions authorizing a labor organization to represent them for purposes of exclusive recognition; allotment of dues forms executed by an employee and the labor organization's authorized official; current dues records; an existing or recently expired agreement, current exclusive recognition or certification; employees' signed and dated petitions or cards indicating a desire

that an election be held on a proposed consolidation of units; or other evidence approved by the Authority.

A **Showing of Interest** of not less than thirty percent (30%) of the employees in the unit involved must be submitted with the petition, except if the petition is to determine eligibility for dues allotment, which requires a showing of interest of membership in the petitioner of not less than ten percent (10%) of the employees in the unit claimed to be appropriate.

2. Clarification or amendment. To clarify, and/or amend, a recognition or certification then in effect, and/or any other matter relating to representation.
3. Consolidation. To consolidate two or more units, with or without an election, in an agency and for which a labor organization is the exclusive representative.

Generally, a representation petition may be filed by an individual, a labor organization, two or more labor organizations acting as a joint petitioner, an individual acting on behalf of any employees, an agency or activity, or a combination of the above. (See section 2422 of FLRA regulations for filing requirements.)

In addition to the situations in which a representation petition may be filed, petitions may also be filed for national consultation rights and for consultation rights on Government-wide rules or regulations.

1. National Consultation Rights (NCR). If a labor organization is the exclusive representative of 3,500 or more employees in a particular agency, or of 10% or more employees in a particular agency, and if no labor organization has been accorded exclusive recognition on an agency basis, a labor organization may be granted national consultation rights by an agency. National Consultation Rights entitle a labor organization to be informed of any substantive change in conditions of employment proposed by the agency, and be permitted reasonable time to present its views and recommendations regarding the changes.

If any views or recommendations are submitted by the labor organization, the agency must consider the views or recommendations before taking final action on any matter with respect to which the views or recommendations are presented, and the agency must provide the labor organization a written statement of the reasons for taking the final action. Issues relating to a labor organization's eligibility for, or continuation of, national consulta-

tion rights may be brought before the FLRA by a petition filed by the labor organization. (Section 7113.)

2. Consultation Rights on Government-Wide Rules or Regulations. A labor organization that is the exclusive representative of 3,500 or more employees, or of 10% or more of the employees in the agency, may be granted consultation rights by any agency with respect to any Government-wide rule or regulation issued by the agency that effects any substantive change in any condition of employment. Such a status would entitle the labor organization to the same rights as set forth under national consultation rights, above, with respect to the particular agency involved. Any issues relating to a labor organization's eligibility for, or continuation of, consultation rights on Government-wide rules and regulations may be brought before the FLRA for determination by a petition filed by the labor organization. (Section 7117.)

Also, a petition filed by a labor organization must include a statement that the labor organization has complied with section 7111(e) of the Statute (that is, that it has submitted to the Department of Labor and the agency involved a roster of its officers and representatives, a copy of its constitution and by laws, and a statement of its objectives).

Additionally, even before a representation petition is filed, all parties affected by the representation issues that may be raised in a petition are encouraged to meet to discuss their interests and narrow and resolve the issues. If requested, a Regional Office representative will participate in these meetings.

After a representation petition is filed, the Regional Director notifies any labor organization, agency or activity that the parties have identified as being affected by issues raised by the petition that a petition has been filed. The Regional Director also makes reasonable efforts to identify and notify any other party affected by the petition. When appropriate, the Regional Director also directs the agency or the activity to post notices of the filing of the petition. After a petition is filed, the Regional Director may require all affected parties to meet to narrow and resolve the issues raised in the petition. (*See* Appendix G for a description of the steps that may be taken after a petition is filed.)

Chapter 5

Representation Proceedings

(Sections 7111 and 7112)

Intervention

A labor organization may file a request to intervene or a cross-petition in a representation proceeding. A cross-petition is a petition which involves any employees in a unit covered by a pending representation petition.

A request to intervene and a cross-petition, accompanied by any necessary showing of interest, must be filed with the Regional Director or the Hearing Officer before the hearing opens, unless good cause is shown for granting an extension. If no hearing is held, a request to intervene and a cross-petition must be filed before the Regional Director resolves the matter in dispute or approves an election agreement.

If the labor organization is not the incumbent exclusive representative, its request to intervene must include a statement that it has complied with section 7111(e) of the Statute (that is, that it has submitted to the Department of Labor and the agency involved a roster of its officers and representatives, a copy of its constitution and bylaws, and a statement of its objectives) and include one of the following:

- a showing of interest of 10% or more of the employees in the unit covered by a petition seeking an election, with an alphabetical list of the names of the employees constituting the showing of interest; or
- a current or recently expired collective bargaining agreement covering any of the employees in the unit affected by issues raised in the petition; or
- evidence that it is or was, prior to a reorganization, the recognized or certified exclusive representative of any of the employees affected by issues raised in the petition.

Without regard to these requirements, an incumbent exclusive representative will be considered a party in any representation proceeding raising issues that affect employees the incumbent represents, unless it

serves the Regional Director with a written disclaimer of any representation interest in the claimed unit.

An agency or activity will be considered a party if any of its employees are affected by issues raised in the petition. An agency or activity that seeks to intervene in any representation proceeding must submit evidence that one or more employees in the agency or activity may be affected by issues raised in the petition.

Election

All parties desiring to participate in an election, and who have met the requirements set forth in the FLRA's regulations, may agree that a secret ballot election shall be conducted among the employees in the agreed-upon appropriate unit. This secret ballot election shall be conducted to determine whether all the employees desire to be represented for purposes of exclusive recognition by any or none of the labor organizations involved. The parties must sign an agreement providing for such an election on a form prescribed by the FLRA. If the Regional Director approves the agreement for consent election, the election is generally conducted by Regional Office personnel. In the event that the parties cannot agree on the election details, the Regional Director will decide the details without prejudice to the right of a party to file objections to the procedural conduct of the election.

The eligible employees are given the opportunity to choose:

- which of the labor organizations on the ballot the employees wish to have represent them; or
- not to be represented by a labor organization.

In an election involving at least three choices and none of the choices receives a majority of the valid votes cast, a runoff election will be conducted between the two choices receiving the highest number of votes. A labor organization which receives the majority of the valid votes in an election is certified by the FLRA as the exclusive representative. (See Appendix G for the steps that may be taken after a petition is filed.)

Bars

Certain situations bar an election from being conducted in a petitioned-for unit. The bars are as follows:

- Election Bar—No election will be conducted if a valid election has been conducted in the unit in the preceding 12 calendar months.
- Certification Bar—No election will be conducted if the FLRA has certified a labor organization as the exclusive representative of employees in the appropriate unit within the previous 12 calendar months. If a signed and dated agreement covering the claimed unit has been entered into, the contract bar rules would apply.
- Contract Bar—No election can be held if there is a collective bargaining agreement covering any employees in the claimed units, unless
 - the collective bargaining agreement has been in effect for more than 3 years, or
 - the petition for exclusive recognition is filed 60-105 days before the expiration date of the agreement.

Investigation and Hearing

The Regional Director investigates the petition and any other matter deemed necessary. The Regional Director will issue a notice of hearing to inquire into any matter about which a material issue of fact exists, and any time there is reasonable cause to believe a question exists regarding unit appropriateness. The notice of hearing will also establish a date for a prehearing conference, conducted by the Hearing Officer, in which the parties must be prepared to discuss, narrow and resolve issues set forth in the notice.

The purpose of a representation hearing is to develop a full and complete record of relevant and material facts. Representation hearings are considered investigatory and not adversarial. There is no burden of proof, except that a party filing objections to an election bears a burden of proof by a preponderance of the evidence concerning those objections. Hearings are open to the public unless otherwise ordered by the Hearing Officer.

After investigation and/or hearing, the Regional Director will resolve the matter in dispute, including—for example, ruling on the

appropriateness of a proposed unit before ordering an election; deciding the merits of any other proposed change to existing bargaining units not requiring an election, such as the status of a position in dispute; and, when appropriate, direct an election or approve an election agreement, or issue a Decision and Order. The Regional Director's Decision and Order is final, unless the party seeking review files an application for review of the Decision and Order with the Authority in accordance with section 2422.31 of the FLRA's regulations. (See Appendix G for a description of the steps that may be taken after a petition is filed; Appendix H for a description of the steps taken if an election is inconclusive, objections filed and/or ballots challenged.)

Chapter 6

Exclusive Representative's Rights and Obligations

(Sections 7103, 7114 and 7115)

An exclusive representative is any labor organization which is certified under the Statute as the exclusive representative of employees in an appropriate unit, or was recognized by an agency immediately before the effective date of the Statute as the exclusive representative of employees in an appropriate unit and continues to be so recognized in accordance with the provisions of the Statute.

The labor organization is the exclusive representative of the employees in the unit it represents and is entitled to act for and negotiate collective bargaining agreements covering all employees in the unit.

The exclusive representative must be given the 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 or any personnel policy or practice or other general condition of employment.

The exclusive representative must be given the opportunity to be represented at any examination of a unit employee by a representative of the agency in connection with an investigation if the employee reasonably believes that the examination may result in disciplinary action against the employee and if the employee requests representation. Management is required to inform employees of this right annually.

The duty to bargain in good faith imposed by the Statute requires an agency to bargain during the term of a collective bargaining agreement on negotiable union proposals concerning matters which are not contained in the agreement unless the union has waived its right to bargain about the subject matter involved.

Any member of the exclusive representative who is an employee of the agency in the appropriate unit can use payroll deductions to pay regular and periodic dues to the exclusive representative upon submission to the agency of an appropriate written assignment. If an appropriate written assignment is submitted to the agency, the agency must honor it and must deduct the dues from the employee's pay pursuant to the written assignment and make the appropriate allotment to the

exclusive representative. Any such allotment is made at no cost to the employee or the exclusive representative. Assignments cannot be revoked for a period of 1 year. However, any allotment for dues deduction for any employee must terminate when

- the agreement between the agency and the exclusive representative involved ceases to be applicable to the employee; or
- the employee is suspended or expelled from membership in the exclusive representative.

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.

It is noted that under section 7120 of the Statute, an exclusive representative must adopt and subscribe to standards of conduct that assure it will maintain democratic principles and a system of financial responsibility. The Department of Labor's Assistant Secretary, Employment Standards Administration has prescribed regulations to carry out the purposes of this section.

Chapter 7



Collective Bargaining

(Sections 7106, 7114, and 7117)

The Obligation to Negotiate

Collective bargaining means the performance of the mutual obligation of the representative of an agency and the exclusive representative of employees in an appropriate unit in the agency to meet at reasonable times and to consult and bargain in a good-faith effort to reach agreement with respect to the conditions of employment affecting such employees and to execute, if requested by either party, a written document incorporating any collective bargaining agreement reached, but the obligation referred to in this paragraph does not compel either party to agree to a proposal or to make a concession. 5 U.S.C. § 7103(a)(12).

Conditions of employment means personnel policies, practices, and matters, whether established by rule, regulation, or otherwise, affecting working conditions, except that such term does not include policies, practices, and matters—

1. relating to political activities prohibited under 5 U.S.C. § 7321; or
2. relating to the classification of any position; or
3. to the extent such matters are specifically provided for by Federal statute. 5 U.S.C. § 7103(a)(14).

The duty of both parties to negotiate in good faith includes the obligation:

1. to approach the negotiations with a sincere resolve to reach a collective bargaining agreement;
2. to be represented at the negotiations by duly authorized representatives prepared to discuss and negotiate on any condition of employment;

3. to meet at reasonable times and convenient places as frequently as may be necessary, and to avoid unnecessary delays;
4. in the case of an agency, to furnish to the exclusive representative, upon request and, to the extent not prohibited by law, data—
 - a. which is normally maintained by the agency in the regular course of business;
 - b. which is reasonably available and necessary for full and proper discussion, understanding, and negotiation of subjects within the scope of collective bargaining; and
 - c. which does not constitute guidance, advice, counsel, or training provided for management officials or supervisors, relating to collective bargaining; and
5. if agreement is reached, to execute on the request of any party to the negotiation a written document embodying the agreed terms, and to take such steps as are necessary to implement such agreement. (*See* Section 7114(b).)

Negotiated Grievance Procedure

The parties are required to provide, in any collective bargaining agreement, procedures for the settlement of grievances, including questions of what can be taken to arbitration. (*See* Chapter 10 on Negotiated Grievance Procedures and Chapter 11 on Exceptions to Arbitration Awards.)

Exceptions to the Duty to Bargain

The duty to bargain does not extend to any matter which is inconsistent with any Federal law, including Government-wide rule or regulation, or 5 U.S.C. § 7106(a) which sets forth management's statutory rights:

As to 5 U.S.C. § 7106(a), management may not bargain over any of the statutory rights set forth therein. Section 7106(a) provides:

Subject to subsection (b) of this section, nothing in the Statute shall affect the authority of any management official of any agency-

1. to determine the mission, budget, organization, number of employees, and internal security practices of the agency; and

2. in accordance with applicable laws-
 - 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-
 - (1) among properly ranked and certified candidates for promotion; or
 - (2) any other appropriate source; and
 - d. to take whatever actions may be necessary to carry out the agency mission during emergencies.

Management's rights under section 7106(a) are not without limitation. The Statute provides certain exceptions to those rights. These exceptions are set forth in 5 U.S.C. § 7106(b), which provides:

Nothing in this section [7106] shall preclude any agency and any labor organization from negotiating-

1. at the election of the agency, on the numbers, types and grades of employees or positions assigned to any organizational subdivision, work project, or tour of duty, or on the technology, methods, and means of performing work;
2. procedures which management officials of the agency will observe in exercising any authority under this section; or
3. appropriate arrangements for employees adversely affected by the exercise of any authority under this section by such management officials.

Also, management may bargain over any matter which is the subject of any agency rule or regulation concerning any condition of employment unless the Authority has determined that a compelling need exists for the rule or regulation. (*See* 5 C.F.R. § 2424.50.) A compelling need exists for an agency rule or regulation when the agency demonstrates that the rule or regulation meets one or more of the following illustrative criteria:

- a. The rule or regulation is essential, as distinguished from helpful or desirable, to the accomplishment of the mission or the execution of functions of the agency, or primary national subdivision, in a manner which is consistent with the requirements of an effective and efficient government.
- b. The rule or regulation is necessary to insure the maintenance of basic merit principles.
- c. The rule or regulation implements a mandate to the agency or primary national subdivision under law or other outside authority, which implementation is essentially nondiscretionary in nature.

Approval of Collective Bargaining Agreement

An agreement between any agency and an exclusive representative is subject to approval by the head of the agency. The head of the agency must approve the agreement within 30 days from the date the agreement is executed if the agreement is in accordance with the provisions of the Statute and any other applicable law, rule, or regulation (unless the agency has granted an exception to the provision). If the head of the agency does not approve or disapprove the agreement within the 30-day period, the agreement becomes effective and binding on the agency and the exclusive representative subject to the provisions of the Statute and any other applicable law, rule, or regulation. A local agreement subject to a national or other controlling agreement at a higher level shall be approved under the procedures of the controlling agreement or, if none, under regulations prescribed by the agency.

Agreements imposed by the Federal Service Impasses Panel also are subject to agency head disapproval, unless they result from Panel approval of a joint request for binding private arbitration. If exceptions are filed, awards pursuant to Panel-approved arbitration are subject to review by the Authority under section 7122 of the Statute.

Chapter 8

Negotiability Appeals

(Section 7117)

An exclusive representative and an agency involved in collective bargaining may disagree about whether the agency is required, or permitted, to negotiate over a particular matter proposed by the exclusive representative. If the agency alleges that the duty to bargain does not extend to the proposed matter because it conflicts with Federal law, Government-wide rule or regulation, or an agency regulation for which there is a compelling need, the exclusive representative may appeal the allegation to the Authority by filing a petition for review. (See Appendix I for a description of the negotiability appeal process.) Only an exclusive representative (not agencies or individuals) may file negotiability appeals with the Authority. A negotiability appeal may also be filed by an exclusive representative when an agency head, upon review under section 7114(c) of the Statute, disapproves contract provisions agreed upon at the local level because those provisions are not in accordance with law.

Negotiability disputes are distinguished under the Statute and the FLRA's regulations from **bargaining obligation disputes**. A negotiability dispute is a disagreement between an exclusive representative and an agency concerning the legality of a proposal or provision. Such a dispute exists when the exclusive representative disagrees with an agency contention that a proposal or provision is outside the duty to bargain because, for example, it is inconsistent with law, including management's rights under section 7106(a), Government-wide rule or regulation, agency regulation for which a compelling need exists, or concerns a matter about which the agency may elect, but is not required, to negotiate. Such a dispute can exist even in the absence of a bargaining obligation dispute. The negotiability appeals procedures are designed for the resolution of such disputes.

A **bargaining obligation dispute** usually occurs in a negotiability case when, for example, an agency states that there is no obligation to bargain over a matter because: (1) the proposed contract language is already covered by or included in an existing collective bargaining agreement; (2) the exclusive representative has waived its right to bargain; (3) an agency-initiated change is too minor to require

bargaining; or (4) the matter does not pertain to the conditions of employment of bargaining unit employees. Bargaining obligation disputes can be resolved through the unfair labor practice procedures of the Statute or through the negotiated grievance procedure. The exclusive representative may also request that the Authority decide the bargaining obligation dispute as a part of a negotiability appeal. In that circumstance, if the Authority decides that the agency has an obligation to bargain, it will not order unfair labor practice remedies as a part of the negotiability appeal. Where the exclusive representative has filed an unfair labor practice charge or a grievance relating to a proposal or provision involved in a negotiability appeal, the Authority will normally dismiss the negotiability appeal.

Time Limits for Filing

The time limit for filing a petition for review is fifteen (15) days after the date the agency's allegation that the duty to bargain in good faith does not extend to the matter proposed to be bargained is served on the exclusive representative. An agency head's disapproval of a provision of a negotiated agreement under section 7114(c) of the Statute constitutes an agency's allegation of nonnegotiability for purposes of starting the 15 day time limit. A negotiability appeal may be filed without an agency allegation of nonnegotiability if an agency fails to respond to a written request for such an allegation within ten (10) days after receipt. Specific provisions governing the computation of the timeliness of filing are set forth in section 2424.21 of the FLRA's regulations.

How the Authority Calculates the Time Period for Filing a Petition for Review

The Authority uses calendar days for its computation of due dates. The 15 days are counted first, and day one of the computation is the day after the allegation of nonnegotiability or the Agency head's disapproval is served on the exclusive representative. The 5-day period for service by mail is added to the computation after the 15 days are counted. If the 15th day falls on either a Saturday, Sunday or Federal holiday, the petition for review must be filed with the Authority on the first business day following that Saturday, Sunday or Federal holiday.

Where to File, How the Authority Determines the Date of Filing

A negotiability appeal must be filed with the Authority's Office of Case Control in Washington, D.C. (*See* Appendix E for the office's

address and telephone number). The appeal cannot be filed with the Authority's Regional Offices. The Authority determines the date of filing by the date of mailing indicated by the postmark date. If no postmark is on the mailing, the Authority presumes that the appeal has been mailed five (5) days prior to receipt by the Authority. If the appeal is filed in person or by commercial delivery, the appeal is considered filed on the date it is received by the Authority.

Content of Petition for Review, Service

1. A petition for review should be filed on a form provided by the Authority for that purpose, or on plain paper that gives the same information that the form requests. The petition must contain, among other things, the exact wording, and explanation of the meaning, of the proposal or provision, as well as a description of how the proposal or provision is intended to work; specific citation to any law, rule, regulation, or other authority relied on by the exclusive representative; copies of materials that are not readily available to the Authority; and a statement as to whether the proposal or provision is also involved in an unfair labor practice, grievance, or impasse proceeding. Other requirements pertaining to the content of a petition for review are set forth in section 2424.22 of the Authority's regulations.
2. The exclusive representative may, but is not required to, request that portions of the proposal(s) or provision(s) being appealed be considered separately. If such a request is made, it must be supported with an explanation of how the severed portion may stand alone and how it would operate.

Incomplete Petition for Review

If an incomplete petition is filed, the Authority will request the exclusive representative to provide the missing or incomplete information. Noncompliance with an Order directing a party to complete the record may result in dismissal of the petition.

Post-Petition Conference

The post-petition conference is normally scheduled within ten (10) days after the Authority receives the exclusive representative's petition. The Authority will issue an Order and Notice notifying the parties of the date and time for the post-petition conference. The post-petition conference is normally scheduled only after the petition complies with

the FLRA's regulations, and is normally held by telephone. Conferences are conducted by Authority staff members. The parties must participate in the post-petition conference.

Specifically, the representative of the exclusive representative must be able to explain everything in its petition for review and the agency representative must be able to explain why it alleged that the matters in dispute are nonnegotiable. The Authority representative will prepare a summary of the conference, send a copy to the parties, and file it in the official record. If the parties, at any time, express an interest in mediation or interest-based bargaining assistance, they will be referred to the Collaboration and Alternative Dispute Resolution (CADR) office of the Authority. If a party fails to participate in the post-petition conference, the Authority may take appropriate action. *See*, 5 C.F.R. § 2424.32(d) of the FLRA's regulations.

Statement of Position of the Agency; Time Limits for Filing

1. After the post-petition conference, the agency must file a statement of position with the Authority. Such statement must be signed and dated and should be filed on a form provided by the Authority for that purpose, or on plain paper that gives the same information the form requests. The statement of position must contain a statement withdrawing the allegation that the duty to bargain in good faith does not extend to the matter proposed to be negotiated or the agency head's disapproval of the disputed provision; or a statement setting forth in full its position on any matters relevant to the petition which it wishes the Authority to consider in reaching its decision, including a full and detailed statement of its reasons supporting the allegation.

The statement must cite the section of any law, rule or regulation relied on as a basis for the allegation or disapproval and must contain a copy of any internal agency rule or regulation relied on or any other materials not readily available to the Authority. Other requirements are set forth in section 2424.24 of the FLRA's regulations.

2. If the exclusive representative has requested severance of portions of a proposal or provision, and the agency opposes that request, the agency must explain with specificity why severance is not appropriate.

3. The agency's statement of position must be filed within 30 days after the agency head or the agency head's designee receives the

exclusive representative's petition, unless the Authority or its representative has granted the agency an extension of time.

Union's Response to the Agency's Statement of Position

1. Within 15 days after the exclusive representative receives the agency's statement of position, it must file with the Authority its response to the agency's statement. The response must be signed and dated and should be filed on a form provided by the Authority for that purpose, or on plain paper that gives the same information that the form requests.

2. The exclusive representative's response is specifically limited to matters raised in the agency's statement. The response must include, among other things, a statement of the exclusive representative's reasons for disagreeing with the agency's claims that it does not have a duty to bargain with respect to the matter in dispute or the agency's claim that the proposal or provision is inconsistent with law, rule, or regulation; and citation to laws, rules, or regulations, and any other authority, that support its opposition to the agency's arguments. Other specific matters that must be addressed in the exclusive representative's response are set forth in section 2424.25 of the FLRA's regulations.

3. If appropriate, the response must also include any argument that agency regulations relied on by the agency violate applicable law, rule, regulation, or appropriate authority outside the agency, that the rule or regulations were not issued by the agency or a primary national subdivision, or that no compelling need exists to bar negotiation.

4. If the exclusive representative did not request severance in its petition for review, or wishes to modify its initial request for severance, it may do so in its response. Any such request must include a statement explaining how the severed portion of a proposal or provision can stand alone and how it would operate as severed.

Agency's Reply Brief

1. Within 15 days after the agency receives the exclusive representative's response to the agency's statement of position, the agency may file a reply to that response. The reply must be signed, dated, and filed on a form provided by the Authority for that purpose, or on plain paper that provides the same information the form requests.

2. The reply is specifically limited to matters raised for the first time in the exclusive representative's response. The Agency's reply must include, among other things, a statement of the arguments and authorities supporting the reply and cite with specificity any laws, rules, regulations, section of a collective bargaining agreement, or other authority relied on. Other specific matters that must be addressed in the reply are set forth in section 2424.26 of the FLRA's regulations.

3. If the exclusive representative requests severance for the first time in its response, or if the request differs from the request in the petition for review, and if the agency opposes such a request, the agency must explain with specificity why severance is not appropriate.

Statement of Service

A copy of all documents that are filed with the Authority must be served on the other parties. The statement of service must include the names and address(es) of the person(s), the date the person(s) is served, the nature of the document, and the method of service (e.g., certified or first-class mail, in person or by commercial delivery). A signed original and four (4) copies of the parties' documents, including any attachments must be filed with the Authority. A signed and dated statement of service should also be submitted to the Authority as well as to the other party(s).

The exclusive representative must also serve the agency head or the agency head's designee with copies of the petition for review and the response to the agency's statement of position. The agency head, for the Authority's purpose, is not the head of the local activity or subsidiary, but the individual(s) at the national level. The exclusive representative may contact the Authority's Office of Case Control in Washington, D.C. for assistance. *See* Appendix E for the Office of Case Control's phone number and address.

See also, the FLRA's regulations at 5 C.F.R. Parts 2424 and 2429; the FLRA's INTERNET website for necessary forms including:

- Petition for Review of Negotiability Issues Proposals
- Statement of Agency Position on Petition for Review of Negotiability Issues Proposals
- Union Response to Agency Statement of Position on Petition for Review of Negotiability Issue
- Agency Reply to Union Response

Chapter 9

Resolution of Negotiation Impasses

(Section 7119)



In carrying out the obligation to bargain collectively, it is not uncommon for parties simply not to agree on certain issues and, during bargaining, to reach an impasse. In such a situation, parties may select among several options to try to resolve the impasse.

Bilateral Arrangements of the Parties

The agency and the exclusive representative may, together, determine appropriate techniques to assist in resolving negotiation impasses, including the use of interest based bargaining approaches, so long as such arrangements result in voluntary settlements without the need for a third party to impose terms on them. The parties may agree to resolve their dispute through binding private arbitration, however, that choice must first be approved by the Federal Service Impasses Panel (Panel).

Federal Mediation and Conciliation Service

The Statute provides that the Federal Mediation and Conciliation Service (FMCS) will provide services and assistance to agencies and exclusive representatives to resolve negotiation impasses. The FMCS determines under what circumstances and in what manner it will provide these services and assistance.

Procedures of the Federal Service Impasses Panel

The Panel is the entity within the FLRA that provides assistance in resolving negotiation impasses between agencies and exclusive representatives. While parties frequently use the term "impasse" to characterize deadlocks in their bargaining, the Panel is empowered to determine, as a threshold jurisdictional matter, whether parties have exhausted voluntary efforts and are, therefore, using the term accurately. To be at an impasse means, at a minimum, that the parties have engaged in bargain-

ing with a sincere resolve to reach agreement and received assistance from the FMCS (or other neutral provider of mediation services).

If the parties' voluntary arrangements fail to resolve the negotiation impasse, either party may request the Panel to consider the matter. The parties also may agree to adopt a procedure for binding private arbitration of the negotiation impasse, as noted above, but the Statute requires that the Panel first approve the procedure. The Panel considers these requests on an expedited basis. In either situation, a REQUEST FOR ASSISTANCE form (*See* Appendix J) is available at the Panel's office and on the Internet. The form serves as a useful guide to the information that the Panel requires to open a case. The Panel's regulations specify that all submissions to the Panel must be served on the other party to the dispute, and that two copies must be provided to the Panel. Requests for assistance and, with prior approval, other written documents, may be served on the Panel by facsimile transmission.

When a party requests that the Panel consider a matter, a Panel designee will promptly investigate, usually by telephone, any request properly presented to it. Although not explicitly mentioned in the Statute, if during an investigation a party raises questions about its duty to bargain, the Panel may decline to assert jurisdiction to permit such questions to be resolved in an appropriate forum. The parties are free to request the Panel's assistance again should the duty-to-bargain questions be resolved in the affirmative, and the resumption of negotiations not result in a settlement.

Once the Panel asserts jurisdiction over a matter, it will consider the impasse and will either: (1) recommend to the parties procedures for resolving their impasse; or (2) assist the parties in resolving the impasse through whatever methods and procedures it may consider appropriate, including face-to-face, telephone, or written interchanges between the parties and a Panel designee. These procedures are described fully in *A Guide to the Dispute Resolution Procedures used by the Federal Service Impasses Panel* which is available by request at the Panel's office and can be found at the FLRA's INTERNET website. While many of the Panel's procedures are informal in nature, its designees may hold hearings, administer oaths, take the testimony or deposition of any person under oath, issue subpoenas, and take whatever other action is necessary and not inconsistent with other sections of the Statute to resolve the impasse. In carrying out its mission, the Panel firmly believes that a solution arrived at by the parties is superior to one it imposes. In all its efforts, therefore, the Panel encourages parties to settle their impasses. (*See* Appendix K for a chart that illustrates the processing of a request for Panel assistance.)

Decisions of the Federal Service Impasses Panel

If the parties do not arrive at a settlement during a procedure, the Panel promptly serves the parties with notice of any final action, generally in the form of a written Decision and Order. (The decisions of the Panel are available to the public in printed form and on the Internet.) The Panel's final action is binding on the parties during the term of their agreement, unless the parties themselves agree otherwise.

The Panel uses similar methods and procedures to resolve impasses arising under the **Federal Employees Flexible and Compressed Work Schedules Act of 1982, 5 U.S.C. § 6120 et seq.** In those cases, the Panel considers whether an agency's determination not to establish or to terminate a flexible or compressed work schedule is supported by evidence of adverse agency impact.

For other helpful information, parties should also consult the Panel's revised regulations at 5 C.F.R. Parts 2470-2473.

Chapter 10

Negotiated Grievance Procedures

(Section 7121)

Statutory Requirements

All collective bargaining agreements must provide procedures for the settlement of grievances, including questions of arbitrability, and those procedures must provide for binding arbitration of any grievance not satisfactorily settled. Submission of grievances to arbitration is limited to either the agency or the union; employees are not entitled to invoke arbitration. The procedures must be fair and simple and must provide for expeditious processing.

Section 7121 also balances the sometimes conflicting interests of an exclusive representative and an aggrieved employee in the presentation and processing of grievances. The negotiated grievance procedure must assure the exclusive representative the right, on its own behalf or on behalf of any bargaining-unit employee, to present and process grievances. At the same time, the procedure must assure the employee the right to present personally a grievance without the representation of the exclusive representative through the steps of the grievance procedure prior to arbitration. In such event, the exclusive representative has the right to be present during the grievance proceedings so that it may protect the interests of other bargaining-unit employees and its institutional interests. Although an aggrieved employee may personally present a grievance, the employee may not be represented in the negotiated grievance proceedings by an attorney or a representative other than one designated by the exclusive representative. Aggrieved employees who do not represent themselves must be represented by the exclusive representative, if they choose to pursue their rights under the negotiated grievance procedure of the collective bargaining agreement.

Coverage of the Grievance Procedure

The negotiated grievance procedure automatically extends to all matters, except those excluded by law, that are covered by the statutory definition of grievance, unless the parties agree to exclude any of those matters in their collective bargaining agreement. In short, all matters

that under law could be submitted to the negotiated grievance procedure "shall in fact" (to quote the Conference Report that accompanied the Civil Service Reform Act) be within the coverage of a grievance procedure unless the parties negotiate exclusions.

The Statute excludes from coverage by a negotiated grievance procedure grievances concerning the following matters: (1) any claimed violation of 5 U.S.C. § 7321 (relating to prohibited political activities); (2) retirement, life insurance, or health insurance; (3) a suspension or removal for national security reasons under 5 U.S.C. § 7532; (4) any examination, certification, or appointment; or (5) the classification of any position that does not result in the reduction either in grade or pay of an employee. Laws outside the Statute also exclude certain matters from the negotiated grievance procedure. For example, 5 U.S.C. § 5566 excludes certain grade and pay retention matters from negotiated grievance procedures, and 5 U.S.C. § 3321 has been applied to preclude grievances over the separation of competitive service employees during their probationary period.

Grievance Resolution Under the Statute

Aggrieved parties are provided with a number of means of resolving employment disputes. An aggrieved party can choose to resolve many of these disputes by filing a grievance if the matter has not been excluded by law from coverage by a negotiated grievance procedure. In processing grievances, the negotiated grievance procedure must first be examined to determine whether the matter has been excluded, as any matter may be by agreement of the parties. For most grievances, if the matter has not been excluded, section 7121 of the Statute provides that the negotiated grievance procedure is the sole and exclusive administrative procedure available to employees in that unit for resolving such grievances. If the grievance is not satisfactorily settled, binding arbitration may be invoked by the union or, when the agency has filed the grievance, by the agency. For most grievances, either party to the arbitration may file exceptions to the arbitrator's award with the Authority under section 7122 of the Statute. Under section 7123 of the Statute, no judicial review of the Authority's decision resolving the exceptions to the award is available, unless "the order involves an unfair labor practice."

However, if the employment dispute involves: (1) an unacceptable performance or serious adverse action matter under 5 U.S.C. § 4303 or § 7512 or a similar matter that has arisen under another personnel system (a section 4303 or 7512 matter); (2) a prohibited personnel practice, including a complaint of discrimination of the type within the jurisdiction of the Equal Employment Opportunity Commission (EEOC); or

(3) an unfair labor practice, the processing of these matters as a grievance is different from most grievances. (See Appendix L for the processing features of these matters).

4303 or 7512 Matter

This type of employment dispute refers to disputes over actions taken under 5 U.S.C. § 4303 or § 7512. A section 4303 matter is a removal or demotion for unacceptable performance. A section 7512 matter is a serious adverse action: a removal; a suspension for more than 14 days; a reduction either in grade or pay; or a furlough for 30 days or less. In this type of case, the exclusivity provision of section 7121 does not apply. Instead, a unit employee eligible to challenge these actions has an option. The employee may choose to challenge this matter by appealing to the Merit Systems Protection Board (MSPB) or by filing a grievance, if the matter has not been excluded from the negotiated grievance procedure.

Although the employee has an option, the employee must elect whether to file a grievance or an appeal to the MSPB, after which the employee is precluded from raising the matter in the other forum. If the employee elects to file a grievance and the matter is submitted to arbitration, this arbitration is different from most arbitrations in two significant respects.

First, the arbitrator resolving a section 4303 or 7512 grievance must apply the standards of 5 U.S.C. § 7701(c) that would have been applied by the MSPB, if the matter had been appealed to the MSPB. Second, judicial review of the award is available in the same manner and under the same conditions as if the award were the decision of the MSPB. Thus, these awards are appealable directly to the U.S. Court of Appeals for the Federal Circuit under the terms of 5 U.S.C. § 7703. These awards are not appealable to the Authority.

Not all employees are employed in the general civil service system. Some Federal employees are employed under other personnel systems. These systems ordinarily provide for actions similar to those provided in section 4303 and 7512. The processing of grievances by these employees is very similar. They have the similar option of raising the matter under applicable appellate procedures, if any, or of filing a grievance, if the matter has not been excluded from the negotiated grievance procedure, but not both. If the employee elects to file a grievance and the matter is submitted to arbitration, judicial review of the award may be obtained in the same manner and on the same basis as could be obtained of a final decision in such matters raised under applicable appellate procedures.

Discrimination Cases

Employment disputes involving allegations of employment discrimination within the jurisdiction of the EEOC are of two types, depending on whether the dispute involves a matter appealable to the MSPB. For those discrimination cases that do not involve a matter appealable to the MSPB, the exclusivity provision of section 7121 does not apply. Instead, a unit employee has an option. The aggrieved employee may choose to raise this matter under the statutory equal employment opportunity (eEO) complaint procedures or by filing a grievance, if the matter has not been excluded from the negotiated grievance procedure.

Although the employee has an option, the employee must elect whether to file a grievance or raise the matter as an eEO complaint, after which the employee is precluded from raising the matter under the other procedure. The employee is deemed to have exercised the option at such time as the employee timely files a formal complaint under the statutory eEO complaint procedure or timely files a grievance in writing, whichever event occurs first. The election of the statutory eEO complaint procedure is made by filing a written complaint; use of the pre-complaint or informal process does not constitute an election for purposes of section 7121(d).

If the employee elects to file a grievance, the initial processing of the grievance is identical to that of most grievances. If the grievance is not satisfactorily settled, arbitration may be invoked and either party may file exceptions to the arbitrator's award with the Authority. This type of discrimination case differs from most grievances in that the selection of the grievance procedure does not prevent the aggrieved employee from requesting the EEOC to review "a final decision . . . involving a complaint of discrimination[.]" Accordingly, the grievant may appeal the final decision of the arbitrator or, if exceptions were filed, the decision of the Authority to the EEOC. In addition, the grievant retains the right to file a civil action in an appropriate U.S. district court under the conditions set forth in 29 C.F.R. part 1614.

Cases in which the agency takes an action against an employee that is appealable to the MSPB and the employee claims that the action was based on employment discrimination within the jurisdiction of the EEOC are referred to as mixed cases under 5 U.S.C. § 7702. An example of a mixed case would be a removal under section 7512 that the employee alleges was based on racial discrimination. As with section 4303 and 7512 matters and other discrimination cases, the employee has several options available because the exclusivity provision of section 7121 does not apply. The scheme for processing these matters is very complex and a detailed explanation is beyond the scope of this guide. For more specific details,

the applicable statutory and regulatory provisions and cases should be consulted, primarily 5 U.S.C. § 7702, 5 C.F.R. part 1201, subpart E, and 29 C.F.R. part 1614, subpart C.

Prohibited Personnel Practice Case

This type of employment dispute is one in which the agency takes a personnel action listed in 5 U.S.C. § 2302(a) against an employee and the employee claims that the action was for any of the prohibited reasons set forth in section 2302(b) (other than prohibited employment discrimination listed under (b)(1)). As with other types of disputes, the employee has several options available because the exclusivity provision of section 7121 does not apply. The employee may choose to resolve this type of dispute either (1) by filing an appeal with the MSPB; (2) by filing a grievance if the dispute has not been excluded from the negotiated grievance procedure; or (3) by seeking corrective action from the Office of Special Counsel by making an allegation under 5 U.S.C. § 1214. Although the employee has these options, the employee must choose under which procedure to raise the matter, after which the employee will be precluded from raising the matter under the other procedures. The employee shall be considered to have exercised the option at such time as the employee timely files a notice of appeal under the applicable appellate procedures, timely files a grievance in writing, or makes an allegation under section 1214, whichever occurs first. As with a mixed case, these options are complicated and applicable regulations should be consulted, primarily 5 C.F.R. part 1208 and 5 C.F.R. part 1800. When the aggrieved employee elects to file a grievance, the arbitrator is authorized to order a stay of a personnel action consistent with 5 U.S.C. § 1221, which pertains to the MSPB. An arbitrator is also authorized to order an agency to take any disciplinary action under 5 U.S.C. § 1215 that is otherwise within the agency's authority.

Unfair Labor Practice Case

Some employment dispute issues may be raised as a grievance under a negotiated grievance procedure or as an unfair labor practice. For these kinds of issues, the aggrieved party (which could be an employee, an agency, or a union) has an option of which procedure to pursue. However, the party must elect whether to file a grievance or raise the issue as an unfair labor practice, after which the party is precluded from raising the matter under the other procedure. If the aggrieved party files a grievance, the processing of the grievance is identical to that of most grievances, except that judicial review may be available if exceptions are filed to an arbitration award resolving the grievance and the Authority's decision involves an unfair labor practice.

Chapter 11

Exceptions to Arbitration Awards

(Section 7122)

Time Limits for Filing

The time limit for filing an exception to an arbitration award is thirty (30) days beginning on the date the award is served on the filing party. The date of service is not the date that the party receives the award. The date of service is either the date the award is deposited in the U.S. mail, delivered in person or received from commercial delivery. Without documentation showing the date of service, the Authority will consider the date of the arbitrator's award as the date of service.

In cases where the award is served on the party by mail, 5 days are added to the 30-day filing period. The five days are not added to the filing period when the arbitrator either delivered the award in person or by commercial delivery to the filing party.

How the Authority Calculates the Time Period for Filing the Exception

The Authority uses calendar days for its computations. The 30 days are counted first. When the award is served by mail, day one of the computation is the postmark date from the envelope which contained the award. When the award is served in person or by commercial delivery, day one of the computation is the date of receipt of the arbitrator's award. If the 30th day falls on either a Saturday, Sunday or Federal holiday, the exception must be filed with the Authority on the first business day following that Saturday, Sunday or Federal holiday.

When the award is served by mail, the 5-day period for service by mail is added last. If the 35th day falls on either a Saturday, Sunday or Federal holiday, the time limit for filing the exception is extended to the next business day.

The 30-day filing period is jurisdictional. Consequently, the Authority is not authorized to grant extensions of time to file exceptions with the Authority or waivers of the filing period for exceptions that were untimely filed. Therefore, parties must strictly adhere to the time limits for filing exceptions with the Authority.

Where to File; How the Authority Determines the Date of Filing

Exceptions to arbitration awards must be filed with the Authority's Office of Case Control in Washington, D.C. Exceptions may not be filed at any Authority regional office. The Authority determines the date of filing by the date of mailing indicated by the postmark date. If no postmark is on the mailing, the Authority presumes that the exception has been filed five (5) days prior to receipt by the Authority. If the exception is filed in person or by commercial delivery, the exception is considered filed on the date it is received by the Authority.

Contents of Exception

An exception must be a dated, self-contained document which includes the following:

1. A statement of the grounds on which review is requested;
2. Evidence or rulings bearing on the issues before the Authority;
3. Arguments in support of the stated grounds, together with specific reference to the pertinent documents and citations of authorities;
4. A legible copy of the award of the arbitrator and legible copies of other pertinent documents; and
5. The name and address of the arbitrator.

Statement of Service

A copy of the exception must be served on the other party and a statement of service must be provided to the Authority. The statement of service must include the names and address(es) of the person(s), the date the person(s) is served, the nature of the document, and the method of service (e.g., certified or first-class mail, in person or by commercial delivery). The statement of service should also be served on the other parties. It is not necessary to serve the arbitrator with the exception. In addition, a signed original and four (4) copies of the exception, including any attachments must be filed with the Authority.

Compliance Provisions of section 7122(b)

Section 7122(b) requires compliance with a final arbitration award, and it is an unfair labor practice for either an agency or a union

to refuse to abide by a provision of the Statute. The Authority has addressed this obligation in three different types of cases.

No Exceptions Filed or No Timely Exceptions Filed

One type of case is where no exceptions, or no timely exceptions, were filed to the award. In this type of case, the award became final and compliance with the award was required when the 30-day period for filing exceptions expired. The Statute precludes a challenge to the validity of the award in any ULP proceeding involving a refusal to implement the award and any court review of the ULP proceeding. These cases serve to emphasize the importance of timely filing exceptions and compliance with final arbitration awards.

Exceptions Denied

The second type of case is where timely exceptions to the award were denied by the Authority. In this type of case, the award became final and compliance was required when the exceptions were denied. The Statute precludes any relitigation of the denial of the exceptions in any ULP proceeding involving a refusal to implement the award and any court review of the ULP proceeding. Both proceedings will focus solely on whether there has been compliance with the final award and not on the propriety of the Authority's denial of the exceptions filed to the award.

Exceptions Pending

The third type of case is where timely exceptions have been filed and are pending before the Authority. An arbitration award is not final and compliance is not required during the pendency of timely filed exceptions with the Authority. It is noted that in 1986 the Authority's regulations were revised to revoke the provisions for requesting a stay of an arbitration award.

Review under Section 7122(a)

The primary role of the Authority with respect to arbitration is to resolve exceptions to arbitration awards in accordance with section 7122 of the Statute. (See Appendix M for description of arbitration appeals process.) The language of section 7122(a) provides the best explanation of the Authority's role. Section 7122(a) provides:

Either party to arbitration under this chapter may file with the Authority an exception to any arbitrator's award pursuant to the

arbitration (other than an award relating to a matter described in section 7121(f) of this title). If upon review the Authority finds that the award is deficient—

- (1) because it is contrary to any law, rule, or regulation; or
- (2) on other grounds similar to those applied by Federal courts in private sector labor-management relations;

the Authority may take such action and make such recommendations concerning the award as it considers necessary, consistent with applicable laws, rules, and regulations.

Under section 7122, either party may file exceptions to an arbitrator's award. "Party" is defined in the FLRA's regulations to include any person who participated as a party in a matter where an arbitration award was issued. This means that unless the grievant participated as a party, only the agency and the union are entitled to file exceptions because they are normally the only parties to the arbitration proceeding. Accordingly, in cases in which exceptions were filed by the grievant, without the authorization of the union, those exceptions were dismissed because the grievant had not participated as a party in the proceedings before the arbitrator, and, consequently, the grievant was not entitled to file exceptions to the award.

Under section 7122, arbitration awards relating to a section 7121(f) matter are not subject to review by the Authority. Consequently, exceptions filed to such an award will be dismissed by the Authority for lack of jurisdiction. The matters described in section 7121(f) are those matters covered by 5 U.S.C. §§ 4303 and 7512 and similar matters that arise under other personnel systems. As described in the discussion of sections 4303 and 7512 cases in chapter 10, awards relating to these matters are subject to review by the U.S. Court of Appeals for the Federal Circuit, as if the award were the decision of the MSPB. Awards relating to similar matters that arise under other personnel systems are reviewable in the same manner and under the same conditions as a final decision raised under applicable appellate procedures of that personnel system.

Section 7122 provides the grounds for review of arbitration awards. The Authority reviews awards to determine whether an arbitration award is deficient because it is contrary to law, rule, or regulation or whether it is deficient on other grounds similar to grounds applied by Federal courts in private-sector, labor arbitration cases.

The standard of review the Authority uses to resolve exceptions depends on the ground for review the party asserts in the exception. When a party files an exception under section 7122(a)(1), which contends that the award is contrary to law or contrary to regulation, the Authority reviews the questions of law or regulation raised by the exception and the arbitrator's award *de novo*. In applying the standard of (*de novo*) review, the Authority assesses whether the arbitrator's legal and regulatory conclusions are consistent with the applicable standard of law or regulation, based on the arbitrator's underlying factual findings. Of the awards found deficient by the Authority, the most common basis has been that the award was contrary to law or contrary to regulation.

When a party files an exception under section 7122(a)(2), the Authority's standard of review is deferential, similar to the deference Federal courts give arbitrators in private-sector labor arbitration cases. The Authority has recognized seven private sector grounds for review: (1) the arbitrator failed to conduct a fair hearing; (2) the arbitrator was biased or guilty of misconduct that prejudiced the rights of a party or the award was obtained by fraud or undue means; (3) the award is incomplete, ambiguous, or contradictory so as to make implementation of the award impossible; (4) the arbitrator exceeded his or her authority; (5) the award is based on a nonfact; (6) the award fails to draw its essence from the collective bargaining agreement; and (7) the award is contrary to public policy.

See FLRA INTERNET website for:

Checklist for Filing Arbitration Appeals with the Authority

Chapter 12

Request for General Statements of Policy or Guidance

(Section 7105)

The head of an agency (or designee), the national president of a labor organization (or designee), or the president of a labor organization not affiliated with a national organization (or designee), may separately or jointly ask the Authority for a general statement of policy or guidance. The head of any lawful association not qualified as a labor organization may also ask the Authority for such a statement provided the request is not in conflict with the provisions of 5 U.S.C. Chapter VII or other law. (See 5 C.F.R. § 2427.2 of FLRA's regulations.)

Standards Governing Issuance of General Statements of Policy or Guidance

In deciding whether to issue statements of policy or guidance, the Authority considers:

1. Whether the question presented can more appropriately be resolved by other means;
2. Where other means are available, whether a statement would prevent the proliferation of cases involving the same or similar question;
3. Whether the resolution of the question presented would have general applicability under the Statute;
4. Whether the question currently confronts parties in the context of a labor-management relationship;
5. Whether the question is presented jointly by the parties involved; and
6. Whether the issuance of a statement of policy or guidance on the question would promote constructive and cooperative labor-management relationships in the Federal service and would otherwise promote the purposes of the Statute.

The Authority ordinarily will not consider a request related to any matter pending before it, the General Counsel, the Federal Service

Impasses Panel, or the Assistant Secretary of Labor for Labor Management Relations. However, section 2429.4 of the FLRA's regulations permit the General Counsel, the Panel, or the Assistant Secretary to refer for review and decision or general ruling by the Authority any case involving a major policy issue that arises in a proceeding before any of them.

Content of Request

1. A request for a general statement of policy or guidance must be in writing and must contain:
 - a. A concise statement of the question in which a statement of policy or guidance is requested together with background information necessary to understand the question;
 - b. A statement of the standards for issuance under 5 C.F.R. § 2427.5 upon which the request is based;
 - c. A full and detailed statement of the position or positions of the requesting party or parties;
 - d. Identification of any cases or proceedings known to bear on the question pending; and
 - e. Identification of other known interested parties.
2. A copy of each document must be served on all known interested parties, including, as appropriate, the General Counsel, the Panel, the Federal Mediation and Conciliation Service, and the Assistant Secretary of Labor for Labor Management Relations. (See 5 C.F.R. § 2427.3 of FLRA's regulations.)

Submissions from Interested Parties

Before a statement of policy or guidance is issued, the Authority may permit interested parties to express their views orally or in writing.

Chapter 13

Unfair Labor Practices Defined

(Section 7116)

Section 7116 of the Statute describes the types of management and labor organization actions that are prohibited and that are bases for unfair labor practices. The unfair labor practices of agencies are set forth below under (a)(1) through (a)(8) and those of labor organizations are set forth under (b)(1) through (b)(8).

Unfair Labor Practices of Agencies

(a)(1) Management shall not interfere with, restrain, or coerce any employee in the exercise of rights under the Statute.

Interference by an agency with the rights of Federal employees to form, join, or assist a labor organization, to bargain collectively, or to refrain from any of these activities constitutes a violation of this subsection.

Examples of this conduct:

- threatening employees with reprisal if they exercise their rights under the Statute;
- making threatening statements to employees to discourage the filing of a representation petition;
- conveying the impression that employees' conduct will be closely monitored as a result of filing an unfair labor practice charge; and
- making implied threats against union representatives for aiding employees in the filing and prosecution of grievances under the parties' negotiated grievance procedure.

(a)(2) It is an unfair labor practice for any agency to encourage or discourage membership in any labor organization by discrimination in connection with hiring, tenure, promotion, or other conditions of employment.

Examples of this conduct:

- issuing a written reprimand to a unit employee in retaliation for activity on behalf of the union; and

- failing to promote an employee because of that employee's union activities or inactivities.

(a)(3) Management will not sponsor, control, or otherwise assist any labor organization, other than to furnish, upon request, customary and routine services and facilities if the services and facilities are also furnished on an impartial basis to other labor organizations having equivalent status.

Examples of improper management activities:

- taking an active part in assisting a labor organization in organizing its employees, such as handing out membership cards or petitions; and
- campaigning for any particular individual running for a union office.

(a)(4) It is an unfair labor practice for an agency to discipline or otherwise discriminate against an employee because the employee has filed a complaint, affidavit, or petition, or has given any information or testimony under the Statute.

This subsection prohibits any kind of discriminatory action against an employee, whether or not the employee is a member of a labor organization, when that employee files a charge or gives testimony in any proceeding under the Statute. This section is intended to guard the right of Federal employees to utilize the processes provided by the Statute without fear of discipline or other forms of reprisal.

Examples of violations:

- demoting an employee because the employee testified at a proceeding under the Statute; and
- transferring an employee to an undesirable job because the employee filed an unfair labor practice charge.

(a)(5) It is an unfair labor practice to refuse to consult or negotiate in good faith with a labor organization as required by the Statute. This section protects many of the different rights of an exclusive representative, such as the right to bargain collectively and in good faith over conditions of employment, the right to be the exclusive representative for its appropriate unit of employees, and the right to be notified of proposed changes in conditions of employment.

Examples of violations:

- unilaterally implementing a reorganization without proper notice to the exclusive representative;

- bypassing the exclusive representative and directly notifying employees of changes in working conditions;
- refusing to provide the labor organization, upon request, with available and necessary information which is required to fulfill its representational obligations; and
- unilaterally changing an established past practice, absent a clear and unmistakable waiver of bargaining rights.

(a)(6) Failing or refusing to cooperate in impasse procedures and impasse decisions as required by the Statute is an unfair labor practice.

An example of this conduct:

- failing and refusing to comply with a final order of the Federal Service Impasses Panel.

(a)(7) It is an unfair labor practice for an agency to enforce any rule or regulation (other than a rule or regulation implementing 5 U.S.C. § 2302—the Civil Rights Act of 1964, which prohibits discrimination on the basis of race, age, etc.)—which is in conflict with any applicable collective bargaining agreement if the agreement was in effect before the date the rule or regulation was prescribed.

(a)(8) To otherwise fail or refuse to comply with any provision of the Statute is an unfair labor practice.

Examples of violations:

- refusing to allow an employee to have union representation during an interview with management when such a meeting could reasonably lead to disciplinary action (5 U.S.C. § 7114(a)(2)(B));
- refusing to provide official time for contract negotiations which take place during an employee's regular work hours and when the employee would otherwise be in a work or paid leave status (5 U.S.C. § 7131(a));
- refusing to honor dues allotment authorizations for an exclusive representative submitted by unit employees in the agency (5 U.S.C. § 7115); and
- refusing to provide the exclusive representative the opportunity to be represented at a formal discussion within the meaning of the Statute (5 U.S.C. § 7114(a)(2)(A)).

In addition to the above prohibited actions, section 7116(e) describes other agency conduct that can constitute an unfair labor practice. Under section 7116(e)—

The expression of any personal view, argument, opinion, or the making of any statement which—

- (1) publicizes the fact of a representational election and encourages employees to exercise their right to vote in such election,
- (2) corrects the record with respect to any false or misleading statement by any person, or
- (3) informs employees of the Government's policy relating to labor-management relations and representation,

shall not, if the expression contains no threat of reprisal or force or promise of benefit or was not made under coercive conditions, constitute an unfair labor practice or constitute grounds for the setting aside of any election conducted under the Statute. (5 U.S.C. § 7116(e))

Unfair Labor Practices of Labor Organizations

(b)(1) A labor organization may not interfere with, restrain, or coerce employees in the exercise of rights assured them by the Statute. Similar to prohibitions on management, this subsection protects the rights of all employees whether or not they choose to join a labor organization.

An example of this conduct:

- informing an employee that membership in the labor organization is required to obtain union assistance in processing a grievance.

(b)(2) A labor organization shall not cause or attempt to cause an agency to discriminate against any employee in the exercise by the employee of any right under the Statute.

Examples of prohibited conduct:

- attempting to get management to discipline an employee who did not join the labor organization;
- attempting to get management to discharge an employee because he or she was organizing on behalf of a different labor organization.

(b)(3) It shall be an unfair labor practice for a labor organization to coerce, discipline, fine, or attempt to coerce a member of the labor organization as punishment, reprisal, or for the purpose of hindering or

impeding the member's work performance or productivity as an employee or the discharge of the member's duties as an employee.

An employee is protected from any form of harassment by the labor organization when that employee is performing assigned duties.

Examples could be:

- imposing fines on unit employees who exceed a certain pre-determined standard of efficiency;
- restricting an employee from serving as an officer of the labor organization if the employee has received an outstanding performance award.

(b)(4) It is an unfair labor practice for a labor organization to discriminate against an employee with regard to the terms or conditions of membership in the labor organization on the basis of race, color, creed, national origin, sex, age, preferential or non-preferential civil service status, political affiliation, marital status, or handicapping condition.

(b)(5) A labor organization must not refuse to consult or negotiate in good faith with an agency as required by the Statute. This includes, among others, the labor organization's responsibility to approach negotiations with a sincere resolve to reach agreement, and to be represented by duly authorized representatives.

An example:

- delaying the start of negotiations for an unreasonable length of time, when the agency attempts to proceed.

(b)(6) A labor organization may not fail or refuse to cooperate in impasse procedures and impasse decisions as required by the Statute. This is identical to the agency requirement under 5 U.S.C. § 7116(a)(6).

(b)(7) It shall be an unfair labor practice for a labor organization to: (A) call, or participate in, a strike, work stoppage, or slowdown, or picketing of an agency in a labor-management dispute if such picketing interferes with an agency's operations; or (B) condone any activity described in (A) above by failing to take action to prevent or stop such activity. However, informational picketing which does not interfere with an agency's operations is not an unfair labor practice.

Also, in the case of any labor organization which by omission or commission has willfully and intentionally, with regard to any strike, work stoppage, or slowdown, violated 5 U.S.C. § 7116(b)(7), the

Authority shall, upon an appropriate finding by the Authority of such violation—

- (1) revoke the exclusive recognition status of the labor organization, which shall then immediately cease to be legally entitled and obligated to represent employees in the unit; or
- (2) take any other appropriate disciplinary action (5 U.S.C. § 7120(f)).

(b)(8) It is an unfair labor practice for a labor organization to otherwise fail or refuse to comply with any provision of the Statute.

In addition to the above, section 7116(c) describes another type of labor organization action which is prohibited and which is the basis for an unfair labor practice—discrimination in membership. Section 7116(c) provides that:

It shall be an unfair labor practice for an exclusive representative to deny membership to any employee in the appropriate unit represented by such exclusive representative except for failure—

- (1) to meet reasonable occupational standards uniformly required for admission; or
- (2) to tender dues uniformly required as a condition of acquiring and retaining membership.

This does not preclude a labor organization from enforcing discipline in accordance with procedures under its constitution or bylaws to the extent consistent with provisions of the Statute.

Bars to Raising Unfair Labor Practice Charges

Section 7116(d) bars certain matters from being raised as unfair labor practice matters. Specifically:

- (1) Issues which can be properly raised under a statutory appeals procedure may not be raised as an unfair labor practice under the Statute.
- (2) Unfair labor practice issues which can also 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 but not under both procedures.

Chapter 14

Processing Unfair Labor Practice Cases

(Section 7118)

The Office of the General Counsel, through the Regional Offices, investigates and prosecutes unfair labor practice (ULP) charges. Before a ULP charge is filed, as well as during the processing of a charge, the Office of General Counsel offers alternative dispute resolution services on a voluntary basis designed to avoid ULP disputes and to resolve ULP disputes informally. These ADR services include facilitation, intervention, training, and education services.

ULP charges generally are filed on forms provided by the OGC and may be filed by an agency, a labor organization, or an individual. (See Appendices N and O for forms.) The person who files a charge is called the charging party; the person against whom a charge is filed is called the charged party. The form asks for certain information, including a clear and concise statement of the facts alleged to constitute a ULP and a statement of the sections of the Statute alleged to have been violated. When filing a charge, the charging party also must submit supporting evidence and documents. A charge can be mailed, hand-delivered, or faxed to the appropriate Regional Director.

In most situations, a charge must be filed within 6 months from the date the alleged ULP occurred. If a charge is not filed within that time period, it will be dismissed as untimely. However, a charge filed after the 6-month period will be considered timely if the charged party prevented the charging party from discovering the allegedly unlawful conduct within the 6-month period by concealment or by failing to perform a duty owed to the charging party.

Once a ULP charge is filed, an agent from the Regional Office conducts an investigation of the charge. (See Appendix P which describes the routes for processing of a charge.) During the investigation, all parties have the opportunity to present their evidence and views, and all parties are required to cooperate fully in the investigation. It is the General Counsel's policy to protect the identity of individuals who submit statements and information during the investigation, and to protect against the disclosure of documents obtained during the investigation, as a

means of ensuring the General Counsel's continuing ability to obtain all relevant information. After issuance of a complaint and in preparation for a hearing, however, identification of witnesses, a synopsis of their expected testimony and documents proposed to be offered into evidence at the hearing may be disclosed as required by the prehearing disclosure requirements in 5 C.F.R. § 2423.23. (See Appendix Q which describes the process after a complaint has issued.)

The Regional Office may use an alternative case processing procedure to assist the parties in resolving their ULP dispute, if the parties voluntarily agree, by facilitating a problem-solving approach, rather than initially investigating the charge. The purpose of this procedure is to resolve the underlying ULP dispute without deciding the merits of the charge, and no evidence is taken in this procedure. If the parties are unable to resolve the dispute, the Region conducts an investigation on the merits of the charge. The agent who was involved in the alternative case processing procedure is not involved in the subsequent investigation on the merits of the charge, unless the parties and the Regional Director agree otherwise.

The General Counsel may seek temporary relief, including a restraining order, under section 7123(d) of the Statute. Consistent with the General Counsel's Injunction Policy, the General Counsel reviews all charges to determine whether to seek the approval of the Authority to initiate and prosecute injunctive proceedings. The General Counsel may not seek such relief without the approval of the Authority.

The Regional Director may take any of the following actions, as appropriate, concerning a ULP charge:

- approve a request to withdraw a charge;
- refuse to issue a complaint;
- approve a written settlement agreement;
- issue a complaint; or
- withdraw a complaint.

If the Regional Director decides not to issue a complaint, he or she will provide the parties with a written statement of the reasons for not issuing a complaint. A charging party may appeal a decision by the Regional Director not to issue a complaint. The appeal is decided by the General Counsel, who may grant the appeal only on limited grounds. After the General Counsel issues a final decision, the charging party may seek reconsideration of that decision if it can establish extraordinary circumstances.

If the Regional Director decides to issue a complaint, the complaint sets forth the ULP alleged to have been committed and a date for a hearing before an Administrative Law Judge (ALJ) from the Authority's Office of Administrative Law Judges (OALJ). Before the hearing date, a Settlement Judge in the OALJ may conduct a conference in which the parties discuss possible resolutions of the dispute without resort to litigation. If the dispute is not resolved, the General Counsel prosecutes the complaint before a different ALJ. Nothing discussed at the settlement conference is disclosed to the ALJ who presides at the hearing if settlement efforts are unsuccessful.

ALJ decisions are transmitted to the Authority. If no party files exceptions to an ALJ's decision, the decision becomes the decision of the Authority and is final without any precedential significance. If exceptions are filed to an ALJ's decision, the Authority reviews the decision and may affirm, modify, remand, or reverse it, in whole or part.

If the Authority finds that an agency or labor organization has committed a ULP, the Authority can order:

- an agency to reinstate an employee with backpay;
- the parties to negotiate a collective bargaining agreement in accordance with the order and require that it be given retroactive effect;
- a party to cease and desist from the conduct that constituted the ULP;
- any combination of the actions described above; or
- such other action as will carry out the purposes of the Statute.



The Collaboration and Alternative Dispute Resolution (CADR) Program

Federal sector labor-management relations has changed significantly in recent years. Greater emphasis is now placed on the use of Alternative Dispute Resolution (ADR) and consensus decision-making in resolving workplace disputes, rather than relying on litigation. ADR is an informal process that allows parties to discuss and develop their interests in order to resolve the underlying issues and problems in their relationship. The discussion is facilitated by a third-party neutral who is present to ensure a productive dialogue.

ADR allows those present to take an active part in the decision-making process. Solutions are adopted by consensus, and reflect an understanding of the interests of all parties. As a result, the solutions are tailored to the needs of the participants. ADR encourages creative, innovative solutions, moving away from the traditional win/lose results of adversarial proceedings. ADR resolves disputes while preserving relationships, and thereby helps create a productive working environment.

The FLRA established the Collaboration and Alternative Dispute Resolution (CADR) program to enhance these efforts by integrating ADR into its case processes. The CADR program provides overall coordination and support for the FLRA's labor-management cooperation and ADR efforts. The program assists agencies and labor organizations in improving their labor-management relationships and in resolving disputes.

The CADR program is voluntary; if parties are interested in using the program's services, they may contact the CADR program office. Those services focus on alternatives to traditional case processing and formal dispute resolution. The CADR program assists the parties both in preventing disputes before they become cases and in coming up with ways to informally resolve disputes in pending cases. This includes interest-based conflict resolution and intervention services in pending unfair labor practice cases, representation cases, negotiability appeals, and impasse bargaining disputes. The CADR program also provides facilitation, training and education to help labor and management develop

collaborative relationships. The ultimate goal is to provide parties with the skills they need to do ADR on their own.

The CADR program is integrated into case processing procedures. FLRA regulations in negotiability, unfair labor practice, and representation cases ensure that parties have the opportunity to use ADR to resolve their cases. For example, in negotiability cases, during the post-petition conference, if the parties express interest in using ADR services, the case will be held in abeyance to give the parties time to get help from the CADR Office. In unfair labor practice cases, an ADR process is available that allows the parties to resolve the underlying dispute by facilitating a problem-solving approach, rather than having the Regional Office investigate the facts and determine the merits of the charge. For cases scheduled for hearing, the ALJ settlement program is available for one more attempt at informal resolution. ADR services are also available in some circumstances for parties who have not filed a case, but would like assistance with disputes or relationship issues.

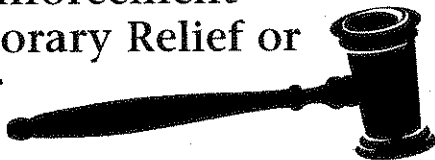
All of the FLRA components provide CADR program services. The OGC offers ADR services in unfair labor practice and representation cases, both before cases are filed and while they are pending. Through its Regional Offices and the National Office, the OGC provides facilitation, intervention, training and education services to agencies and unions. Each Regional Office has a Dispute Resolution Specialist who coordinates ADR services within the Region. The ALJ's office has a settlement program for parties who have hearings pending before an ALJ. The Authority offers ADR services in negotiability and other appropriate cases. The Panel uses ADR techniques in resolving bargaining impasses.

The CADR office assists all FLRA components in the delivery of ADR services. If labor organizations or agencies have questions about how the FLRA's ADR services can help the parties resolve particular disputes or improve their labor-management relationship, the CADR office can help answer those questions.

Chapter 16

Judicial Review-Enforcement- Petition for Temporary Relief or Restraining Order

(Section 7123)



Any persons aggrieved by any final order of the Authority other than an order under—

- 5 U.S.C. § 7122 (involving an award by an arbitrator) unless the order involves an unfair labor practice; or
- 5 U.S.C. § 7112 of this title (involving an appropriate unit determination)

may, during the 60-day period beginning on the date on which the order was issued, institute an action for judicial review of the Authority's order in the United States Court of Appeals in the circuit in which the person resides or transacts business or in the United States Court of Appeals for the District of Columbia.

The Authority may petition an appropriate United States Court of Appeals for the enforcement of any order of the Authority and for appropriate temporary relief or a restraining order.

Parties may request the General Counsel to seek appropriate temporary relief (including a restraining order) under Section 7123(d). The General Counsel will initiate and prosecute injunction proceedings only upon approval of the Authority. A determination by the General Counsel not to seek approval of the Authority for such temporary relief is final and may not be appealed to the Authority.

Whenever the Authority so advises, the General Counsel may, upon issuance of a ULP complaint charging that any person has engaged in or is engaged in an unfair labor practice, petition any United States District Court, within any district in which the ULP in question is alleged to have occurred or in which such person resides or transacts business, for appropriate temporary relief (including a restraining order). The courts shall not grant any temporary relief if it would interfere with the ability of the agency to carry out its essential functions or if the Authority fails to establish probable cause that an unfair labor practice is being committed.

Chapter 17

Foreign Service Labor-Management Relations Program

Foreign Service Labor Relations Board

The Foreign Service Act of 1980, as amended, created a statutory labor-management relations program covering Foreign Service employees in the Broadcasting Board of Governors, the Agency for International Development, and the Departments of State, Agriculture, and Commerce. The Act is similar in many respects to the Federal Service Labor-Management Relations Statute, which governs labor relations involving non-Postal Service, Civil Service employees.

The Act established the Foreign Service Labor Relations Board within the Federal Labor Relations Authority. The Board administers the Act and is composed of three Members, one being the Chairman of the Authority, who also serves as Chairperson of the Board. The Chairperson may at any time designate an alternate Chairperson from among the Members of the Authority. The other two Members of the Board are appointed by the Chairperson of the Board from nominees approved in writing by the agencies to which the Act applies and the exclusive representatives (if any) of employees in each such agency. If the agencies and exclusive representatives are unable to agree on a nominee, the Chairperson appoints the remaining two Members from among individuals the Chairperson considers knowledgeable in labor-management relations and the conduct of foreign affairs.

The Board has no separate staff. The staff of the Authority provides support for the Board. The General Counsel of the Authority investigates alleged ULPs and prosecutes ULP complaints. The Act provides that decisions of the Board shall be consistent with decisions of the Authority unless the Board finds that special circumstances require otherwise.

Foreign Service Impasse Disputes Panel

Section 1010 of the Act establishes the Foreign Service Impasse Disputes Panel. Its function is to assist in resolving negotiation impasses arising in the course of collective bargaining under the Act. Parties may

request the assistance of the Foreign Service Impasse Disputes Panel at the address and telephone numbers provided in this Guide for the Federal Service Impasses Panel.

The Foreign Service Impasse Disputes Panel is composed of five Members, who are appointed by the Chairperson of the Board from among individuals the Chairperson considers knowledgeable in labor-management relations and the conduct of foreign affairs. The Act provides that the Foreign Service Impasse Disputes Panel shall be composed of: (1) two Members of the Foreign Service (other than management officials, confidential employees, or labor organization officials); (2) one individual employed by the Department of Labor; (3) one Member of the Federal Service Impasses Panel; and (4) one public Member who does not hold any other office or position in the Government. The Chairperson of the Board sets the terms of office for the Foreign Service Impasse Disputes Panel Members and determines who shall serve as chair.