

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

**EXCLUSIVE REPRESENTATIVE**. The union that is certified as the exclusive representative of a unit of employees either by virtue of having won a representation election or because it had been recognized as the exclusive representative before passage of the CSRA. See **EXCLUSIVE RECOGNITION**. A union holding exclusive recognition is sometimes referred to as the exclusive bargaining agent of the unit.

**EXTERNAL LIMITATIONS ON THE EXERCISE OF MANAGEMENT'S RIGHTS**. Discretion reserved to management isn't unfettered. Quite apart from any limitations that may be found in the collective bargaining agreement (such as an **appropriate arrangement** provision), its discretion must also be exercised in accordance with the laws and regulations that set limitations on management discretion. Only those external limitations on the exercise of certain rights can be enforced by the union under the **negotiated grievance procedure**. See **APPLICABLE LAWS**.

**FAIR REPRESENTATION, DUTY OF**. The union's duty to represent the interests of all unit employees without regard to union membership.

**FEDERAL LABOR RELATIONS AUTHORITY (FLRA, AUTHORITY)**. The independent agency responsible for administering the **Federal Service Labor-Management Relations Statute (FSLMRS)**. As such, it decides, among other things, representation issues (e.g., the bargaining unit status of certain employees), **unfair labor practices** (violations of any of the provisions of the FSLMRS), **negotiability disputes** (i.e., **scope of bargaining** issues), **exceptions to arbitration awards**, as well as resolve disputes over consultation rights regarding agency-wide and Government-wide regulations. The FLRA maintains nine regional offices. Also see the FLRA web page at <http://www.flra.gov/>

#### Appendix 4

**FEDERAL MEDIATION AND CONCILIATION SERVICE (FMCS)**. An independent agency that provides mediators to assist the parties in negotiations. Although the bulk of its work is in the private sector, it also provides its services to the Federal sector. FMCS also maintains a roster of qualified private arbitrators, panels of which are referred to the parties upon joint request. See **MEDIATION**. Also see the FMCS webpage at <http://www.flra.gov/>

**FEDERAL SERVICE IMPASSES PANEL (FSIP or Panel)**. An entity within the FLRA that resolves bargaining impasses, chiefly by ordering the parties to adopt certain contractual provisions relating to the conditions of employment of unit employees. The Panel uses many procedures for resolving impasses, including fact-finding, med-arb, final-offer interest arbitration, either by the Panel, individual members of the Panel, the Panel's staff, or by ordering the parties to refer their impasse to an agreed-upon private arbitrator who is to provide services. The Panel is empowered to "take whatever action is necessary and not inconsistent with [the Federal Service Labor-Management Relations Statute] to resolve the impasse." For more information on FSIP, see <http://www.flra.gov/>

**FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS STATUTE (FSLMRS)**. Title 5, United States Code, sections 7101 - 7135.

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

**FORMAL DISCUSSION**. Under title 5, United States Code, section 7114(a)(2)(A), the **exclusive representative** must be given an opportunity to be represented at "any formal discussion between one or more representatives of the agency and one or more employees in the unit or their representatives concerning any *grievance* or any personnel policy or practices or other *general condition of employment*." (Italics added.) Under 5 U.S.C. 7114(a)(2)(A), a discussion between an agency representative(s) and a bargaining unit employee(s) concerning any grievance or any personnel policy or practice or other condition of employment which affects bargaining unit employees. The exclusive representative must be given the opportunity to be represented at these meetings.

**FREE SPEECH.** Under title 5, United States Code, section 7116(e), the expression of personal views or opinions, even if critical of the union, is not an **unfair labor practice** if such expression is not made in the context of a representational election and if it "contains no threat of reprisal or force or promise of benefit or was not made under coercive conditions." During the conduct of an election, however, management officials must be neutral. This limited right of free speech applies to agency representatives.

**FROLIC.** employee was engaged in activities clearly unrelated to work. Factors to be considered include the purpose of the detour, whether it had a single or dual purpose; the relationship of the Government employee's activities during the frolic or detour to the official duties; how much time elapsed during the frolic or detour; and whether the Government employee was returning to the authorized route at the time of the incident

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

**GOOD FAITH BARGAINING.** A statutory duty to approach negotiations with a sincere resolve to reach a collective bargaining agreement, to be represented by properly authorized representatives who are prepared to discuss and negotiate on any **condition of employment**, to meet at reasonable times and places as frequently as may be necessary and to avoid unnecessary delays, and, in the case of the agency, to furnish upon request data necessary to negotiation. Also defined as: The overall behavior and effort on the part of an agency and union during the negotiations process. This includes the obligation on the part of an agency and union to: approach negotiations with a sincere resolve to reach agreement; send duly authorized representatives prepared to discuss and negotiated on any condition of employment; meet at reasonable times and convenient places as frequently as necessary and to avoid unnecessary delays; execute, upon request, a written document incorporating the agreed terms, and to take such steps as are necessary to implement the agreement. And in the case of an agency, to furnish to the union upon request and, to the extent not prohibited by law, data ---

1. Which is normally maintained in the regular course of business:

#### Appendix 4

2. Which is reasonably available and necessary for full and proper discussion, understanding and negotiation of subjects within the scope of collective bargaining; and,
3. Which does not constitute guidance, advice, counsel or training provided for management officials or supervisors, relating to collective bargaining.

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

**GRIEVANCE.** Under title 5, United States Code, section 7103(a)(9), a grievance "means any complaint -- (A) by an employee concerning any matter relating to the employment of the employee; (B) by any labor organization concerning any matter relating to the employment of any employee; or (C) by an employee, labor organization, or agency concerning -- (i) the effect or interpretation, or a claim of breach, of a collective bargaining agreement; or (ii) any claimed violation, misinterpretation, or misapplication of any law, rule, or regulation affecting conditions of employment."

**GRIEVANCE ARBITRATION.** See **ARBITRATOR**.

**GRIEVANCE BAR.** A claim by either party to a collective bargaining relationship that a statutory appeal was previously filed involving the same facts and theories alleged in a subsequently filed grievance.

**GRIEVANCE PROCEDURE.** A systematic procedure, devised by the parties to the agreement, by which a grievance moves from one level of authority to the next higher level until it is settled, withdrawn, or referred to arbitration. Under title 5, United States Code, section 7121, a collective bargaining agreement must contain a grievance procedure terminating in final and binding arbitration. Apart from matters that must by statute be excluded (such as grievances relating to retirement, health and life insurance and the classification of positions), the scope of the grievance procedure is to be negotiated by deciding what matters are to be excluded from an otherwise "full scope" procedure--i.e., a procedure that

covers all the matters mentioned in the statutory definition of "grievance." See **NEGOTIATED GRIEVANCE PROCEDURE**.

**HIRE EMPLOYEES.** A right reserved to management. The Authority has said that "the probationary period, including summary termination, constitutes an essential element of an agency's right to hire under [title 5, United States Code,] section 7106(a)(2)(A)."

See **SELECT** for a discussion of the much more frequently utilized right of management, in filling positions, to make selections for appointments from any appropriate source. The relationship between the right to hire and the right to select is still unclear.

**IMPASSE.** See **BARGAINING IMPASSE**.

**I&I (IMPACT AND IMPLEMENTATION) BARGAINING.** Even where the decision to change conditions of employment of unit employees is protected by management's rights, there is a duty to notify the union and, upon request, bargain on **procedures** that management will follow in implementing its protected decision as well as on **appropriate arrangements** for employees expected to be adversely affected by the decision. Such bargaining is commonly referred to as "impact and implementation," or "I&I" bargaining, which is the commonest variety of **midterm bargaining**.

**INFORMATION.** The union, to the extent not prohibited by law (e.g., the Privacy Act), is entitled, under certain circumstances (see **PARTICULARIZED NEED**, below), to data "for full and proper discussion, understanding, and negotiation of subjects within the **scope of bargaining**." The agency must provide that information free of charge.

**INTEREST.** In **interest-based bargaining**, the concerns, needs, or desires behind an issue: *why* the issue is being raised.

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

**INTEREST-BASED BARGAINING (IBB).** A bargaining technique in which the parties start with (or at least focus on) interests rather than proposals; agree on criteria of acceptability that will be used to evaluate alternatives; generate several alternatives that are consistent with their interests, and apply the agreed-upon acceptability criteria to the Appendix 4

alternatives so generated in order to arrive at mutually acceptable contract provisions. The success of the technique depends, in large measure, on mutual trust and a willingness to share information. But even where this is lacking, the technique, with its focus on interests and on developing alternatives, tends to make the parties more flexible and open to alternative solutions and thus increases the likelihood of agreement.

**INTERNAL SECURITY PRACTICES.** A right reserved to management by title 5, United States Code, section 7106(a)(1). The right to determine the internal security practices of an agency isn't limited to establishing "those policies and actions which are part of the Agency's plan to secure or safeguard its physical property against internal and external risks, to prevent improper or unauthorized disclosure of information, or to prevent the disruption of the Agency's activities." It also extends to safeguarding the agency's personnel.

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

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

**JENKS RULE.** Even if it overcomes privileges, the rule is discretionary as to pre-testimony documents. You can always ask the witness if their testimony is based on any document. Likewise, at deposition you can ask about documents that might be relevant to the case generally. But asking, "describe for me each document that you reviewed in preparation for today's deposition" would be an objectionable question. *In short, the "JENKS RULE" is a rule permitting the production of a protected affidavit for purposes of cross examination.*

**LABOR MANAGEMENT AGREEMENT (Collective bargaining agreement, Contract, Agreement)** A written agreement between the Employer and the organization, usually for a definite term, defining conditions of employment,

rights of Employees and labor organizations, procedures to be followed in settling disputes or handling issues that arise during the life of the agreement.

**LABOR ORGANIZATION.** A union--i.e., an organization composed in whole or in part of employees, in which employees participate and pay dues, and which has as a purpose the dealing with an agency concerning grievances and conditions of employment.

**LAYOFF EMPLOYEES.** Right reserved to management by title 5, United States Code, section 7106(a)(2)(A).

**LUNCH PERIODS (Duty Free)** Uninterrupted lunch period, where no work of any kind may be scheduled, unless mission requirements make an early recall to work necessary.

**MANAGEMENT OFFICIAL.** An individual who formulates, determines, or influences the policies of the agency. Such individuals are excluded from **appropriate units**.

**MANAGEMENT RIGHTS.** Refers to types of discretion reserved to management officials by statute.

• **Core rights.** Consists of the rights "to determine the mission, budget, organization, number of employees, and internal security practices of the agency."

• **Operational rights.** Consists of the rights 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; to assign work, to make determinations with respect to contracting out, and to determine the personnel by which agency operations shall be conducted; with respect to filling positions, to make selections for appointments from-- among properly ranked and certified candidates for promotion; or any other appropriate source; and to take whatever actions may be necessary to carry out the agency mission during emergencies.

#### Appendix 4

• **Three exceptions.** The three title 5, United States Code, section 7106(b) exceptions to the above involve (1) **title 5, United States Code, section 7106(b)(1) permissive subjects** of bargaining (e.g., staffing patterns, technology) on which, under the statute, agencies can elect to bargain, (2) **procedures** management will follow in exercising its reserved rights, and (C) **appropriate arrangements** for employees adversely affected by the exercise of management rights.

1. **"Permissive" subjects exception.** This exemption to management's rights "staffing patterns" -- i.e., with "the numbers, types, and grades of employees or positions assigned to any organizational subdivision, work project, or tour of duty" and with "the technology, methods, and means of performing work." Under the statute such matters are, moreover, negotiable "at the election of the agency" even if the proposal also directly interferes with the exercise of a title 5, United States Code, section 7106(a) right.

2. **Procedural "exception."** Title 5, United States Code, section 7106(b)(2), dealing with procedures, really isn't an exception to management's rights as the Authority has held that a proposed "procedure" that "directly interferes" with a management right is not a procedure within the meaning of title 5, United States Code, section 7106(b)(2).

3. **Appropriate arrangement exception.** Title 5, United States Code, section 7106(b)(3) applies only if the proposal is intended to ameliorate the adverse effects of the exercise of a management right. Where such is the intent of the proposal, the Authority applies a balancing test in which it weighs the extent to which the proposal ameliorates the expected adverse effects against the extent to which it interferes with the management right and determines whether or not the specific proposal "excessively" interferes with management rights. If the interference is "excessive," the proposal isn't an "appropriate arrangement" and therefore is nonnegotiable. If otherwise, the proposal is a negotiable appropriate arrangement, even though it interferes with management's rights. To qualify as an "arrangement" to which it would be proper to apply the excessive interference balancing test, the proposal has to be "tailored" so that it applies only to those employees who would be adversely affected by the proposed management decision.

**MANDATORY SUBJECTS OF BARGAINING.** Those matters that the agency must bargain over upon receipt of a union's request, such as conditions of employment not otherwise waived by the union or covered by the parties' agreement.

**MEDIATION.** Use of a third party, usually a neutral without authority to impose a settlement, to assist the parties to reach agreement. Mediation techniques vary, but one common practice is for the labor mediator to separate the parties (in order to control communications) and meet with them separately and, in effect, engage in interest-based bargaining with them. Because the mediator usually is a neutral who cannot impose a settlement and because he or she is expected to keep confidences, each party is more willing to be open with the mediator than with the other party (or with an interest arbitrator). Because of this greater openness, the mediator often is able to see areas of possible agreement that the parties are unable to see in direct, unmediated, negotiations.

**MED-ARB** (mediation followed by interest arbitration). A process in which a neutral with authority to impose (or to recommend the imposition of) a settlement, first resorts to mediation techniques in an attempt to get the parties to voluntarily agree on unsettled matters, but who can later impose a settlement if mediation fails. The theory behind it is that the parties will be more receptive to the med-arb's suggestions for settlement if they know that the med-arb has authority to impose a settlement.

**MERIT PRINCIPLES.** Prohibited personnel practices and Merit Principles

Prohibited personnel practices means actions that are taken for reasons forbidden under law. They include unlawful discrimination; improper personnel solicitations and recommendations; coercing political activity; improperly influencing employment decisions; granting improper preferences in personnel decisions; appointing relatives improperly; retaliation against whistleblowers; retaliation for the exercise of appeal or grievance rights; discrimination on the basis of conduct which is not job-related; and violations of the merit system principles.

According to the nine merit systems principles outlined in 5 USC 2301(b), agencies must:

1. Recruit qualified individuals from all segments of society and select and advance employees on the basis of merit after fair and open competition.
2. Treat employees and applicants fairly and equitably, without regard to political affiliation, race, color, religion, national origin, sex, marital status, age or disability.
3. Provide equal pay for equal work and reward excellent performance.
4. Maintain high standards of integrity, conduct and concern for the public interest.
5. Manage employees efficiently and effectively.

Appendix 4

6. Retain or separate employees on the basis of performance.
7. Educate and train employees when it will result in better organizational or individual performance.
8. Protect employees from improper political influence.
9. Protect employees against reprisal for the lawful disclosure of information in "whistleblower" situations when they disclose waste, fraud, abuse or illegal activities.

**MIDTERM BARGAINING / NEGOTIATIONS.** Literally, all bargaining that takes place during the life of the contract. Usually contrasted with term bargaining – i.e., with the renegotiation of an expired (or expiring) contract. Midterm bargaining includes **I&I bargaining**, **union-initiated midterm bargaining on new matters**; and bargaining pursuant to a **reopener** clause. It excludes matters that are already "**covered by**" the term agreement.

**MISSION OF THE AGENCY.** A right reserved to management by title 5, United States Code, section 7106(a)(1). Although illustrative case law on this particular right is meager, it is generally recognized that the right encompasses the determination of the products and services of an agency.

**NATIONAL CONSULTATION RIGHTS (NCR).** A union accorded national consultation rights is entitled to be consulted on *agency-wide* regulations before they are promulgated. NCR is to be distinguished from consultation rights with respect to

*Government-wide* regulations, under which a union accorded such recognition must be consulted on proposed Government-wide regulations before they are promulgated.

**NATIONAL UNION.** Ordinarily, a union composed of a number of affiliated local unions. The Bureau of Labor Statistics in its union directory, defines a national union as one with agreements with different employers in more than one state, or an affiliate of the AFL-CIO, or a national organization of employees.

**NEGOTIABILITY.** Refers to whether a given topic is subject to bargaining between an agency and the union. The Federal Labor Relations Authority makes the final decision whether a subject is negotiable or nonnegotiable.

**NEGOTIABILITY APPEAL (PETITION FOR REVIEW).** If an agency believes that a union proposal is contrary to law or applicable regulation, or is otherwise nonnegotiable under the statute, it may inform the union of its refusal to negotiate. 5 U.S.C. 7117 provides a right to appeal the agency's determination of non-negotiability to the FLRA.

**NEGOTIABILITY DETERMINATION.** A decision reached by the Federal Labor Relations Authority on a request for expedited review of negotiability issues. Unions in disputes with agencies concerning what matters may be collectively bargained may file negotiability appeals, technically called petitions for review. A negotiability determination may be rendered when an agency claims a matter is non-negotiable or there is no duty to bargain. Matters that involve such allegations that do not involve the actual or contemplated changes in working conditions can only be filed under the negotiability appeal procedure.

**NEGOTIABILITY DISPUTES.** Disputes over whether a proposal is nonnegotiable because (a) it is inconsistent with laws, rules, and regulations establishing conditions of employment and/or (b) it interferes with the exercise of rights reserved to management. Negotiability disputes normally are processed under the FLRA's "no fault" negotiability procedures

**NEGOTIATED GRIEVANCE PROCEDURE (NGP).** A collective bargaining agreement (CBA) must contain a grievance procedure terminating in final and binding arbitration. The NGP, with a few exceptions involving statutory alternatives (e.g., adverse and performance-based actions), is the exclusive administrative procedure for grievances falling within its coverage. Apart from the matters excluded from the coverage of the NGP by statute – e.g., retirement, life and health insurance, classification of positions – the NGP covers those matters specified in the definition of grievance in title 5, United States Code, section 7103(a)(9) (see **GRIEVANCE**, above), minus any of those matters that the parties agree to exclude from the NGP. That is, under the FSLMRS program, the parties negotiate to determine what matters to *exclude* from the procedure rather than what matters it is to *include*—just the opposite from pre-FSLMRS and private sector practices. A systematic procedure agreed to by the negotiating parties for the resolution of grievances. The negotiated grievance procedure is applicable only to employees in the bargaining unit. The scope of the negotiated grievance procedure is negotiated by the parties and may include certain matters for which a statutory appeal procedure exists, unless the parties negotiate their exclusion. Several matters **cannot** be included under its scope: 1) actions taken for violations of the Hatch Act; 2) retirement, life insurance or health insurance; 3) a suspension or removal taken in the interest of national security; 4) any examination, certification, or appointment; or 5) the classification of any position which does not result in the reduction in grade or pay of an employee. 5 U.S.C. 7121 requires the inclusion of a negotiated Appendix 4

grievance procedure in all agreements and requires binding arbitration as the final step of the negotiated grievance procedure.

**NEGOTIATION IMPASSE.** If there are no disputes over the essential obligations of bargaining, assuming the parties' have bargaining in good faith but unsuccessfully over a negotiable proposal, it is point where the parties are unable to reach an agreement.

**NON-NEGOTIABLE.** A term used to indicate the subject matter of a management change does not concern a condition of employment for affected employees, is a reserved management right or because the matter is permissively negotiable and the agency has elected not to bargain. Additionally, the term applies to a union proposal that does not concern a condition of employment for affected employees, is in conflict with law, Government-wide rule or regulation or excessively interferes with a reserved management right.

**NO-DUTY TO BARGAIN.** A term used to indicate the subject matter of a management change or union initiated proposal involves a condition of employment for affected employees that has been previously waived by the union or is covered by the parties' collective bargaining agreement.

**NUMBER OF EMPLOYEES OF AN AGENCY.** A right reserved to management by title 5, United States Code, section 7106(a)(1). There have been no FLRA decisions in which a proposal has been found nonnegotiable because it interfered with this right.

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

**OBLIGATION TO BARGAIN.** The right to bargain is affirmative; if management does nothing, the union may require negotiations over working conditions. The right to bargain is also responsive; when management changes working conditions, the changes may lead to negotiations. That obligation is fulfilled through negotiations leading to a basic agreement, mid-term bargaining, and bargaining over impact and implementation decisions made within the ambit of management rights. In order to meet this obligation, management has the duty to give the exclusive bargaining representative advance notice of the proposed implementation of decisions and provide the union with an opportunity to participate in impact and implementation bargaining. The union must then act if it is to act at all.

**OFFICE OF PERSONNEL MANAGEMENT (OPM).** Issues **Government-wide regulations** on personnel matters that may have a substantial impact on the **scope of bargaining**; consults with labor organizations on those regulations; provides technical advice and assistance on labor-management relations matters to Federal agencies; also provides information on personnel matters to Federal agencies and the general public (e.g., this annotated glossary); exercises oversight with regard to statutory and regulatory requirements relating to personnel matters; and provides support services for the National Partnership Council.

**OFFICIAL TIME.** At one time treated as a term of art created by title 5, United States Code, section 7131, involving paid time for employees serving as union representatives. However, the Authority has said that section 7131(d) does not preclude parties to a collective bargaining agreement from agreeing to provide official time for other matters; that is, matters other than those relating to labor-management relations activities.

Union negotiators (no more than the number of management negotiators) who also are unit employees are statutorily entitled to official time to negotiate agreements. Official time may not, however, be used to perform internal union business. Title 5, United States Code, section 7131(d) allows the parties to negotiate the amount of official time that shall be granted to specified union representatives for the performance of specified representational functions.

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

**OPM.** Refers to the Office of Personnel Management (OPM). OPM supports Government program managers in their personnel management responsibilities through a range of programs. This includes administering or requiring a merit system for Federal employment; providing services related to retirement, health benefits and life insurance benefits for federal employees.

**ORGANIZATION.** A right reserved to management. According to the FLRA, this right encompasses an agency's authority to determine its administrative and functional structure, including the relationship of personnel through lines of control and Appendix 4

the distribution of responsibilities for delegated and assigned duties. That is, the right includes the authority to determine how the agency will structure itself to accomplish its mission and functions.

**ORGANIZATION (Union)** – Refers to Labor organization i.e., Association of Civilian Technicians, Inc., (ACT Arizona Army Chapter #61)

**OPPOSITION TO EXCEPTION TO ARBITRATION AWARD.** If a party files an exception (appeal) to an arbitrator's award, the other party may oppose the exception to the Authority in accordance with 5 CFR 2425.1. Oppositions to exceptions must be filed within thirty (30) days after the date of service of the exception.

**PACKAGE BARGAINING.** A negotiating technique whereby contract proposals are grouped into a "package" usually offering substantial concessions by one party, in exchange for substantial gains. Frequently, the package proposal will be advanced with the condition that it must either be accepted as presented or rejected entirely.

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

**PARTICULARIZED NEED.** The Authority's analytical approach in dealing with union requests for information under title 5, United States Code, section 7114(b)(4). Under this approach, the union must establish a "particularized need" for the information and the agency must assert any countervailing interests. The Authority then balances the one against the other to determine whether a refusal to provide information is an **unfair labor practice**.

**PARTNERSHIP.** A form of employee participation established pursuant to Executive Order 12871 in which the parties are expected to deal with matters relating to improving *the performance of the agency* in a non-adversarial, non-litigious manner. The scope of partnership deliberations are broader than those of collective bargaining in that they usually include, e.g., deliberations over the conditions of employment of non-bargaining unit employees. Partnership deliberations also include deliberations over staffing patterns, technology, methods and means—matters integral to improving *agency* performance, which is the overriding purpose of the Order.

When President Bush signed Executive Order 13203 rescinding 12871, there was speculation that it meant the end of labor-management cooperation and communication in the Federal Government. The President was motivated by his conviction that partnership is not something that should be mandated for every agency in every situation. But while agencies are no longer required to form partnerships with their unions, they are strongly encouraged to establish cooperative labor-management relations. Cooperation between labor and management can enhance effectiveness and efficiency, cut down the number of employment-related disputes, and improve working conditions, all of which contribute to the kind of performance and results sought by the President. This will demand management and union leaders who trust each other, who are open and honest with each other, who respect the different interests that each party brings to the table and build on the interests they share.

**PAST PRACTICE (ESTABLISHED PRACTICE).** Existing practices sanctioned by use and acceptance, that are not specifically included in the collective bargaining agreement. Arbitrators use evidence of past practices to interpret ambiguous contract language. In addition, past practices can be enforced under the **negotiated grievance procedure** because they are considered part of the agreement. To qualify as an enforceable established practice, the practice has to be legal, in effect for a certain period, and known and sanctioned by management. Existing practices sanctioned by use and acceptance, which amount to terms and conditions of employment even though not specifically included in the collective bargaining agreement. In order to constitute a binding past practice, it must be established that (1) the practice must involve a condition of employment; and (2) the practice must be consistently exercised for an extended period of time and followed by both parties, or followed by one party and not challenged by the other over a substantially long duration. It should be noted that if a matter is not a condition of employment, it does not become a condition of employment either through practice or agreement.

**PERFORMANCE STANDARDS** A description of the level of performance/achievement to achieve a fully acceptable performance of the duties and responsibilities of the position.

**PERMISSIVE SUBJECTS OF BARGAINING.** There are two types of proposals dealing with so-called "permissive subjects of bargaining": proposals dealing with (1) matters covered by title 5, United States Code, section 7106(b)(1) — i.e., with staffing patterns, technology, and methods and means of performing the agency's work, and (2) matters that are not conditions of employment of bargaining unit employees. Regarding the former, it should be noted that although an agency can "elect" not to bargain on a (b)(1) matter, the President has directed heads of agencies to instruct agency management to bargain on such matters in section 2(d) of Executive Order 12871 — This directive was rescinded by Executive Order 13203. Regarding the latter, it should be kept in mind that, apart from the statutory exclusions from the definition of **condition of employment** found in title 5, United States Code, section 7103(a)(14), a matter may be found Appendix 4

not be a condition of employment because (1) it deals with the conditions of employment of *non-unit employees* (e.g., a proposed procedure for filling supervisory vacancies) or (2) there is no direct connection between the matter dealt with by the proposal and the work situation or employment relationship of bargaining unit employees (e.g., a proposal authorizing unit employees to hunt on a military base when off duty). Regardless of type, once agreement is reached on a permissive subject of bargaining, that agreement cannot be disapproved by the agency head, and is enforceable under the negotiated grievance procedure.

**PERSONNEL BY WHICH AGENCY OPERATIONS ARE CONDUCTED.** A right reserved to management by title 5, United States Code, section 7106(a)(2)(B).

**PICKETING.** Demonstrating, usually near the place of employment, to publicize the existence of a labor-management dispute. This is commonly called **informational picketing** and is directed toward advising the public about the issue in dispute. This is specifically protected by 5 U.S.C. 7116(b) so long as the picketing does not interfere with agency

operations. This is not to be confused with a "strike" as Federal employees are not permitted to strike under Federal law. Informational picketing may only be conducted outside an employee's established duty hours or the employee must be in an approved leave status.

**PROCEDURES.** Under title 5, United States Code, section 7106(b)(2), the procedures observed by management in exercising its reserved rights are negotiable.

To qualify as a negotiable (b)(2) procedure, the proposed "procedure" must not require the use of standards that, by themselves, directly interfere with management's reserved rights or otherwise have the effect of limiting management's reserved discretion.

**PROHIBITED PERSONNEL PRACTICES (SEE MERIT PRINCIPLES)**

**PROHIBITED SUBJECTS OF BARGAINING.** Includes those matters reserved as management rights pursuant to 5 USC 7106(a).

**QUALIFIED APPLICANT** An applicant for a vacant/advertised position who, using established staffing procedures, is able to meet minimum qualification of the position.

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

**RATIFICATION.** Formal approval of a newly negotiated agreement by vote of the labor organization members affected.

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

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

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

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

**REPUDIATION OF AGREEMENT.** Framework developed by the FLRA to determine whether (1) the breach of the agreement was clear and patent and (2) the provision breached went to the heart of the agreement.

#### Appendix 4

**RETAIN EMPLOYEES.** A right reserved to management. Although the rights to layoff and retain appear to be opposite sides of the same coin, the FLRA rarely mentions the right to retain when invoking the right to layoff to find nonnegotiable proposals dealing with RIF's and furloughs.

**REVIEWER (Performance Appraisals)** Normally the technician's second level supervisor in the (supervisory) chain of command. The appraiser will consult with the reviewer prior to discussing the rating with the technician and obtain the reviewer's concurrence and signature, and then present the rating to the technician for signature.

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

**SELECT (WITH RESPECT TO FILLING POSITIONS)** The statute reserves to management the right to make selections for appointments from any appropriate source. The right to select includes discretion to determine what knowledge, skills and abilities are necessary for successful performance in the position to be filled, as well as to determine which candidates possess these qualifications.

**SENIORITY.** Term used to designate an employee's status relative to other employees for determining order of overtime assignments (n/a to National Guard Technicians), compensatory time assignments, vacations, etc. Straight seniority is seniority acquired solely through length of service. Departmental or shop seniority considers status factors in a particular department or shop, rather than the entire agency. A seniority list is a ranking of individual workers in order of seniority.

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

**STAFFING PATTERNS.** A short-hand expression used to refer to title 5, United States Code, section 7106(b)(1)'s long-winded reference to "the numbers, types, and grades of employees or positions assigned to any organizational subdivision, work project, or tour of duty." Under the statute, agencies can elect not to bargain on such matters.

**STANDARDS OF CONDUCT FOR LABOR ORGANIZATIONS.** Standards regarding internal democratic practices, fiscal responsibility, and procedures to which a union must adhere to qualify for recognition. The Department of Labor has responsibility for making known and enforcing standards of conduct for unions in the Federal and private sectors.

**STEWARD (SHOP, UNION, AREA).** Union representative in an organization to whom the union assigns various representational functions, such as investigating and processing grievances, representing employees, collecting dues, soliciting new members, etc. Stewards are usually fellow employees who are trained by the union to carry out these duties.

**STRIKE (PROHIBITED BY STATUTE).** A temporary stoppage of work by a group of employees in connection with a labor dispute. In the Federal sector, strikes are specifically prohibited by Federal law and constitute an unfair labor practice under Section 7116(b)(7) of the Federal Service Labor-Management Relations Statute. Slowdowns, sickouts and related tactics are also prohibited by the Statute.

**SUBSTANCE BARGAINING.** This concerns bargaining over whether an action by the agency to change to conditions of employment affecting employee working conditions will or will not be made. Substance bargaining rather than impact and implementation bargaining is required anytime the subject matter involves a condition of employment. When an agency has discretion under the law to change or not change employee working conditions, any bargaining concerning whether the change will be made requires substance bargaining (e.g. over the decision itself or over the procedures or appropriate arrangements concerning a decision already made if the matter concerns a management rights or is not a condition of employment).

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

#### Appendix 4

**SUPERVISOR.** Under title 5, United States Code section 7103(a)(10), a supervisor is "an individual employed by an agency having authority in the interest of the agency to hire, direct, assign, promote, reward, transfer, furlough, layoff, recall, suspend, discipline, or remove employees; to adjust their grievances, or to effectively recommend such action, if the exercise of the authority is not merely routine or clerical in nature but requires the consistent exercise of independent judgment, except that, with respect to any unit which includes firefighters or nurses, the term 'supervisor' includes only those individuals who devote a preponderance of their employment time to exercising such authority[.]" The individual need exercise only one of the indicia of supervisory authority, not a majority of them, to qualify as a supervisor for the purposes of the statute, provided it involves the consistent exercise of independent judgment.

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

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

**ULP BAR.** A claim by either party to a collective bargaining relationship that a grievance was previously filed involving the same facts and theories alleged in a subsequently filed ULP.

**UNILATERAL ACTION.** Implementation of management decisions concerning personnel policies and matters affecting working conditions without providing the union advance notice of such changes in working conditions and an opportunity to negotiate to the extent permitted by law.

**UNION.** A labor 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..."  
Association of Civilian Technicians, Inc., ACT Arizona Army Chapter #61

**UNION-INITIATED MIDTERM BARGAINING ON NEW MATTERS.** Absent a bargaining waiver, the union has the right to initiate, during the life of the existing agreement, bargaining on matters not "**covered by**" the agreement. There is a split in the circuits, which the Supreme Court has agreed to resolve, regarding this statutory right, with the D.C. Circuit holding that the union has such a right (see *NTEU v. FLRA*, 810 F.2d 295 (D.C. Cir. 1987)), and the Fourth Circuit holding that it does not (see *SSA v. FLRA*, 956 F.2d 1280 (4th Cir. 1992)). Also see *Dept. of Energy v. FLRA*, Nos. 95-2949 and -3113 (4th Cir. Feb. 13, 1997), where the 4th Circuit went further and held that the FSLMRS *prohibits* such bargaining; consequently, such a right could not be established by collective bargaining agreement.

**UNIT.** See **APPROPRIATE UNIT.**

**UNIT CONSOLIDATION.** A no-risk procedure for combining existing units into one or more larger appropriate units.

**UNIT DETERMINATION ELECTION.** When (a) several petitioners seek to represent different parts of an agency, (b) the proposed units overlap, and (c) the FLRA finds that more than one of the proposed units are appropriate, it lets the employees vote for units as well as unions.

**WAIVER.** An agreement reached between union and management whereby one party voluntarily gives up rights afforded to it. For waivers to be enforceable, they must be "clear and unmistakable." It should be noted that management cannot waive rights afforded to management under 5 U.S.C. 7106(a).

**WAIVER DOCTRINE.** A waiver of bargaining rights may be established by an expressed agreement or bargaining history. Further, any such waiver must be clear and unmistakable.

- **Expressed Agreement** - A union may contractually agree to waive its right to initiate bargaining in general by a "zipper clause," that is, a clause intended to waive the obligation to bargain during the term of the agreement on matters not contained in the agreement or by specifying a particular subject matter that is precluded from further bargaining during the term of the agreement.

- **Clear and Unmistakable** - A waiver may also be evidenced by bargaining history when the subject of mid-term bargaining concerns matters which were discussed in contract negotiations but which were not specifically covered in the resulting contract. In this category, waiver may be found where the subject matter of the proposal offered by the union

Appendix 4

during mid-term negotiations was fully discussed and explored by the parties at the bargaining table. For example, where a union sought to bargain over a subject matter but later withdrew its proposal in exchange for another provision, a waiver of the union's right to bargain over the subject matter that was withdrawn would be found. The particular words of proposals offered during contract and mid-term negotiations need not be identical for a waiver to exist. In determining whether a contract provision constitutes a clear and unmistakable waiver, the Authority examines the wording of the provision at issue as well as other relevant provisions of the contract, bargaining history, and past practice.

**WEINGARTEN RIGHT / EXAMINATIONS.** Under title 5, United States Code, section 7114(a)(2)(B), an employee being examined in an investigation (an investigatory examination or interview) is entitled to union representation if:

- (1) the examination is conducted by a representative of the agency,
- (2) the employee reasonably believes that the examination may result in disciplinary action, and
- (3) the employee asks for representation.

Such examinations are called *Weingarten* examinations because Congress, in establishing this right, specifically referred to the private sector case establishing such a right. Each agency has the obligation to post Weingarten rights annually either through common bulletin boards or web posting through a commonly accessed employee web page. Also defined as a *Weingarten Meeting* whereby an exclusive representative "shall be given the opportunity to be represented at any examination" of a unit employee by an agency representative in connection with an investigation if the employee reasonably believes that discipline may result from the examination and requests representation. An employee who is questioned during an investigatory examination that may result in discipline "may be too fearful or inarticulate to relate accurately the incident being investigated, or too ignorant to raise extenuating factors. Thus, the union representative must be free to help clarify the issues or facts, or to suggest other employees who may have knowledge of them.

**WORK STOPPAGE CONTINGENCY PLAN.** IAW 5 U.S.C 7116(b)(7), it shall be an unfair labor practice for a labor organization to 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 to condone any activity by failing to take action to prevent or stop such activity. This statute prohibits Federal employees from striking against the Government of the United States. Employees can be disciplined for engaging in such action. Informational picketing, which does not disrupt Agency operations or prevent public access to a facility, is not prohibited. The agency headquarters shall be immediately notified when prohibited acts take place. All states should have a Work Stoppage Contingency Plan. This plan is for official use only and is available on a need-to-know basis to those individuals directly involved in developing or implementing it. Review and update the plan biennially and, following any concerted activity, revise as needed.

**WORKING CONDITIONS.** The existing environment in which employees perform their duties. This includes such things as access to and from the facility, beginning at the entrance to the grounds, the type of equipment used and surroundings they are accustomed to (e.g. ceilings, walls, paint, carpet, temperature, lighting, services such as coffee, popcorn, and snacks, rules, relations and procedures relating to any employee activity, rights or benefit (e.g. schedules, breaks, training, discipline, conduct and performance standard, attire, parking, entertainment), etc. Any action taken which changes a right, benefit, privilege, etc. currently enjoyed by employees is a change in working conditions. However, changes in working conditions may or may not be subject to negotiation. See Conditions or Employment.

**ZIPPER CLAUSE.** An agreement provision specifically barring any attempt to reopen negotiations during the terms of the agreement. [For a related term, see **Reopening Clause**.

## Appendix 5

### CURRENT LISTING OF REGULATIONS, DEMA DIRECTIVES & RESOURCES