

SUMMARY TABLE OF CONTENTS

PREFACE	i
GLOSSARY	iii
CHAPTER 1: INTRODUCTION TO FLRA STRUCTURE AND JURISDICTION...	1
CHAPTER 2: UNIT DETERMINATIONS AND ELECTIONS	11
CHAPTER 3: LABOR ORGANIZATIONS.....	235
CHAPTER 4: SUBJECTS OF BARGAINING: PROCEDURES FOR NEGOTIABILITY DETERMINATIONS.....	385
CHAPTER 5: SUBJECTS OF BARGAINING: SUBSTANTIVE LIMITATIONS ON NEGOTIABILITY DETERMINATIONS.....	469
CHAPTER 6: SUBJECTS OF BARGAINING: SPECIFIC APPLICATIONS OF NEGOTIABILITY DETERMINATIONS.....	591
CHAPTER 7: FEDERAL SERVICE IMPASSES PANEL	1149
CHAPTER 8: UNFAIR LABOR PRACTICES	1163
CHAPTER 9: REVIEW OF ARBITRATION AWARDS.....	1625
CHAPTER 10: ADMINISTRATIVE RECONSIDERATION AND JUDICIAL REVIEW	2409
BIBLIOGRAPHY	2471
TABLE OF CASES	2479
INDEX	2553

TABLE OF CONTENTS

PREFACE	i
GLOSSARY	iii
CHAPTER 1: INTRODUCTION TO FLRA STRUCTURE AND JURISDICTION...1	
I. FEDERAL LABOR RELATIONS AUTHORITY.....	1
A. PURPOSE.....	1
B. FUNCTIONS	3
C. STRUCTURE	4
1. Request for Policy and Guidance.....	4
2. Advisory Opinion	5
3. Regulations.....	5
II. LABOR-MANAGEMENT FORUMS.....	5
A. LABOR RELATIONS GROUP	6
III. SPECIALIZED LABOR RELATIONS SYSTEMS	8
A. HOMELAND SECURITY—HUMAN RESOURCES MANAGEMENT SYSTEM	8
B. DEPARTMENT OF DEFENSE—NATIONAL SECURITY PERSONNEL SYSTEM.....	9
CHAPTER 2: UNIT DETERMINATIONS AND ELECTIONS	11
I. UNIT DETERMINATIONS.....	11
A. STATUTORY AND REGULATORY CRITERIA.....	12
1. Actual and Future Duties Control.....	13
a. Newly Encumbered Positions	13
B. STATUTORILY EXCLUDED POSITIONS	13
1. Schedule F Positions: Policy Making, Policy Influencing.....	14
2. Managers; 5 USC 7112(b)(1)	16
a. Technical and Research Directors.....	16
b. Expert Advisors.....	17
c. Auditors.....	17
d. Program Analysts and Program Managers.....	17
e. Contract Negotiators and Specialists	18
f. Engineers.....	18
g. Lawyers	18
h. Adjudicators	18
i. Policymakers for Military Personnel	21
3. Supervisors; 5 USC 7112(b)(1).....	21
a. Guard Units.....	25
b. Firefighters.....	26
c. Nursing Personnel.....	31
d. Small Shop Chiefs.....	32
e. Work or Team Leaders.....	32
f. Administrative Officers.....	33
g. Library.....	33
h. Law Office.....	33
i. Personnel Office.....	34
j. Inspection Positions	34
k. Researchers.....	34
l. Judges.....	34
4. Confidential Employees; 5 USC 7112(b)(2)	34
a. Legal Officers and Staff.....	36
b. Management Secretaries, Assistants.....	37
c. Program Analysts.....	38
d. Schedule C Appointees	38
e. Others	39
5. Employees Engaged in Personnel Work; 5 USC 7112(b)(3).....	42
a. Personnelists; Management Analysts; Administrative Employees	44

b.	Federal Women’s Program Managers.....	47
c.	Hispanic Employment Program Managers	47
d.	EEO Counselors, Specialists	47
e.	Employee Development Specialists; Partnership Mediators.....	47
6.	Employees Who Administer Title VII of the CSRA; 5 USC 7112(b)(4).....	48
7.	Employees Affiliated With Organizations Representing Others Engaged in Administration of Labor Relations Laws; 5 USC 7112(c)(2).....	48
8.	Security Exclusions	50
a.	National Security Work; Employees With Security Clearances; Work Critical to National Infrastructure; 5 USC 7112(b)(6)	50
b.	Internal Agency Investigators; OIG Personnel; 5 USC 7112(b)(7).....	68
c.	Executive Orders 12171, 12559	71
9.	Transportation Security Agency	71
C.	SPECIAL CLASSES OF EMPLOYEES	80
1.	Reemployed Annuitants.....	80
2.	WAE; Intermittent Personnel.....	80
3.	Temporary; Students.....	80
4.	Detailees.....	81
5.	Intergovernmental Personnel Act Assignments.....	81
6.	Inter-Agency Assignments; Loaned Personnel	82
7.	Contract Personnel	82
a.	Teachers.....	82
b.	Private Contractors	82
8.	Interns	83
9.	National Guard Technicians.....	83
10.	Nonappropriated Fund Instrumentality	86
11.	Noncitizens.....	86
12.	Public Health Service Fellowships.....	86
D.	FACTORS FOR APPROPRIATE UNITS	87
1.	Community of Interest	87
a.	Remote Field Organization	88
b.	Schedule C Employees	88
c.	Distinctions in Pay Systems.....	89
d.	Distinctions in Bargaining Rights.....	89
e.	Part-Time Status	90
f.	Units Including Excepted and Competitive Service Personnel.....	90
g.	Units of Police and Other Personnel.....	90
2.	Effective Dealings.....	90
a.	Historical Patterns of Recognition.....	91
3.	Efficiency of Agency Operations.....	91
a.	Avoidance of Unit Fragmentation	91
b.	Anticipated Changes in Workforce; Continuity of Employment	92
c.	Organizational or Geographical Location; Telework.....	92
d.	Agency-Wide Units	93
e.	Occupational Groupings.....	95
f.	New or Newly Acquired Employees.....	95
4.	Vacant Positions.....	97
a.	Unit Determination Essential for Arbitration.....	97
5.	Units of Supervisors and Managers.....	98
a.	Mixed Units of Prevailing Rate Employees Predating the Reform Act	98
E.	PARTICULAR AGENCIES	100
1.	Agency for International Development	100
2.	Agriculture	100
3.	Archives	100
4.	Commerce	100
5.	Defense.....	100
a.	Air Force	100
b.	Army.....	101
c.	Army and Air Force Exchange Service	101
d.	Navy, Marines.....	101
e.	Defense Communications Agency.....	102

f.	Defense Dependents Schools.....	102
g.	Defense Logistics Agency.....	102
h.	Defense Mapping.....	102
i.	Others.....	102
6.	Environmental Protection Agency.....	102
7.	Health and Human Services.....	102
8.	Housing and Urban Development.....	102
9.	Interior.....	102
10.	International Communications Agency.....	102
11.	International Trade Commission.....	102
12.	Justice.....	102
13.	Labor.....	102
14.	NASA.....	103
15.	National Guard.....	103
16.	Small Business Administration.....	103
17.	State.....	103
18.	Transportation.....	103
19.	Treasury.....	103
20.	Veterans Affairs.....	103
a.	Compressed Work Therapy Program Participants.....	103
21.	Boards, Commissions, Corporations.....	103
a.	EEOC.....	103
b.	FDIC.....	104
c.	MSPB.....	104
d.	National Labor Relations Board.....	104
e.	Panama Canal Commission.....	104
f.	Securities and Exchange Commission.....	104
g.	Smithsonian Institution.....	104
II.	REPRESENTATION PROCEEDINGS.....	104
A.	ELECTION PROCEDURES.....	104
1.	Principal Statutory Procedures.....	104
2.	Regulatory Provisions.....	105
a.	Posting of Notice.....	110
3.	Regional Control.....	110
a.	Burden of Proof; Hearings.....	111
b.	Time Limits for Regional Submissions.....	112
c.	Consent Election, Pre-Election Agreements.....	112
d.	Stays of Representation Proceedings.....	113
e.	Collateral Challenges to Unit Certifications.....	114
4.	Showing of Interest.....	115
5.	Intervention.....	118
6.	Good Faith Doubt as to Majority Status; Decertification.....	119
7.	Withdrawal of Petition; Mootness.....	124
8.	Contract Bar.....	127
a.	Request for Renegotiation.....	128
b.	Extensions of Agreements.....	129
c.	Clear and Unambiguous Expiration Date.....	130
d.	Agency Head Disapproval.....	131
e.	Automatic Renewal.....	131
f.	Insulated Period Following Election or Withdrawal of Petition; Election Bar.....	132
g.	Schism.....	133
9.	Professional Employees' Unit Status.....	133
10.	Expanding or Contracting Agency Operations.....	138
11.	Employees Entering Unit Through Unit Clarification Proceeding Without Reorganization.....	138
12.	Tie Vote.....	139
13.	Low Turnout.....	139
14.	Absent Voters.....	139
a.	Mail Ballot Election.....	139
15.	Reconsideration Requests to FLRA.....	139
a.	Persons Entitled to Seek Review.....	141
B.	UNFAIR ELECTION PRACTICES.....	141

1.	Breach of Neutrality by Government	141
2.	Equivalent Status Rule; Access and Solicitation by Rival Unions	144
a.	Facilities Available Through Equivalent Status; Facilities Obtained by Collective Bargaining.....	147
3.	Access to Agency Property by Rival Union Without Equivalent Status; Comparable Public Access.....	148
a.	<i>SSA and NTEU</i>	149
4.	Changes in Employment Conditions	159
a.	Election Guidelines	160
b.	Duration of Question Concerning Representation	160
5.	Campaign Statements, Writings, Activities	161
a.	Management.....	161
b.	Union	162
c.	Nonmanagerial Employee.....	164
6.	Dues Waivers.....	164
7.	Blocking Effect of ULP Charges	164
C.	CHALLENGES TO ELECTIONS, OTHER REPRESENTATION PROCEEDINGS	165
1.	Objections to Elections and Preliminary Proceedings	165
2.	Challenge to Procedures	165
a.	Burden of Proof	166
b.	Effect of Procedural Errors.....	166
3.	Hearing	166
4.	Reckoning Period	168
5.	Remedy for Objectionable Election Conduct	168
6.	Review of Regional Director's Decision.....	168
7.	Challenge Through ULP Process.....	170
8.	Unit Determinations in Grievance Cases	170
III.	CHANGES TO UNIT CERTIFICATION.....	170
A.	UNIT CLARIFICATION	170
1.	Objections and Stay	173
B.	AMENDMENT TO CERTIFICATION PETITION	173
1.	Union Merger; Change in Affiliation.....	173
a.	Balloting Requirements.....	175
b.	Continuity of Union Before and After Change in Affiliation	178
C.	REORGANIZATIONS.....	180
1.	Summary	182
2.	Accretion	183
a.	Procedure	189
3.	Successorship	189
a.	Decisions Predating <i>Port Hueneme</i>	195
b.	Distinctions Between Successorship and Accretion.....	196
c.	Amendment of Certification	204
d.	Elections; 70% Rule.....	205
e.	Disclaimers.....	208
4.	New Employee Doctrine; Newly Created Positions	208
5.	Changes in Chain of Command	209
D.	CONSOLIDATION OF UNITS	218
1.	Effect on Bargaining Obligations	228
E.	SEVERANCE.....	228
1.	Showing of Interest	228
2.	Criteria.....	228
a.	Loss of Community of Interest.....	228
b.	Inadequate Representation by Incumbent Union	229
c.	Change in Union Affiliation	232
CHAPTER 3:	LABOR ORGANIZATIONS.....	235
I.	STATUS	235
A.	DEFINITION OF LABOR ORGANIZATION.....	235
B.	STANDARDS OF CONDUCT.....	235
1.	FLRA Inquiry Into Status	235
2.	Failure of Agency to Recognize Union	238
II.	RESPONSIBILITIES.....	238
A.	EXCLUSIVE REPRESENTATION	238

III. DUES CHECKOFF	238
A. STATUTORY PROCEDURES.....	238
1. Violations.....	239
2. Remedy.....	239
B. SPECIAL PURPOSE CHECKOFF	239
C. TERMINATION OF CHECKOFF.....	239
1. Unit Status	239
2. Effect of Question Concerning Representation	240
3. Employee Revocation	240
4. Effect of Reinstatement of Employee.....	246
D. NEGOTIABLE PROVISIONS.....	247
1. Timing of Remittances	247
2. Waiver of Effect of Error	247
3. Reassignment of Employees.....	248
4. Temporary Promotion	248
5. Procedures for Resolving Errors.....	248
E. DUES ALLOTMENTS UNDER 5 USC 7115(C).....	248
IV. OFFICIAL TIME.....	249
A. EXECUTIVE ORDER 13,837	255
B. COLLECTIVE BARGAINING.....	260
1. Ground Rules	261
2. Impact and Midterm Bargaining	261
3. Local Agreement	261
4. Travel Time.....	262
5. Preparation Time	262
6. Unit Status of Employee Representative	263
C. FLRA PROCEEDINGS	263
1. FSIP	264
2. Negotiation of Official Time	264
D. REPRESENTATION.....	264
1. Unit and Statutory Coverage	266
2. Full-Time Representatives	266
3. Unrestricted Block Grants of Time.....	267
4. Overtime; Representation Activities While in Nonduty Status.....	268
5. Telecommuting	269
6. Training	270
7. EEO Proceeding	270
8. Statutory Appeal; ULP Proceeding	270
9. Internal Union Activities; Union Reporting Requirements	271
10. Joint Committees	271
11. Lobbying	271
E. WITNESSES; OTHERS.....	280
F. TRAVEL AND PER DIEM	280
V. RIGHT TO INFORMATION	284
A. PARTICULARIZED NEED.....	287
1. Articulation of the Need for Information; Countervailing Interests.....	292
2. Overbroad Request; Conclusory Response	295
a. Partial Grants or Denials of Requests	300
3. Examples of Sufficiently Particularized Requests.....	301
4. Specificity, Relevancy of Request; Interactive Process.....	305
5. Grievability, ULP Issues.....	308
6. Availability of Discovery in Other Forums	308
7. Prior Test: Relevance; Presumptive Relevance.....	309
B. ADVERSE ACTION, DISCIPLINARY CASES; INVESTIGATIONS INTO MISCONDUCT	310
1. Supporting Records; Mitigation Analysis; Comparable Offenses; Privacy Concerns.....	310
a. Geographical or Organizational Limitations on Right to Information Concerning Comparable Discipline	317
2. Information Concerning Managers, Supervisors.....	318
3. Information Requested to Monitor Disciplinary Actions.....	318
4. Witness Statements.....	321
C. OTHER INFORMATION REQUESTS	321
1. Overtime	321

2.	Performance Appraisals; Related Data	321
3.	Crediting Plan; Rating Scheme.....	323
4.	Other Promotion Information	326
5.	Leave Request, TDY, Work Schedule	329
6.	Work Rules	329
7.	Reorganization.....	329
8.	Official Time.....	329
9.	EEO Information	329
10.	EEO Settlement.....	330
11.	Inspector General, Law Enforcement Investigative Reports; Investigative, Confidential Information	331
12.	Lobbying Efforts	332
13.	Midterm Negotiations; Ground Rules; Renegotiations	333
14.	Arbitration Transcript.....	333
15.	Automated Information; Classified Data	334
D.	MATERIAL NORMALLY MAINTAINED.....	334
1.	Supervisors' Notes; Memory Joggers.....	335
2.	Inspector General Records.....	335
3.	Reasonably Available; Burden of Production.....	336
4.	Available From Other Sources	338
E.	DISCLOSURE PROHIBITED BY LAW	338
1.	FOIA Exemptions.....	339
2.	Taxpayer Information.....	339
3.	A-76 Cost Studies; MEO Reports	339
F.	PROCEDURE FOR DISCLOSURE	340
1.	Timeliness of Release; Failure to Respond.....	340
2.	Manner of Release; Destruction of Evidence	342
3.	Form of Information Sought	342
4.	Proof of Request	342
G.	INTERNAL AGENCY INFORMATION; DELIBERATIVE PROCESS; MANAGEMENT GUIDANCE, ADVICE, COUNSEL, OR TRAINING.....	343
1.	Guidance From OPM.....	343
2.	Disciplinary, Other Recommendations, Evaluations	343
3.	Performance Issues	350
4.	Reorganizations; RIF.....	351
5.	Classification Issues	352
6.	Evaluations of Work.....	352
H.	FOIA; PRIVACY ACT AND PRIVACY INTERESTS	352
1.	Routine Users; Alternate Means of Disclosure.....	354
a.	Redaction	357
2.	Official Personnel File	358
3.	Promotion Records, Appraisals—1995 and Beyond; <i>TRACON</i> and Public Interest in Disclosure	359
4.	Promotion Records, Appraisals—1994 and Before.....	364
5.	Awards.....	364
6.	Employees' Names and Home Addresses.....	367
a.	Decisions Before 1994.....	369
7.	Medical Information.....	370
8.	Drug Testing.....	371
9.	Disciplinary Cases.....	372
10.	Last Chance Agreements; Settlements	375
11.	Disciplinary Actions Against Supervisors	377
I.	EXEMPT AGENCIES—DEPARTMENT OF VETERANS AFFAIRS TITLE 38 PROFESSIONAL EMPLOYEES	382
J.	REMEDIES	383
1.	Waiver, Mootness of Requests	383

CHAPTER 4: SUBJECTS OF BARGAINING: PROCEDURES FOR NEGOTIABILITY DETERMINATIONS.....385

I.	INTRODUCTION.....	385
II.	ELEMENTS OF BARGAINING	386
III.	EXEMPT AGENCIES.....	387
A.	EXECUTIVE ORDER 12171	387

B.	DEPARTMENT OF VETERANS AFFAIRS	388
IV.	FRAMEWORK FOR NEGOTIABILITY APPEALS	389
A.	REGULATIONS.....	389
B.	DEVELOPMENT OF FACTUAL RECORD	394
1.	Hearings.....	394
C.	EXPEDITION OF NEGOTIABILITY APPEALS	394
D.	REQUIREMENT OF SPECIFIC PROPOSALS; FORMAT	395
1.	Proposals Constituting Demands for Negotiations	396
2.	Proposals Incorporating Other Contract Articles or Materials by Reference.....	397
3.	Examples of Rulings Concerning Specificity of Proposals.....	397
E.	ALLEGATION OF NONNEGOTIABILITY.....	397
1.	Format of Nonnegotiability Allegation	398
2.	Unrequested Allegation.....	399
3.	Service of Nonnegotiability Allegation	401
4.	Failure of Agency to Make Allegation.....	401
a.	Withdrawal of or Failure to Support Nonnegotiability Allegation	402
5.	Effect of Agreement That Matter Is in Dispute; Ineffectiveness of Agreement of Parties to Extend Time for Appeal...403	
F.	DISAPPROVAL OF AGREEMENT BY AGENCY HEAD.....	403
1.	Master Agreement; Ratification; Time for Petition for Review	404
a.	Permissive Subject	405
2.	Locally-Negotiated Agreements; Delegations.....	405
a.	Permissive Subject	406
3.	Management Rights Objection; Excessive Interference	409
4.	Disapproval of Agreement Imposed by FSIP or Interest Arbitrator	414
5.	Format of Disapproval of Agreement; Service.....	416
a.	Ground Rules; Step Preliminary to Agency Head Review	418
6.	Deference to Reasoning Provided by Agency	419
G.	FILING, TIMING, AND SERVICE OF PETITION FOR REVIEW	419
1.	Filing	419
2.	Timeliness	420
3.	Service	421
4.	Untimely Petition; Waiver and Extension	422
5.	Request to Agency for Reconsideration; Resubmission of Proposal; Continuation of Bargaining	423
a.	Revised Proposals; Conditional Approval by Agency.....	424
6.	Format of Petition for Review	426
7.	Amendment of Petition	426
H.	POST-PETITION CONFERENCE; ALTERNATIVE DISPUTE RESOLUTION	426
I.	STATEMENT OF POSITION; RESPONSE; REPLY	427
1.	Specificity; Explanation or Modification of Proposals.....	433
a.	Clarification of Proposal	435
b.	Revisions to Proposal	436
c.	Verbal Proposal.....	436
2.	Timeliness	436
3.	Filing and Service	437
a.	Authority to File	438
4.	Supplemental Submissions; Issues Belatedly Raised	438
5.	Failure to Make Response.....	438
J.	EFFECT OF FLRA RULING	439
1.	Bargaining Still Required	439
2.	No Retroactivity	440
3.	Severable Proposals	440
4.	Overbroad Proposal	442
5.	Incomplete Proposal	442
6.	Alternate Proposals; Grouped Proposals	442
K.	RECONSIDERATION PROCEDURE	442
V.	ISSUES NOT APPROPRIATE FOR NEGOTIABILITY APPEALS	443
A.	APPLICATION OR INTERPRETATION OF NEGOTIATED AGREEMENTS	444
1.	Inconsistencies With Agreements.....	445
2.	Meaning of Agreement.....	445
3.	Arbitrability Issue	445
B.	BARGAINING OBLIGATION DISPUTE	445

1.	Dispute Whether Bargaining Requested	447
2.	Waiver of Bargaining.....	447
3.	Changes in Employment Conditions With <i>De Minimis</i> Effect.....	447
4.	Proposals Covered by Existing Provisions of Agreement; Midterm Bargaining Obligations; Permissive Subjects of Bargaining.....	448
C.	DENIALS OF INFORMATION TO UNION.....	450
D.	DISPUTED RECOGNITION STATUS.....	450
E.	UNIT STATUS.....	451
F.	LEVEL OF BARGAINING.....	451
G.	DISPUTES ON THE MERITS OF PROPOSALS	451
1.	Legality of Negotiated Provision of Agreement.....	451
2.	Legality of Management Action	451
VI.	MOOTNESS; CHANGED CIRCUMSTANCES.....	451
A.	INTERVENING OR EXISTING AGREEMENT	451
B.	WITHDRAWAL OF NONNEGOTIABILITY ALLEGATION	452
1.	Union's Disclaimer of Interest	453
C.	PROPOSAL NO LONGER RELEVANT	453
1.	New Union.....	456
2.	Change in Unit or Agency Status	456
3.	Intervening Change in Law	456
D.	PROVISIONS OF NEGOTIATED AGREEMENTS IN EFFECT BEFORE 1978; 5 USC 7135.....	456
VII.	ROLE OF FSIP	456
A.	NEGOTIABILITY PROBLEMS DURING FSIP PROCEEDINGS	456
1.	Timing of Negotiability Appeal.....	456
2.	Authority of FSIP, Interest Arbitrators to Resolve Duty to Bargain or Negotiability Disputes	457
a.	Permissive Subjects	458
B.	AGENCY REVIEW OF FSIP ORDERS.....	458
C.	AGENCY AND FLRA REVIEW OF FSIP INTEREST ARBITRATION AWARDS.....	459
1.	Award by Panel Designee.....	459
2.	Award by Panel-Directed Arbitrator	460
3.	Award by Voluntarily Selected Panel-Approved Arbitrator	462
4.	Summary.....	463
VIII.	ROLE OF GRIEVANCE ARBITRATION	463
A.	INTEREST ARBITRATORS.....	464
IX.	ROLE OF ULP PROCEDURES	465
A.	EFFECT OF GRIEVANCE RAISING ULP ISSUE.....	467
B.	EFFECT OF ULP DECISION	468

CHAPTER 5: SUBJECTS OF BARGAINING: SUBSTANTIVE LIMITATIONS ON NEGOTIABILITY DETERMINATIONS.....469

I.	INTRODUCTION.....	469
A.	EFFECT OF NLRB PRECEDENT	470
B.	DIVERGENCE OF RESULTS IN FEDERAL APPELLATE COURTS.....	470
II.	EMPLOYMENT CONDITIONS	470
A.	MATTERS COVERED BY LAW	479
1.	Proposal Incorporating Statutory Requirements	480
2.	Proposal to Enforce Agency Regulations and Policies.....	481
3.	Matters Statutorily Entrusted to Agency Discretion.....	483
B.	CONDITIONS OF EMPLOYMENT DEFINED	494
1.	Post-Employment Conditions; Retirees	500
2.	Matters Affecting Employees Off-Duty	500
3.	Matters Affecting Agency Clients.....	501
4.	Matters Covered by Prior Agreement; Effect of Expiration of Agreement.....	502
a.	Grievance and Arbitration Provision	502
5.	Discriminatory Provisions; Unfair Labor Practices.....	503
6.	Position Classification.....	504
C.	MATTERS AFFECTING NONUNIT EMPLOYEES.....	506
1.	"Vitality Affects" Test; <i>Cherry Point</i>	508
2.	Decisions Before the "Vitality Affects" Test Involving Proposals Impacting Nonunit Personnel	515
D.	AGENCY CONTROL OVER WORKING CONDITIONS	515

III. COMPELLING NEED DETERMINATIONS.....	516
A. PROCEDURE	518
1. Mootness.....	519
B. MINORITY/MAJORITY UNION STATUS.....	519
C. OUTSIDE AUTHORITY	519
D. ISSUE RAISED IN NEGOTIABILITY APPEAL	520
E. ISSUE RAISED IN ULP CASE	520
F. ANALYSIS AND FINDINGS.....	521
1. Budgetary Constraints.....	521
2. Uniform Personnel Policies.....	522
IV. GOVERNMENT-WIDE REGULATIONS	522
A. PROPOSALS THAT RESTATE GOVERNMENT-WIDE REGULATIONS, STATUTES.....	525
B. SPECIFIC RULES AND REGULATIONS	526
1. OPM Regulations, FPM.....	526
2. GSA Regulations.....	526
3. OMB Directives.....	526
4. State Department Regulations.....	526
5. Department of Labor Regulations	527
6. Executive Orders.....	527
C. FOREIGN LAW, LOCAL LAW, TREATIES	527
D. CONGRESSIONAL REPORTS	527
V. PERMISSIVE SUBJECTS OF BARGAINING; EXECUTIVE ORDERS 12871, 13522, 13,836	528
A. EXTENSION OF EXISTING AGREEMENTS	534
VI. MANAGEMENT RIGHTS	534
A. GENERAL CONSIDERATIONS	535
B. DETERMINATION OF AGENCY BUDGET	536
C. DETERMINATION OF AGENCY ORGANIZATION.....	544
D. DETERMINATION OF TECHNOLOGY, METHODS AND MEANS OF PERFORMING WORK.....	546
E. STAFFING.....	548
F. ASSIGNMENT OF WORK; DIRECTION OF EMPLOYEES	554
1. Action Required by Particular Level of Management Official	555
G. OPERATIONS DURING EMERGENCIES.....	555
H. DETERMINATION OF INTERNAL SECURITY.....	556
VII. NEGOTIABLE PROCEDURES.....	561
A. ACTING AT ALL.....	562
B. DIRECT INTERFERENCE.....	564
VIII. APPROPRIATE ARRANGEMENTS.....	565
A. EXCESSIVE INTERFERENCE	569
1. KANG.....	570
B. REASONABLY FORESEEABLE ADVERSE EFFECTS; SPECULATIVE ADVERSE EFFECT.....	573
1. Tailoring the Proposal to Suit the Harm; Overbroad Proposals; <i>Minerals Management</i>	577
a. Application to Arbitration	583
b. Improper Tying of Requests for Impact Bargaining, Ground Rules and Term Bargaining	583
C. EFFECT OF GOVERNMENT-WIDE REGULATIONS	587
D. OFFICIAL TIME.....	587
IX. CONSULTATION RIGHTS.....	588
A. NATIONAL CONSULTATION RIGHTS: CHANGES IN EMPLOYMENT CONDITIONS.....	588
1. Procedural Obligations	589
B. GOVERNMENT-WIDE CONSULTATION RIGHTS: GOVERNMENT-WIDE REGULATIONS.....	589

CHAPTER 6: SUBJECTS OF BARGAINING: SPECIFIC APPLICATIONS OF NEGOTIABILITY DETERMINATIONS.....591

I. LOCATION OF WORK	591
A. FIXED DUTY STATION	591
B. TELEWORK	591
C. RELOCATIONS AND REORGANIZATIONS.....	595
II. HOURS OF WORK; TOURS OF DUTY	597
A. SHIFTS, TOURS, HOURS OF DUTY	597
1. Agency Shift Change	600
2. Allocation of Work During Shift	602

3.	Employee-Requested Work Schedule Adjustments.....	602
4.	Shift Swap.....	603
5.	Shift Assignment by Seniority.....	603
6.	Delays in Shift Change.....	604
7.	Notice of Work and Shift Change; Change Made to Avoid Salary Costs.....	604
8.	Reporting, Changing, and Wash-Up Time.....	607
9.	Rest Periods and Other Short Breaks.....	609
a.	Paid Break Tied to Unpaid Break.....	610
10.	Lunch Break.....	610
11.	Time Off for Physical Fitness.....	611
12.	Planning and Training Periods.....	611
13.	Time Set Aside for Particular Tasks.....	611
14.	Hours of Instruction for Teachers.....	612
15.	Basic Work Week; Work Year.....	614
16.	Days Off; Rotations.....	615
17.	Designated Holidays.....	616
18.	Long-Term Tours of Duty.....	616
19.	Maximum Hours of Work.....	617
20.	Commuting Time.....	617
B.	GUARANTEED EMPLOYMENT, HOURS; DESIGNATION OF EMPLOYEES AS “ESSENTIAL”.....	618
C.	ALTERNATIVE WORK SCHEDULES: FLEXTIME AND COMPRESSED WORK SCHEDULES.....	619
1.	Limited Negotiability Appeal.....	622
a.	Agency Efforts to Terminate Compressed Work Schedules.....	622
2.	Permissible Arrangements.....	623
3.	Impermissible Arrangements.....	624
4.	Credit Hours and Union Activities.....	626
5.	National Guard.....	626
D.	OVERTIME AND PREMIUM PAY ASSIGNMENTS.....	626
1.	FLSA Computation.....	627
2.	Overtime and Compensatory Time When Additional Work Is Required.....	627
3.	Overtime Distribution.....	628
4.	Overtime Assignment, Holiday Work Limitations and Requirements.....	629
5.	Privileges With Overtime; Meals and Meal Breaks.....	632
6.	FLSA Exemption Status.....	633
7.	Advance Notice.....	633
8.	Beepers and Standby Time.....	633
E.	OPERATIONS DURING EMERGENCIES, HOLIDAYS.....	634
F.	TIMEKEEPING; LOGS.....	635
III.	TRAINING.....	635
A.	DURATION AND TIMING OF TRAINING.....	636
B.	DISCONTINUATION.....	636
C.	RETRAINING.....	636
1.	Correction of Poor Performance.....	637
2.	Individual Development Plan.....	638
D.	TRAINING AS CONDITION TO WORK ASSIGNMENT.....	638
1.	New Positions; Tasks; Details.....	638
E.	TRAINING AS CONDITION TO WORK EVALUATION.....	639
F.	UNION REPRESENTATIONAL TRAINING; UNION PRESENTATIONS DURING AGENCY TRAINING.....	640
G.	PROFICIENCY TRAINING; CROSS-TRAINING.....	640
1.	Training to Avoid Erosion of Grade.....	643
H.	ARRANGEMENTS FOR PROFESSIONAL TRAINING.....	643
1.	Financial Assistance.....	643
I.	EEO CONSIDERATIONS.....	644
1.	Disability Accommodation.....	644
J.	PERSONNEL WHO PROVIDE TRAINING.....	644
K.	SELECTION OF TRAINEES.....	644
1.	Notice of Training Opportunities.....	644
IV.	JOB CONTENT; WORK ASSIGNMENT.....	644
A.	BROAD CRITERIA GOVERNING ASSIGNMENTS OF WORK.....	644
1.	Compliance With Law.....	644
2.	Seniority.....	645

3.	Personnel Who May Assign Work	645
4.	Personnel Who May Be Assigned Work	645
5.	Military Assignments	645
6.	Immunity From Adverse Consequences When Work Assignments Change	649
B.	SPECIFIC LIMITS ON ASSIGNMENTS OF WORK	650
1.	Voluntary Acceptance	650
2.	Light Duty	651
3.	Workload Management; Equalization	652
a.	Distribution Among Qualified Employees	654
4.	Specific Instructions	655
5.	Agency Handbook	655
6.	Assignments to Union Officials	655
7.	Supervisory Responsibilities	656
8.	Delay Pending Study of Assignments	656
9.	Delay Pending Bargaining	657
10.	Protection of Employee Licensing; Adherence to Certification Requirements	657
11.	Unlawful Order	657
12.	Academic Freedom for Teachers	657
13.	Authority to Carry Weapon	657
14.	Forms of Address; Military Courtesy	661
C.	OTHER DUTIES AS ASSIGNED; POSITION DESCRIPTION	661
1.	Accurate Position Description	661
2.	Linkage of Duties and Position Description	662
3.	Collateral Work Assignment; "Other Duties as Assigned"	662
a.	Teachers; Distribution of Extracurricular Activities	663
4.	Duties to Be Consistent With Grade, Position	664
5.	Documentation of Duties	664
D.	WORK PRESERVATION	664
1.	Unit Work	664
2.	Part-Time/Full-Time Employment	664
3.	Professionals and Nonprofessionals	665
4.	Preservation of Overtime	665
5.	Industry Practices	666
6.	Employee Returning From Leave	666
E.	ROTATION OF JOBS AND ASSIGNMENTS	667
1.	Selection for New Job	668
2.	Supervisory Position	668
F.	CONTROL OVER WORK AND WORK PRODUCT	669
1.	Recognition of Work	670
2.	Instructional Material, Equipment	670
3.	Qualifications for Students	670
4.	Courses to Teach	670
5.	Quality Control	670
6.	Personnel Assigned	670
G.	SAFETY RESTRICTIONS; RISKS TO SAFETY AND HEALTH	670
1.	Weather	671
2.	Working Alone	671
3.	Dangerous Conditions	671
4.	Duration of Assignment	673
5.	Precautionary Measures	673
6.	Medical Requirements; Accommodations and Waivers	676
7.	Medical Restriction	678
a.	Medical Examination	679
V.	CONTRACTING OUT	680
A.	PROPOSALS DIRECTLY AFFECTING THE RIGHT TO CONTRACT OUT	683
B.	PROCEDURES AND APPROPRIATE ARRANGEMENTS	683
C.	PERMISSIVE NEGOTIATION	685
D.	FEDERAL ACTIVITIES INVENTORY REFORM ACT	685
VI.	TRAVEL	687
A.	TRAVEL DAYS AND STATUS	688
1.	Compensatory Time	690

2. Limits on Travel	691
VII. LEAVE ARRANGEMENTS.....	691
A. MANDATORY APPROVAL OF LEAVE.....	691
B. ANNUAL LEAVE	692
1. Seniority Arrangements.....	693
2. Leave Forfeiture; "Use or Lose"	693
C. SICK LEAVE.....	693
1. Permitted Uses	694
2. Required Documentation; Verification.....	694
3. Who May Receive, Approve Request	696
4. Reporting Requirement.....	696
5. Substitution of Annual Leave.....	696
6. Restriction.....	696
7. Required Grant.....	698
D. ADVANCED SICK OR ANNUAL LEAVE.....	699
E. MATERNITY, PATERNITY, AND FAMILY LEAVE.....	699
1. Maternity and Paternity Leave	699
2. Family Leave.....	700
F. RELIGIOUS OBSERVANCES	701
G. LEAVE WITHOUT PAY	702
H. ADMINISTRATIVE LEAVE.....	702
1. Temporary Shutdown of Facility.....	705
2. Health and Welfare	707
a. Blood Donors; Medical Problems	707
b. Weight Control, Fitness	707
c. Safety Training	709
d. Other Bases.....	710
3. Substitution for Travel Time, Overtime, Annual Leave; Personal Holidays	711
I. COMPENSATORY TIME	712
J. CHARGES TO AND ACCOUNTING FOR LEAVE.....	713
1. Emergency Condition.....	713
2. Use or Lose.....	714
3. Liberal Leave Policy; Volunteers.....	714
K. APPROVED LEAVE AS BASIS FOR DISCIPLINE.....	714
L. CIRCUMSTANCES REQUIRING LEAVE	715
1. Directed or Enforced Leave Usage	715
M. CANCELATION	716
N. NAF AND OTHER SPECIAL GROUPS OF EMPLOYEES	725
1. NAF Employees	725
2. Dependents Schools Teachers.....	725
3. National Guard Technicians.....	725
VIII. DISCIPLINARY PROCEDURES AND STANDARDS.....	725
A. INVESTIGATORY PROTECTIONS.....	726
1. Right to Remain Silent.....	726
2. Advice of Rights	726
3. Delay of Interrogation	728
4. Scope and Extent of Representation.....	729
5. Transcript or Record of Interrogation	729
6. Criminal Investigation	731
7. Form and Notice of Complaints, Investigation.....	731
8. Polygraphs	731
9. Search.....	731
10. Monitoring or Restrictions of Telephones, Computers.....	734
11. Hotline.....	735
12. Inspector General Investigation	736
13. Reimbursement of Employees' Expenses.....	741
14. Fitness for Duty Examinations	741
B. PRE-DECISION PROCEDURES	741
1. Investigatory Protections to Assist Employees.....	741
2. Factfinding.....	742
3. Proposing and Deciding Official.....	742

4.	Advance Notice for Adverse Action.....	742
a.	Furlough	743
b.	Opportunity to Resign Before Decision.....	743
5.	Provision of Evidence and Witnesses	744
6.	Structure of Charges	745
C.	OPPORTUNITY TO IMPROVE PERFORMANCE OR CONDUCT	746
1.	Employee Assistance Program	746
2.	Reassignment to Enhance Performance.....	746
3.	Training or Job Familiarization as Condition to Discipline.....	747
D.	RECORDS MAINTENANCE AND USE; DISCLOSURE.....	747
E.	PROTECTION OF PRIVACY	749
F.	STAYS.....	750
1.	Pending Grievance Review	750
2.	Pending Rehabilitation	752
3.	Pending MSPB Review.....	752
4.	Pending Disability Retirement Decision	753
G.	DISCIPLINARY STANDARDS	753
1.	Compliance With Law	753
2.	Definitions, Limitations of Offenses; Unlawful or Unsafe Work Orders	753
3.	Required and Precluded Documentation, Evidence; Expungement of Disciplinary Records.....	756
4.	Just Cause	757
5.	Factors Beyond Employees' Control	758
a.	Immunity From Discipline for Operational Errors in Startup Operation	758
6.	Off-Duty Conduct; Nexus	758
7.	Department of Veterans Affairs Title 38 Employees	759
H.	STANDARDS OF CONDUCT	759
1.	Disclosure Statements and Arrangements Concerning Real or Apparent Conflicting Interests.....	759
2.	Privacy Act Responsibilities	760
3.	Secrecy Agreements	760
I.	OUTSIDE EMPLOYMENT, BUSINESS RELATIONSHIPS	760
1.	Criteria.....	760
2.	Review Procedure	761
J.	FIDUCIARY EMPLOYEES; PECUNIARY LIABILITY; CLAIMS	761
1.	Stay of Collection	761
2.	Debts.....	761
K.	TRAFFIC INFRACTIONS; DRIVING PRIVILEGES.....	762
L.	ALLOWABLE PENALTIES; REMEDIES	763
1.	Limitation or Reckoning Period; Stale Charges; Limitations on Use of Past Discipline.....	764
a.	Shelf Life of Prior Discipline, Warning	765
b.	Time for Issuance of Decision.....	766
2.	Estoppel; Double Jeopardy.....	766
3.	Last Chance Agreement.....	767
4.	Counsel Fees	768
M.	OTHER RESTRICTIONS ON DISCIPLINE	768
1.	Conditions of Suspensions	768
a.	Advance Notice of Effective Date	768
2.	Use of Audit Results.....	768
3.	Discipline Against Union Official.....	768
N.	PROGRESSIVE DISCIPLINE; MITIGATION.....	768
O.	PROBATIONARY, TERM OR TEMPORARY, AND NAF EMPLOYEES	770
1.	Termination	770
2.	Protections Available	773
3.	Temporary, Intermittent Employee	774
a.	Nonrenewal of Appointment.....	775
4.	NAF Employees.....	776
IX.	DRUG USE AND DRUG DETECTION.....	776
A.	EXECUTIVE ORDER 12564	776
B.	NEGOTIABILITY FRAMEWORK	777
1.	Probable Cause; Reasonable Suspicion.....	778
a.	Nullification of Results	779
2.	Consent Forms	779

3.	Testing Objectives.....	780
4.	Personnel Who May Direct Testing	780
5.	Standards for Laboratories	780
6.	Equipment, Testing Methods and Personnel	780
7.	Storage Protection.....	780
8.	Chain of Custody	781
9.	Secondary Testing.....	781
10.	Split Samples; Private Testing	782
11.	Retesting	782
12.	Advance Notice and Timing of Tests	783
13.	Frequency of Tests; Exemption From Testing.....	783
14.	Information for Employees; Union Representatives.....	784
15.	Explanation of Reasons for Testing	785
16.	Provision of Test Results.....	785
17.	Compliance With Law and Regulation	786
18.	Testing During Duty Time; Location, Travel Expense, Arrangements.....	787
19.	Administrative Leave; Official Time.....	788
20.	Compensation for False Positive Test; Unnecessary Testing	788
21.	Involvement of Unit Personnel in Test Administration.....	789
22.	Union Representation; Observer; Lab Inspections	789
23.	Employee Privacy; Search	789
24.	Interpretation, Rebuttal of Test	795
25.	Record Keeping and Disclosure Requirements.....	795
C.	DELAYS IN IMPLEMENTATION PENDING LITIGATION, NOTICE.....	795
D.	STAY OF TESTING PENDING BARGAINING	797
E.	ALTERNATIVES TO TESTING.....	797
F.	DISCIPLINARY LIMITATIONS	797
1.	Firm Choice, Last Chance Agreement.....	798
G.	SAFE HARBOR PROVISIONS	798
1.	Nonnegotiable Proposals.....	799
2.	Negotiable Proposals.....	801
H.	REHABILITATION.....	803
1.	Administrative Leave for Counseling, Rehabilitation.....	806
I.	DESIGNATION OF SENSITIVE POSITIONS	806
J.	TESTING FOR PERSONNEL IN NONSENSITIVE JOBS.....	809
X.	IDENTIFICATION, UNIFORMS, GROOMING.....	810
A.	NAMEPLATES	810
1.	Pseudonyms.....	811
B.	UNIFORMS	811
1.	National Guard; Air Reserve Technicians	811
a.	Use of Uniform During Participation in Third Party Proceedings.....	819
2.	Other Agencies	819
3.	Allowance; Uniform Maintenance.....	820
4.	Personal Apparel	825
5.	Changing Facilities; Storage.....	825
C.	GROOMING AND DRESS CODES	825
1.	Specific Grooming Standards, Exemptions	829
2.	Procedures for Employees to Challenge Application of Dress and Grooming Codes.....	833
XI.	PROMOTIONS, VACANCIES, AND APPOINTMENTS	834
A.	ADVERTISING AND FILLING VACANCIES	834
1.	Time for Filling Vacancies; Effective Date of Personnel Action	834
2.	Advertising Military Assignment Opportunities.....	835
B.	SOURCES FOR VACANCIES	836
1.	Right to Apply; Interviews, Certification.....	836
a.	National Guard Positions: Inversion of Rank.....	837
2.	Restrictions on Outside Candidates	839
a.	Military Family Act.....	840
b.	Personal Service Contracts.....	840
3.	Prior Consideration of Inside Candidates; Justification for Nonselection	841
a.	Cases Before 1992	845
b.	Nonrestrictive Proposals Requiring Consideration of Unit Employees.....	846

4.	Automatic Consideration of Employees	846
5.	Quotas; Upward Mobility	846
6.	Predetermination of Selectees or Eligibles	846
7.	Part-Time Positions	846
8.	Applicants for Employment.....	847
9.	Former Unit Employees	847
C.	RANKING, RATING, AND QUALIFICATIONS	847
1.	Merit Promotion Plan.....	847
a.	Proposals Limiting Sources.....	847
2.	Creation of Rosters.....	848
3.	Seniority.....	849
4.	Uniformity of Standards; Selection Procedures	850
5.	Crediting Plans: Specific Selection Criteria; KSAs	851
a.	Validation of Crediting Plans	854
6.	General and Nonrestrictive Selection Criteria	855
7.	SKAPs; Career or Specialty Codings	855
8.	Licensing, Certification Requirements.....	855
9.	Evidence of Qualifications.....	855
10.	Time-In-Grade Restrictions.....	855
11.	Department of Veterans Affairs Positions	855
12.	National Guard Positions; Military and Civilian Compatibility Requirements.....	860
13.	Nonunit Personnel.....	861
D.	PANELS AND DELIBERATIONS.....	861
1.	Composition.....	861
a.	Union Participation.....	862
2.	Evaluation Procedure.....	864
3.	Records	864
4.	Selecting Official.....	865
E.	JOBS OUTSIDE THE UNIT.....	865
1.	Supervisory and Management Positions.....	865
2.	Permissive Bargaining	866
3.	Return From Promotions Outside the Unit.....	866
F.	TEMPORARY PROMOTIONS	867
1.	Seniority.....	867
2.	Enhanced Duties; Higher-Graded Positions	867
3.	Supervisory Duties.....	867
4.	Rotation	868
5.	Timing; Related Pay Increases.....	868
6.	Time-In-Grade Restrictions.....	869
G.	REPROMOTION	869
1.	Priority Consideration.....	870
2.	Justification for Nonselection; Stays.....	870
H.	ENHANCEMENT OF PROMOTION OPPORTUNITIES	870
1.	Agency Organizational Structure; Bridge Positions.....	870
2.	Enhancement of Duties	870
3.	Reclassification of Positions.....	870
I.	CAREER LADDERS	871
1.	Structure.....	871
2.	Operation	871
a.	Systems Similar to Career Ladders	873
b.	Evaluation of Advancement Potential	873
3.	Other Promotion Issues	874
J.	GRIEVANCE RIGHTS.....	874
XII.	DETAILS, TEMPORARY DUTY, TRANSFER AND REASSIGNMENT	874
A.	SELECTION PROCEDURES.....	874
1.	Seniority; Volunteers	875
2.	Reasonable Accommodation.....	876
3.	Competition; Selection Criteria.....	876
B.	CONDITIONS OF DETAILS	876
1.	Advance Notice.....	876
2.	Compensation.....	876

3. Expense Reimbursement Arrangements.....	878
4. Coverage of Negotiated Agreement; Details Outside Unit.....	878
5. Documentation.....	878
6. Assignment, Distribution of Duties	878
7. Effect on Promotion, Evaluation	878
C. DURATION.....	879
D. ROTATION.....	881
1. Equity of Distribution; Use to Avoid Promotion.....	882
E. REASSIGNMENT	883
1. Volunteers and Seniority	883
2. Application of RIF Procedures	884
3. Conditional Reassignment.....	884
4. Cancellation or Reconsideration of Reassignments; Return Rights.....	884
5. Timing	887
6. Delay Pending Completion of Negotiations or Resolution of Grievances	887
7. Protection Against Involuntary Reassignments.....	887
F. TRANSFERS BETWEEN AGENCIES.....	889
XIII. SAFETY.....	889
A. SAFETY PROCEDURES, TRAINING EQUIPMENT	889
1. Inspections	889
2. Environmental Conditions; Indoor Temperature.....	890
3. Selection of Equipment, Clothing, Grooming Standards; Rules Governing Use of Vehicles	890
4. Provision of Equipment; Safety Shoes; Motorcycle Gear	890
a. Eye Examinations; Corrective Lenses	891
b. Other Protective Equipment	892
5. Training	894
6. Maintenance and Disclosure of Medical and Safety Records.....	895
7. Precautionary Measures	896
8. Medical Treatment Facilities.....	898
9. Alternate Work Arrangements.....	899
10. Assistance to Employees	899
11. Arrangements for Sick or Injured Employees	899
a. Definition of Emergency.....	899
B. SECURITY MEASURES.....	900
1. Building, Installation Security.....	900
a. Surveillance	902
C. SAFETY COMMITTEES	904
1. Certified Committee.....	904
2. Non-Certified Committee.....	904
XIV. SECURITY CLEARANCE PROCESSES	905
XV. PAY, PREMIUMS, AND ALLOWANCES	905
A. ENVIRONMENTAL DIFFERENTIAL, HAZARDOUS DUTY PAY	906
1. Environmental Differentials.....	906
2. Hazard Pay	906
3. Tropical Differential	908
4. Hardship, Danger Pay	908
B. RETAINED PAY FOR INJURED EMPLOYEES	908
C. TRAVEL EXPENSES AND ARRANGEMENTS	908
1. Mileage; Commuting Cost	908
2. Location of Duty Station.....	909
3. Methods of Travel.....	909
4. Local Transportation	909
5. Identification; Documentation.....	909
6. Arrangements for Payment of Expenses; Recovery of Expenses by Agency; Relocation Expenses.....	909
7. Advances	910
a. Amount; Government-Issued Credit Card.....	910
b. Interest on Travel Advance Refund	911
D. SPECIAL STATUTORY PAY RATES	911
E. PREVAILING RATE EMPLOYEES; PAY AND PAY PRACTICES	912
1. Prevailing Rate Determinations	912
a. Participation in Wage Survey	912

2.	Pay and Pay Practices.....	912
a.	Wages Set by Statute	922
b.	Pay Differentials; Comparators	923
c.	Wage Negotiations for Prevailing Rate Employees Who Are Not Subject to 5 USC 704.....	924
d.	Conditions of Employment Other Than Pay.....	925
F.	PAY AND EMPLOYMENT FOR EMPLOYEES OF PARTICULAR AGENCIES	926
1.	General Rule.....	926
2.	Pension Benefit Guaranty Corporation	926
3.	Military School Systems.....	926
a.	Personal Service Contracts.....	927
4.	Panama Canal Commission	928
5.	FDIC.....	928
6.	Office of Thrift Supervision.....	929
7.	Office of the Comptroller of the Currency	929
8.	Bureau of Engraving and Printing.....	929
9.	Department of Veterans Affairs.....	932
10.	Nuclear Regulatory Commission.....	932
11.	Corps of Engineers.....	933
12.	Merchant Marine Academy	933
13.	National Imagery and Mapping Agency	933
G.	HOLIDAYS AND PREMIUMS	934
1.	Other Premium Pay	934
H.	MEAL ALLOWANCE.....	934
I.	OVERTIME RATES; CALLBACK PAY	934
1.	Administratively Uncontrollable Overtime.....	934
J.	INSURANCE COVERAGE, HEALTH CARE	935
1.	Defense Education Activity	935
2.	NAF Employees.....	935
K.	PER DIEM; SUBSISTENCE AND SIMILAR EXPENSES	936
L.	LIVING QUARTERS ALLOWANCE.....	937
M.	MOVING EXPENSES.....	937
1.	Shipment of Household Goods.....	937
2.	Expenses Related to Relocation.....	937
N.	MISCELLANEOUS PAY ISSUES	937
1.	Cessation of Work Before End of Pay Period.....	937
2.	Tip Offsets	938
3.	License and Examination Fees.....	938
4.	Debt Recovery From Employees; Stays of Collection.....	938
a.	Settlement of Pay Claims.....	939
5.	Cost of Living, Comparability Adjustments	940
O.	INCENTIVE PAY; AWARDS	940
1.	Initial Determination of Substantive Nonnegotiability.....	941
2.	Onset of Substantive Negotiability.....	942
3.	Standards Governing Incentive Awards.....	944
a.	Pre-1995 Regulations and Cases.....	945
4.	Profit Sharing; Gainsharing.....	945
5.	Quality Step Increase	947
6.	Suggestion Award.....	948
7.	Special Act Award	948
8.	Other Procedural Elements.....	948
9.	Participation in Awards Ceremonies	948
P.	RETIREMENT ISSUES	948
Q.	DISTRIBUTION OF CHECKS, FINANCIAL DOCUMENTS	949
1.	Direct Deposit Arrangement; Compensation for Payment Delay	950
2.	Cash Advance	950
3.	Agency Loss of Records	950
4.	Check Cashing Privileges.....	950
R.	INDEMNIFICATION AGREEMENTS; IMMUNITY; LEGAL ASSISTANCE.....	950
1.	Reimbursement for Personal Losses; Government Credit Cards	951
XVI.	FACILITIES, BENEFITS FOR EMPLOYEES	952
A.	DAY CARE	952

B.	PARKING AND VEHICLES	953
1.	Reimbursement of Parking Cost.....	956
2.	Removal of Vehicles.....	957
3.	Speed Controls.....	957
C.	OVERSEAS EMPLOYEES.....	957
1.	Vehicle Registration.....	957
2.	Ration Control	957
3.	Home Leave.....	957
4.	Government Schools	958
5.	Education Allowances	958
6.	Travel Arrangements.....	958
D.	LOCKERS, STORAGE FACILITIES	958
1.	Weapons.....	958
E.	RECREATIONAL, EXCHANGE, AND SCHOOL FACILITIES.....	964
1.	Management of Facilities	975
F.	OFFICE AND DESK USE; PRIVACY.....	976
1.	Search of Offices, Furniture.....	976
2.	Meals At or Away From the Worksite	977
3.	Assignment of Desks, Workstations; Seniority.....	978
4.	Choice, Arrangement of Offices.....	979
G.	BUILDING AND OFFICE DESIGN.....	984
1.	Effect on Nonunit Personnel	986
2.	Effect on Building Security.....	986
3.	Size and Use of Offices	986
4.	Smoking Rules; Related Office Arrangements.....	988
5.	Noise Abatement	989
H.	AVAILABILITY AND PRICING OF DINING FACILITIES	990
1.	Pricing, Use, and Location of Vending, Dining Facilities.....	990
2.	Kitchen Facilities	992
3.	Free Meals.....	992
4.	Drinking Water	992
I.	HOUSING	995
1.	Employees at Remote Locations.....	996
J.	TRANSPORTATION ARRANGEMENTS	996
1.	Internal Transportation	996
2.	Availability and Use of Government Vehicles	996
3.	Commuting	998
4.	Employees With Job-Related Injuries.....	998
5.	Commuting and Transportation Allowances.....	998
K.	TELEPHONES; CELL PHONES; PAGERS.....	999
L.	DISTRIBUTION OF MAIL.....	1002
M.	EMAIL	1002
N.	ACCESS TO AGENCY PERSONNEL OFFICE.....	1002
O.	OFFICE EQUIPMENT	1002
P.	CHARITABLE AND ANCILLARY ENDEAVORS	1002
XVII.	EQUAL EMPLOYMENT OPPORTUNITY	1004
A.	EEO PLANS.....	1004
1.	Funding and Support	1004
2.	Instruction of Applicants and Employees	1004
B.	JOB STRUCTURING; SPECIFIC HIRING PRACTICES.....	1004
1.	General Goals; Prospective Employees	1004
2.	Validation of Selection Procedures; Studies	1005
3.	Job Restructuring; Qualification Waiver; Training	1007
a.	Bridge Positions	1007
b.	Disabled Employees	1008
4.	Set-Aside of Jobs	1009
5.	Placement Preferences.....	1009
6.	Facilities, Assistance for Disabled, Stressed Employees	1009
7.	Submission of Medical Information; Privacy of Records.....	1011
C.	EEO PROGRAM STRUCTURE	1011
1.	EEO Counselors.....	1011

2.	Women’s and Hispanic Employment Program Coordinators.....	1011
3.	Qualifications, Training of Counselors	1011
4.	Duties of Counselors	1011
5.	Investigations	1011
D.	DISCIPLINARY ACCOMMODATION	1012
1.	Cost of Rehabilitation	1012
E.	EEO PROCEEDINGS, HEARINGS.....	1012
1.	Representatives; Observers	1013
2.	Agency Liability for Discrimination, Sexual Harassment	1013
3.	EEO Settlement Programs.....	1013
XVIII.	REDUCTIONS IN FORCE.....	1013
A.	COMPETITION.....	1014
1.	Competitive Area	1014
a.	Elective Bargaining	1019
2.	Competitive Level	1020
B.	PLACEMENT; FILLING OF VACANCIES DURING RIF; SENIORITY	1021
1.	Freeze on Positions; Attrition; Creation of Positions.....	1022
2.	Freeze on Position Descriptions.....	1026
3.	Waiver of Qualification Requirements.....	1026
4.	Geographical Reassignment of Senior Employees	1026
C.	RETENTION STANDING; RETREAT RIGHTS.....	1028
1.	Service Credit; Seniority; Performance Rating Levels	1028
2.	Reduction of Nonpermanent Personnel.....	1029
3.	Subgroup Displacement.....	1031
4.	Retention Registers; Performance Appraisals.....	1031
5.	National Guard; Civilian Technicians	1031
6.	Union Officials	1032
7.	Part-Time/Full-Time Employees	1032
8.	Excepted Service Employees	1032
D.	REEMPLOYMENT AND REPROMOTION RIGHTS.....	1033
1.	Preferential Consideration of Repromotion Eligibles for Vacancies.....	1033
2.	Repromotion, Recall by Seniority.....	1036
3.	Mandatory Filling of Vacancies.....	1036
4.	Retraining.....	1036
5.	Pay Adjustments on Repromotion.....	1038
E.	FURLOUGHS; SENIORITY	1038
F.	TRANSFER OF FUNCTION	1038
G.	AGENCY ORGANIZATION; ALTERNATIVES TO RIF.....	1039
1.	Stays.....	1040
H.	LIMITATIONS ON NOTICES.....	1040
1.	Duty Status During Notice Period	1040
I.	APPEAL RIGHTS AND REMEDIES.....	1040
J.	RETIREMENT OPTIONS.....	1040
K.	PAY AND GRADE RETENTION	1043
L.	OTHER ARRANGEMENTS.....	1043
XIX.	CRITICAL ELEMENTS AND PERFORMANCE STANDARDS	1043
A.	SPECIFIC ELEMENTS AND STANDARDS	1043
B.	GENERAL DEFINITIONS.....	1045
1.	Number of Elements; Designation of Elements as Critical.....	1046
2.	Number of Performance Levels.....	1047
C.	BROAD CRITERIA	1047
1.	Exemption of Positions From Appraisal System.....	1050
2.	Relating Standards to Position Description and Assigned Duties.....	1050
3.	Incorporation of Organizational, Other Goals	1051
4.	Uniformity of Standards.....	1051
5.	Explanations of Standards	1051
6.	Professional Positions	1052
7.	Factors Beyond Control of Employees.....	1052
a.	Negotiable Provisions	1052
b.	Nonnegotiable Provisions.....	1054
D.	COVERAGE OF GRIEVANCE PROCEDURE; GRIEVANCE REVIEW STANDARD	1054

1.	Cases Before 1987	1056
2.	Informal Review of Elements and Standards	1056
E.	UNACCEPTABLE PERFORMANCE ACTION PROCEDURES	1057
1.	Timing of Notices; Reviews	1057
2.	Precondition of Reassignment or Demotion	1057
3.	Delays in Actions	1057
4.	Counseling.....	1057
5.	Training; Other Assistance to Employees	1058
F.	ALOC, STEP-INCREASE DETERMINATIONS.....	1058
1.	Quality Step Increase	1058
2.	Within-Grade Increase.....	1058
G.	NONCRITICAL ELEMENTS; COLLATERAL DUTIES	1059
H.	DEVELOPMENT, MODIFICATIONS OF STANDARDS AND ELEMENTS	1060
1.	Reorganizations.....	1061
2.	Details.....	1061
3.	Delay in Implementation.....	1061
4.	Changes in Standards.....	1061
a.	Changes in Standards Requested by Employees.....	1062
I.	NOTICE AND EXPLANATION OF CRITICAL ELEMENTS, STANDARDS	1062
XX.	PERFORMANCE APPRAISAL.....	1062
A.	FREQUENCY AND TIMING OF APPRAISAL	1062
1.	Use of Appraisal.....	1063
2.	Effect of Detail.....	1063
B.	EMPLOYEE INVOLVEMENT IN APPRAISAL PROCESS.....	1064
C.	IMPROVEMENT PERIOD; NOTICE; DELAYS	1064
1.	Second Opportunity Period	1066
2.	Record Retention, Creation, Use.....	1067
3.	Appraisal Forms	1067
D.	PERSONNEL WHO CONDUCT APPRAISALS	1067
1.	Explanation of Rating	1069
2.	Privacy.....	1071
E.	STUDIES, OBSERVATIONS, AND SAMPLING.....	1071
1.	Frequency and Method of Monitoring.....	1073
2.	Classroom Visits	1073
3.	Production of Information	1074
F.	DEFINITION OF WORK ERRORS AND PRODUCTIVITY	1074
1.	Performance Measurement; Statistical Applications; Forced Distributions.....	1076
2.	Allowance for Nonproductive Time.....	1078
3.	Factors Beyond Control of Employee.....	1079
4.	Other Factors Affecting Appraisal.....	1081
G.	EVIDENCE OF PERFORMANCE	1083
1.	Period of Performance Measurement.....	1086
2.	Officials Whose Information May Be Used in Appraisal	1087
H.	NUMBER OF APPRAISAL LEVELS.....	1088
1.	Entry Level or Presumptive Rating.....	1091
I.	APPRAISAL OF UNION OFFICIALS ON OFFICIAL TIME.....	1091
J.	REMEDIAL AUTHORITY OF ARBITRATOR.....	1095
XXI.	UNION RIGHTS, BARGAINING RIGHTS AND PROCEDURES.....	1095
A.	BARGAINING TEAM	1095
1.	Composition.....	1095
2.	Authority	1095
3.	Uniform Requirements.....	1095
a.	Forms of Address	1095
B.	MEMBERSHIP NOTIFICATION, SOLICITATION	1097
1.	Union Literature.....	1098
2.	Notices and Signs.....	1098
C.	WORKPLACE ACCESS.....	1098
1.	Right to Determine Internal Security.....	1098
2.	Access of Employees to Union	1099
D.	WORK AND SHIFT ASSIGNMENTS TO UNION OFFICIALS	1099
1.	Leave of Absence	1100

2.	Premium Pay Assignments, Administrative Leave for Bargaining Representatives	1102
E.	USE OF AGENCY FACILITIES	1104
1.	Telephones	1105
2.	Equipment	1105
3.	Office Space.....	1105
4.	Government Mail	1106
5.	Protection Against Searches of Union Property	1106
F.	JOINT COMMITTEES.....	1106
1.	Incentive Awards Program.....	1108
2.	Promotion and Staffing.....	1109
3.	Training	1110
4.	Performance Appraisal Systems, Standards	1110
5.	Job Content; Work Planning.....	1110
6.	Discussion Forums	1111
7.	Workplace Evaluation	1111
8.	Department of Veterans Affairs Professional Standards Boards	1111
9.	EEO	1111
10.	Official Time Use	1112
G.	LEVEL OF BARGAINING.....	1112
1.	Local Agreements	1112
2.	Participants in Bargaining, Mediation	1112
H.	EFFECTIVE DATE, SEVERABILITY, AND PRESERVATION OF NEGOTIATED AGREEMENT	1113
1.	Renewal of Agreement.....	1113
2.	Survival of Provisions.....	1113
3.	Conflicts With Future Laws, Regulations.....	1113
4.	Reservation of Right to Future Negotiations.....	1114
5.	Affirmation of Agency Policies, Statutory Requirements	1114
6.	Partial Disapproval of Agreement by Agency Head.....	1114
I.	INFORMATION FROM MANAGEMENT	1115
1.	Procedures for Obtaining Information	1115
2.	Studies.....	1115
3.	Copies or Notice of Grievances	1117
4.	Orientation of New Employees	1117
J.	BARGAINING PROCEDURES.....	1117
1.	Ground Rules	1118
2.	Recording of Negotiations.....	1118
3.	Notice of Work Changes	1119
4.	Midterm; Negotiability and Future Disputes	1119
a.	Reopener Clauses.....	1121
b.	Clauses Defining Application of the "Covered By" Doctrine	1121
c.	FSIP Assistance	1126
5.	Ratification.....	1127
6.	Review of Local Agreements.....	1127
7.	Lockouts	1127
8.	Preservation of <i>Status Quo</i> Pending Negotiations.....	1127
9.	<i>Status Quo</i> During Impasse Resolution, Negotiability Appeals, and Grievances.....	1129
10.	Notice of Designated Representatives	1129
K.	MEETINGS; EMPLOYEE REPRESENTATION.....	1130
1.	Meetings With Employees	1130
2.	Desk Audits.....	1131
3.	Disciplinary Tribunals.....	1131
4.	Meetings With Agency Clients	1131
L.	ULP PROCEDURES.....	1131
M.	COMPENSATION MAINTENANCE OR ADVANCEMENT FOR UNION OFFICERS	1131
N.	TRAVEL EXPENSES AND FACILITIES FOR UNION OFFICIALS	1131
O.	SHIFT ADJUSTMENTS FOR UNION OFFICIALS	1132
P.	TRAINING FOR UNION OFFICIALS.....	1132
Q.	UNION MEMBERSHIP REQUIREMENTS; SERVICE FEES.....	1132
XXII.	GRIEVANCE PROCEDURES	1132
A.	EXCLUSIONS.....	1134
1.	Management Grievances	1134

2.	Safety and Health Issues.....	1134
3.	Matters Committed by Statute to Agency Head.....	1134
4.	Department of Veterans Affairs—Title 38.....	1134
5.	National Guard.....	1136
6.	Contract Teachers.....	1136
7.	Excepted Service Employees.....	1136
a.	Other Personnel Systems.....	1138
8.	NAF Employees.....	1139
9.	Executive Order 13,839.....	1139
B.	LEVEL OF UNION GRIEVANCE REPRESENTATION.....	1140
1.	Requirement of Union Involvement.....	1140
C.	ESTOPPEL CLAUSES.....	1140
1.	Final and Binding Arbitration.....	1141
D.	ELECTION OF STATUTORY, NEGOTIATED PROCEDURES.....	1141
1.	Agency Grievance Systems.....	1141
2.	EEO Procedures; Election of Remedies.....	1142
3.	RIF Challenges.....	1142
E.	CONTRACT PROCEDURES.....	1142
1.	Location and Arrangements for Grievance Hearings.....	1142
a.	Shift Changes to Permit Participation.....	1142
2.	Personnel Authorized to Initiate, Consider and Decide Grievances.....	1143
a.	Advisory Boards.....	1143
3.	Parties Who May Invoke Arbitration.....	1143
a.	Unilateral Invocation.....	1143
4.	Grievance Filing Periods.....	1143
5.	Arbitration Procedures.....	1143
6.	Review Rights.....	1144
7.	Alternate Dispute Resolution.....	1144
XXIII.	MANAGEMENT AND SUPERVISORY PRACTICES.....	1144
A.	ASSESSMENT, QUALIFICATIONS OF SUPERVISORS.....	1144
1.	Equipment Available to Supervisors.....	1144
2.	Instruction of Supervisors.....	1144
B.	DESIGNATION OF SUPERVISORS TO ASSIGN WORK.....	1145
1.	National Guard; Inversion of Rank.....	1145
C.	DISCIPLINE OF SUPERVISORS, MANAGERS.....	1145
D.	DUTIES TO BE PERFORMED BY SUPERVISORS, MANAGERS.....	1145
E.	OFFICIALS WHO MAY IMPOSE DISCIPLINE.....	1147
F.	RECORDS TO BE MAINTAINED.....	1147
1.	Official Time Use.....	1147

CHAPTER 7: FEDERAL SERVICE IMPASSES PANEL 1149

I.	MISSION.....	1149
II.	STATUTORY AUTHORITY.....	1149
A.	EXHAUSTION OF VOLUNTARY RESOLUTION EFFORTS; FMCS.....	1150
III.	REGULATORY PROCEDURES.....	1151
A.	DIRECTED INTEREST ARBITRATION.....	1151
B.	VOLUNTARY INTEREST ARBITRATION.....	1153
IV.	SCOPE OF REVIEW AUTHORITY.....	1153
A.	DEFINITION OF ISSUE.....	1153
B.	DISPUTED STATUS OF AGREEMENT.....	1153
C.	NEGOTIABILITY ISSUE.....	1153
D.	FSIP BARGAINING ORDER.....	1153
V.	EFFECT OF DECISION.....	1153
A.	STAY OF DECISION.....	1153
VI.	DECLARATION OF AN IMPASSE.....	1158
A.	MAINTENANCE OF <i>STATUS QUO</i>	1158
1.	Necessary Functioning of Agency.....	1161
VII.	REVIEW AND ENFORCEMENT OF DECISIONS.....	1161
A.	INTERPRETATION OF ORDERS.....	1162

CHAPTER 8: UNFAIR LABOR PRACTICES 1163

I. THE STATUTE.....1163

II. MANAGEMENT VIOLATIONS1164

A. DEFENSE TO STATUTORY VIOLATION; THE CONTRACT PERMITS THE AGENCY TO ACT: *IRS*1164

B. BARGAINING FAILURE1172

 1. Waivers of Bargaining Rights1174

 a. Bargaining History; Discussions During Negotiations1176

 b. Failure to Request Bargaining; Form and Timing of Request; Inaction1176

 2. Submission of Nonnegotiable Proposals1182

 3. Zipper or Integration Clause1182

 4. "Consultation Rights" Clause1183

 5. Incorporation of Past Policies1183

 6. Contemporaneous Agreement; Authority of Representatives1183

 7. Waiver by Withdrawal of Bargaining Request.....1183

 8. Effect of Statutory Changes.....1183

 9. Contract Waiver as Permissive Subject of Negotiations.....1183

 10. Midterm Bargaining Obligation and the "Covered By" Doctrine: *SSA*1184

 a. Evolution of the Doctrine; Confirmation of the Midterm Bargaining Obligation1191

 b. Recent Application of the Doctrine1205

 i. Applicability Only to Collective Bargaining Agreements1210

 ii. Expired Contract1212

 iii. When the Defense Must Be Raised.....1212

 iv. Significance of Past Practice and Bargaining History1212

 v. Examples of "Covered By" Decisions1214

 c. Management Action Permitted by Contract; Harmonizing the *SSA* "Covered By" and the *IRS* Waiver Doctrines...1216

 d. Bargaining to Impasse Over "Covered By" Matters.....1217

 11. Bargaining Delegation; Local Bargaining1218

 a. Involvement of Higher-Level Agency Component1219

 b. Interference by Coordinate Organization.....1221

 c. *Respondeat Superior*; Agency Relationships.....1221

 12. Multi-Unit/Employer Bargaining1221

 a. Bargaining Involving Different Organizational Subcomponents1223

 13. Refusal or Failure to Conclude Agreement1224

 a. Meeting of the Minds.....1224

 b. Authorized Representatives1224

 c. Verbal Agreements1225

 d. Informal Discussions1226

 14. Ground Rules1227

 15. Impassed Proposals; Maintenance of *Status Quo*1228

 a. Existence of Impasse; FMCS, FSIP; Obligations Before and During Impasse.....1232

 b. Exigencies of Agency Operations; Necessary Functioning of the Agency; Nonnegotiable Proposals1234

 c. Effect of Proposal Adopted Following Impasse.....1235

 16. Withdrawal From Agreement; Termination of Agreement1236

 17. Failure to Honor Prior Identical Negotiability Determination.....1236

 18. Failure to Honor FSIP Determination1236

 19. Failure to Sign or Memorialize an Agreement1237

 20. Bargaining to Impasse on Permissive Matter.....1238

 a. Agency Head Disapproval of Negotiated Articles.....1240

 21. Improper Disapproval of Agreement by Agency1240

 a. What Constitutes an Agreement1240

 b. Belated Disapproval.....1240

 c. Obligations Following Disapproval.....1241

C. CLEAR AND PATENT BREACHES OF NEGOTIATED AGREEMENTS.....1241

 1. Breach Amounting to Repudiation of Agreement; *Scott AFB*.....1242

 a. Role of Extrinsic Evidence of Contractual Intent1245

 2. Unfounded Belief of Invalidity of Provision1247

 3. Isolated Noncompliance.....1247

 4. Failure to Honor Grievance Settlement1248

 a. Settlement That Violates Statute.....1248

 b. Lack of Authority to Settle.....1249

 5. Illegal Provisions; Management Rights1250

6.	Treatment of Past Practice	1253
D.	UNILATERAL CHANGES IN EMPLOYMENT CONDITIONS AND PAST PRACTICE	1253
1.	Necessity for Impact and Implementation Bargaining	1253
a.	Ground Rules.....	1255
2.	Past Practice	1256
a.	Employment Condition.....	1257
b.	Historical Patterns	1258
c.	Management’s Knowledge of the Practice	1259
d.	Past Practice Varies From Contract Language.....	1260
3.	Change in Employment Conditions	1261
4.	Absence of Change; Impact on Working Conditions	1264
a.	Determining When Impact Occurs	1264
b.	Reasonably Foreseeable Effect.....	1264
c.	“Substantial Impact”; 2020 Interpretation and Guidance.....	1265
d.	<i>De Minimis</i> Change: <i>SSA OHA</i>	1269
e.	<i>De Minimis</i> Change: Prior Law Distinguishing Substantive and Impact Bargaining.....	1278
f.	Impact of Unit Size, Number of Affected Employees	1279
5.	Illegal Practice or Negotiated Provision	1280
6.	Necessary Functioning of Agency	1283
a.	Budget Issue.....	1285
7.	Effect of Prior Negotiability Determination.....	1286
8.	Specific Changes Requiring Impact or Decision Bargaining.....	1286
a.	Leave; Schedule; Shift	1286
b.	Office Relocation, Reorganization, Abolition	1288
c.	Furlough	1288
d.	Downgradings; Position Reclassification	1288
e.	Work Assignments; Reassignments; Details	1288
f.	Work Methods; Equipment	1291
g.	Position Classification	1291
h.	Overtime.....	1292
i.	Methods of Filling Unit Positions.....	1292
j.	Pay and Fringe Benefits.....	1292
k.	Employees’ Privileges	1292
l.	Union Privileges	1292
m.	Parking.....	1293
n.	Adverse Action Procedures.....	1293
o.	Performance Standards and Critical Elements; Work Review Procedures	1293
p.	Appraisal Procedures	1293
q.	Training Program Requirements.....	1293
r.	EEO Procedures	1293
s.	Upward Mobility, Promotion Programs.....	1293
t.	EEO Settlements	1294
u.	Last Chance Agreements.....	1295
v.	Auto and Motorcycle Use	1296
w.	Travel Arrangements.....	1297
x.	Security Procedures.....	1297
y.	Supervisory Positions.....	1297
9.	Notice of Changes in Working Conditions	1297
a.	Form, Timing, and Recipient of Notice.....	1298
b.	Level of Notification.....	1299
c.	Specificity Required	1300
d.	Extension of Time to Bargain Requested	1300
e.	Maintenance of <i>Status Quo</i> During Bargaining and Arbitration Proceedings.....	1300
10.	Expiration of Agreement	1300
a.	Permissive Subjects of Bargaining	1301
b.	Negotiations Following Expired Agreement on Mandatory Subjects of Bargaining; Piecemeal Negotiations....	1302
E.	BYPASSING UNION	1303
1.	Low-Level Grievance Adjustment	1304
2.	Polls; General Inquiries; Questionnaires.....	1304
F.	FAILURE TO COOPERATE IN ARBITRATION.....	1306
1.	Interference With Grievance	1308

2.	Witnesses; Discovery.....	1308
3.	Failure to Honor Arbitration Award	1308
	a. Jurisdictional Issues	1312
	b. Effect of Change in Law.....	1312
	c. Intervening Events	1312
	d. Delay in Implementation.....	1313
G.	INTERFERENCE	1313
1.	Discouragement of Organization.....	1313
2.	Regulation of Solicitation: Membership, Election	1313
	a. Membership	1313
	b. Internal Union Election.....	1314
	c. No-Distribution Rule	1314
	d. Dues Collection Problem	1315
	e. Fundraising	1315
3.	Surveillance	1316
4.	Interference With Witnesses, Union Representatives, Employees, Grievances, Evidence.....	1316
	a. ULP Cases	1317
	b. Court Testimony.....	1317
	c. Grievances.....	1317
	d. Access to Agency Grievance Procedures	1317
	e. Interrogation of Representatives; Privileged Communications	1317
	f. Interference With Representatives.....	1323
5.	Restraint on Communications.....	1324
	a. Newspaper.....	1324
	b. Bulletin Board	1326
	c. Literature; Leaflets.....	1327
	d. Insignia.....	1328
	e. Other Communications.....	1331
6.	Protected and Unprotected Statements, Writings.....	1333
	a. Union Officials	1334
	b. Employees.....	1340
	c. Management Officials.....	1341
7.	Reprisal and Discipline Causation Analysis.....	1342
	a. Causation Analysis; <i>Letterkenny</i>	1342
	b. Circumstantial Evidence.....	1347
	c. Pre- <i>Letterkenny</i> Analysis.....	1349
8.	Hostile Environment During Negotiations	1349
9.	Reprisal and Discrimination Other Than Discipline	1350
	a. Threat.....	1350
	b. Disparagement.....	1351
	c. Lawsuit; Threats of Litigation	1351
	d. Assault	1351
	e. Performance Appraisal; Balancing Workload	1354
	f. Denial of Promotion	1357
	g. Details and Reassignments.....	1359
	h. Reclassification	1360
	i. Job Tenure.....	1360
	j. Other Working Conditions	1361
10.	Discipline of Union Official	1362
	a. Flagrant Misconduct.....	1363
11.	Protected Action Against Union Official.....	1369
12.	Military Aspects of Civilian Employment.....	1370
13.	Restraint on Union Internal Organization	1371
	a. Recognition of Representatives	1371
	b. Conflict of Interests.....	1372
	c. Voting in Union Elections by Supervisor.....	1377
	d. Control of Bargaining Conduct.....	1377
14.	Interference With Union Facilities, Official Time	1377
	a. Access to Agency Premises, Union Office.....	1377
	b. Policing Official Time.....	1378
	c. Balancing Official Time and Work Needs	1380

d. Access To and Use of Documents and Information; Press Contacts	1381
15. Protection of Supervisor	1382
H. REPRESENTATION DURING INVESTIGATIONS; <i>WEINGARTEN</i> RIGHTS	1382
1. "Reasonable Belief" Standard	1384
a. Immunity; Promise Against Discipline	1385
2. Need to Request Representative	1385
a. Delay of Investigation Pending Arrival of Designated Representative	1386
b. Withdrawal of Request	1387
c. Determining the Unit of Representation	1387
3. Scope of Representation During Investigation	1388
4. Investigations Into Misconduct, Substandard Performance	1392
a. Tax Audits	1392
b. Work Monitoring.....	1392
c. Performance Evaluation; Counseling	1392
d. Search	1392
e. Questioning by Inspectors General and Agency Criminal Investigative Units; Executive Order 12171	1392
f. Security Clearance Inquiries	1401
g. OPM Suitability and Background Investigations.....	1401
5. Misconduct During Investigation.....	1406
6. Exclusion of Particular Representative	1406
7. Employees of the Department of Veterans Affairs; Professional Standards Boards.....	1408
8. Remedy.....	1411
I. REPRESENTATION DURING FORMAL DISCUSSIONS	1413
1. Formal Criteria.....	1414
a. Performance Standards.....	1416
b. Orientation Sessions.....	1416
c. EEO Proceedings: Precomplaint Informal Adjustments	1417
d. EEO Proceedings: Postcomplaint Settlement Discussions and Adjustments; Mediation	1418
e. Adjustments of Nonunit Employees' EEO Complaints.....	1432
f. Grievances.....	1433
g. Adverse Action Reply; MSPB Settlement	1435
2. Brief Conversations With Supervisors.....	1438
a. Routine Counseling	1438
b. Changes in Work Assignments	1438
c. Advice on Employment Opportunities.....	1438
3. Work Practices; Reminders of Policies.....	1438
a. Inspector General Audits	1439
4. Announcement or Warning of Action to Be Taken	1440
5. Workplace Rules, Schedules.....	1442
6. Partnerships, Quality Circles.....	1442
7. Questioning of Witnesses.....	1445
a. <i>Brookhaven</i> Assurances Against Reprisal; Interviews Qualifying as Formal Discussions	1445
b. Arbitration.....	1448
c. ULP Case	1449
d. MSPB Appeal; Interview; Deposition.....	1450
e. EEO Investigative Interview	1456
f. Claims of Attorney Work Product Privilege	1459
8. Notice of Formal Meetings	1461
III. UNION VIOLATIONS	1462
A. BARGAINING FAILURES.....	1463
1. Negotiability Issue	1463
2. Preconditions to Bargaining.....	1463
3. Bargaining to Impasse on Permissive Subject.....	1464
4. Failure to Honor Designation of Management's Negotiator	1464
5. Failure to Honor Settlement.....	1464
6. Failure to Sign Agreement	1464
7. Failure to Secure Ratification of Agreement.....	1464
8. Refusal to Arbitrate.....	1467
B. STRIKING AND PICKETING.....	1470
1. Effect of Decertification	1470
2. Picketing.....	1470

C.	INTERFERENCE	1470
1.	Coercion	1470
2.	Protests to Employer About Unit Employees.....	1470
3.	Interference With Work of Employees	1471
4.	Removal of Officers, Members	1474
a.	Denial of Membership	1476
5.	Committee and Other Nominations	1478
D.	DUTY OF FAIR REPRESENTATION.....	1478
1.	Membership Considerations.....	1478
2.	Scope	1480
a.	MSPB Appeal.....	1481
b.	Arbitration Service Fee	1484
c.	Litigation.....	1485
d.	Provision of Information; Polling; Seniority Determinations	1486
e.	Representation During Negotiations; Ratification	1489
f.	Benefit Programs	1489
3.	Level of Responsibility.....	1490
4.	Definition of Actionable Misconduct.....	1490
a.	Negligence.....	1490
b.	Bad Faith; Arbitrary Conduct; Distribution of Settlement Proceeds; Seniority Adjustments; Agency Liability	1491
5.	Remedies.....	1496
E.	INTERNAL UNION BUSINESS ON DUTY TIME.....	1496
IV.	ULP PROCEDURES	1496
A.	ULP CASE PROCESSING REGULATIONS	1498
B.	ELECTION/PRECLUSION OF REMEDIES; STATUTORY APPEALS; 5 USC 7116, 7121	1504
1.	Issues Litigable Under an Appeals Procedure; MSPB, EEO Complaint, and ULP Elections.....	1504
a.	EEO Procedure	1514
b.	MSPB Procedure, Information Requests.....	1514
C.	FILING PROCEDURES.....	1515
1.	Time for Filing Charge	1515
a.	Failure to Honor Arbitration Award	1517
b.	Deferral by Agreement of the Parties.....	1523
2.	Proper Parties	1523
a.	Who May File Charge	1523
b.	Change of Status of Parties.....	1523
D.	PRESERVATION OF ISSUES.....	1523
1.	Scope and Purpose of Charge	1523
a.	Service of the Charge	1525
2.	Adequacy of Investigation.....	1525
E.	PLEADINGS AND PRELIMINARIES	1526
1.	Withdrawal of Charge; Appeal of Dismissal of Charge	1526
2.	Complaint	1527
a.	Relation of the Charge and Complaint	1527
b.	Specificity	1527
c.	Amendment of Complaint; Matters Fully and Fairly Litigated	1529
d.	Parties Encompassed by Complaint	1533
e.	Answer to Complaint	1534
3.	Discovery.....	1534
4.	Cases Submitted on Stipulation	1534
5.	Collateral Estoppel.....	1535
6.	Summary Judgment	1535
a.	Voluntary Dismissal	1537
7.	Prehearing Procedure.....	1537
a.	Sanctions.....	1538
F.	THE HEARING.....	1538
1.	<i>Prima Facie</i> Case.....	1539
2.	Evidence	1539
a.	Evidence of Events Before and After Charge	1539
b.	Inferences and Presumptions	1539
c.	Admission.....	1540
d.	Parol Evidence	1540

e.	Hearsay.....	1540
f.	Polygraph.....	1541
g.	Administrative and Judicial Notice.....	1541
h.	<i>Res Judicata</i>	1541
i.	New Evidence; Proof of Compliance.....	1542
3.	Witnesses; <i>Jencks</i> Rule.....	1542
a.	Sequestration.....	1542
b.	Experts.....	1542
c.	Attorneys.....	1542
4.	Bias Allegation.....	1543
5.	Rights of Charging Party.....	1544
6.	Continuances.....	1544
7.	Payment of Expenses to Witnesses; Subpoenas.....	1544
a.	Protective Orders; <i>In Camera</i> Inspection.....	1545
G.	REQUIREMENTS OF DECISION.....	1546
1.	Findings on Credibility, Other Issues.....	1546
2.	Jurisdictional Issues.....	1548
3.	Precedential Value.....	1548
4.	Effect of Court Decisions.....	1548
5.	Interlocutory Appeal.....	1549
H.	EXCEPTIONS.....	1549
1.	Filing Dates; Untimely Exceptions.....	1549
2.	Amended and Supplemental Submissions.....	1551
3.	Cross-Exceptions.....	1551
4.	Format.....	1551
5.	Controlling Law.....	1551
6.	Issues Raised Through Exceptions Must First Be Raised With the Judge.....	1551
7.	Factual Findings.....	1553
I.	SETTLEMENT.....	1554
1.	Alternate Dispute Resolution; Precomplaint Settlements.....	1556
2.	Postcomplaint Settlements.....	1557
V.	REMEDIES.....	1558
A.	INTERFERENCE, RESTRAINT, AND COERCION.....	1559
1.	Back Pay.....	1562
a.	Interest.....	1563
b.	Allowances and Differentials; Benefits.....	1564
c.	Deductions From Back Pay for Interim Earnings.....	1565
2.	Interference With Grievance Proceedings.....	1567
a.	Failure to Comply With Arbitration Award.....	1567
3.	Denial of Official Time, Representation, Travel and Per Diem, or Benefits.....	1567
4.	Disciplinary Cases.....	1567
a.	Multiple Charges.....	1567
b.	Effect of Failure to Bargain.....	1568
5.	Security Clearance Revocation.....	1568
6.	Refusal to Recognize Union.....	1568
7.	Mootness.....	1569
8.	<i>De Minimis</i> Violations.....	1571
9.	Probationers; Excepted Service Personnel.....	1571
10.	Exempt Agencies and Employees.....	1571
a.	National Guard Technicians.....	1571
b.	Department of Veterans Affairs.....	1575
B.	FAILURE TO BARGAIN.....	1581
1.	Retroactive Bargaining Orders; Make Whole Remedies.....	1584
a.	Procedural Aspects of Bargaining Orders.....	1589
b.	Examples of Bargaining Orders.....	1589
c.	Inclusion of Provision in Agreement.....	1591
2.	<i>Status Quo</i> Remedy Required.....	1591
a.	Application of Remedy.....	1594
3.	<i>Status Quo</i> Remedy Not Required.....	1596
a.	Interim Accommodations; FSIP Involvement.....	1597
b.	Discontinuance of Temporary Changes.....	1597

c.	Minimal Impact of Change	1597
d.	Good Faith.....	1597
e.	Undue Interruption of Agency Operations; Impossibility of Restoration of <i>Status Quo</i>	1598
4.	<i>Status Quo</i> Orders; Make Whole Remedies	1599
5.	Causal Connection Required for Back Pay in Failure to Bargain Cases	1600
a.	Interference With Awards, Benefits.....	1601
6.	Extension of Certification Year.....	1602
C.	AWARDS OF COUNSEL FEES	1604
1.	Charging Party Against Agency Respondent.....	1604
a.	Basis for Fees—Back Pay Act	1604
b.	Reasonableness of Time.....	1606
c.	Reasonableness of Rate; Cost Basis or Market Rate	1608
d.	Costs.....	1611
2.	Union Respondent Against FLRA	1611
a.	Equal Access to Justice Act	1611
b.	Rates Under Equal Access to Justice Act.....	1612
D.	OTHER REMEDIES; REMEDIAL ISSUES.....	1613
1.	Nontraditional Remedies	1613
2.	Unit Members Adversely Affected by Violation	1615
3.	Parties Encompassed by Remedial Order.....	1616
4.	Postings	1616
a.	Email Notices to Employees.....	1616
b.	Notice Directly to Employees, Managers; Others	1619
c.	Geographic Extent of Posting	1620
d.	Union Violations.....	1622
e.	Individual Who Signs Remedial Notice.....	1622
5.	Interaction With Other Agencies	1624

CHAPTER 9: REVIEW OF ARBITRATION AWARDS 1625

I.	STATUTORY AUTHORITY FOR REVIEW.....	1625
A.	REGULATORY STRUCTURE AND PRACTICE	1625
1.	What Constitutes an Award	1627
B.	AWARDS INVOLVING PARTICULAR AGENCIES	1628
1.	TVA	1628
2.	Panama Canal Commission	1628
3.	Government Printing Office	1628
II.	STATUTORY PRECLUSION OF CERTAIN MATTERS FROM GRIEVANCE ARBITRATION	1629
A.	RETIREMENT.....	1630
B.	CLASSIFICATION.....	1631
1.	Accuracy of Position Description.....	1632
2.	Claim for Back Pay, Promotion.....	1634
3.	Determination of Pay Rate.....	1636
4.	Constructive Demotion.....	1637
5.	Environmental Differential Pay.....	1637
6.	Other Matters	1637
C.	UNIT STATUS DETERMINATION	1638
D.	PRECLUSION OF GRIEVANCES BY PARTICULAR EMPLOYEES	1639
1.	Grievances by Terminated Probationers or Individuals Who Do Not Meet the Statutory Definition of an "Employee" ..	1639
2.	Department of Veterans Affairs Medical Professional; Hybrid Employee.....	1640
III.	STATUTORY ELECTIONS OF REMEDIES THAT PRECLUDE GRIEVANCE ARBITRATION	1649
A.	GRIEVANCE OR ULP FILINGS; 5 USC 7116(D)	1650
1.	Effect of Grievance Procedure on Ability to Assert Statutory Violation in ULP Charge	1656
a.	What Constitutes a Grievance.....	1656
2.	Identity of Parties	1656
3.	Identity of Issues.....	1657
a.	Proposal, Decision to Take Action.....	1670
b.	Contract Violation; Repudiation of Contract	1672
4.	Statutory Violation; Bargaining Failure.....	1673
5.	Timing of Filing	1674
B.	ADVERSE ACTIONS; PERFORMANCE ACTIONS; 5 USC 7121(E)	1675
1.	MSPB Review on EEO Grounds.....	1680

C.	EEO CLAIMS; 5 USC 7121(D)	1680
D.	OTHER PROHIBITED PERSONNEL PRACTICES; WHISTLEBLOWING REPRISAL; 5 USC 7121(G)	1689
E.	RIF	1690
IV.	PARTICULAR MATTERS EXCLUDED OR ENCOMPASSED BY CONTRACT	1691
A.	PERMISSIVE SUBJECTS OF BARGAINING	1691
V.	AWARDS INVOLVING ADVERSE ACTIONS AND PERFORMANCE ACTIONS UNREVIEWABLE BY FLRA: 5 USC 7122, 5 USC 7121(F)	1693
A.	ADVERSE ACTION, PERFORMANCE CASES	1695
1.	Constructive Adverse Action	1698
a.	Coerced Resignation	1699
2.	Determination of Probationary Status	1700
3.	Pay, Grade Retention.....	1701
B.	MATTERS RELATED TO STATUTORY APPEALS.....	1701
C.	STATUTORY APPEAL NOT AVAILABLE	1710
D.	PRE-DECISIONAL ADVISORY ARBITRATIONS.....	1712
E.	CASES UNDER OTHER PERSONNEL SYSTEMS	1712
VI.	RECURRENT ARBITRABILITY OR JURISDICTIONAL ISSUES	1714
A.	ARBITRABILITY, NEGOTIABILITY DISPUTES	1715
B.	CREATION AND EXISTENCE OF COLLECTIVE BARGAINING AGREEMENTS.....	1718
1.	Midterm Bargaining Requirement.....	1718
2.	Negotiability of Local Agreement.....	1718
3.	Conduct of Interest Arbitration; Ground Rules.....	1718
C.	PROCEDURAL ARBITRABILITY ISSUES.....	1718
1.	Mootness of a Grievance	1722
D.	MANAGEMENT RIGHTS; PROCEDURES AND ARRANGEMENTS; IN ACCORDANCE WITH APPLICABLE LAWS.....	1723
E.	ULP ISSUES.....	1725
1.	Effect of Prior, Related ULP Ruling; Estoppel	1726
VII.	PROCEDURES FOR REVIEW OF ARBITRATION AWARDS.....	1726
A.	FINALITY; INTERLOCUTORY APPEALS	1726
1.	General Rule.....	1726
a.	Interim Awards	1727
b.	Awards That Split Resolution of Issues or Claims.....	1727
c.	Arbitrator Reserves Ruling on a Remedy	1729
d.	Procedural Issues and Rulings.....	1735
e.	Bifurcated Cases; Issues of Jurisdiction or Arbitrability; Plausible Jurisdictional Defect	1735
f.	Case Disposition Advanced by Exception Raising Defect in Award.....	1740
g.	Discovery Order	1743
h.	Other Exceptions to Preclusion of Interlocutory Review	1744
i.	Exceptions Requiring Advisory Opinions	1744
2.	Informal FLRA Guidance.....	1745
3.	Deferral or Remand by Arbitrator.....	1746
4.	Doctrine of <i>Functus Officio</i>	1746
a.	Agreement to Vest Jurisdiction in Arbitrator to Resolve Related Dispute Following Award	1751
5.	Clarification, Correction of Awards	1752
a.	Effect of FLRA Decision Setting Award Aside on Ability of Arbitrator to Clarify Award.....	1756
6.	Retained Jurisdiction in Aid of Remedial Implementation.....	1756
7.	Counsel Fees	1757
B.	REQUIREMENTS OF EXCEPTIONS; REGULATIONS.....	1758
1.	Expedited Decision.....	1761
2.	Specificity.....	1761
3.	Proper Party; Intervenor	1763
4.	Timely Filing	1765
a.	Waiver or Forgiveness of Delayed Exception; Equitable Tolling.....	1767
b.	Overseas Case	1770
c.	Place of Filing	1771
d.	Method of Filing; Service	1772
e.	30-Day Period for Exceptions From Service of the Award	1773
f.	Bench Award	1774
g.	Supplemental, Modified, or Clarified Awards.....	1774
h.	Award Served by Email.....	1777
i.	Cross-Exceptions Not Allowed.....	1780

j.	Opposition; Reply	1780
k.	Supplemental Submission; Correction	1781
l.	Supplemental Exception.....	1784
5.	Material Accompanying Exceptions; New Evidence	1784
a.	Hearing Transcript and Other Documents; Unofficial Hearing Record.....	1786
6.	Official Notice	1787
7.	Decisions on Arbitration Awards Involving Identical Contract Provisions	1788
8.	Issues to Be First Raised With the Arbitrator; New or Inconsistent Arguments Raised in Exceptions; Issues Raised by FLRA <i>Sua Sponte</i>	1788
a.	Issues of Jurisdiction, Sovereign Immunity, Constitutional Law	1795
9.	Effect of Failure to File Exception	1799
a.	Awards Under Auspices of FSIP	1799
10.	Dicta.....	1799
a.	Advisory Opinion.....	1799
11.	Award Based on Separate and Independent Grounds.....	1800
a.	Award Challenged on Fewer Than All the Grounds Relied Upon in the Award.....	1800
12.	Mootness.....	1801
a.	Cognizable Interest.....	1801
b.	Possibility of Relief	1804
c.	Stipulation of Error	1804
13.	Waiver of Exceptions	1804
14.	Counsel Fees	1804
15.	Technical Deficiencies	1805
C.	STAYS.....	1805
1.	Effect of Judicial Proceeding.....	1805
D.	PROCEDURE AFTER REVIEW	1805
1.	Modification of Award.....	1805
2.	Remand; Resubmission; Ambiguous or Unclear Award.....	1806
3.	Need for FLRA Clarification.....	1811
VIII.	GROUND FOR REVIEW.....	1811
A.	EXCEPTIONS MUST STATE A RECOGNIZED BASIS FOR REVIEW	1812
1.	Award, Record Considered as a Whole	1814
B.	AWARD FAILS TO DRAW ITS ESSENCE FROM THE AGREEMENT	1814
1.	Nature of the Exception	1817
a.	Procedural Arbitrability; Missteps in Grievance and Arbitration Process.....	1818
b.	Contract Interpretation	1823
c.	Past Practice.....	1824
d.	Examples of Awards Successfully Challenged	1826
C.	AWARD EXCEEDS AUTHORITY OF ARBITRATOR; STIPULATED OR NONSTIPULATED ISSUES	1830
1.	Defining the Issue	1836
2.	Remedy Exceeds Claimed Violation; Remedy Extends to Employees Other Than Grievants	1840
3.	Effect on Nonunit, Former Unit Employees; Actions Occurring Before Unit Membership.....	1845
4.	Time Limit for Filing a Grievance	1846
5.	Remedial Latitude, Limits.....	1846
a.	Reconstruction of Personnel Action.....	1852
b.	Effect on Third Parties: EEO Adjustment	1853
6.	Stay in Aid of Arbitration	1854
D.	AWARD IS BASED ON "NONFACT".....	1854
1.	Factual Dispute	1856
2.	Contract Interpretation	1858
3.	Interpretation of Law	1859
4.	Legal Conclusion	1859
5.	Procedural Arbitrability Issue.....	1859
6.	Past Practice	1860
7.	Examples of Awards Set Aside Based on Nonfact	1861
a.	Remand for Clarification Required	1861
E.	DENIAL OF FAIR HEARING	1861
1.	Conduct of the Hearing; <i>Ex Parte</i> Communications	1864
a.	Discovery; Document Production	1867
b.	Timing of Award.....	1867
2.	Burden of Proof.....	1867

3.	Challenge to Admission of Testimony, Exhibits, Briefs.....	1868
a.	Remand.....	1870
4.	<i>Ex Parte</i> Arbitration	1871
5.	Allegations of Bias.....	1872
a.	Self-Interest in Arbitrator Selection Dispute.....	1874
b.	Preclusion of Other Arbitrators or Remedies; Extent of Arbitrator's Appointment.....	1877
c.	Violation of FMCS or Ethical Rules.....	1878
6.	Award Obtained by Fraud.....	1878
7.	Breach of the Duty of Fair Representation	1878
F.	VIOLATION OF PUBLIC POLICY.....	1878
G.	CONTRARY TO LAW; AWARD IS INCONSISTENT WITH LAW, RULE, OR REGULATION	1880
1.	Contract Provisions Paralleling Statutory or Regulatory Requirements	1882
2.	Arbitrator's Ability to Enforce Laws, Regulations.....	1883
a.	Definition of "Law" Under 5 USC 7106(a)	1884
3.	Nature of the Exception.....	1888
a.	Conflict Between Contract Provisions and Government-Wide Regulations, Agency Rules and Regulations	1891
b.	Regulatory Interpretation.....	1895
c.	Government-Wide Regulations Issued After the Effective Date of the Agreement.....	1896
d.	Expired Contracts; Contracts That Continue After Term Pending Renegotiation	1897
e.	Statutes Specific to Agency Operations.....	1900
f.	Agency Rules, Regulations That Do Not Conflict With Contract Provisions; Effect of Incorporation of Agency Rules in Negotiated Agreements	1901
g.	Contract Provisions That Restate Statutory Requirements	1903
h.	Antideficiency Act.....	1904
i.	Sovereign Immunity.....	1905
j.	Comptroller General Decision	1907
k.	Constitutional Law.....	1909
l.	Court Decisions.....	1911
m.	Back Pay Act.....	1912
n.	Recovery Period	1918
4.	Authority of the Arbitrator to Enforce Provisions of Remedial Statutes; Civil Rights Acts.....	1920
5.	Management Rights; Abrogation of Management Rights Through Contract Articles Providing Appropriate Arrangements; Return to Excessive Interference Standard	1921
a.	Arbitrator May Direct Remedies Without Reconstructing the Action Management Should Have Taken.....	1940
b.	Decisions Applying Review Standards in Effect Before 2010	1944
c.	Right to Determine Agency Budget	1946
d.	Right to Determine Agency Organization.....	1947
e.	Right to Operate During an Emergency.....	1948
f.	Right to Determine Internal Security	1948
6.	Promotion.....	1951
a.	Merit Promotion.....	1952
b.	Career Ladder Promotion	1955
c.	"But For" Test; Contract Breaches; Monetary Remedies.....	1961
d.	Procedural Violations and Remedy	1967
e.	Basic and Relative Qualifications	1971
f.	Seniority.....	1972
g.	Classification; Accretion of Duties	1972
h.	Time-In-Grade Restrictions	1976
i.	Area of Consideration	1976
j.	Reruns.....	1977
k.	Removal of Incumbent From Position	1978
l.	Disqualification of Selectee From Further Consideration; Limitations on Selecting Official, Panel	1979
m.	Priority Consideration.....	1981
n.	Prospective Promotion.....	1986
o.	Application of Crediting Plans	1987
p.	Discrimination	1987
q.	Disability Discrimination; Accommodation.....	1996
r.	Union Animus.....	1996
7.	Temporary Promotions	1999
a.	Authority to Direct Promotion and Award Back Pay.....	2002
b.	Assessment of Qualifications; OPM Qualification Requirements.....	2005

c.	Performance of Higher-Graded Duties.....	2006
d.	Necessity for Classified Position at the Higher Level.....	2008
e.	Classification Issue.....	2011
f.	Accretion of Duties.....	2014
g.	Temporary Supervisory Positions.....	2015
h.	Duration of Back Pay.....	2016
i.	Linkage Required Between Violation of Contract, Regulation, or Past Practice and Entitlement to Temporary Promotion.....	2018
j.	Necessity for Articulated Award.....	2019
8.	Supervisory or Nonunit Vacancies.....	2019
9.	Other Aspects of Employment, Job Retention.....	2023
a.	Recall of Seasonal and Temporary or Intermittent Employees.....	2023
b.	Conversion of Appointment.....	2023
c.	Temporary Appointment of Disabled Employee.....	2025
d.	Initial Appointment; Extensions of Appointment.....	2026
e.	Professional Certification.....	2026
10.	Employment Practice Disputes; Testing Procedures.....	2027
11.	Physical Requirements for Positions; Rehabilitation Act.....	2028
12.	Overtime Compensation.....	2028
a.	Make-Up Overtime.....	2036
b.	FLSA Exemption Status.....	2036
c.	FLSA Class or Group Grievances.....	2041
d.	Work for the Benefit of the Employer.....	2043
e.	Suffer or Permit.....	2044
f.	Ordered or Approved; Federal Employees Pay Act; Title 38 Overtime for VA Professionals.....	2045
g.	Causation; Contract Violation.....	2046
h.	Distribution and Qualifications; Equalization.....	2052
i.	Standby Pay.....	2059
j.	On Call Status.....	2063
k.	Administratively Uncontrollable Overtime and Other Overtime Entitlements.....	2064
l.	Alternate Work Schedule Employee.....	2066
m.	Travel Time.....	2066
n.	Labor Relations Activities.....	2070
o.	Preparatory Time; Changing Clothing; Preliminary and Postliminary Activities.....	2070
p.	Brief Periods of Overtime.....	2080
q.	Security Screening.....	2082
r.	Lunch Period.....	2084
s.	Sleep Time.....	2086
t.	Flexible and Compressed Schedule.....	2086
u.	Calculation.....	2086
v.	Proof.....	2088
w.	Recovery Period; Willful Violation.....	2089
x.	Time for Initiating a Grievance; Impact on Retroactive Recovery.....	2095
y.	FLSA Liquidated Damages; Interest.....	2097
z.	Compensatory Time.....	2108
aa.	Law Enforcement Availability Pay Act of 1994.....	2109
bb.	Customs Officer Pay Reform Act.....	2110
13.	Travel, Commuting Expenses, Parking Fees, and Per Diem.....	2110
a.	Transit Subsidies.....	2112
14.	Other Compensation and Leave Cases.....	2113
a.	Damages, Penalties, Expenses, Interest.....	2114
b.	Compensatory Damages Under the Civil Rights Acts.....	2117
c.	Violation of the Privacy Act; Disclosure in Violation of the ADA or Rehabilitation Act.....	2122
d.	Work Rotation Agreement.....	2126
e.	Teachers; Work Outside Regular Workday.....	2126
f.	Reinstatement Remedies; Offsets From Earnings.....	2126
g.	Leave Dispute; Military Leave; USERRA.....	2127
h.	Family Medical Leave Act; Federal Employees Family Friendly Leave Act.....	2130
i.	Leave Bank.....	2132
j.	Statutory Pay Systems; Statutory Pay Premiums; Bonuses.....	2132
k.	Grade and Pay Retention.....	2136

l.	Official Time	2136
m.	Step Increases	2146
n.	Environmental Differential Pay; Danger Pay	2147
o.	Hazard Pay	2155
p.	Night Differential	2159
q.	Enforced and Administrative Leave; Facility Shutdown	2159
r.	Furlough	2161
s.	Relocation Expenses; LQA and Post Differentials; Transportation Agreements; Severance Pay	2161
t.	Awards	2163
u.	Continuation of Pay	2167
v.	Duration of Back Pay Entitlement	2167
15.	Miscellaneous Benefits; Deductions for Union Dues, Benefits	2168
16.	Work Assignments	2169
a.	Job Qualifications; Certification	2171
b.	Seniority	2171
c.	Work Preservation	2172
d.	Hours, Days of Duty; Schedule Adjustments; Flexible or Compressed Schedules; AWS; Credit Hours	2173
e.	LWOP	2179
f.	Job Rotation	2179
g.	Flexiplace; Telework	2179
h.	Reassignment; Shift Change; Assignment to New Supervisor	2181
i.	Detail	2187
j.	Training	2187
k.	Restructuring of Job	2189
l.	Restoration to Job Following Recovery From Compensable Injury	2189
m.	Temporary Assignment	2189
n.	Filling of Vacancies	2189
17.	Safety and Health	2190
a.	Equipment	2190
b.	Records	2190
c.	Unsafe Working Conditions	2190
d.	Medical Examination	2191
e.	Employment of Personnel Presenting Safety Risk	2192
18.	Management Right to Discipline; "Just Cause"	2192
a.	General Restrictions	2195
b.	Mitigation Analysis; Progressive Discipline	2197
c.	Due Process; Notice of Charges; <i>Ex Parte</i> Communications	2199
d.	Timing of Discipline	2204
e.	Fifth Amendment Concern; Concurrent Disciplinary and Criminal Proceeding	2205
f.	Insubordination, Discourtesy Charges	2205
g.	Drug and Alcohol Testing Problem	2206
h.	Proof of AWOL; Justification for Leave	2207
i.	Union Animus; Prohibited Personnel Practices; Discrimination and Reprisal	2208
j.	Suspension	2214
k.	Technicians Act	2216
l.	Remedial Discipline of Supervisor; Apologies; Public Statements	2216
m.	Dismissals of Probationer, Term or Temporary Employee; Student	2219
n.	Veterans Readjustment Act Appointee	2222
o.	Actions Against Administrative Law Judge	2222
p.	Records in Official Personnel File	2223
19.	Performance-Related Issues	2224
a.	Critical Elements, Performance Standards	2224
b.	Performance Appraisal—1988 and Beyond	2229
c.	Performance Appraisal—Through 1987	2243
d.	Means to Improve Performance	2244
e.	Performance Action	2244
f.	Requests for Information	2245
20.	Reductions in Force	2245
a.	Competitive Area	2247
b.	Competitive Level; Duties of Union Officials	2247
c.	Assignment Rights; Retreat	2249

d.	Appraisal.....	2251
e.	Agency Organization	2251
f.	Seasonal Employee.....	2252
21.	Contracting Out.....	2252
22.	Retirement	2254
23.	Unit Status	2255
a.	Agreement Coverage Distinguished From Unit Status.....	2257
24.	Fiduciary Responsibility; Employee Debt.....	2257
a.	Financial Reporting Requirements.....	2260
25.	Security Clearance	2262
26.	Unfair Labor Practices; Refusal or Failure to Bargain; Repudiation of Contract.....	2262
27.	Impact on Agency Mission	2273
a.	Application of the “Covered By” Doctrine.....	2274
b.	Agreement Concerning Case Processing.....	2277
c.	Implementation of FSIP Decision	2277
d.	Mootness.....	2278
e.	Bargaining Order Without a ULP Finding	2279
28.	Union Rights and Obligations	2279
a.	Agency Facilities	2279
b.	Information Requests.....	2280
c.	Requirements of Grievance Procedure.....	2282
d.	Protection of Union Officials’ Conduct.....	2282
e.	Remedies Against Unions.....	2285
f.	Enforcement of Arbitration Awards	2286
29.	Grievance, ULP Settlement	2286
30.	Existence of Contract.....	2290
31.	Violations of Specific Statutes.....	2290
32.	Prohibited Personnel Practices; Merit Systems Principles.....	2290
a.	Whistleblower Reprisal; Stay and Other Relief.....	2292
b.	Other Prohibited Personnel Practices	2294
33.	Privacy Act Violation.....	2295
34.	Civil Rights Laws	2297
a.	EEO Analysis; Burdens of Proof.....	2297
b.	Disparate Impact	2298
c.	Statistical Evidence	2299
d.	Age Discrimination	2299
e.	Harassment; Hostile Environment.....	2300
f.	Disability Discrimination; Reasonable Accommodation; Treatment of Medical Records	2302
g.	Reprisal.....	2317
h.	EEO Settlement	2318
H.	CHALLENGES TO REASONING OF AWARD	2318
1.	General Policy.....	2318
2.	Significance of Past Practice.....	2319
3.	Uncertain, Ambiguous or Contradictory Award; Implementation Impossible; Involvement of Third Parties	2322
4.	Failure to Discuss All Charges, Evidence, Issues	2323
5.	Right Result, Wrong Reason	2326
a.	Issue Not Raised in Grievance	2326
b.	Estoppel.....	2326
6.	Adherence to Precedent; <i>Res Judicata</i> ; Collateral Estoppel	2327
I.	CHALLENGES TO PROOF	2330
1.	Order of Proof.....	2330
2.	Burden of Proof.....	2330
3.	Quantity and Sources of Evidence	2332
4.	New Evidence	2332
5.	Credibility Issue.....	2332
6.	Past Practice	2332
7.	Harmful Error Rule.....	2332
8.	Adverse Inference	2333
J.	CHALLENGES BASED ON PROCEDURAL REQUIREMENTS OF AGREEMENT.....	2333
1.	Timeliness Objection	2334
a.	Timeliness of Award.....	2335

2.	Allocation of Arbitration Costs	2336
3.	Dispute Concerning Arbitrator's Fee	2337
a.	Recovery by Arbitrator of Fee	2337
IX.	AWARDS OF COUNSEL FEES	2338
A.	REQUIRED FINDINGS AND ANALYSIS	2338
1.	Back Pay Act	2340
a.	Necessity of Unjustified or Unwarranted Personnel Action and Award of Pay, Allowances or Differentials; Contract Violation.....	2341
2.	Reasoned Award.....	2346
a.	Remands-Current Law	2350
b.	Remands-Prior Law	2351
3.	Prevailing Party	2354
a.	Partial Success; Mitigation of Discipline.....	2357
4.	Interest of Justice	2359
a.	Substantial Innocence	2369
b.	Knew or Should Have Known.....	2371
c.	Clearly Without Merit	2378
d.	Gross Procedural Error	2379
e.	Service to Federal Workforce.....	2381
f.	Civil Rights Cases; Title VII.....	2381
g.	Prohibited Personnel Practice.....	2382
5.	Reasonable Rate; Time Reasonably Invested; Location of Counsel; Travel Time and Expenses	2382
a.	Contingency Arrangement	2386
b.	Rates for Counsel Employed by Union	2387
c.	Laffey Matrix	2387
6.	Reasonable Amount; Fee Reduction.....	2391
7.	Compensable Services	2395
a.	Support Personnel; Attorney-Client Relationship	2396
8.	Equal Access to Justice Act.....	2398
9.	Fair Labor Standards Act.....	2398
10.	Costs.....	2399
B.	PROCEDURES.....	2400
1.	When Application May Be Made	2401
a.	Due Process	2404
X.	IMPLEMENTATION OF ARBITRATION AWARD	2405
A.	ULP ENFORCEMENT	2405
1.	Section 7121(f) Award.....	2405
B.	CLARIFICATION	2408
C.	BACK PAY CALCULATIONS, ENTITLEMENT.....	2408

CHAPTER 10: ADMINISTRATIVE RECONSIDERATION AND JUDICIAL REVIEW 2409

I.	ADMINISTRATIVE RECONSIDERATION	2409
A.	TIME LIMIT FOR RECONSIDERATION REQUEST.....	2411
B.	SUBSTANTIVE BASES FOR RECONSIDERATION.....	2412
1.	Vacating Prior Decision—Jurisdictional Issue.....	2415
II.	ACTIONS SUBJECT TO JUDICIAL REVIEW.....	2417
A.	STANDARDS FOR REVIEW.....	2418
1.	Adequacy of FLRA Decision	2419
2.	Finality of FLRA Decision	2420
B.	FSIP DECISION.....	2420
C.	ARBITRATION AWARD	2425
1.	ULP Issue	2429
a.	Direct Review	2430
b.	Indirect Review Through Enforcement.....	2439
2.	Contract Issue.....	2442
3.	Adverse Action.....	2443
4.	Reduction in Force.....	2443
D.	NEGOTIABILITY DECISION.....	2443
1.	Deference.....	2443

2.	Remand.....	2445
3.	Departure From Precedent.....	2445
a.	Effect of Executive Order 11491 Decisions.....	2446
b.	Effect of Private Sector Precedent	2446
4.	Stay.....	2446
5.	Delay	2446
E.	UNFAIR LABOR PRACTICE CASES	2446
1.	Decision Not to Issue ULP Complaint	2448
a.	General Counsel’s Decision to Settle a Complaint.....	2452
2.	Construction of Complaint	2453
3.	Departure From Precedent.....	2453
4.	Counsel Fees	2454
F.	REPRESENTATION AND UNIT DETERMINATION.....	2454
G.	INTERPRETATION AND GUIDANCE.....	2458
III.	INJUNCTION.....	2458
IV.	OTHER ASPECTS OF JUDICIAL REVIEW.....	2459
A.	MOOTNESS	2459
B.	PRECLUSION.....	2460
C.	EXHAUSTION OF REMEDIES	2463
1.	Futility.....	2464
2.	Issues Raised Initially in FLRA Decision	2465
3.	Issues Raised in Enforcement Proceedings.....	2466
D.	STARE DECISIS; COLLATERAL ESTOPPEL.....	2467
E.	VENUE.....	2467
F.	PROPER PARTIES.....	2467
V.	FAIR REPRESENTATION SUIT; RELATED JUDICIAL CLAIM.....	2467
	BIBLIOGRAPHY	2471
	TABLE OF CASES	2479
	INDEX	2553