**Unfair Labor Practice Remedies**

**Overview**

5 USC 7105 in conjunction with 5 USC 7118 provides the Federal Labor Relations Authority with broad remedial authority when it determines that a party has committed an unfair labor practice. It may order the respondent to cease and desist; require the parties to negotiate an agreement and to give it retroactive effect; require reinstatement of an employee with back pay; take any combination of the above actions and "order such other actions" that will carry out the policies and purposes of the statute. The FLRA generally orders remedies that are viewed as traditional. In almost every instance where a ULP is found, the FLRA will order the respondent to cease and desist and to post a notice to all employees acknowledging its violation. The FLRA has also exercised its right to order non-traditional remedies. The remedial authority of arbitrators who find statutory violations is identical to that of the FLRA.

One of the most common unfair labor practice allegations is that an agency has failed to fulfill a duty to bargain over changes in conditions of employment. The FLRA has explained that one of the purposes of a remedy is to recreate the conditions and relationships that existed before the ULP was committed. In cases where an agency is found not to have honored its obligation to bargain, the FLRA typically issues a status quo ante remedy. However, the FLRA has at times found such a remedy impossible or inappropriate. The FLRA applies two different standards -- "*FCI* Factors" and "Special Circumstances" -- to determine whether a return to the status quo is warranted. Where a return to the status quo is not warranted, the FLRA often issues a retroactive bargaining order along with the requirement to cease and desist.

**Key Points**

These key-point summaries cannot reflect every fact or point of law contained within a source document. For the full text, follow the link to the cited source. The references to ***Broida*** in this Quick Start Guide are to federal employment law expert Peter Broida's treatise, *A* *Guide to Federal Labor Relations Authority Law and Practice* (Dewey Publishing Inc.), to which ***cyber*FEDS®** has exclusive Web rights.

**The basics**

* ***Broida:*** The remedial power of the FLRA is broadly defined by statute. [*Broida Guide to Federal Labor Relations Authority Law and Practice:* Remedies](http://www.cyberfeds.com/CF3/servlet/GetDocByTitle?doctitle=Chapter+08:+Unfair+Labor+Practices,+Subchapter+05:+Remedies), *citing Federal Bureau of Prisons*, 100 FLRR 1-1033, 55 FLRA 1250 (FLRA 2000).
* The purposes of a remedial order are to restore the status quo that would have obtained but for the unlawful act and to deter such conduct in the future. *Federal Bureau of Prisons*, 100 FLRR 1-1033, 55 FLRA 1250 (FLRA 2000).
* Where an agency unlawfully denied an employee's request for representation at an investigative meeting, the appropriate remedy was not reinstatement of the terminated employee. To recreate the conditions that would have existed but for the ULP, the FLRA ordered the agency to conduct an investigative meeting with the union present and to reconsider discipline in light of the results of that meeting. *Bureau of Prisons*, 90 FLRR 1-1252, 35 FLRA 431 (FLRA 1990).
* Although the employees involved pursued their terminations either through MSPB or the negotiated grievance procedure, the FLRA majority concluded that 5 USC 7116(d) did not bar consideration of individual remedies. The agency was required to offer reinstatement to terminated employees affected by a ULP. *Davis-Monthan AFB*, 110 LRP 2945, 64 FLRA 355 (FLRA 2009).
* FLRA remedial authority is not limited by the management rights provision of the statute. That provision addresses only the scope of collective bargaining. *60th Air Mobility Wing, Travis Air Force Base, Calif.*, 104 LRP 7386, 59 FLRA 632 (FLRA 2004); *Federal Bureau of Prisons*, 100 FLRR 1-1033, 55 FLRA 1250 (FLRA 2000).
* Arbitrators are empowered to order the same remedies as the FLRA in arbitrating a grievance alleging the commission of an unfair labor practice. *Federal Deposit Insurance Corporation*, 93 FLRR 1-1239, 48 FLRA 566 (FLRA 1993).
* Unless a particular remedy is compelled by statute, the FLRA defers to an arbitrator's award remedying a ULP just as the courts defer to remedies ordered by the FLRA. An exception is when a remedy is a patent attempt to achieve ends other than those which effectuate the policies and purposes of the statute. *GSA, New England Region*, 109 LRP 52331, 63 FLRA 651 (FLRA 2009).

**Traditional remedies**

* Traditional remedies ordered in virtually every case where a ULP is found include a cease and desist order and the posting of a notice to employees. *F.E. Warren AFB*, 96 FLRR 1-1106, 52 FLRA 149 (FLRA 1996).
* Traditional remedies might also include an order that the respondent take some affirmative action such as providing information unlawfully withheld from the union. *Internal Revenue Service*, 96 FLRR 1-1034, 51 FLRA 1166 (FLRA 1996).
* A remedy may not direct a respondent to perform an illegal act, for example, to restore a past practice that had been unlawful. *Portsmouth Naval Shipyard*, 94 FLRR 1-1157, 49 FLRA 1522 (FLRA 1994).
* Remedies must not be punitive. *F.E. Warren AFB*, 96 FLRR 1-1106, 52 FLRA 149 (FLRA 1996).
* A retroactive bargaining order is considered a traditional remedy. *Department of Veterans Affairs Medical Center, Asheville*, 96 FLRR 1-1068, 51 FLRA 1572 (FLRA 1996).
* A retroactive bargaining order is sometimes the best way to allow the parties an opportunity to determine, through negotiations, appropriate relief for employees who were adversely impacted by an agency's unlawful refusal to bargain. *Letterkenny Army Depot*, 104 LRP 57679, 60 FLRA 456 (FLRA 2004).
* ***Broida:*** A retroactive bargaining order affords the parties the ability to negotiate and implement the results of their agreement retroactively, thereby approximating the situation that would have existed had the respondent fulfilled its statutory obligations. Furthermore, a retroactive bargaining order is used where it is clear that some employees have been harmed by an agency's unlawful conduct, but there is no way to ascertain their identity through compliance proceedings. [*Broida Guide to Federal Labor Relations Authority Law and Practice:* Retroactive Bargaining Orders; Make Whole Remedies](http://www.cyberfeds.com/CF3/servlet/GetDocByTitle?doctitle=Chapter+08:+Unfair+Labor+Practices,+Subchapter+05:+Remedies,+Section+B:+Failure+to+Bargain,+Subsection+01:+Retroactive+Bargaining+Orders;+Make+Whole+Remedies).
* A retroactive bargaining order may be used to allow the parties to identify through negotiations those employees entitled to back pay. *Pueblo Depot Activity*, 95 FLRR 1-1037, 50 FLRA 310 (FLRA 1995).

**Monetary issues**

* Because the remedial provisions of the statute do not waive sovereign immunity, the FLRA is prohibited from awarding monetary damages that do not relate to an unlawful reduction in pay, allowances or differentials under the Back Pay Act. *Immigration and Naturalization Service*, 96 FLRR 1-1100, 52 FLRA 103 (FLRA 1996).
* The statute does not contain a waiver of sovereign immunity. It authorizes the FLRA to award back pay only in the context of reinstatement of employees affected by a ULP. *Department of the Army v. FLRA*, *AFGE Local 1441* *(Intervenor)*, 95 FLRR 1-8006, 56 F.3d 273 (D.C. Cir. 1995).
* There is a difference between monetary damages to remedy a ULP, requiring a waiver of sovereign immunity and equitable relief that would allow employees to recoup certain monetary losses resulting from a ULP. *Department of Veterans Affairs*, 100 FLRR 1-1026, 55 FLRA 1213 (FLRA 2000).

**Remedial notice**

* The posting of a notice is a visible signal to employees that a respondent recognizes and intends to fulfill its obligations under the statute. *Department of Housing and Urban Development*, 91 FLRR 1-1324, 41 FLRA 480 (FLRA 1991).
* When the respondent's conduct is an "issue of import" for bargaining unit employees beyond the area where the violation occurred, additional postings in other areas may be warranted. *Federal Bureau of Prisons*, 99 FLRR 1-1048, 55 FLRA 388 (FLRA 1999).
* The FLRA typically directs the highest level official at the activity where the ULP took place to sign the notice to employees acknowledging the violation. *Department of Labor*, 106 LRP 57968, 61 FLRA 825 (FLRA 2006); *Customs Service*, 103 LRP 32167, 58 FLRA 712 (FLRA 2003).

**Non-traditional remedies**

* When the general counsel requests a non-traditional remedy, the record must establish the need. *Department of Commerce*, 98 FLRR 1-1167, 54 FLRA 987 (FLRA 1998).
* A non-traditional remedy may be ordered where there are no legal or public policy barriers, when the remedy is reasonably necessary and would be effective to recreate the conditions and relationships with which a ULP interfered and would effectuate the policies of the statute, including the deterrence of future violative conduct. *Immigration and Naturalization Service*, 103 LRP 31183, 58 FLRA 656 (FLRA 2003); *F.E. Warren AFB*, 96 FLRR 1-1106, 52 FLRA 149 (FLRA 1996).
* ***Broida:*** A nontraditional remedy might be appropriate to remedy a pattern of statutory violations. [*Broida Guide to Federal Labor Relations Authority Law and Practice:* Nontraditional Remedies](http://www.cyberfeds.com/CF3/servlet/GetDocByTitle?doctitle=Chapter+08:+Unfair+Labor+Practices,+Subchapter+05:+Remedies,+Section+D:+Other+Remedies;+Remedial+Issues,+Subsection+01:+Nontraditional+Remedies), *citing* *Immigration and Naturalization Service*, 103 LRP 31183, [58 FLRA 656](http://www.cyberfeds.com/CF3/servlet/GetCase?cite=58+FLRA+656) (FLRA 2003); *see also* *U.S. Penitentiary, Leavenworth*, *Kan.,* 99 FLRR 1-1111, 55 FLRA 704 (FLRA 1999).
* Non-traditional remedies may be appropriate where a respondent has engaged in a pattern of statutory violations. Where a non-traditional remedy was deemed necessary, the FLRA ordered the top management official to acknowledge statutory violations by reading the notice to employees at a mandatory meeting. *U.S. Penitentiary, Leavenworth*, *Kan.,* 99 FLRR 1-1111, 55 FLRA 704 (FLRA 1999).
* To deter future violations, the FLRA has ordered the non-traditional remedy of distributing the signed remedial order to certain management representatives. *Department of Veterans Affairs*, 100 FLRR 1-1158, 56 FLRA 696 (FLRA 2000); *U.S. Penitentiary, Florence, Colo.*, 98 FLRR 1-1037, 53 FLRA 1393 (FLRA 1998).

**Status quo ante remedies -- general provisions**

* When an agency makes unilateral changes and refuses to bargain over them, the typical remedy is for the FLRA to order a make whole or status quo ante remedy. The purpose of such a remedy is to ensure agencies bargain with their unions. *Federal Deposit Insurance Corporation v. FLRA*, 92 FLRR 1-8045, 977 F.2d 1493 (D.C. Cir. 1992).
* The purpose of status quo ante relief is to place parties in the positions they would have occupied had there been no unlawful conduct. *National Guard Bureau*, 101 FLRR 1-1134, 57 FLRA 240 (FLRA 2001).
* Arbitrators have broad discretion in fashioning remedies and may order a return to the status quo ante for a violation of law or an agreement. *Customs and Border Protection*, 107 LRP 67753, 62 FLRA 263 (FLRA 2007).
* The appropriateness of a status quo ante remedy is judged on a case-by-case basis balancing the nature of a particular violation against the potential degree of disruption to government operations. *FCI Petersburg, Va.*, 82 FLRR 1-1487, 8 FLRA 604 (FLRA 1982); *Customs Management Center*, 101 FLRR 1-1019, 56 FLRA 809 (FLRA 2000).
* An agency's budgetary problems are not a sufficient reason for the FLRA to deny status quo ante relief. *AFGE v. FLRA*, 86 FLRR 1-8039, 785 F.2d 333 (D.C. Cir. 1986).

**Status quo ante remedy may be inappropriate**

* Where an arbitrator finds an agreement violation in an agency's failure to bargain but does not also find a statutory violation, there is no requirement that the arbitrator order a return to the status quo. *IRS, Andover Service Center*, 101 FLRR 1-1136, 57 FLRA 256 (FLRA 2001).
* The FLRA found a status quo ante remedy inappropriate where, during the pendency of a ULP proceeding, the parties negotiated to impasse, the union did not request a return to the status quo before the FSIP, and the FSIP resolved the dispute. *Department of Labor*, 106 LRP 32777, 61 FLRA 603 (FLRA 2006).
* In lieu of a status quo ante order, the FLRA may issue a retroactive bargaining order where it is clear some employees were harmed by an agency's unlawful conduct, but it is not possible to ascertain their identity. An RBO allows the parties to negotiate and implement their agreement retroactively, thereby creating the results that would have been achieved but for the agency's failure to bargain. *Letterkenny Army Depot*, 104 LRP 57679, 60 FLRA 456 (FLRA 2004).
* Where the FLRA found it unclear as to what positions the parties would have been in absent the agency's failure to bargain, it found a status quo ante remedy inappropriate. Instead the FLRA issued a prospective bargaining order. *Department of Housing and Urban Development*, 102 LRP 21263, 58 FLRA 33 (FLRA 2002).
* The FLRA ruled a status quo ante remedy inappropriate where it would affect the security level at a military installation. The FLRA ordered the agency to cease and desist from future refusals to bargain. *Willow Grove Air Reserve Station*, 102 FLRR 1-1091, 57 FLRA 852 (FLRA 2002).

**The *FCI* factors**

* There are five factors to be considered in determining whether a status quo ante remedy should be imposed when an agency's failure to bargain involved an exercise of its management rights: 1) whether and when notice was given to the union; 2) whether and when the union requested bargaining; 3) the willfulness of the agency's action in failing to discharge its bargaining obligation; 4) the nature and extent of the impact experienced by adversely affected employees; and 5) whether and to what degree a status quo ante order would disrupt or impair the efficiency of agency operations. *FCI Petersburg, Va.*, 82 FLRR 1-1487, 8 FLRA 604 (FLRA 1982); *SSA, Office of Hearings and Appeals*, 105 LRP 2920, 60 FLRA 549 (FLRA 2005).
* An agency's argument that a return to the status quo would unduly disrupt operations must be based on record evidence. *Defense Commissary Agency, Peterson AFB*, 106 LRP 50876, 61 FLRA 688 (FLRA 2006).
* While the first *FCI* factor weighed against a return to the status quo, but the other four factors supported a status quo ante remedy, the FLRA directed the agency to return employees to their previous offices. *Pension Benefit Guaranty Corporation*, 103 LRP 37848, 59 FLRA 48 (FLRA 2003).
* When it failed to bargain over the impact of a RIF, the agency asserted that a status quo ante order was inappropriate because the RIF was undertaken for budgetary reasons. The FLRA concluded, however, that the agency failed to establish how a return to the status quo would affect its efficiency or mission accomplishment. *Defense Commissary Agency*, *Peterson AFB*, 106 LRP 50876, 61 FLRA 688 (FLRA 2006).
* When an agency's failure to bargain was intentional, even though based on a belief that it had no duty to bargain, the FLRA will find the violation willful for the purpose of applying the *FCI* factors. *Immigration and Naturalization Service*, 100 FLRR 1-1092, 56 FLRA 351 (FLRA 2000).
* The fact that an agency has the right to ultimately implement a change that adversely affects employees does not provide a basis for denying a status quo ante remedy. *Western Area Power Administration*, 100 FLRR 1-1044, 56 FLRA 9 (FLRA 2000).
* The *FCI* factors are not all-inclusive. The FLRA may consider other factors in determining whether a status quo ante order is appropriate. *Federal Deposit Insurance Corporation*, 93 FLRR 1-1210, 48 FLRA 313 (FLRA 1993).
* A finding that a change in work schedules had more than a de minimis effect supported a status quo ante remedy. *Veterans Administration Medical Center, Prescott*, 92 FLRR 1-1357, 46 FLRA 471 (FLRA 1992).

**Special circumstances**

* ***Broida:*** The use of a status quo remedy depends in part on whether the agency failed to bargain on substance or impact. *Immigration and Naturalization Service*, 103 LRP 47892, 59 FLRA 387 (FLRA 2003) summarizes the doctrine. Where an agency has an obligation to bargain over the substance of a matter, and fails to meet that obligation, the FLRA will grant a status quo ante remedy in the absence of special circumstances. [*Broida Guide to Federal Labor Relations Authority Law and Practice:* Status Quo Remedy Required](http://www.cyberfeds.com/CF3/servlet/GetDocByTitle?doctitle=Chapter+08:+Unfair+Labor+Practices,+Subchapter+05:+Remedies,+Section+B:+Failure+to+Bargain,+Subsection+02:+Status+Quo+Remedy+Required); *see also* *Warner Robins Air Logistics Center*, 98 FLRR 1-1062, 53 FLRA 1664 (FLRA 1998); *Defense Commissary Agency, Northeast Region*, 103 LRP 56106, 59 FLRA 472 (FLRA 2003).
* ***Broida:*** By contrast, where an agency has an obligation to bargain over only the impact and implementation of a matter, and fails to meet that obligation, the FLRA applies the factors set forth in *FCI Petersburg, Va.*, 82 FLRR 1-1487, 8 FLRA 604 (FLRA 1982), to determine whether a status quo ante remedy is appropriate. [*Broida Guide to Federal Labor Relations Authority Law and Practice:* Status Quo Remedy Required](http://www.cyberfeds.com/CF3/servlet/GetDocByTitle?doctitle=Chapter+08:+Unfair+Labor+Practices,+Subchapter+05:+Remedies,+Section+B:+Failure+to+Bargain,+Subsection+02:+Status+Quo+Remedy+Required), *citing* *Immigration and Naturalization Service*, 103 LRP 47892, 59 FLRA 387 (FLRA 2003).
* An agency claiming special circumstances bears the burden of showing these special circumstances exist. *SSA, Office of Hearings and Appeals*, 103 LRP 32789, 58 FLRA 722 (FLRA 2003).
* Because 5 USC 6131 requires the agency to bargain over the substance of its cancellation of a compressed work schedule, the agency was required to show that special circumstances precluded a status quo ante order. *Immigration and Naturalization Service*, 103 LRP 47892, 59 FLRA 387 (FLRA 2003).
* Safety and health concerns may be factors to take into account in applying the special circumstances standard, but the agency must demonstrate special circumstances through record evidence. *Defense Commissary Agency, Northeast Region*, 103 LRP 56106, 59 FLRA 472 (FLRA 2003).
* Public policy considerations did not rise to the level of special circumstances so as to preclude the issuance of a status quo ante order. *Luke AFB*, 94 FLRR 1-1038, 49 FLRA 137 (FLRA 1994).