

## FAQ re: (b)(1) Bargaining

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*The following presents a collection of frequently asked questions re: the current state of the case law on (b)(1) bargaining. It represents solely the personal conclusions and opinions of the author. 5/29/02*

### **1. What, specifically, are (b)(1) issues?**

The term (b)(1) refers to matters outlined in section 7106 (b)(1) of the Statute. It grants the discretion to agency management to bargain concerning such matters as the technology, methods and means of performing work, as well as the numbers, types and grades of employees assigned to perform a particular task, or to serve on a particular shift or tour of duty.

### **2. What are examples of typical (b)(1) provisions?**

Common examples of (b)(1) provisions in are those that obligate an agency to use a specific numbers of employees to perform certain tasks, or that require specific numbers of employees to staff certain tours of duty—such as setting a minimum number of employees to be assigned to a particular shift. Some (b)(1) provisions also may establish specific shift hours, and require union agreement before altering them, or require the use of particular technology.

### **3. What is the immediate legal impact of an agency's notification to a union that it no longer intends to be bound by current (b)(1) provisions in agreements?**

It does not change anything overnight. That is, the procedures and arrangements specified in local agreements, as well as other established conditions of employment, remain in effect until such time as agency management determines it is appropriate to change them. The primary impact is that managers will have recovered the authority to make certain changes or adjustment to such things as staffing levels or shift hours without first having to first secure union agreement as to the basic decision.

### **4. What about the bargaining obligation? If, for example, a manager determines that a current provision in a practice or expired agreement (e.g., one requiring a specific number of employees on a particular shift) should be changed to improve efficiency, doesn't the agency still have to bargain with the union over the content of a new provision?**

No. The content of the provision itself—for example, whether a specific number of employees must be assigned to a particular shift—is a (b)(1) issue. Therefore the decision itself is not open to negotiation.

### **5. Would there be any obligation to notify the union of the intended change and bargain about the impact or implementation of the decision?**

Yes. Even if the agency has notified the union that it will no longer be bound by or bargain on the substance of (b)(1) issues, it is still obligated to notify the union of changes that may produce more than a *de minimis* impact on the conditions of employment of unit employees. If

so, it must bargain regarding the impact and implementation of such changes upon request. In virtually all cases, that means there will be an obligation to bargain on the impact of a decision to handle a staffing, technology, or any other (b)(1) matter differently than has been done in the past.

**6. What would constitute a “more than *de minimis* impact” on conditions of employment?**

Practically speaking, virtually any change in starting or quitting times, the number of employees assigned to a task or tour of duty, the technology, methods or means of performing the agency’s work, or virtually any other change that might affect bargaining unit employees would probably qualify as more than *de minimis*.

**7. Does this change in policy mean that agencies should immediately discontinue all provisions that involve (b)(1)?**

No. For one thing, not all current shifts, tours, and operating procedures require changing. They may be fine as-is. Second, you would not want to be tied up in bargaining the impact of numerous changes you are making simultaneously. But if a particular situation is getting in the way of effective or efficient operations or mission accomplishment, it should be changed.

**8. If an agency identifies a particular provision that a) involves a (b)(1) issue (such as number of employees assigned to a tour of duty), and b) determines that it adversely affects effectiveness or efficiency, what, specifically, should it do?**

First, determine whether there is a safe, effective alternative to the current procedure or method of operation. If so, notify the appropriate union official—usually the union president—of the determination to make the change. Then meet to discuss the matter on request. If the union has I&I proposals concerning the change, meet with it to work out the details. And, upon reaching agreement on them, implement the change.

**9. What if the union insists on negotiating a (b)(1) item; or, alternatively, refuses to discuss the change of an existing (b)(1) provision?**

Insistence on bargaining a permissive topic to the point of impasse constitutes an unfair labor practice. If this occurs in your negotiations, make it clear to the other side that you don’t elect to bargain. If the union refuses to move on to other, negotiable proposals, simply implement the change upon the date you had originally specified.

**10. Aren’t we obligated to bargain (b)(1) issues now because we did so in the past? Isn’t that some sort of past practice?**

No. The Statute permits agencies to bargain on (b)(1) issues, but it also allows them to decline to bargain on them again when an agreement expires.

**11. Is there an obligation to bargain on the impact of opting out of (b)(1) bargaining itself?**

No. The election to no longer engage in (b)(1) bargaining or to be bound by agreements involving (b)(1) topics does not, in itself, create an impact on the working conditions of bargaining unit employees. Consequently, there is no resulting obligation to bargain. However, subsequent or “second generation” changes affecting working conditions directly after opting out of (b)(1) agreements usually will involve a bargaining obligation.

**12. What if the parties are unable to agree on proposed ways of dealing with the impact and implementation of an intended change?**

Deal with the matter as you would any other impact bargaining impasse. That is, upon reaching a deadlock (i.e., a point where no further progress is being made) inform the union that the matter is at impasse, and notify it of your intention to implement your most recent offer as of a specific date. If the union seeks assistance from the FSIP in the intervening period, in most cases you will have to postpone implementation until it has concluded its assistance.

**13. What if postponing the change would prevent the agency from carrying out an essential function; e.g., interdiction of a suspected drug shipment or protection of public health?**

If maintenance of the *status quo* would prevent the accomplishment of the agency’s mission, it is preferable to make the change when necessary, rather than waiting for a final resolution of I & I issues. However, make sure the change will measure up to the FLRA’s “necessary functioning” standard before implementing unilaterally. See, for example, *INS*, 55 FLRA 892, and *BATF*, 18 FLRA 466.

**14. What if we have new operational issues that require negotiation (for example, opening a new customer service center) and the union wants to bargain (b)(1) provisions in connection with it?**

Go ahead and negotiate the matter as required by law. But remember that you are not required by law, and are no longer required by an executive order, to negotiate concerning (b)(1) issues. Furthermore, rarely are you likely to find it in the best interests of flexibility, effectiveness or efficiency of operations to agree to (b)(1) proposals.

**15. If (b)(1) are lodged in a document outside our labor agreement—for example, in a memorandum of understanding (MOU) or a partnership agreement—when can such provisions be terminated, and how?**

Each situation must be carefully analyzed to provide a correct answer to that question. If, for example, an MOU contains a (b)(1) provision and does not have a specific duration clause, it could be viewed as being co-terminous with (i.e., running the same period as) the labor agreement. Or, depending on the wording, it could be open to change at any time.

**16. If a labor agreement has expired but contains a “continuation” clause (i.e., a provision requiring that the expired contract continue in effect until a new agreement is finalized), and the “continued” agreement includes (b)(1) provisions that the agency wants to terminate, can it do so, or do they survive until the new contract is completed?**

Again, each situation would have to be analyzed carefully to provide an accurate answer. In most situations meeting the general description provided, however, it is likely that the agency

would be required to continue the (b)(1) provisions along with the rest of the labor agreement until such time as a new agreement could be completed.

**17. Can an agency terminate just the (b)(1) provisions in a contract while “rolling over” the rest of the contract through an automatic renewal provision?**

No. When a contract is “rolled over” (i.e., renewed), all the provisions within it, including those that might involve (b)(1) topics, are renewed.

**18. Can a party announce an election not to bargain on (b)(1) issues when a matter has already been accepted by the FSIP for resolution?**

Yes. An agency is free to terminate bargaining over (b)(1) topics at any time prior to reaching agreement.

**19. Can an agency head disapprove (b)(1) provisions during the review of a labor agreement?**

No. Once agreement is reached, (b)(1) provisions are not susceptible to agency head disapproval simply because they involve (b)(1) topics.

**20. Are there permissive topics of bargaining that are not covered in (b)(1)?**

Yes. Examples would include bargaining concerning positions outside the unit; e.g., supervisory positions. Similarly, bargaining at a level other than the level of recognition is a permissive topic.

**21. What are the primary mistakes that agencies should avoid in dealing with (b)(1) matters in the aftermath of E.O. 12871?**

Agreeing to (b)(1) provisions in the first place, since rarely if ever do they operate to the advantage of agencies in a changing environment. Agreeing to contract provisions that continue all contract articles, including those involving (b)(1), until such time as a replacement agreement is completed. Relying on agency head review to avoid unworkable (b)(1) agreements. Simply rolling over agreements containing (b)(1) provisions.

***Key Legal Points on (b)(1)***

Agencies are authorized to negotiate, at their election, concerning the numbers, types and grades of employees assigned to organizational components, tours of duty and work projects -- as well as upon the technology, methods and means of performing work. 5 USC 7106(b)(1)

Although an agency cannot be compelled to bargain over the substance of 5 USC 7106(b)(1) matters, it is still required to bargain concerning the impact and implementation of them. *Patent and Trademark Office*, 54 FLRA 360

Insisting upon the negotiation of a non-mandatory topic of bargaining to the point of impasse constitutes an unfair labor practice. *FDIC*, 18 FLRA 768

A party may withdraw from the negotiation of a permissive topic of bargaining at any point prior to agreement. *SSA*, 52 FLRA 677

Provisions are not subject to disapproval upon agency head review merely because they implicate permissive topics of bargaining. *National Park Service*, 24 FLRA 56

Provisions involving permissive topics of bargaining may be unilaterally terminated upon the expiration of an agreement. *INS*, 52 FLRA 256

If a party wishes to terminate an agreement concerning a permissive topic, it must notify the other party before or upon expiration of the agreement. *Ft. Sam Houston*, 15 FLRA 974

If parties agree to extend all terms of an agreement pending its re-negotiation, provisions involving permissive topics remain in effect also. *Ft. Sam Houston*, 15 FLRA 974

The fact that a (b)(1) topic was included in a previous agreement does not convert it from a permissive to a mandatory topic of bargaining. *Defense Contract Audit Agency, Central Region*, 57 FLRA 172

A proposal that would require the agency to maintain in full force and effect all provisions of an expired agreement -- including those involving permissive topics of bargaining -- pending finalization of a new agreement, is in itself a permissive topic of bargaining. *Washington National Guard*, 38 FLRA 295