

Executive Order 14003, *Protecting the Federal Workforce*, and Bargaining over Matters under 7106(b)(1) of the Federal Service Labor-Management Relations Statute

Frequently Asked Questions (FAQ)

Training Presented October 28, 2021 - <https://youtu.be/Qu1RaRcM7Bg>

<i>Does the Authority have any guidance or training on differentiating between 7106(a) and 7106(b)?</i>	1
<i>Does "numbers, types, and grades" only apply to bargaining-unit employees and positions?</i>	2
<i>Is a proposal to bargain over 7106(b)(1) issues a 7106(b)(1) issue itself? What about a proposal to establish pre-decisional involvement (PDI)?</i>	2
<i>It was noted, some proposals could be both (b)(1) and (b)(2) or (3) proposals. Is this a distinction we should pay attention to? If yes, why?</i>	2
<i>Will the Authority issue a Policy Statement on Executive Order 14003?</i>	2
<i>What is the FLRA's role if agencies declare a proposal non-negotiable under 7106(b)(1)?</i>	2
<i>There is some dispute within our agency as to whether it would be an unfair labor practice for the Union to push the agency to Impasse on (b)(1) matters. Can you elaborate?</i>	3
<i>Is (b)(1) bargaining to occur pre-change implementation, or post implementation? Or both. . . depending on what, exactly?</i>	3
<i>What is necessary to be most successful bargaining (b)(1) matters?</i>	3
<i>Can we successfully bargain over (b)(1) matters using distributive (position-based) bargaining methods?</i>	4
<i>How, if at all, can you use an integrative bargaining model when the parties' interests are inherently in conflict, or when the other party is using a distributive model?</i>	5
<i>What are some typical subjects addressed in process agreements?</i>	5
<i>We don't trust them when we bargain other things. Why should we trust them when bargaining (b)(1) subjects?</i>	6
<i>How do we go about enforcing the requirement to bargain over permissive subjects under the EO? Can that be done with a charge, or is there some alternative process to enforce the election to bargain, if an agency is refusing to bargain?</i>	7
<i>The presenter indicated that bargaining over 7106(b)(1) matters shall be substantive. Does that mean that bargaining over permissive topics will no longer be limited to impact and implementation?</i>	8
<i>Can unions require agencies to bargain over permissive subjects? That is, does the EO give unions a right to force bargaining over such topics?</i>	8

Does the Authority have any guidance or training on differentiating between 7106(a) and 7106(b)?

The FLRA's website, [FLRA.gov](https://www.flra.gov), contains several guides and training materials. The guides can be found [here](#); the [Guide to Negotiability](#), in particular, contains a detailed discussion of management rights and 7106 of the Statute. Additionally, many of the FLRA's course materials from previous trainings, several of which concern 7106 issues, can be found [here](#). Further, many helpful training programs – including the October 28, 2021 E.O. 14003 and Section 7106(b)(1) training – can be found at the FLRA's YouTube channel [here](#).

Does "numbers, types, and grades" only apply to bargaining-unit employees and positions?

Before a matter under 7106(b) of the Statute requires an agency to bargain, the matter must first involve bargaining-unit employees' conditions of employment. The Statute requires bargaining only over bargaining-unit employees' conditions of employment, not conditions of employment of individuals outside the bargaining unit. But, even some matters concerning unit employees' conditions of employment are outside the duty to bargain under the Statute. As relevant here, if the matter involves a management right under 7106(a) of the Statute, then the matter/proposals are outside the duty to bargain, unless the matter falls within 7106(b). With specific regard to "numbers, types, and grades" – a matter falling within 7106(b)(1) – the Statute provides that the agency may elect to bargain over those matters, although Executive Branch policy under Executive Order 14003 directs the head of each agency to elect to bargain over these subjects and for agency heads to instruct subordinate officials to do the same. Note, however, that even a proposal that directly determines the conditions of employment of individuals other than bargaining-unit employees may be within the duty to bargain if the proposal "vitaly affects" bargaining-unit employees.

Is a proposal to bargain over 7106(b)(1) issues a 7106(b)(1) issue itself? What about a proposal to establish pre-decisional involvement (PDI)?

The Statute makes a proposal to bargain over 7106(b)(1) issues a 7106(b)(1) matter. While the Authority has found proposals providing for joint labor-management committees whose purpose is to make recommendations concerning conditions of employment to be negotiable, the Authority has not yet addressed whether a proposal to establish PDI falls within 7106(b)(1).

It was noted, some proposals could be both (b)(1) and (b)(2) or (3) proposals. Is this a distinction we should pay attention to? If yes, why?

Putting aside any possible impact of the Executive Order on the Statute, the Statute itself makes 7106(b)(1) topics permissive subjects of bargaining. By contrast, 7106(b)(2) and 7106(b)(3) topics are mandatory subjects of bargaining. Therefore, if a bargaining proposal is a procedure or an appropriate arrangement under (b)(2) or (b)(3), the agency must bargain over it, regardless of whether the proposal also falls within 7106(b)(1).

Will the Authority issue a Policy Statement on Executive Order 14003?

Under 5 C.F.R. part 2427, the Authority may issue "General Statements of Policy or Guidance," or "Policy Statements," upon request from certain designated individuals or entities. See 5 C.F.R. § 2427.2. In deciding whether to issue a Policy Statement, the Authority considers several factors, including whether the question can more appropriately be resolved by other means. See *id.* § 2427.5. Currently, there is no request for a Policy Statement regarding the Executive Order pending before the Authority. If one is filed, then the Authority will consider it based on the standards set out in § 2427.5.

What is the FLRA's role if agencies declare a proposal non-negotiable under 7106(b)(1)?

Parties are always free to file an unfair labor practice charge alleging a failure to bargain. Failing to bargain over a proposal previously found to be negotiable, or substantially identical to a proposal the Authority previously determined to be negotiable, is an unfair labor practice. *Dep't of the Air Force, U.S. Air Force Acad.*, 6 FLRA 548 (1981), *affirmed sub nom. Dep't of the Air Force, U.S. Air Force Acad. v. FLRA*, 717 F.2d 1314 (10th Cir. 1983).

The Union also can file a negotiability appeal with the Authority, although the Authority will dismiss the negotiability appeal if there is a pending, “directly related” unfair-labor-practice charge or grievance alleging an unfair labor practice. See 5 C.F.R. § 2424.30(a). That dismissal will be without prejudice to the union’s right to refile the negotiability appeal, once the directly related charge or grievance is administratively resolved, at which point the Authority will determine whether it is still necessary to resolve the petition. See *id.* Assuming that the negotiability petition is properly before the Authority, under current standards, if the Authority finds that the proposal concerns a 7106(b)(1) matter, it will issue an order stating that the proposal is bargainable at the agency’s election. See *id.* § 2424.40(b).

There is some dispute within our agency as to whether it would be an unfair labor practice for the Union to push the agency to Impasse on (b)(1) matters. Can you elaborate?

In *Sport Air Traffic Controllers Organization (SATCO)*, 52 FLRA 339 (1996), the Authority held insistence to impasse on using a recording device during contract negotiations (a permissive matter) supported a finding of bad faith bargaining. It is unclear if that holding will apply to bargaining over substantive proposals unrelated to ground rules. However, OPM issued guidance to agencies on March 5, 2021 stating that “A failure by agency managers to engage in bargaining over the subjects covered by 5 U.S.C. 7106(b)(1) would be inconsistent with the President’s Directive.” Any questions on the President’s directive should be directed to OPM at awr@opm.gov.

Is (b)(1) bargaining to occur pre-change implementation, or post implementation? Or both . . . depending on what, exactly?

Good faith bargaining requires bargaining to agreement or impasse *prior to* implementation unless exigent circumstances require implementation before bargaining is completed.

What is necessary to be most successful bargaining (b)(1) matters?

The most successful (b)(1) negotiators:

- Focus on achieving important outcomes about things that matter.
- Engage with key stakeholders early and often.
- Seek agreement from key stakeholders and *both* bargaining teams on the meaning of success when bargaining (b)(1) matters.
- Focus on what both parties care about most (i.e., key interests) rather than just swap written proposals (i.e., positions).
- Consistently demonstrate mutual respect for each other, for others’ legitimate interests, for others’ ideas, and for the collective-bargaining process.
- Understand the differences between distributive and integrative bargaining models; then *jointly* adopt the most appropriate bargaining model. (Bargaining models defined below in, [Can we successfully bargain over \(b\)\(1\) matters using distributive bargaining methods?](#))
- Solve pragmatic problems rather than just resolve collective-bargaining disputes.
- Continuously improve their own bargaining-related skills, including active listening, and continuously improve their collective-bargaining process.

- Adopt a process agreement that encourages positive bargaining behaviors rather than just adopt ground rules that discourage negative bargaining behaviors.
- Brief all negotiators on current collective-bargaining policy and law.

Can we successfully bargain over (b)(1) matters using distributive (position-based) bargaining methods?

Yes, you can successfully bargain (b)(1) matters using distributive bargaining methods; but you run the risk of being less successful than if you use integrative bargaining methods.

Distributive bargaining—often called traditional bargaining or position-based bargaining—is a strategy used to distribute what negotiators perceive to be fixed resources. Negotiators generally act based on the assumption that they can only take a larger slice of a limited pie by making other negotiators take a smaller slice.

Distributive negotiators adopt competing positions—their preferred outcome—and exchange proposals containing their preferred way to achieve those positions.

In contrast, integrative bargaining—often called interest-based bargaining or principled negotiation—is a strategy used to extract maximum value from the bargaining process for all stakeholders. Negotiators generally act based on the assumption that the most successful outcomes result from a bargaining process that better satisfies key interests. Interests are the reasons that stakeholders care about the outcome of bargaining. Rather than engage over competing positions and proposals, integrative negotiators collaboratively generate options intended to satisfy as many joint and separate interests as possible.

Following are some tips for negotiators who engage in distributive bargaining over (b)(1) matters.

Identify the issue. Before drafting a proposal, first identify the issue or the problem you are trying to solve. Try writing down the issue in the form of a question that will be answered by the language of your negotiated agreement. Be specific and try to define the issue narrowly. See if both parties can agree on the question before you draft a proposal that contains your preferred answer.

For example, what if an agency wants to start performing a new function or substantially change how employees perform an existing function? One important question might be, “How many employees should be assigned to perform the job function?” Before bargaining with the union, the agency might have planned on this being a one-person function. However, the union’s opening (b)(1) proposal might be, “Four employees will perform this job.”

Ask why. How can the parties bridge the gap between their proposals? One important thing they can do is ask “why?” In this hypothetical, the union can ask why the agency wants only one person to perform the job function. The agency can ask why the union wants four employees to perform the job. They might discover that the agency is most concerned about effectiveness and efficiency performing the job function, while the union is most concerned about the employees’ health and safety.

Share information. Discovering what the other party cares about can be critical to successful (b)(1) bargaining, but so is sharing relevant information. In this hypothetical, the union might share information that helps the agency understand how assigning only one employee to the job function could jeopardize that person’s safety. The agency might share information showing that assigning four employees to the job function could be very costly without a meaningful improvement to safety. The more information the parties share, the more likely

they will discover common ground. Transparency also builds confidence in the legitimacy of both parties' goals and proposals, which improves the parties' collective-bargaining relationship.

Facilitator. Ask a facilitator to be available if needed. A skilled facilitator can improve your bargaining process or at least help you overcome barriers to success. In this hypothetical case, a facilitator helped the parties share enough information for both to see that, without new safety protocols, three employees assigned to the job function might not be unreasonable. So the agency offered to implement new safety protocols and the parties agreed to the assignment of only two employees to the job function.

How, if at all, can you use an integrative bargaining model when the parties' interests are inherently in conflict, or when the other party is using a distributive model?

"Interests" are the key reasons that we care so much about what we are bargaining. They answer the question, "Why is this so important?" When we use an integrative model to bargain (b)(1) matters, we usually define success as achieving solutions that satisfy as many joint and separate interests as possible.

Interests are rarely in conflict. Generally, interests are either separate or they are common to both parties. When it feels like they are in conflict, most often the parties have reverted to a distributive form of bargaining. That results in conflict between the parties' *positions*—i.e., their proposals—rather than their interests. A trained facilitator usually can help negotiators recognize how they went off the rails and help them realign their bargaining process.

What are some typical subjects addressed in process agreements?

Ground-rules agreements generally contain requirements and restrictions to discourage negative bargaining behaviors. In contrast, process agreements are designed to encourage positive bargaining behaviors. Integrative-bargaining training might help you identify essential elements for your (b)(1) process agreement. Consider the following examples.

a. Principles

Parties often begin with principles that will guide their (b)(1) bargaining, such as,

1. We will attack problems, not each other;
2. We will keep asking "why" (respectfully, of course);
3. We will strive to develop creative options that satisfy as many interests as possible;
4. We will use power constructively *with* each other, not destructively *against* each other; and
5. Unless we are ready to say "yes," we will explore ways to say "yes, but ..." rather than "no."

b. Success

In addition to principles, process agreements can contain commitments to:

1. Reconsider the meaning of success; and to *help each other* be successful.
2. Treat differences as a strengths and value diversity in all of its forms.
3. Share appropriate information.
4. Educate stakeholders, and rather than solicit their positions, listen to why they care about the topic you are bargaining (i.e., their interests).
5. Acknowledge that success requires both parties to be prepared, and an agreement to enter each bargaining session fully prepared.

- c. Facilitator
Many process agreements contain parties' agreements to use a skilled, external facilitator when appropriate to help manage process so negotiators can focus on substance.
- d. Decision-making model
Many process agreements adopt consensus as the parties' decision-making model. Achieving consensus requires parties' willingness to consider and adopt solutions they support even when they might prefer something else. Training normally is required to apply this model to complex, sensitive, and difficult matters. Facilitation and even mediation—which is assisted negotiation—might also be required to reach consensus on the most difficult matters.
- e. Also ...
Many process agreements contain sections on:
 1. Negotiation training;
 2. The need for consistency, predictability, and transparency; and
 3. The need for commitment, vision, and courage. Commitment to work together for mutual success. Joint vision of what you intend to accomplish through bargaining. Courage to persistently do the right thing despite naysayers, keep fear of failure at bay, and avoid becoming discouraged when times are tough.

We don't trust them when we bargain other things. Why should we trust them when bargaining (b)(1) subjects?

The response to this question contains two parts.

First, if you do not trust each other, you still can successfully bargain (b)(1) subjects by creating a bargaining process you trust. You can do this by jointly adopting a combination of expert facilitation, a good process agreement, and good ground rules to guide you. Expect that (b)(1) bargaining will be more difficult as a result of lingering mistrust. Most likely, bargaining will require more resources, it will take longer, it will feel like additional concessions are being demanded, and the other party might ask for verification that you think is excessive and feels insulting. Those are common consequences of damaged trust. This does not make successful bargaining impossible, just more difficult.

The second part of this response is a bit longer.

Labor-management relationships exist between organizations. They are *institutional*. Trust is not institutional. Trust is *interpersonal*. So, when we talk about trust and mistrust, think about it as something between people, not between institutions.

We tend to trust people whom we perceive as honest, respectful, humble, appreciative, transparent, caring, reliable, and more like us than they are different from us.

Trust is not something we create. Trust is something we *grow* slowly over time. Trust is far easier and quicker to damage than it is to grow. Once we damage trust, it becomes far more difficult to repair.

There is no magic formula for repairing trust in a labor-management relationship. It also is not a unilateral exercise. Repair requires effort by everyone involved.

To repair trust in each other, first acknowledge that trust must be repaired. Ask yourself, what is it about “them” that causes you to not trust them? Instead of accusing them of being untrustworthy, try talking with them about the specific behavior or characteristic in a nonthreatening and neutral way. Try expressing it as your perception rather than declare it to be an absolute fact. Listen carefully, tell them what you heard them say, listen again, and work together to identify ways for them to earn your trust. Use an expert facilitator if doing so might help.

It would be a mistake for someone to enter an existing labor-management relationship and think they can inherit the trust others had for their predecessor. Unfortunately, someone can enter an existing labor-management relationship and inherit the mistrust others had for their predecessor. That’s not something about unions or management. That’s something about people in general.

If you share responsibility for damaging trust in the labor-management relationship, or if you inherited a relationship dominated by mistrust, consider taking the initiative to begin repairing the damage. Recognize that, because trust is personal, repair efforts should not be delegated. Repair takes time, so today might be a good time to begin.

How is this EO enforceable, given the clear language in the Statute, and Congress’ intent, that the legal discretion to bargain on permissive subjects was granted to the agencies?

OPM issued guidance to agencies on March 5, 2021 stating that “A failure by agency managers to engage in bargaining over the subjects covered by 5 U.S.C. 7106(b)(1) would be inconsistent with the President’s Directive. Therefore, in order to carry out the policy decision of the President reflected in the EO, agencies must commence bargaining in good faith over all of these subjects.”

OPM’s guidance is located here: <https://www.chcoc.gov/content/guidance-implementation-executive-order-14003-protecting-federal-workforce>. Any questions on the President’s directive should be directed to OPM at awr@opm.gov.

How do we go about enforcing the requirement to bargain over permissive subjects under the EO? Can that be done with a charge, or is there some alternative process to enforce the election to bargain, if an agency is refusing to bargain?

OPM issued guidance to agencies on March 5, 2021 stating that “A failure by agency managers to engage in bargaining over the subjects covered by 5 U.S.C. 7106(b)(1) would be inconsistent with the President’s Directive. Therefore, in order to carry out the policy decision of the President reflected in the EO, agencies must commence bargaining in good faith over all of these subjects.”

OPM’s guidance is located here: <https://www.chcoc.gov/content/guidance-implementation-executive-order-14003-protecting-federal-workforce>. Any questions on the President’s directive should be directed to OPM at awr@opm.gov.

The presenter indicated that bargaining over 7106(b)(1) matters shall be substantive. Does that mean that bargaining over permissive topics will no longer be limited to impact and implementation?

OPM issued guidance to agencies on March 5, 2021 stating that “A failure by agency managers to engage in bargaining over the subjects covered by 5 U.S.C. 7106(b)(1) would be inconsistent with the President’s Directive. Therefore, in order to carry out the policy decision of the President reflected in the EO, agencies must commence bargaining in good faith over all of these subjects.” In addition, OPM’s guidance further states “In order to implement the policies of the Executive Order, agencies shall agree to bargain over the substance of § 7106(b)(1) subjects, whether at the union’s request (e.g. midterm bargaining request) or as the result of a proposed agency action (e.g. union responding to an agency notice of a pending change subject to collective bargaining).”

OPM’s guidance is located here: <https://www.chcoc.gov/content/guidance-implementation-executive-order-14003-protecting-federal-workforce>. Any questions on the President’s directive should be directed to OPM at awr@opm.gov.

Can unions require agencies to bargain over permissive subjects? That is, does the EO give unions a right to force bargaining over such topics?

OPM issued guidance to agencies on March 5, 2021 stating that “A failure by agency managers to engage in bargaining over the subjects covered by 5 U.S.C. 7106(b)(1) would be inconsistent with the President’s Directive. Therefore, in order to carry out the policy decision of the President reflected in the EO, agencies must commence bargaining in good faith over all of these subjects.”

OPM’s guidance is located here: <https://www.chcoc.gov/content/guidance-implementation-executive-order-14003-protecting-federal-workforce>. Any questions on the President’s directive should be directed to OPM at awr@opm.gov.