



FEDERAL LABOR RELATIONS AUTHORITY

5 CFR Part 2424

Negotiability Proceedings

AGENCY: Federal Labor Relations Authority.

ACTION: Proposed rule with request for comments.

SUMMARY: The Federal Labor Relations Authority (FLRA) intends to revise the regulations governing negotiability appeals to better “expedite proceedings,” consistent with Congress’s direction, and with the FLRA’s goal in its strategic plan to “ensure quality, timely . . . decision-making processes.” The proposed rule is designed to streamline the adjudication process for negotiability appeals, resulting in more timely decisions for the parties.

DATES: Written comments must be received on or before [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

ADDRESSES: You may send comments, which must include the caption “Negotiability Proceedings,” by one of the following methods:

- Email: FedRegComments@flra.gov. Include “Negotiability Proceedings” in the subject line of the message.
- Mail or Hand Delivery: Emily Sloop, Chief, Case Intake and Publication, Federal Labor Relations Authority, Docket Room, Suite 200, 1400 K Street NW, Washington, DC 20424-0001.

Instructions: Please do not email comments if you have mailed or hand delivered the same comments.

FOR FURTHER INFORMATION CONTACT: Rebecca Osborne, Deputy Solicitor,
at rosborne@flra.gov or at: (202) 218-7986.

SUPPLEMENTARY INFORMATION:

Background

The Federal Service Labor-Management Relations Statute (the Statute) authorizes the FLRA to adjudicate a number of matters related to federal sector labor-management relations, including negotiability appeals. Specifically, the Statute provides that “if an agency involved in collective bargaining with an exclusive representative alleges that the duty to bargain in good faith does not extend to any matter, the exclusive representative may appeal the allegation to the Authority in accordance with the provisions of this subsection.” 5 U.S.C. 7117(c)(1). The Statute provides further that “[t]he Authority shall expedite proceedings under this subsection to the extent practicable and shall issue . . . a written decision on the allegation and specific reasons therefor at the earliest practicable date.” 5 U.S.C. 7117(c)(6). The proposed changes are intended to allow the Authority to expedite negotiability appeal proceedings to allow for a written decision at the earliest practicable date.

Analysis of the Regulations

Section 2424.2 Definitions

Section 2424.2 clarifies the definition of a “bargaining obligation dispute” and provides an additional example of such a dispute. The section also changes the definition of Alternative Dispute Resolution to reflect the current practice. The section adds several examples of a “negotiability dispute” to provide a more complete, but not necessarily exhaustive, list. The section proposes removing the definition of “severance” because it

is unclear whether providing for severance of a proposal or provision adds value to the adjudicatory process. Other changes to the regulations will allow for FLRA consideration of particular matters when those matters are submitted as distinct proposals or provisions. However, as discussed in connection with section 2424.22, the Authority is also considering a second option that would limit the opportunities for severance, rather than eliminating it completely.

Section 2424.10 is amended to change the heading to “Alternative Dispute Resolution” and is clarified to explain that the use of alternative dispute resolution is at the discretion of the FLRA.

Section 2424.11 is amended so paragraph (a) requires an exclusive representative to put in writing its request that an agency provide a written allegation concerning the duty to bargain. Paragraph (b) is amended to obligate an agency to respond within ten (10) days to an exclusive representative’s written request for a written allegation concerning the duty to bargain. The section clarifies that if an exclusive representative chooses to file a petition based on an unrequested written allegation concerning the duty to bargain, then the petition must be filed within fifteen (15) days after the date of service of the unrequested written allegation.

Section 2424.21 is amended to state that if an agency fails to respond to a written request for a written allegation within ten (10) days of the request, then the exclusive representative may file a petition within the next sixty (60) days. If the agency serves a written allegation on the exclusive representative more than ten (10) days after receiving a written request for such allegation, and a petition has not yet been filed, then the petition must be filed within fifteen (15) days of the service of that allegation. If the

exclusive representative files a petition after the expiration of the ten (10) day period, and the agency subsequently serves a written allegation on the exclusive representative, then the FLRA will consider the appeal based upon the petition filed prior to the allegation but may allow the exclusive representative to amend the petition. However, the exclusive representative may not file an additional petition. The FLRA is seeking to prevent negotiability disputes from lingering unresolved for a potentially unlimited period of time, to avoid the inefficiencies of adjudicating stale disputes, and to reduce the potential surprise of a negotiability petition being filed long after a written request for an allegation of nonnegotiability was served. The FLRA seeks comments on whether the proposed language would meet those objectives, and the FLRA welcomes comments with alternative proposals to meet those objectives.

Section 2424.22 adds a new paragraph to allow for division of matters into proposals or provisions. Although the FLRA is proposing the revised subsection wording in this notice, the FLRA is also considering another possible option. It requests comments on the advantages and disadvantages of both options:

Option 1. Eliminating severance altogether and replacing it with the proposed wording in this notice.

Option 2. Allowing only one point in the filing process at which an exclusive representative may request severance. Under this option, the FLRA seeks comments on: (a) when during the filing process this opportunity to request severance should occur; and (b) the advantages and disadvantages of automatically granting all timely severance requests in order to reduce the burden of litigating and resolving these requests. If the FLRA were to automatically grant all timely requests, then: (1) the exclusive

representative would bear the burden of requesting severance in a manner that allowed each severed portion to stand alone, and the burden of explaining the meaning and operation of each portion; (2) even if the exclusive representative failed to meet those burdens, the FLRA would automatically grant severance as requested; and (3) where the exclusive representative failed to meet those burdens, after automatically granting severance, the FLRA would find the severed portions outside the duty to bargain, based on the failure to provide an adequate record.

Section 2424.22 also requires greater specificity in what must be included in a petition and requires the submission of relevant documents. The section is also amended to require that an exclusive representative respond in a petition to any specific arguments that are set forth in an agency's written allegation concerning the duty to bargain or an agency head's disapproval of an agreement.

Section 2424.23 is amended to clarify that the decision to hold a post-petition conference is at the discretion of the FLRA and that, regardless of whether one does occur, the parties must observe all filing deadlines. The FLRA seeks comments on the most appropriate juncture, within the stages of pleading, for the post-petition conference to occur, in cases where a conference is held. The section is also amended to clarify that the FLRA may take other appropriate action, in the exercise of its discretion, to aid in decision making, regardless of whether a post-petition conference occurs.

Section 2424.24 clarifies the content of the agency's statement of position, requires greater specificity about certain matters within the statement of position, and requires the submission of relevant documents.

Section 2424.25 clarifies what is to be included in the exclusive representative's response and removes surplus language. This section is amended to limit the content of the response to matters raised for the first time in the agency's statement of position. Because changes to section 2424.22 would require the exclusive representative to address, in its petition, specific arguments in an agency's written allegation concerning the duty to bargain or an agency head's disapproval of an agreement, the exclusive representative could not wait until filing its response under section 2424.25 to address those matters. Any facts or arguments that should be included in the petition in accordance with the changes to section 2424.22, but are not included in the petition, would be barred from consideration in the exclusive representative's response under section 2424.25.

Section 2424.26 is amended to shorten the time period for the agency's submission of a reply to the exclusive representative's response to ten (10) days and specifies the content to be included. The section also reorganizes the content requirements.

Section 2424.27 removes the time period for filing additional submissions authorized in the discretion of the FLRA. When authorizing additional submissions, the FLRA will establish the deadline for their submission.

Section 2424.30, in paragraph (a), clarifies when the deadline begins to run for refiling a petition that was previously dismissed without prejudice by the FLRA in the case of a related grievance that was administratively resolved. The FLRA requests comments on whether the proposed clarification accurately captures all of the scenarios under which a grievance mentioned in this subsection could be administratively resolved.

Subsection (b) of the section clarifies the process by which the FLRA will resolve matters under various factual scenarios.

Section 2424.31 is amended to include a new heading that more accurately reflects its contents, and to make other minor wording changes.

Section 2424.32 is amended to highlight that the parties' failures to explain their positions thoroughly could lead to an adverse ruling, and that assessing the consequences of such a failure (e.g., waiver, concession) is within the discretion of the FLRA.

Section 2424.40 is amended to make conforming changes to reflect the proposed removal of severance. The section also proposes altering the content of an FLRA order where it finds a duty to bargain by deleting the reference to a "request" to bargain concerning the proposal. The FLRA seeks comments on whether the "request" wording serves a useful purpose. The wording may imply that the burden is on an exclusive representative to re-start negotiations following a negotiability decision, and that the agency is not obligated to take any action until the exclusive representative requests that the agency do so.

Section 2424.41 proposes altering the description of noncompliance with an FLRA order by deleting wording that is already present in section 2424.40. As with the proposed change to section 2424.40, the FLRA seeks comments on whether this wording serves a useful purpose or whether it is duplicative of the wording in 2424.40. In addition, this section proposes adding a deadline of thirty (30) days for an exclusive representative to report the failure to comply with an order, following the expiration of the 60-day period under 5 U.S.C. 7123(a).

Section 2424.50 is amended to explain the criteria in the section are illustrative and there may be other, or more appropriate, examples of an agency rule or regulation for which there is a compelling need. The FLRA solicits specific examples of an agency rule or regulation for which there is a compelling need and appropriate illustrative criteria that would establish a compelling need for the rule or regulation.

Executive Order 12866

The FLRA is an independent regulatory agency, and as such, is not subject to the requirements of E.O. 12866.

Executive Order 13132

The FLRA is an independent regulatory agency, and as such, is not subject to the requirements of E.O. 13132.

Regulatory Flexibility Act Certification

Pursuant to section 605(b) of the Regulatory Flexibility Act, 5 U.S.C. 605(b), the Chairman of the FLRA has determined that this rule, as amended, will not have a significant impact on a substantial number of small entities, because this rule applies only to federal agencies, federal employees, and labor organizations representing those employees.

Executive Order 13771, Reducing Regulation and Controlling Regulatory Costs

This proposed rule is not expected to be subject to the requirements of E.O. 13771 (82 FR 9339, Feb. 3, 2017) because this proposed rule is expected to be related to agency organization, management, or personnel.

Executive Order 13132, Federalism

This regulation will not have substantial direct effects on the States, on the relationship between the National Government and the States, or on distribution of power and responsibilities among the various levels of government. Therefore, in accordance with Executive Order 13132, this proposed rule does not have sufficient federalism implications to warrant preparation of a Federalism assessment.

Executive Order 12988, Civil Justice Reform

This regulation meets the applicable standard set forth in section 3(a) and (b)(2) of Executive Order 12988.

Unfunded Mandates Reform Act of 1995

This rule change will not result in the expenditure by state, local, and tribal governments, in the aggregate, or by the private sector, of \$100,000,000 or more in any one year, and it will not significantly or uniquely affect small governments. Therefore, no actions were deemed necessary under the provisions of the Unfunded Mandates Reform Act of 1995.

Small Business Regulatory Enforcement Fairness Act of 1996

This action is not a major rule as defined by section 804 of the Small Business Regulatory Enforcement Fairness Act of 1996. This rule will not result in an annual effect on the economy of \$100,000,000 or more; a major increase in costs or prices; or significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based companies to compete with foreign-based companies in domestic and export markets.

Paperwork Reduction Act of 1995

The amended regulations contain no additional information collection or record-keeping requirements under the Paperwork Reduction Act of 1995, 44 U.S.C. 3501, et seq.

List of Subjects in 5 CFR Part 2424

Negotiability Proceedings

Federal Labor Relations Authority

Rebecca Osborne,

Federal Register Liaison

Accordingly, for the reasons stated in the preamble, FLRA proposes to amend 5 CFR part 2424 as follows:

PART 2424- [AMENDED]

1. The authority citation for part 2424 continues to read as follows:

Authority: 5 U.S.C. 7134.

2. Revise Section 2424.1 to read as follows:

§ 2424.1 Applicability of this part.

This part applies to all petitions for review filed on or after **[DATE 30 DAYS AFTER DATE OF PUBLICATION OF THE FINAL RULE IN THE FEDERAL REGISTER]**.

3. Amend § 2424.2 by:

- a. Revising paragraphs (a), (b), (c)(2) and (c)(3);
- b. Adding paragraphs (c)(4) through (8); and

- c. Revising paragraphs (e) and (f);
- d. Removing paragraph (h);
- e. Redesignating paragraph (i) as (h); and
- f. Revising newly redesignated paragraph (h).

The revisions and additions to read as follows:

§ 2424.2 Definitions.

* * * * *

(a) *Bargaining obligation dispute* means a disagreement between an exclusive representative and an agency concerning whether, in the specific circumstances involved in a particular case, the parties are obligated by law to bargain over a proposal that otherwise may be negotiable. Examples of bargaining obligation disputes include disagreements between an exclusive representative and an agency concerning agency claims that:

- (1) A proposal concerns a matter that is covered by a collective bargaining agreement;
- (2) Bargaining is not required because there has not been a change in bargaining unit employees' conditions of employment; and
- (3) The exclusive representative is attempting to bargain at the wrong level of the agency.

(b) *Alternative Dispute Resolution* refers to the Federal Labor Relations Authority's efforts to assist parties in reaching agreements to resolve disputes.

(c) * * *

- (2) Directly affects bargaining-unit employees' conditions of employment;
- (3) Enforces an "applicable law," within the meaning of 5 U.S.C. 7106(a)(2);
- (4) Concerns a matter negotiable at the election of the agency under 5 U.S.C. 7106(b)(1);

- (5) Constitutes a “procedure” or “appropriate arrangement” within the meaning of 5 U.S.C. 7106(b)(2) and (3), respectively;
- (6) Is consistent with an Executive Order;
- (7) Is consistent with a Government-wide rule or regulation; and
- (8) Is negotiable notwithstanding agency rules or regulations because:
- (i) The proposal or provision is consistent with agency rules or regulations for which a compelling need exists under 5 U.S.C. 7117(a)(2);
 - (ii) The agency rules or regulations violate applicable law, rule, regulation, or appropriate authority outside the agency;
 - (iii) The agency rules or regulations were not issued by the agency or by any primary national subdivision of the agency;
 - (iv) The exclusive representative represents an appropriate unit including not less than a majority of the employees in the rule- or regulation-issuing agency or primary national subdivision; or
 - (v) No compelling need exists for the rules or regulations to bar negotiations.

** * * *

(e) *Proposal* means any matter offered for bargaining that has not been agreed to by the parties. If a petition for review concerns more than one proposal, then the term “proposal” includes each proposal concerned.

(f) *Provision* means any matter that has been disapproved by the agency head on review pursuant to 5 U.S.C. 7114(c). If a petition for review concerns more than one provision, then the term “provision” includes each provision concerned.

** * * *

(h) *Written allegation concerning the duty to bargain* means an agency allegation that the duty to bargain in good faith does not extend to a proposal.

4. Revise § 2424.10 to read as follows:

§ 2424.10 Alternative Dispute Resolution.

Where an exclusive representative and an agency are unable to resolve disputes that arise under this part, they may request that the Office of Case Intake and Publication refer them to alternative dispute resolution. As resources permit, and in the discretion of the Authority, the FLRA may attempt to assist the parties to resolve these disputes. Parties seeking information or assistance under this part may call or write the Office of Case Intake and Publication at (202) 218–7740, 1400 K Street, NW., Washington, D.C. 20424–0001.

5. Revise § 2424.11 to read as follows:

§ 2424.11 Requesting and providing written allegations concerning the duty to bargain.

(a) *General.* An exclusive representative may file a petition for review after receiving a written allegation concerning the duty to bargain from the agency. An exclusive representative also may file a petition for review if it requests in writing that the agency provide it with a written allegation concerning the duty to bargain and the agency does not respond to the request within ten (10) days.

(b) *Agency allegation in response to request.* The agency has an obligation to respond within ten (10) days to a written request by the exclusive representative for a written allegation concerning the duty to bargain. The agency’s allegation in response to the

exclusive representative's request response must be in writing and must be served in accord with § 2424.2(g).

(c) *Unrequested agency allegation.* If an agency provides an exclusive representative with an unrequested written allegation concerning the duty to bargain, then the exclusive representative may either file a petition for review under this part, or continue to bargain and subsequently request in writing a written allegation concerning the duty to bargain, if necessary. If the exclusive representative chooses to file a petition for review based on an unrequested written allegation concerning the duty to bargain, then the time limit in § 2424.21(a)(1) applies.

6. Amend § 2424.21 by revising paragraph (b) amending paragraph (b) introductory text and paragraph (b)(1) to read as follows:

§ 2424.21 Time limits for filing a petition for review.

(b) If the agency has not served a written allegation on the exclusive representative within ten (10) days after the agency's principal bargaining representative has received a written request for such allegation, as provided in § 2424.11(a), then:

(1) The petition may be filed within sixty (60) days after the expiration of the ten (10) day period, subject to the following:

(i) If the agency serves a written allegation on the exclusive representative more than ten (10) days after receiving a written request for such allegation, and the exclusive representative *has not* previously filed a petition under this paragraph, then the petition must be filed within fifteen (15) days after the date of service of that allegation on the exclusive representative;

(ii) If the agency serves a written allegation on the exclusive representative more than ten (10) days after receiving a written request for such allegation, and the exclusive representative *has* previously filed a petition under this paragraph, then the Authority will consider the appeal filed on the date of the previous petition. The exclusive representative may not file an additional petition, but the Authority may allow amendments to the previous petition based on the written allegation.

7. Revise § 2424.22 to read as follows:

§ 2424.22 Exclusive representative’s petition for review; purpose; divisions; content; service.

(a) *Purpose.* The purpose of a petition for review is to initiate a negotiability proceeding and provide the agency with notice that the exclusive representative requests a decision from the Authority that a proposal or provision is within the duty to bargain or not contrary to law, respectively.

(b) *Divisions.* The petition will be resolved according to how the exclusive representative divides matters into proposals or provisions. If the exclusive representative seeks a negotiability determination on particular matters standing alone, then the exclusive representative must submit those matters as distinct proposals or provisions.

(c) *Content.* You must file a petition for review on a form that the Authority has provided for that purpose, or in a substantially similar format. You meet this requirement if you file your petition electronically through use of the eFiling system on the FLRA’s Web site at www.flra.gov. That Web site also provides copies of petition forms. You must date the petition, unless you file it electronically through use of the FLRA’s eFiling system.

And, regardless of how you file the petition, you must ensure that it includes the following:

- (1) The exact wording and explanation of the meaning of the proposal or provision, including an explanation of special terms or phrases, technical language, or other words that are not in common usage, as well as how the proposal or provision is intended to work;
 - (2) Specific citation to any law, rule, regulation, section of a collective bargaining agreement, or other authority on which you rely in your argument or that you reference in the proposal or provision, and a copy of any such material that the Authority cannot easily access (which you may upload as attachments if you file the petition electronically through use of the FLRA's eFiling system);
 - (3) An explanation of how the cited law, rule, regulation, section of a collective bargaining agreement, or other authority relates to your argument, proposal, or provision;
 - (4) A statement as to whether the proposal or provision is also involved in an unfair labor practice charge under part 2423 of this subchapter, a grievance pursuant to the parties' negotiated grievance procedure, or an impasse procedure under part 2470 of this subchapter, and whether any other petition for review has been filed concerning a proposal or provision arising from the same bargaining or the same agency head review; and
 - (5) Documents relevant to the statement, including a copy of any related unfair labor practice charge, grievance, request for impasse assistance, or other petition for review.
- (d) *Response*. Where the agency's written allegation concerning the duty to bargain, or the agency head's disapproval, relies on a specific law, rule, regulation, section of a

collective bargaining agreement, or other authority to support the agency's bargaining-obligation or negotiability claims, the exclusive representative must respond to those specific claims in the petition for review.

(e) *Service*. The petition for review, including all attachments, must be served in accord with § 2424.2(g).

8. Amend § 2424.23 by:

- a. Revising paragraphs (a), (b)(4), and (c); and
- b. Adding paragraphs (d) and (e).

The additions and revisions to read as follows:

§ 2424.23 Post-petition conferences; conduct and record.

(a) *Scheduling a post-petition conference*. The FLRA may, in its discretion, schedule a post-petition conference to be conducted by an FLRA representative by telephone, in person, or through other means. Unless the Authority or an FLRA representative directs otherwise, parties must observe all time limits in this part, regardless of whether a post-petition conference is conducted or may be conducted.

(b) * * *

(4) Status of any proposal or provision that is also involved in an unfair labor practice charge under part 2423 of this subchapter, in a grievance under the parties' negotiated grievance procedure, or an impasse procedure under part 2470 of this subchapter.

(c) *Discretionary extension of time limits* The FLRA representative may, on determining that it will effectuate the purposes of the Federal Service Labor-Management Relations

Statute, 5 U.S.C. 7101 et seq., and this part, extend the time limits for filing the agency's statement of position and any subsequent filings.

(d) *Record of the conference.* After the post-petition conference has been completed, the representative of the FLRA will prepare and serve on the parties a written statement that includes whether the parties agree on the meaning of the disputed proposal or provision, the resolution of any disputed factual issues, and any other appropriate matters.

(e) *Hearings.* Instead of, or in addition to, conducting a post-petition conference, the Authority may exercise its discretion under § 2424.31 to hold a hearing or take other appropriate action to aid in decision making.

9. Amend § 2424.24 by:

- a. Revising the heading of the section;
- b. Revising paragraphs (a) and (b);
- c. Revising the introductory text of paragraph (c)(2);
- d. Revising paragraphs (c)(3) and (c)(4);
- e. Removing paragraph (d); and
- f. Redesignating paragraph (e) as paragraph (d).

§ 2424.24 Agency's statement of position; purpose; time limits; content; service.

(a) *Purpose.* The purpose of the agency's statement of position is to inform the Authority and the exclusive representative why a proposal or provision is not within the duty to bargain or contrary to law, respectively, and whether the agency disagrees with any facts or arguments made by the exclusive representative in the petition.

(b) *Time limit for filing.* The agency must file its statement of position within thirty (30) days after the date the head of the agency receives a copy of the petition for review.

(c) * * *

(2) Set forth in full your position on any matters relevant to the petition that you want the Authority to consider in reaching its decision, including: A statement of the arguments and authorities supporting any bargaining obligation or negotiability claims; any disagreement with claims that the exclusive representative made in the petition for review; specific citation to, and explanation of the relevance of, any law, rule, regulation, section of a collective bargaining agreement, or other authority on which you rely; and a copy of any such material that the Authority may not easily access (which you may upload as attachments if you file your statement of position electronically through use of the FLRA's eFiling system). Your statement of position must also include the following:

(3) Status of any proposal or provision that is also involved in an unfair labor practice charge under part 2423 of this subchapter, a grievance pursuant to the parties' negotiated grievance procedure, or an impasse procedure under part 2470 of this subchapter, and whether any other petition for review has been filed concerning a proposal or provision arising from the same bargaining or the same agency head review; and

(4) If they have not already been provided with the petition, documents relevant to the updates, including a copy of any related unfair labor practice charge, grievance, request for impasse assistance, or other petition for review.

(d) *Service.* A copy of the agency's statement of position, including all attachments, must be served in accord with § 2424.2(g).

10. Revise § 2424.25 to read as follows:

§ 2424.25 Response of the exclusive representative; purpose; time limits; content; service.

(a) *Purpose.* The purpose of the exclusive representative's response is to inform the Authority and the agency why, despite the agency's arguments in its statement of position, the proposal or provision is within the duty to bargain or not contrary to law, respectively, and whether the union disagrees with any facts or arguments made for the first time in the agency's statement of position.

(b) *Time limit for filing.* Within fifteen (15) days after the date the exclusive representative receives a copy of an agency's statement of position, the exclusive representative must file a response.

(c) *Content.* You must file your response on a form that the Authority has provided for that purpose, or in a substantially similar format. You meet this requirement if you file your response electronically through use of the eFiling system on the FLRA's Web site at www.flra.gov. That Web site also provides copies of response forms. You must limit your response to the matters that the agency raised in its statement of position. You must date your response, unless you file it electronically through use of the FLRA's eFiling system. And, regardless of how you file your response, you must ensure that it identifies any disagreement with the agency's bargaining-obligation or negotiability claims. You must: State the arguments and authorities supporting your opposition to any agency argument; include specific citation to, and explanation of the relevance of, any law, rule, regulation, section of a collective bargaining agreement, or other authority on which you rely; and provide a copy of any such material that the Authority may not easily access (which you may upload as attachments if you file your response electronically through

use of the FLRA's eFiling system). You are not required to repeat arguments that you made in your petition for review. If not included in the petition for review, then you must state the arguments and authorities supporting your position on all of the relevant bargaining-obligation and negotiability matters identified in § 2424.2(a) and (c), respectively.

(d) *Service*. A copy of the response of the exclusive representative, including all attachments, must be served in accord with § 2424.2(g).

11. Revise § 2424.26 to read as follows:

§ 2424.26 Agency's reply; purpose; time limits; content; service.

(a) *Purpose*. The purpose of the agency's reply is to inform the Authority and the exclusive representative whether and why it disagrees with any facts or arguments made for the first time in the exclusive representative's response.

(b) *Time limit for filing*. Within ten (10) days after the date the agency receives a copy of the exclusive representative's response to the agency's statement of position, the agency may file a reply.

(c) *Content*. You must file your reply on a form that the Authority has provided for that purpose, or in a substantially similar format. You meet this requirement if you file your reply electronically through use of the eFiling system on the FLRA's Web site at www.flra.gov. That Web site also provides copies of reply forms. You must limit your reply to matters that the exclusive representative raised for the first time in its response. You must date your reply, unless you file it electronically through use of the FLRA's eFiling system. And, regardless of how you file your reply, you must ensure that it identifies any disagreement with the exclusive representative's assertions in its response,

including your disagreements with assertions about the bargaining-obligation and negotiability matters identified in § 2424.2(a) and (c). You must: State the arguments and authorities supporting your position; include specific citation to, and explanation of the relevance of, any law, rule, regulation, section of a collective bargaining agreement, or other authority on which you rely; and provide a copy of any such material that the Authority may not easily access (which you may upload as attachments if you file your reply electronically through use of the FLRA's eFiling system). You are not required to repeat arguments that you made in your statement of position.

(d) *Service*. A copy of the agency's reply, including all attachments, must be served in accord with § 2424.2(g).

12. Revise § 2424.27 to read as follows:

§ 2424.27 Additional submissions to the Authority.

The Authority will not consider any submission filed by any party other than those authorized under this part, provided however that the Authority may, in its discretion, grant permission to file an additional submission based on a written request showing extraordinary circumstances by any party. All documents filed under this section must be served in accord with § 2424.2(g).

13. Revise § 2424.30 to read as follows:

§ 2424.30 Procedure through which the petition for review will be resolved.

(a) *Exclusive representative has filed related unfair labor practice charge or grievance alleging an unfair labor practice*. Except for proposals or provisions that are the subject of an agency's compelling need claim under 5 U.S.C. 7117(a)(2), the Authority will dismiss a petition for review when an exclusive representative files an unfair labor

practice charge pursuant to part 2423 of this subchapter or a grievance alleging an unfair labor practice under the parties' negotiated grievance procedure, and the charge or grievance concerns issues directly related to the petition for review filed pursuant to this part. The dismissal will be without prejudice to the right of the exclusive representative to refile the petition for review after the unfair labor practice charge or grievance has been resolved administratively, including resolution pursuant to an arbitration award that has become final and binding. No later than thirty (30) days after the date on which the unfair labor practice charge or grievance is resolved administratively, the exclusive representative may refile the petition for review, and the Authority will determine whether resolution of the petition is still required. For purposes of this subsection, a grievance is resolved administratively when:

- (1) The exclusive representative withdraws the grievance;
- (2) The parties mutually resolve the grievance;
- (3) An arbitrator has issued an award resolving the grievance, and the 30-day period under 5 U.S.C. 7122(b) has passed without an exception being filed; or
- (4) An arbitrator has issued an award resolving the grievance, a party has filed an exception to that award, and the Authority has issued a decision resolving that exception.

(b) *Exclusive representative has not filed related unfair labor practice charge or grievance alleging an unfair labor practice.* The petition will be processed as follows:

- (1) *No bargaining obligation dispute exists.* The Authority will resolve the petition for review under the procedures of this part.
- (2) *A bargaining obligation dispute exists.* The exclusive representative may file an unfair labor practice charge pursuant to part 2423 of this subchapter or a grievance under

the parties' negotiated grievance procedure concerning the bargaining obligation dispute, and, where the exclusive representative pursues either of these courses, the Authority will proceed in accord with paragraph (a) of this section. If the exclusive representative does not file an unfair labor practice charge or grievance concerning the bargaining obligation dispute, then the Authority will proceed to resolve all disputes necessary for disposition of the petition unless, in its discretion, the Authority determines that resolving all disputes is not appropriate because, for example, resolution of the bargaining obligation dispute under this part would unduly delay resolution of the negotiability dispute, or the procedures in another, available administrative forum are better suited to resolve the bargaining obligation dispute.

14. Amend § 2424.31 by revising the introductory text and paragraph (c) to read as follows:

§ 2424.31 Hearings and other appropriate action.

When necessary to resolve disputed issues of material fact in a negotiability or bargaining obligation dispute, or when it would otherwise aid in decision making, the Authority, or its designated representative, may, in its discretion:

(c) Refer the matter to a hearing pursuant to 5 U.S.C. 7117(b)(3) or (c)(5); or

15. Revise § 2424.32 to read as follows:

§ 2424.32 Parties' responsibilities; failure to raise, support, or respond to arguments; failure to participate in conferences or respond to Authority orders.

(a) *Responsibilities of the exclusive representative.* The exclusive representative has the burden of explaining the meaning, operation, and effects of the proposal or provision; and raising and supporting arguments that the proposal or provision is within the duty to bargain, within the duty to bargain at the agency's election, or not contrary to law, respectively.

(b) *Responsibilities of the agency.* The agency has the burden of explaining the meaning, operation, and effects of the proposal or provision, if the agency disagrees with the exclusive representative's explanations; and raising and supporting arguments that the proposal or provision is outside the duty to bargain or contrary to law, respectively.

(c) *Responsibilities to sufficiently explain.* Each party has the burden to give sufficiently detailed explanations to enable the Authority to understand the party's position regarding the meaning, operation, and effects of a proposal or provision. A party's failure to provide such explanations may affect the Authority's decision in a manner that is adverse to the party.

(d) *Failure to raise, support, and respond to arguments.* (1) Failure to raise and support an argument may, in the Authority's discretion, be deemed a waiver of such argument.

Absent good cause:

(i) Arguments that could have been but were not raised by an exclusive representative in the petition for review, or made in its response to the agency's statement of position, may not be made in this or any other proceeding; and

(ii) Arguments that could have been but were not raised by an agency in the statement of position, or made in its reply to the exclusive representative's response, may not be raised in this or any other proceeding.

(2) Failure to respond to an argument or assertion raised by the other party may, in the Authority's discretion, be treated as conceding such argument or assertion.

(e) *Failure to participate in conferences; failure to respond to Authority orders.* Where a party fails to participate in a post-petition conference pursuant to § 2424.23, a direction or proceeding under § 2424.31, or otherwise fails to provide timely or responsive information pursuant to an Authority order, including an Authority procedural order directing the correction of technical deficiencies in filing, the Authority may, in addition to those actions set forth in paragraph (d) of this section, take any other action that, in the Authority's discretion, it deems appropriate, including dismissal of the petition for review (with or without prejudice to the exclusive representative's refiling of the petition for review), and granting the petition for review and directing bargaining and/or rescission of an agency head disapproval under 5 U.S.C. 7114(c) (with or without conditions).

16. Amend § 2424.40 by revising paragraphs (b) and (c) to read as follows:

§ 2424.40 Authority decision and order.

* * * * *

(b) *Cases involving proposals.* If the Authority finds that the duty to bargain extends to the proposal, then the Authority will order the agency to bargain concerning the proposal. If the Authority finds that the duty to bargain does not extend to the proposal, then the Authority will dismiss the petition for review. If the Authority finds that the proposal is bargainable only at the election of the agency, then the Authority will so state. If the Authority resolves a negotiability dispute by finding that a proposal is within the duty to bargain, but there are unresolved bargaining obligation dispute claims, then the Authority

will order the agency to bargain in the event its bargaining obligation claims are resolved in a manner that requires bargaining.

(c) *Cases involving provisions.* If the Authority finds that a provision is not contrary to law, rule, or regulation, or is bargainable at the election of the agency, then the Authority will direct the agency to rescind its disapproval of such provision in whole or in part as appropriate. If the Authority finds that a provision is contrary to law, rule, or regulation, the Authority will dismiss the petition for review as to that provision.

17. Revise § 2424.41 to read as follows:

§ 2424.41 Compliance.

The exclusive representative may report to the appropriate Regional Director an agency's failure to comply with an order issued in accordance with § 2424.40. The exclusive representative must report such failure within thirty (30) days following expiration of the 60-day period under 5 U.S.C. 7123(a), which begins on the date of issuance of the Authority order. If, on referral from the Regional Director, the Authority finds such a failure to comply with its order, the Authority will take whatever action it deems necessary to secure compliance with its order, including enforcement under 5 U.S.C. 7123(b).

18. Amend § 2424.50 by revising the introductory text to read as follows:

§ 2424.50 Illustrative criteria.

A compelling need exists for an agency rule or regulation concerning any condition of employment when the rule or regulation was issued by the agency or any primary national subdivision of the agency, and the agency demonstrates that either the rule or regulation meets one or more of the following illustrative criteria, or the Authority

determines that other circumstances establish a compelling need for the rule or regulation:

Colleen Duffy Kiko

Chairman, Federal Labor Relations Authority.

Approved: December 12, 2019.

[FR Doc. 2019-27193 Filed: 12/20/2019 8:45 am; Publication Date: 12/23/2019]