Rules and Regulations

Federal Register
Vol. 88, No. 175
Tuesday, September 12, 2023

FEDERAL LABOR RELATIONS AUTHORITY

5 CFR Part 2424

Negotiability Proceedings

AGENCY: Federal Labor Relations Authority.

ACTION: Final rule.

SUMMARY: The Federal Labor Relations Authority (FLRA) is revising the regulations governing negotiability appeals to better ''expedite proceedings,'' consistent with Congress's direction. The final rule is designed to benefit the FLRA's parties by clarifying various matters and streamlining the adjudication process for negotiability appeals, resulting in more timely decisions.

DATES:

Effective Date: This rule is effective October 12, 2023.

Applicability Date: This part applies to all petitions for review filed on or after October 12, 2023.

FOR FURTHER INFORMATION CONTACT: Thomas Tso, Solicitor, at *ttso@flra.gov* or at (771) 444–5779.

SUPPLEMENTARY INFORMATION: The FLRA proposed revisions to part 2424 of the Authority's Regulations concerning negotiability proceedings. The proposed rule was published in the **Federal Register**, and public comments were solicited on the proposed changes (84 FR 70439) (Dec. 23, 2019). After the initial public comment period closed, the FLRA reopened the comment period for an additional round of public feedback (85 FR 4913) (Jan. 28, 2020). (From this point forward, the printed statements at 84 FR 70439 and 85 FR 4913 are collectively referred to as ''the proposal notices.'') Comments were received from unions, agencies, labor-management practitioners, and other individuals. All timely comments have been considered prior to publishing the final rule, and virtually all comments, including all significant comments, are addressed with specificity below. Changes from the proposed rule are also discussed below, and where those changes relate to specific comments, the connection between the changes and the comments is noted.

Significant Changes

In §§ 2424.22 and 2424.25, the final rule changes the procedures through which an exclusive representative may divide or sever a proposal or provision into distinct parts, in order to seek separate negotiability determinations on particular matters standing alone. Section 2424.10 of the final rule does not remove references to the Collaboration and Alternative Dispute Resolution Program. Section 2424.21 of the final rule does not require an exclusive representative to file a petition for review within sixty days after the expiration of the deadline for an agency to respond to a request for a written allegation concerning the duty the bargain. Section 2424.22 of the final rule does not require an exclusive representative to respond, in a petition for review, to specific claims in an agency's allegation concerning the duty to bargain or an agency head's disapproval. Section 2424.26 of the final rule does not shorten the time limit for filing an agency's reply from fifteen days to ten days. Section 2424.41 of the final rule does not require an exclusive representative to report to a Regional Director an agency's failure to comply with a negotiability decision and order within thirty days after the expiration of the 60-day period for seeking judicial review. Unlike the potentially broad revisions contemplated in the proposal notices, the final rule leaves § 2424.50 of the Authority Regulations (concerning compelling need) mostly unchanged.

Miscellaneous Comments and Responses

Some of the comments responding to the proposal notices did not concern a specific section of the proposed rules. One commenter opposed any changes to existing negotiability procedures because, in the commenter's view, the process could be streamlined by employing sufficient staff. As this comment was not germane to the proposed rule, it did not influence the final rule.

The Office of Personnel Management (OPM) requested that the final rule include a provision requiring that, if a petition for review raises a negotiability dispute concerning a statute that OPM administers, an executive order that OPM administers, or a government-wide regulation that OPM promulgated, then the Authority must formally notify OPM and provide OPM an opportunity to intervene in the case.

Section 7105(i) of the Federal Service Labor-Management Relations Statute (the Statute) states that ''the Authority *may request* from the Director of [OPM] an advisory opinion concerning the proper interpretation of rules, regulations, or policy directives issued by [OPM] in connection with any matter before the Authority.'' 5 U.S.C. 7105(i) (emphasis added). Admittedly, Section 7105(i) does not address the full scope of the matters raised in OPM's comment—such as statutes or executive orders that OPM administers. However, regarding government-wide regulations that OPM issued, Section 7105(i) indicates that Congress did not think it necessary either to require the Authority to seek OPM's views in every case, or to provide OPM an opportunity to intervene in cases. In addition, when Congress thought OPM should have the right to intervene in a particular class of civil-service cases—for example, certain cases before the Merit Systems Protection Board involving the ''interpretation or application of any civil[-]service law, rule, or regulation, under the jurisdiction of [OPM]''—Congress provided for intervention in statutory text. 5 U.S.C. 7701(d)(1). Further, nothing in the Statute, including Section 7105(i), prevents the Authority from requesting an advisory opinion from OPM on statutes or executive orders that OPM administers, where such an opinion would aid the Authority in its decision making. Moreover, § 2429.9 of the Authority's Regulations allows any interested person to petition for the opportunity to present views as amicus curiae in a particular case, and OPM may petition to present its views through that provision. 5 CFR 2429.9.

For these reasons, the final rule does not include a provision concerning notification of, and intervention by, OPM in particular cases.

Sectional Analyses, Comments, and Responses

The regulatory analyses provided in the proposal notices about wording that

has not changed from the proposed rule to the final rule should be understood to apply to the unchanged portions of the final rule. Such previous analyses will not be repeated here, although they continue to apply. Further sectional analyses of the amendments and revisions to part 2424, Negotiability Proceedings—including public comments and responses to those comments—follow:

Part 2424—Negotiability Proceedings

Section 2424.1

None of the public comments addressed § 2424.1. The final rule is the same as the proposed rule.

Section 2424.2

Comments and Responses

One commenter stated that the sentence listing examples of bargaining obligation disputes should say that such disputes include, but may not be limited to, the specified examples. This requested change is unnecessary because the list of examples does not purport to be exhaustive. The same commenter asked that the examples be joined by ''or'' rather than ''and.'' The commenter correctly notes that each example is sufficient, on its own, to establish a bargaining obligation dispute. However, this requested change is unnecessary because each example is part of a group of similar terms, so using ''and'' is appropriate. Therefore, these requested changes were not adopted.

Another commenter requested that the examples of bargaining obligation disputes be expanded from the proposed rule so that the examples still included situations where parties disagree about whether a change to conditions of employment was de minimis. As discussed in connection with § 2424.2(a)(2) below, this requested change is incorporated into the final rule.

A third commenter stated that it does not interpret the changes to the examples in this section to alter the legal definition of the defined terms. To the extent that the commenter means that the changes to examples are intended to better illustrate the existing definitions of these terms, rather than to change the operative definitions of the terms, the commenter is correct. This commenter also objected to adding executive orders to the examples of sources of negotiability disputes. As explained further below in connection with § 2424.2(c), executive orders are not included among the examples of sources of negotiability disputes in the final rule. This commenter also asked that, where government-wide rules or regulations are listed as sources of negotiability disputes, the rule be amended to acknowledge that government-wide rules or regulations can be contrary to statutory law. However, this requested change is unnecessary because it is irrelevant to the existence of a negotiability dispute. Regardless of whether a government-wide rule or regulation is consistent with, or contrary to, a statute, a disagreement between parties about whether a proposal or provision is consistent with a government-wide rule or regulation will establish that a negotiability dispute exists.

Further Analysis

As in the proposed rule, § 2424.2(a) of the final rule clarifies the definition of a ''bargaining obligation dispute.'' However, in response to a comment seeking further examples, § 2424.2(a) of the final rule includes two additional examples, rather than (as in the proposed rule) one additional example. Specifically, § 2424.2(a)(2) of the final rule identifies, as examples of bargaining obligation disputes, disagreements concerning agency claims that bargaining is not required ''because there has not been a change in bargaining-unit employees' conditions of employment,'' *see, e.g., NFFE, IAMAW, Fed. Dist. 1, Fed. Loc. 1998,* 69 FLRA 586, 589 (2016) (analyzing agency's contested claim that it made no changes to conditions of employment as a bargaining obligation dispute) (Member Pizzella concurring in part and dissenting in part on other grounds), as well as claims that bargaining is not required ''because the effect of the change is de minimis,'' *e.g., AFGE, Loc. 2139, Nat'l Council of Field Lab. Locs.,* 61 FLRA 654, 656 (2006) (''The claim that a change in employees' conditions of employment is de minimis is a bargaining obligation dispute, rather than a negotiability dispute.''). Section 2424.2(a)(3) of the final rule is the same as the proposed rule and identifies, as an example of a bargaining obligation dispute, a disagreement about an agency claim that ''[t]he exclusive representative is attempting to bargain at the wrong level of the agency.'' Unlike the proposed rule, the final rule does not revise the text currently located at 5 CFR 2424.2(b).

Section 2424.2(c) of the final rule differs from the proposed rule in three respects. First, whereas § 2424.2(c)(2) of the proposed rule identified, as an example of a negotiability dispute, a disagreement concerning whether a proposal or provision ''[d]irectly affects bargaining-unit employees' condition of employment,'' § 2424.2(c)(2) of the final rule removes the word ''[d]irectly.'' The word ''[d]irectly'' was removed because a negotiability dispute exists when there is a disagreement about whether a proposal or provision has *any* effect on bargaining-unit employees' conditions of employment—not only when there is disagreement about direct effects. *See, e.g., NAGE, Loc. R1–144,* 43 FLRA 1331, 1333 (1992); *id.* at 1335 (agency argued that proposals did not concern conditions of employment of bargaining-unit employees), 1350–51 (Authority found four proposals ''nonnegotiable'' because they did not concern the conditions of employment of bargaining-unit employees). Second, unlike § 2424.2(c) of the proposed rule, § 2424.2(c) of the final rule does not include executive orders among the examples of sources of negotiability disputes. However, the omission of this example does not prohibit parties from arguing that a proposal's or provision's inconsistency with an executive order gives rise to a negotiability dispute. Third, because the executive-order example was removed, § 2424.2(c)(7) of the proposed rule has become § 2424.2(c)(6) of the final rule, and § 2424.2(c)(8)(i) through (v) of the proposed rule have become § 2424.2(c)(7)(i) through (v) of the final rule. The remaining changes to the text currently located at 5 CFR 2424.2(c) are the same in the final rule as in the proposed rule.

Section 2424.2(e) and (f) are the same in the final rule as in the proposed rule.

The proposal notices explained that, although the proposed rule contained revised wording that would ''[e]liminat[e] severance altogether,'' ''the FLRA [wa]s also considering another possible option'' that would not completely eliminate severance. 84 FR at 70439. Unlike the proposed rule, the final rule does not remove the existing definition of ''[s]everance,'' located at 5 CFR 2424.2(h). Because the final rule does not remove the ''[s]everance'' definition, the final rule also does not redesignate the definition of ''[w]ritten allegation concerning the duty to bargain'' as § 2424.2(h)—which is a change from the proposed rule. Under the final rule, the definition of ''[w]ritten allegation concerning the duty to bargain'' maintains its existing location at 5 CFR 2424.2(i).

Section 2424.10

Comments and Responses

Three commenters opposed adding to this section new wording that specifies that Collaboration and Alternative Dispute Resolution (CADR) assistance is provided at the discretion of the

Authority. The final rule does not include the wording that assistance is provided ''in the discretion of the Authority''; however, the Authority disagrees with the commenters' assertions that, as long as the parties agree to CADR assistance, the decision about whether a dispute enters the CADR Program should not be at the Authority's discretion. For example, the Authority may not have resources available to provide CADR assistance every time it is requested. If the Authority declines to grant CADR assistance, that action in no way prevents parties from agreeing to seek alternative dispute resolution services from entities outside the FLRA—such as the Federal Mediation and Conciliation Service.

One commenter appeared to believe that, under the proposed rule, after a petition for review had been filed, the Authority could require the parties to participate in alternative dispute resolution without their consent. To the contrary, CADR assistance will continue to require the consent of the parties.

Another commenter expressed reservations about an addition in the proposed rule that stated that CADR assistance would be provided as resources permit. Because the FLRA is unable to offer any services beyond the capacity of its available resources, this wording remains part of the final rule, as discussed further below.

A third commenter expressed disappointment that the proposed rule removed references to the CADR Program. As explained further below, the final rule does not remove those references.

Further Analysis

Unlike the proposed rule, the heading of § 2424.10 in the final rule will remain the same as the existing heading of 5 CFR 2424.10. In another variance from the proposed rule, § 2424.10 of the final rule is amended to state that parties may contact either the CADR Program or the Office of Case Intake and Publication to seek CADR services. Updated phone numbers are added to the final rule. Further, whereas the proposed rule removed all direct references to CADR, § 2424.10 of the final rule retains all of the direct references to CADR that currently appear in 5 CFR 2424.10. As in the proposed rule, § 2424.10 of the final rule clarifies that CADR representatives will attempt to assist parties to resolve their disputes ''as resources permit.''

Section 2424.11

Comments and Responses

Two commenters supported requiring that requests for allegations concerning the duty to bargain be in writing, and like the proposed rule, the final rule incorporates this requirement.

OPM requested that this section be amended to state that any written agency responses to an exclusive representative's proposals—including agency counterproposals—may contain an unrequested agency allegation concerning the duty the bargain. Because the existing wording does not limit the types of written sources that may contain an unrequested agency allegation concerning the duty to bargain, the requested change is unnecessary. Therefore, the final rule does not adopt that requested change.

OPM also requested that this section be amended to specify that an agency allegation concerning the duty to bargain need contain only an assertion of nonnegotiability and the statutory basis, or other authority, supporting that assertion. OPM contended that the rule should make clear that no further detail is necessary to trigger the time limits for filing a petition for review under § 2424.21. The existing wording at 5 CFR 2424.11 does not specify the level of detail required to trigger the time limits in § 2424.21, except to say that agency allegations must be in writing and must concern the duty to bargain. The FLRA believes that case-by-case adjudication continues to provide a superior method for determining precisely when an agency allegation has triggered the time limits in § 2424.21, and the final rule has not adopted OPM's suggested modification.

Further Analysis

The final rule is the same as the proposed rule.

Section 2424.21

Comments and Responses

Six commenters addressed the change in the proposed rule that, if an agency fails to respond within ten days to an exclusive representative's written request for a written agency allegation concerning the duty to bargain, then the exclusive representative may file a petition, but only within the next sixty days. One union commenter stated that the sixty-day timeline was adequate under these circumstances. Three agency commenters stated that imposing the sixty-day timeline would ensure that negotiability disputes did not linger longer than necessary. OPM requested that this deadline be shortened to thirty days. One union commenter opposed the sixty-day deadline because, according to the commenter, this change rewarded an agency's failure to respond to a written request for an allegation of nonnegotiability by nevertheless imposing a deadline on the exclusive representative for filing a petition for review. As discussed further below, the final rule does not impose this sixty-day deadline because it is not clear that there is currently a problem with exclusive representatives waiting for unnecessarily lengthy periods of time to file petitions after requesting, but not receiving, written agency allegations.

Two commenters expressed concern that an agency does not face adverse consequences for failing to provide a written allegation concerning the duty the bargain within ten days of the exclusive representative's written request for such an allegation. One union commenter suggested that, to provide an adverse consequence for an agency in these circumstances, for each day that the agency's requested allegation is late—that is, beyond the ten-day deadline for providing such an allegation—the exclusive representative should receive an additional day for filing its petition. This suggestion would violate Section 7117(c)(2) of the Statute, which requires a fifteen-day deadline for filing a petition for review after an agency alleges that the duty to bargain does not extend to any matter. 5 U.S.C. 7117(c)(2). Thus, this suggestion has not been adopted. The same union commenter was also concerned that fifteen days would be inadequate for filing a petition that satisfies certain new content requirements that appeared in § 2424.22(d) of the proposed rule. As discussed later in connection with § 2424.22(d), the proposed new content requirements are not part of the final rule, so this concern has been mooted. One commenter suggested that the Authority rewrite the section so that none of the deadlines depend on when the exclusive representative receives, or does not receive, written agency allegations. According to this commenter, the complexity of the section in distinguishing between responses or non-responses to written requests for allegations, solicited or unsolicited allegations, and written versus unwritten allegations creates unnecessary formality that will confuse many negotiators, who are often not lawyers. The commenter suggested that the section state simply that an exclusive representative may file an appeal at any time after the representative is placed on notice that the agency considers a proposal

nonnegotiable, even if the exclusive representative has not requested a written allegation of nonnegotiability. This suggestion would violate Section 7117(c)(2) of the Statute, which requires a fifteen-day deadline for filing a petition for review after an agency alleges that the duty to bargain does not extend to any matter. 5 U.S.C. 7117(c)(2). Accordingly, this suggestion has not been adopted.

One union commenter opposed § 2424.21(b)(1)(i) of the proposed rule, which stated that, if the agency serves a written allegation on the exclusive representative more than ten days after receiving a written request for such allegation, then the petition must be filed within fifteen days of the service of that allegation. This union commenter contended that imposing a fifteen-day deadline on an exclusive representative—even when an agency did not satisfy its obligation to provide a requested allegation within ten days of the request—rewards an agency's violation of its regulatory obligation to furnish requested allegations. However, this commenter did not suggest any alternative regulatory wording, and as discussed in the previous two paragraphs, Section 7117(c)(2) of the Statute requires a fifteen-day deadline for filing a petition for review after an agency alleges that the duty to bargain does not extend to any matter. 5 U.S.C. 7117(c)(2). As discussed further below, with some modifications to the wording, the change identified as § 2424.21(b)(1)(i) of the proposed rule has been adopted as § 2424.21(b)(1) of the final rule.

OPM suggested that § 2424.21(b)(1)(ii) of the proposed rule be omitted from the final rule because it was confusing. As explained further below, this suggestion was accepted.

Further Analysis

Unlike the proposed rule, § 2424.21 of the final rule does not state that if an agency fails to respond to a written request for a written allegation within ten days of the request, then the exclusive representative may file a petition, but only within the next sixty days. Further, to simplify the rule, § 2424.21 of the final rule does not adopt the wording from § 2424.21(b)(1)(ii) of the proposed rule, which described how the Authority would handle a situation where an agency served a written allegation on the exclusive representative more than ten days after receiving a written request for such allegation, but the exclusive representative had already filed a petition. These proposed changes have been deliberately omitted from the final rule. However, § 2424.21 of the final rule adopts the change from the proposed rule that, if the agency serves a written allegation on the exclusive representative more than ten 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 days of the service of that allegation. This change now appears as § 2424.21(b)(1) in the final rule.

Section 2424.22

Comments and Responses

OPM suggested that this section specify that untimely petitions will be dismissed absent a demonstration of good cause. Existing procedures for addressing untimely petitions have proven adequate, so this suggestion has not been adopted.

Many of the comments about this section concerned the proposal to amend severance procedures. The proposal notices described two possible severance-amendment options. Under ''Option 1,'' severance would be eliminated altogether by requiring the exclusive representative to divide matters into separate proposals or provisions when filing the petition, and by precluding severance at later stages of the proceeding. Under ''Option 2,'' severance would be available at only one point in the filing process, and timely severance requests would be automatically granted. However, if severance requests were automatically granted, then the exclusive representative would bear certain burdens to ensure that the record was sufficient to assess whether the severed portions were within the duty to bargain or consistent with law.

One union commenter supported the portion of ''Option 1'' that allowed an exclusive representative to divide matters into distinct proposals and provisions at the petition stage, but the commenter desired another opportunity for severance later in the process. This commenter suggested that the exclusive representative's response to the agency's statement of position should be the later point for severance. This commenter supported the portion of ''Option 2'' that would make severance automatic because this approach would prevent severance from becoming its own point of contention in the proceedings.

Another commenter said that neither severance option would streamline the negotiability process because, even after severance occurred, if only a few words from a larger proposal or provision were allegedly nonnegotiable, then that small portion could cause the entire proposal or provision to be found nonnegotiable. However, the consequence that the commenter identified exists regardless of severance procedures: Any portion of a proposal or provision may render the larger whole deficient. Thus, severance procedures could not completely eliminate that risk. If required to choose between the two options, this commenter preferred ''Option 1.''

A commenter suggested that unions should state, during bargaining, how they would prefer proposals to be severed in the event of a negotiability dispute. The commenter asserted that this approach would highlight which portions of proposals were most important to the union before disputes reached the formal negotiability process. However, regulating the methods that parties use in their bargaining before the formal negotiability process begins is beyond the scope of the rule.

An agency commenter supported both eliminating severance altogether and prohibiting an exclusive representative from dividing single proposals from the bargaining table into multiple parts—to be considered as distinct proposals—in a petition. This suggestion is impractical because, in most cases, an exclusive representative must choose how much of the wording from the parties' negotiations will be set forth in the petition. In some cases, negotiations may involve only a few sentences, but many cases involve multiple pages of text. It would be inefficient for the rule to require an exclusive representative to set forth in the petition all of the text from the bargaining table, even though some parts are entirely agreeable to both parties. Thus, an exclusive representative must apportion the text from the bargaining table into proposals for consideration in a petition.

Another union commenter opposed making any changes to existing severance procedures because, according to this commenter, the Statute requires an informal process for presenting arguments to the Authority. However, the Statute is precise in delimiting the procedures for negotiability appeals, and there is nothing to suggest that the entire process should be informal. Further, it is unclear how maintaining or eliminating severance—which is a specialized concept in negotiability law—would promote informality, even if that were a goal of the negotiability process. This commenter also contended that if severance were eliminated, exclusive representatives would be unable to salvage negotiable portions of longer proposals in which easily isolatable parts were outside the duty to bargain. This criticism is

unwarranted because, under either Option, an exclusive representative could submit an easily isolated portion of disputed text as one proposal, and divide the remainder of the disputed text into separate proposals—provided that all proposals have meaning standing alone. Moreover, as discussed in connection with § 2424.25 of the final rule, a modified severance procedure will be available when the exclusive representative files a response to the agency's statement of position. Another agency commenter preferred ''Option 1'' because the commenter said that ''Option 2'' would generate additional disputes over whether an exclusive representative had satisfied its burdens after receiving automatic severance. However, the existing process generates disputes about whether the Authority should grant severance. The idea for automatically granting severance under ''Option 2'' was premised on a prediction that there would be fewer disputes about whether exclusive representatives had satisfied their burdens after automatic severance than there are disputes at present over whether the Authority should grant severance. The FLRA adheres to its predictive judgment that the number of disputes will decrease if the question of whether to grant severance is not its own point of contention.

After consideration of these severance comments, and as explained further below, the final rule incorporates portions of ''Option 1'' and ''Option 2.'' At the petition stage, the exclusive representative will be responsible for dividing matters into distinct proposals or provisions, if it desires distinct negotiability determinations on particular matters standing alone. However, when the exclusive representative files a response to the agency's statement of position, there will be an opportunity to invoke a modified severance procedure. The ways in which that procedure has been modified are discussed in connection with § 2424.25 of the final rule.

The remaining comments on this section concerned § 2424.22(d) of the proposed rule, which required exclusive representatives to respond—in the petition for review—to any specific claims from an agency's allegation concerning the duty to bargain, or from an agency head's disapproval (the response requirement).

One union commenter opposed the response requirement because the commenter said that the requirement was overly formalistic, and many union representatives are not lawyers.

An agency commenter supported the response requirement on the ground that it would foster a more prompt and focused process for resolving negotiability disputes.

One commenter said the fifteen-day deadline for filing a petition would not be sufficient to respond to all of the specific claims in an agency's allegation concerning the duty to bargain, or an agency head's disapproval.

Another union commenter stated that the response requirement would demand that an exclusive representative prove that a proposal was negotiable, rather than require that an agency prove that it was not.

As explained further below, the final rule does not adopt § 2424.22(d) of the proposed rule, so the expressed concerns about, or support for, the response requirement are moot.

Further Analysis

The heading and § 2424.22(a) are the same in the final rule as in the proposed rule. Like the proposal notices' ''Option 1,'' § 2424.22 of the final rule adds a new paragraph—designated § 2424.22(b)—to allow for the division of matters into proposals or provisions. If an exclusive representative seeks a negotiability determination on particular matters standing alone, then the exclusive representative will be required to divide the matters into separate proposals or provisions when filing the petition. An exclusive representative may no longer ask the Authority for severance at the petition stage of the negotiability proceedings, because the exclusive representative is capable of separating matters into distinct proposals or provisions when submitting a petition to the Authority. However, the final rule also adopts parts of ''Option 2'' from the proposal notices. Specifically, the final rule does not completely eliminate severance from negotiability proceedings, although the exclusive representative may no longer ask the Authority for severance at the petition stage. In accordance with the description of ''Option 2'' in the proposal notices, a new sentence has been added to § 2424.22(b) of the final rule that did not appear in the proposed rule. Specifically, § 2424.22(b) of the final rule states that ''the exclusive representative will have an opportunity to divide proposals or provisions into separate parts when the exclusive representative files a response under § 2424.25.'' In other words, a modified severance procedure will be available at the response stage of the negotiability proceedings.

Section 2424.22(c) of the final rule differs from the proposed rule in several respects. The paragraph identified as § 2424.22(c)(3) in the proposed rule is adopted but redesignated as § 2424.22(c)(2)(i) in the final rule. The paragraph identified as § 2424.22(c)(4) in the proposed rule is adopted but redesignated as § 2424.22(c)(3) in the final rule. The word ''and'' has been removed from the end of this paragraph because an additional paragraph has been added to § 2424.22(c) of the final rule. The paragraph identified as § 2424.22(c)(5) in the proposed rule is adopted but redesignated as § 2424.22(c)(3)(i) in the final rule, and the word ''and'' has been added to the end of this paragraph to introduce the final paragraph of § 2424.22(c) of the final rule.

Section 2424.22 of the proposed rule eliminated the wording currently located at 5 CFR 2424.22(b)(4). Section 2424.22 of the final rule maintains the wording currently located at 5 CFR 2424.22(b)(4), but the wording is redesignated as § 2424.22(c)(4) in the final rule. This wording is further amended so that it requires the petition to include any request for a hearing and the reasons supporting such request, ''with the understanding that the Authority rarely grants such requests.'' This additional proviso has been added to make parties aware that, as a matter of longstanding practice, the Authority very seldom grants hearing requests.

Unlike the proposed rule, § 2424.22 of the final rule does not require the exclusive representative to respond, in its petition, to specific bargaining obligation or negotiability claims that appear in an agency's written allegation concerning the duty to bargain, or an agency head's disapproval—although the exclusive representative is not prohibited from responding to those claims in its petition.

Like the proposed rule, § 2424.22 of the final rule eliminates the paragraph concerning severance that is currently located at 5 CFR 2424.22(c).

Section 2424.23

Comments and Responses

Two agency commenters opposed making the scheduling of a post-petition conference dependent on the Authority's discretion. However, the existing regulation already recognized such discretion by saying that conferences would be scheduled only ''where appropriate.'' 5 CFR 2424.23(a). Although the wording is being changed, the effect is the same. One of these commenters also stated that conferences should occur before the agency files its statement of position. Although the Authority endeavors to schedule conferences before the filing of a statement of position, conferences do

not always occur within that timeframe. The final rule does not guarantee that a conference will occur within a particular timeframe, but the Authority will continue to endeavor to schedule conferences at the earliest practicable date.

A union commenter said that conferences should be held early in the filing process. As stated previously, the Authority will continue to endeavor to do so.

Another agency commenter suggested that post-petition conferences should happen within thirty days or less of the Authority's meeting on the case. The commenter expressed concern that, because conferences may be held many months before a decision is issued, the Authority's Chairman and Members may not retain familiarity with the details of the conference. Because the record of a post-petition conference is created shortly after the conference, and that record is part of the official case file that the Chairman and Members review when deciding a negotiability appeal, the commenter's concern is unfounded. Thus, the final rule has not been amended based on this comment.

OPM supported emphasizing the discretionary nature of post-petition conference scheduling, but asked that the regulation be amended further to state that the post-petition conference would generally not occur if no additional clarification was needed regarding the disputed wording. Experience has shown that, in nearly all cases, post-petition conferences meaningfully clarify the disputes in negotiability appeals. Thus, the regulation has not been amended as OPM suggested.

OPM also suggested that the post-petition conferences should occur after the agency files its statement of position. OPM reasoned that the statement of position is the first fully elaborated explanation of the agency's objections to the disputed wording, and if conferences were held after it is filed, then the conference holder would have more material with which to prepare for the conference. Post-petition conferences primarily develop the factual record in a negotiability appeal and reveal whether the parties have a shared understanding of the wording in dispute. If the parties do not already have a shared understanding of the disputed wording, then the conference helps to develop such an understanding, or to precisely identify where the parties' understandings differ.

Although previously expressed legal arguments may shape some of the questions at the conference, the existing process has shown that conference holders are able to elicit sufficient information from agencies during the conference to assess the nature of their objections and tailor the conference accordingly. Further, in cases where the conference occurs before the statement of position is filed, the agency is able to focus its arguments in the statement of position on the actual disputes between the parties, rather than misperceptions about the meaning, operation, and effects of the proposals or provisions. Therefore, the final rule does not aim to schedule post-petition conferences after the filing of the statement of position.

One commenter suggested that the section should not be changed because the existing process has worked very well. The changes adopted in the final rule will more closely align the wording of the regulation and the Authority's actual practices. The essential nature and function of the post-petition conferences will remain the same.

One agency commenter suggested that § 2424.23(e) of the proposed rule should be amended to specify that the Authority may take other appropriate action to aid in its decision making even if a conference is not held. However, the proposed rule already included such wording because it stated that the Authority may hold a hearing or take other appropriate action, in the exercise of its discretion, *instead of, or in addition to,* conducting a post-petition conference. Section 2424.23(e) of the final rule retains this wording.

Further Analysis

The heading of § 2424.23 is the same in the final rule as in the proposed rule. Further, § 2424.23(a) is the same in the final rule as in the proposed rule, with one exception. Whereas § 2424.23(a) of the proposed rule said that ''[t]he FLRA may, in its discretion, schedule a post-petition conference,'' § 2424.23(a) of the final rule says that ''[t]he FLRA will, in its discretion, schedule a post-petition conference.'' The word ''may'' was changed to ''will'' to emphasize that, in the vast majority of cases, a post-petition conference will be scheduled. Further, the phrase ''in its discretion'' already permits the Authority to exercise reasonable judgment in deciding whether to schedule a post-petition conference in a particular case, so the permissive ''may'' was not needed to signal such discretion.

Although the proposed rule did not include changes to § 2424.23(b)(3), the final rule adds the word ''and'' at the end of § 2424.23(b)(3), in order to introduce the following subsection. As this change is merely a grammatically correct way to introduce § 2424.23(b)(4), rather than a substantive change to § 2424.23(b)(3), this technical change falls within the scope of the proposed amendments to § 2424.23(b)(4).

Section 2424.23(b)(4) of the proposed rule was amended, and the amended version appears as § 2424.23(b)(4) of the final rule. Whereas the proposed rule addressed the status of ''any proposal or provision that is also involved in'' another proceeding, the final rule addresses the status of ''any proceedings . . . that are directly related to the negotiability petition.'' Thus, the scope of § 2424.23(b)(4) in the final rule is broader than § 2424.23(b)(4) in the proposed rule. The final rule requires parties to be prepared and authorized to discuss the status of any proceedings directly related to the negotiability petition, and not merely a particular proposal or provision that is involved in both the negotiability process and another proceeding. Further, including the ''directly related'' wording in § 2424.23(b)(4) of the final rule ensures consistency with § 2424.30, which states that the Authority will dismiss a petition for review when the exclusive representative has filed an unfair labor practice (ULP) charge or a grievance alleging a ULP, and the charge or grievance concerns issues ''directly related'' to the petition.

Section 2424.23(b) of the final rule deletes the wording currently located at 5 CFR 2424.23(b)(5) because the subject matter currently addressed at 5 CFR 2424.23(b)(5)—that is, extensions of time limits—is now addressed in § 2424.23(c) of the final rule. Section 2424.23(c) is the same in the final rule as in the proposed rule.

Section 2424.23(d) of the final rule differs from the proposed rule in three respects. First, rather than referring to ''the representative of the FLRA,'' as the proposed rule did, the final rule refers to ''the FLRA representative.'' Second, the final rule clarifies that the FLRA will serve the record of the conference on the parties: the FLRA representative conducting the conference will prepare the record but not serve it. Third, the final rule references ''a written record,'' rather than ''a written statement'' as in the proposed rule. ''Record'' is the term the FLRA uses to refer to this document in communications with parties and in Authority decisions, so the rule's wording was changed to correspond with these other uses.

Section 2424.23(e) is the same in the final rule as in the proposed rule.

Section 2424.24

Comments and Responses

OPM and an agency commenter supported the specificity requirements

of the section as promoting prompt and focused resolutions to disputes.

Further Analysis

The heading and § 2424.24(a) are the same in the final rule as in the proposed rule, with one minor, technical change. The final rule uses the term ''outside the duty to bargain,'' rather than ''not within the duty to bargain,'' to make the sentence read more clearly and to use the same wording that is set forth in § 2424.32(b). The change does not alter the sentence's meaning.

Although the proposed rule included changes to streamline § 2424.24(b), the final rule leaves the wording located at 5 CFR 2424.24(b) unchanged.

Section 2424.24(c)(2) is the same in the final rule as in the proposed rule.

Section 2424.24(c)(3) of the final rule differs from the proposed rule in several respects. The first part of § 2424.24(c)(3) of the final rule—in the portion that begins with the word ''[s]tatus''—is changed from the proposed rule so that this portion of § 2424.24(c)(3) of the final rule mirrors § 2424.23(b)(4) of the final rule. The second part of § 2424.24(c)(3) of the final rule—in the portion that begins with ''and whether''—is the same as in the proposed rule, except the word ''and'' has been deleted after the semicolon.

The paragraph identified as § 2424.24(c)(4) in the proposed rule is adopted but redesignated as § 2424.24(c)(3)(i) in the final rule, and the word ''and'' has been added to the end of this paragraph to introduce the final paragraph of § 2424.24(c) of the final rule. Section 2424.24 of the proposed rule eliminated the wording currently located at 5 CFR 2424.24(c)(4). However, § 2424.24 of the final rule maintains the wording currently located at 5 CFR 2424.24(c)(4), but that wording is supplemented so that it requires the petition to include any request for a hearing and the reasons supporting such request, ''with the understanding that the Authority rarely grants such requests.'' This additional proviso has been added to make parties aware that, as a matter of longstanding practice, the Authority very seldom grants hearing requests.

Like the proposed rule, § 2424.24 of the final rule deletes the paragraph currently located at 5 CFR 2424.24(d), and the final rule also redesignates the paragraph currently located at 5 CFR 2424.24(e) as the new § 2424.24(d) of the final rule.

Section 2424.25

Comments and Responses

OPM suggested that this section specify that untimely responses to statements of position will not be considered, absent a demonstration of good cause. Existing procedures for addressing untimely responses have proven adequate, so this suggestion has not been adopted.

OPM and an agency commenter supported the specificity requirements of this section as promoting prompt and focused resolutions to disputes.

One commenter suggested that the section should clarify that a response is optional if the exclusive representative does not have any additional arguments that were not already set forth in the petition for review. This concern is adequately addressed by § 2424.25(c) of the final rule, which states that the response is limited to matters that the agency raised in its statement of position, and that the exclusive representative is not obligated to repeat arguments that were made in the petition for review.

One commenter specifically supported the idea of granting severance automatically—as suggested in the proposal notices under severance ''Option 2''—and that commenter also advocated making severance available in the response. Except for one point that was already addressed in connection with § 2424.22 about disputes over whether an exclusive representative satisfied its burdens related to automatic severance, commenters did not specifically oppose providing severance automatically when it was sought. To be clear, some commenters did advocate for eliminating severance altogether, but those commenters did not provide specific reasons why—if severance were retained in some fashion—it should not occur automatically when sought.

Further Analysis

Section 2424.25(a) is the same in the final rule as in the proposed rule, except that, instead of the word ''union'' as in the proposed rule, the final rule uses the term ''exclusive representative.''

Although the proposed rule included changes to streamline § 2424.25(b), the final rule leaves the wording located at 5 CFR 2424.25(b) unchanged.

Section 2424.25(c) is the same in the final rule as in the proposed rule, except for the fourth complete sentence in § 2424.25(c). The fourth complete sentence in § 2424.25(c) of the proposed rule stated, ''You must limit your response to the matters that the agency raised in its statement of position.'' By contrast, the fourth complete sentence in § 2424.25(c) of the final rule states, ''With the exception of severance under paragraph (d) of this section, you must limit your response to the matters that the agency raised in its statement of position.'' Thus, this sentence in the final rule allows for the accomplishment of severance in the exclusive representative's response, but otherwise, the response is limited to the matters that the agency raised in its statement of position.

Section 2424.25 of the proposed rule deleted the severance wording currently located at 5 CFR 2424.25(d), and the proposed rule redesignated the wording currently located at 5 CFR 2424.25(e) as the new § 2424.25(d).

As mentioned during the earlier discussion of severance in connection with the content of a petition for review under § 2424.22, the final rule makes a modified severance procedure available under § 2424.25. Thus, unlike the proposed rule, § 2424.25 of the final rule does not completely delete the severance paragraph currently located at 5 CFR 2424.25(d). Instead, the final rule amends that paragraph to allow the exclusive representative, of its own accord, to accomplish severance of a previously submitted proposal or provision. Section 2424.25(d) of the final rule explains how the exclusive representative may accomplish severance of its own accord and describes how the exclusive representative's accomplishment of severance must aim to satisfy the exclusive representative's burdens under §§ 2424.25(c) and 2424.32. This approach is consistent with severance ''Option 2,'' as described in the proposal notices in connection with § 2424.22 of the proposed rule.

Under § 2424.25(d) of the final rule, the exclusive representative must identify the proposal or provision that the exclusive representative is severing and set forth the exact wording of the newly severed portion(s). At that point, under the final rule, severance will have been accomplished, creating revised or new proposals or provisions. However, under the final rule, consistent with FLRA case law, the exclusive representative will maintain the burden of establishing why, despite an agency's objections, the newly severed proposals or provisions are within the duty to bargain or not contrary to law. That burden includes explaining how the newly severed proposals or provisions operate and stand alone with independent meaning. Moreover, under the final rule, if the exclusive representative accomplishes severance of its own accord but fails to meet the associated burdens under § 2424.25(c) or § 2424.32, then the Authority would dismiss the petition as to the newly severed proposals or provisions, based on the exclusive representative's failure

to provide an adequate record for a negotiability determination. *See, e.g., NFFE, Loc. 1655,* 49 FLRA 874, 878–79 (1994) (dismissing petition as to one provision because the record was inadequate for the Authority to make a negotiability determination).

An exclusive representative must be especially attentive to its burdens in connection with accomplishing severance, particularly because a response is ordinarily an exclusive representative's last filing in a negotiability case. Whereas insufficiently explained proposals or provisions in a petition may often be clarified in the record of a later post-petition conference, it is unlikely (although not impossible) that a post-petition conference will occur after the filing of a response.

Section 2424.25(e) of the final rule leaves the wording currently located at 5 CFR 2424.25(e) unchanged.

Section 2424.26

Comments and Responses

OPM suggested that this section specify that untimely replies will not be considered, absent a demonstration of good cause. Existing procedures for addressing untimely replies have proven adequate, so this suggestion has not been adopted.

Two commenters opposed § 2424.26(b) of the proposed rule because that paragraph changed the time limit for filing a reply from fifteen days (under the existing rule) to ten days from the date of receipt of the exclusive representative's response. OPM supported shortening the time limit. As discussed further below, the final rule does not change the time limit.

Further Analysis

The heading and § 2424.26(a) are the same in the final rule as in the proposed rule. Although the proposed rule included changes to § 2424.26(b)—concerning the time limit for filing a reply—the final rule leaves the wording located at 5 CFR 2424.26(b) unchanged.

Section 2424.22(c) is the same in the final rule as in the proposed rule, with one exception. The sixth full sentence of § 2424.22(c) of the final rule ends with the word ''respectively,'' which was not part of the proposed rule.

Section 2424.26 of the proposed rule deleted the severance wording currently located at 5 CFR 2424.26(d), and the proposed rule redesignated the wording currently located at 5 CFR 2424.25(e) as the new § 2424.25(d). The final rule adopts these changes in full.

Section 2424.27

Comments and Responses

One commenter suggested that the paragraph about additional submissions include a time limit for when such submissions must be filed. This paragraph is mostly aimed at addressing unexpected developments that cannot be adequately discussed in the filings that the negotiability regulations already recognize. For that reason, it is unclear what event would trigger a time limit for additional submissions, and the commenter did not suggest any point at which to begin measuring such a time limit. Further, one purpose of this section is to allow filings even late in negotiability proceedings, if sufficiently important developments could affect the Authority's eventual decision and order. A time limit would impede that purpose. Thus, this suggestion has not resulted in changes to the rule.

The proposed rule removed—from the paragraph currently located at the 5 CFR 2424.27—the five-day deadline for filing an additional submission, after receipt of an Authority order granting permission to file that submission. A union commenter opposed this change because the proposed rule did not provide an alternate deadline. As discussed further below, the final rule addresses this issue by requiring that any additional submission be filed simultaneously with the request for permission to file that additional submission.

The same union commenter also characterized this paragraph as creating a process for third parties to submit documents for the Authority's consideration in a negotiability case. That is, the commenter believed that the paragraph concerned filings that are not submitted by the parties to a case. However, the commenter's characterization misconstrued the paragraph. Both before and after revisions, the beginning of the paragraph states that ''[t]he Authority will not consider any submission filed by any party other than those authorized under this part,'' and then the remainder of the paragraph sets forth a process for granting exceptions to that prohibition. 5 CFR 2424.27. The reference to ''any party'' does not permit *non-parties* to employ this procedure to file submissions in a negotiability case. Instead, the reference to ''any party'' emphasizes that *all parties* to negotiability cases are limited to the filings expressly recognized in the negotiability regulations, except for additional submissions that the Authority grants permission to file, in accordance with this section. *See* Processing of Cases; Final Rules, 45 FR 3482, 3485 (Jan. 17, 1980) (explaining that the purpose of the predecessor rule to § 2424.27 was to clarify that ''the Authority will not consider any submissions other than a petition for review, statement of position[,] and response . . . unless such additional submission is requested by the Authority[,] or the Authority in its discretion grants permission to file such submission''). Further, the paragraph states that *a party* must show that extraordinary circumstances justify filing an additional submission, and this burden reinforces that the paragraph does not concern filings by non-parties. A separate rule governing submissions from amicus curiae is located at 5 CFR 2429.9.

Further Analysis

Section 2424.27 of the final rule adopts the heading and all of the wording from the proposed rule, but § 2424.27 of the final rule also includes one additional sentence that comes from the wording currently located at 5 CFR 2424.27. Specifically, the additional sentence in the final rule that was not present in the proposed rule states, ''The additional submission must be filed with the written request.'' The ''written request'' in this additional sentence is a written request to file an additional submission in a negotiability proceeding based on a showing of extraordinary circumstances.

Section 2424.30

Comments and Responses

One union commenter and one agency commenter supported the proposed clarifications in this section about when a grievance alleging a ULP would be considered administratively resolved. These commenters stated that the proposed rule identified all of the circumstances that, to their knowledge, could be considered an administrative resolution that would trigger the thirty-day deadline for an exclusive representative to refile a directly related negotiability petition that was previously dismissed without prejudice. The final rule adopts these clarifications from the proposed rule in full.

The same union commenter suggested that, because this section would now list the possible administrative resolutions for a grievance alleging a ULP, the section should also list the possible administrative resolutions for a ULP charge that prompted the dismissal of a negotiability petition without prejudice. The commenter should refer to the ULP regulations in part 2423 for guidance about potential administrative

resolutions of ULP charges. The final rule does not repeat information from part 2423.

An agency commenter suggested that § 2424.30(b)(2) of the proposed rule state that where an agency makes only bargaining obligation claims, and not negotiability claims, those bargaining obligation claims will not be resolved through the negotiability process. The clarification that this commenter sought is already present in § 2424.2(d)'s definition of a petition for review, so this suggestion has not resulted in changes to § 2424.30 of the final rule.

OPM contended that the Authority should not automatically dismiss petitions for review without prejudice when an exclusive representative has filed a ULP charge or grievance alleging a ULP, and the charge or grievance concerns issues directly related to the petition for review. Instead, OPM advocated a case-by-case assessment of which forum would most expeditiously resolve the parties' disputes. According to OPM, if the Authority determines that the negotiability process would provide the most expeditious resolution, then the Authority should not dismiss a petition for review (without prejudice) while the parties' directly related disputes proceed toward resolution in another forum. When the Authority amended its negotiability regulations to allow for the resolution of bargaining obligation disputes that accompany negotiability disputes, the Authority declined to adopt a commenter's suggestion that, if directly related disputes were filed in multiple forums, then an exclusive representative should have the right to determine which forum proceeds to a resolution first. On that point, the Authority stated that ULP ''proceedings are, in these situations, better suited to resolving the entire dispute.'' Negotiability Proceedings, 63 FR 66405, 66410 (Dec. 2, 1998). The Authority explained further:

> [W]ith the sole exception of compelling need claims . . . all bargaining obligation and negotiability claims may be adjudicated in [a ULP] proceeding. Further, unless excluded from the scope of the parties' grievance procedure by agreement, alleged [ULPs] may be resolved under such negotiated procedures. Thus, with one exception, dismissing petitions for review where [ULP] charges have been filed does not jeopardize a party's ability to obtain adjudication of all claims. In addition, . . . with the exception of orders to bargain, remedies available in [ULP] proceedings under 5 U.S.C. 7118(a)(7) are not . . . available in Authority decisions and orders issued under this part. Accordingly, in situations where an exclusive representative has filed [a ULP] charge, requiring adjudication in a negotiability proceeding would deprive a prevailing exclusive representative of such remedies.

Id. The Authority continues to adhere to those views about resolving cases that involve both bargaining obligation and negotiability disputes. Moreover, a case-by-case assessment would leave the decision-makers in other forums—specifically, the General Counsel and employees of the Office of the General Counsel, as well as arbitrators—uncertain about whether to process disputes before them that are directly related to a negotiability petition for review. For all these reasons, the final rule does not adopt OPM's suggestion.

OPM also suggested that the section state that if an exclusive representative files a ULP charge that solely concerns an allegation of nonnegotiability, then the Authority may choose to process the ULP charge as a negotiability appeal. However, OPM did not provide any legal authority to establish that an exclusive representative's choice of forum may be overruled in that manner, so this suggestion has not been adopted.

Further Analysis

The heading; § 2424.30(a)—including subsections (a)(1), (2), (3), and (4); and § 2424.30(b) and (b)(1) are the same in the final rule as in the proposed rule.

Section 2424.30(b)(2) of the final rule differs from the proposed rule only in its first sentence. This sentence concerns how the Authority will process a petition for review when an exclusive representative has not already filed a related ULP charge or a grievance alleging a ULP, but a bargaining obligation dispute exists in connection with the petition for review. The first sentence of § 2424.30(b)(2) of the proposed rule stated, in pertinent part, ''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 . . . .'' In contrast, the first sentence of § 2424.30(b)(2) of the final rule states, in pertinent part, ''The exclusive representative may have an opportunity to 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 . . . .'' This sentence was changed to avoid implying that, if an exclusive representative files a petition that involves a bargaining obligation dispute, then the exclusive representative is entitled to file a ULP charge or grievance alleging a ULP, irrespective of the ordinary legal and contractual conditions that would otherwise apply to these filings. Thus, this portion of the first sentence of § 2424.30(b)(2) of the final rule uses the phrase ''may have an opportunity to file'' to indicate that, if an exclusive representative files a ULP charge or grievance as described in this subsection, then those filings would be subject to all of the otherwise applicable conditions that ordinarily apply to such filings—such as, for example, time limits. The remainder of § 2424.30(b)(2) of the final rule is the same as the proposed rule.

Section 2424.31

Comments and Responses

One commenter disagreed that this section should allow for hearings or other appropriate action to resolve bargaining obligation disputes since this part of the Authority's Regulations concerns negotiability proceedings. The procedures of this section would apply only to bargaining obligation disputes that may be resolved in a negotiability appeal because they are accompanied by negotiability disputes concerning the same proposal or provision.

A union commenter stated that, to the extent that the final rule is intended to preclude the consideration of parties' views about whether a hearing is needed, the commenter opposes that change. The final rule is not intended to preclude the consideration of the parties' views, and none of the changes to the rule expressly state or imply that the Authority will not consider the parties' views. Thus, this concern is misplaced.

Further Analysis

Section 2424.31 is the same in the final rule as in the proposed rule.

Section 2424.32

Comments and Responses

An agency commenter recommended adding the phrase ''or government-wide regulation'' after the phrase ''contrary to law'' in § 2424.32(a) and (b). This change has not been made because this section's use of the phrase ''contrary to law'' is intended to encompass all authorities with the force and effect of law—not merely statutes.

A union commenter opposed the newly created burden under § 2424.32(c) of the proposed rule that each party must 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. The commenter noted that § 2424.32(c) cautioned that the Authority's decision may be adverse to

a party that fails to satisfy this burden to sufficiently explain, and the commenter contended that an adverse consequence is an unfair penalty for non-lawyer union representatives who may not phrase arguments in the most compelling way. This commenter viewed § 2424.32(c) as an attempt to punish parties that do not provide sophisticated analyses. However, the commenter's criticism is unfounded because the burden in § 2424.32(c) is not concerned with sophistication; it is concerned with sufficiency. Parties must provide the Authority with the details necessary to understand their positions, and parties must be aware that a failure to provide those details may adversely affect them. Section 2424.32(c) essentially warns parties not to expect the Authority to fill in gaps in order to fully develop, or make sense of, incompletely explained positions. Rather, parties must be diligent in setting forth their understandings on all relevant facets of the meaning, operation, and effects of a proposal or provision, as well as the associated legal implications.

Further Analysis

The heading and § 2424.32(a) are the same in the final rule as in the proposed rule.

Section 2424.32(b) of the final rule differs from the proposed rule in one respect. Whereas § 2424.32(b) of the proposed rule stated that ''[t]he 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''; § 2424.32(b) of the final rule states that ''[t]he agency has the burden of explaining the agency's understanding of the meaning, operation, and effects of the proposal or provision, if the agency disagrees with the exclusive representative's explanations.'' Unlike the proposed rule, § 2424.32(b) of the final rule assigns the agency the burden of explaining *the agency's understanding* of meaning, operation, and effects because the agency has this burden of explanation only when the agency disagrees with the explanations that the exclusive representative already provided. In those situations where the agency disagrees with the exclusive representative's explanations, the agency's burden would be to explain the agency's understanding, so as to distinguish that understanding from the exclusive representative's previous explanations.

The wording in § 2424.32(b) of the final rule is consistent with § 2424.24(c)(2)(i) of the final rule, in which agencies are instructed that their statements of positions must include, ''[i]f different from the exclusive representative's position, an explanation of the *meaning the agency attributes* to the proposal or provision and the reasons for disagreeing with the exclusive representative's explanation of meaning.'' 5 CFR 2424.24(c)(2)(i) (emphasis added).

Further, § 2424.32(b) of the final rule is consistent with Authority precedent that when the parties disagree about a proposal's meaning, then the Authority relies on the exclusive representative's explanation of the proposal's meaning to assess whether the proposal is within the duty to bargain, as long as the exclusive representative's explanation comports with the proposal's wording. *E.g., Nat'l Nurses United,* 70 FLRA 306, 307 (2017).

Moreover, § 2424.32(b) of the final rule accounts for cases where an exclusive representative explains a proposal's meaning, but that explanation does not comport with the proposal's wording. Under those circumstances, if the agency disagrees with the exclusive representative's explanation, then the agency bears the burden of explaining (1) the agency's understanding of the proposal and how that understanding comports with the proposal's wording; and (2) why the exclusive representative's alternate explanation does not comport with the proposal's wording.

The remainder of § 2424.32(b) of the final rule is the same as the proposed rule.

Section 2424.32(c); (d)—including subsections (d)(1), (d)(1)(i), (d)(1)(ii), and (d)(2); and (e) of the final rule are the same as the proposed rule.

Section 2424.40

None of the public comments addressed § 2424.40. Section 2424.40 is the same in the final rule as in the proposed rule, except for one phrase that has been added in the final rule. The second complete sentence of § 2424.40(b) in the proposed rule stated, ''If the Authority finds that the duty to bargain does not extend to the proposal, then the Authority will dismiss the petition for review.'' In § 2424.40(b) of the final rule, the second half of this sentence states, ''then the Authority will dismiss the petition for review as to that proposal.'' This change makes § 2424.40(b) of the final rule consistent with § 2424.40(c) of the final rule, which states, ''If the Authority finds that a provision is contrary to law, rule, or regulation, then the Authority will dismiss the petition for review *as to that provision.*'' 5 CFR 2424.40(c) (emphasis added). Further, this change is consistent with the Authority's longstanding practice. *E.g., AFGE, Loc. 3509,* 46 FLRA 1590, 1623–24 (1993) (dismissing petition for review as to seven proposals, but ordering agency to bargain concerning one proposal).

Section 2424.41

None of the public comments addressed § 2424.41. Section 2424.41 is the same in the final rule as in the proposed rule, with one exception. Section 2424.41 of the proposed rule stated that an exclusive representative must report to the appropriate Regional Director an agency's failure to comply with an order issued in accordance with § 2424.40 ''within thirty (30) days following expiration of the 60-day period under 5 U.S.C. 7123(a).'' By contrast, § 2424.41 of the final rule reverts to wording currently located at 5 CFR 2424.41. Thus, § 2424.41 of the final rule states that an exclusive representative must report an agency's failure to comply with an order ''within a reasonable period of time following expiration of the 60-day period under 5 U.S.C. 7123(a).''

Section 2424.50

Comments and Responses

Two union commenters opposed changing the regulatory definition of compelling need in a way that would permit the Authority to find that circumstances other than those listed in the illustrative examples demonstrated the existence of compelling need. These same commenters opposed adding any additional examples to the illustrative criteria.

One commenter provided six additional examples to consider adding to the illustrative criteria.

OPM supported changing the regulatory definition of compelling need in a way that would permit the Authority to find that circumstances other than those listed in the illustrative criteria demonstrated the existence of compelling need.

OPM requested that the section specify that compelling need arguments may be merely one of several grounds for an allegation of nonnegotiability. OPM also asked that the section include additional explanation about what constitutes an agency rule or regulation. These requests were not germane to the definition of a compelling need—which is the subject of this section—so they were not incorporated into the final rule.

OPM suggested removing the reference to ''the accomplishment of the mission or the execution of functions of

the agency or primary national subdivision'' from § 2424.50(a) of the proposed rule. As no rationale was offered for deleting that phrase, it has been retained in the final rule.

One agency commenter argued that all agency rules that have general applicability to the agency's workforce should demonstrate a compelling need. This argument is rejected because it would allow agencies to render topics nonnegotiable merely by issuing a regulation of general applicability. This same commenter argued that executive orders should qualify as ''mandate[s] to the agency or primary national subdivision under law or other outside authority, which implementation is essentially nondiscretionary in nature,'' under § 2424.50(c). Nothing in the rule prevents a party from making that argument in the context of a concrete dispute, but the final rule does not include a blanket statement to that effect.

The Department of Veterans Affairs argued that agency rules and regulations concerning pandemics, epidemics, or other similar emergency situations should be treated as rules and regulations supported by a compelling need, particularly because of the Department's healthcare responsibilities. The Department may advance that argument in the context of a concrete dispute, but the final rule does not include a blanket statement to that effect.

Ultimately, the comments on additional examples to add to § 2424.50 were varied and conflicting. The final rule retains the examples already set forth at 5 CFR 2424.50. However, as explained further below, the final rule does not include any additional examples in the illustrative criteria. In addition, the final rule does not include a phrase that would recognize the Authority's ability to determine that a compelling need exists based on circumstances other than those in the illustrative criteria.

Further Analysis

Section 2424.50 of the final rule differs from the proposed rule in several respects. Like § 2424.50 of the proposed rule, § 2424.50 of the final rule adds to the middle of the introductory paragraph the following wording that does not currently appear in 5 CFR 2424.50: ''the rule or regulation was issued by the agency or any primary national subdivision of the agency, and.'' This additional wording recognizes requirements from Section 7117(a)(3) of the Statute—concerning agency rules or regulations for which a compelling need exists—as part of § 2424.50 of the final rule, which provides a regulatory definition for compelling need.

After the concluding word ''and'' in the additional wording discussed in the preceding paragraph, § 2424.50 of the proposed rule stated that ''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.'' By contrast, after the concluding word ''and'' in the additional wording discussed in the preceding paragraph, § 2424.50 of the final rule states that ''the agency demonstrates that the rule or regulation satisfies one of the following illustrative criteria.'' As such, the final rule departs from the proposed rule in that the final rule does not state that the Authority may determine that ''other circumstances establish a compelling need for the rule or regulation.'' Further, the final rule changes the phrase ''one or more of the following illustrative criteria'' from the proposed rule to simply ''one of the following illustrative criteria.'' This change was made because a compelling need exists if any one of the illustrative criteria is satisfied, and it will ordinarily be unnecessary for the Authority to determine that a rule or regulation satisfies multiple illustrative criteria. However, this change does not preclude the possibility that a rule or regulation could satisfy more than one of the illustrative criteria.

In connection with § 2424.50, the proposal notices solicited suggestions for more illustrative criteria that could be added to the criteria currently located at 5 CFR 2424.50. Although the FLRA appreciates the time that commenters dedicated to suggesting additional illustrative criteria, the final rule does not adopt any additional criteria. Under the final rule, the illustrative criteria currently located at 5 CFR 2424.50(a), (b), and (c) remain unchanged.

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 final rule will not have a significant impact on a substantial number of small entities, because this final rule applies only to Federal agencies, Federal employees, and labor organizations representing those employees.

Executive Order 12866, Regulatory Review

The FLRA is an independent regulatory agency and thus is not subject to the requirements of E.O. 12866 (58 FR 51735, Sept. 30, 1993).

Executive Order 13132, Federalism

The FLRA is an independent regulatory agency and thus is not subject to the requirements of E.O. 13132 (64 FR 43255, Aug. 4, 1999).

Unfunded Mandates Reform Act of 1995

This final rule 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 final 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.

For the reasons stated in the preamble, the Federal Labor Relations Authority amends 5 CFR part 2424 as set forth below:

■ 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 October 12, 2023.

■ 3. Amend § 2424.2 by revising paragraphs (a), (c)(2) and (c)(3), adding

paragraphs (c)(4) through (7), and revising paragraphs © and (f). The revisions and additions read as follows:

§ 2424.2 Definitions.

In this part, the following definitions apply:

(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 or because the effect of the change is de minimis; and

(3) The exclusive representative is attempting to bargain at the wrong level of the agency.

* * * * *

(c) * * *

(2) 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 a Government-wide rule or regulation; and

(7) 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.

* * * * *

■ 4. Revise § 2424.10 to read as follows:

§ 2424.10 Collaboration and Alternative Dispute Resolution Program.

Where an exclusive representative and an agency are unable to resolve disputes that arise under this part, they may request assistance from the Collaboration and Alternative Dispute Resolution (CADR) Program or the Office of Case Intake and Publication (CIP), which will refer requests to the CADR Program. Upon request, as resources permit, and as agreed upon by the parties, CADR representatives will attempt to assist the parties to resolve these disputes. Parties seeking information or assistance under this part may call the CADR Office at (771) 444–5802 or the Office of CIP at (771) 444–5805, or write those offices at 1400 K Street NW, Washington, DC 20424–0001. A brief summary of CADR activities is available on the internet at *www.flra.gov.*

■ 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 must be in writing and must be served in accord with § 2424.2(g).

© *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) 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 the petition may be filed at any time, subject to the following:

(1) If the agency serves a written allegation on the exclusive representative more than ten (10) days after receiving a written request for such allegation, then the petition must be filed within fifteen (15) days after the date of service of that allegation on the exclusive representative.

(2) [Reserved]

■ 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. However, the exclusive representative will have an opportunity to divide proposals or provisions into separate parts when the exclusive representative files a response under § 2424.25.

I *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 website at *www.flra.gov.* That website 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 that you rely on 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);

(i) 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;

(ii) [Reserved]

(3) 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;

(i) 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; and

(ii) [Reserved]

(4) Any request for a hearing before the Authority and the reasons supporting such request, with the understanding that the Authority rarely grants such requests.

■ 8. Revise § 2424.23 to read as follows:

§ 2424.23 Post-petition conferences; conduct and record.

(a) *Scheduling a post-petition conference.* The FLRA will, 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) *Conduct of conference.* The post-petition conference will be conducted with representatives of the exclusive representative and the agency, who must be prepared and authorized to discuss, clarify, and resolve matters including the following:

(1) The meaning of the proposal or provision in dispute;

(2) Any disputed factual issue(s);

(3) Negotiability dispute objections and bargaining obligation claims regarding the proposal or provision; and

(4) Status of any proceedings—including an unfair labor practice charge under part 2423 of this subchapter, a grievance under the parties' negotiated grievance procedure, or an impasse procedure under part 2470 of this subchapter—that are directly related to the negotiability petition.

€ *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 FLRA representative will prepare, and the FLRA will serve on the parties, a written record 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 matter€

(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. Revise § 2424.24 to read as follows:

§ 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 outside 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.* Unless the time limit for filing has been extended pursuant to § 2424.23 or part 2429 of this subchapter, 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.

I *Content.* You must file your statement of position 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 statement electronically through use of the eFiling system on the FLRA's website at *www.flra.gov.* That website also provides copies of statement forms. You must date your statement, unless you file it electronically through use of the eFiling system. And, regardless of how you file your statement, your statement must:

(1) Withdraw either:

(i) The allegation that the duty to bargain in good faith does not extend to the exclusive representative's proposal, or

(ii) The disapproval of the provision under 5 U.S.C. 7114(c); or

(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:

(i) If different from the exclusive representative's position, an explanation of the meaning the agency attributes to the proposal or provision and the reasons for disagreeing with the exclusive representative's explanation of meaning;

(ii) If different from the exclusive representative's position, an explanation of how the proposal or provision would work, and the reasons for disagreeing with the exclusive representative's explanation;

(3) Status of any proceedings—including an unfair labor practice charge under part 2423 of this subchapter, a grievance under the parties' negotiated grievance procedure, or an impasse procedure under part 2470 of this subchapter—that are directly related to the negotiability petition, 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;

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

(ii) [Reserved]

(4) Any request for a hearing before the Authority and the reasons supporting such request, with the understanding that the Authority rarely grants such requests.

(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 paragraphs (a) through (c) of § 2424.25 to read as follows:

§ 2424.25 Response of the exclusive representative; purpose; time limits; content; severance; 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 exclusive representative disagrees with any facts or arguments in the agency's statement of position.

(b) *Time limit for filing.* Unless the time limit for filing has been extended pursuant to § 2424.23 or part 2429 of this subchapter, 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.

© *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 website at *www.flra.gov.* That website also provides copies of response forms. With the exception of severance under paragraph (d) of this section, 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) *Severance.* The exclusive representative may, of its own accord, accomplish the severance of a previously submitted proposal or provision. To accomplish severance, the exclusive representative must identify the proposal or provision that the exclusive representative is severing and set forth the exact wording of the newly severed portion(s). Further, as part of the exclusive representative's explanation and argument about why the newly severed portion(s) are within the duty to bargain or not contrary to law, the exclusive representative must explain how the severed portion(s) stand alone with independent meaning, and how the severed portion(s) would operate. The explanation and argument in support of the severed portion(s) must meet the same requirements for specific information set forth in paragra©(c) of this section, and must satisfy the exclusive representative's burdens under § 2424.32.

* * * * *

■ 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.* Unless the time limit for filing has been extended pursuant to § 2424.23 or part 2429 of this subchapter, within fifteen (15) 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 website at *www.flra.gov.* That website 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), respectively. 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. The additional submission must be filed with the written request. 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 have an opportunity to 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 heading, introductory text, and paragraph © 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 agency's understanding of 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, or 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 assertio©(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 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 as to that proposal. 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.

(d) *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, then 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 a reasonable period of time 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 the rule or regulation satisfies one of the following illustrative criteria:

* * * * *

Approved: August 31, 2023.

Rebecca J. Osborne,

Federal Register Liaison, Federal Labor Relations Authority.

[FR Doc. 2023–19269 Filed 9–11–23; 8:45 am]

BILLING CODE 7627–01–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 71

[Docket No. FAA–2023–1389; Airspace Docket No. 23–AGL–19]

RIN 2120–AA66

Amendment of Class E Airspace; Quincy, IL

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: This action amends the Class E airspace at Quincy, IL. This action is the result of an airspace review caused by the decommissioning of the Quincy very high frequency omnidirectional range (VOR) as part of the VOR Minimum Operating Network (MON) Program. The name and geographic coordinates of the airport and name of the navigational aid are also being updated to coincide with the FAA's aeronautical database.

DATES: Effective 0901 UTC, November 30, 2023. The Director of the Federal Register approves this incorporation by reference action under 1 CFR part 51, subject to the annual revision of FAA Order JO 7400.11 and publication of conforming amendments.

ADDRESSES: A copy of the Notice of Proposed Rulemaking (NPRM), all comments received, this final rule, and all background material may be viewed online at *www.regulations.gov* using the FAA Docket number. Electronic retrieval help and guidelines are available on the website. It is available 24 hours each day, 365 days each year.

FAA Order JO 7400.11G, Airspace Designations and Reporting Points, and subsequent amendments can be viewed online at *www.faa.gov/air_traffic/publications/*. You may also contact the Rules and Regulations Group, Office of Policy, Federal Aviation Administration, 800 Independence Avenue SW, Washington DC 20591; telephone: (202) 267–8783.

FOR FURTHER INFORMATION CONTACT: Jeffrey Claypool, Federal Aviation Administration, Operations Support Group, Central Service Center, 10101 Hillwood Parkway, Fort Worth, TX 76177; telephone (817) 222–5711.

SUPPLEMENTARY INFORMATION:

Authority for This Rulemaking

The FAA's authority to issue rules regarding aviation safety is found in Title 49 of the United States Code. Subtitle I, Section 106 describes the authority of the FAA Administrator. Subtitle VII, Aviation Programs, describes in more detail the scope of the agency's authority. This rulemaking is promulgated under the authority described in Subtitle VII, Part A, Subpart I, Section 40103. Under that section, the FAA is charged with prescribing regulations to assign the use of airspace necessary to ensure the safety of aircraft and the efficient use of airspace. This regulation is within the scope of that authority as it amends the Class E surface airspace and the Class E airspace extending upward from 700 feet above the surface at Quincy Regional Airport-Baldwin Field, Quincy IL, to support instrument flight rule (IFR) operations at this airport.

History

The FAA published an NPRM for Docket No. FAA–2023–1389 in the **Federal Register** (88 FR 41337; June 26, 2023) proposing to amend the Class E airspace at Quincy IL. Interested parties were invited to participate in this rulemaking effort by submitting written comments on the proposal to the FAA. No comments were received.

Incorporation by Reference

Class E airspace designations are published in paragraphs 6002 and 6005 of FAA Order JO 7400.11, Airspace Designations and Reporting Points, which is incorporated by reference in 14 CFR 71.1 on an annual basis. This document amends the current version of that order, FAA Order JO 7400.11G, dated August 19, 2022, and effective September 15, 2022. FAA Order JO 7400.11G is publicly available as listed in the **ADDRESSES** section of this document. These amendments will be published in the next update to FAA Order JO 7400.11.

FAA Order JO 7400.11G lists Class A, B, C, D, and E airspace areas, air traffic service routes, and reporting points.

The Rule

This amendment to 14 CFR part 71:

Modifies the Class E surface airspace to within a 4.3-mile (increased from a 4.2-mile) radius of Quincy Regional Airport-Baldwin Field, Quincy, IL; removes the Quincy VORTAC and associated extension from the airspace legal description; updates the name (previously Quincy Municipal Baldwin Field) and geographic coordinates of the airport to coincide with the FAA's aeronautical database; and replaces the outdated terms ''Notice to Airmen'' with ''Notice to Air Missions'' and ''Airport/Facility Directory'' with ''Chart Supplement'';

And modifies the Class E airspace extending upward from 700 feet above the surface to within a 6.8-mile (decreased from a 7.1-mile) radius of Quincy Regional Airport-Baldwin Field; amends the extension to the southwest to within 4 miles each side (previously 4.4 miles northwest and 7 miles southeast) of the 220° bearing from the Quincy RGNL-Baldwin FLD: RWY 04—Marker Beacon (previously Quincy ILS localizer southwest course) extending from the 6.8-mile (previously 7-mile) radius of the Quincy Regional Airport-Baldwin Field to 9.8 miles (previously 10.4 miles) southwest of the Quincy RGNL-Baldwin FLD: RWY 04—Marker Beacon (previously Quincy LOM/NDB); and updates the name and geographic coordinates of Quincy Regional Airport-