Rules and Regulations

Federal Register
Vol. 63, No. 231
Wednesday, December 2, 1998

FEDERAL LABOR RELATIONS AUTHORITY

5 CFR Part 2424

Negotiability Proceedings

AGENCY: Federal Labor Relations Authority.

ACTION: Final rule.

SUMMARY: The Chair and Members of the Authority component (the Authority) of the Federal Labor Relations Authority (the FLRA) revise the regulations concerning negotiability proceedings. The revisions are designed to expedite these proceedings and facilitate dispute resolution.

EFFECTIVE DATE: April 1, 1999.

ADDRESSES: Written comments received are available for public inspection during normal business hours at the Office of Case Control, Federal Labor Relations Authority, 607 14th Street, NW., Washington, D.C. 20424–0001.

FOR FURTHER INFORMATION CONTACT: Peter Constantine, Office of Case Control, at the address listed above or by telephone # (202) 482–6540.

SUPPLEMENTARY INFORMATION:

Background

In an effort to improve its decision-making processes, the Chair and Members of the Authority established an internal task force to study and evaluate the policies and procedures in effect concerning negotiability proceedings under 5 U.S.C. 7117. To this end, the Authority published a **Federal Register** notice (63 FR 19413) (April 20, 1998) inviting the public to submit written comments on several subjects relevant to negotiability proceedings, and to participate in a focus group held in May 1998 to discuss these matters.

Subsequently, the Authority proposed revisions to part 2424 of the Authority's regulations concerning negotiability proceedings. The proposed rule was published in the **Federal Register** and public comment was solicited on the proposed changes (63 FR 48130) (September 9, 1998). The Authority invited comment on the proposed rule in two ways: by convening meetings in October 1998 in Chicago, IL, Oakland, CA, and Washington, DC, and by offering the public an opportunity to submit written comments. Formal written comments were submitted by seven agencies, six exclusive representatives, and two individuals. In addition, over 80 individuals, representing many agencies and exclusive representatives, participated in meetings to discuss the proposed regulations. All comments, whether expressed orally in a meeting or submitted in writing, have been considered prior to publishing the final rule, and most comments are specifically addressed in the section-by-section analysis below. Revisions to the proposed rule have been made, for the most part, in response to suggestions and comments received.

Significant Changes

The final rule, like the proposed rule, involves important changes in the processing of negotiability appeals. The final rule incorporates significant changes from the proposed rule, based on consideration of comments received. The most significant change is that the Authority determined not to include in the final rule requirements that: (1) An exclusive representative file with the Authority a notice of intent to institute a negotiability appeal; and (2) parties participate in a conference with a representative of the FLRA prior to the filing of a petition for review by the exclusive representative concerning a proposal for bargaining. These proposed requirements would have applied only to bargaining proposals; they were not proposed to apply to disputes involving provisions that had been disapproved by agency heads under 5 U.S.C. 7114(c). The proposed notice of appeal and prefiling conference requirements were intended to provide an opportunity to explore resolution of the dispute, and narrow and clarify issues remaining to be resolved on appeal.

Many of the commenters to the proposed rule objected to the proposed notice of appeal and prefiling conference requirements. The reasons for these objections included comments that the notice of appeal and prefiling conference would lead to unnecessary delay in resolution of the negotiability appeal, and comments that the Authority did not have a sufficient interest in a prefiling dispute to warrant these regulatory requirements. Commenters generally agreed, however, that a conference that included representatives of the parties and the FLRA would be useful during the processing of a negotiability appeal.

In response to these comments, the final rule does not include the notice of appeal and prefiling conference requirements. Instead, the final rule provides for a ''post-petition conference'' to be held in cases involving a proposal or provision after the exclusive representative has filed its petition for review but before the agency files its statement of position. The purpose of the post-petition conference, which may be held in person or telephonically, is to ensure that the parties have a common understanding of the meaning and impact of the proposal or provision at issue; to determine whether there are factual disputes concerning the proposal or provision; and to discuss other relevant matters, including whether the parties wish to explore alternative dispute resolution.

The final rule also differs from the proposed rule by eliminating the provision that would have precluded parties from raising new arguments after the close of the filing conferences. The final rule requires that the agency raise and support in its statement of position all of its arguments that a proposal or provision is outside the duty to bargain or contrary to law, respectively. The exclusive representative, in its response, is required to raise and support any arguments opposing arguments made in the agency's statement of position. The agency is then provided with a right to file a submission not previously proposed: a reply to arguments raised for the first time in the exclusive representative's response. This submission is limited to replying to new arguments in the exclusive representative's response.

In other respects, the final rule retains significant aspects of the proposed rule. In particular, it establishes procedures designed to facilitate the resolution in one proceeding of all issues raised in

connection with a petition for review, including those issues previously processed exclusively under unfair labor practice or grievance procedures. Among other things, with one exception, the final rule retains the portion of the proposed rule that results in dismissal without prejudice of a petition for review where an unfair labor practice charge or grievance is pending over issues directly related to the petition.

The proposed rule has also been modified in many other respects, primarily in response to specific comments. All of the changes from the proposed rule are described in the following sectional analysis of the final rule.

Sectional Analyses

Sectional analyses of the amendments and revisions to part 2424, Negotiability Proceedings, are as follows:

Part 2424—Negotiability Proceedings

Subpart A—Applicability of This Part and Definitions

Section 2424.1

Commenters recommended that the Authority change the effective date of the rule to allow parties sufficient time to train employees and develop procedures to protect their respective interests under the revised rule. To address these concerns, the final rule establishes an April 1, 1999 effective date.

Section 2424.2

Numerous commenters responded favorably to the addition of a definition section to this part. Several changes have been made to particular definitions, in response to suggestions offered by commenters.

Changes have been made in subsection (a) and (c) to clarify and distinguish the two types of disagreements over the duty to bargain, which the proposed rule identified as ''bargaining disputes'' and ''negotiability disputes.'' Several commenters suggested that the term ''bargaining dispute'' was confusing in that it commonly is used to apply to a broader range of disputes than contemplated by the definition of the term in the proposed regulations, and other commenters suggested alternative terms. To address these concerns, the term ''bargaining dispute'' has been changed to ''bargaining obligation dispute'' in the final rule. The term ''negotiability dispute'' has been retained in the final rule. In order to avoid confusion over the disputes to which these terms apply, examples have been provided in both subsection (a) and subsection (c).

Several comments indicated that the concept of ''provision'' in subsection (f) appeared to be broader than its proposed definition and, in particular, should be defined to include a contract term imposed by the Federal Service Impasses Panel pursuant to 5 U.S.C. 7119 and disapproved by an agency head pursuant to 5 U.S.C. 7114(c). The final rule is modified to reflect that a provision encompasses any matter disapproved on agency head review.

With respect to the definition of ''service'' in subsection (g), the final rule remains unchanged from the proposed rule and requires that the exclusive representative serve its filings on both the agency's principal bargaining representative and the head of the agency. In this regard, the final rule does not incorporate the recommendation of one commenter that the requirement for the exclusive representative to serve copies of its filings be limited to service on the agency head, as required in 5 U.S.C. 7117(c)(2)(B). The Authority views service on both the agency's principal bargaining representative and the agency head as important to ensure that appropriate agency officials receive prompt notice of the exclusive representative's filing of the petition for review, as well as subsequent filings. Ensuring that appropriate agency officials receive prompt notice of the filing of a petition for review is particularly important in view of the requirement in § 2424.23 of the final regulations that appropriate agency officials be available and prepared to participate in a post-petition conference within a short time after the filing of the petition. Thus, although the final rule imposes a burden on exclusive representatives, this burden is outweighed, in the Authority's view, by the benefits resulting from the service requirement.

The final rule in subsection (h) modifies the definition of ''severance'' from that in the proposed rule to make clear that the purpose of severance is to determine whether a severed portion of a proposal or provision is within the duty to bargain, or contrary to law, in the event that some portions of the proposal or provision are found to be outside the duty to bargain or contrary to law. In effect, severing portions of a proposal or provision results in the creation of separate proposals or provisions. Thus, severed portions must have independent meaning, and any dispute over severed portions must be argued separately. Resolving bargaining obligation and negotiability disputes regarding portions of a proposal or provision lengthens the time necessary to issue decisions and orders, and requires expenditures of additional resources—separate arguments and responses—by both parties. Accordingly, exclusive representatives should request severance only in situations where they wish to bargain over portions of a proposal, or have only portions of a provision included in a collective bargaining agreement in the event that some portions are found to be outside the duty to bargain or contrary to law.

One commenter suggested that the definition of ''written allegation concerning the duty to bargain'' in subsection (i) be changed to ''written allegation'' or ''written allegation concerning the legality of a proposal or provision'' to eliminate any confusion associated with the term ''bargain,'' which is also used in the unfair labor practice context. Although the final rule does not adopt this suggestion, the definition of ''petition for review'' makes clear that appeals under part 2424 must involve a negotiability dispute: if only a bargaining obligation dispute is involved, then the appeal cannot be resolved under part 2424.

As discussed in further detail in the commentary to Subpart B, the definition of ''notice of intent to appeal'' in the proposed rule has been eliminated from the final rule.

Finally, one commenter recommended that the final rule define the term ''conditions of employment.'' The final rule does not adopt this recommendation because the definition of this term is set forth in 5 U.S.C. 7103 (a)(14), and its inclusion in the regulations would be duplicative.

Sections 2424.3–2424.9

These sections are reserved.

Subpart B—Alternative Dispute Resolution; Requesting and Providing Allegations Concerning the Duty To Bargain

As noted in the introductory discussion, the Authority received many comments objecting to the proposed prefiling requirement and, in particular, prefiling conferences. Commenters did not, however, object to the optional use of such procedures. Several commenters suggested that mandatory prefiling conferences would result in unnecessary delay and would involve the Authority too early in the negotiability process. Commenters also suggested that efforts directed at

alternative dispute resolution would be better handled through programs and/or agencies specifically designed for that purpose, such as the FLRA's Collaboration and Alternative Dispute Resolution Program (CADR) or the Federal Mediation and Conciliation Service. Other commenters questioned the legality of the proposed prefiling conditions as well as the proposal to preclude parties from later raising arguments that had not been raised during the prefiling conference. In response to these comments, the final rule eliminates all proposed prefiling conditions, including the notice of intent to appeal and the mandatory prefiling conferences. As discussed in the commentary to § 2424.10, however, parties are encouraged to explore opportunities for resolution of disputes that arise under part 2424.

Section 2424.10

Parties uniformly supported the retention of the CADR Program for voluntary dispute resolution. The final rule encourages parties to utilize the CADR process in an effort to reach a collaborative resolution of issues that arise under part 2424. In response to suggestions, the final rule includes point of contact information for the CADR office.

Section 2424.11

The final rule on requesting and providing written allegations concerning the duty to bargain has been modified to reflect the elimination of proposed prefiling conditions governing petitions for review. The rule retains the current procedure for requesting and providing allegations concerning the duty to bargain. In response to a commenter, the rule has been clarified to state that a union may file a petition for review where an agency does not respond to a written request for the agency's written allegation concerning the duty to bargain. The regulation has also been clarified to state that, if an agency provides the union an unrequested written allegation concerning the duty to bargain, then the union may choose either to file a petition for review or to wait and later request another written allegation from the agency. A union is required to file a petition for review, on penalty of losing its right to appeal the agency's allegation, only where the agency's written allegation is in response to a written request by the union.

Section 2424.12–2424.19

These sections are reserved.

Subpart C—Filing and Responding to a Petition for Review; Conferences

Section 2424.20

As noted in the earlier commentary concerning Subpart B, the prefiling conditions have been eliminated. The final rule has been modified to reflect this change.

One commenter suggested that agencies should be provided a right to file petitions. This suggestion was not adopted because 5 U.S.C. 7117(c), which mandates the negotiability procedure, provides for appeals by exclusive representatives only. In the event an agency believes that a union has refused to bargain over a mandatory subject of bargaining, it may file an unfair labor practice charge. *See American Federation of Government Employees* v. *Federal Labor Relations Authority*, 778 F.2d 850, 853 n.4 (D.C. Cir. 1985).

Section 2424.21

One commenter, noting that the proposed rule was silent on this matter, suggested that the final rule specify that an agency head disapproval of a provision under 5 U.S.C. 7114(c) triggers the time limit for filing a petition for review. The final rule incorporates this suggestion.

Section 2424.22

Several commenters asserted that the filing requirements were unnecessarily legalistic and burdensome. Commenters recommended that the final rule be revised to make clear the specific information the exclusive representative is required to provide in its petition for review. In response to these concerns, subsection (a), stating the purpose of the petition for review, has been added, and subsection (b) of the final rule, which specifies the information that must be included in a petition for review, has been amplified. Also in response to one comment, the final rule makes clear that an exclusive representative is required to provide the meaning of a proposal or provision in the petition for review. The final rule does not adopt the suggestion of one commenter to delete the requirement that a table of contents and table of authorities be included when a petition exceeds 25 double-spaced pages in length. These tables, which will be required only for lengthy submissions, will assist both the parties and the Authority in reviewing complex petitions.

One commenter questioned whether the proposed regulations intended to delete the procedure in § 2424.4(c) of the current regulations, which provides that filing an ''incomplete petition for review will result in the exclusive representative being asked to provide the missing or incomplete information.'' The commenter is correct in that a parallel section was not included in the proposed regulations, and is not included in the final regulations. The Authority does not intend by this to alter its current practice insofar as both parties are now, and will in the future continue to be, given an opportunity to correct minor or technical deficiencies in a filing. Such minor or technical deficiencies include failing to provide the correct number of copies of documents, or failing to include a statement of service. The consequences of failure to comply with an order requiring such correction are set forth in § 2424.32(d). However, the fact that the Authority will provide opportunities for parties to correct minor, technical deficiencies in filing does not mean that parties may reasonably rely on the Authority to provide them an opportunity to correct other deficiencies, such as failure to raise and support, or failure to respond to, an argument. Consistent with § 2424.32(c), these latter failures will, where appropriate, be deemed waivers or concessions.

In response to comments that certain matters, including exclusive representatives' requests for severance, and exclusive representatives' assertions that proposals or provisions constitute procedures and/or appropriate arrangements under 5 U.S.C. 7106(b) (2) and (3), respectively, would be better addressed at a later stage in the proceeding, the final rule has been changed. In particular, subsection (c) of the final rule does not require that an exclusive representative raise and address any request for severance in its petition for review. Moreover, the responsibility of the exclusive representative to raise any arguments concerning procedures and appropriate arrangements under 5 U.S.C. 7106 (b)(2) and (b)(3) has been moved to the exclusive representative's response to the agency's statement of position set forth in § 2424.25 of the final rule. However, an exclusive representative may choose to raise these matters in its petition for review. As discussed in the commentary to § 2424.24, if an exclusive representative raises such matters in its petition for review, then the agency is required to respond to the matters in its statement of position because failure to do so may be deemed a waiver or concession.

The final rule also modifies the requirement that the exclusive representative provide copies of authorities on which it relies. In

response to comments that this requirement would be burdensome, the rule limits the documents that must be provided to those not ''easily'' available to the Authority. This is intended to clarify that copies of such authorities as provisions in the United States Code, Government-wide regulations, and published precedent need not be provided. However, as agency regulations and such matters as sections in collective bargaining agreements are not easily available, copies of these must be provided. If a filing party is in doubt as to whether an authority it relies on is easily available to the Authority, the party is encouraged to seek guidance from the Case Control Office, whose address and telephone number appear in 5 CFR 2429.24.

Section 2424.23

As noted previously, the proposed rule required a prefiling conference in cases involving proposals for bargaining and a postfiling conference in cases involving provisions disapproved by an agency head under 5 U.S.C. 7114(c). Although commenters generally disfavored mandatory prefiling conferences, commenters generally favored postfiling conferences. The final rule provides in subsection (a) that a representative of the FLRA will, where appropriate, schedule and conduct a conference following the filing of a petition for review involving proposals and provisions. Although a post-petition conference is not required in all cases, it is expected that one will be held in most cases. In response to a suggestion that a time frame be provided for completion of the conference, the final rule provides that all reasonable efforts will be made to schedule and conduct the post-petition conference within 10 days of receipt of the petition for review.

One commenter objected that post-petition conferences should not include mandatory mediation or settlement discussions. Subsection (b) of the final rule has been modified to eliminate any suggestion that the post-petition conference is intended to mediate the dispute or require settlement. Nevertheless, it is envisioned that parties will be asked whether they would like to pursue alternative dispute resolution options, including CADR services. Subsection (b) reflects that the purpose of the conference is to assist the parties in discussing, clarifying and resolving the issues in the negotiability appeal. These issues include the meaning of a proposal or provision, whether there are factual disputes, and other matters. Where appropriate, modification of the wording of a proposal or provision to conform to the intended or agreed-upon meaning of the proposal or provision will be encouraged.

Several commenters objected to an automatic extension of the time limits under §§ 2424.24 and 2424.25. In response to these objections, subsection (b) is modified to reflect that the subject of extension of the time limits under §§ 2424.24 and 2424.25—specifically whether such extension is requested—will be discussed during the post-petition conference, and that the FLRA representative conducting the conference is authorized to grant a requested extension when it would effectuate the purposes of the Federal Service Labor-Management Relations Statute, 5 U.S.C. 7101 *et seq.* A request for an extension of time also may be filed pursuant to § 2429.23 of this subchapter.

Several commenters asserted that parties would be more likely to discuss, clarify and resolve their disputes if no record were made of the conference. Other commenters recommended that, if a record of the conference were prepared, then the Authority should make clear that parties are not limited to arguments and assertions made during the conference. The final rule retains the record of the conference, providing in subsection (c) that a written statement of the conference, including whether the parties agree on the meaning of the proposal or provision and other appropriate matters, will be prepared at, or following the conclusion of, the conference and will be provided to the parties by the FLRA representative. However, commenters' assertions that parties should not be prevented from raising and supporting new arguments after the conclusion of the conference are addressed by the modification to § 2424.32(c) of the final rule, which clarifies that an agency is not limited to the arguments it raises in a conference. As described in the commentary to § 2424.32(c), the final rule clarifies that an agency is precluded from raising a new argument only after the filing of its statement of position, and that an exclusive representative is so precluded only after the filing of its response to the statement of position. In this regard, the purpose of the requirement in § 2424.23 that the parties' representatives must be prepared and authorized to discuss, clarify, and resolve bargaining obligation and negotiability disputes is to facilitate discussion and understanding and, thereby to expedite resolution of a petition for review, not to ''lock'' the parties into particular arguments or prevent the parties from raising new arguments in their subsequent filings. The Authority intends, by this provision, to encourage the parties to engage in a frank and open discussion of issues raised by the petition for review.

Section 2424.24

The purpose of the statement of position has been added as subsection (a) of this section. Several commenters questioned whether the time limit for filing an agency's statement of position could be extended. As explained in the commentary to § 2424.23, an extension of time will be granted by the FLRA representative at the post-petition conference if it is requested and where the extension would effectuate the purposes of the Statute. An extension also may be requested under § 2429.23 of this subchapter. The final rule makes clear in subsection (b) that, unless an extension has been granted, the statement of position must be filed within 30 days after the date the head of the agency is served with a copy of the petition for review. Because the 30-day time limit for filing a statement of position is established by 5 U.S.C. 7117(c)(3), it cannot be shortened. Accordingly, the final rule does not adopt the suggestion of one commenter that the time limit for filing a statement of position be limited to 15 days. However, because it does not establish the Authority's jurisdiction over the petition for review, the 30-day time limit for filing a statement of position, as well as the time limit set forth in 5 U.S.C. 7117(c)(4) for filing the exclusive representative's response, may be extended upon request and when it would effectuate the purposes of the Statute.

Agencies uniformly objected, as previously noted, to the proposed rule precluding any arguments in the statement of position that were not raised in the conference prior to filing its statement of position. The final rule, in § 2424.32(c), is modified to reflect that an agency is not limited to arguments made in the post-petition conference; an agency is precluded from raising new arguments only after the filing of its statement of position.

Comments to the proposed rule viewed it as overly burdensome and unnecessary to require the agency to provide a copy of all the laws, rules, regulations, and other authorities cited. As set forth previously in connection with § 2424.22, the final rule is changed to require the agency to provide only those authorities that are not ''easily available.'' Also as set forth previously, examples of such materials include, but are not limited to, agency rules or

regulations and provisions of a collective bargaining agreement. As with § 2424.22, and for reasons stated in the commentary to that section, the final rule retains the requirement of a table of contents and a table of authorities when a statement of position exceeds 25 double-spaced pages in length.

One commenter noted that, with respect to severance, it would be unduly burdensome to anticipate how severance might affect proposals or provisions in general when the exclusive representative has not stated its position on severance. Responding to this concern, the final regulation clarifies in subsection (d) that an agency is required to respond to a severance request in its statement of position only when the exclusive representative has requested severance in its petition for review.

The Authority emphasizes that the agency is not limited in its statement of position to responding to matters raised in the exclusive representative's petition for review. However, under § 2424.32(c)(2), a failure to respond to an argument raised in the exclusive representative's petition for review may, where appropriate, be deemed a concession. Accordingly, the agency is required to respond to arguments made in the exclusive representative's petition for review, including arguments—such as severance and asserted exceptions to management's rights—that the exclusive representative is not required to include in a statement of position. Moreover, under § 2424.32(c)(1) of these regulations, the agency may not raise new arguments, in this or any other proceeding, after the filing of the statement of position. Therefore, the agency must raise and support in its statement of position all of its bargaining obligation and negotiability claims, whether or not those claims are responsive to requests and arguments made in the exclusive representative's petition for review.

Section 2424.25

As with §§ 2424.22 and 2424.24, a subsection—(a)—stating the purpose of the exclusive representative's response has been added. Several commenters suggested that the time limits for filing a response could not be extended. As noted earlier in connection with §§ 2424.23 and 2424.24, time limits may be extended when requested and when such extension will effectuate the purposes of the Statute. Thus, the final rule makes clear in subsection (b) that an exclusive representative's response must be filed within 15 days of service of the agency's statement of position, unless an extension of time has been granted.

Subsection (c) of the final rule has been modified, based on comments noted in the commentary to § 2424.22. The modification clarifies that, if the exclusive representative believes that a proposal or provision is within the obligation to bargain or is not contrary to law, respectively, because it comes within an exception to management rights under section 7106(a), then the exclusive representative is required to assert and support this claim either in its petition for review or in its response to the agency's statement of position. Exceptions to management rights, set forth in 5 U.S.C. 7106(b), include that a proposal or provision is bargainable at an agency's election, that the proposal or provision constitutes a procedure, and/or that it constitutes an appropriate arrangement. If the exclusive representative does not assert in its petition for review that an exception to management rights applies, then the exclusive representative must do so in its response to the agency's statement of position.

In general, the exclusive representative's response is limited to matters raised in the agency's statement of position. The only exception is a request for severance, which subsection (d) clarifies may be asserted for the first time in a response.

As with §§ 2424.22 and 2424.24 of the final rule, the requirement that the exclusive representative provide a copy of all laws, rules, regulations and authorities cited has been modified to include only those authorities not easily available to the Authority.

The Authority emphasizes that, under § 2424.32(c)(2), a failure to respond to an argument raised in the agency's statement of position may, where appropriate, be deemed a concession. Moreover, under § 2424.32(c)(1) of these regulations, the exclusive representative may not raise new arguments, in this or any other proceeding, after the filing of the response. Therefore, the exclusive representative must raise and support in its response all of its arguments in support of finding the proposal or provision within the duty to bargain or not contrary to law, respectively. With the exception of severance, the exclusive representative's response is limited to arguments raised in the agency's statement of position.

Section 2424.26

A new section permitting a reply by the agency has been added to the final rule. As outlined in the commentary to §§ 2424.22 and 2424.25, the exclusive representative is not required in the initial stage of the negotiability proceeding to anticipate agency arguments. In particular, an exclusive representative's arguments concerning exceptions to management rights and severance may be asserted for the first time in the exclusive representative's response to the agency's statement of position. In order that the agency has an opportunity to address arguments raised for the first time in the exclusive representative's response, this section of the final rule establishes that the agency may file a reply to such arguments. The agency reply constitutes a new filing that will, in some cases, extend the time necessary to resolve a petition for review. However, the Authority anticipates that permitting the filing of a reply will not delay decisions but, rather, will expedite them by providing a more complete record of the parties' arguments and authorities.

Subsection (a) of the final rule states the purpose of the agency's reply. Subsection (b) provides that an agency must file any reply within 15 days after it has been served with a copy of the exclusive representative's response. Subsection (c) of the final rule outlines the information to be included in the agency's reply and specifically limits the agency's reply to those matters raised in the exclusive representative's response to the agency's statement of position. Subsection (d) addresses the agency's responsibility to explain with particularity why the exclusive representative's request for severance, if any, is not appropriate. Service requirements are outlined in subsection (e) of the final rule.

The Authority emphasizes that an agency's reply is limited to arguments raised for the first time in the exclusive representative's response. Thus, as set forth earlier in the commentary to § 2424.24, the agency should respond fully in its statement of position to all arguments raised in the exclusive representative's petition for review, and should not defer such responses to its reply. A failure to respond to arguments raised in the exclusive representative's response may be deemed a concession under § 2424.32 of these regulations.

Section 2424.27

Noting that the Authority seldom accepts additional submissions, one commenter suggested that the regulations should reflect this practice. In particular, the commenter recommended that the Authority adopt an ''extraordinary circumstances'' standard concerning the filing of additional submissions. The final rule incorporates this suggestion and adopts the suggested standard. The final rule

also adopts the recommendation that any additional submission must be filed no later than 5 days after receipt of the Authority's order granting the request. The final rule does not adopt the suggestion that the time for filing an opposition to an additional submission be limited to 5 days after receipt of the additional submission and, instead, provides that an opposition be filed no later than 15 days after receipt of the additional submission. The additional time is provided in recognition of the fact that the responding party may have no advance notice that the submission will be filed and, as such, a 5-day response period is not sufficient.

Sections 2424.28–2424.29

These sections are reserved.

Subpart D—Processing a Petition for Review

Section 2424.30

Several commenters addressed the proposed rule establishing a new process for resolving petitions for review that concern both negotiability and bargaining obligation disputes. Those in favor of the proposed changes asserted that a unified process would be more efficient than the present system. Those opposed to the changes contended that the negotiability process does not lend itself to addressing bargaining obligation disputes and that the existing system does not need modification.

The Authority has determined that, with certain changes, the proposed rule should be made final. In this regard, the Authority's experience has been that the piecemeal resolution of bargaining obligation and negotiability claims is both inefficient and ineffective. The changes adopted in this rule will reduce duplicative administrative decision making and increase the likelihood that disputes will be resolved more timely.

With respect to the specific changes proposed, some commenters asserted that, where both a negotiability appeal and unfair labor practice charge have been filed, the exclusive representative should retain the right to select the procedure that would go forward. This suggestion was rejected, on the ground that unfair labor practice proceedings are, in these situations, better suited to resolving the entire dispute.

In this regard, with the sole exception of compelling need claims, which is discussed below, all bargaining obligation and negotiability claims may be adjudicated in an unfair labor practice proceeding. Further, unless excluded from the scope of the parties' grievance procedure by agreement, alleged unfair labor practices may be resolved under such negotiated procedures. Thus, with one exception, dismissing petitions for review where unfair labor practice charges have been filed does not jeopardize a party's ability to obtain adjudication of all claims. In addition, as clarified in § 2424.40(a), and with the exception of orders to bargain, remedies available in unfair labor practice proceedings under 5 U.S.C. 7118(a)(7) are not be available in Authority decisions and orders issued under this part. Accordingly, in situations where an exclusive representative has filed an unfair labor practice charge, requiring adjudication in a negotiability proceeding would deprive a prevailing exclusive representative of such remedies.

The one exception to the principle that all bargaining obligation and negotiability claims may be adjudicated in an unfair labor practice or grievance proceeding concerns petitions for review where the agency makes a negotiability claim that a proposal or provision conflicts with an agency regulation for which there is a compelling need under 5 U.S.C. 7117(b). Such compelling need claims must be resolved under the procedures of part 2424. *See Department of the Army, Aberdeen Proving Ground v. Federal Labor Relations Authority,* 485 U.S. 489 (1988) (compelling need determinations may not be adjudicated in an unfair labor practice proceeding). Moreover, an agency cannot be found to have committed an unfair labor practice by refusing to bargain over a proposal over which it has made a compelling need claim unless the Authority has made a prior compelling need determination in a proceeding under part 2424. *See Department of the Army, Soldier Support Center, Fort Benjamin Harrison, Office of the Director of Finance and Accounting, Indianapolis, Indiana, et al.,* 41 FLRA 926, 933 n.1 (1991). Thus, unless an agency's compelling need claim regarding a proposal or provision has previously been resolved by the Authority, there is no basis on which to dismiss the petition for review, or the portion of it relating to such proposal or provision, to permit resolution of all issues in an unfair labor practice or grievance proceeding.

In view of the foregoing comments and considerations, subsection (a) of the final rule is modified to clarify that there is an exception—a proposal or provision over which a compelling need negotiability claim is raised—to the requirement to dismiss a petition for review without prejudice in the event an unfair labor practice charge or grievance has been filed over issues directly related to the petition for review. Petitions for review, or portions of them, concerning proposals or provisions subject to compelling need claims will be processed under part 2424.

In addition, the rule is modified to provide that, within 30 days following *administrative* resolution of the unfair labor practice charge or grievance, an exclusive representative may refile the petition for review and the Authority will determine whether resolution of the petition is required. The reference in subsection (a) to administrative resolution is intended to exclude any time necessary for judicial review. That is, an exclusive representative may not await the outcome of judicial review in the unfair labor practice or grievance arbitration proceeding before refiling the petition for review. With regard to an arbitration award, for purposes of refiling a petition for review, the Authority will apply 5 U.S.C. 7122(b) and find an award final and binding in the event no timely exceptions to the award are filed with the Authority; if exceptions are timely filed, then the award is final and binding for purposes of refiling a petition for review when the Authority resolves the exceptions.

In determining whether resolution of the petition is required, the Authority will take into consideration such matters as whether, consistent with the resolution of the unfair labor practice charge or grievance, an Authority decision and order finding a proposal within the duty to bargain and directing bargaining could be enforced.

The final rule clarifies in subsection (b) how the Authority will process a petition for review where the exclusive representative has not pursued a bargaining obligation dispute in any other proceeding. As with the proposed rule, subsection (b) distinguishes between two categories of cases: (1) Cases where no bargaining obligation dispute exists; and (2) cases where both a negotiability dispute and a bargaining obligation dispute exist. With respect to the first category, the final rule remains unchanged from the proposed rule, providing that where there is no bargaining obligation dispute, the Authority will resolve the petition under the procedures of this part. With respect to the second category, subsection (b)(2) of the final rule provides that, where both a negotiability dispute and a bargaining obligation dispute exist, the Authority will inform the exclusive representative of any opportunity to file an unfair labor practice charge or grievance. If the exclusive representative pursues either

of these options, then the petition for review will be processed in accordance with subsection (a). If the exclusive representative does not pursue either of these options, then subsection (b)(2) of the final rule provides that the Authority will resolve all aspects necessary for disposition of the petition unless, in its discretion, the Authority determines that doing so is not appropriate.

Subsection (b)(2) provides two examples of situations to illustrate where it is not appropriate to resolve all aspects of the petition for review under part 2424. The first is where resolution of the bargaining obligation dispute would unduly delay resolution of the negotiability dispute. A specific example of this is a petition for review involving a negotiability dispute that is clearly controlled by existing precedent such that a decision resolving only the negotiability dispute could be issued expeditiously, but numerous bargaining obligation dispute issues also are present. In such a case, the Authority may conclude that prompt resolution of the negotiability dispute only is preferable to delaying issuance of a decision and order so as to resolve bargaining obligation dispute issues at the same time. The second, related situation set forth in subsection (b) is where the procedures in another, available forum are better suited to resolving the bargaining obligation dispute. An example of this is a petition for review involving a bargaining obligation dispute raising issues of first impression. In such a case, the Authority may conclude that unfair labor practice procedures, which permit participation of the General Counsel and, thereby, facilitate consideration of the General Counsel's views on the issues of first impression, are better suited to resolution of the bargaining obligation dispute than are the procedures in this part.

In circumstances where a proposal is within the duty to bargain, then any bargaining order under § 2424.40 would be expressly conditioned on resolution of the unresolved bargaining obligation dispute in a manner requiring bargaining. On the other hand, if the proposal is outside the duty to bargain or the provision is contrary to law, resolution of the bargaining obligation dispute would be unnecessary.

The Authority emphasizes that resolution of a petition for review involving bargaining obligation and negotiability disputes will not result in adjudication of whether an unfair labor practice has occurred. Such determination may be sought only pursuant to 5 U.S.C. 7116 and 7118. Accordingly, although an Authority decision and order under part 2424 may include determination of underlying legal issues that could also be determined in unfair labor practice proceedings—such as whether a proposed matter is covered by a collective bargaining agreement or whether the effect of a change in conditions of employment is de minimis—that determination will not be accompanied by a finding that an agency acted unlawfully by, for example, implementing a change in conditions of employment without bargaining. Such a finding can only be made in an unfair labor practice proceeding, or in a grievance proceeding determining whether an unfair labor practice occurred. In addition, as resolution of petitions for review under this part will not result in unfair labor practice adjudications, decisions and orders issued under this part will not, with the exception of orders to bargain, include remedies available under 5 U.S.C. 7118(a)(7) in unfair labor practice proceedings. Thus, if exclusive representatives desire such remedies, they should file an unfair labor practice charge or a grievance.

Section 2424.31

Clarification was sought as to when and how the Authority would undertake fact finding as set forth in § 2424.34 of the proposed rules. Comments also recommended that the Authority clarify the circumstances under which it would hold a hearing pursuant to § 2424.38 of the proposed rules. Based upon these comments, §§ 2424.34 and 2424.38 of the proposed rules have been consolidated and moved to this section.

Subsection (a) of the final rule clarifies the actions that the Authority may take when necessary to resolve disputed issues of material fact or when such actions would otherwise aid in decision making. These actions include those set forth in the proposed rule, including a hearing under 5 U.S.C. 7117(b) and (c). The reference in the proposed rule to ''fact finding'' has been deleted as unnecessary in view of the inclusion in subsection (d) of ''other appropriate action.''

One commenter suggested that fact finding be limited to unfair labor practice proceedings. This suggestion was rejected as inconsistent with the determination that bargaining obligation disputes could be resolved in the negotiability process.

Section 2424.32

This section of the final rule combines requirements set forth in §§ 2424.35 and 2424.37 of the proposed rule. The requirements have been combined to reduce repetition and clarify the parties' obligations.

Subsections (a) and (b) of the final rule retain the requirement in § 2424.37 (a) and (b) of the proposed rule specifying the parties' burdens. In particular, subsection (a) provides that the exclusive representative is responsible for raising and supporting arguments that, among other things, a proposal or provision is within the duty to bargain or not contrary to law, and subsection (b) provides that the agency has the burden of supporting arguments to the contrary.

Subsection (c) retains and modifies requirements set forth in §§ 2424.35 and 2424.37 of the proposed rules. In particular, subsection (c) specifies the consequences of a party's failure to raise, support, and/or respond to arguments and assertions. With respect to failure to raise and support arguments, subsection (c) states that such failure will, where appropriate, be deemed a waiver of such arguments. It also states that, absent good cause: (1) an agency may not raise in proceedings under part 2424 or any other proceeding arguments that could have been but were not raised in its statement of position or made responsively in its reply to the exclusive representative's response; and (2) an exclusive representative may not raise in proceedings under part 2424 or any other proceeding arguments that could have been but were not raised in the petition for review or responsively in the response to the agency's statement of position. With respect to failure to respond to arguments, subsection (c) states that such failure will, where appropriate, be deemed a concession to such arguments or assertions.

Numerous comments were received objecting to the proposed requirement that, in connection with petitions for review concerning proposals, parties raise all arguments and issues at the prefiling conference or be precluded from raising such arguments and issues at a later stage in the negotiability appeal process. As stated previously, that requirement has been eliminated. However, the final rule precludes agencies and exclusive representatives from raising new arguments after the filing of the statement of position and response, respectively.

Several commenters asserted that any regulation that deemed arguments not raised by an agency to be waived would be inconsistent with the decision of the United States Court of Appeals for the District of Columbia Circuit in *Department of Transportation* v. *FLRA*, 145 F.3d 1425 (D.C. Cir. 1998) (*FAA*).

The Authority has concluded that the final rule is not inconsistent with the decision in *FAA*. In this regard, *FAA* did not address an agency's failure to raise an argument. In fact, the court concluded that, in *FAA*, the agency had ''squarely presented an argument to the [Authority].'' *Id.* at 1428. In addition, the court in *FAA* applied the Authority's existing negotiability regulations, which do not directly address filing requirements, burdens, waivers, and concessions. However, even under the existing regulations, the court in *FAA* stated that an agency has a burden to ''direct the Authority's attention, with as much specificity as possible, to the statutes and regulations relevant to an agency's duty to bargain * * *'' *Id.* at 1428 (quoting *National Federation of Federal Employees, Local 1167* v. *FLRA*, 681 F.2d 886, 891 (D.C. Cir. 1982)).

One commenter suggested that a regulation that deems an agency's failure to raise an objection a ''waiver'' would violate Rule 55(e) of the Federal Rules of Civil Procedure, which provides that there cannot be a ''judgment by default entered against the United States * * * unless the claimant establishes a claim or right to relief by evidence satisfactory to the court.'' However, the principle underlying this rule does not apply to the rule at issue, as is explained in the authority relied on by the commenter. Specifically, in the decision cited by the commenter, the United States Court of Appeals for the 9th Circuit stated that ''rule 55(e) was directed at defaults in the narrow sense of the government's failure to answer or otherwise move against a complaint, and was not intended to preclude the imposition, at a later stage in the proceeding, of sanctions or other court action which prevent the government from presenting further evidence or otherwise augmenting the record.'' *Giampaoli* v. *Califano*, 628 F.2d 1190 (9th Cir. 1980).

One commenter suggested that a failure to rebut an assertion should result in the finding of an adverse inference rather than a waiver or concession. An adverse inference is an evidentiary presumption that takes place when a party fails ''to call a particular witness, or to take the stand as a witness in a civil case, or voluntarily to produce documents or other objects in his or her possession as evidence,'' when it ''would be natural under the circumstances'' for the party to do so. 2 John William Strong et al., *McCormick on Evidence* § 264, at 184 (4th ed. 1992); *see also Internal Revenue Service, Philadelphia Service Center,* 54 FLRA 674, 682 (1998). In negotiability disputes, the more comparable analogue for failing to rebut an assertion raised in a pleading is that set forth in Rule 12 of the Federal Rules of Civil Procedure. *See* 2 James Wm. Moore, *Moore's Federal Practice* § 12.20 (3d ed. 1998) (*Moore's*) (''Rule 12(b) requires a party to assert in the response to any pleading requiring a response, every legal or factual defense to the claims made.''). Thus, the final rule uses the more appropriate term of art for a failure to rebut arguments, which is ''waiver'' or ''concession.'' *See Moore's* § 12.22 (''Rule 12(h)(1) waives certain defenses omitted from a motion * * *.'').

The revised negotiability procedures are intended to resolve, in most cases, all issues with respect to an agency's obligation to bargain over specific proposals or provisions. Accordingly, the Authority does not anticipate additional administrative proceedings before the Authority arising from the circumstances that occasioned the negotiability appeal. In any subsequent proceedings which might occur, the parties will not be permitted to relitigate the obligation to bargain over the proposals or provisions that were the subject of the negotiability appeal. In this regard, applying the well established principle of *res judicata*, a party will be barred from litigating not only those issues actually addressed by the Authority, but also any issues that could have been raised by the party in the negotiability proceeding. *See Department of Health and Human Services, Social Security Administration*, 41 FLRA 755, 772 (1991) (discussing the principles of *res judicata*). Further, where judicial review or enforcement of the Authority's order is sought, section 7123(c) of the Statute bars the parties from raising issues not presented to the Authority.

Subsection (d) addresses a party's failure to participate in a post-petition conference under § 2424.23, procedures directed under § 2424.31, and a failure to respond to Authority orders. The subsection clarifies that, in addition to actions set forth in subsection (c), a failure to participate in a conference or to respond to an Authority order, such as an order directing correction of minor, technical deficiencies in a filing, may result in dismissal of a petition for review, with or without prejudice to the exclusive representative, or granting of the petition for review, with or without conditions. As noted previously in the commentary to § 2424.22, the Authority intends to continue its current practice of permitting a party to correct such minor, technical deficiencies as failing to provide the correct number of copies or failure to attach a certificate of service to a filing. However, a party should not rely on this practice to provide an opportunity for it to correct failures to raise, support, and respond to arguments. Where appropriate, these latter failures will be deemed waivers or concessions, and opportunities to correct the failures will not be provided.

Section 2424.33–2424.39

These sections are reserved.

Subpart E—Decision and Order

Section 2424.40

One commenter objected that the Authority should not issue any order concerning negotiability where there are unresolved bargaining obligation disputes. The Authority's current practice is to issue orders in negotiability cases where there are such unresolved issues, and the final rule will continue this practice in some cases. However, as distinct from current practice, if a bargaining order is issued and there is an unresolved bargaining obligation dispute, then the order will be conditioned on resolution of the bargaining obligation dispute in a manner requiring bargaining.

Another commenter requested that the Authority modify the regulations to require parties to implement portions of agreements that are not disputed. The Authority declines to do so on the ground that the partial implementation of contract terms in this situation is better addressed by the parties in ground rules or during the course of negotiations.

Consistent with the commentary to § 2424.30, subsection (a) is modified from the proposed rule to clarify that, with the exception of an order to bargain, the Authority's decision and order under part 2424 will not include remedies that could be obtained in an unfair labor practice proceeding under 5 U.S.C. 7118(a)(7). In other respects, the final rule is the same as the proposed rule.

Section 2424.41

One commenter noted that the use of the phrase ''specified period'' in the proposed rule may mislead parties into believing that the Authority would seek enforcement of an order before the 60-day period provided for in 5 U.S.C. 7123(a) had expired. In response to this concern, the final rule eliminates the phrase. However, the final rule is modified to make clear that the exclusive representative must bring to the attention of the appropriate Regional Director a failure to comply with an Authority order within a ''reasonable time'' following expiration of the 60-day

period. Failure to do so within a reasonable time may, if the matter is referred by the Regional Director to the Authority, result in the Authority determining not to seek enforcement of the order.

Sections 2424.42–2424.49

These sections are reserved.

Subpart F—Criteria for Determining Compelling Need for Agency Rules and Regulations

Section 2424.50

With one change to correct grammar, the final rule as promulgated is the same as the proposed rule.

Sections 2424.51–2424.59

These sections are reserved.

Other Regulatory Requirements

One commenter made several suggestions for modification of general regulatory requirements that were not responsive to particular sections in the proposed rules. In particular, the commenter requested that the Authority: (1) lengthen the time period for requesting reconsideration of a decision and order under part 2424; (2) modify the ''extraordinary circumstance'' requirement for obtaining reconsideration and grant reconsideration when the Authority's decision raises issues that could not have been anticipated by the parties before the decision, such as when the Authority decision creates a new legal standard; (3) promulgate a regulation requiring the Authority to seek the views of the parties whenever a case is remanded to the Authority on judicial review; and (4) modify existing regulations to permit the Office of Personnel Management (OPM) or any other Federal agency that administers laws having Federal Government-wide implications to intervene, obtain *amicus* status, or submit an advisory opinion in any case involving interpretation of such law.

With regard to the time period for requesting reconsideration, 5 C.F.R. 2429.17 provides that reconsideration of an Authority decision and order must be sought within 10 days after service of the decision and order. Although this time period is short, it encourages prompt consideration of any decision and order and permits, as necessary, correction of errors in the decision and order as quickly as possible. In addition, it applies to all Authority decisions and orders, not only those issued under part 2424. For these reasons, the Authority declines to extend the time period.

As for the ''extraordinary circumstances'' required for reconsideration under § 2429.17 of this subchapter, the existing standard, which requires case-by-case application, does not preclude a party from arguing that reconsideration should be granted because an Authority decision raises issues that could not have been anticipated. Moreover, extraordinary circumstances under § 2429.17 of this subchapter have been expressly interpreted to include situations where a change in the law affects dispositive issues. *See U.S. Department of the Air Force, 375th Combat Support Group, Scott Air Force Base, Illinois,* 50 FLRA 84 (1995). Thus, modification of the existing regulation is not necessary.

The Authority also finds it unnecessary to promulgate a regulation requiring it to seek the parties' views whenever a case is remanded to the Authority following judicial review. In some cases, for example, the remand is solely for the purpose of the Authority taking a particular action, such as dismissing a petition for review. *See National Treasury Employees Union and Nuclear Regulatory Commission,* 39 FLRA 182 (1991) (dismissing petition for review as moot on remand with instructions from the U.S. Court of Appeals for the Fourth Circuit). In such cases, requiring the Authority to obtain party views would unnecessarily lengthen the time necessary to resolve the dispute. Nevertheless, parties are not precluded from seeking permission from the Authority in any case to file an additional submission under § 2424.27.

Similarly, neither OPM nor any other Federal agency is precluded in any way from seeking to participate in any pending case as *amicus curiae* under § 2424.9 of this subchapter. In addition, the Authority requests advisory opinions as it deems appropriate under § 2429.15 of this subchapter. *See, e.g., American Federation of Government Employees, Local 2986 and U.S. Department of Defense, National Guard Bureau, The Adjutant General, State of Oregon,* 51 FLRA 1549 (1996) (Authority requested OPM views on interpretation of certain statutory and regulatory provisions and provided parties opportunity to respond to OPM's views); *National Association of Agriculture Employees and U.S. Department of Agriculture, Animal and Plant Health Inspection Service, Plant Protection and Quarantine,* 51 FLRA 843 (1996) (same). As it is not apparent that, or how, these existing regulations are not sufficient to permit OPM and others to participate in Authority proceedings, the Authority declines to modify them or to create a separate regulatory requirement for intervention.

Regulatory Flexibility Act Certification

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

Unfunded Mandates Reform Act of 1995

This 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 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 recordkeeping requirements under the Paperwork Reduction Act of 1995, 44 U.S.C. 3501, *et seq.*

List of Subjects in 5 CFR Part 2424

Administrative practice and procedure, Government employees, Labor management relations.

For the reasons set forth in the preamble, the Federal Labor Relations Authority revises 5 CFR Part 2424 to read as follows:

PART 2424—NEGOTIABILITY PROCEEDINGS

Subpart A—Applicability of This Part and Definitions

Sec.

2424.1 Applicability of this part.
2424.2 Definitions.
2424.3–2424.9 [Reserved]

Subpart B—Alternative Dispute Resolution; Requesting and Providing Allegations Concerning the Duty to Bargain

2424.10 Collaboration and Alternative Dispute Resolution Program.
2424.11 Requesting and providing allegations concerning the duty to bargain.
2424.12–2424.19 [Reserved]

Subpart C—Filing and Responding to a Petition for Review; Conferences

2424.20 Who may file a petition for review.
2424.21 Time limits for filing a petition for review.
2424.22 Exclusive representative's petition for review; purpose; content; severance; service.
2424.23 Post-petition conferences; conduct and record.
2424.24 Agency's statement of position; purpose; time limits; content; severance; service.
2424.25 Response of the exclusive representative; purpose; time limits; content; severance; service.
2424.26 Agency's reply; purpose; time limits; content; service.
2424.27 Additional submissions to the Authority.
2424.28–2424.29 [Reserved]

Subpart D—Processing a Petition for Review

2424.30 Procedure through which the petition for review will be resolved.
2424.31 Resolution of disputed issues of material fact; hearings.
2424.32 Parties' responsibilities; failure to raise, support, and/or respond to arguments; failure to participate in conferences and/or respond to Authority orders.
2424.33–2424.39 [Reserved]

Subpart E—Decision and Order

2424.40 Authority decision and order.
2424.41 Compliance.
2424.42–2424.49 [Reserved]

Subpart F—Criteria for Determining Compelling Need for Agency Rules and Regulations

2424.50 Illustrative Criteria.
2424.51–2424.59 [Reserved]

Authority: 5 U.S.C. 7134.

Subpart A—Applicability of This Part and Definitions

§ 2424.1 Applicability of this part.

This part is applicable to all petitions for review filed after April 1, 1999.

§ 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 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; and

(2) Bargaining is not required over a change in bargaining unit employees' conditions of employment because the effect of the change is *de minimis.*

(b) *Collaboration and Alternative Dispute Resolution Program* refers to the Federal Labor Relations Authority's program that assists parties in reaching agreements to resolve disputes.

(c) *Negotiability dispute* means a disagreement between an exclusive representative and an agency concerning the legality of a proposal or provision. A negotiability dispute exists when an exclusive representative disagrees with an agency contention that (without regard to any bargaining obligation dispute) a proposal is outside the duty to bargain, including disagreement with an agency contention that a proposal is bargainable only at its election. A negotiability dispute also exists when an exclusive representative disagrees with an agency head's disapproval of a provision as contrary to law. A negotiability dispute may exist where there is no bargaining obligation dispute. Examples of negotiability disputes include disagreements between an exclusive representative and an agency concerning whether a proposal or provision:

(1) Affects a management right under 5 U.S.C. 7106(a);

(2) Constitutes a procedure or appropriate arrangement, within the meaning of 5 U.S.C. 7106(b)(2) and (3), respectively; and

(3) Is consistent with a Government-wide regulation.

(d) *Petition for review* means an appeal filed with the Authority by an exclusive representative requesting resolution of a negotiability dispute. An appeal that concerns only a bargaining obligation dispute may not be resolved under this part.

(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 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 includes each provision concerned.

(g) *Service* means the delivery of copies of documents filed with the Authority to the other party's principal bargaining representative and, in the case of an exclusive representative, also to the head of the agency. Compliance with part 2429 of this subchapter is required.

(h) *Severance* means the division of a proposal or provision into separate parts having independent meaning, for the purpose of determining whether any of the separate parts is within the duty to bargain or is contrary to law. In effect, severance results in the creation of separate proposals or provisions. Severance applies when some parts of the proposal or provision are determined to be outside the duty to bargain or contrary to law.

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

§ 2424.3 –2424.9 [Reserved]

Subpart B—Alternative Dispute Resolution; Requesting and Providing Allegations Concerning the Duty To Bargain

§ 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 Program (CADR). Upon request, 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 or write the CADR Office at (202) 482–6503, 607 14th Street, NW., Washington, D.C. 20424–001. A brief summary of CADR activities is available on the Internet at www.flra.gov.

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

(c) *Unrequested agency allegation.* If an agency provides an exclusive

representative with an unrequested written allegation concerning the duty to bargain, then the exclusive representative may either file a petition for review under this part, or continue to bargain and subsequently request in writing a written allegation concerning the duty to bargain, if necessary.

§§ 2424.12–2424.19 [Reserved]

Subpart C—Filing and Responding to a Petition for Review; Conferences

§ 2424.20 Who may file a petition for review.

A petition for review may be filed by an exclusive representative that is a party to the negotiations.

§ 2424.21 Time limits for filing a petition for review.

(a) A petition for review must be filed within fifteen (15) days after the date of service of either:

(1) An agency's written allegation that the exclusive representative's proposal is not within the duty to bargain, or

(2) An agency head's disapproval of a provision.

(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.

§ 2424.22 Exclusive representative's petition for review; purpose; content; severance; 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. As more fully explained in paragraph (b) of this section, the exclusive representative is required in the petition for review to, among other things, inform the Authority of the exact wording and meaning of the proposal or provision as well as how it is intended to operate, explain technical or unusual terms, and provide copies of materials that support the exclusive representative's position.

(b) *Content.* A petition for review must be filed on a form provided by the Authority for that purpose, or in a substantially similar format. It must be dated and include 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 relied on by the exclusive representative in its argument or referenced in the proposal or provision, and a copy of any such material that is not easily available to the Authority;

(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;

(4) Any request for a hearing before the Authority and the reasons supporting such request; and

(5) A table of contents and a table of legal authorities cited, if the petition exceeds 25 double-spaced pages in length.

(c) *Severance.* The exclusive representative may, but is not required to, include in the petition for review a statement as to whether it requests severance of a proposal or provision. If severance is requested in the petition for review, then the exclusive representative must support its request with an explanation of how each severed portion of the proposal or provision may stand alone, and how such severed portion would operate. The explanation and argument in support of the severed portion(s) must meet the same requirements for information set forth in paragraph (b) of this section.

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

§ 2424.23 Post-petition conferences; conduct and record.

(a) *Timing of post-petition conference.* On receipt of a petition for review involving a proposal or a provision, a representative of the FLRA will, where appropriate, schedule a post-petition conference to be conducted by telephone or in person. All reasonable efforts will be made to schedule and conduct the conference within ten (10) days after receipt of the petition for review.

(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;

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

(5) Whether an extension of the time limits for filing the agency's statement of position and any subsequent filings is requested. 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 such time limits.

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

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

(a) *Purpose.* The purpose of an agency statement of position is to inform the Authority and the exclusive representative why a proposal or provision is not within the duty to bargain or contrary to law, respectively. As more fully explained in paragraph (c) of this section, the agency is required in the statement of position to, among other things, set forth its understanding of the proposal or provision, state any disagreement with the facts, arguments, or meaning of the proposal or provision set forth in the exclusive representative's petition for review, and supply all arguments and authorities in support of its 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, the agency must file its statement of position within thirty (30) days after the date the head of the agency receives a copy of the petition for review.

(c) *Content.* The agency's statement of position must be on a form provided by the Authority for that purpose, or in a substantially similar format. It must be dated and 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 the agency's position on any matters relevant to the petition that it wishes 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 made by the exclusive representative in the petition for review, specific citation to any law, rule, regulation, section of a collective bargaining agreement, or other authority relied on by the agency, and a copy of any such material that is not easily available to the Authority. The 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) 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;

(4) Any request for a hearing before the Authority and the reasons supporting such request; and

(5) A table of contents and a table of legal authorities cited, if the statement of position exceeds 25 double-spaced pages in length.

(d) *Severance.* If the exclusive representative has requested severance in the petition for review, and if the agency opposes the exclusive representative's request for severance, then the agency must explain with specificity why severance is not appropriate.

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

§ 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 union disagrees with any facts or arguments in the agency's statement of position. As more fully explained in paragraph (c) of this section, the exclusive representative is required in its response to, among other things, state why the proposal or provision does not conflict with any law, or why it falls within an exception to management rights, including permissive subjects under 5 U.S.C. 7106(b)(1), and procedures and appropriate arrangements under section 7106(b) (2) and (3). Another purpose of the response is to permit the exclusive representative to request the Authority to sever portions of the proposal or provision and to explain why and how it can be done.

(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.

(c) *Content.* The response must be on a form provided by the Authority for that purpose, or in a substantially similar format. With the exception of a request for severance pursuant to paragraph (d) of this section, the exclusive representative's response is specifically limited to the matters raised in the agency's statement of position. The response must be dated and must include the following:

(1) Any disagreement with the agency's bargaining obligation or negotiability claims. The exclusive representative must state the arguments and authorities supporting its opposition to any agency argument, and must include specific citation to any law, rule, regulation, section of a collective bargaining agreement, or other authority relied on by the exclusive representative, and provide a copy of any such material that is not easily available to the Authority. The exclusive representative is not required to repeat arguments made in the petition for review. If not included in the petition for review, the exclusive representative must state the arguments and authorities supporting any assertion that the proposal or provision does not affect a management right under 5 U.S.C. 7106(a), and any assertion that an exception to management rights applies, including:

(i) Whether and why the proposal or provision concerns a matter negotiable at the election of the agency under 5 U.S.C. 7106(b)(1);

(ii) Whether and why the proposal or provision constitutes a negotiable procedure as set forth in 5 U.S.C. 7106(b)(2);

(iii) Whether and why the proposal or provision constitutes an appropriate arrangement as set forth in 5 U.S.C. 7106(b)(3); and

(iv) Whether and why the proposal or provision enforces an ''applicable law,'' within the meaning of 5 U.S.C. 7106(a)(2).

(2) Any allegation that agency rules or regulations relied on in the agency's statement of position violate applicable law, rule, regulation or appropriate authority outside the agency; that the rules or regulations were not issued by the agency or by any primary national subdivision of the agency, or otherwise are not applicable to bar negotiations under 5 U.S.C. 7117(a)(3); or that no compelling need exists for the rules or regulations to bar negotiations.

(3) A table of contents and a table of legal authorities cited if the response to an agency statement of position exceeds 25 double-spaced pages in length.

(d) *Severance.* If not requested in the petition for review, or if the exclusive representative wishes to modify the request in the petition for review, the exclusive representative may request severance in its response. The exclusive representative must support its request with an explanation of how the severed portion(s) of the proposal or provision may stand alone, and how such severed portion(s) would operate. The exclusive representative also must respond to any agency arguments regarding severance made in the agency's statement of position. The explanation and argument in support of the severed portion(s) must meet the same requirements for specific information set forth in paragraph (c) of this section.

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

§ 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. As more fully explained in

paragraph (c) of this section, the Agency is required in the reply to, among other things, provide the reasons why the proposal or provision does not fit within any exceptions to management rights that were asserted by the exclusive representative in its response, and to explain why severance of the proposal or provision is not appropriate.

(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.* The reply must be on a form provided by the Authority for that purpose, or in a substantially similar format. The agency's reply is specifically limited to the matters raised for the first time in the exclusive representative's response. The agency's reply must state the arguments and authorities supporting its reply, cite with specificity any law, rule, regulation, section of a collective bargaining agreement, or other authority relied on, and provide a copy of any material that is not easily available to the Authority. The agency is not required to repeat arguments made in its statement of position. The agency's reply must be dated and must include the following:

(1) Any disagreement with the exclusive representative's assertion that an exception to management rights applies, including:

(i) Whether and why the proposal or provision concerns a matter included in section 7106(b)(1) of the Federal Service Labor-Management Relations Statute;

(ii) Whether and why the proposal or provision does not constitute a negotiable procedure as set forth in section 7106(b)(2) of the Federal Service Labor-Management Relations Statute;

(iii) Whether and why the proposal or provision does not constitute an appropriate arrangement as set forth in section 7106(b)(3) of the Federal Service Labor-Management Relations Statute;

(iv) Whether and why the proposal or provision does not enforce an ''applicable law,'' within the meaning of section 7106(a)(2) of the Federal Service Labor-Management Relations Statute;

(2) Any arguments in reply to an exclusive representative's allegation in its response that agency rules or regulations relied on in the agency's statement of position violate applicable law, rule, regulation or appropriate authority outside the agency; that the rules or regulations were not issued by the agency or by any primary national subdivision of the agency, or otherwise are not applicable to bar negotiations under 5 U.S.C. 7117(a)(3); or that no compelling need exists for the rules or regulations to bar negotiations; and

(3) A table of contents and a table of legal authorities cited, if the agency's reply to an exclusive representative's response exceeds 25 double-spaced pages in length.

(d) *Severance.* If the exclusive representative requests severance for the first time in its response, or if the request for severance in an exclusive representative's response differs from the request in its petition for review, and if the agency opposes the exclusive representative's request for severance, then the agency must explain with specificity why severance is not appropriate.

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

§ 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 either with the written request or no later than five (5) days after receipt of the Authority's order granting the request. Any opposition to the additional submission must be filed within fifteen (15) days after the date of the receipt of the additional submission. All documents filed under this section must be served in accord with § 2424.2(g).

§ 2424.28–2424.29 [Reserved]

Subpart D—Processing a Petition for Review

§ 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), where 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 Authority will dismiss the petition for review. 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.

(b) *Exclusive representative has not filed related unfair labor practice charge or grievance alleging an unfair labor practice.* Where an exclusive representative files only a petition for review under this part, the petition will be processed as follows:

(1) *No bargaining obligation dispute exists.* Where there is no bargaining obligation dispute, the Authority will resolve the petition for review under the procedures of this part.

(2) *A bargaining obligation dispute exists.* Where a bargaining obligation dispute exists in addition to the negotiability dispute, the Authority will inform the exclusive representative of any opportunity to file an unfair labor practice charge pursuant to part 2423 of this subchapter or a grievance under the parties' negotiated grievance procedure and, where the exclusive representative pursues either of these courses, proceed in accord with paragraph (a) of this section. If the exclusive representative does not file an unfair labor practice charge or grievance, 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.

§ 2424.31 Resolution of disputed issues of material fact; hearings.

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, as appropriate:

(a) Direct the parties to provide specific documentary evidence;

(b) Direct the parties to provide answers to specific factual questions;

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

(d) Take any other appropriate action.

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

(a) *Responsibilities of the exclusive representative.* The exclusive representative has the burden of 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, and, where applicable, why severance is appropriate.

(b) *Responsibilities of the agency.* The agency has the burden of raising and supporting arguments that the proposal or provision is outside the duty to bargain or contrary to law, respectively, and, where applicable, why severance is not appropriate.

(c) *Failure to raise, support, and respond to arguments.* (1) Failure to raise and support an argument will, where appropriate, 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 will, where appropriate, be deemed a concession to such argument or assertion.

(d) *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 (c) of this section, take any other action that, in the Authority's discretion, is deemed appropriate, including dismissal of the petition for review, with or without prejudice to the exclusive representative's refiling of the petition for review, and granting the petition for review and directing bargaining and/or rescission of an agency head disapproval under 5 U.S.C. 7114(c), with or without conditions.

§ 2424.33—2424.39 [Reserved]

Subpart E—Decision and Order

§ 2424.40 Authority decision and order.

(a) *Issuance.* Subject to the requirements of this part, the Authority will expedite proceedings under this part to the extent practicable and will issue to the exclusive representative and to the agency a written decision, explaining the specific reasons for the decision, at the earliest practicable date. The decision will include an order, as provided in paragraphs (b) and (c) of this section, but, with the exception of an order to bargain, such order will not include remedies that could be obtained in an unfair labor practice proceeding under 5 U.S.C. 7118(a)(7).

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

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

§ 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, that the agency must upon request (or as otherwise agreed to by the parties) bargain concerning the proposal or that the agency must rescind its disapproval of a provision. 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).

§§ 2424.42—2424.49 [Reserved]

Subpart F—Criteria for Determining Compelling Need for Agency Rules and Regulations

§ 2424.50 Illustrative criteria.

A compelling need exists for an agency rule or regulation concerning any condition of employment when the agency demonstrates that the rule or regulation meets one or more of the following illustrative criteria:

(a) The rule or regulation is essential, as distinguished from helpful or desirable, to the accomplishment of the mission or the execution of functions of the agency or primary national subdivision in a manner that is consistent with the requirements of an effective and efficient government.

(b) The rule or regulation is necessary to ensure the maintenance of basic merit principles.

(c) The rule or regulation implements a mandate to the agency or primary national subdivision under law or other outside authority, which implementation is essentially nondiscretionary in nature.

§§ 2424.51—2424.59 [Reserved]

Dated: November 25, 1998.

Solly Thomas,

Executive Director, Federal Labor Relations Authority.

[FR Doc. 98–31970 Filed 12–1–98; 8:45 am]

BILLING CODE 6727–01–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. 98–SW–41–AD; Amendment 39–10921; AD 98–24–35]

RIN 2120–AA64

Airworthiness Directives; Eurocopter France Model AS–350B, B1, B2, BA, C, D, D1, and AS 355E, F, F1, F2, and N Helicopters

AGENCY: Federal Aviation Administration, DOT.