

# Proposed Rules

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This section of the FEDERAL REGISTER contains notices to the public of the proposed issuance of rules and regulations. The purpose of these notices is to give interested persons an opportunity to participate in the rule making prior to the adoption of the final rules.

## FEDERAL LABOR RELATIONS AUTHORITY

### 5 CFR Part 2424

#### Negotiability Proceedings

**AGENCY:** Federal Labor Relations Authority.

**ACTION:** Notice of proposed rulemaking; notice of meetings.

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

**DATES:** Comments must be received on or before October 23, 1998. Meetings will be held on October 6, 1998, in Chicago, Illinois; October 8, 1998, in Oakland, California; and October 14, 1998, in Washington, D.C.

**ADDRESSES:** Mail or deliver written comments to the Office of Case Control, Federal Labor Relations Authority, 607 14th Street, NW., Washington, D.C. 20424-0001. The October 6, 1998 meeting will be held at the Ralph H. Metcalfe Federal Building, 77 West Jackson Boulevard, Room 328, Chicago, Illinois. The October 8, 1998 meeting will be held at the Oakland Federal Building, 1301 Clay Street, North Tower, Second Floor, Conference Rooms A and B, Oakland, California. The October 14, 1998 meeting will be held at the Federal Labor Relations Authority's Headquarters, 607 14th St. NW., Washington, D.C. 20424, 2nd Floor Agenda Room.

**FOR FURTHER INFORMATION CONTACT:** *Regulatory information or registration for the Washington meeting:* Peter Constantine, Office of Case Control, at the address listed above or by telephone # (202) 482-6540. *Registration for the Chicago meeting:* Philip T. Roberts, Chicago Regional Office, Federal Labor Relations Authority, 55 West Monroe Street, Suite 1150, Chicago, Illinois

60603-9727, telephone # (312) 886-3465 ext. 20. *Registration for the Oakland meeting:* Lisa C. Vandenberg, San Francisco Regional Office, Federal Labor Relations Authority, 901 Market Street, Suite 220, San Francisco, CA 94103-1791, telephone # (415) 356-5002 ext. 18.

**SUPPLEMENTARY INFORMATION:** 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. To this end, the Task Force published a **Federal Register** notice (63 FR 19413) (April 20, 1998) inviting parties to submit written comments on several subjects relevant to negotiability proceedings. In addition, the Task Force convened focus groups in order to solicit and consider customers' views prior to proposing these revisions.

The proposed revisions represent the Authority's intent to improve and expedite negotiability proceedings. Major aspects of the proposed regulations include pre- and postfiling procedures and conferences designed to narrow and clarify issues to be resolved; revised processing procedures that will enable the Authority, where appropriate, to resolve all aspects of a dispute; and clarification of the responsibilities of each party. The proposed revisions also divide Part 2424 into six subparts: Subpart A—Applicability and definitions; Subpart B—Prefiling procedures; Subpart C—Filing a petition; Subpart D—Processing a petition; Subpart E—Decisions and orders; and Subpart F—Compelling need determinations.

In connection with the proposed revisions to Part 2424, three meetings will be conducted. The first meeting will be held on October 6, 1998, at the Ralph H. Metcalfe Federal Building, 77 West Jackson Boulevard, Chicago, Illinois, at 1:00 p.m. Persons interested in attending this first meeting should write or call Philip T. Roberts, at the address and phone number listed in the preceding section, to confirm attendance. The second meeting will be held on October 8, 1998, at the Oakland Federal Building, 1301 Clay Street, North Tower, Second Floor, Conference Rooms A and B, Oakland, CA, at 1:00 p.m. Persons interested in attending this second meeting should call Lisa C. Vandenberg, at the address and phone

number listed in the preceding section, to confirm attendance. The third meeting will be held on October 14, 1998, at the Federal Labor Relations Authority's Headquarters, 607 14th St. NW, Washington, D.C. 20424, 2nd Floor Agenda Room, at 10:00 a.m. Persons interested in attending this third meeting should write or call Peter Constantine, Office of Case Control, at the address and phone number listed in the preceding section, to confirm attendance.

Copies of all written comments will be available for inspection and photocopying between 8 a.m. and 5 p.m., Monday through Friday, in Suite 415 at the Office of Case Control.

Sectional analyses of the proposed amendments and revisions to Part 2424, Negotiability Proceedings, are as follows.

#### Part 2424—Negotiability Proceedings

##### Subpart A—Applicability of This Part

**Section 2424.1.** This section establishes the January 1, 1999 effective date of the regulations. The section clarifies that the revised regulations will be applied to all written allegations of nonnegotiability that are requested by exclusive representatives after January 1, 1999; all petitions for review filed after January 1, 1999 by exclusive representatives in response to agency head disapprovals of contract provisions; and all petitions for review filed after January 1, 1999 in response to written allegations of nonnegotiability that were requested prior to that date (whether or not the written allegation is actually provided to the exclusive representative prior to that date).

**Section 2424.2.** The listed terms are used throughout the part and are defined to both explain their meaning and to avoid repetition in individual sections in the part. Two new terms—"negotiability dispute" and "bargaining dispute"—distinguish different types of disagreements over the duty to bargain. Two other new terms—"prefiling conference" and "postfiling conference"—encompass requirements applicable to requests for allegations of nonnegotiability regarding proposals for bargaining and petitions for review of agency-head disapprovals of provisions.

The term "negotiability dispute" refers to a disagreement concerning the legality of a proposal or provision.

Specifically, a negotiability dispute is raised by an agency contention that: (1) A proposal is outside the agency's duty to bargain under section 7117 of the Federal Service Labor-Management Relations Statute, 5 U.S.C. 7117; or (2) a provision was properly disapproved by the agency head under section 7114(c) of the Statute, 5 U.S.C. 7114(c). A "negotiability dispute" exists when an agency contends that a proposal or provision is not a proper subject of bargaining *under any circumstances*, or when an agency contends that a proposal is bargainable only at its election. As an example, a dispute over whether a proposal constitutes an appropriate arrangement for employees adversely affected by the exercise of a management right under section 7106 of the Statute raises a "negotiability dispute."

The term "bargaining dispute" refers to disagreements over whether, in the *specific circumstances* involved in a particular case, an agency is obligated to bargain over a proposal without regard to whether the proposal is otherwise consistent with law and regulation. As an example, an agency contention that it is not required to bargain mid-term over a proposal because it concerns a matter that is "covered by" an existing collective bargaining agreement raises a "bargaining dispute." As another example, an agency contention that it need not bargain over a proposal offered in response to a management-initiated change in conditions of employment because the effect of the change on unit employees' conditions of employment is *de minimis* raises a "bargaining dispute."

It is the Authority's experience that a single petition for review filed under this part sometimes raises both a "negotiability dispute" and a "bargaining dispute." That is, an agency might assert both that a particular proposal is outside the duty to bargain under any circumstance because it is inconsistent with law and that it is not required to bargain over the proposal in the specific circumstances of the case because it concerns a matter that is covered by the parties' agreement.

The terms "prefiling conference" and "postfiling conference" refer to discussions among representatives of the parties and a representative of the FLRA. A "prefiling conference" occurs before an exclusive representative requests a written allegation of nonnegotiability concerning a proposal for bargaining and encompasses discussion regarding, among other things, the meaning of a proposal and the ground(s) on which the agency claims that the proposal is outside the

duty to bargain. A "postfiling conference" encompasses the same discussion but involves a provision and occurs after the filing of a petition for review by an exclusive representative but before the filing of the agency's statement of position.

*Sections 2424.3–2424.9.* These sections are reserved.

#### Subpart B—Prefiling Procedures in Cases Involving Proposals

Subpart B proposes significant changes to the current procedures for processing a negotiability appeal involving a proposal. As prompted by suggestions from the Task Force and numerous commenters, the proposed procedures facilitate early involvement by the Authority with the intention to assist resolution of disputes without the necessity for filing a petition for review. In cases where petitions for review are subsequently filed, these procedures facilitate clarification and narrowing of the issues in dispute with the intention to expedite the Authority's decision-making process.

The procedures in this subpart would establish one of several options considered by the Authority for implementing these goals. This option requires a prefiling conference among the parties and a representative of the FLRA before an exclusive representative would be permitted to request a written allegation of nonnegotiability from an agency. The prefiling conference would only be conducted if the exclusive representative had attempted to bargain on a specific proposal and the agency had declined to do so on the basis that the proposal was not a proper subject of bargaining under any circumstances or was bargainable only at its election. This requirement offers the potential for substantial benefits to exclusive representatives, agencies, and the Authority by resolving disputes without commencing a formal adjudicatory proceeding. However, the Authority also recognizes that such requirement could generate unnecessary, or premature, requests for Authority assistance. Such requirement also could be viewed as creating an additional, unnecessary forum for resolution of disputes.

Comments are also requested on two alternatives to requiring a prefiling conference. First, the prefiling conference could be made optional, to be conducted only with the agreement of both parties. Second, a postfiling conference could be required (after the filing of a petition for review but before the filing of an agency statement of position); this procedure would be the same one now proposed in § 2424.30 for

petitions involving provisions that have been disapproved by an agency head.

There may be other alternatives as well. Accordingly, the Authority seeks comment on whether an optional or required conference among the parties and a representative designated by the Authority should take place: (1) Prior to a request for a written allegation of nonnegotiability, as proposed in this subpart; (2) immediately after the filing of a petition for review, as proposed in subpart D in connection with provisions that have been disapproved by an agency head; or (3) at another point in the negotiability process. Following receipt of comments, the Authority will determine and promulgate a final regulation setting out the most appropriate conference procedure.

*Section 2424.10.* This section advises the parties of the availability of the Federal Labor Relations Authority's Collaboration and Alternative Dispute Resolution Program to assist them in resolving disputes that arise under this part.

*Section 2424.11.* This section and section 2424.12 introduce a new dispute resolution process that is designed to address negotiability and bargaining disputes between the parties prior to an exclusive representative requesting, and the agency providing, a written allegation that the duty to bargain in good faith does not extend to a particular proposal. The first step, set forth in subsection (a), requires the filing of a notice of intent to appeal before invoking the statutory process set out in 5 U.S.C. 7117(c). Subsection (b) outlines the requirements, and subsection (c) sets forth the service requirements, of such notice.

*Section 2424.12.* As noted above, this new section provides for discussions between the parties and a designated representative of the FLRA prior to a request for a written allegation of nonnegotiability. Subsection (a) explains that the representative of the FLRA will conduct a prefiling conference with the parties where such a conference is appropriate. A prefiling conference is appropriate and will be conducted unless, for example, the dispute is not ripe for intervention (for example when the bargaining proposal has not been discussed by the parties). At the prefiling conference, which may occur by telephone or in person, the parties must be prepared to discuss and clarify the issues involved in the dispute. The matters to be discussed at the prefiling conference are specifically set forth in the regulation. A record of the prefiling conference, to which the parties may timely object, will be prepared in accordance with subsection

(b). It is the Authority's intent that, whenever possible, the record of the prefiling conference will be developed and agreed upon prior to concluding the conference.

**Section 2424.13.** This section incorporates and amends the current procedure for requesting and giving allegations of nonnegotiability set out in § 2424.3 of the current regulations. As amended, the regulation provides that an exclusive representative may not seek a written allegation concerning the duty to bargain over a particular proposal until the Authority has completed the prefiling conference, declined to hold a prefiling conference, or 30 days have elapsed since the filing of the notice of intent to appeal—whichever occurs first. The latter alternative permits, but does not require, the exclusive representative to request a written allegation concerning the duty to bargain after the passage of 30 days.

**Sections 2424.14–2424.19.** These sections are reserved.

#### Subpart C—Filing a Petition

**Section 2424.20.** This is a new section that supersedes § 2424.2 of the current regulations. The revised regulation provides that an exclusive representative must comply with the prefiling requirements set forth in Subpart B prior to filing a petition for review. The revised regulation explains that Subpart B does not apply in cases involving an agency head's disapproval of a provision pursuant to 5 U.S.C. 7114.

**Section 2424.21.** This section, which addresses the time limits for filing a petition for review, incorporates the time limits set out in the current § 2424.3. A new provision specifies that an allegation of nonnegotiability provided in a response to a request that does not comply with Subpart B will not prompt the running of the 15-day period in which to file a petition for review.

**Section 2424.22.** This section incorporates and expands the content requirements for a petition for review contained in current § 2424.4. A form will be developed for use in filing a petition for review, but its use will not be required provided that the petition for review includes all of the information set forth in the regulation. In addition to the requirements in the current regulation, this section requires the exclusive representative to provide additional information in the petition, including any modifications to the proposal or provision resulting from the prefiling conference, a statement as to whether severance is requested and support for such a request, notification

of whether the negotiability dispute is involved in an impasse procedure under part 2470 of this subchapter or a grievance pursuant to 5 U.S.C. 7121, any request for a hearing before the Authority, and, where available, a copy of the record of the prefiling conference. The section also requires that any petition for review exceeding 25 double-spaced pages in length include a table of contents and a table of legal authorities cited. This requirement, which also applies to agency statements of position under section 2424.32 and responses of exclusive representatives under section 2424.33, mirrors the requirement established in section 2423.40(a)(3), which applies to exceptions to administrative law judge decisions in unfair labor practice cases.

Comment is specifically requested on whether the proposed requirements are burdensome. If the requirements are viewed as burdensome, then commenters are requested to suggest alternatives to create a record sufficient for an agency to file a complete statement of position and for the Authority to resolve the negotiability and/or bargaining dispute.

**Section 2424.23.** This section parallels the current § 2424.4(b) concerning service of the petition for review.

**Sections 2424.24–2424.29.** These sections are reserved.

#### Subpart D—Processing a Petition for Review

Subpart D establishes procedures for processing petitions for review involving proposals and provisions. Section 2424.30, discussed below, requires a postfiling conference in cases involving provisions, i.e. matters that have been agreed to by the parties and disapproved on agency head review pursuant to 5 U.S.C. 7114(c).

**Section 2424.30.** This section addresses the processing of petitions for review involving provisions in a collective bargaining agreement. Subsection (a) sets out the purposes of the conference, which would take place after a petition for review has been filed. The purposes of the conference would be the same as those established in section 2424.12(a) for prefiling conferences.

Subsection (b) specifies that the representative of the FLRA may, on finding good cause (such cause to include, but not be limited to, cases where the parties agree), extend the time limits for filing the agency's statement of position and the exclusive representative's response thereto. Subsection (c) provides for the preparation of, service of, and objection

to, the record of the postfiling conference. Subsection (c) is comparable to section 2424.12(b), which sets out identical procedures for the records of prefiling conferences.

**Section 2424.31.** This section replaces and significantly changes the current § 2424.5. Subsection (a) specifies how the Authority will act on petitions raising negotiability disputes where the exclusive representative has pursued a related bargaining dispute in unfair labor practice or grievance proceedings. In particular, if an exclusive representative has pursued a related bargaining dispute in such proceedings, the Authority will dismiss the petition for review without prejudice to the right of the exclusive representative to refile the petition, after the other proceeding is completed, if necessary to resolve remaining issues. After such refiling, the Authority will determine whether resolution of the petition for review is still required. Under the proposed section, an exclusive representative would, if it filed both an unfair labor practice charge and a petition for review, no longer have the ability to select which should be processed first.

Subsection (b) of the revised regulation distinguishes between two categories of cases: (1) Cases raising a negotiability dispute only; and (2) cases raising both a negotiability dispute and a bargaining dispute.

With respect to the first category, the Authority will resolve the petition under the procedures set out in subsection (b)(1). With respect to the second category, the regulation identifies three approaches in section (b)(2) under which the Authority may proceed, the last of which proposes a significant change to the current practice. Under (b)(2)(i), the Authority will inform the exclusive representative of other proceedings in which it may raise the bargaining dispute; if the exclusive representative proceeds to raise the bargaining dispute in another proceeding, the petition will be processed in accord with subsection (a) of this section. Section (b)(2)(ii), which is the current practice, allows the Authority to address and resolve only the negotiability—but not the bargaining—dispute. Under the final option, section (b)(2)(iii), the Authority would address and resolve both the negotiability dispute and the bargaining dispute aspects of a case. This option departs from current practice, in which the Authority does not resolve bargaining dispute issues in the negotiability process; where such disputes exist, the parties are obliged to pursue them in other proceedings. This change would, in appropriate cases,

relieve the parties of the burden of litigating the same dispute in two, consecutive proceedings.

*Section 2424.32.* This section sets out the time limits for filing, contents, and service of the agency's statement of position. These requirements make several changes to the requirements that now appear in the current § 2424.6. As with the petition for review, a form will be developed for use in filing, but its use will not be required provided that the statement of position includes all of the information set forth in the regulation. Consistent with section 7117(c)(3) of the Statute, a statement of position must be filed and, as set forth in sections 2424.35 and 2424.37 of the regulations, failure to do so may result in the Authority's refusal to consider an argument or may be considered a withdrawal of previous allegations of nonnegotiability and/or a concession. As an example, an assertion made in an allegation of nonnegotiability but not repeated in a statement of position will, in appropriate circumstances, be deemed withdrawn. As another example, an agency's failure to respond to an exclusive representative's assertion that a proposal constitutes an appropriate arrangement within the meaning of section 7106(b)(3) of the Statute, whether or not the agency repeats an argument that the proposal is inconsistent with section 7106(a), will, in appropriate circumstances, be deemed a concession that the proposal is within the duty to bargain under section 7106(b)(3).

In addition to setting out the time limits for filing, subsection (a) provides that the time limits may be extended. Subsection (b), concerning the content of the statement of position, retains and broadens the requirements in the current regulation by, for example, requiring that the agency provide a copy of the particular section of any law, rule, regulation, collective bargaining agreement, or other authority relied on as a basis for an objection or assertion that the matter is outside the duty to bargain, and describe with particularity any opposition to the exclusive representative's request for severance. Service of the statement of position is addressed in subsection (c).

Comment is specifically requested on whether the proposed requirements are burdensome. If the requirements are viewed as burdensome, then commenters are requested to suggest alternatives to create a record sufficient for an exclusive representative to file a complete response and for the Authority to resolve the negotiability and/or bargaining dispute.

*Section 2424.33.* All matters related to the exclusive representative's response to the agency's statement of position that currently appear in § 2424.7 are incorporated here. The section mirrors the format of the preceding section, setting out time limits, contents, and service requirements in subsections (a), (b), and (c) respectively. Subsection (a) provides that time limits may be extended. As with other sections of the proposed rules, subsection (b) indicates that a form will be developed for use in filing, but its use will not be required provided that the response includes all of the information set forth in the regulation. The section requires that the exclusive representative specifically support any allegations and citations offered in response to the agency's statement of position. Service of the statement of position is addressed in subsection (c).

This section is not intended to require an exclusive representative to restate arguments and information that were included in its petition for review. However, consistent with section 7117(c)(4) of the Statute, a response must be filed and, as set forth in sections 2424.35 and 2424.37 of the regulations, failure to address an assertion or argument made in an agency's statement of position may result in the Authority's refusal to consider an argument or may be deemed a concession. As an example, an exclusive representative's failure to respond to an agency's assertion that a proposal would directly determine the conditions of employment of employees outside the bargaining unit will, in appropriate circumstances, be deemed a concession that it would have that effect.

*Section 2424.34.* This new section explains procedures through which the Authority, or a representative of the FLRA, may resolve factual disputes arising in connection with a negotiability and/or bargaining dispute.

*Section 2424.35.* This section, which incorporates certain provisions in the current § 2424.4, outlines the options available to the Authority in the event that a party fails to participate in a conference or provide timely, complete, and responsive information. Subsections (a)–(e) define the actions the Authority may, in its discretion, take to address a party's failures in these respects.

*Section 2424.36.* This section, which addresses additional submissions to the Authority, incorporates the requirements set out in the current § 2424.8.

*Section 2424.37.* This new section defines both the exclusive

representative's and the agency's responsibilities to make, respond to, and support arguments. Subsection (a) specifies the exclusive representative's responsibilities. Absent good cause, the regulations limit the exclusive representative's arguments to those raised in its petition for review and those made in response to the agency's statement of position. Similarly, subsection (b) specifies the agency's responsibilities and, absent good cause, prohibits an agency from subsequently raising arguments in its statement of position or any other proceeding that it did not raise in the prefiling or postfiling conference. Failure by either party to raise, support, or respond to a particular objection or assertion will be deemed, as appropriate, a concession to, or withdrawal of, the objection or assertion.

*Section 2424.38.* This section regarding the holding of a hearing pursuant to 5 U.S.C. 7117(c)(5) contains no changes from the current § 2424.9.

*Section 2424.39.* This section is reserved.

#### Subpart E—Decision and Order

*Section 2424.40.* Matters related to decisions and orders of the Authority, which currently appear in § 2424.10, are moved to this section and appear in subsections (a), (b), and (c). Subsection (a) states that the Authority will expedite proceedings to the extent practicable. Subsection (b) explains the actions the Authority will take with respect to proposals and subsection (c) explains the actions the Authority will take with respect to provisions disapproved on agency head review. This section is intended to clarify the actions that the Authority will take in its decisions and orders, depending on the determinations reached in individual cases. For example, the Authority order will note when bargaining dispute defenses have been raised but not resolved and the Authority's order will recognize the severance of provisions or proposals.

*Section 2424.41.* The current § 2424.10(c) is moved to this section. No changes are made.

*Sections 2424.42–2424.49.* These sections are reserved.

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

*Section 2424.50.* The current § 2424.11 is moved to this section. No changes are made.

*Sections 2424.51–2424.59.* These sections are reserved.

## 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 record keeping requirements under the Paperwork Reduction Act of 1995, 44 U.S.C. 3501, *et seq.*

## List of Subjects in 5 CFR Part 2424

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

For the reasons discussed in the preamble, the Federal Labor Relations Authority proposes to revise 5 CFR Part 2424 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—Prefiling Procedures in Cases Involving Proposals

- 2424.10 Collaboration and Alternative Dispute Resolution Program.
- 2424.11 Notice of intent to appeal.
- 2424.12 Prefiling conference.
- 2424.13 Requesting and giving allegations concerning the duty to bargain.
- 2424.14–2424.19 [Reserved]

### Subpart C—Filing a Petition

- 2424.20 Who may file a petition.
- 2424.21 Time limits for filing a petition.
- 2424.22 Content of petition.
- 2424.23 Service of petition.
- 2424.24–2424.29 [Reserved]

### Subpart D—Processing of a Petition for Review

- 2424.30 Postfiling conference in cases involving provisions.
- 2424.31 Procedure through which the petition for review will be resolved.
- 2424.32 Agency statement of position; time limits; content; service.
- 2424.33 Response of the exclusive representative; time limits; content; service.
- 2424.34 Resolution of disputed factual matters.
- 2424.35 Participation in conferences; incomplete or untimely submissions; Authority requests for supplemental information.
- 2424.36 Additional submissions to the Authority.
- 2424.37 Responsibilities to make, respond to, and support arguments.
- 2424.38 Hearing.
- 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 written allegations of nonnegotiability that are requested by exclusive representatives after January 1, 1999; all petitions for review filed after January 1, 1999 by exclusive representatives in response to agency head disapprovals of contract provisions; and all petitions for review filed after January 1, 1999 in response to written allegations of nonnegotiability that were requested prior to that date.

### § 2424.2 Definitions.

In this part, the following definitions shall apply:

- (a) *Bargaining 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. A bargaining dispute may exist where there is no dispute about the legality of a proposal.

(b) *Collaboration and Alternative Dispute Resolution Program* refers to an agency-wide program in the Federal Labor Relations Authority that assists the parties in resolving 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 agency contends that a proposal or provision is not a proper subject of bargaining under any circumstances, and when an agency contends that a proposal is bargainable only at its election.

(d) *Notice of intent to appeal* means a written notice that an exclusive representative must file with the Authority prior to requesting a written allegation from an agency that the duty to bargain in good faith does not extend to a matter proposed to be bargained.

(e) *Petition for review* means an appeal filed with the Authority after:

(1) An exclusive representative has requested a written allegation from an agency that the duty to bargain in good faith does not extend to a matter proposed to be bargained; or

(2) An agency head has disapproved a provision.

(f) *Proposal* means any matter offered for bargaining that has not been agreed to by the parties.

(g) *Provision* means any matter that has been offered for bargaining and agreed to by the parties, including matters disapproved by the agency head on review pursuant to 5 U.S.C. 7114(c).

(h) *Service* requires compliance with part 2429 of this subchapter and also requires the parties to serve copies of any filing on the other's principal bargaining representative and, in the case of an exclusive representative, on the head of the agency.

(i) *Severance* refers to the division of a proposal or provision into separate parts having independent meaning in the event that certain parts of a proposal are determined to be outside the duty to bargain or certain parts of a provision are determined to be contrary to law.

(j) *Written allegation concerning the duty to bargain* means an agency allegation, provided in response to a written request from an exclusive representative, that the duty to bargain in good faith does not extend to a matter.

**§ 2424.3–2424.9 [Reserved]****Subpart B—Prefiling Procedures in Cases Involving Proposals****§ 2424.10 Collaboration and Alternative Dispute Resolution Program.**

Where the parties experience difficulties in resolving disputes that arise under this part, they may voluntarily request the assistance of the Collaboration and Alternative Dispute Resolution Program. This program will endeavor to assist the parties to resolve these disputes before they become cases, utilize alternative dispute resolution techniques, and develop collaborative and constructive relationships.

**§ 2424.11 Notice of intent to appeal.**

(a) *Precondition.* After the parties have attempted, but failed to reach agreement over a proposal and the agency has indicated that the duty to bargain does not extend to the proposal under consideration, prior to requesting a written allegation concerning the duty to bargain, the exclusive representative must file a notice of intent to appeal with the Authority. The filing of a notice of intent to appeal does not relieve the parties of any obligation to continue negotiations in an effort to resolve the dispute.

(b) *Form and content.* The notice of intent to appeal must be in writing on a form provided by the Authority for that purpose, or in a substantially similar format, and must briefly describe any proposal that the agency has claimed to be the subject of a negotiability dispute and any attempts to reach agreement over the proposal. It must contain the names, addresses, telephone, and facsimile numbers of the parties to the negotiations.

(c) *Service.* The notice of intent to appeal must be served in accord with § 2424.2(h).

**§ 2424.12 Prefiling conference.**

(a) *Conduct of conference.* On receipt of the notice of intent to appeal, a representative of the FLRA will determine whether to conduct and, where appropriate, will conduct, one or more prefiling conferences either by telephone or in person. If it is determined not to conduct a conference, the parties will be provided the reasons for such determination. All parties to the dispute must participate in any prefiling conference and be prepared to discuss and clarify:

- (1) The meaning of the proposal(s) in dispute;
- (2) Any disputed factual issue(s);
- (3) Any agency negotiability dispute objections to the proposal(s);

(4) Any agency bargaining dispute defenses to the proposal(s);

(5) Whether the dispute is also involved in an unfair labor practice charge under part 2423 of this subchapter, in a grievance pursuant to 5 U.S.C. 7121, or an impasse procedure under part 2470 of this subchapter;

(6) Whether the dispute can be resolved through the Collaboration and Alternative Dispute Resolution program.

(b) *Record of the prefiling conference.* After the prefiling conference has been completed, the representative of the FLRA will prepare and serve a report of what transpired during the conference. The parties have 10 days to file written objection to the report of the prefiling conference, which will be made part of the record of the conference.

**§ 2424.13 Requesting and giving written allegations concerning the duty to bargain.**

(a) *Relationship between prefiling conference and requests for written allegations concerning the duty to bargain.* The exclusive representative may not request a written allegation concerning the duty to bargain until the prefiling conference has been completed. *Provided however,* if the Authority declines to hold a prefiling conference or if a prefiling conference has not been completed within 30 days of the filing of a notice of intent to appeal, the exclusive representative may request a written allegation concerning the duty to bargain.

(b) *Agency response.* The agency must respond to the exclusive representative's request and effect service in accord with § 2424.2(h).

**§§ 2424.14–2424.19 [Reserved]****Subpart C—Filing a Petition****§ 2424.20 Who may file a petition.**

A petition for review of a negotiability issue may be filed by an exclusive representative that is a party to the negotiations, and has complied with subpart B. *Provided however,* that where, pursuant to 5 U.S.C. 7114(c), an agency head has disapproved a provision, an exclusive representative may file a petition without having complied with subpart B.

**§ 2424.21 Time limits for filing a petition.**

The time limit for filing a petition for review is fifteen (15) days after the date of service of the agency's written allegation, requested and provided in accord with §§ 2424.12 and 2424.13, that the duty to bargain in good faith does not extend to the matter proposed to be bargained. *Provided however,* that review of a negotiability issue may be requested by an exclusive representative

under this subpart without a prior written allegation concerning the duty to bargain if the agency has not served such written allegation upon the exclusive representative within ten (10) days after the agency bargaining representative at the negotiations has received a written request for such allegation. A written allegation concerning the duty to bargain that is provided prior to the notice of intent to appeal and prefiling conference described in subpart B will not begin the 15-day filing period for the petition for review.

**§ 2424.22 Content of petition.**

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 contain the following:

(a) A statement setting forth the language of any proposal or provision, including any modifications resulting from the prefiling conference.

(b) An explicit statement of the meaning of the proposal or provision as a result of the prefiling conference, including:

(1) Explanation of special terms or phrases, technical language, or any other aspect of the language of the proposal or provision that is not in common usage or has a different meaning in the particular work situation; and

(2) Where the proposal or provision is concerned with a particular work situation, or other particular circumstances, a description of the situation or circumstances that will enable the Authority to understand the context in which the proposal is intended to apply; and

(3) Explanation of how the proposal or provision is intended to work and a description of the impact that it will have.

(c) A statement whether severance is requested, and if so, as to which particular portions of the proposal or provision. The exclusive representative must support its request for severance with an explanation of how the severed portions of the proposal or provision may stand alone, and how such severed portions would operate.

(d) Where available, a copy of the record of the prefiling conference.

(e) A copy of all pertinent material, including the agency's written allegation concerning the duty to bargain, any matter referred to in the proposal or provision, and any other relevant documentary material.

(f) Notification by the petitioning exclusive representative as to whether the dispute is also involved in an unfair

labor practice charge under part 2423 of this subchapter, in a grievance pursuant to 5 U.S.C. 7121, or an impasse procedure under part 2470 of this subchapter.

(g) Any request for a hearing before the Authority and the reasons supporting such suggestion.

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

#### **§ 2424.23 Service of petition.**

The petition for review must be served in accord with § 2424.2(h).

#### **§ 2424.24—2424.29 [Reserved]**

### **Subpart D—Processing of a Petition for Review**

#### **§ 2424.30 Postfiling conference in cases involving provisions.**

(a) *Conduct of conference.* On receipt of the petition for review involving a provision, a representative of the FLRA will, where appropriate, conduct one or more postfiling conferences either by telephone or in person. All parties to the dispute must participate in any postfiling conference and be prepared to discuss and clarify:

(1) The meaning of the provision(s) in dispute;

(2) Any disputed factual issue(s);

(3) Any agency negotiability dispute objections to the provision(s);

(4) Any agency bargaining dispute defenses to the provision(s);

(5) Whether the dispute is also involved in an unfair labor practice charge under part 2423 of this subchapter, in a grievance pursuant to 5 U.S.C. 7121, or an impasse procedure under part 2470 of this subchapter;

(6) Whether the dispute can be resolved through the Collaboration and Alternative Dispute Resolution program.

(b) *Extension of time limits.* The representative of the FLRA may, on determining that it will effectuate the purposes of the Federal Service Labor Management Relations Statute and this part, extend the time limits for filing set out in §§ 2424.32 and 2424.33.

(c) *Record of the postfiling conference.* After the postfiling conference has been completed, the representative of the FLRA will prepare and serve a report of what transpired during the conference. The parties have 10 days to file written objection to the report of the postfiling conference, which will be made part of the record of the conference.

#### **§ 2424.31 Procedure through which the petition for review dispute will be resolved.**

(a) *Exclusive representative has pursued bargaining dispute in other*

*proceedings.* Where an exclusive representative files an unfair labor practice charge pursuant to part 2423 of this subchapter or grievance under 5 U.S.C. 7121, and also files a petition for review pursuant to this part concerning the same dispute, the Authority will dismiss the petition for review without prejudice to the right of the exclusive representative to refile the petition for review after the unfair labor practice or the grievance has been resolved. After the unfair labor practice charge or grievance is resolved, the exclusive representative may refile the petition within 30 days of resolution of the unfair labor practice charge or grievance, and the Authority will determine whether the resolution of the petition is still required.

(b) *Exclusive representative has not pursued bargaining dispute in other proceedings.* Where an exclusive representative files only a petition for review under this part, the petition will be processed as follows:

(1) *Agency does not assert bargaining dispute defenses.* Where the agency has not asserted any bargaining dispute defenses, the Authority will resolve the petition by addressing the negotiability dispute objections under the procedures of this part.

(2) *Agency does assert bargaining dispute defenses.* Where the agency has asserted bargaining dispute defenses, the Authority will either:

(i) Inform the exclusive representative of any opportunity to file an unfair labor practice charge pursuant to part 2423 or a grievance under 5 U.S.C. 7121 and, where the exclusive representative pursues either of these courses, proceed in accord with paragraph (a) of this section;

(ii) Proceed to resolve only the negotiability dispute aspects of the petition, but not the bargaining dispute defenses raised by the agency; or,

(iii) Proceed to resolve the petition in its entirety, including any negotiability dispute objections and bargaining dispute defenses raised by the agency, under the procedures of this part.

#### **§ 2424.32 Agency statement of position; time limits; content; service.**

(a) *Time limit for filing.* Unless the time limit for filing has been extended pursuant to § 2424.30(b) or § 2429.23, the agency must file a statement of position within thirty (30) days after the date the head of the agency receives a copy of a petition for review of a negotiability issue.

(b) *Contents.* 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 the allegation that the duty to bargain in good faith does not extend to the matter proposed to be negotiated; 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 full and detailed statement of the reasons supporting any objections or assertions made concerning any proposal during the prefiling conference or provision during the postfiling conference. The statement must cite and contain a copy of the particular section of any law, rule, regulation, or provision of a collective bargaining agreement relied on. The statement also must cite and contain a copy of other authority relied on as a basis for the objection or assertion, except that copies of published judicial decisions and decisions of the Authority are not required. The agency must submit legal arguments and explanation in support of its contentions that the duty to bargain does not extend to a particular matter. The statement of position must also include:

(i) If different from the exclusive representative's position, an explanation of the meaning the agency attributes to the proposal or provision, including any special terms or phrases, technical language, or any other aspect of the language of the proposal or provision that is not in common usage or has a different meaning in the particular work situation, and the reasons for disagreeing with the exclusive representative's explanation of meaning;

(ii) A description of the particular work situation, or other particular circumstances the agency views the proposal or provision to concern, which will enable the Authority to understand the context in which the proposal is considered to apply to the agency; and

(iii) If different from the exclusive representative's position, an explanation of how the agency asserts the proposal or provision is intended to work and a description of the impact that it will have, and the reasons for disagreeing with the exclusive representative's explanation of meaning.

(3) If the agency opposes the exclusive representative's request for severance in any respect, the agency must explain with particularity why severance is not appropriate.

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

(c) *Service.* A copy of the agency's statement of position, including all



attachments thereto, must be served in accord with § 2424.2(h).

**§ 2424.33 Response of the exclusive representative; time limits; content; service.**

(a) *Time limit for filing.* Unless the time limit for filing has been extended pursuant to § 2424.30(b) or § 2429.23, 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 full and detailed response.

(b) *Contents.* The response must be on a form provided by the Authority for that purpose, or in a substantially similar format. The exclusive representative's response is specifically limited to the matters raised in the agency's statement of position. The response must state the exclusive representative's position including:

(1) Any disagreement with the agency's allegation that a proposal is not within the duty to bargain or that a provision is contrary to law. The exclusive representative must offer specific arguments and explanations in opposition to any agency argument, including the identification and explanation of exceptions to management rights, such as negotiable procedures and appropriate arrangements. The response must cite and contain a copy of the particular section of any law, rule, regulation, or provision of a collective bargaining agreement relied on. The response also must cite and contain a copy of other authority relied on as a basis for the objection or assertion, except that copies of published judicial decisions and decisions of the Authority are not required;

(2) Any arguments and explanations, in response to an agency's allegations, that a proposal or provision is severable; and

(3) Any allegation that the agency's rules or regulations 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. All such allegations must be supported by argument, explanation, and citation to any applicable law, rule, or regulation.

(4) 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.

(c) *Service.* A copy of the response of the exclusive representative including

all attachments thereto must be served in accord with § 2424.2(h).

**§ 2424.34 Resolution of disputed factual matters.**

In resolving necessary factual matters in a negotiability or bargaining dispute, the Authority, or its designated agent, may, as appropriate:

(a) Request specific documentary evidence;

(b) Request that the parties provide answers to specific factual questions in the form of interrogatories;

(c) Refer the matter for fact finding and a recommended decision before a hearing officer designated by the Authority; or

(d) Take any other action that will aid in the resolution of the disputed factual issue, including the holding of a hearing in accord with § 2424.38.

**§ 2424.35 Participation in conferences; incomplete or untimely submissions; Authority requests for supplemental information.**

Where a party fails to participate in a prefiling conference, pursuant to § 2424.12, or a postfiling conference as described in § 2424.30, or where a party provides an untimely or incomplete petition for review as described in § 2424.22, an untimely or incomplete statement of position as described in § 2424.32, an untimely or incomplete response to an agency's statement of position as described in § 2424.33, or otherwise fails to provide timely or responsive information under this part, the Authority may as appropriate and in its discretion:

(a) Refuse to consider certain exclusive representative arguments and, where appropriate, dismiss the petition for review, with or without prejudice to refile;

(b) Refuse to consider certain agency arguments and, where appropriate, grant the petition for review and order the agency to bargain, with or without conditions;

(c) Direct a party to provide the necessary or requested information, or direct the holding of a fact finding conference or hearing for the purpose of obtaining the necessary or requested information;

(d) Disregard and/or strike from the record portions of a party's claims and arguments that rely on information not provided;

(e) Take any other action which in the Authority's discretion is deemed appropriate.

**§ 2424.36 Additional submissions to the Authority.**

The Authority will not consider any submission filed by any party, whether

supplemental or responsive in nature, other than those authorized or requested under this part, except that the Authority may, in its discretion, grant permission to file such a submission based on a written request by any party, a copy of which is served in accord with this part.

**§ 2424.37 Responsibilities to make, respond to, and support arguments.**

(a) *Responsibilities of the exclusive representative.* In the petition for and response to the agency's statement of position filed pursuant to this part, the exclusive representative has the burden of explaining fully why the proposals or provisions under consideration are within the duty to bargain and, where applicable, why severance is appropriate. Failure to address an assertion or objection raised by the agency, will, where appropriate, be deemed a concession to such objection or assertion. Absent good cause, arguments not presented in the petition for review or made in response to the agency's statement of position may not be raised in the response.

(b) *Responsibilities of the agency.* In the statement of position, filed pursuant to § 2424.32, the agency has the burden of explaining fully why the proposals or provisions under consideration are outside the duty to bargain or contrary to law, respectively, and where applicable, its position on severance. Failure to raise and support an objection or defense, will, where appropriate, be deemed a withdrawal of such objection or assertion, and failure to address an assertion raised by the exclusive representative will, where appropriate, be deemed a concession to such assertion. Absent good cause, arguments not raised in the prefiling conference, pursuant to § 2424.12, or postfiling conference, pursuant to § 2424.30, may not be raised in the agency's statement of position or in any other proceeding.

**§ 2424.38 Hearing.**

A hearing may be held, in the discretion of the Authority, before a determination is made under 5 U.S.C. 7117(b) or (c). If a hearing is held, it will be expedited to the extent practicable and will not include the General Counsel as a party.

**§ 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 shall expedite proceedings under this part to the extent practicable and shall issue to the exclusive representative and



to the agency a written decision on the allegation and the specific reasons therefor at the earliest practicable date.

(b) *Cases involving proposals.* If the Authority finds that the duty to bargain extends to the matter proposed to be bargained or any severable part of a matter proposed to be bargained, the decision of the Authority will include an order that the agency must on request (or as otherwise agreed to by the parties) bargain concerning such matter. If the Authority finds that the duty to bargain does not extend to the matter proposed to be bargained, the Authority will so state and issue an order dismissing the petition for review of the negotiability issue. If the Authority finds that the matter is bargainable only at the election of the agency, the Authority will so state. If the Authority finds that the duty to bargain extends to the negotiability dispute aspects of the proposal, but there are unresolved bargaining dispute defenses, the decision of the Authority will include an order that the agency must on request (or as otherwise agreed to by the parties) bargain on this negotiability dispute in the event its bargaining dispute defenses are rejected.

(c) *Cases involving provisions.* If the Authority finds that a provision, or any severable part thereof, disapproved by an agency head pursuant to 5 U.S.C. 7114(c) is not contrary to law, rule or regulation, the decision of the Authority will include an order that the agency must rescind its disapproval of such provision in whole or in part as appropriate. If the Authority finds that a provision disapproved by an agency head pursuant to 5 U.S.C. 7114(c) is contrary to law, rule, or regulation, the Authority will so state and issue an order dismissing the petition for review as to that provision. If the Authority finds that an agreement provision, or any severable part thereof, disapproved by the agency head pursuant to 5 U.S.C. 7114(c), is bargainable only at the election of the agency, the Authority will so state and issue an order that the agency must rescind its disapproval of such provision in whole or in part as appropriate.

#### **§ 2424.41 Compliance.**

The agency or exclusive representative may report to the appropriate Regional Director within a specified period the failure to comply with an order, issued as provided in § 2424.40, that the agency must upon request (or as otherwise agreed to by the parties) bargain concerning the disputed matter or that the agency must rescind its disapproval of a provision. If the Authority finds such a failure to comply with its order, the Authority shall take

whatever action it deems necessary, 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 which 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: September 3, 1998.

**Solly Thomas,**

*Executive Director, Federal Labor Relations Authority.*

[FR Doc. 98–24164 Filed 9–8–98; 8:45 am]

BILLING CODE 6727–01–P

## **DEPARTMENT OF TRANSPORTATION**

### **Federal Aviation Administration**

#### **14 CFR Part 39**

[Docket No. 92–ANE–23]

RIN 2120–AA64

### **Airworthiness Directives; Pratt & Whitney JT9D Series Turbofan Engines**

**AGENCY:** Federal Aviation Administration, DOT.

**ACTION:** Notice of proposed rulemaking (NPRM).

**SUMMARY:** This document proposes the superseding of an existing airworthiness directive (AD), applicable to Pratt & Whitney (PW) JT9D series turbofan engines, that currently requires initial and repetitive inspections of the sixth stage low pressure turbine (LPT) inner airseal, and modification of the sixth stage LPT inner airseal to reduce the

potential for two failure modes. This action would require additional repetitive borescope inspections for sixth stage LPT inner airseals found with cracks less than one inch in length. This proposal is prompted by the publication of a revision to a PW service bulletin that introduces the new borescope inspections. The actions specified by the proposed AD are intended to prevent an uncontained failure of the sixth stage LPT inner airseal, which can result in damage to the aircraft.

**DATES:** Comments must be received by November 9, 1998.

**ADDRESSES:** Submit comments in triplicate to the Federal Aviation Administration (FAA), New England Region, Office of the Regional Counsel, Attention: Rules Docket No. 92–ANE–23, 12 New England Executive Park, Burlington, MA 01803–5299. Comments may also be sent via the Internet using the following address: “9-ad-engineprop@faa.dot.gov”. Comments sent via the Internet must contain the docket number in the subject line. Comments may be inspected at this location between 8:00 a.m. and 4:30 p.m., Monday through Friday, except Federal holidays.

The service information referenced in the proposed rule may be obtained from Pratt & Whitney, 400 Main St., East Hartford, CT 06108; telephone (860) 565–6600, fax (860) 565–4503. This information may be examined at the FAA, New England Region, Office of the Regional Counsel, 12 New England Executive Park, Burlington, MA.

**FOR FURTHER INFORMATION CONTACT:** Tara Goodman, Aerospace Engineer, Engine Certification Office, FAA, Engine and Propeller Directorate, 12 New England Executive Park, Burlington, MA 01803–5299; telephone (781) 238–7130, fax (781) 238–7199.

#### **SUPPLEMENTARY INFORMATION:**

#### **Comments Invited**

Interested persons are invited to participate in the making of the proposed rule by submitting such written data, views, or arguments as they may desire. Communications should identify the Rules Docket number and be submitted in triplicate to the address specified above. All communications received on or before the closing date for comments, specified above, will be considered before taking action on the proposed rule. The proposals contained in this notice may be changed in light of the comments received.

Comments are specifically invited on the overall regulatory, economic,