ORAL ARGUMENT SCHEDULED FOR FEBRUARY 10, 2009

No. 08-1229

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

NATIONAL LABOR RELATIONS BOARD UNION,
and
NATIONAL LABOR RELATIONS BOARD
PROFESSIONAL ASSOCIATION,
Petitioners.

v.

FEDERAL LABOR RELATIONS AUTHORITY,
Respondent

ON PETITION FOR REVIEW OF A DECISION AND ORDER OF THE
FEDERAL LABOR RELATIONS AUTHORITY

BRIEF FOR THE FEDERAL LABOR RELATIONS AUTHORITY

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

A. Parties and Amici

Appearing below in the administrative proceeding before the Federal Labor Relations Authority (Authority) were the National Labor Relations Board Union and the National Labor Relations Board Professional Association (unions) and National Labor Relations Board (Board). The unions are the petitioner in this court proceeding; the Authority is the respondent.

B. Ruling Under Review

The ruling under review in this case is the Authority's decision in *National Labor Relations Board Union and National Labor Relations Board Professional Association,* Case No. 0-NG-2812, decision issued on May 8, 2008, reported at 62 F.L.R.A. 397.

C. Related Cases

This case has not previously been before this Court or any other court. Counsel for the Authority is unaware of any cases pending before this Court which are related to this case within the meaning of Local Rule 28(a)(1)(C).

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Board	National Labor Relations Board
Br.	Brief
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Climax Molybdenum	*Climax Molybdenum* Co. v. Se'y of Labor, 703 F.2d 447 (10th Cir. 1983)
Commerce	*United States Dep't of Commerce v. FLRA*, 7 F.3d 243 (D.C. Cir. 1993)
EEO	Equal Employment Opportunity
EEOC	Equal Employment Opportunity Commission
FLRA	Federal Labor Relations Authority
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NFFE	*NFFE, Local 1167 v. FLRA*, 681 F.2d 886 (D.C. Cir. 1982)
SOP	Statement of Position
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BRIEF FOR THE FEDERAL LABOR RELATIONS AUTHORITY

STATEMENT OF JURISDICTION

The Federal Labor Relations Authority ("Authority" or "FLRA") issued the decision and order under review in this case on May 8, 2008. The decision and order is published at 62 F.L.R.A. 397 and is included in the Joint Appendix (JA) at

JA __.[1] The Authority exercised jurisdiction over the case pursuant to § 7105(a)(2)(E) of the Federal Service Labor-Management Relations Statute, 5 U.S.C. §§ 7101-7135 (2006) (Statute).[2] This Court has jurisdiction to review final orders of the Authority pursuant to § 7123(a) of the Statute.

STATEMENT OF THE ISSUES

1. Whether the Authority reasonably denied the unions' request for a waiver of an expired time limit.

2. Whether the Authority reasonably determined that the unions' proposals were outside the agency-employer's obligation to bargain.

STATEMENT OF THE CASE

This case arose as a negotiability proceeding brought under § 7117 of the Statute. The National Labor Relations Board Union and the National Labor Relations Board Professional Association (collectively "the unions") sought to bargain with the National Labor Relations Board (Board) over the procedures the Board will follow when investigating formal equal employment opportunity (EEO) complaints. As relevant here, the Board declared five of the union's bargaining

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[1] A deferred appendix will be filed in this case.

[2] Pertinent statutory and regulatory provisions are set forth in the Addendum to this brief.

proposals to be outside its obligation to bargain, and the unions appealed the declarations to the Authority.

By Order dated April 29, 2005, the Authority's Director, Case Control and Legal Publications Office (Case Control), held that the unions' response to the Board's Statement of Position (SOP) was filed untimely and hence would not be considered by the Authority. The unions filed a timely request for reconsideration of the Director's Order.

In the Decision and Order under review, the Authority first denied the unions' request for reconsideration. The Authority then ruled on the merits of the negotiability dispute. Considering only those arguments contained in the unions' initial petition for review and the Board's SOP, the Authority held that all the disputed proposals were outside the Board's obligation to bargain.

The unions now seek review of this decision.

STATEMENT OF THE FACTS

A. The Negotiability Process

1. Negotiability Procedure

Because this case focuses on the procedural requirements when the Authority resolves negotiability disputes, a background discussion of that procedure is appropriate. Negotiability cases are processed pursuant to Part 2424

of the Authority's regulations, 5 C.F.R. Part 2424 (2008). Negotiability disputes are triggered when an employer-agency declares that bargaining proposals are outside the agency's statutory obligation to bargain. When a union has received a written declaration from the agency that a proposal is outside the obligation to bargain, the union may file a petition for review with the Authority. 5 U.S.C. § 7117(c)(1); 5 C.F.R. § 2424.21. The purpose of a union's petition for review is to initiate a negotiability proceeding, and provide the agency with notice that the union requests a decision from the Authority as to whether the proposal at issue is within the agency's obligation to bargain. 5 C.F.R. § 2424.22(a). In the initial petition, the union must identify the proposals at issue and provide the Authority with certain background information regarding the dispute. 5 C.F.R. § 2424.22(b).

After a post-petition conference between the parties to the dispute and a representative of the Authority, the agency is required to file its SOP. 5 U.S.C. 7117(c)(3); 5 C.F.R. §§ 2424.23, 2424.24. Among other things, the SOP must set forth the agency's arguments and authorities supporting its contentions that the disputed proposals are outside the obligation to bargain. 5 C.F.R. § 2424.24(c).

Within 15 days after it receives the agency's SOP, the union must file a response. 5 U.S.C. § 7117(c)(4); 5 C.F.R. § 2424.25(b). The purpose of the response is to inform the Authority and the agency why the disputed proposals are

within the agency's obligation to bargain, *i.e.*, that the proposals do not conflict with any law, do not affect any of the reserved management rights under § 7106(a) of the Statute, or if they do affect a management right, that the proposals fall within one of the exceptions found in § 7106(b). 5 C.F.R. § 2424.25(a). The union must provide argument and authorities supporting its position. 5 C.F.R. § 2424.25(c)(1).

2. General Filing Requirements

The Authority's requirements for the filing of documents are found at §§ 2429.21-2429.28 of its regulations, 5 C.F.R §§ 2429.21-2429.28. All documents must be "filed in person, by commercial delivery, by first-class mail, or by certified mail."[3] 5 C.F.R. § 2429.24(e). Section 2429.21(b) provides that when documents are filed by mail, the date of filing shall be determined by the date of mailing indicated by the United States Postal Service postmark date. 5 C.F.R. § 2429.21(b). However, if the delivery is by personal or commercial delivery, it shall be considered filed on the date received by the Authority or any officer designated to receive such materials. *Id.*

[3] Section 2429.24(e) also provides that certain specified documents may be filed by facsimile. However, the documents at issue here are not among those eligible for filing by facsimile.

B. Procedural History

This case arose out of collective bargaining negotiations between the Board and the unions over procedures the Board would use in investigating complaints of discrimination. During the course of these negotiations, the Board declared certain of the unions' bargaining proposals to be outside the Board's obligation to bargain under the Statute. On January 7, 2005, the unions filed a timely negotiability appeal with the Authority.

In accordance with the Authority's regulations, the Board timely filed its SOP on March 4, 2005. Certified Index at 3. Accordingly, the unions' response was to be filed by March 21, 2005. Pursuant to an order granting a 21-day extension of time, the unions were to file their response no later than April 11, 2005. *Id.* at 7 The unions placed their response in the hands of a commercial delivery service (FedEx) on April 11, 2005. Order dated April 19, 2005. The Authority received the response on April 12, 2005. *Id.*

On April 14, 2005, the Authority's Director of Case Control issued an Order to Show Cause requiring the unions to show cause why the response should be accepted for consideration by the Authority. The Order noted that the response was to be filed by April 11, 2005, but was filed with the Authority by commercial delivery on April 12, 2005. Section 2429.21(b) specifically provides that if service

C. The Authority's Decision

1. The Unions' Motion to Reconsider

The Authority first denied the unions' motion to reconsider the previous denial of the request for a waiver of the expired time limits.[5] On reconsideration, the unions asked the Authority to consider the difficulty the unions' counsel had experienced with serving Federal agencies by mail, and their counsel's intent in seeking timely service upon the Authority. The unions also noted that other agencies, as well as the federal courts, consider a pleading deposited with an overnight commercial delivery service to be served on the date it is deposited with the delivery service. Finally, the Unions argued that the late filing should be excused because that mistake did not cause prejudice to any party. 62 F.L.R.A. at 397.

Noting the heavy burden that parties bear in establishing that extraordinary circumstances exist to justify a waiver of expired time limits, the Authority denied the request for reconsideration. The Authority stated that it had previously found that where documents were filed one day late by commercial delivery (FedEx),

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[5] The Authority has delegated the authority to make determinations with respect to the timeliness of filings to the Director of Case Control. The Authority has retained the authority to review those determinations on requests for reconsideration filed pursuant to § 2429.17 of the Authority's regulations, 5 C.F.R. § 2429.17.

there were no extraordinary circumstances warranting waiver of the expired deadline (citing, *e.g.*, *NTEU*, 60 F.L.R.A. 226, 226 n.1 (2004)). The Authority also cited precedent holding that a simple mistake in filing does not constitute a basis for a waiver of an expired time limit (citing *AFSCME, Local 3870*, 50 F.L.R.A. 445, 448 (1995)). Finally, the Authority noted that it had previously rejected an assertion that lack of prejudice to the proceedings or harm to the other party constituted extraordinary circumstances warranting waiver of the expired deadline (citing *NTEU*, 60 F.L.R.A. at 226 n.1). 62 F.L.R.A. at 398.

Accordingly, the Authority denied the unions' motion and, therefore, did not consider the arguments set forth in the unions' response. *Id.*

2. The Negotiability Determination

Considering only the unions' petition for review, the record of the post-petition conference, and the Board's SOP, the Authority considered whether the disputed proposals were within the Board's obligation to bargain. The Authority first noted that the unions' petition for review stated that the disputed proposals merely required that the Board comply with the requirements of the Equal Employment Opportunity Commission (EEOC) as set forth at 29 C.F.R. Part 1614 and in EEOC Management Directive (MD)-110. In that regard, the Authority noted that the exercise of management's rights under § 7106(a)(2) is limited by

"applicable laws" and that proposals that require an agency to exercise its management's rights in accordance with applicable laws do not interfere with such rights, and are within the duty to bargain (citing *NTEU*, 42 F.L.R.A. 377, 388-91 (1991), *enforcement denied on other grounds*, 966 F.2d 1246 (D.C. Cir. 1993)). Further, the Authority stated that under its precedent, an agency regulation may constitute an "applicable law" where that regulation has "the force and effect of law" (citing *NTEU*, 42 F.L.R.A. at 391).[6] 62 F.L.R.A. at 401-402.

However, the Authority held that the unions had failed to raise any "applicable laws" arguments to support the negotiability of their proposals. In this regard, the Authority found that the unions did not explicitly argue that 29 C.F.R. Part 1614 and MD-110 constitute "applicable laws" within the meaning of § 7106(a)(2), nor did the unions explicitly assert that compliance with 29 C.F.R. Part 1614 and MD-110 was grounds for finding the proposals negotiable. Accordingly, the Authority did not consider whether compliance with 29 C.F.R. Part 1614 or MD-110 rendered the proposals negotiable. In so doing, the

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[6] Regulations are found to have the force and effect of law where they: (1) affect individual rights and obligations; (2) were promulgated pursuant to an explicit or implicit delegation of legislative authority by Congress; and (3) were promulgated in conformance with any procedural requirements imposed by Congress. *See United States Dep't of the Navy, Naval Undersea Warfare Ctr., Newport, R.I.*, 55 F.L.R.A. 687, 690 (1999).

Authority relied on § 2424.25(c)(1) of its regulations which requires that unions set forth in their pleadings:

> the arguments and authorities supporting any assertion that [a] proposal . . . does not affect a management right under 5 U.S.C. [§] 7106(a), and any assertion that an exception to management rights applies, including . . . [w]hether and why the proposal . . . enforces an 'applicable law,' within the meaning of 5 U.S.C [§] 7106(a)(2).

5 C.F.R. § 2424.25(c)(1)(iv). 62 F.L.R.A. at 401-402.

Moreover, the Authority stated that even if it were to construe the unions' claim as an assertion that 29 C.F.R. Part 1614 and MD-110 constitute applicable laws, such a claim would amount to nothing more that a bare assertion unsupported by arguments and authorities. Accordingly, and citing *AFGE, Local 1827*, 58 F.L.R.A. 344, 353 (2003), the Authority rejected any contention that the proposals merely require the agency to comply with an applicable law. 62 F.L.R.A. at 402.

Finally, the Authority considered the Board's contention that the disputed proposals impermissibly interfere with the Board's reserved management rights under § 7106(a) of the Statute. Noting that the unions had made no more than a general statement that the proposals concern procedures and that the unions presented absolutely no argument or authority to support this bare assertion, the

Authority declined to address it (citing *AFSCME, Local 2830*, 60 F.L.R.A. 124, 127 (2004)). 62 F.L.R.A. at 402-03.

Finally, stating that apart from this bare assertion, the unions did not otherwise dispute the Agency's assertions that the proposals are outside the duty to bargain, the Authority concluded that all of the disputed proposals are outside the duty to bargain. 62 F.L.R.A. at 403.

STANDARD OF REVIEW

Authority decisions are reviewed "in accordance with the Administrative Procedure Act," and may be set aside only if found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law[.]" *BATF v. FLRA*, 464 U.S. 89, 97 n.7 (1983); *see also Pension Benefit Guaranty Corp. v. FLRA*, 967 F.2d 658, 665 (D.C. Cir. 1992).

"Congress has specifically entrusted the Authority with the responsibility to define the proper subjects for collective bargaining, drawing upon its expertise and understanding of the special needs of public sector labor relations." *Library of Congress v. FLRA*, 699 F.2d 1280, 1289 (D.C. Cir. 1983). As such, "the Authority is entitled to considerable deference when it exercises its special function of applying the general provisions of the [Statute] to the complexities of federal labor relations." *BATF v. FLRA*, 464 U.S. at 97 (citation omitted).

Furthermore, administrative agencies retain substantial discretion in formulating, interpreting, and applying their own procedural rules. *Mountain States Tel. and Tel. Co. v. FCC*, 939 F.2d 1021, 1034-35 (D.C. Cir. 1991) (*Mountain States*) (citing *Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519, 524 (1978)); *see also Climax Molybdenum Co. v. Sec'y of Labor*, 703 F.2d 447, 451 (10th Cir. 1983) (*Climax Molybdenum*) (citing *Am. Farm Lines v. Black Ball Freight Serv.*, 397 U.S. 532, 539 (1970)). As relevant here, agency determinations not to waive procedural requirements will be reversed only when the agency has abused its discretion. *Green Country Mobile Phone, Inc. v. F.C.C.*, 765 F.2d 235, 238 (D.C. Cir. 1985) (*Green Country*). The burden to show an abuse of discretion "is a heavy one," and only where an agency has inconsistently applied a procedural rule will a reviewing court find that an agency abused its discretion in such matters. *Id.; see also Hooper v. Nat'l Transp. Safety Bd.*, 841 F.2d 1150, 1151 n.2 (D.C. Cir. 1988) (agency may enforce a rule as strictly as it pleases as long as it does so uniformly) (*Hooper*); *Tinker Air Force Base* v. *FLRA*, 321 F.3d 1242, 1246 (10th Cir. 2002) (*Tinker AFB*) (upholding Authority's strict application of its filing requirements).

With regard to a negotiability decision, such a "decision will be upheld if the FLRA's construction of the [Statute] is 'reasonably defensible.'" *Overseas Educ.*

Ass'n v. FLRA, 827 F.2d 814, 816 (D.C. Cir. 1987) (citation omitted). Courts "also owe deference to the FLRA's interpretation of [a] union's proposal." *NTEU v. FLRA*, 30 F.3d 1510, 1514 (D.C. Cir. 1994).

SUMMARY OF ARGUMENT

1. The Authority did not abuse its discretion when it denied the unions' request to waive an expired time limit. The burden of establishing that an administrative agency has abused its discretion in denying a waiver of its procedural rules is a heavy one, and an agency's strict, but consistent, application of its rules is insufficient to establish such an abuse. Here, the unions cite no appellate cases where a similar administrative determination has been reversed, nor any case where the Authority has waived a time limit under similar circumstances. To the contrary, the Authority has consistently applied its time limits in a strict manner.

In addition, the unions point to no other reasons for holding that the Authority improperly denied the waiver request. First, the fact that under the procedural rules of some other administrative agencies and the federal courts, the union's response might have been deemed as timely filed is unavailing. It is well settled that the formulation and application of procedural rules are left to the discretion of administrative agencies. In that regard, it is undisputed that the unions' filing was untimely under the Authority's unambiguous requirements.

Second, the unions mistakenly contend that the length of time it took the Authority to issue a decision in the instant case demonstrates that the Authority abused its discretion by denying the unions' waiver request. However, a delay in issuing a decision does not render an agency decision to enforce strictly a statutory time limit "legally flawed." *NFFE, Local 1167 v. FLRA*, 681 F.2d 886, 892-93 (D.C. Cir. 1981) (*NFFE*).

Finally, although the unions contend that there would be no prejudice to other parties if the time limits were waived in this case, lack of prejudice is a factor in waiving procedural requirements only when other mitigating factors are present. As no other reason for waiving the Authority's procedural requirements has been demonstrated, the unions clearly have not met their burden of establishing an abuse of discretion by the Authority.

2. The unions mistakenly contend that, even in the absence of timely filed arguments or authorities supporting the negotiability of the proposals, the Authority should have conducted an independent negotiability analysis. In addition, the unions contend that the Authority's failure to do so in the instant case is an unexplained departure from precedent. The unions' contentions are without merit.

In the first place, the unions' contentions are not properly before the Court because they were not raised before the Authority. No objection that has not been urged before the Authority shall be considered by a court of appeals on review. 5 U.S.C. § 7123(c). Section 7123(c)'s requirements are no less applicable where, as here, a party's first opportunity to raise the matter before the Authority would be in a motion for reconsideration. The unions had the opportunity to raise the issue before the Authority in a motion for reconsideration, and their failure to do so deprives this Court of jurisdiction to consider it.

Further, and in any event, the Authority did not depart from its precedent by not conducting an independent negotiability analysis in the absence of argument and supporting authorities from the unions. The Authority's regulations clearly place the burden of producing arguments and supporting authorities on the parties, and make clear that a party's failure to respond to arguments or assertions raised by the other party may be deemed a concession to such arguments and assertions. The Authority has applied these regulations in a consistent manner since their effective date. Finally, this Court has recognized that it is the responsibility of the parties to create the record upon which the Authority can resolve a negotiability dispute. *NFFE*, 681 F.2d at 891.

For all these reasons, unions' petition for review should be denied.

ARGUMENT

I. THE AUTHORITY REASONABLY DENIED THE UNIONS' REQUEST FOR A WAIVER OF AN EXPIRED TIME LIMIT

It is not disputed that the unions filed their response out of time. The Authority's regulations clearly state that documents served by commercial delivery are deemed filed when received by the Authority. 5 C.F.R. § 2429.21(b). Therefore, the only question before this court is whether the Authority abused its discretion when it denied the unions' request for a waiver of the expired time limit. As will be demonstrated below, the Authority did not abuse its discretion because it applied its clear procedural requirements in a manner consistent with its uniform past practice.

It is well established that, in this context, the burden to show an abuse of discretion "is a heavy one." *Green Country,* 765 F.2d at 238. In that regard, reviewing courts will not overturn an agency's strict application of its own procedural regulations so long as the rule is applied uniformly or with reasoned distinctions. *Tinker AFB*, 321 F.3d at 1246; *Green Country,* 765 F.2d at 237; *Hooper*, 841 F.2d at 1151 n.2; *Gilbert v. NTSB*, 80 F.3d 363, 367 (9th Cir. 1996). Further, standing alone, an agency's strict construction of a procedural rule in the face of a waiver request is insufficient evidence of an abuse of discretion. *Mountain Solutions, Ltd., Inc. v. FCC*, 197 F.3d 512, 517 (D.C. Cir. 1999)

(citations omitted) (*Mountain Solutions*) (holding Commission's denial of a requested waiver of time limit was not an abuse of discretion).

The unions do not, nor could they, contend that the Authority does not apply its procedural rules generally, and its rules on timeliness particularly, in a uniformly strict manner. In that regard, the unions have not cited a single case where the Authority has waived the time limit under circumstances similar to those present in this case. To the contrary, the Authority consistently and uniformly requires strict adherence to filing deadlines. *See, e.g., United States Dep't of Agric., Farm Serv. Agency, Kansas City, Mo. and United States Dep't of Agric., Office of the Inspector Gen., Kansas City, Mo.*, 55 F.L.R.A. 22, 23-24 (1998) (one-day delay caused by agency's internal mail system did not excuse untimely filings); *Dep't of Justice, United States Immigration and Naturalization Serv., United States Border Patrol, El Paso, Tex*, 40 F.L.R.A. 792, 793 (1991) (agency exceptions found in Authority's Case Control Office the morning after the due date without evidence of timely delivery were untimely); *United States Dep't of the Treasury, Customs Serv., Washington D.C.*, 38 F.L.R.A. 875, 877 (1990) (delay caused by courier service procured by the Authority's General Counsel did not excuse untimely filing). Moreover, that the Authority has applied its procedural rules in a

uniform manner has been recognized by at least one court of appeals. *See Tinker AFB*, 321 F.3d at 1246.

Additionally, the Authority has consistently denied waivers in circumstances substantially identical to those found here, *i.e.*, where a document was deposited with a commercial delivery service on the due date, but received by the Authority the next day. *See, e.g.*, *NTEU*, 60 F.L.R.A. at 226 n.1 (agency opposition untimely filed); *United States Dep't of the Treasury, Customs Serv., San Diego Dist., San Diego, Cal.*, 58 F.L.R.A. 240, 241 (2002) (agency exceptions untimely filed); *United States Dep't of the Army, United States Missile Command Redstone Arsenal, Ala.*, 43 F.L.R.A. 1359, 1360 (1992) (grievant's exceptions untimely filed).

In this regard, the unions' attempt (Br. 20) to distinguish *Marine Eng'rs Beneficial Ass'n, Dist. No. 1-PCD*, 60 F.L.R.A. 828 (2005) is unavailing. Although the precise circumstances of *Marine Eng'rs* may be different than those present in the instant case, *Marine Eng'rs* remains, nonetheless, another example of the Authority's strict applications of its filing deadlines.[7]

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[7] *Compare NLRB v. Washington Star Co.*, 732 F.2d 974, 975 (D.C. Cir. 1984) (*Washington Star*). In *Washington Star*, the Court recognized that the Board had broad discretion in making and applying its procedural rules, but, nonetheless held that in the specific circumstances of that case the Board arbitrarily refused to

(footnote continued on next page)

The unions' affirmative arguments suggesting that the Authority abused its discretion in denying the waiver request are all without merit. First, although conceding that the Authority has the right to promulgate its regulations prescribing its filing requirements, the unions argue (Br. 17-19) that the Authority's requirements are "antiquated" and out of line with those of similar administrative agencies and the United States Courts of Appeals.[8] The unions' concession answers its own argument. It is well settled that "the formulation of procedures [is] basically left within the discretion of the agencies to which Congress has confided the responsibility for substantive judgments." *Mountain States*, 939 F.2d

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accept documents filed one day late. 732 F.2d at 976-77. However, *Washington Star* is readily distinguishable from the instant case.

The D.C. Circuit's decision in *Washington Star* was based on two extenuating factors, neither of which is present here. First, the Court found that the Star made good faith, though mistaken, efforts to properly file its exceptions. *Id.* at 975-76. In finding "good faith efforts," the court stated that the Star's misreading of the filing requirements was excusable because it was "a product of the opaque captions and curious wording of the pertinent [Board] regulations." *Id.* at 976 n.1. Here, the unions have not asserted before this Court that the relevant regulations were unclear, nor could they. Second, the *Washington Star* court stressed that the Board had not consistently insisted on strict application of its filing deadlines, occasionally waiving time limits in situations where parties had demonstrated less good faith than had the Star. *Id.* at 977. As demonstrated above, the Authority, on the other hand, has consistently required strict compliance with its filing deadlines.

[8] The unions note that the Merit Systems Protection Board, the EEOC, and the Federal courts treat the date of deposit with a commercial delivery to be the date of filing.

evidence of an abuse of discretion). Accordingly, the Authority's ruling on the unions' waiver request should be upheld.[10]

II. THE AUTHORITY REASONABLY DETERMINED THAT THE UNIONS' PROPOSALS WERE OUTSIDE THE AGENCY-EMPLOYER'S OBLIGATION TO BARGAIN

Based upon the record before it, the Authority reasonably held that the disputed proposals were outside the Board's obligation to bargain. Relying explicitly on its regulations and precedent, and noting that the unions had not filed a timely response to the Board's SOP, the Authority considered only the unions' Petition for Review, the record of the post petition conference, and the Board's SOP in its analysis. As the unions presented no arguments in a timely manner contesting the Board's claim that the proposals interfered with the Board's reserved rights under § 7106(a) of the Statute, nor any other argument or authority that the

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[10] The unions also argue that the denial of the waiver was an abuse of discretion because the Authority unreasonably delayed issuing a decision. Although the delay may be unfortunate, it does not render the Authority's determination legally flawed. *NFFE, Local 1167 v. FLRA*, 681 F.2d 886, 892-93 (D.C. Cir. 1982) (holding that Authority properly refused to consider a party's untimely filing despite the Authority's considerable delay in issuing its decision). Although Congress established specific time limits for the submission of filings in negotiability cases, no such time limits are imposed on the Authority's decision making process in negotiability cases. 5 U.S.C. § 7117(c); *Compare* 5 U.S.C. § 7105(f) (requiring Authority to act within 60 days on petitions for review of actions taken pursuant to delegations to Regional Directors or Administrative Law Judges)

proposals were within the obligation to bargain, the Authority reasonably held that the proposals were nonnegotiable.

The unions do not deny that they provided neither argument nor authorities that would support the negotiability of the proposals in their Petition for Review. Rather, they contend that the Authority should have conducted an independent negotiability analysis and that this failure was an unexplained departure from precedent. The unions' contentions in this regard are without merit. First, the contention is not properly before this Court, because it was not first presented to the Authority. *See* 5 U.S.C. § 7123(c). Second, and in any event, the Authority's analysis in this case was not a departure from its precedent.

A. The Unions' Contention is not Properly Before this Court

Section 7123 of the Statute provides that "[n]o objection that has not been urged before the Authority . . . shall be considered by the court." 5 U.S.C. § 7123(c). The Supreme Court has explained that the purpose of this provision is to ensure "that the FLRA shall pass upon issues arising under the [Statute], thereby bringing its expertise to bear on the resolution of those issues." *Equal Employment Opportunity Comm'n v. FLRA*, 476 U.S. 19, 23 (1986). Accordingly, absent extraordinary circumstances, contentions not urged before the Authority, but instead raised for the first time in a petition for review of the Authority's decision,

are not within the Court's jurisdiction to consider. *See, e.g., United States Dep't of Commerce v. FLRA*, 7 F.3d 243, 244-45 (D.C. Cir. 1993) (*Commerce*).

The unions' contention that the Authority departed from precedent by not conducting an independent negotiability analysis should have been made to the Authority in the first instance. Section 7123(c)'s requirements are no less applicable where, as here, a party's first opportunity to raise the matter before the Authority would be in a motion for reconsideration. *Commerce*, 7 F.3d at 245. Interpreting 29 U.S.C. § 160(e), a substantially identical provision in the National Labor Relations Act (NLRA), the Supreme Court held that "when the NLRB raises and resolves an issue *sua sponte*, a party seeking judicial review of that issue must first file a motion for reconsideration . . . ." *Woelke & Romero Framing, Inc. v. Nat'l Labor Relations Bd., et al.*, 456 U.S. 645, 665 (1982); *see also Commerce*, 7 F.3d at 245; *NAGE, Local R5-136 v. FLRA*, 363 F.3d 468, 479 (D.C. Cir. 2004). Requiring a party to raise an issue before the Authority, even if the first opportunity to do so is on a request for reconsideration, provides the Authority notice of the objection and an opportunity to correct the alleged error. *See W&M Properties of Conn., Inc.*, 514 F.3d 1341, 1345 (D.C. Cir. 2008) (holding that under 29 U.S.C. § 160(e) a party must raise an objection to a Board-imposed

remedy to the Board on a request for reconsideration before raising it before the court of appeals).

Similarly here, the unions were required to raise their contention that the Authority departed from its precedent before the Authority in the first instance. The unions had the opportunity to do so in a motion for reconsideration. Because they did not, the matter is not properly before the Court.

B. The Authority Did Not Depart From its Precedent

Contrary to the unions' contentions, the Authority did not depart from its precedent by not conducting an independent negotiability analysis in the absence of argument and supporting authorities from the unions. As demonstrated below, the Authority's regulations clearly place the burden of producing arguments and supporting authorities on the parties, and the Authority has applied these regulations in a consistent manner. Further, this Court has recognized that it is the responsibility of the parties to create the record upon which the Authority can resolve a negotiability dispute.

1. The Authority's Regulations

In 1998, the Authority proposed regulations intended to expedite the processing of negotiability cases, and to clarify the issues to be resolved and the responsibilities of each party. 63 Fed. Reg. 48,130 (Sept. 9, 1998). As relevant

here, the proposed regulations specifically required unions to respond to the allegations of nonnegotiability and provide support for their assertions. Thus, the proposed regulations stated that a failure to address an assertion or argument made in an agency's SOP might result in the Authority's refusal to consider an argument or could be deemed a concession. 63 Fed. Reg. at 48,133.

After receiving comments from the public, the Authority issued its final regulations governing negotiability proceedings on December 2, 1998. 63 Fed. Reg. 66,405 (Dec. 2, 1998). As the Authority noted in its analysis of the final rules, unions are "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[.]" 63 Fed. Reg. at 66,411. The Authority also stated that, under the final rules, a failure to raise and support arguments "will, where appropriate, be deemed a waiver of such arguments," and a failure to respond to arguments "will, where appropriate, be deemed a concession to such arguments or assertions." *Id.*

The 1998 revisions remain in effect. Section 2424.25(a) specifically requires that the union's response state "why, despite the agency's arguments in its [SOP], the proposal or provision is within the duty to bargain[.]" 5 C.F.R. § 2424.25(a). More specifically, § 2424.25(a) provides that the union must state why the proposal "does not conflict with any law, or why it falls within an

exception to management rights[.]" *Id.* Furthermore, § 2424.25(c) provides that the union's response must include "[a]ny disagreement with the agency's . . . negotiability claims" and "must state the arguments and authorities supporting its opposition to any agency argument." 5 C.F.R. 2424.25(c).

The consequences of any party's failure to raise, support, or respond to arguments are found at 5 C.F.R. § 2424.32(c).[11] Specifically, a "[f]ailure to raise and support an argument will, where appropriate, be deemed a waiver of such argument." 5 C.F.R. 2424.32(c)(1). Further, the "[f]ailure to respond to an argument or assertion raised by the other party will, where appropriate, be deemed a concession to such argument or assertion." 5 C.F.R. § 2424.32(c)(2).

To the extent that, prior to the effective date of the revised procedures, the Authority may have conducted *sua sponte* negotiability analyses, independent from arguments and assertions of the parties, the Authority clarified and explained the burdens of the parties and the consequences of failing to meet those burdens when it promulgated, through public notice and comment, those revisions.[12]

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[11] The sanctions provided in § 2424.32 apply to both agencies and unions. The substantive requirements applicable to agency SOPs and replies are found at §§ 2424.24 and 2424.26, respectively.

[12] The Authority does not concede that it had an established practice of *sua sponte* negotiability analyses prior to 1998. *See NFFE, Local 1167 v. FLRA*, 681 F.2d

(footnote continued on next page)

NTEU, 60 F.L.R.A. 219, 222 (2004) (union lack of response to particular agency contention deemed concession); *IFPTE, Local 96*, 56 F.L.R.A. 1033, 1034 (2000) (agency contentions deemed conceded where union failed to file response).

As noted above (p. 28, n. 12), the union has cited only a single case, *NAGE*, in its attempt to establish that the Authority had an established practice of "undertaking its own analysis of the negotiability of proposals instead of relying only on the analysis presented by the parties." Br. 24. However, as the Authority noted (62 F.L.R.A. at 402 n. 10), that case was decided prior to the 1998 regulatory revisions. In sharp contrast, here, as well as in those cases cited in the previous paragraph, the Authority explicitly relied on the regulatory requirement that the parties raise, respond to, and support arguments on behalf of their positions.[14]

Further, and contrary to the unions' contentions (Br. 25-29), nothing in the Authority's application of §§ 2424.25 and 2424.32 of its regulations affects the value of Authority precedents. As noted above, these provisions only place the burden on the parties to raise, support, and respond to arguments regarding

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[14] Further, and in any event, the union overstates the significance of *NAGE*. In *NAGE*, the Authority only conducted its own analysis regarding the particular question of whether a proposal was intended to enforce an "applicable law" under § 7106(a)(2) of the Statute. *NAGE*, 55 F.L.R.A. at 1086. Nothing in *NAGE* can be reasonably read to imply that the Authority would conduct an independent and free-ranging negotiability analysis in the absence of arguments by the parties.

negotiability. Where arguments are properly raised and supported, the Authority will, as it has in the past, analyze those arguments and apply existing precedent.[15]

3. This Court's Decision in *NFFE, Local 1167 v. FLRA*

The Authority's determination in the instant case is consistent with the precedent of this Court. In *NFFE Local 1167*, 6 F.L.R.A. 574 (1981), the Authority, as here, did not consider an untimely-filed union response to the agency's SOP. On review by this Court, the union did not argue that its response should have been considered. Rather, the union argued "that the [Authority] had an obligation to undertake a substantive independent analysis of the content of the proposals to determine what effect, if any, they had on management rights." *NFFE, Local 1167 v. FLRA*, 681 F.2d at 891 (internal quotations omitted). This Court disagreed. *Id.*

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[15] Nor does the Authority decision on review impact the applicability of *Commander, Carlswell Air Force Base, Texas*, 31 F.L.R.A. 620, 624-625 (1988). *Carlswell AFB* held that where an agency raises a duty to bargain question during impasse resolution proceedings before the Federal Service Impasses Panel (Panel), the Panel may resolve that question where the proposal at issue is substantially identical to a proposal that has previously been addressed by the Authority. *Carlswell AFB* stands for the proposition that the Authority's precedents are intended to provide guidance not only to parties to the bargaining process, but also to third parties such as the Panel and interest arbitrators whose function it is to resolve bargaining impasses. 31 F.L.R.A. at 624. That decision does not support a view that the Authority should address negotiability arguments that a party fails to raise on its own.

The Court held that it is the parties who bear the burden of creating a record sufficient for the Authority to resolve the negotiability dispute. *NFFE*, 681 F.2d at 891. Further, the Court found the parties also have the burden of providing supporting authority for their positions. *Id.* In all, the Court concluded that "[t]he FLRA fully met its procedural obligations in the [ ] case," noting that in the absence of a timely filed response, the Authority could properly accept the agency's uncontroverted assertions. *Id.* There is no obligation for the Authority to supplement the parties' properly filed submissions. *NFFE*, 681 F.2d at 892.

Nothing in this case warrants a different conclusion. The Authority properly relied on the record and assertions properly before it and made its determinations accordingly.

CONCLUSION

The petition for review should be denied.

Respectfully submitted,

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November 2008

CERTIFICATE OF COMPLIANCE REQUIRED BY FRAP RULE 32(A)(7)

Pursuant to Rule 32(a)(7)(C) of the Federal Rules of Appellate Procedure ("FRAP"), I hereby certify that the attached brief is written in a proportionally-spaced 14-point font and contains 7,226 words.

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November 19, 2008

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

NATIONAL LABOR RELATIONS BOARD UNION and NATIONAL LABOR RELATIONS BOARD PROFESSIONAL ASSOCIATION, Petitioners	)	
v.	)	No. 08-1229
FEDERAL LABOR RELATIONS AUTHORITY, Respondent	)	

CERTIFICATE OF SERVICE

I certify that a copy of the Brief for the Federal Labor Relations Authority has been served this day, by mail, upon the following:

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November 19, 2008

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§ 7106. Management rights

(a) Subject to subsection (b) of this section, nothing in this chapter shall affect the authority of any management official of any agency—

(1) to determine the mission, budget, organization, number of employees, and internal security practices of the agency; and

(2) in accordance with applicable laws—

(A) to hire, assign, direct, layoff, and retain employees in the agency, or to suspend, remove, reduce in grade or pay, or take other disciplinary action against such employees;

(B) to assign work, to make determinations with respect to contracting out, and to determine the personnel by which agency operations shall be conducted;

(C) with respect to filling positions, to make selections for appointments from—

(i) among properly ranked and certified candidates for promotion; or

(ii) any other appropriate source; and

(D) to take whatever actions may be necessary to carry out the agency mission during emergencies.

(b) Nothing in this section shall preclude any agency and any labor organization from negotiating—

(1) at the election of the agency, on the numbers, types, and grades of employees or positions assigned to any organizational subdivision, work project, or tour of duty, or on the technology, methods, and means of performing work;

(2) procedures which management officials of the agency will observe in exercising any authority under this section; or

(3) appropriate arrangements for employees adversely affected by the exercise of any authority under this section by such management officials.

§ 7117. Duty to bargain in good faith; compelling need; duty to consult

(a)(1) Subject to paragraph (2) of this subsection, the duty to bargain in good faith shall, to the extent not inconsistent with any Federal law or any Government-wide rule or regulation, extend to matters which are the subject of any rule or regulation only if the rule or regulation is not a Government-wide rule or regulation.

* * *

(c)(1) Except in any case to which subsection (b) of this section applies, if an agency involved in collective bargaining with an exclusive representative alleges that the duty to bargain in good faith does not extend to any matter, the exclusive representative may appeal the allegation to the Authority in accordance with the provisions of this subsection.

(2) The exclusive representative may, on or before the 15th day after the date on which the agency first makes the allegation referred to in paragraph (1) of this subsection, institute an appeal under this subsection by—

(A) filing a petition with the Authority; and

(B) furnishing a copy of the petition to the head of the agency.

(3) On or before the 30th day after the date of the receipt by the head of the agency of the copy of the petition under paragraph (2)(B) of this subsection, the agency shall—

(A) file with the Authority a statement—

(i) withdrawing the allegation; or

(ii) setting forth in full its reasons supporting the allegation; and

(B) furnish a copy of such statement to the exclusive representative.

(4) On or before the 15th day after the date of the receipt by the exclusive representative of a copy of a statement under paragraph (3)(B) of this subsection, the exclusive representative shall file with the Authority its response to the statement.

(5) A hearing may be held, in the discretion of the Authority, before a determination is made under this subsection. If a hearing is held, it shall not include the General Counsel as a party.

(6) The Authority shall expedite proceedings under this subsection to the extent practicable and shall issue to the exclusive representative and to the agency a

written decision on the allegation and specific reasons therefore at the earliest practicable date.

§ 7123. Judicial review; enforcement

(a) Any person aggrieved by any final order of the Authority other than an order under—

(1) section 7122 of this title (involving an award by an arbitrator), unless the order involves an unfair labor practice under section 7118 of this title, or

(2) section 7112 of this title (involving an appropriate unit determination),

may, during the 60-day period beginning on the date on which the order was issued, institute an action for judicial review of the Authority's order in the United States court of appeals in the circuit in which the person resides or transacts business or in the United States Court of Appeals for the District of Columbia.

* * *

(c) Upon the filing of a petition under subsection (a) of this section for judicial review or under subsection (b) of this section for enforcement, the Authority shall file in the court the record in the proceedings, as provided in section 2112 of title 28. Upon the filing of the petition, the court shall cause notice thereof to be served to the parties involved, and thereupon shall have jurisdiction of the proceeding and of the question determined therein and may grant any temporary relief (including a temporary restraining order) it considers just and proper, and may make and enter a decree affirming and enforcing, modifying and enforcing as so modified, or setting aside in whole or in part the order of the Authority. The filing of a petition under subsection (a) or (b) of this section shall not operate as a stay of the Authority's order unless the court specifically orders the stay. Review of the Authority's order shall be on the record in accordance with section 706 of this title. No objection that has not been urged before the Authority, or its designee, shall be considered by the court, unless the failure or neglect to urge the objection is excused because of extraordinary circumstances. The findings of the Authority with respect to questions of fact, if supported by substantial evidence on the record considered as a whole, shall be conclusive. If any person applies to the court for leave to adduce additional evidence and shows to the satisfaction of the court that the additional evidence is material and that there were reasonable grounds for the failure to adduce the evidence in the hearing before the Authority, or its designee, the court may order the additional evidence to be taken before the Authority, or its designee, and to be made a part of the record. The Authority may modify its findings as to the facts, or make new findings by reason of additional evidence so taken and filed. The Authority shall file its modified or new findings, which, with

respect to questions of fact, if supported by substantial evidence on the record considered as a whole, shall be conclusive. The Authority shall file its recommendations, if any, for the modification or setting aside of its original order. Upon the filing of the record with the court, the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the judgment and decree shall be subject to review by the Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of title 28.

29 U.S.C. § 160(e). Petition to court for enforcement of order; proceedings; review of judgment

The Board shall have power to petition any court of appeals of the United States, or if all the courts of appeals to which application may be made are in vacation, any district court of the United States, within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceedings, as provided in section 2112 of title 28. Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the record. The Board may modify its findings as to the facts, or make new findings by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which findings with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. Upon the filing of the record with it the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate United States court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of title 28.

5 C.F.R. PART 2424--NEGOTIABILITY PROCEEDINGS

* * *

Subpart A--Applicability of This Part and Definitions

Sec. 2424.1 Applicability of this part.

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

* * *

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

* * *

Sec. 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 Sec. 2424.11(a), then the petition may be filed at any time.

Sec. 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 Sec. 2424.2(g).

Sec. 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.

Sec. 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 Sec. 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 Sec. 2424.2(g).

Sec. 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 Sec. 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

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 Sec. 2424.2(g).

* * *

Sec. 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 Sec. 2424.23, a direction or proceeding under Sec. 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.

5 C.F.R PART 2429--MISCELLANEOUS AND GENERAL REQUIREMENTS

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Subpart B--General Requirements

Sec. 2429.21 Computation of time for filing papers.

(a) In computing any period of time prescribed by or allowed by this subchapter, except in agreement bar situations described in Sec. 2422.12 (c), (d), (e), and (f) of this subchapter, and except as to the filing of exceptions to an arbitrator's award under Sec. 2425.1 of this subchapter, the day of the act, event, or default from or after which the designated period of time begins to run shall not be included. The last day of the period so computed is to be included unless it is a Saturday, Sunday, or a Federal legal holiday in which event the period shall run until the end of the next day which is neither a Saturday, Sunday, or a Federal legal holiday. Provided, however, in agreement bar situations described in Sec. 2422.12 (c), (d), (e), and (f), if the 60th day prior to the expiration date of an agreement falls on Saturday, Sunday, or a Federal legal holiday, a petition, to be timely, must be filed by the close of business on the last official workday preceding the 60th day. When the period of time prescribed or allowed is 7 days or less, intermediate Saturdays, Sundays, and Federal legal holidays shall be excluded from the computations.

(b) Except when filing an unfair labor practice charge pursuant to part 2423 of this subchapter, a representation petition pursuant to part 2422 of this subchapter, and a request for an extension of time pursuant to Sec. 2429.23(a) of this part, when this subchapter requires the filing of any paper with the Authority, the General Counsel, a Regional Director, or an Administrative Law Judge, the date of filing shall be determined by the date of mailing indicated by the postmark date or the date a facsimile is transmitted. If no postmark date is evident on the mailing, it shall be presumed to have been mailed 5 days prior to receipt. If the date of facsimile transmission is unclear, the date of transmission shall be the date the facsimile transmission is received. If the filing is by personal or commercial delivery, it shall be considered filed on the date it is received by the Authority or the officer or agent designated to receive such materials.

(c) All documents filed or required to be filed with the Authority shall be filed in accordance with Sec. 2429.24(a) of this subchapter.

* * *

Sec. 2429.23 Extension; waiver.

(a) Except as provided in paragraph (d) of this section, and notwithstanding Sec. 2429.21(b) of this subchapter, the Authority or General Counsel, or their designated representatives, as appropriate, may extend any time limit provided in this subchapter for good cause shown, and shall notify the parties of any such extension. Requests for extensions of time shall be in writing and received by the appropriate official not later than five (5) days before the established time limit for filing, shall state the position of the other parties on the request for extension, and shall be served on the other parties.

(b) Except as provided in paragraph (d) of this section, the Authority or General Counsel, or their designated representatives, as appropriate, may waive any expired time limit in this subchapter in xtraordinary circumstances. Request for a waiver of time limits shall state the position of the other parties and shall be served on the other parties.

(c) The time limits established in this subchapter may not be extended or waived in any manner other than that described in this subchapter.

(d) Time limits established in 5 U.S.C. 7105(f), 7117(c)(2) and 7122(b) may not be extended or waived under this section.

Sec. 2429.24 Place and method of filing; acknowledgement.

(a) All documents filed or required to be filed with the Authority pursuant to this subchapter shall be filed with the Director, Case Control Office, Federal Labor Relations Authority, Docket Room, suite 415, 607 14th Street, NW., Washington, DC 20424-0001 (telephone: FTS or Commercial (202) 482-6540) between 9 a.m. and 5 p.m., Monday through Friday (except Federal holidays). Documents hand-delivered for filing must be presented in the Docket Room not later than 5 p.m. to be accepted for filing on that day.

(b) A document submitted to the General Counsel pursuant to this subchapter shall be filed with the General Counsel at the address set forth in the appendix.

(c) A document submitted to a Regional Director pursuant to this subchapter shall be filed with the appropriate regional office, as set forth in the appendix.

(d) A document submitted to an Administrative Law Judge pursuant to this subchapter shall be filed with the appropriate Administrative Law Judge, as set forth in the appendix.

(e) All documents filed pursuant to this section shall be filed in person, by commercial delivery, by first-class mail, or by certified mail. Provided, however, that where facsimile equipment is available, motions; information pertaining to prehearing disclosure, conferences, orders, or hearing dates, times, and locations; information pertaining to subpoenas; and other similar matters may be filed by