

**66 FLRA No. 129**

AMERICAN FEDERATION  
OF GOVERNMENT EMPLOYEES  
LOCAL 3283  
(Union)

and

UNITED STATES  
DEPARTMENT OF DEFENSE  
DEFENSE FINANCE AND ACCOUNTING SERVICE  
CLEVELAND, OHIO  
(Agency)

0-AR-4816

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DECISION

June 7, 2012

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Before the Authority: Carol Waller Pope, Chairman, and  
Thomas M. Beck and Ernest DuBester, Members

**I. Statement of the Case**

This matter is before the Authority on exceptions to an award of Arbitrator James B. Dworkin filed by the Union under § 7122(a) of the Federal Service Labor-Management Relations Statute (the Statute) and part 2425 of the Authority's Regulations. The Agency filed an untimely opposition to the Union's exceptions.<sup>1</sup>

The Arbitrator found that the grievance was untimely and, therefore, not procedurally arbitrable. For the reasons that follow, we deny the Union's exceptions.

**II. Background and Arbitrator's Award**

In May 2010, the Agency informed the Union that it planned to modify employees' performance standards. *See* Award at 2, 7. About a month later, the Union requested to bargain over the performance standards. *Id.* at 8. On June 25, 2010, the Agency asserted to the Union that the matter was not substantively negotiable. *Id.* The Union responded that day with a threat to file an unfair labor practice charge. *See id.* Later that day, the Agency replied to the Union, asserting that it had addressed many of the Union's concerns about the modified standards. *Id.* The Agency added that it would be "happy to address any [additional]

questions or concerns" that the Union might have. *Id.* (quoting Ex. 3). The Union did not respond to the Agency. *See id.*

On January 6, 2011, the Agency notified employees that it would soon implement the modified standards. *See id.* at 8-9. In response, on January 21, 2011, the Union filed a grievance, which was unresolved and submitted to arbitration. *See id.* at 3.

The Arbitrator framed the relevant issue as whether the grievance was timely filed.<sup>2</sup> *See id.* at 2; *see also* Exceptions at 5. The Arbitrator found that, under the parties' agreement, a grievance must be filed within ten workdays of the date on which a dispute arises. Award at 7 (citing Article 39, Section 7 of the parties' agreement). The Arbitrator determined that the parties' dispute arose "as early as May 13, 2010," and rejected the Union's claim that the dispute arose on January 6, 2011, when the Agency notified employees that it would implement the modified standards. *Id.* at 8-9. In this regard, the Arbitrator explained that the Union was "well aware of [the dispute] many months" before January 6, 2011. *Id.* at 8-9. The Arbitrator concluded that the grievance was untimely and, therefore, not procedurally arbitrable. *Id.* at 10.

**III. Preliminary Issue**

The Agency was required to file its opposition with the Authority by April 9, 2012. Order to Show Cause (Order) at 1. The Agency's opposition is postmarked April 10, 2012. *Id.* at 2-3. Accordingly, the Authority issued an order to the Agency to show cause why its opposition should not be dismissed as untimely. *Id.* at 1-2 (citing 5 C.F.R. §§ 2425.3(b), 2429.21(b), 2429.22). In response, the Agency asserts that it submitted the opposition to its mailroom on April 9, 2012, and that the mailroom erroneously postmarked the opposition April 10, 2012. Agency Response to Order to Show Cause (Response) at 1. The Agency requests that the Authority "waive the expiration of the applicable time limit." *Id.* at 2. In this regard, the Agency asserts that Authority decisions holding that "internal mail delays" do not justify such waivers are distinguishable, because this case involves a "violation of [the mailroom's] operating procedures." *Id.* at 2-3. The Agency also asserts that the Authority has "found extraordinary circumstances when the postal service err[s]." *Id.* at 2 (citing *AFGE, Local 1770*, 64 FLRA 953 (2010) (*Local 1770*)).

<sup>1</sup> *See* Section III below.

<sup>2</sup> The Arbitrator addressed two additional issues. *See* Award at 2. As no exceptions were filed regarding those issues, *see* Exceptions at 5, we do not address them further.

Under 5 C.F.R. § 2429.23(b), a waiver of an expired time limit must be based upon a showing of “extraordinary circumstances” justifying the waiver. 5 C.F.R. § 2429.23(b). The Authority has found that an error on the part of a party’s mailroom does not establish an extraordinary circumstance justifying the waiver of an expired time limit. *See, e.g., NTEU*, 64 FLRA 833, 835 (2010). The Agency asserts that this case is distinguishable from prior Authority decisions because here, unlike in those decisions, the Agency’s mailroom “violat[ed] . . . its operating procedures” by not postmarking the opposition April 9, 2012. Response at 2-3. But the Agency provides no basis for finding that its mailroom’s alleged failure to follow Agency procedures is a relevant consideration. With regard to the Agency’s reliance on *Local 1770*, 64 FLRA at 954-55, that decision is inapposite because it involved a delivery failure by the U.S. Postal Service, not an agency’s internal mailroom. Based on the foregoing, we find that the Agency has not established that extraordinary circumstances warrant waiving the expired deadline. As a result, we do not consider the Agency’s untimely opposition to the Union’s exceptions.

#### **IV. Union’s Exceptions**

The Union alleges that the Arbitrator’s finding is based on three “nonfacts.” Exceptions at 5; *see also id.* at 4-5, 9. In this connection, the Union argues that: (1) the aggrieved party is “the employee(s), not the Union;” (2) the triggering event for filing the grievance was January 6, 2011; and (3) a grievance can “only be filed on the impact of an [a]gency’s policy, not the notice of intent to implement.” *Id.* at 5; *see also id.* at 6, 8.

#### **V. Analysis and Conclusions**

An arbitrator’s determination regarding the timeliness of a grievance constitutes a determination regarding the procedural arbitrability of that grievance. *E.g., AFGÉ, Council of Prison Locals, Council 33*, 66 FLRA 602, 604 (2012). The Authority generally will not find an arbitrator’s ruling on the procedural arbitrability of a grievance deficient on grounds that directly challenge the procedural-arbitrability ruling itself. *E.g., id.* In this regard, the Authority has found that nonfact exceptions challenging an arbitrator’s procedural-arbitrability determination provide no basis for finding an award deficient. *See id.* at 605. *See also, e.g., AFGÉ, Local 2172*, 57 FLRA 625, 627 (2001).

Here, the Union’s nonfact exceptions directly challenge the Arbitrator’s finding that the Union’s grievance was untimely. As such, they directly challenge the Arbitrator’s procedural-arbitrability determination. Consistent with the above-cited precedent, we deny the exceptions.

#### **VI. Decision**

The Union’s exceptions are denied.