

66 FLRA No. 170

UNITED STATES
DEPARTMENT OF THE NAVY
MARINE CORPS AIR STATION
CHERRY POINT, NORTH CAROLINA
(Agency)

and

INTERNATIONAL ASSOCIATION
OF MACHINISTS AND AEROSPACE WORKERS
LOCAL 2296
(Union)

0-AR-4833

ORDER DISMISSING EXCEPTIONS

August 29, 2012

Before the Authority: Carol Waller Pope, Chairman, and Ernest DuBester, Member

I. Statement of the Case

This matter is before the Authority on exceptions to an award of Arbitrator William H. Holley filed by the Agency under § 7122(a) of the Federal Service Labor-Management Relations Statute (the Statute) and part 2425 of the Authority’s Regulations. The Union filed an opposition to the Agency’s exceptions.

The Agency challenges the Arbitrator’s restoration of the grievants’ environmental differential pay. For the reasons that follow, we dismiss the Agency’s exceptions as untimely.

II. Background and Arbitrator’s Award

As relevant here, the Agency discontinued paying environmental differential pay to the grievants. Award at 2. The Union filed a grievance and, when the parties could not resolve their dispute, they submitted it to arbitration. *Id.* at 3-10. The Arbitrator sustained the grievance. As a remedy, the Arbitrator directed the Agency to pay the grievants environmental differential pay extending back to fifteen days before the Union filed the grievance through the date of the award’s implementation. *Id.*

III. Positions of the Parties

A. Agency’s Exceptions

As an initial matter, the Agency argues that its exceptions are not untimely. The Agency submits an affidavit in which its representative states that, on April 17, 2012,¹ she took two packages containing exceptions – one addressed to the Authority and the other addressed to the Union – to the departmental mailroom for mailing. Exceptions, Attach., Aff. at 1. She states that “[t]he mail clerk present at the time assisted [her] in proper placement of the certified mail certificates for each package and secured both for mailing.” *Id.* But, on April 25, the package addressed to the Authority “was returned to [the] departmental [mailroom] from the installation post office . . . due to improper packaging.” *Id.* The Agency asserts that it submitted the package to the Authority for mailing “[i]n good faith” before the due date, but, “[d]ue to uncontrollable circumstances, the package was not post[marked] or delivered.” *Id.* The Agency also submits copies of certified mail receipts with no postmark date stamped on them. Exceptions, Attach., Enclosure 1 at 3.

As to the merits, the Agency claims that the award is contrary to 5 U.S.C. § 5343 and the implementing regulations in 5 C.F.R. part 532. Exceptions at 3-5. The Agency also argues that the award fails to draw its essence from the parties’ agreement. *Id.* at 8.

B. Union’s Opposition

The Union argues that the award is not deficient.

IV. Order to Show Cause and Response

The Authority directed the Agency to show cause why its exceptions should not be dismissed as untimely. *See* Order to Show Cause (Order) at 2. The order stated that, as the Arbitrator served the award on the parties by mail on March 19, the exceptions had to be postmarked by the U.S. Postal Service, filed in person, or deposited with a commercial delivery service, no later than April 23 to be timely. Order at 1-2 (citing 5 C.F.R. §§ 2425.2(b) (thirty-day time limit for filing exceptions), 2429.21(b) (date of filing determined by postmark date), & 2429.24(e) (authorized methods for filing documents with the Authority)).² The Agency’s exceptions were not postmarked until April 26. *Id.* at 2.

¹ All dates refer to 2012.

² The Authority’s Regulations – including 5 C.F.R. §§ 2429.21, 2429.24, and 2429.27 – discussed below – were revised effective June 4, 2012, to allow for electronic filing and clarify existing procedural Regulations. *See* 77 Fed. Reg. 26,430, 26,435-37 (2012). As the Agency’s exceptions were filed before that date, we apply the prior Regulations.

In response to the order (response), the Agency asserts that the exceptions are timely because, under § 2429.27(d) of the Authority's Regulations, it "deposited" the exceptions on April 17 at the departmental mailroom which, it claims, constitutes depositing them in the U.S. mail.³ Response at 2; *see also id.* at 3 (citing 5 C.F.R. § 2429.27(d)). According to the Agency, any delay that occurred while the exceptions were being processed "within the [military-]mail system was due to the [installation] military post office[s] rejection" of the Agency's exceptions package. *Id.* at 2. The Agency submits a statement from the postal branch head explaining the procedure for mailing certified packages and stating that the package addressed to the Authority "was rejected because . . . it collapsed inward and because the . . . address contained six lines, one more than the military postal system allows for." *Id.*, Attach. 4. The Agency argues that the package was not postmarked by April 23 because it never reached the central military post office, where packages are postmarked, before being returned to the departmental mailroom for improper packaging. Response at 2, 3 n.2. In this regard, the Agency argues that a postmark is not the only acceptable "proof of service" because the Authority has accepted "alternate proofs of service," such as the meter mark from a union-controlled postal meter, to determine when an item was postmarked. *Id.* at 2-3 (citing *NTEU*, 47 FLRA 370, 372-73 (1993)).

In addition, the Agency makes clear that it is asking the Authority to find the exceptions timely, and not to waive or extend the time limit for filing exceptions. *Id.* at 3. And it contends that "[t]he facts and circumstances involved in the timely filing of [its] [e]xception[s] are one[s] of first impression." *Id.* at 5. But it also argues that the facts and circumstances of this case are analogous to other types of cases in which timeliness was an issue. *Id.* For example, the Agency contends, this situation "most closely resemble[s] instances when exceptions are filed by mail but then lost in the mail." *Id.* at 3 (citing *Dep't of Labor, Mine Safety & Health Admin.*, 32 FLRA 302, 304 (1988) (*MSHA*)). According to the Agency, the Authority should obtain information concerning the circumstances of the mailing from both parties and then use that information to determine the mailing date. *Id.* The Agency also argues that this case is like those in which the Authority has

excused "technical deficiencies" if "statutory requirements are met," such as service errors that result in no harm or prejudice to the opposing party. *Id.* at 4 (citing *Dep't of Def., Def. Mapping Agency, Hydrographic/Topographic Ctr., Wash.*, 42 FLRA 674, 678 (1991) (*Mapping Agency*); *U.S. Dep't of Health & Human Servs., Soc. Sec. Admin., Se. Serv. Ctr.*, 38 FLRA 1170, 1175 (1990) (*HHS*); *Dep't of Def., Def. Contract Audit Agency, Cent. Region*, 37 FLRA 1218, 1222 n.* (1990) (*Audit Agency*)). Based on the foregoing, the Agency asserts, the Authority should find the exceptions timely.

V. Analysis and Conclusions

The Agency claims that the Authority should consider its exceptions timely because, on April 17, it "deposited" them, within the meaning of § 2429.27(d), "into the U.S. Mail system, of which the military postal system is a part." Response at 2-3. But the Agency's argument is based on the erroneous premise that § 2429.27(d) is the applicable Regulation for determining the timeliness of documents *filed* with the Authority. Contrary to the Agency's claim, § 2429.27(d) applies only to the date documents are *served* on the parties, such as the date that an arbitrator serves an award on the parties, or the date an excepting party serves exceptions on an opposing party. 5 C.F.R. § 2429.27(d) ("The date of *service* . . . shall be the day when the matter served is deposited in the U.S. mail . . ." (emphasis added)); *e.g.*, *U.S. Dep't of Justice, Fed. Bureau of Prisons, Fed. Corr. Inst., Sheridan, Or.*, 66 FLRA 388, 390 (2011) (under § 2429.27(d), date of service of arbitration award is the date deposited in the U.S. mail).

Section 2429.21 sets forth the requirements for determining when a document is *filed* with the Authority. At the time the exceptions were filed, § 2429.21 provided, in pertinent part, that "when [the Authority's Regulations] require[] the *filing* of any paper with the Authority, . . . the date of filing shall be determined by the date of mailing *indicated by the postmark date* . . ." 5 C.F.R. § 2429.21(b) (emphases added); *e.g.*, *AFGE, Local 997*, 66 FLRA 499, 499 (2012) (*Local 997*) (filing date is date deposited in U.S. mail as determined by postmark); *see also U.S. Dep't of Labor, Mine Safety & Health Admin.*, 32 FLRA 302, 302 (1988). Thus, even assuming that depositing the exceptions at the departmental mailroom is the same as depositing them in the U.S. mail, the April 26 postmark date is what determines the date of filing with the Authority, and not the alleged April 17 date of deposit. 5 C.F.R. § 2429.21; *Local 997*, 66 FLRA at 499.

Applying § 2429.21 here, the exceptions are untimely because they were not filed – that is, postmarked – with the Authority until three days after the April 23 deadline. 5 C.F.R. § 2429.21. Specifically, as

³ At the time the exceptions were filed, 5 C.F.R. § 2429.27(d) provided, in relevant part:

The date of service or date served shall be the day when the matter served is deposited in the U.S. mail, delivered in person, deposited with a commercial delivery service that will provide a record showing the date the document was tendered to the delivery service or, in the case of facsimile transmissions, the date transmitted.

the Arbitrator served the award on the parties by mail on March 19, the exceptions had to be postmarked by the U.S. Postal Service, filed in person, or deposited with a commercial delivery service, no later than April 23 to be timely. 5 C.F.R. §§ 2425.2(b) (thirty-day time limit for filing exceptions), 2429.21(b) (date of filing determined by postmark date), & 2429.24(e) (authorized methods for filing documents with the Authority). The Agency concedes that its exceptions were not postmarked until April 26. Response at 2. Accordingly, the exceptions are untimely. 5 C.F.R. § 2429.21; *Local 997*, 66 FLRA at 499.

We also reject the Agency's reliance on *NTEU*, 47 FLRA at 372-73, regarding "alternate proofs of service." Response at 2-3 (citing *NTEU*, 47 FLRA at 372-73). In that case, the Authority found that the postmark placed on an envelope by "an approved postal meter" constituted a "postmark" sufficient to establish the date of filing within the meaning of § 2429.21(b). *NTEU*, 47 FLRA at 372-73. But the Agency's statements that it deposited the exceptions at its departmental mailroom on April 17, coupled with copies of certified mail receipts *without* any postmark date stamped on them, are not sufficient to establish the date of filing in this case. Compare *Haw. Fed. Employees Metal Trades Council*, 57 FLRA 450, 452 (2001) (postmarked, certified-mail receipt, together with affidavit attesting to mailing the document on date of certified-mail receipt, sufficient to establish the filing date), with *Local 997*, 66 FLRA at 499 (agency's account that statement of position was filed by certified mail on December 4, when regular-mail postmark reflected a December 10 mailing, insufficient to establish that statement of position timely). We thus reject the Agency's claim that the Authority should find the exceptions timely because the Authority has accepted alternate proofs of service in the past.

The Agency's reliance on *MSHA*, *Mapping Agency*, *Audit Agency*, and *HHS* is similarly misplaced. The Agency argues that this situation "most closely resemble[s] instances when exceptions are filed by mail but then lost in the mail." Response at 3 (citing *MSHA*, 32 FLRA at 304). But *MSHA* holds that, under § 2429.21(b), there are two ways to determine when a document is filed with the Authority: (1) by the postmark on the mailing; and (2) *in the absence of a postmark*, by the date of receipt minus five days. *MSHA*, 32 FLRA at 304. In that case, the Authority never received the original exceptions, so it estimated the date of filing as not earlier than the date of the exceptions and not later than the date the opposing party received the exceptions. *Id.* Here, however, the Authority received the Agency's exceptions, which included an untimely postmark date. As such, this case is distinguishable. The Agency also asserts that the Authority excuses "technical deficiencies" if "statutory requirements are met." Response at 4 (citing *Mapping Agency*, 42 FLRA at 678; *Audit Agency*,

37 FLRA at 1222 n.*; *HHS*, 38 FLRA at 1175). But *Audit Agency*, *Mapping Agency*, and *HHS* are inapposite as they pertain to technical deficiencies related to *servicing* documents on other parties, and not *filing* documents with the Authority.

In sum, as the exceptions were not postmarked and deposited in the U.S. mail, and thus filed, until three days after the April 23 deadline, they are untimely. The Authority has repeatedly and uniformly held that the time limit for filing exceptions to arbitration awards is jurisdictional. See, e.g., *U.S. Dep't of Justice, Fed. Bureau of Prisons, U.S. Penitentiary, Marion, Ill.*, 64 FLRA 437, 439 (2010). And under § 2429.23(d) of the Authority's Regulations, that time limit cannot be waived or extended by the Authority ("[t]ime limit[] established in 5 U.S.C. . . . [§] 7122(b) may not be extended or waived under this section"). Therefore, we dismiss the exceptions.

VI. Order

The Agency's exceptions are dismissed.