68 FLRA No. 36

UNITED STATES
DEPARTMENT OF VETERANS AFFAIRS
MEDICAL CENTER
RICHMOND, VIRGINIA
(Agency)

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 2145
(Union)

0-AR-4995

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DECISION

January 26, 2015

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Before the Authority: Carol Waller Pope, Chairman, and Ernest DuBester and Patrick Pizzella, Members
(Member Pizzella dissenting)

I. Statement of the Case

Arbitrator Stanley H. Sergent found that the grievant was a bargaining-unit employee whose grievance was within the scope of the parties' negotiated grievance procedure, and that the Agency violated the parties' collective-bargaining agreement by failing to compensate the grievant for being on call and performing work outside his regular duty hours. More than thirty days after the Arbitrator served his award on the parties, the Agency filed an exception to the award. The exception presents three questions.

The first question is whether the Authority should reevaluate its determination – first set forth in *U.S. Department of HUD* (*HUD*)[1] – that the thirty-day period for filing an exception to an arbitration award under § 7122(b) of the Federal Service Labor-Management Relations Statute (the Statute)[2] is a jurisdictional requirement that cannot be modified based on equitable considerations. Because subsequent U.S. Supreme Court decisions have undermined *HUD*'s holding, we overrule *HUD* and later Authority decisions to the extent that they found that the thirty-day filing period in § 7122(b) is jurisdictional. And in that regard, we find that the Authority may equitably toll the § 7122(b) filing period in appropriate circumstances.

The second question is whether the Authority should find that the federal-government shutdown in October 2013 (the shutdown) equitably tolled the running of the filing period for the Agency's exception. Based on the way in which the shutdown prevented the Agency from filing its exception and the Agency's diligence in pursuing its rights, we find that the shutdown equitably tolled the filing period from October 1 through October 16. And because, after applying equitable tolling for the duration of the shutdown, the Agency filed its exception within thirty days of the Arbitrator's service of the award, we also find that the exception is timely.

The third question is whether the award is based on the nonfact that the grievant was a member of the bargaining unit. Although the Agency argued that the grievant was not a bargaining-unit member during the period in dispute, the Arbitrator found otherwise based on a personnel-action notice that indicated that the grievant was in the bargaining unit. Even assuming that this bargaining-unit-status finding is a factual matter, the Agency's disagreement with the weight that the Arbitrator accorded the personnel-action notice does not establish that the award is based on a nonfact.

II. Background and Arbitrator's Award

The Union filed a grievance alleging that the Agency violated the parties' collective-bargaining agreement by failing to compensate the grievant for being on call and performing work outside his regular duty hours. The grievance went to arbitration. At arbitration, the Agency argued that the grievance should be denied because it involved a period of time when the grievant was not a bargaining-unit member. Although the Arbitrator stated that the Agency's argument was "untimely,"[3] he addressed its merits. In particular, the Arbitrator found that the personnel-action notice regarding the grievant's position for the period in dispute "show[ed] . . . that [the grievant] remained a member of the bargaining unit," and there was "no evidence" that he "was no longer considered to be a member of the bargaining unit" during that period.[4] Thus, the Arbitrator rejected the Agency's bargaining-unit-status defense and, as relevant here, sustained the grievance.

The Agency filed an exception to the Arbitrator's award, and the Union filed an opposition to the Agency's exception.

[1] 27 FLRA 852, 853-54 (1987).
[2] 5 U.S.C. § 7122(b).
[3] Award at 17.
[4] *Id.*

III. Analysis and Conclusions

A. The filing period for the Agency's exception was equitably tolled.

The Arbitrator served his award on the parties by mail on September 5, 2013. Under § 7122(b) of the Statute and pertinent sections of the Authority's Regulations, without equitable modification, the period for filing an exception to the award would have ended on October 15, 2013.[5] Although the Agency did not file its exception until October 18, 2013, the Agency contended that the exception was "timely filed . . . due to the . . . shutdown"[6] from October 1[7] through October 16, 2013.[8] The Union's opposition did not address the exception's timeliness. The Authority's Office of Case Intake and Publication ordered the Agency to show cause why its exception should not be dismissed as untimely, and to address whether the Authority should apply equitable tolling to the filing period. The Agency filed a response to the order. Although the Union had an opportunity to reply to the Agency's response, the Union did not do so.

Section 7122(b) of the Statute states that "[i]f no exception to an arbitrator's award is filed . . . during the [thirty]-day period beginning on the date the award is served on the party, the award shall be final and binding."[9] As mentioned previously, the Authority found in *HUD* that the thirty-day filing period is a jurisdictional restriction on the Authority's power to consider exceptions.[10] As jurisdictional limits are not subject to modification based on equitable considerations,[11] the Authority held in *HUD* that the filing period in § 7122(b) could not be equitably tolled.[12]

But since *HUD*, the U.S. Supreme Court has clarified the analysis for determining whether a statutory filing deadline is jurisdictional. Specifically, the Court has set forth a "readily administrable" bright-line rule: If Congress "*clearly states* that a threshold limitation . . . shall count as jurisdictional," then it will be treated as such.[13] Otherwise, a limitation should be treated as "non-jurisdictional in character."[14] For example, the Court has stated that, ordinarily, "time prescriptions . . . are not properly typed jurisdictional."[15] Further, a "condition should [not] be ranked as jurisdictional merely because it promotes important congressional objectives."[16]

In *HUD*, the Authority concluded that the filing period in § 7122(b) is jurisdictional because the Statute's structure and legislative history "disclose[d] that Congress'[s] intent regarding the arbitration process is to promote its primacy and finality by limited, expeditious review by the Authority."[17] But as the Supreme Court's precedent since *HUD* has emphasized, a limitation is not jurisdictional merely because it furthers important policy objectives.[18] And with regard to the Court's bright-line rule for jurisdictional limitations – which, we note, the dissent ignores entirely – the Statute's text does not contain a clear statement that § 7122(b)'s filing period is jurisdictional.[19] Rather, the thirty-day period in § 7122(b) resembles a "filing deadline[],"[20] which the Supreme Court has characterized as a "quintessential claim-processing rule[],"[21] rather than a jurisdictional requirement.[22]

In addition, § 7122(b)'s legislative history does not show that the exceptions-filing period is jurisdictional. Although the congressional conference report on the Statute indicates that § 7122(b)'s purpose is to "make clear that the awards of arbitrators, when they become final, are not subject to further review by any other authority or administrative body, including the Comptroller General,"[23] that statement does not clearly

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[5] 5 U.S.C. § 7122(b); 5 C.F.R. §§ 2425.2(b), 2429.21(a), 2429.22.

[6] Exception at 1 n.1.

[7] Office of Mgmt. & Budget, Exec. Office of the President, M-13-24, "Memorandum for the Heads of Executive Departments and Agencies" (Sept. 30, 2013), *available at* http://www.whitehouse.gov/sites/default/files/omb/memoranda/2013/m-13-24.pdf (retrieved Aug. 1, 2014) (directing agencies to "execute plans for an orderly shutdown due to the absence of appropriations"); Letter from President Barack Obama (Oct. 1, 2013), *available at* https://www.opm.gov/news/latest-news/announcements/messagefrompresident-october1.pdf (retrieved Aug. 1, 2014) (recognizing a government shutdown beginning October 1).

[8] Letter from President Barack Obama (Oct. 17, 2013), *available at* https://www.opm.gov/news/latest-news/announcements/messagefrompresident.pdf (retrieved Aug. 1, 2014) (recognizing the end of government shutdown on October 17).

[9] 5 U.S.C. § 7122(b).

[10] 27 FLRA at 853-54.

[11] *See id.* at 854 n.5 (citing *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 392-93 (1982)).

[12] *Id.* at 853-54.

[13] *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 515-16 (2006) (emphasis added).

[14] *Id.* at 516.

[15] *Id.* at 510 (quoting *Scarborough v. Principi*, 541 U.S. 401, 414 (2004)) (internal quotation marks omitted).

[16] *Reed Elsevier, Inc. v. Muchnick*, 559 U.S. 154, 169 n.9 (2010).

[17] 27 FLRA at 853.

[18] *Reed Elsevier, Inc.*, 559 U.S. at 169 n.9.

[19] *Arbaugh*, 546 U.S. at 515-16 (holding that a statutory limit should not be found jurisdictional without a clear statement of its jurisdictional character).

[20] *Henderson v. Shinseki*, 131 S. Ct. 1197, 1203 (2011).

[21] *Id.*; *see also Sebelius v. Auburn Regional Med. Ctr.*, 133 S. Ct. 817, 825 (2013).

[22] *Henderson*, 131 S. Ct. at 1206.

[23] H.R. Rep. No. 95-1717, at 158 (1978) (Conf. Rep.), *reprinted in* 1978 U.S.C.C.A.N. 2860, 2893.

indicate that § 7122(b) contains a jurisdictional limitation. And even if the conference report were ambiguous, Congress later amended § 7122(b) to clarify its intent that parties enjoy a full thirty days to file exceptions to arbitration awards.[24] Specifically, Congress changed the starting date for the exceptions-filing period from the date of the award itself to the date on which the arbitrator served the award on the parties, in order to prevent mailing delays from shortening the filing period.[25] That amendment shows that Congress did not intend for parties to lose part of the thirty-day filing period due to circumstances beyond their control. This legislative history supports treating § 7122(b)'s deadline as a non-jurisdictional limit that may be equitably tolled to ensure parties a full thirty days to file exceptions to arbitration awards.

For the foregoing reasons, we find that the thirty-day filing period in § 7122(b) is not a jurisdictional limit, and we overrule *HUD* and other Authority precedent to the contrary. Moreover, we find that § 7122(b)'s non-jurisdictional filing period is subject to equitable tolling. In that regard, the dissent's attempt to distinguish the Supreme Court precedent on which we rely is unpersuasive.[26] Specifically, the dissent fails to explain why we should not follow the Supreme Court's repeated instructions that statutory filing deadlines are presumptively claims-processing rules, rather than jurisdictional restrictions.[27]

In finding that *HUD* should be overruled, we have not overlooked that, under § 2429.23(d) of the Authority's Regulations, the "[t]ime limit[] established in . . . [§]7122(b) may not be extended or waived."[28] And we acknowledge that the Authority has sometimes conflated *extending* or *waiving* the time limit for filing exceptions with *equitably tolling* the filing period for exceptions.[29] But those are distinct concepts. In that regard, the Authority may extend an unexpired filing period for "good cause"[30] and may waive certain expired time limits in "extraordinary circumstances."[31] But in contrast to an extension, equitable tolling operates without the Authority's advance approval and (as discussed further below) requires a much higher showing than "good cause." And in contrast to a waiver, equitable tolling does not excuse an expired time limit but, rather, pauses the running of a filing period so that a time limit does not expire when it otherwise would. Because of these distinctions, § 2429.23(d)'s prohibition on extending or waiving the time limit for filing arbitration exceptions does not preclude applying equitable tolling to § 7122(b)'s filing period, if tolling is otherwise appropriate.

Here, the Agency contends that equitable tolling is warranted due to the shutdown. Based on case law from the U.S. Court of Appeals for the First Circuit, the Authority has previously examined five factors to determine whether to equitably toll a filing deadline.[32] But the Supreme Court's decisions regarding equitable tolling do not employ those factors. Rather, the Supreme Court recognizes two basic requirements for equitable tolling: (1) that some extraordinary circumstances stood in a party's way to "prevent[] timely filing"; and (2) that the party was "pursuing [its] rights diligently."[33] (Although the dissent implies that equitable tolling should apply only in "very specific situations," such as those that the dissent identifies,[34] the Supreme Court's equitable-tolling case law does not support the dissent's implication.) Further, both the Merit Systems Protection Board[35] and the Equal Employment Opportunity Commission[36] rely on those two requirements to evaluate requests for equitable tolling. To bring the Authority's equitable-tolling case law into accord with the guidance of the Supreme Court and the practices of other administrative agencies, we will rely on the two requirements above to evaluate the Agency's equitable-tolling request.

As to whether extraordinary circumstances stood in the way of the Agency's timely filing, we note that the Authority suspended normal operations from October 1 through October 16, 2013, due to the shutdown.[37] There is no dispute that, during the same period, the Agency's representative could not perform Agency work and, consequently, could not file an exception with the

[24] Civil Service Miscellaneous Amendments Act of 1983, Pub. L. No. 98-224, § 4, 98 Stat. 47, 48 (1984).
[25] *See Ass'n of Civilian Technicians*, 27 FLRA 96, 97 (1987) (discussing the amendment of § 7122(b)).
[26] *See* Dissent at 11-12 & n.34 (distinguishing the facts, but not the pertinent legal conclusions, in *Arbaugh*, *Sebelius*, and *Henderson* from the circumstances of this case).
[27] *See* notes 20-22 (citing *Sebelius*, 133 S. Ct. at 825; *Henderson*, 131 S. Ct. at 1203, 1206).
[28] 5 C.F.R. § 2429.23(d).
[29] *See, e.g.*, *HUD*, 27 FLRA at 853-54.
[30] 5 C.F.R. § 2429.23(a).
[31] *Id.* § 2429.23(b).
[32] *See EEOC, Wash., D.C.*, 53 FLRA 487, 498-99 (1997) (citing *Kelley v. NLRB*, 79 F.3d 1238, 1248 (1st Cir. 1996)).
[33] *Lawrence v. Florida*, 549 U.S. 327, 336 (2007) (quoting *Pace v. DiGuglielmo*, 544 U.S. 408, 418 (2005)) (internal quotation mark omitted).
[34] Dissent at 10.
[35] *Heimberger v. Dep't of Commerce*, 121 M.S.P.R. 10, ¶ 10 (2014) (citing *Pace*, 544 U.S. at 418).
[36] *Smith v. Donahoe*, EEOC Appeal No. 0120100913, 2011 EEOPUB LEXIS 1943, at *5 (stating that plaintiff invoking equitable tolling must show a "condition existed which prevented her from meeting the deadline . . . [and] that she acted diligently" (internal quotation mark omitted)).
[37] *See* notes 7-8 (documenting shutdown dates).

Authority.[38] Thus, we find that the shutdown was an extraordinary circumstance that prevented the Agency from filing its exception for sixteen days – specifically, from October 1 through October 16.[39]

Concerning the Agency's diligence in pursuing its rights, the Agency's exception was postmarked on October 18, just one day after the President signed into law the Continuing Appropriations Act, 2014,[40] which permitted normal federal government operations to resume. The Agency's prompt filing after the end of the shutdown shows diligence and supports applying equitable tolling here.[41] Moreover, as mentioned earlier, the Authority gave the Union an opportunity to reply to the Agency's request for equitable tolling, and the Union did not reply to challenge the request. Considering the Agency's diligent pursuit of its rights, we find that the filing period for the Agency's exception was equitably tolled from October 1 through October 16.

In finding that equitable tolling applies here, we reject the dissent's contrary approach: insisting that the exceptions-filing deadline is a jurisdictional limit that cannot be tolled, while simultaneously tolling it.[42] The dissent attempts to reconcile those two conflicting conclusions based on the purportedly "obvious and simple" theory that the federal government was "frozen in time" during the shutdown.[43] According to the dissent, because "time stopped" in October 2013, there is no need for any further analysis to find that the exception in this case is timely.[44] This theory has no basis in law.

As mentioned previously, the Arbitrator served his award on the parties by mail on September 5, 2013. After equitably tolling the exceptions-filing period for the duration of the shutdown, and consistent with the deadline-calculation methods set forth in § 2429.21 of the Authority's Regulations,[45] the Agency had until October 28, 2013, to timely file its exception. And because the Agency's exception was postmarked October 18, 2013, consistent with the foregoing analysis, the exception was timely filed.

B. The award is not based on nonfacts.

The Agency challenges two arbitral findings as nonfacts. In addressing the Agency's exception, we will assume that the challenged findings are factual determinations.[46]

The Agency's first nonfact argument challenges the Arbitrator's statement that the Agency's bargaining-unit-status argument was untimely raised. Where an arbitrator states that an argument is untimely but nevertheless addresses that argument on its merits, a challenge to the arbitrator's timeliness statements does not establish a deficiency in the award because such statements are mere dicta.[47] Here, the Arbitrator addressed the Agency's bargaining-unit-status argument on its merits, so the Agency's challenge to the Arbitrator's dicta regarding timeliness does not establish a deficiency in the award.[48]

The Agency's second nonfact argument challenges the Arbitrator's finding that the grievant was a bargaining-unit member during the period covered by the grievance. In examining nonfact exceptions, the Authority has long held that disagreement with an arbitrator's evaluation of evidence, including the determination of the weight to be accorded such evidence, provides no basis for finding an award deficient.[49] In this dispute, the Arbitrator relied on a personnel-action notice to determine that the grievant was a member of the bargaining unit during the relevant time period, and the Agency's challenge to the Arbitrator's evaluation and weighing of that evidence does not establish that the award is deficient.[50] (We note, moreover, that the dissent's statement of the law in this area is inaccurate. In stark contrast to the dissent's central argument, the Authority has held – in well-established precedent – that an employee may "remain[] a beneficiary of the protections" of a collective-bargaining agreement while detailed to a supervisory position.[51]) Thus, neither the Agency, nor the dissent, has established that the award is based on nonfacts.

IV. Decision

We deny the Agency's exception.

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[38] *See* Exception at 1 n.1 ("[D]ue to the federal government shutdown[,] the Agency could not file its [e]xception[] on the original due date.").
[39] *See* notes 7-8 (documenting shutdown dates).
[40] Pub. L. No. 113-46, 127 Stat. 558 (Oct. 17, 2013).
[41] *Cf. Dep't of the Air Force Headquarters, 832d Combat Support Grp., DPCE, Luke Air Force Base, Ariz.*, 24 FLRA 1021, 1026 (1986) (applying equitable tolling to filing period for unfair-labor-practice (ULP) charge where charging party "diligently sought" redress for alleged ULP).
[42] *See* Dissent at 10-12.
[43] *Id.* at 11.
[44] *Id.*
[45] 5 C.F.R. § 2429.21.
[46] *See, e.g., U.S. Dep't of HHS, FDA, San Diego, Cal.*, 67 FLRA 255, 255 (2014) ("assuming that the challenged finding is a factual determination").
[47] *AFGE, Local 1923*, 51 FLRA 576, 578 (1995) (*Local 1923*).
[48] *See id.*
[49] *See AFGE, Local 3295*, 51 FLRA 27, 32 (1995).
[50] *Id.*; *see also Local 1923*, 51 FLRA at 578-79.
[51] *U.S. DOD, Def. Commissary Agency, Fort Lee, Va.*, 56 FLRA 855, 859 (2000).

Member Pizzella, dissenting

Harry Simmons is a chaplain at the Veterans Affairs Medical Center (VAMC) in Richmond, Virginia.[1] As a chaplain, his primary duty is to "provid[e] spiritual care to patients *on request*"[2] and to be available to provide spiritual counsel to a patient, and the patient's family, when they face a "crisis situation[]"[3] such as an imminent "death."[4] As one would expect, events of that nature do not coincide necessarily with a typical work-day.

Chaplain Simmons was temporarily promoted, at his request, to the position of Acting Chief of Chaplain Services, a supervisory position.[5]

But, after receiving the promotion, Chaplain Simmons decided that he was not happy with the promotion. As a supervisor, Chaplain Simmons was "exempt" from the overtime provisions of the Fair Labor Standards Act[6] and was not entitled to be paid when he was "on-call" or for overtime when he was called back to work to provide spiritual care.[7] As a supervisor, he also was not part of the bargaining unit, AFGE, Local 2145 – a fact that he seemed to forget when he decided to complain about his compensation. Jennifer Marshall, the president of AFGE, Local 2145 (who had served in that capacity for *fifteen* years and had devoted *100% of her time* to Union duties rather than the job for which she was hired), obliged Chaplain Simmons, and filed this grievance on his behalf, even though he was serving as a supervisor during the entire period covered by his grievance.[8]

There is something wrong with this picture.

The Union never disputes the fact that Chaplain Simmons was acting as a supervisor during his temporary detail. According to the Federal Service Labor-Management Relations Statute (the Statute)[9] and long-standing court and Authority precedent, Chaplain Simmons was not covered by AFGE, Local 2145's collective-bargaining agreement and was not a member of the bargaining unit during the time he served as a supervisor.[10] Therefore, neither he nor the Union had standing to file this grievance and Arbitrator Stanley Sergent had no jurisdiction to resolve the case.

The Arbitrator determined, however, that the VAMC's argument concerning Chaplain Simmons' bargaining-unit status was "untimely"[11] because the VAMC did not address that question until it filed its closing brief. Arbitrator Sergent went on to determine that "there is *no evidence* to show that the [g]rievant *was no longer* . . . a member of the bargaining unit."[12]

The Arbitrator is wrong in several respects.

First, the Authority has long held that matters, addressed by a party in a closing brief, are properly raised.[13]

Second, it was not the Agency's responsibility *to prove* that Chaplain Simmons was *not a member* of the bargaining unit. After the Agency challenged the Union's standing, i.e., jurisdiction, to file the grievance in the first place, the Union had *to prove* that Chaplain Simmons was a member of the bargaining unit[14] because the Statute categorically excludes supervisors from a recognized bargaining unit[15] and makes no distinction between supervisors who are permanent and those who are temporary.[16]

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[1] Award at 6.
[2] *Id*. (emphasis added).
[3] *Id*. at 11.
[4] *Id*.
[5] Exceptions, Attach., Agency's Closing Br. at 2.
[6] *Id*. at 4.
[7] *Id*.
[8] *Id*. at 7.
[9] 5 U.S.C. §§ 7101-7135.
[10] *Id.* § 7112(b)(1); *see AFGE, Local 1012 v. FLRA*, 841 F.2d 1165, 1167-68 (D.C. Cir. 1988) (*AFGE, Local 1012*) ("[a]cting" supervisors during "rotating monthly" details are not part of bargaining unit); *Veterans Admin. & Veterans Admin. Med. Ctr., Lyons, N.J.*, (*VAMC Lyons*) 32 FLRA 433, 435 (1988) (acting supervisors are not covered by parties' collective-bargaining agreement (CBA) when the "nature of the duties performed" are supervisory in nature).
[11] Award at 17.
[12] *Id.* (emphases added).
[13] *See SSA, Office Of Disability Adjudication & Review, Region VI, New Orleans, La.*, 67 FLRA 597, 600 (2014) (Member Pizzella dissenting on other grounds) (matters raised in closing briefs are properly before the arbitrator) *U.S. DOD, Def. Commissary Agency, Fort Lee, Va.*, 56 FLRA 855, 858 (2000) (arguments reflected in parties' closing briefs are properly raised to arbitrator).
[14] *See Hayes v. Wal-Mart Stores, Inc.*, 725 F.3d 349, 354 (3d Cir. 2013) (moving party bears burden to prove standing); *Norkunas v. Seahorse NB, LLC*, 444 Fed. App'x 412, 415 (11th Cir. 2011) (burden of proof to prove standing is on the moving party); *AFGE, Local 3310*, 65 FLRA 437, 441 (2011) (though arbitrators typically may prescribe whatever burden of proof he or she considers appropriate, arbitrator must determine standing as prescribed by statute); *Feder v. Elec. Data Sys. Corp.*, 248 Fed. App'x 579, 580 (5th Cir. 2007) (party seeking relief must prove that they have standing as a member of class entitled to relief); *U.S. Dep't of VA Med. Ctr., Ann Arbor, Mich.*, 56 FLRA 216, 221 (2000) (union has burden of proof that bargaining-unit employees have standing to be included in grievance); *AFGE, Local 1012*, 841 F.2d at 1168.
[15] 5 U.S.C. § 7112(b)(1).
[16] *Id*.

To the extent the Arbitrator determined that Simmons "remained a member of the bargaining unit,"[17] because of certain, unspecified "personnel[-]action form[s],"[18] Authority precedent clearly establishes that the bargaining-unit status of an employee is determined by the duties that are actually performed by an employee and not by personnel forms or position descriptions.[19] Here, there is no dispute that Chaplain Simmons was temporarily promoted to a supervisory position and performed supervisory duties during his temporary promotion.[20]

Unlike the majority, therefore, I would conclude that neither Chaplain Simmons, nor the Union, had standing to file this grievance.

I also do not agree with my colleagues that we should jettison twenty-seven years of precedent, and apply equitable tolling to our statutory-filing requirements (in this case, the requirement that a party file exceptions within thirty days from the date that it is served with an arbitrator's award)[21] whenever the Authority concludes that a waiver is "appropriate."[22]

Equitable tolling is generally applied by courts to very specific situations. For example, a court may apply equitable tolling when a plaintiff cannot act diligently because he or she does not have sufficient knowledge or facts to know that he or she should act; when a plaintiff is not "competen[t]" or too "infirm[]" to act; or when one party (such as a federal agency) has "superior access" to resources or information.[23] Under those circumstances, equitable tolling may be appropriate.

But, to paraphrase the famed novelist, Ernest Hemingway: never send to know for whom the bell tolls; in this case, it does not toll for Chaplain Simmons.[24]

The question in this case is not whether the federal shutdown (October 1 through October 16, 2013)[25] "equitably toll[ed]"[26] the Authority's thirty-day filing requirement?[27] That is not the right question. The pertinent question, under these unique circumstances, is *what effect did the 2013 shutdown have* on all federal agencies and anyone (such as unions, employees, and taxpayers) who do business with the federal government?

To answer that question, we need look no further than the notice that the Authority posted on its public webpage on the first day of the 2013 federal government shutdown:

> *In determining whether or not the time periods for filings and the submission of information and evidence with the FLRA are met, the FLRA* ***will take into account the period of time that the FLRA is closed*** *due to a lapse in appropriations.*[28]

Other agencies such as the National Labor Relations Board (NLRB),[29] the Merit Systems Protection Board (MSPB),[30] and the Office of Special Counsel (OSC)[31] utilized similar notices.

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[17] Award at 17.
[18] *Id.*
[19] See *U.S. Dep't of Interior, Bureau of Reclamation, Yuma Projects Office., Yuma, Ariz.*, 37 FLRA 239, 245 (1990) (bargaining-unit status determined by "actual duties"); *VAMC Lyons*, 32 FLRA at 435 (1988) (whether a temporary promotion is "supervisory" is determined by the "nature of the duties actually performed"); *Veterans Admin., Med. Ctr., Prescott, Ariz.*, 29 FLRA 1313, 1315 (1987) (bargaining-unit status determination is "not based on evidence such as a written position description" but by "what duties actually are performed"); *Veterans Admin., Med. Ctr., Tampa, Fla.*, 19 FLRA 1177, 1177 (1985) (whether employee is performing duties of higher-graded position determined by duties actually performed, not by personnel forms).
[20] My colleagues' reliance on *U.S. Dep't of Defense Commissary Agency, Ft. Lee, Virginia.*, 56 FLRA 855 (2000) is misplaced. In that case, the grievant argued that his "detail," that ran from April through August, actually qualified as a "temporary promotion" under the parties' CBA. *Id.* at 855. The union argued that the grievant *should have been paid at the supervisory rate* for the entire period of time he was detailed because the parties' CBA required that detailed employees "will be temporarily promoted . . . if the detail exceeds [thirty] days." *Id.* at 855 n.2. But, here, the Union filed a grievance covering the period Simmons actually *was temporarily promoted into a supervisory position* but argues that *he should have been paid as a bargaining-unit employee* during the time he served as an acting supervisor.
[21] 5 U.S.C. § 7122(b).
[22] Majority at 5.
[23] *Dixon v. Shinseki*, 741 F.3d 1367, 1371, 1373 (Fed. Cir. 2014); *see also* Black's Law Dictionary 618 (9th ed. 2009) (definition of "equitable tolling").
[24] *See For Whom the Bell Tolls*, Dictionary.com, http://dictionary.reference.com/browse/for whom the bell tolls (last visited Jan. 6, 2015).
[25] Majority at 3.
[26] *Id.* at 5.
[27] *Id.*
[28] flra.gov/sitealert (emphasis added).
[29] *NLRB Reopens on October 17, 2013 – Effect of Government Shutdown on Filing Deadlines*, nlrb.gov/news-outreach/news-story/nlrb-reopens-october-17-2013-effect-government-shutdown-filing-deadlines ("On October 1, 2013, the [NLRB] closed . . . . The Agency's offices were closed for a total of 16 days . . . . Thus, if a document was due on October 8, 2013 it would now be due on October 24, 2013 (October 8 plus 16 days.)").
[30] *FLRA Message Regarding the Shutdown of Operations Due to a Lapse in Appropriations*, flra.gov/sitealert ("In determining whether or not the time periods for filings . . . are met, the

Therefore, the answer is obvious and simple – during the 2013 federal government shutdown, the entire federal government was frozen in time, and time stopped, for those fifteen days. This is not a difficult concept, and it certainly does not support the majority's determination suddenly to spring an entirely new standard on the federal labor-management relations community that will only serve to undermine the filing requirements set forth by Congress in our Statute.

I do not agree with the majority that *Arbaugh v. Y & H Corporation*[32] stands for, or supports, the proposition that the Authority's precedent in *U.S. Department of HUD* (*HUD*)[33] should be "overrule[d]."[34]

In *HUD*, the Authority correctly determined that "jurisdictional limits [established by the Statute] *are not subject to* modification based on *equitable considerations*."[35] While the Court in *Arbaugh* noted (in passing dicta) that some time limits are "mandatory and jurisdictional" and others "are not,"[36] *Arbaugh* had nothing whatsoever to do with *time-filing requirements* such as the Statute's requirement to file exceptions to an arbitrator's award within thirty days. Rather, the Court addressed only whether an "employee-numerosity requirement" was "jurisdictional," just as an "amount-in-controversy threshold" was considered to be "jurisdictional" in diversity-of-citizenship cases.[37] The Court determined that the "employee-numerosity" requirement was not jurisdictional and remanded the case for the lower court to determine whether delivery drivers, owner-managers, and shareholder wives should be counted as "employees," in order to satisfy the fifteen-employee threshold required to bring a Title VII claim against the employer.[38]

Ironically, *Arbaugh* supports the Agency's argument that the question concerning Chaplain Simmons' bargaining-unit status is a question of subject-matter jurisdiction and that it "may be raised . . . *at any stage in the litigation*, even after trial and the entry of judgment."[39]

Thank you.

FLRA will take into account the period of time that the FLRA is closed due to a lapse in appropriations.")

[31] *OSC/MSPB's Government Shutdown Plans*, http://mspbwatch.org/2013/09/30/oscmspbs-government-shutdown-plans/ ("[A]ll filing and processing deadlines will be extended by the number of days the government shuts down.")

[32] 546 U.S. 500 (2006).

[33] 27 FLRA 852 (1987).

[34] Majority at 4. My colleagues' reliance on *Henderson v. Shinseki*, 131 S. Ct. 1197 (2011) and *Sebelius v. Auburn Regional Medical Center*, 133 S. Ct. 817 (2013) is misplaced. In *Henderson*, the Court was unwilling to apply a strict filing requirement for veterans seeking disability benefits. Specifically, the Court noted that the onset of disability is not always clear and apparent, proceedings before the VA are intended to be "informal and nonadversarial," and the VA is responsible for assisting veterans in developing their claims and "must give the veteran the benefit of any doubt." *Henderson*, 131 S. Ct. at 1206. Similarly, in *Sebelius*, the Court found that a 180-day limitation for appeals concerning Medicare overpayments was not "jurisdictional" and found that the Secretary acted within her authority when she extended the limitation to three years. *Sebelius*, 133 S. Ct. at 827-28.

[35] *Id*. at 3 (citing *HUD*, 27 FLRA at 854 n.5) (emphases added).

[36] *Arbaugh*, 546 U.S. at 510.

[37] *Id*. at 514-15.

[38] *Id*. at 515-16.

[39] *Id.* at 506 (emphasis added) (citations omitted).