70 FLRA No. 80

UNITED STATES
DEPARTMENT OF DEFENSE
DEFENSE CONTRACT MANAGEMENT AGENCY
(Agency)

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 2433
(Union)

0-AR-5285

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ORDER DISMISSING EXCEPTIONS

January 23, 2018

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Before the Authority: Colleen Duffy Kiko, Chairman, and Ernest DuBester and James T. Abbott, Members

I. Statement of the Case

In an award dated April 3, 2017, Arbitrator Ronald F. Talarico found that the Agency violated Article 20 of the parties' collective-bargaining agreement (agreement) when it denied two grievants' sick-leave requests.

The main question before us is whether the Agency's exceptions to the Arbitrator's award are timely. Because the Agency's exceptions were filed five days after the filing deadline, and the Authority's Regulations provide that the thirty-day clock begins to run for filing exceptions to an arbitration award when the award is served, we dismiss the Agency' exceptions.

II. Background and Arbitrator's Award

The Union grieved the Agency's denial of recurring sick leave for two grievants, and the Arbitrator found that the Agency violated Article 20 of the parties' agreement when it denied both grievants' sick-leave requests.

The Arbitrator served his award both by e-mail and regular mail on April 3, 2017. The Agency filed its exceptions on May 8, 2017 and the Union opposed. The Authority's Office of Case Intake and Publication (CIP) issued an order directing the Agency to show cause why its exceptions should not be dismissed as untimely. The Agency filed a response to the CIP order.

III. Analysis and Conclusion

As stated above, the Arbitrator served his award by both e-mail and regular mail on April 3, 2017. When an award is served by e-mail, the date of service is the date the e-mail is transmitted to the parties.[1] Further, when an award is served by both e-mail and regular mail on the same day, the excepting party does not receive an additional five days for filing its exceptions, like it would if the award had been served solely by regular mail.[2] Applying these principles here, to be timely, any exceptions had to be postmarked by the U.S. Postal Service, filed in person with the Authority, deposited with a commercial delivery service, or filed electronically through use of the Federal Labor Relations Authority's eFiling system no later than May 3, 2017.[3]

The Agency filed its exceptions on May 8, 2017, five days after the filing deadline. The Agency argues that its exceptions were timely because it was only "actually served" the award by regular mail on April 3, 2017.[4] In this regard, the Agency submitted declarations from two Agency representatives who declared that they never received the e-mailed award,[5] and from an Agency system administrator who declared that a thorough search of the Agency's e-mail database demonstrated that the Agency never received the Arbitrator's e-mail containing the award.[6]

The Authority's Regulations provide that the thirty-day clock for the filing of arbitration exceptions begins to run upon the *service* of the award.[7] In this regard, § 7122(b) of the Federal Service Labor-Management Relations Statute (the Statute) states that exceptions to an arbitrator's award must be filed "during the [thirty]-day period beginning on the date the award is served on the party."[8] And § 2429.23(d) of the Authority's Regulations provides

[1] 5 C.F.R. § 2425.2(c)(3).
[2] *Id.* § 2425.2(c)(5)
[3] *Id.* §§ 2425.2(b)-(c), 2429.21(a), 2429.24(a).
[4] Agency's Resp. to Show-Cause Order at 3.
[5] *Id.* at 1; *Id.*, Attachs. 1, 1.1, 1.2, 2, 3, and 3.1; *see generally AFGE, Local 2145*, 67 FLRA 141, 142 (2013) (parties may use affidavits and additional evidence to respond to show-cause orders).
[6] Agency's Resp. to Show-Cause Order, Attachs. 1 and 2.
[7] 5 C.F.R. § 2425.2(b).
[8] 5 U.S.C. § 7122(b).

that the "[t]ime limit[] established in . . . [§] 7122(b) may not be extended or waived."[9]

In determining the timeliness of exceptions, the Authority, in *AFGE, Local 2145*, found that the union's exceptions, filed some months after the award was first served by the arbitrator by mail, were timely.[10] In that case, the union demonstrated that the original award was only served on the agency, and had never been served on the union. The agency did not forward a copy of the award to the union until three months later.[11] Since the award had never been served on the union by the arbitrator, the Authority found that the union's exceptions were timely filed relative to the date of service when the agency forwarded a copy of the award, three months later.[12]

As stated above, the Agency argues here that the award should be considered served by mail on April 3, 2017, because of how it was "actually served" on the Agency.[13] We do not agree. Unlike the excepting party in *AFGE, Local 2145*, the Agency does not argue that the award was never served, but rather, argues that the mail method of service should control, over the e-mail method, because it did not receive the award by e-mail.[14] But the Authority's Regulation is quite explicit, stating, "if the award is served by e-mail, fax, or personal delivery on one day, and by mail or commercial delivery on the same day, the excepting party will not receive an additional five days for filing the exceptions."[15] When the Authority published the regulation, the Authority specifically acknowledged that one commentator requested that it include a "successfully-served" requirement in the new rule, but the Authority expressly rejected that request.[16] Instead, the Authority encouraged the parties to settle any concerns regarding how arbitration awards will be served, and to agree to a method of service.[17] This view is consistent with Congress' intent to promote the arbitration process and its finality by limited, expeditious review by the Authority.[18]

In deciding this case, we note that our Statute clearly establishes filing deadlines,[19] and, as noted previously, our Regulations provide that some of those deadlines – including the deadline for filing arbitration exceptions – "may not be extended or waived."[20] Enforcing these deadlines ensures that our Statute is applied in a manner that is consistent with the timely and efficient resolution of cases brought before the Authority.[21] Thus, to avoid any uncertainty, we caution that statutory provisions concerning filing deadlines– e.g., the thirty-day deadline for filing arbitration exceptions provided in § 7122(b) of the Statute – will be strictly enforced.[22]

Finally, we note that, while the Agency argues that it did not receive the award by e-mail, the Arbitrator's award included a cover letter that stated the award was served by e-mail and mail on April 3, 2017.[23] By receipt of that cover letter, the Agency was put on notice that the award had been served by e-mail on April 3, 2017, and that it must file its exceptions no later than May 3, 2017 in order to be considered timely.[24]

In summary, because the Agency filed its exceptions five days after the filing deadline, we dismiss the Agency's exceptions as untimely.

IV. Decision

We dismiss the Agency's exceptions.

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[9] 5 C.F.R. § 2429.23(d).
[10] 67 FLRA at 142.
[11] *Id.*
[12] *Id.*; *see also U.S. Dep't of the Army, U.S. Army Corps of Eng'rs, Nw. Div.*, 69 FLRA 226, 227 (2016) (determining exceptions were timely filed relative to the second and successfully served copy of the award).
[13] Agency's Resp. to Show-Cause Order at 3.
[14] 67 FLRA at 142.
[15] 5 C.F.R. § 2425.2(c)(5); *see also U.S. DHS, CBP*, 68 FLRA 1015, 1024-25 (2015) (Dissenting Opinion of Member Pizzella).
[16] *See* Review of Arbitration Awards, 75 Fed. Reg. 42283-01, 42284 (April 29, 2010) (to be codified at 5 C.F.R. pts. 2425 and 2429) (rejecting commenter suggestion that the date of service be "the date of successful and complete transmission").
[17] *Id.*
[18] *U.S. Dep't of HUD*, 27 FLRA 852, 853-54 (1987) (citing 5 U.S.C. § 7122(b)).
[19] 5 U.S.C. § 7122(b).
[20] 5 C.F.R. § 2429.23(d).
[21] 5 U.S.C. § 7101(b).
[22] Member Abbott would distinguish this case from those which the Authority's immediate past majority was criticized for setting "technical trapfalls" for excepting parties. *See IFPTE, Local 4*, 70 FLRA 20, 21 n.9 (2016) (citing *U.S. Dep't of Treasury, IRS*, 68 FLRA 1027, 1037 (2015) (*IRS*)) (Member Pizzella noted that the majority's dismissal of document because the filling party failed to use the magic words "we request leave to file" as a technical trapfall). Missing a statutory deadline is quite different from failing to check a box on a multi-page form or failing to use a precise term or phrase. *IRS*, 68 FLRA at 1037 (Dissenting Opinion of Member Pizzella) (finding the Authority should not go out of its way to catch parties in technical trapfalls and summarily dismiss otherwise meritorious arguments).
[23] Award Cover Letter.
[24] 5 C.F.R. §§ 2425.2(b)-(c), 2429.21(a), 2429.24(a).