

70 FLRA No. 89

UNITED STATES
DEPARTMENT OF THE NAVY
PORTSMOUTH NAVAL SHIPYARD
(Agency)

and

INTERNATIONAL FEDERATION
OF PROFESSIONAL AND
TECHNICAL ENGINEERS
LOCAL 4
(Union)

0-AR-5308

ORDER DISMISSING EXCEPTIONS

March 20, 2018

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

Decision by Member Abbott for the Authority¹

I. Statement of the Case

The Agency filed exceptions to an award of Arbitrator Marilyn H. Zuckerman fifty-two minutes after midnight on the 31st day after service of the award. The question before us is whether the Agency's exceptions should be dismissed as untimely. Because the Agency filed its exceptions after its filing deadline, and the Authority's Regulations provide that a time limit for filing exceptions to an arbitration award may not be extended or waived, we dismiss the Agency's exceptions.

¹ Consistent with the practice of other adjudicatory panels, the Authority is reprising its former practice of occasionally issuing decisions authored by an individual Member on behalf of the Authority. See *AFGE, Local 1997*, 53 FLRA 342, 342 n.1 (1997). These decisions constitute the decision of the Authority. If no individual author is named, the decision is per curiam.

II. Background and Arbitrator's Award

In October 2016, the Union grieved the Agency's alleged failure to comply with a Federal Service Impasses Panel (FSIP) order concerning the remodeling of one of its facilities. The Arbitrator sustained the grievance and ordered the Agency to comply with the FSIP order.

The Arbitrator served her award on the parties by email on July 24, 2017. The Agency filed its *incomplete* exceptions using the Federal Labor Relations Authority's (FLRA's) eFiling system at 12:01 a.m. E.T. on August 24, 2017.² Then, the Agency re-filed its *complete* exceptions electronically at 12:52 a.m. E.T. on August 24, 2017.³ 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 responded to CIP's show-cause order.

In its response to CIP's show-cause order, the Agency asserts that it experienced an Agency-wide network outage and eFiling issues on August 23, 2017. As a result, the Agency claims that it was only able to file its incomplete exceptions, which consisted of its exceptions brief and one attachment, one minute after the midnight filing deadline, on August 24, 2017.⁴ And because the Agency was unable to upload additional attachments once the incomplete exceptions were filed, the Agency re-filed its complete exceptions, which consisted of its exceptions brief and twelve attachments, fifty-two minutes after the midnight filing deadline, on August 24, 2017.

The Agency concedes that its exceptions were untimely filed. However, the Agency contends that the circumstances warrant equitable tolling of the filing deadline because the Agency allegedly experienced an Agency-wide network outage and eFiling issues throughout the day on August 23, 2017.⁵ The Agency's response to the show-cause order also listed attachments meant to demonstrate its network outage and eFiling issues,⁶ but there were no attachments actually included with the response.

² Agency's Resp. at 3 (Agency's incomplete exceptions included its exceptions brief and one attachment) (FLRA's eFiling Docket Case No. 679524806).

³ *Id.* at 4 (Agency's complete exceptions included its exceptions brief and twelve attachments) (FLRA's eFiling Docket Case No. 354812713).

⁴ *Id.*

⁵ *Id.* at 8.

⁶ *Id.* at Table of Contents.

III. Analysis and Conclusion

The Arbitrator served her award by email on July 24, 2017.⁷ When an award is served by email, the date of service is the date the email is transmitted to the parties.⁸ Thus, in order to be timely filed, exceptions electronically submitted through the FLRA's eFiling system must have been filed no later than August 23, 2017.⁹ Documents filed electronically through the use of the FLRA's eFiling system are considered filed on a particular day if they are filed "no later than midnight E.T. on that day."¹⁰ The Agency filed its complete exceptions electronically at 12:52 a.m. E.T. on August 24, 2017, fifty-two minutes after the midnight filing deadline.¹¹

Section 7122(b) of the Federal Service Labor-Management Relations Statute (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,"¹² and § 2429.23(d) of the Authority's Regulations provides that the "[t]ime limit[] established in . . . [§] 7122(b) may not be extended or waived."¹³

The Agency argues, relying on *U.S. Department of VA, Medical Center, Richmond, Virginia (VA)*,¹⁴ that the Authority should apply equitable tolling and consider its untimely exceptions because (1) extraordinary circumstances prevented the Agency representative from filing its complete exceptions on time, and (2) the record demonstrates the Agency diligently pursued its rights.¹⁵ The Authority in *VA* found that a sixteen-day government shutdown was an extraordinary circumstance that prevented the agency from timely filing its exceptions, and applied equitable tolling for the duration of the shutdown.¹⁶

We find the Agency's reliance on *VA* is misplaced, and the facts in this case are more similar to

those presented in *AFGE, Local 3961 (AFGE)*.¹⁷ In *AFGE*, the union filed its exceptions six minutes after the filing deadline due to password errors in the FLRA's eFiling system.¹⁸ The union conceded that its exceptions were untimely, but requested a waiver of the expired filing deadline. The Authority, citing § 7122(b) of the Statute and § 2429.23(d) of the Authority's Regulations, found that the time limit for filing exceptions to an arbitration award may not be waived.¹⁹ In addition, the Authority considered whether equitable tolling was applicable, but found that the union's six-minute delay due to a computer error was not an "extraordinary circumstance" that would satisfy the first requirement of the equitable-tolling standard.²⁰ Accordingly, the Authority dismissed the union's exceptions as untimely.²¹

Here, the Agency requests equitable tolling of the filing deadline because the Agency allegedly experienced an Agency-wide network outage and issues with the FLRA's eFiling system, but maintains that it had pursued its rights diligently.²² On this point, the Agency failed to include any attachments to demonstrate the alleged network outage and eFiling issues,²³ and the Agency concedes that it was "unable to determine [whether the login failures were] due to the network outage, the eFiling system issues, or a combination of both."²⁴ Because the attachments were not included with the Agency's response to the show-cause order, we reject this argument as a bare assertion.

We note that Authority precedent has cautioned parties not to wait until the last minute to e-file their exceptions, in case of any technical difficulties.²⁵ By waiting until the last minute to file its exceptions, the Agency acted at its own peril and must assume the risk of being untimely as a result of any alleged technical difficulties.

⁷ Exceptions Form at 2.

⁸ 5 C.F.R. § 2425.2(c)(3).

⁹ *Id.* §§ 2425.2(b)-(c), 2429.21(a), 2429.24(a) (the time limit to filing exceptions is thirty days from the date of service of the award).

¹⁰ *Id.* § 2429.24(a); *see also* § 2429.21(b)(1)(v).

¹¹ Agency's Resp. at 4.

¹² 5 U.S.C. § 7122(b).

¹³ 5 C.F.R. § 2429.23(d) (emphasis added); *see also U.S. Dep't of the Army, U.S. Army Missile Command, Redstone Arsenal, Ala.*, 43 FLRA 1359, 1361 (1992) (finding the time limit for filing exceptions to arbitration awards may not be waived or extended by the Authority and noting the sole question is whether the exceptions were timely filed).

¹⁴ 68 FLRA 231 (2015) (Member Pizzella dissenting).

¹⁵ Agency's Resp. at 5-6 (citing *VA*, 68 FLRA 231).

¹⁶ 68 FLRA at 234.

¹⁷ 68 FLRA 443 (2015) (Member DuBester dissenting).

¹⁸ *Id.* at 443-44.

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.* at 444-45.

²² Agency's Resp. at 5-6.

²³ *See Id.* at Table of Contents.

²⁴ *Id.* at 3.

²⁵ *AFGE*, 68 FLRA at 444-45 ("While a party 'rightfully' may use every minute of the thirty-day period for filing its exception, a party must accept responsibility for the increased potential that a minor, ordinary obstacle could prove fatal to their ability to file a timely exception."); *see also U.S. DHS, CBP*, 69 FLRA 579, 584 (2016) (Concurring Opinion of Member Pizzella). We encourage agencies and unions to consult with the Authority's *Guide to Arbitration* to better understand their rights and responsibilities under the Statute, <https://www.flra.gov/system/files/webfm/Authority/AR%20For%20ms,%20Guide,%20Other/Arbitration%20Guide%209.30.16.pdf>.

Accordingly, we dismiss the Agency's exceptions as untimely.²⁶ **Member DuBester, concurring:**

I concur in the outcome.

IV. Decision

We dismiss the Agency's exceptions.

²⁶ See *U.S. DOD, Def. Contract Mgmt. Agency*, 70 FLRA 370, 371 (2018) (the time limits set forth in 5 U.S.C. § 7122(b) will be strictly enforced).