

72 FLRA No. 7

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 446
(Union)

and

UNITED STATES
DEPARTMENT OF VETERANS AFFAIRS
MEDICAL CENTER
ASHEVILLE, NORTH CAROLINA
(Agency)

0-AR-5627

DECISION

January 21, 2021

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

I. Statement of the Case

The Union filed two sets of exceptions to Arbitrator Lewis G. Brewer's award denying its grievance. We dismiss the first set because it but did not provide any supporting arguments and dismiss the second set as untimely.

II. Background and Order to Show Cause

The Arbitrator issued an award dated March 30, 2020¹ denying the Union's grievance. On April 28, the Union used the Authority's eFiling system to file exceptions to the award (April 28 exceptions) and attached a brief to its exceptions form. The attached brief was the "Union's Closing Brief" to the Arbitrator (post-hearing brief).² The Union did not include any arguments in the electronic exceptions form.

On May 1, the Union used the eFiling system to refile its exceptions (May 1 exceptions), with a different brief than the one attached to the April 28 exceptions. The brief attached to the May 1 exceptions was the "Union's Exceptions to Arbitral Award"³ (exceptions brief), which argued that the award is deficient on contrary-to-law and essence grounds.

Subsequently, the Authority's Office of Case Intake and Publication issued an order directing the Union to show cause (the order) why the May 1 exceptions should not be dismissed as untimely.⁴ On May 19, the Union filed a timely response to the order (response), but the response does not address the date or method of service of the award. Instead, the Union states that it timely filed its April 28 exceptions but "errantly" attached its post-hearing brief instead of its exceptions brief to its submission.⁵ And the Union claims that the May 1 exceptions should not be dismissed because it was remedying a "clerical error"⁶ precipitated by "technical difficulties"⁷ with the Union's internal computer software when it prepared its April 28 exceptions.⁸ The response states that the Union noticed the error on April 30 and filed the May 1 exceptions to correct the mistake.⁹

The Agency filed an opposition to the Union's exceptions on May 29, asserting in part that the Arbitrator served the award by email and the Union's exceptions are untimely.

III. Analysis and Conclusions: We do not consider the May 1 exceptions and dismiss the April 28 exceptions as unsupported.

The time limit for filing exceptions to an arbitration award is thirty days "after the date of service of the award."¹⁰ The Authority may not extend or waive this time limit.¹¹ However, the time limit may be equitably tolled if a party demonstrates that: (1) some extraordinary circumstance stood in its way to prevent timely filing; and (2) the party was pursuing its rights diligently.¹²

Absent evidence to the contrary, the date of an arbitration award is presumed to be the date of service.¹³ The date of service is the date that the arbitration award is deposited in the U.S. mail, delivered in person, deposited with a commercial delivery service or, in the case of email or fax transmissions, the date transmitted.¹⁴ When an

¹ All dates hereafter occurred in 2020.

² April 28 Exceptions at 3.

³ May 1 Exceptions at 2.

⁴ Order to Show Cause at 1-2.

⁵ Resp. to Show-Cause Order (Resp.) at 1; Resp., Attach., Aff. of Taradawn Nash (Nash Aff.) at 1-2.

⁶ Resp. at 1.

⁷ Nash Aff. at 1.

⁸ Resp. at 1.

⁹ Nash. Aff. at 2.

¹⁰ 5 U.S.C. § 7122(b); 5 C.F.R. § 2425.2(b).

¹¹ 5 C.F.R. §§ 2425.2(b), 2429.23(d).

¹² *U.S. Dep't of HHS, Office of Civil Rights*, 71 FLRA 330, 330 (2019) (*HHS*) (Chairman Kiko concurring).

¹³ *U.S. Dep't of VA, Med. Ctr. Lexington, Ky.*, 40 FLRA 1236, 1241 (1991) (citing *Okla. City Air Logistics Ctr., Tinker Air Force Base, Okla.*, 32 FLRA 165, 167 (1988)).

¹⁴ 5 C.F.R. § 2425.2(c).

award is served by regular mail, the excepting party receives an additional five days for filing its exceptions.¹⁵ The Arbitrator issued his award on March 30.¹⁶ Therefore, if the Arbitrator served the award by email, the exceptions were due by April 29, and if served by regular mail, the exceptions were due by May 4.

Although the order directed the Union to address the method of service of the award so that the Authority could determine whether the May 1 exceptions were timely, the Union did not do so. Instead, the Union states that the April 28 exceptions were timely but incomplete because the Union attached its post-hearing brief.¹⁷ The Union does not allege that the May 1 exceptions were timely; rather it argues that because those exceptions were filed to “correct” a clerical error, it has shown “proper cause” why those exceptions should not be dismissed.¹⁸

We find that the Union has failed to demonstrate that the May 1 exceptions were timely. Moreover, because the Union’s failure to file timely, complete exceptions with the correct brief was caused by the Union’s own “clerical error” and “technical difficulties,” not the Authority’s eFiling system,¹⁹ we find that the Union has not established extraordinary circumstances warranting equitable tolling of the filing deadline.²⁰ Accordingly, we do not consider the May 1 exceptions.

We also dismiss the Union’s April 28 exceptions because they do not articulate any grounds currently recognized for review by the Authority.²¹ Moreover, the Union has not otherwise demonstrated that the exceptions brief it filed on May 1 should be considered as a supplemental submission to its April 28 exceptions. While the Authority may, in its discretion, grant leave to file “other documents” as it deems appropriate,²² a party must request leave to file a supplemental submission, and explain why the Authority should consider the submission.²³ And where a party seeks to raise issues that it could have addressed in a previous submission, the Authority ordinarily denies requests to file supplemental submissions concerning those issues.²⁴

Here, the Union did not request leave to file the May 1 exceptions brief. Moreover, the Union could have submitted the exceptions brief with its April 28 exceptions, or it could have refiled its exceptions with the correct brief on April 29 rather than after the due date. Therefore, we do not consider the May 1 exceptions brief as a supplemental submission, and we dismiss the April 28 exceptions under § 2425.6 of the Authority’s Regulations.²⁵

IV. Decision

We dismiss the Union’s exceptions.

¹⁵ *Id.* §§ 2425.2(c), 2429.21, 2429.22, 2429.24(e)-(f).

¹⁶ Opp’n Br. at 2 (stating that Arbitrator served his award by email on March 30).

¹⁷ Resp. at 1.

¹⁸ *Id.* at 1-2.

¹⁹ Nash. Aff. at 1; Resp. at 1.

²⁰ *HHS*, 71 FLRA at 331 (a party’s mistake does not demonstrate extraordinary circumstances); *see also AFGE, Local 3615*, 65 FLRA 647, 648 n.5 (2011) (declining to find extraordinary circumstances due to a party’s own “inadvertence, accident, or mistake” (citing *AFGE, Local 2113*, 55 FLRA 414, 414 (1999))); *U.S. DHS, U.S. CBP*, 64 FLRA 916, 918-19 (2010) (declining to find extraordinary circumstances when a party conceded that its filing was “technically untimely”).

²¹ Under § 2425.6(e)(1) of the Authority’s Regulations, an exception “may be subject to dismissal . . . if . . . [t]he excepting party fails to raise” a recognized ground for review listed in § 2425.6(a)-(c) of the Authority’s Regulations or “otherwise fails to demonstrate a legally recognized basis for setting aside the award.” 5 C.F.R. § 2425.6(e)(1); *see also AFGE, Local 2272*, 67 FLRA 335, 335 n.2 (2014) (citing *AFGE, Local 3955, Council of Prison Locals 33*, 65 FLRA 887, 889 (2011)).

²² 5 C.F.R. § 2429.26; *see also SPORT Air Traffic Controllers Org.*, 70 FLRA 274, 275 (2017) (*SPORT*).

²³ *SPORT*, 70 FLRA at 275 (citing *AFGE, Local 3652*, 68 FLRA 394, 396 (2015)).

²⁴ *Id.* (citations omitted).

²⁵ 5 C.F.R. § 2425.6.

Chairman Kiko, concurring:

Based on the record before us, I agree that it is appropriate to dismiss both sets of the Union's exceptions.