

72 FLRA No. 23

NATIONAL TREASURY
EMPLOYEES UNION
CHAPTER 226
(Union)

and

UNITED STATES
DEPARTMENT OF AGRICULTURE
FOOD AND NUTRITION SERVICE
ALEXANDRIA, VIRGINIA
(Agency)

0-NG-3487

DECISION AND ORDER
DISMISSING PETITION FOR REVIEW

March 9, 2021

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

I. Statement of the Case

The question before us is whether the Union's petition for review should be dismissed because the Union did not timely respond to an Authority deficiency order. Because the Union has not established extraordinary circumstances justifying waiver of its failure to respond within the time limit, we dismiss the Union's petition.

II. Background and Order to Show Cause

The Union timely filed its petition for review (petition) with the Authority on March 27, 2020.¹ However, the statement of service attached to the Union's petition demonstrated that the Union failed to serve the Agency-head designee with the petition. The Authority's Regulations require the Union to serve a copy of the petition on the agency head, or in this case, agency-head designee.²

¹ Pet. at 14-15.

² 5 C.F.R. § 2424.2(g) ("Service means the delivery of copies of documents filed with the Authority to the other party's principal bargaining representative and, in the case of an exclusive representative, also to the head of the agency."); *id.* § 2424.22(d) ("The petition for review, including all attachments, must be served in accord with § 2424.2(g).").

On April 3, 2020, the Authority's Office of Case Intake and Publication (CIP) issued a procedural deficiency order (PDO) directing the Union to respond to the PDO and to serve the Agency-head designee with the petition by April 17, 2020.³ The PDO stated that "failure to respond to or comply with this order . . . may result in dismissal of the Union's petition."⁴ CIP sent the PDO to the Union via certified mail. Thereafter, the Union's response to the PDO was filed and postmarked on April 18.⁵

On April 30, 2020, CIP issued a show-cause order (SCO) directing the Union to show cause why it should not dismiss its petition for failure to comply with an Authority order. In its timely response to the SCO, the Union argues that the circumstances warrant waiver of the expired Authority time limit because it timely filed a response by placing the documents in a U.S. Postal Service mailbox on April 17 and it also cites complications caused by COVID-19 that delayed it from filing a response.⁶ However, the Union also concedes that it likely missed the last U.S. Postal Service mail pickup on April 17, therefore, the response to the SCO was not postmarked until April 18.⁷

III. Analysis and Conclusions: The Union has failed to establish extraordinary circumstances to justify a waiver for the untimely response to the Authority's deficiency order.

The Union argues that its petition should not be dismissed because of the "unusual circumstances" that caused its untimely response to the PDO.⁸ However, the Union's justifications fail to establish the extraordinary circumstances necessary to demonstrate good cause for a waiver of the expired time limit for responding to the April 3, 2020 PDO.⁹

The Authority's regulations provide that the date of filing for a document shall be determined by the date of mailing.¹⁰ Furthermore, when the document has a postmark, the regulations state that the postmark determines the date of mailing.¹¹ Consequently, the

³ PDO at 1-2.

⁴ *Id.* at 2.

⁵ Resp. to PDO at 1-2.

⁶ Resp. to SCO at 2.

⁷ Resp. to SCO, Attach. 4, Confidential Witness Statement at 1-2.

⁸ Resp. to SCO at 1-2.

⁹ 5 C.F.R. § 2429.23(b) ("[T]he Authority . . . may waive any expired time limit in this subchapter in extraordinary circumstances.").

¹⁰ *Id.* § 2429.21(b)(1)(i); *see also NTEU*, 42 FLRA 160, 161 (1991) (*NTEU*).

¹¹ 5 C.F.R. § 2429.21(b).

Authority has repeatedly affirmed that the filing date for a document is indicated by its postmark date.¹² Here, the Union does not dispute that the postmark date of the Union's response to the PDO is April 18.¹³ The Union's affidavit and statement of service, which indicate that the response was filed on April 17, are not controlling.¹⁴ Furthermore, while the Authority has the discretion to waive or extend an expired deadline in extraordinary circumstances,¹⁵ the Union's justifications do not present an extraordinary circumstance. The Authority has previously found that the illness of a party's representative¹⁶ and mailing difficulties¹⁷ do not establish extraordinary circumstances. Accordingly, we dismiss the Union's petition.¹⁸

IV. Order

We dismiss the Union's petition.

¹² See *AFGE, Loc. 997*, 66 FLRA 499, 499 (2012) (*Local 997*) ("When the document has a postmark, the postmark determines the filing date."); *NTEU*, 42 FLRA at 161 (holding that a party's affidavits and other extrinsic evidence cannot establish the date of service when there is a legible postmark).

¹³ Resp. to SCO at 1-2.

¹⁴ *Local 997*, 66 FLRA at 499; *NTEU*, 42 FLRA at 161.

¹⁵ 5 C.F.R. § 2429.23(b).

¹⁶ *U.S. Dep't of the Army, U.S. Army Med. Dep't Activity, Fort George G. Meade, Md.*, 71 FLRA 368, 369 n.7 (2019) (then-Member DuBester concurring); see also *U.S. DHS, ICE*, 66 FLRA 880, 883 (2012).

¹⁷ See *U.S. Dep't of VA, John J. Pershing VA Med. Ctr.*, 71 FLRA 426, 427 (2019) (*VA Med. Ctr.*) (then-Member DuBester concurring) ("Any suggestion that an internal mailroom error occurred also fails, as the Authority has also held that internal [a]gency error does not constitute extraordinary circumstances."); *U.S. Dep't of VA, Veterans Benefits Admin.*, 71 FLRA 315, 316 (2019) (then-Member DuBester concurring) (finding that failure to process an Authority order with urgency due to internal procedures of x-raying and sorting mail did not establish extraordinary circumstances to justify a waiver); *AFGE, Loc. 3283*, 66 FLRA 691, 692 (2012) (finding that "error on the part of a party's mailroom does not establish an extraordinary circumstance justifying the waiver of an expired time limit" (citing *NTEU*, 64 FLRA 833, 835 (2010))).

¹⁸ See *VA Med. Ctr.*, 71 FLRA at 427.