

74 FLRA No. 20

UNITED STATES
DEPARTMENT OF VETERANS AFFAIRS
JOHN J. PERSHING VA MEDICAL CENTER
POPLAR BLUFF, MISSOURI
(Agency)

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 2338
(Union)

0-AR-5934

ORDER DISMISSING EXCEPTIONS

November 18, 2024

Before the Authority: Susan Tsui Grundmann, Chairman,
and Colleen Duffy Kiko and Anne Wagner, Members

I. Statement of the Case

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 for failure to comply with an Authority procedural-deficiency order. The Agency failed to comply with the show-cause order and does not establish extraordinary circumstances justifying a waiver of that order's expired time limit. Therefore, we dismiss the Agency's exceptions.

II. Background

The Union filed a grievance and invoked arbitration. Arbitrator Paul Betts issued an award sustaining the Union's grievance. The Agency filed exceptions to the award on November 22, 2023, and the Union filed an opposition to the Agency's exceptions on December 22, 2023. In its opposition, the Union argued the Agency improperly served the Union with its exceptions by email¹ and failed to serve the Union with a copy of the Agency's eFiling form.² Thereafter, CIP issued a procedural-deficiency order (PDO) directing the Agency to: (1) properly serve a complete copy of the exceptions, including the eFiling form, on the Union's representative; and (2) respond to the PDO by filing a statement of service with CIP that complies with the Authority's Regulations.³ Because the Agency consented to email service of Authority documents,⁴ the Authority served the PDO on the Agency via email, in accordance with § 2429.12(a) of the Authority's Regulations.⁵ The PDO directed the Agency to file its response with CIP by January 12, 2024.⁶

The Agency did not file a response with CIP by the deadline. On January 31, CIP issued an order (SCO I) directing the Agency to show cause why its exceptions should not be dismissed for failure to respond to the PDO.⁷ In its response to SCO I, the Agency claimed that, on January 12, it filed an "updated statement of [s]ervice" with the Authority demonstrating compliance with the PDO.⁸ However, the Agency did not provide evidence that it served the Union with a complete copy of its exceptions. Further, the Agency's SCO I response included tracking information showing that the Agency filed its PDO response with the Federal Labor Relations Authority's Office of the General Counsel – not CIP.⁹ CIP never received the PDO response.

On April 4, CIP issued a second order (SCO II) directing the Agency to show cause why its exceptions should not be dismissed for failure to: (1) timely file its PDO response with CIP;¹⁰ or (2) properly effectuate

¹ See Opp'n Br. at 4; 5 C.F.R. § 2429.27(a) (stating that any party filing a document must serve a copy upon "all counsel of record or other the designated representative(s) of parties"); *id.* § 2429.27(b)(6) (requiring consent for email service).

² Opp'n Br. at 4-5; *see* 5 C.F.R. § 2429.27(c) (requiring a party filing a document with the Authority to serve all parties with "copies of the filing and any supporting documents" and to file with the Authority a signed, dated statement of service).

³ PDO at 2.

⁴ Exceptions Form at 1.

⁵ 5 C.F.R. § 2429.12(a) ("Where a party using the FLRA's eFiling system has consented to electronic service of documents issued by the Authority in a particular case, the Authority shall serve documents on that party exclusively by email to the email address provided by the party.").

⁶ PDO at 2. Unless otherwise noted, all dates hereafter occurred in 2024.

⁷ SCO I at 1.

⁸ SCO I Resp. at 1.

⁹ SCO I Resp., Enclosure 4, Tracking Information at 2 (showing address of shipping recipient as "Office of General Counsel, Federal Labor Relations Authority, 1400 K Street, NW, Washington, D.C. 204240001, US").

¹⁰ SCO II at 2-3 (citing *U.S. Dep't of the Navy, Naval Comput. & Telecomm. Command Headquarters, Wash., D.C.*, 42 FLRA 1265, 1266 (1991) (dismissing filing delivered to the wrong Authority component because improper delivery rendered filing untimely and "parties filing documents with the Authority are responsible for being knowledgeable of the statutory and regulatory filing requirements").

complete service of its exceptions on the Union.¹¹ SCO II stated that “failure to comply with this order by April 18 . . . may result in dismissal of the Agency’s exceptions.”¹² The Agency filed its response to SCO II on April 29.¹³

III. Analysis and Conclusion: We dismiss the Agency’s exceptions for failure to comply with SCO II.

The Agency asks the Authority not to dismiss its exceptions, alleging that the Authority failed to serve SCO II on the Agency’s primary representative.¹⁴ In addition, the Agency contends that its email system flagged the Authority’s email serving SCO II on the Agency’s secondary representative as junk mail, preventing that representative from responding by the order’s deadline.¹⁵

The Authority will dismiss a party’s filing when the party does not comply with an Authority order concerning that filing.¹⁶ Although the Authority has discretion to waive an expired deadline for responding to an Authority order in extraordinary circumstances,¹⁷ the Authority has repeatedly found that delays caused by a

party’s internal mailing system do not establish extraordinary circumstances.¹⁸ Similarly, the Authority has found that a delay attributed to a party’s administration of its email system fails to establish extraordinary circumstances warranting waiver of an expired time limit.¹⁹

Section 2429.12(c) of the Authority’s Regulations provides that “[w]hen parties are served documents by the Authority by email, the date of service shall be the date the email is sent.”²⁰ As noted above, the Authority served SCO II by email on April 4, serving the Agency’s primary representative at the email address designated for service in the Agency’s exceptions.²¹ The Agency’s claim that its primary representative did not receive SCO II, whether due to mistake, accident, or inadvertence, does not establish extraordinary circumstances warranting waiver of SCO II’s April 18 deadline.²² Therefore, the Agency’s response on April 29 is untimely. Further, consistent with the Authority precedent discussed above, the Agency’s contention that its email system erroneously placed SCO II in the

¹¹ *Id.* at 3 (noting that (1) the Agency’s response to SCO I “did not include evidence that it had effectuated service of a complete copy of its exceptions, including the eFiling form, on the Union”; and (2) the Union was continuing to assert to the Authority “that the Agency never effectuated service of the eFiling form associated with its exceptions”).

¹² *Id.* at 4.

¹³ Although the date listed on the Agency’s response is April 26, SCO II Resp. at 1, the Agency provided tracking information from a commercial-delivery service reflecting the Agency deposited its response with the delivery service on April 29. As such, we consider the SCO II response filed on that later date. *See* 5 C.F.R. § 2429.27(d) (“For any documents . . . serve[d] under this section, . . . the date of service shall be the date on which you have: deposited the served documents . . . with a commercial-delivery service that will provide a record showing the date on which the document was tendered to the delivery service . . .”).

¹⁴ SCO II Resp. at 3.

¹⁵ *Id.* (asserting that its email system “is sensitive to spam and phishing emails”).

¹⁶ *U.S. Dep’t of VA, John J. Pershing VA Med. Ctr., Poplar Bluff, Mo.*, 73 FLRA 904, 904 (2024) (citing *U.S. DOJ, Fed. BOP, USP Admin. Maximum (ADX), Florence, Colo.*, 66 FLRA 20, 20-21 (2011)).

¹⁷ 5 C.F.R. § 2429.23(b) (“[T]he Authority . . . as appropriate, may waive any expired time limit in this subchapter in extraordinary circumstances.”).

¹⁸ *E.g., AFGE, Loc. 1858*, 73 FLRA 296, 297 (2022) (*Loc. 1858*) (denying waiver request where party did not receive Authority order until after deadline, because “untimely filings caused by delays or problems with an internal mail system do not present extraordinary circumstances”); *Bremerton Metal Trades Council*, 73 FLRA 259, 260 (2022) (*Bremerton*) (finding party’s delay in receiving Authority order did not constitute extraordinary circumstances where delay was attributed to

party’s internal mailing system); *see also U.S. Dep’t of VA, John J. Pershing VA Med. Ctr.*, 71 FLRA 426, 427 (2019) (*Pershing*) (Member DuBester concurring) (finding party’s “claim[] to have no knowledge of an Authority order does not constitute an extraordinary circumstance warranting waiver”).

¹⁹ *See U.S. Dep’t of HHS., Off. of C.R.*, 71 FLRA 330, 331 (2019) (*HHS*) (then-Chairman Kiko concurring) (finding no extraordinary circumstances warranting waiver of expired filing deadline where party alleged its representative was delayed in receiving emailed arbitration award due to scheduled leave); *see also Trevino v. City of Fort Worth*, 944 F.3d 567, 572 (5th Cir. 2019) (finding relief from judgment inappropriate where party alleged lower court’s “[e]mails mistakenly [went] to a spam folder”); *Yeschick v. Mineta*, 675 F.3d 622, 630 (6th Cir. 2012) (affirming district court’s denial of motion for relief from judgment where party’s counsel failed to update email address and did not receive notifications regarding case filings).

²⁰ 5 C.F.R. § 2429.12(c).

²¹ SCO II, Statement of Service at 1; *see* 5 C.F.R. § 2429.12(a) (“Where a party using the FLRA’s eFiling system has consented to electronic service of documents issued by the Authority in a particular case, the Authority shall serve documents on that party exclusively by email to the email address provided by the party.”).

²² *See AFGE, Loc. 3438*, 49 FLRA 1145, 1147 (1994) (party’s alleged nonreceipt of Authority order did not establish extraordinary circumstances where Authority served party’s representative at address listed in its exceptions); *see also U.S. Dep’t of the Navy, U.S. Marine Corps, Marine Corps Base, Quantico*, 67 FLRA 114, 115 (2013) (no extraordinary circumstances warranting waiver of expired time limit where “untimely party was properly served at the address it provided”); *AFGE, Loc. 2437*, 53 FLRA 980, 982 (1997) (finding party’s “failure to comply with [an] Authority[] [o]rder result[ing] from inadvertence, accident, . . . or mistake within its office” did not demonstrate extraordinary circumstances).

secondary representative's "[j]unk mail" folder²³ does not constitute extraordinary circumstances justifying waiving that order's expired time limit.²⁴ As such, the Agency does not demonstrate that it complied with SCO II, and provides no basis for finding extraordinary circumstances warranting waiver.²⁵ Accordingly, we dismiss the Agency's exceptions.²⁶

IV. Decision

We dismiss the Agency's exceptions.

²³ SCO II Resp. at 3.

²⁴ See *Loc. 1858*, 73 FLRA at 297; *Bremerton*, 73 FLRA at 260; *Pershing*, 71 FLRA at 427; *HHS*, 71 FLRA at 331.

²⁵ See *U.S. Dep't of VA, Veterans Benefits Admin.*, 71 FLRA 315, 316 (2019) (Member DuBester concurring) (finding no extraordinary circumstances justifying waiver of deadline where counsel claimed no knowledge of an Authority order until after the deadline but evidence demonstrated order received by mail room prior to the deadline); see also *AFGE, Loc. 1417*, 63 FLRA 349, 350 (2009) (dismissing exceptions where party "failed to comply with the requirements of [an Authority d]eficiency [o]rder and . . . [o]rder to [s]how [c]ause"); *U.S. Dep't of VA*, 60 FLRA 479, 479 n.1 (2004) (dismissing party's filing for failing to comply with procedural-deficiency order and subsequent show-cause order).

²⁶ On February 20, the Union filed a motion to dismiss the Agency's exceptions, and on June 20, the Union filed a second motion requesting dismissal. Additionally, we note that the Agency argues it timely filed its response to the PDO with the Authority. SCO I Resp. at 1; SCO II Resp. at 3-4. Because we are dismissing the Agency's exceptions on the basis of its failure to comply with SCO II, we need not resolve whether the Agency complied with the PDO. We also need not resolve whether the Union's motions are properly before us. See, e.g., *Bremerton*, 73 FLRA at 261 n.20 (citing *Pershing*, 71 FLRA at 426 n.1) (finding it unnecessary to resolve additional procedural issues where exceptions dismissed on basis of filing party's failure to timely comply with Authority order).