UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
Office of Administrative Law Judges
WASHINGTON, D.C. 20424-0001

DEPARTMENT OF THE TREASURY INTERNAL REVENUE SERVICE WASHINGTON, D.C. Respondent and NATIONAL TREASURY EMPLOYEES UNION Charging Party	Case No. SF-CA-02-0320

NOTICE OF TRANSMITTAL OF DECISION

The above-entitled case having been heard before the undersigned Administrative Law Judge pursuant to the Statute and the Rules and Regulations of the Authority, the undersigned herein serves his/her Decision, a copy of which is attached hereto, on all parties to the proceeding on this date and this case is hereby transferred to the Federal Labor Relations Authority pursuant to 5 C.F.R. § 2423.34(b).

PLEASE BE ADVISED that the filing of exceptions to the attached Decision is governed by 5 C.F.R. §§ 2423.40-41, 2429.12, 2429.21-2429.22, 2429.24-2429.25, and 2429.27.

Any such exceptions must be filed on or before **JANUARY 27, 2003**, and addressed to:

Office of Case Control
Federal Labor Relations Authority
607 14th Street, N.W., Suite 415
Washington, D.C. 20424

WILLIAM B. DEVANEY
Administrative Law Judge

Dated: December 27, 2002
Washington, DC

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY

Office of Administrative Law Judges
WASHINGTON, D.C. 20424-0001

MEMORANDUM DATE: December 27, 2002

TO: The Federal Labor Relations Authority

FROM: WILLIAM B. DEVANEY
Administrative Law Judge

SUBJECT: DEPARTMENT OF THE TREASURY
INTERNAL REVENUE SERVICE
WASHINGTON, D.C.
Respondent

and Case No. SF-CA-02-0320

NATIONAL TREASURY EMPLOYEES UNION

Charging Party

Pursuant to section 2423.34(b) of the Rules and Regulations 5 C.F.R. § 2423.34(b), I am hereby transferring the above case to the Authority. Enclosed are copies of my Decision, the service sheet, and the transmittal form sent to the parties. Also enclosed are Motions for Summary Judgment and other supporting documents filed by the parties.

Enclosures

FEDERAL LABOR RELATIONS AUTHORITY
Office of Administrative Law Judges OALJ 03-11
WASHINGTON, D.C.

DEPARTMENT OF THE TREASURY INTERNAL REVENUE SERVICE WASHINGTON, D.C. Respondent and NATIONAL TREASURY EMPLOYEES UNION Charging Party	Case No. SF-CA-02-0320

Albert H. Larson, III, Esquire
Richard M. Slizeski, Esquire
Hillary Weingast, Esquire
For the Respondent

Andrew R. Krakoff, Esquire
J. Kenneth Donnelly, Esquire
For the Charging Party

Stefanie Arthur, Esquire
For the General Counsel

Before: WILLIAM B. DEVANEY
Administrative Law Judge

DECISION

Statement of the Case

The complaint alleged a refusal to comply with an arbitrator's award in violation of §§ 7116(a)(1) and (8) of the Statute (Exhibit A to General Counsel's Motion for Summary Judgment, ¶¶8, 12, 13 [- second - should be 14, see Respondent's Answer, Exhibit B to General Counsel's Motion for Summary Judgment, ¶14, n.1]. Respondent states, in its Opposition to General Counsel's Motion for Summary Judgment; Cross Motion for Summary Judgment in Favor of the Agency or, in the Alternative, Motion to Hold Proceedings in Abeyance Until the FLRA Rules on the Related Negotiability Appeal

(hereinafter, referred to as, "Resp. Cross Motion for Summary Judgment").

> ". . . The Agency [Respondent] does not dispute that it has not implemented the award's requirement that the Agency pay overtime to certain employees for time spent commuting. Nor does the Agency dispute that its exceptions to the award were denied by the Federal Labor Relations Authority. Finally, the Agency does not believe there are any facts in dispute." (id. at 2)

General Counsel filed her Motion for Summary Judgment on November 5, 2002, together with a Brief In Support, which were received on November 6, 2000. Respondent filed its Cross Motion for Summary Judgment on November 15, 2002, which was received November 19, 2002.

On November 19, 2002, because the parties agreed that there are no factual issues in dispute, an Order was entered cancelling the hearing, for December 12, 2002, and pre-hearing disclosure and notifying the parties that this matter will be decided on motion for summary judgment.

On November 25, 2002, Counsel for the Charging Party filed an Opposition to Respondent's Motion for Summary Judgment and Reply to Respondent's Opposition to the General Counsel's Motion for Summary Judgement and Opposition to Respondent's Cross Motion for Summary Judgment, which were received December 2, 2002. General Counsel on November 25, 2002, also filed an Opposition to Respondent's Motion for Summary Judgement, which also was received on December 2, 2002.

FACTS

1. The National Treasury Employees Union, Charging Party (hereinafter, "NTEU") is the exclusive representative of a nationwide consolidated unit of appropriate employees, including employees at Respondent's [Internal Revenue Service] facilities at Seattle, Tacoma, Bellevue and Everett, Washington (Complaint, Answer, ¶6). Respondent and NTEU are parties to a national collective bargaining agreement, known as NORD V, Article 29, Section 3E of which provided that,

> "When an employee travels from his/her residence to a point of destination within his/her official duty station, he/she should not be required to leave home any earlier or arrive home any later than he/she does when he/she travels to and from his/her usual assigned place of

business." (Arbitrator's Opinion and Award, Exhibit 1 to General Counsel's Motion for Summary Judgement pp. 1-2).

2. During the 1998 fiscal year, Respondent, as part of a program to provide additional access to taxpayers during the tax filing season, directed Revenue officers and Revenue Agents in Tacoma, Everett and Bellevue, Washington, posts of duty to report, on a recurring basis, to its Headquarters Office in Seattle, Washington. While assigned to different work locations, the employees remained within their official duty stations as the Seattle Office was within a 40 mile radius of the Tacoma, Bellevue and Everett offices. The Revenue Officers and Revenue Agents assigned temporary duty at Seattle were required to arrive at the Seattle Office by the beginning of their normal time of duty and were expected not to depart earlier than the completion of their normal tour of duty. As a result of the temporary assignments, several employees' commute times were affected. NTEU sought compensation for these employees, which Respondent denied, and a grievance was filed which was progressed under NORD V to arbitration (Resp. Cross Motion for Summary Judgement pp. 3-4; 5).

3. The Arbitrator, Samuel A. Vitaro, issued his Decision and Award on July 24, 2000. (Exhibit 1, General Counsel's Motion for Summary Judgment). Respondent filed Exceptions to the Award which the Authority denied on August 17, 2001, U.S. Department of the Treasury, Internal Revenue Service and National Treasury Employees Union, 57 FLRA 444 (2001) (August 17, 2001). The employees involved were covered by the Fair Labor Standards Act (FLSA) (Arbitrator's Decision, Exhibit 1 to General Counsel's Motion for Summary Judgment p. 3; 57 FLRA at 445, 447, 449).

Respondent filed a Motion for Reconsideration which the Authority denied on November 27, 2001, U.S. Department of the Treasury, Internal Revenue Service and National Treasury Employees Union, 57 FLRA 592 (November 27, 2001). In denying Respondent's Motion for Reconsideration, the Authority noted, in part, as follows:

> ". . . the Arbitrator addressed the stipulated issue of whether application of the agreement provision to the employees' temporary assignment would violate law, rule, or regulation, including 5 C.F.R. § 551.422. The Arbitrator concluded that the agreement provision conflicted with law and regulation, including 5 C.F.R. § 551.422, but was nevertheless enforceable under the Portal-to-Portal Act, 29 U.S.C. § 254 (the Act), which

> contains exceptions to the general prohibition on compensation for commute time. (footnote omitted.) The Arbitrator found that the exception allowing compensation for commute travel where authorized by an express provision of a written contract was applicable here because the parties' agreement contained an 'express provision' within the meaning of 29 U.S.C. § 254(b)(1)." (Id. at 592-93).

4. On January 24, 2002, the Department of Justice filed a Petition for Review of the Authority's Decision with the United States Court of Appeals for the D.C. Circuit (Complaint Exhibit A, ¶11, Answer ¶11, General Counsel's Motion for Summary Judgment, in which Respondent further stated, in part, "However, a Motion for Voluntary Dismissal of the Petition was granted by the court on March 5, 2002 . . . .")

5. The Complaint specifically states,

> "12. Since January 24, 2002 and continuing to date, Respondent has failed and refused to take any of the actions directed by the Arbitrator's order." (Exhibit A) which Respondent admitted (Exhibit B) (id.)

6. Paragraph 11 of the Complaint states, in part, that, Respondent ". . . notified Charging Party that, based on the Petition for Review, Respondent did not have to take any action to implement the Arbitrator's award." (Exhibit A, id.). Respondent admitted, with clarification, the allegations of Paragraph 11 of the Complaint, but states, inter alia, that it stated in its letter of January 31, 2002, ". . . that based on the Petition, it was not taking any action to implement the Arbitrator's award at that time." (Exhibit B, id.)

7. The charge was filed February 21, 2002 (Exhibit A, ¶4, id., admitted, Exhibit B, ¶4, id.).

8. The Authority's Rules and Regulations with regard to review of Arbitration Awards provided, in pertinent part as follows:

> **§ 2425.4 Authority decision.**
>
> The Authority shall issue its decision and order taking such action and making such recommendations concerning the award as it considers necessary,

> consistent with applicable laws, rules, or regulations. (5 C.F.R. § 2425.4)

As noted above, the Authority's final decision and order (57 FLRA 444) issued on August 17, 2001.

The Authority's Rules and Regulations as to Reconsideration provides, in pertinent part, as follows:

> **§ 2429.17 Reconsideration.**
>
> ". . . The filing and pendency of a motion under this provision shall not operate to stay the effectiveness of the action of the Authority, unless so ordered by the Authority. . . ." (5 C.F.R. § 2429.17)

In the Order denying Motion for Reconsideration in this case, 57 FLRA 592 (November 27, 2001), the Authority stated, in relevant part, as follows:

> ". . . we deny the Agency's motion and its request for a stay."2/
>
> 2/ The Authority's Regulations do not provide a basis for filing requests for stays of arbitrators' awards. Effective December 31, 1986, the Authority's Regulations were revised to revoke those portions pertaining to the filing of requests for stays of arbitration awards (51 Fed. Reg. 45,754). Therefore, we deny the Agency's request." 57 FLRA 592 (2001).

9. The six month period for filing a charge, pursuant to §7118(4)(A) of the Statute, 5 U.S.C. § 7118(4)(A), expired on February 17, 2002, as there was no failure of the Respondent to perform a duty that prevented the timely filing of a charge and no concealment which prevented discovery of the alleged unfair labor practice during the 6 month period, id., B(i) and (ii), unless General Counsel and/or the Charging Party can show otherwise.

CONCLUSIONS

General Counsel, in her Opposition to Respondent's Motion for Summary Judgment, asserts: First, that ". . . prior to the filing of its Cross Motion for Summary Judgment, the Respondent had never raised the timeliness of the charge as a defense. . . ." (id. at 1) and cities U.S.

Army Armament Research and Development and Engineering Center, Picatinny Arsenal, New Jersey, 52 FLRA 527 (1996) (hereinafter, "Picatinny Arsenal"). There was no hearing in this case and Respondent timely raised the defense of timeliness in its Cross Motion for Summary Judgment. The motions and cross-motions for summary judgment take the place of a hearing and, as the Authority noted in Picatinny, supra,

> "'. . . Statutes of limitation are affirmative defenses and, as such, are waived unless raised in the pleadings or at trial.' [quoting 2A James W. Moore, et al., Moore's Federal Practice, ¶8.27(4) at 8-190-193 n.6) (2d ed. 1996) (52 FLRA at 532) (Emphasis supplied)
>
> ". . . The General Counsel's argument that the Judge should not have addressed this defense is, in effect, a claim that section 7118(a)(4) is a statute of limitation that must be raised prior to the close of the hearing. (id. at 532) (Emphasis supplied)
>
> . . .
>
> ". . . we conclude that section 7118(a)(4) of the Statute is an affirmative defense that was not properly before the Judge because the Respondent failed to raised it prior to the close of the hearing . . . . ." (id. at 522-34) (Emphasis supplied)

Accordingly, Respondent timely raised a §18(a)(4) defense.

Second, General Counsel asserts that the Authority has recognized equitable principles that may justify extension of the time and cites: Department of the Air Force, Headquarters, 832d Combat Support Group, DPCE, Luke Air Force Base, Arizona, 24 FLRA 1021 (1986)(hereinafter, "Luke"). Luke was revisited by the Authority in 1997 in, Equal Employment Opportunity Commission, Washington, DC, 53 FLRA 487 (1997) (hereinafter, "EEOC") and, there, the Authority stated, in part, as follows:

> "Authority precedent establishes that the time limit in section 7118(a)(4)(A) is a statute of limitations and subject to equitable tolling. E.g., Picatinny Arsenal, 52 FLRA at 533-34. The Authority treated section 7118(a)(4)(A) as a statute of limitations in Luke AFB, the only case in which the Authority has applied the doctrine of

equitable tolling. See id. at 533 n.4 (discussing Luke AFB, 24 FLRA at 1025-26). (

"In Luke AFB the Authority found that the statute of limitations should have been tolled because the union did not "sleep on its rights," but diligently sought to have the arbitrator's award enforced through appropriate mechanisms. 24 FLRA at 1026. The Authority found that the union was prevented, through no fault of its own, from filing an actionable charge within the statutory time frame.

"The facts in Luke AFB were, in the Authority's words, 'unique.' 24 FLRA at 1026. The union had filed a ULP charge well within the 6-month period commencing on the date the award became final and binding. That charge was ultimately dismissed on the ground that agency exceptions to the award were pending before the Authority. The union continued to pursue the agency's compliance with the award through 'numerous requests, meetings and ULP charges.' Id. However, through a series of events, none of which were within its control, the union was 'left without an actionable charge' filed within the 6-month period. Id." (id. at 497-98)

. . .

"Specifically addressing the statute of limitations found in section 10(b) of the NLRA, the First Circuit has stated that equitable tolling is 'appropriate only when the circumstances that cause a plaintiff to miss a filing deadline are out of his [or her] hands." Kelley v. NLRB, 79 F.3d 1238, 1248 (1st Cir. 1996) (Kelley) (quoting from Heidemen v. PFL, Inc., 904 F.2d 1262, 1266 (8th Cir. 1990), cert. denied, 498 U.S. 1026 (1991)" (id. at 498)

. . .

"The Supreme Court has not decided a case where equitable tolling was sought because an action was filed in a forum without jurisdiction. However, those courts of appeal that have addressed the issue have generally concluded that commencement of an action in a forum that 'clearly lacks jurisdiction' will not toll a statute of limitations. Shofer v. Hack Co., 970

F.2d 1316, 1319 (4th Cir. 1992) (Shofer); see also Silverberg v. Thomson McKinnnon Securities Inc., 787 F.2d 1079, 1082 (6th Cir. 1987) (Silverberg); Fox v. Eaton Corp., 615 F.2d 716, 719 (6th Cir. 1980), cert. denied 450 U.S. 935 (1981) (Fox); cf. U.S. v. Maryland Casualty Co., 573 F.2d 245, 247 (5th Cir. 1978) (filing of federal claim in state court did not interrupt federal statute of limitations).

. . .

> "Noting virtual unanimity in the Circuits which have considered the issue, we hold that filing a related action in a forum that clearly lacks jurisdiction will not toll the limitations period of section 7118(a)(4) of the Statute." (Id. at 500-01)

Neither General Counsel nor the Charging Party contends that the filing of the Petition on Respondent's behalf, on January 24, 2002, tolled the running of §7118(a)(4). Indeed, in the absence of an Order staying the Authority's final decision of August 17, 2001, that decision remained effective. 5 C.F.R. § 2429.17.

The Complaint alleges that, ". . . Since January 24, 2002 and continuing to date, Respondent has failed and refused to take any of the actions directed by the Arbitrator's order." This statement implies that NTEU knew on, or before, January 24, 2002, that Respondent refused to take any action directed by the Arbitrator's Order. If so, NTEU had, from that date, 24 days to timely file a charge, i.e., by February 17, 2002, but it did not. In its Opposition to Respondent's Motion for Summary Judgment, General Counsel states,

> ". . . it was not until the Respondent sent the Union a letter on January 24, 2002 which the Union received on January 31, 2002 that it was clear that the Respondent was going to appeal the

> arbitrator's award[1] and not comply. . . this gave the Union only 17 calendar days to file a timely charge. . . ." (id. at second page [un-numbered]).

With at least 17 days to file a timely charge, NTEU did nothing. NTEU is a large and experienced federal sector union and was represented by able Counsel. NTEU did not exercise the kind of diligence here that the Authority found compelling in Luke, supra; EEOC, supra at 502. Indeed, NTEU's lack of diligence was further shown by the statement of Andrew R. Krakoff, Esquire, National Counsel for NTEU, as follows:

> "The Arbitrator's award requires IRS to identify employees . . . who were required to travel to and from the Customer Service Staffing Support . . . and provide this information to the union within 45 days of the date of receipt of the Award. After 45 days from the Authority's decision denying reconsideration had passed without receiving this information from the IRS, I wrote to Albert H. Larson, III, IRS Area Counsel . . . ." (Affidavit attached to General Counsel's Motion for Summary Judgment p. 2) (Emphasis supplied).

Mr. Krakoff knew, or should have known, that the 45 days ran from the date of the Authority's final Decision and Order of August 17, 2001, because a motion for reconsideration does not stay the action of the Authority (5 C.F.R. § 2429.17). Consequently, had he exercised diligence, he would have inquired on, or about October 2, 2001, instead of waiting until after January 14, 2002. The Authority in EEOC, supra, stated that, "Although we recognize that there is no apparent prejudice to the Agency . . . lack of prejudice is not an independent basis

[1] The record is somewhat ambiguous concerning the letters referred to, but the record is clear concerning notice to NTEU. Thus a copy of the Petition filed by the Department of Justice on January 24, 2002 (Attachment, General Counsel's Motion for Summary Judgment) was served on NTEU on January 24, 2002 (id.) Mr. Larson's letter dated January 31, 2002, to Mr. Krakoff, in response to Mr. Krakow's letter dated January 24, 2002 (id., Exhibit 2) may, or may not, have been received on January 31, 2002, and NTEU does not say; but there is no reason to doubt that Respondent also wrote NTEU on January 24, 2002, and that such letter (not submitted) was received by NTEU on January 31, 2002, as General Counsel states.

for invoking equitable tolling. . . There being no reason to toll the limitations period, the charge was untimely filed and the complaint . . . must be dismissed." (id.)

In like manner, here, NTEU did not file its charge until February 21, 2002, and no reason whatever was shown to warrant the tolling of the limitations period.

The NTEU, in its Opposition to Respondent's Motion for Summary Judgment, asserts, as follows:

First, it asserts that Respondent's section 7118(a)(4)(A) defense was not timely raised and had been waived,

> ". . . by failure to raise it prior to close of the hearing. . . ." (Opposition at 1)

Of course, here, there was no hearing and Respondent timely raised its 7118(a)(4)(A) defense in its Cross Motion for Summary Judgment. See also, discussion on same issue with regard to a like claim by General Counsel, above.

Second, NTEU claims that the charge was timely because the filing period should be computed by adding five days in accordance with 5 C.F.R. § 2429.22. This was rejected by the Authority in EEOC, supra, where the Authority stated,

> "Under section 7122, an arbitration award becomes final and binding after the period for filing exceptions expires and no exceptions have been filed or after timely filed exceptions have been denied by the Authority. . .
>
> "In Luke AFB, the Authority determined that an agency's obligation to comply with an arbitrator's award begins when the award becomes final and binding (citing United States Air Force, Air Force Logistics Command, Wright-Patterson Air Force Base, Ohio, 15 FLRA 151, 153 (1984), aff'd, 775 F.2d 727 (6th Cir. 1985)). Luke AFB, 24 FLRA at 1025. The Authority further held that the 6-month period for filing a ULP charge alleging noncompliance with the arbitrator's award also commences at that time. 24 FLRA at 1025; accord Department of the Air Force v. FLRA, 775 F.2d 727, 732-33 (6th Cir. 1985).
>
> "Both the language of the Statute and established Authority precedent lead us to conclude that the limitations period for filing a

> ULP charge for failure to comply with an arbitrator's award commences on the date the award becomes final and binding." (53 FLRA at 492-93).

Accordingly, the award in this case became final and binding on August 17, 2001.

Third, NTEU contends that the time period should be tolled because of equitable consideration. NTEU asserts,

> "NTEU Counsel reasonably read Mr. Larson's language ["based on the petition, the Agency's position is that it does not have to take any action to implement the arbitrator's award at this time" (General Counsel's Motion for Summary Judgment, Krakoff's Affidavit; see, also, Exhibit 2, attached to General Counsel's Motion for Summary Judgment] that the Agency did not have to take any action at that time to implement the award to mean it was prepared to do so at the appropriate time. Stated differently, Counsel for the Union did not view this as an unequivocal refusal to implement the award . . . ." (Opposition at 6)

This assertion is wholly without basis. At the outset, Mr. Krakoff, in his affidavit, after referring to Mr. Larson's January 31, 200[2], letter and the attached Petition, stated,

> "This unfair labor practice charge was filed after Larson advised me that he did not intend to comply with the Vitaro award. . . ." (Affidavit at 2-3) (Emphasis supplied).

Nor did the General Counsel have any doubt or reservation that Respondent's letter of January 31, 2002, notified NTEU it was not going to comply. And I find Mr. Larson's language in his January 31, 2002, letter to Mr. Krakoff, "Based on the Petition, the Agency's position is that it does not have to take any action to implement the Arbitrator's award at this time.", wholly devoid of any language, or implication, that it would comply in the future. Indeed, the filing of the petition on January 24, 2002, as Mr. Krakoff recognized in his Affidavit, showed that, ". . . he did not intend to comply . . . ."

The other considerations of equitable considerations have been considered above with regard to a similar contention of General Counsel.

I find no basis for the tolling of the limitations period.

Fourth, NTEU asserts that a "clear and unequivocal Notice" standard should apply and the six month period should begin when Respondent first clearly and unequivocally refused to comply, namely January 31, 2002. The Authority, for reasons already stated, has rejected this assertion. The time for filing an unfair labor practice began to run in this case on August 17, 2001. NTEU's argument is a variant of a continuing violation which the Authority has rejected. Luke, supra; EEOC, supra. Indeed in EEOC, the Authority stated, in part, as follows:

> ". . . we conclude that the Respondent's failure to comply with Lazar's award is not a 'continuing violation' of the Statute.8/
>
> 8/ As noted above, we believe that Luke AFB effectively, overruled Portsmouth Naval Shipyard with respect to the applicability of a continuing violation theory. Nonetheless even if Portsmouth Naval Shipyard has any viability, it will no longer be followed to the extent it is inconsistent with the decision here." (53 FLRA at 496).

Because the charge was filed more than six months after the limitations period for filing under section 7118(a)(4)(A) of the Statute commenced and there was no reason to toll the limitation period, the charge was untimely filed and the complaint must be dismissed.

For the foregoing reasons, it is recommended that the Authority adopt the following:

ORDER

General Counsel's Motion for Summary Judgment is Denied; Respondent's Cross-Motion for Summary Judgment is Granted; and the Complaint in Case No. SF-CA-02-0320 be, and the same is hereby, Dismissed.

_____

WILLIAM B. DEVANEY
Administrative Law Judge

Dated: December 27, 2002
Washington, D.C.

CERTIFICATE OF SERVICE

I hereby certify that copies of this **DECISION** issued by WILLIAM B. DEVANEY, Administrative Law Judge, in Case No. SF-CA-02-0320, were sent to the following parties:

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DATED: DECEMBER 27, 2002
WASHINGTON, DC