

64 FLRA No. 174

UNITED STATES
DEPARTMENT OF HOMELAND SECURITY
IMMIGRATION AND CUSTOMS
ENFORCEMENT
(Agency)

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 222
NATIONAL COUNCIL 118
IMMIGRATION AND CUSTOMS
ENFORCEMENT
(Union)

0-AR-4525

ORDER DISMISSING MOTION FOR
RECONSIDERATION

June 24, 2010

Before the Authority: Carol Waller Pope, Chairman,
and Thomas M. Beck and Ernest DuBester, Members

I. Statement of the Case

This matter is before the Authority on the Agency's response to an order directing the Agency to show cause why its motion for reconsideration of an earlier dismissal order should not be dismissed as untimely. For the reasons that follow, we dismiss the motion for reconsideration.

II. Background

The Agency filed exceptions to an arbitration award, and the Authority issued an order directing the Agency to show cause (July 10 Order) why its exceptions should not be dismissed as interlocutory. Order to Show Cause (July 10, 2009). The July 10 Order stated that the Agency's response was due by July 24 and that the Agency's failure to comply with the order "may result in dismissal of the exceptions." *Id.* at 3.

The Agency did not file a response until August 4, 2009 (August 4 Response). The Agency acknowledged that its response was untimely but did

not request a waiver of the expired time limit, as required by § 2429.23 of the Authority's Regulations.¹ Accordingly, on September 30, 2009, the Authority dismissed the exceptions. *See* Order Dismissing Exceptions (Sept. 30, 2009) (Dismissal Order) at 2.

Although any motion for reconsideration of the Dismissal Order was due by October 19, 2009, and the Agency conceded that it received the Dismissal Order on October 16, the Agency did not file its motion for reconsideration until October 26.² Unlike the August 4 Response, the Agency's motion for reconsideration included a request for waiver of the expired time limit; however, the Agency did not provide the Union's position on the waiver request, as required by § 2429.23(b).

On March 10, 2010, the Authority denied the Agency's request for a waiver of the expired time limit because the Agency had failed to state the Union's position on the waiver request. Order to Show Cause (March 10 Order) at 2. The March 10 Order also directed the Agency to show cause why its motion for reconsideration should not be dismissed as untimely.

1. In pertinent part, § 2429.23 provides, subject to certain exceptions not relevant here:

(b) . . . [T]he Authority . . . may waive any expired time limit . . . in extraordinary circumstances. Request for a waiver of time limits *shall state the position of the other parties* and shall be served on the other parties.

(c) The time limits . . . *may not be extended or waived in any manner other than that described in this [section].*

5 C.F.R. § 2429.23 (emphases added).

2. Although the Agency conceded that it received the Dismissal Order on October 16, it asserted that its representative did not receive the Order until October 23. Mot. for Recons. at 3 & n.2. However, the Agency offered no explanation for the delay between the Agency's receipt and the representative's receipt. Moreover, delays resulting from internal mail procedures or errors do not establish extraordinary circumstances for waiving time limits. *Cf. NTEU*, 64 FLRA 833, 835 (2010). Finally, we note that, pursuant to a standing request from the Agency, the Authority faxed all Authority orders and other case-related documents, including the Dismissal Order, to the Agency's Chief Human Capital Officer on the same day that the Authority mailed them to the Agency's representative. *See, e.g.,* Statement of Service for Dismissal Order (Sept. 30, 2009) at 2.

In response to the March 10 Order, the Agency argues that the Authority failed to serve the Dismissal Order by fax, and that this precluded the Agency from timely requesting reconsideration.³ See Resp. to March 10 Order at 1. The Agency states that the Union “has confirmed” that it would not have agreed to a time-limit waiver for the motion for reconsideration. See *id.* at 3 n.3. Moreover, the Agency requests that the Authority consider the motion and the Agency’s previous filings, without regard to any time limits for filing, under § 2429.26(a), which provides that the Authority may grant leave to file “other documents” as appropriate.⁴ See *id.* at 1 n.1, 4. Finally, the Agency questions whether, by denying its request to waive the expired deadline for reconsideration of the Dismissal Order, the Authority has “prejudged” the Agency’s response to the March 10 Order. See *id.* at 3 n.2.

III. Analysis and Conclusions

The Authority does not entertain relitigation of matters that were already decided in earlier proceedings. See *NTEU, Chapter 207*, 29 FLRA 1465, 1467-68 (1987) (order denying request for reconsideration) (Chairman Calhoun dissenting) (declining agency requests to “reopen[] and reexamin[e]” earlier decisions regarding compelling need and negotiability); cf. *U.S. DOD, Def. Logistics Agency, Def. Distrib. Region, W. Stockton, Cal.*, 48 FLRA 543, 544-45 (1993) (order denying request for reconsideration); *N.Y. State Nurses Ass’n*, 34 FLRA 805, 808 (1990) (same). The March 10 Order denied the Agency’s request for a time-limit waiver for its reconsideration motion because the request failed to state the Union’s position regarding the request, as § 2429.23(b) expressly requires. See March 10 Order at 2; see also 5 C.F.R.

3. The Agency also argues that the Authority miscalculated the reconsideration deadline; according to the Agency, the correct deadline was October 15 (fifteen days after September 30 Dismissal Order). See Resp. to March 10 Order at 2. The Agency is incorrect because the ten-day reconsideration deadline and the five-day mail-service extension, which applies because the Authority served the Dismissal Order by mail, see 5 C.F.R. § 2429.22, are computed *separately*, and, if *either period* would expire on a Saturday, Sunday, or a federal legal holiday, then the period is deemed not to expire until the end of the next workday. 5 C.F.R. § 2429.21(a); see *U.S. Dep’t of Justice, Bureau of Prisons, Metro. Corr. Ctr., N.Y., N.Y.*, 25 FLRA 102, 103 (1986). As applied here, the due date for reconsideration was October 19, 2009.

4. We note that the Agency also relied on § 2429.26(a) in its August 4 Response and its motion for reconsideration.

§ 2429.23(c) (Authority “may not” grant waiver requests that do not meet requirements of § 2429.23); Resp. to March 10 Order at 3 n.3 (conceding that waiver request did not state Union’s position). In addition, even if the Agency had stated the Union’s position on the waiver request, the Agency failed to explain why it did not timely file its reconsideration motion, given its concession that, despite the Authority’s inadvertent failure to serve the Agency’s representative with the Dismissal Order by fax, the Agency received the Dismissal Order prior to the deadline for requesting reconsideration.⁵ See Mot. for Recons. at 3 & n.2; see also *supra* note 2.

The Agency asserts that the March 10 Order’s denial of its waiver request was an inappropriate “prejudg[ment]” of the issue because, according to the Agency, the “essence of the Show Cause Order” was a request for the Agency’s arguments on whether a waiver should be granted. Resp. to March 10 Order at 3 n.2. However, the Agency could have responded to the March 10 Order by, for example, demonstrating that the Agency had, in fact, timely filed its reconsideration motion. See, e.g., *Haw. Fed. Employees Metal Trades Council*, 57 FLRA 450, 452 (2001) (responding to show-cause order, agency produced certified mail receipts and affidavit, establishing timely date of service that differed from apparently untimely metered postmark on envelope in which filing was served). Thus, although the March 10 Order disposed of the request for a time-limit waiver under § 2429.23, it did not “prejudge” the issue of whether the Agency could demonstrate the timely filing of its motion for reconsideration in some other manner.

For the foregoing reasons, the Agency provides no basis to reverse the decision in the March 10 Order not to grant a time-limit waiver for the motion for reconsideration.⁶

5. As noted previously, *supra* note 2, although the Authority did not fax the Dismissal Order to the Agency’s representative, the Authority did fax it to the Agency’s Chief Human Capital Officer on the same day that the Authority mailed it to the Agency’s representative. See Statement of Service for Dismissal Order (Sept. 30, 2009) at 2.

6. As set forth above, we note that *even if* the Agency had properly requested and received a time-limit waiver for its motion for reconsideration, and the Authority re-examined the Agency’s August 4 Response to the July 10 Order, the fact remains that the August 4 Response *was itself untimely* and did not include a request for time-limit waiver, as required by § 2429.23.

With regard to the Agency's reliance on § 2429.26(a) of the Authority's Regulations,⁷ as stated previously, that regulation provides that the Authority may, in its discretion, grant leave to file "other documents" as deemed appropriate. *E.g., Cong. Research Employees Ass'n, IFPTE, Local 75*, 59 FLRA 994, 999 (2004). Under that regulation, the filing party must demonstrate why its submission should be considered. *NTEU, Chapter 98*, 60 FLRA 448, 448 n.2 (2004). However, both the wording of § 2429.26(a) and the aforementioned decisions indicate that this provision permits parties to file *other* documents, and not *any* documents. Put simply, § 2429.26 applies only to documents other than recognized filings; it does not apply in lieu of the requirements for those recognized filings. In this regard, if the Agency were correct, then a party that failed to comply with an applicable time limit in the Authority's Regulations could simply request a "document review" of the untimely filing under § 2429.26(a). This approach would render meaningless the Authority's filing deadlines.

For the foregoing reasons, the Agency's response to the March 10 Order does not provide a basis for considering its untimely motion for reconsideration, and we dismiss that motion.

IV. Order

The motion for reconsideration is dismissed.

7. As the Agency has raised § 2429.26(a) in several of its filings, and the Authority previously has not addressed the Agency's reliance on that regulation, we find it appropriate to do so here.