

66 FLRA No. 134

UNITED STATES
DEPARTMENT OF THE NAVY
MARINE CORPS DEPOT
MAINTENANCE COMMAND
BARSTOW, CALIFORNIA
(Agency)

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 1482
(Union)

0-AR-4804

ORDER DENYING
MOTION FOR RECONSIDERATION

June 13, 2012

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 motion for reconsideration (motion) of an Authority order dismissing the Agency's exceptions. The Union has not filed an opposition to the Agency's motion.

Section 2429.17 of the Authority's Regulations permits a party who can establish extraordinary circumstances to request reconsideration of an Authority final decision or order. For the reasons that follow, we deny the Agency's motion for reconsideration.

II. Procedural Dismissal of Agency's Exceptions

The Union presented a grievance that was unresolved and submitted to arbitration. The Arbitrator sustained the grievance. The Agency then filed exceptions with the Authority. The Authority issued an order directing the Agency to cure procedural deficiencies in its exceptions. As is relevant here, the Authority informed the Agency that it had failed to serve properly its exceptions on the Union's designated representative because it had served them by facsimile. Order to Show Cause, January 27, 2012. The Authority explained that facsimile is not an authorized method of

service under the Authority's Regulations.¹ *Id.* at 2. The Authority provided the Agency with an opportunity to cure the deficiency by reserving its exceptions, ordering the Agency to file a statement of service showing service of its exceptions on the Union's representative through an authorized method of service. *Id.* at 2-3. The Agency filed a response, but it did not provide the requested statement of service. Rather, the Agency argued that service by facsimile was proper because the Union's representative had not provided the Agency with a mailing address. Agency Response to Show Cause Order, February 7, 2012 at 2-3.

The Authority issued a second order requiring the Agency to show cause why its exceptions should not be dismissed because of its failure to comply with the Authority's first order. The Authority again provided the Agency with an opportunity to cure the service deficiency, repeating its order that the Agency file a statement of service showing service of its exceptions on the Union's representative in compliance with the Authority's Regulations. Order to Show Cause, February 22, 2012 at 2. It also stated that, if the Agency did not comply with this order, the Agency's exceptions could be dismissed. *Id.*

In its response, the Agency argued that an Agency paralegal properly served the Agency's exceptions on the Union's representative by facsimile. Agency Response to Show Cause Order, March 5, 2012 (Second Agency Response) at 1 (citations omitted). The Agency also argued that its method of service was appropriate because: the Union's representative constructively consented to the Agency's method of service, *id.* at 1-2; the representative communicated "extensively, if not exclusively," by facsimile, *id.* at 2; the representative did not provide the Agency with a mailing address, *id.* at 2, 3-4; the Agency should not be held accountable for the representative's failure to provide the Agency with a mailing address, *id.* at 3; the Agency properly served its exceptions on Union officials who were the Union's co-representatives, *id.* at 4-5; and the Union did not suffer any prejudice as result of the Agency's methods of service, *id.* at 6.

The Authority found that service of exceptions must be accomplished by "certified mail, first class mail, commercial delivery, or in person." Order Dismissing Exceptions (Dismissal Order) at 1 (quoting 5 C.F.R. § 2429.24(e) and 2429.27(b)). It reiterated that facsimile is not an authorized method of service under the Authority's Regulations. *See id.* (citation omitted). The Authority considered the arguments the Agency presented as to why its method of service was appropriate. However, the Authority found that these

¹ The relevant portions of the Authority's Regulations are set forth in the appendix to this decision.

arguments were irrelevant because, even if they were true, the Agency had not complied with two Authority orders requiring the Agency to serve its exceptions properly. *Id.* at 2-3 n.2. Because the Agency had not established that it served its exceptions as ordered, the Authority dismissed the Agency's exceptions for its "failure to comply with Authority Orders." *Id.* at 3 (citing *AFGE, Local 1417*, 63 FLRA 349, 350 (2009)).

III. Agency's Motion

The Agency avers that extraordinary circumstances exist for reconsideration because the Authority erred in its conclusions of law and factual findings. Motion at 1. The Agency asserts that the Authority has held that service by facsimile is an authorized method of service under the Authority's Regulations. *Id.* at 2 (citation omitted). Additionally, it contends that service by facsimile is not prohibited by the Authority's Regulations. *Id.* The Agency also argues that, contrary to the Authority's conclusions, the Agency complied with the Authority's orders. *Id.* at 2-3. Specifically, it avers that the Agency's paralegal properly served the Union's representative with its exceptions. *See id.*

The Agency additionally contends that the Authority "summarily dismissed" its arguments as to why its service of the exceptions was "legally sufficient" and that the "undeniable facts" stated in the Agency's responses to the Authority's orders "were either not addressed by the Authority, or were cavalierly dismissed." *Id.* at 2.

IV. Analysis and Conclusions

Section 2429.17 of the Authority's Regulations permits a party who can establish extraordinary circumstances to request reconsideration of an Authority order. The Authority has repeatedly recognized that a party seeking reconsideration under § 2429.17 bears the heavy burden of establishing that extraordinary circumstances exist to justify this unusual action. *See, e.g., U.S. Dep't of the Treasury, IRS, Wash., D.C.*, 56 FLRA 935, 936 (2000). The Authority has identified a limited number of situations in which extraordinary circumstances have been found to exist. These include situations: (1) where an intervening court decision or change in the law affected dispositive issues; (2) where evidence, information, or issues crucial to the decision had not been presented to the Authority; (3) where the Authority erred in its remedial order, process, conclusion of law, or factual finding; and (4) where the moving party has not been given an opportunity to address an issue raised sua sponte by the Authority in the decision. *See U.S. Dep't of the Air Force, 375th Combat Support Group, Scott Air Force Base, Ill.*, 50 FLRA 84, 85-87 (1995). In addition, the Authority has held repeatedly

that attempts to relitigate conclusions reached by the Authority are insufficient to establish extraordinary circumstances. *See NAIL, Local 15*, 65 FLRA 666, 667 (2011) (*NAIL*).

The Agency avers that the Authority has approved of service by facsimile and that such service is not prohibited by the Authority's Regulations. Motion at 2 (citation omitted). However, in dismissing the Agency's exceptions, the Authority found that service by facsimile is *not* authorized under the Authority's Regulations. *See* Dismissal Order at 1 (citation omitted). The Authority further noted that the Authority's Regulations authorize service by facsimile for *some* documents, such as certain motions, informational disclosures, and "other similar matters." *Id.*; 5 C.F.R.

§ 2429.24(e) (stating that "motions; information pertaining to prehearing disclosure, conferences, orders, or hearing dates, times, and locations; information pertaining to subpoenas; and other similar matters may be filed by facsimile transmission"). However, it stated that exceptions are not among those types of documents that may be served by facsimile. Dismissal Order at 2; *see also* 5 C.F.R. § 2429.24(e). The Agency also argues that, contrary to the Authority's conclusion, the Agency's paralegal served its exceptions on the Union's representative through an authorized method. *See* Motion at 2-3. The Authority similarly considered this argument when it dismissed the Agency's exceptions, but found that the argument was irrelevant because it did not address the Agency's failure to comply with the Authority's orders. *See* Dismissal Order at 2-3 n.2. Accordingly, the Agency is merely attempting to relitigate issues already presented and resolved. The Agency's arguments, therefore, do not establish that reconsideration is warranted. *See NAIL*, 65 FLRA at 667 (denying motion for reconsideration that merely relitigated conclusions reached by the Authority).

The Agency also contends that the Authority "summarily dismissed" its other assertions as to why its service of the exceptions was "legally sufficient" and that the "undeniable facts" stated in the Agency's responses to the Authority's orders "were either not addressed by the Authority, or were cavalierly dismissed." Motion at 2. However, contrary to the Agency's claim, the Authority considered these arguments. *See* Dismissal Order at 2-3 n.2. Moreover, the Agency does not dispute the Authority's conclusion that the Agency's arguments did not address the Agency's failure to comply with the Authority's orders. *See id.* Consequently, the Agency's contention does not provide a basis for reconsideration. *Cf. Overseas Private Inv. Corp.*, 64 FLRA 827, 828 (2010) (citation omitted) (Authority granted union's motion for reconsideration because Authority failed to consider arguments raised by union).

The Agency has not established extraordinary circumstances warranting reconsideration of the Authority's dismissal of its exceptions. Accordingly, we deny the Agency's motion.

V. Order

The Agency's motion for reconsideration is denied.

APPENDIX

5 C.F.R. § 2429.24(e),² "Place and method of filing; acknowledgement," stated:

(e) All documents filed pursuant to this section shall be filed in person, by commercial delivery, by first-class mail, or by certified mail. Provided, however, that where facsimile equipment is available, motions; information pertaining to prehearing disclosure, conferences, orders, or hearing dates, times, and locations; information pertaining to subpoenas; and other similar matters may be filed by facsimile transmission, provided that the entire individual filing by the party does not exceed 10 pages in total length, with normal margins and font sizes.

5 C.F.R. § 2429.27, "Service; statement of service," provided:

(a) [A]ny party filing a document as provided in this subchapter is responsible for serving a copy upon all counsel of record or other designated representative(s) of parties, upon parties not so represented, and upon any interested person who has been granted permission by the Authority Service upon such counsel or representative shall constitute service upon the party, but a copy also shall be transmitted to the party.

(b) Service of any document or paper under this subchapter, by any party, including documents and papers served by one party on any other party, shall be accomplished by certified mail, first-class mail, commercial delivery, or in person. Where facsimile equipment is available, service by facsimile of documents described in § 2429.24(e) is permissible.

(c) A signed and dated statement of service shall be submitted at the time of filing. The statement of service shall include the names of the parties and

² The Authority's Regulations – including 5 C.F.R. §§ 2429.24 and 2429.27 – were revised effective June 4, 2012, to allow for electronic filing and clarify existing procedural Regulations. *See* 77 Fed. Reg. 26,430 (2012). As the Agency's exceptions were filed before that date, we apply the prior Regulations.

persons served, their addresses, the date of service, the nature of the document served, and the manner in which service was made.

(d) The date of service or date served shall be the day when the matter served is deposited in the U.S. mail, delivered in person, deposited with a commercial delivery service that will provide a record showing the date the document was tendered to the delivery service or, in the case of facsimile transmissions, the date transmitted.