

71 FLRA No. 54

UNITED STATES
DEPARTMENT OF VETERANS AFFAIRS
VETERANS BENEFITS ADMINISTRATION
(Agency)

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
NATIONAL VETERANS AFFAIRS COUNCIL
(Union)

0-AR-5405

ORDER DISMISSING EXCEPTIONS

August 22, 2019

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

Decision by Member Abbott for the Authority

I. Statement of the Case

Because the Agency failed to timely file a response to a show-cause order (SCO), we dismiss the Agency's exceptions as untimely. However, we take the time to discuss this comedy of errors in its entirety to better impress upon the federal labor community the significance of timely and properly filing exceptions. As we have made clear to agencies and unions on multiple occasions, all parties must accept responsibility for the increased potential that a minor, ordinary obstacle could prove fatal to their ability to file a timely and complete document if they wait until after the Authority's close of business on the last day of the filing period and attempt to file electronically with only minutes to spare, as has caught several parties unaware.¹

II. Background and Order to Show Cause

Arbitrator Garvin Lee Oliver served his award on the parties by email on July 31, 2018. To be timely, an exception to the award had to be postmarked by the U.S. Postal Service, filed in person with the Authority,

¹ *U.S. Small Bus. Admin.*, 70 FLRA 745, 746 n.14 (2018); *U.S. Dep't of the Navy, Portsmouth Naval Shipyard*, 70 FLRA 429, 430 (2018) (*Navy Portsmouth*) (Member DuBester concurring).

deposited with a commercial delivery service, or filed electronically through use of the Federal Labor Relations Authority's (FLRA's) eFiling system no later than August 30, 2018.² Documents filed electronically through use of the FLRA's eFiling system are considered filed on a particular day if they are filed "no later than midnight [eastern time] on that day."³

The Agency filed a part of its exceptions, consisting of its brief and the arbitration award, electronically using the FLRA's eFiling system at 11:58 p.m. E.T. on August 30, 2018 – two minutes prior to expiration of the time limit. At 12:06 a.m. on August 31, 2018, the Agency electronically filed another portion of the exceptions consisting of eight additional documents cited in its brief, including the hearing transcript. On September 7, 2018, the Agency filed as part of its exceptions, via personal delivery, three additional documents referenced in its brief. On September 13, 2018, the Agency completed the filing of its exceptions, again via personal delivery, by adding one additional document cited in the Agency's brief. At no time did the Agency request leave to file a supplemental submission.

On September 18, 2018, the Authority's Office of Case Intake and Publication (CIP) issued an SCO directing the Agency to show cause why its late-filed documents should not be dismissed as untimely. The SCO stated that "[t]he Agency's failure to respond to or comply with this order by October 2, 2018, may result in dismissal of the Agency's exceptions."⁴ The Agency filed a response to the SCO on October 3, 2018, one day late. On October 12, 2018, the Union filed a timely opposition to the exceptions filed by the Agency.⁵

III. Analysis and Conclusions

In its untimely response to the SCO, the Agency concedes that the filing was late, but contends that the Authority should grant leave to submit a late response, because "Agency counsel did not actually receive the Authority's Order until after the due date of October 2, 2018."⁶ The Agency asserts that this late response was the result of its mail being x-rayed and sorted.⁷

The justification offered by the Agency for filing an untimely response to the SCO not only fails to

² 5 C.F.R. §§ 2425.2(b)-(c), 2429.21(a), 2429.24(a).

³ *Id.* § 2429.24(a); *see also id.* § 2429.21(b)(1)(v).

⁴ SCO at 3.

⁵ Within the opposition, the Union also sought leave to respond to the SCO and the Agency's response. Because the exceptions are being dismissed on the basis of the Agency's failure to timely respond to the SCO, the Union's request is moot.

⁶ Agency's Resp. at 1.

⁷ *Id.*

establish the extraordinary circumstances needed to demonstrate good cause for a waiver,⁸ the explanation ignores and fails to discuss facts that patently demonstrate why extraordinary circumstances are not present.

Although Agency counsel asserts that an email she received at 8:36 a.m. on October 3, 2018, was the first time she became aware of the SCO, it is clear from the exhibits included with the Agency's late response that the order was received by the Agency and x-rayed on September 24, 2018; received by the Agency's Office of General Counsel on September 27, 2018; and received by the Personnel Law Group on October 2, 2018.⁹ Clearly, the process of x-raying and sorting the mail does not explain the dilatory manner with which the Agency behaved in responding to an order that was within its possession well before the expiration of the October 2 deadline. In fact, it was within the possession of the Agency's Office of General Counsel six calendar days and four work days prior to the due date. That the Agency failed to process the order with the urgency required of a document containing a due date that was only days away does not constitute an extraordinary circumstance, especially when the reduced response time was a function of the Agency's own internal processes. Justification for a waiver based upon delays caused by internal mail procedures was rejected by the Authority previously and, given the repeated lack of diligence present in this case, a similar result is merited.¹⁰

Because the Agency presented no extraordinary circumstance to justify a waiver for missing the October 2, 2018, due date for the response, dismissal of the exceptions is appropriate. The failure to respond to an SCO within the time limit provided is, standing alone, reason enough to dismiss the exceptions.¹¹ Accordingly, we dismiss the Agency's exceptions.¹²

IV. Order

We dismiss the Agency's exceptions.

Member DuBester, concurring:

I concur with the decision to dismiss the Agency's exceptions for the sole reason that they were untimely filed.

⁸ 5 C.F.R. § 2429.23(b).

⁹ Agency's Resp., Ex. 1.

¹⁰ *AFGE, Local 3283*, 66 FLRA 691, 692 (2012); *NTEU*, 64 FLRA 833, 835 (2010).

¹¹ *AFGE, Local 2006*, 27 FLRA 26 (1987); *see also* SCO at 3.

¹² Member Abbott notes that even had the Agency responded to the SCO in a timely manner, he would have strongly considered dismissing the incomplete exceptions themselves for failing to observe the requirement in the Authority's regulations that exceptions be "complete." *See* 5 C.F.R. § 2425.4(a).