

71 FLRA No. 71

UNITED STATES
 DEPARTMENT OF VETERANS AFFAIRS
 NORTHERN CALIFORNIA HEALTH CARE SYSTEM
 MATHER, CALIFORNIA
 (Agency)

and

AMERICAN FEDERATION
 OF GOVERNMENT EMPLOYEES
 LOCAL 1206
 (Union)

0-AR-5442

ORDER DISMISSING EXCEPTIONS

October 30, 2019

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

I. Statement of the Case

The sole question before us is whether the Agency's exceptions to Arbitrator David M. Blair's attorney-fees award are timely. Because the Agency does not demonstrate that it timely filed the exceptions, we dismiss them.

II. Background and Order to Show Cause

The Arbitrator issued an attorney-fees award and served the award on the parties by email on November 1, 2018.¹ Any exceptions to the award were due no later than December 3.²

The Agency filed exceptions to the award using a commercial-delivery service – United Parcel Service (UPS).

The Authority's Office of Case Intake and Publication issued an order to show cause (the order) why the Agency's exceptions should not be dismissed as untimely because it appeared that the Agency did not deposit the exceptions with UPS until December 4.³

¹ All dates referenced hereafter occurred in 2018.

² 5 U.S.C. § 7122(b); *see also* 5 C.F.R. §§ 2425.2(b)-(c), 2429.21(a), 2429.24(a).

³ Order at 2.

Specifically, the Agency was asked to clarify why a mailing label was created on December 3 but the exceptions were not marked as shipped until December 4.⁴ The Agency filed a timely response to the order (response).

In the response, the Agency's representative asserts that the exceptions are timely because on December 3, she contacted the Agency's mailroom clerk to prepare a UPS package, and that, once prepared, the package was "taken to the UPS drop box" located at the federal building that houses the Agency.⁵ She further asserts that, according to the Agency's daily shipment report, the package was shipped to the Authority on December 3.

In support of its timeliness argument, the Agency provides several documents. One document is the Agency-generated shipment report, which lists the scheduled pick up date for the package containing the exceptions as December 3.⁶ Another is a UPS tracking document which shows that the shipping label was created and the "order" was processed on December 3.⁷ However, the UPS tracking document also shows that the package was "[s]hipped" on December 4, with an "Origin Scan" occurring in Louisville, Kentucky.⁸ Additionally, the Agency provides an unsworn memorandum from an Agency official which "interpret[s]" the aforementioned documentation as showing that the exceptions left the Agency's mailroom on December 3, and references the Agency representative's email that she "personally delivered the packet to the local UPS designation."⁹ The referenced email was not included in the Agency's response.

III. Analysis and Conclusion: The Agency's exceptions are untimely.

The time limit for filing exceptions to an arbitration award is thirty days "after the date of service of the award."¹⁰ The Authority may not waive or extend this time period.¹¹

It is undisputed that the Arbitrator served the award by email on November 1, and the exceptions had to be filed no later than December 3. As relevant here, the Authority's regulations provide that a party may file documents "by deposit with a commercial-delivery service that provides a record showing the date of

⁴ *Id.*

⁵ Resp. at 2.

⁶ Resp., Ex. A. at 1.

⁷ Resp., Ex. B (Ex. B) at 2.

⁸ *Id.*

⁹ Resp., Ex. C (Ex. C) at 1.

¹⁰ 5 C.F.R. § 2425.2(b).

¹¹ *Id.* § 2429.23(d).

deposit.”¹² Therefore, to prove that its exceptions are timely, the Agency must provide a UPS record showing that it deposited the exceptions no later than December 3.

Although the Agency asserts that the exceptions were “taken to the UPS drop box” on December 3,¹³ the only record originating from UPS states that the Agency’s mailroom created a shipping label and prepared the package on December 3,¹⁴ and that UPS shipped the package on December 4.¹⁵

The Authority has held that a personal affidavit, coupled with additional evidence, can be sufficient to establish the date of service or the mailing of documents.¹⁶ But the Agency did not provide an affidavit from the Agency representative attesting that she deposited the exceptions with UPS on December 3. Indeed, even in response to the show cause order, the Agency’s representative indicates that the UPS package “was taken to the UPS drop box,” without identifying who took it to the drop box or the basis of her knowledge regarding this assertion. Moreover, the memorandum from a different Agency official makes no attestations as to when the exceptions were deposited.¹⁷ And the Agency did not provide a record from UPS

“showing the date of deposit.”¹⁸ Thus, the Agency – despite ample opportunity to do so in response to the show cause order – has failed to provide clear evidence that the exceptions were deposited on December 3.¹⁹

We acknowledge the dissent’s position that one could infer from the attendant circumstances that the exceptions were timely deposited with UPS. But we are constrained to decide this case in accordance with our regulation, which requires parties filing exceptions with a commercial-delivery service to provide a record showing the date of deposit. Here, the Agency – even after being alerted to the deficiency in its filing by the show cause order – failed to provide the requisite UPS record or other evidence establishing that its exceptions were timely filed. Neither our governing regulation nor Authority precedent applying the regulation directs us to determine the timeliness of the Agency’s filing based upon inferences derived from “the laws of physics,”²⁰ and we decline to do so here. Consequently, we find that the Agency has not demonstrated that its exceptions are timely, and we dismiss them.

IV. Order

We dismiss the Agency’s exceptions.

¹² *Id.* § 2429.21(b)(1)(iv).

¹³ Resp. at 2.

¹⁴ Ex. C at 1.

¹⁵ Ex. B. at 2.

¹⁶ See *AFGE, Local 2145*, 67 FLRA 141, 143 (2013) (citing *Haw. Fed. Emps. Metal Trades Council*, 57 FLRA 450, 452) (2001) (*Hawaii*)) (finding exceptions timely based on email and affidavit from union’s attorney stating when he received award); *U.S. Dep’t of the Army, XVII Airborne Corps & Fort Bragg, Womack Army Med. Ctr., Fort Bragg, N.C.*, 60 FLRA 545, 546 (2005) (citing *Hawaii*, 57 FLRA at 452; *NAGE, Local R14-52*, 55 FLRA 648, 649 (1999) (*NAGE*)) (finding opposition untimely where union’s counsel offered no affidavit supporting his contention as to the filing date, and other record evidence did not clearly establish service). *But see Hawaii*, 57 FLRA at 452 (“An affidavit, standing alone, does not suffice to establish a date of service. However, an affidavit coupled with additional evidence may establish the date of service.”) (citations omitted); *NAGE*, 55 FLRA at 648-49 (counsel’s affidavit to establish service insufficient where affidavit asserted that a nonexistent handwritten date on the award established date of service and the union offered no other supporting evidence).

¹⁷ See Ex. C at 1. As noted, this unsworn memorandum references an email from the Agency’s representative that she delivered the package “to the local UPS designation.” *Id.* However, the Agency did not even include a copy of the referenced email in its response to the show cause order. We simply cannot conclude that this hearsay statement constitutes sufficient proof that the exceptions were timely deposited with UPS. See, e.g., *AFGE, Local 997*, 66 FLRA 499, 499 (2012) (concluding that the agency’s “unsubstantiated statements that it [timely] filed” its statement of position are not sufficient to establish timely filing).

¹⁸ 5 C.F.R. § 2429.21(b)(1)(iv).

¹⁹ We reject the dissent’s assertion that the certificate of service accompanying the Agency’s filing constituted sufficient evidence that the exceptions were timely filed. Adopting this conclusion would effectively nullify our regulation, which requires proof of timely filing by a record from the commercial-delivery service in addition to the required statement of service. And the Authority has previously rejected a party’s argument that its exceptions should be “presumed to have been mailed according to the certificate of service” where the date on the certificate conflicted with the postmarked date, which governed the date of filing under the Authority’s regulations. *Dep’t of VA, L.A. Reg’l Office, L.A., Cal.*, 44 FLRA 15, 16 (1992).

²⁰ Dissent at 5.

Member Abbott, dissenting:

I find sufficient evidence that the Agency deposited its exceptions into the custody of the commercial delivery service (UPS) on December 3, 2018. Therefore, I would find the exceptions timely and reach the merits. Because the majority's decision defies the laws of physics and the space-time continuum,¹ I dissent.

First, the majority chastises the agency for the lack of an affidavit from the Agency Representative attesting to when she deposited the exceptions with UPS on December 3rd, yet concedes that such an affidavit "can" - only *can* - be sufficient to establish the date of service.² Moreover, the majority's explanation for why it dismisses the Certificate of Service that is attached to the exceptions collapses from the false premise that the Louisville, Kentucky date-stamp is an original postmark.³ I cannot ignore that the same representative certified, as an attorney, that she caused the exceptions to be sent by UPS on the 3rd of December. Nothing in the file or in the majority's decision nullifies this certificate or explains why it does not add to the evidence that the exceptions were deposited with the commercial carrier on December 3rd.⁴

Second, the Agency's own UPS account indicates that the label was created after three o'clock in the afternoon of December 3rd. The next entry in the carrier-provided tracking information indicated the package was in Louisville, Kentucky at 3:15 AM on December 4th, being "shipped" to the next station in Maryland.⁵ I fairly read that to mean the package was in the control of UPS for so long, that it was transported across the continent, from California to Kentucky in those twelve hours. That is "clear evidence" to me.⁶ The majority's myopic view of the evidence in the record runs counter to the law of physics and the space-time continuum to pretend that there is the unchecked possibility that the exceptions-laden package was somehow deposited with UPS (at midnight perhaps, 00:00 a.m., or after) only to be transported from Oakland, California on December 4th to arrive in Louisville, Kentucky at 03:30 a.m. still on December 4th. To pretend that all of this could occur in a real-time space of only 30 minutes (considering the three-hour time

difference between Pacific Daylight Time and Eastern Daylight Time) is sophistry at its worst.⁷⁸

The purpose and intent of our regulations are not served when they defy the laws of physics, time, and space.⁹ There is sufficient evidence in the record to conclude that the exceptions were timely filed.

¹ See John Fuller, *How Warp Speed Works*, <https://science.howstuffworks.com/warp-speed2.htm> (last visited October 28, 2019).

² Majority at 3.

³ Exceptions at 9; Majority at 4, n.19.

⁴ See Statement of Service, 5 C.F.R. § 2429.27. I note the opposition was timely filed by the Union with nary an allegation that the Agency's exceptions were untimely.

⁵ Resp. at 2.

⁶ Majority at 4.

⁷ See <https://www.timeanddate.com/worldclock/usa> (last visited October 28, 2019).

⁸ See Nola Taylor Redd, *How Fast Does Light Travel*, <https://www.space.com/15830-light-speed.html> (last visited October 28, 2019). Then again, if 2,303 miles is a fairly accurate distance between Oakland, California, and Louisville, Kentucky, and if the speed of light is 186,282 miles per second, then a ship approaching light speed could have transported the package from Oakland, California, to Louisville, Kentucky within the thirty-minute window documented in the record, again assuming there was little air traffic around the airport at that time in the morning.

⁹ The majority's laughable decision here reminds me of another desperate attempt to defy common sense best illustrated by this classic exchange in the 1975 movie *Monty Python and the Holy Grail*:

Guard: Where'd you get the coconuts?

King Arthur: We found them.

Guard: Found them? In Mercia? The coconut's tropical!

King Arthur: What do you mean?

Guard: Well this is a temperate zone!

King Arthur: The swallow may fly south with the sun, or the house marten or the plover may seek warmer climes in winter, yet these are not strangers to our land!

Guard: Are you suggesting coconuts migrate?

King Arthur: Not at all! They could be carried.

Guard: What? A swallow carrying a coconut?

King Arthur: It could grip it by the husk!

Guard: It's not a question of where he grips it! It's a simple question of weight ratios! A five-ounce bird could not carry a one-pound coconut!

See Eric M. Johnson, *The Science of Monty Python*, <https://scienceblogs.com/primatediaries/2009/07/19/the-science-of-monty-python> (last visited October 28, 2019).