

72 FLRA No. 36

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 2338
(Union)

and

UNITED STATES
DEPARTMENT OF VETERANS AFFAIRS
MEDICAL CENTER
POPLAR BLUFF, MISSOURI
(Agency)

0-AR-5528
(71 FLRA 1185 (2020))

ORDER DISMISSING MOTION
FOR RECONSIDERATION

April 15, 2021

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

I. Statement of the Case

The Union filed a motion for reconsideration (motion) of the Authority's decision in *AFGE, Local 2338 (AFGE)*¹ two days after the regulatory filing deadline. Because the Union has not demonstrated extraordinary circumstances for waiving or extending the expired time limit, we dismiss the motion as untimely filed.

II. Background

On December 11, 2020,² the Authority issued its decision in *AFGE* to the parties via certified mail. In that decision, the Authority denied the Union's exceptions challenging the Arbitrator's award. On December 30, the Union filed its motion to reconsider *AFGE* via fax.

Subsequently, the Authority's Office of Case Intake and Publication issued an order directing the Union to show cause (the order) why the motion should

not be dismissed as untimely filed.³ The Union filed a timely response to the order (response).

In the response, the Union's attorney acknowledges the "delay" in filing the motion, but claims that his "illness and mandatory absence, quarantine, from his office prevented [him] from filing the motion on an earlier date."⁴ Specifically, he states that he and his administrative assistant were diagnosed with COVID-19 on December 21, after first exhibiting symptoms of the disease on December 18,⁵ and therefore "had no one in his office" to collect his mail from December 18 until December 29.⁶ And he states that, although another tenant in his building signed for the Authority's decision in *AFGE* in his absence, he did not actually receive the decision until returning to the office on December 29, whereupon he "immediately" filed the motion on December 30.⁷

III. Analysis and Conclusion: We dismiss the motion for reconsideration as untimely filed.

The Authority's regulations require a motion for reconsideration of an Authority decision to be filed within ten days after service of the decision or order.⁸ Where, as here, the decision is served by mail, the date of service is the date the decision is deposited in the United States mail,⁹ and five days are added to the filing period.¹⁰

The Authority served its decision on the parties by certified mail on December 11. Therefore, in order to be timely, any motion for reconsideration had to be postmarked by the United States Postal Service, faxed, or deposited with a commercial delivery service that will provide a record showing the date the document was tendered to the delivery service no later than December 28.¹¹ The Union's motion was filed with the Authority via fax on December 30, which is two days after the filing deadline.

Under § 2429.23(b) of the Authority's Regulations, a party's request to waive an expired time limit "shall state" the other parties' positions, and requests to waive expired time limits may be granted only in "extraordinary circumstances."¹² Further, § 2429.23(c) provides that "time limits . . . may not be . . . waived in

³ Order at 1-2.

⁴ Resp. at 1-2.

⁵ *Id.* at 1; Resp., Attach., Covid-19 Diagnosis Results at 1-3.

⁶ Resp. at 1.

⁷ *Id.*

⁸ 5 C.F.R. § 2429.17.

⁹ *Id.* § 2429.27(d).

¹⁰ *Id.* § 2429.22.

¹¹ *Id.* §§ 2429.17, 2429.21(b), 2429.22, 2429.24(e).

¹² *Id.* § 2429.23(b).

¹ 71 FLRA 1185 (2020) (Member Abbott concurring).

² Unless otherwise indicated, all dates hereafter occurred in 2020.

any manner other than that described” in the Regulations.¹³ Accordingly, the Authority has denied waiver requests that did not state the positions of other parties, as well as requests that did not establish “extraordinary circumstances.”¹⁴ And, as relevant here, the Authority has specifically declined to find extraordinary circumstances based on a party representative’s illness.¹⁵

Applying these principles, we conclude that the Union’s waiver request fails to establish the extraordinary circumstances necessary for us to waive the Union’s filing deadline. At the outset, the Union has failed to state the Agency’s position, as required by § 2429.23(b). Moreover, although the Union’s attorney states that, during his illness, he “had no one in in his office” to collect his mail during the filing deadline,¹⁶ the Union does not explain why it did not make arrangements for monitoring the Union’s mail in his absence.¹⁷

We acknowledge the serious nature of the COVID-19 pandemic, and recognize the burdens it has placed on all of our parties in conducting business before our agency. But we are constrained by our precedent to conclude that the Union has not demonstrated extraordinary circumstances warranting the waiver of the regulatory filing deadline for the Union’s motion. Accordingly, we find that the motion is untimely filed.

IV. Order

The motion for reconsideration is dismissed.

¹³ *Id.* § 2429.23(c).

¹⁴ *U.S. DOJ, Fed. BOP, Metro. Corr. Ctr., N.Y.C., N.Y.*, 67 FLRA 442, 444 (2014) (*Metro*) (Member Pizzella dissenting) (citing *U.S. DHS, ICE*, 66 FLRA 880, 883 (2012) (*ICE*); *U.S. DHS, ICE*, 64 FLRA 908, 909 (2010); *IRS, Phila. Serv. Ctr.*, 54 FLRA 674, 681 (1998)).

¹⁵ *See, e.g., U.S. Dep’t of the Army, U.S. Army Med. Dep’t Activity, Fort George G. Meade, Md.*, 71 FLRA 368, 369 n.7 (2019) (finding that serious illness did not demonstrate extraordinary circumstances for waiving expired time limit on parties’ filing); *Metro*, 67 FLRA at 444 (finding no extraordinary circumstance for waiving expired time limit where union failed to explain why union representative could not have requested another person to monitor mail while he was out of office); *ICE*, 66 FLRA at 883 (finding that reason for untimely filing – away from office due to work and illness – did not demonstrate extraordinary circumstances for waiving expired time limit).

¹⁶ Resp. at 1.

¹⁷ *See Metro*, 67 FLRA at 444. As noted, the Union’s attorney states that he and his assistant were “quarantined” from December 18 through December 29. Resp. at 1. While this particular ramification of the COVID-19 illness could potentially support a showing of extraordinary circumstances, the Union has not provided any further details regarding this particular circumstance, including whether it precluded the Union’s counsel from making arrangements for receiving official correspondence during this time period.

Member Abbott, dissenting:

This case is certainly a close call. And I firmly believe that the timeliness provisions of our regulations should be applied strictly and uniformly as a matter of process. Nonetheless, I cannot agree that our regulations should be applied so narrowly that we ignore, or appear to ignore, circumstances that are truly extraordinary.

We cannot ignore that in mid-to-late December 2020, a significant spike in COVID-19 infections was transpiring at an alarming rate. Federal health experts and officials were calling on employers, companies, and the government to be flexible in applying all sorts of requirements. The circumstances facing the nation, and the parties to this case, at that time were alarming, unprecedented, and nothing less than extraordinary.

I am uncomfortable with the majority's cold comparison between a COVID-19 illness and cases of simple, routine illness wherein "the Authority has specifically declined to find extraordinary circumstances based on a party representative's illness."¹ I am certain this will be the first of many COVID-19-related cases the Authority will be called upon to resolve. However, I am confident that it will not be difficult to distinguish the extraordinary circumstances found here from the many other "illness" cases the Authority has rejected in the past and those that will occur in the future.

If ever there was a procedural-arbitrability request for reconsideration that demonstrates "extraordinary circumstances" excusing a party's late filing, this is it. Contrasting this case from routine-illness arguments does not contradict our precedent. Instead, it serves to reinforce it.

Therefore, I am unwilling to conclude that the circumstances here were not extraordinary and did not excuse the Union's late filing.

¹ Majority at 3. Indeed, COVID-19 continues to be a pandemic affecting the entire world. As of today, April 15, 2021, 31,158,087 Americans have been infected with COVID-19. *See Centers for Disease Control and Prevention, COVID Data Tracker*, available at https://covid.cdc.gov/covid-data-tracker/#cases_casesper100klast7days (last visited April 15, 2021). Sadly, of the over 31 million Americans infected with COVID-19, 560,576 have lost their lives due to COVID-19. *See id.*