

**63 FLRA No. 114**

UNITED STATES DEPARTMENT OF  
HOMELAND SECURITY  
U.S. CUSTOMS AND BORDER PROTECTION  
U.S. BORDER PATROL  
(Agency)

and

AMERICAN FEDERATION OF GOVERNMENT  
EMPLOYEES  
LOCAL 2554  
NATIONAL BORDER PATROL COUNCIL  
(Union)  
0-AR-4430

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ORDER DISMISSING EXCEPTIONS

May 20, 2009

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Before the Authority: Carol Waller Pope, Chairman and  
Thomas M. Beck, Member

**I. Statement of the Case**

This matter is before the Authority on exceptions to an award of Arbitrator Hadley Batchelder filed by the Agency under § 7122(a) of the Federal Service Labor-Management Relations Statute (the Statute) and part 2425 of the Authority's Regulations. The Union filed an opposition to the Agency's exceptions.

The Agency challenges the Arbitrator's determination that the grievant be reinstated to his former position to complete his two year contractual term of employment under the Federal Career Intern Program (FCIP). For the reasons that follow, we find the Agency's exceptions untimely filed, and therefore, we dismiss the exceptions.

**II. Background and Arbitrator's Award**

The grievant, a federal career intern, was hired as a Border Patrol Agent trainee pursuant to a 2-year contract under the FCIP. Subsequently, the grievant was terminated prior to the end of his two year internship because he was injured on the job and was unable to perform the duties of the position while recovering from surgery. Award at 5. Under the FCIP contract, the only grounds for termination were "work performance or conduct reasons[.]" *Id.* at 4. Thereafter, the Union filed a grievance challenging the grievant's termination.

When the grievance was not resolved, it was submitted to arbitration. The Arbitrator concluded that the grievant had standing to grieve, and that he had jurisdiction to resolve the grievance because the issues at arbitration concerned the interpretation of the parties' agreement. *See id.* at 6. Accordingly, the Arbitrator concluded that the Agency violated the grievant's "contractual rights" and acted "in an arbitrary and capricious fashion." *Id.* at 7. As a remedy, the Arbitrator ordered that the grievant be restored to his former position and be given the "full two year" term, extended by the time he had been unable to perform the full range of duties under the contract, with backpay and benefits. *Id.*

**III. Position of the Parties****A. Agency's Exceptions**

The Agency claims that the Arbitrator lacked authority to review the case because the grievant was an excepted service employee, serving a probationary period, pursuant to 5 C.F.R. § 213.3202(o) and that as such, the grievant had "no procedural rights." Exceptions at 13-20. Moreover, the Agency argues that the grievant is in the class of employees excluded from coverage of the negotiated grievance procedure under Article 32 M of the parties' agreement. *See id.* at 14. The Agency also argues that the remedy portion of the award is contrary to 5 C.F.R. § 213.3202(o)(2) and to management's rights under 7106(a)(2) because it requires the Agency to extend the grievant's appointment beyond the prescribed 2-year limit. *See id.* at 23-24. The Agency further claims that the award fails to draw its essence from Article 33 of the parties' agreement because Article 33 excludes from the negotiated grievance procedure any matter "enumerated in 5 U.S.C. § 7121(c)". *Id.* at 21. Finally, the Agency claims that the Arbitrator exceeded his authority because the Arbitrator failed to address the issue of discrimination which was submitted to arbitration. *See id.* at 25.

**B. Union's Opposition**

The Union claims that the Agency's exceptions are untimely because they were filed beyond the 30-day time limit allowed under 5 C.F.R. § 2425.1 of the Authority's Regulations. Opposition at 3. The Union further asserts that the award was served on September 9, 2008,<sup>1</sup> and that any exceptions to the Authority were due postmarked by October 8, 2008.<sup>2</sup> *See id.* The

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1. While the Union states that the award was served by e-mail on September 9, 2008, the e-mail attached to the record reflects that the Arbitrator transmitted the award to the parties on September 10, 2008. *See* Opposition, Exhibit B.

Union argues that the Agency's exceptions were postmarked October 14, 2008, and that as such they were untimely. The Union further asserts that as time is not extended for service of awards by e-mail transmission, the parties are not entitled to the additional five (5) days for mailing authorized for service by regular mail under 5 C.F.R. § 2429.22. *See id.*

On the merits, the Union claims that by submitting the matter to arbitration, the Agency "waived any argument that the grievance was not arbitrable[.]" *Id.* at 4. In addition, the Union argues that the Agency "agreed . . . to arbitrate such matters" under Article 33 of the parties' agreement. *See id.* As such, the Union argues that under the parties' agreement, probationary employees can grieve an unlawful termination. *See id.* at 5-6. Finally, the Union argues that the grievance challenges a violation of substantive contractual rights which apply to the grievant regardless of his probationary status. *See id.* According to the Union, the reasons given for the grievant's termination -- injury -- does not fall within the categories for which he could be terminated under the terms of the FCIP contract. *See id.* at 4. The Union states that under the FCIP contract the only reasons for termination are performance or conduct. *See id.* at 6.

#### IV. Order to Show Cause

In its exceptions, the Agency asserts that its exceptions were timely filed within the time frame specified in 5 C.F.R. § 2425.1(b). Exceptions at 2. According to the Agency, the Arbitrator's award was dated September 9, 2008, and it was served on the Agency by mail on September 12, 2008. *Id.*

In its opposition, the Union argues that the Agency's exceptions are untimely because the award was first e-mailed to the parties on September 10, 2008,<sup>3</sup> and as a result the parties are not entitled to an additional five (5) days for mailing. Opposition at 3. Based on the date of service of the award by e-mail, any exceptions to the award had to be postmarked by the U.S. Postal Service, filed in person, or received from commercial delivery with the Authority no later than October 9, 2008<sup>4</sup> in order to be timely. The Agency's exceptions were filed with the Authority by mail (postmarked) on October 14, 2008. *See* Order to Show Cause (Order) at 2.

As the Union claimed in its opposition that the exceptions were untimely, the Authority issued an Order on January 13, 2009, directing the Agency to show cause why its exceptions should not be dismissed as untimely filed. In its response to the Order, the Agency argued that its exceptions were timely filed because "email transmission is not an authorized method of service under [the] Authority[']s [R]egulation[s]" and that as such the transmission "was not effective to initiate the 30-day period for filing exceptions." Agency's Response to Order at 2, 4. Citing 5 C.F.R. § 2429.27, the Agency asserts that the 30-day period to file exceptions began the date the Arbitrator served the award on the parties by "United States mail, o[n] September 12, 2008." *Id.* at 5.

#### V. Analysis and Conclusions

The time limit for filing an exception to an arbitration award is 30 days "beginning on the date the award is served on the [filing] party[.]" 5 U.S.C. § 7122(b); *see also* 5 C.F.R. § 2425.1(b). The 30-day time limit may not be extended or waived by the Authority. 5 C.F.R. § 2429.23(d); *see also* *United States Info. Agency*, 49 FLRA 869, 871-73 (1994). Absent evidence to the contrary, the date of an arbitration award is presumed to be the date of service. *See, e.g., United States Dep't of the Navy, Naval Aviation Depot, Norfolk, Va.*, 42 FLRA 322, 326 (1991) (*Naval Aviation Depot*). When an award is served by two methods, the Authority's practice is to determine the timeliness of exceptions based on the earlier date of service of the award. *See, e.g., United States Dep't of the Treasury, Internal Revenue Serv., Wash., D.C.*, 60 FLRA 966, 967 (2005) (*IRS*).<sup>5</sup> Further, in *Social Security Administration, Headquarters, Woodlawn, Maryland.*, 63 FLRA No. 100 (May 8, 2009) (*SSA, Woodlawn*) the Authority held that 5 C.F.R. § 2429.27(d) does not encompass the method of service of arbitration awards because arbitrators are not "parties" before the Authority. *See id.* slip op. at 3. The Authority further held that the question of how an arbitrator is to serve his or her award on the parties is typically addressed informally between the parties and the arbitrator at or after the hearing, or it may be addressed in the arbitration provision of the collective bargaining agreement. *See id.* slip op. at 4.

Here, although the award was dated September 9, 2008, the Arbitrator transmitted the award to the parties by e-mail on September 10, 2008. *See* Opposition, Exhibit B. As there is no prescribed method on how

2. Based on the date of service of the award by e-mail, September 10, 2008, the exceptions due date at the Authority would have been October 9, 2008.

3. *See* n.2 supra.

4. *See* n.3 supra.

5. To the extent that 60 FLRA 966, 967 n.2 (2005) suggests that 5 C.F.R. § 2429.27(b) applies to the service of arbitration awards, it will not be followed.

arbitrators may serve their awards on the parties, and there is no evidence showing that the parties agreed to any other form of service with the Arbitrator, the date of service of the award is the day the Arbitrator transmitted the award by e-mail. *See SSA, Woodlawn*, 63 FLRA No. 100, slip op. at 8. Since the Arbitrator served the award by e-mail on September 10, 2008, before mailing it on September 12, 2008, the 30-day time limit begins on the earlier date of service. *See IRS*, 60 FLRA at 967.

Accordingly, in order to be timely, any exception needed to be postmarked by the U.S. Postal Service, filed in person, by facsimile, or received by commercial delivery with the Authority no later than October 9, 2008. 5 C.F.R. §§ 2425.1(b), 2429.21(b), 2429.24(e). The Agency's exceptions were filed with the Authority by mail (postmarked) on October 14, 2008. Therefore, the exceptions were untimely.

## **VI. Decision**

The Agency's exceptions are dismissed.<sup>6</sup>

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6. In light of this recommendation, we do not address, whether the Authority has jurisdiction under

§ 7122(a) to review the Arbitrator's award, or the merits of the exceptions.