64 FLRA No. 149

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
(63 FLRA 345 (2009))

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ORDER DENYING MOTION
FOR RECONSIDERATION

May 26, 2010

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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 the Authority's Order dismissing the Agency's exceptions as untimely filed. *U.S. Dep't of Homeland Sec., U.S. Customs & Border Prot., U.S. Border Patrol*, 63 FLRA 345 (2009) (*U.S. Border Patrol*). The Union did not file an opposition to the Agency's Motion.

For the reasons set forth below, we find that the Agency has failed to establish that extraordinary circumstances exist warranting reconsideration of the Authority's Order. We therefore deny the Agency's Motion.

II. Background

In *U.S. Border Patrol*, the Authority dismissed the Agency's exceptions as untimely filed. The Authority's action followed its issuance of an Order to Show Cause why the exceptions should not be dismissed as untimely, and its consideration of the Agency's response.

The Authority based its Order on the well established principle that "[w]hen 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." *U.S. Border Patrol*, 63 FLRA at 346 (citations omitted). The Arbitrator served his award by email, and subsequently by regular mail. Because the Agency's exceptions were untimely filed with respect to the Arbitrator's earlier, email service of the award, the Authority dismissed the exceptions. *Id.* (citing, *inter alia*, *SSA Headquarters, Woodlawn, Md.*, 63 FLRA 302 (2009) (*SSA, Woodlawn*), in which the Authority dismissed a party's exceptions in substantially identical circumstances). Specifically, the Arbitrator served his award upon the parties by email on September 10, 2008. Consequently, the Agency's exceptions, filed October 14, 2008, were filed outside the 30-day period for filing exceptions provided by § 2425.1 of the Authority's Regulations.[1] The Authority therefore dismissed the exceptions as untimely filed.

III. Agency's Position

The Agency claims that extraordinary circumstances exist warranting reconsideration of the Authority's Order. The Agency seeks reconsideration on a number of bases. First, the Agency argues that the Authority acted improperly by retroactively applying a new rule when it dismissed the Agency's exceptions. In particular, the

1. 5 C.F.R. § 2425.1 provides:

> (a) Either party to arbitration under the provisions of chapter 71 of title 5 of the United States Code may file an exception to an arbitrator's award rendered pursuant to the arbitration.
> (b) The time limit for filing an exception to an arbitration award is thirty (30) days beginning on the date the award is served on the filing party.
> (c) An opposition to the exception may be filed by a party within thirty (30) days after the date of service of the exception.
> (d) A copy of the exception and any opposition shall be served on the other party.

Agency asserts that the Authority's rules in effect at the time the Agency filed its exceptions did not recognize email as an authorized method of service of arbitrators' awards. Motion at 2 (citing 5 C.F.R. § 2429.27(b) & *U.S. Dep't of the Treasury, IRS, Wash., D.C.*, 60 FLRA 966, 967 n.4 (2005) (*IRS*)). In the Agency's view, it was not until the Authority's holding in *SSA, Woodlawn* that email was recognized as an acceptable method by which arbitrators could serve awards. Motion at 3. The Agency asserts that its exceptions were timely filed with respect to the Arbitrator's later, regular mail service of the award.

Second, the Agency contends that reconsideration is warranted because the Agency did not have an opportunity to respond to *SSA, Woodlawn*'s assertedly new procedural rule. *Id.*

Finally, the Agency requests reconsideration because "email is not a reliable method of service." *Id.*

IV. Analysis and Conclusions

For the reasons set forth below, we deny the Agency's motion for reconsideration.

A. The Authority did not retroactively apply a new rule when it dismissed the Agency's exceptions.

The Agency argues that the Authority acted improperly when it retroactively applied a new rule concerning email service of arbitrators' awards to dismiss the Agency's exceptions. An assertion that an intervening change in the law affected dispositive issues is a ground for seeking reconsideration. *U.S. Dep't of the Air Force, 375th Combat Support Group, Scott Air Force Base, Ill.*, 50 FLRA 84, 86 (1995) (*Scott AFB*).

In support, the Agency asserts that at the time it filed its exceptions, the applicable regulation, 5 C.F.R. § 2429.27(b), did not authorize arbitrators to serve their awards by email. [2] Motion at 2-3. The Agency further contends that when the Authority dismissed the Agency's exceptions, it relied on a new rule established in *SSA, Woodlawn* that email service of awards by arbitrators is acceptable. Motion at 3.

The Agency's assertions do not establish extraordinary circumstances warranting reconsideration of the Authority's Order. The claim that *SSA, Woodlawn* established a new rule permitting email service of arbitrators' awards was thoroughly discussed and rejected by the Authority in that decision. In *SSA, Woodlawn*, the Authority clarified that § 2429.27, which lists the methods by which a party to a proceeding before the Authority may serve documents or papers, "does not address the method of service by an arbitrator on the parties." 63 FLRA at 303. The Authority found that § 2429.27 applies only to a party filing a document and that, because an arbitrator is not a party to a proceeding before the Authority, § 2429.27 does not apply to the method of service an arbitrator uses to serve his award on the parties. *Id.*

Rejecting the claim that its clarification changed its regulations, the Authority explained: "[T]he Authority is not changing or revoking any existing law, regulation or policy. . . . The clarification of the general terms of 5 C.F.R. § 2429.27 does not . . . create any new obligations or deny rights to any groups of individuals. The Authority is merely explaining what the regulation already provides." *Id.* at 304.

Moreover, the Agency's reliance on *IRS*, 60 FLRA 966, is misplaced. Contrary to the Agency's contentions, *IRS* did not exclude email as a method of serving arbitrators' awards. Rather, because the Authority was able to decide the case based on an "earlier" service of the award by regular mail, the Authority in *IRS* specified that it did not need to address the issue of service by email. *Id.* at 967 n.2. In addition, although the Authority noted in *IRS* that email is not an accepted method of service under § 2429.27(b), it did not hold that this regulation applies to arbitrators' service of their awards. *Id.* Therefore, in relying on *IRS* as authority for its decision to ignore the Arbitrator's service of the award by email, the Agency is relying on inapposite precedent.

Based on the foregoing, we reject the Agency's contention that reconsideration is warranted on the ground that the Authority retroactively applied a new rule when the Authority dismissed the Agency's exceptions as untimely filed.

2. 5 C.F.R. § 2429.27(b) states:

> 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.

B. The Agency was not denied an opportunity to address the Authority's dismissal of its exceptions as untimely, based on the date the Arbitrator served the award by email.

The Agency argues that it did not have an opportunity to respond to *SSA, Woodlawn*'s assertedly new procedural rule concerning arbitrators' service of their awards by email. An assertion that a party has not been given an opportunity to address an issue raised *sua sponte* by the Authority in the decision is a ground for seeking reconsideration. *Scott AFB*, 50 FLRA at 86.

In support, the Agency repeats its argument, discussed in § IV.A., above, that the Authority retroactively applied a new rule when it dismissed the Agency's exceptions. Motion at 2-3. In addition, the Agency asserts that it did not have the opportunity to address the rationale the Authority relied on in its dismissal. *Id*. at 3.

These assertions do not establish extraordinary circumstances warranting reconsideration of the Authority's Order. As discussed in § IV.A., above, the claim that *SSA, Woodlawn* established a new procedural rule is meritless.

Further, the Agency had a full opportunity, in responding to the Authority's Order to Show Cause, to address why its exceptions should not be dismissed as untimely based on the Arbitrator's service of his award by email. The Agency's complaint, that it did not have an opportunity to respond to the "legal rationale" that the Authority ultimately employed in dismissing the Agency's exceptions, Motion at 3, merely reflects the Agency's disagreement with how the Authority resolved the issue the Agency addressed in its response to the Order to Show Cause. We therefore reject the Agency's contention that reconsideration is warranted on the ground that it did not have an opportunity to address an issue raised *sua sponte* by the Authority in its dismissal order.

C. The Agency's view that an arbitrator may not serve an award by email because email is not reliable does not raise an extraordinary circumstance.

Finally, the Agency argues in effect that arbitrators should not be allowed to use email to serve awards because email is not reliable. An assertion that the Authority erred in its remedial order, process, conclusion of law, or factual finding is a ground for seeking reconsideration. *Scott AFB*, 50 FLRA at 86.

In support, the Agency argues that email service is difficult to verify and that because of the technology that supports email, "[t]oo much is outside the control of the recipient[.]" Motion at 4.

The Agency's views on email's reliability do not establish extraordinary circumstances warranting reconsideration of the Authority's Order. The Agency does not present any information or explanation that substantiates its view of email's reliability. Thus, this Agency claim constitutes a bare assertion that the Authority's Order is in error, and we reject it on that basis.

Furthermore, as the Authority explained in *SSA, Woodlawn*, the method by which an arbitrator serves his award upon the parties is a matter for the parties and the arbitrator to determine. 63 FLRA at 303. This issue can be discussed informally between the parties and the arbitrator at or after the hearing or it can be addressed in the section of the collective bargaining agreement dealing with arbitration. *Id.* Therefore, the Agency's concerns regarding email as a method of serving an arbitrator's award may be addressed within the collective bargaining relationship or during an arbitration proceeding. However, those concerns, even if not bare assertions, do not constitute extraordinary circumstances warranting reconsideration of the Authority's Order.

V. Order

The Agency's motion for reconsideration is denied.