68 FLRA No. 75

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 3961
(Union)

and

UNITED STATES
DEPARTMENT OF THE AIR FORCE
502nd FORCE SUPPORT SQUADRON
JOINT BASE SAN ANTONIO
FORT SAM HOUSTON, TEXAS
(Agency)

0-AR-5066

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ORDER DISMISSING EXCEPTIONS

April 10, 2015

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Before the Authority: Carol Waller Pope, Chairman, and Ernest DuBester and Patrick Pizzella, Members
(Member DuBester dissenting)

I. Statement of the Case

The Union filed exceptions to an award of Arbitrator Daniel F. Jennings after the deadline for filing exceptions had expired. The question before us is whether the Union's exceptions should be dismissed as untimely, or whether we should waive the expired deadline. Because the Authority's Regulations provide that the time limit for filing exceptions to an arbitration award may not be extended or waived, we dismiss the Union's exceptions as untimely.

II. Background and Order to Show Cause

The Arbitrator served his award on the parties by e-mail on July 25, 2014. To be timely, any exceptions to the award had to be postmarked by the U.S. Postal Service, filed in person with the Authority, 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 25, 2014.[1] 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 E.T. on that day."[2]

The Union filed its exceptions electronically using the FLRA's eFiling system at 12:06 a.m. E.T. on August 26, 2014 – six minutes after the deadline had expired. The Authority's Office of Case Intake and Publication (CIP) issued an order directing the Union to show cause why its exceptions should not be dismissed as untimely. The Union filed a timely response to the CIP order.

III. Analysis and Conclusions

In its response to the order to show cause the Union concedes that its filing was untimely, but contends that the circumstances warrant "a waiver of the filing deadline."[3] The Union asserts that its exceptions were "finalized" and "ready to be filed" at 11:55 p.m. E.T. on August 25, 2014, but the Union's representative encountered an "unexpected[] . . . error"[4] that ended his eFiling session, but for which he would have timely filed the Union's exceptions.[5] According to the Union, the error "kicked the Union['s] representative out of the eFiling system" at 11:55 p.m. E.T.[6] The representative was unable to log back into the eFiling system, so he requested a new password. The Union's representative received a new password at 12:01 a.m. E.T. on August 26, 2014, and he filed the Union's exceptions at 12:06 a.m. E.T. that same day.[7] The Union contends that, because the Union's representative exercised "[d]ue diligence" to timely file the exceptions, the Authority should waive the expired time limit.[8]

However, the Authority's Regulations provide that the time limit for filing exceptions to an arbitration award, including exceptions filed electronically using the FLRA's eFiling system, may not be extended or waived. In this regard, § 7122(b) of the Federal Service Labor-Management Relations Statute states that exceptions to an arbitrator's award must be filed "during the [thirty]-day period beginning on the date the award is served on the party,"[9] and § 2429.23(d) of the Authority's Regulations provides that the "[t]ime limit[] established in . . . [§] 7122(b) may not be extended or waived."[10] Moreover, neither provision contains any exception for exceptions filed electronically using the FLRA's eFiling system.

[1] 5 C.F.R. §§ 2425.2(b)-(c), 2429.21(a), 2429.24(a).

[2] *Id.* § 2429.24(a); *see also id.* § 2429.21(b)(v).
[3] Union's Resp. at 1; *see also id.* at 2-3.
[4] *Id.* at 3.
[5] *Id.* at 2.
[6] *Id.*
[7] *Id.* at 2-3.
[8] *Id.* at 3.
[9] 5 U.S.C. § 7122(b).
[10] 5 C.F.R. § 2429.23(d).

The dissent would equitably toll the filing period for the Union's exceptions,[11] based on the Authority's decision in *U.S. Department of VA, Medical Center, Richmond, Virginia* (*VA*).[12] We do not agree that equitable tolling is appropriate here. As an initial matter, unlike the excepting party in *VA* – which argued that its exceptions should be considered *timely* due to a government shutdown[13] – the Union concedes that its exceptions are *untimely*, and requests a *waiver* of the expired filing deadline.[14] As the Authority held in *VA*, equitable tolling and waiver of an expired filing deadline are "distinct concepts."[15] Thus, we do not view the Union's request for *waiving the expired deadline* as being akin to a request to treat the Union's exceptions as timely (by finding that the deadline was *equitably tolled*).

In addition, even if we were to apply the test for equitable tolling here, we would find that its requirements are not met.[16] This two-pronged test requires that: (1) some extraordinary circumstance stood in a party's way to prevent timely filing; and (2) the party was pursuing its rights diligently.[17] In *VA*, the Authority adopted this standard in light of the government shutdown of October 2013, which it found to be an "extraordinary circumstance" beyond the control of the agency.[18]

Here, the "unexpected[] . . . error" that allegedly "kicked the Union representative out of the FLRA's eFiling system"[19] – which the Union has not substantiated with any evidence – is not an "extraordinary circumstance" that warrants application of the narrow doctrine of equitable tolling.[20] A computer error causing a delay of only a few minutes is not an "extraordinary circumstance" as was the sixteen-day government-wide shutdown in *VA*.[21] Nor is it, contrary to what the dissent argues, similar to the facts in *U.S. DOJ, Federal BOP, Federal Correctional Complex, Coleman, Florida* (*DOJ*).[22] In that case, a snowstorm caused a federal-government closure for the entire day on the last day for filing an exception, rendering it physically impossible for the respondent's exception to be hand-delivered to the Authority.[23] Additionally, the filing party's counsel in that case was not registered to file case documents electronically, and the storm occurred on a Monday, preventing that counsel from anticipating the need to bring his files home before the weekend.[24] Much like the government shutdown, that weather-related closure was completely outside of the filing party's control. Here, on the contrary, the circumstances were well within the Union's control: had the Union finalized its exceptions more than five minutes before the midnight filing deadline, any error encountered with the eFiling system would have been inconsequential. (Moreover, we note that *DOJ* was an unfair-labor-practice (ULP) case where the Authority addressed the standards for waiving an expired deadline – which is permitted for filing exceptions in ULP cases, unlike exceptions in arbitration cases[25] – and did not involve equitable tolling. Thus, *DOJ* is distinguishable on that basis as well.)

Furthermore, it is unclear whether the alleged difficulty in timely filing in this case was caused by the eFiling system or by the Union's own error. Although the dissent states, "there are no Authority records rebutting [the Union's] sworn statement" that the Union was not responsible for the alleged error, there is also no evidence to confirm the dissent's position that "the Union was not at fault."[26] Contrary to the dissent's approach, we find that the burden for establishing "extraordinary circumstances" lies not with the Authority, but with the party requesting that the Authority grant this relief. As the Union has failed to satisfy this burden, the first prong of the equitable tolling standard is not satisfied.

The second prong – that the party was pursuing its rights diligently – is also not satisfied. The dissent opines that "the Union diligently filed its exceptions as soon as possible."[27] However, the Union concedes that it did not finalize its exceptions until five minutes before the midnight filing deadline.[28] While a party

[11] Dissent at 5.
[12] 68 FLRA 231, 232-34 (2015) (Member Pizzella dissenting).
[13] *Id.* at 232.
[14] Union's Resp. at 1.
[15] 68 FLRA at 233.
[16] Member Pizzella notes that, consistent with his dissent in *VA*, he does not agree that the Authority should apply equitable tolling to our statutory filing requirements under any circumstances. *See id.* at 235 (Dissenting Opinion of Member Pizzella). However, applying the majority's decision in *VA* in order to resolve this case, Member Pizzella agrees with the decision to dismiss the Union's exceptions.
[17] *Id.* at 233 (citing *Lawrence v. Florida*, 549 U.S. 327, 336 (2007) (quoting *Pace v. DiGuglielmo*, 544 U.S. 408, 418 (2005))).
[18] *Id.*
[19] Union's Resp. at 2.
[20] *E.g.*, *VA*, 68 FLRA at 233 ("[E]quitable tolling . . . requires a much higher showing than 'good cause.'")
[21] *See id.* at 233-34 ("There is no dispute that . . . the [a]gency's representative could not perform [a]gency work and, consequently, could not file an exception with the Authority.").
[22] 67 FLRA 632 (2014).
[23] *Id.* at 633.
[24] *Id.* at 633-34.
[25] *See* 5 C.F.R. § 2429.23(d) (listing types of filings for which filing periods cannot be waived, including exceptions in arbitration cases under § 7122(b) of the Statute, but not including exceptions in ULP cases).
[26] Dissent at 6.
[27] *Id.*
[28] Union's Resp. at 2.

"rightfully"[29] may use every minute of the thirty-day period for filing its exceptions, a party also must accept responsibility for the increased potential that a minor, ordinary obstacle could prove fatal to their ability to file a timely exception. This is particularly true where the filing party waits until five minutes before the midnight deadline – after the Authority's close of business (when the filing party otherwise could have asked for CIP's assistance) – on the last day of the filing period.

We conclude that, even if the equitable-tolling doctrine were properly raised here, it would not apply under these circumstances. Accordingly, we dismiss the Union's exceptions as untimely.[30]

IV. Order

We dismiss the Union's exceptions.

[29] Dissent at 7.

[30] *Cf. U.S. Info. Agency*, 49 FLRA 869, 871-73 (1994).

Member DuBester, dissenting:

I disagree with my colleagues' determination that the Union's exceptions are untimely because they were filed approximately six minutes beyond the thirty-day filing period. In light of our recent decision in *U.S. Department of VA, Medical Center, Richmond, Virginia* (*VA*),[1] I would *equitably toll* the exceptions-filing period for the duration of the Union's inability to use the Federal Labor Relations Authority's (FLRA's) eFiling system, and find that the Union's exceptions were timely filed.[2]

In *VA*, we determined "that the thirty-day filing period in § 7122(b) [of the Federal Service Labor-Management Relations Statute (the Statute)] is not a jurisdictional limit" and "is subject to equitable tolling."[3] Moreover, we clarified that equitable tolling is a distinct concept and that "[5 C.F.R.] § 2429.23(d)'s prohibition on extending or waiving the time limit for filing arbitration exceptions does not preclude applying equitable tolling to § 7122(b)'s filing period."[4] As such, § 2429.23(d) does not bar all exceptions to an arbitrator's award filed beyond the thirty-day period. And the majority's reliance on § 2429.23(d) to dismiss the Union's exceptions is misplaced because the facts support finding that the Union is entitled to a have a portion of its filing period equitably tolled.[5]

The Authority relies on a two-prong test to determine whether to equitably toll a filing deadline: (1) some extraordinary circumstance stood in a party's way to prevent timely filing; and (2) the party was pursuing its rights diligently.[6] Furthermore, courts have determined that a party "should not be faulted . . . for failing to file early or take other extraordinary precautions early in the limitations period against what are, by definition, rare and exceptional circumstances that

[1] 68 FLRA 231 (2015) (Member Pizzella dissenting).

[2] *Id.* at 232-34 (filing period for agency's exception equitably tolled sixteen days because of federal government shutdown).

[3] *Id.* at 233.

[4] *Id.*

[5] *See Holland v. Florida*, 560 U.S. 631, 649-50 (2010) ("exercise of a court's equity powers . . . must be made on a case-by-case basis. In emphasizing the need for flexibility, for avoiding mechanical rules, we have followed a tradition in which courts of equity have sought to relieve hardships which, from time to time, arise from a hard and fast adherence to more absolute legal rules, which, if strictly applied, threaten the evils of archaic rigidity" (citations omitted) (internal quotation marks omitted)).

[6] *VA*, 68 FLRA at 233 (citing *Lawrence v. Florida*, 549 U.S. 327, 336 (2007) (quoting *Pace v. DiGuglielmo*, 544 U.S. 408, 418 (2005))).

occur later in that period."[7] The courts have also found that a party preserves its rights when it acts with reasonable diligence throughout the period it seeks to toll.[8]

Here, the Union asserts that its exceptions were "finalized" and "ready to be filed" within the thirty-day period, but for an "unexpected[] . . . error" that "kicked the Union representative out of the [FLRA's] eFiling system."[9] Following this malfunction, it took the Union representative approximately eleven minutes to request a new password, log back into the eFiling system, and file the Union's exceptions – placing the filing six minutes beyond the Union's thirty-day filing period.[10]

In analyzing whether both prongs are satisfied, I find *U.S. DOJ, Federal BOP, Federal Correctional Complex, Coleman, Florida* (*DOJ*)[11] helpful. In *DOJ*, an agency's exception to an FLRA Administrative Law Judge's decision was not filed until one day after its (already extended) filing deadline.[12] The Authority's Office of Case Intake and Publication (CIP) issued an order directing the agency to show cause why the exception should not be dismissed as untimely, and the agency responded that inclement weather had forced the agency and CIP to close on the last day that its exceptions were due.[13] We ultimately waived the expired time limit, determining that this situation qualified as an extraordinary circumstance because "the [agency]'s inability to file its exceptions timely was due to circumstances beyond its control,"[14] and concluded that the agency "acted diligently to file as quickly as it could."[15]

Regarding the first prong, the Union's inability to file within the thirty-day filing period is similar to that of the agency in *DOJ* because – just like CIP and the agency's weather-related closure – the Union has no control over the eFiling system and whether the eFiling system will exhibit an error that unilaterally terminates the representative's connection. Importantly, in the response to the order to show cause, the Union representative provided evidence in the form of a sworn affidavit stating that he was "automatically exited" from the eFiling system after hitting the "save and add button," and did not purposefully exit the eFiling system.[16] And there are no Authority records rebutting this sworn statement, or otherwise indicating that the Union's representative was responsible for the "unexpected[] . . . error" that "kicked the Union representative out of the eFiling system."[17] There are also no Authority records indicating that these types of errors occur so often as to be an expected risk in electronically filing with the FLRA, or that the Authority has ever warned prospective eFilers of this risk. Therefore, I would find that the eFiling-system failure, for which the Union was not at fault, qualifies as an extraordinary circumstance.

Regarding the second prong, the record is clear that the Union filed its exceptions mere minutes after having its access to the eFiling system restored.[18] Like the agency in *DOJ*, the Union diligently filed its exceptions as soon as possible. Conversely, the Union is unlike parties in cases where the Authority has determined that waiver is not appropriate because the parties filed days after their expired time limit.[19] The Union rightfully utilized the full extent of its filing time limit,[20] and acted diligently for the brief period that I would equitably toll.

Therefore, under the circumstances, I would find that the eFiling-system error qualifies as an extraordinary circumstance that prevented the Union representative from timely filing the exceptions,[21] and that the Union representative acted diligently to promptly file the Union's exceptions once access to the eFiling system was restored.[22]

As the foregoing reflects, I find unpersuasive the majority's reasons for not applying equitable tolling in this case. In addition to the issues I discuss, the majority's reluctance to apply equitable tolling because the Union asked for a waiver, while the agency in *VA* asked for equitable tolling,[23] relies on a distinction

[7] *McCreary v. Nicholson*, 19 Vet. App. 324, 331 (2005) (citing *Valverde v. Stinson*, 224 F.3d 129, 135-36 (2d Cir. 2000)).
[8] *Id.* (citing *Smith v. McGinnis*, 208 F.3d 13, 17 (2d Cir. 2000)).
[9] Majority at 2 (quoting the Union's Resp. at 2-3).
[10] *Id.*
[11] 67 FLRA 632 (2014).
[12] *Id.* at 633.
[13] *Id.*
[14] *Id.* at 634.
[15] *Id.*
[16] Union's Resp., Attach., Affidavit.
[17] Majority at 2 (quoting Union's Resp. at 2-3).
[18] *Id.*
[19] *See SSA*, 66 FLRA 6, 7 (2011); *U.S. Dep't of Transp. & FAA*, 40 FLRA 690, 690-91 (1991).
[20] 5 C.F.R. § 2429.24(a) ("If you file documents electronically through use of the FLRA's eFiling system, then you may file those documents on any calendar day – including Saturdays, Sundays, and federal legal holidays – and the Authority will consider those documents filed on a particular day if you file them no later than midnight E.T. on that day.").
[21] *See DOJ*, 67 FLRA at 633-34; *see AFGE, Local 1770*, 64 FLRA 953, 955 (extraordinary circumstances demonstrated when U.S. Postal Service failed to deliver reply).
[22] *VA*, 68 FLRA at 234 (agency found to be diligent because it promptly filed exception one day after government shutdown ended).
[23] Majority at 3.

without a significant difference. Equitable tolling and waiver both require a showing of extraordinary circumstances. But that legality aside, the Authority in its show-cause order in *VA* specifically "ordered the [a]gency . . . to address whether the Authority should apply equitable tolling,"[24] and the agency dutifully argued that it should. But the Authority did not include any similar direction to the Union in the later-issued show-cause order in this case. So – with no Authority tolling precedent to rely on – and with no Authority reassurance in the show-cause order that tolling was even a potential issue – the Union in this case argued for waiver. To now penalize the Union for lacking the ability to read the Authority's collective mind regarding tolling, especially where the Union's evidence and arguments support tolling, strikes me as unnecessary, unfair, and wrong.

Accordingly, I would find that the circumstances justify equitably tolling a portion of the Union's filing period, and that the Union timely filed the exceptions.

[24] *VA*, 68 FLRA at 232.