

71 FLRA No. 58

UNITED STATES
DEPARTMENT OF
HEALTH AND HUMAN SERVICES
OFFICE OF CIVIL RIGHTS
(Agency)

and

NATIONAL TREASURY
EMPLOYEES UNION
CHAPTER 218
(Union)

0-AR-5462

ORDER DISMISSING EXCEPTIONS

September 11, 2019

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

I. Statement of the Case

In an award issued December 10, 2018, Arbitrator Lawrence E. Little found that the Agency improperly removed the grievant from her alternative work schedule.

The question before us is whether the Agency filed its exceptions to the Arbitrator's award timely. Because the Agency filed the exceptions one day after the filing deadline and the Agency has not established that the deadline should be equitably tolled, we dismiss the Agency's exceptions.

II. Background and Order to Show Cause

The Arbitrator served his award on the parties by e-mail on December 10, 2018. To be timely, any exceptions to the award had to be filed no later than January 9, 2019.¹

The Agency filed its exceptions electronically using the Authority's eFiling system on January 10, 2019. Because the Agency's exceptions appeared to be untimely, the Authority's Office of Case Intake and

Publication (CIP) issued an order to show cause (the order) why the Agency's exceptions should not be dismissed.² The Agency filed a timely response to the order.

In its response to the order (Agency's response), the Agency argued that circumstances warrant equitable tolling of the filing deadline because: (1) the Agency representative was out of the office on the day the award was served and nobody else in her office received it; (2) the Agency representative was on leave for portions of the filing period; (3) assigning the exceptions to another representative would have prejudiced the Agency; and (4) the one-day delay in filing the exceptions caused no prejudice to the Authority or the Union.³

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."⁴ The Authority may not extend or waive this time limit.⁵ However, the time limit may be equitably tolled if a party demonstrates that: (1) some extraordinary circumstance stood in its way to prevent timely filing; and (2) the party was pursuing its rights diligently.⁶

It is undisputed that the Arbitrator served the award by email on December 10, 2018.⁷ Therefore, any exceptions to the award were required to be filed with the Authority no later than January 9, 2019. The Agency's exceptions were filed using the Authority's eFiling website on January 10 – one day late. The Agency argues that extraordinary circumstances prevented it from filing the exceptions until January 10, and that it was pursuing its rights diligently.⁸

First, the Agency argues that its representative was out of the office unexpectedly because of a death in her family on the date that the Arbitrator emailed the award.⁹ According to the Agency, the representative did not learn of the award's service until December 12, 2018, the day she returned to the office.¹⁰ The Agency also claims that the representative was then out of the office

² Order to Show Cause at 1-2.

³ Agency's Resp. at 1-4.

⁴ 5 U.S.C. § 7122(b); 5 C.F.R. § 2425.2(b).

⁵ 5 C.F.R. §§ 2425.2(b), 2429.23(d).

⁶ *U.S. Dep't of VA, Med. Ctr., Richmond, Va.*, 68 FLRA 231, 233 (2015) (Member Pizzella dissenting) (citing *Lawrence v. Florida*, 549 U.S. 327, 336 (2007)).

⁷ Agency's Resp. at 1.

⁸ *Id.* at 2-4.

⁹ *Id.* at 2.

¹⁰ *Id.*

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

on previously scheduled “use or lose” annual leave on December 17, 2018 and from December 26, 2018 through January 4, 2019.¹¹ The Agency asserts that it diligently pursued its rights because when the representative returned to the office on January 7, 2019, she “thereafter prepared and filed” the Agency’s exceptions.¹²

The Authority has previously held that a representative’s absence from the office due to work obligations or leave does not demonstrate “extraordinary circumstances.”¹³ Here, although the representative was out of the office on the day the award was emailed, she received the award two days later, well in advance of the deadline. And she returned from her “use or lose” leave two days before the exceptions were due. Therefore, the Agency could have timely filed its exceptions but it did not do so.¹⁴ Moreover, while the Agency asserts that the representative “had a good faith belief that she was filing the [e]xceptions on the correct due date,”¹⁵ the Authority has held that a party’s miscalculation of time limits does not demonstrate extraordinary circumstances.¹⁶

Further, the Agency asserts, without explanation, that assigning a different representative to work on the exceptions would have been prejudicial to the Agency.¹⁷ Consequently, we reject the Agency’s argument as a bare assertion.¹⁸

¹¹ *Id.* at 3.

¹² *Id.*

¹³ *See, e.g., U.S. DHS, ICE*, 66 FLRA 880, 883 (2012) (citing *AFGE, Local 1917*, 52 FLRA 658, 661 n.3 (1996)) (representative’s absence from the office was not an extraordinary circumstance).

¹⁴ In a declaration attached to the Agency’s response, the representative states that “Agency officials did not decide to file [e]xceptions until December 20, 2018.” Agency’s Resp., Ex. 1 at 2. However, the Agency’s delayed decision cannot reasonably be considered an extraordinary circumstance that prevented the Agency from filing on time. Rather, the Agency “acted at its own peril” by not making its decision earlier in the filing period. *U.S. Dep’t of the Navy, Portsmouth Naval Shipyard*, 70 FLRA 429, 430 (2018) (*Portsmouth*) (Member DuBester concurring). Regardless, the Agency still had time after December 20 to prepare and file timely exceptions, the representative’s leave notwithstanding.

¹⁵ Agency’s Resp. at 4.

¹⁶ *See, e.g., AFGE, Local 2505*, 64 FLRA 689, 689 (2010) (citing *AFGE, Local 1812*, 59 FLRA 447, 447 n.3 (2003)) (miscalculation of the filing deadline did not constitute extraordinary circumstances).

¹⁷ Agency’s Resp. at 2-3. The Agency included an email sent from the representative to the Arbitrator after the award issued indicating that other Agency personnel had been involved in the case, which undercuts its argument that no other representatives could have worked on the exceptions. Agency’s Resp., Ex. 2 at 1.

¹⁸ *E.g., Portsmouth*, 70 FLRA at 430.

Finally, the Agency claims that the one-day filing delay did not prejudice the Authority or the Union.¹⁹ For support, the Agency cites the lapse in appropriations that shut down the Authority from late December until mid-January.²⁰ The Agency also contends that, despite the Agency’s delay, the Union filed its opposition three days before it was due.²¹ These arguments are unavailing. The Authority expressly notified parties, on its website, that no extension of time would be granted for filing exceptions during the time the Authority was shut down.²² And the Union’s ability to file a timely opposition does not relieve the Agency of the burden to demonstrate that some extraordinary circumstance stood in the Agency’s way to prevent timely filing. Here, the Agency has not demonstrated that any extraordinary circumstance prevented it from timely filing its exceptions.²³

Accordingly, we find that the Agency has not demonstrated that the filing period for its exceptions should be equitably tolled.²⁴

IV. Order

We dismiss the Agency’s exceptions as untimely.

¹⁹ Agency’s Resp. at 4.

²⁰ *Id.*

²¹ *Id.*

²² Agency’s Resp., Ex. 5.

²³ Because we find that the Agency has not demonstrated extraordinary circumstances, we find it unnecessary to address whether the Agency pursued its rights diligently.

²⁴ The Union filed a motion to request leave to file a supplemental submission to address the Agency’s response along with a “[r]esponse to Agency’s [r]esponse to [the o]rder.” However, because the Agency’s response does not establish extraordinary circumstances, we do not consider the Union’s motion.

Chairman Kiko, concurring:

Based on the record before us, I agree with the majority that it is appropriate to dismiss the Agency's exceptions.