

71 FLRA No. 81

UNITED STATES
DEPARTMENT OF VETERANS AFFAIRS
JOHN J. PERSHING VA MEDICAL CENTER
(Agency)

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 2338
(Union)

0-AR-5470

ORDER DISMISSING EXCEPTIONS

November 26, 2019

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

Decision by Member Abbott for the Authority

I. Statement of the Case

The question before us is whether the Agency's exceptions to the Arbitrator's January 3, 2019 award should be dismissed because of the Agency's failure to respond to an Authority deficiency order. Because the Agency has not established extraordinary circumstances justifying waiver of its failure to respond within the time limit, we dismiss the Agency's exceptions in their entirety.

II. Background and Order to Show Cause

The Arbitrator served his award on the parties and the Agency filed timely exceptions.¹ However, the copy of the award that the Agency provided to the Authority was missing several pages. The Authority's Regulations require all excepting parties to include a legible copy of the arbitration award.²

On March 19, 2019, the Authority's Office of Case Intake and Publication (CIP) issued a deficiency order (DO) directing the Agency to correct the procedural deficiency by filing five complete copies of the arbitration award with the Authority by April 2, 2019. The DO stated that "[t]he Agency's failure to comply with this order by April 2, 2019, may result in dismissal of the Agency's exceptions."³

CIP sent the DO to the Agency via certified mail. The tracking information for the mailing demonstrated that the DO was delivered to the Agency's "front desk, reception area, or mail room" on March 22, 2019. The Agency did not respond to the DO.

On April 23, 2019, CIP issued a show-cause order (SCO) directing the Agency to show cause why it should not dismiss its exceptions for failure to respond to an Authority order. In its timely response to the SCO, the Agency argued that the circumstances warrant waiver of the expired Authority time limit because no one within the Agency's human resources office or executive office received the Authority's March 19, 2019 DO, and, therefore, the Agency did not "know" about it.⁴

¹ The Union submitted both an untimely opposition and an untimely supplement to its untimely opposition. On June 19, 2019, the Authority's Office of Case Intake and Publication (CIP) issued a show-cause order (SCO) directing the Union to state why the Authority should not consider its opposition as untimely. The Union timely responded to the SCO. However, because we are dismissing the Agency's exceptions on the basis of its failure to respond to the deficiency order (DO), the issue is moot. *See U.S. Dep't of VA, Veterans Benefit Admin.*, 71 FLRA 315, 315 n.5 (2019) (Member DuBester concurring) (dismissing exceptions on the basis of an agency's failure to timely respond to a show-cause order and finding the union's request to respond to the show-cause order moot).

² 5 C.F.R. § 2425.4(a)(5).

³ DO at 2.

⁴ Agency Resp. to April 23, 2019 SCO at 1.

III. Analysis and Conclusions: The Agency has failed to establish extraordinary circumstances to justify a waiver for the untimely response to the Authority's deficiency order.

The Agency maintains that its exceptions should not be dismissed because of the "unusual or unavoidable circumstance" that the representative did not receive the DO.⁵ This justification fails to establish the extraordinary circumstances necessary to demonstrate good cause for a waiver of the expired time limit for responding to the March 19, 2019 DO.⁶

The Authority has previously held that claiming to have no knowledge of an Authority order does not constitute an extraordinary circumstance warranting waiver.⁷ Such is the case here, and the Agency fails to provide any other reason for its failure to respond to the DO. Any suggestion that an internal mailroom error occurred also fails, as the Authority has also held that internal Agency error does not constitute extraordinary circumstances.⁸

Accordingly, we dismiss the Agency's exceptions.

IV. Order

We dismiss the Agency's exceptions.

Member DuBester, concurring:

I concur in the Decision to dismiss the Agency's exceptions.

⁵ *Id.*

⁶ 5 C.F.R. § 2429.23(b) ("the Authority . . . may waive any expired time limit in this subchapter in extraordinary circumstances").

⁷ See *AFGE, Council 236*, 52 FLRA 1531, 1532 (1997) (finding that "no knowledge" of an Authority order did not constitute an extraordinary circumstance warranting reconsideration of the Authority's order dismissing exceptions).

⁸ See *AFGE, Local 3283*, 66 FLRA 691, 692 (2012) (finding that "error on the part of a party's mailroom does not establish an extraordinary circumstance justifying the waiver of an expired time limit") (citing *NTEU*, 64 FLRA 833, 835 (2010)); see also *AFGE, Nat'l Veterans Affairs Council*, 71 FLRA 315, 316 (2019) (Member DuBester concurring) (finding that failure to process an Authority order with urgency due to internal procedures of x-raying and sorting mail did not establish extraordinary circumstances to justify a waiver).