

71 FLRA No. 110

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 2228
(Union)

and

UNITED STATES
DEPARTMENT OF THE AIR FORCE
28TH FORCE SUPPORT SQUADRON (AFGSC)
ELLSWORTH AIR FORCE BASE, SOUTH DAKOTA
(Agency)

0-NG-3439

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DECISION AND ORDER
DISMISSING PETITION FOR REVIEW

February 21, 2020

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

I. Statement of the Case

The sole question before us is whether the Union's petition for review is timely under § 7117(c)(2) of the Federal Service Labor-Management Relations Statute (the Statute).¹ Because the Union does not demonstrate that it timely filed the petition, we dismiss it.

II. Background and Order to Show Cause

The Agency served an allegation of nonnegotiability regarding one Union proposal on February 5, 2019.² The Union was required to file its petition for review by February 20 to be timely.³ The Union filed its petition using the Authority's eFiling system on February 21.

The Authority's Office of Case Intake and Publication (CIP) issued an order to show cause (the order) why the Union's petition should not be dismissed as untimely.⁴ In the Union's response to the order (response), the Union's representative asserts, in an

unsworn statement, that the Union made "multiple attempts" to file the petition on February 20, but had "technical issues" doing so.⁵

The Union's response includes a copy of an email dated February 21 that had been sent by a CIP employee to the Authority's information technology department referencing a conversation that the CIP employee had with the Union's representative. According to the email, the Union's representative informed CIP that he had "clicked the button [in the eFiling system] to file the petition" on February 20, but that when he checked on the status of the filing in the eFiling system on February 21, the petition did not show as filed.⁶

The email further states that the Union representative tried to refile the petition on February 21, and then contacted CIP when neither of his filing attempts appeared to have been successful.⁷ A screenshot from the eFiling system included with the email, captured on February 21, reflects the petition's "Status" as "Filed," but also indicates – in the field denoting the date the petition was filed – that the petition was "Not Filed."⁸ Subsequent to its conversation with CIP, the Union completed the electronic filing of its petition on February 21.⁹

III. Analysis and Conclusion: The Union's petition is untimely.

The time limit for filing a petition for review is no later than fifteen days after the Agency serves the Union with a written allegation of nonnegotiability.¹⁰ Documents filed electronically through the Authority's eFiling system are considered filed on a particular day if they are filed "no later than midnight E.T. on that day."¹¹

In its response to the order, the Union does not contend that it timely filed its petition, but instead asks the Authority to "accept [its] reasoning . . . on why the timely filing was not achieved, though attempted."¹² The Authority, however, may not waive or extend the time period for filing a petition for review under § 7117(c)(2) of the Statute.¹³ Because the Union has not otherwise

¹ 5 U.S.C. § 7117(c)(2).

² March 19, 2019 Order to Show Cause (Order) at 2. All dates discussed hereafter occurred in 2019.

³ 5 C.F.R. § 2424.21(a)(1).

⁴ Order at 2.

⁵ March 28 Resp. (Resp.) at 2.

⁶ Resp., Attach. 1, Email at 1.

⁷ *Id.*

⁸ *Id.*

⁹ Pet. at 9.

¹⁰ 5 U.S.C. § 7117(c)(2); 5 C.F.R. § 2424.21(a)(1).

¹¹ 5 C.F.R. § 2429.24(a); *see also id.* § 2429.21(b)(v).

¹² Resp. at 2.

¹³ 5 U.S.C. § 7117(c)(2); 5 C.F.R. § 2429.23(d).

demonstrated that it filed its petition on or before February 20, we must dismiss the petition as untimely.¹⁴

IV. Order

We dismiss the Union's petition.

¹⁴ As noted, the email submitted as part of the Union's response states that the Union's representative "clicked the button [in the eFiling system] to file the petition" on February 20. Resp., Attach. 1, Email at 1. This unsworn hearsay statement is insufficient to establish that the petition was timely filed. *See, e.g., AFGE, Local 997*, 66 FLRA 499, 499 (2012) (concluding that the agency's "unsubstantiated statements that it [timely] filed" its statement of position are not sufficient to establish timely filing).

Member Abbott concurring:

I agree with my colleagues that the Union's petition here is untimely and so, should be dismissed.

I write separately because the facts as given by the majority poorly capture the sequence of events, and even suggest that Federal Labor Relations Authority (FLRA) employees may have given encouragement to the Union to believe that its petition was successfully filed but was somehow lost or trapped in the eFiling system. I do not want confusion to settle in the federal Labor Relations (LR) community.¹⁵

While the Union's representative did contact the FLRA's Office of Case Intake and Publication (CIP), the Union representative only did so later that afternoon, only *after* learning that neither of his filing attempts appeared to have been successful. Therefore, the email from our own employee has a different implication when the email (and CIP's self-generated screen shot) is more accurately viewed as having been sent after the Union had already attempted to re-file on February 21st. Simply, we don't know what the CIP employee would have seen in the eFiling system had the Union representative called early in the morning, before he attempted to re-file.

As well, the majority missed the opportunity to remind the LR community that we have previously held parties accountable for adverse results when they delayed until the last minute to file documents electronically through the FLRA's eFiling system.¹⁶ This petition is not the first filing, nor most likely will it be the last, to be dismissed under a cloud of vague assertions of technical problems. The Authority will not become the arbiter of whether sundry "the-dog-ate-it" excuses are or are not true. Either a filing is timely or it is not. In this case, it clearly was not.

This case is another opportunity missed.

¹⁵ See *U.S. DHS, U.S. CBP, El Paso, Tex.*, 70 FLRA 623, 625 (2018) (Member Abbott concurring, Member DuBester dissenting) (Concurring Opinion of Member Abbott).

¹⁶ *U.S. Dep't of the Navy, Portsmouth Naval Shipyard*, 70 FLRA 429, 430 n.25 (2018) (Member DuBester concurring).