

63 FLRA No. 100

SOCIAL SECURITY ADMINISTRATION
HEADQUARTERS
WOODLAWN, MARYLAND
(Agency)

And

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 1923
(Union)
0-AR-4115

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DECISION

May 8, 2009

Before the Authority: Carol Waller Pope, Chairman and
Thomas M. Beck, Member

I. Statement of the Case

This matter is before the Authority on exceptions to an award of Arbitrator Arlene J. M. Grant filed by the Agency under § 7122(a) of the Federal Service Labor-Management Relations Statute (the Statute) and part 2425 of the Authority's Regulations. The Union filed an opposition to the Agency's exceptions.

The Agency challenges the Arbitrator's determination that the grievant be compensated for the Agency's denial of Religious Compensatory Time (RCT). For the reasons that follow, we find the Agency's exceptions untimely filed, and therefore, we dismiss the exceptions.

II. Background and Arbitrator's Award

As relevant here, the Agency denied the grievant's request for 248 hours of RCT, claiming that it would cause an undue hardship on the Agency. The Union filed a grievance, which was submitted to arbitration. The Arbitrator concluded that the Agency violated the parties' agreement and the grievant's rights to equal employment opportunity when it denied her request. *See* Award at 7, 13-14. As a remedy, the Arbitrator ordered the Agency to compensate the grievant for the adjusted total hours of RCT requested as either cash, or as a credit of RCT to be used at the grievant's election.

III. Positions of the Parties**A. Agency's Exceptions**

The Agency claims that the Union failed to establish a *prima facie* case of discrimination under Title VII of the Civil Rights Act of 1964 (Title VII), 42 U.S.C. §§ 2000e(j) and 2000e-2(a)(1), which prohibits discrimination based on religion and "requires employers to accommodate religious beliefs and practices unless such accommodation would place an undue burden upon the employer." Exceptions at 5 (citing 42 U.S.C. §§ 2000e(j) and 2000e-2(a)(1)). The Agency also argues that the Arbitrator erred in finding that providing the grievant with 248 hours of RCT would not pose an undue hardship on the Agency. Finally, the Agency alleges that the Arbitrator's remedy is contrary to various laws, including Office of Personnel Management regulations, Agency regulations, and the Back Pay Act. *See id.* at 17-21.

B. Union's Opposition

The Union asserts that the Arbitrator correctly found that the grievant established a *prima facie* case that the Agency failed to accommodate her religious beliefs. The Union also argues that the Agency failed to demonstrate that granting the requested RCT to the grievant imposed an undue hardship on the Agency. Further, the Union contends that, even absent the violation of Title VII, the Arbitrator's award can be sustained because the Agency violated the parties' RCT Memorandum of Understanding. Opposition at 21. Finally, the Union claims that the Arbitrator's remedy is consistent with law.

IV. Order to Show Cause

The Arbitrator's award is dated June 13, 2005. However, because neither party received the award when it was originally mailed to them, it was served on the parties by electronic mail (e-mail) on June 21, 2006. *See* Award at 14. Based on the date of service, any exceptions to the Arbitrator's award had to be post-marked by the U.S. Postal Service, filed in person, by fax, or received from commercial delivery with the Authority no later than July 20, 2006, in order to be timely. 5 C.F.R. §§ 2425.1(b), 2429.21(b), 2429.24(e). The Agency's exceptions were filed with the Authority by mail (postmarked) on July 21, 2006. *See* Order to Show Cause (Order) at 2.

As such, the Authority issued an Order directing the Agency to show cause why its exceptions should not be dismissed as untimely filed. In its response, the Agency asserts that its exceptions were timely filed

because the award was not served in accordance with the Authority's Regulations, and, as such, the time limit for filing exceptions "never began to run." Agency's Response to Order to Show Cause (Agency's Response) at 5. In this regard, the Agency contends that the Authority's Regulations do not authorize service by e-mail. Agency's Response at 4. Further, the Agency argues that, even in forums that allow service by e-mail, the parties must consent to such service, and the Agency did not consent to that method of service here. *See id.* The Agency also claims that, if the Authority were to deem the date of service of the award as the date the e-mail was sent, then the Authority would be in violation of the Administrative Procedure Act (APA) because it will have changed its regulations without providing the public with notice and an opportunity to comment. *See id.* at 6. In addition, the Agency asserts that a determination that the Agency was served on the day the e-mail attaching the award was sent would violate due process because e-mail is not an allowable form of service, and the Agency had not consented to such service. *Id.* at 8. Thus, according to the Agency, the only date on which service can "be deemed perfected" is June 22, 2006, the date it became aware of the award. *Id.* at 9. Finally, the Agency claims that the Union was afforded an opportunity to, and did, reply to the Agency's exceptions.

V. Analysis and Conclusions

Under § 7122 of the Statute, the time limit for filing an exception to an arbitration award is 30 days "beginning on the date the award is served on the [filing] party[.]" 5 U.S.C. § 7122(b); *see also* 5 C.F.R. § 2425.1(b). The 30-day time limit may not be extended or waived by the Authority. 5 C.F.R. § 2429.23(d); *see also United States Info. Agency*, 49 FLRA 869, 871-73 (1994).

A. The award was served on the parties

The Agency argues that the award was not properly served on the parties because 5 C.F.R. § 2429.27 of the Authority's Regulations do not authorize service of an arbitral award by e-mail.

1. 5 C.F.R. § 2429.27 of the Authority's Regulations does not address the method of service by an arbitrator on the parties

Consistent with the plain wording of 5 C.F.R. § 2429.27, the provision applies only to "any party filing a document [under] this subchapter[.]" 5 C.F.R. § 2429.27. Pursuant to 5 C.F.R. § 2421.11, an arbitrator is not a "party" in proceedings before the Authority. *See* 5 C.F.R. § 2421.11. Consequently, 5 C.F.R. § 2429.27

does not apply to the method of service of an arbitrator's award on the parties.

In this regard, we note that the question of how an arbitrator is to serve his or her award on the parties is typically addressed informally between the parties and the arbitrator at or after the hearing, or it may be addressed in the arbitration provision of the collective bargaining agreement. *See Elkouri & Elkouri, How Arbitration Works*, 314-315 (Marlin M. Volz and Edward P. Coggin, eds., BNA Books 5th ed. 1997). We further note that it is the function and responsibility of the arbitrator to determine procedural matters upon which the parties have not reached agreement. *See id.* at 314; *see also United Steelworkers of America v. Ideal Cement Co., Div. of Ideal Basic Indus., Inc.*, 762 F.2d 837, 841 (10th Cir. 1985) (*United Steelworkers of America*) (holding that matters of procedure lie solely within the discretion of the arbitrator). Therefore, unless the parties specifically limit the powers of the arbitrator in deciding the various aspects of the issue submitted to him, it is "presumed that [the parties] intend[ed] to make the arbitrator the final judge on any questions which arise in the disposition of the issue" Elkouri and Elkouri, *How Arbitration Works* at 517-18. As the Authority's regulations do not currently specify or limit the method of service of an arbitrator's award on the parties, and the evidence does not indicate that the parties placed any limitations on the method of service of the award, the Arbitrator had the option to select the method of service. *See id.*

The Agency argues that, even in forums that allow service by e-mail, the parties must consent to such service and that, in this case, the Agency did not consent to service by e-mail. *See* Agency's Response at 4. In support of its claim, the Agency submits an affidavit, dated October 27, 2006, indicating that it did not consent to service by e-mail. *See* Agency's Response, Attach. A.

As noted above, in arbitration proceedings, the manner in which an arbitrator serves his award on the parties is a matter typically addressed informally by the arbitrator and the parties. When the parties do not reach agreement on procedural matters, these matters are the responsibility of the arbitrator. *See Elkouri & Elkouri, How Arbitration Works* at 314; *United Steelworkers of America*, 762 F.2d at 841. Here, there is no evidence in the record that indicates that the Arbitrator was aware of any agreement or limitation on the method of service of the award. In this regard, the Agency's affidavit does not indicate that, at the time the award was transmitted, the Arbitrator knew that the Agency had not consented to service by e-mail. Consequently, as 5 C.F.R.

§ 2429.27 does not cover the method of service of an arbitrator's award on the parties and, as the record does not show that there was an agreement or limitation on the method of service of the award, the Arbitrator's selection of e-mail as a method of service was within her authority. *See Elkouri & Elkouri, How Arbitration Works* at 314; *United Steelworkers of America*, 762 F.2d at 841.

We note that in *Department of Labor*, 61 FLRA 64, 64 n.2 and in *United States Department of the Treasury, Internal Revenue Service., Washington., D.C.*, 60 FLRA 966, 967 n.2 (2005), the Authority construed the service provision of § 2429.27(d) to apply to the service of arbitration awards. To the extent that the Authority's decisions in those cases are inconsistent with the wording of the regulation, they will no longer be followed.

2. There is no violation of the Administrative Procedure Act (APA)

The Agency argues that, if the Authority concludes that the date of service of the award is the date the e-mail was sent, then the Authority would be in violation of the APA, 5 U.S.C. § 553(b) and (c) because it would have changed its regulations without providing the public with notice and an opportunity to comment.¹ *See* Exceptions at 6. In support of its argument the Agency cites *Alaska Professional Hunters Association, Inc. v. Federal Aviation Administration*, 177 F.3d 1030, 1033-34 (D.C. Cir. 1999) (*Alaska Prof. Hunters*) and *Tunik v. MSPB*, 407 F.3d 1326, 1341 (Fed. Cir. 2005) (*Tunik*). We find the Agency's argument, in this regard, unpersuasive.

The Administrative Procedure Act requires an administrative agency to publish notice of a proposed substantive rule in the Federal Register to allow an opportunity for interested members of the public to comment. 5 U.S.C. §§ 553(b) and (c). The rulemaking requirements of 5 U.S.C. § 553 apply only to substantive rules. Substantive rules are those which effect a change in existing law or policy. *Powderly v. Schweiker*, 704 F.2d 1092, 1098 (9th Cir. 1983) (*Powderly*) (a rule is not substantive when it does not change any existing law or policy, nor remove any previously existing rights). Substantive rules create law, and usually implement existing law, incrementally imposing general, extra-statutory obligations pursuant to authority properly delegated by the legislature. *See, e.g. Alcaraz v. Block*, 746 F.2d 593, 613 (10th Cir. 1984). Interpre-

tive rules are those which merely clarify or explain existing law or regulations. *See Powderly*, 704 F.2d at 1098. Interpretive rules, general statements of policy and rules of agency organization, procedure or practice are exempt from the requirements of § 553(b) and (c). *See* 5 U.S.C. § 553(b)(A).

In *Alaska Prof. Hunters*, the court found that notice and comment were required under the APA because the agency's action extended the coverage of a regulation to a group of individuals who until then had been exempt from its coverage. In *Tunik*, a case which the Agency also cites, the court found that the MSPB violated the APA when it attempted to overturn a regulation which gave certain employees the right to file complaints when facing removals, or other adverse actions. The court found that to the extent that promulgation of agency regulations is subject to the requirements of 5 U.S.C. § 553, the repeal of those regulations is also subject to 5 U.S.C. § 553. *See Tunik*, 407 F.3d at 1341. In *Tunik*, the court further held that the exception in 5 U.S.C. § 553(b)(3)(A) did not apply to the revoked regulation because procedural requisites in manuals or handbooks for the removal of agency employee were substantive rules. *Tunik*, 407 F.3d at 1344. (citing *Chrysler Corp. v. Brown*, 441 U.S. 281 (1979) (distinguishing substantive or legislative rule from interpretive rule)).

This case is distinguishable from the cases cited by the Agency. Here, in contrast to *Alaska Prof. Hunters* and *Tunik*, the 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 have an impact on any substantive right. *Cf. Anderson v. Butz*, 550 F.2d 459 (9th Cir. CA 1977) (where the Agency's interpretation was found to have an impact on the substantive rights of a segment of the public). In contrast to *Alaska Prof. Hunters* and *Tunik*, the Authority's clarification of its regulation here does not create any new obligations or deny rights to any groups of individuals. The Authority is merely explaining what the regulation already provides. *See Powderly*, 704 F.2d at 1098.

In this regard, we note that agencies are given deference when interpreting their own regulations. *See R.I. Hosp. v. Leavitt*, 548 F.3d 29, 34 (1st Cir. 2008) (courts defer to the views of the agency Congress has entrusted with relevant rule-making authority, affording considerable deference to the agency's interpretation of regulations promulgated under that authority). Moreover, the Authority's clarification of 5 C.F.R. § 2429.27 is consistent with the plain language of the regulation. *See* 5 C.F.R. §§ 2429.27; § 2421.11; *see also Glover v. West*,

1. The pertinent sections of the APA are set forth in the Appendix to this decision.

185 F.3d 1328, 1332 (Fed. Cir.1999) (“in construing a statute or regulation, [the court] commence[s] by inspecting its language to ascertain its plain meaning . . . [i]f we conclude that the terms of the statute or regulation are unambiguous, no further inquiry is usually required”). Accordingly, as the Authority is merely explaining what the regulation already provides, there is no need for notice under the APA.

3. There is no violation of due process

The Agency argues that service by e-mail violates due process because due process requires adequate notice “so that a party may be afforded the opportunity to be heard.” Agency’s Response at 8. The Agency asserts that service must be reasonably calculated under all the circumstances to apprise the interested parties. *See id.* In support of this argument, the Agency cites, among others, *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950) (*Mullane*) (“[a]n elementary and fundamental requirement of due process . . . is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections”) and *Rio Props. Inc. v. Rio Int’l Interlink*, 284 F.3d 1007 (9th Cir. 2002) (*Rio Properties*).

On the question of whether e-mail, as a form of service, complies with the requirements of due process, we note that trial courts have authorized a wide variety of alternative methods of service. For example, in applying Rule 4(f)(3) of the Federal Rules of Civil Procedure,² some of the alternative methods of service that the courts have authorized include: publication, ordinary mail, mail to the defendant’s last known address, delivery to the defendant’s attorney, telex, and most recently, e-mail. *See Securities and Exch. Comm’n v. Tome*, 833 F.2d 1086, 1094 (2nd Cir. 1987) (publication); *Smith v. Islamic Emirate*, 2001 WL 1658211 (S.D.N.Y. Dec. 26, 2001) (publication); *Levin v. Ruby Trading Corp.*, 248 F. Supp. 537, 541-44 (S.D.N.Y. 1965) (ordinary mail); *Int’l Controls Corp. v. Vesco*, 593 F.2d 166, 176-78 (2nd Cir. 1979) (mail to last known address); *Forum Fin. Group LLC v. Harvard College*, 199 F.R.D. 22, 23-24 (D. Me. 2001) (service to defen-

dant’s attorney); *New Eng. Merchs. Nat’l Bank v. Iran Power Generation & Transmission Co.*, 495 F. Supp. 73, 80 (S.D.N.Y. 1980) (telex) (*New England Merchants Nat’l Bank*); *Broadfoot v. Diaz*, 245 B.R. 713, 719-21 (N.D. Ga. 2000) (e-mail).

Further, in *Rio Properties*, a case cited by the Agency, the court found that service by e-mail was reasonably calculated to apprise the defendant — an international corporation — of the action and afford it an opportunity to respond. In this connection, the court noted that the Constitution does not require any particular means of service of process, only that the method selected be reasonably calculated to provide notice and an opportunity to respond. *See* 284 F.3d at 1016-17 (citing *Mullane*, 339 U.S. at 314). The court also noted that “[c]ourts . . . cannot be blind to changes and advances in technology.” *See Rio Properties*, 284 F.3d at 1017 (quoting *New England Merchants Nat’l Bank*, 495 F. Supp. at 81); *see also, Philip Morris USA Inc. v. Veles Ltd.*, 2007 U.S. Dist. LEXIS 19780, 8.

As courts have embraced advances in technology, and e-mail has become an acceptable method of service within the legal system, we find that the Arbitrator’s selection of e-mail, under the circumstance of this case, was reasonable. *See, e.g. Rio Properties*, 284 F.3d at 1017-18. Moreover, we find that, as the parties provided the Arbitrator with their e-mail addresses, the Arbitrator had no reason to believe that e-mail was not an acceptable method of communication. *See Maclean-Fogg Co. v. Ningbo Fastlink Equip. Co.*, 2008 U.S. Dist. LEXIS 97241, 6. In addition, we note that, here, there is no uncertainty as to whether the e-mail was received because the Agency acknowledged receipt of the e-mail with the attached award. *See* Agency’s Response at 2. Also, the record indicates that on June 23, 2006, the Union sent an e-mail to the Agency calling its attention to the Arbitrator’s e-mail with the attached award and to the fact that the Arbitrator had included a “new certificate of service so [that the Agency] would have a new 30 days to appeal.” Agency’s Response, Attachment C. Consequently, as the record demonstrates that the Agency received the award, we find that the Agency had sufficient notice and ample opportunity to file its exceptions. Therefore, the Agency has not demonstrated that it was denied due process.

Accordingly, based on the foregoing, we find that the Agency has failed to show that service of the Arbitrator’s award by e-mail was not an adequate form of service. Consequently, the Arbitrator’s award was properly served on the parties.

2. Rule 4(f)(3) provides, in pertinent part:

(f) Serving an Individual in a Foreign Country. Unless federal law provides otherwise, an individual—other than a minor, an incompetent person, or a person whose waiver has been filed—may be served at a place not within any judicial district of the United States:

....

(3) by other means not prohibited by international agreement, as the court orders.

- B. The date of service is the date the award was transmitted by e-mail

The Agency argues that in the event that the Authority concludes that the award was properly served on the parties, the date of service should be the date it gained actual notice of the award, June 22, 2006, rather than the day the Arbitrator transmitted the award, June 21, 2006. Agency's Response at 1.

It is well established that in determining the timeliness of exceptions, it is the date of service — not the date of receipt of the award — that controls. *See e.g. AFGE, Local 2401*, 58 FLRA 1 (2002) (*AFGE, Local 2401*). Also, in forums where service by electronic methods are authorized, the day of service is considered to be the date of transmission. *See Fed. R. Civ. P. 5(b)(2)(E)*. In this case, the certificate of service contained in the Arbitrator's award specifically states that, on June 21, 2006, the Arbitrator's decision "was sent via electronic mail." Award at 14. Accordingly, the date of service of the award is June 21, 2006, which is the date certified by the Arbitrator as the day of service of the award. *See AFGE, Local 2401*, 58 FLRA at 1. We also note that the Agency does not dispute that the award was transmitted by e-mail on June 21, 2006.

As such, June 21, 2006 constitutes the date on which the 30-day time limit began to run. *See* 5 U.S.C. § 7122(b); *see also* 5 C.F.R. § 2425.1(b).³ In order to be timely, any exception to the Arbitrator's award was required to be postmarked by the U.S. Postal Service, filed in person, by facsimile, or received by commercial delivery with the Authority no later than July 20, 2006. 5 C.F.R. §§ 2425.1(b), 2429.21(b), 2429.24(e). As the Agency's exceptions were filed with the Authority by mail (postmarked) on July 21, 2006, the exceptions were untimely.

VI. Decision

The Agency's exceptions are dismissed.⁴

3. Member Beck notes that, in *AFGE, Local 2054*, 63 FLRA 169, 173 n.3 (2009), he noted that the question of whether the date that an arbitral award is served should be included or excluded in calculating the 30-day period to file exceptions under 5 U.S.C. § 7122(b) of the Statute and § 2425.1 of the Authority's Regulations should be revisited either through the rulemaking process or when such issue is properly raised by a party filing exceptions.

4. In light of this conclusion, we do not address the merits of the Agency's exceptions.

APPENDIX

Chapter 5. ADMINISTRATIVE PROCEDURE

5 U S C § 553 Rule making

(b) General notice of proposed rule making shall be published in the Federal Register, unless persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law. The notice shall include—

- (1) a statement of the time, place, and nature of public rule making proceedings;
- (2) reference to the legal authority under which the rule is proposed; and
- (3) either the terms or substance of the proposed rule or a description of the subjects and issues involved.

Except when notice or hearing is required by statute, this subsection does not apply—

- (A) to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice; or

....

(c) After notice required by this section, the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation. After consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose. When rules are required by statute to be made on the record after opportunity for an agency hearing, sections 556 and 557 of this title [5 U.S.C. §§ 556 and 557] apply instead of this subsection.