64 FLRA No. 62

UNITED STATES
DEPARTMENT OF VETERANS AFFAIRS
VETERANS AFFAIRS MEDICAL CENTER
HAMPTON, VIRGINIA
(Agency)

and

NATIONAL ASSOCIATION
OF GOVERNMENT EMPLOYEES
SERVICE EMPLOYEES
INTERNATIONAL UNION
(Petitioner/Union)

WA-RP-08-0074

ORDER DISMISSING
APPLICATION FOR REVIEW

January 12, 2010

Before the Authority: Carol Waller Pope, Chairman, and Thomas M. Beck and Ernest DuBester, Members [1]

I. Statement of the Case

This case is before the Authority on an application for review filed by the Agency under § 2422.31 of the Authority's Regulations. [2] The Petitioner/National Association of Government Employees, Service Employees International Union (Union) filed an opposition to the Agency's application for review.

The Regional Director (RD) determined that four employees occupying Administrative Officer (AO) positions may not be excluded from the collective bargaining unit because they are not confidential employees as defined by the Federal Service Labor-Management Relations Statute (the Statute). For the reasons that follow, we dismiss the Agency's application for review as untimely filed.

II. Order to Show Cause

On September 11, 2009, the RD issued a Decision and Order (D&O) on the Union's petition to clarify the bargaining unit at the Veterans Affairs Medical Center in Hampton, Virginia. The D&O noted that, under § 2422.31 of the Authority's Regulations, a party may file an application for review within 60 days of the date of the D&O. D&O at 9. The D&O further specified that the deadline for filing an application for review in this case was November 13, 2009. *Id.*

The D&O incorrectly stated the due date for filing an application for review. As the D&O is dated September 11, 2009, the due date for filing an application for review was actually November 10, rather than November 13.

The Agency's application for review was filed by mail November 13, 2009 — in compliance with the erroneous deadline reflected in the D&O, but three days after the actual November 10 deadline. As the Agency's application for review appeared to be untimely filed, the Authority issued an Order directing the Agency to show cause why the application should not be dismissed. In response, the Agency cited the D&O's statement of the due date, arguing that "equity and fundamental fairness" required that the Agency should not be punished for the RD's mistake. Agency's Response to Order to Show Cause at 1-2. In opposition, the Union contended that, pursuant to Authority case law, the application for review should be dismissed as untimely. Opposition at 6-7.

III. Analysis and Conclusion

Section 7105(f) of the Statute provides that an application for review of the Regional Director's Decision and Order must be filed with the Authority within sixty days. In §§ 2422.31(a) and 2429.23(d) of its Regulations, the Authority has established that this provision of the Statute may not be extended or waived. *See* 5 C.F.R. § 2422.31 (a) ("The sixty (60) day time limit provided for in 5 U.S.C. 7105(f) may not be extended or waived."); 5 C.F.R. § 2429.23(d) (The "time limit[] established in 5 U.S.C. 7105(f) . . . may not be extended or waived under this section."). As a result, the Authority has not tolled the time limit set forth in § 7105(f) of the Statute based on equitable considerations. *See U.S. Dep't of Housing & Urban Dev., Wash., D.C.*, 34 FLRA 307, 309 (1990) (*HUD*); *cf. U.S. Dep't of Housing & Urban Dev.*, 27 FLRA 852, 853 (1987) (finding same for § 7122(b) of the Statute). The Authority, accordingly, consistently has dismissed as untimely applications for review in circumstances like those pre-

1. Member DuBester's dissenting opinion is set forth at the end of this decision.

2. Section 2422.31 of the Authority's Regulations provides, in pertinent part, that the Authority may grant an application for review when "[e]stablished law or policy warrants reconsideration . . . [or] [t]here is a genuine issue over whether the Regional Director has . . . [f]ailed to apply established law . . . [or] [c]ommitted a clear and prejudicial error concerning a substantial factual matter." 5 C.F.R. § 2422.31(c)(2), (3)(i), (iii).

sented here. *See, e.g., id.* at 310; *Dep't of Veterans Affairs, John J. Pershing Med. Ctr., Poplar Bluff, Mo.*, 45 FLRA 791, 792 (1992). [3]

Further, as in *HUD*, (1) the Agency "is well acquainted with the Authority's Rules and Regulations and the Statute; (2) the Regional Director stated in his decision that the application for review had to be filed within 60 days of the date of his decision and cited [2422.31] . . .; and (3) all of the information necessary for the Agency to satisfy timely filing requirements was readily available." 34 FLRA at 310.

Thus, although this situation is regrettable, and we certainly do not condone an FLRA employee providing incorrect information to a filing party, "we are without authority to modify our existing Rules and Regulations by merely issuing a decision." *HUD*, 34 FLRA at 309. Accordingly, we dismiss the application for review as untimely. [4]

IV. Order

The application for review is dismissed.

3. Member Beck also notes that the Authority's precedent regarding § 7105(f) is consistent with the D.C. Circuit's decision in *Carter/Mondale Presidential Committee, Inc.* v. *FEC*, 711 F.2d 279 (D.C. Cir. 1983); *cf. Donovan* v. *Hahner, Foreman and Harness*, 736 F.2d 1421 (10th Cir. 1984) (applying approach of D.C. Circuit). In *Carter/Mondale*, the court found that the time limit in § 9041 of the Presidential Primary Matching Payment Act was a jurisdictional prerequisite. In making that finding, the court considered, among other things, that the parties were legally sophisticated, the statute was not remedial in nature, and the statute provided judicial review procedures that followed a detailed administrative review process. *Id.* at 284 n.7. These factors are present here as well: (1) the parties in representation matters tend to be legally sophisticated; (2) the clarification of unit representation process is not remedial; and (3) the statute and regulations provide for review by the Authority following a detailed administrative process.

4. Chairman Pope also notes that the Agency neither requests that applicable precedent, including *HUD*, be overruled, nor provides a basis to do so.

Dissenting Opinion of Member DuBester:

The issue presented by this case is whether to equitably toll the Agency's time limit for filing its application for review. The Majority rejects equitable tolling, relying on Authority regulations that are inapposite, and on Authority case law that expressly claims not to reach the issue. [1] In doing so, the Majority ignores Authority precedent that squarely addresses when equitable tolling should be applied. Therefore, I dissent.

Authority and Other Precedent Addressing Equitable Tolling

Authority precedent provides clear guidance concerning how to determine whether a time limit is subject to equitable modification. Whether a statutory time limit such as § 7105(f)'s is "subject to 'equitable considerations' to waive or toll the time limit is primarily a determination of the congressional policy underlying that portion of the act to which the time limit attaches." *U.S. Dep't of Housing and Urban Dev.*, 27 FLRA 852, 854 n.5 (1987) (citations omitted) (*U.S. HUD); cf., e.g., Former Employees of Sunoco Prod. Co. v. Chao*, 372 F.3d 1291, 1297 (Fed. Cir. 2004) (statutory time limit within which a party must appeal a federal agency decision subject to tolling absent contrary congressional intent). The determinative nature of congressional intent in properly understanding a time limit's amenability to equitable modification is a principle that has continued to resonate in subsequent equitable tolling case law. *See, e.g., U.S. v. Brockamp*, 519 U.S. 347, 350 (1997); *Kirkendall v. Dep't of the Army*, 479 F.3d 830, 835-43 (Fed. Cir. 2007).

In *U.S. HUD*, the Authority applied this principle in ruling that the time limit for filing exceptions to arbitrators' awards was not subject to equitable modification. Construing relevant congressional policy, the Authority reasoned: "The structure of the Statute and its legislative history disclose that Congress' intent regarding the arbitration process is to promote its primacy and finality by limited, expeditious review by the Authority." *U.S. HUD*, 27 FLRA at 853.

The Authority in *U.S. HUD* contrasted its ruling with precedent approving, on the same principle, the application of equitable considerations to modify the time limit for filing unfair labor practice (ULP) charges set forth in § 7118(a)(4)(A) of the Statute. *Id.* at 855 n.5 (discussing *Dep't of the Air Force, Headquarters 832d Combat Support Group, DPCE, Luke Air Force Base, Ariz.*, 24 FLRA 1021 (1986) (*Luke AFB*)). In *Luke AFB*, the Authority found "nothing in the legislative history of § 7118(a)(4)(A) of the Statute precluding the application of equitable principles to suspend for a time the running of [the time limit for filing ULP charges.]" *Id.* The Authority added: "In fact, suspension of the time period [for filing ULP charges] is consistent with the intent of Congress reflected in [§§] 7116 and 7118 . . . that [ULPs] should be remedied." *Luke AFB* at 1025-26*; see also EEOC, Wash. D.C.*, 53 FLRA 487, 497-98 (1997) (*EEOC*).

Congress' intent regarding the process for determining appropriate bargaining units likewise supports application of equitable considerations to modify § 7105(f)'s time limit for filing applications for review. Nothing in § 7105(f)'s language or legislative history precludes the application of such equitable principles. Moreover, equitable modification of § 7105(f)'s time limit is consistent with congressional intent that representation matters be thoroughly and completely litigated. As Congress understood when it enacted the representation provisions of the Statute, and similar to private sector practice under the National Labor Relations Act, Authority representation case decisions are not the final step in resolving representation matters in the federal sector. Rather, such decisions are subject to collateral attack in refusal to bargain ULP proceedings, including judicial review. *E.g., NLRB v. FLRA*, No. 09-1119 (D.C. Cir. filed Apr. 10, 2009). This contrasts with congressional intent regarding exceptions to arbitrators' awards, which are not subject to collateral attack in ULP proceedings or, in most instances, to judicial review. *See, e.g., U.S. Air Force, Air Force Logistics Command, Wright-Patterson AFB, Ohio*, 15 FLRA 151, 153-54 (1984), *aff'd sub nom. Dep't of the Air Force v. FLRA*, 775 F.2d 727, 734-35 (6th Cir. 1985).

Ignoring the clear guidance of precedent like *U.S. HUD*, *Luke AFB*, and *EEOC*, the Majority's reasoning is flawed in a number of respects. The Majority's reliance on Authority regulations addressing the extension or waiver of time limits, but not their equitable tolling, is misplaced. Equitable tolling of time limits is different from extension or waiver, a circumstance reflected by, among other things, the different criteria that apply to each. Extension of a time limit is based on a showing of "good cause." *See* 5 C.F.R. § 2429.23(a). Waiver is only justified by "extraordinary circumstances." *See* 5 C.F.R. § 2429.23(b). Differing from both, equitable tolling depends on the weighing of various equitable factors. *See, e.g., EEOC*, 53 FLRA at 498-99 (identifying five equitable factors that should be weighed when considering whether to equitably

1. *U.S. Dep't of Housing and Urban Dev., Wash., D.C.*, 34 FLRA 307 (1990) (*HUD*).

modify a time limit in a given case). Reflecting the distinct character of equitable tolling, the Authority in *U.S. HUD* focused on the Statute's legislative history, not the Authority's regulations, when it reasoned, based on the Statute's legislative history, that the time limit for filing exceptions to arbitration awards was not subject to equitable tolling. *See U.S. HUD*, 27 FLRA at 853.

The Majority's flawed reasoning also extends to its reliance on the *HUD* case, 34 FLRA 307 (1990). *HUD* is noteworthy principally for its mistaken reliance on Authority regulations addressing the extension or waiver of time limits, discussed above. In any event, *HUD* does not provide a substitute for the Authority's established analysis for determining whether a time limit is subject to equitable modification, as explained in *U.S. HUD, Luke AFB, and EEOC*, or excuse the Majority's failure to consider it.

Finally, Member Beck's reliance on the *Carter* and *Donovan* cases [2] does not supplant the clear Authority precedent discussed previously. The *Carter* ruling in particular is founded on the structure of a unique statute [3] as a "key element," and in part on a distinction between remedial proceedings and "judicial review procedures that follow a detailed administrative review process[.]" *Carter*, 711 F.2d at 284 n.7. Reference to it, in the context of a statute completely unlike our own, is an unjustifiable attempt to avoid the consequences of applying the Authority's own precedent, discussed previously.

Because I conclude that § 7105(f)'s time limit should be subject to equitable modification, I turn to the issue of how to apply those equitable considerations in this case.

Application of Equitable Considerations to § 7105(f)'s Time Limit

Authority precedent identifies five equitable factors that should be weighed when considering whether to equitably modify a time limit in a given case. These factors are: (1) lack of actual notice of the filing requirement; (2) lack of constructive knowledge of the filing requirement; (3) diligence in pursuing one's rights; (4) absence of prejudice to the other party; and (5) the affected party's reasonableness in remaining ignorant of the notice requirement. *See EEOC*, 53 FLRA at 498-99 (citing *Kelley v. NLRB*, 79 F.3d 1238, 1248 (1st Cir. 1996)); *see also Andrews v. Orr*, 851 F.2d 146, 151 (6th Cir. 1988). For the following reasons, the Authority should modify § 7105(f)'s time limit in this case and consider the Agency's application for review.

The first, third, fourth, and fifth factors all weigh in favor of equitably modifying § 7105(f)'s time limit in the particular, narrow circumstances of this case. As described above, those circumstances are that an Authority official, authorized to exercise decisional authority, expressly but erroneously set forth in writing the due date for obtaining administrative review by the Authority of the official's decision, a date upon which the filing party relied.

Regarding the first and third factors, there is no evidence that the Agency had actual notice of the correct due date for filing an application for review. In fact, the only due date of which the Agency had actual notice was the incorrect due date explicitly stated in the RD's D&O, with which the Agency completely, and in my view diligently, complied. As to the fourth factor, I find no prejudice to the Union in this case. The primary consequence of considering the Agency's application for review is that the case will be thoroughly and fairly litigated before the full Authority. Finally, as to the fifth factor, in my view it was reasonable for the Agency to rely on the application for review due date explicitly stated in the RD's D&O. Pursuant to 5 C.F.R. Chapter XIV, App. B, § I.C., the RD is authorized to exercise all of the ordinary decisional powers of the Authority in the case, and is thus in a position to speak authoritatively of Statute provisions and Authority regulations discussed in the D&O. As the Authority has previously stated, an RD error of the sort made by the RD in this case is "inexcusable." *HUD*, 34 FLRA at 309.

Only the second factor, concerning constructive knowledge, weighs against equitably modifying § 7105(f)'s time limit in this case. As noted previously, and as the Authority held in *HUD*, parties practicing before the Authority are held to be "knowledgeable of the statutory and regulatory filing requirements" relevant to the case proceeding in which they are engaged. *HUD*, 34 FLRA at 309.

Because the equities favor modifying § 7105(f)'s time limit in the particular, narrow circumstances of this case, I would consider the Agency's application for review. I therefore dissent from the Majority's decision to dismiss the Agency's application as untimely filed. [4]

2. *Carter/Mondale Presidential Committee, Inc. v. FEC*, 711 F.2d 279 (D.C. Cir. 1983); *Donovan* v. *Hahner, Foreman and Harness*, 736 F.2d 1421 (10th Cir. 1984).

3. The Presidential Primary Matching Payment Account Act, 26 U.S.C. §§ 9031-9042.

4. On the merits, I would uphold the RD's determinations and deny the Agency's application for review.