

73 FLRA No. 17

UNITED STATES
DEPARTMENT OF DEFENSE
EDUCATION ACTIVITY
(Agency)

and

FEDERAL EDUCATION ASSOCIATION
(Union)

0-AR-5775

ORDER DISMISSING EXCEPTIONS

June 16, 2022

Before the Authority: Ernest DuBester, Chairman, and
Colleen Duffy Kiko and Susan Tsui Grundmann,
Members

I. Statement of the Case

The Authority's Office of Case Intake and Publication (CIP) issued an order directing the Agency to cure a procedural defect in its exceptions and to file an updated statement of service. The Agency filed an updated statement of service after the deadline set by CIP, and CIP issued an order directing the Agency to show cause why the Authority should not dismiss its exceptions for failure to timely respond to an Authority 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.

II. Background and Order to Show Cause

The Agency filed exceptions to an award by Arbitrator Fred D. Butler. However, the Agency did not serve a copy of the exceptions and attachments to the

exceptions on the Union's counsel. Under the Authority's Regulations, any party filing a document must serve a copy upon all counsel of record¹ and file a statement of service showing that, at the time of filing with the Authority, copies of the filing and any supporting documents were served on the other party.²

On January 26, 2022, CIP issued a procedural deficiency order (PDO) directing the Agency to respond to the PDO, serve a complete copy of the exceptions with all of the attachments on the Union's counsel, and file a statement of service that complies with the Authority's Regulations. The PDO stated that "[t]he Agency's failure to respond to or comply with this order by February 9, 2022, may result in dismissal of its exceptions."³ The postmark date on the Agency's response to the PDO is February 10, 2022.

On February 28, 2022, CIP issued a show-cause order (SCO) directing the Agency to show cause why the Authority should not dismiss its exceptions for failure to respond to an Authority order.⁴ In its timely response to the SCO, the Agency provided an updated statement of service and two declarations attesting that the Agency made good faith efforts to fully comply with the PDO.

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

The Agency argues that its exceptions should not be dismissed because the Agency made "good faith efforts" to comply with the PDO by delivering its response to the mailroom before the cut-off time for same-day pickup by the U.S. Postal Service.⁵ However, the Agency's justifications fail to establish the extraordinary circumstances necessary to demonstrate good cause for a waiver of the expired time limit for responding to the January 26, 2022 PDO.⁶

The Authority's regulations provide that the date of filing for a document shall be determined by the date of

¹ 5 C.F.R. § 2429.27(a).

² *Id.* § 2429.27(c).

³ PDO at 2 (emphasis omitted).

⁴ The SCO also directed the Agency to show cause why the Authority should not dismiss its exceptions for failure to comply with the Authority's order because it appeared that the Agency still had not served a complete copy of its exceptions, including a copy of all attachments, on the Union's counsel. Because we are dismissing the Agency's exceptions on the basis of its failure to timely respond to the PDO, we need not resolve whether the Agency corrected the deficiency. See *U.S. Dep't of VA, John J. Pershing VA Med. Ctr.*, 71 FLRA 426, 426 n.1 (2019) (*VA Med.*

Ctr.) (then-Member DuBester concurring) (citing *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 deficiency order and finding additional procedural issue moot).

⁵ Agency Resp. to Feb. 28 SCO (Agency Resp.) at 1; Agency Resp., Attach. 1, Declaration of Administrative Officer (AO Declaration) at 1; Agency Resp., Attach. 3, Declaration of Logistical Support Supervisor (LSS Declaration) at 1.

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

mailing.⁷ When a document has a postmark, the regulations state that the postmark determines the date of mailing.⁸ Thus, the Authority has repeatedly affirmed that the filing date for a document is indicated by its postmark date.⁹

Here, the Agency does not dispute that the postmark date of the Agency's response to the PDO is February 10,¹⁰ but submits two declarations attesting to its attempts to comply with the PDO. The Agency explains that it delivered its response to the PDO to the Agency mailroom on February 9, after being assured by the Agency's mailroom personnel that the U.S. Postal Service would pick it up and postmark it on the same day.¹¹ The Agency also maintains that its mailroom personnel delivered the response to the Agency building's mailroom early enough that the U.S. Postal Service should have received and postmarked it on the same day.¹²

While the Authority has the discretion to waive an expired deadline for responding to a PDO in extraordinary circumstances,¹³ the Authority has consistently found that delays caused by a party's internal mailing system do not establish extraordinary circumstances.¹⁴ The Agency's declarations do not demonstrate that the Agency's response was actually received by the U.S. Postal Service on February 9, and therefore do not present an extraordinary circumstance justifying a waiver of the expired deadline.¹⁵

Accordingly, we dismiss the Agency's exceptions.

IV. Decision

We dismiss the Agency's exceptions.

⁷ *Id.* § 2429.21(b)(1)(i); *NTEU, Chapter 226*, 72 FLRA 122, 122 (2021) (*Chapter 226*) (citing 5 C.F.R. § 2429.21(b)(1)(i); *NTEU*, 42 FLRA 160, 161 (1991) (*NTEU*)).

⁸ 5 C.F.R. § 2429.21(b).

⁹ *Chapter 226*, 72 FLRA at 123 (citing *AFGE, Loc. 997*, 66 FLRA 499, 499 (2012) (*Local 997*); *NTEU*, 42 FLRA at 161).

¹⁰ AO Declaration at 1 ("I cannot attest why the package was not postmarked until February 10, 2022.").

¹¹ *Id.* ("On February 9, 2022, I delivered the [FLRA] exceptions filing at issue to the Agency's mail room Earlier that day, I confirmed with the [Logistical Support Supervisor] that First Class Mail packages dropped off prior to 1430 hours would be picked up and postmarked by the U.S. Post Office on that same date. On February 9, 2022, I physically dropped off the First-Class Mail package at the Agency's mail room by 1330 hours having been assured that the package would be postmarked for shipping that day (i.e., February 9, 2022).")

¹² LSS Declaration at 1 ("I am employed as a Logistical Support Supervisor with [a company contracted] to provide logistical support, which includes mail services, for the Agency. I work in

[the Agency's] mail room . . . [and I] deliver the Agency mail to the [building mailroom, which] . . . coordinates the delivery and pick up of mail with the USPS. On Wednesday, February 9, 2022, I recall that [the Administrative Officer (AO)] brought in a large stack of paperwork. I assisted [the AO] with packaging and boxing the materials and I sealed the box. . . . I am 100% certain that I delivered the package to the [building mailroom] prior to 2:30 p.m. which is the cut off to ensure that packages are mailed the same day. I have no idea why the package was not postmarked the same day that I delivered it to the [building] mailroom. I have never encountered a similar situation when a package was timely delivered to the mailroom that it was not postmarked that day.")

¹³ 5 C.F.R. § 2429.23(b).

¹⁴ *VA Med. Ctr.*, 71 FLRA at 427 (citing *AFGE, Loc. 3283*, 66 FLRA 691, 692 (2012)); *Dep't of the Army, Aberdeen Proving Ground*, 34 FLRA 521, 523 (1990).

¹⁵ *See Chapter 226*, 71 FLRA at 123 (citing *Local 997*, 66 FLRA at 499; *NTEU*, 42 FLRA at 161).