

**FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.**

**UNITED STATES DEPARTMENT OF HOUSING AND URBAN
DEVELOPMENT
(Agency)**

and

**AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES
NATIONAL COUNCIL OF HUD LOCALS 222
(Union)**

**0-AR-4586
(65 FLRA 433 (2011))
(66 FLRA 867 (2012))
(68 FLRA 631 (2015))
(69 FLRA 60 (2016))
(69 FLRA 213 (2016))**

ORDER TO SHOW CAUSE

September 15, 2016

In the above-captioned case, Arbitrator Andrée Y. McKissick issued two awards: a merits award in 2009 and a remedial award in 2012. Additionally, between 2014 and 2016, the Arbitrator issued ten implementation meeting summaries. On June 30, 2016, the Arbitrator issued her tenth implementation meeting summary (tenth summary). The Agency has filed exceptions to that summary. For the following reasons, the Authority directs the Agency to show cause why its exceptions should not be dismissed as untimely.

I. Background

In *U.S. Dep't of HUD (HUD I)*,¹ the Agency filed exceptions to the third implementation meeting summary (third summary).² The Agency argued that the third

¹ 66 FLRA 631 (2015) (Member Pizzella dissenting).

implementation meeting summary modified the remedial award.³ The Authority found that “even assuming that the Arbitrator modified the remedial award by including all [general schedule job series 1101 (GS-1101)] employees in the class of grievants, the Agency should have filed exceptions when the Arbitrator first made that alleged modification in the second summary.”⁴

The Authority further found that “the Agency’s modification arguments fail to identify any characteristic of the third summary’s challenged remedy that was not in the second summary.”⁵ Accordingly, the Authority found that the Agency’s exceptions were untimely.⁶

In *U.S. Dep’t of HUD (HUD II)*,⁷ the Authority denied the Agency’s motion for reconsideration of *HUD I* and its motion for a stay.⁸ The Authority found that the Agency’s reconsideration motion merely attempted to relitigate *HUD I*’s conclusions and thus did not establish extraordinary circumstances warranting reconsideration.⁹

In *U.S. Dep’t of HUD (HUD III)*,¹⁰ the Agency filed exceptions to: (1) the sixth implementation meeting summary (sixth summary), (2) an order that identified the names of all employees working in GS-1101 who were entitled to relief under the terms of the remedial award and the Arbitrator’s earlier written summaries, and (3) an order that identified the names of all employees holding two particular position titles who were entitled to relief under the terms of the remedial award and the Arbitrator’s earlier written summaries (the orders).¹¹ The Authority found two of the Agency’s arguments – that the remedial award was: (1) incomplete, making implementation impossible and (2) a violation of management’s right to determine the numbers, types, and grades of positions – were barred because they had been dismissed under §§ 2425.4(c) and 2429.5 of the Authority’s Regulations¹² in the Agency’s exceptions to the remedial award.¹³ The Authority further found that §§ 2425.4(c) and 2429.5 barred the Agency’s arguments that the forty-five-day deadline was impossible to implement and that the Arbitrator was biased regarding the sixth summary.¹⁴

² *Id.* at 631.

³ *Id.* at 634.

⁴ *Id.*

⁵ *Id.* at 635.

⁶ *Id.*

⁷ 69 FLRA 60 (2015) (Member Pizzella dissenting).

⁸ *Id.* at 63-64.

⁹ *Id.* at 64 (citing *Bremerton Metal Trades Council*, 64 FLRA 543, 545 (2010) (Member DuBester concurring)).

¹⁰ 69 FLRA 213 (2016) (Member Pizzella dissenting).

¹¹ *Id.* at 213.

¹² 5 C.F.R. §§ 2425.4(c), 2429.5.

¹³ *HUD III*, 69 FLRA at 218-19.

¹⁴ *Id.* at 219.

The Authority denied the Agency's remaining exceptions finding that: the orders were not so uncertain as to make implementation impossible,¹⁵ the disputed awards were not based on nonfacts,¹⁶ the disputed awards were not contrary to law,¹⁷ the Arbitrator did not exceed her authority,¹⁸ and the Agency had not established that the orders demonstrated bias warranting a remand to a different arbitrator.¹⁹ On March 9, 2016, the Agency filed a motion for reconsideration of *HUD III*, which is currently pending before the Authority.

II. Discussion

The time limit for filing exceptions to an arbitration award is thirty days "after the date of service of the award."²⁰ The date of service is the date the arbitration award is deposited in the U.S. mail, delivered in person, deposited with a commercial delivery service that will provide a record showing the date the document was tendered to the delivery service or, in the case of email or fax transmissions, the date transmitted.²¹

Absent evidence to the contrary, an arbitration award is presumed to have been served by mail on the date of the award.²² If the award was served by email or fax, then the date of service is the date of transmission, and the excepting party will not receive an additional five days for filing the exceptions.²³ If the award was served by email, fax, or personal delivery on one day, and by mail or commercial delivery on the same day, the excepting party will not receive an additional five days for filing the exceptions, even if the award was postmarked or deposited with the commercial delivery service before the email or fax was transmitted.²⁴ The time limit for filing exceptions may not be extended or waived by the Authority.²⁵ Under Authority precedent, only where an arbitrator modifies an award in such a way as to give rise to the deficiencies alleged in the exceptions does the filing period begin with the date of service of a supplemental award.²⁶

Additionally, as the U.S. Court of Appeals for the District of Columbia Circuit (D.C. Circuit) in *U.S. DHS, U.S. CBP Scobey, Montana v. FLRA (Scobey)*,²⁷ recently explained, in cases where the sovereign-immunity waiver in the Back Pay Act [BPA] applies, other

¹⁵ *Id.* at 220.

¹⁶ *Id.*

¹⁷ *Id.* at 221-22.

¹⁸ *Id.* at 222.

¹⁹ *Id.* at 223.

²⁰ 5 C.F.R. § 2425.2(b).

²¹ *Id.* § 2425.2(c).

²² See *Okla. City Air Logistics Ctr., Tinker Air Force Base, Okla.*, 32 FLRA 165, 167 (1988).

²³ 5 C.F.R. § 2425.2(c)(3).

²⁴ *Id.* § 2425.2(c)(5).

²⁵ *Id.* § 2429.23(d).

²⁶ See, e.g., *U.S. Dep't of the Navy, Mare Island Naval Shipyard, Vallejo, Cal.*, 52 FLRA 1471, 1474 (1997) (*Navy*).

²⁷ 784 F.3d 821 (D.C. Cir. 2015).

[r]outine statutory and regulatory questions . . . are not transformed into constitutional or jurisdictional issues merely because a statute waives sovereign immunity. Otherwise, Congress's creation of a mostly unreviewable system of arbitration would be eviscerated, as every Authority decision involving an arbitral award arguably in excess of what the [BPA] authorizes would be reviewable.²⁸

In its exceptions, the Agency argues that the Arbitrator is biased and that the case should be remanded to a different arbitrator.²⁹ The Agency also argues that the tenth summary is contrary to law for reasons that do not appear to be linked to any potential modifications arising from the tenth summary.³⁰ The Agency further argues that tenth summary modifies the remedial award because it calls for a "formal hearing" and "order[s] the Agency to produce witnesses to give testimony in the effort to implement the award."³¹ For the reasons that follow, it does not appear that the tenth summary modifies the remedial award in a way that gives rise to the majority of the deficiencies alleged in the Agency's exceptions.³²

The Arbitrator stated her willingness to conduct a formal hearing in the ninth implementation meeting summary (ninth summary), which issued on March 26, 2016.³³ The Arbitrator further stated in the ninth summary that "[t]he Union indicated its intention to timely serve a witness list and subpoena for the next meeting between the [p]arties".³⁴ The Arbitrator also stated "that she would sign subpoenas served by the Union so long as the Agency and witnesses are provided sufficient notice."³⁵ The Agency concedes that the ninth summary stated "that the Arbitrator agreed to '[] conduct [a] formal hearing on the record, with testimony, if necessary.'"³⁶ Additionally, the Agency's bias exception appears to only address events that occurred prior to implementation of the tenth summary.³⁷

Therefore, the Authority directs the Agency to show cause why the Authority should not dismiss the Agency's contrary-to-law exceptions as untimely. The Authority orders the Agency to explain why its purported sovereign-immunity claims do not fall within the D.C. Circuit's discussion in *Scobey* that "[r]outine statutory and regulatory questions . . . are not transformed into constitutional or jurisdictional issues merely because a statute waives sovereign immunity."³⁸ And further, the Authority orders the

²⁸ *Id.* at 823.

²⁹ Exceptions at 3, 41-42.

³⁰ *Navy*, 52 FLRA at 1474.

³¹ Exceptions at 18.

³² *Navy*, 52 FLRA at 1474.

³³ Meeting Summary 9 (Summary 9) at 4-5.

³⁴ *Id.*

³⁵ *Id.*

³⁶ Exceptions at 18 (quoting Summary 9 at 4).

³⁷ *Id.* at 3, 41-42.

³⁸ *Scobey*, 784 F.3d at 823.

Agency to show cause why its bias exception is not untimely to the extent that it appears that the Agency's bias exceptions to only address events that occurred prior to implementation of the tenth summary.³⁹

The Agency must file with the Authority, by **September 29, 2016**, five copies, one of which contains an original signature, of its response to this order. The Agency's response must also include five copies, one of which contains an original signature, of a statement of service that complies with the Authority's Regulations showing that the Agency has served its response to this order on all counsel of record or other designated representatives.⁴⁰ The Agency should direct its response to Cabrina S. Smith, Chief, Office of Case Intake and Publication, Federal Labor Relations Authority, 1400 K Street, NW, Suite 201, Washington, DC 20424-0001.

The Agency's failure to comply with this order to show cause by **September 29, 2016**, may result in dismissal of the Agency's exceptions.

The Union may file a response to the Agency's response within fourteen days of service of the Agency's response on the Union.

For the Authority:



Cabrina S. Smith, Chief
Office of Case Intake and Publication

³⁹ Exceptions at 3, 41-42.

⁴⁰ 5 C.F.R. § 2429.27(a) & (c).

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STATEMENT OF SERVICE

I hereby certify that copies of the Order to Show Cause of the Federal Labor Relations Authority in the subject proceeding have this day been mailed to the following:

CERTIFIED MAIL – RETURN RECEIPT REQUIRED

David M. Ganz
Agency Representative
U.S. Department of Housing and Urban
Development, OGC
451 7th Street, SW, Rm. 2124
Washington, DC 20410

Jacob Y. Statman
Union Representative
Snider & Associates, LLC
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Baltimore, MD 21208

Dated: September 15, 2016
WASHINGTON, D.C. /


Deborah Johnson
Labor Relations Specialist