DEC 3 2009

BEFORE THE FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

AGENCY RESPONSE TO ORDER TO SHOW CAUSE
FLRA CASE No: 0-AR-4586

U.S. Department of Housing and

Urban Development (Agency)

And

American Federation of Government Employees

National Council of HUD Locals 222 (Union)

Background

On October 30, 2009, the Agency served the Authority, the union and the arbitrator with its exceptions to the arbitration decision and award in FMCS Case No. 03-07743 (Attachment 1). The arbitrator served the award on the parties by mail on September 29, 2009. On November 9, 2009, the union filed with the Authority a REQUEST TO ISSUE SHOW CAUSE ORDER AND MOTION FOR EXTENSION OF TIME TO FILE OPPOSITION TO AGENCY'S EXCEPTIONS (Attachment 2). In so doing, the union alleged that the arbitrator served the award on the parties via electronic mail, and, accordingly, argued that the Agency's October 30, 2009 exceptions are untimely. On November 20, 2009, the Authority issued an ORDER TO SHOW CAUSE in the above-captioned case. In its ORDER, the Authority stated that the Agency's failure to comply with the ORDER by **December 4, 2009** (emphasis original) may result in dismissal of its exceptions. In accordance with the Authority's ORDER, the following Agency response is supplied.

Argument

The following facts demonstrate that the Agency's exceptions were timely filed pursuant to established Authority precedent and policy. Specifically, the arbitrator served her Opinion and Award in this matter on the Parties by hard copy (mail) delivery, with the postmark controlling, in accordance with the service requirement she established and enforced throughout the course of this case. The fact that the hard copy (mail) service of the decision was followed by electronic transmittal is irrelevant because the mail service is controlling. The electronic service was not directed to the Agency representative. Public policy considerations dictate that the merits of the Agency's exceptions be considered.

Requirement of Hard Copy Service

Requirement Established and Followed by Arbitrator: An examination of the record in this case demonstrates that, at all times, hard copy service was the requirement. The Declaration of Walter Clifton Vick Jr. (Attachment 3) attests to this fact. In paragraph 5 of the Declaration, Mr. Vick notes that the arbitrator required all documents such as briefs and motions be delivered to her physically rather than electronically. In that paragraph, Mr. Vick also verifies that the arbitrator served all major decisions and correspondence on the Parties by regular mail. Thus, the requirement of mail service was established by the arbitrator and followed by her throughout the lengthy course of this case.

Post-Hearing Brief Postmark Requirement: In paragraphs 6 and 7 of his declaration, Mr. Vick discusses the requirements for the filing of post-hearing briefs in the case. He notes that the

arbitrator instructed the Parties to send hard copies to her as the exclusive means of delivery with the postmark date as controlling. This statement is corroborated by the transcript of the hearing. On the last page, page 123 of the August 28, 2008 hearing, the arbitrator notes that no more evidence will be accepted, and that post-hearing briefs were to be postmarked on Monday November 17, 2008 (Attachment 4). In this regard, paragraph 8 of the Walter Vick Declaration consists of an instructive anecdote. Ari Taragin of Snider & Associates did not comply with the arbitrator's directive concerning post-hearing briefs. Rather, he served her the union's brief via electronic mail. In response, the arbitrator reminded him of the hard copy delivery requirement with which he then complied (Attachment 5). Paragraph 9 of the Vick Declaration explains that the Agency sent hard copies of its brief to the arbitrator and the union with a supplemental, follow-up electronic version to the union in response to the union's specific request.

Agreement of the Parties: The foregoing evidence in the record proves that hard copy service was not only the norm but the requirement, i.e., agreed upon method for the exchange of documents in this case by both the Parties and the arbitrator. Electronic service was neither a requirement nor an option for either the arbitrator or the Parties. Electronic service was only supplied upon request as a courtesy. It was never used in-lieu-of hard copy delivery. In this regard, it must be noted that the arbitrator's electronic transmittal of the decision would not have occurred absent the specific request of the union made on September 7, 2009 (Attachment 2, Exhibit A3). Significantly, the union's request reads "We have not received the Award and **wonder if** it can be emailed **as well as hard copied.**" (Emphasis supplied) Thus, the phrasing of the union's request itself shows that the union was seeking something in addition

to the required hard copy delivery which it concedes (**wonder if**) might not have been granted. It is also necessary to note at this time that the union did not copy the Agency with the request for Email delivery. Accordingly, the request cannot be construed as the union seeking Email delivery in-lieu- of hard copy delivery. Moreover, in her September 29, 2009 3:01 PM reply to the union's request the arbitrator states "Please be advised that the Award was issued at noon today. As promised, I will send the Award via e-mail when I return to my office this evening." Thus, the arbitrator followed the agreed upon practice of hard copy mail delivery to issue the decision at noon on September 29, 2009. She did not even advise the union until three hours later that it could expect an electronic transmittal. The arbitrator sent the electronic transmittal at 4:54 PM, September 29, 2009 Since she implemented her award via hard copy mail first, it cannot reasonably be concluded that the electronic transmittal made during the evening of September 29th was intended to replace the agreed upon requirement of hard copy mail service. Thus, the facts in this case are inapposite to those in *Homeland Security, U.S. Border Patrol and AFGE, National Border Patrol Council 63 FLRA No. 114 (2009)* (Attachment 6) wherein the Authority found electronic service sufficient because there was no evidence showing that the parties agreed to any other form of service.

The Arbitrator Elected to Employ Hard Copy Mail Service

In *Social Security Administration Woodlawn and AFGE Local1923 63 FLRA No. 100 (2009)* (Attachment 7), the Authority held that absent evidence indicating the parties placed any limitations on the method of service of an award the arbitrator has the option to select the method of service. The facts in the case at hand, as noted above, prove that the arbitrator

prescribed hard copy mail as the method for the service of documents, as opposed to informal communications among the arbitrator and the Parties. The arbitrator served her award on the Parties at noon on September 29, 2009 via hard copy mail. (Attachment 2, Exhibits A1 and A3, Attachment 3, Paragraphs 5-8, Attachment 4, Attachment 5).

The Hard Copy Mail Service Controls the Time Limit for Filing Exceptions

In *Internal Revenue Service, Washington, D.C .and NTEU 60 FLRA No. 171 (2005)* (Attachment 8), the following facts are pertinent. In that case, as herein, the arbitration award was served on both parties simultaneously by first class mail on August 7, 2004. Three days later, on August 10, 2004, the arbitrator provided service to the Parties via e-mail. The Agency filed exceptions to the award on September 10, 2004 based on the August 7, 2004 service date. The union claimed that the Agency's exceptions were untimely. It argued that the August 10, 2004 e-mail transmittal precluded the Agency's right to five (5) additional days from August 7 to account for the arbitrator's service of the award by mail. The Authority held that when an award is served by two methods, the Authority's practice is to determine the timeliness of exceptions based on the earlier date of service of the award. It then went on to say that because the arbitrator served the award by mail before he e-mailed a copy, and because the exceptions were timely based on service by mail, the exceptions were timely. This principle was upheld by the Authority, although in the converse, in *Homeland Security, U.S. Border Patrol, supra,* wherein the Authority held that the e-mail service of an arbitration award trumped a subsequent service by mail for purposes of computing the timeliness of filed exceptions. In the case at hand, the arbitrator issued her decision at noon on September 29,

2009 (Attachment 2, Exhibit A3). She did not transmit the decision via e-mail until 4:54 PM on September 29, 2009 (Attachment 2 Exhibit A1). Thus, pursuant to the principle promulgated by the Authority in *Internal Revenue Service, Washington D.C., supra,* and reinforced by *Homeland Security, U.S. Border Patrol*, namely, that when two methods of service of a decision are employed by an arbitrator the earlier method of service controls for the purpose of computing the time frame for filing exceptions, the Authority must find the Agency's exceptions in this matter to be timely.[1]

Email Transmittal Not Sent To Agency Representative

Assuming *arguendo* that the Email transmittal could have some sort of efficacy, it must be noted that it was not sent to the Agency representative. In response to a union inquiry regarding George Corsoro the arbitrator wrote "Mr. Corsoro sent me an e-mail indicating he was the proper pary (sic) several weeks, before the issuance of this Award. Notwithstanding the departure of Mr. Keys and Ms. Robinson,[2] I decided to issue this decision to them as well since they authored the post-hearing brief. I hope this explanation is helpful." At this point, it must be noted that it is readily apparent that the union's inquiry was a *sub rosa* signal to the arbitrator that if Mr. Corsoro was the "proper party" the Agency's exceptions would be untimely and her decision would not be overturned (Attachment 2, Exhibit B1). In this regard, it

[1] The fact that the e-mail transmittal of the award was done the same day of the hard copy issuance of the award does not diminish the significance of the fact that the hard copy mail service preceded the courtesy e-mail transmittal. Accordingly, the Authority must find, pursuant to its current precedent and Section 249.22 of its regulations, that the deadline for filing Agency exceptions was November 2, 2009. Since the Agency's exceptions were served on the Authority on October 30, 2009 (Attachment 1) they are timely.

[2] The arbitrator's September 29, 2009 hard copy mail service of the decision was addressed to Ms. Robinson. Since she had already left the Agency, it was delivered to her erstwhile supervisor who was both *de facto* and *de jure* Agency representative as opposed to Mr. Corsoro who, being a new hire, had no connection to or knowledge of the history of this case.

must be noted that the arbitrator parroted the phrase supplied by the union in her answer, namely, "proper pary" (sic). The fact that that statement is inaccurate is made clear by a reading of Mr. Corsoro's message to the arbitrator. In his message he simply introduces himself and inquires as to when her decision will be issued. Nowhere in his message does Mr. Corsoro identify himself as the Agency representative (Attachment 9). The Authority should not deny the Agency its due process in this matter as a result of such *mala fides* tactics. Should the Authority find the Email transmittal to be controlling for the purpose of service, it would be legitimizing the labor relations equivalent of "sewer service".[3]

Public Policy Considerations

In her award, the arbitrator asserts jurisdiction over the classification of positions which did not result in the reduction in grade or pay of an employee. In so doing, she directed the retroactive "organizational upgrade" of certain positions from GS-12 to GS-13. (Agency Exceptions, Attachment 1). Section 7121(c)(5) of the Federal Service Labor-Management-Relations Statute (Statute) specifically excludes that issue from the coverage of negotiated grievance procedures. In *Director of Administration, Headquarters, U.S. Air Force and AFGE-GAIU Council of Headquarters USAF Locals, 17 FLRA No. 58 (1985)* the Authority held that issues which, as a matter of law, are not cognizable under a grievance procedure, may not go before an arbitrator (Attachment 10). If the Authority rules the Agency exceptions untimely, it will eliminate any possibility that an *ultra vires* Opinion and Award will be overturned and endorse a remedy

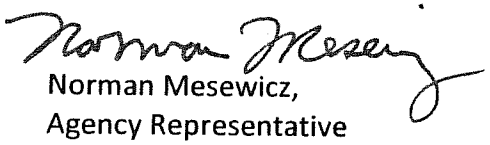
[3] **Sewer Service.** The fraudulent service of process on a debtor by a creditor seeking to obtain a default judgment. Black's Law Dictionary, Seventh Edition, West Group, St. Paul Minn., 1999

requiring the Agency to violate Office of Personnel Management (OPM) classification regulations. (Agency Exceptions, Attachments 4, 5 and 6).

Conclusion

The foregoing demonstrates that the Agency exceptions are, indeed, timely. In this regard, the following facts warrant reiteration. The arbitrator required hard copy service by the Parties and adhered to that requirement herself. Thus, her September 29, 2009 noon hard copy mail service of her decision must control for exceptions purposes since hard copy service was the agreed upon method throughout this case. This is true also because the hard copy service preceded the Email transmittal. Under this fact pattern, Authority precedent mandates the finding that the September 29, 2009 noon hard copy mail service controls. Moreover, the Email transmittal was not directed to the Agency representative, but, rather to a recently hired management official with no knowledge of the case. Lastly, public policy dictates that, at a minimum, the Agency's exceptions be evaluated on their merits in the interest of avoiding the endorsement of an arbitral award contrary to Government-wide OPM regulations, as well as the Statute. The Agency respectfully requests the Authority, under all of the circumstances of this case, to find its exceptions timely and provide consideration of their merits.

Respectfully submitted,



Norman Mesewicz,
Agency Representative

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CERTIFICATE OF SERVICE

I hereby certify that copies of the Agency Response to the Order to Show Cause in the above-captioned case were served on this 3rd day of December 2009, upon the following in the manner indicated:

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Norman Mesewicz, Deputy Director of
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