FEDERAL LABOR RELATIONS AUTHORITY
Washington, DC

IN THE MATTER OF ARBITRATION BETWEEN:

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, NATIONAL COUNCIL OF HUD LOCALS 222,	)	Issue: Fair and Equitable
	)	FMCS Case No. 03-07743
Union,	)	
v.	)	**FLRA Docket No.: 0-AR-4586**
U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT,	)	Arbitrator: Dr. Andree Y. McKissick
Agency.	)	Date: December 10, 2009

UNION'S REPLY TO AGENCY RESPONSE TO ORDER TO SHOW CAUSE

The American Federation of Government Employees, National Council of HUD Locals 222 (the "Union"), by and through its undersigned counsel, hereby replies to the Agency's Response to Order to Show Cause in the above captioned case and in support thereof states as follows:

BACKGROUND FACTS

On November 20, 2009, the Authority issued an Order to Show Cause as to why the Agency's Exceptions should not be dismissed as untimely. The Agency served its Response on December 3, 2009. The Union incorporates by reference all previous filings in this matter and timely files this Reply to the Agency's Response to the Order to Show Cause.

ARGUMENT & ANALYSIS

I. The Agency Exceptions are untimely.

The Agency's Response to the Authority's Order to Show Cause goes through great lengths to explain why the Exceptions were timely, relying on the argument that the service of the Opinion & Award via first class mail (as opposed to email) controls, and as such, five additional days should be provided for the filing of the Exceptions. However, it fails to address the fact even if the Authority disregards the emailed Opinion & Award; the Exceptions would still be untimely.

In its Order to Show Cause the Authority states that the Agency's Exceptions were filed with the Authority by commercial delivery (UPS) on November 3, 2009. When exceptions are served via commercial delivery, such as UPS, the date received is considered the date filed. 5 C.F.R. §§ 2424.25(b) and 2429.21(b). Assuming that the mailed copy of the Opinion & Award controls in this case for purposes of timeliness, any Exceptions would need to be filed by November 2, 2009. The Agency's Exceptions are still untimely.

II. There was never a requirement that the Arbitrator serve the Parties with a hard copy nor did the Arbitrator agree to limit her ability to serve the Parties via email.

In their Response, the Agency argues that hard copy service was a requirement in this arbitration, and that the Arbitrator agreed to limit her ability to serve the Parties via email. Response at p. 2-4. What is puzzling, however, is that the Agency relies on case law that in fact supports the Union's position.

In *Social Security Administration and AFGE Local 1923*, 63 FLRA No. 100 (May 8, 2009) the Authority provided a detailed analysis concerning the manner in which an arbitrator serves a decision. Like in *SSA*, there is no evidence in the record here that indicates that the

Arbitrator was aware of any limitation on her ability to serve the Parties via email. Similarly, the Agency has not argued that at the time the Arbitrator emailed the Opinion and Award, that it had not consented to service by e-mail. *See, Id.* 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. The Agency points out no provision in the Collective Bargaining Agreement between AFGE Council 222 and HUD that limits the method of service or agrees upon a particular method of service, further undermining the Agency's position. There is no past practice established by the Agency showing such agreement or limitation. Further, like in *SSA*, both the Union and Agency provided the Arbitrator with their e-mail addresses, and therefore, the Arbitrator had no reason to believe that e-mail was not an acceptable method of communication. *SSA v. AFGE Local 1923* (internal citations omitted). In fact, the Parties and Arbitrator regularly communicated by email in connection with all aspects of this case.

Based on the foregoing, it is clear that the facts in the case *sub judice* are analogous to the facts in *SSA*, where the Authority determined that the emailing of the decision starts the clock for the filing of Exceptions. There was no agreement to **not** use email, the Parties provided the Arbitrator with their email addresses, and the Agency has not argued that it did not consent to service by email.

III. The e-mailed decision controls for purposes of the time limit for filing exceptions.

The Agency further argues that since service took place both via first class mail and email, that the earlier method of service controls and therefore the Exceptions were timely filed. Res. at p. 5-6. In support of this argument the Agency relies on *IRS v. NTEU*, 60 FLRA No. 171 (2005) and *DHS, U.S. Border Patrol v AFGE, National Border Patrol Council*, 63 FLRA No. 114 (2009). However, both of those cases are clearly and easily distinguishable from the case at bar.

In *IRS*, the Authority stated:

> "When an award is served by two methods, the Authority's practice is to determine the timeliness of exceptions based on the earlier **date (emphasis added)** of service of the award. *See, e.g., Broad. Bd. of Governors, Washington, D.C.*, 0-AR-3743 (Dec. 22, 2003) (order dismissing exceptions)."

In both cases that the Agency relies upon, the second method of service was rendered **multiple calendar <u>days</u> after the first method**. Indeed, the Authority's rule clearly applies when there is a separate **date** for each mode of service. *Supra.* In this case, the decision was served via mail and email **on the <u>same</u> date**. As such, the rule cited above does not support the Agency's position.

Further, assuming *arguendo*, that the above rule does apply (which it does not), there has been no ***proof*** presented as to which method of service was actually effectuated <u>first</u>. The Arbitrator indicated in an email that the Opinion & Award was "**issued"** at approximately 12:00PM. However, there has been no evidence presented that the Arbitrator actually placed the Opinion & Award in the mail at that time. As discussed *infra*, it is the effectuation of **actual service** that controls. Because the Agency has failed to present evidence that the Opinion &

Award was actually placed in the mail prior to the issuance of the decision via email, its argument fails.

IV. The Agency was served with the Opinion & Award via e-mail.

While the undersigned does not appreciate the mud-slinging efforts of the Agency in their argument concerning the transmittal of the Opinion & Award to the Agency Representative, it is clear that this argument too, must fail. The Authority has clearly stated that in determining the timeliness of exceptions, it is the date of service — not the date of receipt of the award — that controls. *SSA, supra* (internal citations omitted).

Whether or not Mr. Corsoro is the actual Agency Representative is irrelevant[1]. The case law is clear that it is the issuance and not the receipt of the award that controls. *Id.* The Agency's Attachment 9 indicates that Mr. Corsoro inquired with the Arbitrator as to when the decision would be issued. Based upon that email, the Arbitrator included him on the list of individuals who were to receive the emailed service copy of the Opinion & Award. She also sent the email to the two prior Agency Representatives. If Mr. Corsoro was involved enough with the case to inquire about the issuance of the decision then the Agency certainly had actual notice, upon the issuance of the Opinion & Award to him, to timely file the Exceptions.

Further, the Agency representative (Ms. Robinson and, previously, Mr. Keys) were no longer on the case and the Arbitrator had no other representative to serve the Award upon. The Director lf Labor and Employee Relations for HUD Headquarters has both actual and apparent authority to serve as the point of contact for receipt of an Arbitration Award.

The decision was emailed to both prior Agency Representatives as well as the de facto Agency Representative. Finally, like in *SSA*, the Agency does not dispute the fact that the Opinion & Award was transmitted via email on September 29, 2009. *Supra.* Actual delivery

[1] Mr. Corsoro is the Director, HUD Headquarters Labor & Employee Relations Division.

was on September 29, 2009, the same day as the issuance of the award by mail. This would be no different then the simultaneous delivery by hand of an Award to the Agency while issuing it by mail the same day – the actual receipt (email or hand delivery) controls, and was valid.

V. Public policy considerations are irrelevant.

With its final effort, the Agency argues that "public policy considerations" should prohibit the Authority from dismissing the Exceptions as untimely. Response at p. 7-8. That argument too, must fail. The Agency fails to provide any case law to support its argument that as a matter of public policy the exceptions should not be dismissed. Indeed, there is no such exceptions to the untimely service of Exceptions.

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). It is clear that the time limit for filing exceptions cannot be extended. Allowing the untimely filed Exceptions to proceed would extend or waive the Authority's strict timeliness requirements.

CONCLUSION

Based on the foregoing, as well as the reasons stated in the Union's Request for Issuance of Order to Show Cause, the Union requests that the Agency's Exceptions be denied.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 11th day of December, 2009, the foregoing was sent to:

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