64 FLRA No. 121

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 2145
(Union)

and

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

0-AR-4097

DECISION

April 21, 2010

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

I. Statement of the Case

This matter is before the Authority on exceptions to an award of Arbitrator Clare B. McDermott filed by the Union under § 7122(a) of the Federal Service Labor-Management Relations Statute (the Statute) and part 2425 of the Authority's Regulations. The Agency filed an opposition to the Union's exceptions.

The grievance alleged that the Agency violated the parties' agreement by issuing the grievant a "paper suspension[,]" which was given in lieu of an actual five-day suspension. [2] Award at 1 (emphasis omitted). The Arbitrator denied the grievance.

For the reasons that follow, we deny the exceptions in part, set aside the award in part, and remand the award to the parties for resubmission to the Arbitrator, absent settlement.

II. Background and Arbitrator's Award

The grievant is the Union President and uses 100 percent official time. The grievant requested and was granted an authorized absence from her duty station to attend a Union training session in Puerto Rico. During the training session, the grievant was injured by another Union official, which resulted in her missing the afternoon session of the conference. When the grievant returned to her duty station, she missed several days of work due to her injury. The Agency informed the grievant that her absences from the conference and work were not authorized and that she needed to request annual leave (AL), sick leave (SL), or leave without pay (LWOP). At that time, the grievant did not request leave under any of these categories, and the Agency charged her with being absent without leave (AWOL). Several months later, the grievant requested LWOP for the time that had been charged as AWOL, but the Agency denied the request as untimely.

Meanwhile, the grievant had filed a claim for workers compensation and requested continuation of pay (COP). [3] In connection with her worker's compensation claim, the grievant informed the Agency that she would be traveling to Washington, D.C. to present a video of the Puerto Rico incident to the Department of Labor (DOL) Claims Examiner. The Agency informed the grievant that she was not authorized to be absent from her duty station to take the trip. The grievant took the trip anyway and did not request leave. Therefore, the grievant was charged with AWOL for that day as well.

In an unrelated incident, an Administrative Board of Investigation held an investigative hearing at which a certain bargaining-unit employee was testifying. Although the witness had originally requested the grievant's representation, the witness later signed a written waiver of her right to representation. The grievant entered the hearing room and, "in a loud voice, ordered the [witness] to leave the room by saying, 'Leave the room. You are not to testify.'" Award at 3 (emphasis omitted). When the witness did not immediately leave the room, the "grievant repeated her command many times, in a louder voice each time, screaming 'Get out.'" *Id*. The witness eventually left the room, and the Board suspended its proceedings for about one hour. When the hearing resumed, the witness returned to testify, but the grievant did not return to act as the witness' representative.

The Agency proposed a five-day suspension of the grievant for the various AWOL charges and for "[d]isrupting a legitimate investigation and forcefully

1. Member Beck's separate opinion, dissenting in part, is set forth at the end of this decision.

2. The "paper suspension" was to remain in the grievant's personnel records for up to six years and it "may be used [to] determin[e] an appropriate penalty if further infractions should occur." Award at 1. *See also* Exceptions, Attachment A at 5.

3. The grievant's claims for workers compensation and COP eventually were denied.

removing an employee from the process[.]" Attachment to Exceptions (Notice of Proposed Suspension) at 2 (Suspension). "The Agency later decided that, rather than actually suspending [the] grievant for five days without pay, it would impose only a 'paper suspension'" and, thereafter, "it issued a Letter of Alternative Discipline in lieu of a real suspension without pay[.]" Award at 1 (emphasis omitted). The grievant filed two grievances alleging that the disciplinary action was unwarranted because: (1) the grievant was not guilty of the charges against her; and (2) the discipline was imposed as reprisal for the grievant's equal employment opportunity (EEO) and Union activities. The Agency denied the grievances, which were consolidated for arbitration. The parties did not stipulate, and the Arbitrator did not expressly frame, the issues to be resolved. However, the Arbitrator reached several conclusions based on the parties' arguments.

First, in response to the Union's claim that a "paper suspension" is not an authorized form of discipline under the parties' agreement, the Arbitrator found that the absence of any reference to a paper suspension in Article 13 of the parties' agreement could not be viewed as forbidding the Agency from imposing such a suspension. [4] *See id*. at 6. Noting that Article 13 "expressly authorizes the Agency to impose disciplinary action for '. . . just and sufficient cause[,]'" the Arbitrator found that the Agency "could place a notice in an employee's file if he or she should commit an offense less serious than would justify a suspension or removal[.]" *Id*. In this connection, the Arbitrator noted that Article 13 expressly permits the Agency to impose an admonishment and a reprimand. According to the Arbitrator, the grievant's paper suspension "is seen here as an 'admonishment' or a 'reprimand.'" *Id*. at 7.

Second, the Arbitrator found that the Agency properly denied the grievant's request for LWOP and that there was just and sufficient cause for the paper suspension based on the AWOL charges. In this connection, the Arbitrator found that "the Agency on seven occasions . . . told [the] grievant that she was not eligible for COP and therefore she should request AL, SL, or LWOP, but [the] grievant clearly refused to follow those suggestions[.]" *Id*. at 9-10. In addition, the Arbitrator found that the "grievant was told clearly" that she would not be granted authorized absence to show her videotape to the DOL in Washington, D.C. *Id*. at 10.

Third, the Arbitrator found that the grievant's conduct at the investigative hearing was not shielded from discipline because of her role as Union President. In this regard, the Arbitrator found that the grievant disrupted the investigative meeting by ordering the witness to leave the room. The Arbitrator found that the grievant was not acting in her official capacity as Union President because: (1) she was not presenting a grievance; and (2) the witness whom the grievant ordered to leave the room was not entitled to representation because the witness did not reasonably believe that her responses at the hearing could result in disciplinary action against her. *See id*. at 11.

Finally, the Arbitrator rejected the Union's claim that the disciplinary action was reprisal for the grievant's prior Union and EEO activities. In this regard, the Arbitrator found that there was "not sufficient proof that the Agency actions against [the] grievant were in any way connected to her protected activities[,]" as those actions were justified by the grievant's conduct. *Id*. at 13.

Based on the foregoing, the Arbitrator denied the grievance.

III. Preliminary Issues

A. The Authority has jurisdiction to review the Union's exceptions.

Under § 7122(a) of the Statute, the Authority lacks jurisdiction to review an arbitration award "relating to a matter described in § 7121(f)" of the Statute. The matters described in § 7121(f) include adverse actions, such as removals, which are covered under 5 U.S.C. § 4303 or § 7512 and appealable to the Merit Systems Protection Board (MSPB). *See U.S. Dep't of Justice, Fed. Bureau of Prisons, Fed. Det. Ctr., Miami, Fla.*, 57 FLRA 677, 678 (2002).

The Union asserts that MSPB precedent is "controlling here because the case involves a removal." Exceptions at 8 (citing *Kennedy v. Dep't of the Army*, 22 M.S.P.R. 190 (1984) and *SSA v. Burris*, 39 M.S.P.R. 51 (1988)). However, the grievance in this case does not concern a removal action. The disputed disciplinary action at issue here is a five-day paper suspension. *See* Award at 1. As such, MSPB precedent is not controlling, and the Authority has jurisdiction to review the Union's exceptions. *See, e.g.*, *U.S. Dep't of the Army, Norfolk Dist., Army Corps of Eng'rs, Norfolk, Va.*, 59 FLRA 906 (2004) (exercising jurisdiction over five-day suspension).

4. Relevant provisions of Article 13 of the parties' agreement are set forth in the appendix to this decision.

B. The Authority will not consider the Agency's opposition.

The Union's exceptions were served on the Agency representative on June 5, 2006, which means that, under the Authority's regulations in effect at the time of filing, the Agency's opposition was due to be received in person or by commercial delivery by the Authority no later than July 10.[5] The Agency's opposition was postmarked July 11. In response to a Show Cause Order issued by the Authority, the Agency claims its opposition was placed in the facility's mail service on July 7 and mailed to the Union on July 10. The Agency states that it "cannot account for why it was not postmarked July 7 or July 10" but asserts that the one-day delay amounts to "harmless error." Response to Show Cause Order at 1.

5 C.F.R. § 2429.23(b) states, in relevant part, that the Authority "may waive any expired time limit . . . in extraordinary circumstances." As the Agency has not established any extraordinary circumstances for the late filing, we will not consider the Agency's opposition.

IV. Union's Exceptions

The Union argues that the award is contrary to law because the Arbitrator applied the wrong legal standard for imposing discipline on the grievant "[w]hen acting in the course of a grievance or EEO procedure . . . ." Exceptions at 8. According to the Union, certain MSPB precedent is applicable, as well as the Authority's decision in *Dep't of the Air Force, Grissom Air Force Base, Ind.*, 51 FLRA 7 (1995) (*Grissom*), which holds that union officials may use "intemperate, abusive, or insulting language without fear of restraint or penalty if he or she believes such rhetoric to be an effective means to make the union's point." Exceptions at 8 (quoting *Grissom*, 51 FLRA at 11). Based on this precedent, the Union claims that the grievant was engaged in protected activity when she interrupted the investigative hearing and, therefore, should not have been disciplined for her actions. The Union disputes the Arbitrator's reasoning, asserting that "[t]here is no limitation on the protection to only a formal grievance meeting and the Arbitrator could not point to any action by the [g]rievant beyond her protected [activity]." Exceptions at 13. With respect to the AWOL charges, the Union claims that the grievant was either on approved duty status to attend training or engaged in activities arising from the incident that occurred while she was on approved duty status to attend training. As such, the Union asserts that the AWOL charges demonstrate the Agency's "improper motive" and "transparent attempt to 'get' the [g]rievant" for engaging in protected activities. *Id.* at 10.

The Union also argues that the award fails to draw its essence from the parties' agreement because neither the parties' agreement nor the Agency's regulations permits the Agency to impose a paper suspension. According to the Union, a paper suspension is authorized only as the result of negotiations, and the Agency may not impose one unilaterally. In this regard, the Union claims that the actions that the Agency may take are "spelled out with a great deal of specificity in both regulation and contract." *Id.* at 6. As to the regulations, the Union claims that the Agency's "table of penalties . . . does not reference paper suspensions as a plausible action or response." *Id.* at 7. As to the contract, the Union asserts that Article 13, § 2 of the parties' agreement permits the Agency to "admonish, reprimand or suspend" an employee and that this is "the complete list of all actions that may be taken." *Id.* at 6. Moreover, the Union asserts that Article 13, § 5 of the parties' agreement "specifically says that alternative disciplinary approaches . . . 'shall be a subject for local negotiations.'" *Id.* According to the Union, the grievant's paper suspension is an alternative disciplinary approach and "[t]here is no dispute that no such negotiations have occurred." *Id.*

V. Analysis and Conclusions

A. The award is contrary to law, rule and/or regulation, in part.

The Union claims that the Arbitrator applied the wrong legal standard for determining whether discipline of the grievant was warranted. When an exception involves an award's consistency with law, the Authority reviews any question of law raised by the exception and the award *de novo*. *See NTEU Chapter 24*, 50 FLRA 330, 332 (1995) (citing *U.S. Customs Serv. v. FLRA*, 43 F.3d 682, 686-87 (D.C. Cir. 1994)). In applying the standard of *de novo* review, the Authority assesses whether an arbitrator's legal conclusions are consistent with the applicable standard of law. *See U.S. Dep't of Def., Dep'ts of the Army & the Air Force, Ala. Nat'l Guard, Northport, Ala.*, 55 FLRA 37, 40 (1998). In making that assessment, the Authority defers to the arbitrator's underlying factual findings. *See id.*

5. Effective November 9, 2009, and as relevant here, the Authority's regulations were amended to treat filing of documents by commercial delivery in the same way as filing by U.S. mail. *See* 5 C.F.R. § 2429.22.

1. The Arbitrator did not err in finding that the grievant's discipline based on the AWOL charges was appropriate.

The Union disputes the Arbitrator's finding that the Agency acted properly in disciplining the grievant for AWOL because the Union claims the AWOL charges are "yet another example of the [Agency's] improper motive" for the discipline. Exceptions at 10.

In cases alleging discrimination, the Authority applies the framework in *Letterkenny Army Depot*, 35 FLRA 113, 118 (1990) (*Letterkenny*). Under that framework, the party making such an assertion establishes a *prima facie* case of discrimination by demonstrating that: (1) the employee against whom the alleged discriminatory action was taken was engaged in protected activity; and (2) such activity was a motivating factor in the agency's treatment of the employee. Once the *prima facie* showing is made, an agency may seek to establish the affirmative defense that: (1) there was a legitimate justification for the action; and (2) the same action would have been taken even in the absence of the protected activity.

Although the Arbitrator did not expressly apply the *Letterkenny* framework, the record is sufficient for the Authority to apply the framework. Even assuming that the grievant was engaged in protected activity, the Arbitrator rejected the Union's claim that the grievant's AWOL charges were motivated by her Union activities. Specifically, the Arbitrator found that there was "not sufficient proof that the Agency actions against [the] grievant were in any way connected to her protected activities." Award at 13. A review of the record provides no basis for concluding that the Arbitrator's finding is deficient. To the contrary, the record shows that the Agency gave the grievant several opportunities to request appropriate leave for her absences, but that the grievant refused to do so in a timely manner, despite being warned that her actions would result in the AWOL charges. In addition, the Union does not demonstrate that the Agency was motivated by the grievant's Union activities. In this connection, although the Union asserts that the grievant was charged with AWOL for conduct that "no other employee would ever be held accountable for[,]" Exceptions at 10, the Union does not point to any instances where other employees were absent from work without requesting leave and were not charged with AWOL. Consequently, the record establishes that the second part of the Union's *prima facie* case under the *Letterkenny* framework is not satisfied and, thus, no *prima facie* case of discrimination based on protected activity has been established. *See, e.g., AFGE Local 1345, Fort Carson, Colo.*, 53 FLRA 1789, 1795 (1998) (finding no *prima facie* case of discrimination where evidence did not show that respondent's actions were motivated by employee's protected activities).

Based on the foregoing, we find that the award is not contrary to law inasmuch as it sustains the grievant's AWOL charges.

2. The Arbitrator erred in finding that the grievant was not acting in her official capacity as a Union representative when she interrupted the investigative hearing.

Under the Statute, a union official acting in a representative capacity may not be disciplined for actions taken in performing representative duties unless such actions exceeded the bounds of protected activity. *See U.S. Dep't of the Air Force, Aerospace Maint. & Regeneration Ctr., Davis Monthan Air Force Base, Tucson, Ariz.*, 58 FLRA 636, 636 (2003). In determining whether an employee has engaged in conduct that exceeds the bounds of protection, the Authority balances the employee's right to engage in protected activity, which "permits leeway for impulsive behavior, . . . against the employer's right to maintain order and respect for its supervisory staff on the jobsite." *Grissom*, 51 FLRA at 11-12. Relevant factors in striking this balance include: (1) the place and subject matter of the discussion; (2) whether the employee's outburst was impulsive or designed; (3) whether the outburst was in any way provoked by the employer's conduct; and (4) the nature of the intemperate language and conduct. *See id.* at 12. The foregoing factors need not be cited or applied in any particular way. *See id*.

The Union disputes the Arbitrator's conclusion that the grievant was not acting in a representative role when she interrupted the investigative hearing. The Arbitrator reached this conclusion because she found that the grievant was not presenting a grievance, and the witness whom the grievant was attempting to represent was not entitled to representation at the hearing. However, these facts do not demonstrate that, as a matter of law, the grievant was not acting in her official capacity as a Union representative. In this connection, the Statute does not limit the Union's right to be represented to only grievance proceedings. Moreover, the Statute expressly permits Union representation at "any exami-

nation of an employee in the unit . . . in connection with an investigation[.]" 5 U.S.C. § 7114(a)(2)(B). [6]

Here, there is no dispute that the grievant, who was on 100 percent official time, was attempting to exercise her right to represent the witness at the investigative hearing because the witness originally had requested Union representation. The Arbitrator found that, at the hearing, the witness testified that she did not believe the examination would result in disciplinary action taken against her, and signed a waiver of her right to representation. However, the Arbitrator did not find, and there is no contention, that the grievant was aware of anything other than the witness' request for representation. In any event, it is undisputed that the grievant was attempting to exercise her right to attend the hearing as a Union representative. As such, the grievant was acting in her official role as a Union representative. *See, e.g., Fed. Bureau of Prisons Office of Internal Affairs, Wash., D.C.*, 53 FLRA 1500, 1518-20 (1998) (union official's presence at counseling meeting protected).

Based on the foregoing, we find that the Arbitrator erred in finding that the grievant was not acting in her official capacity as a Union representative when she interrupted the investigative hearing.

3. The grievant's conduct at the investigative hearing was protected.

The Union claims that the Arbitrator erred in finding that the grievant's conduct was not protected. *See* Exceptions at 8 (citing *Grissom*). Although the Arbitrator did not specifically address the *Grissom* factors, the record shows, for the following reasons, that three of the four factors weigh in favor of the grievant's conduct being protected. With respect to the first factor, the record shows that the conduct took place in a room where an investigative hearing was taking place, and a bargaining-unit employee who had requested Union representation was testifying. There is no indication in the record as to how many people, other than the witness and the three board members that were conducting the hearing, were present in the hearing. However, there is no contention that the grievant's conduct interrupted the work of other employees. *See Grissom*, 51 FLRA at 12 (the fact that an employee's conduct did not occur in a public area was a factor in finding that the conduct did not constitute flagrant misconduct). Moreover, the record shows that the investigative hearing, although delayed for an hour, ultimately was held with the witness testifying as originally planned. There is no claim that the delay negatively affected the Agency's operations, such that the grievant's actions would lose protection under the Statute. *Cf. Veterans Admin. Med. Ctr. Birmingham, Ala.*, 35 FLRA 553, 560-61 (1990) (union representative properly subject to discipline for remaining on phone call to discuss union business after having been ordered to work on a life threatening emergency situation). As to the second *Grissom* factor, there is no basis for finding that the grievant's conduct was designed.

As for the fourth *Grissom* factor — the nature of the intemperate language and conduct — the record shows that the grievant entered the hearing room and ordered the witness several times in a loud voice to "[g]et out[,]" to "[l]eave the room[,]" and to "not . . . testify." Award at 3. Under Authority precedent, as well as National Labor Relations Board (NLRB) precedent, using a loud tone of voice does not, in and of itself, exceed the bounds of protected activity. *See, e.g., Grissom*, 51 FLRA at 12 (loud use of profanity towards agency negotiator protected); *Severance Tool Indus.*, 301 NLRB 1166, 1170 (1991), *aff'd* 953 F.2d 1384 (6th Cir 1992) (calling company president a profane name in a loud voice protected). In addition, the particular comments that the grievant made to the witness to leave the room and to not testify were not as extreme as other comments and conduct that the Authority has found to be protected, consistent with its precedent permitting union officials to use intemperate, abusive, or insulting language when performing representation duties. *See, e.g., U.S. Dep't of Agric., Food Safety & Inspection Serv., Wash., D.C.*, 55 FLRA 875, 880-81 (1999) (calling supervisor "a little shithead" protected); *Air Force Flight Test Ctr., Edwards Air Force Base, Cal.*, 53 FLRA 1455, 1456 (1998) (union representative leaning over a supervisor's desk and pointing finger at supervisor while engaged in protected activity was not "beyond the limits of acceptable behavior"). The grievant's conduct also is unlike other conduct that the Authority has found to be unprotected such as racially inflammatory comments and physical contact. *See, e.g., Veterans Admin., Wash., D.C. & Veterans Admin. Med. Ctr., Cincinnati, Ohio*, 26 FLRA 114 (1987) (upholding discipline of union official for using racially inflammatory comments in a union newspaper), *aff'd sub nom. AFGE, AFL-CIO Local 2031 v. FLRA*, 878 F.2d 460 (D.C. Cir. 1989); *U.S. Dep't of Justice, U.S. Marshals*

6. 5 U.S.C. § 7114(a)(2)(B) provides, in pertinent part, that:

> An exclusive representative of an appropriate unit in an agency shall be given the opportunity to be represented at . . . any examination of an employee in the unit by a representative of the agency in connection with an investigation if (i) the employee reasonably believes that the examination may result in disciplinary action against the employee; and (ii) the employee requests representation.

Serv. & U.S. Marshals Serv., Dist. of N.J., 26 FLRA 890, 890, 901 (1987) (finding that a physical response by union or management representatives in the context of labor-management relations would be beyond the limits of acceptable behavior). Here, there is no evidence that the grievant engaged in any such behavior. [7]

Based on the foregoing, we find that the Arbitrator erred in concluding that the grievant's interruption of the investigative hearing was not protected activity and set aside the award to the extent it sustains the disciplinary action against the grievant for this conduct. [8]

B. The award fails, in part, to draw its essence from the parties' agreement.

In reviewing an arbitrator's interpretation of a collective bargaining agreement, the Authority applies the deferential standard of review that federal courts use in reviewing arbitration awards in the private sector. *See* 5 U.S.C. § 7122(a)(2); *AFGE Council 220*, 54 FLRA 156, 159 (1998). Under this standard, the Authority will find that an arbitration award is deficient as failing to draw its essence from the collective bargaining agreement when the appealing party establishes that the award: (1) cannot in any rational way be derived from the agreement; (2) is so unfounded in reason and fact and so unconnected with the wording and purposes of the collective bargaining agreement as to manifest an infidelity to the obligation of the arbitrator; (3) does not represent a plausible interpretation of the agreement; or (4) evidences a manifest disregard of the agreement. *See U.S. Dep't of Labor* (*OSHA*), 34 FLRA 573, 575 (1990). The Authority and the courts defer to arbitrators in this context "because it is the arbitrator's construction of the agreement for which the parties have bargained." *Id*. at 576.

In addition to its claim that no discipline was warranted, the Union also claims that the award fails to draw its essence from the parties' agreement because the agreement does not permit the Agency to impose a paper suspension without bargaining. In this regard, the Union claims that a paper suspension is not included in the definition of a disciplinary action within the meaning of Article 13, § 2(a)(1). The Union claims that a paper suspension is an alternative disciplinary action, within the meaning of Article 13, § 5 of the parties' agreement, which cannot be imposed without bargaining.

The Arbitrator acknowledged the Union's claim that the paper suspension is an alternative disciplinary action within the meaning of Article 13, § 5 and she found that no negotiations, as required by that provision, occurred here. Award at 6. However, the Arbitrator found that, although the parties' agreement does not specifically refer to a paper suspension, the agreement "could not be seen as forbidding the Agency from imposing such a 'paper suspension.'" *Id.* In this regard, the Arbitrator noted that Article 13, § 1 permits the Agency to impose disciplinary action for "just and sufficient cause." *Id*. Moreover, the Arbitrator found that, where there is just and sufficient cause for discipline, the Agency "could place a notice in an employee's file if he or she should commit an offense less serious than would justify a suspension or removal[.]" *Id*. According to the Arbitrator, "[t]hat is the function of the . . . 'paper suspension'" at issue in this case, which she found "is seen here as an 'admonishment' or a 'reprimand[,]'" as defined by Article 13, § 2(a)(1) of the parties' agreement. *Id*. at 6-7.

The Arbitrator's conclusion that the paper suspension amounts to an admonishment or a reprimand as opposed to "alternative discipline" under Article 13, § 5 is not supported by either the express wording of the parties' agreement or the record evidence. To begin, the

7. With respect to the third *Grissom* factor, it is unclear from the record whether the grievant's comments were provoked by the employer. However, because the other three factors weigh in favor of protection, it is not necessary for the Authority to reach this factor.

8. The dissent asserts that the statutory protection permitting "a union official, acting in a representative capacity, to speak plainly (and even discourteously) to management simply does not apply when a union official is communicating with a non-management co-worker." Dissent at 13. As an initial matter, in issuing the challenged suspension, the Agency emphasized the grievant's disruption of the hearing, rather than the fact that her statements and conduct involved a "co-worker" as such. *See* Suspension at 2 ("Disrupting a legitimate investigation and forcefully removing an employee from the process is a serious offense and will not be tolerated.") Moreover, nothing in the decisions cited by the dissent indicate that statements that would be protected when made to a management official would become unprotected when made to a co-worker. *See, e.g.*, *Old Dominion Branch No. 496, Nat'l Ass'n of Letter Carriers v. Austin*, 418 U.S. 264, 276-79, 282 (1974) (allegedly defamatory statements about co-workers protected). In fact, the National Labor Relations Board has held that employees' protected concerted activity did not lose its statutory protection where the employees directed mocking, profane language toward a co-worker. *See Morton Int'l, Inc.*, 315 NLRB 564, 567 (1994) (employees' written insults on a co-worker's memo — including characterizing the co-worker as "chicken shit" — protected). Finally, the Merit Systems Protection Board decisions cited by the dissent are inapposite because they do not involve employees who were engaged in statutorily protected activities when they allegedly committed acts of misconduct. *See Bailey v. DOD*, 92 M.S.P.R. 59 (2002); *Kirkland-Zuck v. HUD*, 90 M.S.P.R. 12, 19 (2001); *Murphy v. Dep't of Navy*, 25 M.S.P.R. 333 (1984) (citing *Hubble v. Dep't of Justice*, 6 M.S.P.R. 659 (1981)); *Tobochnik v. VA*, 9 M.S.P.R. 82 (1981). By relying on them, the dissent implies that the existence of statutorily protected activity is irrelevant. It is not.

disputed disciplinary action in this case is specifically titled by the Agency as a "Letter of Alternative Discipline." Award at 1 (emphasis omitted). Moreover, Article 13 of the parties' agreement specifically differentiates between disciplinary actions, which § 2(a)(1) defines as "an admonishment, reprimand, or suspension of fourteen (14) calendar days or less" and "alternative discipline," which § 5 provides "shall be a subject for local negotiations." The Arbitrator found that no local negotiations over the letter of alternative discipline took place. *See* Award at 6. In addition, the Arbitrator's finding that the letter of alternative discipline was "seen here as" an admonishment or reprimand cannot in any rational way be derived from the agreement. Award at 7. In this regard, an admonishment and a reprimand are forms of discipline under the parties' agreement that have different, specific consequences. In particular, an admonishment and a reprimand may remain in an employee's file for only two or three years, respectively. Conversely, the letter of alternative discipline at issue in this case specifically states that it will remain in the grievant's file "for a period not to exceed 6 years." Exceptions, Attachment A at 5. Thus, the letter of alternative discipline could not reasonably be interpreted as an admonishment or a reprimand, as defined in the parties' agreement. As such, the Arbitrator's finding that the paper suspension was an admonishment or a reprimand, as opposed to alternative discipline, is unfounded in reason and fact and unconnected with the plain wording of the parties' agreement and other record evidence. *See, e.g., U.S. Dep't of Justice, Fed. Bureau of Prisons, U.S. Penitentiary, Leavenworth, Kan.*, 53 FLRA 29, 33 (1997) (award deficient because arbitrator's assertion of jurisdiction over the grievance was not compatible with a plausible interpretation of the parties' collective bargaining agreement); *see also U.S. Dep't of the Air Force, Okla. City Air Logistics Command, Tinker Air Force Base, Okla.*, 48 FLRA 342, 348 (1993) (award deficient because arbitrator's interpretation of agreement was incompatible with its plain wording).

In sum, the plain wording of the parties' agreement distinguishes between discipline and alternative discipline. Moreover, the disputed action was titled "alternative discipline" by the Agency. Finally, the disputed action was not encompassed by the contractual definition of a disciplinary action and has different characteristics from those of a disciplinary action. As a result, the Arbitrator's finding that the alternative discipline was actually a reprimand or an admonishment fails to draw its essence from the parties' agreement.

Accordingly, we conclude that the Arbitrator's finding that the paper suspension was an admonishment or a reprimand within the meaning of Article 13, § 2 fails to draw its essence from the parties' agreement. Because we deny the Union's exception to the Arbitrator's decision sustaining the AWOL charges, we remand the award to the parties for resubmission to the Arbitrator, absent settlement, to determine whether discipline or alternative discipline, within the meaning of the parties' agreement, is warranted for those charges.

VI. Decision

The exceptions are denied in part, and the award is set aside in part and remanded to the parties for resubmission to the Arbitrator, absent settlement.

APPENDIX

Article 13

Section 1 - General

The Department and the Union recognize that the public interest requires the maintenance of high standards of conduct. No bargaining unit employees will be subject to disciplinary action except for just and sufficient cause. Disciplinary actions will be taken only for such cause as will promote the efficiency of the service. Actions based upon substantively unacceptable performance should be taken in accordance with Title 5, Chapter 43 and will be covered in Article 26 Performance Appraisal System.

Section 2 - Definitions

For purposes of this Article, the following definitions are used:

A. For Title 5 employees:

1. A disciplinary action is defined as an admonishment, reprimand, or suspension of fourteen (14) calendar days or less and

2. Adverse actions are removals, suspensions of more than fourteen (14) calendar[] days, reduction in pay or grade, or furloughs of thirty (30) calendar days or less.

. . . .

Section 3 - Removal of Disciplinary Actions

Admonishments and reprimands may be removed from an employee's files after a six (6) month period. If an employee requests removal of such actions after six (6) months, they should be removed if the purpose of the discipline has been served. In all cases, an admonishment will be removed from an employee's file after two (2) years and a reprimand will be removed after three (3) years.

. . . .

Section 5 - Alternative and Progressive Discipline

The parties agree to a concept of alternative discipline which shall be a subject for local negotiations. The parties also agree to the concept of progressive discipline, which is discipline designed primarily to correct and improve employee behavior, rather than punish.

Exceptions, Attachment unnumbered.

Member Beck, Dissenting Opinion:

I agree with my colleagues that the Union president was acting in her official role as a Union representative when she arrived at the investigative hearing. I do not agree, however, that the Union president's conduct after she arrived — disrupting the investigative meeting * by ordering her co-worker "in a loud voice" to "leave the room" and, when the co-worker did not comply, "scream[ing]" at her repeatedly to "get out" (Award at 3, 11) — is protected by our Statute. See *U.S. Dep't of Transp., FAA, Wash., D.C.,* 64 FLRA 410, 417 (2010) *(FAA)*.

Screaming at a co-worker generally constitutes actionable misconduct. *Bailey v. DOD*, 92 M.S.P.R. 59 (2002) (yelling at coworkers that results in work disruption warrants removal); *Murphy v. Dep't of Navy*, 25 M.S.P.R. 333 (1984) (an agency is entitled to expect its employees to deport themselves in conformance with acceptable standards), citing *Hubble v. Dep't of Justice*, 6 M.S.P.R. 659 (1981) (abusive or disrespectful conduct is not conducive to a stable working relationship); see also *Kirkland-Zuck v. HUD*, 90 M.S.P.R. 12, 19 (2001) and *Tobochnik v. VA*, 9 M.S.P.R. 82 (1981) (disrespectful conduct directed towards a supervisor or co-worker constitutes misconduct).

It has long been acknowledged in the law of labor relations that dealings between union representatives and management representatives can sometimes become "heated affairs" where emotions run high. *Old Dominion Branch No. 496, Nat'l Ass'n of letter Carriers v. Austin*, 418 U.S. 264, 276-77 (1974) (citing *Linn v United Plant Guard Workers of Am., Local 114*, 383 U.S. 53, 58 (1966)). In such circumstances — where union representatives are acting as equal parties in a bargaining relationship rather than as employees carrying out duties on behalf of the employer — union representatives are not required to act in complete conformity with the typical norms of the workplace such as, for example, the duty of loyalty or scrupulous respect toward supervisors. *FAA*, 64 FLRA at 417-18 (citing *Old Dominion Branch No. 496, Nat'l Ass'n of Letter Carriers v. Austin*, 418 U.S. 264, 276-77 (1974); *Dep't of the Air Force v. FLRA*, 294 F.3d 192, 201 (D.C. Cir. 2002)) (citing *Adtranz ABB Daimler-Benz Transp. v. NLRB*, 253 F.3d 19, 27-28 (D.C. Cir. 2001)). However, the latitude that a union representative enjoys when dealing with management does not constitute a license to subject a non-management co-worker to uninvited verbal abuse, as was the case here.

The rationale that permits a union official, acting in a representative capacity, to speak plainly (and even discourteously) to management simply does not apply when a union official is communicating with a non-management co-worker. Accordingly, I conclude that the Arbitrator was correct in finding that the conduct was not protected.

*. The Arbitrator found that the disruption resulted in a one-hour delay in the investigative proceeding. Award at 10.