68 FLRA No. 53

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 2595
(Union)

and

UNITED STATES
DEPARTMENT OF HOMELAND SECURITY
U.S. CUSTOMS
AND BORDER PROTECTION
BORDER PATROL
YUMA SECTOR
(Agency)

0-AR-4937

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DECISION

February 25, 2015

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Before the Authority: Carol Waller Pope, Chairman, and Ernest DuBester and Patrick Pizzella, Members
(Member Pizzella dissenting)

I. Statement of the Case

This case is about protected union activity. The grievant is a Union representative who currently serves as the local Union president. During a meeting with his supervisor to review a form used to request official time, the grievant tossed or threw a related document on the floor and initially refused to pick it up. The Agency gave the grievant a two-day suspension for unprofessional conduct in his supervisor's office, and for conduct in another manager's office that is not at issue here. Arbitrator Steven E. Kane upheld the grievant's suspension only for his unprofessional conduct in his supervisor's office, and reduced the two-day suspension to one day. The Arbitrator found that the grievant was acting in a personal, rather than official, representational capacity when he engaged in the conduct at issue. There are two questions before us.

The first question is whether the Arbitrator erred as a matter of law in determining that the grievant was not engaged in activity protected by the Federal Service Labor-Management Relations Statute (the Statute)[1] when he met with his supervisor to review his official-time form. Because Authority precedent establishes that requesting official time to perform representation activities constitutes protected activity, the answer is yes.

The second question is whether the Arbitrator erred as a matter of law in determining that the grievant's conduct lacked the Statute's protection when he tossed or threw a document related to the official-time form on the floor and initially refused to pick it up. Because the grievant's conduct did not "exceed the boundaries of protected activity"[2] under Authority precedent, the answer is yes.

II. Background and Arbitrator's Award

This case deals with the grievant's actions at a meeting with his supervisor concerning the grievant's requests for official time to perform Union activities. As stated, the grievant is the local Union president.

Section 7131 of the Statute establishes the right to official time for union representatives.[3] In accordance with this statutory authorization and consistent with the parties' collective-bargaining agreement, the grievant is entitled to official time "to perform the duties of [his] office" including "approved labor-management functions."[4] Article 7 prescribes a process by which Union representatives may exercise their right to official time.[5] Specifically, Section A5(b) requires that "[t]he Union official [requesting official time] will prepare the [official-time] form . . . and submit it to the appropriate supervisor."[6] It also provides that "[t]he supervisor will . . . [ensure] that such time is appropriately recorded on the Union official's time and attendance report."[7]

The grievant's work location is different from his supervisor's. His supervisor's office is at the Yuma Border Patrol Station (Yuma Station). While the grievant was at the Yuma Station dealing with a labor-management dispute, his supervisor asked about scheduling a one-on-one meeting to review the grievant's official-time form. The grievant was busy at the time, but told his supervisor that "he would get back to him."[8] The grievant later called his supervisor to say that he was

[1] 5 U.S.C. §§ 7101-7135; *see id.* § 7102.

[2] *U.S. DOD, Def. Logistics Agency*, 50 FLRA 212, 215 (1995) (*Defense Logistics*); *accord AFGE, Nat'l Border Patrol Council*, 44 FLRA 1395, 1400-01 (1992) (*Border Patrol Council*); *U.S. Air Force Logistics Command, Tinker Air Force Base, Okla. City, Okla.*, 32 FLRA 252, 254 (1988) (*Tinker*).

[3] 5 U.S.C. § 7131.

[4] Exceptions, Attach., 1995 Collective-Bargaining Agreement (1995 CBA) at 9-10.

[5] *Id.*

[6] Award at 2.

[7] *Id.* at 3.

[8] *Id.*

available, and the supervisor directed the grievant to come to the supervisor's office.

When the grievant entered the supervisor's office, the supervisor asked the grievant for his time and attendance report. The grievant apparently indicated that he did not have it handy. The supervisor then said, "[w]ell then, go get it and bring it here."[9] The grievant got the timesheet and said, "[s]o here you go."[10]

Although there is some dispute over what occurred next, the Arbitrator found that the grievant either "tossed" or "flick[ed]" his timesheet toward the supervisor.[11] The timesheet fell to the floor, and the supervisor asked the grievant, "Uh, you gonna pick it up off the floor?"[12] The grievant replied, "No, I'm not. It's right there, you wanted it."[13] After about a minute, the grievant retrieved the timesheet from the floor and gave it to the supervisor. The Agency subsequently suspended the grievant for two days, without pay.

The Union filed a grievance challenging the grievant's suspension. The grievance was not resolved and was submitted to arbitration. The parties stipulated to the following issue: "Whether the . . . suspension of [the grievant] was taken for appropriate cause, which is described [in the parties' agreement] as 'cause that is just and sufficient, and only for the reasons as will promote the efficiency of the [s]ervice.'"[14]

Before the Arbitrator, the Union argued that the grievant was "pursuing Union business on official time" when the conduct in his supervisor's office occurred.[15] The Union also argued that "the disciplinary action meted out to [the grievant] is a violation of the protection afforded by [the Statute] and [the parties' agreement]."[16]

In resolving the Union's grievance, the Arbitrator considered the "appropriate[-] cause" wording from Article 32M of the parties' agreement. Article 32M states, in relevant part, "that . . . suspension[s] of less than fifteen (15) days . . . will be taken only for appropriate cause *as provided in applicable law*."[17] Consistent with Article 32M, the Arbitrator based his analysis on statutory considerations; i.e., "the federal sector's scope of protected…activity as [it] would apply in this case."[18]

The Arbitrator concluded that the grievant was not engaged in protected activity during the timesheet incident. Rather, the Arbitrator found that "the capacity in which the [g]rievant was acting when in [the supervisor's] office was more personal than official."[19] The Arbitrator also found that the grievant "was not discharging any union[-] representation duties when his timesheet intentionally went from his hand to the floor[,] and he refused his supervisor's directive to pick it up."[20] The Arbitrator further concluded that the grievant's conduct was "unprofessional, disrespectful, and insubordinate,"[21] and he upheld the Agency's decision to suspend the grievant, finding that the action was taken for "appropriate cause."[22] The Arbitrator also found that the grievant's conduct in the other manager's office, not at issue here, did not warrant discipline. The Arbitrator therefore reduced the grievant's two-day suspension to one day.

The Union filed an exception to the award, and the Agency filed an opposition to the Union's exception.

III. Analysis and Conclusions

A. The Arbitrator's determination that the grievant was not engaged in protected activity when he met with his supervisor to review his official-time form is contrary to law.

The Union claims that the Arbitrator erred as a matter of law in determining that the grievant was not engaged in activity protected by the Statute when he met with his supervisor to review his official-time form.[23] Taking particular issue with the Arbitrator's conclusion that the grievant was acting in a capacity that was "more personal than official,"[24] the Union argues that the grievant was "require[ed] to have his [t]ime and [a]ttendance records and prior use of official time reviewed because he was the [local] Union [p]resident."[25]

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.[26] In applying the standard of de novo review, the Authority assesses whether an arbitrator's legal conclusions are

[9] *Id.* at 4.
[10] *Id.*
[11] *Id.*
[12] *Id.*
[13] *Id.*
[14] *Id.* at 2.
[15] *Id.* at 4.
[16] *Id.*
[17] *Id.* at 3 (emphasis added).
[18] *Id.* at 5.
[19] *Id.*
[20] *Id.*
[21] *Id.*
[22] *Id.* at 6.
[23] Exceptions at 6-7.
[24] Award at 5.
[25] Exceptions at 7.
[26] *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)).

consistent with the applicable standard of law.[27] In making that assessment, the Authority defers to the arbitrator's underlying factual findings,[28] unless a party demonstrates that the findings are nonfacts.[29]

Section 7102 of the Statute provides, in pertinent part, that "[e]ach employee shall have the right to form, join, or assist any labor organization, or to refrain from any such activity, freely and without fear of penalty or reprisal, and each employee shall be protected in the exercise of such right."[30] It is well established in Authority case law that a variety of activities are protected under § 7102, including holding a leadership position with a union and exercising a right under a collective-bargaining agreement.[31]

Moreover, the Statute protects "the right of employees to organize, bargain collectively, and participate [in] labor organizations"[32] and, together with the parties' collective-bargaining agreement, provides official time for these activities. The Authority has consistently found that acting as a union official and requesting official time to perform representation activities constitutes protected activity.[33] Because the grievant attended the meeting in his supervisor's office as part of the process of obtaining approval of official time requests to conduct representational activities – to which he had a right under § 7131 of the Statute and Article 7 of the parties' agreement – we find that the grievant was engaged in a protected activity when he met with his supervisor to review his official-time form. Accordingly, we conclude that the Arbitrator's determination that the grievant was not engaged in protected activity when he met with his supervisor to review his official-time form is contrary to law.

B. The Arbitrator's determination that the grievant's conduct lacked the Statute's protection when he tossed or threw a document related to his official-time form on the floor and refused to pick it up is contrary to law.

The Union claims that the Arbitrator erred as a matter of law in determining that the grievant's conduct lacked the Statute's protection when he tossed or threw his timesheet on the floor and refused to pick it up. Citing the factors set forth in the Authority's decision in *DOD, Defense Mapping Agency Aerospace Center, St. Louis, Missouri* (*Defense Mapping*),[34] the Union argues that the grievant's conduct did not "exceed the boundaries of protected activity."[35]

It is well established that an agency may discipline a union representative for conduct occurring during protected activity if the conduct exceeds the boundaries of protected activity.[36] In *Defense Mapping*, the Authority set forth four factors "to be considered in striking the balance" between protected activity that "allow[s] leeway for impulsive behavior," and flagrant misconduct that "imping[es] upon the [Agency's] right to maintain order."[37] These factors include: (1) the place and subject matter of the discussion; (2) whether the employee's conduct was impulsive or designed; (3) whether the conduct was in any way provoked by the employer's conduct; and (4) the nature of the intemperate language or conduct.[38] Additionally, the Authority determines whether conduct exceeds the boundaries of protected activity on a case-by-case basis and based on the totality of the circumstances.[39]

Consistent with our finding that the grievant was engaged in protected activity when he met with his supervisor, it is necessary to apply the *Defense Mapping* factors to his conduct at the meeting.

1. The place and subject matter of the discussion between the grievant and his supervisor support finding that the grievant's conduct is protected.

Applying the first *Defense Mapping* factor, the Authority considers the place and subject matter of the discussion.[40] Regarding "place," the Authority has repeatedly held that conduct that disrupts the work unit jeopardizes "the employer's right to maintain order and respect for its supervisory staff on the jobsite."[41] Here, the "one-on-one" meeting occurred in the supervisor's

[27] *U.S. DOD, Dep'ts of the Army & the Air Force, Ala. Nat'l Guard, Northport, Ala.*, 55 FLRA 37, 40 (1998).
[28] *Id.*
[29] *NAGE, Local R4-17*, 67 FLRA 4, 6 (2012) (citing *U.S. Dep't of the Air Force, Tinker Air Force Base, Okla. City, Okla.*, 63 FLRA 59, 61 (2008)).
[30] 5 U.S.C. § 7102.
[31] *U.S. DOJ, INS, U.S. Border Patrol, San Diego Sector, San Diego, Cal.*, 38 FLRA 701, 712 (1990).
[32] 5 U.S.C. § 7101.
[33] *See Border Patrol Council*, 44 FLRA at 1402.
[34] 17 FLRA 71 (1985).
[35] *See Defense Logistics*, 50 FLRA at 215; *see also Border Patrol Council*, 44 FLRA at 1400-01; *Tinker*, 32 FLRA at 254.
[36] *U.S. Dep't of the Air Force, Aerospace Maint. & Regeneration Ctr., Davis-Monthan Air Force Base, Tucson, Ariz.*, 58 FLRA 636, 636 (2003) (citing *Dep't of the Air Force, 315th Airlift Wing v. FLRA*, 294 F.3d 192, 201 (D.C. Cir. 2002)).
[37] *Defense Mapping*, 17 FLRA at 81.
[38] *Id.*
[39] *See AFGE*, 59 FLRA 767, 771 (2004); *Air Force Flight Test Ctr., Edwards Air Force Base, Cal.*, 53 FLRA 1455 (1998) (*Edwards*).
[40] *See Defense Mapping*, 17 FLRA at 81.
[41] *Dep't of the Air Force, Grissom Air Force Base, Ind.*, 51 FLRA 7, 11-12 (1995).

office. Although voices were raised, no other employees witnessed or overheard the dialogue between the supervisor and the grievant.[42] To borrow words from the dissent, the meeting occurred "behind closed doors" and was "removed from the immediate workplace."[43] As a result, the event "did not have any direct impact on workplace discipline."[44]

Regarding "subject matter," because the purpose of the meeting was to review the grievant's official-time form, the "subject matter of the discussion was within the scope of the [grievant's] legitimate concerns."[45] Specifically, the discussion concerned not only the grievant's right to official time under the parties' agreement but also his pursuit of that right.[46] Thus, the subject matter implicated both statutory and contractual rights.

Accordingly, we find that application of the first *Defense Mapping* factor supports a conclusion that the grievant's conduct did not exceed the boundaries of protected activity.

2. The impulsive character of the grievant's conduct supports finding the conduct protected.

Applying the second *Defense Mapping* factor, the Authority considers whether the grievant's conduct was impulsive or designed.[47] The Arbitrator's factual findings support the conclusion that the grievant's conduct was impulsive. The Arbitrator found that the grievant tossed or threw the timesheet on the floor in response to his supervisor's request for the timesheet.[48] Thus, the exchange that culminated in the timesheet incident was part of a conversation initiated by the supervisor. In these circumstances, the grievant's ability to plan – or design – his conduct during the timesheet-incident was limited.[49] Rather, the Arbitrator's findings support the conclusion that the grievant's conduct was impulsive. Accordingly, we find that application of the second *Defense Mapping* factor supports a conclusion that the grievant's conduct did not exceed the boundaries of protected activity.

3. Whether the grievant's conduct was provoked by his supervisor's conduct is unclear.

Applying the third *Defense Mapping* factor, the Authority considers whether the conduct at issue was in any way provoked by the employer's conduct.[50] Because the Arbitrator's findings are not particularly helpful in applying this factor to the timesheet incident, this factor does not offer significant assistance in determining whether the grievant's conduct during the timesheet incident exceeded the boundaries of protected activity.

4. The nature of the grievant's conduct supports finding that the conduct is protected.

Applying the fourth *Defense Mapping* factor, the Authority considers the nature of the language or conduct.[51] One of the Authority's considerations is whether the conduct in question was brief or prolonged.[52] In this case, the grievant's conduct was brief. Whether the grievant "tossed" or "flick[ed]" his timesheet, the Arbitrator found that the grievant retrieved the timesheet "[p]erhaps a minute later."[53] The incident, therefore, was brief.[54]

The Authority also examines tone of voice, physical contact, and threats of violence.[55] As applicable here, the Arbitrator made no finding that the grievant raised his voice, made physical contact, or made any type of real or perceived threat to his supervisor.[56] Moreover, even if the grievant's conduct could be described as unprofessional, disrespectful, or insubordinate, Authority precedent permits the use of intemperate, abusive, or even insulting language by union officials when performing representation duties.[57] And the NLRB also distinguishes between true insubordination and behavior

[42] *See U.S. Dep't of Transp., FAA, Wash., D.C.*, 64 FLRA 410, 413 (2010) (*FAA*).
[43] Dissent at 10.
[44] *Felix Indus., Inc.*, 331 NLRB 144, 145 (2000), *remanded* 251 F.3d 1051 (D.C. Cir. 2001), *decision on remand* 339 NLRB 195 (2003), *enforced* 2004 WL 1498151 (D.C. Cir. July 2, 2004) (*Felix*).
[45] *See FAA*, 64 FLRA at 413.
[46] *See Felix*, 339 NLRB 195, 196 (2003).
[47] *See Defense Mapping*, 17 FLRA at 81.
[48] Award at 4.
[49] *See FAA*, 64 FLRA at 410 (union president cursing at supervisor during an impromptu discussion found to be impulsive).
[50] *See Defense Mapping*, 17 FLRA at 81.
[51] *Id.* at 82.
[52] *See FAA*, 64 FLRA at 414.
[53] Award at 3-4.
[54] *See FAA*, 64 FLRA at 414.
[55] *See id.*
[56] Award at 4 (supervisor "asked" if grievant was going to pick up his timesheet from the floor and grievant "responded" that he was not).
[57] *See, e.g., AFGE, Local 2145*, 64 FLRA 661, 665 (2010) (*Local 2145)* (finding that union president's disruption of hearing was protected); *USDA, 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) (leaning over supervisor's desk and pointing finger at supervisor while engaged in protected activity was not "beyond the limits of acceptable behavior").

that is only "disrespectful, rude, and defiant."[58] In similar situations, employees who initially refuse a supervisory instruction, but ultimately comply, are still found to be engaged in protected activity.[59]

Here, the grievant's conduct is unlike other conduct that the Authority has found to be unprotected – "such as racially inflammatory comments and physical contact."[60] Evaluating the range of actions that the Authority has found to be protected by § 7102, we find that the nature of the grievant's conduct supports a conclusion that the grievant's conduct did not exceed the boundaries of protected activity.

For the reasons discussed above, and after considering the totality of the circumstances and weighing the *Defense Mapping* factors, we find that the grievant was engaged in a protected activity when he met with his supervisor to review his official-time form, and that his conduct during the meeting did not exceed the boundaries of protected activity. Therefore, he may not be disciplined for that conduct.[61] Accordingly, we find that the Arbitrator's award upholding the Agency's suspension of the grievant is contrary to law and must be vacated.

As the Authority has made clear in prior cases, we stress that our conclusion should not be construed as condoning the conduct at issue here.[62] Moreover, we share our dissenting colleague's general aspiration for civility in the workplace – an aspiration we would expect union representatives, agency officials, and employees to also support. Finding ways to exercise important statutory rights while also observing fundamental principles of courteousness and mutual respect fosters an effective and efficient government and protects the public interest.

IV. Decision

We grant the Union's contrary-to-law exception.

As it pertains to the grievant's one-day suspension for unprofessional conduct regarding his official-time form, the Arbitrator's award is vacated and the following is substituted in its place:[63]

> The grievance is sustained. All references to the suspension shall be expunged from the grievant's personnel file. Also, in accordance with 5 U.S.C. § 5596(b)(1)(A)(i), the Agency shall reimburse the grievant for an amount equal to all or any part of the pay, allowances, or differentials the grievant would have received had the one-day suspension not been imposed.

[58] *Severance Tool Indus.*, 301 NLRB 1166, 1170 (1990), *enforced mem.*, 953 F.2d 1384 (6th Cir. 1992) (*Severance Tool*).
[59] *See Staffing Network Holdings, LLC*, 362 NLRB No. 12, slip op. at 8-9 (2015), *Goya Foods, Inc.*, 356 NLRB No. 73, slip op. at 4 (2011), *Noble Metal Processing, Inc.*, 346 NLRB 795 (2006), *Severance Tool*, 301 NLRB at 1170.
[60] *Local 2145*, 64 FLRA at 665-66 (citing *Veterans Admin., Wash., D.C. & Veterans Admin. Med. Ctr., Cincinnati, Ohio*, 26 FLRA 114 (1987), *aff'd sub nom. AFGE, Local 2031 v. FLRA*, 878 F.2d 460 (D.C. Cir. 1989)) (upholding discipline of union official for using racially inflammatory comments in a union newspaper); *U.S. DOJ, U.S. Marshals Serv.*, 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).
[61] *See Border Patrol Council*, 44 FLRA at 1403; *U.S. Air Force Logistics Command, Tinker Air Force Base, Okla., City, Okla.*, 34 FLRA 385, 391 (1990) (*Tinker AFB*).
[62] *See, e.g., U.S. DOD, Def. Contract Mgmt. Agency, Orlando, Fla.*, 59 FLRA 223, 229 (2003); *Edwards*, 53 FLRA at 1456.
[63] *See, e.g., Border Patrol Council*, 44 FLRA at 1404; *Tinker AFB*, 34 FLRA at 401.

Member Pizzella, dissenting:

Few cases that come before the Authority inflame the passions of union and management officials, alike, as those cases wherein the Authority sanctions the conduct of union representatives – who act like characters out of a scene from the 1954 Academy Award winning movie, *On the Waterfront* − simply because they carry a union title after their name.

One provision of the Federal Service Labor-Management Relations Statute (the Statute)[1] assures "employee[s]" that they "have the right to form, join, or assist any labor organization . . . to act for a labor organization . . . [and] to present the views of the labor organization."[2] Over time, various majorities of the Authority have determined that union representatives, when they are acting in a representational role (no matter how directly or indirectly related to union activity) may swear at, insult, and even assault their supervisor without being held accountable for such boorish behavior. But nothing in that "ambiguous"[3] provision relieves union representatives from the general obligation "to maintain civility in the workplace"[4] – an expectation that is applied to every other federal employee.

Before the inception of the Statute, the U.S. Supreme Court recognized that union representatives should be afforded some latitude during "classic 'labor disputes,'" [5] because those encounters, by their very nature, have the potential to become "heated." [6] During those encounters, employees and managers may be inclined to "speak bluntly and recklessly." In *Old Dominion*, however, the Court was speaking to those situations where the parties are unmistakably engaged in actual "collective bargaining that takes place with union negotiators *clearly and unequivocally* in the role of union representative rather than in the role of subordinate employee, or an organizing campaign in which the employee is engaged in conduct that occurs outside of the workplace and outside of his regular work time."[7]

The National Labor Relations Board (NLRB) similarly distinguishes "collective bargaining" from workplace disputes.[8] Collective bargaining, negotiating, and organizing are activities that typically take place behind closed doors (and more often than not are removed from the immediate workplace). Those activities are quite different from typical workplace encounters that routinely occur between a supervisor and a subordinate employee, whether or not the employee is involved with the union.[9]

In this respect, my colleagues, and earlier majorities of the Authority, have mistakenly broadened, far beyond what Congress could have ever envisioned, the "boundaries" of what activity is considered to be acceptable for union representatives.[10]

Twelve years ago, the U.S. Court of Appeals for the District of Columbia Circuit (the D.C. Circuit or the court) rejected the Authority's singular focus on "flagrant misconduct"[11] as a "*tortured* . . . interpretation of the limit of § 7102."[12] Contrary to the Authority, the court held that while "flagrant misconduct" is "*illustrative* of [conduct that] exceed[s] the boundaries of protected activities[,]"[13] it is "not the *only* [] basis upon which a union representative may lose protection under [the Statute]."[14] Specifically, the court held that it "defies explanation that a law [that was] enacted to facilitate collective bargaining and protect employees' right to organize [would] prohibit[] employers from seeking to maintain civility in the workplace,"[15] and criticized the Authority for its assumption that union representatives are "incapable of organizing a union or exercising their statutory rights . . . without resort to abusive or threatening language."[16]

Using the "flagrant-misconduct" framework, the Authority has sanctioned all sorts of outrageous, and (in some cases) criminal behavior of union representatives simply because those representatives are now convinced (perhaps by the paternalistic decisions of the Authority) that the rules of common workplace civility do not apply to them while they are engaged in business for the union. Here are but a few examples of conduct that the Authority has sanctioned over the years:

[1] 5 U.S.C. §§ 7101-7135.
[2] *Id*. §7102(1).
[3] *Dep't of the Air Force, 315th Airlift Wing v. FLRA*, 294 F.3d 192, 197 (D.C. Cir. 2002) (*315th Airlift Wing*).
[4] *Id*. at 201 (citing *Adtranz ABB Daimler-Benz Transp. v. NLRB*, 253 F.3d 19, 27-28 (D.C. Cir. 2001) (*Adtranz*)).
[5] *U.S. Dep't of Transp., FAA, Wash., D.C.*, 64 FLRA 410, 418 (2010) (Dissenting Opinion of Member Beck) (*FAA*) (citing *Old Dominion Branch No. 496, Nat'l Ass'n of Letter Carriers v. Austin*, 418 U.S. 264, 272 (1974) (*Old Dominion*) (citing *Linn v. Plant Guard Workers, Local 114*, 383 U.S. 53, 58 (1966))).
[6] *Id.*
[7] *Id.* at 418 & n.2.
[8] *Id.*
[9] *Id*.
[10] Majority at 7-8.
[11] *315th Airlift Wing*, 294 F.3d at 201.
[12] *Id*. at 198 (emphasis added).
[13] *Id*. at 202.
[14] *Id*.
[15] *Id.* (quoting *Adtranz*, 253 F.3d at 27-28) (internal quotation marks omitted).
[16] *Id.* at 198 (quoting *Adtranz*, 253 F.3d at 26) (internal quotation marks omitted).

- A union representative, telling a supervisor, "f--- you, I don't give a f---!"[17]
- A male union representative (much larger than his female supervisor) physically "attack[ing]"[18] his supervisor in "an assault and battery"[19] that was "so forceful . . . [the supervisor] felt compelled to retreat from him."[20] The union representative followed his supervisor and forced her to "arch backward over a counter"[21] "with his stomach pressed up against her . . . belly to belly and toe to toe, in [the supervisor's face]."[22]
- A male union negotiator yelling at a female management negotiator, "the FLRA will shove this up your a--," "I don't give a f--- what you think," "[y]ou can't be that f-----g stupid, lady,"[23] and (just in case she did not get the message that he was angry) "[y]ou can suck my d---[!]"[24]
- A union representative "discuss[ing]" with several other "[u]nion officials" his plan to write and file a false "incident report" accusing a manager of threatening to "shoot" union representatives.[25] The union representative filed the false incident report.[26]
- A 230-pound union representative yelling at and "pointing his finger right in [the] face"[27] of his "diminutive"[28] female supervisor, while leaning over her "[thirty]-inch-wide desk" where she was "seated."[29] The union representative was angry because the supervisor had denied a single one-hour request for official time from 7:00 a.m. to 8:00 a.m. because he had "work to do" before he left for other representational duties at 8:00 a.m., a request that she previously had approved.[30]

All of these cases have several things in common. In each case, the Authority found that the union representative's conduct was not *flagrant*, *did not exceed* the boundaries of protected activity, and did not *go beyond the limits* of acceptable behavior. And, in each case, the agency was found to have violated *the union's* rights by holding the union representative accountable for the boorish (and in several cases, criminal) behavior.

I believe that the Authority was wrong in each of these cases. And just as the D.C. Circuit,[31] Member Beck,[32] and Chairman Cabaniss[33] before me, I question why, and how, "misconduct of any kind" does not, by definition, "exceed[] the boundaries of protected activity."[34] It is obvious to me "that a law [such as the Statute that was] enacted to facilitate collective bargaining and protect employees' right to organize [would not] prohibit[] [an agency] from seeking to maintain civility in the workplace."[35]

In what should come as no surprise, the unmistakable message of these cases was not lost on some federal unions which have used that precedent to recruit and rally their members. The National Border Patrol Council wasted no time cluing its stewards in on how to tell a management official "you can't be that f-----g stupid" or how to call their supervisor an "a--hole" or "space cadet" and get away with it.[36] In 2007, the General Counsel of NFFE prepared a widely disseminated Power-Point presentation that advised its representatives that the "use of profanity [by a union official when acting in a representational role] *will not be* considered to be flagrant misconduct[]" by the FLRA.[37] And, not wanting its representatives to lose out on the fun, NATCA cautioned its bargaining unit that the Authority's sanction of "harsh/robust language . . . *only applies* to representatives of the [u]nion" but "*does not apply* . . . to employees" who do not belong to the union.[38]

The message has not been lost on federal managers either and many are justifiably concerned. *Government Executive* magazine noted that the Authority's "flagrant misconduct" precedent leaves federal managers wondering just "*how much* verbal abuse

[17] *FAA*, 64 FLRA at 410.
[18] *315th Airlift Wing*, 294 F.3d at 195.
[19] *Id.* at 195 (internal quotation marks omitted).
[20] *Id.* at 194.
[21] *Id.*
[22] *Id.* (internal quotation marks omitted).
[23] *Dep't of the Air Force, Grissom Air Force Base, Ind.*, 51 FLRA 7, 20 (1995) (*Grissom*).
[24] *Id.* at 21.
[25] *U.S. Dep't of Energy, Oak Ridge, Tenn.*, 57 FLRA 343, 345-47 (2001) (Chairman Cabaniss dissenting).
[26] *Id.*
[27] *Air Force Flight Test Ctr., Edwards Air Force Base, Calif.*, 53 FLRA 1455, 1461 (1996).
[28] *Id.* at 1460.
[29] *Id.* at 1461.
[30] *Id.*
[31] *315th Airlift Wing*, 294 F.3d at 201.
[32] *FAA*, 64 FLRA at 417 (Dissenting Opinion of Member Beck).
[33] *315th Airlift Wing*, 294 F.3d at 200-01 (directly quoting Dissenting Opinion of Chairman Cabaniss in *Dep't of the Air Force, 315th Airlift Wing, Charleston Air Force Base, S.C.*, 57 FLRA 80, 87 (2001)).
[34] *FAA*, 64 FLRA at 417 (Dissenting Opinion of Member Beck); *see also 315th Airlift Wing*, 294 F.3d at 201.
[35] *315th Airlift Wing*, 294 F.3d at 201 (citing *Adtranz*, 253 F.3d at 27-28).
[36] *FLRA and ULPs*, National Border Patrol Council Manual at II.A.4., www.nbpc1613.org (last visited Dec. 15, 2014).
[37] *Unfair Labor Practice, Charges Against the Agency*, www.nffe.org/ht/a/GetDocumentAction/i/17096 (last visited Dec. 15, 2014) (emphasis added).
[38] www.nwp.natca.org/documents/LR_stuff (emphasis added).

[they] have to take from union officials?"[39] Shortly after the D.C. Circuit reversed the Authority in the case concerning supervisory "assault and battery,"[40] the FedSmith group published, "No Blood, No Foul, No [ULP],"[41] which appeared to summarize the concerns of managers.

The majority seems to believe that union representatives are "incapable of organizing a union or exercising their . . . statutory rights . . . without resort to abusive or threatening language."[42] In my experience, union representatives are sufficiently competent to act as professionals without resorting to abusive or threatening behavior. But, conversely, any employee who is unable to comport themselves in a professional and civil manner when they perform their job – whether as a senior leader, supervisor, division chief, union steward, team lead, or line worker – should be held to the *same standards* that are required of all federal employees. It is "self-evident" that "Congress did not intend to immunize against discipline [any] federal employee" who acts in a disrespectful and boorish manner towards any other employee, in particular, one's supervisor.[43] Therefore, I reach the simple conclusion that "misconduct of any kind . . . , by definition, 'exceed[s] the boundaries of protected activity.'"[44]

Derek Hernandez is the president of AFGE, Local 2595 and has a history of heated encounters with various management officials both before[45] and after this case.[46] In this case, Hernandez's supervisor, Dominic Boswell, needed to meet with Hernandez in order to "review" his official-time form.[47] (Boswell, as Hernandez's supervisor, is responsible to ensure that Hernandez's timesheet is consistent with the official-time form, which, in the case of Hernandez, correlates to his official-time form that is used to record hours spent on AFGE, Local 2595 business.[48]) Hernandez told Boswell that he could not meet then but that "he would get back to [Boswell]."[49] Boswell agreed to the delay and, sometime later, Hernandez telephoned to let Boswell know that he was now available.[50] For some reason, Hernandez "surreptitiously record[ed]" that call.[51]

Hernandez went to Boswell's office but did not bring the form that Boswell needed to review, and Boswell asked Hernandez to "go get it."[52] Hernandez went to get the form (which was in his office, in another building, "two minutes" away[53]). But, when Hernandez returned to Boswell's office, he "tossed" the form at Boswell rather than simply handing it to him.[54] At that point, Boswell asked if Hernandez was "gonna pick it up," to which Hernandez retorted that, "No[,] I'm not. It's right there, you wanted it."[55] Boswell then asked Hernandez to leave his office.[56]

Two days later, the Agency notified Hernandez that he would be suspended for two days for "unprofessional conduct." In the notice, the Agency referenced a prior incident wherein Hernandez had been "formally counseled" for similar conduct directed towards a receptionist.[57]

Arbitrator Steven E. Kane found that Hernandez's conduct "was *more personal than official*" and that "he was not discharging any union representation duties."[58] The Arbitrator also found that Hernandez's conduct was "*unprofessional, disrespectful, and insubordinate*" and was "sufficiently egregious to warrant disciplinary action."[59]

It is not even a close call that Hernandez's conduct towards his supervisor was "unprofessional, disrespectful, and insubordinate."[60] The majority, however, concludes that Hernandez was acting in an official, representational role on behalf of AFGE, Local 2595 when he was supposed to be discussing his official-time form and timesheet with his supervisor and that his misconduct was "protected activity" that "did not exceed the boundaries of protected activity.[61]

I disagree in both respects.

Even though Hernandez happens to be the president of AFGE, Local 2595, he is still accountable to his supervisor for his time and attendance, which includes

[39] *Legal Briefs: !@#% you, boss!*, Government Executive (May 21, 1999) (emphases added).
[40] *See* notes 9-12.
[41] *FedSmith*, www.fedsmith.com (Aug. 15, 2002).
[42] *315th Airlift Wing*, 294 F.3d at 198 (citing *Adtranz*, 253 F.3d at 26).
[43] *FAA*, 64 FLRA at 417 (Dissenting Opinion of Member Beck).
[44] *Id.* (citing *315th Airlift Wing*, 294 F.3d at 201).
[45] Award at 3.
[46] *U.S. DHS, U.S. CBP, U.S. Border Patrol, Yuma Sector*, 68 FLRA 189, 195 (2015) (Dissenting Opinion of Member Pizzella).
[47] Majority at 2.
[48] Award at 2-3 (citing Art. 7A5(b) of the parties' agreement).
[49] *Id.* at 3.
[50] *Id*.
[51] *Id.*; *see also* Exceptions at 5.
[52] Award at 4.
[53] *Id.* at 3.
[54] *Id*. at 4.
[55] *Id*.
[56] *Id*.
[57] *Id*. at 6.
[58] *Id*. at 5 (emphasis added).
[59] *Id*. at 5-6 (emphasis added).
[60] *Id*. at 5.
[61] Majority at 7-8.

his use of official time. A supervisor always has the prerogative to discuss the accuracy of a subordinate's timesheet. Boswell may well have had questions concerning the official time form, but we cannot tell from the record, whether there was any "dispute," let alone a "labor dispute,"[62] because he could not bring himself to simply cooperate and bring the form to Boswell. Boswell never had the opportunity to ask anything. Clearly, this was not protected activity on behalf of AFGE, Local 2595. It was "personal" and related to no one, except Hernandez and his supervisor.[63]

The majority excuses Hernandez's conduct altogether, in part, because they believe his conduct was "impulsive."[64] In this respect, I wonder if my colleagues are reading the same facts that I read in the parties' submissions and the Arbitrator's award. Boswell put no pressure on Hernandez to meet. In fact, Boswell permitted Hernandez to choose the time of the meeting. When Hernandez called Boswell to say that he was ready to meet, Hernandez "surreptitiously record[ed]" the conversation.[65] That action is not indicative of an impulsive act. To the contrary, it demonstrates calculation.

Furthermore, after Hernandez scheduled the meeting with Boswell, he went to Boswell's office *without the form*. Hernandez was well aware that there could be no meeting, and no discussion, without the form. Boswell had no choice but to ask Hernandez to "go get it."[66] At that point, I can *almost* understand that Hernandez might have been mildly annoyed that he had to walk "two minutes" back to his office to get the form (a fact that was not lost on Arbitrator Kane).[67] But, on the other hand, this demonstrates that he had *at least* four to five minutes to collect his thoughts and to respond in a civil manner when he returned. Instead, Hernandez returned and decided to throw the form at his supervisor, and retort in a manner that was clearly insubordinate and disrespectful (some might even say childish) no matter what the context. Without a doubt, Hernandez's actions were not "impulsive."

Accordingly, I would deny the Union's exceptions. I do not agree that Hernandez was engaged in activity on behalf of AFGE, Local 2595. But, to the extent that there is any room for disagreement on that point, Hernandez's conduct was unprofessional, and the Agency was justified in suspending Hernandez. Any other federal employee could, and should, be disciplined for such misconduct. There is no reason why Hernandez should not be held to the same standard just because his name is followed by the title – *President, AFGE, Local 2595*.

Because of his misconduct, and to paraphrase Marlon Brando, Hernandez never "coulda been a contender."[68]

Thank you.

[62] *FAA*, 64 FLRA at 418 (Dissenting Opinion of Member Beck).
[63] Majority at 3.
[64] *Id.* at 7.
[65] Award at 3; *see also* Exceptions at 5.
[66] Award at 4
[67] *Id.* at 3.

[68] http://en.wikipedia.org/wiki/On_the_Waterfront