

**63 FLRA No. 119**

AMERICAN FEDERATION OF  
GOVERNMENT EMPLOYEES  
LOCAL 987  
(Union)

and

UNITED STATES DEPARTMENT  
OF THE AIR FORCE  
WARNER ROBINS AIR LOGISTICS CENTER  
ROBINS AIR FORCE BASE, GEORGIA  
(Agency)

0-AR-4127

—————  
DECISION

May 27, 2009

Before the Authority: Carol Waller Pope,  
Chairman and Thomas M. Beck, Member

**I. Statement of the Case**

This matter is before the Authority on an exception to an award of Arbitrator James J. Odom, Jr. 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 exception.

The grievance alleged that the Agency violated the Statute by suspending the grievant for three days for conduct that occurred while he was engaged in protected activity. The Arbitrator denied the grievance, finding that the grievant was not engaged in protected activity and that the three-day suspension was for just cause.

For the reasons that follow, we deny the Union's exception.

**II. Background and Arbitrator's Award**

The grievant, a Union steward, was suspended for three days for conduct that occurred during two separate incidents. The first incident involved the grievant questioning a Human Resources (HR) Specialist about her review of the grievant's official time use. During the incident, the grievant stated, "through clinched [sic] teeth, and with balled fists[.] 'You better not mess with me! I know my rights.'" Award at 6. When asked to leave, the grievant stated "I don't have to leave" and

then he followed closely behind the HR Specialist from one office to the next "threatening to file a[n] [unfair labor practice (ULP)] and saying [that the HR Specialist] better learn the [parties' master agreement]." *Id.* The HR Specialist testified that the incident made her feel "intimidated and threatened." *Id.* An employee who witnessed the incident testified that the grievant seemed "very upset" and was following her "right there on her heel[.]" *Id.* The witness further testified that she called out to the HR Specialist that she thought the HR Specialist "would be at least a year in the job before she got beat up." *Id.* at 7.

The second incident arose while the grievant was on official time. A third-line supervisor observed the grievant away from his work area and asked an assistant supervisor if he knew where the grievant was going. Later, the grievant asked the third-line supervisor if he had been looking for the grievant, and the third-line supervisor responded that he had just wanted to know the grievant's whereabouts. The grievant responded that the third-line supervisor "had no business asking where he was." *Id.* The grievant then became "loud, unruly, upset and belligerent" and called the third-line supervisor an "Uncle Tom." *Id.*

As a result of the grievant's conduct, the Agency provided the grievant with a Notice of Proposed Suspension. In response to the Notice of Proposed Suspension, the Union Steward explained that the grievant's actions constituted "robust debate" and were, therefore, protected. *Id.* at 3. The grievant was suspended for three days for his conduct during both incidents. He filed a grievance alleging that the suspension violated the Statute because he had not engaged in flagrant misconduct. Unresolved, the grievance was submitted to arbitration, where the Arbitrator framed the following issue: "Did the Agency have just cause to impose a three-day suspension on [the grievant]?" If not, what shall be the remedy[?]" *Id.* at 5.

The Arbitrator found that the grievant had not been acting in his representational capacity during the incidents in question because he had not been advocating for a grievant or the Union. The Arbitrator further reasoned that "[t]here had been no challenge to [the grievant's] right to carry out his duties and responsibilities of Union [s]teward." *Id.* at 8. Turning to the question of whether there was just cause for the suspension, the Arbitrator explained that the grievant had been motivated by personal, not union, considerations, and concluded that, had the grievant "been advocating the position of a grievant or his Union, his conduct would be subject to a different test." *Id.* Nevertheless, having found that the grievant was not acting in his representa-

tional capacity, the Arbitrator determined that there was just cause for the three-day suspension. Accordingly, he denied the grievance.

### III. Positions of the Parties

#### A. Union's Exception

The Union argues that the award is contrary to law because the Arbitrator incorrectly found that the grievant was not acting in his representational capacity. According to the Union, employees may be engaged in protected activities even where they are not advocating for a grievant or a union. The Union asserts that the grievant was questioning or complaining to management officials about their scrutiny of his official time usage, which the Union claims constitutes protected activity under Authority precedent. According to the Union, the Arbitrator erroneously failed to address whether the grievant's conduct "crossed the line from 'robust' advocacy to flagrant misconduct." Exception at 8. In this respect, the Union asserts that the grievant's conduct did not constitute flagrant misconduct "under established case law." *Id.* (citations omitted). Accordingly, the Union contends that the Arbitrator erred by failing to find that the suspension violated the Statute.

#### B. Agency's Opposition

As relevant here,<sup>1</sup> the Agency argues that the grievant's conduct in both incidents exceeded the boundaries of protected activity. Opposition at 4. As to the first incident, the Agency asserts that, because of the grievant's conduct, the HR Specialist "reasonably felt that she was in danger of physical assault . . ." *Id.* at 6. As to the second incident, the Agency claims the grievant called the third-line supervisor "a racially derogatory name . . ." *Id.* Consequently, the Agency asserts that the Union's exception should be denied.

### IV. Analysis and Conclusion

The award is not contrary to law.

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*.<sup>2</sup> See *NTEU, Chapter 24*, 50 FLRA 330, 332 (1995) (citing *United States 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 *United States Dep't of Def., Dep't's*

*of the Army and 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.*

Section 7102 of the Statute guarantees employees the right to form, join, or assist any labor organization, or to refrain from such activity, without fear of penalty or reprisal.<sup>3</sup> 5 U.S.C. § 7102; *AFGE, Nat'l Border Patrol Council*, 44 FLRA 1395, 1402 (1992). However, § 7102 does not allow an employee to act with impunity even though he or she is engaged in such protected activity. Even taking into account the privilege afforded protected activity under § 7102, "an agency has the right to discipline an employee who is engaged in otherwise protected activity for remarks or actions that 'exceed the boundaries of protected activity, such as flagrant misconduct.'" *Dep't of the Air Force, Grissom Air Force Base, Ind.*, 51 FLRA 7, 11 (1995) (quoting *United States Air Force Logistics Command, Tinker Air Force Base, Oklahoma City, Okla.*, 34 FLRA 385, 389 (1990)). As such, flagrant misconduct is a sufficient, but not necessary, condition for a loss of protection under § 7102, *Dep't of the Air Force, 315th Airlift Wing v. FLRA*, 294 F.3d 192, 202 (D.C. Cir. 2002)) (*315th Airlift Wing*), and merely "illustrative of," but not the *only* type of action that could justify removal from the protection of § 7102 of the Statute. *NAGE, Local R3-32*, 61 FLRA 127, 132 (2005) (*NAGE*) (Chairman Caba-

2. We note that the Agency claims that the Arbitrator's finding of no protected activity is a factual one that cannot be reviewed as a matter of law because the Arbitrator resolved only a contractual claim. However, the Agency acknowledges that the Arbitrator reviewed the grievant's conduct in terms of the statutory requirements for protected activity, and in similar circumstances, the Authority has reviewed the issue of whether an employee was engaged in protected activity as a question of law, even when the arbitral issue was framed in contract terms. See *AFGE, Nat'l Border Patrol Council*, 44 FLRA 1395 (1992). Therefore, we determine whether the award is contrary to law.

3. Section 7102 provides:

§ 7102. Employees' rights

Each 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. Except as otherwise provided under this chapter, such right includes the right –

(1) to act for a labor organization in the capacity of a representative and the right, in that capacity, to present the views of the labor organization to heads of agencies and other officials of the executive branch of the Government, the Congress, or other appropriate authorities, and

(2) to engage in collective bargaining with respect to conditions of employment through representatives chosen by employees under this chapter.

1. As the Union's exception is denied, we find it unnecessary to address the Agency's additional arguments.

niss writing separately) (citation omitted) (citing *315th Airlift Wing*, 294 F.3d at 201-02) (citations omitted). Accordingly, an agency has the right to discipline an employee who is engaged in otherwise protected activity for remarks or actions that: (1) constitute flagrant misconduct, or (2) otherwise exceed the bounds of protected activity. See *United States Dep't of the Air Force, Aerospace Maint. & Regeneration Ctr., Davis Monthan Air Force Base, Tucson, Ariz.*, 58 FLRA 636, 636 (2003) (*Davis Monthan*). In sum, “[i]f conduct . . . exceeds the boundaries of protected activities . . . the conduct loses its protection under the Statute and can be the basis for discipline.” *Davis Monthan*, 58 FLRA at 636 (emphasis added).

The Union argues that the grievant was acting in his representational capacity and that “[t]he Arbitrator never reached the issue of whether [the grievant’s] Union activity crossed the line from ‘robust’ advocacy to flagrant misconduct.” Exception at 8. The Union’s argument assumes that “flagrant misconduct” is the only method by which to determine whether a union official’s speech and/or conduct has exceeded the bounds of protected activity and has thus lost the protection of the Statute. However, as set forth above, flagrant misconduct is just one example of the type of conduct that exceeds the bounds of protected activity, thereby causing an employee who is otherwise engaged in protected activity to lose protection under the Statute. *315th Airlift Wing*, 294 F.3d at 201-02. For the following reasons, we find that the grievant’s conduct exceeded the bounds of protected activity and that the Union has not demonstrated that the Arbitrator erred in sustaining his suspension.

With regard to the first incident, the Arbitrator determined that the nature of the grievant’s intemperate language and conduct reasonably caused the HR Specialist to feel “intimidated and threatened.” Award at 6. In this connection, the Arbitrator found that the grievant, in a loud voice, warned the HR Specialist, “through clinched [sic] teeth, and with balled fists” that she “better not mess with” the grievant. *Id.* The Arbitrator also found that the grievant “followed closely behind” the HR Specialist “threatening to file a ULP[.]” *Id.* One witness testified that the grievant was “right there on [the HR Specialist’s] heel . . .” *Id.* The witness further testified that she called out to the HR Specialist that she thought the HR Specialist “would be at least a year in the job before she got beat up.” *Id.* at 7.

Courts have held that the use of threats and intimidation is inappropriate in the workplace. The United States Court of Appeals for the District of Columbia Circuit has held that conduct that involves “actual physical contact and physical intimidation” that placed an

individual in “reasonable apprehension of ‘some unpredictable blow’” is not protected. *315th Airlift Wing*, 294 F.3d at 199. Here, the nature of the grievant’s conduct was intimidating and threatening and caused at least one co-worker to apprehend that the HR Specialist was at risk of being “beat up.” Award at 7. Even assuming that the grievant was engaged in protected activity, this type of conduct exceeds the bounds of protected activity.

With respect to the racially derogatory term used by the grievant in the second incident, courts have held that the use of racial slurs is inappropriate in the workplace. The Authority has long recognized “a clearly expressed public policy against racial discrimination in the workplace” and has found that this policy is undermined by “[r]acial stereotyping . . .” *Veterans Admin., Wash., D.C.*, 26 FLRA 114, 116 (1987) (*VA, Wash.*). Here, the Arbitrator found that the grievant “got loud, unruly, upset and belligerent” with the third-line supervisor for asking about his whereabouts while he was on official time and that the grievant twice called the supervisor an “Uncle Tom.” Award at 7. “Racial stereotyping . . . is [not] part of the mere rough and tumble of ‘robust debate.’” *VA, Wash.*, 26 FLRA at 116. Even assuming that the grievant was engaged in protected activity, the use of racial slurs in the workplace exceeds the bounds of protected activity and is not protected by the Statute.

In sum, the Union has provided no basis for finding that the Arbitrator erred in determining that either of the two incidents provided “just cause” for the grievant’s suspension and we deny the exception.

## V. Decision

The Union’s exception is denied.