FEDERAL LABOR RELATIONS AUTHORITY
Office of Administrative Law Judges
WASHINGTON, D.C.

OALJ 15-02

DEPARTMENT OF JUSTICE
FEDERAL BUREAU OF PRISONS
UNITED STATES PENITENTIARY
FLORENCE, COLORADO
RESPONDENT

AND

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO, COUNCIL OF PRISON LOCALS, LOCAL 1112
CHARGING PARTY

Case No. DE-CA-12-0006

Paige A. Swenson
For the General Counsel

Darrel C. Waugh
For the Respondent

Michael J. Schnobrich
For the Charging Party

Before: RICHARD A. PEARSON
Administrative Law Judge

DECISION

A union official may not be disciplined for actions taken while performing union duties, unless those actions constitute flagrant misconduct or otherwise exceed the bounds of protected activity. In this case, a union officer acting on behalf of his union decided to interrupt, and effectively end, the training presentation of another bargaining unit employee, so that he could begin his own presentation. Because this occurred in front of about 100 coworkers, without provocation, in a bullying and disruptive manner, his actions exceeded the bounds of protected activity. As such, I find that the discipline imposed on him did not violate section 7116(a)(1) and (2) of the Statute.

STATEMENT OF THE CASE

This is an unfair labor practice proceeding under the Federal Service Labor-Management Relations Statute, Chapter 71 of Title 5 of the U.S. Code, 5 U.S.C. §§ 7101 *et seq.* (the Statute), and the Rules and Regulations of the Federal Labor Relations Authority (the Authority or FLRA), 5 C.F.R. part 2423.

The case was initiated on October 11, 2011, when the American Federation of Government Employees, Local 1112 (the Union or Charging Party) filed an unfair labor practice charge against the U.S. Department of Justice, Federal Bureau of Prisons, United States Penitentiary, Florence, Colorado (the Agency or Respondent). GC Ex. 1(a). After investigating the charge, the Regional Director of the Denver Region of the FLRA, on behalf of the General Counsel (GC), issued a Complaint and Notice of Hearing on January 9, 2012, alleging that the Respondent violated § 7116(a)(1) and (2) of the Statute when it suspended Michael Schnobrich for actions he took while making a training presentation. GC Ex. 1(b). The Respondent filed its Answer to the Complaint on February 3, 2012, denying that it had violated the Statute. GC Ex. 1(c).

A hearing was held in this matter on March 21, 2012, in Denver, Colorado. All parties were represented and afforded an opportunity to be heard, to introduce evidence, and to examine and cross-examine witnesses. The GC and the Respondent filed post-hearing briefs, which I have fully considered.

Based on the entire record, including my observation of the witnesses and their demeanor, I make the following findings of fact, conclusions of law, and recommendations.

FINDINGS OF FACT

The Respondent is an agency under § 7103(a)(3) of the Statute. GC Exs. 1(b), 1(c). The American Federation of Government Employees, AFL-CIO, Council of Prison Locals (AFGE), is a labor organization under § 7103(a)(4) and is the exclusive representative of a unit of employees appropriate for collective bargaining at the U.S. Department of Justice, Federal Bureau of Prisons (BOP). GC Exs. 1(b), 1(c). GC Exs. 1(b), 1(c). The Union, which used to be AFGE Local 1302, is an agent of AFGE for the purpose of representing employees at the Respondent, and it is a labor organization under § 7103(a)(4). Tr. 20-21; GC Ex. 1(b), 1(c). The AFGE and the BOP are parties to a nationwide collective bargaining agreement (the Master Agreement) (Jt. Ex. 1), and the Union and Respondent are parties to a local supplemental agreement (Jt. Ex. 2; Tr. 7-8).

This case involves a minor scheduling delay during a training program known as Annual Refresher Training (ART), and Senior Officer Specialist Michael Schnobrich's not-so-minor reaction to it. Tr. 20. ART is a four-day program, conducted annually throughout the BOP, that is mandatory for all employees and supervisors; it covers topics ranging from managing terrorism to writing incident reports of Equal Employment Opportunity matters. Tr. 22, 113; Jt. Ex. 13. About 100 employees, managers, and

supervisors attend each week's program, which is repeated for a different group of employees each week until everyone has completed it. Tr. 50, 162; Jt. Ex. 13. In 2011, the program was held for eleven consecutive weeks between January 4 and March 18. Jt. Ex. 13 at 3. Mr. Schnobrich began working at the BOP in 1991, has attended ART every year since then, and had given presentations on behalf of the Union in years prior to 2011. Tr. 37, 44-45, 54-55.

Under Article 21(g) of the Master Agreement, "[t]he Union may request to participate in Annual Refresher Training at the local level." Jt. Ex. 1. Under Article 21 of the local supplemental agreement covering the Florence facility, the "employer will provide Local 1302 [now Local 1112] with a thirty (30) minute block of time during Annual Refresher Training." Jt. Ex. 2. Pursuant to these provisions, Schnobrich (the Union's Treasurer) and Jeff Johnson (the Union President) had been granted official time to make the Union's presentations in 2011. Jt. Ex. 3. Depending on their schedules, either Schnobrich or Johnson gave the presentation on a given week. Tr. 24, 104-05. They were given official time from 10:00 to 11:00 a.m. each Thursday to get to, set up for, and make their ART presentation, which was scheduled to run from 10:30 a.m. to 11:00 a.m. Tr. 27, 104; Jt. Ex. 3.

On February 24, 2011, Schnobrich arrived at the ART training room around 9:50 a.m. and took a seat in the back. Tr. 25, 194-95; Jt. Ex. 13. The session scheduled for 9:30 a.m. to 10:00 a.m. (on the subject of evidence recovery) had ended late, and the presenter had given attendees a break at the end, pushing the schedule further behind.[1] Tr. 25, 163, 175-78, 195. Although there was a schedule for ART sessions, it was common for there to be unscheduled breaks and for sessions to run longer or shorter than scheduled. Tr. 45, 113, 192-93.

Schnobrich watched the next session – the one just before his own – get started at approximately 10:10 a.m. or 10:15 a.m., ten or fifteen minutes behind schedule. Tr. 65, 163, 178, 195, 233. The presenter was Darla Myers, a financial program specialist and bargaining unit employee. Tr. 155, 157. Myers was giving a PowerPoint presentation on federal travel regulations and using government credit cards. Tr. 162. Schnobrich had followed Myers in at least two previous weeks' training programs and was frustrated that she had not been able to finish any of those presentations at the scheduled time. Tr. 48-49. As Schnobrich described in a statement after the incident, "Ms. Myers has consistently gone past her allotted class time by approximately five minutes on average." Jt. Ex. 4 at 3.[2] Although Myers's lateness concerned Schnobrich, he did not share his concern with Myers or, for that matter, anyone in management, or ask for additional time to complete his presentation. Tr. 53, 56-57. Instead, in the two weeks prior to February 24, Schnobrich dealt with Myers's

[1] There was disagreement among the witnesses as to whether the evidence recovery class had ended late or on time, but all agree that attendees were given a break between that class and the next one, and the next class didn't start until 10:10 a.m. or 10:15 a.m. Tr. 32, 163, 195, 233.

[2] The page numbers of this exhibit differ from the page numbers on the document, because the exhibit includes a cover page.

tardiness by surreptitiously logging her off of the computer. Tr. 49-50, 55-56, 161-62, 173-74. Myers didn't realize that anyone had been logging her off; when she saw that the screen was blank, she just kept talking until she was through with her presentation. Tr. 161-62. Schnobrich later stated that Myers's pattern of ending late prior to February 24 "predisposed me to believe that she didn't take her time frame very serious." Jt. Ex. 4 at 2.

Myers was still giving her presentation when the clock struck 10:30 a.m., the time when Schnobrich's presentation was scheduled to begin. Since it appeared to Schnobrich that Myers was only "[a] little more than halfway through" her material (Tr. 27), he "was concerned that she wasn't going to be able to finish on time, which means I would not have had the full 30 minutes to present our presentation prior to the lunch break[ ]" at 11:00 a.m. Tr. 26. It is notable that Schnobrich viewed Myers's failure to end on time in personal terms. At various points in time, Schnobrich explained: "I thought I was getting cheated out of my time." Jt. Ex. 4 at 3. "I thought I was being disrespected by Ms. Myers . . . ." *Id.* at 4. And, "I felt like I was being stepped on."[3] Jt. Ex. 6 at 2.

So, at around 10:30 a.m., Schnobrich walked to the front of the training room and stood just off to one side, near the computer that was running Myers's PowerPoint presentation. Tr. 27, 51. At the hearing, Schnobrich stated, "I wanted her to stop. I needed to get her attention. . . . That's why I was in front of the classroom trying to get her attention quietly[.]" Tr. 60. He tried to get her attention by "coughing," and "fidgeting a bit," but she didn't respond. Tr. 28. So, Schnobrich explained, "I just kept escalating". Tr. 60. At around 10:40, he logged Myers off of the computer, and the screen showing the PowerPoint slides went blank. Tr. 28, 53, 72. Myers spoke from her notes for a short time, but eventually she looked back at Schnobrich, who was approaching her at the front center of the training room. Tr. 28-29, 163; Jt. Ex. 8 at 2. According to Schnobrich, who admitted he was "rather upset" (Tr. 73), they then had the following exchange:

> Okay, basically she said what was I doing. I said to her, "You are starting to get into my class time," and she said, "Well, you're being very rude." And I said to her, "Yes, I know I'm being very rude, but you're being very rude for interrupting my class time." That's when she told me, she said, it wasn't her fault that she had gotten started late. I explained to her, I don't care if you got started late, that's not my problem, that's your problem. And at that point in time she got a little bit upset with the whole thing and again she called me rude several more times and then she turned over her microphone and left the front of the classroom.

Tr. 29. Both Myers and Schnobrich agreed that while he spoke in an "assertive" tone of voice, he did not raise his voice or use any profanity. Tr. 29-30, 169. Myers said he was "kind of like angry and . . . upset that I was in his turf . . . ." Tr. 169. Schnobrich estimated the entire confrontation lasted about a minute. Tr. 75. Myers testified, "I said, well, I guess my class is over and if you have any questions you guys know where to find me, and just

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[3] Nonetheless, Schnobrich told the Warden later, "It had nothing to do with her [Ms. Myers] personally. I don't even know her." Jt. Ex. 6 at 2.

kind of went home from there. . . I was like – I was dumbfounded, shell-shocked." Tr. 163. Meanwhile, Schnobrich began his presentation at around 10:45 a.m. and finished by 11:00, which required him to cut a significant amount of his presentation. Tr. 30, 81.

Cordelia Peterson, the management official responsible for overseeing ART that day, was working in an office area next to the training room during Myers's presentation. Tr. 188, 193, 195-96. Peterson did not see or hear the confrontation. Tr. 197. Right after the confrontation, however, a coworker came into the office area and told Peterson what had happened, and then Myers also came in. Tr. 196-97. Peterson testified that Myers was "pretty upset, visibly shaken, and there were several people now gathered around her just kind of . . . asking her . . . what happened." Tr. 197. Myers seemed to be "on the verge of tears," and people tried to console her. Tr. 197-98. Peterson then looked out through a window and saw Schnobrich at the head of the classroom, where "a large amount of people, I would say a third of the class, got up and . . . actually left the building." Tr. 197, *see also* 200-02. Over the course of the remainder of the day, several attendees spoke to Peterson about the incident and told her how "disturbing" and "rude" they considered Schnobrick's conduct to be. Tr. 199, 200-02. Peterson had "never seen anything like that happen before." Tr. 203.

One of the employees who left was correctional officer Justen Lee. Tr. 223-25. At the hearing, Lee explained that he saw Schnobrich log Myers out of her PowerPoint presentation and insist that it was his turn to speak. Tr. 223. This "infuriated" Lee, "because you don't treat people like that. . . . I don't deal well with people who treat other people like dirt . . . ." *Id.* As soon as Schnobrich did this, Lee walked out of the class, and several other attendees did the same. Tr. 224-25. Based on talking to some of the other people who walked out, Lee said that "the general consensus in the room[ ]" was "this is BS and, you know, this is a bunch of crap . . . . Everybody was pretty disgusted[.]" Tr. 224.

When Schnobrich finished his presentation, Peterson walked into the training room to talk to him, and she told Schnobrich "that his behavior was inappropriate[.]" Tr. 204. While Schnobrich admitted to her that he had been wrong, he reiterated his earlier comment to Myers that it wasn't his problem that her class had run over. Tr. 81-82, 204; Jt. Ex. 4 at 4. He explained to Peterson that he was "concerned about them [attendees] not leaving for lunch on time." Tr. 204. Peterson "reminded him that we have, you know, pretty fluid process here, that if we had let them leave for lunch on time – late, that we would have made it up at the end of the day somewhere." *Id.* Schnobrich conceded that Peterson told him that if his class had run late, she would have adjusted his class time for the full thirty minutes. Tr. 82; Jt. Ex. 4 at 4. At the hearing, Schnobrich said, "I wouldn't have done it that way . . . because there would have been other ways of dealing with that." Tr. 83.

After the incident was investigated, Captain Russ Krist, Schnobrich's second-line supervisor, recommended that Schnobrich receive a five-day suspension for "interrupt[ing] another instructor's class" at ART, which constituted "unprofessional conduct[ ]" under the Agency's Program Statement 3420.09. Jt. Ex. 5 at 1. Program Statement 3420.09 provides, "It is essential to the orderly running of any Bureau facility employees conduct themselves professionally. Employees shall conduct themselves in a manner which will not be demeaning to inmates, fellow employees, or others." *Id.*

Blake Davis, the Warden of the Florence prison complex, was the deciding official on Schnobrich's proposed suspension. Tr. 109. In addition to the witness statements and other investigative materials, Warden Davis testified that he also considered the numerous negative course evaluations that ART attendees submitted in regard to Schnobrich's February 24 Presentation. Tr. 128-29; R. Ex. 1. The Warden estimated that normally, about half of the attendees on any day will take the trouble to fill out evaluations, but he routinely reviews them "to see if there's any glaring positives or glaring negatives . . . ." Tr. 134. Respondent Exhibit 1 consists of twenty evaluations from the week of February 22-25, all of which contain negative comments regarding Schnobrich's presentation.[4] The Warden admitted that this exhibit only contains the negative comments regarding Schnobrich, and that this was "probably half" of the evaluations that were actually submitted for that week. Tr. 135. Nonetheless, Davis still found twenty negative comments about a single presentation was far beyond anything he had seen previously. Tr. 139. "I'll review 12 weeks of annual refresher or 10 weeks, whatever we have for the year, and I may see one or two negative comments the entire year." *Id.* Thus the twenty negative comments regarding Schnobrich "was an outlier to me. I mean it was beyond an outlier to me. And it was that in conjunction to my staff walking out of the training session was a concern." *Id.* Ultimately, the Warden approved a suspension, but reduced the length to three days. Jt. Ex. 7.

DISCUSSION AND CONCLUSIONS

Positions of the Parties

General Counsel

The General Counsel argues that the Respondent committed an unfair labor practice, because it disciplined Schnobrich for conduct that occurred while he was engaged in protected activity, and Schnobrich's actions did not constitute flagrant misconduct. In support of its premise that Schnobrich was engaged in protected activity when he interrupted Myers's presentation, the GC notes first that under the parties' supplemental agreement, the Union was allotted 30 minutes to give a presentation at ART; therefore, Schnobrich was asserting a contractual right. GC Br. at 8; *see U.S. Dep't of Labor, Emp't & Training Admin., S.F., Cal.*, 43 FLRA 1036, 1039 (1992) (*DOL*). Additionally, he was on official time when he confronted Myers. GC Br. at 8-9. His only reason for being at the ART session that day was to make a presentation on behalf of the Union, which is protected. Thus the first element of the *Letterkenny*[5] test for discrimination has been met.

The GC next contends that Schnobrich's protected activity was a motivating factor in the Agency's decision to suspend him. This is apparent on its face, as both the letter proposing his suspension and the letter approving it expressly refer to Schnobrich's conduct in making his ART presentation on behalf of the Union. Finally, in arguing that the Agency

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[4] Sample comments include: "Should be reprimanded"; "unprofessional"; "rude – disrespectful". R. Ex. 1.

[5] *Letterkenny Army Depot*, 35 FLRA 113 (1990).

failed to establish a legitimate justification for the disciplinary action, the GC asserts that Schnobrich's conduct did not constitute flagrant misconduct or otherwise exceed the boundaries of protected activity.

Looking at the factors outlined by the Authority in *Dep't. of Def., Def. Mapping Agency Aerospace Ctr., St. Louis, Mo.*, 17 FLRA 71, 81 (1985) (*Defense Mapping*), as relevant to identifying flagrant misconduct, the GC urges that the balance is weighted against considering Schnobrich's actions flagrant misconduct. While the GC concedes that the first factor (the place of the discussion) "admittedly weighs against Schnobrich [ ]" (GC Br. at 11) due to the public venue of the February 24 incident, other factors demonstrate that this was not flagrant misconduct. Specifically, the GC asserts, Schnobrich's actions were spontaneous; they were provoked; and they did not involve yelling, touching, threats, or inappropriate language. GC Br. at 12. He logged Myers off the computer only when she ran over her allotted time period and began to infringe on the Union's time, causing Schnobrich's frustration to build. The GC further argues that there was no evidence that Schnobrich "harbored any personal antagonism" against Myers. *Id.* at 12, citing *U.S. Dep't of Def., Def. Contract Mgmt. Agency, Orlando, Fla.*, 59 FLRA 223, 228 (2003) (*DCMA*). The GC further asserts that if Myers had not continued her presentation when it was the Union's turn, "there would have been no need for Schnobrich to interrupt her . . . ." GC Br. at 12. While acknowledging that Myers's "provocation" is "a bit different from most of the flagrant misconduct cases since Myers is a bargaining unit employee", the GC argues that this should not make a difference, because Schnobrich was disciplined for his actions. *Id.* at 12 n.21. Moreover, Schnobrich's behavior was rather mild: he didn't yell or use profanity, and he didn't touch Myers or threaten her in any way.

Finally, the GC argues that Schnobrich's actions were not otherwise outside the boundaries of protected activity, because Schnobrich did not use "racially derogatory" language or threaten or intimidate Myers. *Id.* at 13, citing *AFGE, Local 987*, 63 FLRA 362 (2009) (*Local 987*). Although the Respondent argues that Schnobrich violated the Agency's Standards of Employee Conduct (Program Statement 3420.09), the GC insists that Respondent's failure to enter Program Statement 3420.09 into evidence and makes it impossible to determine whether Schnobrich's conduct actually violated the standards. GC Br. at 14. Moreover, the Warden imposed the suspension without considering Schnobrich's statutory rights as a Union representative.

To remedy the Agency's unfair labor practice, the GC seeks an order to rescind Schnobrich's suspension, expunge it from his records, and make him whole for any losses he incurred by the suspension.

Respondent

The Respondent argues first that the "undisputed facts" show that Schnobrich was not engaged in protected activity on behalf of the Union until after his confrontation with Myers. Accordingly, it is not necessary to find flagrant misconduct or conduct exceeding the boundaries of protected activity in order to sustain the Agency's discipline. Nonetheless, even if Schnobrich was engaged in protected activity when he interrupted Myers, his actions exceeded the boundaries of protected activity.

The Respondent asserts that Schnobrich did not begin to engage in protected activity until he started his presentation to the ART class on behalf of the Union, and he didn't start his presentation until after he had driven Myers out of the room. R. Br. at 10. Further, the Respondent argues that Schnobrich's actions were not made on behalf of the Union and, therefore, are not protected. Respondent compares the facts of this case favorably to those in *AFGE, Local 1164*, 64 FLRA 599 (2010) (*SSA Somerville*), where a union official made disruptive comments criticizing management during an office birthday celebration. In addition, the Respondent argues that the fact that Schnobrich was on official time does not mean that Schnobrich was immunized from discipline.

Even if Schnobrich was acting in a representative capacity when he engaged in his offensive behavior, the Respondent contends that Schnobrich's actions are outside the boundaries of protected activity, upon considering the totality of the circumstances. *See U.S. Dep't of Transp., FAA, Wash., D.C.*, 64 FLRA 410 (2010) (*FAA*). The Respondent cites *AFGE, Local 1164*, 66 FLRA 74 (2011) (*SSA Region 1*) (unlawful disclosure of Privacy Act information), and *Local 987*, 63 FLRA at 364 (intimidation of an HR specialist and use of a racial slur), as analogous cases in which the Authority found a union official's conduct to have exceeded the boundaries of statutory protection.

Analysis

Section 7102 of the Statute guarantees employees the right to form, join, or assist a labor organization, or to refrain from such activity, without fear of penalty or reprisal. *Dep't of the Air Force, Grissom AFB, Ind.*, 51 FLRA 7, 11 (1995) (*Grissom*). When the General Counsel alleges that the discipline of an employee violates § 7116(a)(1) and (2) of the Statute, we utilize the analytical framework of *Letterkenny*, 35 FLRA at 118, with its shifting burdens of proof between the GC and the Respondent. *AFGE, Local 2145*, 64 FLRA 661, 664 (2010) (*Local 2145*).

In cases where discipline is based solely on conduct that occurs during protected activity, the *Letterkenny* framework is also utilized, but only two prongs of the analysis are applicable. *See NTEU, Chapter 284*, 60 FLRA 230, 231 n.3 (2004). The second element of the General Counsel's prima facie case (that the discipline was motivated by protected activity) is "inherently satisfied," and the second element of the Respondent's affirmative defense (that it would have taken the same action in the absence of protected activity) is "inherently inapplicable." *Id.* Accordingly, in such cases the GC must simply prove that the employee was engaged in protected activity; if so, the Respondent will be found to have committed an unfair labor practice, unless it demonstrates that the employee's actions constituted flagrant misconduct or otherwise exceeded the bounds of protected activity. *Id.* at 231-32.

From the latter principle, it is clear that an employee's involvement in union activities does not immunize him from discipline. *SSA Somerville*, 64 FLRA at 601. Rather, "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, quoting *Defense Mapping*, 17 FLRA at 80. Although this standard has sometimes been articulated simply as

whether the employee engaged in "flagrant misconduct," the case law makes it clear that flagrant misconduct is simply one illustration of the type of action that can justify removal from the protection of § 7102. *Dep't of the Air Force, 315th Airlift Wing v. FLRA*, 294 F.3d 192, 202 (D.C. Cir. 2002); *FAA*, 64 FLRA at 415. As the Authority explained in *Dep't of the Navy, Naval Facilities Eng'g Command, W. Div. San Bruno, Cal.*, 45 FLRA 138, 156 (1992) (quoting *AFGE, Nat'l Border Patrol Council*, 44 FLRA 1395, 1402 (1992)), "our task is to determine whether the remarks were 'of such an outrageous or insubordinate nature so as to remove them from the protection of the Statute.'" In order to make such determinations, we utilize the so-called "*Defense Mapping* factors,"[6] which were explicitly endorsed in *Grissom*, 51 FLRA at 11-12, and more recently in *FAA*, 64 FLRA at 413: (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. The Authority has also noted that while these factors are useful in striking the appropriate balance between the rights of employees and agencies, they are not exhaustive, and they need not be cited or applied in a particular way. *Grissom*, 51 FLRA at 12.

Schnobrich was acting in a representative capacity when he confronted Myers

I must first determine, therefore, whether Schnobrich was engaged in protected activity during his confrontation with Myers, which occurred approximately between 10:30 and 10:40 a.m. on February 24, 2011. A union official is engaged in protected activity when acting in his capacity as a union representative or attempting to pursue rights accorded him under a collective bargaining agreement. *See SSA Somerville*, 64 FLRA at 601; *U.S. Dep't of the Army, Headquarters, XVIII Airborne Corps*, 39 FLRA 1149, 1153 (1991). Thus, the Authority has found that an employee was acting in a representative capacity at a meeting because the employee's presence at the meeting was solely due to her activities and status as a union representative. *Fed. BOP, Office of Internal Affairs, Wash., D.C.*, 53 FLRA 1500, 1516-17 (1998) (*Internal Affairs*); *Long Beach Naval Shipyard, Long Beach, Cal.*, 25 FLRA 1002, 1005, 1021-22 (1987). An official who is merely attempting to represent an employee at an investigative hearing is considered to be engaging in protected activity, even if the employee had (without the official's knowledge) waived her earlier request for a representative. *Local 2145*, 64 FLRA at 664-65; *see also DOL*, 43 FLRA at 1039 (an employee who asserts a right that "emanates from" a collective bargaining agreement is engaged in protected activity).

That Schnobrich was acting as a Union representative when the confrontation with Myers occurred is strongly supported by the record. In this regard, Schnobrich was at ART that day solely to make a presentation on behalf of the Union. This is very similar to the situation in *Internal Affairs*. Moreover, he was on official time, and even the Warden

[6] The Authority sometimes uses the phrase "*Defense Mapping* factors" and at other times the phrase "*Grissom* factors," but the criteria are identical. *Compare Local 2145*, 64 FLRA at 665, *and FAA*, 64 FLRA at 413-14. I use the former term, in order to emphasize the long history of the case law on this issue.

acknowledged that official time is granted by management to allow employees "to engage in union activities for the bargaining unit staff[.]" Tr. 144. These facts alone are sufficient to find that Schnobrich was acting in a representative capacity at the time of the confrontation with Schnobrich.

Additionally, Schnobrich's presence at ART was in furtherance of a right granted to the Union under the Master Agreement. As noted in the Findings of Fact, the Master Agreement between AFGE and BOP entitles the Union to participate in ART, and the local supplemental agreement covering the Florence facility specifies that the Union will have "a thirty (30) minute block of time" to address ART participants. Jt. Exs. 1, 2. While neither agreement entitled the Union to start and end at a particular time, Schnobrich testified that the Union wanted the time slot immediately preceding lunch, so that he could answer employee questions during their lunch break, but the Union didn't want to keep employees beyond the lunch break involuntarily. Tr. 30-31. Thus it appears that Schnobrich at least believed that he needed to start his presentation at 10:30 and end it by 11:00 in order to make the best impression on employees.[7] However, there was ample testimony that ART presentations frequently departed from the time schedule, and that even Schnobrich understood that people who started late were allowed to make their full presentation unimpeded. Therefore, while Schnobrich had no reasonable basis to fear that the Union would be denied its contractual right to speak for thirty minutes, he may reasonably have felt that starting after 10:30 would compromise the effectiveness of his presentation. *See also* Jt. Ex. 4. Thus the record supports a finding that Schnobrich was attempting to pursue a right emanating from the supplemental agreement when he confronted Myers. More fundamentally, Schnobrich's actions (however misguided and rude) were in furtherance of his presence at ART as a Union representative.

Respondent's argument that Schnobrich's protected activity did not begin until he started his presentation (i.e., after he had chased Myers off the stage) is unpersuasive and unduly hair-splitting. To paraphrase the Authority's decision in *Internal Affairs*, Schnobrich's actions while seeking to begin his ART presentation are relevant to whether he engaged in flagrant misconduct, but they do not transform his role as a Union representative, or his Union-related purpose for being there. 53 FLRA at 1517. Although his ART presentation did not begin until after he had chased Myers away, Schnobrich's sole reason for being in the classroom that day was to speak on behalf of the Union, and his offensive behavior was committed (albeit misguidedly) in order to complete his contractually guaranteed presentation at the time he felt would be best for the Union. Therefore, he was acting in his Union capacity when he confronted Myers. Respondent's critique of Schnobrich's conduct is best reserved for the final section of this decision.

The Respondent claims that this case is similar to *SSA Somerville*, above. There, an employee who happened to be at the office to perform work in her role as a union official attended an office birthday celebration, where she complained loudly about management; later that day, she complained loudly about management again, this time to a non-employee.

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[7] Of course, if Schnobrich had fully sought to make a good impression, he would not have proceeded to offend a large portion of the class. Nonetheless, I credit his testimony that he was trying to act in the Union's interest.

64 FLRA at 599. Noting that an employee's complaints to, or about, an employer do not necessarily constitute protected activity under the Statute, the Authority found "no evidence" that the employee was acting on behalf of the union or fellow employees or that she was attempting to pursue any rights under the Statute or the parties' collective bargaining agreement. *Id.* at 601. In our case, by contrast, there is substantial evidence that Schnobrich was acting on behalf of the Union and was attempting to pursue a right under the supplemental agreement. Therefore, *SSA Somerville* is inapposite.

Based on the foregoing, I find that Schnobrich was acting in a representative capacity when he confronted Myers.

Schnobrich's actions are outside the bounds of protected activity

Having found that Schnobrich was acting in a representative capacity when he confronted Myers, I must next consider whether his actions constituted flagrant misconduct or otherwise exceeded the boundaries of protected activity. In determining whether an employee has engaged in conduct that exceeds the bounds of protection, the fact finder must balance the rights of the employee and the agency through the framework of the *Defense Mapping* factors, as spelled out earlier. This issue is resolved "on a case-by-case basis and upon the totality of the circumstances." *AFGE*, 59 FLRA 767, 771 (2004).

With regard to the first factor – the place and subject matter of the discussion – I consider whether the outburst was made publicly and in a manner that disrupted other employees or agency operations (factors weighing against protection), or privately and without causing a disruption (factors weighing in favor of protection). *See Local 2145*, 64 FLRA at 665 (citing *Grissom*, 51 FLRA at 12); *DCMA*, 59 FLRA at 227. In *U.S. Dep't of Energy, Oak Ridge, Tenn.*, 57 FLRA 343, 346 (2001) (*Oak Ridge*), the fact that the allegedly offensive conduct related to a labor relations matter rather than a personal one, that the union official's accusations were not made publicly, and that the accusations were confined to appropriate officials and witnesses, weighed in favor of protection. The converse is true here.

It is hard to imagine a more public setting than the ART training session in this case. Schnobrich confronted Myers in front of approximately 100 employees (including managers and supervisors) from across the complex. In this regard, even the GC concedes that the evidence "weighs against Schnobrich." GC Br. at 11. Schnobrich's actions were also disruptive, keeping Myers from presenting, and 100 employees from receiving, a full training session. Based on Schnobrich's estimate that Myers was "a little more than halfway through" at the time he interrupted her (Tr. 27), it is fair to say that he prevented her from giving (and the attendees from receiving) about half of the necessary material. Compare this to the union official's conduct in *Local 2145*, where an investigative hearing was suddenly interrupted, and the testifying witness was taken out of the room for about an hour. 64 FLRA at 661, 665. The disruption in our case was much more extreme, as it occurred in an open classroom filled with people, and it totally and permanently prevented those employees from hearing part of a mandatory training program. The disruptiveness of Schnobrich's actions can be further measured by the number and nature of complaints that attendees submitted to

management about the incident. R. Ex. 1. His actions were so offensive that twenty attendees felt compelled to complain in writing about his conduct, and several attendees walked out of the classroom at the start of Schnobrich's talk. The Warden viewed this negative response as extreme ("an outlier"), and he was quite correct. Tr. 139.

Further, while Schnobrich was attempting to enforce a contractual right on behalf of the Union, the confrontation did not occur within the context of a traditional labor dispute. Schnobrich confronted Myers, a bargaining unit employee, in the middle of a training session where scores of other bargaining unit employees and supervisors were present, not in a bargaining session or a grievance meeting. While the case law gives union officials broad latitude in engaging in "wide-open debate," in order to pursue their representative functions (*see, e.g.*, the Authority's discussion in *FAA*, 64 FLRA at 414-15), a classroom filled with employees receiving training on travel regulations is a quite different environment, and it calls for presenters to exercise greater rhetorical restraint. Accordingly, I find that the first *Defense Mapping* factor weighs heavily in favor of finding that Schnobrich's actions were outside the bounds of protection.

With regard to the second factor – whether the employee's outburst was impulsive or designed – the Authority considers whether the employee's behavior was spontaneous or under the influence of emotions (weighing in favor of protection), or whether it was planned or deliberate (weighing against protection). *See, e.g., DCMA*, 59 FLRA at 227; *Oak Ridge*, 57 FLRA at 346. The facts in *Oak Ridge* are instructive. One hour after a confrontation with management, union officials filed an incident report alleging that a management official engaged in threatening behavior. The Authority found that preparing the incident report required consideration and preparation and therefore was not a purely impulsive act. *Id.* However, even though the report was written an hour after the confrontation, the Authority found that the union official was affected by his emotions, and was not acting dispassionately, when he filed the report. Because filing the report was neither purely spontaneous nor purely designed, the Authority found that the factor neither supported nor undermined a finding of flagrant misconduct. *Id.*

This case presents a similarly close question. In some respects, it is clear that Schnobrich had been planning for the events of February 24 for a few weeks. He had given his presentation after Myers three or four previous times, and each time she had run late. Tr. 26. He felt that he and the Union were being "cheated out of their full 30 minutes[ ]" (Tr. 60), and that he "was being disrespected by Ms. Myers" by her actions. Jt. Ex. 4 at 4. In his own words, Myers's actions in prior weeks had "predisposed me to believe that she didn't take her time frame very serious." *Id.* at 3. Moreover, Schnobrich had interrupted Myers's presentation in the two previous weeks, albeit in a less obvious manner, by turning off her PowerPoint slides. Since quiet sabotage had failed to convince Myers to abbreviate her presentation, Schnobrich chose a more brazen approach on February 24, resulting in a direct verbal argument in front of the entire class. These were not impulsive acts. Yet it is also apparent that Schnobrich's actions were influenced by emotion and a gradually building sense of pressure, as he watched Myers's presentation slowly creep into "his" time slot and as he began "calculating in my mind what am I going to have to cut out" of his own presentation. Tr. 61. "[S]o I just kept escalating it up to the point where I finally did get her

attention." Tr. 60. Therefore, while Schnobrich's behavior lies somewhere in the middle of the impulsive-designed spectrum, I find that the elements of calculation somewhat outweigh the elements of impulsiveness, and that the scales of the second *Defense Mapping* factor tilt slightly toward a finding that Schnobrich was acting outside the bounds of protected activity.

With regard to the third *Defense Mapping* factor – whether the outburst was in any way provoked by the employer's conduct – the Authority considers whether there was provocative conduct that "incited" or "impelled" the employee's behavior. *Defense Mapping*, 17 FLRA at 82. If an employer has provoked the employee, that weighs against a finding of flagrant misconduct. *See, e.g.*, *DCMA*, 59 FLRA at 227. It is important to note that the third factor concerns provocation by the employer, not by a fellow employee. *See AFGE*, 59 FLRA at 771, where the Authority found that any provocation of the employee came from a union official, not the agency, and did not mitigate the severity of the conduct. I reject the GC's contention that Myers provoked Schnobrich by speaking past her scheduled time. The evidence demonstrated clearly that the ART time schedule was quite flexible, and as a long-time employee Schnobrich certainly understood that; accordingly, a late-running class was hardly a provocative act. Any frustration or pressure that Schnobrich may have felt to finish his own presentation by 11:00 a.m. cannot be treated as "provocation" under the *Defense Mapping* analysis. (It is relevant, however, to the impulsiveness of the conduct, and I have treated it as such.) As the Authority explained in *AFGE*, "frustration does not equate to provocation by the Agency." *Id.* This factor also supports a finding that Schnobrich's conduct exceeded the bounds of protected activity.

With regard to the fourth *Defense Mapping* factor – the nature of the intemperate language and conduct – the Authority has considered whether the conduct in question was brief or prolonged, the tone of voice, and whether there was any physical force or threat of violence. *FAA*, 64 FLRA at 414. In addition, the Authority has held that racial slurs and intimidation exceed the bounds of protected activity. *Local 987*, 63 FLRA at 364. It was noted in *Defense Mapping* that there is "a difference between 'letting off steam' spontaneously because of frustration, zealousness, or provocation and deliberate, excessive abuse of supervisory staff based on personal antagonism." 17 FLRA at 83.

The context in which the language or conduct occurred is significant in determining whether it is protected under the Statute. *FAA*, 64 FLRA at 414. For example, in assessing an employee's use of profanity, the Authority has explained that "it is not the words alone that are dispositive. Rather, it is the context, as established by other relevant factors, that determine whether the comment exceeds the bounds of protected activity." *AFGE*, 59 FLRA at 770 n.8. In this regard, the Authority found that an employee's intemperate language was not "consistent with the professional nature of the workplace[,]" and that it supported a conclusion that it was not protected. *Id.* at 771. A proper analysis of the context of disputed conduct will help to determine whether the intemperate rhetoric was simply the union official's way of making his point or whether it was excessive abuse of another individual, unnecessary for any legitimate representational purpose.

The status of the people involved in the disputed incident may also be relevant in establishing the context of the allegedly offensive conduct. While the Authority indicated in *Local 2145*, 64 FLRA at 666 n.8, that intemperate language does not necessarily lose its statutory protection when it is aimed at a co-worker, Chairman Pope has also stated that the status and relationship of the people involved in a discussion may affect the balancing of the *Defense Mapping* factors. Then-Member Pope wrote:

> In applying the [*Defense Mapping*] factors, I would recognize that where . . . the disputed conduct involves an employee/supervisor exchange, not an exchange between a union official and a management counterpart, less leeway for impulsive behavior is warranted. For example, the kind of language and conduct by union and management officials during contract negotiations that I would find protected would be, in my view, unprotected if it occurred as part of a discussion between an employee and supervisor.

USDA, Food & Nutrition Serv., Alexandria, Va., 61 FLRA 16, 25 (2005) (dissenting opinion).

With these principles in mind, I can identify some facts concerning the February 24 incident that mitigate Schnobrich's conduct and other facts that exacerbate it. Schnobrich addressed Myers in a "very assertive" manner, but he never raised his voice or used profanity or threatening gestures. Tr. 30, 168-69. Both of them were on a microphone, however, so everyone in the room could hear them. Tr. 164, 169. While the back-and-forth between Schnobrich and Myers lasted only a minute, a minute is a significant amount of time for a "discussion" being watched by 100 colleagues. Schnobrich did not use profanity, touch Myers, or threaten her with violent gestures. But he acted in an aggressive, bullying manner. His apparent plan was to get her to quietly cede the floor to him, but when that plan didn't work, he continued "escalating" his behavior until he forced her out of the classroom. Tr. 60. Thus in some respects, Schnobrich's behavior was less profane or loud than the conduct of the union officials in *Local 2145* and *FAA*, both of whose actions were found to be protected. 64 FLRA at 665; 64 FLRA at 413-14. But the lack of yelling or swearing belies the context of the incident, which reflects a level of bullying and public humiliation that is indefensible, especially in the absence of the inflamed emotions that often accompany a labor-management confrontation. Thus Schnobrich's behavior left Myers "shell-shocked," "dumbfounded," and "embarrassed." Tr. 163-64. As Myers testified, "You just don't do that. It's not right." *Id.* And the attendees agreed. Approximately twenty of them – an unusually large number – felt compelled to write in their evaluations that Schnobrich's behavior was "rude," "disrespectful," "unprofessional," and worthy of "reprimand[ ]." Tr. 129-30; R. Ex. 1. Schnobrich's behavior caused at least one attendee, correctional officer Justen Lee, to leave in protest, and it appears there were others as well. Tr. 224. Lee explained his departure from ART as follows: "I don't deal well with people who treat other people like dirt." Tr. 223. Schnobrich's conduct might have been compatible with the prison cells around which he spent most of his work day, but it was inconsistent with the professional nature of the classroom environment of ART. It demonstrated a callousness for the feelings of a

fellow employee that an employer cannot tolerate when it occurs so publicly. It was in this context that the Agency cited Schnobrich for violating the portion of the Standards of Employee Conduct that prohibits employees from treating other employees in a demeaning manner. *See* Jt. Ex. 5.

Viewing the totality of the circumstances surrounding the nature and context of Schnobrich's actions of February 24, I consider it to be outrageous and indefensible. Without raising his voice or using profanity, Schnobrich nonetheless managed to publicly humiliate a fellow employee during an agency-mandated training session and to prevent the attendees from receiving a portion of that training. Management has a legitimate interest in protecting employees from unprofessional, demeaning, and disorderly words and actions of other employees, including union representatives. The Agency could not provide a safe, professional, and functional work environment if it was unable to punish Schnobrich for what he did. For these reasons, I find that the fourth *Defense Mapping* factor weighs significantly in favor of finding that Schnobrich's actions are outside the bounds of protected activity.

In summary, three of the four relevant criteria weigh strongly in favor of finding that Schnobrich's conduct was unprotected; the other factor tilts slightly in the same direction. It is apparent, then, that his behavior on February 24 exceeded the bounds of protected activity, and that the Respondent has demonstrated a legitimate basis for suspending him. For all of these reasons, I conclude that the General Counsel has failed to prove that the Respondent violated § 7116(a)(1) and (2) of the Statute. Accordingly, I recommend that the Authority adopt the following Order:

ORDER

It is ordered that the Complaint be, and hereby is, dismissed.

Issued, Washington, D.C., October 15, 2014

RICHARD A. PEARSON
Administrative Law Judge