

71 FLRA No. 5

Accordingly, we deny the Agency's exceptions.<sup>6</sup>

UNITED STATES  
DEPARTMENT OF VETERANS AFFAIRS  
MEDICAL CENTER  
ORLANDO, FLORIDA  
(Agency)

and

AMERICAN FEDERATION  
OF GOVERNMENT EMPLOYEES  
LOCAL 2779  
(Union)

0-AR-5374

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 DECISION

February 8, 2019

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Before the Authority: Colleen Duffy Kiko, Chairman,  
and Ernest DuBester and James T. Abbott, Members  
(Member Abbott dissenting)

This matter is before the Authority on exceptions to an award of Arbitrator Charles J. Murphy filed by the Agency under § 7122(a) of the Federal Service Labor-Management Relations Statute (the Statute)<sup>1</sup> and part 2425 of the Authority's Regulations.<sup>2</sup> The Union filed an opposition to the Agency's exceptions.

We have determined that this case is appropriate for issuance as an expedited, abbreviated decision under § 2425.7 of the Authority's Regulations.<sup>3</sup>

Under § 7122(a) of the Statute,<sup>4</sup> an award is deficient if it is contrary to any law, rule, or regulation, or it is deficient on other grounds similar to those applied by federal courts in private sector labor-management relations. Upon careful consideration of the entire record in this case and Authority precedent, we conclude that the award is not deficient on the grounds raised in the exceptions and set forth in § 7122(a).<sup>5</sup>

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<sup>1</sup> 5 U.S.C. § 7122(a).

<sup>2</sup> 5 C.F.R. pt. 2425.

<sup>3</sup> *Id.* § 2425.7 ("Even absent a [party's] request, the Authority may issue expedited, abbreviated decisions in appropriate cases.").

<sup>4</sup> 5 U.S.C. § 7122(a).

<sup>5</sup> *AFGE, Local 2258*, 70 FLRA 210, 213 (2017) (award not deficient as based on nonfact where the excepting party

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challenges the arbitrator's legal conclusions that the parties disputed at arbitration); *U.S. Dep't of VA, Med. Ctr., N. Chi., Ill.*, 52 FLRA 387, 398 (1996) (award not deficient because of bias on the part of an arbitrator where excepting party fails to demonstrate that the award was procured by improper means, that there was partiality or corruption on the part of the arbitrator, or that the arbitrator engaged in misconduct that prejudiced the rights of the party). We note that the Agency did not file a contrary-to-law exception, and the Agency's brief does not allege that the award is contrary to any provision of the Statute or any previous decision concerning statutory violations.

<sup>6</sup> Chairman Kiko notes that she shares Member Abbott's concerns with the Authority's precedent under § 7102 of the Statute. However, due to the Agency's very limited exceptions constraining our review here, this is not the case in which to address § 7102. Further, the Chairman notes that the Arbitrator found the grievant's most egregious conduct substantiated and found that it *did* merit discipline here. Thus, the grievant will have a first offense in her record as the result of this award. In other words, the grievant will not be left wholly unaccountable for her conduct.

### Member Abbott, dissenting:

Can we all agree with this simple proposition? There is no place for boorish, insulting, and demeaning language in the modern workplace. And, more specifically, can we all agree that referring to one's supervisor as "fuck face,"<sup>7</sup> to an African-American chief of police as a "monkey ass retard,"<sup>8</sup> to a coworker as a "fat ass"<sup>9</sup> and "fat mother fucker,"<sup>10</sup> or responding to a senior official's reminder of a requirement to complete annual IT training with "nice try loser"<sup>11</sup> are the types of insults and abuse which no employee should have to endure in any workplace?

In the case before us, these are but a few examples of repeated outbursts by a fifteen-year medical technician for the Department of Veterans Affairs (who has spent her last eight years working exclusively for AFGE Local 2779 on 100% official time as its president). The Agency imposed a fourteen-day suspension for the president, Muriel Newman, for these outbursts. Newman filed a grievance and convinced Arbitrator Charles Murphy, who applied flawed FLRA precedent (more on this below), that there was nothing wrong with her offensive behavior simply because she was wearing a union hat when she hurled these ongoing invectives at coworkers, the police chief, supervisors, and senior agency officials.

Unlike my colleagues, I would conclude that the Agency raises an indisputable contrary-to-law exception. The parties asked the Arbitrator to decide whether "the Agency *retaliate[d]* against Ms. Newman for her *protected union activities* when it suspended her for fourteen days."<sup>12</sup> In his award, the Arbitrator stated at least eight times (in varying iterations) that Newman was engaged in "*protected activity*"<sup>13</sup> as a "union officer"<sup>14</sup> and therefore could not be disciplined for her offensive behavior.<sup>15</sup> In its exceptions, the Agency directly challenges the conclusions that Newman's offensive interactions were "protected activities"<sup>16</sup> *but also* challenges the "central fact" that "the grievant's misconduct was within the scope of her duties as Union president."<sup>17</sup> The

questions are unquestionably related, but they raise two very different issues—the former challenges a legal conclusion and the latter challenges a mixed question of fact and law. Both parties addressed these questions as distinct issues throughout the grievance and arbitration.<sup>18</sup> Because the Authority now looks to the whole of an exception to determine whether an argument has been raised,<sup>19</sup> I would conclude that the Agency raises a contrary-to-law argument which must be addressed.

Thus, I would take this opportunity to reexamine how the Authority evaluates the conduct, or misconduct, of Union officials as protected or not under § 7102(1). For years, past majorities of the Authority have excused instances of egregious misconduct by union officials unless it amounted to "flagrant misconduct"—a nearly insurmountable hurdle which was rarely met. In 2002, however, the United States Court of Appeals for the District of Columbia Circuit held that there was "little to justify" the Authority's flagrant misconduct standard and its interpretation of § 7102(1).<sup>20</sup> The Court noted that the Authority's standard, which focused solely on whether such conduct was "flagrant,"<sup>21</sup> was a "tortured . . . interpretation"<sup>22</sup> that cannot "reasonabl[y] interpret[] the limit[s] of § 7102."<sup>23</sup> Despite that clear repudiation, the Authority continued to apply the flawed "flagrant misconduct" standard.<sup>24</sup> But, as the

<sup>7</sup> Exceptions, Attach., Joint Ex. 2 at 10; Exceptions, Ex. E, Tr. (11/15/2016) at 74-75.

<sup>8</sup> Exceptions, Attach., Joint Ex. 2 at 53.

<sup>9</sup> Exceptions, Ex. E, Tr. (11/15/2016) at 27.

<sup>10</sup> Exceptions, Attach., Joint Ex. 2 at 35; Exceptions, Ex. E, Tr. (11/15/2016) at 102-04.

<sup>11</sup> Exceptions, Ex. E, Tr. (11/16/2016) at 85.

<sup>12</sup> Award at 1 (emphasis added).

<sup>13</sup> *Id.* at 8.

<sup>14</sup> *Id.*

<sup>15</sup> *Id.* at 8-12.

<sup>16</sup> Exceptions at 7.

<sup>17</sup> *Id.* at 7-8.

<sup>18</sup> From the Union post-hearing brief: "the Agency retaliate[d] against . . . Newman for her protected union activity," Union Post-Hr'g Br. at 2; "[t]he Agency may not retaliate against an employee for their protected union activities," *id.* at 17-20; "[t]he Agency violated the law and the [m]aster [a]greement when it retaliated against . . . Newman for her protected activity," *id.* at 31-39. From the Agency post-hearing brief: "[b]ased upon her belief that she was untouchable as the Union President," Agency Post-Hr'g Br. at 1; "the union has provided no evidence of anti-union animus . . . the Agency has taken disciplinary action against other employees who have engaged in the same behavior, regardless of their union affiliation," *id.* at 14; "[t]he Union also seems to argue that the grievant was engaging in protected activity, bargaining or negotiation, during each one of the events of misconduct," *id.* at 15; "the union has never identified what alleged protected activity the grievant was alleged to be engaged in during any of these events," *id.*; "has not shown any evidence of her alleged affirmative defenses," *id.* at 18.

<sup>19</sup> *U.S. DOD, Def. Contract Mgmt. Agency*, 70 FLRA 370, 371 n.22 (2018).

<sup>20</sup> *Dep't of the Air Force, 315th Airlift Wing v. FLRA*, 294 F.3d 192, 198 (2002) (*315th Airlift Wing*).

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> The Authority's continued application of the "flagrant misconduct" standard, despite the Court's rejection, is closely akin to the Authority's continued application of the "abrogation" standard, even after the Court rejected that standard, a matter we had to correct in *U.S. DOJ, Fed. BOP.*, 70 FLRA 398 (2018) (Member DuBester dissenting).

Court also warned, “applying an unreasonable statutory interpretation for several years cannot transform it into a reasonable interpretation.”<sup>25</sup>

I do not believe it is unreasonable to expect that federal employees, whether supervisor, employee, or union official, should be able to comport themselves appropriately in the federal workplace. I agree entirely with the sentiments (which are worth repeating here) expressed by Member Pizzella in his dissent in *AFGE, Local 2595*.<sup>26</sup> In that case, Member Pizzella detailed numerous instances where the Authority had condoned outrageous conduct perpetrated by union officials in the workplace:

- A union representative, telling a supervisor, “fuck you, I don’t give a fuck!”<sup>27</sup>
- A male union representative (much larger than his female supervisor) physically “attack[ing]”<sup>28</sup> her in “an assault and battery”<sup>29</sup> that was “so forceful . . . [she] felt compelled to retreat from him”<sup>30</sup> and the union representative pursued her and forced her to “arch backward over a counter”<sup>31</sup> “with his ‘stomach pressed up against her . . . belly to belly and toe to toe.’”<sup>32</sup>
- A male union negotiator yelling at a female management negotiator, “the FLRA will shove this up your ass,” “I don’t give a fuck what you think[,]” “[y]ou can’t be that fucking stupid, lady,”<sup>33</sup> and “[y]ou can suck my d--[!].”<sup>34</sup>
- 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.<sup>35</sup> The union representative filed the false incident report.<sup>36</sup>
- A 230-pound union representative yelling at and “pointing his finger right in [the] face”<sup>37</sup> of his “diminutive”<sup>38</sup> female supervisor, while leaning

over her “[thirty]-inch-wide desk” where she was “seated.”<sup>39</sup> 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 request that she previously had approved.<sup>40</sup>

The unmistakable message that was left by these and other union-official misconduct cases was that the Authority would simply look the other way when a union official bullied or acted disrespectfully towards a management official in the conduct of union business. That message was not lost on federal unions or federal managers.

Several national unions began to coach their stewards on how they could use the Authority’s “tortured” standard to their advantage. In one example, the National Border Patrol Council issued a ULP handbook that advised its stewards that they could say “you can’t be that fucking stupid” to a management official or even call them “asshole” or “space cadet” without any repercussions.<sup>41</sup> In another example, NFFE General Counsel Susan Tsui Grundmann advised NFFE’s membership that the “use of profanity [by a union official when acting in a representational role] is not flagrant misconduct.”<sup>42</sup> NATCA, not wanting its representatives to lose out on the fun, brought attention to the fact that the FLRA’s sanctioning of “harsh/robust language . . . only applies to *representatives of the [u]nion*” and gives them “broad latitude” but “does not apply . . . to employees” who do not belong to the union.<sup>43</sup> In that toxic environment, the *Government Executive* magazine noted that the long series of “flagrant misconduct” cases had left federal managers wondering just “how much verbal abuse [they] ha[d] to take from union officials.”<sup>44</sup> The concerns of many federal managers were summarized in a later article, “No Blood, No Foul, No ULP.”<sup>45</sup>

<sup>25</sup> *315th Airlift Wing*, 294 F.3d at 198.

<sup>26</sup> 68 FLRA 293, 298 (2015) (Dissenting Opinion of Member Pizzella).

<sup>27</sup> *U.S. Dep’t of Transp., FAA*, 64 FLRA 410, 410 (Member Beck dissenting).

<sup>28</sup> *315th Airlift Wing*, 294 F.3d at 195.

<sup>29</sup> *Id.* at 195-96 (internal citation omitted).

<sup>30</sup> *Id.* at 194.

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> *Dep’t of the Air Force, Grissom Air Force Base, Ind.*, 51 FLRA 7, 20 (1995) (*Grissom*).

<sup>34</sup> *Id.* at 21.

<sup>35</sup> *U.S. Dep’t of Energy, Oak Ridge, Tenn.*, 57 FLRA 343, 345-47 (2001) (Chairman Cabaniss dissenting).

<sup>36</sup> *Id.*

<sup>37</sup> *Air Force Flight Test Ctr., Edwards Air Force Base, Cal.*, 53 FLRA 1455, 1461 (1998).

<sup>38</sup> *Id.* at 1460.

<sup>39</sup> *Id.* at 1461.

<sup>40</sup> *Id.*

<sup>41</sup> *FLRA and ULPs*, National Border Patrol Council Manual at II.A.4., <https://bpunion.org/rep-resources/flra-ulp/> (last visited February 7, 2019).

<sup>42</sup> *Unfair Labor Practice, Charges Against the Agency*, www.nffe.org/ht/a/GetDocumentAction/i/17096 (last visited February 7, 2019).

<sup>43</sup> *AFGE, Local 2595*, 68 FLRA 293, 299 (2015) (*Local 2595*) (Dissenting Opinion of Member Pizzella) (citing www.nwp.natca.org/documents/LR\_stuff).

<sup>44</sup> Brian Friel & Katy Saldarini, *Legal Briefs: !@#% you, boss!*, *Government Executive* (May 21, 1999), <https://www.govexec.com/federal-news/1999/05/legal-briefs-x-you-boss/3171/> (last visited February 7, 2019).

<sup>45</sup> *FedSmith*, www.fedsmith.com (August 15, 2002).

The Court in *315th Airlift Wing* held, however, that it is “preposterous . . . to conclude that Congress could reasonably have contemplated that federal employees are incapable of exercising their rights under § 7102 without ranting, raving, assaulting, battering and harassing their coworkers.”<sup>46</sup> If that was true *in 2002*, it is all the more relevant today after several years of revelations through news outlets and the #MeToo movement that highlight the devastating effects of unchecked and uncorrected workplace misbehaviors, regardless of whether that conduct is perpetrated by senior managers, rank and file employees, or union officials.

It is important, therefore, that the Authority clarify, once and for all, that there is a necessary and clear distinction between conduct which occurs when union representatives are actively engaged in “classic labor disputes” (i.e. collective bargaining or negotiation of agreements). Those encounters, which typically occur behind closed doors, away from the workplace, and outside the hearing of coworkers and the public, afford union representatives (and managers) “some latitude” to “speak bluntly and recklessly . . . because those encounters by their nature have the potential to become heated.”<sup>47</sup> However, when interactions between management and union officials occur in the workplace, common areas, or take place in front of coworkers or the public, § 7102 does not excuse misconduct for which any other employee would be disciplined. In fact, the Court in *315th Airlift Wing* concluded that “misconduct of any kind . . ., by definition, ‘*exceed[s] the boundaries of protected activity*’” particularly when that misconduct occurs in the workplace and is *part of supervisor and employee interaction*.<sup>48</sup>

Any one of the specifications enumerated by the Agency here would support disciplinary action, regardless of whether Newman was performing duties for the Union. Her actions were ongoing, abusive, and confrontational and demonstrate that she believed that she is “untouchable” so long as she is performing duties for the union (which is 100% of the time).

It is quite obvious to me that conduct of this nature perpetuates itself, in large part, because past majorities of the Authority consistently has looked the other way (despite the fact that the D.C. Circuit declared the Authority’s flagrant misconduct standard to be “tortured” and “unreasonable” in 2002) when union officials have engaged in outrageous behavior that is not tolerated in any other context.

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<sup>46</sup> *315th Airlift Wing*, 294 F.3d at 198.

<sup>47</sup> *Id.* at 198 (internal quotations and citations omitted).

<sup>48</sup> *Local 2595*, 68 FLRA at 300 (Dissenting Opinion of Member Pizzella) (citing *315th Airlift Wing*, 294 F3d at 201).

Accordingly, I do not agree that any of Newman’s actions are “protected” because she was acting as a union representative. I would vacate the Arbitrator’s award and reinstate the fourteen-day suspension as an appropriate penalty for misconduct of this nature.