

**72 FLRA No. 114**

INTERNATIONAL BROTHERHOOD  
OF BOILERMAKERS  
LOCAL 290  
(Union)

and

UNITED STATES  
DEPARTMENT OF THE NAVY  
PUGET SOUND NAVAL SHIPYARD AND  
INTERMEDIATE MAINTENANCE FACILITY  
BREMERTON, WASHINGTON  
(Agency)

0-AR-5668

DECISION

December 17, 2021

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

**I. Statement of the Case**

In this case, we uphold an award finding that the grievant—an employee and Union steward—exceeded the bounds of protected activity during two heated and public exchanges with supervisors.

The Agency suspended the grievant for three days for engaging in unacceptable conduct during two meetings and for demonstrating a lack of candor during subsequent investigations into her conduct. The Union filed a grievance, contending that the grievant was engaged in protected activity during both meetings, and her conduct did not violate any Agency rules. Arbitrator Patrick Halter issued an award denying the grievance. He found that the record established that the grievant had engaged in the behavior alleged and that her behavior exceeded the bounds of protected activity.

On exceptions, the Union argues that the award: is contrary to the First Amendment of the United States Constitution; is based on a nonfact; conflicts with § 7102 of the Federal Service Labor-Management Relations

Statute (the Statute);<sup>1</sup> and fails to draw its essence from the parties' collective-bargaining agreement.

We dismiss the Union's First Amendment exception because the Union failed to raise it before the Arbitrator.<sup>2</sup> Also, because the Arbitrator properly applied the Authority's standard for assessing protected activity, we deny the Union's § 7102 exception. And we deny the Union's nonfact and essence exceptions for failing to establish that the award is deficient. Accordingly, we dismiss, in part, and deny, in part, the exceptions.

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

While attending an Equal Employment Opportunity briefing on the Agency's sexual-harassment policy, the grievant—in the presence of supervisors and staff—engaged the presenter with a series of profanity-laced complaints involving the Agency's sexual-harassment policy. One of the grievant's complaints concerned a picture from an office bulletin that she claimed demonstrated inconsistent application of the sexual-harassment policy by exhibiting sexual conduct. The grievant brought a copy of the picture—which showed a supervisor being kissed on the cheek by his wife—to show during the briefing.<sup>3</sup> Referring to the supervisor's wife, the grievant reportedly said, “[F]or all I know that could have been a hooker.”<sup>4</sup> The grievant also allegedly used explicit language, including the words “f-k” and “f-king,”<sup>5</sup> and stated that the presenter's answer to one hypothetical harassment scenario was “bulls--t.”<sup>6</sup> As a result of the grievant's statements and conduct, the Agency issued her a notice of proposed suspension for unacceptable conduct.

<sup>1</sup> 5 U.S.C. § 7102.

<sup>2</sup> 5 C.F.R. §§ 2425.4(c), 2429.5.

<sup>3</sup> The contradictory nature of her remarks led at least one attendee to state that “it was hard to figure out if [the grievant] was offended or not” by the picture. Exceptions, Enclosure 6, Pre-Action Investigation (Pre-Action Investigation) at 15. That attendee, as well as several others, ultimately concluded that the grievant was worried that the sexual-harassment policy would prohibit the picture because the policy was overly broad and “might be giving a small minority of very easily offended people power.” *Id.*; see also *id.* at 19 (another attendee recalling grievant stating, in response to the presenter discussing a policy of reporting inappropriate conduct, that she thought it was wrong that because “someone isn't minding their f-king business[,] other people get in trouble”); *id.* at 35 (another attendee recalling the grievant stating that “she feels like she can't say anything because anything in her mind can be considered a sexual[-]harassment problem”).

<sup>4</sup> Award at 5.

<sup>5</sup> *Id.* at 2.

<sup>6</sup> Pre-Action Investigation at 11.

Several months later, after a staff meeting, the grievant raised a complaint with her supervisor while in the presence of coworkers regarding the amount of detail provided in work assignments. In reference to the work assignment, the grievant reportedly said, “[T]hat number doesn’t mean f--king s--t to me.”<sup>7</sup> When the grievant’s supervisor warned her about her language, the grievant denied using the word “f--king,” but not the word “s--t.”<sup>8</sup> Based on her conduct in this meeting, the Agency amended the proposed suspension to include another specification for unacceptable conduct.

During the subsequent investigations into the grievant’s conduct, she denied having used the word “hooker” to describe the supervisor’s wife and answered “no” when asked if she used “foul language” during the sexual-harassment briefing<sup>9</sup>—despite the contrary statements of numerous witnesses. As a result, the Agency also charged the grievant with exhibiting a lack of candor to the investigators.

For the two unacceptable conduct charges, and for her lack of candor during the investigations, the Agency issued the grievant a three-day suspension. The Union grieved the suspension, and the dispute proceeded to arbitration.

As the parties did not stipulate to the issue, the Arbitrator framed it as follows: “Did the Agency violate . . . [the parties’ agreement] when it suspended [the] grievant for ‘Unacceptable Conduct’ and ‘Lack of Candor’ because [the] grievant [was] engaged in ‘protected activity’ in her capacity as [c]hief [s]teward?”<sup>10</sup>

At arbitration, the Union argued that the grievant’s conduct during the sexual-harassment briefing was protected because she attended in her capacity as a union steward, and in discussing the picture of the supervisor and his wife, she was expressing the concerns of other bargaining-unit employees.<sup>11</sup> Regarding the lack-of-candor charges, the Union alleged that the investigators accused the grievant of making statements that she did not make.<sup>12</sup>

<sup>7</sup> Award at 9.

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

<sup>9</sup> Pre-Action Investigation at 3.

<sup>10</sup> Award at 7.

<sup>11</sup> Before the Arbitrator, the Union argued that the grievant raised her complaint about the picture after hearing from other concerned bargaining-unit employees, but it did not assert that her other statements during the briefing similarly expressed the views of bargaining-unit employees. *Id.* at 5.

<sup>12</sup> For example, the grievant claimed that she used the word “stripper” rather than “hooker” when referring to the supervisor’s wife. *Id.* at 5-6.

The Arbitrator found that the grievant had engaged in the conduct attributed to her. Specifically, he credited testimony establishing that the grievant arrived at the sexual-harassment briefing “with the obvious intent to distract and manipulate the meeting in an unproductive and inappropriate direction,”<sup>13</sup> and she was “persistent in controlling the presentation,” despite the presenter’s efforts to reclaim the floor.<sup>14</sup> Regarding the briefing, the Arbitrator also determined that the grievant “was aware that her statements and conduct were unacceptable and contrary to the Anti-Harassment Policy.”<sup>15</sup> On the lack-of-candor charges, the Arbitrator held that the grievant’s denials during the investigations were unpersuasive given the “numerous witness statements confirming her use of profanity directed at managers, supervisors and others present.”<sup>16</sup>

The Arbitrator held that the grievant’s conduct was not protected by § 7102, because it was “unprovoked, planned, manipulative, [and] openly-displayed and [it] interfered with, if not undermined, the sexual[-]harassment briefing.”<sup>17</sup> He reasoned that an assertion of protected activity does not insulate a union representative from discipline for misconduct that occurs in front of other employees and that interferes with the operations of an agency. Noting that a relevant Agency rule (called the Secretary of the Navy’s Instruction on Disciplinary Actions) recommended a minimum suspension of ten days for third offenses, the Arbitrator determined that the grievant’s three-day suspension was not inappropriate,<sup>18</sup> and the Agency did not violate the parties’ agreement. Thus, the Arbitrator denied the Union’s grievance.

The Union filed exceptions to the award on September 15, 2020, and the Agency filed an opposition to the Union’s exceptions on March 9, 2021.<sup>19</sup>

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

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

<sup>15</sup> *Id.* at 9.

<sup>16</sup> *Id.*

<sup>17</sup> *Id.* at 11.

<sup>18</sup> *Id.* at 5, 11 (citing Sec’y of the Navy, Instruction on Disciplinary Actions 12752.1A (Nov. 6, 2017) (Navy Instruction)). The Arbitrator noted that the grievant had been disciplined twice previously for unacceptable and disrespectful conduct. *Id.* at 9.

<sup>19</sup> In its opposition, the Agency asks the Authority to dismiss the exceptions on the basis of a procedural deficiency. Opp’n at 6. However, after the Authority’s Office of Case Intake and Publication (CIP) issued orders to the Union regarding the procedural deficiencies, the Union cured them. Accordingly, we consider the Union’s exceptions. *See, e.g., AFGE, Loc. 12, 69 FLRA 28, 29 (2015)* (considering motion for reconsideration once moving party complied with CIP’s order and cured the deficiency).

### III. Preliminary Matter: Sections 2425.4(c) and 2429.5 of the Authority's Regulations bar one of the Union's exceptions.

Citing the First Amendment, the Union argues that the award is contrary to law because it upholds an Agency policy limiting the grievant's speech in the workplace on the basis of a "religious observance."<sup>20</sup> Under §§ 2425.4(c) and 2429.5 of the Authority's Regulations, the Authority will not consider any evidence or arguments that could have been, but were not, presented to the arbitrator.<sup>21</sup> Although the Union claims to have raised a First Amendment argument before the Arbitrator during the Union's cross examination of witnesses,<sup>22</sup> it fails to provide any evidentiary support for that claim and nothing in the record shows that the Union raised the argument at arbitration.<sup>23</sup> Because the Union could have raised this argument to the Arbitrator, but did not, we dismiss this exception as barred by §§ 2425.4(c) and 2429.5 of the Authority's Regulations.<sup>24</sup>

### IV. Analysis and Conclusions

A. The Union does not establish that the award is based on a nonfact.

The Union argues that the Arbitrator erred in finding that the grievant was untruthful during the investigation into her conduct.<sup>25</sup> According to the Union, the grievant provided answers that were factually accurate and directly responsive to the investigator's questions when she denied using "foul language."<sup>26</sup> To establish that an award is based on a nonfact, the excepting party must show that a central fact underlying the award is clearly erroneous, but for which the

arbitrator would have reached a different result.<sup>27</sup> But, the Authority will not find an award deficient on the basis of an arbitrator's determination of any factual matter that the parties disputed at arbitration.<sup>28</sup> In addition, a party's disagreement with an arbitrator's evaluation of evidence provides no basis for finding the award deficient.<sup>29</sup>

Here, the Union concedes that the grievant used the words alleged during the sexual-harassment briefing and the staff meeting.<sup>30</sup> But, the Union contends that her denials were nonetheless truthful because the investigator's questions were vague and inaccurate.<sup>31</sup> However, the issue of whether the grievant was untruthful during the investigations into her conduct was a factual matter that the parties disputed before the Arbitrator.<sup>32</sup> Moreover, the Arbitrator made his determination that the grievant was untruthful based on "numerous witness statements confirming [the grievant's] use of profanity."<sup>33</sup> As the Union's nonfact exception challenges the Arbitrator's evaluation of this evidence, it provides no basis for finding the award deficient.<sup>34</sup> Consequently, we deny this exception.

<sup>20</sup> Exceptions at 4-5.

<sup>21</sup> 5 C.F.R. §§ 2425.4(c), 2429.5; *U.S. DOL*, 67 FLRA 287, 288 (2014); *AFGE, Loc. 3448*, 67 FLRA 73, 73-74 (2012).

<sup>22</sup> Exceptions at 5. The Agency disputes that the Union ever raised this argument. Opp'n at 4 ("The Union did *not* raise this argument before Arbitrator Halter in the 21 July 2020 hearing.").

<sup>23</sup> While the Union states that this argument "is in the [U]nion[]"s notes," Exceptions at 5, the Union does not provide notes or any other documentation showing that it made a First Amendment claim before the Arbitrator. *See id.* at 9-10.

<sup>24</sup> *See AFGE, Loc. 2923*, 69 FLRA 286, 287 (2016) (dismissing exceptions where excepting party did not "demonstrate that it raised the[] arguments before the [a]rbitrator").

<sup>25</sup> Exceptions at 7.

<sup>26</sup> *Id.* (citing *Fargnoli v. Dep't of Com.*, 123 M.S.P.R. 330, 338 (2016) (holding that lack of candor requires the agency to establish that (1) the employee gave incorrect or incomplete information; and (2) the employee did so knowingly)); Pre-Action Investigation at 3 (the grievant asked the investigator to define foul language before answering "[n]o" to the question of whether she had used foul language in the sexual-harassment briefing).

<sup>27</sup> *AFGE, Loc. 1594*, 71 FLRA 878, 880 (2020) (citing *U.S. DOD, Def. Commissary Agency, Randolph Air Force Base, Tex.*, 65 FLRA 310, 311 (2010)).

<sup>28</sup> *U.S. Dep't of the Treasury, IRS, Greensboro, N.C.*, 61 FLRA 103, 105 (2005) (Member Armendariz concurring in part and dissenting in part); *SSA, Off. of Hearings & Appeals*, 58 FLRA 405, 407 (2003) (Chairman Cabaniss dissenting in part).

<sup>29</sup> *U.S. DOD, Def. Logistics Agency, Disposition Servs., Battle Creek, Mich.*, 70 FLRA 949, 950 (2018) (Member Abbott concurring; then-Member DuBester concurring); *Fraternal Ord. of Police, Lodge No. 168*, 70 FLRA 788, 790 (2018) (*Lodge 168*).

<sup>30</sup> Exceptions at 7 ("[The grievant] readily admits to using the specific words in question.").

<sup>31</sup> Award at 6-7 (summarizing the Union's argument that "[t]he Agency falsely accused [the] grievant of . . . lack of candor based on an inadequate investigation"); Exceptions at 7 (arguing that the grievant was not attempting to deceive the investigator, but only to be specific with regard to the "definitions of 'cursing,' '[p]rofanity,' and 'vulgaritys'").

<sup>32</sup> Award at 5-6 (noting the Union's argument that the grievant referred to her supervisor's wife as a "stripper," rather than a "hooker," and that she denied the rest of the statements attributed to her); *see also U.S. Dep't of VA, Med. Ctr., Richmond, Va.*, 63 FLRA 181, 182 (2009) (denying nonfact exception to arbitrator's findings regarding the grievant's alleged misconduct because they were disputed at arbitration); *AFGE, Loc. 1637*, 49 FLRA 125, 129 (1994) (upholding award finding that grievant committed the alleged misconduct where the excepting party did not establish that the factual finding was clearly erroneous).

<sup>33</sup> Award at 9.

<sup>34</sup> *See Lodge 168*, 70 FLRA at 790.

B. The award is not contrary to § 7102 of the Statute.

The Union argues that the award is contrary to § 7102<sup>35</sup> because the grievant attended the sexual-harassment briefing in her capacity as a union representative and was engaged in protected activity.<sup>36</sup> 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.”<sup>37</sup> The Authority has held that a variety of activities are protected under § 7102, including holding a leadership position within a union or acting in a representational capacity on behalf of a union.<sup>38</sup> However, it is well established that an agency may discipline a union representative for conduct occurring during protected activity if the conduct constitutes flagrant misconduct or otherwise exceeds the boundaries of the Statute’s protection.<sup>39</sup>

<sup>35</sup> When an exception involves an award’s consistency with law, the Authority reviews any question of law raised by the exception de novo. *AFGE, Loc. 12*, 70 FLRA 348, 349-50 (2017) (then-Member DuBester concurring) (citing *Fraternal Ord. of Police, Lodge No. 158*, 66 FLRA 420, 423 (2011)). In applying the de novo standard of review, the Authority assesses whether an arbitrator’s legal conclusions are consistent with the applicable standard of law. *Id.* at 350. In making this assessment, the Authority defers to the arbitrator’s underlying factual findings. *Id.*

<sup>36</sup> Exceptions at 5. The Union does not challenge the portion of the award upholding the unacceptable-conduct charge concerning the grievant’s conduct after the staff meeting. *Id.*

<sup>37</sup> 5 U.S.C. § 7102.

<sup>38</sup> See, e.g., *U.S. Dep’t of VA, Med. Ctr., Jamaica Plain, Mass.*, 50 FLRA 583, 586 (1994) (presenting union views to agency officials is a protected activity, as well as publicizing labor disputes or issues that have direct bearing on conditions of employment (citing *Dep’t of the Navy, Naval Facilities Eng’g Command, W. Div. San Bruno, Cal.*, 45 FLRA 138, 148-49, 155-56 (1992) (*Naval Facilities*)); *U.S. Air Force Logistics Command, Tinker Air Force Base, Okla. City, Okla.*, 34 FLRA 385, 390-91 (1990) (serving copies of unfair labor practice charges on behalf of a union is a protected activity); *Dep’t of the Air Force, 3rd Combat Support Grp., Clark Air Base, Republic of the Phil.*, 29 FLRA 1044, 1049 (1987) (distribution of handbills is protected activity); *DOJ, BOP, Fed. Corr. Inst., Butner, N.C.*, 18 FLRA 831, 832-33 (1985) (filing and processing of grievances under a negotiated grievance procedure is protected activity).

<sup>39</sup> *AFGE*, 59 FLRA 767, 770 (2004) (Chairman Cabaniss concurring; Member Pope dissenting); *U.S. Dep’t of the Air Force, Aerospace Maint. & Regeneration Ctr., Davis Monahan Air Force Base, Tucson, Ariz.*, 58 FLRA 636, 636 (2003) (*Davis Monahan*) (citing *Dep’t of the Air Force, 315th Airlift Wing v. FLRA*, 294 F.3d 192, 201 (D.C. Cir. 2002) (*315th Airlift*)).

In determining whether an employee has engaged in flagrant misconduct,<sup>40</sup> 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.”<sup>41</sup> Relevant factors in striking this balance 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.<sup>42</sup> The Authority need not cite or apply these factors in any particular way in determining whether conduct exceeds the bounds of the Statute’s protection.<sup>43</sup> Additionally, the Authority determines whether conduct exceeds the boundaries of protected activity on a case-by-case basis, considering the totality of the circumstances.<sup>44</sup>

In applying the first factor, the Authority considers the place where the incident occurred and the subject matter of the discussion.<sup>45</sup> Regarding “place,” the Authority has repeatedly held that heated encounters in closed-door meetings are more protected,<sup>46</sup> while conduct that disrupts the work unit is less protected because it jeopardizes the employer’s right to maintain order and respect for its supervisory staff on the jobsite.<sup>47</sup> Here, rather than expressing her concerns in an individual meeting with a supervisor, the grievant raised them

<sup>40</sup> We note, as we have in the past, that flagrant misconduct is just one example of the type of conduct that exceeds the bounds of protected activity. E.g., *AFGE, Loc. 1164*, 66 FLRA 74, 79 (2011) (upholding award finding that employee exceeded bounds of protected activity where he unlawfully disclosed documents covered by the Privacy Act); *AFGE, Loc. 987*, 63 FLRA 362, 364 (2009) (holding that an employee’s conduct exceeded the bounds of protected activity where he engaged in physically threatening behavior and used racially-offensive language towards a supervisor); *Davis Monahan*, 58 FLRA at 636 (noting that “flagrant misconduct [i]s only illustrative of exceeding the boundaries of protected activity” (quoting *315th Airlift*, 294 F.3d at 202)).

<sup>41</sup> *DOD, Def. Mapping Agency Aerospace Ctr., St. Louis, Mo.*, 17 FLRA 71, 80 (1985) (*Def. Mapping*) (quoting *Dep’t of the Navy, Puget Sound Naval Shipyard, Bremerton, Wash.*, 2 FLRA 54, 55 (1979)).

<sup>42</sup> *Id.* at 81.

<sup>43</sup> *Dep’t of VA, Med. Ctr., Richmond, Va.*, 63 FLRA 553, 556 (2009).

<sup>44</sup> *AFGE*, 59 FLRA at 771; see also *U.S. Dep’t of Transp., FAA, Wash., D.C.*, 64 FLRA 410, 414 n.11 (2010) (*FAA*).

<sup>45</sup> *Def. Mapping*, 17 FLRA at 81.

<sup>46</sup> *Id.* (noting that a closed-door meeting between an employee and supervisor “weigh[ed] heavily” in favor of the employee retaining protection for her statements to her supervisor).

<sup>47</sup> *AFGE, Loc. 2145*, 64 FLRA 661, 665 (2010) (Member Beck dissenting in part) (union representative’s disruptive conduct during a hearing was protected, in part, because there was “no contention that the grievant’s conduct interrupted the work of other employees”).

during a sexual-harassment briefing attended by coworkers and supervisors.<sup>48</sup> The Arbitrator found, and we agree, that the grievant, by electing to raise her concerns in front of other employees, “disrupted the briefing” and “impeded the Agency’s obligation under law . . . to maintain a work environment free of harassing, offensive behavior and words.”<sup>49</sup>

As for the “subject matter,” the Union contends that the grievant raised some of her concerns in a representative capacity after hearing from other bargaining-unit employees.<sup>50</sup> Nevertheless, the grievant engaged in behavior that the Arbitrator found to be a violation of the Anti-Harassment Policy during a briefing on compliance with that same policy.<sup>51</sup> According to the Arbitrator, the grievant’s actions not only “created an uncomfortable atmosphere for attendees,” but also “denied [them] the opportunity to ask questions and share information about sexual harassment[,] such as identifying and reporting it.”<sup>52</sup>

Thus, even if the grievant was acting in a representative capacity, she undermined this representational function by raising these concerns in an inappropriate place and manner. Accordingly, we find that the first factor weighs heavily against the grievant retaining the protection of the Statute.<sup>53</sup>

The second factor considers whether the conduct was impulsive or designed.<sup>54</sup> The Arbitrator found that at least some of the grievant’s conduct was “planned.”<sup>55</sup> Specifically, the Arbitrator credited the briefing presenter’s description that the grievant arrived “with the obvious intent to distract and manipulate the meeting in an unproductive and inappropriate direction.”<sup>56</sup> Accordingly, we find that application of the second factor

supports the Arbitrator’s conclusion that the grievant’s conduct exceeded the boundaries of protected activity.<sup>57</sup>

The third factor considers whether the conduct was in any way provoked by the employer’s conduct.<sup>58</sup> The Arbitrator found that the grievant’s behavior during the briefing was “unprovoked . . . [and] manipulative.”<sup>59</sup> Employees that attended the briefing described the presenter as “professional and polite,”<sup>60</sup> and noted that, in response to the grievant’s conduct, he “kept himself calm”<sup>61</sup> and was not “disrespectful or inappropriate.”<sup>62</sup> Thus, this factor also supports the Arbitrator’s conclusion that the grievant exceeded the boundaries of protected activity.

The fourth factor considers the nature of the intemperate language or conduct.<sup>63</sup> The Authority has held that while the particular words used are not, standing alone, dispositive, the context of the words determines whether they exceed the bounds of protected activity.<sup>64</sup> In analyzing the nature of intemperate conduct, the Authority considers whether the conduct in question was brief or prolonged.<sup>65</sup> As discussed above, the grievant’s conduct was particularly inappropriate in context given that she made sexually harassing remarks about a supervisor’s spouse during a briefing where the Agency was discussing the Anti-Harassment Policy.<sup>66</sup> Noting that the grievant had attended thirteen harassment briefings in the past, the Arbitrator found that the “grievant was aware that her statements and conduct were unacceptable and contrary to the Anti-Harassment Policy.”<sup>67</sup> While the exact duration of her behavior during the briefing is unclear, the Arbitrator found that she was “persistent in controlling the presentation,” despite attempts by the presenter to open the floor to other questions.<sup>68</sup> Consequently, this factor supports the conclusion that the grievant exceeded the bounds of protected activity during the sexual-harassment briefing.

As noted above, the Authority considers whether conduct exceeds the boundaries of the Statute’s protection on a case-by-case basis, considering the

<sup>48</sup> Award at 4-6.

<sup>49</sup> *Id.* at 11.

<sup>50</sup> *Id.* at 5.

<sup>51</sup> *Id.* at 11.

<sup>52</sup> *Id.* at 8.

<sup>53</sup> See *VA Med. Ctr.*, 32 FLRA 777, 778 (1988) (Chairman Cabaniss dissenting) (denying exceptions to an arbitrator’s award upholding disciplinary action against union official for “loud, disruptive behavior” in the workplace). Cf. *U.S. DOD, Def. Cont. Mgmt. Agency, Orlando, Fla.*, 59 FLRA 223, 227 (2003) (Chairman Cabaniss dissenting) (holding that a union official did not engage in flagrant misconduct during a heated exchange with a supervisor, in part, because the exchange occurred behind closed doors and did not interfere with the work of the office).

<sup>54</sup> *Def. Mapping*, 17 FLRA at 81.

<sup>55</sup> Award at 11.

<sup>56</sup> *Id.* at 8.

<sup>57</sup> Cf. *FAA*, 64 FLRA at 413-14 (holding that a union official’s conduct did not exceed the bounds of protected activity where the official used profanity to a supervisor, in part, because the profanity was due to his frustration in the moment and was not planned).

<sup>58</sup> *Def. Mapping*, 17 FLRA at 81.

<sup>59</sup> Award at 11.

<sup>60</sup> Pre-Action Investigation at 37.

<sup>61</sup> *Id.* at 25.

<sup>62</sup> *Id.* at 33.

<sup>63</sup> *Def. Mapping*, 17 FLRA at 81.

<sup>64</sup> *AFGE*, 59 FLRA at 770 n.8.

<sup>65</sup> *FAA*, 64 FLRA at 414.

<sup>66</sup> Award at 11.

<sup>67</sup> *Id.* at 9.

<sup>68</sup> *Id.* at 8.

totality of the circumstances.<sup>69</sup> In assessing the totality of the circumstances, the Authority has in the past “considered whether an employee’s conduct is ‘similar to’ conduct that the Authority previously found protected.”<sup>70</sup> But the norms of acceptable conduct in the workplace have changed throughout the years as employers have recognized their legal obligations to prevent harassment and ensure a safe and civil environment for employees.<sup>71</sup> Despite these advances in the workplace, the Authority has permitted union representatives’ use of vulgar, opprobrious, and often abusive language in many past decisions.<sup>72</sup> In reversing one such decision, the United States Court of Appeals for the District of Columbia Circuit stated 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 co-workers.”<sup>73</sup> We agree. Accordingly, in assessing the totality of the circumstances, the Authority will place less emphasis on whether an employee’s conduct is similar to conduct previously found protected.<sup>74</sup> Additionally, the

Authority recognizes that the circumstances under consideration must include an agency’s responsibility to “maintain civility in the workplace”<sup>75</sup> and to ensure a safe and civil environment for employees and supervisors alike.

Based on these factors, we conclude that the Arbitrator did not err in finding that the grievant’s conduct exceeded the bounds of protected activity. Accordingly, we deny the Union’s contrary-to-law exception.<sup>76</sup>

C. The award does not fail to draw its essence from the parties’ agreement.

The Union argues that the award fails to draw its essence from the parties’ agreement because it upheld an undefined unacceptable-conduct charge.<sup>77</sup> The Union asserts that the Agency failed to identify a specific rule that the grievant violated.<sup>78</sup>

Here, the Arbitrator found that the Agency had just cause to suspend the grievant for violating the Anti-Harassment policy during the briefing,<sup>79</sup> and he cited another applicable Agency rule: the Secretary of the Navy’s Instruction on Disciplinary Actions.<sup>80</sup> Moreover, in arguing that the award fails to draw its essence from

<sup>69</sup> *AFGE*, 59 FLRA at 771.

<sup>70</sup> *Dep’t of the Air Force, Grissom Air Force Base, Ind.*, 51 FLRA 7, 12 (1995) (*Grissom*) (noting that the employees’ “remarks [were] similar to remarks found not to constitute flagrant misconduct in other cases”); *Air Force Flight Test Ctr., Edwards Air Force Base, Cal.*, 53 FLRA 1455, 1456 (1998) (“Although we do not condone such conduct, in our view it is not the type of unprovoked physical response in a labor-management dispute which the Authority has previously deemed ‘beyond the limits of acceptable behavior.’” (quoting *U.S. DOJ, U.S. Marshals Serv. & U.S. Marshals Serv., Dist. of N.J.*, 26 FLRA 890, 901 (1987))).

<sup>71</sup> See *Gen. Motors LLC*, 369 NLRB No. 127, at \*10-11 (recognizing that the NLRB’s protected activity standard conflicted at times with employers’ duty under federal, state, and local antidiscrimination laws to protect employees from discriminatory and harassing conduct (citing *Constellium Rolled Products Ravenswood, LLC v. NLRB*, 945 F.3d 546 (D.C. Cir. 2019) (denying enforcement of an NLRB decision finding that employer violated the NLRA by disciplining an employee for writing “whore board” on a company bulletin board because NLRB ignored employers’ responsibility to maintain a harassment-free workplace))).

<sup>72</sup> E.g., *Grissom*, 51 FLRA at 20-21 (male union representative yelling at female management negotiator “the FLRA will shove this up your a--,” “[y]ou can’t be that fu--ing stupid, lady,” and “[y]ou can suck my d---”); *Naval Facilities*, 45 FLRA at 142-43 (union steward writing letter to employees referring to supervisors as “bastards” and “sons of b---es,” and using an ethnic epithet directed at a specific supervisor); *AFGE, Nat’l Border Patrol Council*, 44 FLRA 1395, 1396 (1992) (union representative calling supervisor an “a-hole” multiple times and a “space cadet”).

<sup>73</sup> *315th Airlift*, 294 F.3d at 198.

<sup>74</sup> See, e.g., *AFGE, Nat’l Border Patrol Council, Loc. 2266*, 69 FLRA 525, 528 (2016) (Member Pizzella dissenting) (noting that “[a]s part of the totality of the circumstances, the Authority has considered whether an employee’s conduct is ‘similar to’

conduct that the Authority previously found protected”); *U.S. Dep’t of Energy, Oak Ridge, Tenn.*, 57 FLRA 343, 346 (2001) (Chairman Cabaniss dissenting) (holding that an intentionally false incident report was not flagrant misconduct, in part, because “[t]hese statements, while intemperate, are not unlike other statements that have been found protected”).

<sup>75</sup> *315th Airlift*, 294 F.3d at 201 (quoting *Adtranz Abb Daimler-Benz Transp. v. NLRB*, 253 F.3d 19, 27-28 (D.C. Cir. 2001)); see also *Def. Mapping*, 17 FLRA at 83 (noting that while some leeway for impulsive behavior during heated union activities is necessary, such leeway does not license union representatives’ “deliberate, excessive abuse of supervisory staff”).

<sup>76</sup> See *AFGE*, 59 FLRA at 771 (denying a contrary-to-law exception where the arbitrator properly concluded that a union official’s conduct constituted flagrant misconduct).

<sup>77</sup> Exceptions at 8. For an award to be found deficient as failing to draw its essence from the parties’ agreement, the excepting party must establish that the award: (1) cannot in any rational way be derived from the agreement; (2) is so unfounded in reason and fact and so unconnected with the wording and purposes of the parties’ agreement as to manifest infidelity to the obligation of the arbitrator; (3) does not represent a plausible interpretation of the agreement; or (4) evidences a manifest disregard for the agreement. *AFGE, Loc. 1594*, 71 FLRA 878, 879 (2020); *U.S. Dep’t of VA, Gulf Coast Med. Ctr., Biloxi, Miss.*, 70 FLRA 175, 177 (2017); *U.S. DOD, Def. Cont. Audit Agency, Cent. Region, Irving, Tex.*, 60 FLRA 28, 30 (2004) (Member Pope dissenting in part).

<sup>78</sup> Exceptions at 8.

<sup>79</sup> Award at 11.

<sup>80</sup> *Id.* at 5 (citing Navy Instruction).

the parties' agreement, the Union does not identify any provision in the parties' agreement. Thus, the Union fails to show how the award conflicts with the agreement, or how the award is otherwise irrational, unfounded, implausible, or in manifest disregard of the agreement.<sup>81</sup> Consequently, we deny the Union's essence exception.

#### V. Decision

We dismiss, in part, and deny, in part, the Union's exceptions.

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<sup>81</sup> See *AFGE, Loc. 2382*, 66 FLRA 664, 666-67 (2012) (denying essence exception where excepting party did "not identify any specific contractual wording to establish that the [challenged] finding [was] irrational, unfounded, implausible, or in manifest disregard" of the parties' agreement).

**Chairman DuBester, concurring:**

I agree with the majority's decision to dismiss, in part, and deny, in part, the Union's exceptions. However, unlike the majority, I believe that the Union's contrary-to-law exception is readily resolved by applying the standard set forth in *DOD, Defense Mapping Agency Aerospace Center, St. Louis, Missouri*<sup>1</sup> and its governing case law. I further believe that the Authority is entirely capable of addressing changes to the "norms of acceptable conduct in the workplace"<sup>2</sup> by applying this fact-based standard. Indeed, both the Arbitrator and the majority had no difficulty in relying upon the Agency's Anti-Harassment Policy to conclude that the grievant's conduct exceeded the bounds of protected activity as defined by this standard.

I therefore see no need to modify this standard by "plac[ing] less emphasis on whether an employee's conduct is similar to conduct previously found protected."<sup>3</sup> In my view, agencies and unions should not be deprived of the guidance provided by long-standing precedent in applying what is a fundamentally fact-based standard to the particular circumstances they encounter in the workplace.

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<sup>1</sup> 17 FLRA 71 (1985).

<sup>2</sup> Majority at 9.

<sup>3</sup> *Id.* at 10.



**Member Abbott, concurring:**

I agree with the decision's finding that the grievant's conduct is not protected under § 7102 of the Federal Service Labor-Management Relations Statute and that it warrants discipline.<sup>1</sup> However, I do not agree insofar as the decision implicitly suggests that the outrageous conduct of the grievant could be excusable simply because the acts occurred while the grievant was acting in a representational capacity.<sup>2</sup>

Union representatives have the same responsibility to comport themselves as any other employee in the workplace and do not have license to act outside acceptable boundaries just because they happen to be representing the union.<sup>3</sup>

As I have noted before, there is an important distinction to be made between representational activity that occurs in more traditional "behind closed door" encounters and representational activity that occurs in the workplace.<sup>4</sup>

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<sup>1</sup> 5 U.S.C. § 7102.

<sup>2</sup> Majority at 8 ("Thus, even if the grievant was acting in a representative capacity, she undermined this representational function by raising these concerns in an inappropriate place and manner.").

<sup>3</sup> *U.S. Dep't of VA, Med. Ctr., Orlando, Fla.*, 71 FLRA 13, 16 (2019) (*VA Orlando*) (Dissenting Opinion of Member Abbott) ("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."); *AFGE, Loc. 2595*, 68 FLRA 293, 298 (2015) (Dissenting Opinion of Member Pizzella) ("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."); *U.S. Dep't of Transp., FAA, Wash., D.C.*, 64 FLRA 410, 417 (2010) (Dissenting Opinion of Member Beck).

<sup>4</sup> *VA Orlando*, 71 FLRA at 16 (Dissenting Opinion of Member Abbott).