

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY

Office of Administrative Law Judges

WASHINGTON, D.C. 20424-0001

MEMORANDUM

DATE: October 26, 1999

TO: The Federal Labor Relations Authority

FROM: JESSE ETELSON
Administrative Law Judge

SUBJECT: DEPARTMENT OF THE AIR FORCE
315TH AIRLIFT WING
CHARLESTON AIR FORCE BASE
CHARLESTON, SOUTH CAROLINA

Respondent

and

Case No. AT-CA-90324

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 1869

Charging Party

Pursuant to section 2423.34(b) of the Rules and Regulations, 5 C.F.R. § 2423.34(b), I am hereby transferring the above case to the Authority. Enclosed are copies of my Decision, the service sheet, and the transmittal form sent to the parties. Also enclosed are the transcript, exhibits and any briefs filed by the parties.

Enclosures

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
Office of Administrative Law Judges
WASHINGTON, D.C. 20424-0001

DEPARTMENT OF THE AIR FORCE 315TH AIRLIFT WING CHARLESTON AIR FORCE BASE CHARLESTON, SOUTH CAROLINA Respondent	
and AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 1869 Charging Party	Case No. AT-CA-90324

NOTICE OF TRANSMITTAL OF DECISION

The above-entitled case having been heard before the undersigned Administrative Law Judge pursuant to the Statute and the Rules and Regulations of the Authority, the undersigned herein serves his Decision, a copy of which is attached hereto, on all parties to the proceeding on this date and this case is hereby transferred to the Federal Labor Relations Authority pursuant to 5 C.F.R. § 2423.34(b).

PLEASE BE ADVISED that the filing of exceptions to the attached Decision is governed by 5 C.F.R. §§ 2423.40-2423.41, 2429.12, 2429.21-2429.22, 2429.24-2429.25, and 2429.27.

Any such exceptions must be filed on or before **NOVEMBER 29, 1999**, and addressed to:

Federal Labor Relations Authority
Office of Case Control
607 14th Street, NW, 4th Floor
Washington, DC 20424-0001

JESSE

ETELSON
Judge

Administrative Law

Dated: October 26, 1999
Washington, DC

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

DEPARTMENT OF THE AIR FORCE 315TH AIRLIFT WING CHARLESTON AIR FORCE BASE CHARLESTON, SOUTH CAROLINA Respondent	
and AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 1869 Charging Party	Case No. AT-CA-90324

Richard S. Jones, Esq.
For the General Counsel

Major Peter Seebeck, Esq.
For the Respondent

Ms. Brenda Stallard
For the Charging Party

Before: JESSE ETELSON
Administrative Law Judge

DECISION

An unfair labor practice complaint issued by the Regional Director for the Atlanta Region of the Federal Labor Relations Authority (the Authority) alleges that the Respondent violated sections 7116(a)(1) and (2) of the Federal Service Labor-Management Relations Statute (the Statute) by suspending employee Richard P. Egal, president of the Charging Party (the Union), for three days because he participated in certain protected activities. The Respondent's answer denies in part the complaint's version of Egal's alleged protected activities, denies that it suspended Egal because of his participation in protected

activities, and denies that it committed the alleged unfair labor practices.¹

The Respondent filed a motion for summary judgment and the General Counsel filed a cross-motion for summary judgment. The Chief Administrative Law Judge denied both motions. In its prehearing disclosure statement, the Respondent asserts that Egal's suspension was based on his misconduct and that his actions were not protected under the law.

A hearing on the complaint was held on July 20, 1999, in Charleston, South Carolina. All parties were given the opportunity to present and cross-examine witnesses and to advance relevant arguments.² The Union's representative made a closing statement at the hearing. Counsel for the General Counsel and for the Respondent filed posthearing briefs.

Findings of Fact³

A. Background

The Union is the exclusive representative of a unit of the Respondent's employees. Richard P. Egal, an employee of the Respondent, is the president of the Union. Egal's Union responsibilities occupy all of the time he would otherwise be in a duty status; he is thus on what Federal sector mavens refer to as "100% official time."

1

The Respondent denies the complaint's allegation that it is an agency under section 7103(a)(3) of the Statute but admits that it is an "activity" of the United States Air Force, which, the answer states, is an agency under section 7103(a)(3) and subject to the requirements of the Statute.

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Aside from some insignificant errors, the transcript of the hearing fails to note the admission of R Exh. 7 into evidence. The transcript is hereby corrected in that respect.

3

These findings are based on the entire record, the briefs, my observation of the witnesses, and my evaluation of the evidence. Facts stated without reference to their being the testimony of a particular witness or witnesses are either undisputed or uncontroverted and found to be credible. Controverted testimony is set forth first without any credibility resolution, such resolution to be set forth in the final section of these findings of fact.

Sharon Richardson, a unit employee, is the Union's executive vice-president. Richardson is an aircraft structural technician and works in a structural maintenance shop in an organizational component of the Respondent known as "Fabrication Flight." Senior Master Sergeant Grace Picicci holds the position of fabrication flight superintendent. Georgia Fallaw, an air reserve technician, is Picicci's assistant flight chief and functions as an aircraft overhaul supervisor.⁴ Fallaw is Sharon Richardson's supervisor for appraisal purposes. Including civilian employees like Richardson, active duty personnel, and other air reserve technicians, Fallaw supervises approximately 140 people.

Fallaw was promoted to her present position, and thus became Richardson's supervisor, in October 1997. Fallaw came to believe that Richardson thought, and had "let me know," that Richardson, not Fallaw, should have been hired for that position, and that she was resentful of Fallaw's having received the job. At the same time, it appeared to Fallaw that, initially, Richardson wanted to tell Fallaw everything that she thought was wrong with the organization. Fallaw characterized their relationship as somewhat strained, but felt that she tried hard to be fair with Richardson despite Richardson's "difficulty in relating to me." (Tr. 104.)

Richardson affirmed that she found it very difficult to deal with Fallaw. Richardson felt that Fallaw had treated her less favorably than other employees in some ways, had "talked down to me, belittled, and bombarded me with questions without trying to listen to me," and had "taken reprisal action against me." (Tr. 55, 96-97.)

Richardson's annual appraisal period runs from April 1 to March 31. "Performance feedback" sessions between employees and their supervisors are held halfway through the appraisal period. On the morning of October 1, 1998, Fallaw informed Richardson that she wanted to do their performance feedback session some time that day. Richardson told Fallaw that she wanted a Union representative with her at the meeting. Fallaw responded that this was just a regular feedback session and that she did not think it was appropriate for Richardson to have a Union representative present, but that she would check on that.

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Group Commander Colonel Terrance Van Parys testified, in apparent contradiction to Picicci, that Picicci "works for Chief Fallaw" (Tr. 189). I credit Picicci that she was, at the time of the incident in question, the flight chief and that Fallaw was her "assistant flight chief in fabrication flight" (Tr. 206).

Richardson testified that Fallaw told her she would get back to Richardson on the question of a Union representative. Fallaw consulted Phillip Dalpiaz, of the Respondent's civilian personnel office, and had Dalpiaz call Richardson to discuss the matter. The substance of that discussion is not in the record.

Richardson called Union President Egal and asked him to represent her at the session. Egal agreed to do so. The session was to be in the "action flight office" that Fallaw shared with Master Sergeant Picicci. Fallaw, who "had concerns in dealing with Ms. Richardson sometimes," and felt that "she might not want to accept her feedback," asked Picicci to be present in the area while Fallaw conducted the session privately with Richardson. Picicci testified credibly that Fallaw said that she wanted her there because Fallaw felt that there might be problems because Richardson had said she wanted Union representation.

B. Physical Surroundings of the Incident at Issue

The action flight office was inside a suite containing a reception, or flight secretary's office, and the inner, or action flight office. A door from outside the suite leads into a short hallway that is part of the reception office but is separated from the area containing the flight secretary's desk, for most of the hallway's length, by a counter 8.5 feet in length. The counter was between waist-height and chest-height for different individuals (Tr. 56, R Exh. 1).

Before the counter reaches the wall of the suite nearest, and to the left of, the outside door as one enters, it ends and leaves a space sufficient for access to the flight secretary's desk area. The counter thus serves as a barrier opposite the wall onto which the outer door opens. The wall and the counter, then, form the short hallway into which one enters from the outer door.⁵ The end of the hallway if, on entering, one turns right instead of left, leads straight into the action flight office, approximately five feet from the center of the outer doorway.

The hallway is approximately 42 inches wide, from the counter to the opposite wall. The door between the hallway and the action flight office opens into the hallway and toward the wall. At the point in the hallway where the counter faces the opened door, when swung completely against

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There is another door leading directly into the flight action office from outside the suite.

the wall, the effective width of the hallway is reduced to about 36 inches.

C. The Confrontation:

1. As Described by General Counsel's Witnesses

Egal and Richardson testified that they arrived together for the meeting and entered the hallway. They were standing along the counter when Fallaw and Picicci arrived. Richardson stood opposite the doorway through which they had entered and Egal stood near her, toward the end of the counter farthest from the action flight office. Fallaw entered ahead of Picicci. Egal greeted Fallaw and they shook hands. Egal commented on his not having seen her in a while. Fallaw responded that she had been away at school, then asked Egal what he was doing there.

Richardson answered for Egal, stating that he was there as her Union representative. Fallaw asked Richardson whether she had spoken with Mr. Dalpiaz about the nature of the feedback session (with respect to the need for Union representation). Richardson answered that she had.⁶ Notwithstanding any conversation she had had with Dalpiaz, Richardson insisted that she had a "Weingartner" [sic] right to have Egal present.⁷

Fallaw then began to ruminate aloud, speaking to no one in particular, about not realizing that this was a grievance meeting. She indicated to Egal that he would not be allowed to attend the meeting. Egal stated that Richardson had the right to a Union representative and explained why he believed that she did. Sometime during this part of the conversation, Fallaw moved from just inside the outer doorway to a point, opposite the counter. Her back was toward, and perhaps against, the open door to the flight action office.

Fallaw asked Richardson whether she was ready for her feedback. Richardson said that she was. Richardson was

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Richardson did not recall Fallaw's asking her about a conversation with Dalpiaz at that point. Egal did, and I credit his testimony, which is consistent with Fallaw's.

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The reference is to *NLRB v. Weingarten, Inc.*, 420 U.S. 251 (1975), the model for section 7114(a)(2)(B) of the Statute, which mandates the right of an exclusive representative to be given the opportunity to be represented at investigatory examinations of unit employees under certain circumstances.

then still standing at the counter. She walked past Fallaw, through the open doorway into the flight action office, and sat down in a chair in front of a desk that was visible from the hallway and that Richardson identified as Fallaw's desk.

Egal stepped a little past Fallaw, placing him partly inside the open doorway to the flight action office. He asked Richardson if she knew her rights. Richardson said that she did and Egal turned to leave, adding that Richardson should call him when she was finished. Egal turned to Fallaw, pointed a finger toward her chest, and told her, in a "declarative" tone ("slightly [louder] than normal conversation"), that he was going to file "the appropriate paperwork" against her.⁸ Then he continued toward the outer door and left the area.

During the last encounter, Egal's body was close to Fallaw's, possibly as close as five inches (Tr.86), but they did not touch. His pointing finger was between six inches and 18 inches from her chest (Tr. 40-41, 85). Egal testified that he felt frustrated at this point, but was not angry and did not lose his temper.

2. As Described by the Respondent's Witnesses

Fallow and Picicci testified that they arrived in the area of the suite at the same time as Egal and Richardson.

They greeted each other, shook hands, and Egal commented about Fallaw having been gone for some time. Fallaw took his comment to be sarcastic, but "treated it kind of jokingly." According to Fallaw, she asked Egal and Richardson what Egal was doing there and whether Richardson had talked to Dalpiaz at labor relations. Richardson answered that she had talked to Dalpiaz, but that she disagreed with him and, so, had brought Egal with her.

According to Picicci, Fallaw asked Egal, "[M]ay I help you with something?" (Tr. 229.)⁹ Egal responded that he was there in connection with disciplinary action. Fallaw said she was not aware of any disciplinary action and asked Picicci if she knew about any that had developed in Fallaw's

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Egal apparently intended Fallaw to understand that "the appropriate paperwork" referred to a complaint about her refusal to permit him to attend the session.

⁹

Although none of the other witnesses mentioned this question, it was uncontroverted and I credit it in substance.

absence. Picicci responded that she did not know of any discipline and added that Fallaw was supposed to be giving Richardson a feedback. According to Picicci, it was then that Fallaw asked Richardson whether she had talked to Dalpiaz.

Fallow reasserted that no discipline was contemplated, told Egal that he could not be present during the feedback session, and asked him to leave. Richardson told Fallaw that she was denying her her Union representation. Fallaw then asked Richardson if she was ready for her feedback and Richardson said that she was.

Richardson then walked into the action flight office and headed toward Picicci's, not Fallaw's, desk. Picicci's desk was to the left of Fallaw's as one enters the office. Fallaw began to follow Richardson, moving from a point near the outer door toward the action flight office.

According to Picicci, Egal asked Fallaw whether she was denying Richardson's right to union representation. Fallaw, repeating that this was a feedback and not a disciplinary action, told Egan that she feared that he had accompanied Richardson to intimidate and harass her (Fallow) and that she felt very much intimidated.¹⁰ Egal stepped toward Fallaw and started yelling at her. Fallaw could not remember what Egal was yelling. However, Picicci testified that Egal protested Fallaw's denial of Richardson's "right" to union representation. According to Picicci, Egal was "ranting and raving." His face was red and his voice had an angry tone.

By this time Egal had moved very close to Fallaw. Fallaw as standing with her back near the mid-point of the counter, but perhaps slightly closer to the action flight office than to the further end of the counter (R Exhs. 6, 7). Egal had approached Fallaw from her right. Then, from a position near the center of the hallway, he faced her and approached closer until, according to Picicci, "[h]is stomach pressed up against her" (Tr. 216), and according to Fallaw, was "belly to belly and toe to toe, in my face" (Tr. 117, 157-58, 186), pointing his finger and forcing her to arch backward over the counter.

Egal's pointing finger was a "couple" of inches from Fallaw's face (Tr. 118, 211). However, according to Fallaw, a hand was also "reared back," as though Egal might be about to hit or punch her (Tr. 118-19). The hand was "sort of

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Although none of the other witnesses mentioned this statement it was uncontroverted and I credit it.

fist like," but with a finger pointing outward (Tr. 153). He was "on top of" her and appeared to have "blown up" or "snapped or something and was just totally gone" (Tr. 118-19). Egal backed up, disengaging from Fallaw, after what she estimated to be "maybe just like 30 seconds," although she also stated that "[i]t seemed like forever." Picicci was unable to estimate the time that had elapsed.

Egal then stepped toward the action flight office, leaned across the doorjamb, and spoke to Richardson. As Picicci recalled, he asked Richardson to let him know how the feedback turned out. Then he returned to where Fallaw was standing, on his way out of the area. According to Picicci, before he "stormed out the door," Fallaw told him that there was not going to be any disciplinary action, and Egal responded that he did not want to discuss disciplinary action and did not want to talk to management any more (Tr. 223).

Fallaw proceeded into the action flight office, followed by Picicci. They found Richardson seated on a chair beside Picicci's desk. The chair was facing away from the flight secretary's office. (Tr. 125-27, 182, 234-35.)

D. Immediate Reactions of the Witnesses: Two Versions

Fallaw testified that she was frightened by Egal's conduct, and Picicci affirmed that she appeared so. According to Richardson, Fallaw and Picicci proceeded to their respective desks and Fallaw, turning to Picicci, said, "Did you see that? He forced himself upon me. Did you see that? He used forceful body language on me. You will attest to this[.]" (Tr. 65-66.) Both Fallaw and Picicci denied that Fallaw made such a statement. Picicci testified that there was no discussion of the incident in Richardson's presence.

Richardson testified that Fallaw, after her conversation with Picicci about the incident, telephoned Mr. Dalpiaz and repeated to him a description of the incident similar to the description she had just given to Picicci. After Fallaw got off the phone she asked Richardson whether she had talked to Dalpiaz earlier that day. Richardson said that she had. Fallaw then asked her whether Dalpiaz had explained to Richardson her "Weingartner" rights. Richardson responded to Fallaw that Dalpiaz had explained her "Weingartner" rights but that Richardson did not believe his version of those rights.

Fallaw denied that she called Dalpiaz or had such a conversation with Richardson at that time, reasserting that

she had discussed a conversation between Richardson and Dalpiaz at the beginning of the meeting, while Egal was present. Picicci also denied that Fallaw called Dalpiaz in her presence. She also recalled that the conversation with Dalpiaz had been discussed earlier and that it was then that Richardson had said that she disagreed with Dalpiaz.

E. The Feedback Session and Further Events of October 1 and 2

Fallow suggested to Richardson that they postpone the feedback session. Richardson, however, was insistent that the feedback proceed. Fallaw asked Picicci to leave during the private feedback session. At the end of their session, Fallaw presented to Richardson a document memorializing what occurred at the session. Although it is apparently routine for employees to sign such documents, Richardson refused to do so. Fallaw then went out to the secretary's area, where Picicci was standing, and asked her to come back into the office to witness Richardson's refusal to sign. When Picicci returned, Fallaw asked Richardson if she had anything she would like to say. Richardson said she did not, and left. Fallaw and Picicci then discussed the Egal incident.

At some point, which might have been either the same day or the following day, Picicci called the police. Also on the same or the next day, Fallaw called Labor Relations Specialist Tony Owens and told him about the incident. On October 2, Fallaw made a written statement of the incident for her own record and provided it to Respondents' "labor relations guys . . . because I figured it was going to be an issue later" (Tr. 162-64). On October 2 she also informed "labor relations" that she was going to obtain a warrant for Egal's arrest, which she subsequently did.

Meanwhile, Richardson, immediately after she left the feedback session, wrote a summary of the events, including the pre-feedback Egal incident and the conversations among those remaining after Egal left. She testified that she wrote the statement because of the history of her difficult relationship with Fallaw. Her written statement concludes by expressing Richardson's belief that Fallaw's purpose in discouraging her from proceeding with the feedback (after the Egal incident) was to enable her to write Richardson up for refusing the feedback.

F. Subsequent Actions Taken

On November 30, 1998, Egal received a "Notice of Proposed Suspension" stating that a 3-day suspension was proposed, based on his "flagrant misconduct" toward Fallaw on October 1. Egal replied to the notice. He disputed the factual allegations and claimed that, in any event, his conduct was within his rights as a union representative. Colonel Van Parys investigated the matter. His investigation included interviews with all those who had been present.¹¹ He concluded that the allegations of misconduct were supported by the evidence and issued a "Notice of Decision to Suspend" on January 15, 1999, implementing the proposed suspension for three calendar days without pay.

G. Resolution of Disputed Testimony

Based on their demeanor and the actions that some of them took shortly after the incident in question, I conclude that all of the witnesses gave what they believed to be honest accounts of their recollections of the incident. I attribute the disparity between the respective accounts of the witnesses for the General Counsel and for the Respondent to a number of factors, including (1) the witnesses' movements within the office area immediately before and after the incident itself, increasing the difficulty of keeping track of the sequence of events, (2) the brevity and unexpected nature of the incident as described by the Respondent's witnesses, (3) Fallaw's exaggerated sensitivity to Egal's very presence and (4) Richardson's exaggerated sensitivity to and suspicion of anything Fallaw said or did. Finally, I see as a real possibility that Richardson's attention and testimony was focused on what Egal said and did *after* speaking to Richardson at the door to the action flight office, while Fallaw and Picicci were focusing, and his suspension was based, on his actions just *before* he spoke to Richardson.

Egal's own testimony with respect to the crucial incident within the chain of events variously described above is subject to skepticism because I find credible those aspects of Fallaw's and Picicci's testimony that indicate that, at least during that brief confrontation, he was not completely in control of himself.

¹¹

Picicci, however, did not recall having spoken to anyone except Fallaw about the incident until she was interviewed by Respondent's Counsel in preparation for the hearing in this case. I do not regard this lapse of memory, or example of disingenuousness, as sufficient to discredit her as a witness.

With regard to Richardson, as suggested above, there is reason to believe that she conflated in her mind Egal's final conversation with Fallaw and what she witnessed of the earlier confrontation that occurred as Egal was approaching the door to the action flight office to speak to Richardson. During that very brief confrontation, Richardson may well have been settling herself inside the action flight office and have heard but not seen what occurred.

Moreover, according to Richardson, she sat in a chair located in front of Fallaw's desk. While one could have observed the confrontation from the location of the chair if one were seated facing the doorway at which it occurred, the confrontation would have occurred behind the back of the chair's occupant if, as would normally have been expected, the chair was facing Fallaw's desk. Richardson testified that, instead, the chair was facing a file cabinet along the outside wall, and that she was in a position where she could see the hallway by looking to the right (Tr. 77-78, GC Exh. 8).

Aside from the insistence of Fallaw and Picicci that Richardson was seated at a chair next to Picicci's desk, Richardson's description of her own position in the room seems improbable. A chair such as the one Richardson described would appear to have been located next to Fallaw's desk so that its occupant could converse with Fallaw or whoever else was sitting behind her desk. It seems unlikely that Richardson, on entering the office, would have found the chair facing the file cabinet, which would have positioned its occupant so as to be looking *away from* his or her putative conversation partner. While it is possible that Richardson moved or turned the chair before sitting down, she did not testify that she did so and I cannot presume that she did. For these reasons, I conclude that Richardson, wherever she was sitting at the time, did not observe the nonverbal part of the conduct that led to Egal's suspension.

The one witness who undisputedly was positioned to get a good view of the incident and at the same time was not so intimately involved in it, physically or psychologically, as to compromise her status as an observer was Picicci. I have, of course, considered the fact that her managerial status and her close association with Fallaw prevents her from being a completely disinterested witness. Perhaps it is fair to say, however, that she had less at stake in the outcome of this case than the others. Moreover, she would have been free to disagree with Fallaw or to tell her that she was overreacting, when they discussed the incident in their office shortly after it occurred (either before or

after Richardson left), had Picicci seen the event differently.¹² Although I do not believe that Picicci necessarily had a complete and totally accurate recall of the details, I believe that her account came closest to describing the actual event.

Having said this, I must attempt to reconstruct the crucial event to the extent that any of the credible evidence can support such a reconstruction. One disputed issue that the Respondent seems to regard as critical and the General Counsel implicitly acknowledges as being significant is whether there was a physical "touching." I find that there was, if only marginally.

Egal's and Richardson's testimony tell me that, at least at some point, Egal moved very close to Fallaw. Fallaw testified that Egal situated himself "belly to belly, toe to toe, in my face." This reinforces the proximity to which he moved but does not establish, by itself, a touching. The expression, "belly to belly, toe to toe," and its variants, is ambiguous. It could, but need not in its ordinary usage, be taken literally. It does mean, at least, something like the other colloquial phrase that Fallaw used to complete her description of Egal's actions--that he was "in my face."¹³ What more it meant in the context of Fallaw's testimony is uncertain. Fallaw's testimony that he was "on top of" her also requires, more obviously, a figurative interpretation. It does reinforce her credible testimony that he was so close and (to paraphrase the language Richardson attributed to her) so forceful in his body language that she felt compelled to retreat from him as much as was possible.

Picicci, of course, testified that "[Egal's] stomach pressed up against her." Although I have declared Picicci in general to be the most reliable of the witnesses, I do not think her more capable than Fallaw of determining whether there was more than minimal physical contact. That is, Picicci is credible to the extent that she could observe

¹²

If, as Richardson testified (and I tend to credit her in this in general, if not in the exact words that Fallaw used, because I cannot otherwise account for her noting it in writing soon after it occurred) Fallaw asked Picicci in Richardson's presence to attest to Egal's conduct, I see in this no compelling pressure on Picicci to conform her testimony to Fallaw's impressions about the event.

¹³

I have consulted several people from different geographical backgrounds, some with military experience, to test my own interpretation of the "belly-to-belly" expression.

no space between their bodies at stomach level. To that extent and to that extent alone, I find that there was a touching. Had there been a forceful *pressing* against Fallaw, as the most damaging interpretation of Picicci's testimony might have it, I believe that Fallaw would have experienced that physical pressure, in addition to the psychological pressure that she described, and would have so testified.¹⁴

I do find that Egal used some manual gestures, such as finger-pointing within six inches or less of Fallaw's body--whether aimed at her face or chest I find immaterial in these circumstances--and other motions that, as part of his total pattern of conduct at that moment, could reasonably have put Fallaw in fear of some unpredictable blow. This was accompanied by a verbal assault in a tone that Fallaw, on the receiving end, could reasonably have heard as "yelling" and that Picicci could reasonably have characterized as (although this phrase is also rather imprecise) "ranting and raving" and as giving the impression, along with his facial expression, of anger.¹⁵

I must, finally, deal with the duration of Egal's threatening posture. There is no reliable estimate of its duration in the record. Picicci could give no estimate at all and Fallaw's guesstimate of "maybe just like 30 seconds" is of little help except to provide what is perhaps the outside limit of its duration. Egal was speaking (or yelling) throughout this confrontation. According to Picicci, who gave the most complete account of what he said, it was, to quote her paraphrase, "[Y]ou're denying her rights and I'm going to get to bottom of this and action will be taken, you cannot deny her union rights."¹⁶

14

While counsel prompted Fallaw with the suggestion that Egal was "pressed against her" (Tr. 119), I do not regard her failure to disavow this as constituting her testimony.

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Although I noted that Egal had a somewhat ruddy complexion while attending the hearing and, thus, I infer, normally does, I credit Picicci's description of his red face during the confrontation as signifying some accentuation of his normal flush.

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This account suggests a precursor to Egal's statement to Fallaw on his way out, according to Egal and Richardson, that he would be filing "the appropriate paperwork" against her, or some confusion among the witnesses as to when Egal said anything like this.

Even if Picicci's paraphrase (and she did not purport to repeat everything that Egal said) does not recapture all of Egal's verbal outburst, the nature of his message did not lend itself to very much expansion. I find no basis for believing that he said much more than what Picicci reported. Moreover, I believe that if the episode had taken much longer than the time it would have taken for Egal to say what Picicci remembered that he said, the scene would have attracted Richardson's attention, she would have positioned herself to see what was going on, and she would have been less confident that Fallaw was fabricating her story. I also believe that Picicci's inability to estimate the time involved suggests either that the episode passed too quickly for her to do so or that she was reluctant to say anything that might tend to minimize the seriousness of what she considered to be a uniquely "unprofessional" act compared to anything she had seen in her 21 years of military experience (Tr. 223). Further, I believe that if the confrontation had lasted even as long as 30 seconds, and otherwise was as Picicci described it, she would have taken the opportunity to attempt to intervene in some way, which she did not do. I find, therefore, that the entire confrontation in question lasted somewhere in the range of 10 to 20 seconds.

Analysis and Conclusions

Section 7102 of the Statute guarantees employees the right to engage in activities on behalf of a labor organization without fear of penalty or reprisal. However, involvement in such activities does not immunize an employee from discipline. Management's right to take disciplinary action includes the right to discipline a union representative for activities that are not specifically on behalf of the union or which exceed the boundaries of protected activity, such as flagrant misconduct. *U.S. Air Force Logistics Command, Tinker Air Force Base, Oklahoma City, Oklahoma and American Federation of Government Employees, Local 916, AFL-CIO*, 34 FLRA 385, 388-89 (1990).

More recently, the Authority has used "flagrant misconduct" as the standard, rather than as one example, of conduct that exceeds the boundaries of protected activity. See, for example, *Department of the Navy, Naval Facilities Engineering Command, Western Division San Bruno, California*, 45 FLRA 138, 156 (1992) (*Naval Facilities*). And in *Department of the Air Force, Grissom Air Force Base, Indiana*, 51 FLRA 7, 11-12 (1995) (*Grissom*) the Authority recapitulated its criteria for determining whether an employee has engaged in flagrant misconduct:

In determining whether an employee has engaged in flagrant misconduct, 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." [Citations omitted.] Relevant factors in striking this balance include: (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. [Citation omitted.] However, the foregoing factors need not be cited or applied in any particular way in determining whether an action constitutes flagrant misconduct.

The first issue to be decided here is whether Egal's conduct occurred in the course of protected activity and thus is to be evaluated under the "flagrant misconduct" standard. I conclude that it did. Egal was present at the scene to represent Richardson at what Richardson believed to be an examination that might result in disciplinary action against her. Egal remained, once Fallaw denied that there was to be such an examination, for the purpose of disputing Fallaw's assertion and demanding that the Union's right to be represented at the session (under section 7114(a)(2)(B) of the Statute) be honored.

That Egal and Richardson may have been mistaken in their prediction of what Fallaw had in store for Richardson at the feedback session does not negate Egal's section 7102 right to argue, on the Union's behalf, for the right to be present. Nor can Fallaw, as the Respondent contends, have extinguished that right merely by asking Egal to leave. Further, the fact that the conduct in question included both verbal outbursts and allegedly belligerent nonverbal conduct does not render the "flagrant misconduct" standard inapplicable. See *Air Force Flight Test Center, Edwards Air Force Base, California*, 53 FLRA 1455, 1455-56 (1998) (*Flight Test Center*).

Second, I conclude that Egal did not exceed the broad scope of intemperate behavior that remains within the ambit of protected activity. As the Authority has made clear, most recently in *Grissom*, the counterweight against which the employee's right to engage in protected activity must be balanced is not a wide-ranging congeries of employer interests but, specifically, the employer's "right to

maintain order and respect for its supervisory staff on the jobsite." The illustrative factors listed by the Authority as relevant in striking this balance have no intrinsic value in the weighing process. Their relevance is limited to the assistance they provide in resolving the conflict between the specifically identified competing interests. *Flight Test Center*, 53 FLRA at 1463.

With respect to the first of the Authority's illustrative factors, neither the place nor the subject matter of the discussion lent itself particularly to impinging on Respondent's right to maintain order and jobsite respect for its supervisors. The incident occurred outside the presence of any nonsupervisory employees other than Richardson and Egal himself. As Respondent insists, even Richardson did not witness it. Nor was the subject of the dispute anything that impinged on the maintenance of order in the workplace.

Although both Egal and Richardson (unwittingly against their respective interests) sought to portray Egal's demeanor during this incident as relatively calm rather than angry, I have found, consistent with the testimony of Fallaw and Picicci, that he acted angrily and appeared at least somewhat out of control. His impulsive conduct gave no indication that it was pre-planned or otherwise designed.

While Fallaw did nothing in the nature of a direct provocation to Egal's conduct, I find it to have been at least somewhat provocative for her to have told Egal that his very presence was designed to intimidate and harass her. This could reasonably have contributed to an impression that a rational discussion of the issue of Egal's presence would be futile. Fallaw might well have planted the seed for such an impression earlier when she asked Egal at the outset whether she could help him with something, a question with patronizing overtones. The resulting feeling of frustration, while not justifying Egal's conduct, probably affected it. Thus, the Authority's "in any way provoked" factor adds some weight to Egal's side of the scale.

Examination of the last of the Authority's illustrative factors, "the nature of the intemperate language and conduct," must begin with the understanding that the intemperateness itself is a given--a neutral factor in the analysis--and carries no presumption that the conduct exceeded the boundaries of protected activity. The nature of Egal's conduct--and it is his nonverbal conduct that is central here --was his assuming a physical position with respect to Fallaw that was so close as to have involved some

"touching," and, beyond the fact that he left no space between Fallaw and himself, his use of certain threat-like gestures and an angry demeanor, accompanied by a sort of ranting, all in the course of 10 to 20 seconds.

As was the case in *Flight Test Center*, it is reasonable to expect this conduct to have caused fear and considerable discomfort to the supervisor at whom it was directed. However, a supervisor's personal interests as the unwilling target of this attack are not necessarily interchangeable with the employer's "right to maintain order and respect for its supervisory staff on the jobsite." That is a separate question. The Authority adopted this analysis of the relationship between the pertinent employer interest and the harm to the supervisor in *Flight Test Center*, 53 FLRA at 1456, 1464-65:

From the standpoint of maintaining order and respect for the supervisory staff, the leaning and finger-pointing that accompanied [the union representative's] verbal attack did not substantially raise the risk of undermining these interests, at least not in the relative privacy of the surroundings. This is not to make light of the hurt and fear that [the supervisor] apparently suffered, as corroborated by the demeanor observed in her as the incident concluded and by her decision to make the effort necessary to report the incident to the police. However, [the supervisor's] personal interests as the unwilling target of this attack, and even her employment-related interests as [the union representative's] supervisor, are not necessarily interchangeable with the employer's "right to maintain order and respect"

[T]he finger-pointing and aggressive physical posture can be more readily associated with anger than with lack of respect. It did cause [the supervisor] discomfort or worse. But to the extent that [the union representative] may have overstepped the bounds of permissible behavior toward [the supervisor] as an individual, I do not believe that the Authority's balancing test envisions use of the "flagrant misconduct" defense to augment whatever civil or other remedies a supervisor might have to protect those interests. To the extent that an employee's behavior violates criminal statutes, of course, the Statute does not insulate him from the consequences. *Long Beach Naval Shipyard, Long Beach, California, and Long*

Beach Naval Station, Long Beach, California, 25 FLRA 1002, 1006 (1987). Moreover, the hurt that [was] caused . . . might well have been a proper consideration in determining the appropriate discipline if his conduct had not been protected. Nevertheless, I find it to be beyond the scope of the inquiry into whether it was protected.

The instant case is similar to *Flight Test Center* in several ways. The differences do not tend, in their totality, to make a stronger case for the flagrancy of the misconduct. While the actual "touching" here might add some weight to the Respondent's claim, I conclude that it is at least balanced by other considerations. One, as discussed above, is that there was some evidence of provocation. Another is the brevity of the attack and its cessation without the necessity for outside interference. Moreover, Egal's having engaged in this attack knowingly in Piccici's presence, while in one sense adding to the appearance of recklessness, at the same time reduced the probability and the accompanying fear that the incident would result in physical harm.

Finally, Egal's status as a "100% official time" Union officer, although still an employee, might cause such an incident to have less effect on employee-supervisor relationships than would comparable incidents between employees and their own supervisors. This is not to suggest that Egal's status makes his conduct any more excusable, only that its potential for damaging the employer interest identified in *Grissom* may not be as great. Nor is this to deny that Egal's ability to deal with supervisors, especially Fallaw, in the future may have been compromised. However, this case concerns Egal's rights as an employee, not the Union's right to designate its representatives.

For all of the reasons discussed above, I conclude that Egal, while engaged in protected activity, committed misconduct that was not "flagrant" by Authority standards, and that the Respondent violated section 7116(a)(1) and (2)

of the Statute by suspending him for such conduct.¹⁷ Accordingly, I recommend that the Authority issue the following order:

ORDER

Pursuant to section 2423.41 of the Rules and Regulations of the Federal Labor Relations Authority and section 7118 of the Statute, the Department of the Air Force, 315th Airlift Wing, Charleston Air Force Base, Charleston, South Carolina, shall:

1. Cease and desist from:

(a) Disciplining an employee for protected conduct while that employee is acting as a representative of the American Federation of Government Employees, Local 1869.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of rights assured by the Federal Service Labor-Management Relations Statute.

2. Take the following affirmative action in order to effectuate the purposes and policies of the Federal Service Labor-Management Relations Statute:

(a) Rescind the 3-day suspension issued to Richard P. Egal concerning an incident that occurred on October 1, 1998.

(b) Remove any reference to the suspension referred to above from all files maintained by Respondent.

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The Authority takes pains to note that it "[does] not condone" misconduct that it finds to have been within the limits of protected activity. See, for example, *Flight Test Center*, 53 FLRA at 1456. I find this unpersuasive. By providing for the enforcement of an employee's right to engage in protected activity, the Statute requires that such conduct be condoned. Condonation does not mean approval. See *Department of the Navy, Puget Sound Naval Shipyard, Bremerton, Washington*, 2 FLRA 54, 55 (1979) ("The Authority neither defends nor endorses the use of intemperate language in the conduct of labor management relations in the Federal sector.") In the world as we know it, certain intemperate conduct must be condoned if the purposes of the Statute are to be realized.

(c) Make Richard P. Egal whole for any loss incurred because of the suspension referred to above, including lost pay, leave credit, and seniority.

(d) Post at all its facilities copies of the attached Notice on forms to be furnished by the Federal Labor Relations Authority. Upon receipt of such forms, they shall be signed by the Commander of the 315th Airlift Wing and shall be posted and maintained for 60 consecutive days thereafter, in conspicuous places, including all bulletin boards and places where notices to employees are customarily posted. Reasonable steps shall be taken to ensure that such notices are not altered, defaced, or covered by any other material.

(e) Pursuant to section 2423.41(e) of the Authority's Rules and Regulations, notify the Regional Director, Atlanta Regional Office, Federal Labor Relations Authority, in writing, within 30 days from the date of this Order, as to what steps have been taken to comply.

Issued, Washington, D.C., October 26, 1999

JESSE ETELSON
Administrative Law Judge

NOTICE TO ALL EMPLOYEES
POSTED BY ORDER OF THE
FEDERAL LABOR RELATIONS AUTHORITY

The Federal Labor Relations authority has found that the Department of the Air Force, 315th Airlift Wing, Charleston Air Force Base, Charleston, South Carolina, violated the Federal Service Labor-Management Relations Statute and has ordered us to post and abide by this notice.

We hereby notify our employees that:

WE WILL NOT discipline an employee for protected conduct while that employee is acting as a representative for the American Federation of Government Employees, Local 1869.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights assured them by the Statute.

WE WILL rescind the 3-day suspension issued to Richard P. Egal concerning an incident that occurred on October 1, 1998.

WE WILL remove any reference to the suspension referred to above from all files we maintain.

WE WILL make Richard P. Egal whole for the losses he incurred as a result of the suspension referred to above, including lost pay, leave credit, and seniority.

(Activity)

Date:

By:

(Signature)

(Title)

This Notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced or covered by any other material.

If employees have any questions concerning this Notice or compliance with any of its provisions, they may communicate directly with the Regional Director of the Federal Labor Relations Authority, Atlanta Region, whose address is: Marquis Two Tower, Suite 701, 285 Peachtree Center Avenue, Atlanta, Georgia 30303-1270, and whose telephone number is: (404) 331-5380.

CERTIFICATE OF SERVICE

I hereby certify that copies of this DECISION issued by JESSE ETELSON, Administrative Law Judge, in Case No. AT-CA-90324, were sent to the following parties in the manner indicated:

CERTIFIED MAIL:

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Dated: October 26, 1999
Washington, DC