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

MEMORANDUM DATE:
June 6, 2007

TO: The Federal Labor Relations Authority

FROM: PAUL B. LANG
Administrative Law Judge

SUBJECT: DEPARTMENT OF THE INTERIOR
BUREAU OF INDIAN AFFAIRS
WASHINGTON, D.C.

Respondent

and Case
No. DA-CA-06-0533

INDIAN EDUCATORS FEDERATION
AMERICAN FEDERATION OF TEACHERS
AFL-CIO

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

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DEPARTMENT OF THE INTERIOR
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Charging Party

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. ∋∋2423.40-41, 2429.12, 2429.21-2429.22, 2429.24-2429.25, and 2429.27.

Any such exceptions must be filed on or before **JULY 9, 2007**, and addressed to:

Office of Case Control
Federal Labor Relations Authority
1400 K Street, NW, 2nd Floor
Washington, DC 20005

PAUL B. LANG
Administrative Law Judge

Dated: June 6, 2007
Washington, DC

OALJ 07-16

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

DEPARTMENT OF THE INTERIOR BUREAU OF INDIAN AFFAIRS WASHINGTON, D.C. Respondent	
and	Case No. DA-CA-06-0533
INDIAN EDUCATORS FEDERATION AMERICAN FEDERATION OF TEACHERS AFL-CIO Charging Party	

Michael A. Quintanilla, Esq.
For the General Counsel

Patricia Armstrong Hargrave, Esq.
For the Respondent

Susan Sandoval
For the Charging Party

Before: PAUL B. LANG
Administrative Law Judge

DECISION

Statement of the Case

This case arises out of an unfair labor practice charge (GC Ex. 1(a)) which was filed on June 9, 2006, by the Indian Educators Federation, AFT,AFL-CIO (Union or IEF) against Robin Rodar at the Department of the Interior, Bureau of Indian Affairs, Washington, DC. An amended charge against the Department of the Interior, Bureau of Indian Affairs was filed on September 27, 2006 (GC Ex. 1 (c)). On January 22, 2007, the Regional Director of the Dallas Region of the Federal Labor Relations Authority (Authority) issued a Complaint and Notice of Hearing (GC Ex. 1(e)) in which it was alleged that the Respondent violated §7116(a)(1) of the Federal Service

Labor-Management Relations Statute (Statute) by denying access to its facilities to Susan Sandoval, a Field Representative of the Union.

A hearing was held in Albuquerque, New Mexico on March 14 and 15, 2007. Both of the parties were present with counsel and were afforded the opportunity to submit evidence and to cross-examine witnesses. This Decision is based upon consideration of all of the evidence and of the post-hearing briefs submitted by each of the parties.

Positions of the Parties

The General Counsel

The General Counsel maintains that, by denying access to its premises to Sandoval, the Respondent prevented her from effectively performing her duties on behalf of the members of the bargaining unit. The General Counsel further maintains that the Respondent has exaggerated Sandoval's alleged misconduct and that the incident of October 28, 2003, should be totally discounted.[1/] Furthermore, even if Sandoval's conduct was as egregious as alleged by the Respondent, the Respondent was not justified in permanently denying Sandoval access to all of its facilities. That action by the Respondent was overly broad and had the effect of denying bargaining unit employees the right to choose their representative in accordance with §7102 of the Statute.

The General Counsel suggests that the Respondent had the intent of avoiding the necessity of further dealings with Sandoval and used the cited incidents as a means of accomplishing that end. According to the General Counsel, the Respondent's intent was demonstrated by the fact that Sandoval was prohibited from meeting with Union stewards on a parking lot outside of one of the Respondent's buildings so as to deliver literature for a membership drive. The Respondent's intent was also evidenced by its insistence that it had no obligation to allow employees to leave their work sites to meet with Sandoval.

As a remedy the General Counsel proposes an order whereby the Respondent would be prohibited from preventing Sandoval from entering and engaging in representational activity at its facilities and would also be required to rescind its letter of

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[1/] This is one of three incidents cited in the Respondent's post-hearing brief as allegedly justifying its action.

June 30, 2006, and to post an appropriate notice.
The Respondent

The Respondent maintains that it was justified in denying access to its facilities to Sandoval. According to the Respondent, it took action because of numerous incidents in which Sandoval displayed rude, abusive and disruptive conduct. Such conduct would not have been tolerated on the part of employees or members of the public; Sandoval's status as a Union representative did not provide her with immunity from normal standards of conduct. The Respondent further maintains that, in a number of instances, Sandoval's misconduct occurred when she was not legitimately acting as a Union representative and that, consequently, her activities on those occasions were not protected. Furthermore, Sandoval's physical reaction to the security guard on November 10, 2005, constituted an assault which, as a matter of law, was not protected activity.

Finally, the Respondent argues that the case is partially moot because Sandoval was again allowed access to its premises as of February 14, 2007.[2/] Therefore, Respondent maintains that, if I should find that it committed an unfair labor practice, the remedy should be limited to the posting of a notice.

Preliminary Issues

Motion to Amend Complaint

Shortly after the commencement of the hearing the General Counsel made a motion to amend paragraphs 4 and 10 of the Complaint as follows:

> 4. The charge in Case Number DA-CA-06-0533, [w]as filed by the Union [with the] Dallas Regional Director on June 9, 2006.
>
> 10. During the time period covered by this Complaint, Susan Sandoval occupied the position of Field Representative for the Union.

The Respondent did not oppose the motion (Tr. 6, 7); consequently, the General Counsel's motion to amend the

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[2/] Counsel for each of the parties have represented that Sandoval was allowed to return to Respondent's premises because of a temporary restraining order which was issued by the U.S. District Court and subsequently extended by stipulation.

Complaint is granted.

Motion to Correct Transcript

The General Counsel submitted a Motion to Correct Transcript along with her post-hearing brief and, in addition, requested a waiver of the time limit for the filing of such a motion. In view of the fact that the proposed changes are not substantive and that there has been no opposition to the motion, the General Counsel's motion is granted and the transcript is corrected accordingly.

Adverse Inference

The Respondent caused a subpoena (Resp. Ex. 3) to be served on Dennis Ziemer, who is described in its pre-hearing disclosure[3/] as a Staff Representative of the American Federation of Teachers (AFT) and a hostile witness who purportedly has knowledge of Sandoval's disruptive conduct and who was expected to testify that he had to escort Sandoval out of a meeting in one of the Respondent's facilities. Because Ziemer did not appear at the hearing, the Respondent requests that I draw an adverse inference from his absence.[4/] Counsel for the Respondent stated that she had received no communication from Ziemer indicating that he was unavailable, nor did counsel for the General Counsel indicate to her that Ziemer could not have been present at the hearing.

The General Counsel did not dispute either the description of Ziemer's status or the expected nature of his testimony as described in the Respondent's pre-hearing disclosure. However, the General Counsel maintains that an adverse inference is not justified because Ziemer is not affiliated with the IEF and that, consequently, his failure to testify should not be attributed to the Union. The evidence does not support the General Counsel's position. Sandoval testified that the IEF is, in effect, a local of the AFT, although the IEF has a greater degree of independence than other locals in that it has its own governing council (Tr. 55). Nevertheless, IEF is part of AFT and has been identified as such in the Complaint and in the caption of this

[3/] Although the pre-hearing disclosures of the parties were not included with the formal documents in GC Exhibit 1, I will take official notice of their contents and of the fact that they were properly filed and served.

[4/] The General Counsel's brief includes a request that I draw an adverse inference from the Respondent's failure to call a certain witness. That issue will be addressed in the portion of this Decision devoted to discussion and analysis.

case. Furthermore, there is undisputed testimony that Ziemer acted as the Union's chief spokesperson during negotiations (Tr. 183). The interests of the AFT in this case are identical to those of the IEF and it is highly likely that the Union could have obtained Ziemer's testimony on its own behalf.

In United Brotherhood of Carpenters and Joiners of America, Local Union No. 405, AFL-CIO, 328 NLRB 788, n.2 (1999) the National Labor Relations Board held that an adverse inference may be drawn from the failure of an adverse witness to appear. Although the Authority has not yet ruled on that precise issue[5/], in U.S. Penitentiary, Leavenworth, Kansas, 55 FLRA 704, 708 (1999) the Authority held that an adverse inference may be drawn from the failure of a witness to testify on a particular factual issue. That being the case, it appears reasonable to assume that the Authority would reach a similar conclusion with regard to a witness who failed to appear altogether. Therefore, I will draw an adverse inference from Ziemer's failure to testify in response to the Respondent's subpoena. The extent of the inference is limited by the Respondent's description of Ziemer's expected testimony. Accordingly, I will draw the inference that Ziemer would have testified that he escorted Sandoval from a meeting at one of the Respondent's facilities. However, there is no indication of the date of the incident, of the purpose of the meeting or of the precise nature of Sandoval's conduct.[6/] Consequently, the inference is no more than generally corroborative of other evidence, as described below, that

[5/] In U.S. Dept. of the Navy, Naval Surface Warfare Center, etc., 56 FLRA 848 (2000) the Authority declined to overturn an arbitration award in which the Arbitrator had drawn an adverse inference from the refusal of agency counsel to testify in spite of an order by the Arbitrator that he do so.

[6/] Michael Billings, the Respondent's Labor Relations Officer, testified that, on February 14, 2007, Sandoval came into a bargaining session uninvited and unannounced. Ziemer, who was the Union's chief spokesperson, escorted her out and later apologized for the interruption (Tr. 183). If this is the incident about which the Respondent expected Ziemer to testify, it could not have justified Sandoval's exclusion from the Respondent's facilities since it occurred after the Respondent had decided to exclude her. In fact, the incident occurred on the day that the Respondent had rescinded the exclusion in compliance with a temporary restraining order. Billings' testimony does tend to show that the Union did not allow Sandoval to do as she pleased but took corrective action when necessary.

Sandoval sometimes acted in an inappropriate and disruptive manner.

Findings of Fact

The Respondent is an agency within the meaning of §7103 (a)(3) of the Statute. The Union is a labor organization as defined in §7103(a)(4) of the Statute. The Union is the exclusive representative of two units of the Respondent's employees which are appropriate for collective bargaining. At all times pertinent to this case Sandoval was employed by the Union as a Field Representative.

The Respondent is composed of two organizations. The Bureau of Indian Affairs (BIA) operates schools and other facilities on the tribal reservations. The Office of Special Trustee (OST) administers trust funds for the benefit of the members of the tribes (Tr. 185). The Union represents separate bargaining units of employees of each of those entities (Tr. 22, 23, 184, 185; GC Ex. 6).

By letter of June 30, 2006, (GC Ex. 3) from Billings to Patrick Carr, the President of the Union, the Respondent indicated that Sandoval would no longer be permitted to come onto Respondent's facilities. In its post-hearing brief the Respondent has cited the following three incidents in support of its contention that Sandoval's conduct justified her being permanently barred from its facilities:

1. Tribal Consultation, October 28, 2003 [7/]

Donna Erwin[8/] is the Deputy Special Trustee and is the second highest official at OST. On October 28, 2003, Erwin and Ross Swimmer, the Special Trustee, attended a tribal consultation which was held in a hotel in Las Vegas, Nevada. The purpose of the meeting was to discuss the disposition of trust fund assets with representatives of the tribes whose members are beneficiaries of the fund. According to Erwin, the meeting was open to the public (Tr. 214); the Respondent has not alleged that Sandoval was trespassing.

The record is unclear as to the precise agenda and protocol of the meeting, but apparently anyone was allowed to speak. Erwin testified that Sandoval began a long harangue regarding the alleged neglect and mistreatment of employees

[7/] This incident was not cited in Billings' letter to Carr in which he announced Sandoval's exclusion.

[8/] Erwin's name is spelled as "Irwin" in the transcript.

during which a number of attendees left early for lunch (Tr. 218). According to a partial transcript of the meeting, Sandoval also purported to speak as a representative of the Indian tribes. When David Moran, the Solicitor of the Department of the Interior, challenged her status as a tribal representative, Sandoval stated that she did not want to hear from the "talking heads" (Resp. Ex. 2, p. 118). However, Swimmer, who presided over the meeting, did not rule that Sandoval was out of order. He did tell Sandoval that the meeting was to give the public and the tribes the opportunity to comment and that the Union's concerns would be addressed in separate discussions (Resp. Ex. 2, pp. 115, 116). According to Erwin, the presiding officer would have been reluctant to ask Sandoval to step down since such a request would have been contrary to Indian culture (Tr. 229). Billings testified that Erwin called him during the course of the meeting and asked if she could ask Sandoval to leave. He told her that she could do so if a member of the general public would also be asked to leave or if she were causing a commotion (Tr. 169, 170). It is unclear whether Erwin shared this information with Swimmer in time for it to be of any use.

There is no evidence as to whether Sandoval had been assigned to represent the Union at this meeting or if the leadership of the Union even knew that she planned to attend. Furthermore, there is no evidence that the Respondent complained to the Union of Sandoval's conduct at the tribal consultation.

2. Southwest Regional Office, November 10, 2005

On November 10, 2005, Sandoval appeared at the Southwest Regional Office of BIA in order to request a second extension of the deadline for filing a response to the proposed termination of a member of the bargaining unit because of one or more drunken driving convictions. Sandoval acknowledged that the response would be two days past the deadline because it had slipped her mind (Tr. 85). Sandoval's testimony in this regard is somewhat inconsistent. She stated that she first went to see Richard (also known as Dikki) Garcia, a Labor Relations Specialist, in spite of the fact that, according to Sandoval, only Larry Morrin, the Regional Director, had the authority to grant the extension. She did acknowledge that the prior extension had been granted "through" Garcia (Tr. 86). However, Sandoval also testified that Garcia told her that the extension would not be granted rather than that he would not recommend the extension. According to Sandoval she did not argue with Garcia, but left

his office and went to the third floor to see Morrin (Tr. 87).

According to Garcia, Sandoval telephoned him earlier that day to ask for an extension. Garcia testified that he had the authority to grant such extensions. When Garcia refused Sandoval's request and reminded her that he had told her that there would be no further extensions in that matter, Sandoval said that Garcia (or possibly the Respondent) was taking away the employee's livelihood.[9/] Sandoval then stated in an angry tone of voice that, if Garcia was not going to grant the extension, she would "go upstairs". Garcia also testified that he turned on his speaker phone as he often did when speaking to Sandoval so that he would have witnesses to what transpired (Tr. 231-233). According to Garcia, Sandoval later came to his office to again ask for an extension. Garcia refused and informed Sandoval that the Solicitor was reviewing the proposed discipline. At that point Sandoval said that she was "going upstairs" (Tr. 234).

According to Sandoval, when she arrived on the third floor she told Carmen Apodaca, Morrin's administrative assistant, that she wanted to see him. Sandoval claimed that she was accustomed to seeing Morrin without an appointment and that she was typically at the facility seven to ten days each month. However, she also stated that she had only been to Morrin's office before for one or two minor matters (Tr. 88). According to Sandoval, Apodaca told her than Morrin was in a meeting but would be available shortly, at which point Sandoval said that she would "camp out" and wait for him. While Sandoval was waiting, Dawn Selwyn, the Deputy Regional Director, walked by and asked if she could help her. Sandoval said she didn't know, and Selwyn invited Sandoval into her office. When Sandoval told Selwyn the purpose of her visit Selwyn told her that she would not grant the extension. Sandoval's testimony suggests that she did not like the way Selwyn spoke to her, which caused her to ask Selwyn if she was now making decisions for Morrin. Selwyn said that she was and the discussion became "rather heated." According to Sandoval, both she and Selwyn were speaking loudly but neither of them was shouting. At some point Sandoval told Selwyn that their conversation was not going anywhere and that she would wait for Morrin in the front office. Selwyn followed her out of the office and came into Sandoval's "personal space", all the

[9/] In an apparent attempt to minimize the effect of her oversight in representing a member of the bargaining unit who was threatened with termination, Sandoval testified that the extension was not crucial because the Union was still entitled to file a grievance over the proposed termination (Tr. 85).

while talking to her in a loud voice. Sandoval thereupon called the employee involved with her cell phone and left a message (Tr. 88-91).

Sandoval then looked up and saw Garcia and a security guard. This puzzled Sandoval because there had been no threats or violence. Garcia told her that she should leave the building. She agreed and Garcia and the security guard went with her to the parking lot. Sandoval denied that she struck or touched the security guard (Tr. 91, 92).

Apodaca testified that, when Sandoval arrived at the office, she said that she wanted to see Morrin to request an extension. When Apodaca told Morrin that Sandoval wanted to see him,[10/] Morrin said that he was too busy to see Sandoval that day but that she could make an appointment for the next week or he would call her. When Apodaca relayed this message to Sandoval she said that it was an emergency and refused to make an appointment, stating that she would wait until Morrin was free. Sandoval also commented that Morrin did not return telephone calls (Tr. 344, 345, 352). According to Apodaca, Morrin typically saw people by appointment because he was very busy (Tr. 345). However, on cross-examination, Apodaca acknowledged that Morrin often saw people without appointments and that he had previously seen Sandoval without an appointment (Tr. 353). This discrepancy is not crucial since it is undisputed that, on the day in question, Sandoval was informed that Morrin was too busy to see her. Apodaca's testimony also shows that Sandoval's unscheduled presence at the Regional Office was not presumptively irregular.

When Apodaca was asked on cross-examination whether Sandoval had "assaulted" the security guard, she replied, "I didn't see anything, no." It is unclear whether Apodaca meant that she did not see whether Sandoval had struck the guard or whether it did not happen. Neither of the parties sought clarification of Apodaca's testimony on that subject.

Esther Lopez was the secretary for the Southwest Regional Office from some time in 2003 until February of 2007 during which time she reported to Selwyn. She subsequently became the Registrar for the National Indian Program Training Center, which presumably is a unit of the Respondent. Lopez was at Apodaca's desk when Sandoval arrived and told Apodaca in a "very firm voice" that she wanted to see Morrin even if it meant "camping out". Lopez generally confirmed Apodaca's

[10/] It is unclear whether Apodaca informed Morrin of the purpose of Sandoval's visit.

testimony to the effect that Apodaca told Sandoval that Morrin was busy and that Sandoval refused Apodaca's suggestion that she talk to Selwyn. Lopez also confirmed that Sandoval eventually accepted Selwyn's invitation to come into her office and that Sandoval began shouting at Selwyn. Lopez further testified that, after Sandoval had returned to the waiting area, Selwyn instructed Apodaca to inform Morrin that she had spoken to Sandoval and that her recommendation was that no further extension be allowed. At that point Sandoval shouted that it was plain to see who "runs the show around here". Lopez also stated that Sandoval began pacing around the waiting area and that she (Lopez) began to fear that Sandoval would harm herself or others (Tr. 259-265).

Selwyn testified that she noticed Sandoval sitting in the reception area when she was on her way to a meeting after lunch. Both Selwyn and Morrin worked by appointment because of their tight schedules; as far as Selwyn knew Sandoval did not have an appointment. As Selwyn left the meeting she was informed by Apodaca that Sandoval was waiting for Morrin and that he was still tied up in a meeting. Selwyn invited Sandoval into her office and asked if she could help her. When Sandoval requested a second extension, Selwyn informed her that she was not inclined to grant it because it was the second such request and the fact that Sandoval had forgotten about the deadline was not a good reason for granting another extension (Tr. 276-278).

Selwyn further testified that Sandoval then began speaking in a loud and angry tone while leaning forward over the conference table where they were sitting. She said that she should never have talked to Selwyn and that Selwyn did not "give a damn" about her employees. Selwyn told her to calm down so that they could discuss the issue in a rational manner. Sandoval replied that she would not calm down and that she was having a bad day, at which time she mentioned personal and emotional issues. Sandoval then told Selwyn that she (Selwyn) had no business inquiring into her personal life (Tr. 278-281).

According to Selwyn, she told Sandoval that she would have to leave if she could not behave in a professional manner. Sandoval stood up and started to leave Selwyn's office, at which time Selwyn followed her and again told her to calm down. Sandoval again stated that she would not calm down and began "getting boisterous" in the lobby area. Selwyn described Sandoval's appearance as "livid" and "all tensed up" (Tr. 281-282). Sandoval stayed in the lobby area and was

calling Selwyn a "bitch" and saying that she didn't like Selwyn. Eventually Garcia arrived with a security guard who told Sandoval, in a calm voice, that she had to come with him. The guard touched Sandoval's elbow at which time Sandoval jerked her elbow in an aggressive manner. The guard took Sandoval's elbow and Garcia moved to her other side. They escorted Sandoval out of the office while she continued calling Selwyn a "bitch" and saying that she didn't like Selwyn.[11/] All of this took place in the presence of the secretaries (Tr. 282, 283).

Garcia testified that, between 20 and 30 minutes after Sandoval left his office, he looked out the window and saw what was probably illegal activity going on in the parking lot. When he called Apodaca to report the activity, she told him to "come quick" because Selwyn and Sandoval were fighting. He hurried to the third floor along with a security guard, whom he identified as Rudy; when they arrived, Selwyn was telling Sandoval that she needed to leave the office because she was becoming disruptive. Sandoval had her back toward Selwyn and was backing away from the exit and further into the office. Sandoval was not speaking, but Garcia noticed that her eyes were wide and her face was flushed. At that point Garcia said, "let's go, Susan" and he and the security guard approached Sandoval on either side. As the security guard started to take Sandoval's arm, she jerked her elbow back; the security guard then said, "that's it, now we're going." Garcia then urged Sandoval to come outside and she began walking with him and the guard. At this point Sandoval appeared to Garcia, who stated that he knew her well, to be very angry (Tr. 234-238).

Garcia further testified that, as he and the guard were walking Sandoval out of the office, she said, "that bitch. She is so damned condescending. I'm not going to take that shit from her anymore." Garcia told Sandoval that Selwyn was "right there" since Selwyn was directly behind them at the time and could hear Sandoval. As they approached the guard station, Sandoval stopped and said that she was not leaving. Garcia told her that they were just going outside; he dismissed the security guard and walked outside with Sandoval (Tr. 240, 241).

After Garcia and Sandoval had been outside for about 30 seconds, Garcia told Sandoval that he could not believe that she had called Selwyn a bitch. Sandoval expressed surprise

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[11/] It is unclear, and ultimately of little consequence, how many times Sandoval used this language.

that she had done so and said that she should not have come in that day. After about five minutes Sandoval appeared to have calmed down; she told Garcia that she was leaving and proceeded to her automobile (Tr. 241, 242).

The General Counsel maintains that I should draw an adverse inference from the failure of the Respondent to call the security guard as a witness in order to confirm that Sandoval struck him. Yet, the General Counsel has not explained why she did not call him to refute that point. It has not been suggested that the security guard was not available to the General Counsel, by subpoena if necessary.[12/] Accordingly, I will not draw an adverse inference from his failure to testify.

Garcia testified that, immediately after Sandoval's departure, he returned to the Regional Director's office and told Morrin[13/] and the other staff members to prepare written statements because Garcia was required to report the incident to the chief personnel officer. Morrin thereupon asked Garcia to instruct the guards that Sandoval was not to be admitted into the building until he had spoken to Carr, who was Sandoval's superior (Tr. 242).

Upon consideration of the testimony of all of the aforementioned witnesses, I find as a fact that Sandoval came to the office of the Regional Director in an emotional state which intensified during her conversation with Selwyn. Sandoval's condition was apparently caused by anger and frustration over the refusal of both Garcia and Selwyn to grant the requested extension and, in all probability, embarrassment over having missed the deadline for a response to the proposed termination of one of the bargaining unit members whom she was charged with representing. Another factor might have been personal problems in view of her statements to Selwyn and Garcia as well as her own testimony she was "distressed" because a lot of things were going on at the time and she was tired from a trip (Tr. 117, 118). It is also likely that Sandoval was incensed by what she perceived as Selwyn's condescension in telling her to calm down. In any event, it is clear that Sandoval acted inappropriately and disrupted the routine of the Regional Office to the extent that it became necessary to call for assistance. The evidence

[12/] It is unclear whether the security guard was employed by the Respondent, by another government agency or by a contractor.

[13/] It is unclear how much, if any, of the incident was witnessed by Morrin.

as to her alleged physical resistance to the security guard is questionable. It would appear that Sandoval was startled when the guard took her elbow and reacted involuntarily rather than with the intent of actively resisting.

Sandoval's testimony was somewhat inconsistent. For example, she stated that Garcia did not have the authority to grant an extension, yet she acknowledged that he had done so in the past and that she came to his office in a further attempt to obtain the extension. She had selective memory lapses in that she was certain that she did not touch the security guard or direct profanity toward Selwyn (Tr. 115, 116) but did not recall Selwyn telling her to calm down (Tr. 116, 117). She also claimed that neither the security guard nor Garcia asked her to leave, but acknowledged that they said, "let's go ahead and leave" (Tr. 116). Sandoval's self-serving description of the incident is at odds with the credible testimony of other witnesses to the effect that she became angry and disruptive when it became obvious to her that the extension would not be granted.

The Aftermath of the November 10 Incident

After Garcia had spoken to the guards he telephoned Carr to inform him of the incident. When Carr's secretary told Garcia that he was in San Diego he requested and received Carr's cell phone number. He then called Carr and told him what had happened. He also informed Carr that Morrin wanted to meet with him and they arranged a meeting for 9:00 a.m. on Monday, November 13 (Tr. 242, 243).

Garcia's conversation with Carr apparently occurred either shortly before or shortly after a call from Sandoval to Carr. Sandoval testified that she told Carr that she had a problem and described the incident.[14/] According to Sandoval, Carr did not criticize her, but told her that they would "work through it" upon his return on Monday and that she should "sit tight" (Tr. 92).

After informing Morrin of the arrangements for the meeting with Carr, Garcia returned to his own office where he saw that his telephone message light was on. The voice mail message was from Sandoval who said that she was sorry for what had happened and that she would do her "mea culpas" on Monday (Tr. 243).

[14/] Neither Sandoval nor Carr testified as to exactly what Sandoval told him.

On the following Monday Garcia attended a meeting with Morrin, Carr and Selwyn. After Selwyn had described what happened and Carr had apologized, Morrin told Carr that he needed to take some disciplinary action because Sandoval's conduct would not be tolerated. According to Garcia, Morrin specifically mentioned the fact that Sandoval had called Selwyn names. Carr indicated that he understood and that he would get back to Morrin after he had gotten Sandoval's side of the story. The meeting lasted for about 20 minutes. According to Garcia, they received no response from Carr (Tr. 244, 245).

Garcia subsequently reported the incident to a number of Respondent's managers including the Director of BIA (Tr. 245). On December 2, 2005, Billings sent a memorandum to Carr (GC Ex. 2) stating in effect that, while the Respondent did not intend to impose limitations on the Union's ability to represent employees, a future incident of flagrant misconduct by Sandoval would result in her being denied access to the Respondent's premises. In the memorandum, Billings also stated that Sandoval had a "history of crossing the line (both in BIA and OST)", but provided no details as to such alleged incidents.

In describing his meeting with Respondent's representatives, Carr testified that they had "piles of paper" and would often read from a document when describing an incident. Carr told them that he needed written confirmation. He asked for copies of the documents, but never received them. According to Carr, he could not take action against Sandoval without documentation for fear of a grievance by her union or a discrimination claim (Tr. 29-31).

Carr's testimony that he never received supporting documentation is inconsistent with Sandoval's description of a meeting with Carr in which he presented her with a notice of proposed discipline along with attachments that he had received from the Respondent (Tr. 93).[15/]

On December 5, 2005, Billings received an e-mail message from Sandoval (Resp. Ex. 1) which read:

[15/] The notice of proposed discipline, with attachments, was offered into evidence as General Counsel's Exhibit 8. I sustained the Respondent's objection because the document had not been included in the General Counsel's pre-hearing disclosure. I sustained a similar objection when the General Counsel again offered the document as rebuttal evidence (Tr. 362).

> Pat Carr and I met today and he will meet with me and my union representative on Wednesday as well. For all practical purposes, this matter is finally concluded on this end (I am sure Pat has advised you). Pat has provided me with a copy of your memo of Friday as to your expectations.
>
> Discipline has been issued – I do not disagree with it – I earned it and deserve it. I recognize it could have been worse. Pat clearly has utilized the Douglas factors[16/] in coming to his decision. I have admitted culpability in this matter and have provided Pat with assurances it will never happen again. I offer a sincere apology to all involved in this.
>
> Finally, I have done much soul searching since 11/10 – and as a result have developed a strong commitment to taking all steps necessary to take corrective action, not just now in the short term but for as long as necessary.
>
> Thank you for your various comments, some unexpected and more personal in nature, that have helped me get to this point.
>
> Please expect the best from me in the future. A year from now I expect that my credibility will have improved substantially.

Billings testified that he received a telephone call from Sandoval later the same day. Sandoval said that she had been disciplined, that she understood the seriousness of her behavior and that she was going to mend her ways. During the course of the conversation Billings made the following hand-written note at the top of his copy of the e-mail:

> 12/5/05 TC @ Susan – "Anger is my drug of choice"

Billings had a telephone conversation with Carr on December 6, during which Carr informed him that the Union

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[16/] Sandoval was presumably referring to the decision of the Merit Systems Protection Board in Douglas v. Veterans Administration, 5 M.S.P.B. 313 (1981) which sets forth the criteria to be used in determining whether agency-imposed discipline should be mitigated. That decision is not binding on private sector employers such as the Union.

would be suspending Sandoval for two weeks. He recorded that conversation with the following hand-written note at the bottom of his copy of Sandoval's e-mail:

> 12/6/05
> TC @ Pat – Says Susan is going to be suspended for 2 wks.

(Tr. 175-177).

Whether or not the Respondent was satisfied with the Union's response to the incident of November 10, it took no further action at that time based on that incident and any prior occurrences. Billings testified that the Respondent would not have barred Sandoval from its premises had it not been for another incident, as described below, on June 8, 2006 (Tr. 194). Billings also described a meeting with Carr on February 7, 2006, during which Carr stated that he wished that he could get rid of Sandoval and that he was still working on it (Tr. 178, 179).

3. Santa Clara School, June 8, 2006 [17/]

At all times pertinent to this case Jacqueline Sanchez, a member of a bargaining unit represented by the Union, was a teacher at the Santa Clara School, which is one of the facilities run by the BIA. Some time prior to June 8, Sanchez was informed by the Respondent that her teaching contract would not be renewed for the subsequent school year. On the evening of June 7 Sanchez received telephone calls from a number of parents who asked her about a meeting that had been called for the next day by Robin Rodar, the school principal, to discuss her situation and whether she planned to attend. Sanchez testified that she had received no prior notice of the meeting and had no knowledge of its purpose. Later that evening she left several telephone messages with Sandoval describing what she had been told by the parents and asking if Sandoval could attend the meeting with her (Tr. 124-126). Sanchez was aware that Bernadette Wahls, another field representative for the Union, had responsibility for her bargaining unit, but had requested that Sandoval represent her because she had become acquainted with Sandoval and had

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[17/] All subsequently cited dates are in 2006 unless otherwise indicated.

confidence in her ability (Tr. 124).[18/]

Sandoval eventually called Sanchez back and told her that she might not be able to attend the meeting because of other commitments. She would, however, get someone else from the Union to accompany Sanchez. Sanchez asked Sandoval if she could adjust her schedule so as to allow her to attend. The next morning Sandoval called Sanchez to tell her that she would be able to attend the meeting; at that point Sanchez told Sandoval that she was not feeling well and asked if it were vital that she be at the meeting. (Sanchez had previously applied for sick leave on June 8.) Sandoval urged Sanchez to attend and she agreed to do so (Tr. 129, 130).

Rodar testified that, because some of the students seemed upset about Sanchez's departure, she arranged to meet with parents to listen to their concerns. She notified the parents by means of notes that she gave to Sanchez's students as they left on the last day of class (Tr. 300, 301). Rodar did not invite Sanchez to the meeting since it was only for parents (Tr. 303). Rodar also testified that Sanchez saw her giving the notes to students and that she saw Sanchez "whispering" to a student in her classroom after the student had been given the note (Tr. 302). That testimony suggests that, contrary to Sanchez's testimony, she first learned about the meeting on the afternoon of June 7 rather than that evening when she received telephone calls from parents.

The note itself (Resp. Ex. 5) is addressed to "Third Grade Parents and Students" and states, in pertinent part:

> I know that some of you have concerns or questions concerning why Ms. Sanchez is not returning next year. I would like to invite you to meet with me so that I can address your concerns . . . .

Regardless of when Sanchez first learned of the purpose of the meeting, there is no evidence that Sandoval saw the note or knew of its exact wording prior to the meeting on June 8 if ever. Nor is there evidence that Sandoval had independent knowledge of the purpose of the meeting.

Rodar further testified that, when the first group of parents came to her office, she took them to the library,

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[18/] Carr had authorized Sandoval to represent Sanchez (Tr. 34). However, there is no evidence that he or any other Union official, other than Sandoval, knew about the June 8 meeting or that Sandoval planned to attend.

which was the announced location of the meeting. Because Rodar considered the meeting to be private, she asked the librarian to leave the building. Rodar did not expect Sanchez to be present and did not expect her to be in school that day since she had submitted a sick leave form (Tr. 303, 304; Resp. Ex. 6).[19/] Because Rodar's recommendation that Sanchez's contract not be renewed was subject to the approval of the school board (the board had already given its approval), Rodar invited all of the school board members to the meeting so that they could hear what she told the parents, thus countering possible allegations that she had violated Sanchez's rights. Jesse Gutierrez was the only board member who accepted the invitation (Tr. 306).

According to Rodar, they were waiting for other parents when Sanchez and Sandoval arrived. Rodar said that she was "really taken aback" by their presence because they had not been invited. Furthermore, Sandoval had not followed the proper procedure which required her to obtain a visitor's pass from the office; Rodar was certain that Sanchez was aware of the procedure and thought that Sandoval also knew about it because she had been to the school before. Apparently Rodar's dismay was intensified by the fact that Sanchez put a tape recorder on the table and turned it on. Rodar did not immediately mention the tape recorder or challenge the presence of Sanchez and Sandoval. Rather, in spite of being taken aback, she made "light conversation" and asked Sanchez if she would be attending an end-of-year luncheon with the staff (Tr. 307, 308).

Rodar thereupon left the room and telephoned Glenn Himebaugh, the acting Supervisory Human Resources Specialist, and Jody Tomhave, a Labor Relations Specialist, for advice. (Rodar first spoke to Tomhave who referred her to Himebaugh.) Rodar was in her first assignment as a principal and did not want to do anything that would jeopardize her job or the non-renewal of Sanchez's contract. When Himebaugh asked Rodar what she wanted to do, she told him that she had no problem with Sanchez and Sandoval staying at the meeting, but did not

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[19/] The Respondent maintains that Sanchez's credibility is eroded by the fact that she appeared at the meeting in spite of having indicated that she was too sick to work. I disagree. Sanchez never claimed that she was critically ill; it is not surprising that, at Sandoval's urging, she chose to be present at a meeting that she thought might affect her job, even though she was not feeling well. This is true regardless of what Sanchez understood to have been the exact purpose of the meeting.

like the tape recorder. Himebaugh told Rodar that she could inform Sanchez and Sandoval that they could stay if they turned off the recorder (Tr. 308, 309).

The obvious, albeit unspoken, corollary to Himebaugh's advice was that Sanchez and Sandoval could be told to leave if they did not turn off the tape recorder. However, Rodar never exercised that option. She returned to the meeting and, after waiting for late arrivals, told Sanchez and Sandoval that they were welcome to stay if they turned off the tape recorder. They refused to do so; according to Rodar, one or both of them indicated that the tape recorder was for Rodar's protection as well as their own. Rodar again left the meeting and called Himebaugh. She informed him of what had occurred and told him that she did not want to continue the meeting under those circumstances. Himebaugh told her that she should call the police and ask them to escort Sanchez and Sandoval off of the premises (Tr. 309, 310).

Rodar thereupon called the police; she was told by the dispatcher that they had no one available at the time and would respond as soon as possible.[20/] Rodar then returned to the meeting, but, for some reason, did not tell Sanchez and Sandoval that she had called the police. She did say that, if they did not turn off the tape recorder, the meeting was over. They did not turn off the recorder, so Rodar left the room although the others stayed (Tr. 310, 311). Rodar then called Himebaugh for the third time and asked him to speak to everyone on the speaker phone so as to clarify what was required. Everyone, with the exception of Gutierrez who had already left, came into the office where the speaker phone was located. According to Rodar, Sandoval, when challenged by Himebaugh, yelled that they had never been told to turn off the recorder or to leave. Himebaugh then said that he was telling them now, at which point Sandoval turned off the recorder and said that she was leaving (Tr. 311, 312).[21/]

After the tape recorder had been turned off, Rodar asked the parents if they would like to continue the meeting so that she could listen to their concerns. Both Sanchez and Sandoval were still there.

[20/] According to the police report (Resp. Ex. 7) Rodar's call was received at 2:59 p.m.; an officer was dispatched at 3:00, arrived at 3:05 and departed at 3:37.

[21/] Neither Sandoval nor any other witness explained why she expressed her willingness to leave even after she had turned off the tape recorder.

At that point Rodar noticed that a police officer and the tribal sheriff were on the other side of the door.[22/] She told them that "I think we're doing fine" but said that they were welcome to come in. Sandoval then began "grilling" one or both of the officers with questions about such things as badge numbers, how they learned of the meeting and their purpose in being there. After the officers had given the requested information to Sandoval, Rodar thanked them and said they were no longer needed because the tape recorder had been turned off (Tr. 314- 316, 319).

Rodar then told the parents that the meeting had been called to give them an opportunity to express their concerns, but that she could not give them any details so as to protect Sanchez's rights. Sandoval then stated that they would allow Rodar to provide the details. Rodar said that she would not do so, but that Sandoval was free to tell the parents whatever she wanted. Sandoval then spoke to the parents and a number of them expressed dismay at Sanchez's departure. The meeting ended at 4:00 p.m. According to Rodar, it began about 2:30 and would probably have ended at 2:40 had it not been for Sandoval's disruptive behavior (Tr. 319-323).

The description of this incident by Sanchez and Sandoval does not vary significantly from that of Rodar. Sandoval's description of her interaction with management representatives and her conduct on June 8 is generally self-serving and predictably avoids any reference to disruptive or confrontational conduct. However, regardless of when Sanchez first learned of the purpose of the meeting, there is no evidence that Sandoval knew anything in advance other than that it was related to Sanchez's case. Similarly, there is no evidence that Sandoval had advance knowledge that Sanchez would be bringing a tape recorder to the meeting. When Rodar questioned the use of the tape recorder, Sandoval took the recorder from Sanchez and placed it on the table next to her in order to "deflect attention" from Sanchez (Tr. 79). Apparently Sandoval did not consider turning the recorder off herself and, in any event, did not do so at that time. It is also undisputed that Rodar did not ask Sanchez or Sandoval to leave when they first arrived, nor did she explicitly ask them to leave at any other time. However, it is reasonable to

[22/] According to Rodar, she first encountered the police officer during one of her trips from the meeting to the office. She told him that she needed to remove two people but asked him to wait because she hoped to resolve the problem without his intervention (Tr. 313). It is unclear how the sheriff became involved.

assume that, as an experienced field representative, Sandoval soon realized that the meeting as originally planned by Rodar was not one which either she or Sanchez had a right to attend. It is also obvious that, regardless of Sanchez's knowledge, Sandoval realized that Rodar wanted them to either turn off the tape recorder or leave, ideally both. Furthermore, there can be no doubt that Sanchez would have turned off the recorder and left the meeting if Sandoval had told her to do so.

The fact remains that, for whatever reasons, Sandoval chose to see how far she could push Rodar and that Rodar did not take control of the situation, presumably because of the fear that she would do something to jeopardize either her job or the decision not to renew Sanchez's contract. It is also clear that, even if Sanchez and Sandoval had not been present, nothing would have occurred at the meeting other than the parents' expressions of support for Sanchez. The most that can be said was that Sandoval wasted her own time and that of Rodar, Gutierrez and the parents by her refusal to turn off the tape recorder when Rodar first expressed her concern. However, Rodar must share responsibility for unnecessarily prolonging the meeting by her failure to act decisively even after she had conferred with Himebaugh. In any event, as soon as Himebaugh specifically told Sandoval to turn off the tape recorder, she did so, probably because she realized that she had no further room to maneuver. It is probable that Sandoval and Sanchez would have left the meeting altogether if Himebaugh had told them to. He did not do so because, by Rodar's own admission, she told Himebaugh that she had no objection to their presence.

The Aftermath of the June 8 Incident

Billings testified that, in June of 2006, he received a call from Himebaugh who informed him that Sandoval and Sanchez had "barged into" a meeting at the Santa Clara school. Himebaugh also told Billings that Sandoval and Sanchez had not left the meeting when they were asked to do so and that they had refused to turn off a tape recorder. Billings advised Himebaugh to collect statements. As requested, Himebaugh provided Billings with his own statement as well as those of Rodar and Tomhave.[23/] Billings reviewed the statements and spoke to each of them by telephone. He also spoke to other labor relations personnel as well as to personnel in management and in the Solicitor's office. Finally, he consulted security personnel to determine whether Sandoval

[23/] None of those statements were offered into evidence.

could be barred from the Respondent's premises (Tr. 179-181).

Eventually, cognizant management officials at the Respondent reached a consensus that Sandoval should be denied access to agency premises. Their decision was conveyed to the Union by virtue of a memorandum from Billings to Carr dated June 30 (Tr. 181, 182; GC Ex. 3). The subject of the memorandum is "Unprotected Conduct"; it states, in pertinent part

> On June 8, 2006, Susan Sandoval, staff representative, Indian Educators Federation (IEF) created a disturbance at the Santa Clara Day School . . . . The disturbance resulted in the principal of the school, Robin Rodar, telephoning the Santa Clara Tribal Police for assistance. As you are keenly aware, this is not the first incident of misconduct by Ms. Sandoval. She has established a pattern of conduct over the past several years that is routinely "too far out of line".
>
> On December 2, 2005, I provided you with a memorandum entitled "Protected Activity and Flagrant Misconduct" [GC Ex. 2]. That memorandum cited a November 10, 2005, incident where Ms. Sandoval engaged in flagrant misconduct when functioning as a Union representative. My memorandum put the Union on clear and advance notice that the Bureau would not tolerate future conduct by Ms. Sandoval (or any other union representative) that exceeded the boundaries of protected activity. I advised you as well that I believed it was appropriate to provide the Union with advance notice that Ms. Sandoval would no longer be granted access to Agency facilities if her future conduct "exceeds the boundaries of protected activity" . . . . I have also personally discussed appropriate and inappropriate conduct with Ms. Sandoval on numerous occasions. [There is no evidence as to the dates and substance of such discussions.] Verbal abuse of management officials is a chronic issue with Ms. Sandoval. She and the IEF were well aware of our concerns in this regard and clearly on notice as to the consequences of continued opprobrious conduct. Regrettably, the warnings and counsel have not corrected the situation with Ms. Sandoval. This is evidenced by the most recent incident on June 8, 2006.

Billings then set forth a detailed account of his impression of the incident of June 8 along with his conclusion that Sandoval's presence at the meeting was not a valid exercise of her function as a Union representative. Billings also expressed the conclusion that, even if Sandoval's presence at the meeting was protected activity, she had engaged in flagrant misconduct. The memorandum continues as follows:

> . . . I[n] making this determination, I have considered the totality of the circumstances, including the place and subject matter of the incident, whether the incident was impulsive, designed, or provoked, and the pattern of conduct and impact on the Bureau. . . . These principals, along with Ms. Sandoval's past record of misconduct and my conversations with management officials regarding the appropriate action, guided me as I reviewed this incident.
>
> . . . . .
>
> Finally, with respect to the pattern of conduct and impact on the Bureau, I find Ms. Sandoval's misconduct to be repetitive. [Billings briefly described the incident of November 10, 2005]
>
> . . . For all these reasons and those previously expressed to you and Ms. Sandoval in the past, effective immediately, Ms. Sandoval is no longer permitted access to any Bureau (Indian Affairs or OST) facilities. . . . We have taken action to ensure that Bureau security personnel terminate her access privileges. If Ms. Sandoval attempts to enter our facilities, appropriate law enforcement officials will be contacted and criminal charges may be filed.

On cross-examination Billings testified that Sandoval would not have been barred from the Respondent's facilities had it not been for the incident of June 8. He further stated that his impression of the events of June 8 was based upon his conversation with Rodar and his review of the statements submitted by Himebaugh and Tomhave (Tr. 194).

The Effect of the Respondent's Action on the Union

According to Carr, Sandoval's inability to enter the Respondent's facilities had a "devastating" effect on the Union's ability to service its members. He also testified that, for whatever reason, the Union did not assign another field representative to cover the job sites. Sandoval's previous suspension by the Union occurred during the holiday season when the schools were closed and there was not much activity (Tr. 37-39). Sandoval testified that, as a field representative, she spends 80 percent of her time in the field. Her territory covers seven states and between 1,700 and 1,900 employees. Although Union stewards are present at the various job sites, they are volunteers who, with a few exceptions, lack the ability to handle grievances on their own (Tr. 55, 56).

The General Counsel offered no explanation as to why the Union did not assign at least a temporary replacement to cover Sandoval's territory during the approximately seven months that she was unable to visit Respondent's facilities. It is, therefore, doubtful that the effect on the Union of Sandoval's inability to visit Respondent's facilities was as dramatic as Carr and Sandoval suggested. However, the evidence supports the proposition that the Respondent essentially deprived the Union of the benefit of Sandoval's services. Neither the Respondent nor the Authority is entitled to make that determination, what is subject only to the right of the Respondent to maintain order and security.

Discussion and Analysis

The Controlling Law

There is a long line of Authority precedent to the effect that an employee may only be disciplined for engaging in activity which is protected under §7102 of the Statute when he or she has been engaged in "flagrant misconduct" or other conduct which is so egregious that it loses the protection of the Statute, *U.S. Dept. of the Air Force, etc., Davis Monthan Air Force Base, Tucson, Arizona*, 58 FLRA 636 (2003). While the flagrant misconduct standard is most often applied to cases involving the conduct of employees, it has been extended by analogy to situations involving the conduct of non-employees who are engaged in representational activities, *Bureau of Indian Affairs, Isleta Elementary School, Pueblo of Isleta, New Mexico*, 54 FLRA 1428, 1440 (1998) (Isleta). In Isleta the Authority held that the denial of access by a

union's employee to the agency's premises was an unlawful interference with the right of the union, on behalf of bargaining unit employees, to choose its representative. The Authority reasoned that the union's right to choose its representatives is an element of the right of employees to "form, join or assist any labor organization" as guaranteed in §7102 of the Statute, 54 FLRA at 1438. See also, *Philadelphia Naval Shipyard*, 4 FLRA 255, 266 (1980).

In *Dept. of the Air Force, Grissom Air Force Base, Indiana*, 51 FLRA 7, 12 (1995) (*Grissom*) the Authority cited four relevant factors to be used in striking a balance between the rights of employees and the right of employing agencies to maintain order and decorum. Those factors are: (1) the place and subject matter of the discussion, (2) whether the outburst was impulsive or designed, (3) whether the outburst was in any way provoked by the employer's conduct, and (4) the nature of the intemperate language and conduct. The fourth factor is, by its very nature, a flexible standard, the application of which is dependent upon individual circumstances. The Authority has held that an evaluation of the conduct at issue depends upon the facts of the individual case, *Dept. of Defense, Defense Mapping Agency Aerospace Center, St. Louis, Missouri*, 17 FLRA 71, 81 (1985) (*Defense Mapping*).

A review of Authority decisions regarding the issue of flagrant misconduct or otherwise unacceptable behavior reflects adherence to the case-by-case approach approved in *Defense Mapping*. For example, in *United States Forces Korea/ Eighth United States Army*, 17 FLRA 718, 728 (1985) it was held that flagrant misconduct occurred when a union representative published a letter in a foreign newspaper containing derogatory and defamatory statements about U.S. government officials. Yet, in *Federal Aviation Administration, Honolulu, Hawaii*, 53 FLRA 1762, 1772 (1998) the Authority declared that statements made on behalf of a union do not fall outside the protection of the Statute merely because they are offensive. Such statements are grounds for discipline only when they are blatantly offensive (such as racial epithets) or made with a reckless disregard for the truth. *U.S. Dept. of Justice, U.S. Marshals Service, et al.*, 26 FLRA 890, 901 (1987) stands for the principle that a physical response in a labor dispute is beyond the limits of acceptable behavior. However, in Dept. of the *Air Force, 315th Airlift Wing, etc.*, 57 FLRA 80 (2001) the Authority held that there is no *per se* rule that physical touching is beyond the protection of the Statute.

The issue in this case is whether Sandoval's conduct was

so egregious as to outweigh the right of bargaining unit employees, through the Union, to choose her as their representative. In view of the fact that Sandoval is not an "employee" within the meaning of §7103(a)(2) of the Statute, she herself has no rights under the Statute vis-a-vis the Respondent. Therefore, the issue of protected activity, while relevant to an assessment of each incident, is not crucial to this Decision since Sandoval herself could not have engaged in such activity on her own behalf.

It is not necessary to determine whether the incidents of October 28, 2003, and November 10, 2005, would, individually or together, have justified the Respondent's action because Billings, who made the decision to bar Sandoval from the Respondent's premises, acknowledged that the action was triggered by the incident of June 8, 2006. However, since Sandoval's prior conduct is a legitimate factor in evaluating the Respondent's action, I will address each of the incidents in chronological order.

The incident of October 28 may be disposed of quickly. I have assigned no weight to the evidence of that incident since it was obviously an afterthought in an effort by the Respondent to justify its action. It occurred more than two years before the incident of November 10, which was the next one cited by the Respondent, and was not addressed in any of Billings' communications to the Union. It is, however, yet another example of the failure of Respondent's representatives to take decisive action to curtail Sandoval's disruptive conduct. While Sandoval might have been entitled to attend the tribal consultation as a member of the general public, she was not entitled to waste the time of the participants by her self-aggrandizing harangue. Yet, whether for cultural or other reasons, she was not ruled out of order or specifically told to be quiet. Had she refused to do so, she could have been expelled from the conference.

The incident of November 10 is another matter. It occurred within a reasonable interval before the incident of June 8 and, as tacitly acknowledged by Sandoval and the Union, was beyond the protection of the Statute. However, the Union took reasonably prompt disciplinary action against Sandoval and, whatever her motives, Sandoval apologized, both immediately after the incident and after she was disciplined. While the Respondent might have thought that Sandoval had gotten off too easy, it took no further action at that time, perhaps in the hope that Sandoval would get the message.

The incident of June 8 can most charitably be called a fiasco for which the Respondent must share at least equal blame with the Union. As has been shown, Rodar did not take decisive action either by expelling Sanchez and Sandoval immediately upon their arrival, specifically telling them to leave if they did not turn off the tape recorder, or telling them that the police were on their way. Instead, whether from a lack of confidence or a misguided sense of courtesy, Rodar allowed Sandoval to take advantage of the situation.

The Respondent argues that, because Sanchez and Sandoval were not entitled to notice of the meeting or to attend, their presence was not protected activity. While that was true at the outset of the meeting, their activities became protected after Rodar said that they were welcome to stay, albeit under certain conditions. Whatever else may be said about their conduct, it is abundantly clear that Sanchez was at the meeting in an attempt to keep her job and that Sandoval was with her as her representative on behalf of the Union. In fact, Rodar allowed Sandoval to address the parents after declining to tell them why Sanchez's contract had not been renewed. Thus, Sandoval was acting squarely within the scope of §7102 of the Statute. Stated otherwise, the Respondent, through Rodar, could have expelled Sanchez and Sandoval from the meeting or could have required them to turn off the tape recorder as a condition of staying. The Respondent could not deprive Sanchez or the Union, through Sandoval, of the protection of the Statute.

My inquiry must now turn to the question of whether Sandoval's conduct was so egregious as to over-ride the right of the Union to choose her as its representative, *Defense Mapping*. In considering Rodar's description of what transpired, and without regard to the testimony of Sanchez or Sandoval, I have concluded that Sandoval's actions, while hardly exemplary, did not justify the Respondent's actions. In making this determination, I have considered the *Grissom* factors as follows:

1. <u>The place and subject matter of the discussion.</u> The meeting took place at Sanchez's workplace and concerned the non-renewal of her contract of employment. Sandoval could have been expelled but was not. Therefore, this factor does not support the Respondent's action.

2. <u>Whether the outburst was impulsive or designed.</u> Rodar's testimony indicates that, while Sandoval's conduct may be characterized as both impulsive and designed, it did not

amount to an outburst and is in stark contrast to her conduct on November 10. Sandoval's actions can fairly be described as rude and obstructive, but, in spite of Rodar's feeling of intimidation, Sandoval was neither loud nor threatening on this occasion.

3. Whether the outburst was in any way provoked by the employer's conduct. Again, there was no outburst. However, Rodar did not provoke Sandoval's refusal to turn off the tape recorder or her other disruptive conduct.

4. The nature of the intemperate language and conduct. Whatever else may be said about Sandoval's language and conduct, it was not intemperate.

In summary, the first of the *Grissom* factors does not support the Respondent's action and the rest are inapplicable to the incident of June 8. There can be no legitimate doubt that Sandoval was rude, stubborn and disruptive. However, she was neither verbally nor physically abusive. More importantly, the disruptive effect of her conduct could easily have been mitigated by the Respondent's responsible representatives.

The above conclusions should not be construed as condoning Sandoval's conduct or as leaving the Respondent with no recourse in the face of similar conduct by Sandoval in the future. Her presence need not be tolerated in meetings where she has no valid representational function. If she is to be asked to leave, she should be told so unequivocally so that, in fairness to Sandoval, there can be no valid doubt as to the Respondent's position. It goes without saying that flagrant misconduct, as defined by Authority precedent, need not be tolerated. The Respondent can and should inform the Union whenever Sandoval engages in allegedly inappropriate conduct so that it can take corrective action as it sees fit and can decide whether the interests of bargaining unit members are being well served. While the Respondent suggests that the Union did not exercise sufficient control over Sandoval, it disciplined her for her conduct on November 10 and expelled her from a bargaining session after she had regained access to the Respondent's facilities.

Billings' correspondence to Carr indicates that he is well aware of the balance that must be maintained between the Union's right to select its representatives and the Respondent's right to maintain order and security. The Respondent's action, through Billings, in having Sandoval

barred from Respondent's facilities, at least for a time, might well have been permissible if the incident of June 8 had taken place as described. Rodar's testimony indicates that Billings was proceeding on the basis either of misinformation or a misinterpretation of information which he received from the only management witness to the incident. However, his good faith and correct interpretation of the law do not exonerate the Respondent from the consequences of a violation of the Statute.

The General Counsel has suggested that the Respondent was out to get Sandoval and that this agenda colored the decision to bar her from its facilities. The evidence does not support that allegation. While Respondent's management representatives were understandably annoyed by Sandoval's abrasive personality and officious conduct, there is nothing to suggest that the Respondent's decision was based upon anything other than its perception of the facts. I am not persuaded otherwise by Sandoval's testimony as to the refusal of the Respondent to allow employees to leave their work stations to consult with her or to allow her to deliver literature on the school parking lot (Tr. 102-104).

The Remedy

Without prejudice to its denial of liability, the Respondent maintains that this case is at least partially moot because Sandoval has been allowed access to its facilities since February 14, 2007. The Respondent therefore argues that relief, if any, should be limited to a traditional posting.

It is undisputed that Sandoval's access to the Respondent's premises was restored on February 14, 2007, apparently by virtue of pre-judgment injunctive relief in an action before the U.S. District Court. However, neither the operative order nor other pleadings from that action have been offered in evidence. Although neither of the parties has made a representation as to the basis for the injunction, it is safe to assume that the court did not usurp the exclusive jurisdiction of the Authority or of the cognizant United States Court of Appeals under §§7118 and 7123(b) of the Statute by determining whether the Respondent committed an unfair labor practice. Accordingly, the termination or extension of the injunction will depend on legal issues which, while possibly related to some of the evidence in this case, are distinct from those which I have been called upon to consider. It therefore follows that, regardless of the practical effect of the Authority's adoption of the proposed

Order, this case is not moot.

The issue of a remedy is another matter. The General Counsel has proposed that, along with a cease and desist order and the posting of a notice, the Respondent be directed to rescind the letter of June 30, 2006. Such action by the Respondent would add nothing of substance to the cease and desist order in view of the fact that, since Sandoval is not the Respondent's employee, there is no need to expunge her record. Furthermore, a letter of rescission could cause confusion as to whether the Respondent may take appropriate action in the future based upon Sandoval's conduct. Accordingly, I will recommend that the remedy be limited to a cease and desist order and the posting of a notice. Both the proposed order and notice will indicate that, in exercising her right of access to the Respondent's facilities, Sandoval is subject to the same rules governing security as would apply to other non-employees of the Respondent.

For the reasons stated above, I have concluded that the Respondent committed an unfair labor practice in violation of §7116(a)(1) of the Statute by denying access to its facilities to Susan Sandoval. Accordingly, I recommend that the Authority adopt the following Order:

ORDER

Pursuant to ∋2423.41(c) of the Rules and Regulations of the Authority and ∋7118 of the Federal Service Labor-Management Relations Statute (Statute), it is hereby ordered that the Department of the Interior, Bureau of Indian Affairs, Washington, DC, shall:

1. Cease and desist from:

(a) Prohibiting Susan Sandoval from entering the facilities of the Bureau of Indian Affairs (BIA) and the Office of the Special Trustee (OST) in order to engage in representational activities, subject to the same security procedures as apply to all other non-employees.

(b) In any like or related manner, interfering with, restraining or coercing its employees in the exercise of their rights assured by the Statute.

2. Take the following affirmative action:

(a) Allow Susan Sandoval to enter the facilities of

the BIA and the OST in order to engage in representational activities, subject to the same security procedures as apply to all other non-employees.

(b) Post at all BIA and OST facilities, copies of the attached Notice on forms to be furnished by the Authority. Upon receipt of such forms they shall be signed by the Assistant Secretary, Indian Affairs, Department of the Interior, and shall be posted and maintained for 60 consecutive days thereafter in conspicuous places, including all bulletin boards and other 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.

(c) Pursuant to ∋2423.41(e) of the Rules and Regulations of the Authority, notify the Regional Director of the Dalas Region, Federal Labor Relations Authority, in writing, within 30 days of the date of this Order, as to what steps have been taken to comply.

Issued, Washington, DC, June 6, 2007

PAUL B. LANG
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 Interior, Bureau of Indian Affairs, Washington, DC, violated the Federal Service Labor-Management Relations Statute (Statute) and has ordered us to post and abide by this Notice.

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT prohibit Susan Sandoval from entering the facilities of the Bureau of Indian Affairs and the Office of the Special Trustee in order to engage in representational activities, subject to the same security procedures as apply to all other non-employees.

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

WE WILL allow Susan Sandoval to enter the facilities of the BIA and the OST in order to engage in representational activities, subject to the same security procedures as apply to all other non-employees.

_____
(Agency)

Dated: _____ 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 its provisions, they may communicate directly with the Regional Director, Dallas Regional Office, whose address is: Federal Labor Relations Authority, 525 S. Griffin Street, Suite 926, LB-107, Dallas, Texas 75202-1906, and whose telephone number is: 214-767-6266

CERTIFICATE OF SERVICE

I hereby certify that copies of the DECISION issued by PAUL B. LANG, Administrative Law Judge, in Case No. DA-CA-06-0533, were sent to the following parties:

CERTIFIED MAIL & RETURN RECEIPT	**CERTIFIED NOS:**
Michael A. Quintanilla, Esq. Federal Labor Relations Authority 525 S. Griffin St., Suite 926, LB-107 Dallas, TX 75202-1906	**7004 1350 0003 5175 2645**
Patricia Armstrong Hargrave, Esq. Office of the Solicitor U.S. Department of the Interior 1849 C Street, NW, MS 7308 Washington, DC 20240	**7004 1350 0003 5175 2652**
Susan Sandoval Indian Educators Federation AFT, AFL-CIO P.O. Box 26255 Albuquerque, NM 87125	**7004 1350 0003 5175 2669**

DATED: June 6, 2007
Washington, DC