64 FLRA No. 66

UNITED STATES
DEPARTMENT OF TRANSPORTATION
FEDERAL AVIATION ADMINISTRATION
WASHINGTON, D.C.
(Respondent)

and

NATIONAL AIR TRAFFIC
CONTROLLERS ASSOCIATION, AFL-CIO
(Charging Party)

BN-CA-05-0222

DECISION AND ORDER

January 28, 2010

Before the Authority: Carol Waller Pope, Chairman, and Thomas M. Beck and Ernest DuBester, Members [1]

I. Statement of the Case

This unfair labor practice case is before the Authority on exceptions to the attached decision of the Administrative Law Judge (Judge) filed by the Respondent. The General Counsel (GC) and the Charging Party filed oppositions to the Respondent's exceptions.

The complaint alleges that the Respondent violated § 7116(a)(1) and (2) of the Federal Service Labor-Management Relations Statute (the Statute) by ordering the removal of the Charging Party's Local N90 president (the president) from the Respondent's premises because the president engaged in protected activity. *See* Judge's Decision (Decision) at 1-2. The Judge determined that the Respondent violated § 7116(a)(1) and (2) of the Statute as alleged.

For the following reasons, we deny the Respondent's exceptions.

II. Background

The president and his supervisor had an impromptu discussion concerning staffing levels for an upcoming shift and the president's belief that those staffing levels were insufficient under the parties' collective bargaining agreement. Decision at 4-5. During this discussion, the supervisor told the president that a staffing decision had not been made yet but would be made later in the shift, and he repeated this statement after the president protested the lack of an immediate decision. *Id.* at 5. During this conversation, which took place at the supervisor's "position" in the operations room, the president stated to the supervisor, "fuck you, I don't give a fuck." *Id.* at 7, 6 (quoting Transcript (Tr.) at 96) . After the exchange, the president left the supervisor's work area. Decision at 5.

Thereafter, the supervisor summoned a security guard to escort the president back to the operations room. Once there, the supervisor informed the president that he was placing him on administrative leave and directed the security guard to escort the president off of the Respondent's premises. The president was so escorted in view of ten or more bargaining-unit employees. [2] *Id.* at 6. A charge was filed, and a complaint issued alleging that the Respondent's conduct violated Section 7116(a)(1) and (2) of the Statute.

III. Judge's Decision

The Judge set forth the framework established by the Authority in *Letterkenny Army Depot*, 35 FLRA 113 (1990) (*Letterkenny*) for resolving complaints of alleged discrimination in violation of § 7116(a)(1) and (2) of the Statute. Under that framework, the GC establishes a *prima facie* case of discrimination by demonstrating that: (1) the employee against whom the alleged discriminatory action was taken was engaged in protected activity; and (2) such activity was a motivating factor in the agency's treatment of the employee. Once the GC makes the required *prima facie* showing, a respondent may seek to establish the affirmative defense that: (1) there was a legitimate justification for the action; and (2) the same action would have been taken even in the absence of the protected activity. If the respondent establishes an affirmative defense, then the Authority will conclude that the GC has not established a violation of the Statute. *See Letterkenny*, 35 FLRA at 119.

1. Member Beck's dissenting opinion is set forth at the end of the decision.

2. Subsequent to the president's removal from the premises, the supervisor called back the president to perform work on overtime. *See* Decision at 7.

The Judge found that the president's purpose in initiating the discussion with the supervisor was "to resolve the question of assigning overtime so as to fill expected vacancies in the oncoming shift[,]" and that the number of employees assigned to a shift affects the workload of individual employees. Decision at 9. The Judge also found that "[t]he assignment of overtime and the workload of employees are conditions of employment[,]" and that "one of the purposes of a labor organization . . . is 'dealing with an agency concerning . . . conditions of employment'." *Id.* at 9 (quoting § 7103(a)(4) of the Statute). In addition, the Judge found that the parties' agreement contemplates discussion between the Union and the Respondent regarding staffing levels and overtime, and he concluded that the president was engaged in protected activity. *See* Decision at 9.

Turning to whether the Respondent had a legitimate justification for its actions, the Judge noted that, when the alleged discrimination concerns discipline for conduct occurring during protected activity, a necessary part of the respondent's defense is that the conduct constituted flagrant misconduct "or otherwise exceeded the boundaries of protected activity." *United States Dep't of the Air Force, Aerospace Maint. & Regeneration Ctr., Davis Monthan Air Force Base, Tucson, Ariz.*, 58 FLRA 636, 636 (2003) (*Air Force*) (citing *Dep't of the Air Force, 315th Airlift Wing v. FLRA*, 294 F.3d 192, 202 (D.C. Cir. 2002) ("flagrant misconduct" is "illustrative of," but not the only type of, action that could justify removal from the protection of § 7102 of the Statute)). While the Respondent has the burden of establishing its affirmative defense by a preponderance of the evidence, the GC has the overall burden of establishing the violation by a preponderance of the evidence on the record as a whole. *See id.*

The Judge stated that in order to determine whether the president lost the protection of the Statute, the Authority applies the factors set forth in *Dep't of Def., Def. Mapping Agency Aerospace Ctr., St. Louis. Mo.*, 17 FLRA 71 (1985) (*Defense Mapping*). Consistent with that decision, the Judge stated that he would consider the following factors: (1) the place and subject matter of the discussion; (2) whether the president's outburst was impulsive or designed; (3) whether the outburst was provoked by the employer's conduct; and (4) the nature of the intemperate language or conduct. Decision at 9-12 (citing *Defense Mapping*, 17 FLRA at 81).

Applying the four *Defense Mapping* factors, the Judge first found that, although one other employee was able to hear part of the conversation between the supervisor and the president, the workplace was not otherwise disrupted, and none of the other employees was aware of the situation until after the incident was over. *Id.* at 11. The Judge also found that the subject matter of the discussion raised "legitimate concerns" of the Charging Party. *Id.* Second, as to whether the outburst was impulsive or designed, the Judge found that the outburst was unplanned in that the supervisor's repeated refusal to make a decision on overtime caused the president to become frustrated and led to the outburst. *Id.* Third, as to whether the outburst was provoked, the Judge found that although the supervisor's lack of a decision may have annoyed the president, such annoyance was not sufficient provocation to justify the use of profanity.[3] *Id.* Finally, as to the nature of the intemperate language, the Judge found that the profanity was brief, delivered in a normal tone, and unheard by other employees.

Based upon his evaluation of the above factors, the Judge determined that the president's conduct did not "fall outside the protection of the Statute." *Id.* at 10. Thus, the Judge found that the Respondent violated § 7116(a)(1) and (2) of the Statute. The judge recommended, as relevant here, a cease-and-desist order and a notice-posting at the New York Terminal Radar Approach Control (NY TRACON).

IV. Positions of the Parties

A. Respondent's Exceptions

The Respondent contends that the Judge misapplied the first, second, and fourth *Defense Mapping* factors. The Respondent argues that, in so doing, the Judge failed to consider the "totality of the circumstances" and focused on whether the supervisor's actions had a coercive effect on Charging Party activity. Exceptions at 9.

According to the Respondent, the Judge minimized the importance of the first factor — place and subject matter of the discussion. The Respondent states that, although Authority precedent acknowledges "robust debate" during highly charged grievance discus-

3. We note that the Judge referenced a "minor issue of fact" as to whether the supervisor put his finger near the Union president's face during the incident. Decision at 11 n.12. The Judge stated that the supervisor's gesture, if it actually occurred, would not have justified the use of profanity. *Id.* No exceptions to that finding were filed, and we do not address it further.

sions, this case involves a discussion about routine shift assignments, which is a "daily, mundane and innocuous occurrence at NY TRACON" in which one would not anticipate an outburst of profanity. *Id.* at 10-11.

With regard to the second factor — whether the outburst was impulsive or designed — the Respondent asserts that the president's conduct was "designed to humiliate and embarrass [the supervisor] in front of subordinates and peers during the normal course of business." *Id.* at 15. According to the Respondent, it is immaterial that there was only one witness to the president's outburst because NY TRACON is a small operation where every employee knows every other employee and the president's actions were "grist for the rumor mill." *Id.* at 16. The Respondent notes that "abusive language can constitute verbal harassment" that triggers financial liability. *Id.* at 17.

As to the fourth factor — the nature of the intemperate language or conduct — the Respondent argues that the Judge "illogically assumes that private insubordination cannot affect discipline in the workplace." *Id.* at 11. In this regard, the Respondent relies on *Felix v. N.L.R.B.*, 251 F.3d 1051 (D.C. Cir. 2001) (*Felix*), where the court remanded a case to the National Labor Relations Board (NLRB) and held that an employee's repeated statements of obscenities to his supervisors weighed in favor of the employee losing the protection of the National Labor Relations Act (the Act). The Respondent further argues that the president's conduct was incompatible with the Respondent's Human Resources Personnel Manual (the HR Manual) and its Table of Disciplinary Offenses and Penalties (the Table of Penalties). In addition, the Agency refers to a telephone conversation (the phone conversation) between the president and the supervisor that took place on the evening before the incident in the operations room. *See* Exceptions at 5.

Based on the foregoing, the Respondent argues that the president's actions lost the protection of the Statute and, as a result, the Respondent did not violate the Statute as alleged.

B. GC's Opposition

The GC asserts that the Authority should not consider the Respondent's arguments related to the HR Manual or the Table of Penalties because those documents were never introduced at the hearing. *See* Opp'n at 10, citing 5 C.F.R. § 2429.5. [4] Similarly, the GC argues that the Authority should not consider the Respondent's argument regarding its exposure to financial liability because that argument was raised for the first time in its exceptions.

The GC also asserts that the Judge correctly noted that the subject matter of the discussion is within the scope of the Charging Party's legitimate concerns. In addition, the GC contends that the Judge properly concluded that the president's conduct was not removed from the protection of the Statute. *See* Opp'n at 9. According to the GC, the supervisor admitted that only one other employee was in a position to overhear the conversation, and the facts demonstrate that the other employee did not hear any profanity. *See id.* at 2-3; Decision at 6-7. The GC also asserts that the Judge's conclusion that the president's outburst was impulsive is consistent with the record and Authority precedent. According to the GC, there is no evidence that the president's actions were intended to humiliate and embarrass the supervisor. Moreover, the GC asserts that the Judge correctly found that the president's statement was brief and delivered in a normal tone of voice. [5] *See id.* at 9.

C. Charging Party's Opposition

As relevant here, the Charging Party contends that the Judge properly followed and applied *Defense Mapping* in finding that the president's conduct was not removed from protection of the Statute. [6]

V. Preliminary Issue

Under § 2429.5 of the Authority's Regulations, the Authority will not consider "evidence offered by a party, or any issue, which was not presented in the proceedings before the . . . Administrative Law Judge[.]" 5 C.F.R. § 2429.5. Pursuant to this regulation, the Authority will not consider arguments that a party raises in its exceptions if the arguments could have

4. The pertinent wording of § 2429.5 is set forth below.

5. With regard to the Respondent's reliance on the court's decision in *Felix*, the GC notes that, on remand, the NLRB concluded that the affected employee's statement was protected. Opp'n at 8 (citing *Felix Indus.*, 339 NLRB 195 (2003)).

6. The Charging Party also contends that the Judge properly recommended a nationwide posting. However, contrary to the Charging Party's contention, the Judge did not recommend a nationwide posting and, instead, specifically stated that "the posting of a notice at locations other than the [NY] TRACON is not considered to be necessary." *See* Decision at 13. As no exceptions were filed to the scope of the posting, we do not address this issue further.

been, but were not, raised before an administrative law judge. *See, e.g., United States Dep't of Def., Def. Distribution Depot, Anniston, Ala.*, 61 FLRA 108, 109 (2005).

In its exceptions, the Respondent raises arguments regarding the HR Manual, the Table of Penalties, and financial liability. The Respondent could have, but did not, introduce the HR Manual or Table of Penalties before the Judge. Similarly, the Respondent could have, but did not, make an argument regarding financial liability before the Judge. Consistent with the above-cited authority, we do not consider the Respondent's arguments in this regard.

In addition, in arguing that the Judge misapplied the fourth *Defense Mapping* factor, the Respondent cites a phone conversation that took place on the evening before the incident in the operations room. The Respondent did not rely on the phone conversation at the hearing, and although the Respondent did cite the conversation in its post-hearing brief to the Judge, the parties' dispute has consistently focused solely on the statement in the operations room. Further, the Judge made no reference to the phone conversation in his decision, and the Respondent has not excepted to the decision on that basis. In these circumstances, and consistent with the above-cited authority, we decline to consider the phone conversation in resolving the Respondent's exceptions.

VI. Analysis and Conclusions

As an initial matter, the Respondent does not except to the Judge's findings that the president was engaged in protected activity generally, [7] or that the appropriate factors to apply are those set forth in *Defense Mapping*. Rather, the Respondent argues only that the Judge misapplied the first, second, and fourth *Defense Mapping* factors. Accordingly, we address only those three factors. [8]

Under the first *Defense Mapping* factor, the Authority considers the place and subject matter of the discussion. [9] *See* 17 FLRA at 81. In this case, there is no dispute that the discussion between the president and the supervisor occurred in the work place, at or near the supervisor's work space, in a somewhat open area. *See* Decision at 11. It also is undisputed that: the president and the supervisor spoke in normal conversational tones; only one other employee overheard part of the discussion; and that other employee did not hear any profanity. *See id*. at 12, 6. In addition, as the Judge found, the Respondent's operations were not disrupted, and the "subject matter of the discussion was within the scope of the [Charging Party's] legitimate concerns." *Id*. at 11.

The Respondent argues that, as discussions regarding work assignments are "a daily, mundane, and innocuous occurrence[,]" the president's actions do not deserve protection. Exceptions at 10. However, the Respondent provides no basis for concluding that, even if true, that characterization of the discussion detracts from the significance of the undisputed facts and circumstances found by the Judge and set forth above. Accordingly, in agreement with the Judge, we find that the first *Defense Mapping* factor supports a conclusion that the president's conduct was protected.

Under the second *Defense Mapping* factor, the Authority considers whether the outburst was impulsive or designed. *See Defense Mapping*, 17 FLRA at 81. It is undisputed that the supervisor wished to delay making any decision about the use of overtime on the next shift until he obtained additional information. *See* Decision at 5-6. It also is undisputed that the president sought an immediate decision and, when the supervisor refused, the president uttered the profanity in "frustrat[ion]." *Id*. at 11.

Addressing whether the president's conduct was impulsive or designed, the Respondent claims that the president's conduct and language were "calculated" flagrant acts of misconduct. Exceptions at 14. Similarly, the Respondent argues that the president's use of profanity was "designed to humiliate and embarrass" his supervisor in front of subordinates and peers during the normal course of business. *Id.* at 14-15. However, the Respondent cites no record evidence that supports its

7. As such, much of the premise of the dissent – that the president was not engaged in protected activity – addresses an issue that is not before us.

8. We note that the *Defense Mapping* factors were affirmed in *Dep't of the Air Force, Grissom Air Force Base, Ind.*, 51 FLRA 7, 12 (1995) (*Grissom*).

9. Thus, to the extent that the dissent is concerned that the discussion took place "in the workplace during work time[,]" Dissent at 13, the *Defense Mapping* test gives due consideration to these factors.

argument that the president's conduct was not impulsive. Based on the foregoing, the Respondent has not established that the president's utterance was designed, or planned, in any way. *See U.S. Dep't of Def., Def. Contract Mgmt. Agency, Orlando, Fla.*, 59 FLRA 223, 224, 227 (2003) (Chairman Cabaniss dissenting) (union official calling employee a "liar" and "bad mouthing" a management official found to be impulsive). Accordingly, we find, in agreement with the Judge, that the second *Defense Mapping* factor supports a conclusion that the president's conduct did not exceed the bounds of protected activity. [10]

The fourth *Defense Mapping* factor considers the nature of the intemperate language or conduct. *See Defense Mapping*, 17 FLRA at 82. As the Judge noted, in analyzing the nature and context of the remarks, the Authority considers whether the conduct in question was brief or prolonged, the tone of voice, and whether there was any physical conduct or threat of violence. *See* Decision at 12. As applied here, the discussion between the president and the supervisor was conducted in a normal tone, and no other employees overheard the president's profanity. *See* Decision at 12. Although the president used profanity, the Authority has held that the use of profanity, standing alone, does not remove conduct or speech from the protection of the Statute. *See, e.g.*, *AFGE*, 59 FLRA 767, 770 n.8 (2004) ("[I]t is not the words alone that are dispositive. Rather, it is the context, as established by other relevant factors, that determine whether the comment exceeds the bounds of protected activity."). *See also Grissom*, 51 FLRA at 12 (union official calling respondent's negotiator "fucking stupid" did not constitute flagrant misconduct); *U.S. Dep't of Agric., Food Safety & Inspection Serv., Wash., D.C.*, 55 FLRA 875, 880 (1999), and cases cited therein. [11] Contrary to the Respondent's assertion, the Judge did not "ignore" the nature of the intemperate language, Exceptions at 11; the Judge found that the supervisor's own testimony indicates that the burst of profanity was brief, delivered in a normal tone of voice, and not overheard by any other employee. *See* Decision at 6. Moreover, the Respondent's reliance on *Felix*, 251 F.3d 1051, is misplaced. In that case, the court found that the NLRB's "offhand treatment" of an employee's repeated obscenity directed at his supervisor (that the supervisor was "a fucking kid") was inconsistent with NLRB precedent. *Id*. at 1065, 1053. Although the court found that the repeated obscenity "weigh[ed] against protection" and remanded for the NLRB to reconsider its decision, the court did not establish that all obscene statements are unprotected. Moreover, as the GC notes, on remand, the NLRB affirmed its prior decision that the respondent unlawfully fired the affected employee based on the statements. *Felix Indus.*, 339 NLRB 195. In so doing, the NLRB found it "very significant" that — as in the instant case — the subject matter of the decision involved legitimate labor-management concerns. *Id*. at 196. Accordingly, we find, in agreement with the Judge, that the fourth *Defense Mapping* factor supports a conclusion that the president's conduct was protected.

The dissent misconstrues congressional intent concerning the limits on language used in workplace debates. Congress intended, in both the private and federal sectors, to permit uninhibited, robust, and wide-open debate, reaching beyond the strictly civil to encompass even language properly described as "intemperate, abusive, or insulting." *Old Dominion Branch No. 496, Nat'l Ass'n of Letter Carriers v. Austin*, 418 U.S. 264, 283 (1974) (*Letter Carriers*). [12]

10. We note that one of the decisions cited by the dissent contradicts the view that the character of the president's conduct necessarily removed the conduct from the scope of protected activity. *See* Dissent at 13. Specifically, in *Aluminum Co. of America*, 338 NLRB 20 (2002) (*Aluminum Co.*), the NLRB expressly considered whether the type of profanity at issue was otherwise tolerated in the workplace, and whether the employer had demonstrated that it had disciplined other employees for similar outbursts in the past. *See id.* at 22. Thus, there is no basis for finding that profane outbursts necessarily are unprotected.

11. *But see AFGE*, 59 FLRA 767 (2004) (then-Member Pope dissenting) (Authority majority found that employee's use of phrase "kiss my ass" was unprotected flagrant misconduct). We note that, in *AFGE*, the Authority relied heavily on certain facts that are not present here, such as evidence regarding the "nature of the workplace" and evidence of provocation by the union. *See id.* at 771. We further note that the Authority determines, "on a case-by-case basis" taking into account "the totality of the circumstances[,]" whether an employee's conduct exceeds the bounds of protected activity. *Id.* at 771. For these reasons, *AFGE* is distinguishable from, and does not control, the instant case.

12. The dissent implies that the rule set forth in *Letter Carriers* is limited to situations such as "collective bargaining that takes place with union negotiators clearly and unequivocally in the role of union representative rather than in the role of subordinate employee, or an organizing campaign in which the employee is engaged in conduct that occurs outside of the workplace and outside of his regular work time." Dissent at 13. Nothing in *Letter Carriers* or any other authority indicates that the rule is so limited. Further, although the dissent implies that *KSL Claremont Resort*, 344 NLRB 832, 835 (2005), set forth a "workplace" exception to protected activity, *KSL Claremont Resort* did no such thing. That decision stated that "[t]he standards for behavior in negotiations are much different than the standards of conduct for an employee in a luxury hotel[;]" it did not indicate that, merely because activity occurs in the workplace, it is not statutorily protected.

Although, as discussed below, courtesy and respect are arguably more effective forms of address, nevertheless, well established private and federal sector precedent has consistently upheld these broader limits. [13] *See AFGE*, 59 FLRA 767, 774 (2004) (then-Member Pope, dissenting) (citing and discussing cases). As a result, the dissent's effort to expand the definition of conduct that "exceeds the boundaries of protected activity" to include "any misconduct" is flawed. As we have acknowledged above, "flagrant misconduct" is not the only standard theoretically available for determining whether a union official's speech or other conduct loses the Statute's protection. *See Air Force*, 58 FLRA at 636. However, the dissent's proposed "any misconduct" standard would be inconsistent with the principle, discussed above, that language may be "intemperate, abusive, or insulting[]" and nonetheless be protected. *Letter Carriers*, 418 U.S. at 283.

Finally, as indicated above, that we hold the union representative's intemperate remark in this case protected does not imply we approve of the use of profanity in the workplace as a labor-management relations tactic. We have no quarrel with the dissent's preference for civility. However, we are bound to respect and enforce Congress's policy determinations protecting robust debate. Accordingly, we are compelled to reject the dissent's effort to convert good advice concerning workplace behavior into a statutory prescription.

Based on the foregoing, we find that the Judge correctly applied *Defense Mapping* and that the Respondent violated § 7116(a)(1) and (2) of the Statute as alleged. Consequently, we deny the Respondent's exceptions.

VII. Order

Pursuant to § 2423.41(c) of the Authority's Regulations and § 7118 of the Statute, the United States Department of Transportation, Federal Aviation Administration, Washington, D.C. (Respondent) shall:

1. Cease and desist from:

(a) Discriminating against any representative of the National Air Traffic Controllers Association, AFL-CIO (Charging Party) by placing him or her on administrative leave or by causing him or her to be removed from any of the Respondent's facilities because he or she has engaged in activities protected under the Statute.

(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 in order to effectuate the purposes and policies of the Statute:

(a) Rescind and expunge any reference to the incident of March 5, 2005, from the personnel record of the Charging Party representative who was placed on administrative leave and removed from the New York TRACON on that date.

(b) Post at the New York TRACON copies of the attached Notice on forms to be furnished by the Authority. Upon receipt of such forms, they shall be signed by the New York TRACON Air Traffic Manager 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.

---

13. The remaining decisions cited by the dissent are inapposite. Several of the cited decisions do not involve employees who were engaged in statutorily protected activities when they allegedly committed acts of misconduct. *See McKowen v. MSPB*, 703 F.2d 14, 15 (1st Cir. 1983); *Ramos v. U.S. Postal Serv.*, 292 Fed.Appx. 910, 912 (Fed. Cir. 2008); *Webster v. Dep't of the Army*, 911 F.2d 679, 688 (Fed. Cir. 1990); *Pinegar v. FEC*, 105 M.S.P.R. 677, 689 (2007); *Beaudoin v. Dep't of Veterans Affairs*, 99 M.S.P.R. 489, 495, *on reconsid.*, 100 M.S.P.R. 507 (2005), *aff'd*, 202 Fed.Appx. 460 (Fed. Cir. 2006). By relying on them, the dissent implies that the existence of statutorily protected activity is irrelevant. It is not. Moreover, one of the cited decisions actually supports our decision. Specifically, in *Beaudoin*, the Merit Systems Protection Board emphasized that, in certain settings – such as equal employment opportunity (EEO) counseling sessions – employees are allowed "'more leeway' regarding disrespectful comments about agency personnel" because "EEO counseling sessions, by their nature, are emotionally charged settings in which employees are expected to complain about the conduct of other agency personnel." 99 M.S.P.R. at 15-16 (citation omitted). Labor-management discussions are similar to EEO counseling sessions in this respect.

With regard to the additional NLRB decisions cited by the dissent, those decisions also are distinguishable from this case. In *Aluminum Co.*, the NLRB found an employee's activity unprotected on the basis of several factors not present here, including the facts that: there was "sustained" profanity; employees overheard (and complained about) the outbursts; there was evidence that the profanity exceeded the type of profanity that otherwise was tolerated in the workplace; and the employer demonstrated that it had disciplined other employees for similar outbursts in the past. 338 NLRB at 22. With regard to *Avondale Industries, Inc.*, 333 NLRB 622 (2001), that case involved racially inflammatory language. *See id.* at 637 (employee called supervisor a "klansman"). Given the "clearly expressed public policy against racial discrimination in the workplace[,]" the Authority similarly finds that statements reflecting "racial stereotyping" exceed the bounds of protected activity. *Veterans Admin., Wash., D.C.*, 26 FLRA 114, 116 (1987). However, the statement at issue here does not fall within, or even approach, that type of statement. As such, *Avondale* is inapposite.

(c) Include a report of the issuance of this Order and of the posting of the attached Notice in the mandatory briefing of its employees by the same method and for the same length of time that it included a report of the incident of March 5, 2005, in the mandatory briefing of its employees.

(d) Pursuant to § 2423.41(e) of the Authority's Regulations, notify the Regional Director of the Boston Region of the Authority, in writing, within 10 days from the date of this Order, as to what steps have been taken to comply.

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

The Federal Labor Relations Authority has found that the United States Department of Transportation, Federal Aviation Administration, Washington, D.C. violated the Federal Service Labor-Management Relations Statute and has ordered us to post and abide by this Notice.

WE HEREBY NOTIFY EMPLOYEES THAT:

WE WILL NOT discriminate against any representative of the National Air Traffic Controllers Association, AFL-CIO (Charging Party) by placing him or her on administrative leave or by causing him or her to be removed from any of our facilities because he or she has engaged in activities protected under the Statute.

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 rescind and expunge any reference to the incident of March 5, 2005, from the personnel record of the Charging Party representative who was placed on administrative leave and removed from the New York TRACON on that date.

WE WILL include a report of the issuance of the Order in this case and of the posting of this Notice in the mandatory briefing of our employees by the same method and for the same length of time as we included a report of the incident of March 5, 2005, in the mandatory briefing of our employees.

_____
(Agency)

Dated: _____ By: _____
(Signaure) (Title)

This Notice must remain posted for 60 consecutive days from the date of the 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, Boston Regional Office, whose address is: Federal Labor Relations Authority, Thomas P. O'Neill, Jr., Federal Building, 10 Causeway Street, Suite 472, Boston, MA 02222, and whose telephone number is: 617-565-5100.

Member Beck, Dissenting Opinion:

Some of the cases that come to the Authority are nuanced and difficult. Some are close calls. This is not such a case. Some propositions are self-evident, and here is one: When it enacted the Federal Service Labor-Management Relations Statute, Congress did not intend to immunize against discipline federal employees who, in the workplace, during work time, say to their supervisors, "fuck you." Consequently, unlike my colleagues, I conclude that the Union president's use of profanity, directed at his supervisor, in the workplace, during work time, was misconduct that is not protected by our Statute. [1]

I disagree with the Majority in several respects. First, I am not convinced that the Union president was acting in a representational capacity. While the record indicates that the president approached his supervisor to address "the question of assigning overtime," it is not apparent that his interest was necessarily representational rather than personal. *See* Judge's Decision at 5-7. The record establishes that, even after the president's misconduct and the supervisor's direction to remove him from the worksite, the supervisor assigned to the president the one overtime shift that the supervisor approved for the weekend. Judge's Decision at 7.

Second, I would find that the Judge erred by focusing his analysis solely on whether the president's actions amounted to "flagrant" misconduct. *See* Judge's Decision at 10. "Flagrant" misconduct is a sufficient – but not the only – basis upon which a union representative may lose his protections under §§ 7102 and 7116(a). *Dep't of the Air Force, 315th Airlift Wing v. FLRA*, 294 F.3d 192, 201 (D.C. Cir. 2002). When an employee — even one who happens to be a union representative — engages in misconduct of any kind, his conduct, by definition, "exceed[s] the boundaries of protected activity" *Id*. at 201-2, (citing *Dep't of the Air Force, Grissom Air Force Base, Ind.,* (*Grissom*)) 51 FLRA 7, 11 (1995) (quoting *U.S. Air Force Logistics Command, Tinker Air Force Base, Okla. City, Okla.*, 34 FLRA 385, 389 (1990). To conclude otherwise is to believe that Congress intended, through the protections afforded by our Statute, to subsidize workplace misconduct so long as it does not reach "flagrant" proportions. The president's conduct here was plainly the type of workplace misconduct that routinely results in discipline. *See, e.g., Ramos v. U.S. Postal Service*, 292 Fed.Appx. 910, 912 (Fed. Cir. 2008) (telling supervisor "fuck you, I ain't doing it" violates terms of last chance agreement that requires employee to conduct himself in a professional manner); *Kirkland-Zuck v. Dep't of HUD*, 48 Fed.Appx. 749, 751 (Fed. Cir. 2002) (Agency need not countenance disrespectful conduct towards a supervisor more than once), citing *O'Neill v. Dep't of HUD*, 220 F.3d 1354, 1364 (Fed. Cir. 2000), *cert. denied* 531 U.S. 1197 (2001); *Webster v. Dep't of the Army*, 911 F.2d 679, 688 (Fed. Cir. 1990) (disrespectful conduct to supervisor is not acceptable and constitutes just cause for discipline); *McKowen v. MSPB*, 703 F.2d 14, 15 (1st Cir. 1983) (telling supervisor to "[s]tick it in your ear" after being told to refrain from using profanity constitutes insubordination); *Pinegar v. FEC*, 105 MSPR 677, 689 (2007) (affirmed arbitrator's finding that telling supervisor her work is "crap" is actionable misconduct); *Beaudoin v. Dep't of Veterans Affairs*, 99 MSPR 489, 495 (2005) (disrespectful conduct toward a supervisor is a "clear basis" for agency discipline when it occurs in a "normal employment setting"); *In re: Aluminum Co. of America*, 338 NLRB 20, 22 (2002) (use of profanity – referring to supervisor as "son of a bitch" and "mother fucker" – removes protection of the National Labor Relations Act); *Avondale Industries, Inc. and New Orleans Metal Trades Council*, 333 NLRB 622, 637 (2001) (calling supervisor a "klansman" and impugning his ability is disrespectful and constitutes insubordination).

Third, the Majority's analysis relies on *Defense Mapping* and *Grissom* to conclude that the conduct was protected. *See* Majority at 6-7. However, the Majority fails to give even a passing reference to *Dep't of the Air Force v. FLRA*, in which the D.C. Circuit sharply criticized the Authority's rationale in *Dep't of Def. Def. Mapping Agency Aerospace Ctr., St Louis, Mo. (Defense Mapping)* and *Grissom.* 294 F.3d 192 (D.C. Cir. 2002). In *Air Force*, the Court remarked that it "defies explanation that a law enacted to facilitate collective bargaining and protect employees' right to organize prohibits employers from seeking to maintain civility in the workplace." 294 F.3d at 201, citing *Adtranz ABB Daimler-Benz Transp. v. NLRB*, 253 F.3d 19, 27-28 (D.C. Cir. 2001). The Court concluded that "it is preposterous … to hold that employees are incapable of organizing a union or exercising their statutory rights …without resort to abusive or threatening language." 294 F.3d at 198, citing *Adtranz*, 253 F.3d at 26.

Fourth, the Majority erroneously relies on *Old Dominion Branch No. 496, Nat'l Ass'n of Letter Carriers v. Austin*, 418 U.S. 264 (1974) (*Letter Carriers*), to support its notion that Congress intended for "intemper-

1. I contrast this case with *U.S. Dep't of Veterans Affairs, Med. Ctr., Richmond, Va* because the representative in that case did not engage in behavior that could properly be characterized as misconduct. *See* 63 FLRA 553, 556 n.5 (2009).

ate, abusive, or insulting" language to be tolerated in a workplace dispute like the one presented here. In *Letter Carriers*, the Court addressed whether "statements made in a union newsletter during a continuing organizational drive" could create liability under state libel law. 418 U.S. at 266. The Court reaffirmed that union representatives are afforded wide latitude in their conduct during "labor disputes" because those encounters are "heated affairs" where "[b]oth labor and management often speak bluntly and recklessly[.]" *Id.* at 272, (citing *Linn v. Plant Guard Workers Local 114*, 383 U.S. 53, 58 (1966)). *Letter Carriers* involved a classic "labor dispute" — an organizing campaign. It did not involve a disagreement between a supervisor and a subordinate employee in the workplace during work time, which can fairly be classified as a "workplace dispute." Accordingly, *Letter Carriers* is easily distinguished from the situation presented by the instant case.

The Union president's conduct here did not take place in the context of what could properly be characterized as a "labor dispute" — for example, collective bargaining that takes place with union negotiators clearly and unequivocally in the role of union representative rather than in the role of subordinate employee, or an organizing campaign in which the employee is engaged in conduct that occurs outside of the workplace and outside of his regular work time. Rather, the conduct here must be characterized as a "workplace dispute" — that is, a disagreement between a supervisor and a subordinate employee that occurs in the workplace during work time. [2]

The Majority is unwilling to draw this distinction and extends statutory protections that were intended to safeguard union representatives engaged in traditional labor relations activities that are by nature "heated affairs" to any workplace disagreement between a union representative and a supervisor regardless of when and where the encounter occurs. Our case law has not previously gone this far. The cases cited by the Majority involve circumstances where the union representative was:

- Attending, in his capacity as Chief Steward, an investigative meeting called by management (*U.S. Dep't of Def., Def. Contract Mgmt. Agency, Orlando, Fla.*, 59 FLRA 223, 223-24 (2003));
- Attending a quarterly labor-management meeting in his capacity as Acting Union President (*U.S. Dep't of Agric., Food Safety & Inspection Serv., Wash., DC*, 55 FLRA 875, 878-79 (1999));
- Addressing the agency's Chief Negotiator "during a negotiation session" (*Grissom*, 51 FLRA at 8); and,
- Responding to formal disciplinary charges in a scheduled grievance meeting (*Defense Mapping*, 17 FLRA at 82-83).

In each of these cases, and in contrast to the instant case, the disciplined employee was indisputably acting as a union representative (rather than subordinate employee) and was engaged in classic labor-management dispute resolution (rather than garden-variety workplace discussion).

For the reasons stated above, I would grant the Respondent's exceptions and find that the Respondent did not commit an unfair labor practice under our Statute.

2. The DC Circuit has recognized the same distinction between, on the one hand, conduct that facilitates "collective bargaining" and the union's "right to organize" and, on the other hand, the civil conduct that is required of all employees "in the workplace." *Air Force*, 294 F.3d at 201, citing *Adtranz*, 253 F.3d at 27-28. Similarly, the National Labor Relations Board has determined that "the standards for behavior in negotiations are much different than the standards of conduct for an employee [in the workplace]." *KSL Claremont Resort and Hotel Employees and Restaurant Employees Union Local 2850*, 344 NLRB 832, 835 (2005).