

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

MEMORANDUM

DATE: July 25, 1996

TO: The Federal Labor Relations Authority

FROM: JESSE ETELSON
Administrative Law Judge

SUBJECT: AIR FORCE FLIGHT TEST CENTER
EDWARDS AIR FORCE BASE,
CALIFORNIA

Respondent

and Case No. SF-
CA-50924

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 1406, AFL-CIO

Charging Party

Pursuant to section 2423.26(b) of the Rules and Regulations, 5 C.F.R. § 2423.26(b), I am hereby transferring the above case to the Authority. Enclosed are copies of my Decision, the service sheet, and the transmittal form sent to the parties. Also enclosed are the transcript, exhibits and any briefs filed by the parties.

Enclosures

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
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WASHINGTON, D.C. 20424-0001

AIR FORCE FLIGHT TEST CENTER EDWARDS AIR FORCE BASE, CALIFORNIA Respondent	
and AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 1406, AFL-CIO Charging Party	Case No. SF-CA-50924

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. § 2423.26(b).

PLEASE BE ADVISED that the filing of exceptions to the attached Decision is governed by 5 C.F.R. §§ 2423.26(c) through 2423.29, 2429.21 through 2429.25 and 2429.27.

Any such exceptions must be filed on or before **AUGUST 26, 1996**, and addressed to:

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

JESSE ETELSON
Administrative Law Judge

Dated: July 25, 1996
Washington, DC

**UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
OFFICE OF ADMINISTRATIVE LAW JUDGES
WASHINGTON, D.C. 20424-0001**

AIR FORCE FLIGHT TEST CENTER EDWARDS AIR FORCE BASE, CALIFORNIA Respondent	
and AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 1406, AFL-CIO Charging Party	Case No. SF-CA-50924

Major James M. Peters, Esquire
For the Respondent

Timothy Sheils, Esquire
For the General Counsel

Stan Schoen, President
For the Charging Party

Before: JESSE ETELSON
Administrative Law Judge

DECISION

Respondent suspended employee Philip Goodykuntz for one day for "discourteous and disrespectful conduct and abusive behavior towards your supervisor." An unfair labor practice complaint alleges that Respondent suspended Goodykuntz because he engaged in protected activity under the Federal Service Labor-Management Relations Statute (the Statute), in violation of section 7116(a)(1) and (2) of the Statute.

A hearing was held in Los Angeles, California. Counsel for the General Counsel and for Respondent filed post-hearing briefs. Counsel for Respondent also filed a motion to correct a number of non-substantive errors in the transcript. The motion is granted. The following findings are based on the record, the briefs, my observation of the witnesses, and my evaluation of the evidence.

Findings of Fact

Background

The Charging Party (the Union) represents employees in a bargaining unit of Respondent's employees. Mr. Goodykuntz is employed by Respondent as a civilian employee in the receiving section (or "element") within Respondent's supply unit. Goodykuntz is also a Union steward and, during the first seven months of 1995, if not earlier, spent a substantial part of his working hours on official time for negotiations. He worked a 4-day, 10-hour schedule, Monday through Thursday. By agreement, he regularly devoted most of every Tuesday, Wednesday, and Thursday to preparation for and attendance at negotiation sessions. In addition, he often had occasion to request official time for representational duties that were separate from the negotiations.

Goodykuntz's first-line supervisor is Sandra Facey, who supervises one other civilian employee directly. Ten military personnel are also under her supervision. These ten may or may not include a technical sergeant and two staff sergeants who handle much of the direct supervision of the other military personnel. Except for the prearranged official time for ongoing negotiations, Goodykuntz was required to request official time from Ms. Facey, whose decisions to grant or not to grant were governed only by a contractual standard of "reasonable and necessary" (Tr. 185, 192). It was customary in applying this standard for supervisors to consider the workload (Tr. 186). Facey had granted many discretionary requests from Goodykuntz for official time but had sometimes rejected his requests for what she explained as workload reasons.

The Incident

My findings on the relevant details of the incident giving rise to the suspension are based largely on the testimony of Facey, augmented in part by the testimony of Annie Andersen. Both of these witnesses appeared to be candid and forthcoming in their descriptions of what they observed. Although I have generally credited Facey, I did not find her testimony to be a reliable indicator of the sequence in which various aspects of the incident proceeded. To the extent that Goodykuntz's truncated version of the incident omitted details I have credited, I do not attribute this to lack of candor but to a mental state during the incident that detracted from his ability to reconstruct it in words. This state was captured most eloquently in Goodykuntz's post-incident statement to Andersen that he had "lost it" with Facey.

On August 1, 1995, a Tuesday, Goodykuntz was scheduled to take official time for negotiations beginning at 8 am. When Facey arrived at work that morning she passed by Goodykuntz's work area at approximately 7:15. Goodykuntz asked if he could speak with her and she said they could talk in her office, so he followed her there.

Goodykuntz is a large man, estimated by Facey, a woman of moderate if not diminutive proportions, as encompassing 230 pounds. Facey's office is upstairs from the main work area. Its walls have windows on two or more sides, so that the inside of the office is visible from an office next to Facey's and from a hallway at the top of the stairs. However, there is normally no one upstairs except Facey before 7:30 am.

Although it was already 7:15 or later, Goodykuntz asked Facey for official time from 7 to 8 am that morning for representational duties. Facey declined to grant this request, stating that there was work to do that morning. Goodykuntz responded that Facey was a hypocrite.¹

Goodykuntz told Facey that she was responsible for his going into a "hole on [his] leave." He also stated that his fellow civilian employee did no work. Facey responded that she was the coworker's supervisor, that "Goody" should concern himself about his own work, and that Facey would "take care of" the other employee.

Goodykuntz "brought up" past Union grievances and a pending grievance over a similar denial by Facey of his request for official time from 7 to 8 am because of workload. He also told Facey it was her fault that he had not received a "superior" rating on a recent appraisal.

Facey was seated at her desk during this incident, which lasted about 15 minutes. During much of it, Goodykuntz was standing, on the opposite side of her 30-inch-wide desk. As the altercation ended, Goodykuntz shook his finger at Facey "again" and stated, "You know what, Sandy, I used to be your friend but now you are nothing but a hypocrite." At that point, Goodykuntz was "basically leaning over [her] desk pointing his finger right in [her] face." He appeared to Facey to be "in a rage."

1

According to Goodykuntz, his sole use of this epithet came later in the conversation, after other statements had heated up the tone. The difference, in my view, is not dispositive. Goodykuntz also testified that Facey responded to his accusation by telling him that he was the hypocrite. Again, no matter.

Facey's supervisor, Annie Andersen, and Master Sergeant Milton Bryant arrived then (approximately 7:30 am) and observed the final moment of the incident through a window, although they were unable to hear any of the conversation. Ms. Andersen observed Goodykuntz to appear "very upset" and "mad." Facey had a "worried" or "scared" look. Andersen estimated Goodykuntz's pointing finger to be "less than 18 inches . . . , no farther than 10 inches" from Facey's face.

Their arrival startled Goodykuntz and caused him to step back. Facey still had a "worried" look on her face. As Andersen recalled, "[s]he just looked upset."

Analysis and Conclusions

In the often-cited case of *U.S. Air Force Logistics Command, Tinker Air Force Base, Oklahoma City, Oklahoma*, 34 FLRA 385, 388-89 (1990) (*Tinker*), the Authority summarized the broad principles governing situations like the one presented here:

Although section 7102 of the Statute guarantees employees the right to engage in activities on behalf of an exclusive representative without fear of penalty or reprisal, an employee's involvement in union activities does not immunize the employee from discipline. [Citations omitted.] Management's right to take disciplinary action under section 7106(a) (2) (A) of the Statute includes the right to discipline a union representative for activities which "are not specifically on behalf of the exclusive representative or which exceed the boundaries of protected activity such as flagrant misconduct." [Citation omitted.]

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

In determining whether an employee has engaged in flagrant misconduct, the Authority balances the employee's right to engage in

protected activity, which "permits leeway for impulsive behavior, . . . against the employer's right to maintain order and respect for its supervisory staff on the jobsite." [Citations omitted.] Relevant factors in striking this balance include: (1) the place and subject matter of the discussion; (2) whether the employee's outburst was impulsive or designed; (3) whether the outburst was in any way provoked by the employer's conduct; and (4) the nature of the intemperate language and conduct. [Citation omitted.] However, the foregoing factors need not be cited or applied in any particular way in determining whether an action constitutes flagrant misconduct.

The first issue to be decided here is whether Goodykuntz's conduct occurred in the course of protected activity and thus is to be evaluated under the "flagrant misconduct" standard. I conclude that it did. Goodykuntz asked to speak to Facey for the purpose of requesting official time, a request necessarily made in his capacity as a Union official. See *American Federation of Government Employees, National Border Patrol Council and U.S. Department of Justice, Immigration and Naturalization Service, El Paso Border Patrol Sector*, 44 FLRA 1395, 1401-02 (1992). Everything else flowed from that, although he digressed by raising some issues that were personal to him as an employee. This sort of confusion of roles is difficult to prevent when an employee functions in a dual capacity of individual and representative with respect to his supervisor. It would be an extreme measure indeed to attempt to forestall such digressions by erecting a figurative iron curtain between strictly union-oriented statements and those relating more specifically to the employee's individual status, holding all conduct arising during the latter parts of a meeting to be outside the course of protected activities. I do not believe that Goodykuntz stepped outside. The question is whether he exceeded the permissible scope of intemperate behavior.

Nor did the meeting cease to be part of a protected course of activity because, as Respondent argues, the practice under the parties' contract made the supervisor the initial arbiter of requests for official time, subject only to the grievance procedure. Assuming that the grievance procedure was available to Goodykuntz, I cannot see that avenue as being contractually exclusive in the sense that it precluded his immediate, informal pursuit of a different resolution from his supervisor. Thus, I reject any "contract" defense to the assertion that Goodykuntz conduct

occurred in the course of protected activity, whether that defense is viewed as falling under a "waiver," a "covered by," or a "contract interpretation" theory.

Second, I conclude that Goodykuntz did not exceed the broad scope of intemperate behavior that remains within the ambit of protected activity. As the Authority has made clear, most recently in *Grissom*, the counterweight against which the employee's right to engage in protected activity must be balanced is not a wide-ranging congeries of employer interests but, specifically, the employer's "right to maintain order and respect for its supervisory staff on the jobsite." The illustrative factors listed by the Authority as relevant in striking this balance have no intrinsic value in the weighing process. Their relevance is limited to the assistance they provide in resolving the conflict between the specifically identified competing interests. Thus, the Authority noted in *Grissom* that "the foregoing factors need not be cited or applied in any particular way in determining whether an action constitutes flagrant misconduct."

To the extent that the listed illustrative factors are applicable here, they present somewhat of a mixed package. Neither the place nor the subject matter of the discussion would have been expected to lead to any particular impingement on Respondent's right to maintain order or jobsite respect for its supervisors. Then too, Goodykuntz's outburst, although it extended beyond a single moment of climactic exuberance, appears to have been the product of a sustained impulse rather than of a design. As he diagnosed his own condition afterward and, as I believe, accurately, to Andersen, he simply "lost it." On the other hand, Facey did nothing that can reasonably be characterized as a provocation sufficient to explain Goodykuntz's behavior.

This leaves the final factor in the list: "the nature of the intemperate language and conduct." In determining how this rather elusive factor plays out here in harmony with applicable precedent, it may be useful to probe further into how the Authority has described the boundary between protected and excessive behavior. Thus, while Goodykuntz's behavior could well be described as insubordinate, that is not dispositive. *Tinker* at 390. Rather, even insubordinate behavior must be examined according to the broader "flagrant misconduct" standard in order to determine whether it is of "such 'an outrageous and insubordinate nature' as to remove [it] from the protection of the Statute." *Grissom* at 11, quoting *Naval Facilities* at 56 and *Tinker* at 390. Even "abusive" or "insulting" language does not necessarily fall over that line. *Grissom* at 11.

As with each of the factors that go into the ultimate determination, the nature of the intemperate language and conduct must be evaluated in terms of its effect on the employer's right to maintain order and respect for its supervisory staff. In this light, the privacy of the occurrence, at least with respect to nonsupervisory employees, and the fact that Goodykuntz desisted as soon as he became aware of the presence of others, must weigh heavily in favor of protecting his conduct.

What Respondent emphasizes with respect to this factor, however, and properly so, is the nonverbal content of Goodykuntz's behavior. In a nutshell, Respondent views his behavior as "threatening, intimidating, and belligerent." However, these labels do little to help place this behavior in its appropriate position on the spectrum of protected-to-excessive conduct. The nonverbal aspect of Goodykuntz's conduct, which was essentially his leaning over the desk and pointing his finger as close as ten inches to his supervisor's face, must of course be viewed in conjunction with his verbal outbursts. Nor is his nonverbal behavior subject to a different standard than the language that it accompanied, for the "flagrant misconduct" standard applies equally to "remarks or actions." *Grissom* at 11.

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

Goodykuntz's finger-pointing undermined order, and evidenced lack of respect for Facey, no more than his calling her a "hypocrite." In fact, unlike his use of that word, the finger-pointing and aggressive physical posture can be more readily associated with anger than with lack of respect. It did cause her discomfort or worse. But to the extent that Goodykuntz may have overstepped the bounds of permissible behavior toward Facey as an individual, I do not believe that the Authority's balancing test envisions use of the "flagrant misconduct" defense to augment whatever civil or other remedies a supervisor might have to protect those

interests. To the extent that an employee's behavior violates criminal statutes, of course, the Statute does not insulate him from the consequences. *Long Beach Naval Shipyard, Long Beach, California, and Long Beach Naval Station, Long Beach, California*, 25 FLRA 1002, 1006 (1987). Moreover, the hurt that Goodykuntz caused Facey might well have been a proper consideration in determining the appropriate discipline if his conduct had not been protected. Nevertheless, I find it to be beyond the scope of the inquiry into whether it was protected. The same can be said about Goodykuntz's failure to apologize to Facey after, according to the credited testimony of Andersen, he told her he would. Presumably this additional lapse of civility was motivated by the theory that no good deed goes unpunished.

Respondent contends that holding Goodykuntz's behavior to be protected would not only embolden union representatives to use bullying tactics, but would affect Facey's (and, implicitly, other supervisors') ability to make appropriate decisions adverse to union stewards who have shown a propensity for abusive responses. These are worthy considerations, but I believe they are subsumed by the broader principles already discussed. I believe that the "flagrant misconduct" standard is designed to protect the exercise of employee rights even at some degree of risk of abuse and of an adverse effect on the ability of some supervisors to resist unreasonable demands. This risk is deemed necessary to impose because in most respects the dynamics of what is perceived as the traditional workplace do not lend themselves particularly to pressure from the bottom up.

Finally, Respondent urges a finding that upholds civility. It is true that Goodykuntz's behavior fails on such a test. It is also useful to raise a concern about the loss of civility in such situations and, as has been noted elsewhere, in general. The style of advocacy that Goodykuntz adopted on this occasion was, to say the least, unsuccessful. One can only hope that if for no better reason than its slim prospects for achieving the desired results, the fact that certain intemperate behavior is deemed to be protected will not make it appear any more desirable as a tactic.

I conclude that Respondent has violated sections 7116 (a)(1) and (2) of the Statute and recommend that the Authority issue the following order.

ORDER

Pursuant to section 2423.29 of the Rules and Regulations of the Federal Labor Relations Authority and section 7118 of the Statute, it is hereby ordered that the Air Force Flight Test Center, Edwards Air Force Base, California, shall:

1. Cease and desist from:

(a) Disciplining an employee for conduct while that employee is acting as a representative of the American Federation of Government Employees, Local 1406, AFL-CIO.

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

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

(a) Rescind the one day suspension issued to Phillip Goodykuntz concerning the August 1, 1995 meeting he had with Sandra Facey.

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

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

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

(e) Pursuant to section 2423.30 of the Authority's Rules and Regulations, notify the Regional Director, of the San Francisco Region, Federal Labor Relations Authority, 901 Market Street, Suite 220, San Francisco, California 94103-1791, in writing, within 30 days from the date of this Order, as to what steps have been taken to comply.

Issued, Washington, DC, July 25, 1996

JESSE ETELSON
Administrative Law Judge

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

The Federal Labor Relations authority has found that Air Force Flight Test Center, Edwards Air Force Base, California, violated the Federal Service Labor-Management Relations Statute and has ordered us to post and abide by this notice.

We hereby notify our employees that:

WE WILL NOT suspend an employee, such as Phillip Goodykuntz, who is acting as a representative for the American Federation of Government Employees, Local 1406, AFL-CIO (Union) during a meeting with a supervisor, or otherwise discriminate against Phillip Goodykuntz or any other employee, because the employee has engaged in activities protected by the Statute.

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

WE WILL rescind the one day suspension issued to Phillip Goodykuntz concerning the August 1, 1995 meeting he had with supervisor Sandra Facey and remove any reference to the suspension from our files and WE WILL make him whole for the losses he incurred as a result of the unlawful suspension.

(AIR FORCE FLIGHT TEST
CENTER)

Date: _____ By: _____
(Signature) Commander

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

If employees have any questions concerning this Notice or compliance with any of its provisions, they may communicate directly with the Regional Director of the Federal Labor Relations Authority, San Francisco Region, 901 Market Street, Suite 220, San Francisco, California 94103-1791, and whose telephone number is: (415) 356-5000.

CERTIFICATE OF SERVICE

I hereby certify that copies of this DECISION issued by JESSE ETELSON, Administrative Law Judge, in Case No. SF-CA-50924 sent to the following parties in the manner indicated:

CERTIFIED MAIL:

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Dated: July 25, 1996
Washington, DC