69 FLRA No. 75

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
NATIONAL BORDER PATROL COUNCIL
LOCAL 2266
(Union)

and

UNITED STATES
DEPARTMENT OF HOMELAND SECURITY
U.S. CUSTOMS AND BORDER PROTECTION
(Agency)

0-AR-5171

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DECISION

August 24, 2016

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Before the Authority: Carol Waller Pope, Chairman, and Ernest DuBester and Patrick Pizzella, Members
(Member Pizzella dissenting)

I. Statement of the Case

Arbitrator Janet Maleson Spencer concluded that an employee (the grievant) exceeded the boundaries of protected activity under § 7102 of the Federal Service Labor-Management Relations Statute[1] when, contrary to supervisory instructions, he: (1) sent his official-time request to a supervisor whom management had not designated to accept it, and (2) failed to email that supervisor to alert him to the request in his mailbox. The main question before us is whether the Arbitrator erred as a matter of law in reaching that conclusion. Because Authority precedent does not support it, the answer is yes.

II. Background and Arbitrator's Award

As discussed in more detail below, the Agency suspended the grievant, the Union grieved the suspension, and the grievance went to arbitration.

At all times relevant here, the grievant worked as a border patrol agent, and served as a Union representative. The Arbitrator found that the "relationship between" the grievant and his supervisors concerning the grievant's "Union activities [w]as strained and distrustful,"[2] particularly with respect to the grievant's requests for "official time" to perform Union duties.[3]

The parties' collective-bargaining agreement sets forth a process for submitting official-time requests (requests) to, and receiving approval from, the requesting employee's first-level supervisor. But the Arbitrator found that the grievant's third-level supervisor "unilaterally" imposed an additional requirement that the third-level supervisor personally approve the grievant's requests, after the first-level supervisor approved them.[4]

As a result of this new requirement, the Arbitrator found that management felt "excessive time pressure" to complete two levels of review for each request by the relevant deadline.[5] The Arbitrator also found that, consequently, two months after imposing the new requirement, the third-level supervisor "unilateral[ly] establish[ed]"[6] a "new submission procedure" for the grievant's requests (new procedure).[7] Under the new procedure, if the grievant's first-level supervisor was unavailable at the time of the request, then the grievant was required to locate another first-level supervisor on duty, submit the request to that supervisor, and email the receiving supervisor to alert that person of the request in her or his mailbox. According to the Arbitrator, the new procedure assured management sufficient time to act on the grievant's requests before the grievant actually used the official time.

The grievant's first-level supervisor explained the new procedure to him, and "warned" that if the grievant "ignor[ed] the new procedure," he "would be disciplined."[8] However, when the grievant submitted his next request, he followed the contractual procedure of submitting the request to his first-level supervisor, even though that supervisor was not on duty. The Arbitrator found that, based on the schedules of the first- and third-level supervisors, the grievant "concluded" that submitting the request to his first-level supervisor would be "more efficient."[9] However, by submitting the request in this manner, the grievant did not follow the new procedure because he failed to: (1) submit the request to an on-duty supervisor; and (2) email the receiving supervisor about his request. Nevertheless, the grievant's request timely reached the third-level supervisor, who denied it.

[1] 5 U.S.C. § 7102.

[2] Award at 5.
[3] *See* 5 U.S.C. § 7131(a), (c), (d).
[4] Award at 6.
[5] *Id.* at 7.
[6] *Id.* at 15.
[7] *Id.* at 7; *see also id.* at 15.
[8] *Id.* at 8.
[9] *Id.*

Several months later, the Agency suspended the grievant for three days, based on two charges of misconduct. The first charge asserted that the grievant failed to follow supervisory instructions (the instructions charge) when submitting the request described above. The second charge (the disrespectful-conduct charge) alleged that the grievant was "disrespectful" during two interactions with his supervisors because: (1) in the first interaction, the grievant referred to a television psychic in his request for official time; and (2) in the second interaction, the grievant stated that he did "not understand" the unilateral changes that the Agency made to the requirements for official-time requests.[10] The Union's grievance challenged both charges, and the parties stipulated to the following issues for arbitration: "Was the suspension . . . for just and sufficient cause and only for reasons as will promote the efficiency of the service[?] If not, what should be the remedy?"[11]

The Arbitrator found "no dispute" that both of the Agency's disciplinary charges concerned the grievant's conduct while he was "engaged in protected [union] activity."[12] Further, the Arbitrator recognized that, in order to discipline the grievant for his conduct during union activities protected by § 7102 of the Statute, the Agency had to establish that the grievant engaged in "flagrant misconduct"[13] or otherwise "exceeded the bound[aries] of protected activity."[14] In that regard, the Arbitrator stated that whether certain conduct exceeded the boundaries of protected activity depended on "balanc[ing]" the Agency's right to maintain order and discipline, against the grievant's right to choose how to carry out statutorily protected representational duties.[15] In an effort to determine an appropriate balance, the Arbitrator reviewed each party's actions and considered how those actions affected the rights at stake.

As to the disrespectful-conduct charge, the Arbitrator found that: (1) both of the underlying interactions were "private" displays of the grievant's frustration with the Agency's unilateral changes;[16] (2) the evidence showed that neither interaction "had . . . any adverse impact on the Agency's ability to maintain order and discipline" in the workplace;[17] and (3) in the second interaction, the grievant's forceful statement that he did not understand the Agency's unilateral changes was "provoked by [the Agency's] threat of discipline" if the grievant followed the contractual procedures for requesting official time.[18] For those reasons, the Arbitrator set aside the disrespectful-conduct charge in its entirety as unlawful punishment for protected activity.

Turning to the instructions charge, the Arbitrator found that the Agency instituted the new submission procedure to further management's interest in getting the grievant's requests to the supervisors responsible for evaluating them, before the official-time activity occurred. And the Arbitrator found it significant that, by ignoring the new procedure due to his disagreement with it, the grievant "ignore[d] the fundamental principle 'obey now, grieve later.'"[19] In particular, the Arbitrator found "no reason that this principle should not apply," because it "would not have interfered . . . with [the grievant's] ability to engage in his protected representational activities."[20] For those reasons, the Arbitrator found that the grievant's failure to follow the new procedure for requesting official time "was outside the bound[aries] of protected activity."[21]

Thus, the Arbitrator denied the grievance with respect to the instructions charge. But the Arbitrator mitigated the grievant's three-day suspension to a letter of reprimand because: (1) the Arbitrator had completely set aside the disrespectful-conduct charge; and (2) another arbitrator had mitigated some of the grievant's prior discipline, on which the suspension in this case relied. In addition, the Arbitrator directed the Agency to make the grievant whole for losses resulting from the suspension.

The Union filed an exception to the award, and the Agency filed an opposition to the Union's exception. The Agency did not file any exceptions, and, thus, does not challenge the Arbitrator's decision to set aside the disrespectful-conduct charge.

[10] *See* Exceptions, Attach., Tab 2 at 1-2 (Disciplinary Proposal, Charge 2: Disrespectful Conduct (June 9, 2014)).
[11] Award at 2.
[12] *Id.* at 12.
[13] *Id.* at 10 (quoting *U.S. Dep't of the Air Force, Aerospace Maint. & Regeneration Ctr., Davis Monthan Air Force Base, Tucson, Ariz.*, 58 FLRA 636, 636 (2003) (*Davis Monthan*)).
[14] *Id.* at 11 (citing *Dep't of the Air Force, Grissom Air Force Base, Ind.*, 51 FLRA 7, 11-12 (1995) (*Grissom*)).
[15] *Id.* at 19 (citing *Grissom*, 51 FLRA at 11).
[16] *Id.* at 13.
[17] *Id.* at 14.
[18] *Id.* at 13.
[19] *Id.* at 16 (quoting *U.S. Dep't of the Air Force, Seymour Johnson Air Force Base*, 56 FLRA 249, 252 (2000)).
[20] *Id.*
[21] *Id.* at 15.

III. Preliminary Matter: We deny the Union's request to take official notice of a letter proposing the grievant's removal.

In its exceptions, the Union requests that the Authority take "official notice" of an Agency letter that proposes the grievant's removal (proposal letter), allegedly based on other official-time requests.[22] Section 2429.5 of the Authority's Regulations states that the Authority "will not consider any evidence, factual assertions, [or] arguments . . . that could have been, but were not, presented in the proceedings before the . . . arbitrator. The Authority may, however, take official notice of such matters as would be proper."[23]

The Union asserts that the proposal letter did not exist when the record for the arbitration hearing closed. So, according to the Union, it could not have presented the proposal letter to the Arbitrator for her consideration.[24] But the Union asserts that the proposal letter went out in September 2015,[25] and the Arbitrator did not issue her award until December 2015.[26] In that regard, the Union has not shown that it was precluded from presenting the proposal letter to the Arbitrator before she issued her award. For that reason, we reject the Union's request that we take official notice of the proposal letter under § 2429.5. To the contrary, we find that § 2429.5 bars considering the proposal letter.[27]

IV. Analysis and Conclusion: The award is contrary to § 7102 of the Statute.

The Union argues that the Arbitrator should have: (1) applied the framework from *Letterkenny Army Depot* (*Letterkenny*)[28] to determine whether the grievant's discipline was discriminatory under § 7116(a)(1) and (2) of the Statute;[29] and (2) found that the grievant's conduct while requesting official time retained its "protected status" under § 7102 at all times.[30] And the Union argues that, consequently, the Arbitrator should have set aside the grievant's discipline entirely, rather than merely reducing it.[31]

When an exception involves an award's consistency with law, the Authority reviews any question of law raised by the exception and the award de novo.[32] In applying the standard of de novo review, the Authority assesses whether an arbitrator's legal conclusions are consistent with the applicable standard of law.[33]

Initially, we note that the Authority has never held that the *Letterkenny* framework must invariably be applied to decide whether an agency violated § 7102 by punishing protected activity.[34] As mentioned above, when reviewing exceptions to an arbitration award, the Authority assesses whether an arbitrator's *conclusions* are consistent with applicable legal standards.[35] Therefore, the Arbitrator's failure to apply the *Letterkenny* framework in this case does not provide a basis for finding the award deficient as a matter of law.

To determine the award's consistency with § 7102, we begin with the statutory text. Section 7102 provides, in pertinent part, that "[e]ach employee shall have the right to form, join, or assist any labor organization, or to refrain from any such activity, freely and without fear of penalty or reprisal, and each employee shall be protected in the exercise of such right."[36] The Authority's case law establishes that § 7102 protects a variety of activities, including requesting official time to perform representational activities.[37] In this regard, although the dissent implies that the Authority's case law is unsettled about whether requesting official time is protected activity,[38] the Authority clearly held that § 7102 protects such requests

[22] Exceptions at 3 n.2 (citing 5 C.F.R. § 2429.5).
[23] 5 C.F.R. § 2429.5.
[24] Exceptions at 3 n.2.
[25] *Id.*
[26] *See* Award at 18 (showing date and Arbitrator's signature).
[27] *See U.S. DHS, U.S. CBP, Border Patrol San Diego Sector, San Diego, Cal.*, 68 FLRA 128, 130 (2014) (where one month passed between union submitting post-hearing brief and arbitrator issuing award, Authority declined to consider agency's argument about union's post-hearing brief, because agency did not show it had been precluded from presenting argument to arbitrator first).
[28] 35 FLRA 113 (1990).
[29] *E.g.*, Exceptions at 10.
[30] *Id.* at 11.
[31] *Id.* at 14-15.
[32] *NTEU, Chapter 24*, 50 FLRA 330, 332 (1995) (citing *U.S. Customs Serv. v. FLRA*, 43 F.3d 682, 686-87 (D.C. Cir. 1994)).
[33] *U.S. DOD, Dep'ts of the Army & the Air Force, Ala. Nat'l Guard, Northport, Ala.*, 55 FLRA 37, 40 (1998) (*DOD*).
[34] *See, e.g., AFGE, Local 2595*, 68 FLRA 293, 295-97 (2015) (*Local 2595*) (Member Pizzella dissenting) (reversing arbitrator's finding that agency did not punish grievant for protected activity, without applying *Letterkenny*); *U.S. Dep't of VA, Med. Ctr., Richmond, Va.*, 63 FLRA 553, 555-56 (2009) (resolving exception to arbitrator's finding that discipline for protected activity violated § 7102, without referring to, or relying on, *Letterkenny*).
[35] *E.g., U.S. Dep't of the Air Force, Seymour Johnson Air Force Base, N.C.*, 55 FLRA 163, 165 (1999) ("[F]ailure to apply a particular legal analysis 'does not render [an] award deficient . . . .'" (second alteration in original) (quoting *AFGE, Nat'l Border Patrol Council*, 54 FLRA 905, 910 n.6 (1998))).
[36] 5 U.S.C. § 7102.
[37] *AFGE, Nat'l Border Patrol Council*, 44 FLRA 1395, 1402 (1992) (*Border Patrol Council*).
[38] Dissent at 16-17.

almost twenty-five years ago.[39] And, in this case, there is no dispute that the grievant's request for official time was a protected activity,[40] notwithstanding the dissent's attempts to manufacture a dispute on this point.[41] Nevertheless, despite the Arbitrator's recognition that § 7102 generally protects the act of requesting official time, she found that the grievant's conduct during his request – specifically, not submitting the request in accordance with the new procedure – was "outside the bound[aries] of protected activity."[42] *That* is the issue before us.

The Authority has recognized that an agency may discipline a union representative for conduct occurring during protected activity if the representative engages in flagrant misconduct or otherwise exceeds the boundaries of protected activity.[43] In *DOD, Defense Mapping Agency, Aerospace Center, St. Louis, Missouri* (*Defense Mapping*),[44] the Authority recognized four factors "to be considered in striking the balance" between activity that the Statute protects, and misconduct that "imping[es] upon the [agency's] right to maintain order."[45] As relevant here, those factors include: (1) the place and subject matter of the conduct; (2) whether the conduct was impulsive or designed; (3) whether the conduct was in any way provoked by the employer; and (4) the nature of the intemperate conduct.[46] Additionally, the Authority determines whether conduct exceeds the boundaries of protected activity on a case-by-case basis that considers the totality of the circumstances.[47] As part of the totality of circumstances, the Authority has considered whether an employee's conduct is "similar to" conduct that the Authority previously found protected.[48]

In reviewing the Arbitrator's finding that the grievant's conduct lost § 7102's protection, we will first evaluate the *Defense Mapping* factors – as well as explain why we disagree with the dissent's contrary evaluation – and then we will discuss a relevant case involving protected activity.

As stated above, the first *Defense Mapping* factor concerns the "place" and "subject matter" of the conduct.[49] Regarding "place," the Authority has held that conduct that disrupts a work unit jeopardizes "the employer's right to maintain order and respect for its supervisory staff on the jobsite."[50] Here, the grievant's misdirected request did not cause any worksite disruption. Regarding "subject matter," because the grievant's request aimed to secure official time for representational activities, the "subject matter of the [request] was within the scope of the [grievant's] legitimate [representational] concerns."[51] And as the request concerned "not only the grievant's right to official time under the parties' agreement[,] but also his pursuit of that right,"[52] the subject matter implicated both contractual and statutory rights.[53] Accordingly, we find that the first *Defense Mapping* factor supports a conclusion that the grievant's conduct did not exceed the boundaries of protected activity.

Applying the second *Defense Mapping* factor, the Authority considers whether the grievant's conduct was impulsive or designed.[54] The Arbitrator's findings do not indicate that the grievant acted impulsively in directing his request to the wrong supervisor. Accordingly, the second factor does not weigh in favor of finding the grievant's conduct within the boundaries of protected activity.

As to the third *Defense Mapping* factor, the Authority considers whether the conduct at issue was in any way provoked by the employer's conduct.[55] Because the Arbitrator's findings do not address provocation in connection with the instructions charge, "this factor does not offer significant assistance in determining whether

[39] *See Border Patrol Council*, 44 FLRA at 1402 ("[T]he grievant was engaged in protected activity under [§] 7102 of the Statute when he sought approval of the official[-]time . . . requests in order to perform [u]nion duties."); *cf. Chevron Mining, Inc. v. NLRB*, 684 F.3d 1318, 1322 (D.C. Cir. 2012) (observing that, under National Labor Relations Act, 29 U.S.C. § 157, "[i]t is well-established that the exercise of a right grounded in a [collective-bargaining agreement] is protected" (citing *NLRB v. City Disposal Sys., Inc.*, 465 U.S. 822, 829 (1984))).

[40] Opp'n at 8 ("[T]he Agency does not dispute that [the grievant's] actions of requesting official time constituted protected activity."); *see also* Award at 12 ("There is no dispute that, in all [of the instances of conduct] cited in the [charges], [the grievant] was engaged in protected activity.").

[41] *See* Dissent at 16-17.

[42] Award at 15.

[43] *Davis Monthan*, 58 FLRA at 636 (citing *Dep't of the Air Force, 315th Airlift Wing v. FLRA*, 294 F.3d 192, 201 (D.C. Cir. 2002)).

[44] 17 FLRA 71 (1985).

[45] *Id.* at 81.

[46] *Id.*

[47] *See AFGE*, 59 FLRA 767, 771 (2004); *Air Force Flight Test Ctr., Edwards Air Force Base, Cal.*, 53 FLRA 1455, 1456 (1998).

[48] *Grissom*, 51 FLRA at 12.

[49] *Def. Mapping*, 17 FLRA at 81.

[50] *Grissom*, 51 FLRA at 11-12.

[51] *U.S. Dep't of Transp., FAA, Wash., D.C.*, 64 FLRA 410, 413 (2010) (*FAA*).

[52] *Local 2595*, 68 FLRA at 296 (citing *Felix Indus., Inc.*, 339 NLRB 195, 196 (2003), *enforced*, 2004 WL 1498151 (D.C. Cir. July 2, 2004)).

[53] *See id.*

[54] *See Def. Mapping*, 17 FLRA at 81.

[55] *Id.*

the grievant's conduct . . . exceeded the boundaries of protected activity."[56]

Regarding the fourth *Defense Mapping* factor, the Authority considers the nature of the conduct by examining: (1) whether the conduct was brief or prolonged; (2) the tone of communication; and (3) whether there was any physical conduct or threat of violence.[57] Based on the Arbitrator's findings, the grievant resisted the new procedure for more than a brief interval.[58] Regarding the "tone" of the communication,[59] there is no dispute that the request conveyed only mundane factual information, such as names, position titles, times, a duty location, and a section of the parties' agreement.[60] Further, the placement of the request in the wrong supervisor's mailbox did not affect the tone of the request. And, as for whether there was any physical conduct or threat of violence,[61] the misdirected form here was far removed from those types of behavior. Thus, on balance, we find that the fourth factor supports finding that the grievant's conduct did not exceed the boundaries of protected activity.

Contrary to the dissent's narrative of this case, we are not reviewing a disciplinary charge that alleges that the grievant repeatedly misdirected official-time requests – a different situation that could have affected our view of the "nature of the . . . conduct" at issue.[62] As all but the dissent recognize,[63] the Arbitrator did not sustain the disrespectful-conduct charge.[64] Indeed, the *only* charge that the Arbitrator sustained – and, given the Agency's decision not to file exceptions to the award, the *only* charge before us now – expressly relied on a single official-time request.[65] And the *only* basis on which the Agency alleged that this single request constituted misconduct – despite the request's apparent satisfaction of all expressly stated conditions in the parties' agreement – was the grievant's failure to fulfill his supervisors' unilaterally imposed, extra-contractual demands.[66]

The dissent attempts to obscure these basic facts by: (1) comparing this case to a decision by the U.S. Court of Appeals for the District of Columbia Circuit (D.C. Circuit)[67] that concerned discipline for "*many incidents* of . . . insubordinate conduct";[68] (2) characterizing the interactions at issue in the disrespectful-conduct charge – which the Arbitrator set aside completely, and which the Agency did not seek to revive through exceptions – as "figur[ing] prominently" in this dispute;[69] (3) setting out a confounding argument about distinctions between employee misconduct and disciplinary charges;[70] (4) alleging that *the grievant* repeatedly violated the parties' collective-bargaining agreement, without citing any arbitral findings to that effect;[71] and (5) attempting to place the instructions charge against the grievant into an alleged pattern of

[56] *Local 2595*, 68 FLRA at 296 (finding provocation factor "not particularly helpful" where arbitral findings did not address provocation).
[57] *Id.* (citing *FAA*, 64 FLRA at 414).
[58] *E.g.*, Award at 15 (noting that grievant "signal[ed] his continuing opposition to" the new procedure).
[59] *Local 2595*, 68 FLRA at 296 (citing *FAA*, 64 FLRA at 414).
[60] *See* Exceptions, Attach., Tab 2 at 22 (Official-Time Request (Mar. 5, 2015)).
[61] *Local 2595*, 68 FLRA at 296 (citing *FAA*, 64 FLRA at 414).
[62] *Def. Mapping*, 17 FLRA at 81.
[63] *See* Dissent at 18 ("It is clear . . . that [the] Arbitrator . . . agreed with [the Agency] . . . and sustained the [disrespectful-conduct] *charge*.").
[64] Award at 14 (finding that the disrespectful-conduct charge "d[id] not provide a proper basis for discipline"); Exceptions Br. at 4 (noting that Arbitrator granted "the Union's grievance in regards to [the disrespectful-conduct charge]"); Opp'n at 4 ("Arbitrator Spencer . . . *did not sustain* Charge 2 - Disrespectful Conduct." (emphasis added)).
[65] *See* Exceptions, Attach., Tab 2 at 1 (Disciplinary Proposal, Charge 1: Failure to Follow Supervisory Instructions (June 9, 2014)).
[66] *Compare id.* (stating that grievant "did not . . . e-mail [the supervisor] . . . that the [request] was placed in his mail"), *and id.* (stating that grievant "did not provide" the request to someone besides his first-level supervisor), *with* Exceptions, Attach., Tab 6, Collective-Bargaining Agreement at 11-12 (Art. 7, § A.5.(a) to (b)) (requiring official-time requestors to submit contractually prescribed form, but not imposing separate email-notice requirement), *and id.* (Art. 7, § A.5.(a)) (stating that form must be submitted to the "immediate supervisor *or* designee," but not requiring submission to two individuals (emphasis added)).
[67] Dissent at 12-13 (citing *Power v. FLRA*, 146 F.3d 995 (D.C. Cir. 1998)).
[68] *Power*, 146 F.3d at 996 (quoting *PBGC v. FLRA*, 967 F.2d 658, 670 (D.C. Cir. 1992)) (omission in original) (emphasis added).
[69] Dissent at 12 (claiming that the late, former television psychic "Miss Cleo" "figure[s] prominently" in this case, despite the Agency's decision not to except to the Arbitrator's overturning of the disciplinary charge that mentioned "Miss Cleo").
[70] *See id.* at 18-20. *Compare id.* at 18 (stating that majority "*erroneous*[*ly*] . . . assert[s] that 'the only *charge* that the Arbitrator sustained' was . . . failure to follow instructions" (first emphasis added) (quoting Majority at 8)), *with id.* at 19 (eventually asserting that it "does not make . . . [a] difference *how many charges* were brought against" the grievant).
[71] *See id.* at 14 (asserting that the grievant "refuse[d] to comply with the . . . procedures" in the parties' agreement and a separate memorandum of understanding).

misconduct by others.[72] Moreover, the dissent proposes that we decide this case using a legal standard that the dissent attributes to the D.C. Circuit – in which a single act of misconduct would, "by definition," exceed the boundaries of protected activity[73] – but that standard is of the dissent's own making, and not from any D.C. Circuit decision.[74] For those reasons, we reject the dissent's characterization of the conduct at issue in the Union's exceptions, as well as the dissent's novel standard for evaluating such conduct.

Further, as part of the totality of circumstances relevant here, we note that the Authority's decision in *U.S. Air Force Logistics Command, Tinker Air Force Base, Oklahoma City, Oklahoma* (*Tinker*),[75] is "similar to" this case in many ways.[76] In *Tinker*, the grievant attempted "to personally serve copies of unfair[-]labor[-]practice charges . . . on . . . supervisors who were named in the charges."[77] The grievant's "actions took place in a work area" on a military base, after his workday ended.[78] Several supervisors questioned the grievant about what he was doing, and told him to leave the area where he was attempting to serve the charges.[79] The grievant "refused to leave the work area, . . . was detained[,] and security police were called to remove the grievant."[80] The grievant then refused to follow a security-police officer's instruction to leave the work area, at which point a second officer arrived to assist the first officer.[81] Only then did "the grievant agree[] to depart."[82] At all times, the grievant explained that he was acting on behalf of his union.[83]

As discipline for the conduct described above, the agency in *Tinker* issued a letter of reprimand, which the union in that case grieved.[84] The arbitrator who resolved that grievance upheld the discipline, based on his finding that the grievant should have "compl[ied] with a clear order and . . . [g]rieve[d] later."[85] In reviewing a contrary-to-law exception to that arbitrator's award, the Authority accepted that the grievant's failure to follow directions "constituted insubordination," but "reject[ed] the [a]gency's assertion that . . . insubordination . . . cannot be protected under the Statute."[86] Instead, because the grievant's conduct was not so "outrageous and insubordinate" as to exceed the boundaries of protected activity, the Authority set aside the letter of reprimand as inconsistent with § 7102 of the Statute.[87]

Although the Arbitrator's findings here are very similar to those discussed in *Tinker*, the Agency neither attempts to distinguish *Tinker*, nor questions its continued validity. In addition, we observe that the conduct in *Tinker* was arguably more outrageous than the conduct here, because the grievant in *Tinker* not only disobeyed the instructions of multiple agency supervisors, but also repeatedly defied instructions from two security-police officers. Thus, we see no principled basis to reach a different conclusion in our § 7102 analysis here than the one that the Authority reached in *Tinker*.

In sum, two of the *Defense Mapping* factors – the first factor ("place" and "subject matter")[88] and the fourth factor ("nature of the conduct")[89] – weigh in favor of a conclusion that the grievant's conduct did not exceed the boundaries of protected activity. Only one of the factors – the second, which considers whether conduct was "impulsive or designed"[90] – does not weigh in favor of that conclusion. And the third factor, regarding provocation,[91] does not offer significant assistance here. Further, the Authority's decision in *Tinker* firmly bolsters

[72] *E.g.*, *id.* at 13 (without citation to evidence or award, asserting that representatives of labor organizations affiliated with the Union's parent body "have *routinely* ignored and challenged" the collective-bargaining agreement's requirements for official-time requests (emphasis added)); *id.* (again without citation to evidence or award, asserting that "it is difficult to reach any conclusion other than that . . . [the] leadership *and* legal teams [of the Union's parent body] have *coached*" representatives in being confrontational in order "to test the limits of the Authority's leniency" (emphases added)); *id.* at 21 ("*presum*[*ing*] . . . that the [Union's] attorney . . . *encourage*[*d* the grievant] to challenge the procedures by which [a Union] representative requests official time" (emphases added) (footnote omitted)).

[73] *Id.* at 17 (quoting *Local 2595*, 68 FLRA at 300 (Dissenting Opinion of Member Pizzella)).

[74] *Compare Local 2595*, 68 FLRA at 300 (Dissenting Opinion of Member Pizzella) ("[M]isconduct of any kind . . . , by definition, 'exceed[s] the boundaries of protected activity.'" (omission and second alteration in original) (citing *315th Airlift Wing*, 294 F.3d at 201-02)), *with 315th Airlift Wing*, 294 F.3d at 201-02 ("[A]n agency has the right to discipline an employee who is engaged in otherwise protected activity for remarks or actions that 'exceed the boundaries of protected activity[,] such as flagrant misconduct.'" (emphasis omitted) (quoting *Grissom*, 51 FLRA at 11)).

[75] 34 FLRA 385 (1990).

[76] *Grissom*, 51 FLRA at 12.

[77] 34 FLRA at 386.

[78] *Id.*

[79] *Id.*

[80] *Id.*

[81] *Id.*

[82] *Id.*

[83] *See id.* at 390.

[84] *Id.* at 386.

[85] *Id.* at 387.

[86] *Id.* at 390.

[87] *Id.*

[88] *See* sources cited in notes 49-53 above, and accompanying text.

[89] *See* sources cited in notes 57-61 above, and accompanying text.

[90] *See* sources cited in notes 46, 54 above, and accompanying text.

[91] *See* sources cited in notes 46, 55-56 above, and accompanying text.

a conclusion that the grievant's conduct did not exceed the boundaries of protected activity.

Therefore, based on the totality of the circumstances relevant here, we find that the Arbitrator erred as a matter of law in determining that the Agency could discipline the grievant for failing to submit his request in accordance with the new procedure. Rather, we find that the grievant's conduct retained its protected status under § 7102 because it did not exceed the boundaries of protected activity. And, we find that the Agency could not lawfully discipline the grievant for this protected activity. Accordingly, we set aside the letter of reprimand, and we modify the award to sustain the grievance with regard to the instructions charge.

V. Decision

We grant the Union's contrary-to-law exception on the basis that the award is inconsistent with § 7102 of the Statute.

To the extent that the award pertains to discipline for the instructions charge, we vacate that portion of the award and substitute the following in its place:[92]

> The grievance is sustained regarding the charge of failure to follow supervisory instructions. All references to a suspension or a letter of reprimand as discipline for that charge shall be expunged from the grievant's personnel files. Also, in accordance with 5 U.S.C. § 5596(b)(1)(A)(i), to the extent that the Agency has not already done so, the Agency shall reimburse the grievant for an amount equal to all or any part of the pay, allowances, or differentials that the grievant would have received had discipline not been imposed.

[92] *See, e.g.*, *Local 2595*, 68 FLRA at 297 (citing *Border Patrol Council*, 44 FLRA at 1404; *Tinker*, 34 FLRA at 401).

Member Pizzella, dissenting:

Let me clarify one thing before you read this dissent. *These facts are **true***. They arose in a federal workplace. And *they are **not fiction***.

"Call Miss Cleo now!" and "Your cards are waiting!"[1] are two phrases that many a sleep-deprived television user may remember. Those phrases were uttered repeatedly on late-night television by the self-proclaimed (and recently-deceased) Miss Cleo (Yourell Dell Harris) who made a name for herself as a television staple from 1997 – 2003.[2] Thousands of television viewers paid good money to seek her advice (until she ran into serious legal troubles). I do not know if I am more astounded by the timing of Miss Cleo's demise or that Miss Cleo would figure prominently[3] in a case appealed to the Federal Labor Relations Authority. But this is not a fictional story. Miss Cleo is now forever a fixture in this dispute that arose between a union representative of AFGE's National Border Patrol Council and the United States Customs and Border Protection Agency (CBP).

In *American Federation of Government Employees Local 2595* (*AFGE Local 2595*)[4], I noted that the Federal Service Labor-Management Relations Statute (the Statute) assures a "right to form, join, or assist any labor organization . . . to act for a labor organization . . . [and] to present the views of the labor organization."[5] In that case, I also reminded the majority that the United States Court of Appeals for the District of Columbia Circuit (the D.C. Circuit) has held (contrary to various decisions of the Authority and the National Labor Relations Board which interprets a corollary statutory provision) that it is "preposterous" to suggest that such an "ambiguous"[6] provision could be interpreted so as to relieve a union representative from his or her general obligation "'to maintain civility in the workplace' – *an expectation that is applied to every other federal employee*."[7]

In an earlier decision, strikingly similar to the facts in this case, the D.C. Circuit reversed the Authority because the Authority erroneously held that the conduct of a union representative − who "tardily submit[ed] nonresponsive documents in response to his supervisor's repeated and legitimate requests [to submit documents in a particular format]" − constituted "insubordinate behavior" and most definitely was not "statutorily 'protected'" by 5 U.S.C. § 7102.[8] Rejecting the Authority's overly lenient interpretation of § 7102, the Court pointed out that, in such circumstances, the union representative's "*first obligation* was *to comply* with his supervisor[']s orders [and to] reserve[e] any complaints or grievances *for a later time*."[9]

The national agreement between the U.S. Customs and Border Protection Agency (CBP) and AFGE's National Border Patrol Council requires that, when a union representative believes that official time will be needed, the representative is to provide his or her supervisor "advance written notice" by submitting a form which asks for two things – the "activity to be performed"[10] and the "estimated amount of time to be used."[11] That is not exactly an onerous undertaking, but in any event, it is the procedure to which AFGE's National Border Patrol Council agreed and has been in place for over ten years.

But Dolan is not the first representative of AFGE's National Border Patrol Council to have routinely ignored and challenged these simple requirements.

In *AFGE Local 2595* (which my colleagues refuse to consider despite the obvious commonality and similarity shared with this case), the local president of AFGE's National Border Patrol Council at CBP's Yuma Sector (Arizona) station did not want to fill out his official time form as required by the national agreement. The union president, therefore, became annoyed when his supervisor asked him to bring his current official-time form to the supervisor's office because the supervisor needed to resolve several discrepancies between the union president's time sheet and his official-time form.[12] Rather than "simply cooperate [with,] and bring the form

[1] Matt Stopera, *The Legend of Miss Cleo*, BuzzFeed https://www.buzzfeed.com/mjs538/the-legend-of-miss-cleo?utm_term=.wvX1LDRw3#.qwn4wVG56.

[2] *See* Wikipedia, *Miss Cleo*, https://en.wikipedia.org/wiki/Miss_Cleo.

[3] My colleagues take issue with my aside concerning my surprise that the late Miss Cleo would "figure[] prominently" in any case that comes before the Authority. *See* Majority at 9 n. 69. I am not certain as to what is the point of their objection. Whether or not Miss Cleo literally "figure[d] prominently" in this case must be in the eye of the beholder. But what I can say is that, upon my first review of this case, the invocation of Miss Cleo (by the grievant) certainly caught my attention, and Merriam Webster's defines "prominent" as "*sticking out* in a way that is *easily seen or noticed*."

[4] *AFGE, Local 2595*, 68 FLRA 293, 298 (2015) (*AFGE Local 2595*).

[5] 5 U.S.C. §§ 7101-7135; *AFGE Local 2595*, 68 at 298 (quoting *Dep't of the Air Force, 315th Airlift Wing v. FLRA*, 294 F.3d 192, 197 (D.C. Cir. 2002) (*315th Airlift Wing*)).

[6] *AFGE Local 2595*, 68 at 298 (quoting *315th Airlift Wing*).

[7] *Id.* (quoting *315th Airlift Wing*, 294 at 201) (emphasis added).

[8] *Power v. FLRA*, 146 F.3d 995, 1000 (D.C. Cir. 1998) (*Power*).

[9] *Id.* (emphasis added).

[10] Award at 5.

[11] *Id.* at 3 (quoting Joint Ex. 7 at Art. A.5(a)).

[12] *AFGE Local 2595*, 68 FLRA at 301.

to[,] [his supervisor],"[13] the union president decided that he could "thr[o]w"[14] the form at his supervisor with no consequence simply because he carried a union title and an official time form. My colleagues in the majority saw nothing wrong with that behavior and concluded that because, in their view, the conduct was not "flagrant" it did not exceed the bounds of protected activity. Unlike the majority, I saw the conduct as boorish and unprofessional, concluded that it was not protected by § 7102, and most certainly exceeded the boundaries of protected activity.[15]

The cases are so eerily similar, it is difficult to reach any conclusion other than that AFGE's National Border Patrol Council leadership and legal teams have coached Dolan to test the limits of the Authority's leniency. Consequently, one needs not strain their imagination to conclude that Daniel Dolan of the Beecher Falls CBP station in northeastern Vermont decided that five months later he too could get away with the parties' procedures for requesting official time after observing how the majority, in *AFGE Local 2595*, turned a blind eye to the actions of the local president at the Yuma facility of AFGE's National Border Patrol Council. But my colleagues ignore entirely this pattern and similarity.[16]

Even though Dolan's supervisors discussed, clarified, and entered into an *additional* memorandum of understanding (MOU) concerning official time-request procedures with Dolan in December 2013, Dolan continued to refuse to comply with the procedures set forth in both the parties' agreement *and* the MOU.[17] Dolan also was "warned" by his supervisors about the possible consequences of "ignoring" these procedures.[18]

Dolan showed ever increasing defiance towards his supervisor and repeatedly refused to provide estimates of the amount of time his representational activities would take him away from his job. In response to the supervisor's request to provide an estimated amount of time when he submitted an official time request, Dolan inserted onto the form: "I am not [Miss] Cleo. I cannot see the future." and "affixed a picture from the web[site] of Miss Cleo ([the now discredited] TV infomercial psychic from the 90's)."[19]

The form, when provided in a timely manner and properly filled out, makes it possible for the supervisor to make the necessary work-schedule adjustments and to otherwise cover for the Union representative while he is engaged in business for the Union. (After all, someone has to do the work.) Therefore, I am perplexed why it is seemingly impossible for the Union's representatives – here, Dolan, and in *AFGE Local 2595*, the union president − to put two bits of information on a form and turn it into their supervisors in a timely manner. I have read that a number of individuals (Megan Fox of Transformers fame is one)[20] suffer from a phobic condition known as papyrophobia, a fear of paper.[21] For these individuals, the sight of an empty form or a blank sheet of paper may trigger sweating, panic attacks, or an urge to flee from blank forms or paper.[22] That is one possible explanation for these union representatives' inability to turn in a completed form (and it may explain Ms. Fox's difficulties) but I doubt that is what caused Dolan's problems in this case.

Dolan's work history, and short time as a Union representative, exhibits a consistent pattern of circumventing rules and challenging his supervisors. Although the majority attempts to characterize Dolan's misconduct in this case as an isolated incident,[23] Dolan has a long history of "discourteous and unprofessional conduct."[24] On July 2, 2013, in front of his co-workers, Dolan "yelled at," "insulted," "engaged in a tirade" towards, and "def[ied] the [] authority" of his supervisor.[25] For that conduct, the CBP imposed a one-day suspension. But afterwards, AFGE's National Border Patrol Council promoted Dolan to the position of union representative at the Beecher Falls station.[26]

As I noted in *AFGE Local 2595*, AFGE's National Border Patrol Council provides written guidance to its representatives which suggests that the lenient boundaries which have been established by the Authority, in numerous decision, will "protect" them from any consequence whenever they engage confrontationally

[13] *Id.*
[14] *Id.* at 293.
[15] *Id.* at 301.
[16] *See* majority at 9, n.71-72.
[17] Award at 5.
[18] Majority at 2.
[19] Award at 6 (quoting Tr. 219).

[20] Aditi Mathur, T*op 10 Weirdest Celebrity Phobias: The Famous Faces and Their Fears*, Int'l. Bus. Times (Jan. 3, 2012, 9:45 AM), http://www.ibtimes.com/top-10-weirdest-celebrity-phobias-famous-faces-their-fears-photos-390106.
[21] *Papyrophobia – Fear of Paper*, Remedies Point (Jun. 19, 2012). www.remediespoint.com/phobias/papyrophobia-fear-paper.html.
[22] *Id.*
[23] Majority at 7.
[24] Award at 4.
[25] *Id.*
[26] *Id.* at 5.

with supervisors.[27] It should come as no surprise, then, that AFGE's National Border Council attorney, Michael Baranic − who argued to the arbitrator in *AFGE Local 2595* (*in April 2013*) that the union president's boorish behavior should be excused[28] – would also advise Dolan just five months later to refuse to cooperate with his supervisors as well.[29]

This pattern was not lost on Arbitrator Janet Maleson Spencer. In her award, Dolan's encounters with his supervisors were described as "aggressive, insubordinate and defiant."[30] Dolan began his tenure as AFGE's National Border Patrol Council representative *in September 2013* and from the outset was unwilling to comply with the procedures for requesting official time even though those procedures are clearly explained in the parties' national agreement.[31] Dolan consistently challenged his supervisors – providing incomplete information concerning the activities for which he was requesting official time, refusing to provide estimates of the amount of time that those activities would require, and then failing to turn the form into his supervisor in time for the supervisor to get an "approval or denial" of the request before the end of the day.[32]

CBP charged and suspended Dolan for three days for "disrespectful conduct"[33] and "failure to follow instructions."[34] At first glance, it seems incongruous that the Arbitrator would, on the one hand, agree with CBP that Dolan had in fact treated his supervisor disrespectfully (as the Agency charged)[35] but would finally conclude that the conduct was not flagrant.[36] But, considering, the Authority's misguided history − as to what misconduct exceeds the boundaries of protected activity (an analysis which the D.C. Circuit has described as "tortured," [37] "preposterous,"[38] and "mak[ing] no sense"[39]) − such a dissonant outcome comes as no surprise. And for the same reason, it was entirely predictable that AFGE's National Border Patrol Council would argue in these exceptions that Dolan carries absolutely *no responsibility* for his ongoing refusal to cooperate with his supervisors even though the Arbitrator mitigated the three-day suspension to a simple "reprimand"[40] (which by now has run its course and is no longer part of Dolan's record).

I do not agree with my colleagues that union representatives should be treated differently than other employees when they engage in routine and ministerial acts simply because they carry a union title.

First, as I noted in *AFGE Local 2595*, I do not agree that, in most circumstances, the ministerial act of requesting permission to be absent from the worksite for any type of leave, whether it be annual leave, sick leave, or official time constitutes "protected activity."[41] When Dolan requested time away from his normal duties to perform work for the union, he was *not* on official time. He was *requesting permission* to perform official time (e.g. work for the Union) at a future time (generally, the next day as required by the parties' agreement). Therefore, just as the union president in *AFGE Local 2595* was "accountable to his supervisor,"[42] Dolan too is accountable to his supervisor, and has a responsibility to comply with the procedures the parties negotiated for *requesting* official time. Dolan's responsibility to request time away from the worksite, for any reason, and to do so in a respectful manner should not be any different than it is for any other employee.

I also do not agree with the majority that we may simply presume "that the grievant's *request* for official time was a *protected activity*."[43] In the Authority's recent decisions addressing the conduct of union officials, the majority dismissively ignores any and all arguments made by any agency which would support the notion that a rogue union may be held accountable for any misconduct whether or not the union official is actually on official time. Therefore, it should come as no surprise that CBP would "not dispute" that the act of requesting official time constituted protected activity.[44] Regardless, that is of little consequence here, because the question of whether a union official is engaged in

[27] *AFGE Local 2595*, 68 FLRA at 299 (quoting *FLRA and ULPs*, National Border Patrol Council Manual at II.A.4., www.nbpc1613.org (last revised Feb. 2, 2015)).
[28] *See* Exceptions, *AFGE Local 2595*, 68 FLRA 293 (2015).
[29] *See Id.*; Award at 1.
[30] *Id.* at 5.
[31] *Id.* at 5-6.
[32] *Id.*
[33] *Id.* at 12.
[34] *Id.* at 14.
[35] *Id.* at 12 ("The Agency argues that [Dolan] showed disrespect in both episodes. I do not disagree.").
[36] *Id.* at 14.
[37] *315th Airlift Wing*, 294 F.3d at 198.
[38] *Id.* at 201.
[39] *Id.* at 199.
[40] Award at 18.
[41] *AFGE Local 2595*, 68 FLRA at 301.
[42] *Id.* at 300-01.
[43] Majority at 5 (emphasis added).
[44] *Id.* at 6 n.40.

protected activity is a legal question. It is not an assumption that may be presumed.[45]

Accordingly, when Dolan failed to follow the established procedures for requesting official time (failure to follow instructions) I would conclude that Dolan was *not* engaged in protected activity.

Second, and for the reasons that I discussed in *AFGE Local 2595* (wherein I relied on the views of the D.C. Circuit, Member Beck, and Chairman Cabaniss), I do not agree with the majority's erroneous conflation of the terms "flagrant misconduct" and conduct which "otherwise exceeds the boundaries of protected activity."[46] As I noted in my dissent in that case, the Supreme Court (and the NLRB) has held that the flagrant-misconduct standard applies to union officials when they are engaged in "classic labor disputes" (such as actual collective bargaining and the negotiation of agreements) and affords union representatives "some latitude" in those encounters to "speak bluntly and recklessly . . . because those encounters by their nature have the potential to become heated."[47] Section 7102 does not, however, excuse misconduct which results from those common, day-to-day interactions which occur between a supervisor and employee.

And, although the majority describes my approach as "novel,"[48] I would remind my colleagues that the D.C. Circuit *has consistently endorsed* this approach and *has rejected* ***their*** (self-described "*long-standing*")[49] approach *each and every time* it has been reviewed. According to the D.C. Circuit, it is self-evident that "misconduct *of any kind* . . . by definition, 'exceed[s] the boundaries of protected activity'" particularly when that misconduct occurs in the workplace and is *part of supervisor and employee interaction*.[50] The Court also explained that it "defies explanation that a law [that was] enacted to facilitate collective bargaining and protect employees' right to organize [would] prohibit[] employers from seeking to maintain civility in the workplace,"[51] and criticized the Authority for its assumption that union representatives are "incapable of organizing a union or exercising their statutory rights" without resort to misconduct.[52]

The majority may believe that "the Authority [has] *clearly* held that § 7102 generally protects [such conduct]" and is convinced that their approach is beyond "dispute,"[53] but the D.C. Circuit has *clearly* held that their standard is *clearly* wrong. In other words, just because the Authority repeats and reapplies an erroneous standard does not make it good law.

Third, my colleagues unsupported (and erroneous) assertion that "the only *charge* that the Arbitrator sustained" was charge 1, failure to follow instructions, demonstrates a profound misunderstanding of the clear distinction − that has been recognized by the Merit Systems Protection Board (MSPB),[54] the United States Court of Appeals for the District of Columbia,[55] and the United States Court of Appeals for the Federal Circuit[56] for thirty-four years − between a disciplinary "*charge*" and the underlying *misconduct* that forms the basis for the disciplinary action. Contrary to the majority's erroneous conflation of the terms, the distinction is not at all "confounding"[57] (nor insignificant under the circumstances of this case). According to the MSPB, a disciplinary charge is the legal "label" which describes in narrative the underlying "misbehavior"[58] and

[45] *See, e.g., N. Am. Pipe Corp. & Unite Here, AFL-CIO, CLC*, 26-CA-21773, 2005 WL 742050 (Mar. 29, 2005) ("The Board has specifically noted that questions of statutory construction, as distinguished from contract interpretation, are legal questions concerning the National Labor Relations Act, and thus are within the special competence of the Board rather than an arbitrator."); *Dist. Council of New York & Vicinity, United Bhd. of Carpenters & Joiners of Am., AFL-CIO*, 326 NLRB 321, 322 (1998) ("Applying these principles here, we find that fundamental issues of whether the OOC and JVC violated Section 8(e) present questions of statutory construction rather than of contract interpretation and thus raise legal questions concerning the Act itself, which are within the special competence of the Board rather than of an arbitrator. Resolution of these issues necessarily involves the application of statutory policy, standards, and criteria, and is thus not appropriate for deferral to arbitration.").

[46] *AFGE Local 2595*, 68 FLRA at 299 (citing *315th Airlift Wing*, 294 F.3d 192, 201 (D.C. Cir. 2002) (citations omitted).

[47] *Id.* at 298 (internal quotation marks and citations omitted).

[48] Majority at 9.

[49] *315th Airlift Wing*, 294 F.3d at 198.

[50] *AFGE Local 2595*, 68 FLRA at 300.

[51] *Id.* (quoting *Adtranz*, 253 F.3d at 27-28) (internal quotation marks omitted).

[52] *Id.* (quoting *Adtranz*, 253 F.3d at 26) (internal quotation marks omitted).

[53] Majority at 6 (emphasis added).

[54] *See, e.g., Otero v. U.S. Postal Serv.*, 73 MSPR 198, 202-04 (1997) (*Otero*).

[55] *Drew v. U.S. Dep't of the Navy*, 672 F.2d 197, 200-01 (D.C. Cir. 1982).

[56] *Burroughs v. Dep't of the Army*, 918 F.2d 170, 172 (Fed. Cir. 1990).

[57] *See* majority at 9.

[58] *Otero*, 73 MSPR at 202 ("Nothing in law or regulation requires that an agency affix a label to a charge of misconduct. If it so chooses, it may simply describe actions that constitute misbehavior in a narrative form.").

"misconduct"[59] which, as in *Otero* and here, "contains dates, times, names of participants, exact quotes of the offensive language the [appellant in *Otero* or Dolan in this case] purportedly used, and a detailed description of the alleged events."[60]

This distinction is as significant here as it is in an appeal to the MSPB. In an appeal to the MSPB, an agency may prove that an employee's misconduct occurred as charged, but the MSPB may still conclude that the penalty imposed for the proved misconduct does not, for example, "promote the efficiency of the service."[61] Similarly, where a grievant argues that his misconduct is not "outside the bounds of protection," it is feasible for the Arbitrator to sustain the charge but still conclude that the misconduct was activity that was protected.[62]

That is what Arbitrator Spencer did here. Concerning charge 2, disrespectful conduct, the Arbitrator found − "The Agency argues that [*Dolan*] *showed disrespect* in both episodes. *I do not disagree*."[63] It is clear, therefore, that Arbitrator Spencer agreed with CBP that Dolan's conduct was disrespectful and sustained the *charge*. But, concerning the Union's argument that Dolan's *disrespectful misconduct* was "protected activity,"[64] the Arbitrator separately concluded that his *misconduct* "d[id] not rise to the level of flagrant *misconduct* nor was it otherwise outside the bounds of protection."[65] As to charge 1, failure to follow instructions when requesting official time, however, the Arbitrator found that there was "no question that [Dolan] did not comply" with the instructions, but that this *misconduct*, unlike that in charge 2, *was not* protected because it fell "*outside the bounds of protected activity*."[66]

The fact that the Arbitrator concluded that Dolan's disrespectful conduct *did not* exceed the bounds of protection, has no bearing whatsoever on the single question before us – whether Dolan's failure to follow instructions *exceeded* "the bound[aries] of protected activity"[67] and thus warranted a letter of reprimand.[68]

Notwithstanding the majority's unsupported assertion to the contrary, there is nothing "confounding" about the Arbitrator's reasonable determination.

Furthermore, the Arbitrator's conclusion, unlike the majority's decision, is entirely consistent with the D.C. Circuit's rulings in *Power and 315th Airlift Wing*. In *Power*, the Court determined that the agency "would have [] *terminated*" the union representative for his "many incidents of insubordination" "even in the absence of protected activity."[69] In that case, the Authority and D.C. Circuit had to determine whether the *many charges* supported the termination of a union representative and whether the *misconduct* underlying those charges was protected activity. And, in *315th Airlift Wing* (wherein the Court rejected the Authority's "'long-held' standard"[70] which the majority reaffirms today calling it ***settled*** and ***undisputed***,[71] but which the Court described as "tortured,"[72] "preposterous"[73] and "mak[ing] no sense"), the Court determined that a *single charge* against a union representative for "assaultive behavior" towards his supervisor supported a three-day suspension and was *misconduct* that was *not protected* by § 7102.[74]

Therefore, in this case, it does not make one wit of difference *how many charges* were brought against Dolan. What does matter is that the Arbitrator found that the misconduct, underlying the failure to follow instructions charge was not protected by § 7102 and warranted a letter of reprimand. Because the Arbitrator determined that the *misconduct* underlying *charge* 2 was "protected" (and CBP does not challenge that determination) the only question before the Authority is whether the *misconduct* underlying *charge* 1 constitutes protected activity.

In making that determination, however, the circumstances surrounding charge 2, disrespectful conduct, need not, and cannot, be ignored. Authority precedent, which is relied upon by the majority, holds that to determine whether conduct by a union representatives is protected by § 7102 "the *totality* of the circumstances" must be "balanced" "on a case-by-case basis."[75] In this case, it is not disputed that the conduct underlying both charges occurred between January 23, 2014[76] and March 5, 2014.[77] Nor is it disputed that both

[59] *Id.* at 203 ("A charge usually has two parts: (1) A name or label that generally characterizes the misconduct; and (2) a narrative description of the actions that constitute the misconduct. In [*Burroughs v. Dep't of the Army*, 918 F.2d 170, 172 (Fed. Cir. 1990)], the court used the term "charge" to apply to the charge's label.").
[60] *Id.*
[61] *Id.*
[62] Award at 14.
[63] *Id.* at 12 (emphasis added).
[64] *Id.* at 8.
[65] *Id.* at 14 (emphasis added).
[66] *Id.* at 15 (emphasis added).
[67] Majority at 6 (quoting Award at 15).
[68] Award at 18.
[69] *Power*, 146 F.3d at 1001.
[70] *315th Airlift Wing*, 294 F.3d at 198.
[71] Majority at 6.
[72] *315th Airlift Wing*, 294 F.3d at 198.
[73] *Id.* at 199.
[74] *Id.* at 202.
[75] Majority at 7 (citations omitted) (emphasis added).
[76] Award at 6.
[77] *Id.* at 8.

charges involved Dolan's unwillingness to comply with established procedures for requesting official time. Looking at the totality of these circumstances it is abundantly clear that Dolan's misconduct during those six weeks is interrelated and cannot be segregated into the separate, hyper-technical compartments which the majority tries to draw.

Dolan's long history, of refusing to comply with the procedures and instructions concerning requests for official time, and comments, such as his "clever" comments "Miss Cleo,"[78] demonstrate a pattern of poor behavior. Dolan's behavior was prolonged (not brief) and certainly was not impulsive. As such, Dolan's failure to follow instructions cannot be viewed in isolation from Dolan's disrespectful conduct in determining whether or not that misconduct is protected. Dolan's history and the context of his behavior – behaviors which one might expect of a fifth-grader but not a federal employee / union representative − demonstrate that his ongoing refusals to comply were all part of a designed plan to purposely confront his supervisors. In this respect, the Arbitrator found that "I am convinced that [] Dolan understood" the procedures and that "*automatically responding 'no*,' [when asked if he understood the procedures was his] way of signaling his *continuing opposition* to the protocols."[79]

I would conclude that Dolan's conduct is not protected by § 7102. His ongoing refusals to comply went on for far too long to be considered isolated in any sense of the word.

I have no doubt that there is a direct correlation between the increasingly lenient view of the Authority and this majority − of what conduct is protected by § 7102 – and the recurrence of the confrontational behavior which is at issue in this case. As I outlined in *AFGE Local 2595*,[80] it may be an inconvenient history but my colleagues seem oblivious to the consequences of these ill-advised decisions the impact which they have on labor-management relations throughout the federal government.

Consider that since 2000, *thirty* cases concerning union representative misconduct have been considered by the Authority and its administrative law judges. *Nineteen* of those cases have involved the misconduct of representatives of AFGE. Relatedly, the Department of Labor's Office of Labor-Management Standards reported in June of 2015 that AFGE leads *all* American unions in serious misconduct by its officials.[81] It can be reasonably presumed, therefore, that the same AFGE attorney, which advised the AFGE representative in *AFGE Local 2595* (just five months after the arbitration in that case)[82] and who advised and represented Dolan here, would encourage Dolan to challenge the procedures by which an AFGE representative requests official time. It is particularly telling that the manual provided by AFGE National Council of Prison Locals to its representatives advises on how to engage in such conduct.[83]

One does not need a psychic reading from Miss Cleo to conclude that, when Congress enacted § 7102, it never intended to sanction planned defiance, disrespect, and sarcasm by union representatives when those representatives engage with their supervisors in the workplace on routine, ministerial procedures. Turning a blind eye to such misconduct most certainly does not "interpret [our Statute] in a manner consistent with the requirement of an effective and efficient Government."[84] I believe the D.C. Circuit accurately reflected Congress' intent when it observed that our Statute, which was "enacted to facilitate collective bargaining and protect employees' right to organize [does not]prohibit[] employers from seeking to maintain civility in the workplace."[85] Supervisors do not have to look the other way when employees, whether or not they carry the title of union representative after their name, refuse to comply with established procedures and act in a manner that can only be considered sarcastic and confrontational.

Therefore, I would conclude that Dolan's conduct exceeded the boundaries of protected activity and would deny the exceptions filed by AFGE's National Border Patrol Council.

If only we could "Call Miss Cleo Now!!"

Thank you.

[78] *Id.* at 15.
[79] *Id.* (emphasis added).
[80] *See* 68 FLRA at 298-300.

[81] Bob Gilson, *AFGE Leads All American Unions in Criminal Misconduct by its Officials Since 2014*, FedSmith, www.fedsmith.com/2015/06/04/afge-leads-
[82] *See* Exceptions, *AFGE Local 2595*, 68 FLRA 293 (2015); Award at 1.
[83] *See* n.24 above.
[84] 5 U.S.C. § 7101(b).
[85] *AFGE Local 2595*, 68 FLRA at 298 (quoting *315th Airlift Wing*, 294 F.3d at 202).