

## Harsh/Robust Language or Actions

Hello NWP Reps and Members;

Welcome to LR Chronicles number 24. In this edition of the LR Chronicles, I will discuss using harsh and/or robust language or actions by a Union representative in the performance of their representational duties. This subject matter **ONLY** applies to representatives of the Union, in their role as Union representatives, and does **NOT** apply, generally, to employees of the FAA that are not duly authorized and recognized Union representatives. Nor, does it apply to representatives of the Union that are not acting within the scope and performance of their representational duties.

In order to be considered a duly authorized and recognized representative of the Union, it is required that an employee be elected or appointed to speak and act on behalf of the Union. Once again, and I cannot stress this enough, the subject matter contained in this edition of the LR Chronicles does **NOT** apply to employees that do not meet the definition of “Union representative” as stated above. This is an extremely important difference.

There are many terms used to describe harsh/robust language or actions on the part of Union representatives, who are also employees of the FAA. Some of these terms are:

- Harsh language or actions;
- Robust language or actions;
- Robust debate;
- Spirited debate.

Sometimes, the FAA will propose a disciplinary or adverse action against a Union representative, whose language or actions, they believe have “crossed the line” in the representation of employees or the Union. NATCA takes a very strong position when the agency disciplines our representatives, and as a result, NATCA will vigorously represent and defend our representatives when the Agency proposes such action.

Union representatives have a right to firmly and vigorously represent bargaining unit employees (BUEs) as well as the Union. This right is contained in both our collective bargaining agreement (CBA) as well as in federal law. Article 2, Section 19 of the CBA states *“[T]he Agency recognizes the right of a duly recognized Union representative to express the views of the Union, provided those views are identified as Union views.”* Federal law provides in 5 USC 7102(1) *“To act for a labor organization in the capacity of a representative and the right, in that capacity, to present the views of the labor organization to heads of agencies, and other officials of the executive branch of the Government, the Congress, or other appropriate authorities.”*

A representative of the Union must balance their representational role in representing BUEs and the Union, against the duties performed as an employee of the FAA. There are limits to speech and actions on the part of Union representatives. Inappropriate speech or actions may be considered misconduct and therefore result in a disciplinary or adverse action. A disciplinary action is defined as an action proposed by an Agency up to and including a suspension of fourteen (14) days. This includes Letters of Reprimand as well as Oral and written Admonishments. An Adverse Action is defined as an action proposed by an Agency of a suspension of more than fourteen (14) days, including termination, a reduction in grade or pay, as well as furloughs of thirty (30) days or less for reasons other than a lapse in Congressional appropriations.

A Union representative has to be very careful regarding the performance of his/her duties as a Union representative, especially if they have already received a disciplinary or adverse action. In accordance with the FAA's Conduct and Discipline order, a subsequent disciplinary or adverse action counts as "progressive discipline" even though the subsequent action is not related to the first action. Therefore, the agency will use the "second offense" or "third offense" penalty in their Order, as well as make the argument in front of a Third Party that the employee had already received a previous disciplinary or adverse action. If this is the case, I highly suggest that the Union representative keep in very close contact with Ham and I so that we can assess the situation and, if necessary, contact the NATCA National office for guidance.

The Federal Labor Relations Authority (FLRA) has issued numerous decisions and case law regarding this very important subject. The vast majority of these decisions state that "*flagrant misconduct or other conduct exceeding the bounds of legally defined protected activity may be grounds for disciplinary action.*" The FLRA focuses on two specific questions when determining whether or not disciplinary/adverse action is appropriate. Those two questions are:

- Were the Union representative's actions on behalf of the Union when the alleged misconduct occurred?
- Was the conduct flagrant or did it otherwise exceed the bounds of protected activity?

In rendering decisions on this subject matter, the FLRA also attempts to temper the right of a Union representative to engage in protected activity against the right of an agency to maintain order and respect in the workplace. In one of its decisions, (51 FLRA 7), the FLRA created a "flagrant misconduct" test. This test contains four parts:

- What was the place and subject matter of the discussion?
- Was the employee's outburst impulsive or designed?
- Was the outburst in any way provoked by the conduct of the Agency?
- What was the nature of the intemperate language and conduct?

The FLRA, along with other Third Parties, have also stated the following in a few of their decisions regarding language and/or actions on the part of Union representatives in the performance of their duties:

- "Union officials acting in their official capacity have very broad latitude in speech and action." (57 FLRA 343)
- "Statements lose the protection of the statute when they are knowingly false and uttered with reckless abandon." (57 FLRA 343)
- "Consistent with Section 7102, an Agency has a right to discipline an employee who engaged in otherwise protected activity, for remarks or actions that exceed the boundaries of protected activities, such as flagrant misconduct." (57 FLRA 343)
- "The Agency must prove that the conduct constituted flagrant misconduct or otherwise exceeded the boundaries of protected activity." (59 FLRA 767)
- "Discipline of employees is permitted if their conduct exceeds the boundaries of protected activity." (58 FLRA 636)
- "Conduct by a Union representative exceeding the boundaries of robust debate is not protected activity." (This case was regarding the discipline of a local Union President for "harsh criticism" of a management official which included racial epithets and disparagements). It was determined that the discipline was appropriate. (29 FLRA 3)

- “In our view, the grievant’s remarks were not of such an outrageous or insubordinate nature so as to remove them from the protection of the statute.” (This case is regarding a Union representative calling his supervisor an “asshole” and “space cadet.”) (44 FLRA 1395)
- An arbitrator concluded in his decision that “...*an employee’s status as a union official is not an impenetrable shield against discipline and a union official, as an employee, is subject to the same rules as any other employee.*” (59 FLRA 458)

The D.C. Circuit Court of Appeals has also rendered a decision regarding a “physical response” as well as their opinion on the intent of Congress as it relates to 5 USC 7102. In their decision at 01-1275, they state, “*A physical response, in the context of a labor-management dispute, by either the Union representative or a manager is deemed beyond the limits of acceptable behavior.*” They also state “...*it is not reasonable to suppose that Congress considered it permissible and immune from consequence for an employee to commit an assault and battery against a coworker. No employee, including a Union officer acting in a representational capacity, has the right to put another in fear of being struck or to commit a battery in order to present the views of the labor organization and engage in collective bargaining.*”

There is one last case that I want to bring to your attention. This Arbitration case was regarding whether or not a Union representative was acting in his official capacity as a Union representative. (The FLRA's two question test) A Union representative was suspended for two incidents in which he confronted, in a disrespectful manner, managers who questioned why he was away from his work area. In the reply to the proposed suspensions, the Union argued that the Union representative was engaged in robust debate in his capacity as Union representative. The Arbitrator, however, did not see it that way. He found that the business with both management officials was personal and concluded that the Union representative was "*personally affronted that a supervisor had so much as inquired into the nature of his activities while he was away from his job.*" The Arbitrator determined that the Union representative was not in a protected status when he engaged in the disrespectful conduct; therefore, his personal misconduct was not protected activity. (106 LRP 50883)

There are many references to the term "flagrant misconduct" on the part of a Union representative in this edition of the LR Chronicles. The FLRA, in (45 FLRA 156), has defined this term. They state "*[R]emarks or conduct that are of such an outrageous or insubordinate nature as to remove them from the protection of the statute.*"

As you can see, although the agency has a right to discipline its employees for this type of behavior, they must also ensure and prove to a Third Party, among other things, that this discipline is not otherwise "protected activity" under the law and CBA. It must also be remembered that since the agency does maintain the right to discipline for what it believes to be "flagrant misconduct", the Union, will be left fighting this disciplinary/adverse action from the back end through a grievance or an Unfair Labor Practice (ULP).

As a Union representative and in the performance of your duties in dealing with management officials, please be very careful on how you conduct yourself. While you have the protections of the law and CBA on your side, we will be left fighting this issue as stated above, after the fact. Should you ever find yourself in this situation, please contact Ham or I.

Considering some of third Party decisions as stated above, it should be our first effort to keep our interactions with management as professional as possible. As some of you know about me, I have not always followed that line of thinking. In some situations, I “attacked” rather than first attempting to keep it professional. However, I have learned over the course of my experience that this did not always end up in obtaining the best possible outcome for our membership. I hope that I have since learned that lesson and now I make an effort to first keep it professional. It is preferred, at least in this region that we make a concerted effort to keep our dealings with management on a professional level first, prior to utilizing the latitude provided by the law.

If there are any questions please feel free to contact me.

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