67 FLRA No. 128

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 1547
(Union)

and

UNITED STATES
DEPARTMENT OF THE AIR FORCE
LUKE AIR FORCE BASE, ARIZONA
(Agency)

0-NG-3143

_____

DECISION AND ORDER
ON A NEGOTIABILITY ISSUE

July 29, 2014

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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

This is the second time the Authority has been presented with a negotiability appeal involving these parties and the issue of civilian access to facilities on a military installation. And in between the two appeals, issues regarding this access were presented to and resolved through mediation-arbitration directed by the Federal Service Impasses Panel (the Panel). Details of this complex situation follow.

In the first negotiability appeal, *AFGE, Local 1547* (*Local 1547*),[1] the Authority ordered the Agency to bargain over two Union proposals to give civilian employees represented by the Union (unit employees) access to, respectively, the commissary and the exchange – including the exchange's satellite stores, such as a "Shoppette" – on Luke Air Force Base (the base).[2] When they were unable to reach agreement during subsequent bargaining, the Panel directed that the parties participate in mediation-arbitration, which resulted in a Panel Member (the arbitrator) directing the parties to include in their collective-bargaining agreement a provision that grants unit employees full access to the Shoppette. On agency-head review under § 7114(c) of the Federal Service Labor-Management Relations Statute (the Statute), the Agency head disapproved the provision. The Union then filed this (second) negotiability appeal under § 7105(a)(2)(E) of the Statute. The appeal presents us with two substantive questions.

The first question is whether the provision concerns unit employees' conditions of employment. Because decades of precedent hold that it does, the answer is yes.

The second question is whether the Agency has shown that the provision is contrary to 10 U.S.C. §§ 101, 113, 2481(a)-(b), or 2484(c)(2). Because the Agency has not demonstrated that those sections either give the Secretary of Defense "sole and exclusive discretion" to determine who has access to the Shoppette,[3] or prohibit the Agency from granting civilian employees such access, the answer is no.

II. Background

The Shoppette, part of the base exchange, sells food, gas, and certain health and household items. Unit employees currently have access to the Shoppette only to purchase food that can be consumed on the premises. These unit employees work varying shifts during the week and on weekends, and many have limited break periods. And they often have to drive off of the base during breaks in their shifts to "satisfy their shopping needs,"[4] which can contribute to traffic congestion on the base.

The Union proposed to grant unit employees broad access to base commissary and exchange facilities, including the Shoppette. When the Agency declared the Union's proposals outside the duty to bargain, the Union filed a petition for review with the Authority and, in *Local 1547*,[5] the Authority found that the Agency was obligated to bargain over the following two proposals:

> Proposal 1.
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> All . . . unit employees shall be granted access to . . . the . . . [c]ommissary.
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> Proposal 2.
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> All . . . unit employees shall be granted access to and use of the . . . [e]xchange and all of its satellite stores (e.g., Shoppette, gas station, etc.), except for purchase of articles of uniform items.[6]

[1] 64 FLRA 642 (2010) (Member Beck dissenting in part).
[2] *Id.* at 643, 648.
[3] Agency's Statement of Position at 11.
[4] Union's Petition at 6.
[5] 64 FLRA at 645-46.
[6] *Id.* at 643 (citations omitted).

The Authority concluded that the proposals concerned unit employees' conditions of employment by applying the two-part test set forth nearly thirty years ago in *Antilles Consolidated Education Ass'n*.[7] The Authority found that: (1) the proposals pertained to unit employees; and (2) the record established a direct connection between the proposals and unit employees' work situation or employment relationship.[8] Based on long-standing precedent, the Authority rejected the Agency's arguments that the required connection was not established because: (1) access to the base facilities was only a matter of employee convenience;[9] and (2) access to facilities could occur during nonduty hours.[10]

The Authority concluded also that the statutory provisions on which the Agency relied – 10 U.S.C. §§ 2481 and 2482, 10 U.S.C. §§ 1061 to 1065 – neither expressly granted unit employees access to commissaries and exchanges nor prohibited granting such access.[11] The Authority noted that "the Agency [did] not contend that the proposals [were] *contrary* to the provisions of Title 10; the Agency merely assert[ed] that nothing in Title 10 grants unit employees the privileges that the proposals request[ed]."[12] Finding that the Agency had discretion to bargain over the proposals, the Authority found that the proposals were within the duty to bargain.[13]

The Agency did not seek Authority reconsideration or judicial review of *Local 1547*. Instead, the parties resumed bargaining. When they could not reach agreement, they submitted the matter to the Panel, which determined that the dispute should be resolved through mediation-arbitration before the arbitrator. During mediation, the Union revised the two proposals found negotiable in *Local 1547* to one proposal providing unit employees access only to the Shoppette, including the gas station (but not to uniform items, alcohol, or tobacco).

During arbitration, the Agency conceded that "there is no statutory bar"[14] to granting unit employees access to the Shoppette and acknowledged that, under Department of Defense Instruction 1330.21 (the DOD Instruction), all civilian employees working on base have access to food and beverages sold at any exchange facility, if consumed on base. But the Agency argued that, with regard to the Shoppette, it had authority to extend access to unit employees "solely to the 'heat and eat' section."[15] The Agency's proposal before the arbitrator was to permit "unit employees to purchase 'at [the] . . . Shoppette . . . food and beverages of the heat and eat category.'"[16]

The arbitrator found that the DOD Instruction permits the Secretary of the Air Force to expand the list of authorized patrons of exchanges. The arbitrator acknowledged the Agency's claim that access to commissaries and exchanges provides a benefit to military personnel that serves as a recruitment and retention tool. But she "fail[ed] to see how allowing civilian employees access to a gas station convenience store measurably weakens that benefit."[17]

As to the latter point, the arbitrator noted that: (1) civilian employees have access to various eating establishments on base, including the "heat and eat" part of the Shoppette;[18] (2) civilian employees who work in exchange facilities are authorized to shop in them, including the Shoppette; and (3) the prices at the Shoppette's gas station are not cheaper than those outside the base. She found, as a result, that military personnel do not have exclusive access to the Shoppette and that access to the gas station provides them no "benefit other than convenience."[19] She noted that access to the Shoppette would "significantly benefit" unit employees, who "due to the closing of many gates after September 11, 2001, have been confronted with more traffic and, therefore, more travel time to leave the base,"[20] and who are not able to buy on base such necessary items as "health items [and] feminine care products."[21]

The arbitrator found it "illogical that it is acceptable to have civilians enter a store to buy hot dogs, but damaging to morale if they are allowed to purchase aspirin, batteries, or tissues."[22] Accordingly, the arbitrator concluded that adopting the Union's proposal for full access to the Shoppette was a reasonable compromise between the Union's initial proposals (found negotiable in *Local 1547)* and the Agency's proposal for access only to food that is eaten on site.[23] She directed the parties to adopt the provision at issue here.

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[7] 22 FLRA 235 (1986).
[8] *Local 1547*, 64 FLRA at 645.
[9] *Id.*
[10] *Id.* at 646.
[11] *Id.* at 647.
[12] *Id.* at 647 n.7.
[13] *Id.* at 647.
[14] *Dep't of the Air Force, Luke Air Force Base, Luke Air Force Base, Ariz.*, 11 FSIP 111 at 8 (2011) (*Luke AFB*).
[15] *Id.* at 5.
[16] *Id.* at 4.
[17] *Id.*
[18] *Id.*
[19] *Id.*
[20] *Id.*
[21] *Id.*
[22] *Id.*
[23] *Id.* at 9.

The Agency head disapproved the provision, without elaboration, as contrary to "law, rule[,] or regulation."[24] The Union then filed with the Authority a petition for review (the Union's petition) of the disapproval, resulting in the case now before us. The Agency filed a statement of position (the Agency's statement), the Union filed a response (the Union's response), and the Agency filed a reply (the Agency's reply).

III. Provision

A. Wording

> Bargaining[-]unit employees with a valid DOD [identification] card shall be granted full access to the Luke Air Force Base Exchange Shoppette, including the gas station. Employees may not purchase uniform items, "[t]ax free" tobacco items[,] and "[t]ax-free" alcoholic beverages.[25]

B. Meaning

The parties agree that the provision gives unit employees access to the Shoppette during both duty and non-duty hours.[26]

C. Analysis and Conclusions

As an initial matter, we note that it is the Authority's responsibility to apply the law to the issues and facts that are a part of the case record properly before it.[27] And in discharging this responsibility, we honor the section of the Statute requiring that its provisions be interpreted in a manner consistent with an effective and efficient government.[28] Where other statutory and regulatory provisions apply, we are guided, as adjudicators, by the fundamental principle that the terms and intent of those statutory and regulatory provisions control.[29]

1. The Agency's claim regarding conditions of employment provides no basis for finding the provision contrary to law.

In *Local 1547*, the Authority concluded that the Union's proposals – broader than the provision now before us – concerned conditions of employment. The Authority cited longstanding precedent that, in widely varying circumstances, providing unit employees access to food services at the workplace,[30] as well as civilian employees access to military exchange and exchange-related facilities,[31] including access during non-duty hours,[32] concerns employees' conditions of employment. The Authority cited judicial precedent to the same effect.[33]

While the Agency continues to press the point, it raises nothing new. And the Agency neither requested reconsideration of *Local 1547* nor requested judicial review of that decision. In these circumstances, we reach the same conclusion as in *Local 1547* for the same reasons: The provision concerns unit employees' conditions of employment.

2. The Agency's arguments regarding Title 10 of the U.S. Code do not demonstrate that the provision is contrary to law.

The Agency argues that the provision is contrary to various sections of Title 10 of the U.S. Code because: (1) those sections give the Secretary of Defense "sole and exclusive discretion" to determine who has access to exchanges;[34] and (2) the provision is inconsistent with the cited sections of Title 10.

And the Agency contends that its interpretations of Title 10 are "entitled to deference."[35] While the Agency does not specify what level of deference the Authority should give those interpretations, we find that

[24] Union's Pet., Attach. 1.
[25] Union's Pet. at 4.
[26] Record of Post-Pet. Conference at 2.
[27] *See, e.g.*, *POPA*, 56 FLRA 69, 88 (2000).
[28] 5 U.S.C. § 7101(b).
[29] *See, e.g.*, *United States v. Hopkins*, 427 U.S. 123, 125 (1976).
[30] 64 FLRA at 645 (citing *IFPTE, Local 35*, 54 FLRA 1377, 1381 (1998) (Member Wasserman concurring)); *Marine Corps Logistics Base, Barstow, Cal.*, 46 FLRA 782, 783 (1992) (and cases cited therein), *recons. denied*, 47 FLRA 454 (1993); *Dep't of VA, Veterans Admin. Med. Ctr., Veterans Canteen Serv., Lexington, Ky.*, 44 FLRA 179, 189 (1992); *NAGE, Local R1-144*, 43 FLRA 1331, 1345-46 (1992); *AFGE, Local 2614*, 43 FLRA 830, 833-34 (1991) (*Local 2614*); *Dep't of the Treasury, IRS (Wash., D.C.)*, 27 FLRA 322, 325 (1987)).
[31] *Id.* at 646 (citing *SEIU, Local 556*, 49 FLRA 1205 (1994); *id.* at 647 (citing *AFGE, Local 1786*, 49 FLRA 534, 536 (1994) (*Local 1786*)); *id.* at 645 (citing *Antilles Consol. Educ. Ass'n*, 46 FLRA 625, 629-30 (1992); *Local 2614*, 43 FLRA 830; *Dep't of the Army, Fort Greely, Alaska*, 23 FLRA 858 (1986); *Dep't of the Air Force, Eielson Air Force Base, Alaska*, 23 FLRA 605 (1980)).
[32] *Id.* (citing *Local 1786*, 49 FLRA at 536).
[33] *Id.* (citing *U.S. Dep't of the Air Force, Griffiss Air Force Base, Rome, N.Y. v.. FLRA*, 949 F.2d 1169 (D.C. Cir. 1991); *id.* at 645 (citing *AFGE, Local 2761, AFL-CIO v. FLRA*, 866 F.2d 1443 (D.C. Cir. 1989)).
[34] Agency's Statement at 11.
[35] *Id.* at 13.

deference is warranted to the extent that the interpretations have the "power to persuade."[36] In this regard, agency interpretations that are promulgated solely in the course of litigation receive the level of deference set forth in *Skidmore v. Swift* (*Skidmore*),[37] under which the deference due an agency's statutory interpretation "will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control."[38]

Here, the Agency provides no evidence that its interpretations of the cited sections of Title 10 were promulgated outside the course of litigation. And we note that the Agency head's disapproval of the provision does not contain those interpretations, or even cite any sections of Title 10.[39] As a result, the (higher) level of deference accorded under *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.* (*Chevron*),[40] does not apply. We note that *Chevron* deference is due only if an agency reached its interpretations "in a notice-and-comment rulemaking, a formal agency adjudication, or in some other procedure meeting the prerequisites for *Chevron* deference."[41] And *Chevron* deference is *not* warranted in cases involving "agency litigating positions that are wholly unsupported by regulations, rulings, or administrative practice"[42] – in other words, "post hoc interpretations contained in agency briefs."[43] Thus, we accord *Skidmore* deference.[44] To the extent that Authority decisions hold or imply to the contrary, we will no longer follow them.[45]

In addition, we address only the Agency's claims that cite specific sections of Title 10 and provide supporting arguments. In this regard, § 2424.24(c)(2) of the Authority's Regulations requires an agency to include, in its statement of position, a "*specific* citation to

[36] *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944).

[37] *Id.*; *see, e.g., Price v. Stevedoring Servs. of Am., Inc.*, 697 F.3d 820, 825-31 (9th Cir. 2013) (citing *Wheeler v. Newport News Shipbuilding & Dry Dock Co.*, 637 F.3d 280, 290-91 (4th Cir. 2011) (applying *Skidmore* deference to litigating position)); *Day v. James Marine, Inc.*, 518 F.3d 411, 418 (6th Cir. 2008) (accepting concession that litigating position was not entitled to *Chevron* deference, but only *Skidmore* deference); *Pool Co. v. Cooper*, 274 F.3d 173, 177 n.3 (5th Cir. 2001) (interpretations advanced in litigation briefs warrant only *Skidmore*, not *Chevron*, deference); *Ala. Dry Dock & Shipbuilding Corp. v. Sowell*, 933 F.2d 1561, 1563 (11th Cir. 1991) (declining to defer to agency's litigating position), *abrogated on other grounds by Bath Iron Works Corp. v. Dir., OWCP*, 506 U.S. 153 (1993)); *see also N. Fork Coal Corp. v. Fed. Mine Safety & Health Review Comm'n*, 691 F.3d 735, 742-43 (6th Cir. 2012).

[38] *Skidmore*, 323 U.S. at 140.

[39] *See* Union's Pet., Attach. 1.

[40] 467 U.S. 837, 842-43 (1984).

[41] *Barnes v. Comm'r of IRS*, 712 F.3d 581, 583 (D.C. Cir. 2013) (quoting *Landmark Legal Found. v. IRS*, 267 F.3d 1132, 1135-36 (D.C. Cir. 2001)); *see also Precon Dev. Corp. v. U.S. Army Corps of Eng'rs*, 633 F.3d 278, 290 n.10 (4th Cir. 2011) (declining to grant *Chevron* deference to an interpretation that was not incorporated in "notice-and-comment rulemaking," but "only in a non-binding guidance document"); *Sursely v. Peake*, 551 F.3d 1351, 1355 n.2 (Fed. Cir. 2009) (finding that an opinion letter was "not the type of formal exercise of delegated authority entitled to deference under *Chevron*"); *Sierra Club, Inc. v. Leavitt*, 488 F.3d 904, 915 (11th Cir. 2007) (declining to give *Chevron* deference to an EPA guidance letter because there was "no indication that the . . . letter was the product of a 'formal [agency] adjudication,' 'notice-and-comment rulemaking,' or 'any other circumstances reasonably suggesting that Congress ever thought of [guidance letters] as deserving . . . deference" (quoting *United States v. Mead Corp.*, 533 U.S. 218, 230-31 (2001) (*Mead*))); *White & Case LLP v. United States*, 89 Fed. Cl. 12, 21 (Fed. Cl. 2009) (declining to give *Chevron* deference to an interpretation that did not involve "a formal adjudication with a hearing, published findings, internal appeals[,] and the like," but was promulgated under a process that was "much less formal than the adjudications of tribunals or independent agencies to which the Supreme Court has deferred").

[42] *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 212 (1988).

[43] *Miller v. Clinton*, 687 F.3d 1332, 1340 (D.C. Cir. 2012); *see also Martin v. Occupational Safety & Health Review Comm'n*, 499 U.S. 144, 156 (1991) ("Our decisions indicate that agency 'litigating positions' are not entitled to deference when they are merely appellate counsel's 'post hoc rationalizations' for agency action, advanced for the first time in the reviewing court.").

[44] *Skidmore*, 323 U.S. at 140; *see, e.g., Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 111 n.6 (2002); *Mead*, 533 U.S. at 235; *see also Vulcan Constr. Materials, L.P. v. Fed. Mine Safety & Health Review Comm'n*, 700 F.3d 297, 316 (7th Cir. 2012); *Public Citizen, Inc. v. U.S. Dep't of HHS*, 332 F.3d 654, 660-61 (D.C. Cir. 2003).

[45] *E.g., U.S. Dep't of the Interior, Nat'l Park Serv., Pictured Rocks Nat'l Lakeshore, Munising, Mich.*, 61 FLRA 404, 406-07 (2005), *recons. denied*, 61 FLRA 552 (2006); *Ass'n of Civilian Technicians, R.I. Chapter*, 55 FLRA 420, 423 (1999); *Indian Educators Fed'n, N.M. Fed'n of Teachers*, 53 FLRA 696, 707-17 (1997).

any law" that the agency relies on.[46] Thus, in its statement of position, "an agency has the burden of providing a record to support its assertion" that a provision is contrary to law.[47] A "blanket assertion" that a provision conflicts with an entire statute "is insufficient to meet [an agency's] regulatory burden to demonstrate how particular sections of the provision are contrary to specific terms of" the cited statute.[48]

Consistent with this regulation, we do not address the Agency's citations to "Chapter 147" of Title 10[49] and "10 U.S.C. § 2481 et seq." because they lack the required specificity under the regulations.[50] But we address the Agency's arguments that, under specific sections of Title 10: (1) it has sole and exclusive discretion to determine access to exchanges;[51] and (2) the provision conflicts with those specific sections.[52] In this regard, the Agency cites 10 U.S.C. §§ 101, 113, 2481, and 2482(c)(2).[53] In citing § 2482(c)(2) – which deals with decisions to close commissaries[54] – the Agency actually quotes from § 2484(c)(2).[55] As it is clear that the Agency intended to cite § 2484(c)(2), we include it among the provisions that we address. And as § 2484(c)(2) references, and is understood only in the context of, § 2484(c)(1), we also address § 2484(c)(1).

The pertinent provisions of Title 10 state:

> 101. Definitions
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> (a) In general.—The following definitions apply in this title:
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> . . . .
>
> (6) The term "department" . . . [w]hen used with respect to the Department of Defense . . . means the . . . part of the department . . . under the control or supervision of the Secretary of Defense . . . .[56]
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> . . . .
>
> 113. Secretary of Defense
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> . . . .
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> (b) The Secretary is the principal assistant to the President in all matters relating to the Department of Defense. Subject to the direction of the President and to this title and section 2 of the National Security Act of 1947 (50 U.S.C. 401), he has authority, direction, and control over the Department of Defense.[57]
>
> . . . .
>
> 2481. Defense commissary and exchange systems: existence and purpose
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> (a) Separate Systems.—The Secretary of Defense shall operate . . . a world-wide system of commissary stores and a separate world-wide system of exchange stores. The stores . . . may sell, at reduced prices, food and other merchandise to members of the uniformed services on active duty, members of the uniformed services entitled to retired pay, dependents of such members, and persons authorized to use the system under chapter 54 of this title.
>
> (b) Purpose of Systems.—The defense commissary system and the exchange system are intended to enhance the quality of life of members of the uniformed services, retired members, and dependents of such members, and to support military readiness, recruitment, and retention.[58]
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> . . . .
>
> 2484. Commissary stores: merchandise that may be sold; uniform surcharges and pricing
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> . . . .

[46] 5 C.F.R. § 2424.24(c)(2) (emphasis added).
[47] *AFGE, Local 3928*, 66 FLRA 175, 178 (2011) (Member Beck dissenting as to application of burden).
[48] *NTEU*, 66 FLRA 892, 899 (2012), *recons. denied*, 66 FLRA 1028 (2012).
[49] Agency's Statement at 13.
[50] *Id.* at 12.
[51] *Id.* at 11.
[52] *Id.* at 13-14.
[53] *Id.* at 9-12.
[54] 10 U.S.C. § 2482(c)(2).
[55] Agency's Statement at 12.
[56] 10 U.S.C. § 101(a)(6).
[57] *Id.* § 113(b).
[58] *Id.* § 2481(b).

> (c) Inclusion of Other Merchandise Items.—(1) The Secretary of Defense may authorize the sale in . . . commissary stores of merchandise not covered by a category specified in subsection (b) . . . .
>
> (2) Notwithstanding paragraph (1), the Department of Defense military resale system shall continue to maintain the exclusive right to operate convenience stores, shopettes, and troop stores . . . .[59]

a. The Agency has not demonstrated that 10 U.S.C. § 101, § 113, § 2481(a)-(b), or § 2484(c)(2) gives the Secretary of Defense sole and exclusive discretion to establish access to exchanges.

The Agency contends that the Secretary of Defense has "sole and exclusive discretion" to determine who has access to the exchanges, and that, as a result, the Secretary's authority is not subject to collective bargaining.[60]

Where law or applicable regulation gives an agency "sole and exclusive discretion" over a matter, the Authority has found that it would be contrary to law to require that discretion to be exercised through collective bargaining.[61] In resolving an agency's claim of sole and exclusive discretion, the Authority examines the plain wording and legislative history of the statute or regulation at issue.[62] The Authority has found that laws that give agency officials the authority to make certain determinations "without regard to the provisions of other laws" and "notwithstanding any other provision of law" demonstrate sole and exclusive discretion.[63]

The Agency did not claim in *Local 1547* that the Secretary of Defense has sole and exclusive discretion to determine access to commissaries and exchanges. And *before the arbitrator, the Agency expressly made a contrary claim*: that the Secretary of the *Air Force* had power to grant access to the Shoppette.[64] Although the Agency's latter claim is not before us, the former has scant, if any, support. In this regard, § 113(b) gives the Secretary of Defense "authority, direction, and control over the Department of Defense,"[65] and § 101(a)(6) defines "department" as various entities "under the control or supervision" of the Secretary of Defense.[66] Section 2481(a) provides that the Secretary of Defense "shall operate, in the manner provided by" Title 10, Chapter 147 and other provisions of law, a system of exchanges,[67] and § 2481(b) discusses the purpose of the exchange system.[68]

The Agency neither cites any judicial or Authority precedent regarding sole and exclusive discretion, nor explains how the cited sections of Title 10 are similar to statutes that have been found to provide such discretion. And there is nothing in the plain wording of these sections comparable to the wording, noted above, found to provide sole and exclusive discretion. Instead, these sections, individually and as a whole, provide the Secretary with power to operate an exchange system, in concert with laudable statutory goals. Further, the only legislative history the Agency cites is a House of Representatives subcommittee report (the subcommittee report) that, according to the Agency, provides that the exchange system was intended to "improve [military-service members'] purchasing power"[69] and to be "maintained for the morale and vital benefit" of those members.[70] We have no doubt that the exchange system is intended for these purposes and agree that they are important. But nothing in this report addresses whether such benefits may be extended to others. And it certainly does not address the situation here, involving only an incremental extension (from a part of the Shoppette to the whole).

As for the Agency's reliance on § 2484(c)(2), that section states, as relevant here, that: (1) the Secretary of Defense may authorize the sale of certain merchandise in commissaries;[71] and (2) "the Department of Defense military resale system shall continue to maintain the exclusive right to operate convenience stores, shopettes, and troop stores, including such stores established to support contingency operations."[72] But the *commissary* system addressed by

[59] *Id.* § 2484(c)(2).
[60] Agency's Statement at 11.
[61] *E.g.*, *POPA*, 59 FLRA 331, 346 (2003); *Ass'n of Civilian Technicians, Mile High Chapter*, 53 FLRA 1408, 1412 (1998) (*ACT*).
[62] *E.g.*, *U.S. Dep't of the Interior, Bureau of Indian Affairs, Sw. Indian Polytechnic Inst., Albuquerque, N.M.*, 58 FLRA 246, 248-50 (2002); *NAGE, Local R5-136*, 56 FLRA 346, 348-49 (2000); *ACT*, 53 FLRA at 1412-416.
[63] *AFGE, Local 3295*, 47 FLRA 884, 895 (1993).
[64] *See Luke AFB*, 11 FSIP 111 at 4, 8.
[65] 10 U.S.C. § 113(b).
[66] *Id.* § 101(a)(6).
[67] *Id.* § 2481(a).
[68] *Id.* § 2481(b).
[69] Agency's Statement at 11.
[70] *Id.*
[71] 10 U.S.C. § 2484(c)(1).
[72] *Id.* § 2484(c)(2).

§ 2484 is "separate" from the *exchange* system at issue here.[73] Thus, it is unclear how § 2484(c)(2) is relevant. Further, the plain wording of § 2484(c)(2) does not suggest that it is intended to provide sole and exclusive discretion. To the contrary, this section is about the sale of specific merchandise, not access to facilities selling it. And the Agency has cited no legislative history supporting its claim.

As noted above, the deference we provide the Agency's interpretations of these statutory sections under *Skidmore* "depend[s] upon the thoroughness evident in its consideration, the validity of its reasoning, [and] its consistency with earlier and later pronouncements."[74] The foregoing demonstrates that the Agency's interpretations do not satisfy these requirements. As such, we do not defer to the Agency's interpretations and conclude that the Secretary does not have sole and exclusive discretion to determine access to the Shoppette under 10 U.S.C. §§ 101, 113, 2481(a)-(b), or 2484(c)(2).

If an agency has discretion to take an action, and that discretion is not sole and exclusive, then the Statute requires the agency to bargain over that action, unless bargaining is otherwise unlawful.[75] The Agency disagrees, relying on *Department of the Navy, Military Sealift Command v. FLRA* (*Military Sealift Command*).[76] There, the court held that "Congress did not intend to subject the Navy's pay practices" to collective bargaining but found it unnecessary to decide whether the test urged by the Authority – that matters subject to an agency's discretion are within the duty to bargain subject to such exceptions as sole and exclusive discretion – could have "utility in defining the scope of bargaining over agency discretion outside the area of pay and pay practices."[77] Thus, *Military Sealift Command* does not undermine our reliance on "discretion" precedent, both judicial and Authority.[78]

In addition, subsequent to *Military Sealift Command*, the Supreme Court held in *Fort Stewart Schools v. FLRA* (*Fort Stewart*)[79] that pay matters can constitute conditions of employment; the Authority has held that the decision in *Military Sealift Command* is no longer viable in light of the Supreme Court's decision in *Fort Stewart*.[80] As for the dissent's reliance on *U.S. Dep't of the Navy, Naval Undersea Warfare Center Division, Newport, Rhode Island v. FLRA*,[81] the court there disagreed with the Authority's interpretation of a statute. But that disagreement proves nothing here, which involves interpretation of a *different* statute in a *different* context using *different* legal principles.

For these reasons, the Agency has not demonstrated that the Secretary of Defense has sole and exclusive discretion to establish access to the Shoppette.

b. The Agency has not demonstrated that the provision is inconsistent with 10 U.S.C. §§ 101, 113, 2481(a)-(b), or 2484(c)(2).

The Agency argues that the provision is contrary to 10 U.S.C. §§ 101, 113, 2481(a)-(b), and 2484(c)(2).[82] According to the Agency, those statutory sections set forth categories of individuals who are authorized to use exchanges, and "[t]o impose [a] requirement to extend [e]xchange privileges to" individuals who are not listed would be contrary to law.[83] Citing the subcommittee report, the Agency claims that the exchange system is maintained "for the morale and vital benefit of the military service personnel"[84] and that "[a]ny expansion of patron privileges without the express authority granted by the Secretary [of Defense] is contrary to law."[85]

The wording of the cited provisions is set forth above. They define various terms, including "department"[86] as used with respect to the Department of Defense, and provide that the Secretary has authority to operate commissary and exchange systems. They also provide that the systems "are intended to enhance the quality of life of members of the uniformed services, retired members, and dependents of such members, and to support military readiness, recruitment, and retention."[87] As for 10 U.S.C. § 2484(c)(2) (and as discussed previously), that provision addresses the

[73] *Id.* § 2481(a); *cf. Local 1547*, 64 FLRA at 642 (distinguishing commissaries from exchanges).
[74] 323 U.S. at 140.
[75] *E.g., AFGE, Locals 3807 & 3824*, 55 FLRA 1, 2 n.3 (1998) (*Locals 3807 & 3824*) (and cases cited therein).
[76] 836 F.2d 1409 (3rd Cir. 1988).
[77] *Id.* at 1415.
[78] *See, e.g., Dep't of the Treasury, U.S. Customs Serv. v. FLRA*, 836 F.2d 1381, 1385-86 (D.C. Cir. 1988); *Locals 3807 & 3824*, 55 FLRA at 2 n.3.
[79] 495 U.S. 641 (1990).
[80] *AFGE, AFL-CIO, Local 3732*, 39 FLRA 187, 194 (1991); *see also U.S. Dep't of the Treasury, BEP v. FLRA*, 995 F.2d 301, 304 (D.C. Cir. 1993) ("insofar as the Third Circuit's decision in [*Military Sealift Command*] stood for the proposition that § 7103(a)(14)(C) [of the Statute] categorically removed all aspects of wage-setting from potential bargaining, . . . it cannot survive.").
[81] 665 F.3d 1339, 1348 (D.C. Cir 2012) (*Naval Undersea Warfare Ctr.*).
[82] Agency's Statement at 9-14.
[83] *Id.* at 15.
[84] *Id.* at 11.
[85] *Id.* at 13.
[86] 10 U.S.C. § 101(a)(6).
[87] *Id.* § 2481(b).

commissary system, not the separate exchange system, and is of questionable, if any, relevance.

None of these provisions addresses civilian access to exchanges. And the Agency does not provide any reasoning, or cite any precedent, to support its contrary interpretations. We have no doubt either that exchanges are intended to benefit the military community or that those benefits support readiness, recruitment, and retention. But this does not resolve the issue of whether extending those benefits to unit employees is contrary to law. And nothing in the wording of the provisions suggests that the incremental extension of benefits encompassed by the provision (as stated by the arbitrator, from "hot dogs" to "aspirin, batteries, [and] tissues"[88]) is unlawful.

We note that, under the DOD Instruction, the Agency has already extended some benefits to civilians, including unit employees.[89] In fact, the DOD Instruction permits numerous non-military persons access to exchange facilities. As noted by the arbitrator, civilian employees of the exchanges themselves have unlimited access to the exchanges (with the exception of uniform items and tobacco).[90] So do civilian employees working for the Red Cross.[91] And "contract surgeons" have "unlimited exchange privileges" during the periods of their contracts.[92]

In addition, the Agency's position on this matter has been far from consistent. The Agency did not claim in *Local 1547* that the proposals were "*contrary* to the provisions of Title 10; the Agency merely assert[ed] that nothing in Title 10 grants unit employees the privileges that the proposal[] request[ed]."[93] The Agency also did not make such a claim before the arbitrator; in fact, as set forth above, it argued that the *Secretary of the Air Force* had discretion to grant such access.[94] And the Authority previously has rejected similar arguments.[95]

For these reasons, the Agency has not demonstrated that its interpretations have the "power to persuade" within the meaning of *Skidmore*. Accordingly, we conclude that the Agency has not demonstrated that the provision is inconsistent with 10 U.S.C. §§ 101, 113, 2481(a)-(b), or 2484(c)(2). And as the Agency has not demonstrated that the provision is contrary to law on any other basis, we order the Agency to rescind its disapproval of the provision. We note that, in reaching this conclusion, we have not relied on the Agency's reply, which was untimely filed. In this regard, the Agency requested that the time limit for filing the reply be waived because (according to the Agency) its designee never received the Union's response. But the Union's supplemental submission, for which the Union requested and was granted permission to file, establishes that the designee *did receive* the Union's response on May 14, 2012. Therefore, the Agency's request for waiver is denied. As the Agency was required to file its reply by May 29,[96] but did not file it until June 13, we do not consider the reply.

In conclusion, we restate that we do not see our role as rendering policy pronouncements. If appropriate at all in a quasi-adjudicatory, administrative agency such as the Authority, it is a luxury accorded only to one writing a separate opinion, which, of course, is not subject to judicial review. Instead, we are guided, as we must be, by the law, including the decades of precedent and scores of decisions that support our conclusion here.

IV. Order

The Agency shall rescind its disapproval of the provision.

[88] *Luke AFB*, 11 FSIP 111 at 7.
[89] *See, e.g., id.* at 4; Union's Response at 3 n.5.
[90] DOD Instruction 1330.21, Enclosure 6 at Table E6.T2.2.
[91] *Id.* at Table E6.T2.1.
[92] *Id.* at Table E6.T1.12.
[93] 64 FLRA at 647 n.7.
[94] *Luke AFB*, 11 FSIP 111 at 4.
[95] *See, e.g., Local 1547*, 64 FLRA at 647 n.7 (citing decisions).
[96] Agency's Reply at 2; *see also* 5 C.F.R. § 2424.26(b).

Member Pizzella, dissenting:

I do not agree with the majority insofar as they conclude that the Agency did not have the authority to disapprove a provision that seeks to extend to civilian employees access to military exchanges, a benefit that is reserved, by statute and regulation, exclusively for the military, their families, and others to whom the Secretary of Defense has been authorized to extend those benefits.

This is, in fact, the second time that AFGE Local 1547 has sought to force the Air Force to extend access to its military exchanges to civilian-bargaining-unit employees at Luke Air Force Base (presumably to take advantage of discounted prices on goods, services, or gasoline that may be sold up to 30% below their fair-market value[1] off base), a benefit that is subsidized by the American taxpayer and is extended, by statute, to individuals who serve, or have served, in the United States armed forces, their families, dependents, and survivors.

A brief history lesson here is illustrative. Base exchanges were established in 1895 "to give back to *the military community*" to "deliver quality goods and services at competitively low prices."[2] Since that time, Congress has deemed it to be in the nation's interest to appropriate funds each year to support commissaries and exchanges to ensure that soldiers, and their families, have the "merchandise [and support] they need to make their lives more comfortable."[3]

Taxpayer support to military exchanges is not insignificant. In fiscal year 2013, Congress authorized $1.4 billion,[4] and a variety of tax and labor incentives, to provide a wide array of discounted products and services through the military exchanges – fast food, pharmacies, gas, convenience stores (carrying over 11,000 items),[5] adult and child clothing, shoes, car care,[6] beauty and barber-shop services, and laundry and dry-cleaning services.[7] By offering subsidized and discounted products and services, commissaries and exchanges save the typical military family approximately $6,500 a year and serve as one of the military's most effective assets in "retain[ing] the quality men and women [the military] need[s]."[8] And it has been reported that military retirees, to whom exchange benefits have been extended (by 10 U.S.C. § 2481(a)), will often drive two hours or more to avail themselves of these discounted privileges.[9]

It is understandable, then, that bargaining-unit employees, who work on military bases, might be envious of the benefits available to their military counterparts. But Congress' commitment to the military-exchange program does not exist to provide market discounts to every civilian who simply happens to work on a military base. Instead, it was created to help offset the "great sacrifice[s]" made by soldiers and their families[10] who are frequently called upon to serve in harsh conditions overseas and at remote domestic bases, where the availability of retail stores and services may be lacking or nonexistent.[11]

Title 10 of the United States Code also provides the Secretary of Defense exclusive discretion to extend military-exchange access to survivors and dependents of active-duty soldiers, reservists, National Guardsmen, as well as certain, specified categories of civilians, when they are stationed outside of the United States and as an "induce[ment]" to accept assignments in remote outposts where the quality or availability of food products, goods, and services may be limited.[12]

But none of those circumstances are present in this case.[13] Luke Air Force Base is located in Glendale, Arizona, a suburb of Phoenix. It is home to four universities, the Fiesta Bowl, was the host city for the 2007 AFC championship game, and will host the NFL's upcoming 2015 Super Bowl.[14] Ironically, Glendale was recently recognized by *USA Today* and *Sunset Magazine* "as one of the country's ten best places

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[1] Rajiv Chandrasekaran, *Plan to shut military supermarkets shows difficulty of cutting defense spending*, Wash. Post, http://www.washingtonpost.com/world/national-security/commissary-plan-backlash-show-difficulty-of-cutting-military-personnel-spending/2013/06/01/15fb6c12-c922-11e2-9245-773c0123c027_story.html (June 1, 2013) ("Plan to shut military supermarkets" article).

[2] U.S. Army & Air Force Exchange Service, http://www.shopmyexchange.com/exchangestores (last visited April 21, 2014) (emphasis added).

[3] *Id*.

[4] "Plan to shut military supermarkets" article.

[5] U.S. Army & Air Force Exchange Service.

[6] *Who may shop at AAFES?*, Edwards Air Force Base, http://www.edwards.af.mil/news/story.asp?id=123201267 (last visited April 21, 2014).

[7] *Base Exchange*, Wikipedia, http://en.wikipedia.org (last visited April 21, 2014) ("Base Exchange" article).

[8] "Plan to shut military supermarkets" article (quoting Frederick Vollrath, Assistant Sec'y of Def. for Readiness & Force Management).

[9] *Id*.

[10] Terry Howell, *Group Fights to Save Commissaries*, Military.com, http://militaryadvanage.military.com (June 7, 2012) (Howell article).

[11] "Plan to shut military supermarkets" article.

[12] *AFGE, Local 1547*, 64 FLRA 642, 649 (2010) (Dissenting Opinion of Member Beck) (*Local 1547*).

[13] *Id.*

[14] *Glendale, Arizona*, Wikipedia, http://en.wikipedia.org/wiki/Glendale,_Arizona (last visited April 23, 2014).

for shopping."[15] Luke Air Force Base, therefore, may hardly be described as an isolated, or hardship, post. Just like any other Glendale resident, the civilian employees who work there have ready access to numerous businesses from which they may purchase food, groceries, and other essential services and household items, compared to civilian employees who have accepted hardship assignments in Baghdad or Kabul.

Against this backdrop, I do not agree with the majority that this provision, which requires the Air Force to extend access to its military exchange to civilian-bargaining-unit employees, "establish[es] a direct connection to [the] employees' work situation or employment relationship."[16]

More specifically, Title 10 authorizes the Secretary of Defense to establish military exchanges to sell specific goods and services *but only* to specific "members of the uniformed services" and other "persons" who are specified in chapter 54 of Title 10,[17] such as – "[s]urvivors of certain Reserve and Guard members,"[18] "former spouses" of military service members,[19] "members of reserve components and reserve retirees under age 60,"[20] and Red Cross workers,[21] "contract surgeons"[22] and "members of [the] National Guard serving in federally declared disaster[s] or national emergenc[ies]."[23] Notably absent from this list are any civilian employees – bargaining unit or non-bargaining unit – that just happen to work at a military base.

Despite this exclusive authority that has been granted to the Secretary of Defense since 1895, the majority declares today that the Secretary's discretion in this regard is not "sole and exclusive," is subject to the bargaining requirements of the Federal Service Labor-Management Relations Statute (our Statute),[24] and that DOD's implementing instructions are simply "policy pronouncements."[25] The majority concludes, therefore, that the Air Force must negotiate with the Union about who will be granted access to its own military exchange.[26]

Once again, I cannot read our Statute so broadly that the Authority may require the Secretary of Defense to expand the categories of persons to whom military-exchange access will be extended. That would be like an obtuse neighbor assuming he could show up at my invitation-only afternoon barbeque simply because I never told him *not to come*.

In *U.S. Department of the Navy, Naval Undersea Warfare Center Division, Newport, Rhode Island v. FLRA*,[27] the U.S. Court of Appeals for the District of Columbia Circuit criticized the Authority for injecting its own "organic statute [into] another statute . . . not within [the Authority's] area of expertise."[28] In that case, the Court determined that we could not tell the Navy that it must purchase bottled water for its employees.[29] More recently, the same Court told the Authority that we could not use our Statute to tell the Department of Homeland Security's Inspector General how they should interpret various provisions of the Inspector General Act.[30] And, for the same reasons that I explained in *U.S. Department of Homeland Security, U.S. Immigration & Customs Enforcement*, I believe that the majority reads our Statute more "expansively" than Congress intended when we tell the Air Force that its discretion is not sole and exclusive when it comes to determining who will be granted access to its own military exchange.[31]

Title 10 is a unique statutory construct that must be read in its entirety and in its historical context. It has always defined the products and services that will be provided to soldiers to offset the "great sacrifice[s]" made by them, and their families,[32] while serving the country under harsh conditions (usually overseas but also at remote domestic bases) where commercial retail sources are lacking or nonexistent.[33] Over time, Congress recognized that other specific categories of persons, such as those described above – dependents of

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[15] *Glendale, Arizona*, http://www.visitglendale.com/shops (last visited April 23, 2014).
[16] *Local 1547*, 64 FLRA at 649 (Dissenting Opinion of Member Beck).
[17] 10 U.S.C. § 2481(a).
[18] *Id.* at § 1061.
[19] *Id.* at § 1062.
[20] *Id*. at § 1063.
[21] Majority at 12 n.90 (citing DOD Instruction 1330.21, Enclosure 6 at Table E6.T2.1).
[22] *Id*. at Table E6.T1.12.
[23] 10 U.S.C. § 1064.
[24] Majority at 5-6.
[25] *Id*. at 13.
[26] *Id*. at 11-13.
[27] 665 F.3d 1339, 1348 (D.C. Cir 2012) (*Naval Undersea Warfare Ctr.*).
[28] *Naval Undersea Warfare Ctr.*, 665 F.3d at 1348 (quoting *U.S.Dep't of the Air Force v. FLRA*, 648 F.3d 841, 846 (D.C. Cir. 2011).
[29] *Id*. (internal quotation marks omitted);
[30] *U.S. DHS, U.S. CBP v. FLRA*, 751 F.3d 665, 669 (D.C. Cir. 2014) ("The Authority therefore knew that the agency's argument was that bargaining . . . was incompatible with the [Inspector General] Act *as a whole*.") (emphasis in original).
[31] 67 FLRA 501, 508 (2014) (Dissenting Opinion of Member Pizzella) (Congress could not have intended for our Statute to be read so "expansively" as to require an agency to bargain with the union before it could exercise its exclusive responsibilities under the Federal Information Security Management Act.)
[32] Howell article.
[33] "Plan to shut military supermarkets" article; *see also* "Base Exchange" article.

those in military service, retirees, reservists, national guardsmen, survivors of those killed in action, should also be extended the same access,[34] as well as civilian employees (such as those enumerated above) when they "fac[e] the challenges implicit to military service[, such as,] when assigned or on temporary duty overseas, or when they are on temporary duty and residing in government quarters on military installations in the United States."[35] But the purpose of the discretion to authorize access to military exchanges, has always been to offset "sacrifice[s]" that are made in service to our country and to "induce" civilians to accept assignments in locations that would be considered a hardship.[36]

But, in the end, the determination of who will be granted access is a decision that is left to the sole discretion of the Secretary of Defense. It is not a privilege that is subject to negotiation under our Statute.

The majority also ignores the fact that military exchanges rely on the support of appropriated funds (even though to a lesser degree than commissaries) in order to provide products and services up to 30% lower than their fair-market value.[37] In this respect, my colleagues conclude that the Secretary's discretion cannot be "sole and exclusive" because several provisions from Title 10, that are relied upon by the Agency, address "the *sale* of specific merchandise" rather than "*access* to facilities selling it."[38] I do not agree with the majority's conclusion, but to the extent my colleagues are correct in any respect, that is clearly a distinction without a difference. The Court in *Naval Undersea Warfare Center*, clearly reaffirmed that "*all uses of appropriated funds* must be affirmatively approved by Congress; the mere absence of a prohibition is not sufficient."[39] Therefore, the Authority may not require the Secretary of Defense to extend access to military exchanges to civilian bargaining-unit employees – even if that access is granted in "increment[s]," or is limited, as the majority erroneously asserts, to the purchase of "aspirin, batteries, [and] tissues"[40] – any more than the Authority was able to require the Department of the Navy to purchase bottled water for its employees.[41]

I would conclude, therefore, that the provision is contrary to law.

Thank you.

[34] 10 U.S.C. § 2481(a).
[35] *DOD Civilians Using the BX*, Buckley Air Force Base, http://www.buckley.af.mil/library/factsheets/factsheet.asp?id=14060 (last visited April 21, 2014).
[36] "Plan to shut military supermarkets" article.
[37] *Id*.
[38] Majority at 10.
[39] *Naval Undersea Warfare Ctr.*, 665 F.3d at 1348 (emphasis added).
[40] Majority at 12. As noted earlier, access to the military exchange would provide civilian-bargaining-unit employees access to discounted fast food, pharmacies, gas, 11,000 convenience store items, clothing, shoes, car care, beauty and barber-shop services, and laundry and dry-cleaning services – all subsidized by, but not available to, the American taxpayer. *See* Dissent at 1, nn.5-7.
[41] *Naval Undersea Warfare Ctr.*, 665 F.3d at 1343.