

In the Matter of

DEPARTMENT OF THE AIR FORCE
LUKE AIR FORCE BASE
LUKE AFB, ARIZONA

and

LOCAL 1547, AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES, AFL-CIO

Case No. 11 FSIP 111

ARBITRATOR'S OPINION AND DECISION

Local 1547, American Federation of Government Employees, AFL-CIO (Union) filed a request for assistance with the Federal Service Impasses Panel (Panel) to consider a negotiation impasse under the Federal Service Labor-Management Relations Statute (Statute), 5 U.S.C. § 7119, between it and the Department of the Air Force, Luke Air Force Base, Luke AFB, Arizona (Employer).

Following investigation of the request for assistance, arising from negotiations over bargaining unit employees' ability to use the Base Exchange and Commissary,^{1/} the Panel determined that the dispute should be resolved through mediation-arbitration with the undersigned in conjunction with two other negotiation impasses in Case Nos. 11 FSIP 112 and 124 involving the same parties. The parties were informed that if settlement on any of the issues at impasse were not reached during mediation, I would issue a binding decision to resolve them.

Consistent with the Panel's procedural determination, on November 7 and 8, 2011, I conducted a mediation-arbitration proceeding with representatives of the parties at the Panel's offices in Washington, D.C. During the mediation phase, the parties reached voluntary settlements in Case Nos. 11 FSIP 112 and 124, but were unable to resolve the issue in Case No. 11

^{1/} The Union's proposals, which arose during Union-initiated mid-term bargaining, were found negotiable by the Federal Labor Relations Authority (FLRA) in AFGE, Local 1547 and U.S. Department of the Air Force, Luke Air Force Base, Arizona, 64 FLRA 642 (April 7, 2010) (Luke AFB).

FSIP 111. Thus, I am required to issue a final decision imposing terms in accordance with the Statute and 5 C.F.R. §2471.11 of the Panel's regulations. In reaching this decision, I have considered the entire record, including the parties' pre-hearing submissions. By agreement of the parties, the record was closed at the end of the hearing on November 8 and there were no post-hearing position statements.

BACKGROUND

The Employer's primary mission is to train F-16 fighter pilots and crew chiefs. The Union represents a bargaining unit that, at the time of the hearing, consisted of 777 non-professional General Schedule and Wage Grade employees. The parties' most recent collective bargaining agreement expired in 2000; they continue to follow it as "past practice," with the exception of certain provisions deemed by the Union to be permissive subjects of bargaining.

ISSUE AT IMPASSE

The parties disagree over the extent to which bargaining unit employees should have access to a facility operated by the Luke AFB Base Exchange.

POSITIONS OF THE PARTIES

1. The Union's Position

The Union's proposed Memorandum of Understanding includes the following wording:

Bargaining unit employees with a valid DoD ID card shall be granted full access to the Luke AFB Base Exchange restaurants and Shoppette.^{2/} Employees may not purchase uniform items, "Tax-free" tobacco items and "Tax-free" alcoholic beverages.

By signing this agreement the Union agrees to withdraw the other proposals in 11 FSIP 111.

^{2/} According to the Union, the Shoppette is a gas station-type convenience store on base with gasoline available all day, nights and weekends. The Union indicated on the record that access to the Shoppette would include access to the adjoining gas station.

In support of this proposal, the Union cites the decision in Luke AFB in which the FLRA ruled that access to the Base Exchange is a negotiable subject. The Employer did not appeal this decision to the courts. Accordingly, the Employer's arguments are based on case law that has been reversed. The Union was not aware of the DoD regulations cited by the Employer and can no longer negotiate over those regulations. In this proceeding it is trying only to negotiate over the discretion that lies with the head of the Agency. Insofar as the Employer is arguing that the authority to grant access lies with another entity, such as the Army and Air Force Exchange Service (AAFES), that entity should have been at the table.

With regard to the substance of the proposal, there is no evidence that access by bargaining unit employees to Base Exchange restaurants and the Shoppette would create harm to any process or system. It would result in no additional cost to either Luke AFB or AAFES. Based on an earlier survey by the Union, probably no more than 200 bargaining unit employees would take advantage of the additional access. Many bargaining unit employees already have such access either through their status as retired military or because they are dependants of military personnel or military retirees. Although the FLRA ruled that full access to the Base Exchange properties is negotiable, during the hearing the Union compromised by reducing its initial proposal to cover only the restaurants and the Shoppette, including the gas station attached to the Shoppette.^{3/} The Union is seeking the ability to purchase more than food that can be consumed on the premises, as the Employer proposes. The Union proposal would also cover other items sold in the Shoppette, such as health care supplies, feminine care items and other small goods. If bargaining unit employees currently can purchase tax-free food on the base, why do they have to leave the base to purchase bandages and batteries? Since the events of September 11, 2001, some of the gates to the installation have been closed; the gates that are still open are often congested and thus it is not always easy to get off the base. Moreover, at certain times the base is closed entirely for many hours. Finally, the funds generated by the Base Exchange facilities

3/ Initially, this case involved two Union proposals: (1) All bargaining unit employees shall be granted access to and use of the Base Commissary; and (2) All bargaining unit employees shall be granted access to and use of the Base Exchange and all of its satellite stores (e.g., Shoppette, gas station, etc.) except for purchase of articles of uniform items.

support the Morale, Welfare and Recreation programs on the base, which the civilian employees, as well as members of the military, use.

2. The Employer's Position

The Employer acknowledges that bargaining unit employees already have access to "all AAFES eating facilities" and proposes to permit bargaining unit employees to purchase "at [the] Base Shoppette of Luke AFB food and beverages of the heat and eat category called Snack Avenue." In addition:

[the] Union can put together a package justifying access to the Luke AFB Shoppette/Base Exchange facilities. The Union must submit it following DoDI 1330.21 procedures. It would go through channels to the Air Force Secretariate.

Under Department of Defense Instruction 1330.21 bargaining unit employees have access to a number of places to eat on the base that are operated by the Base Exchange.^{4/} They also have access to a variety of restaurants within 5.6 miles of the base. There is no evidence that the Union requested to bargain with AAFES over the DoD Instructions, which govern this situation. The Shoppette was created primarily for military personnel. During the hearing there was testimony that access to base exchanges is a powerful recruitment and retention tool for the military. Citing Department of the Air Force, Tyndall Air Force Base and Local 3240, AFGE, AFL-CIO, Case No. 01 FSIP 193 (December 18, 2001) (Tyndall), the Employer asserts that it can provide Base Exchange privileges only to the extent of its bargaining authority. Only the Secretary of the Air Force can authorize exceptions to the rule set forth in Instruction 1330.21 and, pursuant to section 6.5.3 of that Instruction, delegation of that authority is prohibited; the Union could go through the process necessary to request an exception. Citing Department of the Army, Headquarters, Fort Devens and Local R1-

^{4/} Pursuant to Enclosure 6, Table E6.T2.6 of Instruction 1330.21, civilian employees of the U.S. Government working on, but residing off of, Military Installations have access to "All food and beverages sold at any exchange food activity, if consumed on post." That Instruction and others make it clear that, with the exception of certain outlined circumstances, civilian employees are not currently authorized to use base exchange facilities for other purposes.

4, NAGE, SEIU, AFL-CIO, Case No. 93 FSIP 95 (November 16, 1993) (Fort Devens), it claims that it would be inappropriate for the Panel to create a new protected class through collective bargaining.

Accordingly, the Employer has the authority to extend access for bargaining unit employees solely to the "heat and eat" section of the Shoppette.

CONCLUSION

1. Preliminary Matter

On November 21, 2011, after the record closed in this case, the Employer filed a Motion to Dismiss, based on its assertion that the "Panel lacks jurisdiction to hear this case pursuant to the Panel's rules at 5 C.F.R. §2471.6(a)(1)." In this regard, according to the Employer's Motion, the Union declared during the hearing that the issue before the arbitrator did not concern access to food sold on base. Rather, the Union clarified that its proposal concerned the reduction of work hours of non-appropriated fund employees, which is "substantively a new issue that has not enjoyed the fruits of bargaining consistent with the Statute and certainly one that is not ripe for impasse."^{5/}

In its response to the Motion to Dismiss, the Union argues that the Employer has made "false assertions" about the nature of the Union's last offer proposal, stating that there is "no plausible means" by which its proposal could affect the compensable work hours of non-appropriated fund employees, as claimed by the Employer. Rather, it has consistently negotiated over Base Exchange privileges for bargaining unit employees.

Having studied my notes and the evidence submitted during the mediation and arbitration phases of this proceeding, I find no justification for concluding that the Union has sought to bargain over the hours of work of non-appropriated fund employees. Admittedly, the Union submitted some data suggesting that revenues had fallen at the Base Exchange. I viewed that data as the Union's attempt to emphasize the benefits to the Employer of increasing patronage at Base Exchange facilities and

^{5/} Assuming, without deciding, that the Motion to Dismiss concerns a jurisdictional issue that can be raised at any time, I will address the issue even though at the time the Motion was filed the record had been closed for almost 2 weeks.

not as an effort to affect the jobs performed by the non-appropriated fund employees who staff those facilities. I can find no other evidence to substantiate the Employer's contention that the Union sought to negotiate over the terms and conditions of employment of non-bargaining unit members. Rather, from the beginning, the Union was steadfast in its efforts to obtain additional benefits for unit employees at the Base Commissary and Base Exchange facilities. That it eliminated or modified portions of its proposals in an effort to achieve a compromise solution does not suggest otherwise. Insofar as the Employer argues that the Union's proposals did not concern access to food sold on base, I note that those proposals were always sufficiently broad to include access by unit employees to an array of items in addition to food, such as the health care merchandise sold in the Shoppette. The parties were, and remain, at impasse over such a proposal. Accordingly, I hereby deny the Motion to Dismiss.

2. The Issue at Impasse

After careful consideration of the evidence and testimony introduced at the mediation-arbitration proceeding and the arguments presented by the parties, I conclude that adoption of the Union's proposal is the best way to resolve the parties' impasse.

The Union's original proposals at impasse would have permitted all bargaining unit employees access to the Base Commissary and the Base Exchange facilities. Before the mediation session began, the Union withdrew the proposal regarding access to the Commissary; during mediation, the Union eliminated the requirement of access to the main Base Exchange and revised its second proposal to allow the employees to access only the Shoppette, including the gas station but excluding the purchase of tobacco and alcohol products. Although I understand the Employer's position that access to commissaries and base exchanges provides an additional benefit for military personnel that serves as a recruitment and retention tool, I fail to see how allowing civilian employees access to a gas station convenience store measurably weakens that benefit. In this regard, I note the following: (1) civilian employees already are allowed to use AAFES eating establishments throughout the base, including the "heat and eat" section of the Shoppette^{6/};

^{6/} In view of this fact, it does not appear that the Employer's proposal accords the bargaining unit any privileges it does not already enjoy. For the same reason,

(2) civilian employees who work in the Base Exchange facilities are currently authorized to shop in the Base Exchange facilities, including the Shoppette; and (3) the gas station's prices are competitive with stations outside the base and, according to testimony presented by the Union, gas can be purchased more cheaply elsewhere. Thus, the record establishes that military personnel no longer have sole access to the Shoppette and that the gas station provides them with no particular benefit other than convenience.^{7/} Accordingly, I am not convinced that granting civilian employees access solely to the Shoppette property would create recruitment, retention, or morale problems for the military.

In contrast, the Union persuasively argued that access to the Shoppette would significantly benefit bargaining unit employees, many of whom work close to the convenience store but, 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.^{8/} Although it is undisputed that the civilian employees have a number of places where they can eat meals on the base, they are not able to purchase other necessities close to their work that they might need during the work day, such as health items, feminine care products, and other small supplies. As the FLRA stated in Luke AFB, "[FLRA] precedent establishes that the 'ability to obtain a variety of goods and services . . . , including health-related supplies and food items, [during nonduty hours] directly relates to the work situation of employees'." 64 FLRA 642 at 646, quoting Antilles Consol. Edu. Ass'n, 46 FLRA 625, 630 (1992) (emphasis in the original). I find 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. With regard to food and other goods that are not consumed or used on the base, the Employer noted that there has been opposition to such sales by stores and restaurants outside military installations. This is understandable, but not

the Union's proposal is redundant in seeking access to Base Exchange restaurants.

^{7/} There is no indication that the Union is attempting to create a "new protected class," as argued by the Employer, relying on Fort Devens. Significantly, that case involved an allegation of discrimination, which is not present here.

^{8/} For example, there was uncontested testimony that the north gate to and from the base had recently been closed.

particularly applicable to the situation at Luke AFB, where the record indicates that the Union does not expect a large number of additional customers to use the on-base facility. Thus, allowing civilian employees to purchase ice cream and other frozen food items, as well as non-food goods, from a convenience store for consumption or use off the base is unlikely to create a major problem for commercial establishments outside the base, especially in view of the exclusion of tobacco and alcoholic beverages from the Union's proposal.

The Employer admits - as it must, following the FLRA's decision in Luke AFB - that there is no statutory bar to granting access to the Shoppette. Nonetheless, it points to DoD Instructions that do not permit such access without express, non-delegable authorization by the Secretary of the Air Force. Although the FLRA ruled in Luke AFB that the Employer must bargain with the Union to the extent of its discretion, the Employer apparently did not argue the applicability of any DoD instructions in that proceeding. Significantly, however, in SEIU, Local 556 and Department of the Navy, Marine Corps Air Station, Kaneohe Bay Morale, Welfare and Recreation Activity, 49 FLRA 1205 (1994) (Local 556), the FLRA ruled that there was no compelling need under section 2424.11(a) and (c) of its Rules and Regulations for a substantially similar agency-wide rule, DoD Directive 1330.9, Section II. In Local 556, which involved a proposal that sought access for some bargaining unit employees to purchasing privileges in the base's exchange system, the employer contended that the directive implemented Congressional mandates concerning the operation of military exchanges, including determinations as to patron eligibility. In finding no compelling need for the directive, the FLRA relied on an earlier case, AFGE Local 1786 and Marine Corps Base, Quantico, Virginia, 49 FLRA 534 (1994) (Local 1786), which concluded that the regulation was not "essential to the accomplishment of the mission" of the particular program involved, under section 2424.11(a) of the FLRA's Rules and Regulations, because "the regulation permits Secretaries [of the Military Departments] to grant deviations from the list of authorized patrons[.]" In addition, Local 1786 found that the directive did not incorporate a nondiscretionary mandate within the meaning of section 2424.11(c).

Here, as in Local 556 and Local 1786, DoD Instruction 1330.21 permits the Secretary of the Air Force to grant exceptions to the list of authorized patrons of base exchanges. In addition, no evidence was presented to establish that Instruction 1330.21 differs from Directive 1330.09 in terms of

incorporating a nondiscretionary mandate. Accordingly, following the FLRA's guidance in Commander, Carswell Air Force Base, Texas and AFGE, Local 1364, 31 FLRA 620 (1988), I may impose a provision on the parties that expands access to an exchange facility despite the apparent restrictions in DoD Instruction 1330.21.

For the reasons set forth above, I conclude that full access to the Shoppette is a reasonable compromise between the Union's initial proposals - which the FLRA found negotiable in Luke AFB - and the current prohibition against access by civilian employees to all but food that can be consumed on site. It will create only a slight change in the *status quo* and will enhance substantially the morale of the workforce.

DECISION

The parties shall adopt the following wording to resolve their impasse:

Bargaining unit employees with a valid DoD ID card shall be granted full access to the Luke Air Force Base Exchange Shoppette, including the gas station. Employees may not purchase uniform items, "Tax-free" tobacco items and "Tax-free" alcoholic beverages.^{9/}


Barbara B. Franklin
Arbitrator

December 13, 2011
Washington, D.C.

^{9/} I have modified the Union's proposal slightly by eliminating the reference regarding access to Exchange-operated restaurants, a privilege the Employer acknowledges that bargaining unit employees already possess, and by clarifying that access to the Shoppette includes access to the adjoining gas station.