64 FLRA No. 118

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 1547
(Union)

and

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

0-NG-3023

DECISION AND ORDER
ON NEGOTIABILITY ISSUES

April 7, 2010

Before the Authority: Carol Waller Pope, Chairman, and Thomas M. Beck and Ernest DuBester, Members [1]

I. Statement of the Case

This matter is before the Authority on a negotiability appeal filed by the Union under § 7105(a)(2)(E) of the Federal Service LaborManagement Relations Statute (the Statute). The appeal involves three proposals concerning commissary and exchange privileges for civilian employees. The Agency filed a statement of position (SOP), to which the Union filed a response (response to the SOP). The Agency also filed a response to the record (response to the record) of the post-petition conference concerning the proposals (record).

For the reasons that follow, we find that Proposals 1 and 2 are within, and Proposal 3 is outside, the Agency's duty to bargain.

II. Background

The Agency operates a base commissary and a base exchange (BX), which includes a main location as well as several satellite stores. *See* Record at 2. The commissary is a supermarket, selling food and household supplies. *See* Response to Record at 1; Petition for Review at 4 (Petition). The BX resembles a general department store. *Id.* The commissary and BX are restricted to authorized purchasers, such as active-duty military members, military retirees, and certain military dependents. *See* Petition at 4. The base's civilian employees are not authorized purchasers at these facilities unless they qualify for purchase privileges because of some status, such as military retiree or dependent, that they hold independent of their civilian employment relationship. *See* SOP at 3; Petition at 4.

III. Preliminary Matters

A. The Union's untimely response to the SOP will not be considered.

The response to the SOP was not timely filed, and the Authority issued an order directing the Union to show cause why the Authority should not disregard its response. *See* Order to Show Cause at 3. The Union failed to respond to the order. Where a party does not respond to a show-cause order, the Authority has held that it will not consider the deficient filing that prompted the order. *See, e.g.*, *U.S. Dep't of Veterans Affairs, Jefferson Barracks Nat'l Cemetery, St. Louis, Mo.*, 61 FLRA 861, 861 n.1 (2006) (citing *U.S. Dep't of Veterans Affairs*, 60 FLRA 479, 479 n.1 (2004)). Given the Union's failure to respond to the order to show cause, we decline to consider the response to the SOP.

Where a union does not file a response to an SOP, the Authority will consider the union's contentions in its petition for review. *See, e.g.*, *Int'l Ass'n of Fire Fighters*, 59 FLRA 832, 833 (2004); *Int'l Ass'n of Machinists & Aerospace Workers*, 59 FLRA 830, 831 (2004). However, when a union does not respond to an SOP, and the petition for review does not contest certain assertions in the SOP, the Authority will find that the union concedes those assertions. *See, e.g.*, *AFGE, Local 801*, 64 FLRA 62, 64 (2009) (citing 5 C.F.R. § 2424.32(c)(2) [2]) (*Local 801*). Therefore, in determining the negotiability of the proposals, any of the Agency's assertions in the SOP that are not contested in the petition will be treated as undisputed.

B. Only first page of response to the record will be considered.

The record of the post-petition conference states that parties may file objections to its content. *See* Record at 2. Within the time specified for such objections, the Agency filed a response to the record. Part of the Agency's response – specifically, the first page – relates to the content of the record, and we will, there-

1. Member Beck's separate opinion, dissenting in part, is set forth at the end of this decision.

2. Section 2424.32(c)(2) states, "Failure to respond to an argument or assertion raised by the other party will, where appropriate, be deemed a concession to such argument or assertion."

fore, consider the first page. However, the second and third pages of the response to the record address the Union's untimely filed response to the SOP. Although the Agency asserts that it is responding to legal arguments that were advanced by the Union at the post-petition conference, none of the legal arguments addressed in the Agency's response to the record appears in the record. *See* Response to the Record at 2-3. In effect, the second and third pages of the response to the record are a reply to the Union's response to the SOP.

The purpose of an agency's "reply is to [allow an agency to respond to] any facts or arguments [appearing] for the first time in the [union]'s response." 5 C.F.R. § 2424.26(a). In addition, "[t]he [content of an] agency's reply is *specifically limited* to the matters raised for the first time in the exclusive representative's response." 5 C.F.R. § 2424.26(c) (emphasis added); *see Antilles Consol. Educ. Ass'n*, 61 FLRA 327, 331 (2005) (Chairman Cabaniss dissenting as to other matters) (stating that, under § 2424.26(c), the Authority will not consider arguments in agency's reply that are "not responsive to any of the matters raised by the [u]nion in its response"). Consistent with our decision not to consider the Union's untimely response to the SOP, there are no facts or arguments before us that were raised for the first time in the response to the SOP. Thus, the second and third pages of the Agency's response to the record do not address matters raised for the first time in response to the SOP, and, as the Agency did not request permission to file a supplemental submission, [3] there is no basis for considering the second and third pages of the response to the record. Therefore, we will not consider those pages. [4] *See NLRB Union, NLRB Prof'l Ass'n*, 62 FLRA 397, 398 (2008) (holding that where no Union response is considered, Authority "will also not consider [an a]gency's reply"); *Int'l Fed'n of Prof'l & Technical Eng'rs, Local 29, Goddard Eng'rs, Scientists & Technicians Ass'n*, 61 FLRA 382, 383 (2005) (citing § 2424.26(a)) (declining to consider agency reply that addressed untimely union response to SOP).

3. Section 2424.27 of the Authority's regulations states, "The Authority will not consider any submission filed by any party other than those authorized under this part, provided however that the Authority may, in its discretion, grant permission to file an additional submission based on a written request showing extraordinary circumstances by any party. . . ."

IV. Proposals 1 & 2

A. Wording

1. Proposal 1

> All bargaining unit employees shall be granted access to and use of the Base Commissary.

Petition at 3.

2. Proposal 2

> All bargaining unit employees shall be granted access to and use of the Base Exchange and all of its satellite stores (e.g., Shopette, gas station, etc), except for purchase of articles of uniform items.

Petition at 6.

B. Meaning

The parties agree that Proposals 1 and 2 are intended to grant employees privileges to shop at the base commissary, the BX, and the BX's satellite stores. Record at 2. In its response to the record, the Agency asserts that the proposals seek to "obtain specific military benefits for the civilian workforce without the sacrifices, hardships and service commitments required of military members." Response to the Record at 1.

4. In this regard, because union responses and agency replies serve different purposes, the Authority treats them differently. Where no SOP is considered, the Authority may nevertheless consider a response because, "[a]s expressly permitted on the form provided by the Authority for filing petitions, [a u]nion [may] reserve[] the right to make legal arguments . . . in [its] response" to the SOP. *Marine Eng'rs' Beneficial Ass'n, Dist. No. 1 - PCD*, 60 FLRA 828, 829 (2005) (then-Member Pope writing separately; Chairman Cabaniss dissenting). If the Authority refused to consider responses in cases where no SOP is considered, then, by not submitting an SOP, an agency could nullify the Authority's assurance that a union may reserve legal arguments until filing its response. Consequently, the Authority has held that "it [may be] appropriate and equitable to consider" a response even when no SOP is considered. *Id.* In contrast, when an agency files an SOP, it is required to "set forth in full the agency's position on any matters relevant to the petition that [the agency] wishes the Authority to consider in reaching its decision[.]" 5 C.F.R. § 2424.24(c)(2). The Authority does not permit an Agency to reserve, for later submission in a reply, facts or arguments that could have been included in its SOP. *See* 5 C.F.R. § 2424.26(a). Moreover, there is no mechanism through which a union might prevent an agency from filing an SOP. Therefore, unlike cases in which the Authority may consider a response without considering an SOP, there is no basis for considering an agency's reply when no union response is considered.

C. Positions of the Parties

1. Agency

The Agency contends that the proposals do not concern conditions of employment. *See* SOP at 1. The Agency asserts that employees enjoy "an assortment of [dining] choices" on base, and those who go off base have "an array of . . . restaurants and retail stores . . . in close proximity[.]" *See id.* at 2. The Agency further asserts that eating or shopping off base is "a personal choice[,] not one of necessity," and, thus, employees' experiences exiting and reentering the base do not support finding that the proposals concern conditions of employment. *Id.* In addition, the Agency contends that employees may dine at several BX-affiliated eateries on base, so accessing the commissary, which sells very few items that could be immediately consumed, would not provide any meaningful benefit. *See id.* at 2.

The Agency asserts that there is no correlation, nexus, or link between the proposals and the work situation or employment relationship of civilian employees, and, therefore, the proposals do not directly relate to the employees' work situation or employment relationship. *See* SOP at 3-5 (citing *AFGE v. FLRA*, 833 F.2d 1037, 1044 (D.C. Cir. 1987); *Antilles Consol. Educ. Ass'n*, 22 FLRA 235 (1986) (*Antilles*)). Unlike previous decisions in which the Authority has found proposals for commissary or exchange privileges negotiable, the Agency contends that here, privileges are "not needed to sustain adequate living standards, there is no past practice [of affording such privileges,] and the [A]gency has not used commissary/exchange privileges as an inducement to employment." *See id.* at 5. The Agency also contends that the Authority has held that proposals to allow access to a retail establishment to purchase personal products during nonduty hours do not concern conditions of employment. *See id.* at 4. The Agency adds that even if the proposals made shopping or dining more convenient, "[a] 'convenience' does not equate to a condition of employment." *See id.* at 6.

Finally, the Agency argues that the proposals are not "statutorily authorized" because benefits for civilian employees, in their status as civilian employees, are not afforded by the statutory provisions for establishing commissary and exchange systems, 10 U.S.C. §§ 2481 and 2482, or the provisions "covering commissary and exchange benefits[,]" 10 U.S.C. §§ 1061 to 1065.[5] *See id.* at 3.

2. Union

The Union argues that access to the commissary, which is located "in close proximity to a vast number of the bargaining unit employees[;]" the BX, which has "food, household/office and pharmacy items for sale[;]" and the BX's satellite stores, which include a convenience store and a gas station, would benefit unit employees. *See* Petition at 4, 78. Moreover, the Union asserts that, currently, unit employees may access only a limited number of the BX-affiliated dining facilities. *See id.* at 8.

The Union further asserts that "there is a direct connection between access to [commissary and] exchange facilities and the work situation of bargaining unit employees." *See id.* at 4, 8. The Union contends that, since September 11, 2001, there are four fewer gates for entry to and exit from the base and that "bottle neck traffic" prevents unit employees from leaving the base and returning within their half-hour lunch periods. *See id.* at 5. In addition, the Union contends that base hospital employees lost their dedicated dining facility "a few years ago" and that the nearby commissary could partially offset the reduction in these employees' dining options. *See id.* Further, the Union contends that some unit employees, such as emergency-services personnel or those working beyond their normal duty hours, have "assignments in the evening hours" with "a limited amount of personal time available to satisfy their" shopping and personal needs. *See id.* In particular, the Union contends that more than eighty unit employees work on base in assignments that run "around the clock," sometimes for multiple days, or on weekends, and that other unit members are "on call" during their lunch periods and cannot go far to obtain food or personal items during those periods. *See id.*

The Union asserts that these particular circumstances support a conclusion that "the ability to obtain a [wider] variety of goods and services at the [commissary and BX], including health-related supplies and food items, . . . directly relates to the work situation of employees." *See id.* at 5-6. Finally, the Union argues that, because many unit members already enjoy commissary and BX privileges owing to their status as military retirees or dependents, any impact on the Agency that would result from the proposals "would be absolutely minimal." *See id.* at 6.

5. The pertinent language of 10 U.S.C. §§ 2481–82 and 1061–65 appears in the Appendix to this decision.

D. Analysis and Conclusions

1. Proposals 1 & 2 concern conditions of employment.

Section 7103(a)(12) of the Statute defines "collective bargaining," in pertinent part, as the parties' mutual obligation to bargain "with respect to . . . conditions of employment[,]" and Section 7103(a)(14) defines "conditions of employment," with exclusions not relevant here, as "personnel policies, practices, and matters, whether established by rule, regulation, or otherwise, affecting working conditions[.]" In determining whether a proposal concerns conditions of employment of bargaining-unit employees, the Authority applies the two-factor test set forth in *Antilles*, 22 FLRA at 236-37. Under this test, the Authority determines whether: (1) the proposal pertains to bargaining-unit employees; and (2) "the record establishes that there is a direct connection between the proposal and the work situation or employment relationship of bargaining unit employees." *See id.* To identify a direct connection, the Authority "inquires into the extent and nature of the effect of the [proposal] on working conditions[,]" determining whether there is a "link" or "nexus" between the subject matter of the proposal and unit members' work situation or employment relationship. *See U.S. Dep't of the Army, Aviation Sys. Command, St. Louis, Mo.*, 36 FLRA 418, 422-24 (1990) (quoting *AFGE, Local 2761, AFL-CIO v. FLRA*, 866 F.2d 1443, 1445, 1449 (D.C. Cir. 1989) (*AFGE, Local 2761*)). [6]

The parties do not dispute that Proposals 1 and 2 would grant all unit employees access to the base commissary, the BX, and BX satellite stores. As the proposals pertain to bargaining-unit employees, they satisfy the first factor of the *Antilles* test. *See AFGE, Local 12*, 60 FLRA 533, 534 (2004) (Member Armendariz concurring as to other matters). With regard to the second factor of the *Antilles* test, the Authority has consistently held that proposals related to the provision of food services at the workplace concern conditions of employment and are, therefore, within the scope of mandatory bargaining. *See, e.g.*, *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) ("[M]atters pertaining to food services and related prices for bargaining unit employees are within the mandatory scope of bargaining."), *reconsideration denied*, 47 FLRA 454 (1993); *Dep't of Veterans Affairs, Veterans Admin. Med. Ctr., Veterans Canteen Serv., Lexington, Ky.,* 44 FLRA 179, 189 (1992) (*Canteen Serv., Lexington*); *NAGE, Local R1-144,* 43 FLRA 1331, 1345-46 (1992) ("[A]s a general proposition, matters pertaining to the availability and provision of food services for bargaining unit employees are within the mandatory scope of bargaining.") (*Local R1-144)*; *AFGE, Local 2614*, 43 FLRA 830, 833-34 (1991) (finding proposal to expand post exchange privileges to be negotiable, in part because unit employees had a "half hour limitation" on lunch periods) (*Local 2614*); *Dep't of the Treasury, IRS (Wash., D.C.),* 27 FLRA 322, 325 (1987). As there is no dispute that sales of edible products – i.e., one example of "food services" – occur at the commissary, the BX, and various satellite stores (the facilities), the above-cited precedent supports a conclusion that Proposals 1 and 2 concern conditions of employment of unit employees. *See id.*; *AFGE, Local 1547*, 64 FLRA 635 (2010).

The Agency asserts that the proposals in this case are distinguishable from proposals concerning food services and exchange privileges that the Authority has found within the duty to bargain in previous decisions. In particular, the Agency argues that, although access to the facilities might be convenient for unit employees, mere convenience does not concern conditions of employment. However, the Authority has rejected similar arguments in several decisions. *See, e.g.*, *AFGE, Local 1786*, 49 FLRA 534, 536 (1994) (rejecting argument that proposal was nonnegotiable because "there [were] adequate shopping facilities within close proximity of the Agency's facilities") (*Local 1786*); *Antilles Consol. Edu. Ass'n*, 46 FLRA 625, 629-30 (1992) (rejecting agency claim that other on-base dining options were sufficient and finding proposal negotiable because it "would enable employees to purchase a wider variety of food items for consumption during the duty day") (*Antilles II*). With regard to the Agency's claim that, because leaving base is not required, the proposals involve only employees' "personal choice[s]" about

6. Although, under the circumstances in *AFGE, Local 2761*, the D.C. Circuit stated that "[t]hree factors in particular" led the court to find that "exchange privileges . . . [were] a condition of employment," the court did not hold that the same three factors *are required* in order for proposals regarding exchange privileges to concern conditions of employment. *See id.*, 866 F.2d at 1446, 1448. In this regard, the Authority has expressly found that the factors in *AFGE, Local 2761* are not necessary conditions for establishing that exchange privileges concern conditions of employment. *See AFGE, Local 1786*, 49 FLRA 534, 535-36, 540 (1994) (discussed in greater detail *infra*).

where to eat or shop, the Authority has previously rejected a similar argument. *See Local R1-144*, 43 FLRA at 1335 (finding proposal negotiable despite agency contention that it involved only "personal considerations").

Regarding the Agency's assertion that the Authority has held that proposals concerning access to retail establishments during nonduty hours are always outside the duty to bargain, SOP at 4, the Agency cites no decisions that support this assertion. In fact, the Agency's assertion is contrary to other Authority precedent. *See, e.g.*, *Local 1786*, 49 FLRA at 535, 53940 (finding proposal concerned conditions of employment and was within duty to bargain, despite agency argument that proposal was nonnegotiable because shopping at post exchange would be "conducted during off-duty hours [and was therefore] clearly unconnected with the work situation of unit employees"). The Agency cites *Antilles* in connection with this assertion, but *Antilles* contains no such blanket statement regarding employees' nonduty-hour activities. To the contrary, *Antilles* states that, when a proposal concerns nonduty-hour activities, its negotiability depends on whether it satisfies the *Antilles* second factor by establishing a direct connection to employees' work situation or employment relationship. *See id.* 22 FLRA at 237-38. *See also U.S. Dep't of the Air Force, Griffiss Air Force Base, Rome, N.Y. v. FLRA*, 949 F.2d 1169, 1173 (D.C. Cir. 1991) (Court "agree[d] with the Authority" that neither circuit's "case law [nor Authority's] own precedents establish a broad rule excluding employer policies affecting off-duty conduct from the [Statute's] coverage."). The Authority found the *Antilles* proposals nonnegotiable because "the [u]nion . . . provided *no evidence, whatever*, and the record d[id] *not otherwise establish*[,] that access to the facilities in question [was] *in any manner related* to the work situation or employment relationship or [was] *otherwise linked* to the employees' assignments[.]" *Id.* at 238 (emphases added). The same cannot be said regarding the proposals in this case.

Although the Agency argues that any products purchased from the facilities would not usually be ready for consumption, Authority precedent does not support finding that only proposals involving prepared foodstuffs concern conditions of employment. *See, e.g.*, *Local R1-144*, 43 FLRA at 1345-46 (finding proposal negotiable because it involved food *services*). To the extent that the Agency contends that the sale of nonfood items at the facilities renders the proposals nonnegotiable, Authority 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." *Antilles II*, 46 FLRA at 630 (emphasis added) (finding further that, where employees work evening hours or beyond a normal duty day, agency must bargain over proposal that allows employees "to satisfy their shopping needs," which are not limited to food items).

With regard to the Agency's argument that the proposals do not involve sustaining adequate living standards, discontinuing a past practice, or using privileges as an inducement to employment, the Authority stated in *Local 1786* that, when determining whether a proposal concerns condition of employment: (1) the Authority "considers the circumstances of each case[;]" (2) no "one factor is more significant than another" in establishing the *Antilles* second-factor direct connection; and (3) finding a direct connection "does not depend on the number of [previously considered] factors present in the circumstances of a case." *See id.*, 49 FLRA at 540. Therefore, the mere fact that the proposals may not implicate three particular factors that the Authority has relied on to find other proposals negotiable does not establish that Proposals 1 and 2 are outside the duty to bargain.

Finally, with respect to Proposal 2, the Authority has frequently held that proposals granting civilian employees access to exchange and exchange-affiliated facilities are within the duty to bargain because they concern conditions of employment. *See, e.g.*, *SEIU, Local 556*, 49 FLRA 1205 (1994) (*Local 556*); *Local 1786*; *Antilles II*; *Local 2614*; *Dep't of the Army, Fort Greely, Alaska*, 23 FLRA 858 (1986) (*Fort Greely*); *Dep't of the Air Force, Eielson Air Force Base, Alaska*, 23 FLRA 605 (1986) (*Eielson*); *NFFE, Local 1363*, 4 FLRA 139 (1980) (*Local 1363*). *Cf. AFGE, Local 1547*, 64 FLRA at 638 (finding negotiable proposals involving military base club memberships, where clubs operated dining facilities and offered discounted prices to members, and finding negotiable a proposal concerning civilian employees' use of military base "chow hall").

For the foregoing reasons, we find that Proposals 1 and 2 concern bargaining-unit employees' conditions of employment.

2. Proposals 1 & 2 do not require statutory authorization from Title 10 of the United States Code in order to be within the duty to bargain.

With regard to the Agency's claim that Proposals 1 and 2 are not "statutorily authorized," SOP at 3, [7] it is well established that the duty of an agency under the Statute is to negotiate with an exclusive representative concerning conditions of employment to the extent of the agency's discretion. *See, e.g.*, *Local R1-144*, 43 FLRA at 1348-49; *NTEU*, 3 FLRA 769 (1980), *aff'd sub nom. NTEU v. FLRA*, 691 F.2d 553 (D.C. Cir. 1982). Certain provisions of Title 10 [8] afford particular classes of individuals commissary and exchange privileges; civilian employees, in their status as civilian employees, do not constitute one of those classes of persons. However, nothing in those statutory provisions indicates that the Agency lacks discretion to afford such privileges to civilian employees. In this respect, although the Agency is correct that Title 10 does not specifically afford bargaining-unit employees the benefits set forth in the proposals, Title 10 also does not prohibit those benefits. Regarding the Agency's argument that the proposals seek benefits for employees without the sacrifices required of military members and their dependents, the Authority has previously rejected a similar argument. *See Local 1786*, 49 FLRA at 536, 541 (responding to agency contention that proposal contravened "the principal purpose of military exchanges . . . to provide support to military personnel and their dependents," *id.* at 536, Authority noted that "[n]othing in the proposal prevents the [BX] from appropriately serving [other] authorized patrons or interferes with that mission[,]" *id.* at 541).

Accordingly, we find that the Agency possesses the necessary discretion to bargain over Proposals 1 and 2, and that the proposals are not outside the duty to bargain merely because Title 10 does not expressly provide the benefits set forth in the proposals.

For the foregoing reasons, we find that Proposals 1 and 2 are within the duty to bargain.

V. Proposal 3

A. Wording

> The dependents of bargaining unit employees are not authorized to make purchases; however, they may accompany the bargaining unit employee as guests.

Petition at 10.

B. Meaning

The parties agree that Proposal 3 is "intended to permit dependents of the employees to accompany employees to" – but not actually "shop at" – the base commissary and BX, if employees are granted access to those facilities. Record at 2. In its response to the record, as with Proposals 1 and 2, the Agency asserts that Proposal 3 seeks to "obtain specific military benefits for the civilian workforce without the sacrifices, hardships and service commitments required of military members." Response to the Record at 1.

C. Positions of the Parties

1. Agency

The Agency does not address Proposal 3 separately from the other proposals; all of the arguments that it raises regarding Proposals 1 and 2 also apply to Proposal 3. Specifically, the Agency argues that Proposal 3 is outside the duty to bargain because it does not involve unit employees' conditions of employment and because it is not "statutorily authorized" by Title 10 of the United States Code.

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7. As the Union does not address Title 10 of the United States Code, the Union concedes the Agency's assertion that the proposals lack express statutory authorization from Title 10. *See Local 801*, 64 FLRA at 64 (citing 5 C.F.R. § 2424.32(c)(2)). However, the Agency does not contend that the proposals are *contrary* to the provisions of Title 10; the Agency merely asserts that nothing in Title 10 grants unit employees the privileges that the proposals request. Therefore, the Union has not conceded that the proposals are contrary to Title 10. Even if the Agency had argued that the proposals were contrary to law, we note that the Authority has previously rejected similar arguments. *See, e.g.*, *Local 556*, 49 FLRA at 1208-09 (finding proposals authorizing exchange privileges for civilian employees within duty to bargain; rejecting agency's argument that proposals were nonnegotiable because "[a]ny change in exchange patronage must be authorized by Congress[;]" further finding that directive straight from Department of Defense to Marine Corps to limit such privileges could not obviate agency's duty to bargain); *Local 1786*, 49 FLRA at 535, 541-44 (same); *Fort Greely*, 23 FLRA at 860 (finding neither then-AR 60-20 & AR 30-19 nor then-DoDI 1330.17, which defined the classes of authorized users entitled to commissary and exchange privileges, could foreclose bargaining over such privileges, despite agency's contention that regulations did not authorize fort or brigade to bargain over such matters); *Local 1363*, 4 FLRA at 141, 145-46 (rejecting argument that UNC/USFK/EA Regulation 60-1, which regulated commissary and exchange privileges of civilian employees pursuant to a Status of Forces Agreement in Korea, made proposals concerning employees' access to those facilities nonnegotiable). *See also Canteen Serv., Lexington*, 44 FLRA at 184 (rejecting contention that, because United States Code gives Department Secretary authority to operate canteens, agency need not negotiate over proposals affecting canteen operations).

8. The relevant provisions of Title 10 are set forth in the Appendix to this decision.

2. Union

In its petition, the Union does not provide any legal arguments supporting the negotiability of Proposal 3. *See* Petition at 10. Instead, the Union asserts only that "[i]f bargaining employees are able to use these base facilities[,] the Union feels that it should be appropriate that their guests are allowed to be escorted in the facilities[. G]uests have no ability or right to purchase." *Id.*

D. Analysis and Conclusions

Proposal 3 is outside the duty to bargain.

As discussed, *supra* section III.A., when a union does not respond to an SOP, and the petition for review does not contest certain assertions in the SOP, the Authority will find that the Union concedes those assertions. *See Local 801*, 64 FLRA at 64 (citing 5 C.F.R. § 2424.32(c)(2)). Although the Union provides explanations of Proposals 1 and 2 in the petition, the Union does not explain how Proposal 3 concerns unit employees' conditions of employment. Therefore, we find that the Union concedes the Agency's assertion that the proposal does not concern unit employees' conditions of employment. Consequently, we find that Proposal 3 is outside the Agency's duty to bargain.

VI. Order

The Agency shall, upon request or as otherwise agreed to by the parties, negotiate with the Union over Proposals 1 and 2. [9] The petition for review as to Proposal 3 is dismissed.

9. In finding Proposals 1 and 2 within the duty to bargain, we make no judgments as to their merits.

APPENDIX

10 U.S.C. §§ 2481–82 and 1061–65 provide, in relevant part:

> (a) [T]he Secretary of Defense shall operate . . . a world-wide system of commissary stores and a separate world-wide system of exchange stores. The stores of each system may sell . . . food and other merchandise to . . . persons authorized to use the system . . . .
> (b) [T]he defense commissary [and exchange] system[s] 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. . . .

10 U.S.C. § 2481.

> (a) [T]he needs of members of the armed forces on active duty [and of] dependents of such members shall be the primary consideration whenever the [Sec'y of Def.] —
>
> > (1) assesses the need to establish a commissary store; and
> > (2) selects the actual location for the store.
>
> (b) [I]n determining the size of a . . . store, the [Sec'y of Def. shall consider] the number of all authorized patrons of the . . . commissary system who are likely to use the store.

10 U.S.C. § 2482.

> (a) [The Sec'y of Def.] shall prescribe regulations to allow dependents of members of the uniformed services . . . to use commissary and exchange stores on the same basis as dependents of members of the uniformed services who die while on active duty . . . .

10 U.S.C. § 1061.

> The [Sec'y of Def.] shall prescribe . . . regulations . . . to provide . . . an unremarried former spouse . . . commissary and exchange privileges to the same extent and on the same basis as the

> surviving spouse of a retired member of the uniformed services.

10 U.S.C. § 1062.

> (a) [A] member of the Selected Reserve in good standing . . . shall be permitted to use commissary [and] retail facilities on the same basis as [active-duty] members.
> (b) [Subject to Sec'y's regulation,] a member of the Ready Reserve (other than members of the Selected Reserve) may be permitted to use commissary [and] retail facilities on the same basis as [active-duty] members.
> (c) [A] member or former member of a reserve component under 60 years of age who, but for age, would be eligible for retired pay . . . shall be permitted to use commissary [and] retail facilities on the same basis as members . . . entitled to retired pay . . . .
> (d) [(1)] Dependents of a member who is permitted under subsection (a) or (b) to use commissary [and] retail facilities shall be permitted to use . . . such facilities on the same basis as dependents of [active-duty] members. . . .
> (2) Dependents of a member who is permitted under subsection (c) to use commissary [and] retail facilities shall be permitted to use . . . such facilities on the same basis as dependents of members . . . entitled to retired pay under any other provision of law.

10 U.S.C. § 1063 (including successor provisions of former § 1065).

> (a) [A] member of the National Guard who, although not in Federal service, is called or ordered to duty in response to a federally declared disaster or national emergency shall be permitted to use commissary [and] retail facilities during the period of such duty on the same basis as [active-duty] members of the armed forces.
> (b) [A] dependent of a member of the National Guard who is permitted under subsection (a) to use commissary [and] retail facilities shall be permitted to use such . . . facilities . . . on the same basis as dependents of [active-duty] members of the armed forces.

10 U.S.C. § 1064.

Member Beck, Dissenting in part:

I agree with my colleagues that Proposal 3 is outside the Agency's duty to bargain.

I do not agree that we should reject the Agency's Response to the post petition conference. We have recognized that a party's submission can be accepted and considered when it complies with regulatory requirements (*Marine Eng'rs' Beneficial Assn., District No. 1-PCD*, 60 FLRA 828, 829 (2005)) and the record otherwise would be insufficient to make a determination. *PASS*, 64 FLRA 492, 493 (2010).

The Majority cites *NLRB Union, NLRB Prof'l Ass'n* and *Int'l Fed'n of Prof'l & Tech Eng'rs, Local 29* to conclude that the Authority will not consider an agency's reply when the union's response is not considered. That may be true as a general proposition; however, in *IFPTE, Local 29*, the Authority refused to consider the agency's response because the agency demonstrated "no reason" that would require the Authority to consider the agency's response. 61 FLRA 382, 383 (2005); *see also NLRB Union, NLRB Prof'l Ass'n,* 62 FLRA 397, 398 (2008) (citing *IFPTE, Local 29*) (where Authority did not consider union's response, there was *no reason* to consider agency's reply to that response (emphasis added)). Neither of these cases precludes the Authority from considering a response where, as here, the circumstances establish a reason to consider the response. There is sufficient reason to consider the Response here because the post petition conference summary lacks detail and the Agency's submission provides useful elaboration.

Proposals 1 and 2 seek access for civilian employees to the base commissary and base exchange. Consistent with my dissent in *AFGE, Local 1547*, 64 FLRA 635, 640-41 (2010), I do not agree that the proposals establish a direct connection to the employees' work situation or employment relationship. Any connection to the availability or provision of food services is even less direct and more incidental than the proposals in *AFGE, Local 1547*.

In *AFGE, Local 2761*, the court considered three factors to determine that the union established a direct link between civilian access to the base exchange and a condition of employment: (1) exchange access was used by the agency to induce civilians to work at Fort Buchanan, Puerto Rico; (2) the quality of food products available in the local market area was questioned by employees working at Fort Buchanan, Puerto Rico; and (3) civilian access had been authorized by the agency for a period of 18 years (past practice). *AFGE, Local*

2761 v. FLRA, 866 F.2d 1443, 1447-8 (D.C. Cir. 1989). Notably, the court found that, taken alone, none of the individual factors would have been determinative. *Id*. at 1448. Not one of the factors considered by the court in that case is present here.

The circumstances in this case differ markedly from those in *AFGE, Local 2761* and other cases relied upon by the Majority: [1] (1) at least twelve eating establishments within close proximity offer a variety of food types and food services (fast food, sit-down, drive-through) (Agency SOP at 2; Agency Response at 2); (2) the Union does not dispute that the Agency provides an adequate number of vending machines as well as refrigerators and microwave ovens for the storage, warming, and consumption of food brought from home (Agency Response at 2; Union Petition at 6, 9); and (3) the employees are not stationed overseas or at a remote facility, and are not dependent on unfamiliar foreign markets for essential food and household items (Agency SOP at 4-5).

Further, the Union's explanations of its proposals are unpersuasive and internally inconsistent. *PASS,* 64 FLRA at 496 (Dissenting Op. of Member Beck) (citing *AFGE, Local 12*, 60 FLRA 533, 537 (2004) (union's explanation of intent of its proposal is unpersuasive when it is inconsistent with plain language of proposal); *see also Fed Union of Scientists and Eng'rs*, 22 FLRA 731, 732 (1986)). Throughout its Petition, the Union cites a myriad of concerns that are unrelated to access to food and cannot be considered conditions of employment: access to "household items" (at 4, 7); "ability to obtain a variety of goods and services" (at 5, 8); "ability to obtain . . . health-related supplies" (at 5) and "health items" (at 5, 6, 9); access to "pharmacy" (at 7); access to "gas station and gasoline" (mentioned three times at 7); and access to "household/office" items (at 7). The Union argues that access to the commissary and exchange would "satisfy [employees'] shopping needs" (at 5); "enable employees to purchase a wider variety of food and health items" (at 9); and be "more convenient than leaving the base during the work day to purchase items" (at 9). These arguments appear more frequently than do references to access to food services and thereby establish that the Union's proposals relate more to personal convenience than to conditions of employment. As I noted in my dissent in *AFGE, Local 1547*, a mere "preference" is not a subject of mandatory bargaining. 64 FLRA 635, Beck dissent at 641. Similarly, I cannot conclude that a matter of mere personal convenience constitutes a condition of employment that falls within the Agency's duty to bargain. [2]

Accordingly, I do not agree that proposals 1 and 2 fall within the Agency's duty to bargain.

1. The other cases cited by the Majority that pertain to civilian access to commissaries and military exchanges rely on factors similar to those considered by the court in *AFGE 2761*. See *SEIU, Local 556 and Marine Corps Base Kanehoe Bay, Hawaii*, 49 FLRA 1205 (1994) (past practice permitting access); *Antilles Consolidated Education Assn (Antilles II)*, 46 FLRA 625 (1992) (remote military facility outside Continental United States (OCONUS), unavailability of school supplies in local market area, and requirement to remain at work for evening school activities); *AFGE Local, 2614*, 43 FLRA 830 (1991) (remote OCONUS military facility, unavailability of snack bar or restaurant, and teachers restricted to thirty minute lunch break); *Department of the Army, Fort Greely, Alaska*, 23 FLRA 858 (1986) (isolated OCONUS military facility, few shopping alternatives, access used by agency to induce employment, and past practice permitting access); *Department of the Air Force, Eielson AFB, Alaska*, 23 FLRA 605 (1986) (isolated OCONUS military facility, few shopping alternatives, access used by agency to induce employment, and past practice permitting access). Other cases cited by the Majority address proposals unrelated to access to commissaries and military exchanges. See Majority at [slip op. at 6-8] (citing *U.S. Dep't of the Army, Aviation Sys. Command St. Louis, Mo.* (fitness center privileges); *IFPTE, Local 35* (location of McDonald's restaurant); *Marine Corps Logistics Base, Barstow, Cal* (pricing at catering trucks); *Canteen Serv., Lexington* (access to microwave and vending machines); *NAGE, Local R1-144* (physical arrangements of dining facility); and the *Dep't of the Treasury, IRS (Wash., D.C.) (*obligations of agency to bargain regarding removal of a microwave and refrigerator in break room)).

2. In its initial decision in *AFGE, Local 2761*, *supra*, the Authority found that a "convenience" is not a condition of employment. *See Dep't of Defense, Dep't of the Army, Fort Buchanan, San Juan , Puerto Rico*, 24 FLRA 971, 974 (1986). The D.C. Circuit did not reverse that aspect of the Authority's analysis.