68 FLRA No. 92

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
(67 FLRA 523 (2014))

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ORDER DENYING
MOTION FOR RECONSIDERATION

May 13, 2015

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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 matter is before the Authority on the Agency's motion for reconsideration of the Authority's decision in *AFGE, Local 1547* (*AFGE*).[1] In *AFGE*, the Agency head disapproved a provision involving civilian access to the military exchange's satellite store, the "Shoppette."[2] The Union filed a petition for review of this disapproval with the Authority. The Authority found that the provision concerned bargaining-unit employees' (unit employees') conditions of employment, and that the Agency failed to demonstrate that the provision is inconsistent with 10 U.S.C. §§ 101, 113, 2481(a)-(b), or 2484(c)(2). On this basis, the Authority ordered the Agency to rescind its disapproval of the provision. The Agency then filed its motion for reconsideration. There are five questions before us concerning whether extraordinary circumstances exist warranting reconsideration of *AFGE*.

The first question is whether the Authority in *AFGE* erroneously relied on decisions that "were wrongly decided,"[3] and failed to address certain Agency arguments, in deciding that the disputed provision concerns unit employees' conditions of employment. Because the Authority considered and rejected the Agency's arguments, and the Agency's attempt simply to relitigate conclusions reached in an Authority decision does not provide a basis for reconsidering that decision, the answer is no.

The second question is whether the Authority erred in the level of deference it accorded the Agency's interpretations of Title 10 of the U.S. Code (Title 10), and in determining that the Agency's interpretations do not have the "power to persuade" under *Skidmore v. Swift* (*Skidmore*).[4] Because the Agency does not demonstrate that deference under the standards set forth in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.* (*Chevron*)[5] should apply, and the Agency's attempt simply to relitigate conclusions reached in an Authority decision does not provide a basis for reconsidering that decision, the answer is no.

The third question is whether the Authority erred by not considering whether the provision is contrary to Title 10 "in its entirety."[6] Because the Agency's claims based on Title 10 "in its entirety" are the same as the Title 10 claims the Agency raised and the Authority rejected in *AFGE*, the Agency's argument is an attempt simply to relitigate conclusions reached by the Authority in *AFGE*. Because such arguments do not provide a basis for reconsidering an Authority decision, the answer is no.

The fourth question is whether the Authority erred by determining that the provision is not inconsistent with §§ 101, 113, 2481(a)-(b), or 2484(c)(2), which assertedly give the Secretary of Defense sole and exclusive discretion to establish access to exchanges. Because the Authority considered and rejected these arguments in *AFGE*, and the Agency's attempt simply to relitigate conclusions reached in an Authority decision does not provide a basis for reconsidering that decision, the answer is no.

The fifth question is whether we should reconsider *AFGE* because it "negate[s] any oversight or discretion the Secretary of Defense has over the [m]ilitary [e]xchange [s]ystem."[7] Because the Agency raises this argument for the first time in its motion for reconsideration, when it could have raised the argument previously, the answer is no.

[1] 67 FLRA 523 (2014) (Member Pizzella dissenting).
[2] *Id.* at 523.
[3] Mot. for Recons. at 11.
[4] 323 U.S. 134, 140 (1944).
[5] *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984).
[6] Mot. for Recons. at 13.
[7] *Id.* at 19.

II. Background

In *AFGE*, the Authority ordered the Agency to rescind its Agency-head disapproval of a provision that gives unit employees access to the Shoppette.[8] As the Authority found in *AFGE*, the Shoppette sells food, gas, and certain health and household items.[9] Unit employees currently have access to the Shoppette only to purchase food that can be consumed on the premises.[10] These unit employees work varying shifts during the week and on weekends, and many have limited break periods.[11] And they often have to drive off of the base during breaks in their shifts to satisfy their shopping needs, which can contribute to traffic congestion on the base.[12]

Relying on Authority precedent, the Authority held that the provision concerns unit employees' conditions of employment.[13] In addition, the Authority rejected the Agency's arguments that the provision is contrary to various sections of Title 10 that assertedly give the Secretary of Defense "sole and exclusive discretion" to determine who has access to exchanges.[14] Because the Authority found that the Agency's arguments lacked merit, the Authority ordered the Agency to rescind its disapproval of the provision.

The Agency now asks us to reconsider our decision in *AFGE*.

III. Preliminary Matter: It is unnecessary to decide whether the Agency's corrected motion for reconsideration is properly before us.

The Agency requested leave to file a corrected motion for reconsideration, and enclosed the corrected motion. The Agency seeks to correct the original motion by including a sentence missing from the original motion.

Section 2429.26(a) of the Authority's Regulations states, in pertinent part, that the "Authority . . . may in [its] discretion grant leave to file other documents as [it] deem[s] appropriate."[15] Assuming without deciding that the Agency's corrected motion is properly before us, considering it would not alter our determination that, for the reasons set forth below, reconsideration is not warranted in this case. Accordingly, we find no need to rule on the Agency's request.

IV. Analysis and Conclusions: The Agency fails to establish extraordinary circumstances warranting reconsideration of *AFGE*.

The Agency argues that extraordinary circumstances warrant reconsideration of *AFGE* because the Authority erred in its legal conclusions. Section 2429.17 of the Authority's Regulations permits a party who can establish extraordinary circumstances to move for reconsideration of an Authority decision.[16] It is well-established that a party seeking reconsideration of an Authority decision bears the heavy burden of establishing that extraordinary circumstances exist to justify this unusual action.[17] And errors by the Authority in its conclusions of law constitute extraordinary circumstances that may justify reconsideration.[18] But attempts simply to relitigate conclusions reached by the Authority are insufficient to establish extraordinary circumstances.[19] Moreover, the Authority will not consider claims raised for the first time that could have been raised previously.[20]

A. The Authority did not err in determining that the provision concerns conditions of employment.

The Agency asserts that the Authority erred by determining that the provision concerns conditions of employment because: (1) the Authority relied on cases that "were wrongly decided";[21] and (2) the Authority failed to consider "new and compelling" Agency arguments "concerning . . . how access to military exchanges could not be a condition of employment."[22]

The Agency's claims fail to demonstrate extraordinary circumstances that justify reconsidering *AFGE*. Regarding the Agency's first claim, in *AFGE*, the Authority relied on "the same reasons" articulated in a previous case involving the Agency, for finding that the proposals in that case concerned unit employees'

[8] 67 FLRA at 525, 530.
[9] *Id.* at 523.
[10] *Id.*
[11] *Id.*
[12] *Id.*
[13] *Id.* at 525 (citing *AFGE, Local 1547*, 64 FLRA 642, 645-46 (2010) (Member Beck dissenting in part)).
[14] *Id.* at 525-30.
[15] 5 C.F.R. § 2429.26(a).
[16] *Id.* § 2429.17.
[17] *E.g.,U.S. Dep't of the Treasury, IRS, Wash., D.C.*, 56 FLRA 935, 936 (2000) (*IRS*).
[18] *E.g., U.S. DOJ, Fed. BOP, U.S. Penitentiary, Atwater, Cal.*, 65 FLRA 256, 257 (2010); *U.S. Dep't of the Air Force, 375th Combat Support Grp., Scott Air Force Base, Ill.*, 50 FLRA 84, 85-87 (1995).
[19] *U.S. DHS, U.S. CBP*, 67 FLRA 251, 253 (2014) (*DHS*); *IRS*, 56 FLRA at 936.
[20] *E.g.,U.S. Dep't of HHS, Office of the Assistant Sec'y for Mgmt. & Budget, Office of Grant & Contract Fin. Mgmt., Div. of Audit Resolution*, 51 FLRA 982, 984 (1996) (*HHS*).
[21] Mot. for Recons. at 10-11 (citing *AFGE*, 67 FLRA at 524, 525 n.31).
[22] *Id.* at 21 (citing *AFGE*, 67 FLRA at 525).

conditions of employment.[23] That case, *AFGE, Local 1547* (*Local 1547*),[24] dealt with proposals to give civilian unit employees access to, among other facilities, the Shoppette. In *Local 1547*, the Authority found that the proposals satisfied the Authority's conditions-of-employment test[25] set forth in *Antilles Consolidated Education Ass'n* (*Antilles*).[26] Applying *Antilles*, the Authority found that the proposals pertained to unit employees and that the record established a direct connection between the proposals and unit employees' work situation or employment relationship.[27] And the Authority rejected the Agency's arguments that the required connection was not established because access to the base facilities was only a matter of employee convenience, and that access to facilities would occur during non-duty hours.[28] In *AFGE*, the Authority adopted *Local 1547*'s analysis to resolve the conditions-of-employment issue that the Agency raised concerning the disputed provision.[29]

The Agency's argument seeking reconsideration of *AFGE*'s resolution of this issue is nothing more than an attempt to relitigate this conclusion and the bases on which it was reached.[30] As such, it does not provide a basis for granting reconsideration.[31]

The Agency's second claim also does not provide a basis for granting reconsideration. Contrary to the Agency's claim, the Authority considered all of the Agency's conditions-of-employment arguments. The Agency may view those arguments as "new and compelling," but the Authority found that "[w]hile the Agency continues to press the [conditions-of-employment] point, it raises nothing new" to supplement its arguments in *Local 1547*.[32] Accordingly, because the premise of the Agency's second claim is not accurate, and because attempts simply to relitigate an Authority decision do not provide a basis for granting reconsideration of that decision,[33] the Agency's second claim also does not provide a basis for reconsidering *AFGE*.

B. The Authority did not err in holding that the Agency's interpretations of various sections of Title 10 are entitled to *Skidmore* deference, but do not have the "power to persuade."

The Agency asserts that the Authority erred in according *Skidmore*, as opposed to *Chevron*, deference to its interpretations of Title 10.[34] Alternatively, the Agency asserts that if *Skidmore* deference applies, the Authority should have accepted the Agency's interpretations because they have "the power to persuade."[35] In support, the Agency cites Department of Defense Instruction 1330.09 (the DOD Instruction) and notes that this Agency regulation was established "well before this litigation."[36] According to the Agency, the DOD Instruction provides that a policy consideration in operating exchanges is "to fulfill [military uniform service members'] needs while maintaining a readiness capability to support wartime missions and to meet quality, fiscal, health and safety standards."[37]

Contrary to the dissent's view,[38] a review of the record in *AFGE* reveals that neither the Union *nor the Agency* referenced the DOD Instruction in its submissions to the Authority. As the Agency failed to raise the DOD Instruction in *AFGE*, it is barred from doing so now.

Moreover, even assuming for the sake of argument that the Agency had properly raised the DOD Instruction, the Authority's conclusion in *AFGE* would remain the same. According *Skidmore* deference, the Authority found that "the Agency provid[ed] *no evidence* that its interpretations of the cited sections of Title 10 were promulgated outside the course of litigation."[39] To the extent that the Agency argues that *Chevron* deference should apply because the DOD Instruction was promulgated outside the course of litigation, the Agency has not demonstrated that it reached its interpretations "in a notice-and-comment rulemaking, a formal agency adjudication, or in some other procedure meeting the prerequisites for *Chevron* deference."[40]

To the extent that the Agency argues that the DOD Instruction or its promulgation should alter the Authority's conclusion that the Agency's interpretations lack the "power to persuade" under *Skidmore*, neither the

[23] *AFGE*, 67 FLRA at 525.
[24] 64 FLRA 642.
[25] *Id.* at 645-47 (citations omitted).
[26] 22 FLRA 235 (1986).
[27] 64 FLRA at 645-47.
[28] *Id.* at 645-46.
[29] 67 FLRA at 525.
[30] *DHS*, 67 FLRA at 253.
[31] *Id.*
[32] *AFGE*, 67 FLRA at 525.
[33] *DHS*, 67 FLRA at 253.
[34] Mot. for Recons. at 17.
[35] *Id.* at 16 (internal quotation marks omitted).
[36] *Id.*
[37] *Id.* (internal quotation marks omitted).
[38] Dissent at 10.
[39] *AFGE*, 67 FLRA at 526 (emphasis added).
[40] *Barnes v. Comm'r of IRS*, 712 F.3d 581, 582-83 (D.C. Cir. 2013) (citations omitted) (internal quotation marks omitted) (and cases cited therein).

regulation nor its promulgation raise any issues on this subject beyond those already raised and rejected in *AFGE*. Specifically, nothing in the regulation's plain wording, as quoted by the Agency, suggests that it is intended to provide sole and exclusive discretion to the Secretary of Defense to determine who has access to the exchanges, or that the provision is inconsistent with sections of Title 10 on which the Agency relies.

Thus, once again, the Agency's arguments attempt simply to relitigate conclusions reached in *AFGE*, and do not provide a basis for granting reconsideration.[41]

C. The Authority did not err by not considering whether the provision is contrary to Title 10 "in its entirety."

The Agency argues that the Authority erred by failing to consider whether the provision is contrary to Title 10 "in its entirety."[42] The Agency claims that the U.S. Court of Appeals for the D.C. Circuit's decision in *U.S. DHS, U.S. CBP v. FLRA* (*U.S. DHS*)[43] requires the Authority to resolve that issue. *U.S. DHS* issued after the Agency filed its statement of position, and before the Authority issued *AFGE*.

The holding in *U.S. DHS* that the Agency cites is inapplicable here. The issue the court resolved was whether the agency in that case had waived certain claims that it presented to the court because it did not raise them before the Authority in the underlying case, an issue peculiar to a judicial review proceeding.[44]

But even assuming that the Authority is required to consider whether the provision is contrary to Title 10 "in its entirety," the Agency merely raises in that context the same arguments addressing the same sections of Title 10 that it raised,[45] and the Authority rejected,[46] in *AFGE*. For example, regarding Title 10 "in its entirety," the Agency asserts that Congress granted the Secretary of Defense authority to operate an exchange system.[47] But in *AFGE*, regarding the same argument, the Authority found that the Agency's contentions did not identify anything in Title 10 specifically discussing the Secretary's "sole and exclusive discretion, []or explain[ing] how [Title 10's provisions] are similar to statutes that have been found to provide such discretion."[48] As another example, as to the Agency's assertion that Title 10 "in its entirety" demonstrates that "[a]ny expansion of patron privileges without the express authority granted by the Secretary [of Defense] is contrary to law,"[49] the Authority in *AFGE* held that nothing in the wording of cited sections of Title 10 "addresses civilian access to exchanges" or suggests "that the incremental extension of benefits encompassed by the provision . . . is unlawful."[50] The Agency's arguments based on Title 10 "in its entirety" do not contradict that conclusion. Once again, the Agency's attempts simply to relitigate conclusions reached in an Authority decision do not provide a basis for granting reconsideration.[51]

D. The Authority did not err in determining that the provision is not inconsistent with 10 U.S.C. §§ 101, 113, 2481(a)-(b), or 2484(c)(2).

The Agency contends that the Authority erred by determining that, under §§ 101, 113, 2481(a)-(b), or 2484(c)(2): (1) the Secretary of Defense did not have sole and exclusive discretion to establish access to exchanges;[52] and (2) the provision is not inconsistent with these specific sections.[53] Supporting the first argument, the Agency relies on a House of Representatives subcommittee report (the subcommittee report)[54] and *Department of the Navy, Military Sealift Command v. FLRA*[55] to assert that these sections give the Secretary of Defense sole and exclusive discretion to determine who has access to exchanges, and as a result, the Secretary's authority is not subject to collective bargaining.[56] Regarding the second argument, the Agency argues that extending "[e]xchange privileges" to individuals who are not listed under these sections would be contrary to law.[57] Also, relying on the subcommittee report, the Agency claims that the exchange system is maintained "for the morale and vital benefit of the military service personnel,"[58] and that expanding patron privileges without the Secretary of Defense's express authority is contrary to law.[59]

These are the same arguments that the Agency raised,[60] and the Authority rejected,[61] in *AFGE*. Thus, the Agency once again attempts simply to relitigate conclusions that the Authority reached in *AFGE*. But, as

[41] *DHS*, 67 FLRA at 253.
[42] Mot. for Recons. at 13.
[43] 751 F.3d 665, 669-70 (D.C. Cir. 2014).
[44] *Id.*
[45] Agency's Statement of Position at 9-15.
[46] *AFGE*, 67 FLRA at 528-30.
[47] Mot. for Recons. at 13.
[48] *AFGE*, 67 FLRA at 528.
[49] Mot. for Recons. at 14.
[50] *AFGE*, 67 FLRA at 530.
[51] *DHS*, 67 FLRA at 253.
[52] Mot. for Recons. at 15 (citing *AFGE*, 67 FLRA at 528).
[53] *Id.* at 16 (citing *AFGE*, 67 FLRA at 530).
[54] *Id.* at 17 (discussing the subcommittee report).
[55] *Id.* at 20 (citing 836 F.2d 1409 (3d Cir. 1988)).
[56] *Id.* at 15-19.
[57] *Id.* at 12.
[58] *Id.* at 17.
[59] *Id.* at 14.
[60] Agency's Statement of Position at 9-15.
[61] *AFGE*, 67 FLRA at 528-530.

discussed several times above, such attempts simply to relitigate conclusions reached in an Authority decision do not provide a basis for granting reconsideration of that decision.[62]

E. The Authority will not consider arguments raised for the first time in a motion for reconsideration.

The Agency argues that extraordinary circumstances exist for reconsideration of *AFGE* because the provision "negate[s] any oversight or discretion the Secretary of Defense has over the [m]ilitary [e]xchange [s]ystem."[63] Under the provision, the Agency claims, the Secretary "will have no say [regarding] whom the [m]ilitary [e]xchanges serve" because the provision does not "preserve even one iota of the [Secretary's] discretion . . . over the [m]ilitary [e]xchanges."[64]

The Agency's argument does not provide a basis for reconsidering *AFGE*. As an initial matter, the Agency had the opportunity to make this argument in its submissions to the Authority in *AFGE*, but did not raise the argument then. The argument is therefore untimely raised, and cannot provide any basis for reconsideration.[65]

The Agency did, as the dissent points out, argue in *AFGE* that the provision "undermine[d]"[66] and "usurp[ed]"[67] the Secretary of Defense's authority. But the Agency made these arguments in support of the Agency's claim that the Secretary of Defense had "sole and exclusive"[68] discretion over the exchanges. To the extent that Agency is seeking to relitigate this argument, it is addressed in Part IV.D of this decision.

Further, even assuming for the sake of argument that the Agency made this claim in its submissions to the Authority in *AFGE*, and that the Authority failed to address it, the argument is clearly without merit. An agency's discretion over a matter does not cease to exist simply because the agency's exercise of that discretion is subject to collective bargaining.[69] Therefore, this Agency argument does not provide a basis for reconsidering *AFGE*.

Accordingly, we find that the Agency has failed to establish that extraordinary circumstances exist to warrant reconsidering *AFGE*.

V. Order

We deny the Agency's motion for reconsideration.

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[62] *DHS*, 67 FLRA at 253.
[63] Mot. For Recons. at 19.
[64] *Id.*
[65] *HHS*, 51 FLRA at 984.
[66] Agency's Statement of Position at 10.
[67] *Id.* at 14.
[68] *Id.* at 11.
[69] *See AFGE, SSA Gen. Comm.*, 68 FLRA 407, 409 (2015) ("where a statute gives an agency discretion over a matter concerning conditions of employment, the agency is required to bargain over how it will exercise its discretion unless its discretion is 'sole and exclusive'").

Member Pizzella, dissenting:

I once again dissent from the majority for the same reasons that I explained in *AFGE, Local 1547* (*AFGE*).[1] As I noted therein, I do not agree insofar as the majority concludes 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.

Rather than taking advantage of this opportunity to reconsider and correct a decision that is clearly contrary to law and regulation, the majority stubbornly refuses to consider the merits of any of the Agency's arguments - several because the Agency *raised* them below ("simply . . . *relitigate[s]*" the same arguments)[2] and several more because the Agency *did not raise* them below (but should have).[3]

As I noted in *NAIL, Local 7*, "I do not believe that the Authority should go out of its way to summarily dismiss otherwise meritorious arguments."[4] Just last year the U. S. Court of Appeals for the District of Columbia Circuit criticized the Authority "for holding that a party had 'waived' an argument simply because it failed to use the right combination of words."[5] Rather, the Court advised the Authority that "an argument is preserved if the party has 'fairly brought' the argument 'to the Authority's attention.'"[6]

Contrary to my colleagues, therefore, I would conclude that the Agency has established that the majority erred in its legal conclusions in *AFGE*. Accordingly, the majority should reconsider its decision.

Specifically, I do not agree with the majority that the Agency raised DOD Instruction 1330.09 (the instruction) in support of its *Chevron*-"deference" argument "for the first time" in its request for reconsideration.[7] In *AFGE*, the Union specifically acknowledged that the Agency argued in *Department of the Air Force, Luke Air Force Base, Luke Air Force Base, Arizona*[8] that, pursuant to DOD Instruction 1330.21, only the Secretary of Defense may authorize exceptions to the list of persons authorized to use base exchanges and that the Agency made those "same arguments" in this case.[9] Therefore, to the extent that decisions of the Federal Service Impasses Panel (the Panel) are public records, the majority may not simply ignore the impact of that regulation when it determines whether these provisions are negotiable. In fact, the language of the instruction indicates that they are not.[10]

It is no small matter to conclude that decisions concerning who may access military exchanges must be subject to the bargaining requirements of the Federal Service Labor-Management Relations Statute.[11] But to conclude *again* that the instruction does not "suggest[] that it is intended to provide *sole and exclusive* discretion to the Secretary of Defense,"[12] the majority *again* injects our own "organic statute [into] another statute . . . not within [the Authority's] area of expertise"[13] and does so without considering the entirety of the evidence that was "fairly brought . . . to the Authority's attention."[14]

I also disagree with the majority that the Agency did not argue in *AFGE* that the subject provisions will "negate[]" the Secretary's role in the military exchange system.[15] Incredulously, my colleagues assert that the Agency's argument, that the provision "*does not 'preserve even one iota* of the [Secretary's] discretion,'"[16] is an entirely distinct argument, from its arguments made in *AFGE* that the provision "*undermine[d]*" and "*usurp[ed]*" the authority of the Secretary of Defense, and should have been argued separately in order to be considered in this request for reconsideration.[17] I do not

[1] 67 FLRA 523, 531-533 (2014) (*AFGE*) (Dissenting Opinion of Member Pizzella).
[2] Majority at 7 (emphasis added).
[3] *Id.* at 6, 8-9.
[4] 67 FLRA 654, 663 (2014) (Dissenting Opinion of Member Pizzella).
[5] *Id.* (citing *NTEU v. FLRA*, 754 F.3d 1031, 1040 (D.C. Cir. 2014) (*NTEU*)).
[6] *Id.* (citing *NTEU*, 754 F.3d at 1040 (quoting *U.S. Dep't of Commerce v. FLRA*, 7 F.3d 243, 245 (D.C. Cir. 1993))).
[7] Majority at 5.
[8] 11 FSIP 111 (2011) (*Luke AFB*); *see id.* at 4 ("Under Department of Defense Instruction 1330.21 . . ."), 8 ("DOD Instruction 1330.21 permits the Secretary of [Defense] to grant exceptions to the list of authorized patrons of base exchanges."), 9 ("I may impose a provision on the parties that expands access to an exchange facility despite the apparent restrictions in D[O]D Instruction 1330.21.").
[9] Union's Resp. at 2 ("The [A]gency in their SOP comes now with pretty much their same arguments they made in *Luke AFB* and 11 FSIP 111."), 3 ("The agency throughout their SOP makes reference to the discretion of the Secretary of Defense."); *see also* Agency's Statement of Position (Statement) at 7.
[10] *Luke AFB*, 11 FSIP 111 at 4, 8-9.
[11] Majority at 3.
[12] *Id.* at 6 (emphasis added).
[13] *U.S. Dep't of the Navy, Naval Undersea Warfare Ctr. Div., Newport, R.I. v. FLRA*, 665 F.3d 1339, 1348 (2011) (quoting *Dep't of the Air Force, 4th Fighter Wing, Seymour Johnson Air Force Base, v. FLRA*, 648 F.3d 841, 846 (D.C. Cir. 2011).
[14] *NTEU*, 754 F.3d at 1040 (quoting *U.S. Dep't of Commerce v. FLRA*, 7 F.3d 243, 245 (D.C. Cir. 1993)).
[15] Majority at 8.
[16] *Id.* (emphasis added)
[17] *Id.*

agree that those arguments are distinct, and I find it rather ironic that, had the Agency made that argument separately, the majority presumably would dismiss it here because it was raised below.[18]

Contrary to the majority's assertions that the Agency did not argue that the subject provisions will "negate[]" the Secretary's role, however, the Agency made variations of this argument at least five times – "any collective bargaining agreement that *undermines* the Secretary's authority is inconsistent with law;"[19] 10 U.S.C. § 2482(c)(2) gives the Secretary the "*exclusive right* to operate" military exchanges;[20] 10 U.S.C. § 2481 gives the Secretary authority "to set *all* operating procedures for all stores in the system;"[21] the Secretary is "*exclusively authorized* to establish operational guidance;"[22] and "mandating that the Secretary of Defense authorize access to the [e]xchange [s]ystem entities not provided for by law is a *usurpation* of his authority under Title 10 and is in contravention of Congressional intent"[23] – but these arguments were ignored by the majority in *AFGE*, and they are ignored by the majority again today simply because the Agency before used the words *undermine* and *usurpation*, rather than *negate*.

It seems to me that my colleagues simply do not want to address directly this significant issue. I would conclude, however, that the Agency has demonstrated that, in its request for reconsideration, the majority erred in conclusions of law.

Historically, the disposition of a request for reconsideration is simple, quick, and requires approximately two pages of analysis to explain why the request does not have merit.[24] In contrast, the issues raised by the Agency in the August 8, 2014[25] request for reconsideration are of sufficient complexity that the Authority has required more than nine months, and nine pages of analysis, to demonstrate that the Agency's arguments do not warrant reconsideration.

It is apparent to me, therefore, that the time and detail which was required to rebut the Agency's arguments unmistakably demonstrate that the issues raised in the request for reconsideration go directly to the heart of the matter before us and lead to one conclusion – that these provisions overreach into an area that falls within the sole and exclusive discretion of the Secretary of Defense and are thus contrary to law.

On a sidenote, the Authority's decision in *AFGE*, the Agency's request for reconsideration from that decision, and the majority's decision today illustrate the inherent tension that exists between the statutory right of federal employees to collectively bargain and the ability of agencies, such as the Department of Defense and the Department of Homeland Security (DHS), to effectively carry out their mission to protect American citizens.

The Department of Defense has tried to balance these requirements effectively through regulations, such as those at issue in this case, and in other regulations as well, such as DOD Directive 1354.1, which recognizes that DOD employees have the right "to organize . . . for purposes of negotiating or bargaining about terms or conditions of military service."[26] But, on the other hand, DOD Directive 1354.1 mandates that any bargaining may "not *modify or diminish* the *existing authority* of commanders *to control access* to, or maintain good order and discipline *on, military installations*."[27]

Today's case does not address the question that may need to be resolved sometime in the future − whether, and to what extent, collective bargaining is appropriate, or statutorily mandated, when it directly impacts military and federal law-enforcement authority and, in turn, implicates mission readiness, national security, and the specific authorities granted by federal statute exclusively to the military and/or DHS. That, however, is a question for another day.

Thank you.

[18] *See id*. at 2.
[19] Statement at 10 (emphasis added).
[20] *Id*. at 12.
[21] *Id.* (emphasis added).
[22] *Id*. at 13. (emphasis added).
[23] *Id.* at 14. (emphasis added).
[24] *See e.g.*, *U.S. DHS, ICE*, 64 FLRA 908 (2010); *AFGE, Local 3529*, 58 FLRA 151 (2002); *Ass'n of Civ. Technicians Treasure State Chapter No. 57*, 57 FLRA 53, 53 (2001).
[25] Mot. for Recons. at 23.
[26] DOD Instruction, No. 1354.1, "DOD Policy on Organizations That Seek to Represent or Organize Members of the Armed Forces in Negotiation or Collective Bargaining," at 1 (Jan. 19, 2007) available at http://www.dtic.mil/whs/directives/corres/pdf/135401p.pdf.
[27] *Id*. (emphases added).