

66 FLRA No. 124

UNITED STATES
DEPARTMENT OF THE NAVY
NAVAL UNDERSEA
WARFARE CENTER DIVISION
NEWPORT, RHODE ISLAND
(Agency)

and

NATIONAL ASSOCIATION
OF GOVERNMENT EMPLOYEES
LOCAL R1-134
FEDERAL UNION
OF SCIENTISTS AND ENGINEERS
LOCAL R1-144
(Unions)

0-AR-4405
(64 FLRA 1136 (2010))

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DECISION

May 11, 2012

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

I. Statement of the Case

This matter is before the Authority on remand from the United States Court of Appeals for the District of Columbia Circuit (the court). *U.S. Dep't of the Navy, Naval Undersea Warfare Ctr. Div., Newport, R.I. v. FLRA*, 665 F.3d 1339 (D.C. Cir. Jan. 13, 2012) (*Navy v. FLRA*).

In *Navy v. FLRA*, the court vacated the Authority's decision in *United States Department of the Navy, Naval Undersea Warfare Center Division, Newport, Rhode Island*, 64 FLRA 1136 (2010) (Member Beck dissenting as to other matters) (*Undersea Warfare*). In *Undersea Warfare*, the Authority denied exceptions to an award of Arbitrator Jerome H. Wolfson, in which the Arbitrator found that the Agency improperly failed to bargain before ending its practice of providing Agency-purchased bottles of water at its buildings. The court remanded the decision to the Authority for further findings.

For the following reasons, we remand the award to the parties for resubmission to the Arbitrator, absent settlement, for further findings consistent with the court's opinion.

II. Background and Arbitrator's Award

The background is set forth fully in *Undersea Warfare* and is only briefly summarized here. In the mid-1990s, the Agency began using appropriated funds to provide bottled water to Agency buildings that contained lead-contaminated water fountains. *Undersea Warfare*, 64 FLRA at 1136. Over time, the Agency began to provide bottled water to some buildings that did not have lead-contaminated fountains, and it began to replace lead-contaminated fountains with lead-free fountains. *Id.* After July of 2006, the Agency tested fountains for lead and determined that water from the fountains was safe for drinking. *Id.* Based on this determination, the Agency unilaterally discontinued its practice of providing bottled water. *Id.*

The Unions filed grievances alleging that the Agency improperly ended its practice of providing bottled water without first negotiating with the Unions. *Id.* at 1136-37. The grievances were unresolved and submitted to arbitration. *Id.* As relevant here, the Arbitrator found that the Agency was obligated to continue its practice of providing bottled water. *Id.* at 1137. The Arbitrator also found that the Agency was required to bargain before changing this established past practice. *Id.* In addition, he rejected the Agency's reliance on federal appropriations laws and decisions of the United States Comptroller General (Comptroller General). *Id.* Accordingly, the Arbitrator directed the Agency to resume providing bottled water at no charge to the employees in the buildings where it previously had done so. *Id.*

III. Authority's Decision in *Undersea Warfare*

The Agency filed exceptions to the Arbitrator's award, claiming that the award was contrary to: (1) the Anti-Deficiency Act, 31 U.S.C. § 1341; (2) the Purpose Statute, 31 U.S.C. § 1301(a); and (3) Comptroller General decisions concerning the use of appropriations for bottled water. *Undersea Warfare*, 64 FLRA at 1137-38. The Authority noted that the parties did not dispute that the Agency's provision of bottled water for many years was an established past practice. *Id.* at 1139. And the Authority found that the Agency could not change this condition of employment without fulfilling its bargaining obligations unless a statute or regulation precluded such bargaining. *Id.* The Authority determined that the Anti-Deficiency Act, the Purpose Statute, and Comptroller General decisions did not prohibit such negotiations. *Id.* Accordingly, the Authority denied the Agency's exceptions. *Id.* at 1140.

IV. Court's Decision in *Navy v. FLRA*

As relevant here, the court found that the Agency's duty to bargain "depends on whether federal appropriations law permits the purchase of bottled water where safe and drinkable tap water is available." *Navy v. FLRA*, 665 F.3d at 1348. Applying the "necessary expense doctrine" set forth in Comptroller General precedent, the court held that "[b]ottled water is considered necessary – and thus may be purchased with appropriated funds – when the available water posed a health risk if consumed, or because water was not available." *Id.* at 1350 (internal quotation marks omitted). The court agreed with the Comptroller General's interpretation of the Purpose Statute that an agency would violate that statute by providing bottled water when safe and drinkable water is available. *Id.*

The court vacated the Authority's decision and remanded it to the Authority "to determine whether the tap water is in fact safe to drink." *Id.* at 1351. In this connection, the court held that the Authority should assess the arbitration awards of Arbitrator Laurie G. Cain (the Cain arbitrations) – which involve whether the water is potable – even though "[t]hose arbitrations were not in the record before the Authority." *Id.*

V. Analysis and Conclusions

The court remanded this matter to the Authority to determine whether, in fact, the tap water at the Agency buildings is safe to drink, and to assess the decisions in the Cain arbitrations. *Id.* In reviewing an arbitration award, the Authority defers to an arbitrator's factual findings because the parties bargained for the facts to be found by an arbitrator chosen by them. *See, e.g., U.S. Dep't of Labor*, 62 FLRA 153, 156 (2007) (Chairman Cabaniss concurring); *Nat'l Air Traffic Controllers Ass'n*, 60 FLRA 398, 400 (2004); *AFGE, Local 2612*, 55 FLRA 483, 486 (1999). *Cf. United Paperworkers Int'l Union, AFL-CIO v. Misco, Inc.*, 484 U.S. 29, 37-38 (1987) ("Because the parties have contracted to have disputes settled by an arbitrator chosen by them rather than by a judge, it is the arbitrator's view of the facts and of the meaning of the contract that they have agreed to accept."). In addition, the Authority does not supplement an arbitrator's findings by engaging in its own factfinding. *See, e.g., U.S. Dep't of the Treasury, Internal Revenue Serv., Wash., D.C.*, 64 FLRA 426, 431 (2010); *AFGE, Nat'l Council of HUD Locals 222*, 54 FLRA 1267, 1275 (1998) (Member Wasserman dissenting as to other matters).

These principles support a conclusion that the Arbitrator, whom the parties in this case chose to make factual findings, should have the first opportunity to address the issues that the court remanded. Accordingly,

we remand the award to the parties for resubmission to the Arbitrator, absent settlement, for the Arbitrator "to determine whether the tap water is in fact safe to drink," *Navy v. FLRA*, 665 F.3d at 1351, and to assess the Cain arbitrations.

VI. Decision

The award is remanded to the parties for resubmission to the Arbitrator, absent settlement, for further findings consistent with the court's opinion.