66 FLRA No. 109

NATIONAL TREASURY
EMPLOYEES UNION
(Union)

and

UNITED STATES
DEPARTMENT OF THE TREASURY
INTERNAL REVENUE SERVICE
(Agency)

0-AR-4729

_____

DECISION

March 30, 2012

_____

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 exceptions to an award of Arbitrator Jeanne M. Vonhof filed by the Agency and the Union under § 7122(a) of the Federal Service Labor-Management Relations Statute (the Statute) and part 2425 of the Authority's Regulations. Each party filed an opposition to the other's exceptions.[1]

The Arbitrator found that the Agency violated both the parties' national agreement (National Agreement) and § 7116(a)(1) and (5) of the Statute by changing conditions of employment without providing the Union with notice or an opportunity to bargain. She denied the Union's request for a status-quo-ante remedy, but did award monetary compensation and other remedies, including a notice posting. She also denied the Union attorney fees.

For the reasons that follow, we: set aside the Arbitrator's finding that the Agency violated § 7116(a)(1) and (5); modify the award to delete the reference to an unfair labor practice (ULP) in the notice that the Arbitrator directed; deny the Union's exception to the Arbitrator's chosen remedies; grant the Union's contrary-to-law exception to the Arbitrator's denial of attorney fees; and remand the portion of the award concerning attorney fees to the parties, absent settlement, for resubmission to the Arbitrator.

II. Background and Arbitrator's Award

When the number of taxpayers requesting assistance from the Taxpayer Advocate Service (TAS) increased, *see* Award at 40, 45, the Union filed a national grievance contending that the Agency violated both the National Agreement and the Statute by "measurably" increasing the workload of TAS Case Advocates, without providing the Union with notice or an opportunity to bargain over the impact and implementation of the increased workload, *id.* at 3-4; Agency's Exceptions, Attach. 6 ("National Grievance Regarding Increased Caseload of TAS Case Advocates") at 1. The grievance was unresolved and submitted to arbitration, Award at 4, where the Arbitrator framed the following issues: "Did the Agency violate Article 47 of the . . . National Agreement [(Article 47)][2] *and* 5 U.S.C. § 7116(a)(1) and (5)[3] by increasing the workload assigned to TAS Case Advocates by more than a de minimis amount, without providing notice to, or bargaining with the Union?," *id.* at 1 (emphasis added) (original italics omitted).

As relevant here, based on court and Authority decisions concerning § 7116, *see id.* at 32-33, as well as the text of Article 47, *see id.* at 32, 34, the Arbitrator found that "[u]nilateral changes in working conditions made by [the A]gency without giving the [U]nion notice and an opportunity to bargain over the changes may . . . [constitute a ULP] *or* a contract violation," *id.* at 33-34 (emphasis added). But the Arbitrator also found that both the Statute and the National Agreement limit the Agency's midterm notice-and-bargaining obligations to those changes in conditions of employment that, as relevant here: (1) result from actions taken by the Agency; and (2) are not "covered by" an existing agreement. *See id.* at 28-32, 34.

The Agency argued that "the Union [did not] pinpoint any particular change in any Agency policy, practice[,] or procedure" that would have triggered the

[1] In addition, the Agency requested leave to file a supplemental brief concerning *Federal Bureau of Prisons v. FLRA*, 654 F.3d 91 (D.C. Cir. 2011) (*BOP v. FLRA*), *granting petition for review and vacating U.S. Department of Justice, Federal Bureau of Prisons, Washington, D.C.*, 64 FLRA 559 (2010), and the Authority granted the request. *See* Order (Sept. 22) at 1. The Union was given an opportunity to file – and did file – a response to the Agency's brief. *See id.*; Union's Resp. to Agency's Supplemental Brief.

[2] The relevant text of Article 47 is set forth in the appendix to this decision.

[3] Under § 7116(a)(1) of the Statute, it is a ULP for an agency "to interfere with, restrain, or coerce any employee in the exercise" of rights under the Statute; under § 7116(a)(5), it is a ULP "to refuse to consult or negotiate in good faith with a labor organization" as required by the Statute.

Agency's notice-and-bargaining obligations, *id.* at 35, but the Arbitrator faulted the Agency for "divid[ing] up an ever-growing pool of cases among virtually the same number of existing Case Advocates without making other reasonable adjustments," *id.* at 40. In particular, the Arbitrator found that "[t]here has been [neither a] permanent alteration in case processing deadlines . . . [nor] any adjustment in the application of the job performance criteria." *Id.* at 43-44. As such, the Arbitrator determined that the Agency changed Case Advocates' working conditions, *id.* at 40, because the Agency did not "sufficiently mitigate[] the effects of the substantial caseload increase so as to reduce the impact [on Case Advocates] . . . to a de minimis level," *id.* at 46 (italics omitted). She found further that both the Statute and the National Agreement required the Agency to provide the Union with notice and an opportunity to bargain over the impact and implementation of that caseload increase, unless it was a change "covered by" the National Agreement. *See id.* at 28-30. In that regard, the Arbitrator rejected the Agency's argument that Article 25 of the National Agreement (Article 25)[4] "covered" the dispute, *id.* at 30-32, finding that Article 42 of the National Agreement (Article 42)[5] specifically permitted the Union to file an institutional grievance seeking relief for violations of Article 47, *id.* at 26-28. Therefore, the Arbitrator concluded that the Agency violated both Article 47 and § 7116(a)(1) and (5) of the Statute by changing employees' conditions of employment without fulfilling its notice-and-bargaining obligations. *Id.* at 46; *see id.* at 48 (reiterating that Agency "violated the [National] Agreement and committed [a ULP] in failing to bargain").

In order to redress the violations of "both Article 47 and federal law," *id.* at 46, the Arbitrator directed the Agency to: (1) bargain with the Union at the national level, *id.*; (2) post a notice "stating that the Agency has committed [a ULP] and violated Article 47 of the [National] Agreement . . . and has been ordered by the Arbitrator to bargain," *id.*; and (3) "make employees whole" for certain monetary losses resulting from lower performance evaluations that were attributable to the Agency's violations, *id.* at 47. She denied the Union's request for a status-quo-ante remedy involving Case Advocates' workloads, *id.* at 46-47, and denied the Union attorney fees, finding that an award of fees "would not be in the interest of justice" because "the issue of the duty to bargain over the impact and implementation of increases in caseload[s] is not a straightforward[,] simple issue," *id.* at 48.

[4] The relevant text of Article 25 is set forth in the appendix to this decision.

[5] The relevant text of Article 42 is set forth in the appendix to this decision.

III. Positions of the Parties

A. Agency's Exceptions and Supplemental Brief

The Agency contends that the award is contrary to law because the Arbitrator found that the Agency violated § 7116 even though, according to the Agency, her factual findings demonstrate that there was no "Agency-initiated action or change" in policy or practice that would trigger notice-and-bargaining obligations under the Statute. Agency's Exceptions at 10-11. In this regard, the Agency argues that the Arbitrator found that the "Agency made a change by *not* making a change," *id.* at 26 (internal quotation marks omitted), which is inconsistent with the Authority's precedent on § 7116, *id.* at 11-19 (citing *U.S. Dep't of Veterans Affairs, Med. Ctr., Sheridan, Wyo.*, 59 FLRA 93, 94-95 (2003) (Chairman Cabaniss concurring) (*VA Sheridan*); *U.S. Immigration & Naturalization Serv., Houston Dist., Houston, Tex.*, 50 FLRA 140, 145 (1995) (*INS Houston*)). In addition, the Agency asserts that the Arbitrator's finding that the grievance was not "covered by" Article 25 is contrary to law. *Id.* at 28-30. *See also* Agency's Supplemental Brief at 6-8 (citing *BOP v. FLRA*, 654 F.3d at 95-98) (arguing that Article 25 expressly covers changes in workload).

B. Union's Opposition to Exceptions and Response to Supplemental Brief

The Union argues that, to the extent that Authority precedent "*requires* . . . show[ing] that an agency has [acted] affirmative[ly] to change a 'policy or practice' [resulting] in a change in conditions of employment" to establish a violation of § 7116, "the standard . . . ought to be changed to include the type of factual circumstances" in this case. Union's Opp'n at 15. In this regard, the Union requests that the Authority establish a "bright line rule" that significantly increased workloads automatically trigger § 7116 notice-and-bargaining obligations, regardless of whether the increase is "precipitated by the agency." *Id.* at 30. Moreover, the Union asserts that the decisions cited by the Agency are either inapposite, *see id.* at 19-20 (discussing *INS Houston*), or rely on an "abandoned distinction" between "conditions of employment" and "working conditions" under the Statute, *id.* at 24; *see id.* at 22-24 (discussing *VA Sheridan*). The Union also asserts that the Arbitrator correctly rejected the Agency's "covered by" defense. *Id.* at 32-33. *See also* Union's Resp. to Agency's Supplemental Brief at 7-14 (arguing *BOP v. FLRA* is distinguishable). Finally, the Union requests that the Authority exclude from consideration a table in the "Facts" section of the Agency's exceptions, as well as an argument offered to support the exceptions, because neither the table nor the argument was presented to the

Arbitrator, as required by § 2425.4(c) of the Authority's Regulations.[6] *See* Union's Opp'n at 35-36.

C. Union's Exceptions

The Union argues that the award is contrary to law and that the Arbitrator exceeded her authority in denying status-quo-ante relief and attorney fees. Union's Exceptions at 3, 4, 12, 14. The Union contends that the Arbitrator denied its request for a status-quo-ante remedy even though application of factors in *Federal Correctional Institution*, 8 FLRA 604 (1982) (*FCI*), "compels a conclusion" that such a remedy is "warranted." Union's Exceptions at 7; *see also id.* at 8. The Union contends further that the Arbitrator exceeded her authority by prematurely denying the Union attorney fees before the Union filed a motion requesting fees. *Id.* at 13 & n.9. In addition, the Union asserts that the denial of fees is contrary to the Back Pay Act (BPA), 5 U.S.C. § 5596, and contrary to 5 U.S.C. § 7701(g) (§ 7701(g)), because it is not "fully articulated and reasoned." Union's Exceptions at 14 (citation omitted); *see also id.* at 14-15. Consequently, the Union asks the Authority to "vacate" the fee determination and to refrain from remanding the attorney-fee issue to the Arbitrator because, according to the Union, that would be "premature." *Id.* at 15. Notwithstanding that request, the Union also requests that the Authority "void" the Arbitrator's fee determination and "remand[] [it] to the parties and the [A]rbitrator, if necessary." *Id.* at 13.

D. Agency's Opposition

The Agency argues that the Union fails "to cite any legal authority requiring a status[-]quo[-]ante remedy in this case." Agency's Opp'n at 6. Further, the Agency contends that the Arbitrator had the authority to decide whether to award the Union attorney fees, *id.* at 12-15, because the "Union expressly sought attorney fees in its post-hearing brief, placing [that] question . . . before the Arbitrator," *id.* at 14 (citing Union's Exceptions, Attach. 2 (Union's Post-Hearing Brief) at 43-44). Finally, the Agency asserts that the Arbitrator's finding that fees would not be "warranted in the interest of justice" sufficiently justified her denial of fees. *Id.* at 15-18.

IV. Analysis and Conclusions

When an exception involves an award's consistency with law, the Authority reviews any question of law raised by the exception and the award de novo. *See NTEU, Chapter 24*, 50 FLRA 330, 332 (1995) (citing *U.S. Customs Serv. v. FLRA*, 43 F.3d 682, 686-87 (D.C. Cir. 1994)). In applying the standard of de novo review, the Authority assesses whether an arbitrator's legal conclusions are consistent with the applicable standard of law. *See U.S. Dep't of Def., Dep'ts of the Army & the Air Force, Ala. Nat'l Guard, Northport, Ala.*, 55 FLRA 37, 40 (1998). When a grievance under § 7121 of the Statute involves an alleged ULP, the arbitrator must analyze the ULP allegation using the same standards and burdens that would be used by an administrative law judge in a ULP proceeding under § 7118. *See NTEU*, 64 FLRA 462, 464 (2010). As in other arbitration cases, including those where violations of law are alleged, the Authority defers to an arbitrator's findings of fact. *See, e.g., U.S. Dep't of Commerce, Patent & Trademark Office*, 52 FLRA 358, 367 (1996).

A. The Arbitrator erred in finding that the Agency violated § 7116(a)(1) and (5) of the Statute.

The Agency contends that the award is contrary to law because the Arbitrator's factual findings demonstrate that there was no "Agency-initiated action or change" in policy or practice that would require the Agency to provide the Union with notice and an opportunity to bargain under the Statute. Agency's Exceptions at 10-11.

To find that an agency has violated § 7116(a)(1) and (5) by failing to provide a union with notice and an opportunity to bargain over changes to conditions of employment, there must be a threshold determination that the agency made a change in a policy, practice, or procedure affecting unit employees' conditions of employment. *See VA Sheridan*, 59 FLRA at 94 (citing *U.S. Dep't of Labor, OSHA, Region 1, Bos., Mass.*, 58 FLRA 213, 215 (2002) (*OSHA*) (Chairman Cabaniss concurring); *U.S. Immigration & Naturalization Serv., N.Y.C., N.Y.*, 52 FLRA 582, 585-86 (1996); *INS Houston*, 50 FLRA at 143-44). The determination of whether a change in conditions of employment has occurred involves a case-by-case analysis. *See OSHA*, 58 FLRA at 215 (citing *92 Bomb Wing, Fairchild Air Force Base, Spokane, Wash.*, 50 FLRA 701, 704 (1995); *INS Houston*, 50 FLRA at 144). In addition, where employees' "volume" of work or "number" of assignments increases, but those increases are not attributable to any change in the agency's policies, practices, or procedures affecting working conditions, the Authority has found that such increases "[s]tanding alone" do not trigger notice-and-bargaining obligations

[6] Section 2425.4(c) states that "an exception may not rely on any evidence, factual assertions, arguments (including affirmative defenses), requested remedies, or challenges to an awarded remedy that could have been, but were not, presented to the arbitrator."

under § 7116(a)(5). *See VA Sheridan*, 59 FLRA at 94-95.[7]

The Arbitrator found that the number of "incoming cases" received by TAS "increased considerably in the last several years." Award at 45. In addition, she found that: (1) the Agency "divide[d] up an *ever-growing pool of cases* among virtually the same number of existing Case Advocates *without making other reasonable adjustments*," *id.* at 40 (emphases added); (2) "[t]here ha[d] been *no permanent alteration* in case processing deadlines . . . *[n]or* . . . *any adjustment* in the application of the job performance criteria," *id.* at 43-44 (emphases added); and (3) the Agency did not "sufficiently mitigate[] the effects of the substantial caseload increase," *id.* at 46. Based on the foregoing, the only change found by the Arbitrator was an increase in the number of incoming cases that TAS had to process. *See id.* at 40 ("ever-growing pool of cases"). That is, the Arbitrator did not find that the Agency itself made any changes to its policies, practices, or procedures. Thus, we find that the Agency did not make a unilateral change to conditions of employment that violated its notice-and-bargaining obligations under the Statute.[8] *See VA Sheridan*, 59 FLRA at 94-95.

The Union argues that the Authority should establish a "bright line rule" that significantly increased workloads trigger an agency's notice-and-bargaining obligations under § 7116 regardless of whether the increase is "precipitated by the agency." Union's Opp'n at 30. But this argument ignores that the Authority has long held that agencies violate their § 7116(a)(5) notice-and-bargaining obligations only where, as relevant here, they make "unilateral changes" to conditions of employment. *See, e.g.*, *U.S. Dep't of the Treasury, Internal Revenue Serv.*, 66 FLRA 528, 528, 530 (2012) ("unilateral[] reclassifi[cation]"); *U.S. Dep't of the Navy, Naval Aviation Depot, Jacksonville, Fla.*, 63 FLRA 365, 369-70 (2009) ("unilateral implementation" of new instruction); *Dep't of the Air Force, Scott Air Force Base, Ill.*, 5 FLRA 9, 10-11 (1981); *Internal Revenue Serv., Wash., D.C.*, 4 FLRA 488 (1980). The Union has not explained how an agency could *unilaterally change* conditions of employment – and thereby violate § 7116 – if it has not *made any change* to a policy, practice, or procedure affecting conditions of employment. Accordingly, we reject the Union's request to establish a new "bright line rule" that significantly increased workloads necessarily trigger statutory notice-and-bargaining obligations, regardless of whether the increase is "precipitated by the agency." Union's Opp'n at 30.

Based on the foregoing, we set aside the Arbitrator's finding that the Agency violated § 7116(a)(1) and (5).[9]

B. Setting aside the Arbitrator's ULP finding does not require setting aside the entire award.

Consistent with the Arbitrator's findings, set forth above, the Agency acknowledges that: (1) the "grievance . . . asserted that the Agency violated Article 47, Section 2 of the National Agreement *and* 5 U.S.C. § 7116[] . . . *both*[,] by failing to provide notice and an opportunity to bargain," Agency's Exceptions at 33 (emphases added) (internal quotation marks omitted); and (2) the "Arbitrator defined the issue as[,] 'Did the Agency violate Article 47 . . . *and* 5 U.S.C. § 7116 . . .?,'" *id.* (emphasis added). Despite its acknowledgment of the separate contractual and statutory bases of the award, the Agency excepts only on the grounds that: (1) the Arbitrator erred "as a matter of law" in finding that workload increases "generated an obligation under the Statute," *id.* at 1; and (2) the workload increases provide no "basis for sustaining the charged violation of 5 U.S.C. § 7116," *id.* at 34. That is, while acknowledging that the grievance and award concern violations of both the National Agreement and the Statute, the Agency excepts only to the Arbitrator's

[7] The Union mistakenly asserts that *VA Sheridan* was based on an "abandoned distinction" between "conditions of employment" and "working conditions" under the Statute. Union's Opp'n at 24. The majority opinion in *VA Sheridan* was not based on such a distinction. *See* 59 FLRA at 94 ("[T]he fact that there were more acute patients admitted [to a particular unit after a certain date] does not establish that the [agency] made a change in its admission policy, practice, or standards concerning the acuity of patients admitted.").

[8] As set forth *supra* Part III.B., the Union requests that the Authority exclude from consideration a table and an argument concerning the Agency's calculation of the percentage increase in employees' caseloads over several years. *See* Union's Opp'n at 35-36. As neither the table nor the argument is required to support the finding that the Agency did not change a policy, practice, or procedure affecting conditions of employment, we find it unnecessary to address the Union's request. *See AFGE, Council 236*, 58 FLRA 582, 583 n.3 (2003) (Authority may decline to address requests to bar arguments where addressing those requests is unnecessary to resolve exceptions).

[9] As we have set aside the finding that the Agency violated § 7116(a)(1) and (5), we find it unnecessary to address the Agency's argument that the award is contrary to law because it is inconsistent with the "covered by" doctrine.

finding of a statutory violation.[10] In the absence of an exception arguing that the Arbitrator's finding of a contractual violation fails to draw its essence from Article 47, that finding remains undisturbed.[11] *Cf. Broad. Bd. of Governors, Office of Cuba Broad.*, 64 FLRA 888, 891 (2010) (agency's exception arguing that it had no statutory duty to bargain provided no basis for finding award deficient, where arbitrator found that agency violated a contractual obligation to bargain).

The Arbitrator awarded remedies that redressed violations of "*both* Article 47 *and* federal law." Award at 46 (emphases added). Thus, setting aside the Arbitrator's ULP finding affects only those remedies that are tied solely to the ULP. The only remedy that is tied solely to the ULP is the Arbitrator's direction that the posted notice "stat[e] that the Agency has committed a[] [ULP]." *Id.* Therefore, consistent with our decision to set aside the finding of a ULP, we modify the award to delete the notice's reference to a ULP.

As the Arbitrator's remaining remedies are not tied solely to the finding of a ULP, and as the Agency does not except to the finding of a contractual violation, there is no basis for setting aside the remaining remedies. Further, as the undisturbed contractual violation could support the Union's requested status-quo-ante remedy and an award of attorney fees – both of which the Arbitrator denied – it is necessary to address the Union's exceptions regarding the denied remedy and attorney fees. We do so below.

C. The Arbitrator's denial of a status-quo-ante remedy is not contrary to law.

The Union argues that application of factors in *FCI*, 8 FLRA 604, "compels [a] conclusion that a status[-]quo[-]ante remedy is warranted." Union's Exceptions at 7-8. The Authority has held that arbitrators have "great latitude in fashioning remedies." *AFGE, Local 916*, 57 FLRA 715, 717 (2002) (quoting *NTEU, Chapter 68*, 57 FLRA 256, 257 (2001) (*Chapter 68*)); *Dep't of the Air Force, Warner Robins Air Logistics Ctr., Robins Air Force Base, Ga.*, 25 FLRA 969, 971 (1987). In particular, where an arbitrator finds that an agency's failure to bargain violates a collective-bargaining agreement, the propriety of status-quo-ante relief is governed by the arbitrator's remedial authority under the violated agreement, not the *FCI* factors. *Chapter 68*, 57 FLRA at 257; *AFGE, Council 215, Nat'l Council of SSA, OHA Locals*, 46 FLRA 1518, 1523-24 (1993) (*Council 215*).

As discussed above, because we have set aside the Arbitrator's finding that the Agency violated § 7116(a)(1) and (5), the only remaining basis for the awarded relief is the violation of Article 47. The Arbitrator was not required to apply the *FCI* factors to remedy that contractual violation.[12] *Chapter 68*,

[10] As a result, this case differs in significant respects from *BOP v. FLRA*, which, as mentioned in note 1, *supra*, both parties addressed in supplemental submissions. In that case, the court found that, because the "arbitral award [at issue] ma[de] no distinction between the . . . separate statutory and contractual grounds for the award," 654 F.3d at 97 (internal quotation marks omitted), the agency was not required to file distinct exceptions to both of those grounds, *id.* Here, by contrast, the Arbitrator's award provides separate and distinct analyses regarding the Agency's statutory obligations and violations, and its contractual obligations and violations. *Compare, e.g.*, Award at 32-33 (finding statutory notice-and-bargaining obligations based on court and Authority decisions interpreting § 7116), *and id.* at 28-29, 31-32 (discussing statutory "covered by" limitation on § 7116(a)(5) obligations), *with id.* at 32, 34 (finding contractual notice-and-bargaining obligations based on the specific wording of Article 47), *and id.* at 29-30 (discussing contractual "covered by" limitation on Article 47 obligations). *See also id.* at 46 (finding Agency "violated the [National] Agreement *and* committed a[] [ULP]" (emphasis added)). And here, the Agency expressly acknowledges that the award is based on findings of both statutory and contractual violations, *see* Agency's Exceptions at 33, but excepts solely to the finding of a statutory violation, *see id.* at 1, 34.

[11] Even if the Agency *had* excepted to the Arbitrator's finding of a contractual violation in this case, recent Authority precedent would support denying the exception. *See U.S. Dep't of the Treasury, IRS, Wage & Inv. Div.*, 66 FLRA 235 (2011) (*IRS*). In *IRS*, an arbitrator – interpreting the same National Agreement that is at issue in this case, *see id.* at 245-46 – found that an agency had violated both contractual and statutory bargaining obligations, *see id.* at 236. The agency excepted to the findings of both violations, but relied solely upon statutory standards to support its exceptions. *See id.* at 236-37. After denying the exceptions to the finding of a statutory violation, the Authority stated that the agency's statutory arguments "d[id] not address the [a]rbitrator's conclusion that the [a]gency violated the parties' agreement, which was solely a matter of contract interpretation." *Id.* at 240. "Thus," the Authority concluded, "the [a]gency's arguments provide[d] no basis for finding the [a]rbitrator's conclusion regarding the contractual violation deficient." *Id.* (footnote omitted). In so concluding, the Authority noted that the agency "d[id] not assert that the contractual provisions in dispute [t]here mirror[ed] the Statute." *Id.* at 240 n.5. Like the agency in *IRS*, the Agency in this case – which does not argue that Article 47 "mirrors" § 7116(a)(1) and (5) – relies solely on statutory standards in support of its exceptions, and its statutory arguments do not address the Arbitrator's conclusion that the Agency violated the National Agreement, "which was solely a matter of contract interpretation." *Id.* at 240. Therefore, even if the Agency had excepted to the contractual finding, *IRS* would support denying that exception, given the absence of contractual arguments to support it.

[12] We note that the Union does not claim that the remedial award fails to draw its essence from the National Agreement.

57 FLRA at 257; *Council 215*, 46 FLRA at 1523-24. Thus, we find that the Union has not established that the Arbitrator's denial of a status-quo-ante remedy is contrary to law.

D. The Arbitrator's denial of attorney fees is contrary to law.

The Union asserts that the Arbitrator's denial of attorney fees is contrary to the BPA and § 7701(g). As relevant here, the BPA requires that an award of fees be in accordance with standards established under § 7701(g). *See U.S. Dep't of Def., Def. Distrib. Region E., New Cumberland, Pa.*, 51 FLRA 155, 158 (1995) (*DoD*). Section 7701(g), as pertinent here, provides that an award of attorney fees must be warranted in the interest of justice. *See id.* An award of attorney fees is warranted in the interest of justice if it satisfies any one of the criteria set forth in *Allen v. U.S. Postal Service*, 2 M.S.P.R. 420, 434-46 (1980), or *U.S. Patent & Trademark Office*, 32 FLRA 375, 376-78 (1988) (citing *Naval Air Dev. Ctr., Dep't of the Navy*, 21 FLRA 131, 139 (1986) (Concurring Op. of Chairman Calhoun)). *See U.S. Dep't of Def., Def. Mapping Agency, Hydrographic/Topographic Ctr., Wash., D.C.*, 47 FLRA 1187, 1194 (1993).

An arbitrator's attorney-fee award or denial under § 7701(g) must set forth specific findings supporting determinations on each pertinent statutory requirement. *See DoD*, 51 FLRA at 158. Where an attorney-fee determination is deficient, the Authority "take[s] the action necessary to assure that the award is consistent with applicable statutory standards." *AFGE, Local 3020*, 64 FLRA 596, 597-98 (2010) (citing *U.S. Dep't of Agric., Animal & Plant Health Inspection Serv., Plant Prot. & Quarantine*, 53 FLRA 1688, 1695 (1998)). If an award does not contain the findings necessary to enable the Authority to assess the arbitrator's legal conclusions, and those findings cannot be derived from the record, then the attorney-fee issue will be remanded to the parties, absent settlement, for resubmission to the arbitrator so that requisite findings can be made. *See NFFE, Local 1437*, 53 FLRA 1703, 1712 (1998) (*NFFE*).

The Arbitrator found that an award of fees "would not be in the interest of justice" because "the issue of the duty to bargain over the impact and implementation of increases in caseload[s] is not a straightforward[,] simple issue." Award at 48. The Arbitrator's one-sentence explanation fails to set forth specific findings supporting the denial of attorney fees, as § 7701(g) requires. In particular, the denial does not address any of the recognized interest-of-justice criteria discussed above. *Cf. Ala. Ass'n of Civilian Technicians*, 54 FLRA 229, 233 (1998) (one-sentence denial did not meet statutory requirements). In addition, the necessary findings cannot be derived from the record. Therefore, we grant the Union's contrary-to-law exception to the Arbitrator's denial of attorney fees.

With regard to the Union's argument that a remand of the attorney-fee issue would be "premature," Union's Exceptions at 15, the Agency correctly points out that the Union's post-hearing brief requested the Arbitrator to award attorney fees, and the brief also put the interest-of-justice criteria before the Arbitrator, *see id.*, Attach. 2 (Union's Post-Hearing Brief) at 43-45. In addition, the brief included the Union's argument as to why an award of fees would be in the interest of justice. *See id.* at 44. Therefore, we find that a remand of the attorney-fee issue would not be premature. The Union alternatively requests that the Authority "remand[] [the attorney-fee issue] to the parties and the [A]rbitrator, if necessary." Union's Exceptions at 13. The Union's alternative request is consistent with the Authority's practice in cases such as this one. *See, e.g., AFGE, Local 987*, 64 FLRA 884, 886-87 (2010); *NFFE*, 53 FLRA at 1710-12. Thus, we remand the portion of the award concerning attorney fees to the parties, absent settlement, for resubmission to the Arbitrator, in order to make the additional findings required to satisfy the standards set forth above.[13]

V. Decision

The Arbitrator's finding that the Agency violated § 7116(a)(1) and (5) is set aside, and the award is modified to delete the notice's reference to a ULP. The Union's exception to the Arbitrator's chosen remedies is denied, but its contrary-to-law exception to the Arbitrator's denial of attorney fees is granted. The portion of the award concerning attorney fees is remanded to the parties, absent settlement, for resubmission to the Arbitrator.

[13] As we are remanding the attorney-fee determination to the parties on the basis of its being contrary to law, we find it unnecessary to evaluate the Union's exception contending that the Arbitrator exceeded her authority by addressing the attorney-fee issue.

APPENDIX

The National Agreement provides, in pertinent part:

> Article 25
> Workload Management
>
> Section 1
>
> . . . .
>
> B.
> Employees are encouraged to discuss unmanageable inventory problems with their supervisors at any appropriate time. If the matter remains unresolved, employees may submit their concerns in writing. The supervisor will provide a written response within five (5) workdays addressing the resolution of the problem. Grievances seeking to remedy the adverse impact on employees can only be filed in connection with a completed personnel action, for example, non-selection for a promotion or discipline.
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> . . . .
>
> Article 42
> Institutional Grievance Procedure
>
> . . . .
>
> Section 4
> National Union Institutional Grievance Procedure
>
> A.
> The Union's National President may file grievances as provided in this section. For purposes of this section only, the term "grievance" means:
>
> . . . .
>
> 2. a grievance concerning an issue of rights afforded to employees under this Agreement[,] which otherwise would be cognizable only as separate grievances from two (2) or more chapters over identical issues.
>
> . . . .
>
> Article 47
> Mid-Term Bargaining
>
> Section 1
> General Provisions
>
> . . . .
>
> Q.
> In accordance with 5 U.S.C. Chapter 71, to the extent permitted by law, either party may initiate mid-term bargaining by proposing changes in conditions of employment provided that such changes are not covered by this or any other collective bargaining agreement between the parties. . . .
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> . . . .
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> S.
> 1. Unless otherwise permitted by law, no changes will be implemented by the [Agency] until proper and timely notice has been provided to the Union, and all negotiations have been completed[,] including any impasse proceedings.
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> Section 2
> National Bargaining
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> A.
> Where either party proposes changes in conditions of employment that are Service-wide in nature (to include those matters that affect employees in one (1) or more Divisions in multiple geographic areas), it will consolidate those proposed changes and serve notice thereof on a quarterly basis. Such notice will be due within five (5) workdays of April 1, July 1, October 1, and January 1, of each year, respectively.

Agency's Exceptions, Attach. 2 at 90 (Art. 25, § 1); *id.* at 135 (Art. 42, § 4); *id.* at 146-47 (Art. 47, §§ 1-2); *see also* Award at 2-3 (quoting relevant contract provisions).