United States of America
FEDERAL LABOR RELATIONS AUTHORITY
Office of Administrative Law Judges
Washington, D.C. 20424

OALJ 25-11

PENSION BENEFIT GUARANTY CORPORATION
WASHINGTON, D.C.
(Respondent)

and

INDEPENDENT UNION OF PENSION EMPLOYEES
FOR DEMOCRACY AND JUSTICE
(Charging Party)

WA-CA-21-0018 &
WA-CA-22-0433

Douglas Guerrin
Adryan Richardson
For the General Counsel

Ryan Donaldson
John Scott Hagood
For the Respondent

Valda Johnson
Craig White
For the Charging Party

Before: LEISHA A. SELF
Administrative Law Judge

DECISION

This case revolves around the arbitrator selection and notification provision of an expired collective bargaining agreement negotiated between the Agency and the prior exclusive representative. Because this provision constitutes a mandatory subject of bargaining, it continues to bind the Agency and the current exclusive representative, the Union. The Union and the Agency have been in litigation involving this provision and related matters for over a decade.

The current dispute involves whether the Agency failed to continue this mandatory provision to the maximum extent possible when it declined to meet with the Union for the purpose (according to the General Counsel) of filling the arbitration panel and, on another occasion, for the purpose of discussing contacting an arbitrator the parties had selected to notify her of her selection.

In order to so establish, it must be shown that there is a pattern of conduct and/or other indicator that establishes that the Agency has unilaterally terminated, changed or ceased giving effect to this provision. *See, e.g., U.S. Dep't of Def. Ohio Nat'l Guard*, 71 FLRA 829, 829 (2020) (*Nat'l Guard*).

As to the first situation, there are at least two significant reasons for my determination that the Agency did not cease giving effect to the provision. Firstly, the Union President created a confusing situation such that the Agency likely believed the meeting was about another (intertwined) matter, rather than an effort generally to fill the arbitrator panel, regarding which the Agency had valid reasons not to meet at the time. Secondly, thereafter, the Agency justifiably delayed the selection process pending resolution of that intertwined matter.

As to the second event in question, I similarly find that the Agency did not cease giving effect to the mandatory provision when it declined to meet to discuss contacting the arbitrator about her selection. This is so in large part because the Agency reasonably believed that the provision specified that the arbitrator should not be contacted until a full arbitrator panel was created, a belief to which the Union significantly contributed, and because of the lack of clarity about the meeting, to which the Union also contributed.

Further, as to both instances, the Agency's actions simply do not create a pattern of conduct that would establish that it ceased to give effect to the arbitrator selection and notification provision in the agreement. Nor are there other indicators, such as statements disavowing the provision, which would so establish. As such, the Agency has not violated § 7116(a)(1) and (5) of the Statute.

That is not to say, however, that the Agency (or the Union, for that matter) engaged in best practices with regard to the arbitrator selection and notification provision. Instead, its efforts (along with the Union's) during the period of this current matter have been less-than-energetic. Given the parties' history, this is not surprising. Nevertheless, I cannot implore both parties enough to resume their arbitrator selection process and to do so with vigor, such that they obtain a full panel and quickly. The bargaining unit and the Agency will all be so much better off for the effort.

I. Statement of the Case

This is an unfair labor practice (ULP) proceeding under the Federal Service Labor-Management Relations Statute (the Statute), 5 U.S.C. §§ 7101-7135, and the Rules and Regulations of the Federal Labor Relations Authority (the Authority), 5 C.F.R. part 2423.

On October 21, 2020, and on May 25, 2022, the Independent Union of Pension Employees for Democracy and Justice (the Union or the Charging Party) filed ULP charges (WA-CA-21-0018 and WA-CA-22-0433) against the Pension Benefit Guaranty Corporation (the Respondent or the Agency). GC Ex. 1(a) and (c). After investigating the charges, the Regional Director of the Washington Region issued an Order Consolidating Cases, and issued the Consolidated Complaint and Notice of Hearing on July 31, 2023, on behalf of the Acting General Counsel (GC). GC Ex. 1(e). Thereafter, on August 14, 2023, the Regional Director issued the Amended Consolidated Complaint and Notice of Hearing (complaint), which amended the date of the hearing. GC Ex. 1(f).

The complaint alleges that the Respondent violated § 7116(a)(1) and (a)(5) of the Statute by failing to continue existing personnel policies, practices, and matters affecting working condition to the maximum extent possible. The specific conduct alleged is that, on September 15, 2020, the Respondent declined the Union's invitation to attend a meeting to discuss filling vacancies in the arbitration panel or pool and that, since January 26, 2022, after the parties exchanged arbitrator lists and finding one name in common, Blanca Torres, the Respondent failed and refused to inform Torres of her selection and to ask her to serve as a member of the panel. *Id.* On January 22, 2025, during the hearing, the GC moved to amend the complaint to add that, "on May 25, 2022, Respondent declined to meet with the Union for the purpose of contacting Torres to speak to her about joining the panel," which conduct also constitutes a failure to continue existing personnel policies, practices, and matters affecting working conditions to the maximum extent possible. Tr. 98-106. Over the Respondent's objection, I granted the motion to amend, because I found that the Respondent had adequate notice of the conduct at issue in the proposed amendment and would have full and fair opportunity to litigate the matter. *Id.*

On September 8, 2024, the Respondent filed Respondent Agency's Motion to Dismiss and/or Consolidated Answer to Amended Consolidated Complaint (motion to dismiss and answer). GC Ex. 1(g). As to the answer, the Respondent admits that it declined to meet with the Union on September 15, 2020, but explains reasons for doing so, and denies that it failed and refused to inform Torres of her selection and to ask her to serve as a member of the panel. The answer further asserts that its actions are covered by the collective bargaining agreement. *Id.* The answer also denies that the Respondent violated § 7116(a)(1) and (5) of the Statute. *Id.*

In its motion to dismiss, the Respondent argued that the complaint should be dismissed because it was issued in violation of the Statute and the Federal Vacancies Reform Act of 1998, 5 U.S.C. § 3345, *et seq.* *Id.* The GC submitted General Counsel's Opposition to Respondent's Motion to Dismiss on September 15, 2023. GC Ex. 1(h). On February 27, 2024, I denied the motion to dismiss. GC Ex. 1(i).

On September 12, 2024, the Respondent filed Respondent Agency's Motion for Summary Judgment (motion for summary judgment). In it, the Respondent argued that there are no material facts in dispute, that it did not illegally interfere with protected activity in violation of § 7116(a)(1) of the Statute, and that it did not repudiate the contract in violation of § 7116(a)(1) and (5). Therefore, it was entitled to judgment as a matter of law. GC Ex. 1(k). In order to give due consideration to the motion for summary judgment, I rescheduled the hearing, which had been scheduled for October 2, 2024, to November 13, 2024 (and continuing to November 14, 2024, if necessary). GC Ex. 1(l). After requesting and receiving an extension of time to file its response to the motion for summary judgment, the GC filed General Counsel's Opposition to Respondent's Motion for Summary Judgment on September 25, 2024. In it, the GC argued that there are material facts in dispute and that the GC did not allege either interference or repudiation. Rather, the GC alleges in its complaint that the Respondent failed to continue existing personnel policies, practices and matters affecting working conditions to the maximum extent possible in violation of § 7116(a)(1) and (5). Therefore, the Respondent was not entitled to judgment as a matter of law. GC Ex. 1(m). On October 1, 2024, I denied the motion for summary judgment. GC Ex. 1(n).

On October 30, 2024, the GC and the Respondent filed their prehearing disclosures. GC Ex. (1)(o) and (p). Thereafter, because the GC's sole witness (and representative for the

Charging Party) became ill shortly before the hearing set for November 13, 2024, it was necessary to postpone the hearing again, with new dates set for January 22, 2025 and January 23, 2025. GC Ex. 1(q).

On January 7, 2025, the Charging Party filed the Motion to Have FLRA Attorney Guerrin Recused From Cases; To Allow the Union to Provide Documents and Its Own Testimony In All Cases, Block Request for New Compliance Documents, and Union Motion to Choose Its Own Representative Who Will Also Testify By Reading Statement in Record, As There Are Issues of Bias and a Conflict of Interest (recusal motion). GC Ex 1(r). Thereafter, also on January 7, 2025, the Charging Party filed the Motion to Move Date for Prehearing Disclosures for Above-Mentioned Cases Until Union's Motions are Determined (motion to postpone prehearing disclosures). GC Ex. 1(s). On that same date, I denied the Charging Party's motion to postpone prehearing disclosures (which were due the following day), absent agreement by all parties. GC Ex. 1(y). Following that denial, the Charging Party filed the Motion to Have All Documents Previously Submitted as Prehearing Disclosures for Case WA-CO-22-0437 Submitted for These Cases (motion to use prehearing disclosures for a different case for this case). GC Ex. 1(t).

On January 8, 2025, the GC filed the General Counsel's Opposition to Union's Motion, which opposed all of the matters raised in the recusal motion filed on January 7, 2025. GC Ex. 1(u). On that same date, the Charging Party filed the Reply to GC's Opposition to Union's Motion, which also regarded all of the matters raised in the recusal motion of January 7, 2025. GC Ex. 1(x). Also, on January 8, 2025, the GC and the Respondent timely submitted their supplemental prehearing disclosures. GC Ex. 1(v) and (w).

On January 15, 2025, I conducted a prehearing conference. During that conference, I reiterated that I had denied the Charging Party's motion to postpone prehearing disclosures, absent the parties' agreement, noting that I did so by email on January 7, 2025, without awaiting responses from the other parties, given that the prehearing disclosures were due the following day. I explained that I denied the motion because the timing difficulties the Charging Party raised were self-created as the Charging Party elected to file the recusal motion the day before the prehearing disclosures were due, rather than earlier, and also had not obtained the agreement of the other parties. GC Ex. 1(y).

During the prehearing conference, I also denied the request (made in the Charging Party's recusal motion) to remove Attorney Guerrin and the Washington Regional Office from the case, as lacking in basis. Also at the prehearing conference, I denied the Charging Party's request to have its representative testify by reading a statement into the record (also part of the recusal motion), and explained that the Charging Party's representative would need to answer questions asked, in the traditional format, to allow time for proper objections and responses thereto. As to the Charging Party's request to block the admission of documents that the GC and the Respondent had included in their prehearing disclosures (also part of the recusal motion), I denied the request to do so at the prehearing stage, but explained that I would rule on any objection to that evidence at the hearing. GC Ex. 1(y).

As to the Charging Party's request to provide documents and its own testimony in the instant case (also part of the recusal motion), I explained that the Charging Party has the right at hearing to provide documents and its own testimony, generally speaking, but that the Charging

Party's prehearing disclosures need to give the other parties notice of the testimony and documents it seeks to provide. I further explained that the Charging Party's motion to use prehearing disclosures for a different case for this case does not satisfy the notice requirement because the information in the document the Charging Party sought to use does not regard the instant case, and in fact regards other matters in which the Union is the Respondent, rather than the Charging Party. As such, the Charging Party did not provide adequate prehearing disclosures. GC Ex. 1(y).

The Charging Party nevertheless indicated it wished to provide testimony and documents to support that it had ongoing requests to the Respondent for the last eight years to meet to fill the arbitration panel, but those requests were blocked. The Charging Party indicated that it wished to provide this evidence to counter the Respondent's anticipated defense that the Union had not requested to meet after the Agency declined the Union's request on September 15, 2020. Over the Respondent's objection on the basis of timeliness and prejudice from a late prehearing submission, as well as its concern that the testimony would devolve into irrelevance, I allowed the Charging Party until the following day, January 16, 2025, 6:00 pm, Eastern Time, to provide prehearing disclosures that would give actual notice of the testimony and documents it wished to present (which needed also to be consistent with the explanation the Charging Party gave at the prehearing conference). However, in order to address the Respondent's timeliness, prejudice, and relevancy concerns, I limited the testimony and documents regarding requests to meet with the Respondent over the arbitration panel to one year prior to the September 15, 2020, date, consistent with my authority under 5 C.F.R. §§ 2423.24(e) and 2423.30(c). *See* GC Ex. 1(y).

The next day, the Charging Party timely submitted the late-allowed prehearing disclosures. However, those disclosures did not comport with the subject matter for testimony and documents the Charging Party had described during the prehearing conference or the timeframe limitations I had imposed. Therefore, given the timeliness, prejudice, and relevancy concerns, and consistent with my authority under §§ 2423.24(e) and 2423.30(c) of the Authority's Regulations, I disallowed the Charging Party from presenting a case-in-chief, but allowed it to provide an opening statement, to cross-examine witnesses, and to provide rebuttal testimony. *See* Tr. 94-95.

A hearing was held on this matter on January 22 and 23, 2025, via the Microsoft Teams video platform. All parties were represented and afforded an opportunity to be heard, to introduce evidence, and to examine witnesses, except that the Charging Party was disallowed from presenting a case-in-chief, consistent with my prior ruling.

After the hearing, the Charging Party timely filed a motion to correct the transcript, which included some offered word corrections and also additional exhibits, which were designed to either supplement or substitute for some of the hearing exhibits. I granted the motion in part, allowing some of the word corrections, but disallowing the addition of exhibits to either substitute for or supplement the hearing exhibits.

All parties timely submitted post-hearing briefs, with the Charging Party's including two attachments that were not part of the hearing record. Following the submission of briefs, on March 18, 2025, the GC filed the Motion to Strike (GC's motion to strike), which requested that the portions of the Charging Party's post-hearing brief referring to information not in the record and also exhibits attached to the Charging Party's post-hearing brief be stricken from the record and not considered. On March 19, 2025, the Charging Party filed the Motion to Deny Doug Guerrin's

(FLRA) Motion to Strike Union's Reference to General Counsel Exhibits (Formal Papers) Validly Introduced Into Record, and, If Not, Motion to Strike Agency's Reference to General Counsel Exhibit 1(k) of the Formal Papers (Charging Party's opposition and motion to strike Respondent's reference).

With regard to the GC's motion to strike, it is granted. Firstly, the documents the Charging Party submitted post-hearing are not a part of the hearing record and are therefore stricken and will not be considered. *See U.S. Dep't of the Treasury, U.S. Customs Svc., Sw. Region, Hous., Tex.*, 43 FLRA 1362, 1368 (1992) (documents not admitted into evidence at the hearing may not be submitted after the hearing).

Secondly, the GC is correct that the Charging Party includes in its post-hearing brief factual assertions that are unsupported by the hearing record. Some of these assertions are unaccompanied by citations to anything, *see, e.g*, Un. Br. at 16 ("I thought Mr. Conway should have been paid, but I now understand why others were upset. The Union was being taken for a ride"); some of these factual assertions cite for support the Charging Party's opening statement or its objections, *see, e.g., id.* at 3 ("the FLRA blocked the Union's charges against PBGC for failing to meet to fill vacancies on the panel for over four years"), neither of which constitutes evidence, and some cite the transcript for assertions that are not contained in the citation, *see, e.g., id.* at 14 ("Bartlett threw out a ulp involving first steps PBGC took to dismantle the performance and awards articles," referring to a portion of the transcript that does not say that). These factual assertions are stricken and will not be considered.

Further, it is noted that the Charging Party attempts to support some of its factual assertions in its post-hearing brief by reference to the formal papers, which were offered by the GC and admitted into evidence at the start of the hearing. The formal papers are admitted into the hearing record as proof of the pleadings and filings from the case from the filing of the unfair labor practice charge up until the hearing. As the formal papers are not admitted into the hearing record for the truth of the matters contained therein, I do not consider them appropriate as factual support in a post-hearing brief, generally speaking.[1] Therefore, the factual assertions in the Charging Party's post-hearing brief that rely for factual support entirely upon references to the formal papers are stricken and will not be considered.

Similarly, the Charging Party attempts to support some of its factual assertions by referring to its prehearing disclosures, which are part of the formal papers. *See, e.g.,* Un. Br. at 8 (referring to GC Exhibit 1(z)). Again, generally speaking, the formal papers do not provide appropriate factual support for the truth of the matters contained therein. Further, the Charging Party's citations in its post-hearing brief to its prehearing disclosures is something of an end-run of my ruling disallowing the Charging Party from presenting a case-in-chief. Therefore, to the extent that the Charging Party cites its prehearing disclosures, GC Ex. 1(z), in support of factual assertions that are otherwise not supported by the hearing record, those factual assertions are stricken and will not be considered.

As noted, in addition to opposing the GC's motion to strike, the Charging Party also moved to strike the Respondent's factual assertions that rely on an exhibit attached to the Respondent's

[1] There are exceptions to this general proposition, such as when, for example, a matter alleged in the complaint is admitted in the answer. That is not the situation at issue in the Charging Party's post-hearing brief, however.

motion for summary judgment, namely, GC Exhibit 1(k) (at Exhibit 11 attached thereto). This document also was only admitted into the record as part of the formal papers, which again are simply proof of the pleadings, filings and orders in the case that occurred prior to the hearing, and do not establish the truth of the matters asserted therein, generally speaking. Therefore, the Respondent's reliance on GC Exhibit 1(k) and the exhibit attached thereto for factual support in its post-hearing brief is also misplaced. As such, the factual assertions in the Respondent's post-hearing brief that rely entirely on GC Exhibit 1(k) and its attached Exhibit 11 are also stricken and will not be considered.

II. Findings of Fact

The Respondent is an agency within the meaning of § 7103(a)(3) of the Statute. The Charging Party is a labor organization within the meaning of § 7103(a)(4) of the Statute and is the certified exclusive representative of employees of the Respondent.

On May 3, 2011, a Collective Bargaining Agreement (CBA) between the Respondent and the former exclusive representative, Union of Pension Employees (UPE), took effect. Jt. Ex. 1. On November 16, 2011, the Charging Party replaced UPE as the exclusive representative of unit employees at the Respondent. Tr. 34. The Charging Party and the Respondent have not negotiated a successor collective bargaining agreement. Tr. 33-34.

The CBA includes a provision, Article 2, § 3.B.1., for the selection of arbitrators to form the arbitrator pool or panel to hear arbitrations.[2] It provides:

> Selection of the Pool – Within thirty (30) days of implementation of this Agreement, the Parties will exchange lists of the names of ten (10) arbitrators they deem acceptable to serve as arbitrator for disputes under this Agreement. Up to five arbitrators common on both Parties' lists will be informed of their selection to serve as a member of a rotating panel. If there are not five (5) names common to both lists, the Parties will repeat the process until five (5) common names have been identified. If a vacancy is created, the Parties will repeat the selection process to fill the vacancy. Any fees or costs in establishing the pool of arbitrators will be borne by the Employer.

Jt. Ex. 1. Article 2 also includes a provision for selection within the pool for arbitrators to hear specific arbitrations. It states that, "[o]nce the pool has been identified, as arbitrations are invoked, arbitrators will be selected alphabetically by their last name. Jt. Ex. 1, Art. 2, § 3.B.3.

After the CBA went into effect and before the Union became the exclusive representative, on September 20, 2011, UPE and the Agency negotiated a Memorandum of Agreement (MOA) regarding the arbitrator pool. The MOA states that UPE and the Agency agreed to and selected the five following arbitrators for the pool: James Conway; Charles Feigenbaum; Allen Foster; Joshua Javits; and Seymour Strongin. GC Ex. 2; Tr. 189. The MOA further explains that each of the arbitrators had been notified of their selection and had agreed to serve under the terms of the CBA. GC Ex. 2.

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[2] The parties use the term panel and pool interchangeably to refer to the group of arbitrators selected to hear the parties' arbitrations. *See* GC Br. at 3 n.4.

Sometime after the Union became the exclusive representative, in the words of the current Union President, Valda Johnson, the arbitrators were "invited" to leave the panel (by the Union). Tr. 38-39. By comparison, the Agency's witness, former Deputy Assistant General Counsel for the Agency, Michelle Bergman, considered the Union's actions to constitute a "campaign to chase off the arbitrators" from the panel. Tr. 193-94. By 2015, four of the arbitrators, Feigenbaum, Conway, Foster and Strongin, had resigned from the panel. Jt. Ex. 2 at 29; Tr. 38-39.

As a result of the Union's actions, the Agency filed two unfair labor practice charges. After complaints were issued on the charges and the complaints were consolidated, an administrative law judge (ALJ) granted summary judgment in favor of the Agency on February 28, 2017. The ALJ found that:

> By refusing to be bound by the arbitration panel and attempting to dismantle it by asking, encouraging, and even improperly demanding that arbitrators resign or face spurious allegations of ethical violations, the Union violated § 7116(b)(1) and (5) of the Statute when it refused to be bound by the MOA negotiated pursuant to the grievance and arbitration procedures of the CBA that remained in effect.

Jt. Ex. 2 at 12-30; Tr. 190. As a remedy, the ALJ ordered the Union to invite Arbitrator Feigenbaum back to the panel. Jt. Ex. 2 at 29. The Union and the Agency both filed exceptions to the ALJ's decision. Jt. Ex. 2 at 1; Tr. 40. On September 18, 2018, the Authority denied the Union's exceptions and granted the Agency's in part by extending the remedy to include an invitation to Arbitrator Conway as well. Jt. Ex. 2 at 7-8. The Union continued to appeal without success. Tr. 41. Ultimately, on August 17, 2020, the D.C. Circuit denied the Union's request for a rehearing and, on September 1, 2020, the Court issued a mandate, returning the case to the Authority's jurisdiction. GC Ex. 3 at 3-4; Tr. 43-44, 198-99. This case will be referred to as the Feigenbaum and Conway case or matter.

Meanwhile, before the D.C. Circuit issued the mandate, on August 28, 2020, Union President Johnson sent a calendar invite to Bergman and others, for September 18, 2020, with the subject line: "Tentatively scheduling to fill the arbitration panel." Jt. Ex. 3. At this point, there was one arbitrator remaining on the panel, Arbitrator Foster. Tr. 56-57. Johnson testified that she sent the email to ask the Agency to meet to select arbitrators. Tr. 55-56. Approximately eight business days later, on September 10, 2020, Bergman responded, asking about the subject matter. Jt. Ex. 4 at 2; Tr. 200-201. Johnson responded that same day as follows:

> My understanding is that we are to meet to discuss how to fill the arbitration pool. That is what the FLRA shared with me, as a condition of two past ULP's. The meeting is to discuss the MOA that must be followed for doing such.

Jt. Ex. 4 at 1-2. To this email, Bergman responded that the "Agency has received no such instructions from the FLRA. Accordingly, we decline the calendar invite." *Id.* at 1.

It was not until September 21, 2020, that the Authority sent its actual instructions following the D.C. Circuit mandate. Those instructions were in a letter from the Authority to the Union

explaining that the Union should immediately begin complying with the Authority's Order. GC Ex. 3; Tr. 41. For purposes of this matter, that meant that the Union needed to invite Arbitrators Feigenbaum and Conway back to the panel and needed to notify the Authority of the steps it had taken to comply within fifteen calendar days of the Order and then after thirty calendar days. Robin McClure, Bergman's supervisor, Tr. 63, was copied on this correspondence. GC Ex. 3.[3] As well, the letter explained that the Agency "should be served with copies of [the Union's] compliance correspondence to the [Authority]." GC Ex. 3 at 1.

However, even before it received the instructions from the Authority, the Union had actually completed all of the invitation efforts that it engaged in with the arbitrators. As to the invitation to Arbitrator Feigenbaum, some history is in order. Specifically, following the ALJ decision in 2017, Arbitrator Feigenbaum was invited to return to the panel and he did so. Tr. 44-45. However, on August 18, 2020, Feigenbaum again resigned via an email to both parties so stating. Approximately two weeks later, on August 31, 2020, the Union replied to Feigenbaum's resignation email, asking Feigenbaum whether he was "expecting that [the Union] should invite [him] back again or is this a firm decision . . . to resign." GC Ex. 4. Feigenbaum responded that he "was not angling to be invited back on the panel," and had "definitely resigned." *Id.*

As to Arbitrator Conway, on September 2, 2020, the Union sent an email to him, explaining that it was providing a "judicially/FLRA mandated invitation" to him to return to the arbitration panel. GC Ex. 5. This email to Conway also included various restrictions and conditions, including that the Union would not pay transportation fees or hotel fees, and that "[a]ny excessive fees will be reported to the FMCS," as would "[a]ny prejudice/bias." *See* Ag. Ex. 1; Tr. 174-75 (representation by Union representative that Agency Exhibit 1 had the same restrictions that were included in the September 2, 2020, email to Conway); GC Ex. 5. Some of these matters, such as concerns regarding transportation costs, were consistent with the intent of UPE and the Agency when they originally selected arbitrators from a list of local arbitrators back in 2011. *See* Un. Ex. 3. Other matters, such as the notifications that bias and excessive fees would be reported, were not. Moreover, the Authority's Order did not actually indicate that the Union could place any restrictions or conditions on its invitation to Conway. Jt. Ex. 2 at 9. Arbitrator Conway did not respond to this email. Tr. 63.

The Union did not copy the Agency on these emails to the arbitrators. *See* GC Ex. 4 and 5; Tr. 55, 209. According to Johnson, it did not do so because the Order did not require it to do so, but rather only required the Union to copy the Agency on compliance correspondence to the Authority. Tr. 47. The Agency asserts that the failure to include it on the correspondence with the arbitrators was improper. Tr. 209-11. It is notable that the Union's justification for omitting the Agency from the arbitrator correspondence came from a document (the Authority letter dated September 21, 2020, GC Ex. 3) that it did not even receive until after it sent the arbitrator correspondence (without copying the Agency).

Regardless of the propriety of the Union's actions and its after-the-fact justification, it is nevertheless clear that the Agency was unaware of the arbitrator invitations at the time that Johnson invited the Agency to "discuss the MOA that must be followed" in order to "fill the arbitration pool," as a "condition of two past ULPs," as the Union described the purpose of the meeting. Jt.

[3] While some of the correspondence in this matter was directed to McClure, Bergman testified that she was privy to it because she worked together with McClure. Tr. 214-15.

Ex. 4 at 1-2; Tr. 203, 215. And, once it received the actual Authority Order, it was the Agency's understanding that the "order of things was that the Union would comply" with the Authority Order, then compliance would be confirmed, and then the parties would engage in the arbitrator selection process. Tr. 203. The Agency's reason for this was because the parties needed to know how many vacant seats needed to be filled. Tr. 296.

It was not until October 6, 2020, that the Agency was notified of the Union's emails to the arbitrators. Tr. 215. That was when the Union sent compliance correspondence to the Authority and copied the Agency. Included in that correspondence apparently were the Union's emails with both Feigenbaum and Conway, as well as notification that Feigenbaum "had definitely resigned" and that Conway had not responded to the Union's invitation to rejoin the panel. GC Ex. 6 at 5.[4]

The version of the email to Conway that the Union sent to the Authority and copied to the Agency however was altered from the original version the Union sent to Conway. In place of the Union's various restrictions and conditions to Conway, the Union inserted a line of X's. *See* GC Exs. 5 and 6 at 1; Ag. Ex. 1; Tr. 174-75. While the Agency did not know then (and did not know until the hearing in this matter, Tr. 238) what had been in place of the X's, they were concerned that it was a restriction or caveat that would impact upon Conway's willingness to return. GC Ex. 6 at 1-2; Tr. 225-28. Additionally, because the Union did not copy the Agency on the original email, the Agency was also concerned about whether the email had been sent and whether or not Conway had responded. GC Ex. 6 at 1-2; Tr. 227-28. For these reasons, the Agency had concerns about whether the Union had complied with the Authority's Order. GC Ex. 6 at 1-2; Tr. 225-28.

Thereafter, on October 21, 2020, the Union followed up with another email to the Authority, copying the Agency, which simply stated that the Union had complied with the Authority's Order in the Feigenbaum and Conway case. GC Ex. 6 at 4. On that same day, the Union also filed one of the charges at issue in this matter, WA-CA-21-0018, alleging that the Agency "continues to fail to meet, accept, follow and continue mandatory procedures to fill vacancies in the Arbitration Pool." GC Ex. 1(a).

Approximately a month later, on November 25, 2020, the Authority emailed Johnson about compliance with the Authority's Order, specifically requesting a copy of the Union's correspondence to Arbitrator Conway and a copy of the electronic dissemination of the notice to bargaining unit employees. The purpose was to confirm that those compliance requirements had been satisfied, GC Ex. 6 at 3-4, as the Agency had apparently raised concerns about those matters with the Authority. *See* GC Ex. 6 at 2-3. The Union responded by providing the same documents it had previously provided, including the redacted email to Conway, rather than providing the original. GC Ex. 6 at 3.

Thereafter, on December 9, 2020, the Agency sent a detailed email to the Authority explaining that it believed that the Union had "failed to comply with the Authority's requirement to invite Arbitrator Conway back to the arbitrator panel," and its reasons for this belief, specifically that the X's might contain restrictions or caveats that would impact on Conway's willingness to return to the panel, that the email might not have been sent, and that the Agency could not verify

[4] Although the subject line of the Union's October 6, 2020, compliance email to the Authority indicates that it regards a different matter, both the Union and the Agency understood that it actually regarded compliance with the Feigenbaum and Conway case. Tr. 63-64, 216.

that Conway had not responded. GC Ex. 6 at 1-2. Certainly, with respect to the restrictions and conditions, Tr. 239-40, the Agency's concerns were well-founded. *See* Ag. Ex. 1; Tr. 239-40. Nevertheless, on December 18, 2020, the Authority notified the Union, and copied the Agency, that it found compliance and closed the matter. GC Ex. 7.

Shortly after the Authority did so, on Friday, January 8, 2021, Johnson sent a calendar invite for the following Monday, January 11, 2021, for "Panel Selection for Arbitrator." Jt. Ex. 5. Bergman responded, also on January 8. She explained that the Agency was unavailable that Monday and asked that Johnson provide dates and times toward the end of the coming week or for the week thereafter. Jt. Ex. 5 at 2. Bergman testified that the Union did not follow up then or thereafter to provide dates for arbitrator selection until December 2021. Tr. 260, 245. Johnson testified that she believes or thinks that she did follow up at the time. However, she also testified that she "[doesn't] remember." Tr. 68-69, 122. There were no documents provided at hearing to support Johnson's belief. As such documents would bolster the Union's assertion and would likely be part of the email thread, Bergman's recollection is the more credible. *See* Tr. 245. The parties did not thereafter meet to select arbitrators in 2021. Tr. 68-69, 245. Johnson explained that was so because they were busy with a number of other things, such as arbitrations pending before the last remaining arbitrator, Foster, and negotiations. Tr. 68-69.

Then, on December 14, 2021, Arbitrator Foster resigned. Tr. 69. On that same day, Johnson emailed Bergman requesting to meet to choose arbitrators. Ag. Ex. 2. Johnson followed-up by sending an email invite to the Agency for January 7, 2022, with the subject, "Meeting to Choose Arbitrators." *See* Jt. Ex. 6 at 8. McClure responded that the Agency was not available on that date, but proposed a new date to meet, January 26, 2022, which was a date the parties had previously set aside to have a call with Arbitrator Foster, Jt. Ex. 6 at 8, which meant that the parties were both likely available. Johnson responded substantively to that email on January 12, 2022, agreeing to the January 26 meeting and noting that she would be forwarding arbitrators for the Agency to consider. *Id.* at 7-8. The following day, January 13, 2022, Bergman offered to exchange arbitrator lists on January 19, 2022. *Id.* at 7. Johnson did not respond substantively to the proposed January 19, 2022 date for exchanging lists, but instead responded that she, Johnson, "was speaking to Ms. McClure," rather than to Bergman (apparently), when she sent her email. *Id.* at 6-7.

On January 26, 2022, Bergman followed up with Johnson, noting that the parties should exchange arbitrator lists before the scheduled call and asking for Johnson to select a time for the mutual exchange before the call. Thereafter, the parties exchanged arbitrator lists pursuant to Article 2. Tr. 266. They had one match, Blanca Torres. Jt. Ex. 6 at 3-4. In an email ten minutes before the scheduled call, Johnson confirmed that the parties had one match and would need to put together another list. *Id.* at 3.

After the parties matched on Blanca Torres, neither party immediately contacted her or discussed what to do about the match. Tr. 72, 273. In response to a question at hearing about whether the parties discussed how to proceed after matching on Torres, Johnson responded that they did not and that she was hoping to get more arbitrators on the panel, "not that that was a requirement but just that it might be a good idea." Tr. 72. Bergman confirmed that, at that time, the Union did not request or demand that Arbitrator Torres be contacted and did not indicate any wish to contact her then. Tr. 274. Bergman testified that the Agency also did not wish to contact

Torres at that point because it believes that Article 2 requires a full panel before the arbitrators are contacted about their selection. Tr. 266, 273-74.

While Johnson claimed the parties did not meet after exchanging lists on January 26, 2022, due to the Agency's decision to exchange lists instead of meeting (and in fact never met), Tr. 70, 77, 78, Johnson's own email contradicts that. In her email dated the following day, January 27, 2022, Johnson wrote that, on January 26, the parties had only "one match and then [met]," and then she described in that email her understanding of at least part of the discussion during the meeting, which involved suggestions by both parties for modifying the arbitrator selection process. Jt. Ex. 6 at 2. After the meeting, in late January 2022, Bergman and Johnson exchanged additional emails about modifying the selection process, but did not come to an agreement. *See* Jt. Ex. 6 at 1-2; Tr. 73-74, 267.

Also in late January 2022, the Union asked the Agency to pay for and request additional lists of arbitrators, which would be procured from FMCS, so that they could continue the selection process. Jt. Ex. 6 at 2-3. Apparently, the Agency did so. *See* Jt. Ex. 7. However, the parties did not reconvene again until mid-March 2022. *See id.* Johnson explained that was so because she was trying to resolve issues with Foster, and the parties were trying to devise a different arbitrator selection process and resolve the ULP. Tr. 73. Then, on March 17, 2022, Johnson requested that the parties meet to select arbitrators on March 22, 2022. Jt. Ex. 7 at 6. The Agency was unavailable but suggested two alternative dates shortly thereafter and also that the parties simply exchange lists by email rather than meeting. *Id.* at 4-5. The Union agreed to one of the new alternative dates and did not voice objection to an email exchange rather than meeting. *Id.* at 4.

The parties had their next arbitrator list exchange on March 24, 2022. *Id.* at 3-4. There were no matches. *Id.* at 3; Tr. 74. After that, the parties again exchanged ideas about modifying the selection process, but again failed to come to agreement. Jt. Ex. 7 at 2-3. Shortly thereafter, Bergman asked Johnson for a new date for exchanging lists. Johnson responded that she would provide a date after the Agency obtained new lists. *Id.* at 1. The following day, Johnson emailed Bergman, asking her, "When are you intending to get a new panel?" *Id.* Two hours later, Johnson emailed Russ Dempsey, Bergman's third-level supervisor, Tr. 311, telling him that "Bergman needs to let us know if she is acting in good faith to fill the panel or if we should ask the one arbitrator that we have chosen if she will act on our panel so that we can move [a particular] arbitration forward." Un. Ex. 1. Johnson testified that she reached out to Dempsey because she was frustrated over not being able to meet with Bergman or her supervisor, McClure, and instead they were only exchanging lists. Tr. 78. Yet, she had not voiced that frustration to Bergman or McClure, Jt. Ex. 7 at 4, and the parties did meet in January 2022. Jt. Ex. 6 at 2. In any event, Dempsey did not respond. Tr. 78.

There was then another approximately six-week delay after the March 2022 emails before the parties resumed efforts to fill the panel. Johnson testified that was because they were involved in negotiations over telework, because she caught COVID, and because she had a death in her family. Tr. 78-79. Then, on May 10, 2022, Johnson sent an invite for May 19, 2022, at 10:00 am to the Agency. The subject line was "Selecting Arbitrators," but, in the body of the invitation, Johnson wrote, "I realize that we can exchange the list at an agreed upon time, but we have to contact the one arbitrator in any case to discuss scheduling of some of the arbitrations." The invite included a dial-in number and participant code. Un. Ex. 2. The next email between the parties that

is in evidence came from Bergman on May 16, 2022. That email has a different subject line, "Proposed Date/Time for Exchange of Arbitrator List," and indicates that the Agency was available on May 19 for an arbitrator list exchange. It does not mention anything about contacting the one arbitrator to which the parties had agreed. Jt. Ex. 8 at 3.

After some back and forth on availability, on May 19, 2022, Bergman requested to do the arbitrator list exchange at 10:30 am on Wednesday, May 25, 2022. *See* Jt. Ex. 8 at 2-3. None of these emails, including Bergman's May 16 email, includes a dial-in number or participant code. *See* Jt. Ex. 8. Thereafter, on May 19, 2022, Bergman accepted Johnson's calendar invite from May 10, 2022, with the subject line, "Selecting Arbitrators," but which now did not include the information regarding contacting Torres, but which did have the dial-in number and participant code. It also had a modified date of May 25, 2022, at 10:30 am. Jt. Ex. 9. It appears that Bergman was trying to accept an invitation to exchange arbitrator lists, and the invite's subject line of "Selecting Arbitrators" unsurprisingly led her to believe that was what she was doing.

On May 25, 2022, at approximately 10:30 am, the parties exchanged arbitrator lists (which resulted in no matches). Tr. 185. Minutes later, Johnson replied to the arbitrator exchange list email thread, which did not contain the dial-in number or participant code, stating, "We are on the line to discuss contacting Arbitrator Torres." Jt. Ex. 8 at 1. Johnson then followed up by resending the original invite, with the subject, "Selecting Arbitrators," which included the dial-in number and participant code. Ag. Ex. 3. Johnson then emailed Dempsey, as well as other Agency representatives. In that email, Johnson alleged that it was Dempsey's "intent that [the parties wouldn't] have an arbitration panel at all," as they had "been going around the mulberry bush for months trying to get a panel." She reported that so far there was only one arbitrator match and acknowledged that "we have put off contacting that arbitrator to try to get a full panel," the "we" presumably being the Union and the Agency. Ag. Ex. 3 at 1. A few minutes later, the Agency responded that it is "not prepared to discuss contacting arbitrators, as there is not a Panel in accordance with Article 2 of the CBA." Jt. Ex. 8 at 1. Johnson disagrees that Article 2 requires a full panel before the selected arbitrators are notified. Tr. 81-82, 84. To the Agency, she replied that she would be contacting Arbitrator Torres "because you will NOT play games with our arbitrations." Jt. Ex. 8 at 1. Minutes later, on behalf of the Union, Johnson filed the other ULP charge at issue in this matter, WA-CA-22-0433. In it, she alleged that the Agency is refusing to contact an arbitrator to ask that she participate on a panel to which she had been selected, "so that a timely arbitration may take place." GC Ex. 1(c).

At the hearing, Johnson explained the reason she had originally been willing to wait to contact Torres and also the reason that in May 2022 she no longer was willing to do so. She testified that she originally was willing to wait because she wanted one or two more arbitrators for the panel because she had seen the effect of the "burnout" on the one arbitrator they had for a period. However, she realized in May that they were unlikely to get another match. Further, she was concerned about timeliness of a particular matter because, according to Johnson, "the Agency was threatening to deem [that arbitration] untimely, so we felt that it was appropriate to contact Ms. Torres a month before the expiration of that arbitration." Tr. 84-85.[5] She believed it was "within the boundaries of the CBA" to contact Torres at that point. *Id.*

[5] According to Johnson, the Agency threatened to move for the case's dismissal if the arbitration was not scheduled by December 31, 2021. Tr. 90. No documentary evidence confirms that. Also, by May 25, 2022, the December 31, 2021, alleged deadline had come and gone by approximately five months.

About an hour and a half after Johnson demanded that the parties contact Arbitrator Torres and an hour after she filed the ULP charge, Johnson contacted Torres to notify her of her selection. Jt. Ex. 10 at 2-3. In addition, Johnson also told Torres that the parties needed her to "resolve an issue on the Agency's unilateral decision/action to change the Performance Management System before first negotiating with the Union." McClure responded for the Agency. She confirmed to Torres that she had been selected by the parties as an arbitrator for the panel, but explained that the parties had not yet filled the panel. She also told Torres that it was the Agency's position that the CBA required the panel to be established with five arbitrators before assigning grievances to the arbitrators. *Id.* at 1-2. Johnson responded, disagreeing with McClure's email (other than regarding Torres's selection). Jt. Ex. 10 at 1. Torres did not respond to these emails. Tr. 90-91. Since May 2022, the parties have not exchanged arbitrator lists or otherwise filled the panel. Tr. 91-92.

III. Positions of the Parties

A. General Counsel

The GC alleges that the Agency violated § 7116(a)(1) and (5) of the Statute when it failed to continue existing personnel policies, practices, and matters regarding the grievance and arbitration procedure after the expiration of the CBA. The GC argues that the Agency did so by refusing to meet with the Union on two separate occasions: "first, to select replacement arbitrators; and, second, to discuss inviting an arbitrator to serve on the arbitration panel." GC Br. at 9.

Citing *Indep. Union of Pension Employees for Democracy & Justice*, 68 FLRA 999, 1004 (2015) (*IUPEDJ 2015*), the GC explains that, when a negotiated collective bargaining agreement expires, (and even after the exclusive representative is decertified and a new exclusive representative is installed), matters affecting working conditions, personnel policies, and practices, continue to the maximum extent possible absent either an express agreement to the contrary or the modification of those conditions of employment in a manner consistent with the Statute. GC Br. at 9-10. Again citing *IUPEDJ 2015*, 68 FLRA at 1004, the GC explains that among those policies and practices that continue are the negotiated grievance and arbitration procedure, including the selection of arbitrators. GC Br. at 9. Therefore, an agency that unilaterally terminates, changes, or ceases giving effect to the negotiated grievance and arbitration procedure violates § 7116(a)(1) and (5) of the Statute. *Dep't of HHS, SSA*, 44 FLRA 870, 881 (1992) (*SSA*). The GC points out that, as well, the Authority has regularly determined that refusal to participate in the selection of arbitrators is an unfair labor practice, although a defense to such a claim is that a provision in the collective bargaining agreement permits the action (or lack thereof). GC Br. at 10.

The GC asserts that it is established that the Union and the Agency in this case are bound by the terms of Article 2 of the expired CBA. GC Br. at 11. According to the GC, Article 2 requires a specific procedure for the parties to mutually select arbitrators to serve on a rotating panel to hear arbitrations. Further, Article 2 specifies that, if a vacancy is created, the parties will repeat the selection process to fill the vacancy by exchanging lists of ten names each in order to fill that vacancy. According to the GC, as the parties are so obligated and the CBA does not contemplate delays or alternative methods of accomplishing this task, the Agency violated the Statute when it declined to meet with the Union to attempt to fill the panel vacancies. *Id.* at 11-12.

In particular, according to the GC, at the time the Union requested to meet in September 2020, there were four vacancies that needed to be filled on the panel. Yet, the Agency declined to meet without offering alternative dates or options for doing so, according to the GC. GC Br. at 12. The GC asserts that the Agency then made no further attempts to meet its obligations to fill the panel. *Id.* As the CBA requires the parties to fill vacancies and the Agency declined the Union's request to do that, it violated the Statute, according to the GC. *Id.*

To the Agency's claim that it could not engage in the selection process while compliance with the order in the Feigenbaum and Conway case was pending, the GC argues that no delay is contemplated by the CBA, including for such compliance, and that, regardless, even if both arbitrators had accepted the invitations to rejoin, there were still two other vacant slots the parties could have filled. GC Br. at 12-13. Moreover, addressing the Agency's concern that the parties might have matched on more than two arbitrators, the GC dismisses the concern as speculative, asserts that the parties could have agreed to more arbitrators than Article 2 specifies, and also argues that the possibility of excessive matches does not excuse the Agency's failure to abide by its obligations. Therefore, according to the GC, the Agency violated the Statute. *Id.* at 13.

The GC also argues that the Agency violated the Statute when it declined an invitation from the Union to meet to discuss inviting Arbitrator Torres to officially serve on the panel, as Article 2 requires the parties to inform arbitrators of their selection. GC Br. at 13. According to the GC, the Article 2 language, "[u]p to five arbitrators common on both Parties' lists will be informed of their selection to serve as a member of a rotating panel," unambiguously requires the parties to inform the arbitrators of their selection without delay after they are selected until there are five on the panel. *Id.* at 14. According to the GC, the Agency's claim that the arbitrators should not be notified until there is a full panel of five ignores the plain meaning of Article 2. *Id.* at 14-15.

In remedy, the GC requests a cease-and-desist order and posting (signed by the Director of the Agency), and that the Agency be required to immediately restart exchanging names of potential arbitrators to fill the panel. Further, the GC requests that the Agency be ordered to immediately notify the arbitrators selected and invite them to the panel, in conjunction with the Union. GC Br. at 15-16.

B. Respondent

The Respondent argues that it has followed the Article 2 procedures for selecting and notifying arbitrators and therefore cannot be found to have violated the Statute. Ag. Br. at 12-13. As to the selection process, the Respondent argues that it complied with that process on January 26, 2022, when the parties exchanged lists and had one name in common, Torres. *Id.* at 15. Then, according to the Respondent, it continued to comply when it did not notify Torres immediately of her selection. The Respondent argues that is so because Article 2 requires that five common names be identified to create the panel and then, once the panel is identified, arbitrations are assigned by rotating selection, meaning that there must be five common names prior to the assignment of arbitrations. *Id.* According to the Respondent, the appointment of a single arbitrator and assignment of arbitrations to her ignores the requirement of a pool. *Id.*

The Respondent also argues that the CBA does not specify when a vacancy in the panel must be filled. Therefore, it was reasonable for the Agency to wait until compliance efforts were complete so that it would know the number to reach the requirement of five arbitrators for the panel. Moreover, according to the Agency, the parties developed a practice of not promptly meeting to fill panel vacancies, but rather continued to arbitrate cases with the remaining panelists. Ag. Br. at 15-16.[6]

The Respondent also argues that it is important to focus on what the CBA does not specify, such as: an obligation by the Agency to be the party notifying the arbitrator of their selection; an Agency obligation to immediately notify the arbitrator as soon as the Union decides it is appropriate; and an obligation for the parties to meet to discuss inviting an arbitrator to the panel. Ag. Br. at 16. As there are no such obligations in the CBA (or in the Statute), it is clear that the Agency acted in accordance with the CBA, according to the Respondent. *Id.*

The Respondent argues that it did not violate the Statute when it declined the Union's calendar invite to discuss filling vacancies in the panel because it reasonably believed that the parties needed to know how many arbitrators they needed to select, which was dependent on whether Feigenbaum and Conway returned. As the Agency had concerns, based on the Union's compliance correspondence, that Conway had been actually invited, it was entitled to wait until a determination on compliance was made, according to the Agency. Once that occurred, the Agency agreed to meet with the Union but the Union did not provide available dates or otherwise take steps to select new panel members, according to the Agency. Ag. Br. at 18. According to the Agency, at most waiting for compliance with the Feigenbaum and Conway matter was an innocent, good faith mistake, analogous to a "mere breach" and is not a ULP. *Id.*

Regarding the failure to contact Torres, the Agency's actions in that regard also did not violate the Statute, according to the Agency. That is so because firstly there is no obligation to contact the arbitrators of their selection until there is a full panel, and the Union's inaction for four months after Torres's selection other than to work with the Agency to exchange additional lists supports that the Union agreed with this interpretation, according to the Agency. Ag. Br. at 19. Further, according to the Agency, simply because the Union grew weary of the CBA's selection process and then demanded that Torres by notified does not mean that the Respondent violated the Statute. *Id.* at 20.

As to the alleged failure to meet to discuss contacting Torres about her selection, the Respondent argues that there is no CBA provision that requires meeting to discuss contacting arbitrators; nor is there a right to demand the parties use an arbitrator before the selection process is complete. Ag. Br. at 20. Rather, according to the Respondent, the CBA states that, "once the pool has been identified, as arbitrations are invoked, arbitrators will be selected alphabetically by their last name." *Id.* According to the Respondent, that is what occurred with the original panel. *Id.*

As to the allegation that, since January 26, 2022, the Respondent "has failed and refused to inform Torres of her selection and ask her to serve as a member of the panel," the Respondent argues that allegation is false, as neither party sought to inform Torres right after the selection or in

[6] As the Agency objected during the prehearing conference to the Union providing evidence of its efforts over many years to fill arbitrator vacancies (due in part to relevancy concerns), and I limited the Union's belated pre-hearing disclosures in part to address those concerns, I will not now consider the Agency's past-practice argument on this point.

March 2022. Further, the CBA does not require notification until there is a full panel, according to the Respondent, also for the reasons discussed above. Ag. Br. at 21. For that reason, it continued to be appropriate for the Agency to decline to contact Torres to notify her of her selection in May 2022, as there still was not a full panel then. *Id.* Indeed, according to the Agency, the Union violated the CBA by contacting Torres in May 2022. Moreover, even assuming the Agency is incorrect, the matter is moot because the Union notified Torres of her selection less than two hours after the Agency declined to do so. *Id.* at 22. At best, according to the Respondent, this renders the Agency's action *de minimis*. *Id.*

The Respondent also argues that the GC's claim that there is an ongoing obligation to fill the vacancies in the panel is inconsistent with the parties' past practice of not filling vacancies as they occur. Ag. Br. at 23.[7] Indeed, according to the Respondent, the Union only became interested in filling vacancies after it forced the resignation of the last remaining arbitrator in December 2021. *Id.* Before that, the parties never followed the Article 2 procedures to fill vacancies, according to the Agency. *Id.* at 24. For all of these reasons, according to the Respondent, it did not violate the Statute.

As to remedy, the Respondent argues against a remedy that would allow the Charging Party to select an arbitrator of its choice. As such a remedy would not recreate the *status quo*, but would instead alter a central tenet of the parties' agreement (to mutually select arbitrators), the Respondent requests that no such remedy be provided. Ag. Br. at 26.

C. Charging Party

Much of the Charging Party's post-hearing brief does not comport with my ruling that the Charging Party was not allowed to present a case-in-chief, but was only allowed to provide an opening statement, cross-examine witnesses and provide rebuttal testimony. Those portions of the Charging Party's post-hearing brief are therefore stricken and will not be considered. Further, much of the Charging Party's factual assertions have been stricken as based either on documents that are not part of the hearing record, on citations to the Charging Party's opening statement or objections, which are not evidence, on citations to the formal papers, which are not (generally speaking) admitted for the truth of the matter contained therein, or which otherwise lack factual support. I will summarize the Charging Party's position only insofar as its arguments and assertions comport with my ruling disallowing the Charging Party's case-in-chief and my ruling striking portions of the Charging Party's post-hearing brief, and only to the extent they have not already been addressed by the General Counsel in its post-hearing brief.

In its brief, the Charging Party argues that perhaps the reason the Respondent believes that the Union should have included the Respondent when it invited Arbitrator Conway to rejoin the panel is because of a secret agreement between Conway and the Respondent. Un. Br. at 5. It further argues that the Respondent failed to timely inform the Authority about its objection to the invitation that the Union sent to Conway to rejoin the panel. *Id.* It further argues that the Respondent's various reasons for declining to meet to fill the panel between September 15, 2020, and later in 2020 are unfounded and do not make sense. That is so, according to the Charging Party, because Bergman testified that the Respondent did not meet with the Union because the

[7] For the reason discussed earlier, I will not consider the Agency's argument regarding past practice.

Authority had not instructed them to meet, but she then testified that "that there was no instruction to wait for instruction to proceed." *Id.* at 5-6. Further, the Charging Party points out that the Respondent also indicated it did not meet in 2020 because it believed "the Union had not complied with its invitation to Conway." *Id.* at 6. The Charging Party also asserts that the Respondent's witness, Bergman, could not testify credibly about the Respondent's reasons for declining to meet because the Respondent's emails during 2020 were between the Union and McClure, Bergman's supervisor. *Id.* at 6. The Charging Party also argues that, if the Respondent had really been concerned about compliance with the Conway invitation matter, it could have filed in court to have that matter addressed. Furthermore, according to the Charging Party, in December 2020 and January 2021, the Respondent did not even mention compliance as an issue, but rather only indicated that McClure was unavailable in January 2021 and did not offer other dates. *Id.* at 7. The Charging Party claims that the Respondent is incorrect in its assertion that the Union should have coordinated the date and time in January 2021 for meeting, rather than unilaterally selecting a date, as the Respondent also sometimes unilaterally selected dates and times for meeting. *Id.* at 7-8. As well, the Charging Party argues that the Respondent also has a responsibility for initiating efforts to select arbitrators, and the Respondent never did so. *Id.* at 8. It argues that, by comparison, on May 10, 2022, the Union made three attempts to coordinate to meet with the Respondent. *Id.* The Charging Party argues that the Respondent was refusing to meet in order to run the clock on arbitrations. *Id.* at 9.

The Charging Party also argues that there is evidence of bias in this case because the GC sought to include in the hearing exhibits documentation about the Union's compliance with the Feigenbaum and Conway case, because the Charging Party had to introduce on its own an email showing that it asked the Respondent as early as March 2022 whether the parties should contact Arbitrator Torres about her selection, because the Charging Party had to ask other questions in cross-examination (which presumably it believes the GC should have asked), because the GC moved to amend the complaint during the hearing, and because the GC did not object to various matters. Un. Br. at 9-12.

As to filling the panel, the Charging Party argues that, in the past, the Respondent did not assert that the CBA requires that there has to be five members on the arbitration panel before the arbitrators are notified. Therefore, its claim now that there needs to be a panel of five before the arbitrators are notified does not make sense. Un. Br. at 12. Further, it does not make sense that arbitrations should be paused whenever the panel drops below five. Finally, as to filling the panel, the Charging Party argues that Article 2 simply requires that, when vacancies are created, the parties must repeat the selection process, such that arbitrators can be added one at a time, rather than filling "all vacancies at once," as it believes the Respondent argues is the proper interpretation of Article 2. *Id.* at 13.

Regarding the emails to Torres about joining the panel, the Charging Party asserts that McClure's emails demeaned the Union to Torres, which the Union asserts may have caused Torres to not respond or accept the invitation to join the panel. Un. Br. at 15. Regarding compliance with the Feigenbaum and Conway case, the Charging Party asserts that the conditions that it placed in the invitation to Conway were merely reminders to him of the ground rules, which the Union was entitled to mention, under the Statute, the First Amendment to the Constitution, and in order to curb waste, mismanagement and abuse. *Id.* at 16-17.

Finally, the Charging Party argues for an extraordinary remedy, in addition to the traditional remedies. That is, the Charging Party requests that I choose an "arbitrator from a list chosen by each side." Un. Br. at 19.

It is noted that, even as to the arguments and assertions that are not stricken, many of the Charging Party's arguments and assertions are either irrelevant to the matters herein, unsupported, and/or duplicative of the General Counsel's arguments. They will be addressed in this decision only insofar as that is not the case.

IV. Analysis and Conclusions

The Charging Party's Allegations that the GC is Biased

As a preliminary matter, it is appropriate to address the Charging Party's allegations made in its post-hearing brief of bias on the part of the GC. Un. Br. at 9-12.[8] These allegations are primarily based on disagreement that the Charging Party has with various litigation decisions the GC made during the course of the proceedings prior to and during the hearing. Un. Br. at 9-12.

However, the GC, and not the Charging Party, is in charge of the prosecution of an unfair labor practice complaint. *CPSC and AFGE Local 3705*, 4 FLRA 803, 803 n.1 (1980); *see also NTEU and Bernsen*, 53 FLRA 1541, 1575–76 (1998). Moreover, there is nothing with regard to the GC's litigation decisions or anything else that occurred during the course of these proceedings that indicates that the GC has a bias against the Charging Party. Accordingly, I find no merit to the Charging Party's allegations of bias and I will proceed to the merits of the case.

The Framework for Establishing the ULP

It is well-established that, when a negotiated agreement expires, personnel policies, practices and matters affecting working conditions continue to the maximum extent possible absent either an express agreement to the contrary or the modification of those conditions of employment in a manner consistent with the Statute. These continuing policies, practices, and matters encompass negotiated grievance and arbitration procedures, including arbitrator selections. Such provisions survive and remain in full effect, not only following contract expiration, but also following the decertification of one exclusive representative and the installation of a new one. *IUPEDJ 2015*, 68 FLRA at 1004.

Therefore, an agency that unilaterally terminates, changes, or ceases giving effect to such a mandatory provision of an expired collective bargaining agreement, or an agreement between the agency and the previous exclusive representative, violates § 7116(a)(1) and (5) of the Statute. *See SSA*, 44 FLRA at 881; *cf. Dep't of the Air Force, 35th Combat Support Grp. (TAC), George Air Force Base, Cal.*, 4 FLRA 22, 22-23, 29 (1980) (*Air Force*) (agency violated the Statute by failing and refusing to process an employee's grievance and by telling employee that she had no rights under the negotiated grievance procedure because the negotiated agreement had expired).

[8] As noted, the Union raised bias allegations against the GC prior to hearing as well. At the prehearing conference, I addressed those allegations and found them without merit. GC Ex. 1(y).

However, when a party is accused of an unfair labor practice, it may claim that a provision in the collective bargaining agreement permits the action. When that is so, the Authority will determine the meaning of the parties' collective bargaining agreement and resolve the unfair labor practice accordingly, interpreting the agreement using the standards and principles that arbitrators and courts use in the federal and private sectors. *IRS*, 47 FLRA 1091, 1103 (1993).

Moreover, the mere breach of an agreement by itself does not constitute a termination, change or cessation of a mandatory provision of an expired collective bargaining agreement, although such actions may become part of a pattern that establishes that. *Indep. Union of Pension Employees for Democracy & Justice*, 70 FLRA 820, 844 (2018) (*IUPEDJ 2018*). Thus, the cases in this area in which a statutory violation have been found involve more than a mere breach, but rather a pattern or other indicator that establishes that one party is ceasing to abide by a mandatory provision of the collective bargaining agreement.

For example, in *Air Force*, the agency refused to process an employee's grievance, filed under the parties' negotiated grievance procedure after the agreement had expired. Additionally, the agency told the employee that she had no rights or recourse under the grievance procedure because the negotiated agreement had expired. Based upon these factors, the Authority found the agency had terminated, changed or ceased giving effect to a mandatory provision of the expired agreement. 4 FLRA at 22-23.

Similarly, in *Nat'l Guard*, 71 FLRA at 829, the Authority held that the agency unilaterally terminated, changed, and ceased giving effect to a mandatory provision of an expired collective bargaining agreement based upon a pattern and other indicators of refusal to abide by the expired agreement. Specifically, the agency notified the union and bargaining-unit employees that it was not bound by the Statute or the parties' expired collective bargaining agreement, refused to comply with the grievance procedure, terminated the authorized union dues allotments, and unilaterally implemented new dues allotment and merit promotion policies.

Further, in *IUPEDJ 2018*, involving the same union, agency and collective bargaining provision as herein, the Authority found that the union committed several ULPs when it refused to accept the arbitrator pool and sought to dismantle it, by improperly emailing the arbitrators, requesting their resignation, and accusing them of violating ethics rules. 70 FLRA at 821, 842-44. On the other hand, the Authority found no independent statutory violation based on the union's failure to pay an arbitrator. Instead, the Authority found that such action was, at most, a breach of the collective bargaining agreement, which, if standing alone, did not constitute an independent statutory violation. *Id.* at 826.

Article 2

Following this framework, the first question is whether the article at issue, Article 2, is a mandatory provision of the expired CBA. Because Article 2 regards arbitration and arbitrator selection, it is beyond dispute that the article is a mandatory provision of the expired agreement. *See IUPEDJ 2015*, 68 FLRA at 1004. As a result, these provisions remain in effect following the CBA's expiration and also the installation of a new exclusive representative, the Union. Therefore, if the Agency's actions constituted a unilateral termination, change, or cessation of Article 2, it will be found to have violated the Statute.

In order to assess the Agency's actions, it is important to understand what Article 2 requires. As noted, this assessment will follow the standards and principles that arbitrators and courts use in the federal and private sectors. *IRS*, 47 FLRA at 1103. These standards and principles seek to determine the meaning of the collective bargaining provision according to the intent of the contracting parties. That intent is determined by reference to the language of the clause itself, by inferences drawn from the contract as a whole, and by extrinsic evidence. *Id.* at 1110.

There are some aspects of Article 2 that are clear based on the contractual language alone. These include that, when establishing the pool, the parties are required to exchange lists of ten arbitrators' names ("the Parties will exchange lists of the names of ten (10) arbitrators they deem acceptable to serve as arbitrator"). Jt. 2, Art. 2, § 3.B.1. Further, if there are five names in common, then those five arbitrators are to be informed of their selection to serve on the panel or pool ("Up to five arbitrators common on both Parties' lists will be informed of their selection"). As well, if there are not five in common, the parties are required to continue to exchange lists until there are five ("If there are not five (5) names common to both lists, the Parties will repeat the process until five (5) common names have been identified"). Then, as to vacancies, the parties must "repeat the selection process to fill the vacancy." *Id.*

Somewhat less clear from the plain language of the provision is the timeframe for arbitrator notification. The GC argues that the phrase, "[u]p to five arbitrators common on both Parties' lists will be informed of their selection," means that, as soon as an arbitrator is selected, they must be informed, as "up to five" will be informed and there is no allowance for delay in the contract language. GC Br. at 13-14. The Respondent argues that notification should take place only after there are five common names, relying on the requirement that the exchange continues until there are five and on another provision of Article 2, which indicates that "once the pool has been identified, as arbitrations are invoked, arbitrators will be selected alphabetically by name." Ag. Br. at 15 (citing to Jt. 2, Art. 2, § 3.B.3.).

Based on the contract language, the juxtaposition of phrases, the totality of the involved provisions, and a common-sense reading, I find that it is acceptable and appropriate for the parties to notify the arbitrator of his or her selection anytime from each's initial selection until shortly after the pool of five has been created. I do not find that the phrase, "up to five arbitrators . . . will be informed," means that, as soon as there is a common arbitrator, that arbitrator must be informed of her selection. This is so because of the phrase that follows it, which specifies that the parties must continue to exchange lists until they have five in common. Jt. 2, Art. 2, § 3.B.1. Based on the juxtaposition of these two sentences, and the emphasis on five arbitrators and no more, it is apparent that the "up to five" language is intended to explain only that no more than five arbitrators will be informed of their selection. Further, given that the contract language requires the establishment of the pool (which consists of five arbitrators selected) before arbitrations are assigned to arbitrators ("Once the pool has been identified, as arbitrations are invoked, arbitrators will be selected alphabetically"), Jt. 2, Art. 2, § 3.B.3., it follows that it is acceptable to wait until there are five before any arbitrator is notified.[9] On the other hand, there is nothing in the language of Article 2 that indicates that it is improper to notify arbitrators of their selection before the entire

[9] While the Union asserts that the Agency claims that no arbitrations may take place during the pendency of a vacancy, Un. Br. at 13, I do not understand the Agency to be so claiming and I do not so find. My analysis of arbitration assignments is confined to the situation of the initial pool creation, that is, when going from zero to five.

panel is established, as the language on which the Agency relies for this point is not addressed to notification of selection, but rather it is addressed to the assignment of arbitrations. *See* Ag. Br. at 15 (citing to Jt. 2, Art. 2, § 3.B.3.).

WA-CA-21-0018

With this understanding, the Agency's actions in WA-CA-21-0018 are considered. The GC alleges that the Agency unilaterally terminated, changed, or ceased giving effect to Article 2 when, on September 15, it declined the Union's invitation to meet to select replacement arbitrators. The GC argues that the purpose of the meeting was clear, "to fill the arbitration panel, as stated in the invitation subject line," there were vacancies that needed to be filled, and the contract required that they be filled. GC Br. at 12.

While indeed there were vacancies that needed to be filled, the contract required that they be filled, the subject line of Johnson's invitation read "Tentatively scheduling to fill the arbitration panel," and the Agency declined to meet, there is more to the story. That is, around the time that Johnson sent the invitation, the D.C. Circuit had denied the Union's petition for review of the Feigenbaum and Conway case, which had required as a remedy that the Union invite Feigenbaum and Conway to return to the parties' arbitration panel. Indeed, within days of Johnson's invitation, the D.C. Circuit had issued its mandate following its denial of the Union's petition, returning the case to the Authority. GC Ex. 3 at 3-4. One of the impacts of this is that, undoubtedly, the Agency expected that the Authority would issue an order regarding that case giving instructions on compliance with the Authority's remedy, which would involve invitations to Feigenbaum and Conway. However, as of Johnson's August 28, 2020, email to the Agency and even as of the date Johnson had offered, September 18, 2020, for the parties to "fill the panel," the Authority had not issued instructions on compliance in the Feigenbaum and Conway case. *See* GC Ex. 3 at 1-2.

Given the uncertainty about that matter, which was closely related to the subject line of the invitation (filling the arbitration panel), it was therefore not unreasonable for Bergman to inquire about the reason for meeting. When she did so, Johnson responded that the meeting was about complying with the Authority's Order in the Feigenbaum and Conway case -- which the Authority had not yet issued. Johnson wrote that the Authority had "shared with [her that], as a condition of two past ULP's," the parties needed "to meet to discuss how to fill the arbitration pool," and the "meeting is to discuss the MOA that must be followed for doing such." Jt. Ex. 4 at 1-2. Since the Agency had not received those instructions from the Authority at that point (and in fact never received those exact instructions), and it now understood the meeting to regard compliance with the Feigenbaum and Conway case, it declined to meet. Jt. Ex. 4 at 1. In other words, the evidence establishes that what the Agency meant to decline (and declined) was a meeting regarding the Authority's instructions about the Feigenbaum and Conway case (which the Agency had not yet received and which involved an MOA for filling the pool, according to Johnson's description of the Authority's instruction), rather than a general meeting to fill the arbitrator pool. While the Agency could have inquired further to clarify the subject matter of the meeting (given that Johnson's initial invite was more general about filling the pool), and did not do so, it is unknown whether such clarification would have been forthcoming. In any event, within a week of the Agency declining the Union's invitation, the parties received the Authority's Order regarding the Feigenbaum and Conway decision. GC Ex. 3 at 1-2.

That September 21, 2020, Order required the Union to invite Feigenbaum and Conway back to the panel. *Id.* It did not mention anything about an MOA or discussions about filling the pool, as Johnson had indicated to the Agency was the case. In any event, once the Agency had received the Order, it was their understanding that the "order of things was that the Union would comply" with it, then compliance would be confirmed, and then the parties would engage in the arbitrator selection process to fill remaining vacancies. Tr. 203. It is for that reason that the Agency did not move forward with filling vacancies after it received the Order. Tr. 296-97.

The GC argues, by contrast, that Article 2 does not contemplate any allowable delays in filling a vacancy on the panel, including for the reasons the Agency provided, as the Article is silent on the subject of delays. GC Br. at 13. The GC's position however does not withstand scrutiny. Certainly, there are a number of reasons that the parties might be appropriately delayed in filling a vacancy on the panel. Johnson herself described several reasons why she did not pursue filling the vacancies at times. For example, she explained that the parties did not try to fill vacancies in 2021 because they were involved in negotiations and an arbitration. Tr. 68-69. She also explained that they did not exchange lists between late January and mid-March 2022, because the parties were trying to work out a different methodology for selecting arbitrators, because Johnson was dealing with issues with an arbitrator, and because they needed another list of arbitrators. Tr. 73-74. Johnson further explained that the parties did not exchange lists between late March and May 2022 because the parties were involved in another negotiation, because Johnson caught COVID, and because she had a death in her family. Tr. 78-79.

The Agency believes it appropriately delayed filling the panel because, without knowing whether Feigenbaum and Conway had been invited and then accepted or declined the invitations, it did not know how many vacancies to fill. Tr. 296. However, the GC points out that, regardless of whether Feigenbaum and Conway had accepted, there were still two other vacancies. GC Br. at 12-13. That point is reasonable and certainly, if the Union had clearly explained that it wished to fill those two vacancies and that was the purpose of the invitation, rather than leading the Agency to believe the invitation regarded compliance with instructions it had not yet received, the GC's position would be stronger.

Regardless, determining whether the Union had appropriately invited Feigenbaum and Conway to return and what their responses were (so that the parties would know the number of vacancies) seems to be no less of a good reason for delay than those that Johnson asserts as her appropriate reasons for delay. And, as to that subject, the Agency was not provided any information until October 6, 2020, when the Union sent its first compliance correspondence to the Authority and cc'ed the Agency. Tr. 215. That was because the Union itself declined to include the Agency on its earlier invitation to Conway,[10] which hampered the Agency's ability to know whether the invitation had been sent and whether it had been accepted. *See* GC Ex. 4 and 5; Tr. 55, 209. And, the delay that this caused is fully on the Union's shoulders, as the Union could have but did not include the Agency on the invitation. Further, it is also on the Union's shoulders that there was even more delay after the Agency received the compliance documents on October 6, 2020, given the X's redactions in the version of the Conway invitation that Johnson provided then (which the Agency considered suspect, and in fact covered up restrictions to and conditions regarding the

[10] Again, the Union's stated reason for not including the Agency on the email invitation, that the Authority's Order did not require it to, does not hold water. This is because the Union sent the invitation prior to receiving the Order.

invitation). *See* GC Ex. 6; Ag. Ex. 1; Tr. 239-40.[11] Moreover, the compliance documents that the Union provided to the Authority and the Agency on October 21, 2020, shortly before it filed the charge in this matter, did nothing to alleviate those concerns. GC Ex. 6. Thus, it is clear that the Agency had a reasonable reason for delaying filling the arbitrator vacancies.

Matters that were addressed at the hearing that occurred after the Union filed its charge on October 21, 2020, and through January 2021 are post-charge conduct that is irrelevant in determining whether or not the Statute has been violated. *See, e.g., NTEU*, 53 FLRA 1541, 1555 (1998). Nevertheless, some of those matters inform whether the Agency was ceasing to give effect to Article 2 when it declined the invitation for September 18, 2020 and did not address filling vacancies thereafter, or was simply operating under an assumption that compliance with the Feigenbaum and Conway matter should precede filling the rest of the panel vacancies. This later conduct includes the Agency's continued efforts to determine whether the Union had complied with the requirement to invite Conway to return to the panel,[12] which concluded on December 18, 2020, when the Authority found compliance and closed the case. GC Exs. 6 and 7. It includes the Union's invitation on January 8, 2021, to the Agency for "Panel Selection for Arbitrator" to occur on January 11, 2021. Jt. Ex. 5. And, it includes the Agency's agreement to do so, with a request that the Union provide alternate dates, which did not materialize. Jt. Ex. 5; Tr. 68-69, 245, 260. This post-charge conduct, including the Agency's continued efforts to determine compliance, and then agreement to select arbitrators after the Authority closed the compliance matter, all suggests that, when the Agency did not work to fill the vacancies after it had received the Authority's Order in the Feigenbaum and Conway case, the Agency was not ceasing to give effect to Article 2, but rather was working within a framework of compliance with the Order first, vacancy-filling second, a reasonable basis for delay.

All of this explanation shows that there is simply no pattern of behavior or other indicator that would establish that the Agency ceased to give effect to Article 2. Unlike in *Air Force*, 4 FLRA at 22-23, in which the agency refused to process a grievance and told the employee she had no rights under the expired agreement, or *Nat'l Guard*, 71 FLRA at 829, in which the agency notified the union and employees that it was not bound by the Statute or the expired collective bargaining agreement, and refused to comply with several mandatory provisions of the agreement, or in *IUPEDJ 2018,* 70 FLRA at 842-44, in which the union engaged in a systematic pattern to dismantle the arbitration panel, the Agency here has not engaged in a pattern of behavior that shows it ceased to give effect to Article 2. Rather, it simply declined an invitation that it understood was about a compliance order it had not yet received, and then reasonably assumed it should wait until the Authority found compliance with the Order before moving forward with Article 2 processes. Nor does this case present any other indicator that the Agency ceased to give effect to Article 2, such as statements that it was not bound by Article 2 or other similar statements as were made in the above cases. Indeed, it is not even necessary to differentiate this case from a mere breach of the agreement, which would not constitute an unfair labor practice (standing alone),

[11] The Union argues that it was entitled to put restrictions on Conway's invitation based on the Statute, the First Amendment, and in order to curb waste, mismanagement and abuse. Un. Br. at 16-17. Whether or not that is so is immaterial, as what matters is that the X's redactions caused the Agency to be suspicious, which caused reasonable delay in the ability to know whether compliance with the invitations had occurred.

[12] It is noted that the Union argued that the Agency unduly delayed notifying the Authority about its objections to the Union's compliance efforts. Un. Br. at 5. However, the Agency responded reasonably promptly to the Authority's communication about whether the compliance was sufficient. *See* GC Ex. 6 at 1-2 (Authority email dated November 25, 2020 followed by Agency email dated December 9, 2020).

see id. at 826, as there is not even an obvious breach. As such, the Agency did not violate § 7116(a)(1) and (5) when it declined the Union's invitation to meet on September 18, 2020, as it did not fail to continue existing personnel policies, practices, and matters affecting working conditions to the maximum extent possible.[13]

WA-CA-22-0433

In WA-CA-22-0433, the GC alleges that the Agency failed to continue existing personnel policies, practices, and matters affecting working conditions to the maximum extent possible in violation of § 7116(a)(1) and (5) of the Statute when it declined an invitation from the Union to meet to discuss inviting Arbitrator Blanca Torres to officially serve on the panel. GC Br. at 13; Tr. 102-105 (amendment to the complaint made during the hearing). This allegation stems from matters that occurred between the parties between January 26, 2022 and May 25, 2022, when the Union filed the WA-CA-22-0433 charge.

Specifically, on January 26, 2022, the parties exchanged lists and had one arbitrator in common, Blanca Torres. *See* Jt. Ex. 6 at 3-4. Neither the Union nor the Agency notified Torres at the time. Tr. 72, 273-74. The Agency explained that it did not do so because it believes that Article 2 requires a full panel before arbitrators are notified of their selection. Tr. 266, 273-74. Johnson explained that she did not do so because she thought it was better to get more arbitrators on the panel, although that was not required. Tr. 72.

Thereafter, the parties did not exchange lists from late January 2022 to mid-March 2022, which Johnson attributed to her being busy. Tr. 73. The parties then had an unsuccessful exchange on March 24, 2022. Jt. Ex. 7. Another delay ensued, which Johnson attributed to the parties' negotiations over another matter, because she caught COVID and because of a death in her family. Tr. 78-79. Then, after another unsuccessful exchange on May 25, 2022, Johnson sought to meet with the Agency to notify Torres of her selection. Jt. Ex. 8 at 1. The Agency declined based on its continued belief that Article 2 requires a full panel before arbitrators are notified. *Id.* Shortly thereafter, on that same day, Johnson filed the charge in WA-CA-22-0433, alleging that the Agency refused to contact arbitrators to inform them of their selection to the panel. GC Ex. 1(c).

My analysis of whether the Agency failed to continue existing personnel policies, practices and matters affecting working conditions to the maximum extent possible begins with Article 2's requirements. I found that Article 2 allows for notification anytime from initial selection until shortly after the pool of five has been created. This makes sense because Article 2 requires the creation of the pool of five before arbitrators are initially assigned to arbitrations, which means that it is reasonable to wait on notification until the entire pool is established. Jt. Ex. 2, Art. 2, § 3.B.3. And, on the other hand, Article 2 does not prohibit notifying arbitrators prior to that (although arbitrations may not be assigned until there is a full pool).[14] Therefore, it does not matter whether

[13] It is also possible that the GC argues that the Agency violated the Statute by refusing to participate in the selection of arbitrators. GC Br. at 10. This was not the direct theory put forth by the GC in the complaint or in its prehearing disclosures. GC Ex. 1(f), (p) and (w). Further, that is not what the Agency did when it declined the invitation for September 18, 2020, as the Union described the invitation as regarding compliance with the Order, rather than a general invitation to fill the additional vacancies.

[14] Again, I emphasize that my analysis regarding arbitration assignments is limited to the situation involving the creation of a pool, rather than when the pool of five has one or more vacancies.

the arbitrators are informed immediately after their individual selection or after the selection of all five. *See* GC Ex. 2. Therefore, it was entirely appropriate for Johnson to seek to notify Torres of her selection when she did so. But the question is whether the Agency ceased giving effect to Article 2 when it declined to meet on May 25, 2022, to discuss informing Torres of her selection.

At the outset, it is worth noting that the GC's emphasis on meeting (and declining to meet) is somewhat confusing. This is because Article 2 does not have specific meeting requirements. However, giving the idea of a meeting a more expansive interpretation, I understand the meeting emphasis to regard the concept of the Agency working together with the Union on the Article 2 notification process. As understood this way, certainly, the Agency declined to meet with the Union on May 25, 2022 to discuss notification to Torres. However, again there is more to the story.

Part of the story regards the impression that Johnson gave to the Agency about whether Torres should be notified immediately after her selection, or later, or only after there was a full panel. And, it appears that Johnson gave the Agency the impression that she agreed with the Agency's understanding that notification should occur only after the panel's full creation. Certainly, after the parties selected Torres in January 2022, Johnson did not seek to notify her of her selection or request that the Agency do so. Tr. 72, 273-74. Instead, she wrote to Bergman, "I only see one match. We will have to put together another list." Jt. Ex. 6 at 3. She also did not discuss contacting Torres during the meeting that Johnson and Bergman had on January 26, 2022, after the exchange. Jt. Ex. 6 at 2; Tr. 274. Then, on March 29, 2022, Johnson wrote to Bergman's third-level supervisor, Russ Dempsey, that "Bergman needs to let us know if she is acting in good faith to fill the panel or if we should ask the one arbitrator that we have chosen if she will act on our panel." Un. Ex. 1 at 1. This statement seems to support that Johnson believes that the panel needs to be filled before the arbitrators are notified, as she only excepted to that idea in the event that Bergman was not acting in good faith. Then, on May 25, 2022, before filing the ULP charge, Johnson wrote to numerous Agency officials about the selection and notification process: "We have only had one match. We have put off contacting that arbitrator to try to get a full panel." Ag. Ex. 3. These communications (or lack thereof) about notification to Torres create the clear impression that the Union was aligned with the Agency's belief that Article 2 notification should occur only once there is a panel of five. As a result, it is unsurprising that the Agency balked at the idea of contacting Torres on May 25, 2022, when the Union changed courses.

This is particularly so given the confusion about the interactions scheduled for that day. As noted, leading up to May 25, 2022, two different email communication threads were occurring between the parties, one of which regarded the exchange of arbitrator lists (which did not have a call-in number included, which would indicate emails rather than a meeting), and one of which had the subject line, "Selecting Arbitrators," but which Johnson then described in the body as regarding contacting Arbitrator Torres, and which did have a call-in number (which would indicate a meeting, as opposed to simply email exchanges). Both ultimately included a date and time of May 25, 2022, at 10:30 am. Un. Ex. 2; Jt. Exs. 8, 9. Bergman accepted the "Selecting Arbitrators" invitation (which had the call-in number), likely thinking that what she was agreeing to do was select arbitrators and that would be by email. However, in fact that mislabeled invite was about contacting or discussing contacting Torres and the Union anticipated it would be by telephone.

Then, on May 25, 2022, the Union engaged in the arbitrator list exchange together with the Agency (without any matches). Jt. Ex. 8. It can be surmised that, when Johnson emailed the Agency shortly thereafter telling them that she was on the line to discuss contacting Torres, it came as something of a surprise, given that it is likely that the only activity the Agency understood it was involved in that day was the exchange of arbitrator lists. It was against this (confusing) backdrop, in large part Union-created, that the Agency declined to discuss the matter.

Should the Agency have declined such a discussion, even in these convoluted circumstances? The best answer is "no." A discussion on the matter was certainly in order, particularly given the Union's stated concern about a pending arbitration and whether the Agency would claim untimeliness, which was apparently in part driving the Union's sudden desire to contact Torres. Ag. Ex. 3. Furthermore, the parties truly needed (and need) to figure out a game plan for getting the panel of five created and getting those arbitrators notified of their selection. But, given the confusion and the surprise (to the Agency) that they were expected to be having a telephone call, it is not surprising that the Agency responded negatively.

In any event, the question is not whether the Agency failed to agree to a call to which it should have agreed, the question to answer is whether the Agency terminated, changed or ceased giving effect to Article 2 when it declined to discuss contacting Arbitrator Torres on May 25, 2022, as shown by a pattern of behavior and/or other indicators of cessation. *See Air Force*, 4 FLRA at 22-23; *Nat'l Guard*, 71 FLRA at 829; *IUPEDJ 2018*, 70 FLRA at 820. And, neither a pattern nor other indicators of cessation are apparent. What is apparent are (some) efforts to establish the panel, a reasonable belief that it was improper to notify arbitrators of their selection before the full panel of five was created (a belief to which the Union contributed by its words and actions), and a confusing couple of email threads for an event or events set for May 25, 2022, given that the Agency likely understood that it was only exchanging lists that day, up until Johnson's email notifying them that she was on the line to discuss contacting Torres. As such, the Agency did not violate § 7116(a)(1) and (5) when it declined to discuss contacting Arbitrator Torres on May 25, 2022. Whether the Agency breached its obligation under Article 2 on May 25, 2022, is another question, but one that I need not answer.

Similar to WA-CA-21-0018, the parties devoted some attention to events that occurred after the Union filed its charge on May 25, 2022, at 11:00 am. *See* GC Ex. 1(c); Tr. 85-91; Ag. Br. at 22; Un. Br. at 15. However, as noted, post-charge conduct is irrelevant in determining whether or not the Statute has been violated. *See, e.g., NTEU*, 53 FLRA 1541, 1555 (1998). Moreover, the post-charge activity in this matter involved simply more of the same, with the Union contacting Torres to notify her of her selection and to address other matters with her and the Agency responding by acknowledging that Torres had been selected but disagreeing with the Union about the other matters. Nothing in these communications alters my analysis of the event in question, which was the Agency's declination of the Union's request to discuss informing Torres of her selection.

All of this being said, before leaving this matter, one thing bears saying and reemphasizing: both the Union and the Agency need to devote their fullest attention to getting a full panel of arbitrators and they need to do so promptly, not as an afterthought, not as a matter to be squeezed in as is convenient, and with full understanding that they both need to address some behaviors. While I do not find that the Agency committed a ULP in this matter, I nevertheless take note that rarely in

this voluminous record did I find instances of the Agency seeking out the Union to exchange lists or otherwise operating proactively to move the process forward toward obtaining a panel. On the other hand, I also discerned that Union President Johnson did not help her cause, and in fact hindered it frequently, by creating suspicion (notably, about the Conway invitation), by causing confusion (notably, when she told the Agency that the September 18, 2020, meeting was about compliance with two ULPs, rather than about general arbitrator selection, and by titling a meeting "Selecting Arbitrators," when what she wanted to do was discuss notifying an arbitrator), by requiring near-immediate Agency action as soon as she deems it appropriate (for example, requesting meetings on a Friday for the following Monday, without pre-arrangement), while otherwise engaging in substantial delay herself, and by misleading the Agency (for example, regarding waiting on notifying Torres). All of this behavior (Agency and Union) needs to change so that the parties can create a functioning arbitration system, which is essential for the bargaining unit, the Union and the Agency.

For all of these reasons, the GC has not established that the Agency failed to continue existing personnel policies, procedures and matters affecting working conditions to the maximum extent possible in violation of the Statute. Accordingly, I recommend that the Authority adopt the following Order:

ORDER

IT IS ORDERED that the Complaint be, and hereby is, dismissed in its entirety.

Issued, May 20, 2025, Washington, D.C.

LEISHA SELF

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LEISHA A. SELF
Administrative Law Judge