

70 FLRA No. 164

INDEPENDENT UNION
OF PENSION EMPLOYEES FOR
DEMOCRACY AND JUSTICE
(Respondent/Union)

and

PENSION BENEFIT GUARANTY CORPORATION
(Charging Party/Agency)

WA-CO-13-0227
WA-CO-15-0158

DECISION AND ORDER

September 24, 2018

Before the Authority: Colleen Duffy Kiko, Chairman,
and Ernest DuBester and James T. Abbott, Members
(Member DuBester concurring)

Decision by Member Abbott for the Authority

I. Statement of the Case

In this case we must address, *yet once again*, the Respondent Union's (the Union's) long-standing attempts to evade certain provisions in a binding collective-bargaining agreement (CBA) and a binding memorandum of agreement (MOA) concerning the selection of arbitrators.¹ We adopt, with only slight modification, the recommend decision and order of Chief Administrative Law Judge Charles R. Center (Judge)² that found the Union had engaged in such "reprehensible behavior" before various arbitrators, who had comprised the pool for the negotiated grievance procedure for their agreement, that the Union committed more than one unfair labor practice (ULP).³

On February 28, 2017, the Judge granted, in part, the motion for summary judgment (motion) of the Federal Labor Relations Authority's (FLRA's) General Counsel (GC) and found that the Union violated § 7116(b)(1) and (5) of the Federal Service

¹ See *Ind. Union of Pension Emps. for Democracy & Justice*, 68 FLRA 999 (2015) (*IUPEDJ*), *recons. denied*, 69 FLRA 158 (2016).

² To the extent that the Judge's recommended decision provides a more detailed analysis of the matters raised in the exceptions or cross-exceptions, we adopt that analysis as our own, except as expressly modified below.

³ Judge's Decision at 25.

Labor-Management Relations Statute (Statute).⁴ Specifically, the Judge concluded that the Union had committed several ULPs when it refused to be bound by provisions of a CBA and an MOA concerning the selection of arbitrators.

The Union filed cross-exceptions alleging that the Judge improperly granted the motion because there were genuine disputes as to material factual matters. Because the Union fails to identify any genuine disputes as to any material facts, we deny this cross-exception.

The Union also contends that it did not commit a ULP. Because § 7116(b)(1) and (5) apply to the actions of the Union and the Union fails to demonstrate that it did not otherwise commit a ULP, we deny these cross-exceptions.

The Agency alleges that the Judge erred in not finding that the failure to pay Arbitrator Conway was a ULP. Because the Agency has not demonstrated that the failure to pay Arbitrator Conway constitutes an independent ULP, rather than part of a pattern the Judge found to be a ULP, we deny this exception.

Finally, the Agency alleges that three additional arbitrators should be given the opportunity to return to the arbitration pool. Because the actions of the Union resulted only in the resignation of one of those additional arbitrators, Arbitrator Conway, we extend this remedy to include Arbitrator Conway.

II. Background and Judge's Order

As the attached Judge's decision sets forth the relevant facts in detail, we will only briefly summarize them here.

A. WA-CO-13-0227

Years prior to the first ULP charge, the Agency had, under the CBA and an MOA negotiated with the prior union, agreed to a rotating pool of five permanent arbitrators. The Union was then certified as the exclusive representative. At a certain point, the Union sent Arbitrators Conway and Feigenbaum each an email stating that the CBA and MOA were with the previous union and requested an interview. After both arbitrators refused the Union's request to be interviewed, the Union sent emails "respectfully suggest[ing] that you voluntarily withdraw your participation in the arbitrator pool."⁵

⁴ 5 U.S.C. § 7116(b)(1), (5).

⁵ Judge's Decision at 8 (quoting GC's Ex. 12).

In response to the Union's email, Arbitrator Feigenbaum resigned from the arbitration pool.⁶

In a series of email exchanges, in a pending grievance where Arbitrator Conway had been selected, Arbitrator Conway stated that he was not going to grant what he viewed as a motion for recusal from the Union, and he attempted to schedule a prehearing conference. During the same series of email exchanges, the Union continued to ask for Arbitrator Conway to voluntarily resign from the arbitration pool. When Arbitrator Conway again refused to resign from the pool, the Union sent another email to Arbitrator Conway quoting the Federal Mediation and Conciliation Service (FMCS) ethics code.

The Agency filed the first ULP charge, WA-CO-13-0227, on February 28, 2013, and amended it on May 7, 2013. The GC issued a complaint (first complaint) on October 30, 2014, alleging that the Union violated § 7116(b)(1) and (5) of the Statute and committed a ULP when it refused to accept the terms of the CBA for the selection of arbitrators and arbitration procedures and that, by doing so, the Union failed to continue existing personnel policies, practices, and matters to the maximum extent possible.

B. WA-CO-15-0158

After the filing of the first ULP charge, Arbitrator Conway issued an award; the Authority considered, and rejected, the Union's exceptions to that award in *Independent Union of Pension Employees for Democracy & Justice (IUPEDJ)*.⁷ Also after the filing of the first ULP charge, Arbitrator Strongin, another arbitrator in the arbitration pool, indicated that, due to the difficulty in collecting his fee from the Union, he would no longer be taking any cases from the Agency.

Similarly, on December 15, 2014, Arbitrator Conway sent an email to the Union alleging that the Union had refused to pay its portion of his fees. Arbitrator Conway later settled a suit against the Union that included Arbitrator Conway's resignation from the arbitration panel.

To another arbitrator, Arbitrator Javits, the Union raised the same ethics concerns it had raised with Arbitrator Conway, accusing Arbitrator Javits of violating the FMCS ethics code.

The Agency filed a second ULP charge against the Union, WA-CO-15-0158, on January 22, 2015. The GC issued a complaint (second complaint) on January 21, 2016 alleging that the Union had violated § 7116(b)(1) and (5) of the Statute when it refused to accept the terms of the CBA regarding the selection of arbitrators, the payment of arbitrators, and arbitration procedures. As with the first complaint, the second complaint alleged that the Union had failed to continue these existing personnel policies, practices, and matters affecting working conditions to the maximum extent possible in violation of the Statute.

C. Judge's Decision

The Judge consolidated the cases for hearing. On June 1, 2016, the GC filed a motion for summary judgment on both complaints. The Union opposed the motion, claiming that there were genuine disputes as to material facts, thirty nine in all.

The Judge found that there were no genuine issues of material fact in either case and granted the motion for summary judgment.

The Judge found that the Union improperly emailed arbitrators, requested them to resign, and accused the arbitrators of violating FMCS ethics rules. In the first case, the Judge found that the Union "actively attempt[ed] to dismantle the arbitration panel . . . through active solicitation of resignations from the duly appointed Arbitrators Conway and Feigenbaum."⁸ In the second case, the Judge found that the Union refused to accept the selection of Arbitrator Javits, "improperly accus[ed] Arbitrator Javits of violating the ethics code, . . . encouraged Arbitrator Javits to resign from the panel, and thus attempted to dismantle the duly assembled arbitration panel." The Judge concluded that these actions violated § 7116(b)(1) and (5).⁹

However, the Judge concluded that the failure to comply with a scheduling request of Arbitrator Conway and refusal to pay him were not separate ULPs.¹⁰ The Judge noted that, "[a]t most, the [current Union]'s failure to pay Arbitrator Conway is further evidence of the violation already committed by the [Union]'s refusal to be bound by the MOA."¹¹

As a remedy, the Judge ordered the Union to post a notice concerning its violation and to offer

⁶ The Respondent also sent a similar email to Arbitrator Foster who stated that he was "neither prepared nor authorized to be your arbitrator unless both sides have consented or do consent." *Id.* at 13 (quoting GC's Ex. 19 at 1).

⁷ 68 FLRA 999 (2015), *recons. denied*, 69 FLRA 158 (2016).

⁸ Judge's Decision at 22.

⁹ *Id.* at 24.

¹⁰ The Judge also denied the charges concerning the payment of Arbitrator Strongin and the resignation of Arbitrator Conway as untimely. The Judge also rejected the Respondent's defenses.

¹¹ Judge's Decision at 24.

Arbitrator Feigenbaum “an opportunity to rejoin the arbitration panel set forth in the MOA.”¹²

On April 3, 2017, the Agency filed exceptions to the Judge’s decision. On April 24, 2017, the Union filed cross-exceptions to the decision in response.

III. Analysis and Conclusions

A. This case is appropriate for summary judgment.

The Union alleges¹³ that the Judge erred in granting the GC’s motion because there were disputed material facts.¹⁴ A motion for summary judgment filed under § 2423.27 of Authority Regulations¹⁵ serves the same purpose and has the same requirements as motions for summary judgment filed with United States District Courts pursuant to Rule 56 of the Federal Rules of Civil Procedure.¹⁶ As such, an administrative law judge “shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to a judgment as a matter of law.”¹⁷ Here, the Union alleges that there are factual matters in dispute. We will consider each of these allegations and determine whether they are (1) factual matters, (2) in dispute, (3) material, and (4) genuine.

- i. Several of the Union’s alleged disputed factual matters were not disputed by the parties.

Where the parties agree as to a factual matter, then there is no dispute and an administrative law judge may grant a motion for summary judgment.¹⁸ The record indicates that the parties did not dispute many of the factual matters the Union alleges were disputed. Specifically, there was no dispute over: (1) the timeliness of the charge alleging that the Union failed to pay

¹² *Id.* at 30.

¹³ Respondent’s Cross-Exceptions at 103.

¹⁴ As we will not, under 5 C.F.R. § 2429.5, consider arguments that were not raised before the Judge but could have been, we will not consider two of the Respondent’s alleged disputed facts that were not, but could have been, presented to the Judge when he was considering how to rule on the motion. Respondent’s Cross-Exceptions at 97 (“The Union disputes the facts asserted in the [Judge’s] Decision that the Union refused to be bound by the MOA and that the Union had unlawful motives and intentions.”); *id.* at 98 (“The Union disputes the facts asserted in the [Judge’s] Decision that the Union misused the ethics code.”).

¹⁵ 5 C.F.R. § 2423.27.

¹⁶ *Dep’t of VA, VA Med. Ctr., Nashville, Tenn.*, 50 FLRA 220, 222 (1995) (*Nashville*); *Dep’t of the Navy, U.S. Naval Ordinance Station, Louisville, Ky.*, 33 FLRA 3, 4-5 (1988).

¹⁷ Fed. R. Civ. P. 56(a).

¹⁸ *Id.*

Arbitrator Strongin;¹⁹ (2) whether there was an agreement between the parties;²⁰ (3) whether the Agency and the prior union selected an arbitrator from a list provided by the FMCS rather than the pool created by the MOA;²¹ or (4) whether the Union’s expressions were its beliefs or opinions.²²

Because none of these facts were in dispute, these facts would not prevent the Judge from ruling on the GC’s motion.²³

- ii. The Union raises many disputed facts that are not material to the ULP charges.

Rule 56 requires that any disputed facts be material.²⁴ Disputed facts are material where that fact “might affect the outcome of the suit under the governing law,” precluding the Judge from granting a motion for summary judgment.²⁵

¹⁹ Compare Respondent’s Br. at 29 (alleging that the GC knew about the refusal to pay Arbitrator Strongin on December 3, 2013) and Judge’s Decision at 3 (“1,” “2,” and “3”), with GC’s Mot. for Summary Judgment (Mot.) at 5-6 (acknowledging that the Charging Party knew of the refusal to pay Arbitrator Strongin “in December 2013”).

²⁰ Compare Respondent’s Cross-Exceptions at 42 (“[w]hether there was a CBA between [the Respondent] and [the Agency]”) and Judge’s Decision at 4 (“4”), with GC’s Mot. at 4 (“Charging Party and the Union of Pension Employees . . . , the employees’ exclusive representative at the time, executed a [collective-bargaining agreement]” and the “Respondent and Charging Party have not negotiated a successor [collective-bargaining agreement].”).

²¹ Compare Respondent’s Cross-Exceptions at 47 (“[w]hether, in practice, the Agency and the prior union . . . selected arbitrators” through FMCS), Respondent’s Br. at 34, and Judge’s Decision at 4 (“9”), with generally GC’s Mot.

²² Compare Respondent’s Br. at 49 and Judge’s Decision at 4 (“24”), with GC’s Mot. at 8 (The “Respondent erroneously believed that it was not bound by the arbitration provision.”) and *id.* (The “Respondent . . . believed the arbitrators should resign.”).

²³ Fed. R. Civ. P. 56(a).

²⁴ *Id.*

²⁵ *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986) (*Liberty Lobby*).

Several of the Union's alleged disputed facts contest actions by the Agency²⁶ or an arbitrator.²⁷ The complaints issued by the GC concern the conduct of the Union.²⁸ Because the actions of the Union are in question—not the actions of the Agency or any arbitrator²⁹—these alleged facts are not material.³⁰

Several of the Union's alleged disputed facts concern whether actions were allowed under the CBA³¹

or how the CBA operated.³² However, the complaints concern the Union's actions in dismantling the arbitration pool in violation of the Statute. As such, any alleged disputed facts concerning limitations absent from the CBA about communications with arbitrators, the effect of a vacancy, or the withdrawal of grievances are immaterial.³³

The Union also alleges that it was a disputed fact whether the arbitrators who resigned from the pool did so “voluntarily of their own free will” or were forced by the Union to resign.³⁴ However, the ULPs concern the Union's actions. Even if the Union's actions did not have the effects alleged in the complaints, the actions in and of themselves are a ULP.³⁵

Second, the Union disputes whether Stuart Bernsen, a Union official, had any obligation to personally pay Arbitrator Conway's fees.³⁶ As the Union's conduct is the subject of the complaints and not the conduct of any individual Union official in a personal capacity, this alleged disputed fact is not material to the complaints before the Judge.

²⁶ Respondent's Br. at 34-35 (“[w]hether the Agency . . . had authority to ‘assign’ arbitrators to arbitrations invoked by”); *see also* Judge's Decision at 4 (“10”); Respondent's Br. at 55 (“Whether the Agency engaged in ex parte communications with [A]rbitrator Strongin.”); *see also* Judge's Decision at 4 (“30”); Respondent's Br. at 58 (“[w]hether . . . [A]rbitrator Javits declined to proceed with the Agency's institutional grievance”); *see also* Judge's Decision at 5 (“34”); Respondent's Br. at 59-60 (“[w]hether the Agency improperly . . . engaged [Arbitrator Foster] in an arbitration for an individual . . . not represented by [the Respondent]”); *see also* Judge's Decision at 5 (“35”); Respondent's Br. at 60 (“[w]hether the Agency failed and refused to pay fees to Arbitrator Robert Moore” in an arbitration not involving the Respondent); *see also* Judge's Decision at 5 (“36”); Respondent's Br. at 61 (“[w]hether the Agency failed and refused to comply with final orders of [A]rbitrator [Foster]” in an arbitration not involving the Respondent); *see also* Judge's Decision at 5 (“37”).

²⁷ Respondent's Br. at 54 (“[w]hether [A]rbitrator Conway expressed a nasty, belligerent, hostile, aggressive, adversarial, unjudicial, prejudiced, and/or biased attitude and tone toward the Union”); *see also* Judge's Decision at 4 (“29”); Respondent's Br. at 55 (“[w]hether [A]rbitrator Strongin engaged in ex parte communications with the Agency”); *see also* Judge's Decision at 4 (“31”).

²⁸ GC's Mot. at 10; Complaint and Notice of Hearing for WA-CO-13-0227 at 2.

²⁹ GC's Mot. at 10; Complaint and Notice of Hearing for WA-CO-13-0227 at 2.

³⁰ *Liberty Lobby*, 477 U.S. at 248.

³¹ Respondent's Br. at 35-36 (“[w]hether there were any restrictions on [the Respondent's] communications with arbitrators” based on Article 2 of the agreement); *see also* Judge's Decision at 4 (“11”); Respondent's Br. at 36 (“[w]hether any provision of the [CBA] contained rules and requirements with respect to communications with arbitrators and scheduling”); *see also* Judge's Decision at 4 (“12”); Respondent's Br. at 48 (“[w]hether anything prohibited [the Respondent] from withdrawing an arbitration”); *see also* Judge's Decision at 4 (“23”).

³² Respondent's Br. at 47 (“[w]hether the . . . CBA acknowledged that vacancies in the arbitration pool could be created”); *see also* Judge's Decision at 4 (“22”); Respondent's Br. at 49 (“Nothing in the . . . CBA restricted, prohibited[,] or limited the [Respondent's] communications.”); *see also* Judge's Decision at 4 (“11”); Respondent's Br. at 56 (“[w]hether [A]rbitrator Javits was the proper arbitrator under the pool rotation” for a certain grievance); *see also* Judge's Decision at 5 (“32”); Respondent's Br. at 57 (“[w]hether under the [agreement] any arbitrators could be assigned to cases when there were vacancies in the pool”); *see also* Judge's Decision at 5 (“33”).

³³ *Liberty Lobby*, 477 U.S. at 248.

³⁴ Respondent's Br. at 50; *see also* Judge's Decision at 4 (“25”); Respondent's Br. at 43 (“[w]hether the Union forced any arbitrator to do anything against his will”); *see also* Judge's Decision at 4 (“18”).

³⁵ *Dep't of HHS, SSA*, 44 FLRA 870, 881 (1992) (*HHS I*) (party violated § 7116(a)(1) and (5) of the Statute when it ceased giving effect to the parties' agreement); *Dep't of the Air Force, 35th Combat Support Grp. (TAC), George Air Force Base, Cal.*, 4 FLRA 22, 23 (1980) (*Air Force*).

We also reject as not material allegations that the Respondent began to challenge the grievance-arbitration procedures in 2012. Respondent's Br. at 63; *see also* Judge's Decision at 5 (“39”). Not only is this immaterial to the issue at hand, but the Authority has already answered this question. *IUPEDJ*, 68 FLRA at 1005 (“[W]e find that the Union is bound by the arbitration procedures included in the CBA negotiated by the previous exclusive representative until the parties negotiate a new CBA with new procedures.”).

³⁶ Respondent's Br. at 64; *see also* Judge's Decision at 5 (“39”).

Because the above matters are not material to the alleged violations, they would not prevent the Judge from granting a motion for summary judgment.³⁷

- iii. The Union fails to show that there was a genuine dispute over some of its alleged disputed facts.

In order to demonstrate that there is a genuine dispute over material factual matters, a party must cite specific items of the record or provide other support that would allow a factfinder to rule in the nonmovant's favor.³⁸ Furthermore, in order to demonstrate a genuine dispute, a party must point to believable evidence.³⁹ An administrative law judge can grant a summary judgment where evidence provided by the nonmoving party is merely colorable or not significantly probative.⁴⁰

Many of the Union's alleged disputed facts are merely insinuations with no basis in the record or are blatantly contradicted by the record. The Union alleges that the officials from the former union "acted as agents of the Agency . . . in connection with the selection and appointment of arbitrators for the pool."⁴¹ However, the Union only supports this allegation with innuendo and

blanket statements such as a declaration stating that a witness "ha[s] knowledge of the factual statements . . . based on direct knowledge and from documents that the [A]gency . . . provided to the Union" without actually producing any documents or stating this knowledge in the declaration.⁴² This blanket statement does not indicate what knowledge the witness could provide and does not create a genuine factual issue.⁴³ As such,⁴⁴ this alleged factual dispute and related alleged factual disputes⁴⁵ do not present genuine disputes.⁴⁶

Additionally, record evidence⁴⁷ blatantly contradicts some of the Union's alleged genuine factual

³⁷ Fed. R. Civ. P. 56(a).

³⁸ *Rojas v. Roman Catholic Diocese of Rochester*, 660 F.3d 98, 104 (2d Cir. 2011) (there must be evidence on which a jury could reasonably find for nonmoving party); *Wavetronix v. EIS Elec. Integrated Sys.*, 573 F.3d 1343, 1354 (Fed. Cir. 2009) ("[A]n issue of material fact is 'genuine' if the evidence is such that a reasonable jury could return a verdict for the non-moving party."); *Muir v. Navy Fed. Credit Union*, 529 F.3d 1100, 1107 (D.C. Cir. 2008) ("A dispute about a material fact is 'genuine' if a reasonable jury, drawing all reasonable inferences in [nonmovant's] favor, could return a verdict against the [nonmovant].").

³⁹ *See Scott v. Harris*, 550 U.S. 372, 378-81 (2007) (In light of unchallenged video that clearly contradicted plaintiff's version of high-speed police chase, court should not have adopted plaintiff's version of events in upholding denial of summary judgment.); *Kannady v. City of Kiowa*, 590 F.3d 1161, 1172-73 (10th Cir. 2010) (The claim that recorded conversations took place before a certain date did not raise genuine factual dispute because it was blatantly contradicted by the record and the content of conversations showed that they clearly took place after that certain date.); *Jeffreys v. City of N.Y.*, 426 F.3d 549, 551 (2d Cir. 2005) (Summary judgment was proper when plaintiff's testimony was "largely unsubstantiated by any other direct evidence" and "'so replete with inconsistencies and improbabilities' that no reasonable juror would undertake the suspension of disbelief necessary to credit the allegations made in his complaint.").

⁴⁰ *Liberty Lobby*, 477 U.S. at 249-50.

⁴¹ Respondent's Br. at 33; *see also id.* at 32 (alleging that officials of the former union "acted as agents of the Agency . . . when they agreed to an arbitration pool system in 2011"); *see also* Judge's Decision at 4 ("7").

⁴² Respondent's Br., Attach. C, Declaration of Stuart Bernsen at 1.

⁴³ Fed. R. Civ. P. 56(c)(4) ("An affidavit or declaration used to support or oppose a motion must . . . set out facts that would be admissible in evidence."); *Liberty Lobby*, 477 U.S. at 250 ("[T]he adverse party 'must set forth specific facts showing that there is a genuine issue for trial.'").

⁴⁴ Fed. R. Civ. P. 56(a); *Liberty Lobby*, 477 U.S. at 248.

⁴⁵ Respondent's Br. at 33 (alleging that officials of the former union "acted as agents of the Agency . . . in connection with the selection and appointment of arbitrators for the pool"); *see also* Judge's Decision at 4 ("8"); Respondent's Br. at 61 ("[w]hether the FLRA Washington Region delayed the representation election during December 2010 through May 2011 in order to allow [the Agency] and [the former union] to negotiate a CBA and to hamstring [the Respondent] if it won the election"); *see also* Judge's Decision at 5 ("38").

⁴⁶ We also deny Cross-Exceptions relying on these unsupported innuendos. Respondent's Cross-Exceptions at 107 (alleging that there was no valid MOA).

⁴⁷ GC's Mot., Ex. 5 (MOA signed by the president of the former union and an Agency representative listing the five arbitrators selected and appointed to the arbitration pool pursuant to the CBA).

disputes.⁴⁸ This includes evidence in the record⁴⁹ that the Union⁵⁰ harassed arbitrators.⁵¹

The Union also claims that it is a disputed fact whether “the Union’s communications and actions regarding the arbitration system that are the subject of the instant ULP complaint in Case WA-CO-13-0227 were proper and timely bargaining proposals.”⁵² However, the Union does not point to any evidence that any statements it made were bargaining proposals and the statements themselves do not, on their face, appear to be bargaining proposals. As such, the Union has failed to present believable evidence to demonstrate that there is a genuine dispute regarding this topic.⁵³

⁴⁸ Respondent’s Br. at 31 (“[w]hether the Agency . . . unilaterally *selected* arbitrators for the pool in 2011”); *see also* Judge’s Decision at 4 (“5”); Respondent’s Br. at 32 (“[w]hether the Agency . . . unilaterally *appointed* arbitrators to the pool in 2011”); *see also* Judge’s Decision at 4 (“6”); Respondent’s Cross-Exceptions at 107 (alleging that there was no valid MOA).

⁴⁹ Judge’s Decision at 7-8 (quoting emails the Respondent sent to arbitrators).

⁵⁰ Respondent’s Br. at 40; *see also* Judge’s Decision at 4 (“16”); Respondent’s Br. at 39 (alleging that “[w]hether the Union threatened any arbitrators” was a material factual matter at issue); *see also* Judge’s Decision at 4 (“15”); Respondent’s Br. at 42 (alleging that “[w]hether the Union harassed any arbitrators *to resign*” was a material factual matter at issue); *see also* Judge’s Decision at 4 (“17”); Respondent’s Br. at 44 (alleging that “[w]hether the Union pressured any arbitrators” was a material factual matter at issue); *see also* Judge’s Decision at 4 (“19”); Respondent’s Br. at 45 (alleging that “[w]hether the Union intimidated any arbitrators” was a material factual matter at issue); *see also* Judge’s Decision at 4 (“20”).

⁵¹ Furthermore, these alleged disputes go to the intent of the Respondent. However, the Respondent’s intent is immaterial for a violation of the Statute. *See Mich. Army Nat’l Guard*, 69 FLRA 393, 396 (2016) (“The test for determining whether a statement or conduct violates § 7116(a)(1) is an objective one. Although the circumstances of the pertinent incident are taken into consideration, the standard is not based on the subjective perceptions of the employee or the intent of the employer.”), *enforced sub nom. FLRA v. Mich. Army Nat’l Guard*, 878 F.3d 171 (6th Cir. 2017).

⁵² Respondent’s Br. at 52; *see also* Judge’s Decision at 4 (“26”).

⁵³ *Nashville*, 50 FLRA at 222 (“Consistent with the courts’ interpretations of Rule 56, a party opposing a motion for summary judgment cannot rely on its pleading alone, but must show by affidavits or otherwise that there is a genuine issue of material fact.”). We note that the Respondent argued that the Authority should be “cautious” when granting motions for summary judgment because the Authority does not allow for discovery. Respondent’s Cross-Exceptions at 102. However, before the Judge, the Respondent conceded that it was not hampered by any lack of discovery. Respondent’s Br. at 66 (“In any event, the [Respondent] has submitted sufficient evidence . . . to refute all of the claims stated in the complaint.”).

Consequently, these alleged disputed facts would not prevent the Judge from ruling on the motion.⁵⁴

B. The Union violated § 7116(b)(1) and (5) of the Statute.

The Union raises several challenges to the Judge’s finding that the Union committed a ULP and violated § 7116(b)(1) and (5) of the Statute. First, the Union challenges the very applicability of § 7116(b)(1) and (5),⁵⁵ stating that the allegations against the Union “d[id] not concern any violation by the [Union] of any right of ‘any employee.’”⁵⁶

As the Judge noted, it is a ULP for an agency to unilaterally terminate, change, or cease to give effect to a mandatory provision of an expired collective bargaining agreement.⁵⁷ We agree that the same conduct by an exclusive representative also constitutes a ULP. Specifically, the Union denied bargaining-unit employees—the employees it represents—access to the grievance procedures in the CBA. In doing so, the Union “interfere[d] with, [and] restrain[ed] . . . employee[s] in the exercise by the employee of [a] right”⁵⁸ under the Statute and unilaterally ceased to give effect to the CBA.⁵⁹ Consequently, § 7116(b)(1) and (5) apply here, and we deny this exception.

Second, the Union alleges that it did not commit a ULP because the Judge only found that the Union *attempted* to commit a ULP.⁶⁰ However, this mischaracterizes the decision. Although the Judge did find that the Union was “actively attempting to dismantle the arbitration panel set forth in the MOA,”⁶¹ the mere

⁵⁴ Because—with the exception of the Charging Party’s exceptions addressed below in Section C concerning Arbitrator Conway’s fees—no party challenges the Judge’s finding of no violation in failing to comply with Arbitrator Conway’s request to schedule a pre-hearing conference, Judge’s Decision at 22, refusing to pay arbitrator fees, *id.* at 24, and Arbitrator Conway’s resignation, *id.*, we do not address the Respondent’s alleged material facts in dispute concerning those issues. Judge’s Decision at 4 (“13,” “14,” “21,” “27,” and “28”).

⁵⁵ 5 U.S.C. § 7116(b)(1) (It shall be a ULP for a labor organization “to interfere with, restrain, or coerce any employee in the exercise by the employee of any right under this chapter.”); *id.* § 7116(b)(5) (It shall be a ULP for a labor organization “to refuse to consult or negotiate in good faith with an agency as required by” the Statute.).

⁵⁶ Respondent’s Cross-Exceptions at 105.

⁵⁷ Judge’s Decision at 19 (citing *Air Force*, 4 FLRA at 29 (Judge’s Decision in that case)).

⁵⁸ 5 U.S.C. § 7116(b)(1).

⁵⁹ *HHS I*, 44 FLRA at 881 (finding a violation of § 7116(a)(5) where respondent changed a mandatory subject of bargaining upon the expiration of a collective-bargaining agreement).

⁶⁰ Respondent’s Cross-Exceptions at 104.

⁶¹ Judge’s Decision at 22.

attempt was not, in and of itself, a ULP. Rather, the Judge found that the Union's actions—such as its “active solicitation of resignations from the duly appointed” arbitrators⁶²—demonstrated that the Union “refused to give effect to the grievance and arbitration procedures under the” CBA in violation of § 7116(b)(1) and (5).⁶³ Because this exception mischaracterizes the Judge's decision,⁶⁴ we deny it.⁶⁵

Finally, the Union claims⁶⁶ that its statements could not be ULPs under § 7116(e) of the Statute.⁶⁷ As relevant, § 7116(e) protects certain statements if they were “not made under coercive conditions.”⁶⁸ Here, however, the Judge found the Union's various statements to the arbitrators were not personal views and opinions, and moreover were made under “coercive” conditions,⁶⁹ and, therefore, not protected under § 7116(e).⁷⁰ The Union's rearguments of its views do not persuade us that the Judge erred; nor do they demonstrate that the many statements, found by the Judge to have been made by the

Union on behalf of itself and its officers, were in fact personal opinions.⁷¹

Consequently, we deny the Union's cross-exceptions.⁷²

C. The Agency does not demonstrate that the Union's refusal to pay Arbitrator Conway's arbitration fees warrants a separate ULP.

The Agency alleges that the Judge erred when he found that the Union's refusal to pay Arbitrator Conway did not violate the Statute.⁷³ While the Agency contends that the Union's refusal to pay Arbitrator Conway is a violation of the CBA and the MOA, the Agency cites to no authority that it should be considered a separate ULP rather than, as the Judge found, part of a pattern by the Union in failing to give full effect to the CBA.

At best, the Union's refusal to pay Arbitrator Conway is, in isolation, a violation of the CBA.⁷⁴ However, a mere contract violation, without more, does not constitute a ULP.⁷⁵ Consequently, the Agency has not demonstrated that the Judge erred in not finding a separate ULP in the Union's refusal to pay Arbitrator Conway.⁷⁶

D. The Union's actions warrant a nontraditional remedy.

The Agency alleges that the Judge erred when he modified its requested remedy.⁷⁷ As noted above, the

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *U.S. Penitentiary, Leavenworth, Kan.*, 55 FLRA 704, 710 (1999).

⁶⁵ We similarly deny the Respondent's exception challenging that a violation of the CBA or MOA cannot be a ULP. Respondent's Cross-Exceptions at 16 (alleging that a violation of an MOA cannot be a ULP). This was more than a mere violation; this was a blatant and aggressive attempt by the Respondent to thwart a grievance procedure it did not agree with. While any single action done by the Respondent might only amount to a grievable offense, the totality of the Respondent's actions more than supports a finding of a ULP.

⁶⁶ Respondent's Cross-Exceptions at 115.

⁶⁷ 5 U.S.C. § 7116(e).

⁶⁸ *Id.*

⁶⁹ Judge's Decision at 26 (“[T]he Union's refusal to be bound by the MOA, and its attempt to dismantle it, were made under coercive conditions.” (citing *HHS I*, 44 FLRA at 881; *Air Force*, 4 FLRA at 22-23)).

⁷⁰ *IUPEDJ*, 68 FLRA at 1011-13 (coercive statements receive neither First Amendment nor § 7116(e) protections); *cf. NLRB v. Gissel Packing Co.*, 395 U.S. 575, 616-20 (1969) (ruling that threats against employees do not receive protection from the NLRA's counterpart to § 7116(e) of the Statute); *NLRB v. U.S. Postal Serv.*, 526 F.3d 729, 732 (11th Cir. 2008) (ruling that the NLRA's counterpart to § 7116(e) of the Statute incorporates the First Amendment, but a “threat of retaliation against an employee for engaging in protected conduct” does “not enjoy Speech Clause immunity”). Additionally, we reject the Union's First Amendment claims, Respondent's Br. at 75, as the Union does not argue that its speech was a matter of public concern. Judge's Decision at 26 (citing *IUPEDJ*, 68 FLRA at 1011-12).

⁷¹ *See U.S. Air Force, Lowry Air Force Base, Denver, Colo.*, 16 FLRA 952, 963 (1984) (Judge's Decision in that case) (distinguishing between an individual's statements on behalf of management and the individual's expression of his own personal views).

⁷² The Respondent claims sixteen affirmative defenses. Respondent's Cross-Exceptions at 133-34. After due consideration of these claimed defenses, we find that all of them are either addressed elsewhere in this decision, the Judge's decision that we are adopting, or are not relevant to the allegations against the Respondent.

⁷³ Charging Party's Amended Exceptions at 16.

⁷⁴ Judge's Decision at 24 (“[W]hile the [Respondent]'s refusal [to pay Arbitrator Conway's arbitration fee] may have been a breach of the CBA, the GC failed to establish how such a breach is itself a [ULP] At most, the [Respondent]'s failure to pay Arbitrator Conway is further evidence of the violation already committed by the [Respondent]'s refusal to be bound by the MOA.”).

⁷⁵ *U.S. DOL*, 70 FLRA 27, 31 (2016); *IRS, Wash., D.C.*, 47 FLRA 1091, 1104 (1993).

⁷⁶ Because the Union and Arbitrator Conway resolved the issue of his fees, this issue is moot and requiring the Union to pay Arbitrator Conway's fees is not an appropriate remedy. Judge's Decision at 29.

⁷⁷ Charging Party's Exceptions at 23.

Agency requested a nontraditional remedy that the Union “make a good-faith attempt to restore the arbitration panel set forth in the MOA,”⁷⁸ but the Judge limited that remedy to Arbitrator Feigenbaum. The Judge excluded Arbitrators Conway and Strongin from this remedy because their resignations occurred outside of the time periods covered by the ULP charges. The Judge also excluded Arbitrator Foster because he did not find sufficient evidence that the Union violated the Statute in relation to him.

A nontraditional remedy is appropriate where—assuming no legal or public policy objections are present—the remedy is reasonably necessary and would be effective to recreate the conditions and relationships with which the ULP interfered as well as to effectuate the policies of the Statute, including the deterrence of future violative conduct.⁷⁹ While post-charge conduct is irrelevant in determining whether a party violated the Statute, it is permissible to consider post-charge events in order to remedy the harm that results from pre-charge activities.⁸⁰

As the Judge found no violation in terms of the Union’s actions with Arbitrators Foster and Strongin, we agree that they should be excluded from the remedy. However, the Judge did find a violation in terms of the Union’s actions with Arbitrator Conway.⁸¹ Although Arbitrator Conway’s resignation occurred after the filing of the charge, we consider that evidence in order to remedy the harm resulting from the Union’s pre-charge activities.⁸² Consequently, we grant, in part, the Agency’s exception and extend the remedy to include offering Arbitrator Conway an opportunity to rejoin the arbitration pool.

The Union contends that the Judge erred in granting any nontraditional remedy because the Agency had unclean hands.⁸³ Under the doctrine of clean hands,

if a party comes before a court for relief, that court can deny equitable relief where that party is tainted with bad faith relative to the matter in which it seeks relief.⁸⁴ That doctrine does not apply here. The Union points to many alleged actions⁸⁵ unrelated to the misconduct at issue, and therefore irrelevant.⁸⁶ The Union likewise raised⁸⁷ unrelated issues concerning the GC that are equally irrelevant.⁸⁸

Additionally, the Union argues that the Authority should not grant the Agency nontraditional remedies.⁸⁹ However, the Union merely presents arguments already considered and rejected elsewhere in this decision.⁹⁰

For the reasons above, we grant, in part, the Agency’s exception and modify the remedy to include Arbitrator Conway. We deny the Agency’s remaining exceptions and the Union’s cross-exceptions.

IV. Order

⁸⁴ *Precision Instrument Mfg. Co. v. Auto Maint. Mach. Co.*, 324 U.S. 806, 814-15 (1945) (citing *Bein v. Heath*, 47 U.S. 228, 247 (1848)).

⁸⁵ Respondent’s Cross-Exceptions at 135 (presenting allegations concerning arbitration of employee not represented by the Respondent); *id.* at 136 (presenting allegations concerning unrelated ULP).

⁸⁶ *Romeo & Juliette Laser Hair Removal, Inc. v. Assara I LLC*, 679 Fed. App’x 33, 36 (2d Cir. 2017) (citing *Dunlop-McCullen v. Local 1-S, AFL-CIO-CLC*, 149 F.3d 85, 90 (2d Cir. 1998) (“[M]isconduct unrelated to the claim to which it is asserted as a defense, does not constitute unclean hands.”)).

⁸⁷ Respondent’s Cross-Exceptions at 137 (alleging that the GC had unclean hands due to actions concerning the election of the Respondent).

⁸⁸ The Respondent does point to alleged ex parte communications by the Charging Party with Arbitrator Strongin. Respondent’s Cross-Exceptions at 135. While tangentially related to the allegations against the Respondent, these actions, even if true, would not warrant the application of the clean hands doctrine. *Republic Molding Corp. v. B.W. Photo Utilities*, 319 F.2d 347, 348 (2d Cir. 1963) (“What does seem clear is that misconduct in the abstract, unrelated to the claim to which it is asserted as a defense, does not constitute unclean hands. The concept invoking the denial of relief is not intended to serve as punishment for extraneous transgressions, but instead is based upon ‘considerations that make for the advancement of right and justice.’” (quoting *Keystone Driller Co. v. Gen. Excavator Co.*, 290 U.S. 240, 245 (1933))). We therefore reject this cross-exception.

⁸⁹ Union’s Opp’n at 6, 8, 11.

⁹⁰ *Id.* at 6 (arguing that the Agency’s arguments for nontraditional remedies relies on issues that cannot be resolved on a motion for summary judgment); *id.* at 8 (arguing that a nontraditional remedy is not warranted because the Union did not commit a ULP); *id.* at 11 (arguing that a nontraditional remedy is not warranted because the arbitrators resigned voluntarily).

⁷⁸ Judge’s Decision at 28.

⁷⁹ *U.S. DOJ, Fed. BOP, Fed. Corr. Inst. Englewood, Littleton, Colo.*, 70 FLRA 372, 373 (2018) (Member DuBester dissenting); *F.E. Warren Air Force Base, Cheyenne, Wyo.*, 52 FLRA 149, 161 (1996); *U.S. DOJ, BOP, Stafford, Ariz.*, 35 FLRA 431, 445 (1990) (“Remedies should be designed to ‘restore, so far as possible, the status quo that would have obtained but for the wrongful act.’” (quoting *NLRB v. J.H. Rutter-Rex Mfg. Co.*, 396 U.S. 258, 265 (1969))).

⁸⁰ *E.g., Dep’t of HHS, SSA, Dall. Region, Dall., Tex.*, 32 FLRA 521, 525-26 (1988) (*HHS II*) (order to reverse adverse personnel actions that resulted from unlawful, unilateral implementation of change in conditions of employment applied to actions more than six years after the ULP hearing).

⁸¹ Judge’s Decision at 22 (finding that the Respondent violated the Statute “through active solicitation of resignations from the duly appointed Arbitrator[] Conway”).

⁸² *HHS II*, 32 FLRA at 525-26.

⁸³ Respondent’s Cross-Exceptions at 134.

Pursuant to § 2423.41(c) of the Authority's Regulations⁹¹ and § 7118 of the Statute,⁹² the Independent Union of Pension Employees for Democracy and Justice, shall:

1. Cease and desist from:

(a) Failing or refusing to be bound by grievance and arbitration procedures under the CBA, including those set forth in the MOA.

(b) In any like or related manner, interfering with, restraining, or coercing bargaining-unit employees in the exercise of their rights assured by the Statute.

2. Take the following affirmative actions in order to effectuate the purposes and policies of the Statute:

(a) Offer Arbitrators Feigenbaum and Conway an opportunity to rejoin the arbitration panel set forth in the MOA.

(b) Post a Notice to All Employees containing the contents of the order. The Notice is to be posted in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. The Notice should be signed by the Union President. Reasonable steps shall be taken to ensure that such Notices are not altered, defaced, or covered by any other material.

(c) In addition to physical posting of paper notices, the notice shall be distributed electronically, on the same day, such as by email, posting on an intranet or an internet site, or other electronic means if such is customarily used to communicate with bargaining-unit employees.

(d) Pursuant to § 2423.41(e) of the Authority's Regulations,⁹³ provide the Regional Director, Washington Region, within thirty days from the date of this order, a report regarding what compliance actions have been taken.

⁹¹ 5 C.F.R. § 2423.41(c).

⁹² 5 U.S.C. § 7118.

⁹³ 5 C.F.R. § 2423.41(e).

NOTICE TO ALL EMPLOYEES

POSTED BY ORDER OF THE

FEDERAL LABOR RELATIONS AUTHORITY

The Federal Labor Relations Authority has found that the Independent Union of Pension Employees for Democracy and Justice violated the Federal Service Labor-Management Relations Statute (Statute) and has ordered us to post and abide by this notice.

WE HEREBY NOTIFY EMPLOYEES THAT:

WE RECOGNIZE our obligation to comply with grievance and arbitration procedures under the CBA, including those set forth in the September 20, 2011, Memorandum of Agreement (MOA) between the Agency and the Union of Pension Employees.

WE WILL follow the grievance and arbitration procedures under the CBA, including those set forth in the MOA, to the maximum extent possible.

WE WILL offer Arbitrators Feigenbaum and Conway an opportunity to rejoin the arbitration panel set forth in the MOA.

WE WILLNOT in any like or related manner interfere with, restrain, or coerce employees or management in the exercise of the rights assured by the Statute.

This notice must remain posted for sixty consecutive days from the date of posting and must not be altered, defaced, or covered by any other material.

If employees have any questions concerning this notice or compliance with any of its provisions, they may communicate directly with the Regional Director, Washington Region, Federal Labor Relations Authority, 1400 K Street, N.W., 2nd Flr., Washington, D.C., 20424, and whose telephone number is: (202) 357-6011.

(IUPEDJ/Respondent)

Dated: _____

By: _____
(Signature) (Title)

Member DuBester, concurring:

I agree with the determination to grant, in part, and deny, in part, the Agency's exceptions, and to deny the Union' exceptions.

Office of Administrative Law Judges

INDEPENDENT UNION
OF PENSION EMPLOYEES
FOR DEMOCRACY AND JUSTICE
RESPONDENT

AND

PENSION BENEFIT GUARANTY CORPORATION
CHARGING PARTY

WA-CO-13-0227
WA-CO-15-0158

Douglas A. Edwards
For the General Counsel

Stuart E. Bernsen
For the Respondent

Kimberlee J. Gee
Raymond M. Forster
Adrienne F. Boone
For the Charging Party

Before: CHARLES R. CENTER
Chief Administrative Law Judge

**DECISION ON MOTIONS FOR SUMMARY
JUDGMENT**

These cases arose under the Federal Service Labor-Management Relations Statute (Statute), 5 U.S.C. §§ 7101-7135 and the revised Rules and Regulations of the Federal Labor Relations Authority (FLRA/Authority), part 2423.

On February 28, 2013, the Pension Benefit Guaranty Corporation (Agency, Charging Party, or PBGC) filed an unfair labor practice (ULP) charge in Case No. WA-CO-13-0227 against the Independent Union of Pension Employees for Democracy and Justice (Union, Respondent, or IUPEDJ) with the Washington Region of the FLRA. GC Ex. 1(a). A first amended charge was filed on May 7, 2013. GC Ex. 1(d). On June 23, 2013, the charge was transferred to the Boston Region of the FLRA. GC Ex. 1(c). After investigating the ULP charge, the Boston Regional Director issued a Complaint and Notice of Hearing on October 30, 2014, alleging that the IUPEDJ refused to accept the terms of the collective bargaining agreement (CBA) between the Agency and the previous exclusive representative, the Union of Pension Employees (UPE), with regard to the selection of arbitrators and arbitration procedures, and that IUPEDJ thus failed to continue existing personnel policies, practices, and matters affecting working

conditions to the maximum extent possible, in violation of § 7116(b)(1) and (5) of the Statute. GC Ex. 1(d). The hearing was scheduled for January 13, 2015. GC Ex. 1(d). On October 31, 2014, the case was transferred back to the Washington Region. GC Ex. 1(e). On November 19, 2014, the Respondent filed an Answer denying it violated the Statute.

On December 16, 2014, the General Counsel filed a motion to postpone the hearing in WA-CO-13-0227. The reason for the requested postponement was to allow the Authority to resolve exceptions to Case No. 0-AR-5075, which involved issues that would likely resolve issues in dispute in WA-CO-13-0227. On December 17, 2014, the motion was granted and the hearing was indefinitely postponed.

On January 22, 2015, the Agency filed a ULP charge in Case No. WA-CO-15-0158 against IUPEDJ with the Washington Region of the FLRA. GC Ex. 1(b). On January 21, 2015, the case was transferred to the Denver Region of the FLRA. GC Ex. 1(f).

On September 29, 2015, the Authority issued a decision, *Indep. Union of Pension Emps. for Democracy & Justice*, 68 FLRA 999 (2015) (*IUPEDJ*), *recons. denied*, 69 FLRA 158 (2016), resolving the exceptions at issue in Case No. 0-AR-5075. On October 5, 2015, the hearing in Case No. WA-CO-13-0227 was rescheduled to October 29, 2015. On October 19, 2015, the hearing was rescheduled to February 2, 2016.

The Denver Regional Director issued a Complaint and Notice of Hearing in Case No. WA-CO-15-0158 on January 21, 2016, alleging that IUPEDJ refused to accept the terms of the CBA between the Agency and UPE regarding the selection of arbitrators, payment of arbitrators, and arbitration procedures in matters before certain arbitrators, and that IUPEDJ thus failed to continue existing personnel policies, practices, and matters affecting working conditions to the maximum extent possible, in violation of § 7116(b)(1) and (5) of the Statute. GC Ex. 1(g). The hearing was scheduled for April 13, 2016.

On January 22, 2016, the General Counsel filed a motion to consolidate Case Nos. WA-CO-13-0227 and WA-CO-15-0158. On February 2, 2016, the motion was granted, and a hearing was scheduled for June 7, 2016. GC Ex. 1(h). On February 12, 2016, the Respondent filed an Answer (amended on February 16, 2016) denying it violated the Statute.

A prehearing conference on conducted on May 31, 2016. During the conference, the General Counsel and the Charging Party contended that based upon documents filed as part of prehearing disclosure, there

were no genuine issues of material fact remaining and the cases could be decided on summary judgment, pursuant to 5 C.F.R. § 2423.27. Therefore, the parties were orally given leave to file motions upon that issue.

On June 1, 2016, the General Counsel filed a Motion for Summary Judgment and a Brief in Support of the General Counsel's Motion for Summary Judgment (GC Br.), along with General Counsel Exhibits 1 through 29 (GC Exs. 1-29).

On June 2, 2016, pursuant to 5 C.F.R. § 2423.27, approval to file motions for summary judgment was granted. The parties were given until June 9, 2016, to file motions for summary judgment, and until June 16, 2016, to file any response. The order granting approval noted that it would be determined by June 20, 2016, whether a hearing set for June 23, 2016, would be necessary.

On June 9, 2016, the Charging Party filed a Brief in Support of Motion for Summary Judgment (CP Br.) and stated that its exhibits would consist of certain documents submitted in its prehearing disclosure, specifically, Charging Party Exhibits: C1 through C23 (CP Exs. C1 - C23); F1 through F5 (CP Exs. F1 - F5); Fos. 1 through Fos. 4 (CP Exs. Fos. 1- Fos. 4); J1 through J-8 (CP Exs. J1 - J8); M1 through M24 (CP Exs. M1-M24); and S1 through S5 (CP Exs. S1 - S5).

The Respondent failed to file a response to the motions for summary judgment by June 16, 2016. Instead, on June 14, 2016, the Respondent filed a Motion to Stay the Proceedings or to Grant an Extension, based on a bare assertion that a representative of the Respondent had experienced a personal emergency.

On June 21, 2016, I ordered the Respondent to show cause why its failure to respond to the motions for summary judgment by the June 16, 2016, deadline should not result in a default judgment. The Respondent had until July 5, 2016, to respond to the order to show cause. The hearing was indefinitely postponed pending the Respondent's response. The Respondent provided a response on June 29, 2016. On June 30, 2016, I found that waiver of the June 16, 2016, deadline was appropriate due to extraordinary circumstances, and that the Respondent had until August 31, 2016, to file a response to the motions for summary judgment. On August 31, 2016, the Respondent filed a response to the motions for summary judgment and submitted Respondent Exhibits: A-D (Resp. Exs. A-D) and 1-29 (Resp. Exs. 1-29).

Motions for summary judgment filed under § 2423.27 of the Authority's Regulations are governed by the same principles as motions filed under Rule 56 of the

Federal Rules of Civil Procedure. *Dep't of VA, VA Med. Ctr., Nashville, Tenn.*, 50 FLRA 220, 222 (1995). Summary judgment is appropriate when there is no "genuine dispute as to any material fact" and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56.

The Respondent argues that there are genuine disputes over material facts. In this regard, the Respondent makes the following assertions:

1. Arbitrator Strongin notified the Agency, on December 3, 2013, that the Union had not paid his arbitration fees;
2. The Agency untimely filed the ULP charge in Case No. WA-CO-15-0158 with respect to the payment of Arbitrator Strongin's arbitration fees;
3. Arbitrator Strongin notified the Agency, on December 3, 2013, that he was resigning from the PBGC arbitration pool;
4. There is no signed CBA between the Agency and the Union;
5. The Agency unilaterally selected arbitrators for the pool in 2011;
6. The Agency unilaterally appointed arbitrators to the pool in 2011;
7. The UPE and its officials acted as agents of the Agency when they agreed to the arbitration pool system in 2011;
8. The UPE and its officials acted as agents of the Agency in connection with the selection and appointment of arbitrators for the pool in 2011;
9. The Agency and the UPE selected an arbitrator from a list provided by the Federal Mediation and Conciliation Service (FMCS), on November 16, 2011;
10. The Agency lacked authority to assign arbitrators to arbitrations invoked by the Union and to unilaterally communicate with those arbitrators;
11. There were no restrictions on the Union's communications with arbitrators;
12. The CBA does not contain provisions regarding communications with arbitrators and arbitration scheduling;
13. The Union did not fail or refuse to follow orders from arbitrators;
14. The Union did not fail or refuse to follow directions by arbitrators to participate in conference calls;
15. There is no evidence that the Union threatened any arbitrator;

16. There is no evidence that the Union harassed any arbitrator;
17. There is no evidence that the Union harassed any arbitrator to resign;
18. There is no evidence that the Union forced any arbitrator to do anything against his will;
19. There is no evidence that the Union pressured any arbitrator;
20. There is no evidence that the Union intimidated any arbitrator;
21. The Union did not fail to comply with the CBA concerning pre-arbitration procedures and scheduling;
22. The CBA acknowledges that vacancies in the arbitration pool could be created;
23. The CBA does not prohibit parties from withdrawing from arbitrations;
24. The communications at issue involve the Union's expressions of its beliefs and opinions;
25. Arbitrators Conway, Feigenbaum, Foster, and Strongin resigned from the pool voluntarily and of their own free will;
26. That communications concerning the arbitration process that the Union made in January and February 2013 were midterm bargaining proposals;
27. The Union paid Arbitrator Strongin's fees in 2013;
28. The Union paid Arbitrator Conway's fees in 2015;
29. Arbitrator Conway expressed a "nasty . . . prejudiced, and/or biased attitude and tone toward the Union";
30. The Agency did not include the Union in an email to Arbitrator Strongin on March 4, 2013, in which the Agency referenced a broader dispute with the Union over arbitration and asked Arbitrator Strongin to remain in the arbitrator pool;
31. Arbitrator Strongin did not include the Union in an email to the Agency on March 5, 2013, in which he stated that he would be pleased to remain in the arbitration pool and help resolve the broader dispute with the Union;
32. Arbitrator Javits was not the proper arbitrator under the pool rotation system for the Agency's April 2014 institutional grievance over the Union's attendance at a formal meeting;
33. In light of there being at least one vacancy in the arbitration pool, the Union had a right to object to the assignment of Arbitrator Javits;
34. The Agency failed to pursue a matter before Arbitrator Javits and abandoned it.
35. In 2014, the Agency selected Arbitrator C. Allen Foster to hear the arbitration of a grievant not represented by the UPE or the Union, and the Agency did so without sharing any communications with the Union;
36. In 2013, the Agency demanded an accounting of Arbitrator Robert Moore's arbitration fee, and ultimately paid only half of the fee, in an arbitration of a grievant not represented by the UPE or the Union;
37. In 2016, after an award in a grievance of a grievant not represented by the Union, the Agency failed to pay attorney fees and comply with the arbitrator's orders;
38. The FLRA's Washington Region delayed the representation election to allow the Agency to obtain an agreement with the UPE;
39. The Union raised questions about the CBA's grievance-arbitration procedure in early 2012; in September 2012, the Union agreed to have Arbitrator Strongin resolve a grievance; the Union paid Arbitrator Strongin the fees due him in 2013; the Union paid Arbitrator Conway's fees in a court settlement; Union President Stuart Bernsen had no obligation as an individual to pay Arbitrator Conway's fees; Arbitrator Conway voluntarily resigned from the arbitration panel; and the Agency objected to proceeding in a matter before Arbitrator Javits.

While numerous, the Respondent's assertions do not establish that there are genuine issues of material fact in either case. As such, and based on the entire record, I have determined that summary judgment is appropriate. Accordingly, a hearing is not necessary for these cases.

FINDINGS OF FACT

The Charging Party is an agency within the meaning of § 7103(a)(3) of the Statute. The Respondent is a labor organization within the meaning of § 7103(a)(4) of the Statute and is the exclusive representative of a unit of employees appropriate for collective bargaining at the Agency.

This dispute traces its origins to March 2009, when the Regional Director of the FLRA's Washington Region certified UPE as the exclusive representative of bargaining unit employees at the Agency. Resp. Ex. 29 at 3. In July 2010, the Union, IUPEDJ, filed a petition requesting an election to determine whether employees still wished to be represented by UPE, or whether they wished instead to be represented by IUPEDJ. *Id.* Subsequently, the Agency and UPE engaged in negotiations resulting in a Collective Bargaining Agreement (CBA), that went into effect on May 3, 2011. GC Ex. 3; *see also IUPEDJ*, 68 FLRA at 1000. (The Agency and the Union, IUPEDJ, have not negotiated a successor agreement.) GC Ex. 2 ¶6. The CBA provides for the creation of a pool (also referred to as a panel) of arbitrators. Specifically, Article 2, Section 3(B)(1) of the CBA provides that, within thirty days of the CBA's implementation, the parties will exchange lists of the names of ten arbitrators they deem acceptable "to serve as arbitrator[s] for disputes under this [a]greement," and that five arbitrators listed by both parties "will be informed of their selection to serve as a member of the rotating panel." GC Ex. 3. Article 2, Section 3(B)(1) further provides: "If a vacancy is created [on the panel], the Parties will repeat the selection process to fill the vacancy." *Id.* Article 2 further provides that arbitrators will be selected from the arbitration panel to resolve grievances. Specifically, Article 2, Section 3(B)(3) of the CBA states: "Once the pool has been identified, as arbitrations are invoked, arbitrators will be selected alphabetically by their last name." *Id.* Finally, with respect to arbitration fees, Article 2, Section 3(A)(6) of the CBA provides that the Employer will pay for up to the first two days of one arbitration per year, and that otherwise the parties will split arbitrator fees on a fifty-fifty basis. *Id.*

On May 10, 2011, the FLRA's Washington Regional Office conducted the election sought by IUPEDJ, Resp. Ex. 29 at 3, and IUPEDJ won the election. *Id.* at 4. UPE filed objections to the conduct of the election, the RD dismissed the objections, and UPE filed an application for review. *Id.* at 4, 21. The UPE remained the exclusive representative of the bargaining unit during the pendency of that review.

Around this time, UPE filed a grievance concerning an employee's within grade increase (WIGI grievance). The matter was unresolved and, on June 3, 2011, UPE invoked arbitration. Resp. Ex. 1. On June 13, 2011, FMCS provided the Agency and UPE a list of seven arbitrators from which the Agency and UPE would select an arbitrator to resolve their dispute. *Id.*

In August 2011, the Agency and UPE agreed on the five arbitrators who would be selected to serve on the arbitration panel. CP Ex. M17. Subsequently, the

Agency, with UPE's concurrence, sent letters to the arbitrators asking them if they would agree to serve on the arbitration panel. Resp. Ex. 24. (The Agency sent carbon copies of these letters to UPE.). *Id.* In response, all five arbitrators agreed to serve on the panel.

On September 20, 2011, the Agency and UPE signed a memorandum of agreement (MOA) regarding the establishment of an arbitration panel. The MOA stated:

Pursuant to Article 2, Section 3.B.1 of the Collective Bargaining Agreement (CBA) between the Pension Benefit Guaranty Corporation (PBGC) and the Union of Pension Employees (UPE), the Parties have agreed upon and selected the following individuals to serve as arbitrators on the PBGC Arbitrator Panel:

James Conway
Charles Feigenbaum
Allen Foster
Joshua Javits
Seymour Strongin

Each arbitrator has been contacted and has agreed to serve under the terms of the CBA. GC Ex. 5.⁹⁴

On November 14, 2011, the Authority resolved UPE's application for review in favor of IUPEDJ. *Pension Benefit Guar. Corp.*, 66 FLRA 349, 349 (2011). On November 16, 2011, the RD for the FLRA's Washington Region certified IUPEDJ as the exclusive representative of bargaining unit employees at the Agency. GC Ex. 6. On that same date, UPE and PBGC selected an arbitrator, Jonathan E. Kaufmann, from the FMCS list to resolve the WIGI grievance. Resp. Ex. 1.

Events Leading to the Filing of Charge in Case No. WA-CO-13-0227

On December 21, 2012, IUPEDJ invoked arbitration over four pending grievances, including an institutional grievance concerning official time (official time grievance). GC Exs. 2, 8; *see also* Resp. Br. at 14.

On January 18, 2013, the Agency began selecting arbitrators from the arbitration panel established by the MOA. Working in alphabetical order, the Agency

⁹⁴ In correspondence in the summer of 2011, and in the Agency's August 11, 2011, letter, Arbitrator C. Allen Foster is referred to as "Charles Foster" and "Charles Allan Foster." CP Ex. M17; CP Ex. M21; Resp. Ex. 18; *see also* Resp. Br. at 21. Here and elsewhere he is referred to as "Allen Foster." GC Ex. 19.

sent an email to Arbitrator Conway informing him that the Union had invoked arbitration over the official time grievance, and that he had been selected to hear the grievance.⁹⁵ GC Ex. 8; *see also* Resp. Br. at 15. Later that day, the Agency sent an email to Arbitrator Feigenbaum informing him that the Union had invoked arbitration over a grievance concerning an employee's progress review, and that he had been selected to hear the grievance. GC Ex. 7. In both emails, the Agency stated: "In August 2011, you consented to be among a pool of arbitrators to handle labor arbitrations at PBGC." GC Exs. 7 & 8.

Later that day, Stuart Bernsen, President of IUPEDJ, sent emails to Arbitrator Conway and Arbitrator Feigenbaum, in response to the Agency's emails. Bernsen took issue with the fact that the Agency had stated that the arbitrators had consented to be among the pool of arbitrators to handle labor arbitrations at PBGC in August 2011. Bernsen asserted: "The employer's message left out some significant, historical facts. They did not inform you that we are a new union at PBGC. The prior union is gone. The parties and circumstances have changed." GC Ex. 10. Bernsen stated that the Agency reached a CBA with "the prior union" (i.e., UPE), on May 3, 2011, that the "prior union" was defeated in the May 10, 2011, election, and that the "prior union" filed objections, which the RD dismissed. "Nevertheless," Bernsen stated, "the prior union and the Employer put together a panel of five arbitrators" in August 2011, prior to the time IUPEDJ was certified as exclusive representative on November 16, 2011. *Id.* Bernsen continued:

With no disrespect intended, we are not clear about what considerations were involved in the prior union agreeing to particular arbitrators for a pool. We do not know the circumstances or conditions under which particular arbitrators agreed to serve on the panel. We may be fine with some or all of the arbitrators the prior union agreed to. However, we would like the opportunity to evaluate the question. . .

In light of the foregoing, we would appreciate it if you would share with us any communications you may have had with the prior union and PBGC at the time of your selection for the panel. We would also appreciate it, if

appropriate, if you would provide us with the opportunity to interview you.

Resp. Ex. 8.

Arbitrator Feigenbaum responded by email on January 19, 2013. He declined Bernsen's interview request, stating, "I do not think that an ex parte interview is appropriate." *Id.* He added that he had not had any communications with UPE. *Id.*

Arbitrator Conway responded to Bernsen's email on January 21, 2013. He declined Bernsen's interview request as well. He stated in this regard that such interviews were discouraged by the National Academy of Arbitrators as "highly unethical 'beauty contests.'" GC Ex. 11. Arbitrator Conway added that he "knew nothing" about the PBGC or the prior union. *Id.* In addition, Arbitrator Conway asked the parties to determine a mutually convenient time to have a prehearing scheduling conference. *Id.*

On January 29, 2013, the Union sent letters to Arbitrators Conway and Feigenbaum signed by Bernsen and other members of the Union's executive committee. In each letter, the Union stated:

As explained in our January 18 letter, as a new union at PBGC and as a new party, [IUPEDJ] believes that it should have a role in the selection of arbitrators. In fairness and as a matter of professionalism, we respectfully suggest that you voluntarily withdraw your participation in the arbitrator pool.

GG Ex. 12.

This led to further conversations with Arbitrators Conway and Feigenbaum, as well as a new conversation with Arbitrator Foster along similar lines. Each conversation is discussed below.

⁹⁵ All conversations in this case occurred by letter or email. Unless otherwise noted, emails sent to or from an arbitrator included representatives of the Agency and the Union.

Arbitrator Feigenbaum

Arbitrator Feigenbaum responded to the Union on February 3, 2013. He informed the Union that he wished to hear from the Agency “before I respond to the Union request that I resign from participation in the . . . arbitration pool.” Resp. Ex. 8. The next day, Agency attorney Paul Chalmers stated that the Agency opposed the withdrawal of any arbitrator from the panel properly established in accordance with the CBA and MOA. *Id.*

On February 5, 2013, Arbitrator Feigenbaum informed Bernsen and Chalmers that he was resigning from the arbitration panel. GC Ex. 13. Arbitrator Feigenbaum explained that his decision to resign was not based on any “legal issues,” but instead reflected his “personal opinion of how arbitration can most effectively function.” Resp. Ex. 8. He continued:

I believe that one of the great virtues of arbitration is that . . . parties can bring a dispute . . . to a mutually selected decision-maker. I was not mutually selected by the present parties. I do not wish to preside over cases where the non-selecting party does not wish me to be the decision maker. *Id.*

Arbitrator Conway

On February 6, 2013, Agency attorney Dharmesh Vashee informed Arbitrator Conway that the Agency opposed Arbitrator Conway’s withdrawal from the panel and asserted that the Union had engaged in ex parte communication. GC Ex. 14. Arbitrator Conway responded later that day. He asked the parties to “forego the dope slaps” and suggested that the parties have a prehearing conference so that he could consider whether “recusal is in order.” *Id.* Arbitrator Conway added that he had “no interest in jamming in where I’m not wanted,” but that he had seen “too many instances of parties attempting to game the system by submitting motions for recusal without much more.” *Id.*

Valda Johnson, a member of the Union’s executive committee, responded the next day. She asserted:

[I]t appears that Management may have wished to game the system, if anyone. . . Management sent letters to you on your selection even after an election and win of the new Union (IUPEDJ). . . As Mr. Bernsen stated . . . we were not a part of the selection process and we aren’t even sure if the former Union was. *Id.*

Johnson added that the Union would discuss a conference with the Agency. *Id.*

Arbitrator Conway replied the next day. He stated that he had “no clue . . . as to what [IUPEDJ] is looking at in moving for recusal,” and that he would step down if there was concern that he was biased. *Id.*

Johnson wrote back about a half hour later. She noted that “when we asked you to resign,” the request was not based on a particular decision that the Union disagreed with. *Id.* Rather, Johnson explained, the Union’s resignation request was based on the fact that the Union was “not involved in the process” of selecting the arbitrators on the arbitration panel, and on the fact that the Union did not know whether UPE was “coerced or was there some false retro affirmation?” *Id.* Johnson asserted that since the Union was “now in the process, we should be able to confirm our approval of selections.” *Id.* Later that day, Bernsen forwarded Arbitrator Conway a copy of Arbitrator Feigenbaum’s resignation letter and asked him to read it. GC Ex. 16.

On February 8, 2013, and again on February 12, 2013, Vashee asked Bernsen for dates when the Union would be able to participate in a conference call with Arbitrator Conway. GC Ex. 15. On February 12, 2013, Bernsen replied, “The Union is not available.” *Id.*

On February 14, 2013, Bernsen asked Arbitrator Conway whether he had “considered Arbitrator Feigenbaum’s [resignation] letter”, which was attached, especially with regard to the last paragraph of that email (GC Ex. 13, quoted above). GC Ex. 16 at 2.

Arbitrator Conway replied minutes later, stating, “Way too much footsie.” GC Ex. 17. He continued that requests for recusal are used for many reasons, including delaying arbitrations, finding a more favorable forum, or intimidating the neutral, and that the tactic has been “compared to Billy Martin kicking dirt on the umpire’s shoes, hoping the next call may go in his favor.” *Id.* In addition, Arbitrator Conway stated that he did not intend to recuse himself, absent “compelling support for the motion.” *Id.* at 2. Arbitrator Conway noted that he had asked the parties on February 6, 2013, to set a date to meet about the issues raised by the Union, and he asked the parties to comply with that request “without further delay.” *Id.* In closing, Arbitrator Conway stated, “I have no kidney for seeing any further e-mails” beyond those relating to the scheduling of a prehearing conference. *Id.*

Later that day, Bernsen replied:
The Union has not requested your recusal. . . . The Union has simply asked that you consider voluntarily

resigning from an arbitration panel where this Union had absolutely no role. See example of Arbitrator Feigenbaum voluntarily resigning. . . .

There is no need for any call. There is nothing to discuss. Please just let us know if you wish to voluntarily resign, as Arbitrator Feigenbaum did . . . and as other arbitrators have been willing to do.

The Union does not wish to participate in any discussion now about any particular case. The Union is not agreeable to paying any fees or costs that are not [sic] associated with any particular case.

Resp. Ex. 6 at 12-13.

Bernsen added that the Union was withdrawing the official time grievance from arbitration, which was another reason why there was “no need for a call with Your Honor.” *Id.* Bernsen closed: “In sum, please simply let us know if you wish to voluntarily resign from the panel.” *Id.*

Arbitrator Conway replied on February 16, 2013, stating, “A great many hairs being split here.” *Id.* at 12. Arbitrator Conway stated that he viewed the Union’s request that he withdraw from the arbitration panel as being the functional equivalent of a request for recusal. *Id.* Arbitrator Conway added that he would not resign from the arbitration panel unless the Union provided him with a reason for doing so. *Id.* Arbitrator Conway stated that he wanted to meet with the parties specifically so he could address the Union’s concerns and to see whether there was a valid reason for him to recuse himself. *Id.* However, Arbitrator Conway acknowledged that since the Union had withdrawn the official time grievance, “[t]he issue of my service on your panel” might be “moot.” *Id.*

On February 21, 2013, Bernsen forwarded Arbitrator Conway a letter from the Union’s executive committee with the subject heading “Request That You Reconsider Resignation in Light of Ethics Violations.” GC Ex. 18; Resp. Ex. 6. The letter stated:

The Union, IUPEDJ, requests that you reconsider your decision *not* to resign from the arbitration pool. Your refusal to resign is a violation of the Code of Professional Responsibility for Arbitrators of Labor Management Disputes of the . . . FMCS [(the ethics code)]” GC Ex. 18. The Union asserted that Arbitrator Conway was violating “Rule #1” of the ethics code (i.e., section 1(A)(1)(a)), which, the Union asserted,

“emphasizes . . . that the fundamental measure of . . . [essential] qualifications is that an arbitrator be selected ‘by mutual agreement of the parties.’” *Id.* at 2.

The Union then quoted from the ethics code, stating:

Selection by mutual agreement of the parties or direct designation by an administrative agency are the effective methods of appraisal of . . . an individual’s potential and performance, rather than the fact of placement on a roster of an administrative agency or membership in a professional association of arbitrators. (emphasis added by the Union); *see also* Resp. Ex. 12 at 5.

The Union continued:

Arbitrator Feigenbaum certainly understood and followed this basic Rule #1 of the [ethics code] when he voluntarily resigned. He wrote in his February 5, 2013 letter, sent to you previously: “I was not mutually selected by the present parties. I do not wish to preside over cases where the non-selecting party does not wish me to be the decision maker. . . .

. . . .

Accordingly, please comply with this ethical Rule #1 and confirm your resignation.

Your participation in an arbitration pool is not mandatory. Whether or not as a new union we are bound with using a rotating pool method of selecting arbitrators instead of obtaining lists from FMCS on a case-by-case basis, we are not bound to accepting individual arbitrators where we have had no role in the selection, and we did not agree to particular arbitrators. . . .

It is unethical for you to impose yourself on us.

In addition to your outright violation of this fundamental ethics Rule #1, your behavior is unprofessional.

For example, you fabricated the idea that there was a motion for recusal from “sitting in a particular case.” There was never any motion or issue from the Union or the Employer about “recusal.” No one accused you of personal bias. When an arbitrator invents issues, there

are serious questions about competency and fairness. . . .

You also used the phony, straw man issue of “recusal” to make derogatory, negative attacks on the Union, accusing it of intimidation, “kicking dirt,” “dope slaps,” and “attempting to game.” That kind of behavior is not neutral.

. . . .

In conclusion, in light of Rule #1 of the [ethics code], and the foregoing, IUPEDJ not only requests your voluntary resignation, but demands it.

GC Ex. 18 at 2-3; Resp. Ex. 6.

Arbitrator Foster

On February 14, 2013, the Union engaged in similar behavior with Arbitrator Foster. After the Agency informed Arbitrator Foster that he had been selected to hear a grievance concerning an employee’s progress review, Arbitrator Foster wrote to the parties to introduce himself and to ask that both sides present arguments regarding the grievance’s arbitrability. Hours later, Bernsen sent Arbitrator Foster an email stating:

The Union is not agreeable that you are the designated arbitrator for this case.

. . . .

(Please note that this Union did not participate in the selection of an arbitrator pool. The Employer refers to a pool selected by a prior union that was defeated in an FLRA election in 2011.)

. . . .

In any event, regardless, the Union would not be able to proceed on the suggested schedule. . . .

In sum, it is impossible to proceed in the way suggested at this time.

GC Ex. 19 at 1.

A few minutes later, Arbitrator Foster replied, “Naturally, I am neither prepared nor authorized to be your arbitrator unless both sides have consented or do consent. Please discuss the matter between yourselves and come to a conclusion.” *Id.*

Events Occurring between the Filing of the ULP Charge in Case No. WA-CO-13-0227 and the Filing of the ULP Charge in Case No. WA-CO-15-0158

On March 4, 2013, Agency attorney Adrienne Boone sent Arbitrator Strongin an email (Boone did not send a copy to the Union). GC Ex. 29. Boone stated that she wanted to update Arbitrator Strongin on objections

raised by the Union regarding a recent arbitration, and that those objections were “part of a broader dispute that has arisen between PBGC and the Union over arbitration in the [CBA].” *Id.* Boone asked Arbitrator Strongin to remain on the arbitration panel. *Id.* Arbitrator Strongin sent an email back the next day (he did not copy the Union) stating that he would be pleased to remain on the arbitration panel and to be of assistance in the broader dispute with the Union. *Id.*

In June 2013, the Union received an invoice from Arbitrator Strongin. Resp. Ex. D

¶3. The Union asked Arbitrator Strongin for an accounting, which Arbitrator Strongin declined to provide. *Id.* ¶4. In August 2013, the Union sent Arbitrator Strongin a check, which it believed was “payment in full.” *Id.* ¶5; *see also* Resp. Ex. 20.

On June 10, 2013, Arbitrator Robert T. Moore sent an invoice to the Agency for \$1,100. On July 30, 2013, the Agency asked Arbitrator Moore for an accounting. (On January 24, 2014, the Agency paid Arbitrator Moore \$550). Resp. Ex. 17 at 4-6.

In the fall of 2013, the Agency filed an institutional grievance against the Union claiming that the Union retaliated against an employee’s testimony in another matter through statements the Union made in its newsletter (the newsletter grievance). GC Ex. 2 ¶22. Ultimately, the Agency invoked arbitration, and the matter was heard by Arbitrator Conway. GC Ex. 2 ¶21; Resp. Ex. A ¶¶37-38.

On December 3, 2013, Arbitrator Strongin wrote an email to the Agency (he did not send a copy the Union) asserting that he was having “difficulties . . . with the Union over the collection of [his] fee” for an earlier decision, that this was the first time that this had happened in fifty years of practice. Arbitrator Strongin stated that he was therefore “not taking any further cases from the PBGC.” GC Ex. 20.

On May 23, 2014, Agency attorney Raymond Forster sent Arbitrator Javits an email informing him that he had been selected to hear an Agency-invoked arbitration over a grievance regarding the Union’s alleged misconduct at a staff meeting (staff meeting grievance). GC Ex. 23. With respect to the context in which Arbitrator Foster was selected, Forster stated:

IUPEDJ is the successor to [UPE], the union that negotiated the current [CBA] and selected the pool of arbitrators. Both IUPEDJ and PBGC have been operating in accordance with the mandatory terms of the CBA. Under the CBA, once arbitration is invoked,

arbitrators are selected from the pool in alphabetical order, and your name was up for this arbitration. . . . *Id.*

Later that day, Arbitrator Javits asked the parties for hearing dates. Forster replied that the Agency would be in touch with the Union and would then respond. Resp. Ex. 28 at 2-3. Bernsen then wrote Arbitrator Javits the next day, stating: “We are a new Union. We never selected you.” *Id.* at 2. About an hour later, Arbitrator Javits responded, “Sorry if I jumped the gun. Will leave it [to] the parties.” *Id.* On May 30, 2014, Forster reiterated to Arbitrator Javits the Agency’s position that the Union was bound by the grievance and arbitration procedures of the CBA. *Id.* On June 4, 2014, Arbitrator Javits responded that he would be willing to hold a conference call on the matter, if the parties wished. *Id.*

On September 13, 2014, Arbitrator Conway issued his award in the newsletter grievance. Arbitrator Conway sustained the grievance. GC Ex. 25 at 28. In doing so, Arbitrator Conway found that the CBA had post-expiration effect and survived the change in representation from, the previous union, UPE, to the Union. *Id.* at 16.

On September 25, 2014, Forster sent Arbitrator Javits a copy of Arbitrator Conway’s award in the newsletter grievance and renewed the Agency’s request that Arbitrator Javits hear the case. GC Ex. 26. Bernsen replied later that day. He asserted to Arbitrator Javits that the award would be appealed and that there was “no valid reason for scheduling with you at this time.” *Id.* (The Union filed its exceptions to the award, Case No. 0-AR-5075, on October 14, 2014; the Authority issued its decision, denying and dismissing the exceptions, on September 29, 2015). Resp. Ex. 25.

On October 1, 2014, Arbitrator Javits offered to hold a conference call to discuss the matter. GC Ex. 26. While the Agency wished to participate, the Union did not, and Bernsen stated, “the issues of arbitrator jurisdiction and authority” would be decided by the Authority, presumably when it resolved the Union’s exceptions to Arbitrator Conway’s decision in the newsletter grievance. *Id.* On November 28, 2014, the Agency attempted to schedule a conference call for December. *Id.* Two days later, Arbitrator Javits replied that he would be available for a call. *Id.*

On December 1, 2014, Bernsen replied by email that the Union was not available. *Id.* Bernsen then raised an argument similar to those made to Arbitrators Conway and Feigenbaum. He stated:

[A]s indicated in prior communications, this is a brand new

union. We were never involved in your selection as an arbitrator or in your employment. You were contacted by the Agency back in August 2011. We won a representation election conducted by the FLRA in May 2011, and were certified in November 2011. Nevertheless, the Agency contacted you in August after the prior union was defeated.

The Agency has insisted on using its hand-picked arbitrators. The issue of your jurisdiction and authority as well as other arbitrators is the subject of exceptions and other disputes before the FLRA right now. It does not make sense to have you repeat all of that.

We recommend that you take a look at the arbitrators’ code of professional responsibility. . . . The Ethics Code emphasizes in Rule #1 [(i.e., section 1(A)(1)(a))] that . . . an arbitrator be selected “by mutual agreement of the parties.” You are in violation of this paramount rule. This Union did not participate in your selection, and we never have and do not agree to your selection. This union, which is an equal party, did not “mutually agree” to your selection. *Id.*

To support his accusation that Arbitrator Javits was “in violation” of the ethics code, Bernsen quoted Section 1(A)(1)(a), stating: “Selection by mutual agreement of the parties [. . .] [is] the effective method[] of appraisal of this combination of an individual’s potential and performance.” *Id.* (second and third alterations in original); *see also* Resp. Ex. 12.

On December 15, 2014, Arbitrator Conway sent an email to Bernsen (with a copy to the Agency) asserting that the Union had refused to pay fees it owed for the newsletter grievance. GC Ex. 2 ¶26; GC Ex. 27. Arbitrator Conway informed Bernsen that he planned to sue for recovery of the fees. GC Ex. 27. (Subsequently, Arbitrator Conway sued Bernsen and the Union in the Small Claims branch of the Superior Court of the District of Columbia.)

Events Occurring after the Filing of Charge in Case No. WA-CO-15-0158

On February 5, 2015, Forster sent an email to Arbitrator Strongin asking whether the Union had paid its portion of fees in a decision issued on June 18, 2013.

(Forster did not send a copy to the Union.) GC Ex. 29. Forster also asked Strongin whether he was still willing to be on the arbitration panel. *Id.* Arbitrator Strongin responded later that day that the Union had paid him “only a small fraction” of his fee, and that he was “not available for membership on the [arbitration] panel.” *Id.*

On May 27, 2015, Arbitrator Conway’s suit against Bernsen was dismissed, and Bernsen was awarded costs in the amount of \$95.00 for fees incurred as a result of the action. Resp. Ex. 25. On October 27, 2015, Arbitrator Conway’s suit against the Union was settled, with the Union agreeing to pay Arbitrator Conway \$1,200, and with Arbitrator Conway agreeing to resign from the arbitration panel. Resp. Ex. 19. On December 1, 2015, Arbitrator Conway notified the Agency that he was resigning from the arbitration panel, pursuant to the settlement agreement. GC Ex. 28.

POSITIONS OF THE PARTIES

General Counsel

The General Counsel argues that negotiated grievance and arbitration procedures remain in full effect following contract expiration and following the decertification of one exclusive representative and the installation of a new one. GC Br. at 7. The GC contends that when an agency is operating under the terms of an expired agreement, the agency’s failure to continue personnel policies, practices, and matters affecting working conditions to the maximum extent possible violates § 7116(a)(1) and (5) of the Statute. Based on the “parallel structure” of the Statute, the GC submits that when a union is operating under the terms of an expired agreement, the union’s failure to continue personnel policies, practices, and matters affecting working conditions to the maximum extent possible also violates those provisions of the Statute. *Id.* at 7-8.

The GC argues that IUPEDJ was bound by the arbitration provisions of the CBA and that the Union violated § 7116(b)(1) and (5) of the Statute by refusing to continue existing personnel policies, practices, and matters affecting working conditions (as related to the arbitration provisions of the CBA negotiated by UPE) to the maximum extent possible. *Id.* at 10. In Case No. WA-CO-13-0227, the GC contends the Union violated § 7116(b)(1) and (5) by “harassing Arbitrators Feigenbaum and Conway to resign” from the arbitration panel, and by “refusing to comply with multiple requests to schedule a prehearing scheduling call.” *Id.* at 9.

With respect to Case No. WA-CO-15-0158, the GC asserts that IUPEDJ violated § 7116(b)(1) and (5) of the Statute by “refusing to accept [p]anel arbitrators as legitimate, refusing to move forward with the Charging

Party initiated arbitration in front of Arbitrator Javits, and refusing to pay fees properly owed to [p]anel arbitrators.” *Id.* at 10. With regard to unpaid fees, the GC submits that the Agency learned on December 15, 2014, that the Respondent did not pay Arbitrator Conway its share of arbitration fees for the newsletter grievance, in violation of the CBA. *Id.* at 9. Further, while the GC acknowledges that events in February and December 2015 occurred after the charge in Case No. WA-CO-15-0158 was filed, it argues that the Agency only “definitively” learned on February 5, 2015, that Arbitrator Strongin would no longer serve on the arbitration panel because of the Union’s failure to pay his arbitration fees for a matter resolved in 2013, and that Arbitrator Conway resigned from the arbitration panel in December 2015, pursuant to a settlement with the Union regarding a fee dispute. *Id.* at 9-10 & n.1.

As a remedy, the GC requests that the Union be ordered to cease and desist from failing and refusing to continue existing personnel policies, practices, and matters affecting working conditions to the maximum extent possible. *Id.* at 11.

Charging Party

Like the GC, the Charging Party argues that the Union refused to accept the existing CBA with regard to arbitration procedures and thus violated § 7116(b)(1) and (5) of the Statute. CP Br. at 6. The Charging Party further argues that because the Union attempted to dismantle the arbitration panel, nontraditional remedies are warranted. Specifically, the Charging Party argues that the Union should be required to make a good-faith attempt to restore the arbitration panel, and that the Union should be ordered to pay Arbitrators Strongin and Conway “the full amount of the Union’s portion of [their] fee[s].” *Id.* at 11.

Respondent

The Respondent argues that it did not violate the Statute. Resp. Br. at 93. In this regard, the Respondent contends that it was not improper for it to “communicate its legal positions to arbitrators and the Agency” by, for example, “rais[ing] issues concerning jurisdiction and arbitrability,” and that “nothing in the . . . CBA . . . precluded [the Union] from communicating with any of the arbitrators about voluntarily resigning.” *Id.* at 72, 77.

The Respondent argues that its communications were protected under the Statute. Specifically, the Respondent asserts that: under § 7102 of the Statute, unions have the right “to present the views of a union to Agency officials and . . . arbitrators”; under § 7114(a)(1) of the Statute, unions are entitled to negotiate collective bargaining agreements; under § 7116(e) of the Statute,

communications “cannot constitute [a ULP] where they involve the expression of . . . arguments and opinions and contain no threats”; under § 7116(a)(4) of the Statute, a union “may communicate in arbitration proceedings.” *Id.* at 75-76. In addition, the Respondent asserts, “[A] union may assert and report arbitrator ethics violations to the FMCS.” *Id.* at 76. The Respondent also argues that under the First Amendment to the U.S. Constitution, “the rights to freedom of speech . . . include the right . . . to communicate” in arbitrations, and that the Union’s “free speech rights . . . included the right to propose and request that individuals [i]n the . . . arbitrator pool . . . resign.” *Id.* at 76-77.

In addition, the Union claims that the CBA acknowledges that vacancies on the arbitration panel “could be created.” *Id.* at 77. Moreover, the Respondent contends that to the extent “repudiation analysis” applies, the Respondent argues that the arbitration provisions in the CBA are ambiguous, and that there was no “clear and patent” breach of the CBA. *Id.* at 84. The Respondent also asserts that the Agency and UPE had selected arbitrators from FMCS lists, and that the Respondent did nothing to change that “past practice.” *Id.* at 86.

The Respondent also argues that Arbitrator Feigenbaum resigned voluntarily, and that when he resigned, he “acknowledged and complied with the fundamental ethical requirement promulgated by the FMCS that arbitrators be mutually selected by the parties to particular cases.” *Id.* at 3.

The Respondent argues that from January 4, 2013, through February 21, 2013, the Union was free to make midterm bargaining proposals under the CBA, and that during that time, “[t]he Union’s communications also constituted bargaining proposals.” *Id.* at 78.

The Respondent argues that the ULP charge in WA-CO-15-0158 is untimely with respect to the Union’s payment of Arbitrator Strongin, and his resignation from the panel, since Arbitrator Strongin notified the Agency that he had not been paid and would not accept future assignments more than six months before the charge in Case No. WA-CO-15-0158 was filed. *Id.* at 68-69. In addition, the Respondent argues that the charge in Case No. WA-CO-15-0158 cannot be based on post-charge conduct, including Arbitrator Strongin’s formal resignation from the panel, communicated to the Agency on February 5, 2015, and Arbitrator Conway’s formal resignation from the panel, which he agreed to in the October 27, 2015, settlement, and which he communicated to the Agency in December 2015. *Id.* at 69-70, n. 5.

The Respondent argues that there is “unfairness in these proceedings.” *Id.* at 92. In this regard, the Respondent contends that the parties were allowed to file motions for summary judgment after the deadline for doing so had “expired.” *Id.*

With respect to the remedy, the Respondent asserts that the Charging Party’s request that the arbitration panel be restored is “contrary to the method for filling vacancies prescribed in the CBA.” *Id.* at 1 n.3. The Respondent contends that it already paid Arbitrator Conway and that, to the extent the matter was timely raised, it already paid Arbitrator Strongin. *Id.* at 5, 88-89. Further, the Respondent argues that the Charging Party’s requested remedies are unjustified because the charging party has “unclean hands.” *Id.* at 89. In this regard, the Respondent claims that: (1) on March 4, 2013, the Agency engaged in ex parte communications with Arbitrator Strongin; (2) on June 10, 2013, Arbitrator Robert T. Moore billed the Agency for an arbitration, on July 30, 2013 (the Agency paid Arbitrator Moore \$550, which apparently was half of what it owed him, on January 24, 2014) (Resp. Ex. 17); (3) “during 2014-2016,” the Agency “secretly” and “improperly” engaged Arbitrator Foster in an arbitration for a bargaining unit employee who was not represented by the Union; (4) the Agency is “defying” an order issued in November 2015, *Pension Benefit Guar. Corp.*, Case No. WA-CA-14-0448, ALJD No. 16-08, (Nov. 13, 2015) (*PBGC*) (the Agency violated § 7116(a)(1) and (8) of the Statute by failing to provide the Union with notice and an opportunity to designate representatives for a meeting in which general conditions of employment were discussed with bargaining unit employees); and (5) in 2016, the Agency failed to comply with an order issued by Arbitrator Foster. *Id.* at 89-91.

DISCUSSION

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 an express agreement to the contrary or the modification of those conditions of employment in a manner consistent with the Statute. *IUPEDJ*, 68 FLRA at 1004; *see also NTEU*, 64 FLRA 982, 985 n.4 (2010) (conditions of employment that are required to be maintained are specific conditions established pursuant to the parties’ mutual obligation to negotiate over “mandatory” subjects of bargaining). These continuing policies, practices, and matters encompass negotiated grievance and arbitration procedures, including the selection of an arbitrator. *IUPEDJ*, 68 FLRA at 1004 (citing *Dep’t of the Air Force, 35th Combat Support Grp. (TAC), George AFB, Cal.*, 4 FLRA 22, 23 (1980) (*Air Force*)). Furthermore, 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*, 68 FLRA at 1004 (citing *U.S. Nuclear Regulatory Comm'n*, 6 FLRA 18, 19-20 (1981)).

An agency that unilaterally terminates, changes, or ceases giving effect to 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 Dep't of HHS, SSA*, 44 FLRA 870, 881 (1992) (*SSA*); *cf. Air Force*, 4 FLRA at 22-23, 29 (agency violated § 7116(a)(1) of 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). It follows, based on the parallel structure of the Statute, that when an exclusive representative engages in such conduct, the exclusive representative also violates § 7116(b)(1) and (5) of the Statute. *See AFGE, AFL-CIO*, 21 FLRA 986, 987-88 (1986) (*AFGE*) (by rescinding memorandum of understanding and refusing to abide by its terms, exclusive representative violated § 7116(b)(5) of the Statute).

The first question before me is whether the Union was bound by the MOA and related provisions of the CBA. Based on the Authority's decision in *IUPEDJ*, the answer to the question is yes.

In *IUPEDJ*, the Authority considered the Union's exceptions to Arbitrator Conway's award resolving the newsletter grievance challenging, as relevant here, Arbitrator Conway's finding that the CBA had post-expiration effect and survived the change in representation from the previous union, UPE, to the current one, *IUPEDJ*, i.e., the Union. The Authority denied and dismissed the Union's exceptions and held – based on the reasoning cited above, and noting that “the stability of a new bargaining relationship is enhanced by a required maintenance of existing personnel policies and practices, and matters affecting working conditions pending the negotiation of a new agreement,” – that “the grievance and arbitration procedures under the CBA negotiated by the previous exclusive representative bind the Union.” 68 FLRA at 1003-05.

In light of the Authority's decision in *IUPEDJ*, and in the absence of an express agreement between the Agency and the Union to no longer abide by the grievance and arbitration procedures under the existing CBA inherited by the Union, it is clear that the Union was and is, bound by the grievance and arbitration procedures of the CBA, including the following key contractual provisions: Article 2, Section 3(B)(1) of the

CBA, which provides for the creation of the arbitration panel; the MOA, which was created pursuant to Article 2, Section 3(B)(1) of the CBA, and which established the arbitration panel consisting of Arbitrators Conway, Feigenbaum, Foster, Javits, and Strongin; and Article 2, Section 3(B)(3) of the CBA, which clearly indicates that arbitrators are to be selected from the arbitration panel set forth in the MOA. GC Ex. 3; *see also IUPEDJ*, 68 FLRA at 1000, 1003-05. In addition, the Union was bound by Article 2, Section 3(A)(6) of the CBA, which provides, as relevant here, that the Agency and the exclusive representative split arbitration fees on a fifty-fifty basis.

As the Union was bound by the MOA and related provisions of the CBA negotiated for the bargaining unit by a prior recognized representative, the Union's assertions regarding the formation of those agreements are without merit. In essence the Union took on the bargaining unit as it found it and had to work with the CBA that was in place until it negotiated a replacement.

Thus, the next question is whether the Union refused to be bound by the MOA (as well as by Article 2, Section 3(B)(3) of the CBA, which clearly indicates that arbitrators are to be selected from the arbitration panel set forth in the MOA), in violation of § 7116(b)(1) and (5) of the Statute. *See SSA*, 44 FLRA at 881. The answer to that question in both cases is yes.

Case No. WA-CO-13-0227

The Union's refusal to be bound by the MOA, and its attempt to dismantle it, began with innuendo. In his January 18, 2013, messages to Arbitrators Conway and Feigenbaum, Bernsen suggested that the MOA was illegitimate by noting that the MOA had been agreed to by the “prior union,” UPE, even though UPE had already lost a representation election to the Union. GC Ex. 10. In addition, Bernsen indicated that the Union was not willing to automatically accept the arbitration panel set forth in the MOA. Specifically, Bernsen stated that the Union “[m]ay be fine with some or all of the arbitrators the prior union agreed to,” but first the Union wanted to “evaluate the question.” *Id.* (emphasis added). Accordingly, Bernsen asked Arbitrators Conway and Feigenbaum to submit to interviews. *Id.*

After Arbitrators Conway and Feigenbaum rejected the interview requests, the Union moved beyond innuendo. In its January 29, 2013, letters to Arbitrators Conway and Feigenbaum, the Union's executive committee clearly indicated that the Union did not wish to be bound by the arbitration panel set forth in the MOA, stating, “[*IUPEDJ*] believes that it should have a role in the selection of arbitrators.” GC Ex. 12. Through these

letters, the Union's executive committee attempted to dismantle the arbitration panel established by the MOA pursuant to the CBA, by asking Arbitrators Conway and Feigenbaum to resign, stating: "[W]e respectfully suggest that you voluntarily withdraw your participation in the arbitrator pool." *Id.*

Days later, Arbitrator Feigenbaum acceded to the Union's request that he "resign from . . . the . . . arbitration pool." GC Ex. 13. In doing so, Arbitrator Feigenbaum indicated that he was resigning from the arbitration panel, not because it was legally required, but because the Union had requested it. He explained, "I do not wish to preside over cases where the non-selecting party does not wish me to be the decision maker." *Id.*

The Union then redoubled its efforts to have Arbitrator Conway resign from the duly established arbitration panel. On February 7, 2013, Johnson suggested that Arbitrator Conway do as Arbitrator Feigenbaum did and "graciously resign[.]" GC Ex. 14 at 2. On February 8, 2013, Johnson clarified to Arbitrator Conway that the Union "asked you to resign," and Bernsen forwarded Arbitrator Conway a copy of Arbitrator Feigenbaum's resignation letter and asked him to read it. GC Exs. 14, 16. On February 14, 2013, Bernsen sent Arbitrator Conway another copy of Arbitrator Feigenbaum's resignation letter and asked him whether he had "considered" it. GC Ex. 16 at 2. When Arbitrator Conway offered a conference to consider his recusal, Bernsen fired back, "There is no need for any call. There is nothing to discuss. Please just let us know if you wish to voluntarily resign . . ." Resp. Ex. 6 at 12-13.

The Union then upped the ante in a February 21, 2013, letter from its executive committee. In that letter, the Union again refused to be bound by the arbitration panel properly established by the MOA pursuant to the CBA, stating: "Whether or not as a new union we are bound with using a rotating pool method of selecting arbitrators . . . *we are not bound to accepting individual arbitrators where we have had no role in the selection, and we did not agree to particular arbitrators.*" *Id.* at 15, p. 2 (emphasis added). The Union then accused Arbitrator Conway of ethical violations (the subject of the letter was "Request That You Reconsider Resignation in Light of Ethics Violations") and used that spurious accusation to amplify its request that Arbitrator Conway resign. In this regard, the Union (1) asked Arbitrator Conway to "reconsider your decision *not* to resign from the arbitration pool"; (2) alleged that Arbitrator Conway's decision to remain on the arbitration panel violated the ethics code because his selection to the arbitration panel set forth in the MOA was not made "by mutual agreement of the parties"; (3) asserted that Arbitrator Feigenbaum "understood and followed" the

ethics code "when he voluntarily resigned"; (4) stated, "[P]lease comply with [the ethics code] and confirm your resignation"; (5) asserted, "It is unethical for you to impose yourself on us"; and (6) alleged that Arbitrator Conway was "unprofessional," "invents issues," was "not neutral." *Id.* at 6. The Union concluded, "in . . . light of [the ethics code] . . . and the foregoing, IUPEDJ not only requests your voluntary resignation, *but demands it.*" *Id.* (emphasis added).

The Union's accusation of ethical impropriety is especially notable since the ethical code cited by the Union does not support the claim. Specifically, the portion of the ethics code that the Union cited is not an ethical standard at all. The language cited by the Union is an illustrative or explanatory comment to the General Qualifications standard which reads as follows:

1. ARBITRATOR'S QUALIFICATIONS AND RESPONSIBILITIES TO THE PROFESSION

A. General Qualifications

1. **Essential personal qualifications of an arbitrator include honesty, integrity, impartiality, and general competence in labor relations matters. An arbitrator must demonstrate ability to exercise these personal qualities faithfully and with good judgment, both in procedural matters and in substantive decisions.**

- a. Selection by mutual agreement of the parties or direct designation by an administrative agency are the effective methods of appraisal of this combination of an individual's potential and performance, rather than the fact of placement on a roster of an administrative agency or membership in a

professional
association of
arbitrators. (**Bold
type** appears in
original).

In other words, the ethical standard set forth in bold does not require that arbitrators be mutually selected by the parties. Further, the explanatory language, and as established below that is what subparagraph (a) is⁹⁶, states that either “mutual agreement of the parties or direct designation by an administrative agency are effective methods” of appraising an arbitrator’s potential and performance upon the ethical standard set forth in the bold print of paragraph (A)(1). In this case, the parties who negotiated the MOA used a direct designation of arbitrators provided by the Federal Mediation and Conciliation Service to develop the list of arbitrators named in the MOA.

Moreover, the portion of the ethics code cited by the Union does not suggest that an arbitrator would act unethically by doing what was done here, that is, accepting an assignment to arbitrate a grievance after being selected by procedures set forth in a negotiated agreement that was binding upon subsequent parties who inherited those obligations. Resp. Exs. 6, 12. Thus, it is apparent that the Union leveled this accusation of unethical behavior at Arbitrator Conway not to right some ethical wrong, but instead to misuse the ethics code to intimidate and pressure him into resigning.

By denying the binding nature of Article 2, Section 3(B)(3) of the CBA and the arbitration panel properly established by the MOA, and by actively attempting to dismantle the arbitration panel set forth in the MOA through active solicitation of resignations from the duly appointed Arbitrators Conway and Feigenbaum, the Union refused to give effect to grievance and arbitration procedures under the CBA to which it had to adhere, and thus violated § 7116(b)(1) and (5) of the Statute.

However, I do not find that the Union violated the Statute by failing to comply with Arbitrator Conway’s request to schedule a prehearing conference. See GC Br. at 9. While it is true that the Union failed to comply with Arbitrator Conway’s initial request of February 6, 2013, it did respond to a second request on February 14, 2013, by withdrawing the grievance and the GC has not

demonstrated that failure to schedule a prehearing conference within seven days is itself a violation of § 7116(b)(1) and (5) the Statute. Cf. *U.S. DOJ, Fed. BOP*, 68 FLRA 786, 788 (2015) (*DOJ*) (showing that the breach of an agreement does not necessarily constitute an unlawful repudiation of the agreement). At most, the Union’s failure to schedule a prehearing conference merely confirms what has already been established – that the Union refused to be bound by the MOA. Accordingly, I do not find that the Union further violated the Statute by failing to schedule a prehearing conference within seven days of the Arbitrator’s request.

Finally, while the GC does not specifically allege that the Union violated the Statute in its interaction with Arbitrator Foster (*see* GC Br. at 9), it should be noted that the Union engaged in similar improper tactics as those imposed upon Arbitrators Conway and Feigenbaum. Specifically, on February 14, 2013, Bernsen asserted to Arbitrator Foster, “The Union is not agreeable that you are the designated arbitrator for this case.” GC Ex. 19 at 1. The only reason the Union provided for its opposition to Arbitrator Foster’s jurisdiction was that he was selected from the arbitration panel established by the MOA, asserting, “[T]his Union did not participate in the selection of an arbitrator pool. The Employer refers to a pool selected by a prior union that was defeated in an FLRA election in 2011.” *Id.* Viewed in context, it is apparent that the Union’s interaction with Arbitrator Foster was part of a broad campaign to effectively render the MOA a nullity. *Case No. WA-CO-15-0158*

The Union’s opposition to Arbitrator Javits’s jurisdiction began on May 24, 2014, the day after Arbitrator Javits was selected from the arbitration panel to resolve the staff meeting grievance. Specifically, Bernsen informed Arbitrator Javits, “We are a new Union. We never selected you.” Resp. Ex. 28 at 2. On October 1, 2014, Bernsen refused to participate in a conference call with Arbitrator Javits, based on the Union’s belief that “issues of arbitrator jurisdiction and authority,” i.e., issues regarding whether the Union was bound to accept arbitrators selected from the arbitration panel set forth in the MOA, were unsettled. See GC Ex. 26 at 5. (Bernsen repeated this argument a few days later.)

On December 1, 2014, Bernsen asserted to Arbitrator Javits that, “as indicated in prior communications” (including the May 24, 2014, communication), the Union was not subject to the arbitration panel set forth in the MOA, or to any of the other grievance and arbitration procedures under the CBA. In this regard, Bernsen asserted that the Union did not accept Arbitrator Javits’s “authority,” because the Union did not bargain the MOA and therefore was “never involved in [Arbitrator Javits’s] selection”

⁹⁶ The Preamble to the Code of Professional Responsibility for Arbitrators of Labor-Management Disputes includes this explanation under Format of Code: **Bold Face** type, sometimes including explanatory material, is used to set forth general principles. *Italics* are used for amplification of general principles. Ordinary type is used primarily for illustrative or explanatory comment.

GC Ex. 26 at 1. Similarly, Bernsen asserted that the Union did not accept the Agency's right to select arbitrators from the arbitration panel set forth in the MOA, since those arbitrators were "hand-picked" by the Agency.⁹⁷ *Id.* Bernsen further asserted that because the Union "did not participate in" Arbitrator Javits's selection from the arbitration panel, the Union would not accept Arbitrator Javits's jurisdiction. In this regard, Bernsen insisted, "[W]e never have and do not agree to your selection." *Id.*

Bernsen then raised the ethics argument that the Union had previously used in an attempt to intimidate and pressure Arbitrator Conway to resign from the arbitration panel. Specifically, Bernsen indicated that if Arbitrator Javits was selected from the panel to hear a case involving the Union, Arbitrator Javits would be violating the ethics code, stating, "We recommend that you take a look at the arbitrators' [ethics code, which] . . . emphasizes in Rule #1 that . . . an arbitrator be selected 'by mutual agreement of the parties.' *You are in violation of this paramount rule.*" *Id.* (emphasis added). It is obvious that under the Union's view, Arbitrator Javits could avoid violating "Rule #1" of the ethics code only by refusing to be selected from the arbitration panel to hear cases involving the Union.

While the clear implication of Bernsen's argument was that Arbitrator Javits should resign to avoid facing an accusation of unethical behavior, I again note that the portion of the ethics code that Bernsen cited does not require that Arbitrator Javits (or anyone else on the arbitration panel) to resign. Further, that portion of the ethics code does not even suggest that an arbitrator would be acting unethically by accepting an assignment to hear a grievance after being selected using procedures set forth in a negotiated agreement that was binding on subsequent parties. Resp. Exs. 6, 12. Given the unfounded nature of the Union's ethical claims, it is clear the Union accused Arbitrator Javits of violating the ethics code in an attempt to intimidate and pressure him into resigning.

By refusing to accept Arbitrator Javits's selection from the arbitration panel, the Union refused to accept the terms of the MOA and the related provision of the CBA, and thus refused to be bound by grievance and arbitration procedures under the CBA, in violation of § 7116(b)(1) and (5) of the Statute. In addition, by improperly accusing Arbitrator Javits of violating the ethics code, the Union encouraged Arbitrator Javits to resign from the panel, and thus attempted to dismantle the duly assembled arbitration panel established by the MOA, in further violation of § 7116(b)(1) and (5).

⁹⁷ Given the mutual assent of the UPE that was clearly documented in GC Exhibit 5, this assertion was the real unethical behavior present in this matter.

In reaching these conclusions, I do not find that the Union violated § 7116(b)(1) and (5) of the Statute by refusing to pay fees properly owed to panel arbitrators. GC Br. at 10. While the Agency learned on December 15, 2014, that the Respondent did not pay Arbitrator Conway's arbitration fee for the newsletter grievance, and while the Union's refusal may have been a breach of the CBA, the GC failed to establish how such a breach is itself a violation of § 7116(b)(1) and (5) of the Statute. *Cf. DOJ*, 68 FLRA at 788. At most, the Union's failure to pay Arbitrator Conway is further evidence of the violation already committed by the Union's refusal to be bound by the MOA.

I also find that the ULP charge with respect to the payment of Arbitrator Strongin's fees, and his resignation from the panel, was untimely. Section 7118(a)(4)(A) of the Statute requires that a charge be filed within six months of the alleged ULP. Actions committed more than six months before the charge was filed cannot constitute the basis for a violation of the Statute. *See, U.S. DHS, U.S. Customs & Border Prot., El Paso, Tex.*, 65 FLRA 422, 424 (2011). Here, Arbitrator Strongin notified the Agency that the Union had not paid him, and that he would therefore not accept future assignments, on December 3, 2013. This occurred more than six months before the charge was filed, on January 22, 2015. Accordingly, the charge with respect to the Union's payment of Arbitrator Strongin, and his resignation from the arbitration panel was untimely.

As for Arbitrator Strongin's email regarding fees sent on February 5, 2015, and Arbitrator Conway's resignation from the arbitration panel (a decision agreed to in October 2015 and announced to the Agency in December 2015), those matters occurred after the ULP charge was filed and do not evidence a charge previously filed. *U.S. DOJ, Exec. Office for Immigration Review, N.Y.C., N.Y.*, 61 FLRA 460, 467 (2006).

The Union's Arguments That It Did Not Violate the Statute Are Without Merit

While the Union maintains that its reprehensible behavior in these cases did not violate the Statute, its arguments are unconvincing. In this regard, the Union contends that it was entitled to "communicate its legal positions to arbitrators" by, for example, "rais[ing] issues concerning jurisdiction and arbitrability[.]" and that "nothing in the . . . CBA" precluded the Union from asking arbitrators to resign. Resp. Br. at 72, 77. If the Union had stated its opinion while accepting the binding nature of the MOA's arbitration panel and refraining from asking and encouraging arbitrators to resign, the Union could raise such concerns before those duly appointed arbitrators. But the Union went too far when it

refused to be bound by the properly negotiated MOA and that conduct violated the Statute. *See IUPEDJ*, 68 FLRA at 1004; *AFGE*, 21 FLRA at 987-88; *Air Force*, 4 FLRA at 22-23, 29. Accordingly, I reject the Union's claim.

The Union contends that its communications were protected under several provisions of the Statute. Resp. Br. at 76-77. The Union cites § 7116(a)(4) of the Statute, which provides, in pertinent part, that it is a ULP to discipline or discriminate against an employee because the employee filed a "complaint, affidavit, or petition, or has given any information or testimony" under the Statute. 5 U.S.C. § 7116(a)(4). However, this case does not concern an employee being disciplined or discriminated against for filing a complaint, affidavit, or petition, or for giving information or testimony. As such, the Union's reliance on § 7116(a)(4) is misplaced.

The Union cites § 7114(a)(1) of the Statute, which provides, in pertinent part, that a labor organization that has been accorded exclusive recognition is entitled to "act for, and negotiate collective bargaining agreements covering, all employees in the unit." 5 U.S.C. § 7114(a)(1). However, the right to represent under § 7114(a)(1) does not permit a union to represent employees in an unlawful manner, and thus does not permit the Union's refusal to be bound by the MOA or the Union's attempt to dismantle it. *See AFGE, Local 1164*, 66 FLRA 74, 79 (2011); *see also U.S. Dep't of the Navy, Naval Mine Warfare Eng'g Activity, Yorktown, Va.*, 39 FLRA 1207, 1214 (1991) (holding that the right to represent under § 7114(a)(1) does not override other provisions of law). Because § 7114(a)(1) does not permit the Union to engage in conduct that is otherwise unlawful, the Union's reliance on § 7114(a)(1) is misplaced.

The Union cites § 7102 of the Statute, which provides, in pertinent part, that an employee acting in the capacity of a representative of a labor organization has the right to present the views of the labor organization "to heads of agencies and other officials of the executive branch of the Government, the Congress, or other appropriate authorities." 5 U.S.C. § 7102. Yet the rights enumerated under § 7102 are subject to the remainder of the Statute. *IUPEDJ*, 68 FLRA at 1012. As such, § 7102 cannot operate as a shield to protect the Union from the unlawful conduct in which it engaged here.

The Union cites § 7116(e) of the Statute, which provides, in pertinent part, that "[t]he expression of any personal view, argument, opinion" shall not constitute a ULP if the expression "was not made under coercive conditions." 5 U.S.C. § 7116(e). In this case, the repeated refusals to be bound by the MOA, and the attempts to dismantle a panel properly established pursuant to the inherited CBA by asking, encouraging

and even demanding arbitrators to resign under threat of ethics allegations were made on behalf of the Union by Union officers and its executive board. They were not merely personal views and opinions. Moreover, it is apparent, as indicated above, the Union's refusal to be bound by the MOA, and its attempt to dismantle it, were made under coercive conditions. *See SSA*, 44 FLRA at 881; *Air Force*, 4 FLRA at 22-23. Accordingly, the Union's reliance on § 7116(e) of the Statute is misguided.

The Union argues that it may "assert and report arbitrator ethics violations to the FMCS." Resp. Br. at 76. This is a non sequitur since the Union did not assert or report ethics violations to the FMCS or the National Academy of Arbitrators. Furthermore, there is a difference between reporting legitimate misconduct to a lawful authority and manufacturing spurious ethical complaints to bully and intimidate an individual simply because they are subject to an ethical code of conduct. Any unethical behavior in this matter worthy of reporting was not that exhibited by the arbitrators. In fact, Arbitrator Conway correctly informed the parties that the Union was required to comply with the CBA it inherited long before the Authority proved him correct.

The Union contends that it was free, from January 4, 2013, through February 21, 2013, to make midterm bargaining proposals under the CBA, and that the Union's communications during that time "also constituted bargaining proposals." *Id.* at 78. The Union has provided no evidence that its statements during this time were "also" proposals. For example, the Union has not cited a written request to bargain or a list of actual proposals. More importantly, what is demonstratively clear from the weight of the evidence present in the record is the Union's clear intent to not comply with the valid MOA it inherited. Therefore this bargaining argument is rejected as unfounded.

The Union asserts that, under the First Amendment to the U.S. Constitution, "the rights to freedom of speech . . . include the right . . . to communicate in those proceedings," and that the Union's "free speech rights . . . included the right to propose and request that individuals [i]n the . . . arbitrator pool . . . resign." *Id.* at 76-77. The Union's free speech rights are implicated only if the speech in question involves a matter of public concern. *IUPEDJ*, 68 FLRA at 1011-12. Here, the Union has not even cited a public concern involved in its resignation requests, and none is apparent. Resp. Br. at 76-77. As such, the Union's argument is without merit.

The Union cites Article 2, Section 3(B)(1) of the CBA, which states, in pertinent part, "If a vacancy is created [on the panel], the Parties will repeat the selection process to fill the vacancy." The Union argues that this

means that vacancies “could be created” and suggests that the CBA permitted it to unilaterally create vacancies by innuendo, intimidation and outright misrepresentation about the previously established arbitration panel. Resp. Br. at 77. The Union’s argument is absurd. Article 2, Section 3(B)(1) establishes what procedures will be followed *if* a vacancy is created. No reasonable reader would interpret Article 2, Section 3(B)(1) as allowing parties to cause or *create* vacancies on the arbitration panel using any means necessary, including those that are illegal under the Statute. Accordingly, I reject this claim.

The Union contends that, to the extent “repudiation analysis” applies, the Union did not repudiate the CBA, because the arbitration provisions of the CBA are ambiguous and because there was no “clear and patent” breach of the CBA. *Id.* at 84. As discussed above, this case involves the Union’s obligation to be bound by grievance and arbitration procedures under the CBA, which was signed by the Agency and the previous union, UPE; it does not involve repudiation. *See IUPEDJ*, 68 FLRA at 1004. If repudiation analysis did apply, however, it would not help the Union. When analyzing repudiation allegations, the Authority examines: (1) the nature and scope of the alleged breach of an agreement (i.e., was the breach clear and patent?); and (2) the nature of the agreement provision allegedly breached (i.e., did the provision go to the heart of the parties’ agreement?). Under the first prong, the Authority will analyze the clarity of the provision that the charged party allegedly breached. The Authority will not find a repudiation where a party acts in accordance with a reasonable interpretation of an unclear contractual term. Under the second prong, the Authority focuses on the importance of the provision that was allegedly breached relative to the agreement in which it is contained. *DOJ*, 68 FLRA at 788. Here, the MOA is not in any way ambiguous, even a bad high school student could understand it. It specifically named the five arbitrators who sit on the arbitration panel. As such, the Union would have clearly and patently breached the MOA when it asked, encouraged and even demanded that arbitrators named in the properly negotiated MOA resign from the panel. Further, it is obvious that the composition of the panel lies at the heart of the MOA. Accordingly, even if a repudiation analysis did apply, the Union’s reliance on it would fail as miserably as the behavior it exhibited towards independent arbitrators duly appointed pursuant to a CBA to which the Union was obligated to follow.

The Union argues that it did nothing to change the “past practice” of selecting an arbitrator from a list provided by FMCS. A past practice may be established if it has been “consistently exercised” over a “significant period of time” *e.g.*, *U.S. Patent & Trademark Office*, 57 FLRA 185, 191 (2001). The practice the Union refers to here – using an FMCS list to select an arbitrator –

occurred only once after the MOA went into effect and therefore does not constitute a past practice. Because the Union’s argument is premised on a non-existent past practice, the Union’s argument is unfounded.

The Union claims that Arbitrator Feigenbaum’s resignation was voluntary and based on the principle that arbitrators be mutually selected by the parties. But Arbitrator Feigenbaum explained that he resigned, not because he was required to by law, but because the Union asked him to do so. Specifically, Arbitrator Feigenbaum stated that he resigned because “the non-selecting party does not wish me to be the decision maker.” GC Ex. 13. Further, while Arbitrator Feigenbaum’s resignation highlights the damage to the “finality, speed, and economy[.]” of the arbitration process that the Union’s requests could cause, *IUPEDJ*, 68 FLRA at 1004, the question of whether the Union’s requests got him or any other arbitrators to resign is not decisive. Instead, the decisive question is whether the Union refused to be bound by the MOA and attempted to dismantle a properly assembled arbitration panel by asking, encouraging and demanding that duly selected arbitrators resign. *See SSA*, 44 FLRA at 881; *cf. Air Force*, 4 FLRA at 22-23, 29. As shown above, the Union engaged in such unlawful conduct.

Finally, the Union argues that there is “unfairness in these proceedings,” because the parties were permitted to file motions for summary judgment on May 31, 2016, less than ten days prior to the June 7, 2016, hearing. According to the Union, the parties were allowed to file motions for summary judgment after the deadline for doing so had “expired.” Resp. Br. at 92. As discussed above, the parties were given leave to file motions for summary judgment because two parties indicated that there were no genuine issues of material fact present in the cases. While this leave was granted within ten days of a scheduled hearing, the approval is specifically authorized under 5 C.F.R. § 2423.27 of the Authority’s Regulations, which provides, in pertinent part: “Any party may move for a summary judgment in its favor on any of the issues pleaded. *Unless otherwise approved by the Administrative Law Judge*, such motion shall be made no later than 10 days prior to the hearing.” 5 C.F.R. § 2423.27(a) (emphasis added). As leave to file summary judgment motions is authorized under the regulations, the Union’s claim that the deadline had “expired” is patently wrong.

Sadly, the Union’s aspersions of unfairness are not surprising. The record demonstrates that the Union thinks nothing of lobbing unfounded accusations at fact-finders when it believes that such accusations will further its long-term goals. For example, the Union readily leveled baseless ethics accusations at Arbitrators Conway and Javits. That the Union asserts unfairness in

this proceeding while also citing a prior decision in which I found in the Union's favor as evidence of the Agency's "unclean" hands, demonstrates that the Union has neither the facts nor logic to support such a claim. In sum, the Union violated § 7116(b)(1) and (5) of the Statute in the cases before me and none of the assertions presented as disputed facts are material to that determination. Therefore, the most efficient and effective means of resolving the complaints in these cases is to grant the motions for summary judgment filed by the General Counsel and the Charging Party.

Remedy

The Agency requests that I order two nontraditional remedies, specifically, that I order the Union to: (1) make a good-faith attempt to restore the arbitration panel set forth in the MOA; and (2) pay Arbitrators Conway and Strongin "the full amount of the Union's portion of [their] fee[s]." CP Br. at 10-11.

If there are no legal or public policy objections to a proposed nontraditional remedy, it must be reasonably necessary and effective to recreating the conditions and relationships with which the ULP interfered, as well as to effectuate the policies of the Statute, including the deterrence of future violations. *F.E. Warren AFB, Cheyenne, Wyo.*, 52 FLRA 149, 161 (1996).

As discussed above, the Union's actions caused Arbitrator Feigenbaum to resign from the arbitration panel. I find it entirely appropriate to order the Union to make a good-faith attempt to bring Arbitrator Feigenbaum back to the arbitration panel set forth in the MOA. Doing so would be consistent with Authority precedent, *cf. AFGE*, 21 FLRA at 989 (ordering compliance with the repudiated agreement), and will recreate the conditions and relationships with which the ULP interfered, and will effectuate the policies of the Statute, including the deterrence of future violations. The Union argues that such a remedy would run counter to the method for filling vacancies prescribed in the CBA, but it is wrong, yet again. Such an order merely remedies the Union's violations. As for the Union's "unclean hands" arguments, the claim regarding the Agency's "secret" engagement of Arbitrator Foster is without merit, and the Union's other claims pertain to matters that fall outside of the relevant time periods covered by the complaints for which violations were established by the General Counsel.

While four of the arbitrators on the arbitration panel ultimately resigned, I find such a remedy appropriate only with respect to Arbitrator Feigenbaum. (GC Ex. 2 ¶28; *see also* Resp. Br. at 50-51). The Agency's requested remedy is not appropriate with

respect to the other three arbitrators who ultimately resigned. Nor is it appropriate with respect to Arbitrator Conway, since his resignation occurred after the ULP charges in this case were filed. It is not appropriate with respect to Arbitrator Foster, because there is insufficient evidence indicating that the Union violated the Statute in its interactions with him. And it is not appropriate with respect to Arbitrator Strongin, since his resignation occurred outside of the time period covered by the ULP charges present in these cases.

Further, I find that it is not appropriate to order the Union to pay Arbitrators Conway and Strongin. The failure to pay Arbitrator Conway's fee was not the basis for a violation proven by the GC, and it also appears that the issue was rendered moot by subsequent resolution between Arbitrator Conway and the Union. As for the claim that the Union failed to pay Arbitrator Strongin, the charge with respect to that claim was untimely and a remedy is inappropriate. For these reasons, I do not order the Union to pay Arbitrators Conway and Strongin.

Finally, in accordance with the Authority's recent decision that ULP notices should, as a matter of course, be posted both on bulletin boards and distributed electronically, such posting is ordered. *See U.S. DOJ, Fed. BOP, Fed. Transfer Ctr., Okla. City, Okla.*, 67 FLRA 221 (2014).

CONCLUSION

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 of § 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. Accordingly, I recommend that the Authority grant the motions for summary judgment filed by the General Counsel and the Charging Party in these cases.

ORDER

Pursuant to § 2423.41(c) of the Authority's Rules and Regulations and § 7118 of the Federal Service Labor-Management Relations Statute (Statute), the Independent Union of Pension Employees for Democracy and Justice, shall:

1. Cease and desist from:

(a) Failing and refusing to be bound by grievance and arbitration procedures under the CBA, including those set forth in the MOA.

(b) In any like or related manner interfering with, restraining, or coercing bargaining unit employees in the exercise of the rights assured by the Statute.

2. Take the following affirmative actions in order to effectuate the purposes and policies of the Statute:

(a) Offer Arbitrator Feigenbaum an opportunity to rejoin the arbitration panel set forth in the MOA.

(b) Post a Notice to All Employees containing the contents of the order. The Notice is to be posted in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. The Notice should be signed by the Union President. Reasonable steps shall be taken to ensure that such Notices are not altered, defaced, or covered by any other material.

(c) In addition to physical posting of the paper notices, notices shall be distributed electronically, on the same day, such as by email, posting on an intranet or an internet site, or other electronic means if such is customarily used to communicate with bargaining unit employees.

(d) Pursuant to § 2423.41(e) of the Authority's Rules and Regulations, provide the Regional Director, Washington Region, Federal Labor Relations Authority, within thirty (30) days from the date of this Order, a report regarding what compliance actions have been taken.

Issued, Washington, D.C., February 28, 2017

CHARLES R. CENTER
Chief Administrative Law Judge

NOTICE TO ALL EMPLOYEES

POSTED BY ORDER OF

**THE FEDERAL LABOR
RELATIONS AUTHORITY**

The Federal Labor Relations Authority has found that the Independent Union of Pension Employees for Democracy and Justice (IUPEDJ), violated the Federal Service Labor-Management Relations Statute (Statute), and has ordered us to post and abide by this Notice.

This Notice must remain posted for sixty (60) consecutive days from the date of posting and must not be altered, defaced, or covered by any other material.

If employees have any questions concerning this Notice or compliance with any of its provisions, they may communicate directly with the Regional Director, Washington Region, Federal Labor Relations Authority, 1400 K Street, N.W., 2nd Flr., Washington, D.C., 20424, and whose telephone number is: (202) 357-6011.

WE HEREBY NOTIFY EMPLOYEES THAT:

WE RECOGNIZE our obligation to comply with grievance and arbitration procedures under the CBA, including those set forth in the September 20, 2011, Memorandum of Agreement (MOA) between the Agency and the Union of Pension Employees.

WE WILL follow the grievance and arbitration procedures under the CBA, including those set forth in the MOA, to the maximum extent possible.

WE WILL offer Arbitrator Feigenbaum an opportunity to rejoin the arbitration panel set forth in the MOA.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees or management in the exercise of the rights assured by the Statute.

(IUPEDJ/Respondent)

Dated: _____

By: _____
(Signature) (Title)