74 FLRA No. 82

SOCIAL SECURITY ADMINISTRATION
(Agency)

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 2369
(Union)

0-AR-5931

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DECISION

September 25, 2026

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Before the Authority: Colleen Duffy Kiko, Chairman, and Anne Wagner and Charles O. Arrington, Members
(Member Wagner dissenting)

I. Statement of the Case

After the Agency denied an employee's (the grievant's) request to telework, the Union grieved the denial, claiming that it violated a provision of the parties' 2019 collective-bargaining agreement (CBA). Although the parties agreed that the provision – when negotiated – did not require the Agency to grant the grievant's request, Arbitrator Randall M. Kelly issued an award finding the Agency's denial of the request nonetheless violated the CBA.

The Agency filed exceptions on essence and exceeded-authority grounds. For the reasons discussed below, we revisit the Authority's standard for evaluating whether an arbitrator's contractual interpretation draws its essence from the parties' agreement. Because the Arbitrator's interpretation of the CBA conflicts with the parties' undisputed, intended meaning, we find the award fails to draw its essence from the CBA, and, thus, set the award aside.

II. Background and Arbitrator's Award

In March 2020, the Agency responded to the COVID-19 pandemic by allowing all eligible employees to telework from home. In January of 2022,[1] the parties agreed to a memorandum of understanding (MOU) concerning employees' re-entry into the Agency's physical workspaces, which provided, in part, that "[e]mployees with dependent family members located in their household deemed 'high[-]risk for COVID' by a medical provider, may request, and normally be approved for," a Temporary Compassionate Assignment (TCA).[2] The MOU stated that this TCA provision was a temporary "expansion" of the existing TCA process in the CBA, and that, "[f]or the purposes of this MOU, TCA means assignment to the employee's alternative duty station."[3] Article 41 of the CBA defines an alternative duty station as either "[a]n employee's residence . . . or . . . [a]nother SSA facility that may be closer to an employee's home and where there is space to accommodate additional Agency employees."[4]

Following execution of the MOU, the grievant requested a TCA to telework from her home because her father was at "high-risk for COVID-19."[5] The grievant's father lived "with his wife in a residence about three miles from the [g]rievant's home," and "[t]he [g]rievant would go to his house to care for him every evening."[6] However, because the grievant's father was not "located in [her] household," the Agency determined that the grievant was not eligible for a TCA under the terms of the MOU and denied her request.[7] The Union grieved the denial, arguing that the Agency violated either the MOU, or in the alternative, the separate TCA provision of the CBA – Article 27, Section 10 (Section 10).

Section 10 provides that "[e]mployees may request an assignment to another SSA facility in a different geographic location for up to [sixty] days based on a temporary personal situation (e.g., illness of a parent, etc.)."[8] The Agency denied the Union's grievance, contending that Section 10, unlike the MOU, only permits TCAs to "another SSA facility," not a telework assignment to an employee's residence.[9] The grievance proceeded to arbitration.

The Arbitrator noted the parties did not stipulate an issue, and had "agreed to allow [the Arbitrator] to . . . craft an issue."[10] The Arbitrator did not expressly frame any issues, but incorporated both of the parties' proposed issues. The Union's proposed issue was whether "the

[1] All subsequent dates occurred in 2022 unless otherwise noted.
[2] Exceptions, Ex. 4, Joint Ex. 2, MOU (MOU) at 2.
[3] *Id.*; *see also* Award at 2 ("Paragraph 6 of the . . . MOU was a temporary expansion of Article 27, Section 10 of the 2019 CBA.").
[4] Exceptions, Ex. 4, Joint Ex. 1, CBA (CBA) at 214.
[5] Award at 2.
[6] *Id.* at 3.
[7] *Id.* at 8.
[8] CBA at 171.
[9] Award at 9.
[10] *Id.* at 2.

[g]rievant's contractual rights [were] violated when she was denied a [TCA] . . . [and if] so, what shall be the remedy?"[11] The Agency proposed, as relevant here, "[w]hether the provisions of . . . [Section 10], or Article 41 . . . required the Agency to approve the [g]rievant's request for a [TCA] to her residence . . . [and, i]f so, what shall be the remedy?"[12]

After noting the Union withdrew its argument that the Agency violated the MOU,[13] the Arbitrator found that Section 10 "govern[ed]" the grievant's request.[14] Considering Section 10, the Arbitrator identified the primary dispute between the parties as concerning the meaning of "another SSA facility."[15] According to the Agency, the term refers only to "brick and mortar" buildings owned and operated by the Agency.[16] The Union acknowledged that, in 2019, "[w]hen the contract was negotiated, the parties were of a mind that [an SSA facility for Section 10 requests] was another[] physical [field] office."[17] However, the Union argued that "[c]ircumstances greatly changed with the COVID public health crisis," causing the Agency to grant TCAs to employees' homes.[18] Thus, the Union contended that granting these TCAs during the pandemic "alter[ed] the practical application of [Section 10],"[19] such that "another SSA facility" has the broader meaning the parties attributed to the term "alternate duty station," as defined by Article 41.[20]

In support of this change, the Union "relie[d]" on statements an Agency representative allegedly made during bargaining over the MOU.[21] Citing notes from the MOU bargaining table, a Union witness testified that the Agency representative stated that some offices had granted telework requests under Section 10. The Agency "offered other officials to rebut the meaning of these statements,"[22] but the Arbitrator found it "[s]ignificant[]" that the Agency failed to produce its representative from the MOU negotiations to testify at arbitration.[23] Crediting the Union's bargaining-history evidence, the Arbitrator found the Agency representative's statements "make it clear that for some period . . . circumstances . . . change[d,] and interim interpretation[s] of a contract [may] change for a period of time."[24] Thus, the Arbitrator found "the Union's interpretation [wa]s sufficient to grant the grievance."[25] Finding a violation of Section 10, the Arbitrator directed the Agency to restore the grievant's leave and pay her backpay for the roughly two-month period during which the grievant was unable to telework.[26]

The Agency filed exceptions on November 17, 2023, and the Union filed an opposition on December 18, 2023.

III. Analysis and Conclusion: The award fails to draw its essence from the CBA.

The Agency argues the award's interpretation of the term "another SSA facility" in Section 10 fails to draw its essence from the CBA.[27] As such, we find this case presents an appropriate opportunity to revisit the standard that the Authority applies when evaluating a claim that an arbitrator's contract interpretation fails to draw its essence from the parties' agreement.

Under § 7122 of the Federal Service Labor-Management Relations Statute (the Statute), the Authority reviews exceptions challenging awards on the grounds that the awards are contrary to law, rule, or regulation or "on other grounds similar to those applied by [f]ederal courts in private sector labor-management relations."[28] Drawing on federal court precedent, the Authority developed a deferential standard for evaluating whether an arbitrator's interpretation draws its essence from the parties' agreement.[29] Under this standard, the Authority will find that an award fails to draw its essence from the parties' agreement when the excepting party establishes the award: (1) cannot in any rational way be derived from the agreement; (2) is so unfounded in reason and fact and so unconnected with the wording and purposes of the agreement as to manifest an infidelity to the obligation of the arbitrator; (3) does not represent a plausible interpretation of the agreement; or (4) evidences a manifest disregard of the agreement (the four essence tests).[30]

[11] *Id.* at 1-2.
[12] *Id.* at 2.
[13] *Id.* at 8 (describing parties' arguments and noting that Union withdrew arguments concerning MOU).
[14] *Id.* at 9.
[15] *Id*.
[16] *Id.*
[17] *Id.* at 7.
[18] *Id.*
[19] *Id.*
[20] *Id.* at 4.
[21] *Id.* at 9.
[22] *Id.*
[23] *Id.* at 6.
[24] *Id.* at 9.
[25] *Id.*
[26] Following this two-month period, the grievant began working in a Union position for 50% of her duty time, which permitted her to telework. *Id.* at 10.
[27] Exceptions at 6-9.
[28] 5 U.S.C. § 7122(a).
[29] *U.S. Army, Missile Materiel Readiness Command*, 2 FLRA 432, 437-38 (1980) (*Army*) (citing *Ludwig Honold Mfg. Co. v. Fletcher*, 405 F.2d 1123, 1128 (3d Cir. 1969) (*Honold*); *Holly Sugar Corp. v. Distillery, Rectifying, Wine & Allied Workers Int'l Union, AFL-CIO*, 412 F.2d 899, 903 (9th Cir. 1969) (*Holly Sugar*)).
[30] *AFGE, Loc. 446*, 73 FLRA 421, 421 (2023); *Army*, 2 FLRA at 437-38.

Shortly after adopting this federal-court-derived standard, the Authority granted its first essence exception. In *Overseas Education Ass'n*, an arbitrator found that a union president could use the contract's allotment of official time and leave-without-pay status interchangeably, rather than exhausting official time first.[31] Although the contract authorized the union president to conduct union business using only official time or leave without pay, the arbitrator directed the agency to record the union president as being in a paid status that did not count against his official-time balance for the days at issue in the dispute.[32] The Authority found that, although the "agreement provide[d] only two options . . . for conducting labor-management business" – paid official time or leave without pay – the arbitrator "fashioned a third type of pay status . . . for which there [was] no rational basis in the agreement."[33] Because the arbitrator's interpretation was unsupported by the plain wording of the parties' agreement, the Authority found that it "evidence[d] a manifest disregard of the agreement."[34]

Over the following forty years, the Authority continued to apply the four essence tests and regularly granted essence exceptions when arbitrators' interpretations conflicted with the plain wording of the parties' agreement.[35] Over time, however, disagreement grew among the Authority's Members regarding whether the Authority had become overly deferential to arbitrators' contractual interpretations – even those that seemed implausible, irrational, or to conflict with plain contract wording.[36] Six years ago, in *U.S. DOJ, Federal BOP, Federal Correctional Institution, Miami, Florida* (*Miami*), the Authority sought to forestall this trend and clarify that federal court precedent did not "establish a mandate that requires [the Authority] to ignore erroneous arbitral awards that run counter to the plain language . . . of contractual provisions."[37] The Authority observed that, while the Statute does not address what degree of deference should be accorded to arbitrators' interpretations of collective-bargaining agreements, the Authority's application of the essence standard occasionally extended a credulous deference to clearly erroneous contract interpretations.[38] Finding this overly deferential standard untenable, the Authority held that – consistent with its forty-year practice since *Overseas Education Ass'n*[39] – it would no longer blindly defer to

[31] 4 FLRA 98, 102-03 (1980).

[32] *Id.*

[33] *Id.* at 102.

[34] *Id.* at 102-03.

[35] *See, e.g.*, *AFGE, Loc. 1822*, 72 FLRA 595, 598 (2021) (Chairman DuBester concurring) (finding an award failed to draw its essence from a settlement agreement when the arbitrator imposed an obligation that was contrary to the plain wording of the agreement); *SSA, Off. of the Gen. Couns.*, 72 FLRA 554, 555 (2021) (finding an arbitrator's procedural-arbitrability determination failed to draw its essence from the parties' agreement when "the [a]rbitrator's waiver finding conflict[ed] with the plain wording of the . . . agreement"); *U.S. Dep't of the Army, Moncrief Army Health Clinic, Fort Jackson, S.C.*, 72 FLRA 207, 208 (2021) (*Moncrief*) (Member Abbott concurring; Chairman DuBester dissenting) (setting aside award that found grievance arbitrable where the parties' agreement "expressly exclude[d]" the grievance at issue); *U.S. Dep't of the Air Force, 673rd Air Base Wing Joint Base Elmendorf-Richardson, Alaska*, 71 FLRA 781, 782-83 (2020) (Member DuBester dissenting) (granting essence exception where arbitrator ignored the "clear[] and unambiguous[]" deadline in the parties' agreement); *Libr. of Cong.*, 60 FLRA 715, 718 (2005) (Member Pope dissenting) (finding award was not plausible interpretation of parties' agreement where the arbitrator "ha[d] effectively rewritten the . . . [a]greement in violation of its plain wording"); *SSA, Lansing, Mich.*, 58 FLRA 93, 95 (2002) (*SSA, Lansing*) (Member Pope dissenting) (setting aside award where award was not a plausible interpretation of the parties' agreement); *U.S. Dep't of the Air Force, Okla. City Air Logistics Command, Tinker Air Force Base, Okla.*, 48 FLRA 342, 348 (1993) (*Tinker*) (setting aside award because "the plain wording of [the parties' agreement] is simply not compatible with the [a]rbitrator's interpretation"); *AFGE, Loc. 547*, 19 FLRA 725, 727 (1985) (*Loc. 547*) (setting aside award where "the [a]rbitrator clearly subjected to grievance and arbitration [a matter] . . . which [the parties' agreement] expressly exclude[d] . . . from coverage by the negotiated grievance procedure").

[36] *E.g.*, *U.S. Dep't of the Treasury, Off. of the Comptroller of the Currency*, 71 FLRA 387, 389 n.23 (2019) (Member DuBester dissenting in part) (Chairman Kiko noting, in an attributed footnote, that she would find arbitrator's interpretation of performance-management provision "irrational and implausible"); *NTEU, Chapter 83*, 68 FLRA 945, 949 (2015) (Member Pizzella dissenting) (denying essence exception where arbitrator found relevant word in parties' agreement was a "remnant" of a previous practice and could be ignored entirely); *U.S. DOJ, Fed. BOP*, 68 FLRA 311, 316 (2015) (Dissenting Opinion of Member Pizzella) (dissenting to denial of essence exception on the ground that the award's interpretation "does not even resemble the plain words [the parties] negotiated"); *U.S. Dep't of VA, Med. Ctr., Tuscaloosa, Ala.*, 64 FLRA 379, 380 (2009) (Member Beck dissenting) (denying essence exception where the arbitrator acknowledged the parties had specifically negotiated an appropriate remedy for the grieved action, but – reasoning that this was only one "potential remedy" – disregarded the remedy provision entirely).

[37] 71 FLRA 660, 664 (2020) (Member Abbott concurring; Member DuBester dissenting).

[38] *See id.* ("[W]e disagree with the dissent that the *Steelworkers* cases establish a mandate that requires us to ignore erroneous arbitral awards that run counter to the plain language, or judicial interpretations, of contractual provisions.").

[39] *E.g., Overseas Educ. Ass'n*, 4 FLRA at 102-03 (granting essence exception where award "disregarded the terms of the agreement"); *see also SSA*, 64 FLRA 1119, 1122 (2010) (Member DuBester concurring; Chairman Pope dissenting) ("When an arbitrator's award is inconsistent with the terms of the parties' agreement, such as the arbitrator's award here, the award cannot be said to 'draw its essence' from the agreement.").

erroneous arbitral determinations that run counter to the plain language of a contract.[40]

Subsequently, in *National Weather Service Employees Organization v. FLRA* (*NWSEO*), the U.S. Court of Appeals for District of Columbia Circuit (D.C. Circuit) granted a petition for review of an Authority decision concerning an unfair labor practice.[41] When the Authority resolves exceptions to an arbitration award under § 7122, the Statute authorizes judicial review only where the Authority's order "involves an unfair labor practice."[42] However, rejecting "the Authority's view that the court may review only the portion of the order that discusses the alleged unfair labor practice,"[43] and exercising jurisdiction broadly over the Authority's unrelated application of its essence standard in that decision,[44] the D.C. Circuit found that the Authority's "sole inquiry . . . should have been whether the [a]rbitrator was 'even arguably construing or applying the [parties' agreement].'"[45] The Court concluded that the question of "[w]hether the [a]rbitrator correctly interpreted the [parties' agreement] was beyond the scope of the Authority's review."[46] To the extent the D.C. Circuit properly exercised jurisdiction in considering the Authority's essence standard in *NWSEO*,[47] we recognize its decision as the law of that case.[48] But the Authority also recognized again in a contemporaneous case that "the Authority is not obligated to blindly defer to the erroneous conclusions that are made by arbitrators."[49]

Thereafter, in *U.S. DOD, Education Activity, Alexandria, Virginia* (*DODEA*), a new majority of the Authority reversed course and adopted the D.C. Circuit's reasoning that "the Authority may not reverse the arbitrator's award even if the [the Authority] is 'convinced [the arbitrator] committed serious error.'"[50] Despite embracing this near-total deference to arbitrators' contractual interpretations, the majority (the *DODEA* majority) also "emphasize[d] that [it was] not eliminating the Authority's existing tests for analyzing essence exceptions."[51] For the reasons discussed below, we find this reassurance unpersuasive and completely inconsistent with our longstanding standard for evaluating essence challenges, which the Authority drew from decisions by "[f]ederal courts in private sector labor-management relations."[52]

The *DODEA* majority defended its no-error-too-severe standard, explaining that the four existing tests are "consistent with the notion that the relevant question is not whether the arbitrator erred – or even seriously erred – in interpretating the contract, but whether the arbitrator was even arguably construing or applying the contract."[53] However, each of the essence tests asks a variation of the same question: did the arbitrator seriously err when interpreting the parties'

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[40] *Miami*, 71 FLRA at 664 ("[T]o the extent prior Authority decisions have been interpreted as requiring blind deference to erroneous arbitral determinations, we choose to change that trajectory going forward."); *see, e.g.*, *id.* at 663 ("[I]t is clear to us that, to the extent the arbitrator's interpretation of [the provision] runs counter to clear judicial and Authority precedent, this award does not represent a plausible interpretation of the parties' agreement.").
[41] 966 F.3d 875, 882-85 (D.C. Cir. 2020).
[42] 5 U.S.C. § 7123(a)(1).
[43] *NWSEO*, 966 F.3d at 880.
[44] *Id.* at 879-82 (finding that the Authority's decision "is reviewable in its entirety" because the decision *contained* an unfair labor practice). *But see Ass'n of Civilian Technicians, N.Y. State Council v. FLRA*, 507 F.3d 697, 699 (D.C. Cir. 2007) (noting that, although arbitral decisions are not generally subject to judicial review, the Statute provides a "limited exception" intended to "further[] Congress's other stated interest of ensuring '*a single uniform body of case law concerning unfair labor practices*'" (quoting *AFGE, Loc. 2510 v. FLRA*, 453 F.3d 500, 505 (D.C. Cir. 2006) (emphasis added))).
[45] *NWSEO*, 966 F.3d at 881 (quoting *United Paperworkers Int'l Union, AFL-CIO v. Misco, Inc.*, 484 U.S. 29, 38 (1987) (*Misco*)).
[46] *Id.*
[47] *See* 5 U.S.C. § 7123(a)(1) (barring judicial review of a final order of the Authority "involving an award by an arbitrator[], unless the order involves an unfair labor practice"); *see also U.S. DOD Educ. Activity, Alexandria, Va.*, 73 FLRA 398, 407 (2022) (Dissenting Opinion of then-Member Kiko) ("I believe that the [D.C. Circuit] lacked jurisdiction to review the Authority's disposition of an essence exception in *NWSEO* because that exception did not 'involve[] an unfair labor practice.'" (quoting 5 U.S.C. § 7123(a)(1))).
[48] *See, e.g.*, *DOD, Domestic Dependent Elementary & Secondary Schs., Fort Buchanan, P.R.*, 72 FLRA 414, 415 (2021) (Chairman DuBester concurring; Member Abbott dissenting) (adopting D.C. Circuit's holding "as the law of the case" and vacating portion of Authority's original decision that conflicted with that holding); *U.S. DOJ, Fed. BOP, Wash., D.C.*, 67 FLRA 69, 70 (2012) (adopting D.C. Circuit's decision, on remand, as the "law of the case" that governed the remanded dispute).
[49] *U.S. DOJ, Fed. BOP, Fed. Corr. Inst., Aliceville, Ala.*, 72 FLRA 497, 498-99 (2021) (Chairman DuBester dissenting).
[50] 73 FLRA 398, 401 (2022) (then-Member Kiko dissenting) (quoting *NWSEO*, 966 F.3d at 881).
[51] *Id.* at 402.
[52] 5 U.S.C. § 7122(a); *see Army*, 2 FLRA at 437-38 (quoting *Honold*, 405 F.2d at 1128; *Holly Sugar*, 412 F.2d at 903).
[53] *DODEA*, 73 FLRA at 402 (citation modified).

agreement[54] – the exact question the *DODEA* majority prohibits the Authority from considering. Troublingly, under the *DODEA* standard, arbitrators may insulate serious errors in their analysis merely by citing a relevant provision – and, thus, "*arguably* construing or applying" the contract.[55] In other words, while the *DODEA* majority claimed that it was preserving the Authority's four longstanding tests, it adopted a standard that rendered these tests effectively irrelevant.[56]

As the Authority held in *Miami*, this credulous reverence for arbitral interpretation is an untenable restriction on the Authority's review function; when a party seeks to challenge a clear misapplication of the agreement they negotiated, the Authority cannot extend "blind deference to erroneous arbitral determinations."[57] The dissent asserts that the *DODEA* majority's approach of extreme deference even in the face of "serious error"[58] is consistent with precedent from the U.S. Courts of Appeals for the Sixth,[59] Ninth, and D.C. Circuits.[60] However, we note that the federal circuits differ on the appropriate level of deference to apply to arbitrators' interpretations, and our approach is consistent with federal circuit court precedent in the U.S. Courts of Appeals for

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[54] *See Moncrief*, 72 FLRA at 208 (finding award evidenced manifest disregard for parties' agreement where arbitrator directed remedy for individual employee despite agreement stating that particular grievances "*cannot* be used for . . . personal relief of individual employees"); *U.S. Dep't of the Treasury, IRS, Kan. City Campus*, 71 FLRA 1161, 1162-63 (2020) (Member DuBester dissenting) (setting aside award finding union's mass-grievance claims procedurally arbitrable where the union only named one employee in its grievance despite contract requiring union to "provide the names of all known grievants *when it files* the mass grievance"); *U.S. DOJ, Fed. BOP, Fed. Corr. Complex, Coleman, Fla.*, 71 FLRA 1013, 1014 (2020) (Member DuBester concurring; Member Abbott concurring) (finding arbitrator's conclusion that a grievance was filed "in response to" a memo that was "issued . . . more than a week *after*" the grievance was "so unfounded in reason and fact and so unconnected with the wording and purpose of the parties' agreement as to manifest an infidelity to the obligation of the [a]rbitrator"); *SSA, Lansing*, 58 FLRA at 95 (granting essence exception because award did not "represent plausible interpretation of the agreement" where arbitrator found agency had just cause to discipline employees but directed no discipline – an outcome that conflicted with the disciplinary system in the agreement); *Tinker*, 48 FLRA at 348 (finding award "evidence[d] a manifest disregard of the parties' agreement" where agreement required agency to "consider" factor in weighing discipline and arbitrator instead found that factor *precluded* agency from disciplining employees); *U.S. Dep't of the Air Force, Hill Air Force Base, Utah*, 39 FLRA 103, 108 (1991) (finding arbitrator's interpretation of provision governing expedited arbitration proceedings as permitting him to disregard complicated arguments – despite "unequivocal" wording to the contrary in parties' agreement – could not "in any rational way be derived" from the agreement); *Loc. 547*, 19 FLRA at 727 (finding award evidenced manifest disregard for parties' agreement where arbitrator directed agency to issue incentive award to grievant despite contract provision specifically excluding such a determination from the grievance procedure).

[55] *DODEA*, 73 FLRA at 402 (emphasis added).

[56] The dissent argues that, if the "even arguably construing or applying" test renders the Authority's four essence tests "effectively irrelevant," "it certainly does not do so any more than the majority's test focusing on whether 'the award conflicts with the agreement's plain wording.'" Dissent at 47 n.179. We disagree. As noted above, each of the Authority's four essence tests ask whether the arbitrator committed a serious interpretative error – questions that complement our consideration of the plain wording of the agreement. For example, we believe that an interpretation that clearly conflicts with unambiguous wording is not plausible and, in fact, evidences a manifest disregard for the parties' agreement. Conversely, under the dissent's favored test, it is immaterial whether the arbitrator's interpretation is implausible; irrational; so unconnected with the wording and purposes of the agreement as to manifest an infidelity to the obligation of the arbitrator; or evidences a manifest disregard of the agreement – what matters is simply whether the arbitrator sufficiently mentions the provision at issue, and, thus, *arguably* construes or applies the contract.

[57] *Miami*, 71 FLRA at 664.

[58] Dissent at 44 (quoting *NWSEO*, 966 F.3d at 881).

[59] We note that, although the Sixth Circuit has adopted the unquestioning "even arguably applying or construing" test advocated by the dissent, *Michigan Family Resources, Inc. v. SEIU Local 517M*, 475 F.3d 746, 753 (2007), this circuit had – for more than thirty years – applied a more discerning essence standard. Previously, the Sixth Circuit would find that an award failed to draw its essence from the parties' agreement when the award: (1) conflicted with the express terms of the agreement; (2) imposed additional requirements that were not expressly provided in the agreement; (3) was without rational support or could not be rationally derived from the terms of the agreement; or (4) was based on general considerations of fairness and equity instead of the precise terms of the agreement. *See Cement Divs., Nat'l Gypsum Co. (Huron) v. United Steelworkers of Am., AFL-CIO-CLC, Loc. 135,* 793 F.2d 759, 766 (6th Cir. 1986) (citing *Grand Rapids Die Casting Corp. v. Loc. Union No. 159, United Auto., Aerospace & Agric. Implement Workers of Am., U.A.W.*, 684 F.2d 413 (6th Cir. 1982); *Sears, Roebuck & Co. v. Teamsters Loc. Union No. 243*, 683 F.2d 154 (6th Cir. 1982), *cert. denied*, 460 U.S. 1023 (1983); *Timken Co. v. Loc. Union No. 1123, United Steelworkers of Am., AFL-CIO*, 482 F.2d 1012 (6th Cir. 1973); *Loc. 342, United Auto., Aerospace & Agric. Implement Workers of Am. (UAW) AFL-CIO v. T.R.W., Inc.*, 402 F.2d 727 (6th Cir. 1968), *cert. denied*, 395 U.S. 910 (1969)).

[60] Dissent at 28-35.

the Second, Third, Fourth, Fifth, Eighth, Ninth,[61] and Eleventh Circuits, which have held that an award is deficient if it conflicts with the express provisions of a collective-bargaining agreement.[62] As the U.S. Court of Appeals for the Seventh Circuit has held, negotiated agreements would "cease to have meaning" if an arbitrator could "cast aside clear and unambiguous contractual language . . . merely by invoking the magic words 'contract interpretation.'"[63]

Because arbitrators may not "sit to dispense [their] own brand of industrial justice," the Supreme Court has held that an arbitrator's award "is legitimate only so long as it draws its essence from the collective bargaining agreement."[64] We agree with the federal courts who have, in applying this Supreme Court precedent, concluded that an arbitrator may not shield a deficient award from essence review "simply by making the . . . noises of contract interpretation."[65] To do so would be to grant arbitrators unchecked authority to alter the meaning of contracts to fit their "own brand of industrial justice."[66]

According to the dissent, arbitrators cannot misinterpret contracts because an arbitrator is the

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[61] Although the dissent cites Ninth Circuit precedent to support the "even arguably construing or applying" standard, Dissent at 33-35, we note that the Ninth Circuit has also vacated awards that conflict with the plain wording of a collective-bargaining agreement. *See Aspic Eng'r & Constr. Co. v. ECC Centcom Constructors, LLC*, 913 F.3d 1162, 1168 (9th Cir. 2019) ("The [a]ward disregarded specific provisions of the plain text in an effort to prevent what the [a]rbitrator deemed an unfair result. Such an award is 'irrational.'"); *Frederick Meiswinkel, Inc. v. Laborer's Union Loc. 261, Laborers' Int'l Union of N. Am., AFL-CIO*, 744 F.2d 1374, 1377 (9th Cir. 1984) ("An award that conflicts directly with the contract cannot be a 'plausible interpretation.'" (quoting *Pac. Motor Trucking Co. v. Auto. Machinists Union*, 702 F.2d 176, 177 (9th Cir. 1983))); *United Food & Com. Workers Union, Loc. 1119, AFL-CIO v. United Mkts., Inc.*, 784 F.2d 1413, 1415-16 & n.2 (9th Cir. 1986) (*United Food*) (vacating award because the arbitrator did not attribute contract words their "usual meaning"); *Federated Emps. of Nev., Inc. v. Teamsters Loc. No. 631*, 600 F.2d 1263, 1265 (9th Cir. 1979) ("The violation of an express and explicit restriction on the arbitrator's power cannot be a plausible interpretation."); *see also Freightliner, LLC v. Teamsters Loc. 305*, 336 F. Supp. 2d 1118, 1127-28 (D. Or. 2004) (finding award did "not represent a plausible interpretation" of the parties' agreement where arbitrator relied on an inapplicable state law to modify a clear contractual definition).

[62] *E.g.*, *Monongahela Valley Hosp., Inc. v. United Steel Paper & Forestry Rubber Mfg. Allied Indus. & Serv. Workers Int'l Union AFL-CIO CLC*, 946 F.3d 195, 200 (3d Cir. 2019) ("[W]e cannot affirm [an] award that manifestly disregards the plain language of [a collective-bargaining agreement]."); *Pa. Power Co. v. Loc. Union No. 272 of the Int'l Bhd. of Elec. Workers, AFL-CIO*, 276 F.3d 174, 181 (3d Cir. 2001) (overturning arbitrator who ignored "express provisions of the [a]greement" and had "written into the contract a provision" the parties did not bargain); *Int'l Union, United Mine Workers of Am. v. Marrowbone Dev. Co.*, 232 F.3d 383, 389 (4th Cir. 2000) (*Marrowbone*) (holding an award that "squarely conflicts with the plain language of [an] [a]greement" does not draw its essence from that agreement, and the court must refuse to enforce the award); *Delta Queen Steamboat Co. v. Dist. 2 Marine Eng'rs Beneficial Ass'n*, 889 F.2d 599, 604 (5th Cir. 1989) ("[A]rbitral action contrary to express contractual provisions will not be respected."); *Bruno's, Inc. v. United Food & Com. Workers Int'l Union, Loc. 1657*, 858 F.2d 1529, 1532 (11th Cir. 1988) (holding that portion of award "in direct conflict with the express terms of the collective[-]bargaining agreement was properly vacated"); *St. Louis Theatrical Co. v. St. Louis Theatrical Bhd. Loc. 6 of Int'l All. of Theatrical Stage Emps. & Moving Picture Operators of the U.S. & Can.*, 715 F.2d 405, 409 (8th Cir. 1983) (*St. Louis*) (overturning arbitrator after finding "the arbitrator's opinion reflected the arbitrator's efforts to balance the equities of the situation, rather than to interpret and apply the agreement"). The dissent states that neither *St. Louis* nor *Marrowbone* "supports a conclusion than an award automatically fails to draw its essence from a CBA merely because the award appears to conflict with the CBA's plain wording." Dissent at 39 (citing *St. Louis*, 715 F.2d at 409; *Marrowbone*, 232 F.3d at 389). The dissent suggests that the awards in these cases were deficient on other grounds besides just essence – specifically, that the arbitrators exceeded their authority. *See id.* However, we do not think multiple deficiencies in these awards weakens the support that these cases provide for our position; in both cases, the courts found the awards deficient because the arbitrators acted beyond their authority by engaging in actions specifically proscribed by the contract. *See, e.g.*, *St. Louis*, 715 F.2d at 409 ("[T]he agreement is not susceptible to any construction beyond its plain meaning . . . . The arbitrator does not point to, nor can we find, any provision of the agreement that grants the arbitrator the authority to balance the equities."); *Marrowbone*, 232 F.3d at 389 ("[The arbitrator] issued an award without holding an evidentiary hearing. This action squarely conflicts with the plain language of the [a]greement.").

[63] *Anheuser-Busch, Inc. v. Beer, Soft Drink, Water, Fruit Juice, Carbonic Gas, Liquor Sales Drivers, Helpers, Inside Workers, Bottlers, Warehousemen, Sch., Sightseeing, Charter Bus Drivers, Gen. Promotions Emps., & Emps. of Affiliated Indus., Maltster, Laborers, Syrup, Yeast, Food, Vinegar, Brewery, Recycling & Miscellaneous Workers of Chi. & Vicinity, Ill., Loc. Union No. 744*, 280 F.3d 1133, 1144 (7th Cir. 2002) (*Anheuser-Busch*) (emphasis omitted).

[64] *United Steelworkers of Am. v. Enter. Wheel & Car Corp.*, 363 U.S. 593, 597 (1960) (*Steelworkers*).

[65] *Leed Architectural Prods., Inc. v. United Steelworkers of Am., Loc. 6674*, 916 F.2d 63, 65 (2d Cir. 1990) (quoting *In re Marine Pollution Serv., Inc.*, 857 F.2d 91, 94 (2d Cir. 1988)); *see also Anheuser-Busch*, 280 F.3d at 1138 (noting than an arbitrator cannot shield a contract interpretation from review by merely "making noises of contract interpretation" (quoting *Ethyl Corp. v. United Steelworkers of Am., AFL-CIO-CLC*, 768 F.2d 180, 187 (7th Cir. 1985))); *Glass, Molders, Pottery, Plastics & Allied Workers Int'l Union, AFL-CIO v. Owens-Illinois, Inc.*, 758 F. Supp. 962, 971 (D.N.J. 1991) (*Owens-Illinois*) (same).

[66] *See Steelworkers*, 363 U.S. at 597.

"joint alter ego" or "surrogate" of the parties.[67] Thus, "a 'misinterpretation' or 'gross mistake' by the arbitrator becomes a contradiction in terms,"[68] because the arbitrator's "award *is* [the parties'] contract,"[69] However, we are understandably skeptical of a standard that treats an arbitrator as the infallible "joint alter ego" of the parties when other arbitrators – also serving as infallible "joint alter ego[s]" of the same parties – may arrive at contradictory interpretations.[70] Because arbitration awards are not precedential, these supposed contracts created by arbitral interpretation – occasionally based on readings that we would consider "misinterpretations" or even "gross mistake[s]"[71] – may only exist for the sake of *one grievance*. But as the D.C. Circuit has held, "[i]mplicit in th[e Statute's] purpose [of promoting the negotiation of collective bargaining agreements] is the need to provide the parties to such an agreement with stability and repose with respect to matters reduced to writing in the agreement."[72] Without the right to meaningfully challenge misinterpretations of their contracts, parties are deprived of stability and repose because a future arbitrator may find them in violation of a contractual obligation that they neither negotiated, nor had reason to anticipate. Thus, we reject this maximally deferential understanding of the arbitrator's role; parties select arbitrators to *read* their contracts – not to serve as faultless sovereigns of their collective-bargaining relationship.[73]

Accordingly, we return to *Miami*'s reasonable deference to arbitrators' contractual interpretations, which we find better effectuates the four essence tests the Authority has long used to evaluate an arbitrator's interpretation of the parties' collective-bargaining agreement. We believe these four tests appropriately balance the rights of unions and agencies within the unique framework of federal-sector collective bargaining, and ensure that the Statute is "interpreted in a matter consistent with the requirement of an effective and efficient Government."[74] Thus, in applying these tests, the Authority will find that an award fails to draw its essence from a collective-bargaining agreement where the award conflicts with the agreement's plain wording.[75]

The dissent argues that permitting parties to challenge arbitrators' contractual interpretations will "not promote effective and efficient government" because it will "increas[e] litigation and reduc[e] the finality of

[67] *See* Dissent at 29 (quoting *Cole v. Burns Int'l Sec. Servs.*, 105 F.3d 1465, 1474-75 (D.C. Cir. 1997) (*Cole*)), 33 (quoting *Kobold v. Good Samaritan Med. Ctr.*, 832 F.3d 1024, 1047 (9th Cir. 2016) (*Kobold*)).
[68] *Id.* at 29 (quoting *Cole*, 105 F.3d at 1474-75).
[69] *Id.* at 33 (quoting *Kobold*, 832 F.3d at 1047).
[70] *See, e.g.*, *IFPTE, Loc. 28, Lewis Eng'rs & Scientists Ass'n*, 50 FLRA 533, 536-37 (1995) ("Arbitrator[s] [are] not . . . bound by awards resolving other disputes [because] . . . [a]rbitration awards are not precedential." (quoting *U.S. Dep't of Transp., FAA, Springfield, Ill.*, 39 FLRA 1036, 1043 (1991))); *Adjutant Gen. State of Okla., Air Nat'l Guard, Tulsa, Okla.*, 34 FLRA 691, 695 (1990) ("Even if the [a]rbitrator's award is inconsistent with the three arbitration awards cited by the [u]nion . . . arbitration awards are not precedential and an inconsistency with these awards provides no basis for finding the [a]rbitrator's award deficient.").
[71] Dissent at 26, 30.
[72] *Dep't of the Navy, Marine Corps Logistics Base, Albany, Ga. v. FLRA*, 962 F.2d 48, 59 (D.C. Cir. 1992).
[73] *See Anheuser-Busch*, 280 F.3d at 1144 ("Arbitrators are not free to dispense their own brand of industrial justice and 'may not ignore the plain language of the contract.'" (quoting *Misco*, 484 U.S. at 38)); *see also id.* at 1142 ("[A]n arbitrator cannot 'dress his policy desires up in contract interpretation clothing'; a wolf in sheep's clothing is still nothing other than a wolf." (quoting *N. Ind. Pub. Serv. Co. v. United Steelworkers of Am., AFL-CIO-CLC*, 243 F.3d 345, 347 (7th Cir. 2001))). The dissent relies on the Supreme Court's reasoning in *United Steelworkers of America v. Warrior & Gulf Navigation Co.* (*Warrior & Gulf*) that, in the private sector, "[t]he labor arbitrator is usually chosen because of the parties' confidence in his knowledge of the common law of the shop." Dissent at 22 (quoting 363 U.S. 574, 580-82 (1960)). However, we note that this confidence relies precariously on the assumption that, despite the "Byzantine rules that govern federal personnel operations[,] . . . arbitrators who are not federal-sector specialists could easily adapt to adjudicating disputes under the Statute." *U.S. Dep't of VA, John J. Pershing VA Med. Ctr., Poplar Bluff, Mo.*, 74 FLRA 163, 169 (2025) (Concurring Opinion of then-Member Kiko) ("[T]he Authority's experience with arbitration appeals makes me skeptical of that assumption."). Because "arbitrators who may hear private-, state-, local-, and federal-sector disputes have little incentive to develop a working knowledge of distinctive federal procedures on their own time," *id.*, we are less inclined than the dissent to defer to an arbitrator's "knowledge of the common of the shop" when the contract does not appear to support the arbitrators' interpretation.
[74] 5 U.S.C. § 7101(b).
[75] *See, e.g.*, *U.S. SBA*, 70 FLRA 525, 527 (2018) (*SBA*) (Member DuBester concurring in part and dissenting in part) (finding arbitrator's "determination that the grievance was procedurally arbitrable conflict[ed] with the plain wording of the parties' agreement"); *Tinker*, 48 FLRA at 348 (granting essence exception where "[t]he plain wording of [the contract was] simply not compatible with the [a]rbitrator's interpretation").

arbitration."[76] However, to the extent our return to the standard that existed for the forty years before *DODEA* causes an increase in litigation, we note that the purpose of this litigation is the vindication of painstakingly negotiated rights. In order to build a functioning "system of industrial self-government,"[77] the parties must first negotiate and jointly execute a comprehensive collective-bargaining agreement that addresses the contours of the parties' rights and obligations. To reach agreement, parties must bargain in good faith over a wide range of topics;[78] take intractable issues to the Federal Service Impasses Panel;[79] litigate the lawfulness of proposals and provisions in negotiability petitions before the Authority;[80] and seek agency-head review and – where appropriate – union ratification of their agreement.[81] Yet, despite this exhaustive process to hammer out mutually acceptable terms, the dissent advocates for a standard that permits an arbitrator to unilaterally alter the resulting agreement as long as the award cites the agreement – leaving aggrieved parties with no recourse should the arbitrator jettison a hard-fought benefit. As noted above, the dissent suggests that an arbitrator "cannot misinterpret a [contract]" because the arbitrator's "award *is* [the parties'] contract."[82] In other words, the parties' laborious bargaining effort may be summarily supplanted by the arbitrator's *unimpeachable* reading of the agreement and the parties' intent.[83] In such circumstances, where the parties are bound – without recourse – by an arbitrator's clearly erroneous interpretation of the parties' agreement, we are hard pressed to agree with the dissent's description of that system as "self-government."[84]

In explaining the "even arguably construing or applying standard," the dissent concedes that it is appropriate to grant an essence exception where arbitrators "base their awards wholly on considerations external to the CBA (as distinct from relying on non-textual considerations to give the CBA meaning)."[85] However, we find this distinction unworkable; when arbitrators rely on non-textual considerations, they are – by definition – relying on considerations external to the CBA. If the contract is ambiguous, certain non-textual evidence – such as past practice – may be necessary to give the unclear contract provisions a discernible meaning. But when an arbitrator relies on external considerations to reach a conclusion that conflicts with unambiguous wording in the contract, the arbitrator has not "confined [the award] to interpretation and application of the collective-bargaining agreement; . . . [he has] dispense[d] his own brand of industrial justice."[86]

Thus, consistent with our precedent, arbitrators may rely on extrinsic evidence of the parties' contemporaneous understanding to interpret the agreement when a term in a collective-bargaining agreement is

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[76] Dissent at 45.
[77] *See id.* at 21 (quoting *Warrior & Gulf*, 363 U.S. at 578-79).
[78] *See, e.g.*, 5 U.S.C. § 7116 (providing that agencies and unions have an obligation to consult or negotiate in good faith).
[79] *See id.* §§ 7116 (providing that agencies and unions have obligation to cooperate in impasse procedures and impasse decisions), 7119 (providing the structure of the Federal Service Impasses Panel and the process for bringing impasses to the panel).
[80] *See id.* §§ 7105(a)(2)(E) (providing that the Authority shall be responsible for "resolv[ing] issues relating to the duty to bargain in good faith under [§] 7117(c)"), 7117(c) (providing the processes for parties to seek negotiability determinations before the Authority).
[81] *See id.* §§ 7102 (providing that employees have right to engage in collective bargaining over conditions of employment through their chosen representatives), 7114(c) (providing for period of agency-head approval of executed agreements); *see also SSA*, 46 FLRA 1404, 1415 (1993) (finding that the right to employee ratification "implicitly and logically flows from [§] 7102 of the Statute").
[82] Dissent at 33 (quoting *Kobold*, 832 F.3d at 1047); *but see United Food*, 784 F.2d at 1415-16 & n.2 (vacating award where arbitrator failed to give contract words their "usual meaning"); *Owens-Illinois*, 758 F. Supp. at 971 (an arbitrator "may not shield an 'outlandish disposition of a grievance' from judicial review 'simply by making the right noises – noises of contract interpretation'").
[83] *But see Aspic Eng'r & Constr. Co. v. ECC Centcom Constructors, LLC*, 268 F. Supp. 3d 1053, 1059 (N.D. Cal. 2017) (granting essence exception where "[a]rbitrator voided and reconstructed parts of the [s]ubcontracts based on a belief that the [s]ubcontracts did not reflect a 'true meeting[] of the minds'"), *aff'd*, 913 F.3d 1162 (9th Cir. 2019).
[84] *See* Dissent at 21.
[85] *Id.* at 37 (emphasis omitted).
[86] *See Steelworkers*, 363 U.S. at 597. The dissent also suggests that, when an arbitrator improperly relies on external considerations, "a party may have a valid argument that the arbitrator exceeded their authority." Dissent at 36 & n.98. However, under the Authority's exceeded-authority precedent, we consider whether the award responds to the issues submitted to arbitration – not whether the arbitrator considered improper extrinsic evidence in interpreting the contract. *See U.S. Dep't of Transp., FAA*, 74 FLRA 433, 436 (2026) ("Arbitrators exceed their authority when they fail to resolve an issue submitted to arbitration, resolve an issue not submitted to arbitration, disregard specific limitations on their authority, or award relief to persons who are not encompassed by the grievance."). Thus, this question is properly addressed under a deferential but realistic essence standard; for the reasons described above, the question would be a fruitless task under the "even arguably construing or applying" standard.

ambiguous.[87] However, when an agreement is clear, arbitrators may not look to extrinsic evidence to alter the meaning of unambiguous contractual terms.[88] A term is ambiguous when it is reasonably susceptible to multiple interpretations, not simply when the parties later disagree on its meaning.[89] Moreover, as "[t]he aim of contract interpretation is to achieve . . . the parties' intent at the time of bargain,"[90] arbitrators "may not rely on outside sources not within the parties' contemplation at the time they drafted their agreement."[91]

The dissent argues that we erroneously rely on the decision by the U.S. Court of Appeals for the Eighth Circuit in *Boise Cascade Corp. v. Paper Allied-Industrial, Chemical & Energy Workers (PACE), Local 7-0159* (*Boise*),[92] for the proposition that arbitrators should not look to extrinsic evidence outside the parties' contemplation at the time of the agreement.[93] Specifically, the dissent claims that "the court in *Boise* did *not* hold that parties are strictly bound to what they envisioned at the time they bargained, even if their subsequent practices demonstrate a different understanding."[94] However, nothing in *Boise* suggests that arbitrators may rely on subsequent practices to interpret the parties' intent at the bargaining table; instead, the court in *Boise* found that the award failed to draw its essence because it "contravene[d]" the "parties' intent in drafting the [contract], as informed by their *past* practice."[95] The court cited cases for the principle that *past* practice, bargaining *history* of the parties, and the *existing* common law of the shop were appropriate for determining the parties' contemporaneous intent *at the bargaining table*.[96] Here, the parties' post-bargaining conduct – the Agency's treatment of TCA requests during the pandemic – was not "within the parties' contemplation at the time they drafted the[] agreement."[97] Thus, even if the term "SSA facility" were ambiguous – which it is not – *Boise*'s focus on contemporaneous evidence of intent at the bargaining table supports our conclusion that the Arbitrator improperly relied on testimony concerning the Agency's disputed

[87] *SSA, Off. of Hearings Operations*, 71 FLRA 687, 688-89 (2020) (Member DuBester dissenting on other grounds) (finding arbitrator's reliance on bargaining history was appropriate where term was ambiguous and bargaining history clarified term's contemporaneous intended meaning); *see also Champion Boxed Beef Co. v. Loc. No. 7 United Food & Com. Workers Int'l Union*, 24 F.3d 86, 88-89 (10th Cir. 1994) ("It is a well-recognized principle that, except where expressly limited by a labor agreement, an arbitrator may consider and rely upon extrinsic evidence, including negotiating and contractual history of the parties, evidence of past practices, and the common law of the shop, when interpreting *ambiguous* provisions." (emphasis added)).

[88] *U.S. DHS, U.S. CBP*, 71 FLRA 744, 745 (2020) (*CBP*) (Member Abbott concurring; Member DuBester dissenting) ("[T]he Authority has stated that arbitrators may not look beyond a collective-bargaining agreement – to extraneous considerations – to modify an agreement's clear and unambiguous terms." (citing *U.S. Dep't of the Army, 93rd Signal Brigade Fort Eustis, Va.*, 70 FLRA 733, 734 (2018) (Member DuBester dissenting); *SBA*, 70 FLRA at 528)); *see also CP Kelco U.S., Inc. v. Int'l Union of Operating Eng'rs*, 381 F. App'x 808, 814 (10th Cir. 2010) (*Kelco*) ("Although an arbitrator may resolve ambiguities that the arbitrator finds in the collective bargaining agreement by considering extrinsic evidence like past practices or the 'law of the shop,' the arbitrator cannot use such evidence to alter or rewrite an unambiguous provision in the collective bargaining agreement."); *Commonwealth Commc'ns, Inc. v. NLRB*, 312 F.3d 465, 468 (D.C. Cir. 2002) (*Commonwealth*) ("Resort to parol evidence is only appropriate when the written contract is ambiguous."); *Wash. Metro. Area Transit Auth. v. Geo. Univ.*, 347 F.3d 941, 946 (D.C. Cir. 2003) (*Wash. Metro.*) ("If the . . . language is unambiguous, the court need only apply the meaning of the words."); *Caring Habits, Inc. v. Fund for the Pub. Int., Inc.*, No. 11–cv–5768 (NSR)(LMS), 2014 WL 7146041, at *9 (S.D.N.Y. 2014) ("There is no legal basis to disregard unambiguous contract language in favor of the 'spirit of the agreement.'").

[89] *Ameren Servs. Co. v. Fed. Energy Regul. Comm'n*, 330 F.3d 494, 499 (D.C. Cir. 2003); *see also id.* ("We determine the plain meaning of a contract from the language used by the parties to express their agreement." (citation modified) (citing *Wash. Metro. Area Transit Auth. v. Mergentime Corp.*, 626 F.2d 959, 961 (D.C. Cir. 1980))).

[90] *Platinum Servs., Inc. v. United States*, 168 Fed. Cl. 130, 136 (Fed. Cl. 2023) (*Platinum Servs.*) (citing *Stockton E. Water Dist. v. United States*, 583 F.3d 1344, 1362 (Fed. Cir. 2009)).

[91] *Boise Cascade Corp. v. Paper Allied-Indus., Chem. & Energy Workers (PACE), Loc. 7-0159*, 309 F.3d 1075, 1083-84 (8th Cir. 2002) (*Boise*); *see also Commonwealth*, 312 F.3d at 468 ("In the absence of ambiguity in the collective[-]bargaining agreement . . . we have no cause to examine extrinsic evidence of the parties' intent." (quoting *Am. Postal Workers Union, AFL-CIO v. U.S. Postal Serv.*, 940 F.2d 704, 708 (D.C. Cir. 1991))).

[92] 309 F.3d at 1083-84.

[93] Dissent at 53-54.

[94] *Id.* at 54.

[95] *Boise*, 309 F.3d at 1086 (emphasis added).

[96] *Id.* at 1084 (citing *Alvey, Inc. v. Teamsters Loc. Union No. 688*, 132 F.3d 1209, 1213 (8th Cir. 1997); *NCR Corp., E&M–Wichita v. IAMAW, Dist. Lodge No. 70*, 906 F.2d 1499, 1501 (10th Cir. 1990)).

[97] *Id.* at 1083-84.

post-bargaining conduct when interpreting the parties' agreement.[98]

The Agency argues that the meaning of the term "SSA facility in a different geographic location" in Section 10, is "clear – it refers to an SSA building where the operations of the [Agency] are conducted."[99] Whereas, according to the Agency, Article 41 – which defines an alternate duty station as *either* "[a]n employee's residence . . . *or* [a]nother SSA facility"[100] – demonstrates that the parties did not consider "another SSA facility" to refer to an employee's residence.[101] Instead, the parties defined "alternate duty station" as a broad term that encompassed two distinct options: an employee's home or "another SSA facility."[102]

The dissent argues that "the fact that the . . . CBA does not define 'SSA facility' lends further support to the Arbitrator's conclusion" that "SSA facility" could be interpreted to include telework at an employee's residence.[103] However, by listing both "SSA facility" and "employee residence" as *separate options* for alternative duty stations,[104] the CBA does provide a limited definition of SSA facility: an SSA facility is an alternative duty station that is *not* an employee's residence. By enumerating these two options as discrete alternative duty station options, and, thus, defining "SSA facility" by its mutually exclusive relationship to an "employee residence," Article 41 contradicts the Arbitrator's interpretation of the two terms as synonymous.

The Agency contends that the MOU – which the parties agreed was a "temporary expansion" of Section 10[105] – further supports drawing a distinction between these two options for alternative duty stations.[106] The MOU provides that, "*[f]or the purposes of th[e] MOU*, TCA means assignment to the employee's alternate duty station."[107] Thus, the MOU specifically permits, by reference to the broader term defined in Article 41, assignment to "[a]n employee's residence . . . or [a]nother SSA facility."[108] This "temporary expansion"[109] – executed years after Section 10 was negotiated and expressly limited to the MOU – reflects the parties' intention that the MOU would provide employees a right *not* available under Section 10: a telework option for employees with dependent family members in their households who were at "high risk for COVID."[110] As noted above, the Union withdrew its argument that the grievant was entitled to a TCA under the MOU; the award solely concerns whether Section 10's reference to "another SSA facility" can refer to an employee's household.

Crucially, the Union conceded at arbitration, and does not dispute here, that "[w]hen the contract was negotiated, the parties were of a mind that [an SSA facility for Section 10 requests] was another physical [field] office."[111] Thus, the parties agree that their "intent at the time of bargain"[112] was to authorize TCAs to different Agency facilities – not to authorize telework. Although the parties later negotiated the MOU to provide a specific telework option for employees navigating the complicated

[98] The dissent disagrees with our position that arbitrators should not look to extrinsic evidence outside the parties' contemplation at the time of bargaining, arguing that "all but one" of the cases we cite – *Boise* – "did not involve reviews of arbitration awards – and . . . [a]s such, they are inapposite." Dissent at 53. However, because these cases express similar propositions to the federal court cases that *do* involve arbitral review of labor contracts, we find that these cases provide meaningful guidance on how arbitrators should interpret contracts in collective-bargaining context. *Compare Boise*, 309 F.3d at 1082 ("[W]here the plain text of the agreement is unmistakably clear, it is presumed to evince the parties' intent, and the arbitrator normally need look no further, but must give effect to the parties' agreement as written."); *Minneapolis-St. Paul Mailers Union, Loc. # 4 v. Nw. Publ'ns, Inc.*, 379 F.3d 502, 511 (8th Cir. 2004) ("An arbitrator's paramount obligation is to apply the parties' agreement in a way that gives effect to their intent."), *and CSX Transp., Inc. v. United Transp. Union*, 29 F.3d 931, 936 (4th Cir. 1994) ("Determining the intent of the parties is the essential inquiry . . . if the parties' written agreement is ambiguous or silent[,] . . . the arbitrator may use past practices and bargaining history to fill a gap." (citation modified)), *with Platinum Servs.*, 168 Fed. Cl. at 136 ("The aim of contract interpretation is to achieve, as best as possible . . . , the parties' intent at the time of the bargain."), *and Wash. Metro.*, 347 F.3d at 946 ("If the deed's language is unambiguous, the court need only apply the meaning of the words [but if] the language is ambiguous, the court must determine the parties' intent as to the scope of the easement in light of the circumstances surrounding its execution.").

[99] Exceptions at 6 (citation modified).
[100] Award at 4 (emphasis added).
[101] Exceptions at 7.
[102] *Id.*
[103] Dissent at 50.
[104] Award at 4.
[105] *Id.* at 2; *see also* MOU at 2.
[106] Exceptions at 7.
[107] MOU at 2 (emphasis added).
[108] CBA at 214.
[109] Award at 2.
[110] MOU at 2; *see also id.* ("For the duration of this MOU . . . [e]mployees with dependent family members located in their household deemed 'high[-]risk for COVID' by a medical provider may request, and normally be approved for, a TCA."); Award at 8 ("Paragraph 6 of the Reentry MOU was a temporary expansion of . . . Section 10."); MOU at 2 (referencing COVID-related "expansion[s]" of Section 10, but noting that "these expansions under TCA" were available only pursuant to, and for the duration of, the MOU).
[111] Award at 7; *see also* Opp'n at 10 (noting that Section 10 "was previously provided under the contract to be conducted from a 'brick and mortar' Agency location").
[112] *Platinum Servs.*, 168 Fed. Cl. at 136.

health concerns of the COVID-19 pandemic, that "temporary expansion"[113] applied *only to requests under the MOU* – the parties did not agree to modify Section 10.

Acknowledging that the parties intended "another SSA facility" in Section 10 to have the narrower meaning the Agency provided,[114] the Arbitrator nonetheless found "the Union's interpretation [wa]s sufficient to grant the grievance."[115] In reaching this conclusion, the Arbitrator noted that the Union "relie[d]" exclusively on one Agency representative's – disputed[116] – statements during the MOU negotiation that some offices had approved telework requests under Section 10 during the pandemic.[117] Thus, without finding the term ambiguous,[118] the Arbitrator relied on extrinsic evidence – statements an Agency representative allegedly made during bargaining over a *different* agreement negotiated *years after* the CBA's execution – to replace the parties' intended meaning for Section 10 with the Union's new, preferred interpretation.[119]

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[113] Award at 8.

[114] *Id.* at 7 (reciting Union's assertion that TCAs under Section 10 concerned only physical field offices "when the contract was negotiated" (citation modified)). Although the dissent asserts that federal courts have "sometimes found that parties' practices under an agreement have demonstrated that they have relaxed, modified, or even waived the agreement's literal language," Dissent at 38, other, more numerous federal courts have forbidden arbitrators from relying on past practices to alter unambiguous contractual wording. *See Int'l Union, United Auto., Aerospace & Agric. Implement Workers of Am. v. TRW Auto. U.S. LLC*, 766 F. App'x 186, 196 (6th Cir. 2019) (setting aside arbitration award that found parties' conduct modified the plain wording of the agreement); *Kelco*, 381 F. App'x at 814 ("Although an arbitrator may resolve ambiguities that the arbitrator finds in the collective[-]bargaining agreement by considering extrinsic evidence like past practices or the 'law of the shop,' the arbitrator cannot use such evidence to alter or rewrite an unambiguous provision in the collective[-]bargaining agreement."); *Beaird Indus., Inc. v. Loc. 2297, Int'l Union*, 404 F.3d 942, 946-47 (5th Cir. 2005) (finding "an arbitrator may look beyond the written CBA *if it is ambiguous or silent upon a precise question*," but not otherwise (emphasis added)); *Anheuser-Busch*, 280 F.3d at 1139 ("[W]hile [an arbitrator's] reliance on the law of the shop is appropriate to interpret *ambiguous* contract terms . . . the law of the shop cannot be relied upon to *modify clear and unambiguous provisions*." (second alteration in original) (quoting *Tootsie Roll Indus., Inc. v. Loc. Union No. 1, Bakery, Confectionery & Tobacco Workers' Int'l Union*, 832 F.2d 81, 84 (7th Cir. 1987))); *Excel Corp. v. United Food & Com. Workers Int'l Union, Loc. 431*, 102 F.3d 1464, 1468 (8th Cir. 1996) ("When the language of the contract is clear and unambiguous, . . . the arbitrator may not rely on parole evidence [to interpret it]."); *Keebler Co. v. Milk Drivers & Dairy Emps. Union, Loc. No. 471*, 80 F.3d 284, 288 (8th Cir. 1996) (setting aside arbitration award that relied on parties' later conduct to impose obligations that were contrary to the contract's unambiguous terms); *Chi. Web Printing Pressmen's Union No. 7 v. Chi. Newspaper Publishers' Ass'n*, 772 F.2d 384, 387 (7th Cir. 1985) ("To place past practice on a par with the parties' written agreement would 'create the anomaly that, while the parties expend great energy and time in negotiating the details of the [a]greement, they unknowingly and unintentionally commit themselves to unstated and perhaps more important matters which in the future may be found to have been past practice.'" (quoting Elkouri & Elkouri, *How Arbitration Works* 394 (3d ed. 1976))); *see also U.S. Postal Serv. v. Am. Postal Workers Union, AFL-CIO*, 204 F.3d 523, 530 (4th Cir. 2000) ("Parties to a collective[-]bargaining agreement get what they bargain for – no less and no more. If [a union wants employees to have an additional right], it [can] bargain[] for such a right.").

[115] Award at 9 (finding that the existing "interpretation of [the] contract [may] change for a period of time").

[116] *Id.* ("Management offered other officials to rebut the meaning of these statements.").

[117] Award at 9.

[118] *But see CBP*, 71 FLRA at 745 ("[T]he Authority has stated that arbitrators may not look beyond a collective-bargaining agreement – to extraneous considerations – to modify an agreement's clear and unambiguous terms."); *see also Wash. Metro.*, 347 F.3d at 946 ("If the . . . language is unambiguous, the court need only apply the meaning of the words."); *Commonwealth*, 312 F.3d at 468 ("In the absence of ambiguity in the collective[-]bargaining agreement . . . we have no cause to examine extrinsic evidence of the parties' intent.").

[119] Award at 9.

The dissent argues that this is a reasonable conclusion because, after negotiating Section 10, "the Agency subsequently interpreted 'SSA facilities' to include telework sites."[120] As noted above, we find the Arbitrator's consideration of bargaining history concerning a separate contract inappropriate evidence for interpreting the CBA. However, we also note that the Agency's decision to exercise its discretion to grant telework requests during a global emergency does not, as the dissent suggests, demonstrate that the parties' intended to modify the language of Section 10 through conduct.[121] In fact, the parties' decision to negotiate an MOU to address telework requests during the pandemic by creating a "temporary expansion"[122] of TCAs indicates a contrary intention: rather than continuing to grant telework requests unaddressed by Section 10, the parties needed a new agreement to cover pandemic telework. If the parties intended to amend Section 10 through conduct to permit telework requests for the purpose of caring for sick relatives, then the parties did not need to execute an MOU to accomplish that purpose.

Because the Arbitrator expressly rejected the parties' stated, intended meaning of unambiguous contract language, and effectively rewrote a provision of the CBA on the basis of improper, extrinsic evidence, the award does not represent a plausible interpretation of the CBA. Consequently, we grant the Agency's essence exception and set aside the award.[123]

IV. Decision

We grant the Agency's essence exception and set aside the award.

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[120] Dissent at 50 (emphasis omitted).

[121] *See Anheuser-Busch*, 280 F.3d at 1139-40 ("The existence of . . . 'industrial common law' does not necessarily mean, however, that the parties should be bound by their customs to the same extent as by explicitly negotiated provisions in their collective bargaining agreement. Unlike contractual agreements, past practices may not always be the result of joint determination[.] . . . In such cases there is no thought of obligation or commitment for the future. Such practices are merely present ways, not prescribed ways, of doing things." (alterations in original) (quoting *Chi. Web Printing Pressmen's Union, No. 7*, 772 F.2d at 387 (quoting Elkouri & Elkouri, *How Arbitration Works* 394 (3d ed. 1976)))).

[122] Award at 8.

[123] *See CBP*, 71 FLRA at 745 (granting essence exception where contractual provision was "unambiguous, and clearly d[id] not require the [a]gency to [take the requested action, and, thus,] the [a]rbitrator erred by considering extraneous evidence to find a meaning that is incompatible with the plain wording of that" provision); *SBA,* 70 FLRA at 528-29 (setting aside award on the ground that "arbitrators may not look beyond a collective-bargaining agreement – to extraneous considerations such as past practice – to modify an agreement's clear and unambiguous terms"). Because we set aside the award, we do not need to consider the Agency's exceeded-authority exception. *See U.S. Dep't of VA, John J. Pershing VA Med. Ctr., Poplar Bluff, Mo.*, 72 FLRA 662, 665 n.43 (2022) (Chairman DuBester concurring) (finding it unnecessary to address the remaining exceptions after setting aside the award).

Member Wagner, dissenting:

Section 7122(a) of the Federal Service Labor-Management Relations Statute (the Statute) provides that the Authority may find an arbitrator's award deficient "(1) because it is contrary to any law, rule, or regulation; or (2) *on other grounds similar to those applied by [f]ederal courts in private[-]sector labor-management relations*."[1] As relevant here, in the private sector, courts will set aside an arbitration award if it "fails to draw its essence" from a collective-bargaining agreement (CBA) – a standard that originated in U.S. Supreme Court opinions.[2] Today, the majority clarifies its views as to how the Authority should apply the essence standard when reviewing arbitration awards in the federal sector. I take this opportunity to do the same.

I. Supreme Court Precedent

As discussed below, the U.S. Courts of Appeals (circuit courts) have applied the essence standard in different ways – with some giving more deference to arbitrators than others. Given these differences – and to provide context for why I think that the more deferential circuit courts have the more legally sound approach – I believe that it is important to set out, in some detail, the Supreme Court's own words about the essence standard.

It began in 1960, when the Supreme Court issued three decisions that later came to be known as "the *Steelworkers Trilogy*."[3] In the first of those decisions – *United Steelworkers of America v. American Manufacturing Co.* (*American Manufacturing*)[4] – the Court stated that, in the context of CBAs:

> The function of the court is very limited when the parties have agreed to submit all questions of contract interpretation to the arbitrator. It is confined to ascertaining whether the party seeking arbitration is making a claim which on its face is governed by the contract.[5] Whether the moving party is right or wrong is a question of contract interpretation for the arbitrator. In these circumstances the moving party should not be deprived of the arbitrator's judgment, when it was his judgment and all that it connotes that was bargained for.
>
> The courts, therefore, have no business weighing the merits of the grievance, considering whether there is equity in a particular claim, or determining whether there is particular language in the written instrument which will support the claim . . . .
>
> . . . When the judiciary undertakes to determine the merits of a grievance under the guise of interpreting the grievance procedure of [CBAs], it usurps a function which under that regime is entrusted to the arbitration tribunal.[6]

In the second decision of the *Steelworkers Trilogy* – *United Steelworkers of America v. Warrior & Gulf Navigation Co.* (*Warrior & Gulf*)[7] – the Court elaborated on these principles, stating:

> [A]rbitration of labor disputes under [CBAs] is part and parcel of the collective[-]bargaining process itself.
>
> The [CBA] . . . is more than a contract; it is a generalized code to govern a myriad of cases which the draftsmen cannot wholly anticipate . . . . The [CBA] covers the whole employment relationship. It calls into being a new common law – the common law of a particular industry or of a particular plant. As one observer has put it: It is not unqualifiedly true that a [CBA] is simply a document by which the union and employees have imposed upon management limited, express restrictions of its otherwise absolute right to manage the enterprise, so that an employee's claim must fail unless he

[1] 5 U.S.C. § 7122(a) (emphasis added).
[2] *United Steelworkers of Am. v. Enter. Wheel & Car Corp.*, 363 U.S. 593, 597 (1960).
[3] *Int'l Union, United Auto., Aerospace & Agric. Implement Workers of Am., AFL-CIO, Loc. 283 v. Scofield*, 382 U.S. 205, 220 (1965).
[4] 363 U.S. 564 (1960).
[5] I note that under the Statute – unlike in the private sector – questions regarding whether the subject matter of a claim is arbitrable under a CBA go to the arbitrator. *U.S. Dep't of the Army, Army Materiel Command, Army Sec. Assistance Command, Redstone Arsenal, Ala.*, 73 FLRA 356, 359 (2022) (*Redstone*) (then-Member Kiko dissenting) ("[W]hile private-sector precedent *allows* parties to agree to use negotiated grievance procedures and grievance arbitration to resolve their contractual disputes . . . , the Statute effectively *requires* them to do so."); 5 U.S.C. § 7121(a)(1) (providing that CBAs negotiated under the Statute "shall provide procedures for the settlement of grievances, including questions of arbitrability").
[6] *American Manufacturing,* 363 U.S. at 567-69 (footnote omitted).
[7] 363 U.S. 574 (1960).

> can point to a specific contract provision upon which the claim is founded. There are too many people, too many problems, too many unforeseeable contingencies to make the words of the contract the exclusive source of rights and duties.[8]

Rather,

> A [CBA] is an effort to erect a system of industrial self-government . . . . The mature labor agreement may attempt to regulate all aspects of the complicated relationship, from the most crucial to the most minute over an extended period of time. Because of the compulsion to reach agreement and the breadth of the matters covered, as well as the need for a fairly concise and readable instrument, the product of negotiations (the written document) is, in the words of the late Dean Shulman, "a compilation of diverse provisions: some provide objective criteria almost automatically applicable; some provide more or less specific standards which require reason and judgment in their application; and some do little more than leave problems to future consideration with an expression of hope and good faith." . . . . Gaps may be left to be filled in by reference to the practices of the particular industry and of the various shops covered by the agreement. Many of the specific practices which underlie the agreement may be unknown, except in hazy form, even to the negotiators . . . . [T]he grievance machinery under a [CBA] is at the very heart of the system of industrial self-government. Arbitration is the means of solving the unforeseeable by molding a system of private law for all the problems which may arise and to provide for their solution in a way which will generally accord with the variant needs and desires of the parties. The processing of disputes through the grievance machinery is actually a vehicle by which meaning and content are given to the [CBA].
>
> Apart from matters that the parties specifically exclude, all of the questions on which the parties disagree must therefore come within the scope of the grievance and arbitration provisions of the [CBA]. The grievance procedure is, in other words, a part of the continuous collective[-]bargaining process. . . .
>
> The labor arbitrator performs functions which are not normal to the courts; the considerations which help him fashion judgments may indeed by foreign to the competence of courts.
>
> > A proper conception of the arbitrator's function is basic. He is not a public tribunal imposed upon the parties by superior authority which the parties are obliged to accept. He has no general charter to administer justice for a community which transcends the parties. He is rather part of a system of self-government created by and confined to the parties. . . . [9]
>
> *The labor arbitrator's source of law is not confined to the express provisions of the [CBA], as the industrial common law – the practices of the industry and the shop – is equally a part of the [CBA] although not expressed in it.* The labor arbitrator is usually chosen because of the parties' confidence in his knowledge of the common law of the shop and their trust in his personal judgment to bring to bear considerations which are not expressed in the [CBA] as criteria for judgment. . . .[10]

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[8] *Id.* at 578-79 (citation modified).
[9] *Id.* at 580-81 (quoting Shulman, *Reason, Cont., and L. in Lab. Rels.*, 68 Harv. L. Rev. 999, 1004-05, 1016).
[10] *Id.* at 582 (emphasis added).

In the third decision of the *Steelworkers Trilogy – United Steelworkers of America v. Enterprise Wheel* (*Enterprise Wheel*)[11] – the Court elaborated further:

> The refusal of courts to review the merits of an arbitration award is the proper approach to arbitration under [CBAs]. The federal policy of settling labor disputes by arbitration would be undermined if courts had the final say on the merits of the awards. As we stated in [*Warrior & Gulf]*, the arbitrators under these [CBAs] are indispensable agencies in a continuous collective[-]bargaining process. They sit to settle disputes at the plant level – disputes that require for their solution knowledge of the custom and practices of a particular factory or of a particular industry as reflected in particular agreements. . . .
>
> When an arbitrator is commissioned to interpret and apply the [CBA], he is to bring his informed judgment to bear in order to reach a fair solution of a problem. This is especially true when it comes to formulating remedies. There the need is for flexibility in meeting a wide variety of situations. The draftsmen may never have thought of what specific remedy should be awarded to meet a particular contingency. *Nevertheless, an arbitrator is confined to interpretation and application of the [CBA]; he does not sit to dispense his own brand of industrial justice. He may of course look for guidance from many sources, yet his award is legitimate only so long as it draws its essence from the [CBA]. When the arbitrator's words manifest an infidelity to this obligation, courts have no choice but to refuse enforcement of the award.*[12]

In *Enterprise Wheel*, the Court found that part of the arbitrator's award before it was ambiguous, in that it could

> be read as *based solely upon the arbitrator's view of the requirements of enacted legislation, which would mean that he exceeded the scope of his submission*. Or it [could] be read as embodying a construction of the agreement itself, perhaps with the arbitrator looking to "the law" for help in determining the sense of the agreement.[13]

However, the Court found that:

> A mere ambiguity in the opinion accompanying an award, which permits the inference that the arbitrator *may have* exceeded his authority, is not a reason for refusing to enforce the award. Arbitrators have no obligation . . . to give their reasons for an award. To require opinions free of ambiguity may lead arbitrators to play it safe by writing no supporting opinions. This would be undesirable[,] for a well-reasoned opinion tends to engender confidence in the integrity of the process and aids in clarifying the underlying agreement. . . .
>
> . . . [P]lenary review by a court of the merits [of an arbitrator's construction of the CBA] would make meaningless the provisions that the arbitrator's decision is final, for in reality it would almost never be final. This underlines the fundamental error which we have alluded to in [*American Manufacturing*]. As we there emphasized, the question of interpretation of the [CBA] is a question for the arbitrator. It is the arbitrator's construction which was bargained for; and *so far as the arbitrator's decision concerns construction of the contract, the courts have no business overruling him because their interpretation of the contract is different from his.*[14]

Over the years following the *Steelworkers Trilogy*, the Supreme Court has periodically expanded on the principles set forth in those early landmark decisions.

[11] 363 U.S. 593.
[12] *Id.* at 596-97 (emphasis added).
[13] *Id.* at 597-98 (emphasis added).
[14] *Id.* at 598-99 (emphasis added).

For example, in *Alexander v. Gardner-Denver Co.* (*Gardner-Denver*),[15] the Court stated:

> As the proctor of the bargain, the arbitrator's task is to effectuate the intent of the parties. His source of authority is the [CBA], and he must interpret and apply that agreement in accordance with the "industrial common law of the shop" and the various needs and desires of the parties. The arbitrator, however, has no general authority to invoke public laws that conflict with the bargain between the parties[.][16]

Quoting *Enterprise Wheel*'s statements about arbitrators "exceeding the scope of their submission" if they base their awards "solely upon the arbitrator's view of the requirements of enacted legislation," the Court held that "the arbitrator has authority to resolve only questions of contractual rights."[17]

Then, in the seminal decision *United Paperworkers International Union, AFL-CIO v. Misco, Inc.* (*Misco*),[18] the Supreme Court stated:

> [CBAs] commonly provide grievance procedures to settle disputes between union and employer with respect to the interpretation and application of the agreement and require binding arbitration for unsettled grievances. In such cases, . . . the Court made clear almost [thirty] years ago that the courts play only a limited role when asked to review the decision of an arbitrator. The courts are not authorized to reconsider the merits of an award even though the parties may allege that the award rests on errors of fact or on misinterpretation of the contract. . . . As long as the arbitrator's award "draws its essence from the [CBA]" and is not merely "his own brand of industrial justice," the award is legitimate. . . .
>
> . . . Because the parties have contracted to have disputes settled by an arbitrator chosen by them rather than by a judge, it is the arbitrator's view of the facts and of the meaning of the contract that they have agreed to accept. . . . To resolve disputes about the application of a [CBA], an arbitrator must find facts and a court may not reject those findings simply because it disagrees with them. *The same is true of the arbitrator's interpretation of the contract. The arbitrator may not ignore the plain language of the contract; but the parties having authorized the arbitrator to give meaning to the language of the agreement, a court should not reject an award on the ground that the arbitrator misread the contract*. . . . Furthermore, it must be remembered that grievance and arbitration procedures are part and parcel of the ongoing process of collective bargaining. It is through these processes that the supplementary rules of the plant are established. *As the Court has said, the arbitrator's award settling a dispute with respect to the interpretation or application of a labor agreement must draw its essence from the contract and cannot simply reflect the arbitrator's own notions of industrial justice. But as long as the arbitrator is even arguably construing or applying the contract and acting within the scope of his authority, that a court is convinced he committed serious error does not suffice to overturn his decision*.[19]

[15] 415 U.S. 36 (1974).
[16] *Id.* at 53.
[17] *Id.* at 53-54. I note that the Supreme Court has subsequently held that, in the private sector, "statutory claims may be the subject of an arbitration agreement," and emphasized that "the employees [in *Gardner-Denver*] had not agreed to arbitrate their statutory claims." *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26, 35 (1991). Similarly, under the Statute, grievances include complaints regarding "any claimed violation, misinterpretation, or misapplication of any law, rule, or regulation affecting conditions of employment." 5 U.S.C. § 7103(a)(9)(C)(ii). My discussion in this dissent is solely about situations where an arbitrator is tasked with interpreting and applying a CBA – not a law, rule, or regulation.
[18] 484 U.S. 29 (1987).
[19] *Id.* at 36-38 (quoting *Enterprise Wheel*, 363 U.S. at 596) (emphasis added).

The Court elaborated on these principles in *Major League Baseball Players Ass'n v. Garvey* (*Garvey*),[20] stating:

> Judicial review of a labor-arbitration decision pursuant to [a CBA] is very limited. Courts are not authorized to review the arbitrator's decision on the merits despite allegations that the decision rests on factual errors or misinterprets the parties' agreement. . . . It is only when the arbitrator strays from interpretation and application of the agreement and effectively "dispense[s] his own brand of industrial justice" that his decision may be unenforceable. When an arbitrator resolves disputes regarding the application of a [CBA], and no dishonesty is alleged, the arbitrator's "improvident, even silly, factfinding" does not provide a basis for a reviewing court to refuse to enforce the award.
>
> . . . .
>
> . . . [E]ven "serious error" on the arbitrator's part does not justify overturning his decision, where . . . he is construing a contract and acting within the scope of his authority.[21]

Later, in *Oxford Health Plans LLC v. Sutter* (*Oxford*)[22] – a case involving commercial arbitration under the Federal Arbitration Act (FAA), but also applying essence precedent from the labor context[23] – the Supreme Court distinguished situations where an arbitration award "lacked *any* contractual basis" from those where it lacked a "sufficient" one.[24] The Court noted that, in its previous decision in *Stolt-Nielsen S.A. v. AnimalFeeds International Corp.* (*Stolt-Nielsen*),[25]

> the arbitrators did not construe the parties' contract, and did not identify any agreement authorizing class proceedings. So in setting aside the arbitrators' decision, we found not that they had misinterpreted the contract, but that they had abandoned their interpretive role. Here, the arbitrator did construe the contract (focusing, per usual, on its language), and did find an agreement to permit class arbitration. So to overturn his decision, we would have to rely on a finding that he misapprehended the parties' intent. [Section] 10(a)(4) [of the FAA] bars that course: It permits courts to vacate an arbitral decision only when the arbitrator strayed from his delegated task of interpreting a contract, not when he performed that task poorly. *Stolt-Nielsen* and this case thus fall on opposite sides of the line that § 10(a)(4) draws to delimit judicial review of arbitral decisions.[26]

The Court rejected an argument that the arbitrator's contract interpretation was deficient, "because, and only because, it is not properly addressed to a court."[27] In this connection, the Court stated:

> Nothing we say in this opinion should be taken to reflect any agreement with the arbitrator's contract interpretation, or any quarrel with [the petitioner's] contrary reading. All we say is that convincing a court of an arbitrator's error – *even his grave error* – is not enough. So long as the arbitrator was "arguably construing" the contract – which this one was – a court may not correct his mistakes under § 10(a)(4). . . . As we have held before, we hold again: It is the arbitrator's construction [of the contract] which was bargained for; and so far as the arbitrator's decision concerns construction of the contract, the courts have no business overruling him because their interpretation of the contract is different from his. . . . *The arbitrator's construction holds, however good, bad, or ugly.*
>
> . . . .
>
> . . . The arbitrator did what the parties requested: He provided an interpretation of the contract resolving

[20] 532 U.S. 504 (2001).
[21] *Id.* at 509-10.
[22] 569 U.S. 564 (2013).
[23] Under the FAA, an arbitration award may be vacated "where the arbitrators exceeded their powers." 9 U.S.C. § 10(a)(4). Courts have applied "essence" standards in assessing that question. *See, e.g.*, *Oxford*, 569 U.S. at 569.
[24] *Oxford*, 569 U.S. at 571.
[25] 559 U.S. 662 (2010).
[26] *Oxford*, 569 U.S. at 571-72.
[27] *Id*. at 572.

> th[e] disputed issue. His interpretation went against [the petitioner], maybe mistakenly so. But still, [the petitioner] does not get to rerun the matter in a court. Under § 10(a)(4), *the question for a judge is not whether the arbitrator construed the parties' contract correctly, but whether he construed it at all.* Because he did, and therefore did not "exceed his powers," we cannot give [the petitioner] the relief it wants.[28]

II. Circuit-Court Precedent

The above-quoted and other statements from the Supreme Court support a conclusion that courts should give maximum deference to arbitrators' awards that are based on CBA interpretations.[29] While the various federal circuit courts have articulated and applied the essence test in different ways, the decisions of the D.C., Sixth, and Ninth Circuits are notable for being particularly and most closely aligned with the relevant Supreme Court precedents.

A. The D.C. Circuit

The D.C. Circuit has held that "[c]ourts do not review the substantive reasonableness of a labor arbitrator's contract interpretation,"[30] and that "the relevant question under the Supreme Court's precedents is not whether the arbitrator erred – or even seriously erred – in interpreting the contract,"[31] but whether the arbitrator was "even arguably construing or applying the contract."[32] In this regard, the D.C. Circuit has stated, "It does not matter whether we agree with [the arbitrator's] reasoning or judgment, so long as we find that his award *rested on his construction of* the CBA."[33]

The D.C. Circuit has also held that, "[i]n interpreting the agreement, the arbitrator may . . . go beyond its literal text,"[34] and may consider "[t]he parties' past practice, the 'industrial common law' . . . [and] the structure of the contract as a whole."[35] In this regard, the D.C. Circuit has stated that "it is enough to sustain the award that the arbitrator, permissibly drawing on the sources just mentioned as well as on the explicit provisions of the contract itself, 'purport[ed] to be interpreting the

[28] *Id.* at 572-73 (emphasis added).
[29] *See, e.g.*, *E. Associated Coal Corp. v. United Mine Workers of Am., Dist. 17*, 531 U.S. 57, 61-62 (2000) ("[B]oth employer and union have granted to the arbitrator the authority to interpret the meaning of their contract's language, including such words as 'just cause.' . . . [The petitioner] does not claim here that the arbitrator acted outside the scope of his contractually delegated authority. Hence we must treat the arbitrator's award as if it represented an agreement between [the petitioner] and the union as to the proper meaning of the contract's words 'just cause.' . . . For present purposes, the award is not distinguishable from the contractual agreement."); *AT&T Techs., Inc. v. Commc'n Workers of Am.*, 475 U.S. 643, 649-50 (1986) (finding that, one "principle derived from our prior cases is that, in deciding whether the parties have agreed to submit a particular grievance to arbitration, a court is not to rule on the potential merits of the underlying claims. Whether 'arguable' or not, indeed even if it appears to the court to be frivolous, the union's claim that the employer has violated the [CBA] is to be decided, not by the court asked to order arbitration, but as the parties have agreed, by the arbitrator."); *W.R. Grace & Co. v. Loc. Union 759, Int'l Union of the United Rubber, Cork, Linoleum & Plastic Workers of Am.*, 461 U.S. 757, 764 (1983) ("Under well[-]established standards for the review of labor[-]arbitration awards, a federal court may not overrule an arbitrator's decision simply because the court believes its own interpretation of the contract would be the better one. . . . When the parties include an arbitration clause in their [CBA], they choose to have disputes concerning constructions of the contract resolved by an arbitrator. Unless the arbitral decision does not 'dra[w] its essence from the [CBA],' . . . a court is bound to enforce the award and is not entitled to review the merits of the contract dispute. This remains so even when the basis for the arbitrator's decision may be ambiguous.") (quoting *Enterprise Wheel*, 363 U.S. at 597); *id.* at 765 n.8 ("It seems to us . . . that the [c]ompany's argument was that the court should interpret the legality clause itself, a privilege not permitted to federal courts in reviewing an arbitral award."); *Barrentine v. Ark.-Best Freight Sys., Inc.*, 450 U.S. 728, 744 (1981) ("[E]ven though a particular arbitrator may be competent to interpret and apply statutory law, he may not have the contractual authority to do so. An arbitrator's power is both derived from, and limited by, the [CBA]. . . . He 'has no general authority to invoke public laws that conflict with the bargain between the parties.' . . . His task is limited to construing the meaning of the [CBA] so as to effectuate the collective intent of the parties. Accordingly, '[i]f an arbitral decision is based "solely upon the arbitrator's view of the requirements of enacted legislation," rather than on an interpretation of the [CBA], the arbitrator has "exceeded the scope of the submission," and the award will not be enforced.'" (first quoting *Gardner-Denver*, 415 U.S. at 53; and then quoting *Enterprise Wheel*, 363 U.S. at 597)).
[30] *Nat'l Postal Mail Handlers Union v. Am. Postal Workers Union*, 589 F.3d 437, 441 (D.C. Cir. 2009) (*Mail Handlers*).
[31] *Id.*
[32] *Id.*
[33] *U.S. Postal Serv. v. Am. Postal Workers Union*, 553 F.3d 686, 695 (D.C. Cir. 2009) (emphasis added); *see also Madison Hotel v. Hotel & Rest. Emps., Loc. 25, AFL-CIO*, 144 F.3d 855, 859 (D.C. Cir. 1998) ("It is enough to sustain the award that the arbitrator, permissibly drawing on the sources just mentioned as well as on the explicit provisions of the contract itself, purported to be interpreting the contract in rendering his final decision." (citation modified)).
[34] *Wash. Hosp. Ctr. v. SEIU, Loc. 722, AFL-CIO*, 746 F.2d 1503, 1514 (D.C. Cir. 1984).
[35] *Madison Hotel*, 144 F.3d at 859.

contract' in rendering his final decision."[36] Relatedly, the court has stated that "[t]he fact that an arbitrator relies on a substantive background principle of law . . . – and does not follow the plain text of a contract – does not automatically mean the arbitrator has gone rogue."[37] Thus, an arbitrator may rely on external legal authorities, as long as it is done in the service of interpreting a CBA.[38]

However, the D.C. Circuit has also stressed that an arbitrator cannot "simply *ignore* the contract and 'dispense his own brand of industrial justice.'"[39] As such, in resolving a contractual dispute, an arbitrator cannot "render[ ]a judgment based on *external legal sources, wholly without regard to the terms of the parties' contract*."[40]

Summarizing its approach, the D.C. Circuit has stated:

> Professor Theodore St. Antoine, a preeminent labor[-]law scholar, has aptly explained the arbitrator's role in the context of collective bargaining and the deference accorded to his or her decisions in these terms:
>
> > Put most simply, the arbitrator is the parties' officially designated "reader" of the contract. He (or she) is their joint alter ego for the purpose of striking whatever supplementary bargain is necessary to handle the anticipated unanticipated omissions of the initial agreement. Thus, a "misinterpretation" or "gross mistake" by the arbitrator becomes a contradiction in terms. In the absence of fraud or an overreaching of authority on the part of the arbitrator, he is speaking for the parties, and his award is their contract . . . . In sum, the arbitrator's award should be treated as though it were a written stipulation by the parties setting forth their own definitive construction of the contract.
>
> . . . Professor St. Antoine's article has been widely recognized as an almost gospel statement on the meaning of the *Steelworkers Trilogy*.[41]

[36] *Id.* (quoting *Util. Workers Union of Am., Loc. 246, AFL-CIO v. NLRB*, 39 F.3d 1210, 1216 (D.C. Cir. 1994)); *see also Kanuth v. Prescott, Ball & Turben, Inc.*, 949 F.2d 1175, 1182 (D.C. Cir. 1991) (in FAA case, finding "there is nothing on the face of the [arbitration] panel's . . . award which suggests that the panel failed to construe the contract," and that "[t]o hold otherwise would require us to inquire into precisely how and why the panel derived the . . . award, an inquiry clearly outside of our limited scope of review").

[37] *Mail Handlers*, 589 F.3d at 443; *see also id.* ("Relying on traditional canons of construction or other settled interpretive principles – and not merely on the plain text of a contract – might be seriously misguided in certain cases, but such reliance cannot be dismissed as the arbitrator's dispensing 'his own brand of industrial justice.'").

[38] *U.S. Postal Serv. v. Nat'l Ass'n of Letter Carriers, AFL-CIO*, 789 F.2d 18, 20 (D.C. Cir. 1986) (*Postal Service*) ("Here, . . . the arbitrator did not rely directly on the Tennessee statute but rather on the language of the [CBA] requiring management decisions to be consistent with applicable law. . . . [T]he Tennessee statute is . . . an 'applicable law' and thus, . . . we hold that the real basis of the arbitrator's award lies in the [CBA], not in the local statute itself.").

[39] *Madison Hotel*, 144 F.3d at 859 (emphasis added) (quoting *Enterprise Wheel*, 363 U.S. at 597).

[40] *Bhd. of R.R. Signalmen v. Nat'l R.R. Passenger Corp.*, 117 F.4th 463, 467 (D.C. Cir. 2024) (*Signalmen*); *Madison Hotel*, 144 F.3d at 859; *Postal Service*, 789 F.2d at 20; *Am. Postal Workers Union, AFL-CIO v. U.S. Postal Serv.*, 789 F.2d 1, 8 (D.C. Cir. 1986) (*APWU*).

[41] *Cole v. Burns Int'l Sec. Servs.*, 105 F.3d 1465, 1474-75 (D.C. Cir. 1997) (quoting Theodore J. St. Antoine, *Jud. Rev. of Lab. Arb. Awards: A Second Look at Enterprise Wheel and its Progeny*, 75 Mich. L. Rev. 1137, 1140 (1977) (footnote omitted); *see also APWU*, 789 F.2d at 6-7 (adopting Prof. St. Antoine's analysis).

B. The Sixth Circuit

Like that of the D.C. Circuit, the approach taken by the Sixth Circuit – and especially the evolution of its case law – is illuminating. In 1986, in its decision in *Cement Divisions, National Gypsum Co., (Huron) v. United Steelworkers of America, AFL-CIO-CLC, Local 135* (*Cement Divisions*),[42] the court established the following, four-part essence test:

> An award fails to derive its essence from the [CBA] when [the award] (1) . . . conflicts with express terms of the [CBA] . . . , (2) . . . imposes additional requirements that are not expressly provided in the [CBA] . . . , (3) . . . is without rational support or cannot be rationally derived from the terms of the [CBA] . . . , and (4) . . . is based on general considerations of fairness and equity instead of the precise terms of the [CBA] . . . .[43]

However, in 2007, the Sixth Circuit – sitting *en banc* – overruled that test in *Michigan Family Resources, Inc. v. SEIU, Local 517M* (*Michigan Family Resources*).[44] The court stated:

> During the [twenty] years since *Cement Divisions*, the Supreme Court has refined the standard of review in this area in two cases, both of which suggest that *Cement Divisions* gives federal courts more latitude to review the merits of an arbitration award than the Supreme Court permits. In 1987, just one year after *Cement Divisions,* the Court considered "when a federal court may refuse to enforce an arbitration award rendered under a [CBA]" in [*Misco*] . . . . [, and later *Garvey*] reinforced the federal courts' modest role in this area.[45]

Specifically, the Sixth Circuit found that

> *Misco* and *Garvey* refine the *Steelworkers Trilogy* in two ways. One, they define the line between a permissible award (that "draws its essence from the contract") and an impermissible award (that "simply reflect[s] the arbitrator's own notion[ ]of industrial justice") based on whether "the arbitrator is even arguably construing or applying the contract and acting within the scope of his authority." . . . Two, *Misco* and *Garvey* show that the [Supreme] Court means what it is saying. In both cases, the Court held that once it was established that the arbitrator was construing or applying the contract (and acting within the scope of his authority), it made no difference whether the arbitrator had committed "serious," "improvident" or even "silly" errors in resolving the merits of the dispute. . . .[46]

Given these intervening developments in the case law, the Sixth Circuit overruled the *Cement Divisions* essence test[47] and held that, going forward, it would ask only:

> Did the arbitrator act "outside his authority" by resolving a dispute not committed to arbitration? Did the arbitrator commit fraud, have a conflict of interest or otherwise act dishonestly in issuing the award? And in resolving any legal or factual disputes in the case, was the arbitrator "arguably construing or applying the contract"? So long as the arbitrator does not offend any of these requirements, the request for judicial intervention should be resisted even though the arbitrator made "serious," "improvident" or "silly" errors in resolving the merits of the dispute.[48]

The Sixth Circuit then asked: "What role, if any, still remains for a court to consider the arbitrator's resolution of the merits in determining whether he was 'arguably construing' the contract?"[49] The court found that the Supreme Court's "repeated insistence that the federal courts must tolerate 'serious' arbitral errors

[42] 793 F.2d 759 (6th Cir. 1986).
[43] *Id.* at 766.
[44] 475 F.3d 746 (6th Cir. 2007).
[45] *Id.* at 751-52.
[46] *Id.* at 752-53 (citations omitted).
[47] Accordingly, the continued viability of Sixth Circuit opinions applying the *Cement Divisions* essence test is, at best, questionable.
[48] *Michigan Family Resources*, 475 F.3d at 753; *see also Bhd. of Locomotive Eng'rs & Trainmen v. United Transp. Union*, 700 F.3d 891, 901 (6th Cir. 2012) ("*Cement Divisions*'s refusal to recognize that the words of a CBA are not the exclusive source of rights and duties under it, . . . as well as its insistence that a court could vacate an arbitrator's award based solely on its disagreement with his reading of a contract, made it incompatible with Supreme Court authority.").
[49] *Michigan Family Resources*, 475 F.3d at 753.

suggests that judicial consideration of the merits of a dispute is the rare exception, not the rule."[50] "At the same time," the Sixth Circuit stated, "we cannot ignore the specter that an arbitration decision could be so 'ignor[ant]' of the contract's 'plain language,' . . . as to make implausible any contention that the arbitrator was construing the contract."[51] According to the Sixth Circuit, "[a]n interpretation of a contract . . . could be 'so untethered to' the terms of the agreement . . . that it would cast doubt on whether the arbitrator indeed was engaged in interpretation."[52] The Sixth Circuit said that "[s]uch an exception . . . is reserved for the rare case" because, "in most cases, it will suffice to enforce the award that the arbitrator appeared to be engaged in interpretation, and if there is doubt we will presume that the arbitrator was doing just that."[53]

The Sixth Circuit acknowledged,

> This view of the "arguably construing" inquiry no doubt will permit only the most egregious awards to be vacated. But it is a view that respects the parties' decision to hire their own judge to resolve their disputes, a view that respects the finality clause in most arbitration agreements, . . . and a view whose imperfections can be remedied by selecting better arbitrators.[54]

Applying these standards to the arbitration award before them, the Sixth Circuit found that the award had "all the hallmarks of interpretation" because the arbitrator "refer[red] to, quote[d] from and analyze[d] the pertinent provisions of the agreement, and at no point . . . [said] anything indicating that he was doing anything other than trying to reach a good-faith interpretation of the contract."[55] The court also stated, "Neither can it be said that the arbitrator's decision on the merits was so untethered from the agreement that it casts doubt on whether he was engaged in interpretation, as opposed to the implementation of his 'own brand of industrial justice.'"[56] The court found that the arbitrator

> made a legal error, perhaps even a serious legal error, but an error of interpretation nonetheless, which does not authorize us to vacate the award. It was the "arbitrator's construction" . . . that the parties "bargained for," and that delegation of decision-making authority must be respected even when time and further review show that the parties in the end have bargained for nothing more than error.[57]

The court concluded:

> An arbitrator does not exceed his authority every time he makes an interpretive error; he exceeds that authority only when the [CBA] does not commit the dispute to arbitration. Otherwise, every error would be grounds for judicial intervention, which is inconsistent with the Supreme Court's insistence that we must tolerate "serious," "improvident" and "silly" legal and factual arbitral errors and which is inconsistent with another provision of this [CBA] (and most [CBAs]): that the arbitrator "shall have full authority to render a decision which shall be final and binding upon both parties." No decision would be final, to say nothing of "speedy," . . . if the losing party needed only to allege an interpretive error to invoke the intervention of the federal courts. True, no arbitration agreement . . . explicitly gives the arbitrator jurisdiction to *misapprehend* the agreement, and neither for that matter does Title 28 of the United States Code[, which provides for judicial review of private-sector arbitration awards,] explicitly give appellate courts jurisdiction to affirm legal errors. But that is the import of having a finality clause in an arbitration agreement, the import of the Supreme Court's decisions in this area over the last [forty-seven] years and, so far as our jurisdiction is concerned, the import of asking fallible human beings to make final sense of imperfectly worded documents. In the last analysis, we have an arbitrator who plainly was "arguably construing" the contract and who perhaps just as plainly made a "serious error" in construing the contract, a confluence of circumstances that does not invest us with authority to "overturn

[50] *Id.*
[51] *Id.* (quoting *Misco*, 484 U.S. at 38).
[52] *Id.* (citation omitted).
[53] *Id.*
[54] *Id.* at 753-54.
[55] *Id.* at 754.
[56] *Id.*
[57] *Id.* at 756.

> [the] decision." . . . The award must be enforced.[58]

C. The Ninth Circuit

Like the D.C. Circuit and the Sixth Circuit, the Ninth Circuit has taken a highly deferential approach to reviewing arbitration awards. In *Hawaii Teamsters & Allied Workers Union, Local 996 v. United Parcel Service* (*Hawaii Teamsters*),[59] the Ninth Circuit stated that the narrow task for courts "is to determine whether the arbitrator interpreted the [CBA], *not* whether he did so correctly."[60] "The quality – that is[,] the degree of substantive validity – of his interpretation is, and always has been, beside the point."[61] In this connection, the Ninth Circuit has stated that, "since the labor arbitrator is designed to function in essence as the parties' surrogate, *he cannot 'misinterpret' a [CBA]*."[62] "In this sense, his award *is* their contract."[63] Thus, "'as long as the arbitrator is even arguably construing or applying the contract and acting within the scope of his authority,' his award must be upheld."[64] In other words, "the court's inquiry ends if the arbitrator made any interpretation or application of the agreement at all."[65]

Nevertheless, the Ninth Circuit has held that an arbitration award may be vacated if it is "completely irrational,"[66] which means that the award "*ignores* controlling terms of the parties' contract."[67] The court has stated that, to assess whether an award draws its essence from a CBA, "the court must ensure that the arbitrator looked to the words of the contract *and* to the conduct of the parties."[68] In this regard, "[a]n arbitrator is not . . . limited to the four corners of the CBA in interpreting its terms,"[69] but may interpret the CBA "in light of . . . indications of the parties' intentions" and find that the parties' conduct modified, or even *waived*, the CBA's text.[70] Thus, an award draws its essence from the CBA if it is derived from the agreement, viewed "in light of the [CBA's] language and context, as well as other indications of the parties' intentions."[71] An award will also stand "if it is based on the arbitrator's understanding of industry practices," because "[a]n arbitrator . . . may also consider the 'industrial common law' which is equally a part of the [CBA] although not expressed in it."[72]

As the Ninth Circuit stated in *Aspic Engineering & Construction Co. v. ECC Centcom Constructors LLC* (*Aspic*),[73] "[w]hat an arbitrator may not do, however, is *disregard* contract provisions to achieve a desired result."[74] For example, the Ninth Circuit has stated that an arbitrator may not merely "follow his own whims and biases."[75] Further, an award does not draw its essence from a CBA if it is "based on *external legal sources, wholly without regard to the terms of* the" CBA.[76] "Although an award [involving a contractual dispute] may not be based 'solely upon the arbitrator's view of the requirements of enacted legislation,' the arbitrator 'may of course look for guidance from many sources.'"[77]

The majority contends that the Ninth Circuit has "vacated awards that conflict with the plain wording of a [CBA]."[78] However, none of the cases that the majority cites supports that broad proposition. In *Aspic*,[79] the award was not deficient merely because it conflicted with the CBA's plain wording; it was deficient because the arbitrator "*disregarded* specific provisions of the [CBA's] plain text *in an effort to prevent what the [a]rbitrator*

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[58] *Id.*
[59] 241 F.3d 1177 (9th Cir. 2001).
[60] *Id.* at 1178; *see also Sw. Reg'l Council of Carpenters v. Drywall Dynamics, Inc.*, 823 F.3d 524, 531-32 (9th Cir. 2016) (*Carpenters*) (noting that the court's limited role is to determine whether the arbitrator interpreted the CBA when rendering its decision).
[61] *ASARCO LLC v. United Steel, Paper & Forestry, Rubber, Mfg., Energy, Allied Indus. & Serv. Workers Int'l Union, AFL-CIO, CLC*, 910 F.3d 485, 491 (9th Cir. 2018) (*ASARCO*) (citation modified); *see also Carpenters*, 823 F.3d at 532.
[62] *Kobold v. Good Samaritan Reg'l Med. Ctr.*, 832 F.3d 1024, 1047 (9th Cir. 2016) (emphasis added) (citation modified).
[63] *Id.* (citation modified); *see also Hawaii Teamsters*, 241 F.3d at 1181-82 ("Fundamental to an understanding of our task here is the fact that we are to view an award not as a potentially erroneous result of the arbitrator's contract interpretation, but rather as the contract itself.").
[64] *Carpenters*, 823 F.3d at 530 (quoting *Misco*, 484 U.S. at 38).
[65] *ASARCO*, 910 F.3d at 491 (citation modified).
[66] *HayDay Farms, Inc. v. FeeDx Holdings, Inc.*, 55 F.4th 1232, 1241 (9th Cir. 2022) (*HayDay*); *see also Bosack v. Soward*, 586 F.3d 1096, 1106 (9th Cir. 2009).
[67] *HayDay*, 55 F.4th at 1241 (emphasis added); *Bosack*, 586 F.3d at 1107; *Aspic Eng'g & Constr. Co. v. ECC Centcom Constructors LLC*, 913 F.3d 1162, 1167 (D.C. Cir. 2019) (*Aspic*).
[68] *Mich. Mut. Ins. Co. v. Unigard Sec. Ins. Co.*, 44 F.3d 826, 831 (9th Cir. 1995) (emphasis added) (citation modified).
[69] *Va. Mason Hosp. v. Wash. State Nurses Ass'n*, 511 F.3d 908, 915 (9th Cir. 2012); *Phx. Newspapers, Inc. v. Phx. Mailers Union Loc. 752, Int'l Bhd. of Teamsters*, 989 F.2d 1077, 1081 (9th Cir. 1993).
[70] *Aspic*, 913 F.3d at 1167; *Bosack*, 586 F.3d at 1106; *Metzler Contracting Co. LLC v. Stephens*, 479 F. App'x 783, 784 (9th Cir. 2012) (finding parties waived a provision of their contract through conduct).
[71] *Aspic*, 913 F.3d at 1166; *Bosack*, 586 F.3d at 1106.
[72] *SFIC Props., Inc. v. IAMAW, Dist. Lodge 94, Loc. Lodge 311*, 103 F.3d 923, 925 (9th Cir. 1996) (citation modified).
[73] 913 F.3d 1162.
[74] *Id.* at 1167 (emphasis added).
[75] *Hawaii Teamsters*, 241 F.3d at 1181 (citation modified).
[76] *IAMAW, AFL-CIO v. Alaska Airlines, Inc.*, 896 F.2d 555, 1990 WL 15464 at *3 (9th Cir. 1990) (emphasis added).
[77] *Id.*
[78] Majority at 9 n.61.
[79] 913 F.3d 1162.

deemed an unfair result."[80] The same was true in *Pacific Motor Trucking Co. v. Automotive Machinists Union*.[81] In *Frederick Meiswinkel, Inc. v. Laborer's Union Local 261, Laborers' International Union of North America, AFL-CIO*,[82] the award was deficient because "the arbitrator decided an issue which was the subject of a jurisdictional dispute," despite the fact that "the parties did not agree to submit jurisdictional disputes to arbitration."[83] In *United Food & Commercial Workers Union, Local 1119, AFL-CIO v. United Markets, Inc.*[84] – the continued viability of which *Hawaii Teamsters* later called into question[85] – the arbitrator "violated express contractual limits on his *authority*."[86] Similarly, *Federated Employees of Nevada, Inc. v. Teamsters Local No. 631*[87] involved a situation where the arbitrator "violat[ed] . . . an express and explicit restriction on the arbitrator's power."[88] Finally, in *Freightliner, LLC v. Teamsters Local 305*,[89] the arbitrator based the award on external law, rather than the CBA.[90] None of the cited cases undercuts the notion that the Ninth Circuit provides great deference to arbitrators' CBA interpretations.

D. Summary of Principles

The above "critical principles" set forth by the Supreme Court and the D.C., Sixth, and Ninth Circuits "can elude parties who sometimes quixotically seek to overturn labor[-]arbitration decisions," including before the Authority.[91] Nevertheless, these principles should "guide [the Authority's] approach to labor arbitration generally and to this case in particular."[92] Put simply, in conducting an essence analysis, the proper focus is on whether the arbitrator has done the job that he or she was charged with doing – not whether he or she did that job correctly.

In sum, while some other circuit courts may be less deferential in scrutinizing arbitral awards,[93] the approaches adopted by the D.C., Sixth, and Ninth Circuits are demonstrably more consistent with the relevant longstanding Supreme Court jurisprudence concerning the proper judicial posture in reviewing arbitrators' decisions.

That is not to say, however, that an award could never be deemed deficient on essence grounds. To quote the D.C. Circuit, "[a]n exceedingly narrow standard of review does not mean . . . that anything goes."[94] For example, the D.C. Circuit has found that, where an arbitration board "wholly disregarded the parties' contract and improperly based its arbitral award on external legal principles" that were "unmoored from the parties' contract"– without even "purport[ing] to be interpreting the contract," and without relying on those external principles "in the service of interpreting the contract" – the award "simply ignore[d] the contract" and, thus, was deficient.[95] Further, even under its highly deferential *Michigan Family Resources* test, the Sixth Circuit has found an award failed to draw its essence from a CBA where, for example, the arbitrator based the award on a CBA "that was [not] actually put before him," rather than on the CBA that was.[96] As for the Ninth Circuit, as noted above, it has found an award failed to draw its essence from a CBA in various circumstances, such as where an arbitrator "disregarded specific provisions of the plain text [of a CBA] in an effort to prevent what the [a]rbitrator deemed an unfair result."[97]

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[80] *Id.* at 1168 (emphasis added).
[81] 702 F.2d 176, 177 (9th Cir. 1983) ("The arbitrator disregarded a specific contract provision to correct what he perceived as an injustice.").
[82] 744 F.2d 1374 (9th Cir. 1984).
[83] *Id.* at 1377.
[84] 784 F.2d 1413 (9th Cir. 1986) (*United Markets*).
[85] *Hawaii Teamsters*, 241 F.3d at 1183 (noting that a party "attempt[ed] to rely on language in some of [the Ninth Circuit's] cases," including *United Markets*, that "suggest[ed] that a court may vacate an arbitral award upon a determination that it does not stem from a 'plausible' reading of the CBA," but then noted that "[r]ecent cases, however, have made clear that the 'plausibility' inquiry does not represent an independent avenue for a merits-based attack on an arbitral award").
[86] *United Markets*, 784 F.2d at 1415 (emphasis added).
[87] 600 F.2d 1263 (9th Cir. 1979).
[88] *Id.* at 1265.
[89] 336 F. Supp. 2d 1118 (D. Or. 2004).
[90] *Id.* at 1127-28.
[91] *Mail Handlers*, 589 F.3d at 441.
[92] *Id.*
[93] For example, in *Monongahela Valley Hospital, Inc. v. United Steel Paper & Forestry Rubber Mfg. Allied Indus. & Serv. Workers Int'l Union AFL-CIO CLC*, 946 F.3d 195 (3d Cir. 2019) (*Monongahela*) – cited by the majority, *see* Majority at 10 n.62 – the U.S. Court of Appeals for the Third Circuit (Third Circuit) set aside an arbitrator's award on essence grounds where the arbitrator "not only fail[ed] to heed the plain language of the agreement but also exceed[ed] his authority by injecting language into it that was already rejected in prior bargaining." 946 F.3d at 201. However, as discussed further below, the Third Circuit subsequently limited the holding of *Monongahela*.
[94] *Signalmen*, 117 F.4th at 467.
[95] *Id.* at 467-69.
[96] *Totes Isotoner Corp. v. Int'l Chem. Workers Union Council/UFCW Loc. 664C*, 532 F.3d 405, 418 (6th Cir. 2008).
[97] *Aspic*, 913 F.3d at 1168.

In those types of circumstances – where arbitrators are tasked with interpreting and applying a CBA, but base their awards *wholly* on considerations external to the CBA (as distinct from relying on non-textual considerations to give the CBA meaning)[98] – I believe it is appropriate to set aside the awards on essence grounds.[99]

At the same time, as noted above, the Supreme Court has stated that "[t]he labor arbitrator's source of law is not confined to the express provisions of the contract, as the industrial common law – the practices of the industry and the shop – is equally a part of the [CBA] although not expressed in it."[100] Consistent with this principle, and the other principles discussed above, circuit courts routinely have held that arbitrators may rely on certain extrinsic evidence – such as the parties' practices or course of dealings under their CBAs – to interpret and apply those CBAs.[101] Although some courts require that the CBA be silent or ambiguous on the matter at issue before the arbitrator may look to extrinsic evidence, other courts have held that arbitrators may rely on extrinsic evidence even in

[98] I disagree with the majority's assertion that this "distinction [is] unworkable," Majority at 13, given that – as discussed above – there are examples of circuit-court cases showing precisely how it works.

[99] I note that, in those circumstances, a party may have a valid argument that the arbitrator exceeded their authority by resolving an issue not submitted to them and/or failing to resolve an issue that was submitted to them. *See, e.g.*, *AFGE, Loc. 2338*, 74 FLRA 99, 102 (2024) (arbitrators exceed their authority when, among other things, they fail to resolve an issue submitted to arbitration or resolve an issue not submitted to arbitration). I also note that courts often speak of an essence deficiency in exceeded-authority terms. *See, e.g.*, *United Mexican States v. Lion Mex. Consol. L.P.*, 172 F.4th 1, 5 (D.C. Cir. 2026) (*Mexican States*) ("Only when arbitrators exceed the scope of their delegated authority by 'issuing an award that simply reflects [their] own notions of economic justice rather than drawing its essence from the contract' will the arbitrators' decision be set aside." (quoting *Oxford*, 569 U.S. at 569)); *Commc'ns Workers of Am., AFL-CIO v. Sw. Bell Tel. Co.*, 953 F.3d 822, 826 (5th Cir. 2020) ("To determine whether an arbitrator exceeded his authority, courts apply the 'essence test[.]'" (citing *Executone Info. Sys., Inc. v. Davis*, 26 F.3d 1314, 1325 (5th Cir. 1994))).

[100] *Warrior & Gulf*, 363 U.S. at 581-82; *see also Cruz-Martinez v. DHS*, 410 F.3d 1366, 1370 (Fed. Cir. 2005) ("Clear and long-standing practices of the parties – in other words, 'past practices' – can establish terms of the agreement that are as binding as any specific written provision."); *Air Line Pilots Ass'n, Int'l v. E. Air Lines, Inc.*, 869 F.2d 1518, 1522 (D.C. Cir. 1989) ("a [CBA] may include not only the terms of the written contract but also 'the common law of a particular industry or of a particular [workplace]'" and "[c]onstruing the 'common law of a particular [workplace]' is a question of contract interpretation within the expertise and authority of an arbitrator, not the court").

[101] *See, e.g.*, *Meridian Med. Techs., Inc. v. Int'l Bhd. of Teamsters, Chauffeurs, Warehousemen & Helpers of Am., Loc. Union No. 688*, 158 F.4th 924, 930 (8th Cir. 2025) (*Meridian*) (citing *Exide Techs. v. Int'l Bhd. of Elec. Workers, Loc. No. 700*, 964 F.3d 782, 787 (8th Cir. 2020)); *Barwin v. Vill. of Oak Park*, 54 F.4th 443, 460 (7th Cir. 2022); *Indep. Lab'y Emps.' Union, Inc. v. ExxonMobil Rsch. & Eng'g Co.*, 11 F.4th 210, 216 (3d Cir. 2021); *BLET GCA UP v. Union Pac. R.R. Co.*, 988 F.3d 409, 413-14 (7th Cir. 2021); *United Steel, Paper & Forestry, Rubber, Mfg., Energy, Allied Indus. & Serv. Workers Int'l Union, AFL-CIO-CLC, USW Loc. 200 v. Wise Alloys, LLC*, 807 F.3d 1258, 1274 (11th Cir. 2015); *Titan Tire Corp. of Bryan v. United Steelworkers of Am., Loc. 890L*, 656 F.3d 368, 374 (6th Cir. 2011); *Michigan Family Resources*, 475 F.3d at 755; *Appalachian Reg'l Healthcare, Inc. v. Ky. Nurses Ass'n*, No. 06-6470, 2007 WL 4269063 at *2 (6th Cir. Dec. 4, 2007) (per curiam); *Madison Hotel*, 144 F.3d at 859; *Jasper Cabinet Co. v. United Steelworkers of Am., AFL-CIO-CLC, Upholstery & Allied Div.*, 77 F.3d 1025, 1030 (7th Cir. 1996) (*Jasper*); *CSX Transp., Inc. v. United Transp. Union*, 29 F.3d 931, 936 (4th Cir. 1994); *Champion Boxed Beef Co. v. Loc. No. 7 United Food & Com. Workers Int'l Union*, 24 F.3d 86, 88-89 (10th Cir. 1994); *Fairview Southdale Hosp. v. Minn. Nurses Ass'n*, 943 F.2d 809, 812 (8th Cir. 1991); *Folger Coffee Co. v. Int'l Union, United Auto., Aerospace & Agric. Implement Workers of Am. – UAW, Loc. Union No. 1805*, 905 F.2d 108, 111 (5th Cir. 1990) (*Folger*); *Manville Forest Prods. Corp. v. United Paperworkers Int'l Union, AFL-CIO*, 831 F.2d 72, 76 (5th Cir. 1987); *Kaiser Found. Plan of the Nw. v. United Food & Com. Workers, Loc. 555*, No. 3:25-cv-00085-AN, 2026 WL 851184, at *6 (D. Or. Mar. 27, 2026); *AWP, Inc. v. IAMAW, AFL-CIO, Dist. Lodge 54/Loc. Lodge 1297*, No. 5:24-CV-1995, 2026 WL 120216, at *7 (N.D. Ohio Jan. 16, 2026); *Whiting-Turner Contracting Co. v. Laborers Dist. Council Pension & Disability Trust Fund No. 2*, No. 1:24-cv-02250-JRR, 2025 WL 2711557, at *9 (D. Md. Sept. 23, 2025); *Pocono Med. Ctr. v. JNESCO Dist. Council 1, Int'l Union of Operating Eng'rs, AFL-CIO*, No. 3:22-CV-1901, 2023 WL 4685985, at *17 (M.D. Pa. July 21, 2023); *Gradall Indus., Inc. v. IAMAW, Dist. Lodge 54*, No. 5:20-cv-01493, 2021 WL 243183, at *3 (N.D. Ohio Jan. 25, 2021); *Churchill Downs Racetrack, LLC v. Laborers' Int'l Union of N. Am., Loc. Union No. 576*, No. 3:19-cv-595-DJH-CHL, 2020 WL 6946574, at *4 (W.D. Ky. Nov. 25, 2020); *Chenega Infinity, LLC v. Transp. Worker Union of Am., AFL-CIO*, No. 6:17-cv-1937-Orl-DCI, 2018 WL 7284231, at *5 (M.D. Fla. Sept. 6, 2018); *Comprehensive Healthcare Mgmt. Servs., LLC v. SEIU Healthcare Pa., CTW, CLC*, No. 16-358, 2016 WL 6946849, at *4 (W.D. Pa. Nov. 10, 2016) (*Comprehensive Healthcare*), *report and recommendation adopted*, 2016 WL 7243622 (W.D. Pa. Dec. 14, 2016); *Graphic Packaging Int'l, Inc. v. Graphic Commc'n Conf. Int'l Bhd. of Teamsters, Dist. Council 1, Loc. 77-P*, No. 09-C-553, 2010 WL 3699981, at *3 (E.D. Wis. Sept. 13, 2010); *Loc. Union No. 1 Bakery, Confectionary, Tobacco Workers & Grain Millers Int'l Union, AFL-CIO-CLC v. Alpha Baking Co.*, No. 07 C 4166, 2008 WL 4067105, at *2 (N.D. Ill. Aug. 28, 2008) (*Local No. 1*); *Markin Tubing, LP v. Voelz*, No. 06-CV-00183C(F), 2006 WL 8455790, at *6 (W.D.N.Y. Sept. 11, 2006).

interpreting *unambiguous* contract terms.[102] Further, courts have often found that terms that *appear* to be unambiguous on their face do not actually have the meaning that they appear to have.[103] Additionally, some courts have held that an arbitrator may find a "latent" ambiguity[104] or an "implicit" condition in a CBA,[105] and, as noted above, have sometimes found that parties' practices under a CBA have demonstrated that they have relaxed, modified, or even waived the CBA's literal language.[106] In my view, these more deferential approaches more closely comport with the "essence analysis" that the Supreme Court has laid out.

The majority, citing purportedly less deferential court opinions, contends that "the Second, Third, Fourth, Fifth, Eighth, Ninth, and Eleventh Circuits . . . have held that an award is deficient if it conflicts with the express provisions of a [CBA]."[107] I have addressed the cited Ninth Circuit cases above. As with those cases, most of the other circuit-court opinions that the majority cites do not stand for the broad proposition that arbitration awards are deficient solely because they appear to conflict with a CBA's plain wording.

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[102] *See, e.g.*, *Warrior Met Coal Mining, LLC v. United Mine Workers of Am.*, 28 F.4th 1073, 1081-82 (11th Cir. 2022) (*Warrior*) ("Even if we were to assume . . . that the arbitrator's award is contrary to the express language of the provision . . . , the arbitrator is entitled to 'give meaning to express terms' of an agreement even when the express term 'is not facially ambiguous' by relying on 'evidence of the parties' intent' like 'past practices'") (quoting *Wiregrass Metal Trades Council AFL-CIO v. Shaw Env't & Infrastructure, Inc.*, 837 F.3d 1083, 1088-90 (11th Cir. 2016) (*Wiregrass*)); *Folger*, 905 F.2d at 111 (stating that "some courts have confirmed awards where the arbitrators had relied on past practice, even though past practice contradicted written contract provisions") (citing *Loveless v. E. Air Lines*, 681 F.2d 1272 (11th Cir. 1982) (*Loveless*)); *GCA Servs. Grp., Inc. v. AFSCME Fla. Council 79*, No. 3:19-cv-464-J-32JBT, 2020 WL 13119043, at *5 (M.D. Fla. Oct. 9, 2020) (finding that "the arbitrator was not precluded from considering extrinsic evidence even if the language of the agreements is unambiguous on its face").

[103] *Warrior*, 28 F.4th at 1081 ("Because of the deference we give to the arbitrator's interpretation of an agreement, we can find that an agreement is 'open to interpretation' even if we would not conclude that the language was open to interpretation in other contexts."); *Comcast of N.J., LLC v. IBEW Loc. 827*, No. 12-926 (MAS) (DEA), 2013 WL 396243, at *6 (D. N.J. Jan. 31, 2013) (upholding arbitration award finding that, based on the structure of the parties' agreement, the word "replace" "under no circumstances means literally 'replace'"); *N.Y.C. Dist. Council of Carpenters Pension Fund v. Metro Furniture Servs., Inc.*, No. 09 Civ. 3206(LAK), 2009 WL 2032098, at *2 (S.D.N.Y. June 30, 2009) (in rejecting essence claim, court noted that "[t]he [agreement] may use the term 'liquidated damages' in a sense different than the conventional contract[-]law definition").

[104] *See, e.g.*, *Int'l Bhd. of Elec. Workers, Loc. Union No. 199 v. United Tel. Co. of Fla.*, 738 F.2d 1564, 1568-69 (11th Cir. 1984) (reaffirming that an arbitrator may discern a latent ambiguity in a contract based upon the arbitrator's examination of past practices or bargaining history even though no ambiguity appears on the face of the contract); *Arlen House Condo. Ass'n v. Hotel Emps. & Rest. Emps. Int'l Union Loc. 355*, 2008 WL 4844109, at *5 (S.D. Fla. Nov. 10, 2008) (finding that, although the contract language was "relatively clear, both [a]rbitrators found a latent ambiguity in the contract based upon their examination of the parties' dealings with each other," and "[b]ecause of the latent ambiguity, it was within the [a]rbitrators' authority to include extrinsic evidence to determine the intent of the parties" (citing *Loveless*, 681 F.2d at 1278); *Specialized Distrib. Mgmt., Inc. v. Bhd. of Teamsters, Auto Truck Drivers, Line Drivers, Car Haulers & Helpers, Loc. # 70 of Alameda Cnty., IBT, AFL-CIO*, 1995 WL 688662, at *6 (N.D. Cal. Nov. 13, 1995) (the arbitrator "implicitly found that the language of the CBA was not 'plain' but rather contained a latent ambiguity . . . demonstrated by the practices of the industry in the area and the interpretation of similar language in the industry in the area," and the court found it was "not free to disregard the arbitrator's view on this issue of interpretation").

[105] *See, e.g.*, *Wiregrass*, 837 F.3d at 1090 (stating that if the arbitrator "engaged in a textual analysis of the relevant terms" or "attempted to give meaning to express terms – or discover implied terms – based on extrinsic evidence of the parties' intent, such as their bargaining history or past practices," then "that will ordinarily mean [that the arbitrator] engaged in interpretation, not modification"); *Jasper*, 77 F.3d at 1029 (upholding arbitrator's finding of an "implicit condition" in the agreement because that was "contract interpretation – plain and simple"); *Ethyl Corp. v. United Steelworkers of Am., AFL-CIO-CLC*, 768 F.2d 180, 186 (7th Cir. 1985) (holding that "contracts have implied as well as express terms, and the authority of an arbitrator to interpret a collective[-]bargaining contract includes the power to discover such terms").

[106] *See, e.g.*, *Aspic*, 913 F.3d at 1167 ("An arbitrator may interpret the contract 'in light of . . . indications of the parties' intentions' and find that the parties' conduct modified the text of a contract.") (quoting *Bosack*, 586 F.3d at 1106)); *NF&M Corp. v. United Steelworkers of Am.*, 524 F.2d 756, 759 (3d Cir. 1975) ("If the arbitrator's award has deviated from the plain meaning of a labor[-]contract provision, it must find support in the contract itself *or in prior practices demonstrating relaxation of the literal language.*") (emphasis added)); *Metzler Contracting Co. LLC v. Stephens*, 479 F. App'x 783, 784 (9th Cir. 2012) (finding parties waived a provision of their contract through conduct).

[107] Majority at 9.

In *Saint Louis Theatrical Co. v. Saint Louis Theatrical Brotherhood Local 6 of the International Alliance of Theatrical Stage Employees & Moving Picture Operators of the United States & Canada*,[108] the Eighth Circuit found an award deficient because "the arbitrator decided issues not properly before him."[109] And, in *International Union, United Mine Workers of America v. Marrowbone Development Co.*,[110] the CBA at issue expressly required the arbitrator to conduct a hearing unless the parties agreed that there was no question of fact involved in the grievance.[111] Despite the parties affirmatively acknowledging the existence of factual disputes, the arbitrator did not conduct a hearing.[112] The Fourth Circuit found that, by doing so, "the arbitrator . . . exceeded his authority under" the CBA.[113] Neither of those decisions supports a conclusion that an award automatically fails to draw its essence from a CBA merely because the award appears to conflict with the CBA's plain wording.

Additionally, as noted above,[114] in *Monongahela Valley Hospital, Inc. v. United Steel Paper & Forestry Rubber Manufacturing Allied Industrial & Service Workers International Union AFL-CIO CLC* (*Monongahela*),[115] the Third Circuit set aside an arbitrator's award on essence grounds where the arbitrator "not only fail[ed] to heed the plain language of the agreement but also exceed[ed] his authority by injecting language into it that was already rejected in prior bargaining."[116] However, the Third Circuit subsequently held in *Independent Laboratory Employees' Union, Inc. v. ExxonMobil Research & Engineering Co.* (*ILEU*),[117] that "where an arbitrator's award deviates from the plain meaning of a provision it can be upheld if it can find prior practices demonstrating relaxation of the literal language."[118] Applying this principle in *ILEU*, the Third Circuit stated that the arbitrator's award at issue could "be distinguished from the award in *Monongahela* . . . because [the *ILEU* arbitrator permissibly] rested her decision largely upon the 'law of the shop.'"[119]

Similarly, with regard to the Eleventh Circuit's opinion in *Bruno's, Inc. v. United Food & Commercial Workers International Union, Local 1657* (*Bruno's*),[120] and the Second Circuit's opinion in *Leed Architectural Products, Inc. v. United Steelworkers of America, Local 6674* (*Leed*),[121] subsequent court opinions – in *Radio & Television Broadcasting Engineers Union, Local 1212 v. WPIX, Inc.* (*WPIX*),[122] and *Beth Israel Medical Center v. Local 814, International Brotherhood of Teamsters* (*Beth Israel*),[123] respectively – characterized *Bruno's* and *Leed* as involving situations where arbitrators had impermissibly modified the CBAs at issue.[124] By contrast, in *WPIX* and *Beth Israel*, the courts upheld awards that deviated from the CBAs at issue because the arbitrators had permissibly found that *the parties themselves* had modified the CBAs through their conduct.[125]

As for the Seventh Circuit's opinion in *Anheuser-Busch, Inc. v. Beer, Soft Drink, Water, Fruit Juice, Carbonic Gas, Liquor Sales Drivers, Helpers, Inside Workers, Bottlers, Warehousemen, School, Sightseeing, Charter Bus Drivers, General Promotions Employees, & Employees of Affiliated Industries, Maltster, Laborers, Syrup, Yeast, Food, Vinegar, Brewery, Recycling & Miscellaneous Workers of Chicago & Vicinity, Illinois, Local Union No. 744* (*Anheuser-Busch*),[126] the Seventh Circuit subsequently clarified the limits of that decision in *International Union of Operating Engineers, Local 139, AFL-CIO v. J.H. Findorff & Son, Inc.* (*IUOE*).[127] In *IUOE*, the Seventh Circuit reversed a district-court opinion that had vacated an arbitrator's award on the basis that the award conflicted with the CBA's plain wording. The Seventh Circuit noted that *Anheuser-Busch* "was the only decision on which the district court relied for the proposition that, if the court deems contractual language 'plain,' the arbitrator is forbidden to select any other interpretation."[128] The Seventh Circuit noted that "[t]he [district-court] judge [in *IUOE*] quoted at length from what he styled the *majority* opinion in *Anheuser–Busch,* but what he should have called the *lead* opinion – for the three members of the panel wrote separately, and none spoke for

[108] 715 F.2d 405 (8th Cir. 1983).
[109] *Id.* at 409.
[110] 232 F.3d 383 (4th Cir. 2000).
[111] *Id.* at 389.
[112] *Id.*
[113] *Id.*
[114] *See* note 92, above.
[115] 946 F.3d 195.
[116] *Id.* at 201.
[117] 11 F.4th 210.
[118] *Id.* at 217 (citation modified).
[119] *Id.* at 218.
[120] 858 F.2d 1529 (11th Cir. 1988).
[121] 916 F.2d 63 (2d Cir. 1990) (cited at Majority at 11 n.65).
[122] 716 F. Supp. 777 (S.D.N.Y.), *aff'd sub nom. Radio & Television v. WPIX, Inc.*, 895 F.2d 1411 (2d Cir. 1989).
[123] No. 99 CIV. 9828 (JSM), 2000 WL 1364367 (S.D.N.Y. Sept. 20, 2000).
[124] *WPIX*, 716 F. Supp. at 782 (stating that the arbitrator in *Bruno's* had "unilaterally modif[ied]" the CBA); *Beth Israel*, 2000 WL 1364367, at *4 (stating that the arbitrator in *Leed* had "altered the contract").
[125] *WPIX*, 716 F. Supp. at 782 (stating that "the parties themselves, by their conduct, modified the agreement"); *Beth Israel*, 2000 WL 1364367, at *4 (stating that "the arbitrator found that the parties themselves modified the agreement").
[126] 280 F.3d 1133.
[127] 393 F.3d 742 (7th Cir. 2004).
[128] *Id.* at 746-47.

a majority."[129] According to the court, "[l]anguage in the lead opinion [in *Anheuser-Busch*], taken out of context, could be understood to support the view that judges may override arbitrators' decisions by calling the language 'clear' or 'plain.'"[130] But the Seventh Circuit found that "*Anheuser-Busch* . . . does not commit this court to the proposition that a judicial declaration of 'plain meaning' displaces an arbitrator's interpretation," noting that "[a]ny such rule would be incompatible with *Garvey* and its predecessors, as well as . . . dozens of other decisions in this circuit."[131]

Finally, as one court noted, three of the opinions on which the majority relies – *Anheuser-Busch*, *Leed*, and *Delta Queen Steamboat Co. v. District 2 Marine Engineers Beneficial Ass'n*[132] – "all involved arbitral awards in which the arbitrator's decision contradicted the plain and *undisputed* meaning of the agreements."[133]

Thus, even most of the purportedly less deferential court decisions cited by the majority do not hold that an arbitration award is deficient merely because it appears to conflict with a CBA's plain wording. In fact, as noted above, some of the circuit courts referenced by the majority have held to the contrary.[134]

III. Applicability of Private-Sector Essence Precedent to the Federal Sector

It is not clear to me whether the majority believes that the principles that apply to court review of arbitration awards in the private sector also apply to Authority review of arbitration awards involving CBA matters. On the one hand, the majority reaffirms the Authority's existing essence tests, stressing that they are rooted in private-sector court opinions.[135] On the other hand, the majority: (1) appears to criticize the Authority's prior adoption of the "arguably construing or applying" essence standard,[136] despite the facts that the Supreme Court articulated that standard[137] and that every single circuit court has applied it (albeit some more deferentially than others) in the private sector;[138] (2) states that it "return[s] to . . . [the] reasonable deference to arbitrators' contractual interpretations"[139] that the Authority set forth in *U.S. DOJ, Federal BOP, Federal Correctional Institution, Miami, Florida* (*Miami*), where the Authority stated that the "foundational principles of collective bargaining that the Supreme Court outlined for the private sector in the *Steelworkers* cases does not extend very far into the collective-bargaining framework that Congress established for the [f]ederal [g]overnment";[140] and (3) asserts that the Authority's existing essence tests "appropriately balance the rights of unions and agencies within the *unique framework of federal-sector collective bargaining*, and ensure that the Statute is 'interpreted in a matter consistent with the requirements of an effective and efficient Government.'"[141]

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[129] *Id.* at 747 (emphasis added).
[130] *Id.*
[131] *Id.*; *see also Ameritech Corp. v. Int'l Bhd. of Elec. Workers, Loc. 21*, No. 04 C 6149, 2005 WL 1272138, at *3 (N.D. Ill. May 5, 2005) (citing *IUOE*, the court stated that, "in a more recent case the Seventh Circuit has declined to extend the holding of *Anheuser-Busch* . . . to the broad extent that is employed by" the party citing it, and that the Seventh Circuit in *IUOE* had "made clear the narrow scope of judicial review of an arbitrator's ruling").
[132] 889 F.2d 599, 604 (5th Cir. 1989).
[133] *Sequoias-S.F. v. SEIU, United Healthcare Workers-W.*, No. C09-05279 WHA, 2010 WL 1135793, at *6 (N.D. Cal. Mar. 22, 2010), *aff'd*, 447 F. App'x 803 (9th Cir. 2011).
[134] *See also Warrior*, 28 F.4th at 1081-82 (Eleventh Circuit held that, "[e]ven if we were to assume . . . that the arbitrator's award is contrary to the express language of the provision," the award was not deficient).
[135] Majority at 7-10.
[136] *Id.* at 8, 12.
[137] *Misco*, 484 U.S. at 38.
[138] *See, e.g.*, *N.Y. Presbyterian Hosp. v. N.Y. State Nurses Ass'n*, 180 F.4th 482, 487 (2d Cir. 2026); *Mexican States*, 172 F.4th at 5; *Meridian*, 158 F.4th at 929; *U.S. Trinity Energy Servs., L.L.C. v. Se. Directional Drilling, L.L.C.*, 135 F.4th 303, 308 (5th Cir. 2025); *Brent Elec. Co., Inc. v. Int'l Bhd. of Elec. Workers Loc. Union No. 584*, 110 F.4th 1196, 1225 (10th Cir. 2024); *Hidroelectrica Santa Rita S.A. v. Corporacion AIC, SA*, 119 F.4th 920, 925 (11th Cir. 2024); *Triple Canopy, Inc. v. United Gov't Sec. Officers of Am., Loc. 206 Union*, No. 23-1538, 2024 WL 305635, at *4 (6th Cir. Jan. 26, 2024); *Astronics Elec. Sys. Corp. v. MAGicALL, Inc.*, No. 22-35645, 2023 WL 3451682, at *1 (9th Cir. May 15, 2023); *Constellium Rolled Prods. Ravenswood, LLC v. United Steel, Paper & Forestry, Rubber, Mfg., Energy, Allied Indus. & Serv. Workers Int'l Union AFL-CIO/CLC*, 18 F.4th 736, 742 (4th Cir. 2021); *Union Internacional UAW, Loc. 2415 v. Bacardi Corp.*, 8 F.4th 44, 51 (1st Cir. 2021); *Bayer CropScience AG v. Dow Agrosciences LLC*, 680 F. App'x 985, 993 (Fed. Cir. 2017); *Johnson Controls, Inc. v. Edman Controls, Inc.*, 712 F.3d 1021, 1025 (7th Cir. 2013); *Akers Nat. Roll Co. v. United Steel, Paper & Forestry, Rubber, Mfg., Energy, Allied Indus. & Serv. Workers Int'l Union*, 712 F.3d 155, 160 (3d Cir. 2013).
[139] Majority at 12.
[140] 71 FLRA 660, 664 (2020) (Member Abbott concurring; Member DuBester dissenting).
[141] Majority at 12 (emphasis added) (citing 5 U.S.C. § 7101(b)).

However, as noted above, § 7122(a) of the Statute provides that the Authority may find an arbitrator's award deficient "(1) because it is contrary to any law, rule, or regulation; or (2) *on other grounds similar to those applied by [f]ederal courts in private[-]sector labor-management relations*."[142] In *Devine v. White*,[143] the D.C. Circuit acknowledged that there are "several differences" between the federal sector and the private sector,[144] but ultimately found that those differences do not warrant applying a less deferential review standard to arbitrators' CBA-based awards in the federal sector than is applied in the private sector.[145] The court concluded:

> As in the private sector, . . . "[c]ourts should be most reluctant to override the earlier commitment of both parties to select [a] particular arbitrator as the articulator of their contractual obligations in order to . . . relieve one party from the unwelcome result of that purposeful choice." And, like their private[-]sector counterparts, federal agency employers and employees can return "an occasional aberrant arbitral decision . . . to the same process of negotiation by which the parties created the arbitrator's authority in the first place." In these important senses, arbitration is as much a part of the system of self-government in the federal service as in the private sector.
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> . . . .
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> . . . In the federal sector, however, arbitration is intended not only to ensure compliance with [CBAs], but also "to review or police compliance with controlling laws, rules, and regulations by federal agency employers and employees alike." When a grievance implicates the second of these roles, it is not clear that all of the assumptions underlying *Enterprise Wheel's* "essence" test – particularly the notion that arbitrators are better versed in the "law of the shop" and better able to construe [CBAs] than are judges – continue to justify deference to the arbitrator's decision.
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> *This argument, of course, provides no support for expanded judicial review when an arbitrator has performed the more traditional role of contract interpretation.*[146]

The court concluded that "the possible grounds for treating arbitral decisions in the federal sector less deferentially than private[-]sector decisions cannot withstand careful scrutiny,"[147] and that "the policies favoring extremely limited judicial review of arbitrators' decisions are fully applicable in the federal sector."[148]

Then, in *Griffith v. FLRA*,[149] the D.C. Circuit – citing § 7122(a) of the Statute – stated:

> Congress specified that the [Authority] was to review arbitrators' decisions on grounds "similar to those applied by [f]ederal courts in private sector labor-management relations." . . . . *Congress thus appears to have intended that in the area of arbitral awards the Authority would play in federal labor relations the role assigned to district courts in private[-]sector labor law.* The conference report on the Civil Service Reform Act[, of which the Statute is a part,] confirms this view, stating that, "The Authority will only be authorized to review the award of the arbitrator on very narrow grounds similar to the scope of judicial review of an arbitrator's award in the private sector."
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> . . . .

[142] 5 U.S.C. § 7122(a) (emphasis added). I acknowledge that § 7122(a) uses the term "similar," rather than "the same as." That is hardly surprising, given that, even prior to the Statute's enactment, courts did not all use the same exact verbiage in articulating the essence standard. *Swinerton & Walberg Co. v. United Ass'n of Journeymen & Apprentices of Plumbing & Pipefitting Indus. of the U.S. & Can. Loc. # 3*, 806 F. Supp. 913, 916 (D. Colo. 1992) (surveying pre-Statute court opinions and finding that "[c]ourts have used a number of *similar tests* to determine whether an award draws from the 'essence' of the agreement and thus is within the scope of the arbitrator's authority") (emphasis added)).

[143] 697 F.2d 421 (D.C. Cir. 1983).

[144] *Id.* at 437.

[145] *Id.* at 439.

[146] *Id.* at 438 (emphasis added). Consistent with the D.C. Circuit's holding on this point, I disagree with the majority's implication that the "Byzantine rules that govern federal personnel operations" warrant giving less deference to arbitrators in cases involving *CBA interpretations*, like the one before us here. Majority at 12 n.73.

[147] 697 F.2d at 439.

[148] *Id.* at 440.

[149] 842 F.2d 487 (D.C. Cir. 1988).

> Our reading of the Act comports also with what we believe to have been a major object of the legislation: extending the benefits of arbitration in labor relations from the private to the public sector. In *The Steelworkers Trilogy,* the Supreme Court exalted the role of the arbitrator in labor-management disputes and set out a general policy of judicial deference to the decisions of arbitrators. . . . Moreover, the policies underlying judicial deference to arbitral decisions are as important for public as for private employment.[150]

Consistent with these principles, the D.C. Circuit – again, citing § 7122(a) of the Statute, as well as *Enterprise Wheel*[151] – subsequently stated that the Authority "must apply a very deferential standard of review on most issues, . . . akin to that which governs judicial review of arbitration in the private sector."[152]

Then, in *National Weather Service Employees Organization v. FLRA* (*NWSEO*),[153] the D.C. Circuit stated that, "[w]hen reviewing an arbitrator's award, the Authority is required to apply a similarly deferential standard of review to that [which] a federal court uses in private-sector labor-management issues."[154] In *NWSEO*, the court found that the Authority had failed to accord an arbitrator the proper degree of deference because the Authority engaged in a "thorough, substantive review" of the arbitrator's CBA interpretation to set aside the arbitrator's award on essence grounds.[155] Quoting from the Supreme Court's opinion in *Misco*, the D.C. Circuit stated that, under the (correct) essence standard, "'as long as the arbitrator is even arguably construing or applying the contract and acting within the scope of his authority,' the Authority may not reverse the arbitrator's award even if it is 'convinced he committed serious error.'"[156] Thus, the court stated: "[T]he Authority's sole inquiry under the proper standard of review should have been whether the Arbitrator was 'even arguably construing or applying the [CBA].' . . . Whether the Arbitrator *correctly* interpreted the CBA was beyond the scope of the Authority's review."[157]

Subsequently, in *U.S. DOD, Education Activity, Alexandria, Virginia* (*DODEA*),[158] the Authority – rightly, in my view – adopted the principles set forth in *NWSEO*.[159] Therefore, to the extent that the majority now finds that private-sector principles do not apply to "the unique framework of federal-sector collective bargaining,"[160] I disagree.

I also disagree with the majority's cursory statement that applying less deferential review to arbitration awards will "ensure that the Statute is 'interpreted in a matter consistent with the requirements of an effective and efficient Government.'"[161] As the Authority has recognized, "the essential underlying policy goal of arbitration . . . is to permit a quick and definite resolution of grievances arising in the work place,"[162] and "[o]ne of the primary goals of arbitration is 'settling disputes efficiently.'"[163] The Authority also has recognized "Congress's interest in resolving disputes between executive-branch agencies and unions representing executive-branch employees through the arbitration process with finality, speed, and economy."[164] To that end, "Congress intended that the arbitration process be final, and that the Authority engage in only

[150] *Id.* at 491-92 (emphasis added); *see also U.S. Dep't of the Treasury, U.S. Customs Serv. v. FLRA*, 43 F.3d 682, 686-87 (D.C. Cir. 1994) ("The Authority's role in reviewing [arbitration] awards . . . depends on the nature of the exception raised by the complaining party. If the arbitrator's decision is attacked 'because it is contrary to any law, rule, or regulation,' the Authority reviews the legal question de novo. . . . If, on the other hand, the objection is not one of law, but of contract, the Authority's role is limited to that of 'federal courts in private sector labor-management relations.'"). *Cf. U.S. DOJ v. FLRA*, 792 F.2d 25, 28 (2d Cir. 1986) ("It is clear that Congress intended to limit severely judicial review of arbitral decisions under the Statute. For example, [§] 7123(a)(1) of the Statute states that the Authority's review is to be analogous to that of a federal court reviewing an arbitral award in the private sector."); *AFGE, AFL-CIO, Loc. 3090 v. FLRA*, 777 F.2d 751, 755 (D.C. Cir. 1985) ("Congress clearly was aware of the private[-]sector labor[-]arbitration experience, and it is therefore reasonable to conclude that, in drafting the language of [§] 7122(b), Congress had the private[-]sector model in mind.").
[151] 363 U.S. 593.
[152] *Dep't of the Treasury, Off. of Chief Counsel v. FLRA*, 873 F.2d 1467, 1470 (D.C. Cir. 1989).
[153] 966 F.3d 875 (D.C. Cir. 2020).
[154] *Id.* at 881.
[155] *Id.* at 877.
[156] *Id.* at 881 (quoting *Misco*, 484 U.S. at 38).
[157] *Id.* (quoting *Misco*, 484 U.S. at 38 (emphasis added)).
[158] 73 FLRA 398 (2022) (then-Member Kiko dissenting).
[159] *Id.* at 401-02.
[160] Majority at 12.
[161] *Id.* (citing 5 U.S.C. § 7101(b)).
[162] *U.S. Dep't of HHS, Health Care Fin. Admin.*, 35 FLRA 491, 496 (1990).
[163] *Redstone*, 73 FLRA at 359-60.
[164] *Indep. Union of Pension Emps. for Democracy & Just.*, 68 FLRA 999, 1004 (2015); *see also Dep't of the Army, Def. Language Inst., Presidio of Monterey, Cal.*, 43 FLRA 974, 981 (1992) (characterizing grievance arbitration as "a neutral and expeditious method of dispute resolution in the [f]ederal workplace").

limited review of arbitration awards."[165] That also is why Congress precluded court review of the Authority's decisions in arbitration cases, unless the Authority's order involves an unfair labor practice.[166] In my view, engaging in a more expansive review of arbitration awards involving contractual disputes "will encourage the filing of more exceptions . . . with the Authority, thereby increasing litigation and reducing the finality of arbitration."[167] That will not promote effective and efficient government.

Finally, I agree with the majority's statement, quoting the D.C. Circuit, that "[i]mplicit in th[e Statute's] purpose [of promoting the negotiation of [CBAs]] is the need to provide the parties to such an agreement with stability and repose with respect to matters reduced to writing in the agreement."[168] But, as noted above, the D.C. Circuit *also* has held that "the Authority's sole inquiry under the proper standard of review" of an essence exception is "whether the [a]rbitrator was 'even arguably construing or applying the [CBA].'"[169] And the parties' agreement regarding who will serve as their arbitrator – or at least to the procedures that they will apply in making that selection – is *also* an agreement that deserves respect,[170] even if a party subsequently is dissatisfied with what the arbitrator ultimately decides. As for the majority's statement that "arbitration awards are not precedential,"[171] that is true only as a default rule; parties may agree otherwise if they so choose.[172] In any event, to the extent that the majority suggests that this warrants against deferring to the parties' chosen arbitrator, I disagree.

IV. The Authority's Essence Tests

In *U.S. DOL (OSHA)*,[173] the Authority set out four tests (the *OSHA* essence tests) that the Authority applies in reviewing essence exceptions to arbitration awards. Specifically, the Authority held that, in order to demonstrate that an arbitrator's award fails to draw its essence from a CBA, the excepting party must establish that the award: (1) cannot in any rational way be derived from the CBA; (2) is so unfounded in reason and fact and so unconnected with the wording and purposes of the CBA as to manifest an infidelity to the obligation of the arbitrator; (3) does not represent a plausible interpretation of the CBA; or (4) evidences a manifest disregard of the CBA.[174]

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[165] *SSA, Off. of Disability Adjudication & Rev., Region VI, New Orleans, La.*, 67 FLRA 597, 602 (2014) (Member Pizzella dissenting); *see also U.S. DOD, Def. Cont. Mgmt. Agency*, 70 FLRA 370, 371 (2018) (citing *U.S. Dep't of HUD*, 27 FLRA 852, 853-54 (1987)) (noting that, in enacting the Statute, Congress "inten[ded] to promote the arbitration process and its finality by limited, expeditious review by the Authority"); *U.S. DOD, Def. Logistics Agency, Def. Distrib. Depot Red River, Texarkana, Tex.*, 67 FLRA 609, 611-12 (2014) (Member Pizzella dissenting). *Cf. Lee Quigley Co., Inc. v. Metal Polishers Union, Loc. 8A-28A*, No. 06 C 4871, 2007 WL 9814433, at *3-4 (N.D. Ill. May 29, 2007) ("Labor arbitration is not merely the first step in protracted federal-court litigation. . . . Rather, it is a process designed for speed and to avoid the cost of litigation; hence, the limited review. . . . If a gaffe authorized a court to set aside the award, there would be little difference between arbitration and litigation other than the extra cost and delay of presenting the case to the arbitrator before taking it to court. That would turn arbitration on its head; the process is designed to achieve speed, lower cost, and expertise. That can be accomplished only if courts enforce intellectually honest arbitral decisions, even if the court thinks the arbitrator's decision is mistaken. . . . Thus, it is not the Court's job to decide if an arbitrator erred in interpreting a labor contract, even if the error was significant. Instead, we will only determine if the arbitrator did indeed interpret the contract." (citation modified)).

[166] 5 U.S.C. § 7123(a)(1); *see also Griffith,* 842 F.2d at 491 (noting that Congress limited judicial review of the Authority's decisions in arbitration cases in order to protect "the features of the arbitral process that . . . Congress had in mind when it set up the scheme: finality, speed[,] and economy").

[167] *U.S. DOJ, Fed. BOP, Fed. Transfer Ctr., Okla. City, Okla.*, 58 FLRA 109, 117 (2002) (Concurring Opinion of Member Pope).

[168] Majority at11 (quoting *Dep't of the Navy, Marine Corps Logistics Base, Albany, Ga. v. FLRA*, 962 F.2d 48, 59 (D.C. Cir. 1992)).

[169] *NWSEO*, 966 F.3d at 881.

[170] *See, e.g.*, *Enterprise Wheel*, 363 U.S. at 598-99 (holding that "[i]t is the arbitrator's construction which was bargained for").

[171] Majority at 11.

[172] *U.S. Dep't of Transp., FAA*, 62 FLRA 344, 347 (2008) (citing *Hotel Ass'n of Wash., D.C. v. Hotel & Rest. Emps. Union, Loc. 25*, 963 F.2d 388, 390 (D.C. Cir. 1992)).

[173] 34 FLRA 573 (1990).

[174] *Id.* at 575. I note that, in *OSHA*, the Authority set these forth in a different order, and combined the third and fourth tests as a single test, but subsequently restated them as set forth above. *See, e.g.*, *U.S. Dep't of the Treasury, IRS, Brookhaven Serv. Ctr.*, 37 FLRA 1176, 1186-87 (1990).

Although the *OSHA* essence tests were rooted in private-sector court precedent that preceded much of the Supreme Court precedent discussed above[175] – including *Misco* and its "arguably construing or applying" clarification of the essence standard[176] – I agree that the Authority's articulation of the *OSHA* essence tests is consistent with Supreme Court and prevailing judicial precedent. I note, in this regard, that the Authority previously has stated that it viewed the *OSHA* essence tests as being consistent with the "arguably construed or applied" standard.[177] At the same time, the Authority also stated that, "to the extent that other Authority decisions have *applied* those tests in a way that does not comport with" that standard, "those decisions will no longer be followed."[178] I agree with that statement and, thus, will continue to object to Authority decisions that are inconsistent with the Supreme Court and prevailing judicial precedent discussed above.[179]

Further, while I agree with the articulation of the *OSHA* essence tests, the third of those tests – whether the award represents "a plausible interpretation of the agreement"[180] – could be misinterpreted as implying that the Authority engages in its own contract interpretation when reviewing arbitration awards, when that is not our proper role. Again, on this point, judicial precedent informs as to the Authority's appropriate posture in reviewing arbitration awards. Specifically, in explaining its own "plausibility" standard, and pointing out a district court's flawed analysis, the Ninth Circuit has stated:

> The district court erred in two respects in making its "plausibility" ruling. Most fundamentally, the court conducted the wrong inquiry. Under controlling Supreme Court precedent, a court may not evaluate an arbitrator's interpretation of an agreement to determine whether it meets some judicial standard of acceptability as a construction of the contract. . . . The question is not, therefore, whether the arbitrator's interpretation of the agreement was "plausible," in the sense of one a court might render, but instead whether he made any interpretation or application of the agreement at all. If so, the court's inquiry ends.
>
> The district court's error is perhaps understandable in light of language from a long line of Ninth Circuit cases articulating *Enterprise Wheel*'s admonition that an arbitrator's decision must "draw its essence" from the agreement as requiring a "plausible interpretation of the contract." . . . As we have carefully explained, however, "the 'plausibility' inquiry does not represent an independent avenue for a merits-based attack on an arbitral award. Rather, it is nothing more than another way of formulating the old rule of *Enterprise Wheel* that an arbitrator may not 'dispense his own brand of industrial justice.'" . . . *Hawaii Teamsters* reiterated that the relevant inquiry is simply whether "the arbitrator's decision concerns construction of the contract," not an evaluation of the merits of that construction. . . .
>
> As a description of the appropriate standard for evaluating a labor arbitration award, the word "plausible" is thus somewhat misleading. It could suggest some inquiry into the quality of the arbitrator's interpretation. . . . [A]n active, substantive judicial role is in sharp contrast to the judicial "hands[-]off" approach long required in labor[-]arbitration cases, as long as the arbitrator engages with the interpretive task.[181]

[175] *See OSHA*, 34 FLRA at 575-76 (citing *Dep't of HHS, SSA, Louisville, Ky. Dist.*, 10 FLRA 436, 437 (1982) (Member Applewhaite dissenting); *U.S. Army Missile Materiel Readiness Command (USAMIRCOM)*, 2 FLRA 432, 437 (1980) (citing *Bhd. of R.R. Trainmen v. Cent. of Ga. Ry. Co.*, 415 F.2d 403, 415 (5th Cir. 1969); *Holly Sugar Corp. v. Distillery, Rectifying, Wine & Allied Workers Int'l Union, AFL-CIO*, 412 F.2d 899, 903 (9th Cir. 1969); *Ludwig Honold Mfg. Co. v. Fletcher*, 405 F.2d 1123, 1128 (3d Cir. 1969)).
[176] 484 U.S. at 38.
[177] *DODEA*, 73 FLRA at 402 (citing *U.S. Dep't of the Army, U.S. Army Corps of Eng'rs, Mobile Dist., Mobile, Ala.*, 64 FLRA 508, 509 (2010) (Member Beck dissenting)).
[178] *Id.*
[179] The majority contends that the "arguably construing or applying" test "renders [the *OSHA* essence] tests effectively irrelevant." Majority at 8 (emphasis removed). But it certainly does not do so any more than the majority's test focusing on whether "the award conflicts with the agreement's plain wording." *Id.* at 12.
[180] 34 FLRA at 575.
[181] *Carpenters*, 823 F.3d at 531-32.

Therefore, the Ninth Circuit

> conclude[d] that it is time for us to retire the use of "plausibility" as a term to describe the courts' role in reviewing labor[-]arbitration awards. We do not, of course, propose any substantive change to the settled law in this area, nor could we. We merely reiterate, and emphasize, the fundamental concept *Hawaii Teamsters* articulated, drawing on decades of Supreme Court jurisprudence: the quality – that is, the degree of substantive validity – of an arbitrator's interpretation is, and always has been, beside the point. Instead, the appropriate question for a court to ask when determining whether to enforce a labor[-]arbitration award interpreting a [CBA] is a simple binary one: *Did the arbitrator look at and construe the contract, or did he not?*[182]

I wholly agree with these principles. Further, I continue to agree that the Authority's "plausible interpretation"[183] test is permissible, under the Ninth Circuit's "plausibility" standard.[184] Nevertheless, for the sake of avoiding confusion, I would be open to taking a cue from the Ninth Circuit and reconsidering our use of that test in a future, appropriate case.

V. Application to the Instant Case

In this case, the Arbitrator found that the Agency violated Article 27, Section 10 (Section 10) of the parties' 2019 CBA (the 2019 CBA) when it denied the grievant's request for a Temporary Compassionate Assignment (TCA) that would have allowed her to continue teleworking from her home for a period. As the Arbitrator noted, Section 10 states:

> Employees may request an assignment to another *SSA facility* in a different geographic location for up to [sixty] days based on a temporary personal situation (e.g., illness of parent, etc.). The employee must submit a written request stating the nature of the personal situation, a prioritized list of office(s) for the assignment, and the anticipated length of the assignment. Assignment approval is at the discretion of management.[185]

It is undisputed that the 2019 CBA does not define the term "SSA facility,"[186] and the Arbitrator noted that the parties had differing positions regarding that term's meaning. Specifically, the Agency argued that it means only a "brick and mortar" Agency facility.[187] By contrast, the Union argued that it also includes an employee's residential telework site. For support, the Union relied on statements that, according to two of its witnesses (and corroborated by one of those witnesses' notes), the Agency Chief Negotiator made during negotiations over a separate memorandum of understanding concerning employees' post-pandemic re-entry into the Agency's physical workspaces (the MOU). According to the Union, during those negotiations, the Agency Chief Negotiator stated that the Agency had been treating alternative duty stations (ADSs), including telework locations, as SSA facilities for purposes of Section 10.[188] The Union acknowledged that, when the parties originally negotiated Section 10 in 2019 – before the pandemic and the Agency's concomitant expansion of telework – the parties "were of a mind that the ADS for those purposes was another, physical . . . office."[189] However, the Union argued that "[c]ircumstances greatly changed" as a result of the pandemic, and "the Agency began treating ADS assignments differently as [including] telework because [telework was] prevalent in many circumstances, altering the practical application of" Section 10.[190] The Union also stated that, at the arbitration hearing, "Agency representatives conceded that facial contract language can be interpreted differently as circumstances change – a point underscored by [one Agency witness's] testimony admitting to such an example where Union officials are now permitted to perform official duties at home, which was something no[t] contemplated by the plain contract language" addressing Union use of official time.[191]

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[182] *Id.* at 532 (emphasis added).
[183] *Id.*
[184] *Id.*
[185] Award at 4 (emphasis added).
[186] Opp'n, Attach., June 9, 2023 Tr. (Tr.) at 58-59 (Agency Chief Negotiator for the 2019 CBA (2019 Agency Chief Negotiator) testified that, to his knowledge, the 2019 CBA did not define "SSA facility"); Exceptions, Ex. 3, Agency Post-Hr'g Br. at 14 (noting 2019 Agency Chief Negotiator's testimony that "the term was not specifically defined in" the 2019 CBA).
[187] Award at 9.
[188] *Id.*
[189] *Id.* at 7.
[190] *Id.*
[191] *Id.*

Considering the parties' arguments, the Arbitrator noted that, at the arbitration hearing, "[m]anagement offered other officials to rebut the meaning of" the Agency Chief Negotiator's statements regarding Section 10.[192] However, he also noted that the Union cited "traditional inferences from arbitration that evidence [should] be presented by the party making . . . statements unless otherwise unavailable."[193] The Arbitrator then found "no reason to ignore the Union's position" regarding the Agency Chief Negotiator's statements, "especially when [his] statements were made in the hearing and he is still an employee of the Agency," yet the Agency did not call him to testify at the hearing.[194] The Arbitrator further determined:

> [The Agency Chief Negotiator's] statements make it clear that for some period . . . circumstances make changes and interim interpretation of a contract [may] change for a period of time. Here, we are only looking at a period of [sixty] days for a TCA after a COVID pandemic. This is not that different from the situation with handling Union business from home, which is not allowed under the contract. I find that the Union's interpretation is sufficient to grant the grievance.[195]

Put simply, the Arbitrator credited the Union's evidence and found that the Agency Chief Negotiator conceded that – regardless of what the parties may have contemplated when they negotiated Section 10 in 2019 – the *Agency* subsequently interpreted "SSA facilities" to include telework sites. In short, the Arbitrator considered the parties' differing arguments regarding the meaning of "SSA facility" and looked to past-practice evidence to determine its meaning. This analysis comports with, and is entitled to deference under, the standards discussed above.

The majority appears to find the term "SSA facility" so unambiguous that the Arbitrator's interpretation conflicts with its plain meaning.[196] I disagree. Even were it appropriate for us to examine the meaning of "SSA facility" ourselves in this case, "the term ['facility'] itself is ambiguous"[197] and has multiple meanings. One meaning of that term is "a place, especially including buildings, where a particular activity happens."[198] Another is "[s]pace . . . for doing something."[199] Finding that a residential space where SSA work is performed constitutes an "SSA facility" is consistent with these definitions. Further, I note that at least one court has held that "the ordinary meaning of 'facility' is not so restrictive" as to "be limited to a 'brick and mortar' structure."[200] This undercuts the Agency's claim – and the majority's apparent belief – that "SSA facility" must mean a "brick-and-mortar [SSA] facility."[201] Moreover, the fact that the 2019 CBA does not define "SSA facility" lends further support to the Arbitrator's conclusion. In this regard, in finding that arbitrators' awards draw their essence from CBAs, federal

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[192] *Id.* at 9.
[193] *Id.*
[194] *Id.*
[195] *Id.*
[196] Majority at 15 (stating that, "even if the term 'SSA facility' were ambiguous – *which it is not*," the award is still deficient (emphasis added)).
[197] *Farina v. Nokia Inc.*, 625 F.3d 97, 118 (3d Cir. 2010).
[198] *Facility*, Dictionary.Cambridge.org, https://dictionary.cambridge.org/us/dictionary/english/facility (on file with the Federal Labor Relations Authority) (last visited Sept. 22, 2026).
[199] *Facility*, New Oxford English Dictionary (3d ed. 2010).
[200] *A.Z. v. Regence Blueshield*, 333 F. Supp. 3d 1069, 1075-76 (W.D. Wash. 2018).
[201] Award at 9.

courts and the Authority frequently have relied on the fact that the agreements do not define the pertinent terms.[202]

The majority also states that the Arbitrator relied on extrinsic evidence "without *finding* the term ['SSA facility'] ambiguous."[203] As noted above, circuit courts are split over whether arbitrators may rely on extrinsic evidence only when CBAs are silent or ambiguous with respect to the matter at issue. But, in any event, arbitrators are not required to explicitly *state* that they find a CBA provision ambiguous before they may consider extrinsic evidence of the parties' intent.[204] Here, the Arbitrator considered the parties' differing definitions of the term "SSA facility," implicitly found that term ambiguous, and proceeded to consider the parties' practices in applying that term. That was permissible.

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[202] *See, e.g.*, *Ball Metal Beverage Container Corp. v. Loc. 129, United Auto., Aerospace, & Agric. Implement Workers of Am.*, No. 21-10755, 2022 WL 340573, at *5 (5th Cir. Feb. 4, 2022) (*Ball Metal*) ("We have determined that explicating broad CBA terms like 'cause,' when left undefined by contract, is the arbitrator's charge." (citation modified)); *Delek Ref., Ltd. v. United Steel, Paper & Forestry, Rubber, Mfg., Energy, Allied Indus. & Serv. Workers Int'l Union, AFL-CIO*, No. 6:15-CV-00491-RWS-KNM, 2017 WL 4479615, at *10 (E.D. Tex. Feb. 7, 2017), *report and recommendation adopted sub nom. Delek Ref., Ltd. v. United Steel*, No. 6:15-CV-00491-RWS-KNM, 2017 WL 4510591 (E.D. Tex. Mar. 27, 2017), *aff'd sub nom. Delek Ref., Ltd. v. Loc. 202, United Steel, Paper & Forestry, Rubber, Mfg., Energy, Allied Indus. & Serv. Workers Int'l Union, AFL-CIO*, 891 F.3d 566 (5th Cir. 2018) (finding that "the CBA does not define any of the [relevant] exceptions[,] leaving those terms ambiguous and subject to interpretation"); *Mercy Med. Ctr. v. Or. Nurses Ass'n*, No. 3:15-CV-00699-PK, 2015 WL 12966314, at *5 (D. Or. Dec. 29, 2015), *report and recommendation adopted*, No. 3:15-CV-00699-PK, 2016 WL 2946272 (D. Or. Apr. 22, 2016), *aff'd*, 726 F. App'x 591 (9th Cir. 2018) (holding that "[b]ecause the CBA did not define just cause, [the arbitrator] was permitted to reference the industrial common law in resolving the issue"); *Campbell v. Nev. Prop. 1 LLC*, No. C2:10-02169-APG, 2013 WL 6118622, at *3 (D. Nev. Nov. 20, 2013), *aff'd*, 672 F. App'x 698 (9th Cir. 2016) (holding that, "[a]bsent a definition" of a particular term in an agreement, "arbitrators have the authority to interpret" that term); *Crozer-Chester Med. Ctr. v. Crozer-Chester Nurses Ass'n*, No. 11-7300, 2012 WL 2500930, at *6 (E.D. Pa. June 29, 2012) (*Crozer-Chester*) ("It is within the province of an arbitrator to interpret ambiguous, undefined phrases where such contractual ambiguities exist.") (citing *Exxon Shipping Co. v. Exxon Seamen's Union*, 73 F.3d 1287, 1296 (3d Cir. 1996) (citing *United Transp. Union Loc. 1589 v. Suburban Transit Corp.*, 51 F.3d 376, 380-81 (3d Cir. 1995) (*Suburban Transit*)); *Consolidation Coal Co. v. United Mine Workers of Am.*, No. 1:09CV61, 2010 WL 4628537, at *4 (N.D. W.Va. Nov. 8, 2010) ("This [c]ourt has no warrant to overturn the arbitrator because he consulted an outside source to define a term without a specific definition in the CBA."); *Local No. 1*, 2008 WL 4067105, at *2 ("When a term is left undefined in a [CBA], an arbitrator may bring to bear his own knowledge and experience to interpret its meaning."); *see also Meridian*, 158 F.4th at 929 (citing *Bhd. of Maint. of Way Emps. v. Terminal R.R. Ass'n of St. Louis*, 307 F.3d 737, 740 (8th Cir. 2002)); *Marine Club Manager, Inc. v. RB Com. Mortg. LLC*, No. 23-1841, 2024 WL 3617552, at *5 (4th Cir. 2024); *Bimbo Bakeries USA, Inc. v. Bakery, Confectionary, Tobacco Workers & Grain Millers, Loc. 53*, No. 24-9153 (ES) (MAH), 2025 WL 2731068, at *10 (D. N.J. Sept. 25, 2025); *Nat'l Nurses Org. Comm. v. MH Hosp. Manager, LLC*, No. 1:23-cv-00321-MR-WCM, 2024 WL 1292362, at *4 (W.D. N.C. March 26, 2024); *Comcast of N.J. LLC v. IBEW Loc. Union No. 827*, No. 22-3239, 2024 WL 340692, at *3 (3d Cir. Jan. 30, 2024) (*Comcast*); *Dayton Heidelberg Distrib. Co. v. Loc. Union No. 957, Int'l Bhd. of Teamsters*, No. 3:18-cv-294, 2019 WL 3082406, at *5 (S.D. Ohio July 12, 2019); *SEIU, Loc. 32BJ v. Dayton Beach Park No. 1 Corp.*, No. 18 Civ. 3887 (LGS), 2019 WL 120998, at *2 (S.D.N.Y. Jan. 4, 2019) (citing *Niagara Blower Co. v. Shopmen's Loc. Union 576 of the Int'l Ass'n of Bridge, Structural, Ornamental, & Reinforcing Iron Workers*, No. 16 Civ. 262, 2018 WL 4382371, at *6 (W.D.N.Y. Sept. 14, 2018)); *Comprehensive Healthcare*, 2016 WL 6946849, at *4; *Chevron Oronite Co., LLC v. United Steel Paper & Forestry, Rubber, Mfg., Energy, Allied-Indus. & Serv. Workers Int'l Union, Loc. 13-447*, No. 11-0560, 2012 WL 3683539, at *4; *Crozer-Chester*, 2012 WL 2500930, at *6; *NYSARC-Rockland Cnty. Chapter v. Loc. 253, Dist. Council 1707, AFSCME, on behalf of Palefsky*, No. 10-CV-7955 (CS), 2011 WL 13557549, at *6 (S.D.N.Y. Sept. 30, 2011); *United Steel, Paper & Forestry, Rubber Mfg., Energy, Allied Indus. & Serv. Workers Int'l Union & its Loc. 6580 v. Sec. DBS*, No. H-06-2062, 2007 WL 9822668, at *4 (S.D. Tex. June 14, 2007); *Chamberlain Mfg. Co. v. Loc. Lodge No. 847*, 474 F. Supp. 2d 682, 688 (M.D. Pa. 2007); *Tampa Elec. Co. v. Int'l Bhd. of Elec. Workers of Am., Loc. 108*, No. 8:05-CV-497-T-17TBM, 2006 WL 8440045, at *6 (M.D. Fla. Sept. 13, 2006); *U.S. Dep't of the Navy, Naval Med. Ctr. Camp Lejeune, Jack., N.C.*, 73 FLRA 137, 139 (2022).

[203] Majority at 18 (emphasis added).

[204] *Browning-Ferris Indus. of Ohio, Inc. v. Int'l Bhd. of Teamsters, Loc. Union No. 20*, No. 20-4073, 2022 WL 684579, at *5 (6th Cir. March 8, 2022) (*Browning-Ferris*), 2022 WL 684579, at *5 ("True, the decision did not state that the language of Section 9.04 was so ambiguous as to justify an inquiry into bargaining history and community practices, but we do not require arbitrators to utter magic words from contract-law hornbooks. Rather, it is at least arguable – if not probable – that the arbitrator referenced this extrinsic evidence to inform his reading of the 'import' of Section 9.04. That is enough for our inquiry into the form of the decision." (citing *Michigan Family Resources*, 475 F.3d at 753-54)); *Folger*, 905 F.2d at 111 (stating that "arbitrators need not explicitly state that they find a clause ambiguous" before they may consider extrinsic evidence such as past practice); *Int'l Union of Operating Eng'rs, Loc. 18 v. Ohio Contractors Ass'n*, No. 1:18-cv-722, 2018 WL 6267760, at *4 (N.D. Ohio Nov. 30, 2018) (finding that arbitrator determined that provision was ambiguous before considering extrinsic evidence including past practices; and stating that, "[a]lthough the arbitrator could have been clearer, he stated that '[t]he parties offer[ed] different interpretations of Paragraph 29' and that 'the intent of Paragraph 29 [was] unclear' before he proceeded to consider the extrinsic evidence").

Additionally, the majority relies on the Union's statement that when the parties originally negotiated Section 10 in 2019 – before the pandemic and the Agency's concomitant expansion of telework – the parties "were of a mind that the ADS for those purposes was another, physical . . . office."[205] In fact, the majority appears to treat that statement as a *concession* by the Union that the 2019 CBA unambiguously does not apply to telework.[206] But the Union's statement regarding what it contemplated at the time of negotiations does not compel a conclusion that the award is deficient. As an initial matter, a statement that the parties only contemplated one application of Section 10 at the time of negotiations in 2019 – before the pandemic – is *not* the same thing as a statement that the parties consciously considered, and rejected, the notion of additional applications. And, even if the Union had made such a statement, that would not demonstrate that the award is deficient. In this regard, neither the majority nor the Agency cites any authority that would preclude the Arbitrator from relying on the parties' past practices in the face of purportedly contradictory claims that they made regarding bargaining history.[207]

According to the majority, "the aim of contract interpretation is to achieve . . . the parties' intent at the time of bargain," and arbitrators "may not rely on outside sources [that were] not within the parties' contemplation at the time they drafted their agreement."[208] For support, the majority cites several court cases.[209] However, all but one of those cases did not involve reviews of arbitration awards[210] – and did not apply the deferential "essence" standard that applies to review of arbitration awards. As such, they are inapposite.[211]

The one case that did involve review of an arbitration award is *Boise Cascade Corp. v. Paper Allied-Industrial, Chemical & Energy Workers (PACE), Local 7-0159* (*Boise*).[212] In *Boise*, the Eighth Circuit did state that "the arbitrator must restrict his inquiry to evidence that will aid him in divining the parties' intent; he may not rely on *outside* sources not within the parties' contemplation at the time they drafted their agreement."[213] However, the court then immediately distinguished the types of sources that arbitrators may properly consider from those that they should not consider. According to the court, sources that arbitrators may properly consider include "other terms in the contract[,] the negotiating and contractual history of the parties, . . . evidence of past practices[,] . . . prior arbitral and judicial decisions[,] and the common law of the shop."[214] By contrast, sources that arbitrators should not consider include "Missouri state criminal and evidence law."[215] This distinction is consistent with the above-discussed notion that, if an arbitrator is charged with interpreting a CBA, then his or her award will fail to draw its essence from the *CBA* if he or she "wholly disregard[s] the [CBA] and improperly base[s the] arbitral award on *external legal principles*" that are "unmoored from the CBA"– without even "purport[ing] to be interpreting the [CBA]," and without

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[205] Majority at 17.
[206] *Id.* ("Crucially, the Union conceded at arbitration, and does not dispute here, that 'when the contract was negotiated, the parties were of a mind that [an SSA facility for Section 10 requests] was another physical [field] office.' . . . Thus, the parties agree that their 'intent at the time of bargain' was to authorize TCAs to different Agency facilities – not to authorize telework.").
[207] *City Wide Constr. Prods. Co. v. Teamsters Loc. Union No 245*, 167 F.4th 1015, 1018-19 (8th Cir. 2026) (where party argued that arbitrator "ignored the mutual intent of the parties" – specifically, "rejected draft provisions that were proposed in the process of negotiating the CBA" – the court held that "[t]his argument requires us to speculate about how the arbitrator viewed the mutual intent of the parties and extrinsic evidence, which we cannot do"). *Cf. Cliftex Corp. v. Loc. 377, New England Reg'l Joint Bd., Amalgamated Clothing & Textile Workers Union, AFL-CIO, CLC*, 625 F. Supp. 903, 907-08 (D. Mass. 1986) ("It is commonplace for parties to a [CBA] consciously to agree on ambiguous terms with the intent that an arbitrator will further define their agreement at a later date. To do otherwise would require the parties to set upon the impossible task of addressing every possible contingency that might arise during the life of the agreement.").
[208] Majority at 13-15.
[209] *See id.* at 15 (citing *Platinum Servs., Inc. v. United States*, 168 Fed. Cl. 130, 136 (Fed. Cl. 2023) (*Platinum Servs.*); *Commonwealth Commc'ns, Inc. v. NLRB*, 312 F.3d 465, 468 (D.C. Cir. 2002) (*Commonwealth*); *Boise Cascade Corp. v. Paper Allied-Indus., Chem. & Energy Workers (PACE), Loc. 7-0159*, 309 F.3d 1075, 1083-84 (8th Cir. 2002).
[210] *See Commonwealth*, 312 F.3d at 468; *Platinum Servs.*, 168 Fed. Cl. at 136.
[211] *Bakery Drivers Union, Loc. 802 v. S.B. Thomas, Inc.*, No. 78-C 1270, 1978 WL 1654, at *3 (E.D.N.Y. June 21, 1978) (*Bakery Drivers*) (stating that, in settling disputes that arise under CBAs, "the labor arbitrator's role is substantially different from that of a judge").
[212] 309 F.3d 1075.
[213] *Id.* at 1083-84 (emphasis added).
[214] *Id.* at 1084; *see also Minneapolis-St. Paul Mailers Union, Loc. #4 v. Nw. Publ'ns, Inc.*, No. CIV.02-1101 ADM/AJB, 2003 WL 21672743, at *6 (D. Minn. July 15, 2003) (*Minneapolis*), *aff'd sub nom. Minneapolis-St. Paul Mailers Union, Loc. No. 4 v. Nw. Publ'ns, Inc.*, 379 F.3d 502 (8th Cir. 2004) (citing *Boise* for the proposition that "[a]n arbitrator's paramount obligation is to apply the parties['] agreement in a way that gives effect to their intent" and that, "[t]o do so, resort to extrinsic evidence of past practice and bargaining history is not only acceptable, but encouraged").
[215] *Boise*, 309 F.3d at 1084.

relying on those external principles "in service of interpreting the [CBA]."[216]

In context, it is clear that the court in *Boise* did *not* hold that parties are strictly bound to what they envisioned at the time they bargained, even if their subsequent practices demonstrate a different understanding.[217] Such a holding would conflict not only with the well-established principle that past practices can flesh out an agreement's meaning after it is enacted, but also with the similarly well-established notion that parties cannot predict every possible scenario when they negotiate a CBA[218] – like a pandemic-induced expansion of the use of telework. In ascertaining the meaning of "SSA facility," it was perfectly appropriate for the Arbitrator to look at the Agency's understanding of that term as it developed over time.[219] And, again, neither the Agency nor the majority cites any authority that demonstrates that the Arbitrator could not find that developed understanding persuasive, regardless of what the parties may have anticipated when they negotiated the CBA in 2019, before the pandemic.[220]

Additionally, the majority asserts that the MOU "reflects the parties' intention that the MOU would provide employees a right *not* available under Section 10: a telework option for employees with dependent family members in their households who were at 'high-risk for COVID.'"[221] The majority also asserts that, when the parties negotiated the MOU, they "did not agree to modify Section 10."[222] But the Union's Chief Negotiator for the MOU explained how the MOU expanded upon the

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[216] *Signalmen*, 117 F.4th at 467-69; *see also Minneapolis*, No. CIV.02-1101 ADM/AJB, 2003 WL 21672743, at *7 (finding that an arbitrator properly relied on "a piece of extrinsic evidence" because it was "not devoid of any direct connection to the dispute," unlike "the rule of state law" that an arbitrator had impermissibly relied on in *Alvey, Inc. v. Teamsters Loc. Union No. 688*, 132 F.3d 1209, 1213 (8th Cir. 1997)).

[217] I also note that in *Continental Airlines, Inc. v. Air Line Pilots Ass'n, Int'l*, 555 F.3d 399 (5th Cir. 2009), the Fifth Circuit found that *Boise* applied a "markedly less deferential approach" than the Fifth Circuit did, and was "not the law of [the Fifth C]ircuit." *Id.* at 409 n.29.

[218] *Steelworkers*, 363 U.S. at 578 (stating that a CBA "is more than a contract; it is a generalized code to govern a myriad of cases which the draftsmen cannot wholly anticipate"), 579-81 ("There are . . . too many unforeseeable contingencies to make the words of the contract the exclusive source of rights and duties. . . . Within the sphere of collective bargaining, the institutional characteristics and the governmental nature of the collective-bargaining process demand a common law of the shop which implements and furnishes the context of the agreement. . . . Gaps may be left to be filled in by reference to the practices of the . . . various shops covered by the agreement. Many of the specific practices which underlie the agreement may be unknown, except in hazy form, even to the negotiators."), 581 ("The processing of disputes through the grievance machinery is actually a vehicle by which meaning and content are given to the [CBA]."); *Gateway Coal Co. v. United Mine Workers of Am.*, 414 U.S. 368, 378 (1974) ("A [CBA] cannot define every minute aspect of the complex and continuing relationship between the parties. Arbitration provides a method for resolving the unforeseen disagreements that inevitably arise. And in resolving such disputes, the labor arbitrator necessarily and appropriately has resort to considerations foreign to the courts."); *ILEU*, 11 F.4th at 216 ("Our narrow scope of review arises from the recognition of the realities of the relationship between labor and management. Too many unforeseeable contingencies may arise in an industrial setting for us to mechanically reject an arbitrator's interpretation of a [CBA]. . . . Unlike other contractual relationships, the relationship between an employer and a labor union entering a labor agreement is unique because a relationship almost always exists between the employer and the union before the parties enter negotiations. 'Law of the shop' is a gap filler that necessarily arises from the impossibility of creating a CBA sufficient to regulate every aspect of the relationship between an employer and a union."); *Bakery Drivers*, 1978 WL 1654, at *3 ("Since a [CBA] cannot define every aspect of the relationship between the parties, arbitration provides a method for resolving the unforeseen disagreements that inevitably arise.").

[219] *See, e.g.*, *Comcast*, 2024 WL 340692, at *3 (noting that "it appears that – at least at the time it submitted the claim to the arbitrator – even [the company] shared th[e] understanding" that the term "just cause" included progressive discipline).

[220] *See, e.g.*, *Desert Palace, Inc. v. Loc. Joint Exec. Bd. of L.V.*, 679 F.2d 789, 793 (9th Cir. 1982) ("As long as a plausible solution is available within the general framework of the agreement, the arbitrator has the authority to decide what the parties would have agreed on *had they foreseen the particular item in dispute*." (emphasis added)); *Amerisure Mut. Ins. Co. v. Everest Reinsurance Co.*, 109 F. Supp. 3d 969, 992 n.11 (E.D. Mich. 2015) (stating that "the fact that both parties argue that [a] contract is unambiguous does not preclude . . . [a] finding [that] the contract [is] ambiguous" (quoting *Pitcher v. Principal Mut. Life Ins. Co.*, 870 F. Supp. 903, 907, n.1 (S.D. Ind. 1994), *aff'd*, 93 F.3d 407 (7th Cir. 1996))). *Cf. United Steel, Paper & Forestry, Rubber, Mfg., Energy, Allied Indus. & Serv. Workers Int'l Union, AFL-CIO-CLC v. Exxon Mobil Corp.*, No. CV 14-35-BLG-CSO, 2014 WL 7148721, at *7 (D. Mont. Dec. 15, 2014) ("[A]lthough [the employer] now argues that . . . bargaining history conveys a 'clear intent' to grant [the employer] the right to contract out work without having to face an arbitration each time it does so, this 'clear intent' was not sufficiently clear to [the employer] itself. [The employer] engaged in the CBA's grievance process for several months beginning in December 2012, and for approximately seven months thereafter it exchanged correspondence with the [u]nion as to how the question regarding this dispute should be submitted to the arbitrator – all without objecting until December 2013 that the dispute was excluded from the scope of the CBA's arbitration provision.").

[221] Majority at 17.

[222] *Id.*

2019 CBA,[223] and he and another Union witness testified that the Agency's concession that Section 10 applies to telework even caused the Union to change its bargaining position with regard to the MOU.[224] Further, given the Agency's concession that Section 10 applies to telework – and, as the Union notetaker stated, the parties "weren't bargaining" over the term agreement at the time[225] – there was no reason for the parties to "agree to modify Section 10" when they were negotiating over the MOU.[226]

The majority asserts that the Agency Chief Negotiator's statements during MOU negotiations were "disputed."[227] But, as discussed above, the Arbitrator noted that the Agency Chief Negotiator was still employed by the Agency at the time of the hearing, and the Agency did not call him to testify. Thus, the Arbitrator credited the Union's testimony and found that the Agency Chief Negotiator made the disputed statements. As the Agency does not argue that finding is a nonfact, I would defer to it.[228]

VI. Conclusion

In sum, I disagree with the majority's finding that the award fails to draw its essence from the 2019 CBA. It may be that the Agency's (and the majority's apparent) interpretation of "SSA facility" is *better* than the Arbitrator's. But that is not the question before us when assessing whether an award draws its essence from a CBA.[229] I would deny the essence exception and would resolve the Agency's exceeded-authority exception. Accordingly, I dissent.

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[223] Tr. at 99-100 (the Union Chief Negotiator for the MOU testified that the 2019 CBA gave management discretion to approve or deny requests, and "what the re-entry MOU did was it made clear for certain circumstances that the standard for approval would be expanded or improved for [certain] circumstances"), 107-09 (noting that, under the MOU, "the thing that was . . . expanded was the approval standard" for certain circumstances).

[224] *Id.* at 75-76 (the Union notetaker for the MOU negotiations testified that the Union agreed to the language in the MOU because of what the Agency Chief Negotiator said regarding Section 10), 98 (the Union Chief Negotiator testified that it was the Agency Chief Negotiator's statement "that induced us to drop our proposal for expanded work at home for quarantine and adopt the Agency's approach"), 114 (the Union Chief Negotiator testified that the Agency Chief Negotiator's "statement was made to us in order to induce us to reach agreement on something").

[225] *Id.* at 77.

[226] Majority at 17.

[227] *Id.*

[228] *See AFGE, Loc. 2328*, 70 FLRA 797, 797-98 (2018) (deferring to arbitrator's factual findings in resolving essence exception where excepting party did not successfully challenge those findings as nonfacts).

[229] *Enterprise Wheel*, 363 U.S. at 599 ("It is the arbitrator's construction which was bargained for; and so far as the arbitrator's decision concerns construction of the contract, the courts have no business overruling him because their interpretation of the contract is different from his."); *Browning-Ferris*, No. 20-4073, 2022 WL 684579, at *6 ("This may be the better reading of the contractual language. . . . But the *best* reading is not the *only* reading available."); *Ball Metal*, No. 21-10755, 2022 WL 340573, at *6 ("We hold only that [the arbitrator's] interpretation is an 'arguable reading' of the CBA, not that it is the best or even a good one. The correctness of the arbitrator's interpretation is irrelevant so long as it was an *interpretation*.") (internal citations and quotations omitted); *Alcan Packaging Co. v. Graphic Commc'n Conf., Int'l Bhd. of Teamsters & Loc. Union No. 77-P*, 729 F.3d 839, 843 (8th Cir. 2013) ("Erroneous textual analysis . . . does not justify disregarding the decision of the arbitrator agreed upon by the parties to resolve their dispute . . . ."); *Crozer-Chester*, 2012 WL 2500930, at *6 (finding that the employer's "contention that its own interpretation of 'just cause' is more reasonable than the result decided by the [a]rbitrator is not the relevant test" (citing *Suburban Transit*, 51 F.3d at 380-81)).