

**74 FLRA No. 83**

UNITED STATES  
DEPARTMENT OF HOUSING  
AND URBAN DEVELOPMENT  
(Agency)

and

AMERICAN FEDERATION  
OF GOVERNMENT EMPLOYEES  
LOCAL 911  
(Union)

0-AR-6025

DECISION

September 28, 2026

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

**I. Statement of the Case**

The Union grieved an Agency decision to require teleworking employees to report to the office one additional day per week. After the Agency denied the Union's grievance, the Union invoked arbitration by requesting a panel of arbitrators, but failed to timely notify the Agency it was doing so, as required by the parties' collective-bargaining agreement. Before arbitration, the Agency moved to dismiss the grievance based on this procedural deficiency. Arbitrator Stanley T. Dobry issued an interim award finding the grievance procedurally arbitrable and a merits award finding the Agency violated the parties' agreement.

The Agency filed exceptions challenging the Arbitrator's procedural-arbitrability determination, his merits findings, and the remedies he awarded. Because the Agency demonstrates that the Arbitrator's procedural-arbitrability determination fails to draw its essence from the parties' agreement, we set aside the interim award and the merits award.

**II. Background and Arbitrator's Award**

The Agency notified the Union that it was increasing the number of days teleworking employees would be required to report to the office from one day per week to two days per week. The Union grieved, and the Agency denied the grievance, sending the Union its final grievance response on April 29, 2024.<sup>1</sup>

Article 52, Section 52.02 of the parties' agreement (Section 52.02) provides that a party invoking arbitration:

shall notify the other party of its submission of a matter to arbitration by giving written notice within twenty-five . . . days of a final rejection at the last step of the grievance procedure . . . . [Then,] the party[] invoking arbitration shall submit the request for arbitrators to [the Federal Mediation and Conciliation Service (FMCS)] . . . with the Notice of Invocation of Arbitration.<sup>2</sup>

On May 24, the Union sent FMCS a request for a panel of arbitrators without sending written notice to the Agency. The Agency learned that the Union invoked arbitration when FMCS provided the list of arbitrators. On May 31, a week after the twenty-five-day deadline, the Union sent the Agency an email titled "Invocation of Arbitration – Permanent Telework Modification," which stated that "[a]s a follow-up to the denial of [the grievance . . . the Union] has filed for an arbitration panel in moving forward with this matter."<sup>3</sup> The Agency responded on June 12 acknowledging receipt of the invocation of arbitration.

After the parties selected the Arbitrator, the Agency moved to dismiss the grievance for failure to comply with Section 52.02's requirement of timely notice that the Union was invoking arbitration (notice requirement). In his interim award, the Arbitrator noted that contractual "[t]ime limits are usually treated as jurisdictional[, so i]f the time line was[ not] met, the arbitrator lacks authority to hear the case on its merits."<sup>4</sup> He then stated that, as "procedural resolutions are not highly favored[,] . . . arbitrators have found various mechanisms to not enforce forfeitures, depending on the circumstances."<sup>5</sup> Citing general equitable principles, the Arbitrator found the grievance arbitrable on four grounds.

First, the Arbitrator found that "the Union substantially complied"<sup>6</sup> with the notice requirement

<sup>1</sup> All dates are in 2024 unless otherwise stated.

<sup>2</sup> Exceptions, Attach. 15, Joint Ex. 2, Collective-Bargaining Agreement (CBA) at 243.

<sup>3</sup> Exceptions, Attach. 9, App. A, Agency's Ex. 4 at 1.

<sup>4</sup> Interim Award at 9-10.

<sup>5</sup> *Id.* at 11.

<sup>6</sup> *Id.* at 17.

because “the Union in good faith believed it sent a separate email communication on May 24” to the Agency.<sup>7</sup> The Arbitrator credited the Union’s statement that, following the Agency’s motion to dismiss the grievance, “the Union came to realize that the original email never went through to the Agency presumably due to a technical issue with Outlook.”<sup>8</sup> He reasoned that, “[e]ven if the [parties’ agreement] includes clear time frames, the case should not be dismissed if it would be unreasonable to require strict compliance.”<sup>9</sup>

Second, noting that Article 51, Section 51.06 of the parties’ agreement (Section 51.06) provides that “[a] continuing violation may be grieved at any time,” the Arbitrator found the grievance arbitrable because the employees were “still working the . . . griev[ed] telework schedules.”<sup>10</sup> He reasoned that the grievance should not be dismissed, because “the Union could refile its grievance . . . , getting back to this same step by sending a separate twenty-five . . . day notice of invocation.”<sup>11</sup>

Third, the Arbitrator excused the untimeliness of the Union’s notice of invocation on the ground that the Agency was slow to acknowledge the untimely notice. The Arbitrator cited Section 51.06, which provides, in part, “No time limit for responding [to] or appealing [grievance responses or related communications] shall begin to run until the Union [r]epresentative has received the [Agency] response or communication.”<sup>12</sup> Applying this provision to the invocation, the Arbitrator determined that the Union’s deadline for invoking arbitration should be retroactively determined based on the date that the Agency “acknowledged receipt” of that invocation.<sup>13</sup> Thus, “even if the Agency did not receive the separate notification email” within twenty-five days of the final grievance denial, the Arbitrator found the Union nevertheless satisfied the notice requirement because “the Agency did not respond that it received the Union’s Invocation of Arbitration . . . until June 12” – two weeks after the untimely invocation email.<sup>14</sup>

Fourth, the Arbitrator determined that the Agency waived its procedural-arbitrability argument by waiting until pre-arbitration communication with the Arbitrator to raise the arbitrability issue. Article 51, Section 51.14 (Section 51.14) provides that “[q]uestions of arbitrability

may be raised at any step of the grievance procedure, including the arbitration stage.”<sup>15</sup> Acknowledging that the parties’ agreement “permits jurisdictional challenges at any time,” the Arbitrator nonetheless determined that “permission on the timing of the challenge is not akin to a command of its outcome.”<sup>16</sup> The Arbitrator then found the Agency “slept in the weeds, and did not timely and unambiguously assert [its] claims, which are held to be waived.”<sup>17</sup>

Relying on these four rationales, the Arbitrator found the grievance arbitrable. Following a hearing on the merits, the Arbitrator issued the merits award finding the Agency violated the parties’ agreement by changing telework schedules, and he directed remedies, which included returning affected employees to their previous telework agreements and reimbursing them for “all costs incurred by [the affected employees] directly related to the violations alleged including, but not limited to[,] parking, dependent care, and commute-related costs.”<sup>18</sup>

The Agency filed exceptions on April 8, 2025, and the Union filed an opposition on May 13, 2025.

### III. Analysis and Conclusion: The Arbitrator’s procedural-arbitrability determination fails to draw its essence from the parties’ agreement.

The Agency argues that the Arbitrator’s procedural-arbitrability determination fails to draw its essence from the parties’ agreement because the Arbitrator relies on inapposite contractual provisions and general equitable principles to “nullify” a clear, negotiated deadline.<sup>19</sup> The Authority will find 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.<sup>20</sup> The Authority has held that, “when parties agree to a [procedural]

<sup>7</sup> *Id.* at 16.

<sup>8</sup> *Id.* at 5 n.1 (internal quotation marks omitted).

<sup>9</sup> *Id.* at 21.

<sup>10</sup> *Id.* at 20.

<sup>11</sup> *Id.* at 20-21.

<sup>12</sup> *Id.* at 17.

<sup>13</sup> *Id.* (finding the Union’s time limit for invocation did not “begin to run until the Union [r]epresentative . . . received the [Agency’s June 12] response . . . acknowledg[ing] receipt”).

<sup>14</sup> *Id.*

<sup>15</sup> CBA at 241.

<sup>16</sup> Interim Award at 9.

<sup>17</sup> *Id.* at 24-25.

<sup>18</sup> Merits Award at 65.

<sup>19</sup> Exceptions at 12, 13; *see id.* at 6.

<sup>20</sup> *AFGE, Loc. 446*, 73 FLRA 421, 421 (2023) (citing *U.S. Dep’t of VA, John J. Pershing VA Med. Ctr., Poplar Bluff, Mo.*, 73 FLRA 67, 69 (2022) (Member Kiko concurring on other grounds)).

deadline – with no mention of any applicable exception – the parties intend to be bound by the deadline.”<sup>21</sup>

The Arbitrator found that the grievance was procedurally arbitrable, in part, because the Union “substantially complied” with the notice requirement when it, “in good faith[,] believed it sent” the invocation notification to the Agency.<sup>22</sup> Section 52.02 requires the Union to send written notification within twenty-five days of receiving a final grievance denial.<sup>23</sup> According to the Agency, the Arbitrator’s finding that the Union sufficiently complied conflicts with Section 52.02 because the Arbitrator failed to identify any provision of the parties’ agreement that “defined or allowed ‘substantial compliance’ to substitute for actual compliance.”<sup>24</sup> The Agency argues the Arbitrator simply excused noncompliance, noting that the Union provided no evidence – such as a draft email or affidavit – suggesting that anyone had drafted the required notification – let alone attempted to send it.<sup>25</sup> In fact, the only evidence the Arbitrator relied on to find the Union “substantially complied”<sup>26</sup> was the Union’s assertion that it intended to send the email, but, “presumably due to a technical issue with Outlook,” it did not.<sup>27</sup>

According to the Arbitrator, “[i]f the time line was[ not] met, the arbitrator lacks authority to hear the case on its merits.”<sup>28</sup> However, after acknowledging this limitation on his authority, the Arbitrator promptly announced his intention to bypass it,<sup>29</sup> stating that, “[e]ven if the [parties’ agreement] includes clear time frames, the case should not be dismissed if it would be unreasonable

to require strict compliance.”<sup>30</sup> Thus, rather than identifying an applicable, agreed-upon exception to the parties’ negotiated notice requirement, he found that enforcing the Union’s obligation was an “unreasonable” result given the Union’s purported *intention* to comply.<sup>31</sup> Because the Arbitrator looked outside the contract for a “mechanism[] to not enforce” Section 52.02’s clear deadline,<sup>32</sup> the Arbitrator’s reasoning evidences a manifest disregard for the parties’ agreement.<sup>33</sup>

The Arbitrator’s continuing-violation finding is similarly flawed. Noting that the employees were “still working” the grieved schedules, the Arbitrator found the grievance arbitrable, in part, because “the Union could refile its grievance . . . and get[] back to this same step by sending a separate twenty-five . . . day notice of invocation.”<sup>34</sup> The Agency argues that this finding fails to draw its essence from the parties’ agreement because the Arbitrator’s reasoning effectively “nullif[ied] the time limit for invoking arbitration,” despite no contractual support for such a result in the agreement.<sup>35</sup>

The Authority has previously rejected an arbitrator’s conclusion that a grievance-filing provision permitting a party to *file grievances* at any time likewise authorized the grieving party to *invoke arbitration* at any time.<sup>36</sup> Instead, where a collective-bargaining agreement contains a *clear deadline* for invoking arbitration, with no applicable exceptions, the arbitrator is bound to apply the

<sup>21</sup> *U.S. DOJ, Fed. BOP, Fed. Corr. Complex, Coleman, Fla.*, 71 FLRA 1013, 1014 (2020) (*Coleman*) (Member DuBester concurring; Member Abbott concurring) (quoting *U.S. DOJ, Fed. BOP, Fed. Corr. Complex, Coleman, Fla.*, 71 FLRA 892, 893 (2020) (Member DuBester concurring in part)).

<sup>22</sup> Interim Award at 16-17.

<sup>23</sup> CBA at 243.

<sup>24</sup> Exceptions at 8 (quoting Interim Award at 17).

<sup>25</sup> *Id.* at 15-16.

<sup>26</sup> Interim Award at 17.

<sup>27</sup> *Id.* at 5 n.1.

<sup>28</sup> *Id.* at 9-10.

<sup>29</sup> Member Arrington notes the Arbitrator’s statements – (1) “procedural resolutions are not highly favored[,] . . . arbitrators have found various mechanisms to not enforce forfeitures, depending on the circumstances”; (2) “[e]ven if the [parties’ agreement] includes clear time frames, the case should not be dismissed if it would be unreasonable to require strict compliance”; and (3) while the parties’ agreement “permits jurisdictional challenges any time,” that “permission on the timing of the challenge is not akin to a command of its outcome” – demonstrate a clear intention to disregard clear contractual language in pursuit of his own sense of industrial justice. *See id.* at 9, 11, 21. Such blatant disregard of contractual language is an affront to the purpose of collective-bargaining agreements – stability in labor relations.

<sup>30</sup> *Id.* at 21.

<sup>31</sup> *Id.*

<sup>32</sup> *See id.* at 11.

<sup>33</sup> *See U.S. Dep’t of the Air Force, 673rd Air Base Wing, Joint Base, Elmendorf-Richardson, Alaska*, 71 FLRA 781, 781-83 (2020) (Member DuBester dissenting) (granting essence exception where arbitrator excused missed procedural deadline on purely equitable grounds); *U.S. DOD, Educ. Activity*, 70 FLRA 937, 938 (2018) (*DODEA*) (Member DuBester dissenting) (granting essence exception where “[t]he [a]rbitrator cited no authority or contractual language allowing him to disregard the parties’ explicit forty-five-day [filing] limitation”).

<sup>34</sup> Interim Award at 20-21.

<sup>35</sup> Exceptions at 12.

<sup>36</sup> *See U.S. Dep’t of VA, John J. Pershing VA Med. Ctr.*, 71 FLRA 947, 949 (2020) (*Dep’t of VA*) (Member DuBester dissenting) (“The parties’ agreement provides that if the violation is of the continuing nature, the [u]nion may file a *grievance* at any time, not *invoke arbitration* at any time.”).

parties' negotiated deadline.<sup>37</sup> Here, the Arbitrator found a deficient grievance was arbitrable under the continuing-violation provision of the grievance procedure because the Union could *hypothetically* comply with all of its procedural obligations in a future grievance on the same subject.<sup>38</sup> Because this reasoning disregards a clear procedural requirement – potentially *all* procedural requirements where the alleged violation is continuing in nature – it fails to draw its essence from the parties' agreement.<sup>39</sup>

The Arbitrator also found that, “even if the Agency did not receive the separate notification email” by the deadline, the late email nevertheless satisfied the notice requirement because “the Agency did not respond that it received the Union’s [i]nvocation[-]of[-a]rbitration” email until two weeks after receiving it.<sup>40</sup> The Arbitrator cited Section 51.06 stating, “No time limit for responding [to] or appealing [grievance responses or related communications] shall begin to run until the Union [r]epresentative has received the [Agency] response or communication.”<sup>41</sup> Relying on this provision, he reasoned that the Union’s time limit for invoking arbitration did not “begin to run until the Union [r]epresentative . . . received the [Agency’s June 12] response . . . acknowledg[ing] receipt” of the Union’s invocation of arbitration.<sup>42</sup>

Not only is this reasoning unsupported by the parties' agreement, it is also plainly illogical. As the Agency argues, the parties' agreement imposes “no

deadline for the Agency’s acknowledgment of the invocation of arbitration,” nor does it condition the notice-requirement deadline on such acknowledgement.<sup>43</sup> As the Agency correctly contends, the Agency’s acknowledgement of the invocation does not have “any impact on whether the notice *preceding* the acknowledgment is deemed timely.”<sup>44</sup> Section 51.06 establishes *prospective deadlines* that “begin to run” from the receipt of a grievance response – not retroactive extensions.<sup>45</sup> Disregarding the clear meaning of Section 51.06, the Arbitrator irrationally interpreted this provision to excuse a missed deadline because the Agency did not respond to the untimely notice of invocation by some unspecified acknowledgment deadline.<sup>46</sup> Because this finding is both unsupported by, and inconsistent with, the parties' negotiated arbitration procedures, it does not reflect a plausible reading of the agreement. Consequently, the Arbitrator’s interpretation of Section 51.06 fails to draw its essence from the agreement.<sup>47</sup>

Finally, the Arbitrator found the Agency waived its procedural-arbitrability argument by not timely raising it.<sup>48</sup> As the Agency notes,<sup>49</sup> Section 51.14 expressly provides that, “[q]uestions of arbitrability may be raised at any step of the grievance procedure, *including the arbitration stage.*”<sup>50</sup> Interpreting the contract, the Arbitrator acknowledged that the agreement “permits jurisdictional challenges *at any time*,”<sup>51</sup> and that “[i]f the time line was[ not] met, [then] the arbitrator lacks authority

<sup>37</sup> *Id.* at 948 (“The Authority has held that a procedural-arbitrability determination does not represent a plausible determination when the [a]rbitrator fails to enforce the plain language of the agreement.” (citing *U.S. DOD, Educ. Activity, Alexandria, Va.*, 71 FLRA 765, 767 (2020) (Member DuBester dissenting)); *see also U.S. Dep’t of the Treasury, Off. of the Comptroller of the Currency*, 71 FLRA 179, 180 (2019) (Member DuBester dissenting) (vacating award finding grievance arbitrable despite untimely scheduling of arbitration because the collective-bargaining agreement did “not contain any language that either allow[ed] the party invoking arbitration to be dilatory or excuse[d] non-compliance”).

<sup>38</sup> Interim Award at 20-21 (“Because the [employees] are still working the subject grievance telework schedules, the Union could refile its grievance . . . and[,] crossing all the Union t’s and dot[ting] every I perfectly, get[] back to the same step by sending a separate twenty-five[-]day . . . notice of invocation.”).

<sup>39</sup> *See U.S. Dep’t of HUD*, 72 FLRA 450, 452 (2021) (Chairman DuBester dissenting) (setting aside procedural-arbitrability determination based on the invocation-notification provision at issue here because “Article 52 does not contain any language excusing the [u]nion’s noncompliance” with the notice requirement); *Dep’t of VA*, 71 FLRA at 949 (granting essence exception where “the [a]rbitrator refused to enforce the plain language of [the invocation-of-arbitration provision, and, thus,] the procedural-arbitrability determination [was] not a plausible interpretation of the parties’ [collective-bargaining] agreement”).

<sup>40</sup> Interim Award at 17.

<sup>41</sup> *Id.* (quoting CBA at 239).

<sup>42</sup> *Id.*

<sup>43</sup> Exceptions at 13-14.

<sup>44</sup> *Id.* at 14 (emphasis added).

<sup>45</sup> Interim Award at 17 (quoting CBA at 239).

<sup>46</sup> *See id.*

<sup>47</sup> *See U.S. DOJ, Fed. BOP, Fed. Corr. Inst., Dublin, Cal.*, 72 FLRA 343, 344-45 (2021) (Member Abbott concurring; Chairman DuBester dissenting, in part) (granting essence exception where arbitrator’s procedural-arbitrability determination “conflict[ed] with the plain wording” of the parties’ agreement); *Coleman*, 71 FLRA at 1014 (granting essence exception where arbitrator “permitt[ed] the [untimely] grievance to proceed as though the [u]nion had properly filed it”).

<sup>48</sup> Interim Award at 24-25.

<sup>49</sup> Exceptions at 4.

<sup>50</sup> CBA at 241 (emphasis added).

<sup>51</sup> Interim Award at 9 (emphasis added).

to hear the case on its merits.”<sup>52</sup> However, without citing the record or explaining his reasoning, the Arbitrator found that the Agency “slept in the weeds” in raising its procedural-arbitrability challenge during pre-hearing communications.<sup>53</sup>

The dissent finds this conclusion persuasive, noting that the Arbitrator stated elsewhere in the award that “permission on the timing of the challenge is not akin to a command of its outcome.”<sup>54</sup> Thus, according to the dissent, although the Arbitrator interpreted the contract as “permit[ing] jurisdictional challenges at any time,”<sup>55</sup> he could nevertheless *impose his own deadline* on the Agency. But such reasoning contradicts the plain wording of the agreement: while the Arbitrator can undoubtedly

reject a procedural-arbitrability challenge on the merits, the contract does not permit him to reject an arbitrability challenge as untimely when the parties specifically declined to impose a deadline for such a challenge.<sup>56</sup> Because the express language of the agreement<sup>57</sup> – as acknowledged by the Arbitrator<sup>58</sup> – allows the Agency to raise such arguments at arbitration, the Arbitrator’s unexplained denial of the Agency’s right to raise this

<sup>52</sup> *Id.* at 9-10.

<sup>53</sup> *Id.* at 24-25.

<sup>54</sup> Dissent at 15 (citing Interim Award at 9). The dissent also asserts that “at least some federal courts have found that parties’ practices under a collective-bargaining agreement may demonstrate that the parties have relaxed, modified, or even waived their collective-bargaining agreements’ literal language.” *Id.* at 15. However, we note that such findings are in conflict with numerous findings by federal courts that have prohibited arbitrators from relying on past practice to alter unambiguous contractual wording. See *Int’l Union, United Auto., Aerospace & Agric. Implement Workers of Am. (UAW) v. TRW Auto. U.S. LLC*, 766 F. App’x 186, 195-96 (6th Cir. 2019) (setting aside arbitration award that found parties’ conduct modified the plain wording of the agreement); *CP Kelco U.S., Inc. v. Int’l Union of Operating Eng’rs*, 381 F. App’x 808, 814 (10th Cir. 2010) (“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 [collective-bargaining agreement] if it is ambiguous or silent upon a precise question,” but not otherwise (emphasis added)); *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, 1139 (7th Cir. 2002) (*Anheuser-Busch*) (“While 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.” (citation modified)); *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.”).

<sup>55</sup> Interim Award at 9.

<sup>56</sup> The dissent suggests that, notwithstanding the precedent cited above in which courts have prohibited arbitrators from altering unambiguous contractual provisions, such alterations are permitted when the arbitrator decides a procedural matter. See Dissent at 15-17. We disagree. The Authority has held that when parties agree to procedural requirements for arbitration – with no mention of any applicable exception – they intend to be bound by those requirements. See, e.g., *U.S. DOJ, Fed. BOP, Fed. Corr. Complex, Terre Haute, Ind.*, 72 FLRA 711, 712 (2022) (Chairman DuBester dissenting) (citing *DODEA*, 70 FLRA at 938); see also *U.S. DHS, U.S. CBP, S.D., Cal.*, 72 FLRA 698, 699-700 (2022) (Member Abbott concurring; Chairman DuBester dissenting) (setting aside award where “[t]he [a]rbitrator cited no contractual wording that permitted the [u]nion to file a grievance outside the parties’ explicit forty-five-day timeframe”); *Dep’t of VA*, 71 FLRA at 948 (“The Authority has held that a procedural-arbitrability determination does not represent a plausible determination when the [a]rbitrator fails to enforce the plain language of the agreement.”). Consistent with this principle, the Authority will defer to arbitrators’ interpretations of the procedural requirements for arbitration; it will not ignore interpretations that alter unambiguous procedural requirements.

<sup>57</sup> See CBA at 241 (“Questions of arbitrability may be raised at any step of the grievance procedure, including the arbitration stage. . . . Questions of arbitrability shall be . . . decided prior to any hearing.”).

<sup>58</sup> Interim Award at 9 (“The [parties’ agreement] permits jurisdictional challenges at any time.”).

argument *at arbitration* directly conflicts with the plain wording of the parties' agreement.<sup>59</sup>

For the foregoing reasons, we grant the Agency's exception arguing that the Arbitrator's procedural-arbitrability determination fails to draw its essence from the parties' agreement, and set aside the interim award. As we find the Arbitrator erred in considering the grievance's merits, we also set aside the merits award, including the awarded remedies.<sup>60</sup>

#### IV. Decision

We grant the Agency's essence exception to the interim award and set aside both awards.

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<sup>59</sup> See *SSA*, 74 FLRA 555, 561 (2026) (*SSA*) (Member Wagner dissenting) (“[T]he 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.”); *SSA*, *Off. of Gen. Couns.*, 72 FLRA 554, 555 (2021) (*Off. of Gen. Counsel*) (setting aside finding that agency waived procedural-arbitrability argument where “the [a]rbitrator did not explain how the [a]gency’s actions amounted to a waiver when it had met the contractual deadline to raise the arbitrability issue”); *DODEA*, 70 FLRA at 938 (granting essence exception to award finding agency waived procedural-arbitrability determination where “[t]he [a]rbitrator d[id] not explain how the [a]gency’s decision to raise its timeliness issue at arbitration prejudiced the [u]nion, is contrary to the parties’ negotiated grievance procedure, or is otherwise barred”); *U.S. Small Bus. Admin.*, 70 FLRA 525, 527-28 (2018) (Member DuBester concurring in part and dissenting in part) (finding waiver of procedural-arbitrability argument did not represent a plausible interpretation of the parties’ collective-bargaining agreement “[b]ecause the [a]rbitrator’s waiver determination [had] no basis in the parties’ agreement”). The dissent claims that, “in assessing whether an arbitration award fails to draw its essence from a collective-bargaining agreement, the Authority must ask ‘whether the arbitrator was even “arguably construing or applying the [collective-bargaining agreement].”’” Dissent at 15 (alteration in original) (quoting *Nat’l Weather Serv. Emps. Org. v. FLRA*, 966 F.3d 875, 881 (D.C. Cir. 2020)). However, as we recently explained in *SSA*, we agree with those federal courts who have held that “an arbitrator may not shield a deficient award from essence review ‘simply by making the . . . noises of contract interpretation.’” *SSA*, 74 FLRA at 560 (quoting *Leed Architectural Prods., Inc. v. United Steelworkers of Am.*, *Loc. 6674*, 916 F.2d 63, 65 (2d Cir. 1990)); see also *Anheuser-Busch*, 280 F.3d at 1138 (same) (quoting *Ethyl Corp. v. United Steelworkers of Am.*, 768 F.2d 180, 187 (7th Cir. 1985)). Thus, we clarified that we will no longer uphold awards that conflict with the plain wording of an agreement simply because the arbitrator referenced – and, thus, “arguably” applied – the contract before reaching a clearly deficient interpretation. *SSA*, 74 FLRA at 556-61.

<sup>60</sup> See *Off. of Gen. Counsel*, 72 FLRA at 555 (setting aside merits award after finding procedural-arbitrability determination erroneous). Because we set aside both the interim and merits awards, we do not need to consider the Agency’s remaining exceptions. See *id.* at 555 n.21 (finding it unnecessary to consider remaining exceptions after setting aside arbitrator’s procedural-arbitrability determination).

**Member Arrington, concurring:**

I agree with the majority that the award fails to draw its essence from the parties' agreement. However, the gravity of this issue demands a more forceful articulation. Collective-bargaining agreements are the product of extensive negotiation, often spanning months or years, with every word and provision chosen deliberately and precisely. These agreements then undergo agency-head review<sup>1</sup> and, where applicable, formal ratification by union members. As someone who has spent decades negotiating collective-bargaining agreements, an arbitrator disregarding the clear, unambiguous language of these provisions, is not merely frustrating, it is a fundamental breach of the process and the respect it commands. While genuine contractual ambiguities arise and should be settled, situations such as this, where the departure from the plain text is indisputable,<sup>2</sup> amount to a failure by the Arbitrator to the parties, the Statute, and the rule of law.

First and foremost, the Arbitrator was clearly set on reaching the merits of the grievance, even if that meant disregarding the plain language of the parties' agreement. In this regard, the Arbitrator stated: "[I]t has been said that arbitrators have a preference to hear and decide cases on their merits . . . . Consequently, procedural resolutions are not highly favored. To that end, arbitrators have found various mechanisms to not enforce forfeitures, depending on the circumstances."<sup>3</sup> Not only do these statements evidence a manifest disregard of the parties' agreement, but including them in the award evidences the Arbitrator's predetermination to reach the merits of the grievance.

As noted in the majority, the Arbitrator blatantly disregarded the plain language of multiple provisions to find the grievance procedurally arbitrable – despite the Union's failure to adhere to the procedural requirements of

the parties' agreement. Because these types of provisions provide the procedures the parties *mutually agreed to follow*, arbitrators must enforce them even if they deem the result would be "unfair and unreasonable."<sup>4</sup> In this respect, the law dictates that the negotiated "grievance and arbitration procedures of the [parties' agreement] . . . bind the parties until they negotiate new terms."<sup>5</sup> In sum, the Arbitrator failed to properly consider and apply the procedural requirements of the parties' agreement – which is a breach of his responsibility to the parties, the Statute, and the rule of law.

<sup>1</sup> 5 U.S.C. § 7114(c)(1) ("An agreement between any agency and an exclusive representative shall be subject to approval by the head of the agency.").

<sup>2</sup> Cf. *U.S. DOJ, Fed. BOP, Fed. Corr. Complex, Terre Haute, Ind.*, 72 FLRA 711, 712-13 (2022) (Chairman DuBester dissenting) (vacating procedural determination that was contrary to the express deadline established by the parties' agreement); *U.S. Dep't of the Army, 93rd Signal Brigade, Fort Eustis, Va.*, 70 FLRA 733, 734 (2018) (Member DuBester dissenting) (vacating procedural determination that is incompatible with the express language of the agreement); *U.S. Small Bus. Admin.*, 70 FLRA 525, 527-28 (2018) (Member DuBester concurring in part and dissenting in part) (vacating arbitrator's conclusion that agency waived right to contest timeliness of invocation because the "determination ha[d] no basis in the parties' agreement")

<sup>3</sup> Interim Award at 11.

<sup>4</sup> See *id.* at 39 ("Put another way, arbitrators must take care to avoid giving one party an unfair and unreasonable advantage."); see also *U.S. Dep't of the Air Force, 673rd Air Base Wing, Joint Base, Elmendorf-Richardson, Alaska*, 71 FLRA 781, 782-83 (2020) (granting agency's essence exception, reasoning that "arbitrators are not free to ignore the procedural rules parties negotiate into a collective-bargaining agreement"); *U.S. Dep't of VA, John J. Pershing Med. Ctr., Poplar Bluff, Mo.*, 68 FLRA 852, 856 (2015) (Member DuBester concurring; Member Pizzella dissenting) (Dissenting Opinion of Member Pizzella) ("If an arbitrator is free to ignore the procedural rules that are negotiated by the parties into a collective-bargaining agreement simply because the arbitrator believes another outcome should be dispensed, then what purpose is served by including procedural requirements in the first place?").

<sup>5</sup> *Indep. Union of Pension Emps. for Democracy & Just.*, 68 FLRA 999, 1001 (2015). There is nothing that prohibits parties from negotiating grievance procedures that include good-faith-effort exceptions.

**Member Wagner, dissenting:**

The Arbitrator found, among other things, that the Agency waived its procedural-arbitrability objections to the grievance by failing to timely and unambiguously assert those objections. The majority concludes that this finding fails to draw its essence from the parties' collective-bargaining agreement. For the following reasons, I disagree.

I start with the parties' and the Arbitrator's actions and course of communications in this case, which provide important context for the Arbitrator's findings. As relevant here, on April 29, 2024,<sup>1</sup> the Union received the Agency's response to the Union's last-step grievance. On May 24 – within twenty-five calendar days of receiving the Agency's response – the Union invoked arbitration and requested a panel of arbitrators from the Federal Mediation and Conciliation Service (FMCS). The same day, FMCS notified the Agency of the Union's submission. Although the Union "in good faith believed it sent a separate" notice of invocation of arbitration to the Agency the same day,<sup>2</sup> it apparently failed to successfully do so.<sup>3</sup>

One week later, on May 31 – after not receiving any acknowledgment from the Agency that it had received the Union's notice of invocation – the Union sent the Agency an email, requesting such an acknowledgment. The Agency did not respond for nearly two weeks – until June 12, when it responded that it received its "invocation of arbitration and receipt of the panel," which the Arbitrator found "further [led] the Union to believe" that the Agency had received the Union's May 24 attempted email notification.<sup>4</sup>

On June 26, the Arbitrator received an email notification from FMCS that the parties had appointed him to resolve the dispute. On June 30, the Arbitrator accepted the appointment and offered dates for a hearing in July or August. On July 2, the Union representative emailed the Arbitrator, stating that it had conferred with the Agency and could not meet until September or later. On July 4, the Arbitrator responded, withdrawing his proffered July and August hearing dates and instead offering three dates in September.

On July 9, the Agency emailed the Arbitrator, stating that the parties believed that the arbitration hearing might run into a second day, and asking the Arbitrator to reserve September 23 and 24. On July 10, the Arbitrator responded and confirmed those dates; he said that he required a Zoom pre-hearing conference, which he would like to happen no later than the beginning of September.

On July 11, the Arbitrator received an email from the Agency, which stated that (1) the Agency had not previously agreed to conduct the arbitration hearing virtually; (2) if the Arbitrator preferred to see witnesses in person, then the Agency had office space that it could make available for an in-person hearing; and (3) if the Arbitrator preferred to conduct the hearing virtually, then the Agency had no objection to proceeding by Zoom. The same day, the Arbitrator responded, acknowledging receipt of the Agency's email and stating that he could do the hearing however the parties wanted him to do it. However, he stated that if he needed to travel to Chicago, then he would need to set aside four days (including two days for travel), and that September 23 and 24 would no longer be feasible because he had conflicts on September 22 and 25 and would not be able to travel those days. He also stated that the September 23 and 24 dates would remain the hearing dates, but if the parties notified him that they wanted to conduct the hearing in person, then they would need to schedule new dates.

Throughout this entire process, the Agency never mentioned to either the Union or the Arbitrator that it had never received an invocation of arbitration from the Union or that it would move to dismiss the grievance on procedural grounds. Then, nearly five weeks after the Arbitrator's July 11 email, in the late afternoon of August 23, the Agency "abruptly" changed course.<sup>5</sup> For the first time, the Agency demanded postponement of the September 23 and 24 Zoom hearing. The Agency stated that it intended to file a motion to dismiss the grievance based on arbitrability, and that, "[p]ursuant to the [parties' collective-bargaining agreement], questions of arbitrability shall be submitted to the arbitrator, in writing, and be decided prior to any hearing."<sup>6</sup> The Agency requested that the Arbitrator schedule a status call to discuss filing deadlines for the Agency's motion and the Union's reply.

<sup>1</sup> All following dates are from 2024.

<sup>2</sup> Interim Award at 16.

<sup>3</sup> *Id.* at 5 n.1 ("Upon investigation, the Union came to 'realize that the original email never went through to the Agency[,] presumably due to a technical issue with Outlook'").

<sup>4</sup> *Id.* at 2.

<sup>5</sup> *Id.* at 5.

<sup>6</sup> *Id.* at 6. In this connection, Article 51, Section 51.14 of the parties' agreement pertinently provides, "Questions of arbitrability shall be submitted to the arbitrator in writing and be decided prior to any hearing unless mutually agreed otherwise." Exceptions, Attach. 15, Joint Ex. 2, Collective-Bargaining Agreement (CBA) at 241.

On August 25, the Arbitrator responded to the Agency's email and asked for the Union's reply to it. He noted that the parties had mutually agreed to the September 23 and 24 dates for the Zoom hearing, and that they had confirmed those dates by email on July 11. The Arbitrator stated that the Zoom hearing remained in his calendar, and "whatever we choose to do," they would need a Zoom prehearing conference.<sup>7</sup> He suggested that the parties come back to him with a proposed date and time for that conference in the coming weeks, and he offered to send them proposed times if needed. The same day, the Agency responded, stating that it would meet with the Union to discuss the matter and would contact the Arbitrator regarding a Zoom date and time. On September 5, the Arbitrator conducted a hearing on the Agency's motion to postpone the scheduled hearing.

Subsequently, the Arbitrator issued his interim award. The Arbitrator found, among other things, that the Agency "slept in the weeds, and did not timely and unambiguously assert [its procedural-arbitrability] claims," which the Arbitrator "held to be waived."<sup>8</sup> Although the Arbitrator acknowledged that the parties' agreement "permits jurisdictional challenges at any time," he found: "[T]he permission on the timing of the challenge is not akin to a command of its outcome. One may be given leave to ask; but sometimes the answer is 'No.'"<sup>9</sup> Based on this finding (the waiver finding), among others, the Arbitrator concluded that the grievance was procedurally arbitrable.

I do not agree with the majority that the waiver finding fails to draw its essence from the parties' agreement. As I stated in my dissent in *SSA*,<sup>10</sup> the standards that federal courts apply in reviewing arbitration awards in the private sector also apply to the Authority's review of arbitrators' awards resolving contractual disputes in the federal sector.<sup>11</sup> Under those standards, in assessing whether an award draws its essence from a collective-bargaining agreement, the Authority must ask "whether the Arbitrator was 'even arguably construing or applying the [collective-bargaining agreement].'"<sup>12</sup> As I

also stated in *SSA*, I believe that the Authority's current "essence" tests – at least when properly applied – are consistent with that inquiry.<sup>13</sup> Under those tests, to demonstrate that an arbitrator's award fails to draw its essence from a collective-bargaining agreement, the excepting party must establish that 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.<sup>14</sup>

In addition, as I discussed in *SSA*, at least some federal courts have found that parties' practices under a collective-bargaining agreement may demonstrate that the parties have relaxed, modified, or even waived their collective-bargaining agreements' literal language.<sup>15</sup> Although the majority contends that those courts' holdings "are in conflict with numerous findings by federal courts that have prohibited arbitrators from relying on past practice to alter unambiguous contractual wording,"<sup>16</sup> none of them involved arbitration awards that purportedly

<sup>7</sup> Interim Award at 6.

<sup>8</sup> *Id.* at 24-25.

<sup>9</sup> *Id.* at 9.

<sup>10</sup> 74 FLRA 555, 567-91 (2026) (Dissenting Opinion of Member Wagner).

<sup>11</sup> *Id.* at 581-83.

<sup>12</sup> *Nat'l Weather Serv. Emps. Org. v. FLRA*, 966 F.3d 875, 881 (D.C. Cir. 2020) (quoting *United Paperworkers Int'l Union v. Misco, Inc.*, 484 U.S. 29, 38 (1987) (*Misco*)).

<sup>13</sup> 74 FLRA at 584-86.

<sup>14</sup> *U.S. DOL (OSHA)*, 34 FLRA 573, 575 (1990). However, in *SSA*, I also noted that I would be open to reconsidering the "plausible interpretation" test in a future, appropriate case. 74 FLRA at 586.

<sup>15</sup> 74 FLRA at 579 (citing *Aspic Eng'g & Constr. Co. v. ECC Centcom Constructors LLC*, 913 F.3d 1162, 1167 (9th Cir. 2019) ("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 v. Soward*, 586 F.3d 1096, 1106 (9th Cir. 2009)); *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 Fed. Appx. 783, 784 (9th Cir. 2012) (finding parties waived a provision of their contract through conduct).

<sup>16</sup> Majority at 8 n.54.

conflicted with *procedural* contract provisions.<sup>17</sup> It is well-established that arbitrators' determinations regarding procedural matters are entitled to even *greater* deference than those involving substantive matters.<sup>18</sup> Consistent with that principle, the U.S. Supreme Court has acknowledged that arbitrators may find *procedural* requirements in collective-bargaining agreements waived or excused.<sup>19</sup> Thus, federal courts have routinely upheld arbitration awards finding that parties, through their conduct, waived their ability to raise procedural objections

<sup>17</sup> See *Int'l Union, United Auto., Aerospace & Agric. Implement Workers of Am. (UAW) v. TRW Auto. U.S. LLC*, 766 F. App'x 186, 195-96 (6th Cir. 2019) (provisions concerning healthcare-coverage requirements); *CP Kelco U.S., Inc. v. Int'l Union of Operating Eng'rs*, 381 Fed. Appx. 808, 814-15 (10th Cir. 2010) (provision expressly reserving management's right to unilaterally outline call-in procedures); *Beaird Indus., Inc. v. Loc. 2297, Int'l Union*, 404 F.3d 942, 946-47 (5th Cir. 2005) (provision reserving management's right to subcontract); *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, 1135-36, 1137-38 (7th Cir. 2002) (*Anheuser-Busch*) (provision regarding commission rates) (citing *Tootsie Roll Indus., Inc. v. Loc. Union No. 1, Bakery, Confectionery & Tobacco Workers' Int'l Union*, 832 F.2d 81, 84 (7th Cir. 1987) (involving a last-chance agreement)); *U.S. Postal Serv. v. Am. Postal Workers Union, AFL-CIO*, 204 F.3d 523, 528 (4th Cir. 2000) (finding that arbitrator's award did *not* fail to draw its essence from an agreement where the arbitrator *declined* to accord the parties' alleged past practice the same authority as a contract provision retaining management's right to separate probationary employees); *Excel Corp. v. United Food & Com. Workers Int'l Union, Loc. 431*, 102 F.3d 1464, 1468 (8th Cir. 1996) (seniority provision); *Keebler Co. v. Milk Drivers & Dairy Emps. Union, Loc. No. 471*, 80 F.3d 284, 288-89 (8th Cir. 1996) (provisions concerning transfers of accounts).

<sup>18</sup> *Stroh Container Co. v. Delphi Indus., Inc.*, 783 F.2d 743, 749 (8th Cir. 1986) (*Stroh*) (“[W]e must . . . accord even greater deference to the arbitrator’s decisions on procedural matters than those bearing on substantive grounds.”); *United Steelworkers of Am., AFL-CIO-CLC v. Ideal Cement Co., Div. of Ideal Basic Indus., Inc.*, 762 F.2d 837, 841 (10th Cir. 1985) (*Ideal Cement*) (“The federal courts are to give even greater deference to an arbitrator’s decisions on matters of procedure which arise from the dispute and bear on its final disposition.”); *In re Laclede Elec. Coop., Inc. v. Int'l Bhd. of Elec. Workers, Loc. Union No. 53*, No. 6:22-cv-03227-MDH, 2024 WL 188403, at \*5–6 (W.D. Mo. Jan. 17, 2024) (*Laclede*) (noting “the even heightened deference arbitrators enjoy in the evaluation of procedural rather than substantive matters” (citing *El Dorado Sch. Dist. # 15 v. Cont'l Cas. Co.*, 247 F.3d 843, 846 (8th Cir. 2001) (*El Dorado*))); *Dustex Corp. v. Bd. of Trs. of the Mun. Elec. Util. of the City of Cedar Falls, Iowa*, No. 13-CV-2087-LRR, 2014 WL 2759630 at \*10 (N.D. Iowa June 18, 2014) (“Because the issue of whether the condition precedent was satisfied is a procedural issue – not

a substantive issue – the arbitrators’ decision is entitled to even more deference than it would receive were this an issue of substantive arbitrability.”); *United Food & Com. Workers Int'l Union, Loc. No. 7 v. Gruma Corp.*, No. 07-cv-1797-JLK, 2009 WL 1844304 at \*6 (D. Colo. June 24, 2009) (noting that “judicial review of . . . a procedural matter is even more deferential than the already narrow [essence] standard of review described above,” and that “the courts must defer to the arbitrator’s judgment on such matters”); *Praml v. Linsco/Priv. Ledger Corp.*, No. Civ. 05-581 (JRT/FLN), 2005 WL 2290943 at \*3 (D. Minn. Sept. 20, 2005) (“The court accords even greater deference to the arbitrator’s decisions on procedural questions than it does on substantive questions.”); *Am. Postal Workers Union, AFL-CIO v. U.S. Postal Serv.*, 362 F. Supp. 2d 284, 288 (D.D.C. 2005) (“Judicial deference is even greater for procedural decisions.”); *FSC Sec. Corp. v. Freel*, 811 F. Supp. 439, 444 (D. Minn. 1993) (holding that “the deference owed to an arbitrator’s decision on procedural matters is even greater than that owed to an arbitrator’s substantive decisions”), *aff’d*, 14 F.3d 1310 (8th Cir. 1994); *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) (“Where the award sought to be overturned turns on an alleged procedural error on an arbitrator’s part, the standard of review is even more deferential.”); see also *Brown v. Brown-Thill*, 762 F.3d 814, 819 (8th Cir. 2014) (“When an arbitration has been completed and a court is asked to vacate the award because the arbitrator was guilty of or permitted the prevailing party to commit procedural irregularities, ‘we must . . . accord even greater deference to the arbitrator’s decisions on procedural matters than those bearing on substantive grounds.’” (quoting *Stroh*, 783 F.2d at 748-49)); *Kennecott Utah Copper Corp. v. Becker*, 186 F.3d 1261, 1267 (10th Cir. 1999) (noting that, in *Ideal Cement*, “this court held that federal courts are to give even greater deference to an arbitrator’s decision on matters of procedure” (citation modified)).

<sup>19</sup> See *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 84 (2002) (“[T]he presumption is that the arbitrator should decide ‘allegation[s] of waiver, delay, or a like defense to arbitrability.’” (quoting *Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25 (1983) (emphasis added))); *John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543, 557 (1964) (“Doubt whether grievance procedures or some part of them apply to a particular dispute, whether such procedures have been followed or excused, or whether the unexcused failure to follow them avoids the duty to arbitrate cannot ordinarily be answered without consideration of the merits of the dispute which is presented for arbitration.” (emphasis added)).

to grievances or arbitration.<sup>20</sup> That is precisely what the Arbitrator found here, and it was appropriate under the principles set forth above. The cases cited by the majority do not support a contrary conclusion.<sup>21</sup>

In vacating the waiver finding, the majority relies on Article 51, Section 51.14 of the parties' agreement (Section 51.14), which provides that "[q]uestions of arbitrability may be raised at any step of the grievance

procedure, including the arbitration stage."<sup>22</sup> As an initial matter, that provision does not state that parties may raise arbitrability questions at *any* point in the arbitration stage, regardless of how far along the process is or how long the objecting party has been aware of the question. Nor does it say that the right to raise arbitrability questions is unwaivable. In any event, the Arbitrator did not ignore or refuse to apply Section 51.14. Rather, he *construed* the contract language simply as allowing the Agency to *raise*

<sup>20</sup> See, e.g., *Peco Foods Inc v. Retail Wholesale & Dep't Store Union Mid-S. Council*, 727 F. App'x 604, 608-09 (11th Cir. 2018); *Sw. Reg'l Council of Carpenters v. Drywall Dynamics, Inc.*, 823 F.3d 524, 531 (9th Cir. 2016); *Resol. Performance Prods., LLC v. Paper Allied Indus. Chem. & Energy Workers Int'l Union, Loc. 4-1201*, 480 F.3d 760, 769 (5th Cir. 2007); *Shopmen's Loc. 539 of Int'l Ass'n of Bridge, Structural & Ornamental Iron Workers, AFL-CIO v. Mosher Steel Co.*, 796 F.2d 1361, 1364-66 (11th Cir. 1986); *Laclede*, No. 6:22-cv-03227-MDH, 2024 WL 188403, at \*5-6 (citing *El Dorado*, 247 F.3d at 846); *Cascade Steel Rolling Mills, Inc. v. United Steelworkers Int'l Union Loc. 8378*, No. 21-CV-01090-YY, 2022 WL 5247555, at \*10-13 (D. Or. Aug. 12, 2022), *report and recommendation adopted*, 2022 WL 16781999 (D. Or. Nov. 8, 2022); *Jay v. SEIU-United Health Care Workers W.*, No. 16-cv-01340-EMC, 2017 WL 697110, at \*3 (N.D. Cal. Feb. 22, 2017); *Cascades Tissue Grp.-Pa., Inc. v. United Steel, Paper, & Forestry, Rubber, Mfg., Energy, Allied Indus. & Serv. Workers Int'l Union*, 119 F. Supp. 3d 307, 315 (E.D. Pa. 2015); *Reg'l Loc. Union No. 846 v. Gulf Coast Rebar, Inc.*, 83 F. Supp. 3d 997, 1013-14 (D. Or. 2015); *Transervice Lease Corp. v. Auto. Mechs. Union Loc. 701, IAMAW, AFL-CIO*, No. 12-C-6355, 2012 WL 6764050, at \*3 (N.D. Ill. Dec. 31, 2012) (citing *Bank v. Truck Ins. Exch.*, 51 F.3d 736, 737 (7th Cir. 1995)); *Cent. States, Se. & Sw. Areas Pension Fund v. Schilli Corp.*, 420 F.3d 663, 673 (7th Cir. 2005); *PPL Servs. Corp. v. Int'l Bhd. of Elec. Workers, Loc. 1600*, No. 11-3273, 2012 WL 5987546, at \*4-5 (E.D. Pa. Nov. 29, 2012); *United Steel, Paper & Forestry, Rubber Mfg., Enery, Allied Indus. & Serv. Workers Int'l Union v. Sec. DBS*, No. H-06-2062, 2007 WL 9822668, at \*3-4 (S.D. Tex. June 14, 2007). Cf., e.g., *Brown & Pipkins, LLC v. SEIU, Loc. 32BJ*, 846 F.3d 716, 727-28 (4th Cir. 2017) (upholding arbitrator's finding that party waived its objection to grievance's timeliness by stipulating to arbitrability at arbitration hearing); *EuroChem Trading USA Corp. v. Ganske*, No. 18-cv-16-slc, 2019 WL 2929760, at \*4 (W.D. Wis. July 8, 2019) (upholding arbitrator's finding that company waived its right to argue that the arbitrator applied the wrong rules by fully participating in the arbitration proceeding up until a particular point without objecting to application of those rules (citing *BG Grp. PLC v. Republic of Arg.*, 572 U.S. 25, 34 (2014))); *Nat'l Postal Mail Handlers Union v. U.S. Postal Serv.*, 67 F. Supp. 3d 236, 239-40 (D.D.C. 2014) (upholding arbitrator's finding that union's actions excused employer's failure to raise timeliness objection earlier, despite contract provision stating that the employer's failure to raise timeliness objections would be waived); *Hammerlund Constr., Inc. v. Int'l Union of Operating Eng'rs, Loc. 49*, No. 11-1041 ADM/LIB, 2012 WL 87794, at \*3 (D. Minn. Jan. 11, 2012) (upholding arbitrator's finding that employer waived its right to challenge the grievance as time-barred by failing to timely raise the issue in arbitration).

<sup>21</sup> With respect to the majority's reliance on *Anheuser-Busch*, I also note – as I did in *SSA* – that the Seventh Circuit subsequently clarified that opinion's limitations, stating that it “does not commit this court to the proposition that a judicial declaration of ‘plain meaning’ displaces an arbitrator’s interpretation,” and that “[a]ny such rule would be incompatible with [*Major League Baseball Players Ass'n v. Garvey*, 532 U.S. 504 (2001)] and its predecessors, as well as . . . dozens of decisions in this circuit.” *SSA*, 74 FLRA at 581 (quoting *Int'l Union of Operating Eng'rs, Loc. 139, AFL-CIO v. J.H. Findorff & Son, Inc.* 393 F.3d 742, 747 (7th Cir. 2004)). As I also noted, another court subsequently recognized that *Anheuser-Busch* involved an arbitral award “in which the arbitrator’s decision contradicted the plain and undisputed meaning of the agreement[.]” *Id.* (quoting *Sequoias-S.F. v. SEIU*, 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)). Thus, *Anheuser-Busch* is particularly inapposite here.

<sup>22</sup> Majority at 3 (quoting CBA at 241).

an arbitrability argument, not entitling it to prevail on its arbitrability objections without consideration of its conduct throughout the grievance and arbitration process. As such, his analysis easily cleared the hurdle of “*arguably* construing or applying” the agreement,<sup>23</sup> and, consequently, is not irrational, unfounded, implausible, or in manifest disregard of the parties’ agreement.<sup>24</sup> Therefore, his waiver finding is not deficient on essence grounds.

Further, his waiver finding is enough to sustain his conclusion that the grievance was procedurally arbitrable. In this regard, although the Arbitrator cited several reasons for reaching that conclusion, his waiver finding is a separate and independent basis for that conclusion. As such, I need not – and do not – address the Arbitrator’s other reasons for reaching that conclusion, the Agency’s challenges to those reasons, or the majority’s resolution of those challenges.<sup>25</sup>

In sum, I would deny the essence exception to the Arbitrator’s procedural-arbitrability conclusion and resolve the Agency’s remaining exceptions. Accordingly, I dissent.

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<sup>23</sup> *Misco*, 484 U.S. at 38 (emphasis added).

<sup>24</sup> See, e.g., *U.S. Dep’t of Transp., FAA*, 74 FLRA 433, 436 (2026) (denying essence exception where excepting party failed to demonstrate that award was irrational, unfounded, implausible, or evidence of a manifest disregard of the agreement).

<sup>25</sup> See, e.g., *U.S. Dep’t of VA*, 73 FLRA 660, 661-62 (2023) (finding arbitrator’s conclusion that agency waived its arbitrability challenges provided separate and independent ground for arbitrator’s procedural-arbitrability determination, and therefore finding it unnecessary to resolve exceptions to arbitrator’s other ground for that determination).