

74 FLRA No. 86

UNITED STATES
DEPARTMENT OF HOUSING
AND URBAN DEVELOPMENT
(Agency)

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 3972
(Union)

0-AR-5537
(72 FLRA 450 (2021))

ORDER DENYING
MOTION FOR RECONSIDERATION

September 30, 2026

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

I. Statement of the Case

The Union requests that we reconsider our decision in *U.S. Department of HUD (HUD)*.¹ In that case, the Authority found that the Arbitrator ignored the plain wording of the parties' collective-bargaining agreement and improperly relied on past practice to determine that the Union had properly invoked arbitration. Accordingly, the Authority set aside the award.

As discussed further below, we find that the Union's arguments in its motion for reconsideration (motion) attempt to relitigate conclusions reached in *HUD* or fail to establish extraordinary circumstances warranting reconsideration. Therefore, we deny the motion.

II. Background and Authority's Decision in *HUD*

The facts, summarized here, are set forth in greater detail in *HUD*.² The Union filed a grievance alleging that the Agency violated the grievant's *Weingarten* rights³ and improperly suspended the grievant for misconduct. To invoke arbitration, the Union filed a form with the Federal Mediation and Conciliation Service (FMCS) requesting a panel of arbitrators. Article 52 of the parties' agreement states that the party invoking arbitration

shall notify the other party of its submission of a matter to arbitration by giving written notice Such notice shall identify the specific grievance, suspension of [fourteen] days or less, adverse action[,] or unacceptable performance action involved and the designated representative(s) who shall handle the case. The party(s) invoking arbitration shall submit the request for arbitrators to FMCS or another mutually agreed upon source of arbitrators with the Notice of Invocation of Arbitration.⁴

The Agency alleged that the Union did not provide the written notice required by Article 52.

The Arbitrator held that Article 52's reference to a "Notice of Invocation [of] Arbitration" suggested the creation of a form.⁵ But the Arbitrator found that there was nothing in the agreement about "who [wa]s responsible for creating that form/document," and there was no evidence that either party had created a form.⁶ The Arbitrator then determined Article 52's notice provision was ambiguous because no form existed. As a result, the Arbitrator relied on the parties' past practice to conclude that the Union had properly invoked arbitration by filing only the FMCS form.

¹ 72 FLRA 450 (2021) (Chairman DuBester dissenting).

² *Id.* at 450-51.

³ Section 7114(a)(2)(B) of the Federal Service Labor-Management Relations Statute provides a right to representation during certain investigative examinations, which is similar to the right recognized in the private-sector decision in *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251 (1975), and therefore it is often called the *Weingarten* right. *HUD*, 72 FLRA at 450 n.3.

⁴ Exceptions, Combined Exs. at 56, Collective-Bargaining Agreement, Art. 52 (Art. 52).

⁵ Award at 6.

⁶ *Id.*; see also *id.* at 7 n.7 (stating that "[t]o require the Union to create an 'Invocation of Arbitration' form/document would be to modify a provision of the collective[-]bargaining agreement," which would exceed the arbitrator's authority).

In *HUD*, the Authority observed that, in order to satisfy Article 52's "written notice" requirement, the Union had to send the Agency the specified written notice *with* its FMCS form.⁷ As it was undisputed that the Union did not provide the notice required by Article 52,⁸ the Authority determined that the award conflicted with the plain wording of the parties' agreement. The Authority also concluded that the FMCS form could not, by itself, constitute written notice, because it did not include the specific information required under Article 52.⁹

Additionally, the Authority concluded that the Arbitrator manufactured Article 52's ambiguity by finding that Article 52's reference to "Notice of Invocation of Arbitration" could only be interpreted as requiring the creation of a form.¹⁰ In this regard, the Authority observed that the Union could have provided the written notice required by Article 52 "through any method of written communication to the Agency – including email."¹¹ Accordingly, the Authority found that the Arbitrator erred by relying on past practice to modify Article 52's "clear and unambiguous terms," and set aside the award.¹²

On September 7, 2021, the Union filed this motion.

III. Analysis and Conclusion: We deny the Union's motion for reconsideration.

Section 2429.17 of the Authority's Regulations permits a party that can establish extraordinary circumstances to move for reconsideration of an Authority

decision.¹³ The Authority has repeatedly held that a party seeking reconsideration bears the heavy burden of establishing that extraordinary circumstances exist to justify this unusual action.¹⁴ Errors in the Authority's remedial order, process, conclusions of law, or factual findings may justify granting reconsideration.¹⁵ However, attempts to relitigate conclusions reached by the Authority are insufficient to establish extraordinary circumstances.¹⁶

The Union argues that its failure to provide the written notice required by Article 52 was a "de minimis error[]" or departure from the language of the [parties' agreement]," and the parties' agreement did not compel the Arbitrator to dismiss the grievance for such an error.¹⁷ But we considered, and rejected, this argument in *HUD*.¹⁸ The Authority did not find a technical defect in an otherwise compliant notice; rather, based on the Arbitrator's undisputed factual findings, the Authority found that the Union failed to provide the required notice at all.¹⁹ That is, by simply submitting a request for arbitrators *to FMCS*²⁰ – which did not include the specific information needed to satisfy Article 52²¹ – the Union failed to conform to either the form or the substance of Article 52's written notice requirement.²² Moreover, although the parties' agreement did not contain language compelling the grievance's dismissal, the Authority has set aside arbitrators' procedural-arbitrability determinations under similar circumstances.²³ Thus, this argument fails

⁷ *HUD*, 72 FLRA at 452. In this regard, we note the dissent's misstatement that, "[a]ccording to the [*HUD*] majority, Article 52 'required' the Union to submit a separate 'Notice of Invocation of Arbitration' form." Dissent at 12 (citing *HUD*, 72 FLRA at 452). Nowhere in *HUD* did the Authority claim Article 52 required that written notice be submitted in a "form." To the contrary, the Authority found the Arbitrator manufactured an ambiguity by finding Article 52 "requir[ed] the creation of a form," and instead emphasized that "Article 52 makes no reference to a form." *HUD*, 72 FLRA at 452.

⁸ *HUD*, 72 FLRA at 452 ("[I]t is undisputed that the Union did not submit a separate 'Notice of Invocation of Arbitration' 'with' the FMCS form, as required by Article 52." (emphasis added)).

⁹ *Id.* at 452 n.27 (reciting contractual requirement that the notice of invocation of arbitration "shall identify the specific grievance, suspension of [fourteen] days or less, adverse action[,] or unacceptable performance action involved and the designated representative(s) who shall handle the case" (quoting Art. 52)).

¹⁰ *Id.* at 452 ("Article 52 makes no reference to a form. It simply states that the party invoking arbitration must give 'written notice' and it specifies the requirements necessary for that notice.").

¹¹ *Id.* at 452 n.23.

¹² *Id.* at 452.

¹³ 5 C.F.R. § 2429.17.

¹⁴ *AFGE, Loc. 2338*, 71 FLRA 644, 644 (2020).

¹⁵ *Id.* at 644-45.

¹⁶ *Id.* at 645.

¹⁷ Mot. at 11.

¹⁸ 72 FLRA at 451-52 & n.28.

¹⁹ *Id.* at 452 & n.27.

²⁰ *Id.* at 450 (noting that "the Union filed a form with FMCS requesting a panel of arbitrators" and "FMCS notified the Agency that the Union had submitted the request for a panel of arbitrators").

²¹ *Id.* at 452 n.27 ("[T]he FMCS form did not include the specific information required for written notice, and thus does not meet Article 52's requirement for a written 'Notice of Invocation of Arbitration.'").

²² *Id.* at 451-52.

²³ See *U.S. DOJ, Fed. BOP, Fed. Corr. Inst., Talladega, Ala.*, 71 FLRA 1145, 1146 n.15 (2020) (Member DuBester dissenting) (noting that the Authority "has set aside arbitrators' procedural-arbitrability determinations for failing to enforce the plain wording of the parties' procedural filing requirements even where the collective-bargaining agreement did not expressly require cancellation of an improperly filed grievance"); *U.S. Dep't of the Army, 93rd Signal Brigade, Fort Eustis, Va.*, 70 FLRA 733, 734 (2018) (*Fort Eustis*) (Member DuBester dissenting) (setting aside an arbitrator's procedural-arbitrability determination, in part, because nothing in the parties' agreement "excuse[d] the [u]nion's non-compliance with the negotiated grievance procedure").

to establish extraordinary circumstances warranting reconsideration.²⁴

The Union also contends that the Arbitrator did not err by looking at past practice because Article 52 was ambiguous.²⁵ We also considered and rejected this argument in *HUD*.²⁶ As the Authority found in *HUD*,²⁷ the Arbitrator manufactured Article 52's ambiguity by determining that written notice must be presented on a particular nonexistent form.²⁸ According to the Arbitrator, the ambiguity stemmed from the agreement's silence as to "who is responsible for creating that form," as well as a lack of evidence that the form existed.²⁹ Our dissenting colleague finds the Arbitrator's reasoning persuasive, arguing that "[i]t was hardly irrational for [the Arbitrator] to find that Article 52's reference to a (capitalized) 'Notice of Invocation [of] Arbitration' contemplated the creation of a form."³⁰ However, the absence of a prescribed form does not render ambiguous either Article 52's requirement to provide written notice or the information that the notice must contain. Although the parties chose to identify – and require the use of – specific forms in other articles of the agreement,³¹ the parties did not articulate in Article 52 that written notice could only be executed on a particular form. Moreover, there is no

indication that the Union's clear obligation to provide written notice was contingent on the creation of such a form.³²

Conversely, Article 52 unambiguously requires the party invoking arbitration to provide the other party certain information in writing: the notice must "identify the specific grievance, [the challenged Agency action,] and the designated representative(s) who shall handle the case."³³ It also unambiguously requires that, after sending written notice with this information, the invoking party must enclose this written notice in its request for arbitrators along with the FMCS form.³⁴ As the Authority reasoned in *HUD*, the Arbitrator eliminated the Union's obligation to provide this written notice, finding that the parties' past practice conflicted with – and modified – Article 52's clear and unambiguous notice requirement.³⁵ The Union's motion – arguing that consideration of past practice was necessary to understand Article 52³⁶ – is merely an attempt to relitigate *HUD*, and, thus, it fails to demonstrate extraordinary circumstances.³⁷ Nor does the Union's assertion that its past-practice evidence was un rebutted alter that conclusion.³⁸ Even assuming the past practice existed, the Authority in *HUD* applied precedent to conclude that the Arbitrator could not rely on past

²⁴ See *U.S. Dep't of VA, John J. Pershing VA Med. Ctr., Poplar Bluff, Mo.*, 72 FLRA 419, 420 (2021) (*Poplar Bluff*) (attempt to relitigate argument did not demonstrate extraordinary circumstances warranting reconsideration).

²⁵ Mot. at 13.

²⁶ 72 FLRA at 452 ("[T]he Arbitrator erred in relying on past practice to modify Article 52's clear and unambiguous terms.").

²⁷ *Id.* at 452 n.23 (determining that the Arbitrator created Article 52's ambiguity by finding that article required a form even though the plain wording of the article would have permitted the Union to "provide[] written Notice of Invocation of Arbitration . . . through any method of written communication").

²⁸ Award at 7 ("[T]he [A]rbitrator finds the language in this collective[-]bargaining agreement is not clear, but ambiguous for it does not contain a 'Notice of Invocation [of] Arbitration' form/document."); see also *id.* at 6 ("No evidence was provided by the Agency that such a form/document exists.").

²⁹ *Id.* at 6.

³⁰ Dissent at 18.

³¹ Compare Exceptions, Combined Exs. at 64-65, Collective-Bargaining-Agreement Excerpts (CBA Excerpts) (Art. 51 stating, "[T]he employee or Union shall submit the grievance on an Employee Grievance Form."), and CBA Excerpts at 66 (Art. 56 stating, "The Department shall ensure that forms for reporting loss, theft, or damage to Government-owned personal property, as well as forms needed to identify and remove privately-owned personal property from the premises, shall be readily available to employees through administrative offices."), with Art. 52 ("The party[] invoking arbitration shall submit the request for arbitrators to FMCS or another mutually agreed upon source of arbitrators with the Notice of Invocation of Arbitration.").

³² We note that, to avoid "modify[ing]" the contract by requiring the Union to create a form for invoking arbitration, the Arbitrator chose to substantially modify the contract by eliminating the

written notice obligation altogether. Compare Award at 7 n.7 (stating that "[t]o require the Union to create an 'Invocation of Arbitration' form/document would be to modify a provision of the collective[-]bargaining agreement," which would exceed the arbitrator's authority), with *HUD*, 72 FLRA at 452 (finding award directly conflicted with parties' agreement because "Article 52 does not contain any language excusing the Union's noncompliance" with the written-notice requirement).

³³ Art. 52.

³⁴ *Id.* The dissent notes that "the language in Article 52 upon which the *HUD* majority relied appears to address only the procedure for submitting a request for arbitrators 'to FMCS' (or another mutually agreed upon source of arbitrators); it does not unequivocally address the process governing notice to the Agency." Dissent at 19. We disagree; the lion's share of Article 52 concerns the procedures by which "[e]ither the Union or Management shall notify the other party of its submission of a matter to arbitration." Art. 52. It is only after establishing the deadlines and information required for providing written notice to the other party that Article 52 mentions that this written notice must accompany a request to FMCS for an arbitrator. See *id.*

³⁵ See *HUD*, 72 FLRA at 452; see also *U.S. Small Bus. Admin.*, 70 FLRA 525, 528 (2018) (*SBA*) (Member DuBester concurring, in part, and dissenting, in part) ("[A]rbitrators may not look beyond a collective-bargaining agreement – to extraneous considerations such as past practice – to modify an agreement's clear and unambiguous terms.").

³⁶ Mot. at 13 ("Once he found [Article 52] so vague as to require further context as to what form or process . . . the provision was referring[, he was] constrained to find the text of [Article 52] ambiguous, and [he] had no alternative but to use past practice to interpret it.").

³⁷ See *Poplar Bluff*, 72 FLRA at 420.

³⁸ Mot. at 13.

practice to modify Article 52's clear and unambiguous terms.³⁹

Additionally, the Union alleges that the Authority should have considered the factors in *Cruz-Martinez v. DHS*⁴⁰ to determine if the parties' past practice was binding.⁴¹ However, it was unnecessary for the Authority to consider any past-practice factors because the Arbitrator was precluded from modifying the plain and unambiguous wording of Article 52.⁴² Thus, this allegation does not provide a basis for granting reconsideration.

Citing cases involving private-sector arbitration, the Union also contends that the Authority did not properly defer to the Arbitrator's interpretation of Article 52.⁴³ According to the Union, the Authority must defer to an arbitrator's contractual interpretation as long as the

arbitrator is "even arguably construing or applying the contract" – regardless of whether the Authority is "convinced [the arbitrator] committed serious error."⁴⁴ However, as we recently held in *SSA*, this "even arguably construing or applying" standard conflicts with the federal-court-derived essence tests that the Authority has applied for over forty years.⁴⁵ Because we agree with the federal courts who have held that an arbitrator may not shield a deficient award from essence review "simply by

³⁹ 72 FLRA at 452 (citing *SBA*, 70 FLRA at 528). The dissent also asserts that "some courts . . . have sometimes found that parties' practices under a CBA have demonstrated that they have relaxed, modified, or even waived the CBA's literal language." Dissent at 15-16. However, as we recently noted in *SSA*, 74 FLRA 555, 562 (2026) (Member Wagner dissenting), 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. 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 CBA 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*) ("[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." (all but first 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.").

⁴⁰ 410 F.3d 1366, 1370-71 (Fed. Cir. 2005) (finding substantial evidence supported arbitrator's finding of past practice); see also *id.* at 1369 (U.S. Court of Appeals, Federal Circuit reviews arbitration awards regarding removal from federal service under the "deferential standard" set forth in 5 U.S.C. § 7703(c)).

⁴¹ See Mot. at 15-16.

⁴² See *HUD*, 72 FLRA at 452; see also *Fort Eustis*, 70 FLRA at 734 (determining the arbitrator "could not rely on the parties' alleged 'normal course of business' to modify [agreement]'s plain wording"). Additionally, the Authority does not apply the standard set forth in 5 U.S.C. § 7703 in reviewing arbitration awards. See *SBA*, 70 FLRA at 528 n.32 ("[T]he Authority has repeatedly rejected the applicability of . . . § 7703 to the review of procedural-arbitrability determinations under the . . . Statute.").

⁴³ See Mot. at 14-15 (citing *Major League Baseball Players Ass'n v. Garvey*, 532 U.S. 504, 509 (2001) (*Garvey*); *E. Associated Coal Corp. v. United Mine Workers of Am., Dist. 17*, 531 U.S. 57, 62 (2000); *United Paperworkers Int'l Union, AFL-CIO v. Misco, Inc.*, 484 U.S. 29, 36 (1987); *United Steelworkers of Am. v. Enter. Wheel & Car Corp.*, 363 U.S. 593, 597 (1960); *United Steelworkers of Am. v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 581-82 (1960)).

⁴⁴ *Id.* at 14 (quoting *Garvey*, 532 U.S. at 509).

⁴⁵ *SSA*, 74 FLRA at 558-59 ("[E]ach of the essence tests asks a variation of the same question: did the arbitrator seriously err in interpreting the parties' agreement – the exact question the ['even arguably construing or applying' standard] prohibits the Authority from considering.").

making the . . . noises of contract interpretation,”⁴⁶ we 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.⁴⁷

Applying this standard here, we find the Union does not demonstrate that the Authority failed to properly defer to the Arbitrator’s clearly erroneous contract interpretation. Based on the above, the Union has failed to meet the heavy burden of establishing extraordinary circumstances that would warrant reconsideration of *HUD*.⁴⁸ Therefore, we deny the Union’s motion.⁴⁹

IV. Decision

We deny the Union’s motion for reconsideration.

⁴⁶ *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 (quoting *Ethyl Corp. v. United Steelworkers of Am.*, 768 F.2d 180, 187 (7th Cir. 1985)); *Monongahela Valley Hosp. Inc. v. United Steel, Paper & Forestry, Rubber, Mfg., Allied Indus. & Serv. Workers Int’l Union, AFL-CIO*, 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.”); *Appalachian Reg’l Healthcare, Inc. v. United Steelworkers of Am.*, AFL-CIO-CLC, Loc. 14398, 245 F.3d 601, 605 (6th Cir. 2001) (“The arbitrator’s construction of the [a]greement conflicts with express provisions and therefore fails to draw its essence from the [a]greement.”); *Int’l Union, United Mine Workers of Am. v. Marrowbone Dev. Co.*, 232 F.3d 383, 389 (4th Cir. 2000) (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.”).

⁴⁷ See *SSA*, 74 FLRA at 561 (citing *U.S. SBA*, 70 FLRA 525, 527 (2018) (Member DuBester concurring in part and dissenting in part); *U.S. Dep’t of the Air Force, Okla. City Air Logistics Command, Tinker Air Force Base, Okla.*, 48 FLRA 342, 348 (1993)).

⁴⁸ See *U.S. Dep’t of the Army, Moncrief Army Health Clinic, Fort Jackson, S.C.*, 72 FLRA 506, 507-08 (2021) (Chairman DuBester dissenting) (denying reconsideration where union’s arguments that agreement was ambiguous and award drew its essence from the parties’ agreement merely attempted to relitigate matters that the union had already raised and the Authority had resolved).

⁴⁹ Member Arrington notes this case provides another example of the importance of “honor[ing] the plain language of negotiated provisions.” See *U.S. Dep’t of the Treasury, BEP*, 74 FLRA 530, 538 (2026) (Dissenting Opinion of Member Arrington).

Member Wagner, dissenting:

In *U.S. Department of HUD (HUD)*,¹ a majority of the Authority (the *HUD* majority) set aside an award of Arbitrator Edward B. Valverde on the ground that the award failed to draw its “essence” from the parties’ collective-bargaining agreement (CBA).² The Union has filed a motion for reconsideration of *HUD* (motion), arguing that the *HUD* majority made an error of law in its application of the essence standard.³ For the following reasons, I agree.

One of the issues before the Arbitrator was “[w]hether the Union’s invocation of arbitration was in compliance with Article 52, Section 52.02 of the parties’ [CBA]” (Article 52).⁴ Article 52 states, in relevant part:

Notice. Either the Union or Management 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, or Management’s final notice of decision in a suspension of [fourteen] days or less, adverse action[,] or unacceptable performance[-]based action. Such notice shall identify the specific grievance, suspension of [fourteen] days or less, adverse action[,] or unacceptable performance action involved and the designated representative(s) who shall handle the case. The party(s) invoking arbitration shall submit the request for arbitrators to [the Federal Mediation and Conciliation Service (FMCS)] or another mutually agreed upon source of arbitrators with the Notice of Invocation [of] Arbitration. . . .⁵

Relying largely on stipulated facts, the Arbitrator made the following findings. After the Agency suspended an employee, the Union filed a grievance (the first grievance) that the parties were unable to resolve. On August 10, 2018,⁶ an Agency representative (the first Agency representative) received an email from the Union, asking for an extension of time to invoke arbitration. The first Agency representative responded that “the Agency is

not able to grant an extension for invoking arbitration,” and asked the Union to “proceed with invoking arbitration within the timeline in the [CBA].”⁷ Therefore, on August 20, the Union filed a form with FMCS requesting a panel of arbitrators (the FMCS form). On August 30, the first Agency representative emailed the Union, saying that she had not received notification from the Union that it was invoking arbitration per Article 52. However, “[s]he acknowledged she had received [notification from FMCS] on August 20,”⁸ and the FMCS form was attached to her email. Also on August 30, another Agency representative (the second Agency representative) denied a related, subsequently filed Union grievance. In his email denying that grievance, the second Agency representative stated the Union “did invoke arbitration” on the first grievance.⁹

Reviewing the terms of Article 52, the Arbitrator found that it “identifies that both the Union *and* Agency have the ability to submit matters to arbitration; then addresses the requirements of the notice.”¹⁰ The Arbitrator determined that Article 52 “provides a name for the document that purportedly is to provide the notice, i.e., ‘Notice of Invocation [of] Arbitration.’”¹¹ According to the Arbitrator, “[t]his suggests that a form was to be created, but it does not identify who is responsible for creating that form/document.”¹² In this regard, the Arbitrator found that “[n]o such form/document is attached to the CBA,” and the Agency did not “submit such a form into evidence.”¹³ Further, the Arbitrator stated that

[n]o evidence was provided by the Agency that such a form/document exists, much less that it had been used by the parties to provide notice of invocation of arbitration. Because both parties can submit matters to arbitration, conceivably each party could have designed its own notice of invocation form/document to be used for forwarding their grievance to arbitration; however, neither party provided evidence that such a form/document exists.¹⁴

The Arbitrator further stated that, “[t]o require the Union to create an ‘Invocation of Arbitration’ form/document would be to modify a provision of the [CBA], which is beyond the authority of the [A]rbitrator.”¹⁵

¹ 72 FLRA 450 (2021) (Chairman DuBester dissenting).

² *Id.* at 452.

³ Mot. at 10.

⁴ Award at 2.

⁵ *Id.* at 4-5 (emphasis omitted).

⁶ All dates in this paragraph are from 2018.

⁷ Award at 3.

⁸ *Id.*

⁹ Mot., Ex. 3, Union’s Pre-Hr’g Br. at 54; *see* Award at 4.

¹⁰ Award at 6.

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.* at 7 n.7 (citing Art 52.10(2)).

The Arbitrator concluded that Article 52 was “not clear, but ambiguous for it does not contain a ‘Notice of Invocation [of] Arbitration’ form/document, nor does it identify who is responsible for creating such a form/document.”¹⁶ The Arbitrator also found “[t]hat ambiguity is further illustrated by the fact that . . . the [first Agency representative] did not accept the FMCS notice as complying with the contractual provision regarding notice of invocation of arbitration,” but “the [second Agency representative] fully recognized [that] the Agency had received notice of invocation when it received notice from FMCS.”¹⁷

Having found Article 52 ambiguous, the Arbitrator considered the parties’ past practices “regarding what the[y] . . . ha[d] accepted” with respect to “the notice for invoking arbitration.”¹⁸ The Arbitrator noted that the CBA had an effective date of March 2015, but that the Union contended that Article 52’s language had been “unchanged through several contracts.”¹⁹ The Arbitrator found that “[o]nly the Union provided evidence on what it has done in the past to invoke arbitration, i.e., it has contacted FMCS, ma[de] its request for a panel of arbitrators (i.e., complete[d] [the] FMCS [f]orm . . .), [and] pa[id] the filing fee,” and “FMCS notifies the other party (Agency) that a panel of arbitrators has been requested.”²⁰ In this connection, the Union provided the Arbitrator with a sworn affidavit from the person who had served as its local president from May 1994 through April 2016 (the First Local President). The First Local President “stated that in his [twenty-two] years as [l]ocal president he invoked arbitration approximately [sixty-five] times and did so by going to the FMCS website to complete the FMCS form and pay the required fee”; and FMCS would “process[] the request and notif[y] the Agency representative of the request.”²¹ According to the First Local President, “the Agency had never before questioned his method of invoking arbitration or [claimed] that it was not in compliance with” the parties’ agreements.²² The First Local President also stated that he had trained his successor, who served as local president from April 1, 2016, through January 27, 2019 (the Second Local President), “on how to invoke arbitration, i.e., by contacting the FMCS website, completing the FMCS form[,] and paying the fee.”²³ The Union also submitted an affidavit from the Second Local President, who “stated she invoked arbitration in the manner she had been taught by [the First Local President], i.e., by going to the FMCS

website, completing the FMCS form . . . and pay[ing] the filing fee.”²⁴

The Arbitrator determined that this method “has apparently sufficed to notify the Agency that arbitration has been invoked,”²⁵ and he found it “clear [that] the Union’s actions [in this case] were consistent with what it had done in the past and what the Agency had previously accepted.”²⁶ Accordingly, the Arbitrator rejected the Agency’s claim that the Union failed to timely invoke arbitration, and he resolved the grievance on the merits.

The Agency filed exceptions to the Arbitrator’s award, arguing, as relevant here, that the Arbitrator’s findings regarding Article 52 failed to draw their essence from the CBA.²⁷ Among other things, the Agency argued that “[t]he Notice of Invocation of Arbitration (‘Notice’), described in [Article 52], is a stand-alone document that must be sent by the invoking party, here the Union, to the Agency.”²⁸

The Union filed an opposition. The Union responded to the Agency’s claim that Article 52 requires that a Notice of Invocation of Arbitration be an independent document attached to the FMCS form when requesting a list of arbitrators. Specifically, the Union noted that the second Agency representative

had not interpreted [Article 52] to have such a requirement, and as the Union noted in its prehearing submission [to the Arbitrator], although the contract language does state that the party invoking arbitration “shall submit the request for arbitrators to FMCS or another mutually agreed upon source of arbitrators *with* the Notice of Invocation . . .,” when filling out the form online, there is no opportunity to attach additional documentation to the request for arbitrators.²⁹

The Union contended that “the inability to attach a document independent of the [FMCS] form to serve as a ‘Notice of Invocation of Arbitration’ makes the contract language even less clear that a notice of invocation under [Article 52] has to be a document independent of the [FMCS] form itself.”³⁰ Further, the Union noted that even the Agency’s two representatives took different positions

¹⁶ *Id.* at 7.

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.* at 6.

²⁰ *Id.*

²¹ *Id.* at 3.

²² *Id.* at 3-4.

²³ *Id.* at 3.

²⁴ *Id.* at 4.

²⁵ *Id.* at 6.

²⁶ *Id.* at 7.

²⁷ Exceptions at 3-5.

²⁸ *Id.* at 4.

²⁹ Opp’n at 12-13.

³⁰ *Id.* at 13.

on whether the Union's actions satisfied Article 52, stating that "[t]he fact that there were conflicting positions even within the Agency demonstrates that there was not only one plausible reading of the [CBA]."³¹ Finally, the Union contended that the Arbitrator did not err by looking to the parties' past practices, because "it is 'permissible for [arbitrators] to consider parties' past practices when interpreting an ambiguous contract provision."³²

The HUD majority set aside the Arbitrator's award on essence grounds.³³ According to the majority, Article 52 "require[d]" the Union to submit a separate "Notice of Invocation of Arbitration" form, and it failed to do so.³⁴ "As Article 52 does not contain any language excusing the Union's noncompliance," the majority found that the Arbitrator's award "conflicts with the plain wording of" Article 52.³⁵ Further, the majority stated that the Arbitrator

created [a] so-called ambiguity [in Article 52] by finding that Article 52's reference to a "Notice of Invocation [of] Arbitration" could only be interpreted as requiring the creation of a form. But Article 52 makes no reference to a form. It simply states that the party invoking arbitration must give "written notice," and it specifies the requirements necessary for that notice. Therefore, the Arbitrator erred in relying on past practice to modify Article 52's clear and unambiguous terms.³⁶

With respect to the Union's claim that there was no opportunity to attach additional documentation to its request for arbitrators, the HUD majority simply stated that "the Union could have easily provided written Notice of Invocation of Arbitration *with* the FMCS form through any method of written communication to the Agency – including email."³⁷

Chairman DuBester dissented.³⁸

In its motion, the Union argues that the HUD majority made an error of law in its application of the essence standard.³⁹ Specifically, the Union contends that the HUD majority erroneously "negated the weighty authority in the federal courts to both defer to an arbitrator's sound judgment and to apply past practices when necessary to fairly adjudicate a matter before him."⁴⁰

I agree that the HUD majority erred, as a matter of law, in how it reviewed the Arbitrator's award. As I stated in my dissent in *SSA*,⁴¹ 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.⁴² Under those standards, in assessing whether an award draws its essence from a CBA, the Authority must ask "whether the Arbitrator was 'even arguably construing or applying the [CBA].'"⁴³ 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.⁴⁴ Under those tests, 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.⁴⁵

In addition, as I noted in *SSA*, the U.S. Supreme Court has stated that "[t]he 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."⁴⁶ Accordingly, circuit courts routinely

³¹ *Id.* at 12.

³² *Id.* at 4.

³³ 72 FLRA at 451-52.

³⁴ *Id.* at 452.

³⁵ *Id.*

³⁶ *Id.* (footnotes omitted).

³⁷ *Id.* at 452 n.23.

³⁸ *Id.* at 453-54.

³⁹ Mot. at 10-16.

⁴⁰ *Id.* at 15-16.

⁴¹ 74 FLRA 555, 567-91 (2026) (Dissenting Opinion of Member Wagner).

⁴² *Id.* at 583; see also *U.S. DOL*, 74 FLRA 604, 610 (2026) (*DOL*) (Dissenting Opinion of Member Wagner); *U.S. Dep't of HUD*,

74 FLRA 592, 600 (2026) (*Dep't of HUD*) (Dissenting Opinion of Member Wagner).

⁴³ *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*)).

⁴⁴ 74 FLRA at 585; see also *DOL*, 74 FLRA at 610; *Dep't of HUD*, 74 FLRA at 600.

⁴⁵ *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; see also *DOL*, 74 FLRA at 610 n.5; *Dep't of HUD*, 74 FLRA at 600 n.14.

⁴⁶ 74 FLRA at 568 (quoting *United Steelworkers of Am. v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582 (1960)).

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.⁴⁷ 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 interpreting *unambiguous* contract terms.⁴⁸ 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.⁴⁹ Additionally, some courts have held that

⁴⁷ *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) (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); *BLET GCA UP v. Union Pac. R.R. Co.*, 988 F.3d 409, 413-14 (7th Cir. 2021); *Indep. Lab. Emps.’ Union, Inc. v. ExxonMobil Rsch. & Eng’g Co.*, 11 F.4th 210, 216 (3d 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, 1273-74 (11th Cir. 2015); *Titan Tire Corp. of Bryan v. United Steelworkers of Am., Loc. 890L*, 656 F.3d 368, 374 (6th Cir. 2011); *Mich. Fam. Res., Inc. v. SEIU, Loc. 517M*, 475 F.3d 746, 755 (6th Cir. 2007); *Appalachian Reg’l Healthcare, Inc. v. Ky. Nurses Ass’n*, No. 06-6470, 2007 WL 4269063 at *2 (6th Cir. Dec. 4, 2007); *Madison Hotel v. Hotel & Rest. Emps., Loc. 25, AFL-CIO*, 144 F.3d 855, 859 (D.C. Cir. 1998); *Jasper Cabinet Co. v. United Steelworkers of Am., AFL-CIO-CLC, Upholstery & Allied Div.*, 77 F.3d 1025, 1030-31 (7th Cir. 1996); *CSX Transp., Inc. v. United Transp. Union*, 29 F.3d 931, 936-38 (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, 811-12 (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, 75-76 (5th Cir. 1987); *Kaiser Found. Plan of the Nw. & Kaiser Found. Hosps. 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 *3-4 (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 *4-6 (W.D. Pa. Nov. 10, 2016); *Graphic Packaging Int’l, Inc. v. Graphic Comm’n Conf. Int’l Bhd. of Teamsters, Dist. Council 1, Loc. 77-P*, No. 09-C-553, 2010 WL 3699981, at *3-4 (E.D. Wis. Sept. 13, 2010); *Local 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); *Markin Tubing, LP v. Voelz*, No. 06-CV-00183C(F), 2006 WL 8455790, at *6 (W.D.N.Y. Sept. 11, 2006)).

⁴⁸ *Warrior Met Coal Mining, LLC v. United Mine Workers of Am.*, 28 F.4th 1073, 1081-82 (11th Cir. 2022) (*Warrior*) (quoting *Wiregrass Metal Trades Council AFL-CIO v. Shaw Envtl. & Infrastructure, Inc.*, 837 F.3d 1083, 1088-90 (11th Cir. 2016) (*Wiregrass*)); *Folger*, 905 F.2d at 111 (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).

⁴⁹ *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 [contract] may use the term ‘liquidated damages’ in a sense different than the conventional contract[–]law definition”); *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.”).

an arbitrator may find a “latent” ambiguity⁵⁰ or an “implicit” condition in a CBA,⁵¹ and have sometimes found that parties’ practices under a CBA have demonstrated that they have relaxed, modified, or even waived the CBA’s literal language.⁵² As I noted in *SSA*, “these more deferential approaches more closely comport with the ‘essence analysis’ that the Supreme Court has laid out.”⁵³ And, contrary to the standard applied by the majority in *SSA*, and again in this case, “even most of the purportedly less deferential court decisions . . . do not hold that an arbitration award is deficient merely because it appears to conflict with a CBA’s plain wording.”⁵⁴

⁵⁰ See, e.g., *IBEW Loc. Union No. 199 v. United Tel. Co. of Fla.*, 738 F.2d 1564, 1569 (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 (quoting *Loveless*, 681 F.2d at 1278–79 n. 14)); *Arlen House Condo. Ass’n v. Hotel Emps. & Rest. Emps. Int’l Union Loc. 355*, No. 06-21040-CIV, 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 Cty., IBT, AFL-CIO*, No. C-95-2058 CW, 1995 WL 688662, at *6 (N.D. Cal. Nov. 13, 1995) (the arbitrator “implicitly found that the language of the [contract] 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”).

⁵¹ 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 CBA 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 [CBA] includes the power to discover such terms”).

⁵² See, e.g., *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

As I also have previously stated, it is well-established that arbitrators’ determinations regarding procedural matters are entitled to even *greater* deference

itself or in prior practices demonstrating relaxation of the literal language.”) (emphasis added) (citing *H. K. Porter Co., Inc. v. United Saw, File & Steel Prods. Workers of Am.*, 333 F.2d 596 (3d Cir. 1964)); *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)).

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.” Majority at 6 n.39. However, as I discussed in *Dep’t of HUD*, the cases that they cite in this regard did not involve arbitration awards that purportedly conflicted with *procedural* contract provisions. See 74 FLRA at 600-01, 601 n.17 (discussing *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); *CP Kelco U.S., Inc. v. Int’l Union of Operating Eng’rs*, 381 Fed. Appx. 808, 814-15 (10th Cir. 2010); *Beaird Indus., Inc. v. Loc. 2297, Int’l Union*, 404 F.3d 942, 946-47 (5th Cir. 2005); *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 (7th Cir. 2002) (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)); *U.S. Postal Serv. v. Am. Postal Workers Union, AFL-CIO*, 204 F.3d 523, 528 (4th Cir. 2000); *Excel Corp. v. United Food & Com. Workers Int’l Union, Loc. 431*, 102 F.3d 1464, 1468 (8th Cir. 1996); *Keebler Co. v. Milk Drivers & Dairy Emps. Union, Loc. No. 471*, 80 F.3d 284, 288-89 (8th Cir. 1996)). As discussed in *Dep’t of HUD*, and further below, arbitrators’ determinations regarding procedural matters – such as the Arbitrator’s determination at issue here – are entitled to even *greater* deference than those involving substantive matters. Accordingly, the decisions that the majority cites are inapposite. Cf. *Chi. Web Printing Pressmen’s Union No. 7 v. Chi. Newspaper Publishers’ Ass’n*, 772 F.2d 384, 388 (7th Cir. 1985) (rejecting an essence challenge to an arbitrator’s award because “the arbitrator was entitled to determine whether . . . [a] past practice should not be deemed part of the written agreement”) (emphasis added)).

⁵³ 74 FLRA at 579.

⁵⁴ *Id.* at 581.

than those involving substantive matters.⁵⁵ Consequently, the Supreme Court has acknowledged that arbitrators may find *procedural* requirements in CBAs waived or excused,⁵⁶ and federal courts have routinely upheld arbitration awards finding that parties, through their conduct, waived their ability to raise procedural objections to grievances or arbitration.⁵⁷

Applying these deferential standards, I would find that the HUD majority erred as a matter of law by setting aside the Arbitrator's award on essence grounds. The Arbitrator clearly construed Article 52, but found it ambiguous. It was hardly irrational for him to find that Article 52's reference to a (capitalized) "Notice of Invocation [of] Arbitration" contemplated the creation of a form, particularly given the Agency's position that the

Union was required to submit a document separate from the FMCS form.⁵⁸ As such, the Arbitrator appropriately considered whether the parties had in fact created such a Notice of Invocation of Arbitration form or, if not, what sort of actions they had taken in the past to satisfactorily invoke arbitration under Article 52. The Arbitrator's finding of ambiguity was reinforced by his finding that the second Agency representative recognized the Agency had received notice of invocation when the Agency received notice from FMCS. In this regard, as the dissent in HUD noted,

Even the Agency's *own representatives* disagreed on how Article 52 should be applied to the Union's invocation of arbitration in the dispute before the

⁵⁵ *Dep't of HUD*, 74 FLRA at 601 (citing *Stroh Container Co. v. Delphi Indus., Inc.*, 783 F.2d 743, 749 (8th Cir. 1986)); *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); *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*) (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); *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); *Praml v. Linsco/Priv. Ledger Corp.*, No. Civ. 05-581 (JRT/FLN), 2005 WL 2290943 at *3 (D. Minn. Sept. 20, 2005); *Am. Postal Workers Union, AFL-CIO v. U.S. Postal Serv.*, 362 F. Supp. 2d 284, 288 (D.D.C. 2005); *FSC Sec. Corp. v. Freel*, 811 F. Supp. 439, 444 (D. Minn. 1993), *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); *Brown v. Brown-Thill*, 762 F.3d 814, 819 (8th Cir. 2014); *Kennecott Utah Copper Corp. v. Becker*, 186 F.3d 1261, 1267 (10th Cir. 1999)).

⁵⁶ 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.'" (emphasis added) (quoting *Moses H. Cone Mem'l Hosp.*, 460 U.S. 1, 24-25 (1983))); *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)).

⁵⁷ 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 *11-13 (D. Or. Aug. 12, 2022), *report and recommendation adopted*, 2022 WL 16781999 (D. Or. Nov. 8, 2022); *Jay v. SEIU-United Health 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); *Polk Bros., Inc. v. Chi. Truck Drivers Union*, 973 F.2d 593, 597 (7th Cir. 1992)); *PPL Servs. Corp. v. Int'l Bhd. of Elec. Workers, Loc. 1600*, No. 11-3273, 2012 WL 5987546, at *5 (E.D. Pa. Nov. 29, 2012); *United Steel, Paper & Forestry, Rubber Mfg., Energy, 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) (citing *BG Grp. PLC v. Republic of Argentina*, 572 U.S. 25, 34 (2014) (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); *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).

⁵⁸ Award at 5.

Arbitrator. Moreover, one of its representatives interpreted the provision in precisely the same manner as the Union. It is hard to imagine more persuasive evidence regarding this provision's ambiguity as applied to the Union's grievance.⁵⁹

The *HUD* majority found that Article 52's "plain wording" requires the party invoking arbitration to

complete two tasks in order to "notify the *other party* of its submission of a matter to arbitration by giving written notice": (1) "submit [a] request for arbitrators to FMCS or another mutually agreed upon source of arbitrators," and (2) include a "Notice of Invocation of Arbitration" "with" that request.⁶⁰

That is hardly clear from Article 52's plain wording. In fact, the language in Article 52 upon which the *HUD* majority relied appears to address only the procedure for submitting a request for arbitrators "*to FMCS*" (or another mutually agreed upon source of arbitrators); it does not unequivocally address the process governing notice to the *Agency*.⁶¹ Therefore, contrary to the holding of the *HUD* majority, the Arbitrator did not "modify Article 52's clear and unambiguous terms."⁶²

In sum, the Arbitrator did not err in finding Article 52 ambiguous and considering the parties' practices to resolve that ambiguity.⁶³ His analysis easily cleared the hurdle of "*arguably* construing or applying" the CBA,⁶⁴ and, consequently, is not irrational, unfounded, implausible, or in manifest disregard of the CBA.⁶⁵ The *HUD* majority erred, as a matter of law, in concluding otherwise – and the majority repeats that mistake today. Unlike the majority, I would grant the Union's motion, deny the Agency's essence exception, and resolve the Agency's remaining exceptions that were not addressed in *HUD*. Accordingly, I dissent.

⁵⁹ 72 FLRA at 453-54.

⁶⁰ *Id.* at 451-52 (emphasis added) (quoting Article 52).

⁶¹ Award at 5.

⁶² 72 FLRA at 452.

⁶³ Even if Article 52 were unambiguous – which it is not – I would find that, consistent with the more deferential court opinions discussed above, the Arbitrator would not have been precluded from considering the parties' past practices.

⁶⁴ *Misco*, 484 U.S. at 38 (emphasis added).

⁶⁵ 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 for the agreement").