**70 FLRA No. 107**

UNITED STATES
SMALL BUSINESS ADMINISTRATION
(Agency)

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 3841
(Union)

0-AR-5260

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DECISION

May 2, 2018

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

## I. Statement of the Case

Six months after invoking arbitration on a grievance, the Union submitted a form to the Agency to jointly request a panel of arbitrators from the Federal Mediation and Conciliation Service (FMCS). On January 3, 2017, Arbitrator Barton W. Bloom issued an award finding that the Union's submission was untimely under Article 40 of the parties' master collective-bargaining agreement. Nonetheless, the Arbitrator determined that the grievance was procedurally arbitrable, and he resolved it on the merits.

The main issue before us is whether the Arbitrator's determination that the grievance was procedurally arbitrable fails to draw its essence from the parties' agreement.

This case presents us with an appropriate opportunity to reexamine the Authority's precedent regarding: (1) essence challenges to arbitrators' procedural-arbitrability determinations, and (2) the effect of parties' past practices on the clear and unambiguous terms of their collective-bargaining agreements. For the reasons discussed below, we reverse that precedent and hold that: (1) parties may file essence exceptions that directly challenge arbitrators' procedural-arbitrability determinations, and (2) arbitrators may not rely on past practices to overrule clear and unambiguous provisions of collective-bargaining agreements.

Applying these standards here, we find that the Arbitrator's interpretation of the parties' agreement is contrary to its plain wording, and the Arbitrator's reliance on the parties' past practice was improper. Accordingly, the award fails to draw its essence from the agreement, and we set it aside.

## II. Background and Arbitrator's Award

The Union filed a grievance alleging that the Agency violated the parties' agreement by failing to properly compensate an employee (the grievant). The Agency denied the grievance, and the Union invoked arbitration.

Approximately six months after invoking arbitration, the Union contacted the Agency to jointly request a panel of arbitrators from FMCS. At that time, the Union sent the Agency a form and its portion of a required fee (the Union's submission). The Agency completed the form, wrote in "timeliness" and "arbitrability" on the "issue line" of the form,[1] and submitted it to FMCS.

At arbitration, the Agency argued that the grievance was not arbitrable because the Union's submission was untimely under Article 40 of the parties' agreement. Article 40, Section 2 (Section 2) requires the party invoking arbitration to submit the "FMCS form[,] . . . along with [its] portion of the required fee[,] to the opposing party" "[w]ithin fourteen . . . calendar days of invoking arbitration."[2] After receiving the FMCS form, the opposing party has fourteen days to complete it, forward it to FMCS, and send a copy to the invoking party. Article 40, Section 1 (Section 1) provides that "[u]nless mutually agreed upon, all time limits contained in [that] procedure shall be strictly observed."[3]

The Arbitrator found that the Union failed to comply with the fourteen-day time limit in Section 2 because it had waited more than six months after it invoked arbitration to submit the FMCS form to the Agency. However, the Arbitrator concluded that the grievance was procedurally arbitrable. According to the Arbitrator, the Agency waived the right to contest the timeliness of the Union's submission by accepting and processing the FMCS form without objection. The Arbitrator found that the Agency failed to notify the Union that it had added the issues of "timeliness and

[1] Award at 34.
[2] *Id.* at 24 (quoting Collective-Bargaining Agreement (CBA) Art. 40, § 2).
[3] *Id.* (quoting CBA Art. 40, § 1).

arbitrability" to the FMCS form.[4] Thus, the Arbitrator concluded that the Union was unaware that the Agency was raising those issues until the arbitration hearing.

The Arbitrator also stated that "[e]ven if" the Agency had objected to the timeliness of the Union's submission before the hearing,[5] the grievance was procedurally arbitrable because the parties had a practice that allowed the Union not to "strict[ly] compl[y] with the time limit[s]" contained in Section 2.[6]

On the merits, the Arbitrator sustained the grievance and awarded the grievant a retroactive temporary promotion and backpay.

On February 7, 2017, the Agency filed exceptions to the award, and, on March 10, 2017, the Union filed an opposition to the Agency's exceptions.

## III. Analysis and Conclusions

### A. The Arbitrator's procedural-arbitrability determinations fail to draw their essence from the parties' agreement.

The Agency contends that the Arbitrator's procedural-arbitrability determinations – that the grievance was procedurally arbitrable[7] and that the Agency waived the right to contest the timeliness of the Union's submission[8] – fail to draw their essence from the parties' agreement.[9] We believe that this case presents an appropriate opportunity to reexamine the Authority's approach to reviewing such contentions.

Procedural arbitrability involves "procedural questions, such as whether the preliminary steps of the grievance procedure have been exhausted or excused."[10] The Authority has found that essence challenges to procedural-arbitrability determinations provide no basis for finding an award deficient.[11] However, that is inconsistent with the practice of federal courts. Specifically, federal courts have applied the essence standard to review essence challenges to procedural-arbitrability determinations.[12] To the extent that the Authority's existing precedent is based on an interpretation of the U.S. Supreme Court's decision in *John Wiley & Sons, Inc. v. Livingston*,[13] that interpretation is incorrect. In *Wiley*, the Court addressed only who – arbitrators or courts – *initially* decides

[4] *Id.* at 34.
[5] *Id.* at 47.
[6] *Id.* at 48.
[7] *See AFGE, Local 1242, Council of Prison Locals 33*, 62 FLRA 477, 479 (2008) (an arbitrator's determination regarding the timeliness of a grievance constitutes a determination regarding the procedural arbitrability of that grievance (citation omitted)).
[8] *See U.S. DHS, U.S. CBP, Border Patrol, San Diego Sector, San Diego, Cal.*, 68 FLRA 128, 131 (2014) (*DHS*) (an arbitrator's finding that a party has waived its challenge to a procedural-arbitrability determination is itself a procedural-arbitrability determination (citation omitted)).
[9] *See* Exceptions at 24-27.
[10] *AFGE, Local 2431*, 67 FLRA 563, 563-64 (2014) (citing *Fraternal Order of Police, N.J. Lodge 173*, 58 FLRA 384, 385 (2003)); *see also Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 84 (2002) (noting that procedural-arbitrability issues include "allegation[s] of waiver, delay, or a like defense to arbitrability") (citation omitted)).
[11] *E.g., Indep. Union of Pension Emps. for Democracy & Justice*, 68 FLRA 999, 1006 (2015); *DHS*, 68 FLRA at 131.
[12] *See Detroit Coil Co. v. IAMAW, Lodge No. 82*, 594 F.2d 575, 581 (6th Cir.), *cert. denied*, 444 U.S. 840 (1979) (finding that an arbitrator's procedural-arbitrability determination failed to "draw its essence" from the parties' agreement); *accord Brown & Pipkins, LLC v. SEIU*, 846 F.3d 716, 726 (4th Cir. 2017) (finding that an arbitrator's procedural-arbitrability determination was an "arguabl[e] construc[tion] [of] the CBA"); *Kennecott Utah Copper Corp. v. Becker*, 186 F.3d 1261, 1268 (10th Cir. 1999) (reviewing arbitrator's procedural-arbitrability ruling "to determine whether . . . he was 'even arguably construing or applying the contract'" (citation omitted)); *Shopmen's Local 539 of the Int'l Ass'n of Bridge, Structural & Ornamental Iron Workers, AFL-CIO v. Mosher Steel Co.*, 796 F.2d 1361, 1364 (11th Cir. 1986) (noting that an "[a]rbitrator's decision, even in a procedural matter, must be based upon some interpretation of the CBA"); *Reg'l Local Union No. 846 v. Gulf Coast Rebar, Inc.*, 83 F. Supp. 3d 997, 1010-1015 (D. Or. 2015) (applying essence standard); *Piggly Wiggly Midwest LLC v. United Food and Commercial Workers, Local 1473*, No. 11-CV-00604, 2011 WL 5024575, at *1-2 (E.D. Wis. Oct. 20, 2011) (same); *Rental Servs. Corp. v. Int'l Union of Operating Eng'rs, Local 150*, No. 02-C-1244, 2003 WL 1394367, *5 (N.D. Ill. Mar. 20, 2003) ("Although it is true that procedural arbitrability is a question for the arbitrator and not the court, it cannot be said that courts have no authority to review arbitrator's decisions on such matters[, because] [t]he arbitrator's decision must still draw its essence from the contract.").
[13] 376 U.S. 543 (1964); *see, e.g., AFGE, Local 2172*, 57 FLRA 625, 627 (2001) (*Local 2172*) (citing *Wiley*); *U.S. Dep't of VA, Eisenhower Med. Ctr., Leavenworth, Kan.*, 50 FLRA 16, 19-20 (1994) (same); *U.S. Dep't of the Army, Fort Monroe, Va.*, 35 FLRA 1187, 1192 (1990) (*Fort Monroe*) (finding that it is "[c]onsistent with" *Wiley* to deny an essence challenge to an arbitrator's procedural-arbitrability determination); *AFGE, Local 1915*, 32 FLRA 1223, 1225 (1988) (same); *U.S. EPA, Region IV, Atlanta, Ga.*, 5 FLRA 277, 279 (1981) (relying on *Wiley* to deny a direct challenge to an arbitrator's procedural-arbitrability determination).

questions of procedural arbitrability,[14] not whether courts can review essence challenges to procedural-arbitrability determinations once the arbitrator has made them.

Consistent with the Authority's mandate, as relevant here, to review arbitral awards on grounds "similar to those applied by [f]ederal courts in private[-]sector labor-management relations,"[15] we now reexamine our precedent and hold that parties may directly challenge arbitrators' procedural-arbitrability determinations on essence grounds. Consequently, we will no longer follow Authority decisions holding otherwise.[16]

Here, the Agency contends that the award fails to draw its essence from the plain wording of Sections 1 and 2, and other provisions of the parties' agreement.[17] In particular, the Agency argues that the Arbitrator erred by finding that the grievance was procedurally arbitrable and that the Agency waived its right to contest the timeliness of the Union's submission.[18]

The Authority will find that an arbitration award is deficient as failing to draw its essence from a collective-bargaining agreement when the excepting party establishes 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.[19] The Authority has found that an award fails to draw its essence from a collective-bargaining agreement where the award conflicts with the agreement's plain wording.[20]

Section 1 clearly and unambiguously requires the party that invokes arbitration to "strictly observe[]" Section 2's fourteen-day time limit for submitting the FMCS form to the opposing party.[21] And, as the Agency points out,[22] Article 39, Section 6.a.1. of the parties' agreement provides that a failure "to adhere to the time limitations . . . *at any step* of the [grievance] procedure *shall result in cancellation of the grievance*."[23] The Arbitrator – despite repeatedly recognizing that the Union submission was untimely under Section 2[24] – did not find that the Union's failure to comply with the contractual time limit resulted in the cancellation of the grievance. Thus, his determination that the grievance was procedurally arbitrable conflicts with the plain wording of the parties' agreement.[25]

Moreover, nothing in the agreement provides for "waive[r]"[26] in the event that the Agency fails to give the Union advance notice of an argument that it plans to raise at arbitration.[27] Yet the Arbitrator found that the Agency waived the right to contest the timeliness of the Union's submission by failing to provide such notice.[28] While the Agency did fail to forward a copy of the altered FMCS form to the Union[29] as Section 2 requires,[30] the Union should have known that its submission – which was more than six months late[31] – was untimely. Because the Arbitrator's waiver determination has no basis in the

[14] *See Wiley*, 376 U.S. at 557-59; *see also AFGE, Local 3294*, 70 FLRA 432, 434 (2018).
[15] 5 U.S.C. § 7122(a)(2); *see also* H.R. Rep. No. 95-1717, at 153 (1978) (Conf. Rep.) ("The Authority will only be authorized to review the award of the arbitrator on very narrow grounds similar to the scope of judicial review of an arbitrator's award in the private sector.").
[16] *See, e.g.*, *supra* note 11.
[17] Exceptions at 23-26.
[18] *See id.*
[19] *E.g.*, *Library of Congress*, 60 FLRA 715, 717 (2005) (*Library of Congress*) (citing *U.S. DOL (OSHA)*, 34 FLRA 573, 575 (1990)).
[20] *U.S. Dep't of the Air Force, Okla. City Air Logistics Command, Tinker Air Force Base, Okla.*, 48 FLRA 342, 348 (1993) (*Tinker*).
[21] Award at 24 (quoting CBA Art. 40, § 1).
[22] Exceptions at 26.
[23] Award at 20 (emphasis added) (quoting CBA Art. 39, § 6.a.1.).
[24] *Id.* at 41 (finding that the Union "failed to submit the form requesting a panel of arbitrators with[in] [fourteen] days after invoking arbitration as required by . . . Section 2); *id.* (noting that the Union "fail[ed] to comply with the . . . procedural requirement[s] set forth in . . . Section 2"); *id.* at 42 (stating that the Union "untimely submi[tted] to the Agency . . . the [FMCS] form . . . as provided in . . . Section 2"); *id.* at 43 (stating that "the Union's . . . submission . . . was well outside the time limits prescribed by . . . Section 2"); *id.* at 44 (noting that the Union "untimely submitted the [FMCS] form"); *id.* at 47 ("Clearly, the Union's submission . . . was well beyond the time limit for doing so prescribed by . . . Section 2."); *id.* (noting that the Union "breach[ed] . . . the time requirements [set forth in] . . . Section 2").
[25] *See Tinker*, 48 FLRA at 348 (finding that an award evidenced a manifest disregard of an agreement where the arbitrator's interpretation was "not compatible with" the "plain wording" of that agreement).
[26] Award at 41.
[27] *See United Parcel Serv., Inc. v. Int'l Bhd. of Teamsters, Local 385*, No. 6:ooCV6ORL19DAB, 2001 WL 1725291, at *5 (M.D. Fla. Mar. 8, 2001) (noting that an employer preserved its right to contest arbitrability by voicing it objection to the union *at arbitration*).
[28] Award at 41, 42, 46-47.
[29] *Id.* at 34.
[30] *Id.* at 24 (the opposing party must send a "copy [of] the [FMCS form to the] invoking party" (quoting CBA Art. 40, § 2)).
[31] *Id.* at 33.

parties' agreement, it does not represent a plausible interpretation of that agreement.[32]

Based on the foregoing, we find that the Arbitrator's procedural-arbitrability determinations evidence a manifest disregard of, and do not represent a plausible interpretation of, the parties' agreement.[33] Accordingly, we find that the award fails to draw its essence from the agreement.

B. The Arbitrator erred by relying on the parties' past practice.

As noted above, the Arbitrator found, in the alternative, that "[e]ven if" the Agency had objected to the timeliness of the Union's submission before the hearing, the grievance was procedurally arbitrable[34] because the parties had a practice that allowed the Union not to "strict[ly] compl[y] with the time limit[s]" contained in Section 2.[35]

The Agency argues that the Arbitrator erred by relying on the parties' past practice[36] instead of the "clearly define[d]" provisions of their agreement.[37] The Authority has held that it is appropriate for arbitrators to find that a past practice has modified the terms of a collective-bargaining agreement.[38] However, the Authority has also acknowledged that judicial decisions "are mixed" on that issue.[39] And, on reexamination, we find that certain concerns specific to the federal sector support reversing our existing precedent and holding that arbitrators may not modify the plain and unambiguous provisions of an agreement based on parties' past practices.

First, we believe that such a rule best serves the statutory policy of providing parties "with stability and repose with respect to [the] matters [that they have] reduced to writing."[40] That stability is undermined when arbitrators are able to modify the clear terms of a bargained-for agreement. By contrast, precluding arbitrators from engaging in such modification enables parties to rely on the negotiated terms of their agreements.[41]

Second, § 7114(c) of the Federal Service Labor-Management Relations Statute (the Statute)[42] provides for the submission of collective-bargaining agreements to the agency head for review.[43] But past practices are not subject to that review process.[44] Therefore, finding that an arbitrator may rely on a past practice to effectively create a new contract provision is in tension with § 7114(c) of the Statute.

With these considerations in mind, we now reconsider Authority precedent and find that arbitrators may not look beyond a collective-bargaining agreement – to extraneous considerations such as past practice – to modify an agreement's clear and unambiguous terms.[45]

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[32] The dissent's reliance on *Gunn v. Veterans Administration Medical Center, Birmingham, Alabama*, 892 F.2d 1036, 1038 (Fed. Cir. 1990), is outdated and ignores Authority precedent. Dissent at 10. In that case, the U.S. Court of Appeals for the Federal Circuit reviewed the arbitrator's ruling on arbitrability "in accordance with [5 U.S.C. §] 7703(c)." *Gunn*, 892 F.2d at 1037. Section 7703(c) sets forth the standard of review that the Federal Circuit applies to Merit Systems Protection Board decisions. 5 U.S.C. § 7703(c). As such, the Authority has repeatedly rejected the applicability of *Gunn* and § 7703 to the review of procedural-arbitrability determinations *under the Federal Service Labor-Management Relations Statute*. *Local 2172*, 57 FLRA at 627 (citing *AFGE, Local 2635*, 56 FLRA 114, 115 n.2 (2000); *Fort Monroe*, 35 FLRA at 1192). In addition, the court in *Gunn* specifically found that the union was prejudiced by the agency waiting until the arbitration hearing to raise a timeliness objection. *Gunn*, 892 F.2d at 1039. But here, the Arbitrator did not find, and nothing in the record indicates, that the Union was prejudiced by the timing of the Agency's objection to the Union's untimely submission.

[33] *See, e.g.*, *NTEU, Chapter 207*, 60 FLRA 731, 733-34 (2005) (Chairman Cabaniss dissenting) (where the arbitrator found that there was a two-step selection process for the agency to determine the qualifications of an applicant for reassignment, the Authority found that the award evidenced a manifest disregard of the parties' agreement because "nothing in the agreement" explicitly or implicitly provided for such a process); *Library of Congress*, 60 FLRA at 717-18 (where the arbitrator directed a party to pay a performance award in lieu of a performance-based pay adjustment, the Authority found that the arbitrator's award did not represent a plausible interpretation of the agreement because the plain wording of the agreement did not permit performance awards); *Tinker*, 48 FLRA at 348.

[34] Award at 47.

[35] *Id.* at 48.

[36] Exceptions at 25.

[37] *Id.* at 23.

[38] *E.g.*, *U.S. Dep't of VA, N. Ariz. VA Health Care Sys., Prescott, Ariz.*, 66 FLRA 963, 965 (2012) (*Prescott*).

[39] *Id.* (quoting *AFGE, Local 1633*, 64 FLRA 732, 734 n.3 (2010) (*Local 1633*)).

[40] *Dep't of the Navy v. FLRA*, 962 F.2d 48, 59 (D.C. Cir. 1992).

[41] *See Hull v. Cent. Transp., Inc.*, 628 F. Supp. 784, 789 (N.D. Ind. 1986) (noting that "[p]arties to collective[-]bargaining agreements should be able to rely on their bargain"); *cf. IRS*, 17 FLRA 731, 734 (1985) ("[T]o the extent that the parties are required to adhere to the specific conditions of employment mutually established in their agreement during the life of such agreement, stability at the work place is thereby fostered." (citation omitted)).

[42] 5 U.S.C. § 7114(c).

[43] *See id.* at § 7114(c)(1)-(4).

[44] *See U.S. Dep't of the Treasury, Bureau of Engraving & Printing*, 44 FLRA 926, 940 (1992).

[45] *See, e.g.*, *Judsen Rubber Works, Inc. v. Mfg., Prod. & Serv. Workers Union, Local No. 24*, 889 F. Supp. 1057, 1064 (N.D. Ill. 1995).

And we will no longer follow Authority precedent holding otherwise.[46]

As discussed above, the award is inconsistent with the plain terms of the parties' agreement. And, for the reasons set forth above, we find that the Arbitrator's alternative rationale – that the parties modified the clear and unambiguous terms of their agreement by past practice[47] – cannot provide a basis for the award. Therefore, the award is deficient,[48] and we set it aside. Consequently, we find it unnecessary to resolve the Agency's remaining exceptions.[49]

## IV. Decision

We set aside the award.

[46] *See, e.g.*, *Prescott*, 66 FLRA at 965; *Local 1633*, 64 FLRA at 734.
[47] Award at 48.
[48] *See Judsen Rubber Works*, 889 F. Supp. at 1066-67; *see also U.S. Soccer Fed'n, Inc. v. U.S. Nat'l Soccer Team Players Ass'n*, 838 F.3d 826, 835 (7th Cir. 2016) (noting that the body of past practices between the parties "cannot be relied upon to modify clear and unambiguous provisions" of their agreement (citation omitted)).
[49] *See* Exceptions at 6-22.

**Member DuBester, concurring in part, dissenting in part:**

As I have said previously,[1] I agree that we should reexamine the Authority's precedent limiting review of arbitrators' procedural-arbitrability determinations.[2] Having reviewed this precedent,[3] I agree that it is premised on a misinterpretation of *John Wiley & Sons, Inc. v. Livingston*.[4] And, I agree that under the Federal Service Labor-Relations Management Statute (the Statute), we may review arbitrators' procedural-arbitrability determinations as matters of contract interpretation, subject to the deferential essence standard.[5] Accordingly, on this issue, I concur.

However, I disagree with the majority's conclusion that the Arbitrator's contractual interpretations—concluding that the grievance is procedurally arbitrable—fail to draw their essence from the parties' agreement. The majority makes a number of errors that invalidate its decision. First, the majority erroneously rejects the Arbitrator's finding that the Agency waived its right to object to the grievance's procedural-arbitrability,[6] despite judicial precedent recognizing that a party may waive its contractual rights even if the parties' agreement does not expressly discuss waiver. Second, addressing a separate and independent ground for the award, the majority erroneously overturns long-standing Authority past-practice precedent,[7] despite

[1] *AFGE, Local 3294*, 70 FLRA 432, 437 (2018) (*Local 3294*) (Concurring Opinion of Member DuBester).
[2] *Compare id.* at 434 (allowing nonfact challenges to an arbitrator's procedural-arbitrability determination) *with U.S. Dep't of the Air Force, Joint Base Elmendorf-Richardson*, 69 FLRA 541, 543-44 (2016) (holding that, generally, the Authority will not find an arbitrator's procedural-arbitrability determination deficient on grounds that directly challenge the determination itself).
[3] *E.g.*, *Indep. Union of Pension Emps. for Democracy & Justice*, 68 FLRA 999, 1006 (2015); *U.S. DHS, U.S. CBP, Border Patrol, San Diego Sector, San Diego, Cal.*, 68 FLRA 128, 131 (2014).
[4] 376 U.S. 543 (1964). In *Wiley*, a union sued to compel arbitration under a collective-bargaining agreement. No procedural issue had yet been addressed by an arbitrator. *See id.* at 544-46. The Court held that when parties have an obligation to arbitrate a dispute, related procedural questions must also be resolved at arbitration. *Id.* at 557. *Wiley* does not discuss the extent to which such determinations are subject to judicial review.
[5] *See* 5 U.S.C. § 7122(a)(2).
[6] *AFGE, Local 2302*, 70 FLRA 259, 261 (2017) ("The Authority defers to arbitrators' [interpretations of a collective-bargaining agreement] 'because it is the arbitrator's construction of the agreement for which the parties have bargained.'").
[6] Majority at 5-6.
[7] *Id.* at 6-7.

established arbitral practice and the predominant view of the courts holding that past practices may modify even the express terms of an agreement. Accordingly, on these issues, I dissent.

I. The Arbitrator's waiver finding.

The Arbitrator's procedural-arbitrability analysis has two steps. In the first step, the Arbitrator, making a finding the majority does not challenge, finds that the Union timely invoked arbitration under the only section of the parties' agreement that "provides for the manner and time in which an aggrieved party invokes arbitration," Article 40, Section 1.[8] Article 40, Section 1 provides that "[a]ny grievance processed under the grievance procedure herein may be referred to arbitration by the Agency or the Union upon written notice to the other. Such notice[s] shall be made within thirty (30) calendar days of the receipt of the final decision on the grievance."[9] The Arbitrator finds it "clear . . . that the parties intended the referral of a grievance to arbitration in Article 40, Section 1 to mean or be interchangeable with invoking . . . arbitration."[10] And the Arbitrator makes the uncontested finding that the Union invoked arbitration within Article 40, Section 1's thirty-day time limit.[11]

In the next step, the Arbitrator considers the effect of Article 40's second section on the procedural-arbitrability issue. Article 40, Section 2 provides, as relevant here, that "[w]ithin fourteen (14) calendar days of invoking arbitration, the invoking party shall execute and forward the applicable . . . form used to request the panel of arbitrators, along with [the invoking party's] portion of the required fee to the opposing party."[12] It is conceded that the Union was untimely in forwarding the request form and fee. The Agency argued that the Union's untimely compliance with Article 40, Section 2 rendered the grievance not procedurally arbitrable.

The Arbitrator finds that the Agency "waived [its] right," "by failing to raise a timely objection prior to the hearing," "to claim that the grievance is procedurally inarbitrable" based on the Union's untimely submission of the request form.[13]

Concluding that there cannot be a waiver because "nothing in the agreement provides for 'waive[r],'"[14] the majority rejects the Arbitrator's finding that the Agency waived its right to object to the grievance's procedural-arbitrability. But the majority fails to identify any authority to support its conclusion. Further, that conclusion is contrary to persuasive judicial precedent. In *Gunn v. Veterans Administration Medical Center, Birmingham, Alabama*,[15] for example, the Federal Circuit found that an agency waived its right to object to a grievance's arbitrability, despite a lack of contractual language authorizing waiver, when an agency waited until the final hearing to raise its timeliness objection.[16] And, the Arbitrator relied on *Gunn* when he made his waiver finding.[17]

The Arbitrator's reliance on *Gunn* is appropriate.[18] Parties run the risk of waiving their right to object to a grievance on procedural grounds if they withhold those objections until the hearing.[19] And here, like *Gunn*, the Agency waited until the last moment to raise its objection. In these circumstances, and lacking any contractual provisions to the contrary, the Arbitrator

[8] Award at 46.
[9] *Id.* at 42.
[10] *Id.* at 45.
[11] *Id.* at 40.
[12] *Id.* at 42.
[13] *Id.* at 46-47.
[14] Majority at 5 (internal quotation marks omitted).
[15] 892 F.2d 1036, 1038 (Fed. Cir. 1990) (upholding arbitrator's finding that failure to raise objection until final hearing constitutes waiver); *see* Award at 40-41.
[16] *Compare* Majority at 5 (finding lack of waiver language in parties' agreement fatal), *with Gunn*, 892 F.2d at 1038 (upholding arbitrator's waiver finding despite lack of contractual waiver language).
[17] Award at 40.
[18] The majority claims in a footnote that my reliance on *Gunn* is "outdated" and "ignores Authority precedent." Majority at 6 n.32. Instead, it is the majority's reliance on "outdated" cases addressing *Gunn* that ignores Authority precedent, as recently revised. Every case the majority cites to discount *Gunn* does so based on Authority precedent that the Authority has abandoned. Those cases discount *Gunn* because, at the time those cases were decided, the Authority disagreed with *Gunn*'s holding that arbitrators' procedural-arbitrability determinations are reviewable on the same basis as other arbitral determinations. *See AFGE, Local 2172*, 57 FLRA 625, 627 (2001) (*Local 2175*); *U.S. Dep't of the Army, Fort Monroe, Va.*, 35 FLRA 1187, 1192 (1990) (*Fort Monroe*), both cited in the majority's footnote. At the time, the Authority's position was that arbitrators' procedural-arbitrability determinations were largely *unreviewable*. *See Local 2172*, 57 FLRA at 627; *Fort Monroe*, 35 FLRA at 1192. But, as the majority should be well aware, the Authority recently reversed that precedent, *Local 3294*, 70 FLRA at 434, 437 (Member DuBester concurring), and now agrees with *Gunn* on this point. Indeed, in this very decision, the Authority confirms that change in precedent. *See* Majority at 3-4 and the first paragraph of this separate opinion. There is thus no reason to reject *Gunn*'s applicability. Put differently, the majority's reliance on "outdated" case law does not in any way temper the conflict between the majority's decision and Federal Circuit case law.
[19] *Gunn*, 892 F.2d at 1039 (internal quotation marks omitted).

acts appropriately in finding waiver.[20] Accordingly, I would follow the Federal Circuit, reject the Agency's exception, and defer to the Arbitrator's waiver finding.

II. The Arbitrator's past-practice finding.

Discussing a separate and independent ground for the award's procedural-arbitrability ruling, the Arbitrator relied on the parties' past practices. The Arbitrator finds that "[e]ven if the Agency had raised a timely objection to the arbitrability of the grievance based on the Union's [untimely submission of the request form], the Arbitrator would still find that the grievance is procedurally arbitrable."[21] The Arbitrator finds "that by virtue of [the parties'] long-standing, uniform past practice of not requiring strict compliance with the time limit for submitting request[s] for a panel of arbitrators, the parties have mutually agreed that strict observance of [that time limit] is not required."[22]

The majority erroneously rejects the Arbitrator's reliance on the parties' past practice. In doing so, its decision reverses the Authority's past-practice precedent and conflicts with the clear weight of other authority that has addressed the subject. In contrast, I agree with *Elkouri & Elkouri*, the predominant view of the courts and arbitrators, and the Authority's well-established precedent, that "[a]n arbitrator's award that appears contrary to the express terms of the agreement may nevertheless be valid if it is premised upon reliable evidence of the parties' intent."[23] And, I do not find persuasive either of the considerations cited by the majority to overturn this standard.

The majority raises two concerns, neither of which withstands scrutiny. The majority is concerned with: (1) respecting the parties' intent in establishing their contractual relationship; and (2) avoiding tension with the agency-head review process under § 7114(c) of the Statute.[24] Neither rationale justifies abandoning past-practice principles.

Regarding the majority's first concern, giving effect to an established past practice respects the parties' intent. It does not—as the majority claims—"[en]able [arbitrators] to modify the clear terms of a bargained-for agreement" contrary to the parties' understanding and application of the agreement.[25] The majority ignores that proof of a past practice "constitutes one of the most significant evidentiary considerations in labor-management arbitration," and can be used "to support allegations that the 'clear language' of the written contract has been amended by mutual agreement."[26] Here, the Union successfully presented such evidence to the Arbitrator. And, the Arbitrator finds that the parties "mutually agreed" to a "long-standing, uniform past practice of not requiring strict compliance with the time limit for submitting request[s] for a panel of arbitrators."[27] I agree with the Arbitrator and would find that the parties' past practice clarifies "what [the parties] regularly do . . . in the administration of their labor agreement."[28]

The majority's second concern is likewise meritless. Honoring parties' *mutual* intent in establishing a past practice does not create tension with the agency-head review process under § 7114(c). That review process only deals with agreement provisions that are contrary to law.[29] In other respects, the agency-head review process is required to respect the parties' discretionary choices concerning the contractual nature of their collective-bargaining relationship. The Authority's past-practice precedent is entirely consistent with this principle; established past practices that are contrary to law are *unenforceable*.[30] Therefore, I see no justification for overturning the Authority's past-practice precedent, and I would uphold the Arbitrator's past-practice determination on its merits.

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[20] *Compare* Award at 41 (Agency waited until hearing to raise timeliness motion), *with Gunn*, 892 F.2d at 1038 (agency waited until hearing to raise timeliness motion).

[21] Award at 47.

[22] *Id.* at 48.

[23] *Elkouri & Elkouri, How Arbitration Works*, 12-28 (Kenneth May ed., 8th ed. 2016) (*Elkouri*) (citing *Int'l Bhd. of Elec. Workers, Local Union No. 199 v. United Tel. Co. of Fla.*, 738 F.2d 1564, 1568 (11th Cir. 1984)); *see, e.g.*, *Dep't of the Navy, Naval Underwater Systems Ctr., Newport Naval Base*, 3 FLRA 413, 414 (1980) (parties may establish terms and conditions of employment by practice, and those terms and conditions may not be altered by either party in the absence of agreement).

[24] Majority at 6-7.

[25] *Id.*

[26] *Elkouri* at 12-1; *Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 581-82 (1960) ("The labor arbitrator's source of law is not confined to the express provisions of the contract, as the industrial common law—the practices of the industry and the shop—is equally a part of the collective[-]bargaining agreement although not expressed in it.").

[27] Award at 48.

[28] *Elkouri* at 12-2.

[29] *AFGE, AFL-CIO, Local 3732*, 39 FLRA 187, 211-12 (1991) (If negotiators conclude an agreement containing provisions that are permissively negotiable, an agency head must accept those provisions unless they are contrary to law or applicable rule or regulation.).

[30] *U.S. Dep't of Transp., FAA*, 60 FLRA 20, 24 (2004) ("[T]he Authority has consistently held that there can be no binding practice that requires the performance of an unlawful or illegal act.") (citing *U.S. Dep't of the Treasury, Customs Serv., New Orleans, La.*, 38 FLRA 163, 174 (1999)).

On a final, more general note, the majority's terse rejection of the Arbitrator's careful and detailed contract interpretation, without any reasoned application of the established, deferential standards for analyzing essence challenges to awards, is inconsistent with the Statute's requirements. Since its inception, the Authority, consistent with established judicial practice, has deferred to arbitrators' contractual interpretations because it is the *arbitrator's* construction of the agreement for which the parties have bargained.[31] The parties select, hire, and pay for arbitrators based on their qualifications to resolve the parties' disputes. And while it is clear that the majority does not care for this Arbitrator's interpretations, the majority should heed the U.S. Supreme Court's injunction that "if an arbitrator is *even arguably construing or applying the contract* . . . the fact that a court is convinced he committed serious error does not suffice to overturn his decision."[32] Applying that deferential standard, the Arbitrator's procedural-arbitrability determination survives the Agency's essence challenge. The Arbitrator applied the contract by determining the parties' intent, looking "not [to] a single word or phrase, but [to] the instrument as a whole."[33] I agree with the Arbitrator's interpretation, and reject the majority's erroneously non-deferential, overly rigid, approach.[34] Accordingly, I would find that the award draws its essence from the parties' agreement and deny the Agency's essence exception.

In sum, I concur that the Authority may review arbitrators' procedural-arbitrability determinations as matters of contract interpretation, subject to the deferential essence standard. However, I would deny the Agency's exceptions to the Arbitrator's procedural-arbitrability rulings and reach the Agency's remaining exceptions. Accordingly, I dissent from the majority's determination to do otherwise.

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[31] *IFPTE Ass'n, Admin. Law Judges*, 70 FLRA 316, 317 (2017); *Dep't of HHS, SSA, Louisville, Ky. Dist.*, 10 FLRA 436, 437 (1982).

[32] *Major League Baseball Players Ass'n v. Garvey*, 532 U.S. 504, 509 (2001) (emphasis added).

[33] Award at 44.

[34] *Compare id.* (interpreting contract as a whole) *with* Majority at 5 (relying on strict wording of Article 39, Section 6.a.1.).