73 FLRA No. 70

UNITED STATES
DEPARTMENT OF THE ARMY
ARMY MATERIEL COMMAND
ARMY SECURITY ASSISTANCE COMMAND
REDSTONE ARSENAL, ALABAMA
(Agency)

and

NATIONAL FEDERATION
OF FEDERAL EMPLOYEES
LOCAL 1332
(Union)

0-AR-5665

_____

DECISION

December 8, 2022

_____

Before the Authority: Ernest DuBester, Chairman, and Colleen Duffy Kiko and Susan Tsui Grundmann, Members
(Member Kiko dissenting)

I. Statement of the Case

Arbitrator William L. McKee issued an interim award finding that the Union's grievance was procedurally arbitrable. The Agency filed interlocutory exceptions on the ground the interim award fails to draw its essence from the parties' agreement.

For the following reasons, we revisit the Authority's standard regarding review of interlocutory exceptions to arbitration awards. We now clarify that such review is warranted only when the excepting party demonstrates *both* that the arbitrator lacks jurisdiction as a matter of law *and* that resolving the exceptions would bring an end to the entire dispute that the parties submitted to arbitration. In so holding, we reverse the Authority's decision in *U.S. Department of the Treasury, IRS* (*IRS II*)[1] and any other Authority precedent that conflicts with this revised standard. Finally, applying the revised standard, we dismiss the Agency's exceptions without prejudice.

II. Background and Arbitrator's Interim Award

The Union filed a grievance alleging the Agency violated the Fair Labor Standards Act (FLSA), other relevant law and regulations, and the parties' agreement by failing to properly classify employees under the FLSA. As a remedy, the grievance sought that the employees be made whole, with retroactive overtime, and other relief under the FLSA.

The grievance went to arbitration. Before hearing the merits, the Arbitrator agreed to decide threshold arbitrability questions raised by the Agency, and framed the issue as whether the grievance was "procedurally inarbitrable."[2] As relevant here, the Arbitrator concluded the Agency failed to establish that the Union did not follow Article 35, Section P's procedural requirements, and therefore, the grievance was arbitrable.

The Agency filed exceptions to the interim award on September 3, 2020, and the Union filed an opposition on October 7, 2020.

III. Analysis and Conclusions

The Agency concedes that its exceptions are interlocutory.[3] However, the Agency asserts extraordinary circumstances warrant review because resolution of the Agency's essence exceptions could obviate the need for further arbitral proceedings.[4]

Section 2429.11 of the Authority's Regulations pertinently provides that the Authority "ordinarily will not consider interlocutory appeals."[5] In the arbitration context, this means that the Authority ordinarily will not resolve exceptions to an arbitrator's award unless the award completely resolves all of the issues submitted to arbitration.[6]

However, over time, the Authority has developed exceptions to this general rule. First, in *U.S. Department of the Treasury, IRS, Los Angeles District* (*IRS I*),[7] the Authority acknowledged that § 2429.11 "reflects the judicial policy of discouraging fragmentary appeals of the same case," but also said that this judicial policy "is not without exceptions."[8] "For example," the Authority stated, "the judicial procedure for the U.S. courts of appeals permits a departure from this policy for certain cases that involve a controlling question of law and where an immediate appeal may materially advance the ultimate termination of the litigation."[9] For support, the Authority cited 28 U.S.C. § 1292(b), which concerns interlocutory

[1] 70 FLRA 806 (2018) (then-Member DuBester dissenting).
[2] Interim Award at 2.
[3] Exceptions Br. at 6.
[4] *Id.*
[5] 5 C.F.R. § 2429.11.
[6] *See, e.g.*, *U.S. Dep't of the Air Force, Pope Air Force Base, N.C.*, 66 FLRA 848, 850 (2012) (*Pope AFB*).
[7] 34 FLRA 1161 (1990).
[8] *Id.* at 1163.
[9] *Id.* at 1163-64.

appeals from U.S. district courts to U.S. courts of appeals.[10]

In *IRS I*, the Authority stated, "[W]hen an arbitrator finds, prior to ruling on the merits, that a matter is grievable and arbitrable and a party files an exception claiming that the arbitrator lacks jurisdiction because the matter is not grievable under the Statute, it does not serve the purposes and policies of the Statute to refuse to resolve that question as an interlocutory matter."[11] The Authority further stated that, "[s]imilar to cases immediately appealable in the [f]ederal courts, these cases raise a controlling question of jurisdiction, the immediate resolution of which may advance the case's ultimate resolution."[12] As the exceptions in *IRS I* raised an issue of the arbitrator's jurisdiction under the Statute, the Authority granted interlocutory review.[13]

However, in *U.S. Department of the Interior, Bureau of Indian Affairs, Wapato Irrigation Project, Wapato, Washington* (*Interior*),[14] the Authority later found that "the broad holding of *IRS [I]*, under which any jurisdictional issue that would control the outcome of the case warrants interlocutory review, should be modified."[15] According to the Authority, the *IRS I* standard "permit[ted] the interlocutory review of a case to be triggered by the mere *assertion* of a controlling jurisdictional issue by a party."[16] The Authority concluded that, instead, "interlocutory review should be reserved for those extraordinary circumstances where it is necessary" – specifically, "where the arguments challenging an award *in fact* present a plausible jurisdictional defect, the resolution of which will advance the ultimate disposition of the case."[17]

In *Interior*, the Authority found that the agency's exceptions asserted, but did not demonstrate, that the arbitrator lacked jurisdiction over the grievance as a matter of law.[18] Accordingly, applying its revised standard, the Authority dismissed the agency's exceptions as interlocutory.[19]

Then, in *Library of Congress*,[20] the Authority held that "a '*plausible*' jurisdictional defect cannot simply refer to a jurisdictional defect that is found to exist."[21] "Rather," the Authority stated, "a jurisdictional defect is one that, on its face, is a credible claim, the resolution of which will advance the ultimate disposition of the case."[22]

In *Library of Congress*, the agency asserted, among other things, that the arbitrator lacked jurisdiction as a matter of law – specifically, § 7116(d) of the Statute.[23] The Authority stated that, if the agency were correct, then "there would be no need for the parties to proceed to a hearing on the merits of the grievance" and, thus, "no need for the parties to incur any additional, unnecessary expenditures in processing the merits of the grievance, including the time and costs associated with another arbitration hearing."[24] "Conversely," the Authority stated, "if there is no bar to the continued processing of the grievance, the parties may proceed to a hearing on the merits of the grievance, with the knowledge that the jurisdictional issue has been fully resolved."[25]

Applying that standard, the Authority in *Library of Congress* found that the exceptions raised a plausible jurisdictional defect, the resolution of which would advance the ultimate disposition of the case, and granted interlocutory review.[26] However, upon review, the Authority rejected the agency's arguments and found that the arbitrator did not lack jurisdiction as a matter of law.[27]

In sum, over time, the Authority has changed the level of proof required to warrant interlocutory review. However, starting with *IRS I*, the Authority asked the same basic, general questions: Is there some jurisdictional bar (whether actual, plausible, or merely alleged) that precluded the arbitrator from hearing the grievance, and

[10] *See* 28 U.S.C. § 1292(b); *see also U.S. DHS, U.S. Citizenship & Immigr. Servs.*, 65 FLRA 723, 725 (2011) (*U.S. CIS*) (noting that "the Authority has emphasized that the exceptional interlocutory review allowed by 28 U.S.C. § 1292 for federal courts of appeal specifically requires that the case must involve a controlling question of law").
[11] *IRS I*, 34 FLRA at 1164.
[12] *Id.*
[13] *Id.*
[14] 55 FLRA 1230 (2000).
[15] *Id.* at 1232.
[16] *Id.* (emphasis added).
[17] *Id.* (emphasis added).
[18] *Id.*
[19] *Id.*
[20] 58 FLRA 486 (2003) (Member Pope dissenting).
[21] *Id.* at 487 (emphasis added).
[22] *Id.*
[23] *Id.*
[24] *Id.*
[25] *Id.*
[26] *Id.* at 487-88.
[27] *Id.* at 488.

would resolving the interlocutory exceptions advance the case's ultimate disposition?[28]

In assessing those questions, the Authority would find a plausible jurisdictional defect only when the exceptions challenged the arbitrator's *jurisdiction as a matter of law*.[29] This was distinct from cases where a party alleged that the arbitrator's *award* was contrary to law, which did not warrant interlocutory review.[30] It also was distinct from cases where a party relied on *contractual* limitations to an arbitrator's jurisdiction – which also did not warrant interlocutory review.[31]

However, even where an arbitrator allegedly lacked jurisdiction as a matter of law, the Authority would dismiss interlocutory exceptions if resolving them would not advance the ultimate disposition of the case.[32] The Authority described this situation as one in which resolving the exceptions would end the litigation.[33]

After applying these basic standards for nearly thirty years, the Authority significantly changed course in *IRS II*.[34] In *IRS II*, the Authority stated that it "agree[d] with" the "longstanding judicial policy [that] discourages fragmenting appeals of the same case."[35] However, the Authority stated it "d[id] not agree that only exceptions which raise a 'plausible jurisdictional defect' present extraordinary circumstances which warrant review" of interlocutory exceptions.[36] Rather, citing only Congress' expressed, general intent that the Statute "should be interpreted in a manner consistent with the requirement of an effective and efficient Government,"[37] the Authority eliminated the jurisdictional component of the interlocutory-review exception. Specifically, the Authority stated that "any exception which advances the ultimate disposition of a case – by obviating the need for further arbitral proceedings – presents an extraordinary circumstance which warrants [interlocutory] review."[38]

Applying that standard, the Authority in *IRS II* found that the Arbitrator's failure to dismiss the grievance as untimely, under the time limits contained in the parties' collective-bargaining agreement, failed to draw its essence from that agreement.[39] Consequently, the Authority set aside the arbitrator's award.[40]

In establishing the new standard in *IRS II*, the Authority did not address whether that standard was consistent with private-sector precedent. However, the Authority recently has been admonished not to depart from private-sector arbitration principles, at least where the

[28] *See, e.g.*, *U.S. Dep't of the Army, XVIII Airborne Corps & Fort Bragg, Fort Bragg, N.C.*, 70 FLRA 172, 173 (2017) (*Fort Bragg*) ("the Authority will review interlocutory exceptions that allege a plausible jurisdictional defect – that the arbitrator did not have the power to issue the award as a matter of law – if addressing that defect will advance the ultimate disposition of the case by ending the litigation"); *U.S. Dep't of the Army, White Sands Missile Range, White Sands Missile Range, N.M.*, 67 FLRA 1, 2-3 (2012) (*White Sands*) ("Extraordinary circumstances have been found by the Authority only in situations in which a party raised a plausible jurisdictional defect, the resolution of which would advance the ultimate disposition of the case. Exceptions raise a plausible jurisdictional defect when they present a credible claim that the arbitrator lacked jurisdiction over the subject matter as a matter of law.").

[29] *U.S. DOJ, Exec. Off. for Immigr. Rev.*, 67 FLRA 131, 132 (2013); *White Sands*, 67 FLRA at 4-5; *see, e.g.*, *Fort Bragg*, 70 FLRA at 174 (granting interlocutory review where arbitrator made a bargaining-unit determination, because, under §§ 7105(a)(2)(A) and 7112(a) of the Statute, the Authority has exclusive jurisdiction to resolve questions regarding employees' bargaining-unit status); *U.S. Dep't of the Navy, Naval Undersea Warfare Ctr. Div. Keyport, Keyport, Wash.*, 69 FLRA 292, 293-94 (2016) (granting interlocutory review and setting aside award where arbitrator lacked jurisdiction under § 7121(d) of the Statute); *U.S. DOL*, 63 FLRA 216, 217-18 (2009) (granting interlocutory review and setting aside award where arbitrator lacked jurisdiction under § 7121(c)(5) of the Statute); *U.S. Dep't of the Army, Army Corps of Eng'rs, Norfolk Dist.*, 60 FLRA 247, 249 (2004) (noting that "the few cases in which the Authority has granted interlocutory review have involved jurisdictional issues that arise pursuant to a statute" (citing *U.S. DOD, Nat'l Imagery & Mapping Agency, St. Louis, Mo.*, 57 FLRA 837, 837 n.2 (2002) (Member Pope dissenting); *Interior*, 55 FLRA at 1232)).

[30] *See, e.g.*, *U.S. Dep't of HHS, Navajo Area Indian Health Serv.*, 58 FLRA 356, 356-57 (2003) (finding no plausible jurisdictional defect where excepting party alleged that award was contrary to law).

[31] *See, e.g.*, *Pope AFB*, 66 FLRA at 851 (citing *U.S. DOL, Bureau of Lab. Stat.*, 65 FLRA 651, 655 (2011); *U.S. Dep't of the Treasury, BEP, W. Currency Facility, Fort Worth, Tex.*, 58 FLRA 745, 746 (2003)).

[32] *See, e.g.*, *NTEU*, 66 FLRA 696, 699 (2012) ("Even assuming that the sovereign-immunity exception establishes a plausible jurisdictional defect, the [a]gency does not demonstrate that interlocutory resolution of that exception will advance the ultimate disposition of this case."); *U.S. Dep't of the Interior, Bureau of Reclamation*, 59 FLRA 686, 687 (2004) (*Reclamation*) ("[E]ven if the Authority viewed the [a]gency's claim as jurisdictional and adopted the [a]gency's interpretation of the FLSA, the grievance would proceed to arbitration on the merits of the claims of" some employees.).

[33] *U.S. CIS*, 65 FLRA at 725 (citing *Reclamation*, 59 FLRA at 688; *IRS I*, 34 FLRA at 1163-64).

[34] 70 FLRA 806.

[35] *Id.* at 807-08.

[36] *Id.* at 808.

[37] *Id.* (quoting 5 U.S.C. § 7101(b)).

[38] *Id.*

[39] *Id.* at 808-09.

[40] *Id.* at 809.

Statute does not provide a basis for doing so.[41] Thus, we must either apply private-sector arbitration principles or explain why the Statute warrants a departure from those principles.

With one exception discussed further below, we find no indication in the Statute that the Authority should depart from private-sector principles regarding interlocutory review of arbitration awards.[42] In fact, if anything, the Statute provides *additional* support for applying those principles. In the private sector, courts are tasked with resolving substantive-arbitrability questions, absent the parties' agreement to submit those questions to arbitration.[43] However, under § 7121(a)(1) of the Statute, negotiated grievance procedures – which parties *must* include in their agreements, along with binding arbitration for unresolved grievances[44] – "*shall* provide procedures for the settlement of grievances, including questions of arbitrability."[45] In other words, while private-sector precedent *allows* parties to agree to use negotiated grievance procedures and grievance arbitration to resolve their contractual disputes (including arbitrability questions), the Statute effectively *requires* them to do so. Congress' determination that grievance arbitration must be part of federal-sector collective-bargaining agreements reflects its determination that such arbitration is "central[]" to the Statute.[46] In our view, this provides additional support for adhering to private-sector principles governing interlocutory review.[47]

Further, we believe that *IRS II*'s finding that expanding interlocutory review would promote effective and efficient government was misplaced. One of the primary goals of arbitration is "settling disputes

[41] *See Nat'l Weather Serv. Emps. Org. v. FLRA*, 966 F.3d 875, 881 (D.C. Cir. 2020) (reiterating that Congress "intended that in the area of arbitral awards[,] the Authority would play in federal labor relations the role assigned to district courts in private sector labor law," and admonishing the Authority for "engag[ing] in a much more searching review of the [a]rbitrator's decision than permitted by law" (quoting *Griffith v. FLRA*, 842 F.2d 487, 491 (D.C. Cir. 1988))).

[42] *Cf. Devine v. White*, 697 F.2d 421, 440 (D.C. Cir. 1983), *abrogated on other grounds*, *Cornelius v. Nutt*, 472 U.S. 648 (1985) (holding that "the policies favoring extremely limited judicial review of arbitrators' decisions are fully applicable in the federal sector[]").

[43] *See, e.g.*, *Loc. Joint Exec. Bd. v. Mirage Casino-Hotel, Inc.*, 911 F.3d 588, 595-96 (9th Cir. 2018) (in the context of collective-bargaining agreements, substantive-arbitrability questions are "a question for judicial determination unless the parties 'clearly and unmistakably provide otherwise'" (quoting *AT & T Techs., Inc. v. Commc'ns Workers of Am.*, 475 U.S. 643, 649 (1986))).

[44] *See* 5 U.S.C. § 7121(b)(1)(c)(iii).

[45] *Id.* § 7121(a)(1) (emphasis added).

[46] *U.S. Dep't of VA*, 55 FLRA 781, 784 (1999) (noting the "centrality of arbitration under the Statute"); *Headquarters, XVIII Airborne Corps & Fort Bragg, Fort Bragg, N.C.*, 34 FLRA 21, 25 (1989) (same) (citing *U.S. Marshals Serv. v. FLRA*, 708 F.2d 1417, 1419 (9th Cir. 1983)).

[47] We note, in this regard, that the U.S. Court of Appeals for the D.C. Circuit has stated:

> [T]o the extent that arbitration deserves deference because of its role as part of a system of industrial self-government, closer scrutiny might be justified in the federal sector because grievance procedures are statutorily mandated, whereas in the private sector grievance procedures are strictly the product of the parties' negotiations. But this difference seems inconsequential, for both the precise nature of grievance procedures and the matters to which they apply are generally left to the parties' discretion in the federal sector. Furthermore, the parties to the collective[-]bargaining agreement control the selection of the arbitrator who will resolve their particular dispute. As in the private sector, therefore, "[c]ourts should be most reluctant to override the earlier commitment of both parties to select [a] particular arbitrator as the articulator of their contractual obligations in order to . . . relieve one party from the unwelcome result of that purposeful choice." And, like their private[-]sector counterparts, federal agency employers and employees can return "an occasional aberrant arbitral decision . . . to the same process of negotiation by which the parties created the arbitrator's authority in the first place." In these important senses, arbitration is as much a part of the system of self-government in the federal service as in the private sector.

Devine, 697 F.2d at 437-38 (footnotes omitted).

efficiently."[48] If the parties pause the process while the Authority considers interlocutory exceptions – which can take time, particularly in complex cases – the interlocutory appeal disrupts the arbitration process.[49] Relatedly, if the parties continue with the arbitration proceedings while the exceptions are pending, which they often do,[50] encouraging them to file interlocutory exceptions likely saves them little in terms of the time and expense of continued arbitration proceedings. This is not a hypothetical concern. In the years following *IRS II*, the number of decisions that the Authority issued in cases involving interlocutory exceptions nearly *tripled*.[51] Simply put, shifting litigation from arbitration to the Authority does not promote effective and efficient government.

In short, *IRS II* incorrectly failed to consider private-sector principles regarding interlocutory appeals, and that its reliance on the Statute's general goal of effective and efficient government did not provide a sufficient justification for applying different principles. Accordingly, we find it appropriate to establish a standard for interlocutory review that is more consistent with those private-sector principles.

In fashioning this standard, we note that, in reviewing arbitration awards, the Authority generally stands in the shoes of a federal district court in the private sector.[52] Therefore, to the extent that the Authority's pre-*IRS II* precedent was rooted in private-sector precedent involving interlocutory appeals from district courts to courts of appeals, rather than appeals from arbitrators to district courts,[53] that focus was somewhat misplaced.[54]

In the private sector, the "complete-arbitration rule" prohibits district courts from hearing piecemeal appeals from arbitration awards.[55] As particularly relevant to the *IRS II* test, such appeals are precluded even when hearing them could resolve the entire case and avoid

[48] *42nd & 10th Hotel v. N.Y. Hotel & Motel Council, AFL-CIO*, --- F. Supp. 3d ---, 2022 WL 955477, at *3 (S.D.N.Y. Mar. 30, 2022) (quoting *Scandinavian Reins. Co. v. Saint Paul Fire & Marine Ins. Co.*, 668 F.3d 60, 71-72 (2d Cir. 2012)); *see also Devine*, 697 F.2d at 435 ("It has long been recognized that arbitration of [labor] disputes is faster, cheaper, less formal, more responsive to industrial needs, and more conducive to the preservation of ongoing employment relations than is litigation.").

[49] *Peabody Holding Co. v. United Mine Workers of Am.*, 815 F.3d 154, 161 (4th Cir. 2016) ("the Companies' efficiency argument overlooks the widely held view that the sort of interlocutory appeal the Companies are requesting can, if not circumscribed, become inherently disruptive") (internal quotations omitted); *Pub. Serv. Elec. & Gas Co. v. Sys. Council U-2*, 703 F.2d 68, 70 (3d Cir. 1983) ("Review of the [arbitration] decision at this stage would disrupt and delay the arbitration process and could result in piecemeal litigation."); *Verizon Pa. LLC v. Commc'ns Workers of Am.*, 216 F. Supp. 3d 530, 534 (E.D. Pa. 2016) ("judicial review of incomplete awards is inappropriate in all but the 'most extreme' situations because review at that stage would disrupt and delay the arbitration process and could result in piecemeal litigation").

[50] *See, e.g.*, *NLRB*, 72 FLRA 334, 335 (2021) (arbitrator held merits hearing while interlocutory exceptions were pending before the Authority).

[51] *U.S. Marine Corps, Marine Corps Air Ground Combat Ctr., Twentynine Palms, Cal.*, 72 FLRA 473, 476 (2021) (Dissenting Opinion of Chairman DuBester).

[52] *See Griffith v. FLRA*, 842 F.2d 487, 491 (D.C. Cir. 1988) (in enacting § 7122 of the Statute, Congress "intended that in the area of arbitral awards the Authority would play in federal labor relations the role assigned to district courts in private[-]sector labor law").

[53] *See IRS I*, 34 FLRA at 1163-64.

[54] *See, e.g.*, *Loc. 689, Amalgamated Transit Union v. WMATA*, 249 F. Supp. 3d 427, 438 (D.D.C. 2017) (citing *Peabody Holding Co.*, 815 F.3d at 159-60) (distinguishing 28 U.S.C. § 1291, governing appeals from final judgments in federal district courts, from the rules that govern district-court review of arbitration awards). Nevertheless, the private-sector rules regarding district-court review of arbitration awards, discussed further below, "draw[] from the same well of policy rationales" that apply to appeals-court review of district-court decisions. *Peabody Holding Co.*, 815 F.3d at 159. Thus, to the extent that the Authority's pre-*IRS II* precedent is consistent with private-sector precedent concerning district-court review of arbitration awards, and the principles stated herein, we will continue to apply that precedent.

[55] *See, e.g.*, *Peabody Holding Co.*, 815 F.3d at 159; *Savers Prop. & Cas. Ins. Co. v. Nat'l Union Fire Ins. Co.*, 748 F.3d 708, 719 (6th Cir. 2014); *Loc. 36, Sheet Metal Workers Int'l Ass'n v. Pevely Sheet Metal Co.*, 951 F.2d 947, 949-50 (8th Cir. 1992); *Union Switch & Signal Div. Am. Standard, Inc. v. United Elect., Radio & Mach. Workers of Am., Loc. 610*, 900 F.2d 608, 610-12 (3d Cir. 1990); *Millmen Loc. 550, United Bhd. of Carpenters & Joiners of Am. v. Wells Exterior Trim.*, 828 F.2d 1373, 1375 (9th Cir. 1987); *Pub. Serv. Elec. & Gas Co.*, 703 F.2d at 70; *Phillips 66, Bayway Refinery v. IBT, Loc. 877*, 2014 WL 320384, at *3-*4 (D.N.J. Jan. 29, 2014); *Hyatt Corp. v. Unite Here Loc. 5*, 2012 WL 652098, at *4-*7 & n.3 (D.Haw. Feb. 29, 2012); *Am. Mar. Officers Union*, 2006 WL 8446734, at *2-*4 (N.D. Ohio Aug. 29, 2006) (*Maritime*).

further proceedings.[56] Further, the complete-arbitration rule bars interlocutory appeals of arbitrators' arbitrability determinations where the arbitrators have not yet resolved the merits of the issues presented,[57] and even where a party is alleging that the arbitrator's non-final award is unlawful.[58]

As a general matter, the Statute gives no indication that the Authority should depart from these well-established private-sector principles. We recognize, however, that in the federal sector – unlike in the private sector – certain matters are excluded, as a matter of law, from negotiated grievance procedures and grievance arbitration.[59] In other contexts, the Authority has relied on these exclusions to carve out narrow exceptions to other Authority doctrines, such as the general rule that parties generally cannot make arguments to the Authority that they failed to raise at arbitration.[60]

We believe it is appropriate to carve out a similar exception in the context of interlocutory appeals and continue to allow interlocutory appeals that demonstrate legal bars to an arbitrator's jurisdiction. If a dispute arises whether an arbitrator is legally barred from hearing a grievance in the first place – an issue that the Authority reviews de novo, without deference to the arbitrator's legal interpretation[61] – it is appropriate for the Authority to intervene, when asked, on an interlocutory basis to resolve that dispute.

However, in order to hew as closely as possible to the private-sector principles discussed above, we also believe that this exception should be narrowly applied, in accordance with the following principles.

First, we emphasize that this exception involves only bars to the arbitrator's authority to *exercise jurisdiction over a grievance in the first place* – not situations where, for example, an arbitrator is asked to find a violation, or to grant a remedy, that would conflict with governing law.[62] The latter situations will not warrant interlocutory review.

Second, we will apply this exception only where an excepting party has *demonstrated* that the arbitrator lacks jurisdiction as a matter of law. It will not be sufficient to merely allege, or even present a "plausible" claim, regarding legal bars to jurisdiction. We acknowledge that, in some previous decisions, the Authority has remanded to the arbitrator for further findings when the record was ambiguous as to whether the arbitrator lacked jurisdiction.[63] On further reexamination, we believe that if the record is ambiguous – requiring further findings by the arbitrator – then it is more appropriate to deny interlocutory review and let the arbitration proceed. In our view, this approach will discourage disruptions to the arbitration process, while also signaling to arbitrators and parties that they should further develop a record that will enable the Authority to

[56] *See, e.g.*, *In re Sussex*, 781 F.3d 1065, 1075 (9th Cir. 2015) (finding that "cost and delay alone" did not justify intervening (quoting *Aerojet-Gen. Corp. v. Am. Arb. Ass'n*, 478 F.2d 248, 251 (9th Cir. 1973))); *see also Andrade v. P.F. Chang's China Bistro, Inc.*, 2016 WL 4098210, at *3 (S.D. Cal. Aug. 2, 2016) (declining intervention where party claimed that it would "continue to suffer irreparable harm by being forced to incur significant time, expense, and discovery burdens, over 'representative' claims that the parties agreed would *not* be subject to arbitration"); *Phillips 66, Bayway Refinery*, 2014 WL 320384, at *4 (declining intervention where party argued that "a ruling in this case is outcome determinative for a great many additional cases between the Company and the [u]nion").

[57] *See, e.g.*, *Orion Pictures Corp. v. Writers Guild of Am., W., Inc.*, 946 F.2d 722, 725 (9th Cir. 1991); *Bell Cold Storage, Inc.*, 673 F. Supp. 987, 989-91 (D. Minn. 1987); *see also Int'l Shipping Agency*, 2008 WL 11496513, at *3 (D.P.R. Feb. 27, 2008); *Maritime*, 2006 WL 8446734, at *2-*4.

[58] *See, e.g.*, *Verizon Pa. LLC,* 216 F. Supp. 3d at 535. We note that the U.S. Court of Appeals for the Ninth Circuit has stated that there could be an exception to the complete-arbitration rule in very limited cases, due to "the remote possibility of an extreme case that could cause 'severe irreparable injury' from an error that 'cannot effectively be remedied on appeal from the final judgment' and that would result in 'manifest injustice'" *In re Sussex*, 781 F.3d at 1073 (quoting *Aerojet-Gen. Corp.*, 478 F.2 at 251). "Nevertheless, no intervention of an ongoing arbitration has ever been approved" in that circuit. *Willick v. Napoli Bern Ripka & Assocs.*, 2019 WL 4580939, at *2 (C.D. Cal. May 9, 2019).

[59] *See, e.g.*, 5 U.S.C. § 7121(c).

[60] *See, e.g.*, *U.S. DOD, Def. Commissary Agency*, 69 FLRA 379, 380 (2016) (Member Pizzella dissenting on other grounds) ("[T]he Authority has declined to apply §§ 2425.4(c) and 2429.5 [of the Authority's Regulations] to bar exceptions regarding arbitrators' statutory jurisdiction, regardless of whether the exception was raised during the arbitration.").

[61] *See, e.g.*, *AFGE, Loc. 0922*, 70 FLRA 34, 36 (2016) ("In applying the standard of de novo review, the Authority assesses whether an arbitrator's legal conclusions are consistent with the applicable standard of law[.]"). By contrast, when an arbitrator bases an arbitrability determination on a collective-bargaining agreement, the Authority applies the deferential "essence" standard on review. *See, e.g.*, *Overseas Priv. Inv. Corp.*, 68 FLRA 982, 985 (2015) (Member Pizzella dissenting) ("When an arbitrator's substantive-arbitrability determination is based on an interpretation of the parties' agreement, the Authority reviews that determination de novo.").

[62] *See, e.g.*, *U.S. Dep't of HUD*, 62 FLRA 52, 53 (2007) (finding that § 7106 of the Statute does not provide a basis for finding a grievance inarbitrable and does not raise a plausible jurisdictional defect).

[63] *See, e.g.*, *U.S. Dep't of Transp., FAA*, 61 FLRA 634, 636 (2006).

resolve any law-based jurisdictional challenges at a later stage.

Third – consistent with both the Authority's extant precedent and the private-sector principles above – we will continue to grant interlocutory review only if doing so would bring an end to the entire dispute that the parties submitted to arbitration.[64]

In sum, the Authority will now consider interlocutory exceptions only when the excepting party demonstrates *both* that the arbitrator lacks jurisdiction as a matter of law *and* that resolving the exceptions would bring an end to the entire dispute that the parties submitted to arbitration. Accordingly, we hereby reverse *IRS II* and any other Authority decisions to the extent that they conflict with this standard.

Applying this standard here, as stated above, the Agency argues that interlocutory review is warranted because the interim award fails to draw its *essence* from the parties' agreement.[65] In other words, the Agency is arguing that the grievance is inarbitrable under the terms of the parties' *agreement* – not that the Arbitrator lacked jurisdiction as a matter of *law*. Thus, the Agency fails to meet the first part of the above standard, and interlocutory review is not warranted. Accordingly, we dismiss the exceptions without prejudice to the Agency's ability to refile them when the Arbitrator issues a final award.

IV. Decision

We dismiss the Agency's exceptions without prejudice.

[64] *See, e.g.*, *NTEU*, 66 FLRA at 699; *Reclamation*, 59 FLRA at 687.

[65] Exceptions Br. at 15-16; 19-20 (arguing the interim award finding the grievance procedurally arbitrable fails to draw its essence from the parties' agreement); *id.* at 18-19 (arguing the interim award fails to draw its essence from the parties' agreement because the Union failed to invoke arbitration within the deadline required by the parties' agreement).

Member Kiko, dissenting:

The majority's decision to substantially restrict interlocutory review is a mistake. Under the standard established in *U.S. Department of the Treasury, IRS* (*IRS II*), the Authority granted interlocutory review of any exception that, "if decided, could obviate the need for further arbitration."[1] By allowing parties to avoid the cost and effort of unnecessary arbitration, the *IRS II* standard advanced the Federal Service Labor-Management Relations Statute's (the Statute's) purpose of promoting "an effective and efficient government."[2]

With this decision, even where a meritorious exception could obviate the need for further proceedings, the majority obligates parties to engage in unnecessary arbitration in all but a few limited circumstances. Under the new standard, the Authority will no longer consider interlocutory exceptions even when the excepting party has proven that the arbitrator lacks the contractual authority to hear the grievance.[3] In abandoning the *IRS II* standard, the majority disregards parties' collective-bargaining agreements; reduces government efficiency; disregards key principles from the Statute; and dismisses meritorious exceptions. For these reasons, I dissent.

A. The new standard is unsupported and disrespects parties' collective-bargaining agreements.

As the Authority explained in *IRS II*, when an arbitrator issues a procedural-arbitrability determination that conflicts with the plain wording of a collective-bargaining agreement, the parties should have the opportunity to challenge that deficiency before engaging in potentially unnecessary and costly arbitration.[4] Changing direction, the majority now finds it "appropriate" to grant interlocutory review only when the issue before the Authority is "whether an arbitrator is *legally* barred from hearing a grievance in the first place."[5] Thus, under the new standard, the Authority will not intervene even when a party "*demonstrate*[*s*] that the arbitrator lacks jurisdiction" as a matter of contract.[6] However, the majority does not explain why an arbitrator may issue a merits award without contractual jurisdiction. Nor does the majority provide any private-sector case law to support distinguishing between legal- and contract-based challenges to an arbitrator's authority.

Further, although the majority states that it must either "apply private-sector arbitration principles or explain . . . [its] departure from those principles,"[7] the majority does neither when it comes to the private-sector tenet that, "The agreement fashioned by the parties deserves judicial respect."[8] Section 7121(a)(1) of the Statute states that "collective[-]bargaining agreement[s] shall provide procedures for the settlement of grievances, including questions of arbitrability."[9] In accordance with § 7121, parties bargain jurisdictional prerequisites that must be satisfied in order for a grievance to proceed to arbitration.[10] These prerequisites are wide ranging, and often include filing deadlines,[11] as well as notification and specificity requirements.[12] Despite the Statute's clear mandate that parties define the conditions precedent to arbitration, the majority's new standard forces parties to engage in unnecessary, costly arbitration when these conditions have not been satisfied. As a result, the

[1] 70 FLRA 806, 808 (2018) (then-Member DuBester dissenting).
[2] *Id.*
[3] Majority at 10.
[4] *IRS II*, 70 FLRA at 808.
[5] Majority at 9 (emphasis added).
[6] *Id.* at 10.
[7] *Id.* at 6.
[8] *Peabody Holding Co. v. United Mine Workers of Am.*, 815 F.3d 154, 162 (4th Cir. 2016) (*Peabody Holding*).
[9] 5 U.S.C. § 7121(a)(1). The majority notes that the federal sector differs from the private sector because, rather than "*allow*[*ing*] parties to agree to use negotiated grievance procedures," the Statute "effectively *requires*" parties in the federal sector to use a grievance procedure. Majority at 6. The majority finds that this difference "provides additional support for adhering to private-sector principles governing interlocutory review." *Id.* at 7. I believe that this difference supports the opposite conclusion: as the Statute mandates that parties negotiate prerequisites for arbitration, the Authority should respect parties' choices to bar arbitration where the grieving party fails meet those agreed-upon *threshold* requirements.
[10] *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 85 (2002) (defining procedural arbitrability as addressing whether the parties have satisfied the prerequisites for arbitration).
[11] *E.g.*, *U.S. DOJ, Fed. BOP, Fed. Corr. Complex, Terre Haute, Ind.*, 72 FLRA 711, 713 (2022) (Chairman DuBester dissenting) (deadline to file grievances); *U.S. Dep't of VA, John J. Pershing VA Med. Ctr.*, 72 FLRA 191, 191 (2021) (Chairman DuBester concurring) (deadline to invoke arbitration).
[12] *E.g.*, *U.S. DOJ, Fed. BOP, Fed. Corr. Inst. Aliceville, Ala.*, 72 FLRA 497, 498 (2021) (Chairman DuBester dissenting) (requiring grievances be filed with specific agency representative); *AFGE, Loc. 1741*, 72 FLRA 501, 501 (2021) (Member Abbott dissenting) (requiring specific information about the date and nature of grieved offense and the contractual provision allegedly violated).

majority denies parties the ability to meaningfully enforce their agreements.[13]

Although an arbitrator may lack jurisdiction over a grievance on either legal or contractual grounds, the majority's new standard distinguishes between the two. Not only is this approach unsupported and arbitrary, it disrespects parties' choices concerning arbitrability.

B. The new standard reduces government efficiency.

Attempting to justify the changed standard, the majority asserts that interlocutory review disrupts arbitration because some parties choose to pause arbitration while the Authority considers interlocutory exceptions.[14] But, as the Authority previously explained in *IRS II*, this is exactly the efficiency gained by expanding review: when an arbitrator is contractually prohibited from hearing a grievance, the *IRS II* standard allowed parties to avoid the time and expense of continued arbitration proceedings.[15] Even if the Authority denied interlocutory exceptions after parties paused arbitration, the Authority's denial resolved the jurisdictional dispute – potentially reducing the time parties and arbitrators would later expend arbitrating procedural matters. Under the majority's new standard, the Authority will merely postpone answering legitimate jurisdictional questions until parties have invested more government resources into the process.[16]

Additionally, the majority asserts that if parties continue to arbitrate while the Authority considers interlocutory exceptions, and the arbitrator issues a final award, then permitting "interlocutory exceptions likely saves them little in terms of the time and expense of continued arbitration proceedings."[17] But if an arbitrator issues a final award before the Authority resolves pending interlocutory exceptions, then the exceptions are no longer interlocutory.[18] And if either party files exceptions to the final award, then the Authority can consolidate the two sets of exceptions for one decision, where appropriate.[19] While the majority is correct that parties will not have avoided arbitration, the Authority may have already begun evaluating the initial exceptions. Thus, the Authority may issue a consolidated decision expeditiously.

Moreover, under the Authority's prior standard, when a record was ambiguous as to whether the arbitrator lacked jurisdiction as a matter of law, the Authority remanded to the arbitrator for further findings. With this decision, the majority abandons that salutary approach.[20] Instead, the Authority will now *deny* interlocutory review if the record is ambiguous as to whether the arbitrator lacked lawful jurisdiction.[21] Thus, even in cases where the grievance might, for example, involve a non-arbitrable retirement, life-insurance, health-insurance, suspension, removal, examination, certification, appointment, classification, or political matter,[22] the majority's new standard forces parties to spend time and resources arbitrating the grievance. I cannot agree to a standard that obligates parties to arbitrate matters that are, by law, inarbitrable.

Additionally, the majority's refusal to remand an ambiguous award at the interlocutory stage may simply

[13] Under this new standard, even when parties jointly agree to bifurcate arbitration proceedings in order to resolve whether a matter is contractually arbitrable *before* proceeding to the merits, the majority will ignore that explicit agreement and force parties to litigate the merits of a grievance when the arbitrator erroneously finds that a grievance is arbitrable. *See Providence J. Co. v. Providence Newspapers Guild*, 271 F.3d 16, 20 (1st Cir. 2001) (granting review of a partial arbitral award where the parties informally agreed to bifurcate arbitration into multiple discrete phases); *Hart Surgical, Inc. v. Ultracision, Inc.*, 244 F.3d 231, 235 (1st Cir. 2001) (granting interlocutory review where the parties formally agreed to bifurcate arbitration into discrete phases).

[14] Majority at 7.

[15] *IRS II*, 70 FLRA at 808.

[16] Because the Authority will now grant interlocutory review only when a party has "demonstrated" that the arbitrator lacks jurisdiction as a matter of law, Majority at 10, the Authority will need to meaningfully consider the merits of any exception raising statutory jurisdictional questions. I fail to see how a standard that dismisses an exception without prejudice after the Authority has considered – and rejected – the merits of that exception improves the efficiency of Authority operations. Additionally, the majority fails to explain which statutory grounds would be sufficient for an arbitrator to lack jurisdiction as a matter of law under the new standard.

[17] *Id.* at 7.

[18] *U.S. DOJ, Fed. BOP, U.S. Penitentiary, Bryan, Tex.*, 70 FLRA 707, 708 (2018) (*BOP*) (finding that interlocutory status of exceptions to first award was moot where second award resolved any outstanding questions from first award); *U.S. Agency for Glob. Media*, 70 FLRA 946, 947 n.7 (2018) (*Glob. Media*) (then-Member DuBester dissenting on other grounds) (same).

[19] *See, e.g.*, *NLRB*, 72 FLRA 334, 334 n.2 (2021) (consolidating exceptions to interlocutory and final awards (citing *Glob. Media*, 70 FLRA at 946; *BOP*, 70 FLRA at 708 n.11).

[20] *E.g.*, *U.S. Dep't of Transp., FAA*, 61 FLRA 634, 636 (2006) (citing *U.S. Dep't of HUD, Wash., D.C.*, 59 FLRA 630, 632 (2004)).

[21] Majority at 10 ("[I]f the record is ambiguous – requiring further findings by the arbitrator – then it is more appropriate to deny interlocutory review and let the arbitration proceed.").

[22] 5 U.S.C. § 7121(c).

delay a remand order if the excepting party raises the same challenge to the final award. In those cases, the new standard adds a costly, time-consuming step that the previous standard would have prevented. The majority states that denying interlocutory review, instead of remanding, will "signal[] to arbitrators and parties that they should further develop a record that will enable the Authority to resolve any law-based jurisdictional challenges at a later stage."[23] But that is precisely what a remand order does.[24] Therefore, the majority's rationale justifies remanding, not denying review.

Rather than denying interlocutory review and *hoping* that parties and arbitrators will clarify the record, the Authority should continue remanding awards when it appears that an arbitrator lacks jurisdiction as a matter of law.

C. The new standard disregards the Statute's directives.

As a basis for the new standard, the majority relies on the "complete arbitration rule" applied by federal courts, noting that it "prohibits district courts from hearing piecemeal appeals from arbitration awards."[25] The majority determines that "the Statute gives no indication that the Authority should depart from th[is] well-established private sector principle[]."[26] But the Statute instructs the Authority to review arguments that an award is deficient on grounds "*similar* to those applied by Federal courts in private sector labor-management relations";[27] it does not require the Authority to apply the *same* standards that federal courts use when reviewing a private-sector dispute.

In fact, the Statute instructs the Authority to apply our procedures in a manner that meets "the special requirements and needs of the Government" and to interpret its provisions consistent with the requirements of "an effective and efficient government."[28] Thus, rather than blindly applying the rules that govern in the private sector, the Authority must also consider whether those rules advance the Government's special requirements and needs.[29]

Regarding the "complete arbitration rule," it is salient that this principle is "not a limitation on a district court's jurisdiction,"[30] but instead "necessarily constitutes only a prudential limitation on a court's authority."[31] The United States Court of Appeals for the Fourth Circuit has noted that the purpose of the complete-arbitration rule is to "ensure that courts will not become incessantly dragooned into deciding narrow questions that form only a small part of a wider dispute otherwise entrusted to arbitration."[32]

Under the *IRS II* standard, rather than deciding "narrow questions that form only a small part of . . . wider dispute[s],"[33] the Authority considered only those threshold issues that advanced the ultimate disposition of a case by obviating the need for further arbitral proceedings.[34] Instead of creating "fragmented litigation," the *IRS II* standard provided an opportunity for parties to raise crucial questions at the most practical point in the proceedings.[35] Although the majority laments that the *IRS II* standard has caused "cases involving interlocutory exceptions [to] nearly *triple*[]," [36] this characterization sensationalizes the scale of the change: the Authority has decided approximately thirty-one cases involving interlocutory exceptions since adopting the *IRS II* standard in 2018.[37] I see little evidence that the *IRS II* standard caused the Authority to be "incessantly dragooned" into

[23] Majority at 10. As the majority's reliance on a "signal[]," suggests, *id.*, there is no guarantee that dismissing such exceptions will result in a more developed record on the jurisdictional issue.

[24] *AFGE, Loc. 3506*, 64 FLRA 583, 584 (2010) ("Where an arbitrator has not made sufficient factual findings for the Authority to assess . . . an [a]rbitrator's legal conclusions, and those findings cannot be derived from the record, the Authority will remand the award to the parties for further action." (citing *AFGE, Loc. 2054*, 63 FLRA 169, 172 (2009); *U.S. Dep't of Transp., Maritime Admin.*, 61 FLRA 816, 822 (2006))).

[25] Majority at 8.

[26] *Id.* at 9.

[27] 5 U.S.C. § 7122(a)(2) (emphasis added).

[28] *Id.* § 7101(b).

[29] In the name of hewing close to private-sector principles, the majority fails to consider interlocutory review in the unique context of federal-sector arbitration or explain how this change complies with § 7101(b) of the Statute. And, remarkably, despite using the term "private sector" twenty-two times, the majority fails to demonstrate how the majority's new standard is closer to the private-sector approach than any previous standard the Authority applied.

[30] *Union Switch & Signal Div. Am. Standard, Inc. v. United Elec., Radio & Mach. Workers of Am., Loc. 610*, 900 F.2d 608, 612 (3rd Cir. 1990) (*Union Switch*).

[31] *Peabody Holding*, 815 F.3d at 159 (citing *Millmen Loc. 550, United Bhd. of Carpenters & Joiners of Am. v. Wells Exterior Trim*, 828 F.2d 1373, 1377 (9th Cir. 1987)).

[32] *Peabody Holding*, 815 F.3d at 160.

[33] *Id.*

[34] *IRS II*, 70 FLRA at 808.

[35] *Union Switch*, 900 F.2d at 611. The majority states that the *IRS II* standard "eliminated the jurisdictional component" to granting interlocutory review. Majority at 5. However, the Authority in *IRS II* merely recognized that the same reasoning that justified granting interlocutory review of jurisdictional questions applied equally to other questions that would "obviate the need for further arbitration." *IRS II*, 70 FLRA at 808. Thus, rather than eliminating the jurisdictional component, the Authority expanded interlocutory review to exceptions that, if granted, could conclusively end arbitration.

[36] Majority at 7.

[37] Regarding the cases in which the Authority granted review, it set aside or remanded *more than half* of the reviewed awards.

deciding interlocutory matters in the manner contemplated by federal courts.[38] Accordingly, I disagree that private-sector principles – or the "special requirements and needs of the Government"[39] – justify the majority's action in this case.

D. Under the *IRS II* standard, the Authority would set aside this award.

This case exemplifies the inefficiency of the majority's new approach to interlocutory review. Rather than vacating the Arbitrator's clearly erroneous procedural-arbitrability determination now, the Authority requires the parties to litigate the merits of the grievance.

Under the *IRS II* standard, an exception presents "extraordinary circumstances" that warrant interlocutory review when resolving the exception could advance the ultimate disposition of the case by obviating the need for further arbitral proceedings, including when an exception alleges that the arbitrator improperly found a grievance to be procedurally arbitrable under the parties' agreement.[40] As described further below, the Agency argues that the Arbitrator's procedural-arbitrability determination fails to draw its essence from the parties' agreement because the Arbitrator failed to enforce the clear procedural requirements in the agreement.[41] Because resolution of the Agency's exception could conclusively determine whether any further arbitral proceedings are required, I would grant interlocutory review under the *IRS II* standard.[42]

Concerning the exception's merits, the Agency argues that the Arbitrator disregarded the plain wording of Article 35, Section P (Section P) of the parties' agreement.[43] As relevant here, Section P requires the Union to:

> notify the [Agency] in writing within [ten] work days of the occurrence of the event or knowledge of the matter being grieved. When such notice has been given, the parties shall meet within five (5) workdays to discuss the matter and seek informal resolution. When agreement cannot be reached at such meeting, the grieving party may, within twenty (20) work days, submit a formal written grievance to the [Agency].[44]

Here, the Arbitrator found that the Union notified the Agency of the matter being grieved when it submitted a grievance memo on May 29, 2009.[45] He then determined that the parties met on July 15, 2009 to discuss the matter.[46] Finally, he found that the Union satisfied the formal-grievance requirement by submitting the initial grievance memo on May 29, 2009.[47]

Section P unambiguously requires that the grieving party submit a formal grievance *after* the parties meet to discuss the matter being grieved.[48] Thus, contrary to the Arbitrator's finding, the Union's May 29 memo – which the Union submitted nearly two months *before* the July 15 meeting – could not function as the formal grievance.[49]

Consistent with Authority precedent, the Arbitrator's refusal to enforce the plain language of Section P does not draw its essence from the parties' agreement.[50] Yet the majority refuses to consider this error now – preferring instead to delay consideration of it until after the parties have expended additional time and

[38] *Peabody Holding*, 815 F.3d at 160.
[39] 5 U.S.C. § 7101(b).
[40] *IRS II*, 70 FLRA at 808.
[41] Exceptions at 19. For an award to be found deficient as failing to draw its essence from the parties' agreement, the excepting party must establish that the award: (1) cannot in any rational way be derived from the agreement; (2) is so unfounded in reason and fact and so unconnected with the wording and purposes of the parties' agreement as to manifest infidelity to the obligation of the arbitrator; (3) does not represent a plausible interpretation of the agreement; or (4) evidences a manifest disregard for the agreement. *AFGE, Loc. 1594*, 71 FLRA 878, 879 (2020); *U.S. Dep't of VA, Gulf Coast Med. Ctr., Biloxi, Miss.*, 70 FLRA 175, 177 (2017); *U.S. DOD, Cont. Audit Agency, Irving, Tex.*, 60 FLRA 28, 30 (2004).
[42] *See U.S. Dep't of the Army, Moncrief Army Health Clinic, Fort Jackson, S.C.*, 72 FLRA 207, 208 (2021) (Member Abbott concurring; Chairman DuBester dissenting) (granting interlocutory review where excepting party raised a plausible jurisdictional defect, which could advance the ultimate disposition of the case); *U.S. Small Bus. Admin.*, 70 FLRA 885, 886 (2018) (then-Member DuBester dissenting) (same).
[43] Exceptions at 19.
[44] Exceptions, Ex. 2, Collective-Bargaining Agreement (CBA) at 48.
[45] Award at 19.
[46] *Id.*
[47] *Id.* at 20.
[48] CBA at 48.
[49] Award at 19-20.
[50] *See U.S. Dep't of VA, John J. Pershing VA Med. Ctr.*, 71 FLRA 947, 949 (2020) (then-Member DuBester dissenting) (granting essence exception where arbitrator "refused to enforce the plain language" of the parties' agreement in finding the grievance procedurally arbitrable); *U.S. DOD, Domestic Elementary & Secondary Schs.*, 71 FLRA 236, 237 (2019) (Member Abbott concurring; then-Member DuBester dissenting) (vacating award where arbitrator disregarded agreement's procedural-arbitrability requirements).

government resources on litigating the merits of the grievance. Because the majority refuses to act where doing so would improve government operations and preserve government resources, I dissent.