68 FLRA No. 148

UNITED STATES
DEPARTMENT OF JUSTICE
FEDERAL BUREAU OF PRISONS
FEDERAL MEDICAL CENTER
LEXINGTON, KENTUCKY
(Agency)

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
COUNCIL OF PRISON LOCALS, COUNCIL 33
LOCAL 817
(Union)

0-AR-4931

_____

DECISION

September 15, 2015

_____

Before the Authority: Carol Waller Pope, Chairman, and Ernest DuBester and Patrick Pizzella, Members
(Member Pizzella concurring, in part, and dissenting, in part)

I. Statement of the Case

Arbitrator Edwin R. Render issued two awards (the initial award and the final award). In the awards, the Arbitrator: (1) found that the Agency violated the Fair Labor Standards Act (FLSA)[1] by failing to compensate certain employees (the grievants) for several activities performed both before and after their assigned shifts, and (2) directed the Agency to compensate the affected grievants with overtime pay. There are nine substantive questions before us.

The first question is whether the final award is based on a nonfact. Because the challenged finding concerns a matter that the parties disputed before the Arbitrator, the answer is no.

The second question is whether the award of overtime pay for undergoing security screening is contrary to law. As the pertinent legal standards changed while this case was pending before the Authority, the Arbitrator did not have the opportunity to apply the correct legal standards. Further, we are unable to determine whether the awards of compensation for undergoing security screening are consistent with those standards. Therefore, we remand that matter to the parties for resubmission to the Arbitrator, absent settlement, for further findings.

The third question is whether the awards are contrary to law to the extent that they provide compensation for donning duty belts and chains and traveling to the Agency's control center. The Arbitrator premised the compensation for those activities on the notion that security screening began the compensable, continuous workday, and that the workday encompassed donning duty belts and chains and traveling to the control center. As we are unable to determine whether security screening is compensable, the premise of the Arbitrator's rationale may be incorrect. Further, we are unable to determine whether the awards of compensation for these activities are otherwise consistent with law. Accordingly, we remand these matters as well. And, for any grievants who do not pick up equipment at the control center, we remand for further findings, if necessary, regarding any activities that they perform before they begin to perform work at their assigned posts.

The fourth question is whether the award of overtime pay for flipping an accountability chit – used to indicate the grievants' presence in the Agency's facility – is contrary to law. Because flipping an accountability chit is compensable as part of the pertinent grievants' continuous workday, the answer is no.

The fifth question is whether the awards are contrary to law to the extent that they compensate some grievants for preparatory and concluding activities that do not exceed ten minutes per workday. Under 5 C.F.R. § 551.412(a)(1), to be compensable, preparatory and concluding activities must be performed for more than ten minutes per workday.[2] Therefore, the answer is yes.

The sixth question is whether the award of overtime pay for a period of time during which grievants' shifts overlapped with other officers' shifts is contrary to law. The Arbitrator made factual findings that, regardless of the overlaps in shifts, grievants performed compensable duties before and after their scheduled shifts. The Agency does not show that these findings are deficient, and the findings support the Arbitrator's award of overtime pay for the period in question. Therefore, the answer is no.

The seventh question is whether the final award is contrary to law because it resolves issues regarding employees who work for Federal Prison Industries, Inc.

[1] 29 U.S.C. §§ 201-219.

[2] 5 C.F.R. § 551.412(a)(1).

(UNICOR). Because the Agency does not cite a law that prohibits these employees from being covered by the grievance or receiving overtime pay under the FLSA, the answer is no.

The eighth question is whether the final award is incomplete, ambiguous, or contradictory as to make implementation impossible because the Arbitrator failed to determine the amount of time that passed from the grievants' first compensable acts until they arrived at their assigned posts. Because the Agency fails to show how implementation of the award is impossible, the answer is no.

The ninth question is whether the Arbitrator exceeded his authority by resolving an issue that was not submitted to arbitration. Because the Agency does not show that the Arbitrator's interpretation of the grievance is deficient, the answer is no.

II. Background and Arbitrator's Awards

The Union represents the grievants – correctional officers – at the Agency's correctional facility. The grievants work eight-hour shifts at several assigned posts, which are staffed either twenty-four, sixteen, or eight hours per day. Before the Agency instituted mandatory security screening (the pre-screening period), the grievants would, before their scheduled shifts: (1) enter the Agency's control center and most would pick up, from other officers at the control center, equipment that could include keys, radios, detail pouches (used to identify each inmate that the grievants supervise during a shift), chits (exchanged for equipment located at the grievants' posts), batteries, and handcuffs; (2) flip their "accountability chit" (used to indicate their presence in the facility) and walk through a "sallyport," which is the area between the control center and the grievants' assigned posts; and (3) travel through the facility to their assigned posts.[3] At the end of their shifts, the grievants would walk through the sallyport and, for those who picked up equipment at the control center upon entering the facility, return their equipment at the control center. Some grievants apparently picked up and returned equipment at their assigned posts, rather than at the control center.

In 2008, the Agency began requiring the grievants to go through security screening before they entered the control center (post-screening period). During the post-screening period, the Agency required the grievants to walk through a metal detector. In doing so, the grievants were required to pass their duty belts and chains – on which they keep chits and keys – through an x-ray machine. After undergoing security screening, they would once again don their duty belts and chains, and then walk to the control center to begin the process discussed above in connection with the pre-screening period.

From the start of the period covered by the grievance until March 2005 (pre-mission-critical period), for grievants who worked posts that were staffed twenty-four hours per day, the Agency overlapped shifts for fifteen minutes. From March 2005 to December 2006 (mission-critical period), the Agency discontinued overlapping shifts. Then, beginning in December 2006 until the end of the period covered by the grievance (post-mission-critical period), the Agency again overlapped shifts – this time, for ten minutes.

The Union filed a grievance alleging that, "[f]rom August 2003, as well as before," the Agency violated the FLSA by failing to compensate the grievants for work performed both before and after their assigned shifts.[4] The grievance went to arbitration. The parties did not stipulate to the issue before the Arbitrator, and he did not expressly frame one, but he considered "whether the [grievants] . . . worked more than eight hours on various days generally covered by the grievance."[5]

In the interim award, the Arbitrator determined that "obtaining and putting on the various pieces of equipment obtained at the [c]ontrol [c]enter is an integral and indispensable part of the [grievants'] job[s]."[6] He also stated that during the pre-screening period, "the [grievants]' work[]days began when they picked up equipment at the [c]ontrol [c]enter."[7]

Turning to the post-screening period, the Arbitrator determined that "going through the security[-]screening process [was] an activity [that was] an integral and indispensable part of [the grievants'] princip[al] activities."[8] In this regard, he found that the Agency required the grievants to pass through security screening to prevent them from bringing contraband, "like weapons, narcotics[,] and cell phones," into the Agency's facility.[9] The Arbitrator further found that this screening "reduce[d] the chance that contraband [would] either inadvertently or intentionally make its way into the interior of the institution."[10] Based on these findings, he determined that undergoing security screening helped the grievants maintain the security of the Agency's facility, which he found to be their "princip[al] duty and main

[3] Interim Award at 14.

[4] *Id.* at 8-9.
[5] *Id.* at 155.
[6] *Id.* at 159.
[7] *Id.* at 160.
[8] *Id.* at 158 (internal quotation marks omitted).
[9] *Id.* at 156-57.
[10] *Id.* at 157.

responsibility."[11] He concluded that during the post-screening period, the grievants' workdays began "when they pass[ed] through the security[-]screening mechanism."[12]

For both the pre- and post-screening periods, the Arbitrator found that the grievants' compensable workdays ended "when they turn[ed] in their equipment at the [c]ontrol [c]enter at the end of their shifts."[13]

Based on the foregoing, the Arbitrator found that the Agency violated the FLSA by "suffering or permitting" the grievants to work before and after their assigned shifts without proper compensation.[14] He awarded compensation ranging from ten to thirty-one-and-a-half minutes of overtime per workday, depending on the assigned post.

Moreover, the Arbitrator rejected the Agency's argument that the grievance included only grievants who worked twenty-four or sixteen-hour posts where they were "required to relieve another employee" (relief posts) and did not include grievants who worked eight-hour posts, which did not require such relief (non-relief posts).[15] In this regard, the Arbitrator found that because the grievance stated that the Agency was "requiring bargaining[-]unit employees . . . to perform work prior to and after their shifts," the grievance included employees who worked both relief and non-relief posts.[16]

The Arbitrator retained jurisdiction for the purpose of resolving various outstanding issues and stated that he "expect[ed] that the parties [would] meet and attempt to resolve the outstanding issues in this case."[17] He also noted that the parties agreed to submit supplemental briefs to him "prior to the issuance of a final award."[18]

After the parties submitted supplemental briefs to the Arbitrator, he issued the final award. In the final award, the Arbitrator awarded liquidated damages and found that the recovery period should be three years.

Additionally, the Arbitrator clarified that the grievance included UNICOR employees. He also clarified the amount of overtime compensation. In particular, he stated that he had awarded compensation for the time spent actually *undergoing* security screening, but not for "time spent *waiting* to go through security screening."[19] He also stated that, "[l]ikewise, he should not award compensation for [grievants] waiting" to pick up equipment at the control center during the pre-screening period.[20] In this regard, he found that grievants spent "no more than four minutes" waiting in line to pick up equipment during that period.[21] On this basis, he reduced the varying amounts of overtime in the interim award by four minutes each workday to account for the time spent waiting during the pre-screening period. As a result of the four-minute reductions, compensation for grievants working certain posts – "[c]ompound [o]fficer #2" (morning and evening shifts),[22] "[v]isiting [r]oom [o]fficers" (day shift),[23] "[b]asement [c]orridor [o]fficer" (morning shift),[24] and UNICOR employees – was ten minutes or less per workday for the pre-screening period.

Regarding compensation awarded in the interim award for the pre- and post-mission-critical periods, the Arbitrator found "no evidence that the process of entering the facility through the [c]ontrol [c]enter . . . changed either before or after [the] [m]ission[-c]ritical [period] prior to the institution of security screening."[25] With regard to the pre-mission-critical period, the Arbitrator relied on testimony to find that employees had to pick up and return equipment at the control center before arriving at, and after departing from, their assigned posts. He also found that, based on the wording of the grievants' post orders, the grievants' assigned shifts, including any overlap with the shifts of other officers, did not begin until they reported to their assigned posts. On these bases, he found that "there is evidence in the record that [during the pre-mission-critical period, grievants] . . . worked uncompensated overtime work prior to and after their scheduled start times."[26] With regard to the post-mission-critical period, the Arbitrator rejected the Agency's argument that compensation for this period had to be reduced by ten minutes to account for shift overlap. Like his findings concerning the pre-mission-critical period, the Arbitrator found that, regardless of any shift overlap within grievants' assigned shifts, the Agency failed to compensate the grievants for pre- and post-shift activities.

The Agency filed exceptions to the Arbitrator's awards. The Union filed an opposition to the Agency's exceptions.

[11] *Id.* at 13; *see id.* at 157.
[12] *Id.* at 159.
[13] *Id.*
[14] *Id.* at 151.
[15] *Id.* at 153 (internal quotation marks omitted).
[16] *Id.* (internal quotation marks omitted).
[17] *Id.* at 171.
[18] Final Award at 1.
[19] *Id.* at 35-36 (emphasis added).
[20] *Id.* at 36.
[21] *Id.*
[22] Interim Award at 164-65.
[23] *Id.* at 167.
[24] *Id.* at 168-69.
[25] Final Award at 34.
[26] *Id.* at 34-35.

III. Preliminary Matters

A. Sections 2425.4(c) and 2429.5 of the Authority's Regulations do not bar the Agency's claim that undergoing security screening is not an integral and indispensable part of the grievants' principal activities under the FLSA.

Under §§ 2425.4(c) and 2429.5 of the Authority's Regulations, the Authority will not consider any arguments that could have been, but were not, presented to the Arbitrator.[27] The Agency argues that the awards are contrary to the FLSA because the time during which the grievants undergo security screening is not compensable as an integral and indispensable part of the grievants' principal activities.[28] The Union contends that the Agency did not raise this argument, along with certain legal precedent that the Agency cites in its exceptions, before the Arbitrator.[29] As a result, the Union claims, the Authority should bar the Agency's argument.[30]

The record shows that, in its post-hearing brief to the Arbitrator, the Agency argued that undergoing security screening is not a compensable activity and cited the same legal precedent that it cites in its exceptions.[31] As a result, §§ 2425.4(c) and 2429.5 do not bar the Agency from making that argument in its exceptions, and we address it in Section IV.B.1. below.

B. We will not consider the Union's supplemental submission.

The Union filed a supplemental submission – concerning a decision that the U.S. Supreme Court issued during the pendency of this case[32] – without requesting leave to file the submission, as § 2429.26 of the Authority's Regulations requires.[33] As the Union failed to request leave to file this supplemental submission, we will not consider it.[34] However, where necessary to resolve the parties' arguments that are properly raised in the exceptions and opposition, we will take official notice of all current, relevant precedent.[35]

IV. Analysis and Conclusions

A. The final award is not based on a nonfact.

The Agency argues that the final award is based on a nonfact because the Arbitrator erred by finding that the grievants were "suffered and permitted to work" without compensation during the pre-mission-critical period.[36]

To establish that an award is based on a nonfact, the appealing party must demonstrate that a central fact underlying the award is clearly erroneous, but for which the arbitrator would have reached a different result.[37] The Authority will not find an award deficient on the basis of the arbitrator's determination on any factual matter that the parties disputed at arbitration.[38]

We assume, without deciding, that the challenged finding is a factual determination. But the record demonstrates that the issue of whether the grievants "were suffered and permitted to work" without compensation during the pre-mission-critical period was disputed at arbitration.[39] Consequently, consistent with the above principles, it cannot successfully be challenged as a nonfact.[40] Accordingly, we deny the Agency's exception.

---

[27] 5 C.F.R. §§ 2425.4(c), 2429.5; *see, e.g., Broad. Bd. of Governors*, 66 FLRA 380, 384 (2011).
[28] Exceptions at 6.
[29] Opp'n at 12.
[30] *Id.*
[31] Exceptions, Attach. H, Agency's Post-Hr'g Br. at 5-6.
[32] Union's Supp. Submission at 2 (citing *Integrity Staffing Solutions, Inc. v. Busk*, 135 S. Ct. 513 (2014) (*Integrity Staffing*)).
[33] 5 C.F.R. § 2429.26; *U.S. DHS, CBP*, 68 FLRA 722, 724 (2015) (citing *SSA, Region VI*, 67 FLRA 493, 496) ("[T]he Authority generally requires the party to request leave to file [a supplemental submission].").
[34] *SSA, Region VI*, 67 FLRA 493, 496 (2014) (declining to consider party's supplemental submission where it failed to request leave to file under § 2429.26).
[35] *See AFGE, Local 3652*, 68 FLRA 394, 396 (2015) (*Local 3652*) (declining to consider supplemental submission but noting that "the Authority may take official notice of its own issued decisions in any event").
[36] Exceptions at 22.
[37] *U.S. Dep't of the Air Force, Lowry Air Force Base, Denver, Colo.*, 48 FLRA 589, 593 (1993).
[38] *AFGE, Local 2382*, 66 FLRA 664, 668 (2012) (*Local 2382*) (citing *NFFE, Local 1989*, 56 FLRA 38, 42 (2000)).
[39] Final Award at 17.
[40] *Local 2382*, 66 FLRA at 668.

B. We remand the awards in part, find that they are not contrary to law in part, and find that part of the final award is contrary to law.

The Agency argues that, in several respects, the awards are contrary to law.[41] When a party's exceptions involve an arbitration award's consistency with law, the Authority reviews the questions of law raised by the award and the party's exceptions de novo.[42] In applying a de novo standard of review, the Authority assesses whether the arbitrator's legal conclusions are consistent with the applicable standard of law.[43] In making that assessment, the Authority defers to the arbitrator's underlying factual findings unless the excepting party establishes that they are nonfacts.[44]

1. We remand the awards for further findings regarding security screening.

The Agency argues that the awards are contrary to the FLSA because undergoing security screening is not compensable as an integral and indispensable part of the grievants' principal activities.[45] In its opposition, the Union argues that, in determining that undergoing security screening is integral and indispensable, the Arbitrator made a factual finding to which the Authority should defer.[46] Although the Authority defers to an arbitrator's factual findings when assessing whether the award is contrary to law, a determination that an activity is integral or indispensable to a principal activity is a legal conclusion, which the Authority reviews de novo.[47]

In passing the FLSA, Congress distinguished between "the principal activity or activities that an employee is hired to perform," which are compensable, and "activities [that] are preliminary to or postliminary to said principal activity or activities," which are not compensable.[48] However, 5 C.F.R. § 551.412(a)(1) pertinently provides that, if a "preparatory or concluding activity is closely related to," and is "indispensable to the performance of," an employee's principal activities, and "the total amount of time spent in that activity is more than [ten] minutes per workday, the agency shall credit all of the time spent in that activity, including the [ten] minutes, as hours of work."[49] In determining whether an employee has engaged in a compensable preparatory or concluding activity, the Authority has assessed whether the activity is "an integral and indispensable part of" the employee's principal activities.[50]

While this case was pending before the Authority, the U.S. Supreme Court held in *Integrity Staffing Solutions, Inc. v. Busk* (*Integrity Staffing*)[51] that an activity is "integral and indispensable to the principal activities that an employee is employed to perform if it is an intrinsic element of those activities and one with which the employee cannot dispense if he is to perform his principal activities."[52] In so holding, the Court rejected tests, articulated in several federal-court decisions,[53] that had focused on "whether an employer required a particular activity" or "whether the activity is for the benefit of the employer."[54] Instead, the "test is tied to the productive work that the employee is *employed to perform*."[55] We note that, to the extent that previous Authority decisions are inconsistent with the test set forth in *Integrity Staffing*, we will no longer follow the pertinent portions of those decisions.[56]

In *Integrity Staffing*, the Court held that the time employees spent waiting to undergo, and actually undergoing, security screenings before leaving the workplace was not an integral and indispensable part of the employees' principal activities.[57] There, to prevent theft, the employer required its employees – "warehouse workers who retrieved inventory and packaged it for shipment" – to undergo security screening before leaving the warehouse each day.[58] Applying the test for "integral and indispensable" set forth above, the Court concluded

[41] Exceptions at 6-16.
[42] *NTEU, Chapter 24*, 50 FLRA 330, 332 (1995) (citing *U.S. Customs Serv. v. FLRA*, 43 F.3d 682, 686-87 (D.C. Cir. 1994)).
[43] *NFFE, Local 1437*, 53 FLRA 1703, 1710 (1998).
[44] *U.S. DHS, U.S. CBP, Brownsville, Tex.*, 67 FLRA 688, 690 (2014) (*CBP Brownsville*) (citing *U.S. Dep't of the Treasury, IRS, St. Louis, Mo.*, 67 FLRA 101, 104 (2012)).
[45] Exceptions at 6.
[46] Opp'n at 15, 17.
[47] *See generally U.S. DOJ, Fed. BOP, Fed. Prisons Camp, Bryan, Tex.*, 67 FLRA 236, 238 (2014) (*BOP Bryan*).
[48] *U.S. DOJ, Fed. BOP, Fed. Corr. Inst., Allenwood, Pa.*, 65 FLRA 996, 999 (2011) (*FCI Allenwood*) (internal quotation marks omitted) (citing 29 U.S.C. § 254 (a)(1)-(2)).
[49] 5 C.F.R. § 551.412(a)(1).
[50] *See, e.g., FCI Allenwood*, 65 FLRA at 999.
[51] 135 S. Ct. 513.
[52] *Id.* at 517.
[53] *Bonilla v. Baker Concrete Constr., Inc.*, 487 F.3d 1340, 1344 (11th Cir. 2007) (citing *Dunlop v. City Elec., Inc.*, 527 F.2d 394, 400-01 (5th Cir.1976)) (determining whether activities are integral and indispensable to principal activities by considering "(1) whether the activity is required by the employer, (2) whether the activity is necessary for the employee to perform his or her duties, and (3) whether the activity primarily benefits the employer").
[54] *Integrity Staffing*, 135 S. Ct. at 519 (emphasis omitted).
[55] *Id.*
[56] *E.g., Local 3652*, 68 FLRA at 400; *FCI Allenwood*, 65 FLRA at 999; *U.S. DOJ, Fed. BOP, Fed. Corr. Inst., Terminal Island, Cal.*, 63 FLRA 620, 623 (2009) (*Terminal Island*).
[57] *Integrity Staffing*, 135 S. Ct. at 519.
[58] *Id.* at 515.

that "screenings were not an intrinsic element of retrieving products from warehouse shelves or packaging them for shipment," and that the employer "could have eliminated the screenings . . . without impairing the employees' ability to complete their work."[59]

Here, the Arbitrator concluded that passing through security screening was an integral and indispensable part of the grievants' principal activities[60] because (1) the Agency required the screening and (2) the screening benefitted the Agency by preventing contraband from reaching secure areas.[61] But, as discussed above, *Integrity Staffing* rejected similar reasoning.[62] Further, the Arbitrator did not conduct the inquiry that *Integrity Staffing* now requires. Specifically, the Arbitrator did not assess whether security screening in the particular circumstances of the grievants – correctional officers in a prison, whose principal responsibility is the security of the Agency's facility – is "an intrinsic element of" the principal activities that the grievants are employed to perform "and one with which the [grievants] cannot dispense if [they are] to perform [their] principal activities."[63] And the Arbitrator did not make sufficient factual findings for us to assess whether security screening in the circumstances of this case meets that standard. Where the Authority is unable to determine whether an arbitration award is consistent with applicable legal principles, the Authority remands the award for further findings.[64] As we are unable to determine whether the awards of overtime pay for security screening are contrary to law, we remand that issue to the parties for resubmission to the Arbitrator, absent settlement, for further findings.

2. On remand, if necessary, the Arbitrator should also make further findings regarding donning duty belts and chains and traveling to the control center, and, for any grievants who do not pick up and return equipment from the control center, also make further findings regarding the activities that they perform between traveling to the control center and beginning to perform work at their assigned posts.

The Arbitrator found that, after passing through security screening, the grievants donned their duty belts and chains and then traveled to the control center.[65] And the Arbitrator compensated them for these activities solely because he found that they were part of their "continuous workdays"[66] – in other words, because they occurred after security screening, which the Arbitrator found to be the first compensable activity of the workday during the post-screening period.

Under the continuous-workday doctrine, activities that take place between the first and last principal activities of the day – including those that otherwise would be non-compensable under the FLSA – are compensable because they occur during the continuous workday.[67] As discussed in Section IV.B.1. above, we are unable to determine whether the awards of compensation for security screening are contrary to law. As it is unclear whether security screening is compensable, it also is unclear whether that activity begins the compensable, continuous workday. If, on remand, the Arbitrator applies *Integrity Staffing* and finds that security screening is compensable, then donning duty belts and chains and traveling to the control center would be compensable as part of the continuous workday. But if the Arbitrator applies *Integrity Staffing* and finds that security screening is *not* compensable, then donning duty belts and chains and traveling to the control center are compensable only if they are either (1) principal activities[68] or (2) integral and indispensable to principal activities[69] and last over ten minutes per workday.[70]

If it is necessary for the Arbitrator to address these issues on remand, we note the following. Principal activities are the activities that an employee is "employed to perform."[71] And, as with security screening, *Integrity Staffing* sets forth the applicable standard for determining whether activities are integral and indispensable. If the Arbitrator assesses whether donning duty belts and chains is an integral and indispensable activity, then he should also assess whether the Agency required the grievants to don their duty belts and chains *immediately after* undergoing screening, such that doing so at that particular time was compensable and triggered the continuous workday. And with regard to traveling to the control center, it is well established that unless employees are required to engage in principal activities during their travel, their time spent traveling to and from

[59] *Id.* at 518.
[60] Interim Award at 158 (internal quotation marks omitted).
[61] *Id.* at 156-57.
[62] 135 S. Ct. at 519.
[63] *Id.* at 517.
[64] *See, e.g.*, *FCI Allenwood*, 65 FLRA at 1001.
[65] Interim Award at 14.
[66] *Id.* at 14, 158.
[67] *Local 3652*, 68 FLRA at 399 (citations omitted); *FCI Allenwood*, 65 FLRA at 999 (citing *IBP, Inc. v. Alvarez*, 546 U.S. 21, 29-30, 37, 40 (*Alvarez*)).
[68] *See FCI Allenwood*, 65 FLRA at 999.
[69] *See id.*
[70] 5 C.F.R. § 551.412(a)(1).
[71] *Id.* § 550.112(a).

the actual place of performance of their principal activities is non-compensable, even if it is on the employer's premises, and even if it occurs after the employee checks in.[72] If necessary, the Arbitrator should address this standard as well.

For the above reasons, we remand the awards of compensation for donning duty belts and chains and traveling to the control center to the parties for resubmission to the Arbitrator, absent settlement, for further findings. In so doing, we note that there is no dispute that, for most of the grievants, the activity that follows the travel to the control center – specifically, picking up equipment there – is a compensable activity. There also is no dispute that all of the activities that follow picking up equipment at the control center – up to, and including, returning equipment at the control center at the end of the day – also are compensable as part of those grievants' continuous workday; although, as discussed in Section IV.B.3. below, there is a dispute regarding whether flipping the accountability chit occurs before or after returning equipment at the end of the workday. Consequently, we find no basis for remanding the portions of the awards that provide most grievants compensation for picking up equipment, returning equipment, and all of the activities in between.

However, the Arbitrator apparently found that some grievants pass through, but do not pick up or return equipment, at the control center.[73] If necessary, on remand, then the Arbitrator should apply the above-stated legal principles to also assess the compensability of the activities that these grievants perform after traveling to the control center and before beginning work at their assigned posts.

3. The award of overtime pay for flipping an accountability chit is not contrary to the FLSA.

The Agency argues that the final award is contrary to the FLSA insofar as it awards overtime pay for flipping accountability chits.[74] In this connection, the Agency asserts that the Arbitrator used this activity "as a point of demarcation, ending the [grievants'] workday,"[75] and that this activity is not compensable as an integral and indispensable part of the grievants' principal activities.[76]

The Union argues that "the Arbitrator did *not* conclude that flipping the accountability chit . . . ends the compensable workday."[77] The Union acknowledges that, in the final award, the Arbitrator made a "conclusory statement . . . that the workday ends after 'they flipped their accountability chit[] . . . on the way out.'"[78] But the Union asserts that the compensable workday, for most grievants, actually ended when the grievants returned their equipment – and that flipping the accountability chit preceded this activity, so it was compensable as part of the continuous workday.[79]

As discussed in Section IV.B.2. above, there is no dispute that returning equipment to the control center, for those grievants who picked up equipment at the control center, is compensable. Rather, the only question before us is whether the Arbitrator found that flipping the accountability chit ended the compensable workday for those grievants.[80] The Agency interprets the final award as finding that the compensable workday ends when those grievants flip an accountability chit. In this connection, in the final award, the Arbitrator: noted an Agency argument that "the Union's claim for post-[m]ission[-c]ritical relief must be reduced by the ten-minute overlap in which both officers were compensated;"[81] "disagree[d]" with that argument;[82] and stated that "[f]or the officers who had to pass through security screenings, their workdays began when they went through that process . . . [and] ended when they flipped their accountability [chits] on the way out."[83]

However, with respect to this issue, the Arbitrator did not state that he intended to change his repeated findings from the interim award[84] that the compensable workday ended when those grievants who picked up equipment at the control center *returned their equipment at the control center*. In fact, in the final award – at a point different from that cited by the Agency – the Arbitrator, in justifying compensation, expressly relied on "the fact that [the grievants] went through [the c]ontrol [c]enter and *exited through [the c]ontrol [c]enter* after having worked more than eight hours."[85] Read in context, the most reasonable reading of the final award is that the Arbitrator did not change his previous,

[72] *U.S. DOJ, Fed. BOP, U.S. Penitentiary, Terre Haute, Ind.*, 58 FLRA 327, 329 (2003) (*Terre Haute*).
[73] Interim Award at 166.
[74] Exceptions at 8.
[75] *Id.* at 9.
[76] *Id.* at 8, 15-16.
[77] Opp'n at 21.
[78] *Id.* at 23 (quoting Final Award at 37).
[79] *Id.* at 21.
[80] *See* Interim Award at 159.
[81] Final Award at 36.
[82] *Id.*
[83] *Id.* at 37.
[84] *See, e.g.*, Interim Award at 159 ("employees who go through the [c]ontrol [c]enter end their [workday] when they turn in their equipment at the [c]ontrol [c]enter at the end of their shifts"); *id.* at 160 (during the pre-screening period, grievants' workdays "ended when they returned" equipment to the control center).
[85] Final Award at 41 (emphasis added).

repeated, express findings that the compensable workday ended when the grievants returned equipment at the control center.

There is no dispute that the grievants flipped their accountability chits before they returned equipment at the control center. As there is no dispute that returning equipment at the control center is a compensable activity, flipping the accountability chits is a compensable part of the continuous workday.[86] Although the Agency cites the Authority's decision in *U.S. DOJ, Federal BOP, U.S. Penitentiary, Terre Haute, Indiana* (*Terre Haute*),[87] that decision is distinguishable. Specifically, there, unlike in this case, flipping the accountability chit occurred *after* the end of the continuous workday.[88] Therefore, *Terre Haute* is inapposite and provides no basis for finding the Arbitrator's awards contrary to law.

For the foregoing reasons, we deny the Agency's exception.

4. The final award is contrary to 5 C.F.R. § 551.412(a)(1) to the extent that it provides compensation for preparatory or concluding activities that last ten minutes or less per workday.

The Agency alleges that awarding ten minutes or less of overtime compensation per shift for employees assigned to certain posts during the pre-screening period violates 5 C.F.R. § 551.412(a)(1).[89] As stated previously, that regulation pertinently provides that, if a "preparatory or concluding activity is closely related to," and is "indispensable to the performance of," an employee's principal activities, *and* "the total time spent in that activity is *more than [ten] minutes per workday*, the agency shall credit all of the time spent in that activity, including the [ten] minutes, as hours of work."[90]

The Union contends that § 551.412(a)(1) – which concerns "preparatory or concluding" activities[91] – does not apply because the Arbitrator found that activities at issue, picking up and returning equipment at the control center, were "*principal* activities"[92] that began and ended the compensable workday. In this connection, the Union notes the Arbitrator's statement that "what happens [at the control center area] meets any of the tests for compensability under the FLSA."[93]

The Arbitrator expressly found that picking up equipment is integral and indispensable to a principal activity;[94] he did *not* expressly find that it is a principal activity itself. As for returning equipment, the Arbitrator found that it was compensable, but did not expressly state whether he did so because it was an integral and indispensable activity, or because it was a principal activity.[95] To the extent that the Arbitrator's statement that these activities meet "any of the tests for compensability under the FLSA"[96] could be read as an alternative finding that they are principal activities, we now address that question.

As stated previously, principal activities are the activities that an employee is "employed to perform."[97] Here, the Arbitrator made no finding, and there is no claim, that picking up and returning equipment are the duties that the grievants are "employed to perform."[98] Therefore, there is no basis for finding that these are principal activities, and the only basis for compensating them is if they are integral and indispensable to the grievants' principal activities. In this regard, we note that there is no dispute that picking up and returning equipment is integral and indispensable to the pertinent grievants' principal activities.

The Authority repeatedly has applied § 551.412(a)(1) to preparatory and concluding activities that are integral or indispensable to principal activities.[99] The Union argues that, even if this regulation applies, it does not preclude awards of compensation for ten minutes or less.[100] In this regard, the Union claims that this Office of Personnel Management (OPM) regulation must be interpreted in a manner that is consistent with U.S. Department of Labor interpretations of the FLSA, Supreme Court cases, and other authority.[101] The Union, citing several court decisions, asserts that the time spent performing activities amounting to ten minutes or less of compensation is not

[86] *FCI Allenwood*, 65 FLRA at 999 (citing *Alvarez*, 546 U.S. at 29-30).
[87] 58 FLRA 327.
[88] *See FCI Allenwood*, 65 FLRA at 999 (similarly distinguishing *Terre Haute*).
[89] Exceptions at 15.
[90] 5 C.F.R. § 551.412(a)(1) (emphasis added).
[91] *Id.*
[92] Opp'n at 35-39.
[93] *Id.* at 36 (citing Interim Award at 160).
[94] Interim Award at 159.
[95] *Id.*
[96] *Id.* at 160.
[97] 5 C.F.R. § 550.112(a).
[98] *Id.*
[99] *See, e.g., U.S. DOJ, Fed. BOP, Fed. Corr. Complex, Yazoo City, Miss.*, 68 FLRA 269, 270 (2015) (*FCC Yazoo*); *U.S. DOJ, Fed. BOP, U.S. Penitentiary, Coleman II, Fla.*, 68 FLRA 52, 56-57 (2014) (*Coleman*); *BOP Bryan*, 67 FLRA at 238; *FCI Allenwood*, 65 FLRA at 1001; *U.S. DOJ, Fed. BOP, Fed. Corr. Inst., Sheridan, Or.*, 65 FLRA 157, 159 (2010) (*FCI Sheridan*); *Terminal Island*, 63 FLRA at 625.
[100] Opp'n at 39-50.
[101] *Id.*

"de minimis."[102] Specifically, it argues that employees can work ten minutes or less per workday and still exceed the de minimis rule, which weighs certain factors, including the amount of overtime work at issue, to determine whether activities are compensable.[103] Moreover, the Union contends that § 551.412(a)(1) does not apply to those grievants who were awarded compensation of *exactly* ten minutes.[104]

Regarding the Union's claim that § 551.412(a)(1) must be construed consistently with various authorities, the interpretation of § 551.412(a)(1) set forth above is well established in Authority precedent,[105] and the Union does not provide a basis for reversing that precedent. To the extent that the Union is arguing that the regulation is invalid, it is well established that the Authority does not have the power to assess whether an OPM regulation is invalid.[106] Further, while several of the decisions that the Union cites did involve the judicial doctrine of de minimis, those decisions are inapposite because they do not involve application of § 551.412(a)(1), a government-wide regulation that is generally applicable to civilian employees of the federal government and that contains the ten-minute requirement.[107] With respect to the remaining decisions, which do involve federal employees,[108] those decisions *do not* hold that federal employees who perform ten minutes or less of activities that are integral or indispensable to principal activities may recover overtime compensation under the FLSA. Finally, as for the Union's claim that § 551.412(a)(1) does not apply to those grievants awarded compensation of exactly ten minutes, the Authority has expressly held to the contrary.[109]

For the above reasons, the Union's arguments provide no basis for declining to apply § 551.412(a)(1) and relevant Authority precedent here. Therefore, we find that the awards are contrary to § 551.412(a)(1) to the extent that they award compensation for preparatory and concluding activities that do not exceed ten minutes per workday. Here, there is no dispute that the Arbitrator awarded the grievants working certain posts – namely "[c]ompound [o]fficer #2" (morning and evening shifts),[110] "[v]isiting [r]oom [o]fficers" (day shift),[111] "[b]asement [c]orridor [o]fficer" (morning shift)[112] and UNICOR employees[113] – ten minutes or less of compensation for the pre-screening period.[114] Accordingly, the awards of overtime compensation to these grievants are contrary to § 551.412(a)(1), and we set aside those awards.

5. The award of overtime pay for the pre-mission-critical period is not contrary to the FLSA to the extent that the activities at issue are compensable.

The Agency argues that the final award is contrary to the FLSA because the Arbitrator awarded overtime compensation for the pre-mission-critical period.[115] According to the Agency, the Union provided no evidence that grievants engaged in compensable activities before or after their shifts.[116] To support its arguments, the Agency cites *U.S. DOJ, Federal BOP, Federal Correctional Institution, Terminal Island, California* (*Terminal Island*).[117]

As discussed previously, we have denied the Agency's nonfact exception to the Arbitrator's finding that the grievants were suffered or permitted to work without compensation during the pre-mission-critical period. And that finding supports the Arbitrator's award of compensation for that period, to the extent that the activities at issue are otherwise compensable. We note, in this regard, that this exception challenges only the Arbitrator's findings regarding *when* the grievants engaged in particular activities, not which of those activities are compensable. But, as discussed in Section IV.B.1. and 2. above, we remand the awards, in part, for an assessment of whether certain activities are compensable under the FLSA.

[102] *Id.* at 35-39.
[103] *Id.* at 39-40.
[104] *Id.* at 50.
[105] *E.g.*, *FCC Yazoo*, 68 FLRA at 270; *Coleman*, 68 FLRA at 56-57; *BOP Bryan*, 67 FLRA at 238; *FCI Allenwood*, 65 FLRA at 1001; *FCI Sheridan*, 65 FLRA 157, 159; *Terminal Island*, 63 FLRA at 625.
[106] *AFGE, AFL-CIO, Nat'l Council of Grain Inspection Locals v. FLRA*, 794 F.2d 1013, 1015 (5th Cir. 1986); *NTEU*, 60 FLRA 782, 783 (2005); *U.S. Dep't of the Army, Corpus Christi Army Depot, Corpus Christi, Tex.*, 56 FLRA 1057, 1065 (2001) (citing *AFGE, Local 4052, Council of Prison Locals*, 56 FLRA 414, 416-17 (2000)).
[107] *See* 5 C.F.R. §§ 551.102(a) & 551.101(b).
[108] Opp'n at 43-44 (citing *Carlsen v. U.S.*, 521 F.3d 1371, 1380-81 (Fed. Cir. 2008); *Abbey v. U.S.*, 82 Fed. Cl. 722, 729 (Fed. Cir. 2008); *Bobo v. U.S.*, 136 F. 3d 1465, 1468 (Fed. Cir. 1998)).
[109] *U.S. DOJ, Fed. BOP, U.S. Penitentiary, Leavenworth, Kan.*, 59 FLRA 593, 598 (2004).
[110] Interim Award at 164-65.
[111] *Id.* at 167.
[112] *Id.* at 168-69.
[113] *Id.* at 169-70.
[114] *Id.* at 165, 168-70; Final Award at 35-36; Exceptions at 15-17; Opp'n at 35.
[115] Exceptions at 11-13.
[116] *Id.* at 13.
[117] 63 FLRA 620; *see* Exceptions at 13.

With regard to the Agency's citation to *Terminal Island*, that decision is distinguishable. There, the Authority remanded an arbitrator's award for clarification where the record was insufficient to determine which employees performed compensable pre- and post-shift activities and the varying amounts of time that they spent engaged in those activities.[118] By contrast, the Arbitrator here identified which grievants performed purportedly compensable pre- and post-shift activities and the varying amounts of time that they spent engaged in such activities, which depend on their assigned posts.[119] Accordingly, the Agency's reliance on *Terminal Island* is misplaced.

For the foregoing reasons, the Agency's arguments provide no basis for finding the final award contrary to law.

6. The award of overtime pay for the post-mission-critical period is not contrary to the FLSA to the extent that the activities at issue are compensable.

The Agency argues that the final award is contrary to the FLSA because the Arbitrator awarded overtime compensation for the post-mission-critical period.[120] Specifically, the Agency contends that "facts in this instance are clear"[121] that the Agency paid the grievants at least "eight hours of compensation for their scheduled workday, which included the [ten]-minute[-]shift overlaps . . . where both [the incoming and outgoing] officers are compensated."[122]

Here, the Arbitrator found that, regardless of any shift overlap within the grievants' assigned shifts, the Agency failed to compensate the grievants for pre- and post-shift activities.[123] Although the Agency argues that "facts in this instance" demonstrate that the Agency compensated grievants for the shift overlap included in their assigned shifts,[124] the Arbitrator found that the Agency did not compensate the grievants for pre- and post-shift activities.[125] Further, the Agency does not contend that the Arbitrator based the final award on a nonfact in this regard, and, as stated previously, absent a nonfact, the Authority defers to an arbitrator's factual findings when assessing whether the award is contrary to law.[126] The Arbitrator's factual findings support his award of compensation for this period to the extent that the activities at issue are otherwise compensable. We note, in this regard, that this exception challenges only the Arbitrator's findings regarding *when* the grievants engaged in particular activities, not which of those activities are compensable. But, as discussed in Section IV.B.1. and 2. above, we remand the awards, in part, for an assessment of whether certain activities are compensable under the FLSA.

The Agency also argues that the ten-minute overlap occurred during the grievants' workday because it occurred before the grievants flipped an accountability chit – which, according to the Agency, the Arbitrator found to be the end of the grievants' compensable workday.[127] As discussed in Section IV.B.3. above, we do not read the final award as holding that flipping an accountability chit ends the compensable workday. Accordingly, the premise of the Agency's argument is misplaced, and we reject the argument.

For the foregoing reasons, the Agency provides no basis for finding that the award of overtime pay for the post-mission-critical period is contrary to the FLSA. Accordingly, we deny this exception.

The Agency also argues that, if we grant its contrary-to-law claims regarding the pre- and post-mission-critical periods, and doing so results in awarding certain grievants ten minutes or less of overtime pay per workday, then those awards are also contrary to § 551.412(a)(1).[128] Because we have rejected the Agency's arguments regarding both the pre- and post-mission-critical periods, it is unnecessary to address the Agency's remaining argument regarding § 551.412(a)(1).[129]

7. The Arbitrator's finding that the grievance covered UNICOR employees is not contrary to law.

Citing federal court decisions, the Agency contends that "the Arbitrator makes a mistake in law in assessing the United States[']s liability for UNICOR's actions."[130] According to the Agency, these decisions support a conclusion that "[t]he United States, in this case the Agency, is not financially answerable for the actions of UNICOR in [c]ourt."[131]

[118] *Terminal Island*, 63 FLRA at 625.
[119] Interim Award at 163-70; *see* Final Award at 36.
[120] Exceptions at 13.
[121] *Id.* at 14.
[122] *Id.* (emphasis omitted).
[123] Interim Award at 170; *see* Final Award at 37.
[124] Exceptions at 13-14.
[125] Interim Award at 170; *see* Final Award at 36-37.
[126] *CBP Brownsville*, 67 FLRA at 690.
[127] *See* Exceptions at 13-14.
[128] *Id.* at 16.
[129] *Id.*
[130] *Id.* at 21.
[131] *Id.*

There is no dispute that the UNICOR employees are federal employees employed by an Agency component. UNICOR is a nonappropriated-fund instrumentality (NAFI), a term denoting an activity whose monies are not received by congressional appropriation, and whose employees are paid primarily from income generated by the activity itself.[132] Although NAFI employees have limited federal benefits comparable to other federal employees, Congress specifically included NAFI employees within the coverage of the Federal Service Labor-Management Relations Statute,[133] and there is no dispute that they are covered by the FLSA.

There also is no dispute that the UNICOR employees are members of the bargaining unit that the Union represents and that the parties' collective-bargaining agreement covers UNICOR employees. And the Agency does not cite any law, rule, or regulation that prohibits employees employed by a NAFI from: (1) joining in a grievance with employees who are paid from appropriated funds; or (2) receiving overtime pay under the FLSA. Accordingly, we find that the Agency has not demonstrated that the final award is contrary to law in this regard, and we deny the Agency's exception.

C. The final award is not incomplete, ambiguous, or contradictory as to make implementation impossible.

The Agency argues that the final award is incomplete, ambiguous, or contradictory as to make implementation impossible because the Arbitrator failed to determine the amount of time that passed from the grievants' first compensable acts until they arrived at their assigned posts.[134] The Authority will find that an award is deficient on this ground when the excepting party shows that implementation of the award is impossible because the meaning and effect of the award are too unclear or uncertain.[135]

Here, the Arbitrator awarded varying amounts of overtime compensation depending on the individual posts to which grievants were assigned.[136] The Agency does not demonstrate that implementation of the final award is impossible because the meaning and effect of this award are too unclear or uncertain. Accordingly, consistent with the principles set forth above, we deny this exception.

D. The Arbitrator did not exceed his authority.

The Agency argues that the Arbitrator exceeded his authority.[137] Specifically, the Agency contends that the Arbitrator "expanded the scope of the grievance" by addressing non-relief posts, including those worked by UNICOR employees, and that this action was taken (1) contrary to the wording of the grievance and (2) without the parties' mutual consent, as the parties' agreement allegedly requires.[138]

Arbitrators exceed their authority when they fail to resolve an issue submitted to arbitration, resolve an issue not submitted to arbitration, disregard specific limitations on their authority, or award relief to those not encompassed within the grievance.[139] Where the parties fail to stipulate the issue, the arbitrator may formulate the issue on the basis of the subject matter before him or her.[140] "[I]n challenging [an a]rbitrator's interpretation of the grievance, [an agency] challenges [an a]rbitrator's interpretation of the issue[s]" that were before him.[141] The Authority and the federal courts accord an arbitrator's formulation of the issues to be decided the same substantial deference that the Authority and the federal courts accord the arbitrator's interpretation of a collective-bargaining agreement.[142]

As discussed previously, the Arbitrator did not expressly frame an issue, but he considered "whether the employees who are the subject of this grievance worked more than eight hours on various days generally covered by the grievance."[143] In doing so, he found that the wording of the grievance was not limited to only grievants working relief posts, but also encompassed non-relief posts, including those worked by UNICOR employees.[144] The Agency provides no basis for declining to defer to the Arbitrator's interpretation of the grievance. Accordingly, we reject the Agency's challenge to that interpretation.

The Agency further argues that the Arbitrator exceeded his authority because he "makes a mistake in law in assessing the United States['] liability for

[132] *AFGE, Local 2921*, 47 FLRA 446, 451 (1993) (citations omitted) (internal quotation marks omitted).
[133] 5 U.S.C. § 7103(a)(3).
[134] Exceptions at 16-17.
[135] *E.g., AFGE, Local 1395*, 64 FLRA 622, 624 (2010).
[136] Interim Award at 163-70.
[137] Exceptions at 18-21.
[138] *Id.* at 18-19.
[139] *AFGE, Local 1617*, 51 FLRA 1645, 1647 (1996) (citing *USDA, Animal & Plant Health Inspection Serv. Plant Prot. & Quarantine*, 51 FLRA 1210, 1218 (1996)).
[140] *U.S. DOD, Educ. Activity, Arlington, Va.*, 56 FLRA 887, 891 (2000).
[141] *NAIL, Local 17*, 68 FLRA 97, 99 (2014).
[142] *U.S. DOJ, Fed. BOP, Fed. Corr. Inst., Terminal Island, Cal.*, 68 FLRA 537, 541 (2015) (citations omitted) (internal quotation marks omitted).
[143] Interim Award at 155.
[144] *Id.* at 153; Final Award at 41-42.

UNICOR's actions."[145] But, as stated previously, we have rejected the Agency's contrary-to-law claim in this regard. As the exceeded-authority argument is premised on that claim, we also reject the exceeded-authority argument.

For the foregoing reasons, we deny the Agency's exceeded-authority exceptions.

V. Decision

We remand the awards, in part, for further findings regarding security screening, donning duty belts and chains immediately thereafter, traveling to the control center, and – for grievants who do not pick up and return equipment at the control center – any activities that they perform after traveling to the control center and before beginning work at their assigned posts. We set aside the awards of compensation for integral and indispensable activities that did not exceed ten minutes per workday. We deny the Agency's remaining exceptions.

[145] Exceptions at 21.

Member Pizzella, concurring, in part, and dissenting, in part:

The grievants in this case believe that they were not paid properly from 2003 through 2008. They filed a grievance. The arbitration hearing took place over twelve days in 2011, spanning a six-month period. Arbitrator Edwin Render issued his award and remedy in August 2013 wherein he determined that the federal penitentiary in Lexington, Kentucky, violated the Fair Labor Standards Act in the manner by which it paid guards for picking up equipment and going through security screening before work and for going through security screening and dropping off equipment at the conclusion of their shifts.

The grievants have now waited more than seven years for a resolution. That is a long time.

Last year, the U.S. Supreme Court in *Integrity Staffing Solutions, Inc. v. Busk* (*Integrity Staffing*)[1] made a determination regarding the compensability of such duties as those that are at issue in this case. It is apparent to me, therefore, that the Arbitrator's decision is not consistent with the Supreme Court's decision in *Integrity Staffing*. For that reason alone, I agree with the majority that it is necessary to remand the award to parties for resubmission to the Arbitrator in light of the Supreme Court's decision in *Integrity Staffing*.

In other words, I would remand the entire award for reconsideration in light of the Supreme Court's decision.

While I express no opinion, at this time, as to whether *Integrity Staffing* affects the compensability of equipment collection or return, if the Agency believes that it does, then it should have the opportunity to make that argument. Moreover, the majority relies on *the absence of* "dispute [over whether] . . . picking up equipment . . . is a compensable activity"[2] to refrain from remanding those issues and thereby ignores the fact that an important Supreme Court decision has issued since the Agency filed its exceptions.

Given that Authority precedent allows a party to file a motion for reconsideration if it "establishe[s] that . . . an *intervening court decision* or change in the law affected dispositive issues,"[3] I find it baffling that the majority refuses to remand the award to allow the

[1] 135 S. Ct. 513 (2014).
[2] Majority at 11.
[3] *U.S. Dep't of HHS, Office of the Assistant Sec'y for Mgmt. & Budget, Office of Grant & Contract Fin. Mgmt., Div. of Audit Resolution*, 51 FLRA 982, 984 (1996) (emphasis added).

Arbitrator to decide, in the first instance, whether *Integrity Staffing* has affected the compensability of equipment pick-up, particularly where *we are already remanding on other issues.*

Thank you.