68 FLRA No. 68

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 3652
(Union)

and

UNITED STATES
DEPARTMENT OF JUSTICE
FEDERAL BUREAU OF PRISONS
METROPOLITAN CORRECTIONAL CENTER
CHICAGO, ILLINOIS
(Agency)

0-AR-5059

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DECISION

March 27, 2015

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Before the Authority: Carol Waller Pope, Chairman, and Ernest DuBester and Patrick Pizzella, Members

I. Statement of the Case

The Union filed a grievance alleging that the Agency violated the Fair Labor Standards Act (FLSA)[1] by failing to pay employees overtime for certain activities occurring before and after their scheduled shifts. Arbitrator Herbert M. Berman found no violation and denied the grievance. There are three substantive questions before us.

The first question is whether the Arbitrator exceeded his authority by not deciding whether two specific activities were compensable. Because the Arbitrator's award addresses the parties' stipulated issues, which did not include specifically addressing the two activities that the Union identifies, the answer is no.

The second question is whether the award is based on nonfacts. The Union's nonfact arguments: challenge findings regarding matters that were disputed at arbitration; contend that certain findings have no evidentiary support; challenge the Arbitrator's weighing of evidence; fail to identify clearly erroneous factual findings; challenge the Arbitrator's interpretation of Authority precedent; or are based on a misreading of the award. Because none of those arguments provides a basis for finding the award deficient on nonfact grounds, the answer is no.

The third question is whether the Arbitrator erred as a matter of law by: (1) finding that the Agency rebutted the Union's prima facie case for overtime; (2) failing to apply the rule that employees are entitled to compensation for all activities that occur between the first and last compensable activities in their day (the continuous-workday doctrine); or (3) determining that certain activities were not compensable. The Union does not establish that any of the Arbitrator's findings are inconsistent with applicable legal standards. Therefore, the answer is no.

II. Background and Arbitrator's Award

The Union filed a grievance alleging that the Agency required employees to perform compensable work before and after their scheduled shifts, without compensation. The grievance went to arbitration.

At arbitration, the parties stipulated the issues as: "Did the [Agency] suffer or permit bargaining[-]unit employees to perform work before and/or after their scheduled shifts without compensation[,] in violation of the . . . [FLSA] and the parties' [collective-bargaining agreement]? If so, what is the remedy?"[2]

The Arbitrator explained that this case involves various posts within a twenty-six-story prison. The Arbitrator extensively summarized the evidence from both parties, noting that the evidence was complex and that the parties used "different approaches" with respect to the presentation of evidence – specifically, that the Union relied on testimony and the Agency relied "primarily" on video recordings.[3]

The Arbitrator stated that employees enter the prison through a street-level lobby; check in with a lieutenant; receive their post assignment for their shift and any pertinent information about problems in the prison; stow their personal items; clear a metal detector; pass through a sallyport; if appropriate, pick up equipment at the control center; and then take an elevator to their assigned posts. The employees' activities are reversed at the end of their shifts. The Arbitrator noted that some employees rely on a two-way radio for communication, and that battery chargers for the radio batteries are installed at each post. Additionally, the Arbitrator noted that, when one employee relieves another at a post, the employee being relieved passes on information and equipment at the post.

[1] 29 U.S.C. §§ 201-219.

[2] Award at 1.

[3] *Id.* at 23.

The Arbitrator stated that the Union has "the burden of showing by a preponderance of the evidence considered in its entirety" that the Agency "suffered or permitted" the employees to perform work without compensation.[4] The Arbitrator cited the legal framework set forth by the U.S. Supreme Court in *Anderson v. Mt. Clemens Pottery Co.* (*Mt. Clemens*),[5] and stated that, in an FLSA case, when an employer's records are "inaccurate or inadequate," an employee's burden of proof is satisfied if "he proves that he has in fact performed work for which he was improperly compensated and if he produces sufficient evidence to show the amount and extent of that work as a matter of just and reasonable inference."[6] The Arbitrator explained that the burden then shifts "to the employer to come forward with evidence of the precise amount of work performed or with evidence to negative the reasonableness of the inference to be drawn from the employee's evidence."[7] The Arbitrator noted that, under *Mt. Clemens*, "representative evidence"[8] was sufficient for him to determine whether the Agency violated the FLSA.[9] In this regard, the Arbitrator "assume[d]" that the Union's testimonial evidence fairly represented the "same or substantially similar work experience of other employees in the same job classification" and that it established a prima facie FLSA violation.[10]

The Union requested that the Arbitrator find an "adverse inference" against the Agency because: the Agency allegedly did not produce "cohesive or representative" video evidence;[11] the video evidence produced was "self-serving, unclear, and unrepresentative"; and the Union did not have a "reasonable opportunity to inspect and respond" to that evidence.[12] The Arbitrator denied this request. The Arbitrator explained that he had directed the Agency to produce video evidence for multiple entrances to the prison for a "discrete two-week period" and that the Union had an opportunity to review the evidence.[13] The Arbitrator acknowledged the Union's assertion that the video evidence was not comprehensive, but he stated that the Union was partially responsible for any evidentiary shortcomings because the Union had not acted with "sufficient dispatch" to ensure the Agency's preservation of evidence.[14] In this regard, the Arbitrator noted that the Union: waited until just before the hearing to request the videos, instead of requesting them two years earlier when the grievance was filed; did not request any continuance in the hearing to review the evidence; and "did not file a post-hearing motion either to suppress or not consider the[] videos."[15]

The Arbitrator then found that the Agency's video evidence "cast doubt on the overall reliability of the [Union's] testimony,"[16] and, under *Mt. Clemens*, "negate[d]" the Union's case.[17] The Arbitrator concluded that none of the evidence proffered by the parties was "ideal," but that, "[o]n balance, . . . a preponderance of the evidence considered in its entirety did not establish that the preliminary or postliminary activities of employees generally exceeded [ten] minutes."[18] Specifically, the Arbitrator stated that, "[d]isregarding non-compensable time spent waiting for elevators or clearing the metal detector," the time spent performing the preliminary activities was "de minimis."[19] The Arbitrator then stated that, even "assuming . . . otherwise," he still had to determine whether the preliminary activities were "an integral and indispensable part" of principal activities and, therefore, began the employees' continuous workday.[20]

The Arbitrator found that checking in with the lieutenant in the front lobby of the prison; donning equipment after clearing the metal detector; picking up batteries at the control center; and being alert and vigilant upon entering the prison were not indispensable to the employees' principal activities – and, thus, that none of those activities began the employees' compensable workday. As relevant here, with respect to checking in with the lieutenant, the Arbitrator stated that, "[o]n balance," the evidence established that, "generally, the 'meetings' between a [l]ieutenant and the [employees] who checked in with him were little more than 'taking attendance' and advising employees of their assignment."[21] Regarding picking up batteries at the control center, the Arbitrator explained that the parties previously had a case involving similar issues with batteries before the Authority in *U.S. DOJ, Federal BOP, Metropolitan Correctional Center, Chicago, Illinois* (*Metro*).[22] The Arbitrator stated that, after the Authority issued its decision in *Metro*, employees were not required

[4] *Id.* at 47 (quoting Tr. at 5) (internal quotation marks and alterations omitted).
[5] *Id.* at 42 (citing *Mt. Clemens*, 328 U.S. 680, 687-88 (1946)).
[6] *Id.* at 42-43 (quoting *Mt. Clemens*, 328 U.S. at 687) (internal quotation marks omitted).
[7] *Id.* (quoting *Mt. Clemens*, 328 U.S at 687-88).
[8] *Id.* at 42.
[9] *Id.* at 44-45 (citing *Morgan v. Family Dollar Stores*, 551 F.3d 1233 (11th Cir. 2008)).
[10] *Id.* at 45.
[11] *Id.* at 47 (quoting Union's Post-Hr'g Br. at 65) (internal quotation marks omitted).
[12] *Id.* at 52.
[13] *Id.* at 49-50.
[14] *Id.* at 60-61.
[15] *Id.* at 59.
[16] *Id.* at 46.
[17] *Id.* at 45; *see also id.* at 62.
[18] *Id.* at 62.
[19] *Id.* at 64.
[20] *Id.* at 65 (citing Union's Post-Hr'g Br. at 77) (internal quotation marks omitted).
[21] *Id.* at 69.
[22] 63 FLRA 423 (2009).

to pick up batteries, because the Agency had "obviat[ed] any official reason for [employees] to pick up batteries" at the control center by installing battery chargers on the posts.[23] And regarding being "alert and vigilant," the Arbitrator found that merely entering the prison does not establish that an employee engages in compensable activity.[24] The Arbitrator made no findings regarding whether employees picked up equipment other than batteries at the control center, or whether picking up other equipment besides batteries is a compensable activity.

The Arbitrator concluded that the Agency did not violate the FLSA by not compensating the employees for activities before and after their shifts. The Union filed exceptions to the award, and the Agency filed an opposition to the Union's exceptions.

III. Preliminary Matter: We decline to consider the parties' supplemental submissions.

The Union requested leave to file, and filed, both a response to the Agency's opposition (the Union's first submission)[25] and a brief regarding the Authority's decision in *U.S. DOJ, Federal BOP, U.S. Penitentiary, Coleman II, Florida* (*Coleman II*)[26] (the Union's second submission).[27] The Agency requested leave to file, and filed, responses to both the Union's first[28] and second submissions.[29] The Authority's Office of Case Intake and Publication permitted the parties to file the supplemental submissions, but stated that the Authority reserved judgment on whether it would consider them.[30]

Although the Authority's Regulations do not provide for the filing of supplemental submissions, § 2429.26 of those Regulations provides that the Authority may, in its discretion, grant leave to file "other documents" as deemed appropriate.[31] The Authority has held that a filing party must show why its supplemental submission should be considered.[32] Where a party seeks to raise issues that it could have addressed in a previous submission, the Authority ordinarily denies requests to file supplemental submissions concerning those issues.[33] The Authority also has denied a party's request to file a supplemental submission to "respond to a party-opponent's alleged mischaracterization" of the requesting party's position or a misstatement of law.[34]

The Union's first submission states that the Agency's opposition "misrepresents . . . [the] Arbitrator['s] decision below and the previous [Authority] decision regarding this same issue."[35] The Union states that its exceptions are "very complex" and that it can "simplif[y] and clarif[y] the issues before the Authority, in addition to correcting any misrepresentations by the Agency" with a reply brief.[36] The Union has already been afforded an adequate opportunity to address the case's complexities, and did so in its exceptions.[37] Further, the Union's contention that the Agency's opposition contains misstatements does not merit considering its supplemental submission.[38] Accordingly, consistent with the principles set forth above, we decline to consider the Union's first submission.

The Union argues in its second submission that the Authority's decision in *Coleman II*, which issued after the Union filed its exceptions, "is highly relevant" because it addresses the Union's argument that employees should be compensated for being "alert and vigilant" upon entering the prison.[39] However, the Union addressed the same issue in its exceptions – the compensability of alertness and vigilance[40] – that it argues the Authority should allow it to address again in the context of the *Coleman II* decision. The Authority has stated that where the record is sufficient for it to resolve the issues in a case, it will not consider a party's supplemental submission.[41] We find that the Union's argument presented in its exceptions is sufficient and, because the Authority may take official notice of its own issued decisions in any event,[42] that it is unnecessary to consider the Union's second submission.

Where the Authority declines to consider a document, the Authority also declines to consider a subsequent response to that document because the

[23] Award at 78.
[24] *Id.* at 70-71 (internal quotation marks omitted).
[25] Union's First Submission (Motion (Sept. 30, 2014); Motion (Oct. 20, 2014)).
[26] 68 FLRA 52 (2014) (Member Pizzella concurring in part, dissenting in part).
[27] Union's Second Submission (Motion (Nov. 4, 2014)).
[28] Agency's Motions (Oct. 7, 2014; Nov. 3, 2014).
[29] Agency's Motion (Nov. 7, 2014).
[30] Order (Oct. 21, 2014) at 1-2; Order (Nov. 20, 2014) at 1.
[31] 5 C.F.R. § 2429.26.
[32] *U.S. Dep't of Transp., FAA*, 66 FLRA 441, 444 (2012) (citing *NTEU*, 65 FLRA 302, 305 (2010)).
[33] *U.S. DHS, U.S. CBP*, 68 FLRA 184, 185 (2015).
[34] *Id.*
[35] Union's First Submission at 1.
[36] *Id.*
[37] *See, e.g.*, *U.S. Dep't of the Army, Corps of Eng'rs, Portland Dist.*, 61 FLRA 599, 601 (2006) (declining to consider a supplemental submission that challenged a portion of the award that could have been addressed in the party's exceptions).
[38] *NTEU*, 65 FLRA at 305.
[39] Union's Second Submission at 1 (citing Agency's Opp'n at 27-28).
[40] Exceptions at 43-46.
[41] *NTEU*, 41 FLRA 1241, 1241 n.2 (1991); *see also U.S. DOJ, INS, N. Region, Twin Cities, Minn.*, 51 FLRA 1467, 1471 n.6 (1996) (finding that supplemental submissions were unnecessary to resolve the issues in the case in reference to a court decision because the existing record was sufficient).
[42] *AFGE, Local 3911*, 58 FLRA 101, 104 (2002).

response is moot.[43] Because we decline to consider the Union's first and second submissions, we do not consider the Agency's submissions.

IV. Analysis and Conclusions

A. The Arbitrator did not exceed his authority.

The Union argues that the Arbitrator exceeded his authority by allegedly not deciding whether: (1) an employee's compensable workday begins when the employee picks up equipment (other than a battery) at the control center; and (2) an employee performs compensable work by reviewing photos of particular inmates once a month (the photos).[44] As relevant here, an arbitrator exceeds his or her authority when he or she fails to resolve an issue submitted to arbitration.[45] In this regard, the Authority has held that an arbitrator does not exceed his or her authority by failing to address an argument that the parties did not include in their stipulation.[46]

The stipulated issues before the Arbitrator concerned, in relevant part, whether the Agency violated the FLSA by failing to compensate employees for work performed before or after their scheduled shifts.[47] In deciding that issue, the Arbitrator reviewed evidence regarding various activities in order to determine when the employees' compensable workdays began and ended, and whether time spent on particular activities was compensable.[48] The Arbitrator found that, based on the evidence in its entirety, the Agency did not "suffer or permit bargaining[-]unit employees to perform work before and/or after their scheduled shifts without compensation."[49] The stipulated issue did not require the Arbitrator to address specifically whether either picking up equipment other than a battery or viewing the photos is compensable.[50] For these reasons, the Arbitrator's award is responsive to the stipulated issue. Accordingly, we find that the Union has not demonstrated that the Arbitrator exceeded his authority.[51]

B. The award is not based on nonfacts.

The Union challenges several of the Arbitrator's findings as nonfacts.[52] To establish that an award is based on a nonfact, the excepting party must demonstrate that a central fact underlying the award is clearly erroneous, but for which the arbitrator would have reached a different result.[53] However, the Authority will not find an award deficient based on the arbitrator's determination regarding any factual matter that the parties disputed at arbitration.[54] And disagreement with an arbitrator's evaluation of evidence, including the arbitrator's determination of the weight to be given such evidence, provides no basis for finding the award deficient as a nonfact.[55] Further, the Authority has held that an argument that no evidence was presented at arbitration to support an arbitral finding does not demonstrate that an award is based on a nonfact.[56] Also, neither challenges to an arbitrator's legal conclusions nor arguments based on a misunderstanding of an award provide a basis for finding an award deficient as based on nonfacts.[57]

First, the Union contests the Arbitrator's finding that the Agency rebutted the Union's (alleged) prima

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[43] *Broad. Bd. of Governors*, 66 FLRA 380, 384 (2011).

[44] Exceptions at 14.

[45] *GSA, E. Distrib. Ctr., Burlington, N.J.*, 68 FLRA 70, 72 (2014) (citing *U.S. Dep't of the Treasury, IRS*, 66 FLRA 325, 331 (2011)).

[46] *Id.*

[47] Award at 1.

[48] *E.g.*, *id.* at 65-66 (citing Tr. at 1143-45), 67-68 (citing Tr. at 1223-30), 70 (citing Tr. at 467-69), 77-78 (citing the arbitrator's findings in *Metro*); *see also id.* at 24-40 (summarizing the Union's evidence regarding the control center, the housing units, internal security, offsite hospitals, the front lobby, perimeter patrols, the visiting room, the tool room, the rear sallyport, custody, food service, the powerhouse, and recreation).

[49] *Id.* at 79.

[50] *Id.* at 1.

[51] *SPORT Air Traffic Controllers Org.*, 66 FLRA 547, 551 (2012) (denying an exceeded-authority exception because the award was responsive to the stipulated issue); *see also NTEU, Chapter 90*, 58 FLRA 390, 395 (2003) (denying an exceeded-authority exception because an arbitrator is not required to set forth specific findings supporting award).

[52] Exceptions at 14, 17, 24, 32, 40, 47-48.

[53] *U.S. Dep't of the Army, White Sands Missile Range, White Sands Missile Range, N.M.*, 67 FLRA 619, 623 (2014) (*White Sands*) (citing *U.S. Dep't of VA, Med. Ctr., Wash., D.C.*, 67 FLRA 194, 196 (2014)).

[54] *SPORT Air Traffic Controllers Org.*, 68 FLRA 9, 11 (2014) (*SPORT*) (citing *Int'l Bhd. of Elec. Workers, Local 26*, 67 FLRA 455, 457 (2014)).

[55] *USDA, Forest Serv.*, 67 FLRA 558, 560 (2014) (*Forest Serv.*).

[56] *U.S. DOD Educ. Activity, Arlington, Va.*, 56 FLRA 836, 842 (2000) (*DOD*) (finding that a claim that "no evidence has been presented" to support the arbitrator's factual finding did not demonstrate that a central fact underlying the award was clearly erroneous); *NAGE, Local R4-45*, 55 FLRA 695, 697, 700 (1999) (noting agency argument that "[n]o evidence" supported finding, and holding that an "absence of facts" does not demonstrate that an award is based on nonfact).

[57] *U.S. DHS, CBP*, 68 FLRA 157, 160 (2015) (*CBP*) (citing *AFGE, Nat'l Joint Council of Food Inspection Locals*, 64 FLRA 1116, 1118 (2010); *AFGE, Local 801, Council of Prison Locals 33*, 58 FLRA 455, 456-57 (2003) (*Local 801*)); *see also Union of Pension Emps.*, 67 FLRA 63, 64-65 (2012) (*Pension*) (challenge to legal conclusion).

facie case.[58] In this regard, the Union challenges the Arbitrator's finding that, based on the video evidence, the employees spent only "de minimis" amounts of time performing the activities in dispute.[59] However, the amount of time that employees spent performing the activities was disputed at arbitration,[60] so this argument provides no basis for finding that the award is based on a nonfact.[61] The Union also argues that the Agency did not present video evidence regarding certain posts and individual employees.[62] But, as discussed above, an argument that no evidence was presented to support an arbitral finding does not demonstrate that the award is based on a nonfact.[63] Further, although the Union argues that the Arbitrator relied on "irrelevant evidence" to find that the Agency rebutted the Union's case,[64] that argument challenges the Arbitrator's weighing of the evidence – and, as such, provides no basis for finding that the award is based on a nonfact.[65]

Second, the Union argues that the Arbitrator failed to apply the continuous-workday doctrine, and that this alleged failure is based on a nonfact because the Arbitrator "mistakenly evaluated each separate activity, rather than as part of the continuous workday."[66] In this regard, the Union contends that the Arbitrator's "de minimis" finding is erroneous because it is based on: (1) his exclusion of time spent waiting for elevators, which the Union claims is compensable as part of the employees' continuous workday; and (2) a misreading of the Authority's decision in *Metro*.[67] But the Union does not identify any factual findings that allegedly are clearly erroneous, which is required in order to demonstrate that the award is based on a nonfact.[68] And, with regard to the Union's challenge to the Arbitrator's interpretation of *Metro*, the interpretation of Authority precedent is a question of law.[69] As stated above, legal conclusions are not challengeable as nonfacts.[70] Therefore, these Union arguments provide no basis for finding that the award is based on a nonfact.

Third, the Union challenges the Arbitrator's finding that employees do not perform compensable work when they pick up batteries at the control center.[71] In this regard, the Arbitrator determined that the pick-up and drop-off of batteries was not indispensable to the performance of the employees' principal activities.[72] Even assuming that this determination is a factual finding, the necessity of the battery pick-up was disputed at arbitration[73] – so the Union's challenge cannot establish that the award is based on a nonfact.[74] Additionally, the Union argues that different arbitrators have determined, based on the particular facts before them, that picking up batteries constitutes compensable work.[75] But arbitration awards are not precedential,[76] and the Union's argument provides no basis for finding that the Arbitrator erred in the factual findings that he made based on the particular record in this case.

Fourth, the Union challenges the Arbitrator's finding that employees do not perform compensable work when they check in with the lieutenant before their shifts.[77] The evidence that the Union relies upon to support its argument – that the employees receive "pertinent" and "critical" information during the check-in[78] – was disputed at arbitration.[79] Further, the Union alleges that the Arbitrator "ignored" testimony from a particular witness and relied "solely" on the testimony of others.[80] In effect, the Union's arguments challenge how the Arbitrator weighed the evidence. Thus, the arguments do not establish that the award is based on a nonfact.[81]

Fifth, the Union claims that the Arbitrator's finding that the Agency modified its rules and procedures after the Authority issued its decision in *Metro*[82] is based on a nonfact because the finding is "not supported by the evidence."[83] As discussed above, an argument that evidence does not support a finding is insufficient to

[58] Exceptions at 15.
[59] *Id.* at 17 (emphasis omitted), *see also id.* at 24-25.
[60] Award at 23; *see also id.* at 45-46.
[61] *SPORT*, 68 FLRA at 11.
[62] Exceptions at 20-21.
[63] *DOD*, 56 FLRA at 842.
[64] Exceptions at 21.
[65] *Forest Serv.*, 67 FLRA at 560.
[66] Exceptions at 27.
[67] *Id.* at 28-30.
[68] *DOD*, 56 FLRA at 842 (stating that absent a demonstration that a fact is clearly erroneous, the Authority will not find an award deficient based on a nonfact).
[69] *E.g.*, *GSA, Region 9, L.A., Cal.*, 56 FLRA 683, 685 (2000) (stating that a claim that an arbitrator misapplied Authority precedent was a contrary-to-law argument).
[70] *CBP*, 68 FLRA at 160; *Pension*, 67 FLRA at 64-65.
[71] Exceptions at 32.
[72] Award at 78.
[73] Tr. at 81-84, 155-56.
[74] *SPORT*, 68 FLRA at 11.
[75] Exceptions at 38-39.
[76] *E.g.*, *U.S. Dep't of the Air Force, Warner Robins Air Logistics Complex, Robins Air Force Base, Ga.*, 68 FLRA 102, 106 (2014) (*Warner Robins*) (stating that arbitration awards are not precedential); *AFGE, Council 236*, 49 FLRA 13, 16-17 (1994) (citing *U.S. Dep't of the Treasury, IRS, Se. Region, Atlanta, Ga.*, 46 FLRA 572, 577 (1992)) (arbitrator is not bound to follow previous arbitration awards with similar issues when deciding a dispute before him or her).
[77] Exceptions at 40.
[78] *Id.* at 41.
[79] Award at 65-68; *see also* Tr. at 631-32.
[80] Exceptions at 43.
[81] *Forest Serv.*, 67 FLRA at 560.
[82] 63 FLRA 423.
[83] Exceptions at 47-48.

establish that an award is based on a nonfact.[84] So the Union's claim does not demonstrate that the award is based on a nonfact.

Sixth, the Union argues that the Arbitrator found that the videos showed bargaining-unit employees "working significant amounts of overtime" and that, consequently, he erred in concluding that they worked only "[d]e [m]inimis" amounts of overtime.[85] However, the quoted statement regarding "significant amounts of overtime" is the Arbitrator's recitation of the assertions made by Union witnesses, not a finding that he made.[86] Therefore, the premise of the Union's argument is incorrect and provides no basis for finding that the award is based on a nonfact.[87]

For the foregoing reasons, we deny the Union's nonfact exceptions.

C. The award is not contrary to law.

The Union argues that several of the Arbitrator's findings are contrary to law.[88] In resolving an exception claiming that an award is contrary to law, the Authority reviews any question of law raised by an exception and the award de novo.[89] 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.[90] Under this standard, the Authority defers to the arbitrator's underlying factual findings unless the excepting party establishes that they are nonfacts.[91]

The Union claims that the Arbitrator's finding that the Agency rebutted the Union's prima facie case is contrary to law because the Agency's evidence was "not sufficient"[92] under the *Mt. Clemens* framework, which requires "[p]recise rebuttal."[93] We note, in this regard, that the Arbitrator "assume[d]" that the Union established a prima facie case – he did not find that the Union actually established it.[94] But, in any event, the Union's claim does not demonstrate that the Arbitrator's finding regarding rebuttal is contrary to law. Under *Mt. Clemens*, two methods are available for the Agency to rebut a prima facie case: (1) by presenting evidence of the precise amount of work performed *or* (2) by presenting evidence "to negative the reasonableness of the inference to be drawn from the employee's evidence."[95] The Arbitrator applied the second method, finding that the Agency's representative evidence "largely negates the Union's prima facie case."[96] The Union provides no basis for finding that the Arbitrator erred as a matter of law in this regard.

The Union also argues that the Arbitrator erred in finding that the Agency did not violate the FLSA by failing to keep accurate records of the employees' time.[97] In this connection, the Authority has stated that an agency is not required to maintain records for overtime that is not worked.[98] And because the Arbitrator determined that the employees did not perform compensable tasks outside of their scheduled shifts – a finding that the Union has not shown to be deficient – there was no overtime for which the Agency failed to maintain records. Thus, the Union's record-keeping argument provides no basis for finding the award contrary to law.[99]

Next, the Union argues that the Arbitrator failed to apply the continuous-workday doctrine, and that he erred as a matter of law in finding that checking in, picking up batteries, or being alert and vigilant do not start the employees' compensable workday.[100] As the Authority has explained, employees are entitled to compensation under the FLSA, as amended by the Portal-to-Portal Act (the Act),[101] for the principal activities that the employees are hired to perform,[102] but are compensated for activities that are preliminary or postliminary to those principal activities only if the preliminary or postliminary activities last more than ten minutes.[103] Under the continuous-workday doctrine, activities that take place between the first and last principal activities of the day, including those that would otherwise be excluded from compensation under the Act, are covered by the FLSA because they occur during the continuous workday.[104]

[84] *DOD*, 56 FLRA at 842.
[85] Exceptions at 24.
[86] Award at 46 (citing Union's Br. at 58-64).
[87] *U.S. DHS, U.S. CBP, JFK Airport, Queens, N.Y.*, 62 FLRA 129, 132 (2007) (rejecting a contrary-to-law exception because it was based on an incorrect premise).
[88] Exceptions at 15 (citing 29 U.S.C. § 211(c)).
[89] *White Sands*, 67 FLRA at 621 (citation omitted).
[90] *Forest Serv.*, 67 FLRA at 560.
[91] *Id.* (citation omitted).
[92] Exceptions at 16.
[93] *Id.* at 18.
[94] Award at 45.
[95] *Mt. Clemens*, 328 U.S. at 687-88.
[96] Award at 45.
[97] Exceptions at 15-16.
[98] *NFFE, Local 1804*, 66 FLRA 512, 515 (2012) (citing *Local 801*, 58 FLRA at 457).
[99] *Id.*
[100] Exceptions at 27-28; *see also id.* at 44.
[101] 29 U.S.C. § 254(a).
[102] *U.S. DOJ, Fed. BOP, Fed. Corr. Inst., Terminal Island, Cal.*, 63 FLRA 620, 623 (2009) (*Terminal Island*) (citing *Steiner v. Mitchell*, 350 U.S. 247, 256 (1956)).
[103] *U.S. DOJ, Fed. BOP, Fed. Corr. Complex, Yazoo City, Miss.*, 68 FLRA 269, 270 (2015) (citing 5 C.F.R. § 551.412(a)(1)).
[104] *U.S. DOJ, Fed. BOP, Fed. Corr. Inst., Allenwood, Pa.*, 65 FLRA 996, 999 (2011) (citing *IBP, Inc. v. Alvarez*, 546 U.S. 21, 29-30, 37, 40 (2005)); *see also* 29 C.F.R. § 790.6(a)-(b).

Regarding check-in, the Arbitrator found, based on the evidence before him, that it involved "little more than taking attendance,"[105] and that, consistent with Authority precedent involving a similar check-in,[106] the activity was not a principal activity.[107] The Union argues that the Arbitrator's finding that check-in is not compensable conflicts with the Authority's decision in *U.S. DOJ, Federal BOP, Federal Correctional Institution, Jesup, Georgia* (*Jesup*).[108] However, unlike the Arbitrator in this case, the arbitrator in *Jesup* "specifically found that employees do more than check in at the lieutenant's office[;] [h]e found that they also check their mailboxes, receive instructions, and review and sign various documents," and, therefore, that the check-in activity there was compensable.[109] Thus, *Jesup* is distinguishable from this case, and the Union's reliance on that decision provides no basis for concluding that the Arbitrator erred, as a matter of law, by not awarding compensation for the check-in.[110]

Regarding picking up batteries at the control center, the Union asserts that the Arbitrator erred in concluding that this activity is not integral and indispensable to the employees' principal duties, because the Arbitrator erroneously assessed whether employees are "required" to pick up batteries.[111] In this regard, the Union claims that the correct inquiry is whether picking up batteries is "necessary" and performed "primarily for the benefit of the employer."[112] However, the Arbitrator found that because batteries were available at the employees' posts, and that picking up batteries was a choice rather than a necessity, it was "not indispensable to the performance of the principal activities."[113] The Arbitrator's conclusion is consistent with the Authority's decision in *Metro* that, under the FLSA, the agency was not required to compensate employees who were not required to pick up batteries but did so anyway.[114] The Union also asserts that the Agency conceded, in a filing to the Authority in an *unrelated case* involving a *different institution*, that picking up batteries is "indispensable to the performance of the principal work activity."[115] But arguments regarding what the Agency claimed in a different case are not pertinent to our analysis here.[116] Therefore, the Union provides no basis for concluding that the Arbitrator erred by finding that battery pick-up was not compensable.

Regarding employees needing to be alert and vigilant, the Union argues that the Arbitrator – in finding that this is not compensable – erroneously relied on the expense and administrative difficulty involved in paying employees for all time spent inside the prison.[117] The Union also asserts that other arbitrators have found that a requirement that correctional officers be alert and vigilant is compensable.[118] However, the Union does not cite any court or administrative precedent that supports a conclusion that, as a matter of law, a requirement that employees be alert and vigilant when they travel within a prison requires compensation for that travel.[119] And with respect to the Union's reliance on other arbitration awards, as stated previously, arbitration awards are not precedential.[120] Therefore, the Union's arguments provide no basis for concluding that the Arbitrator erred, as a matter of law, in concluding that the employees are not entitled to compensation solely because they are required to be alert and vigilant.

The Union also argues that the Arbitrator erred by not awarding overtime to employees who picked up and dropped off equipment other than batteries at the control center, because "[i]t is undisputed that picking up and dropping off equipment at the [c]ontrol [c]enter is compensable work."[121] However, as discussed previously, the Arbitrator made no findings regarding employees who picked up equipment other than batteries at the control center, and we found that he did not exceed his authority by failing to do so. Thus, there is no basis for finding that the Arbitrator was required to award overtime pay for this alleged activity, and the Union's

[105] Award at 69 (internal quotation marks omitted).
[106] *Terminal Island*, 63 FLRA at 624.
[107] Award at 69.
[108] 63 FLRA 323 (2009).
[109] *Id.* at 327-28.
[110] *U.S. DOJ, Fed. BOP, U.S. Penitentiary, Terre Haute, Ind.*, 58 FLRA 327, 330 (2003) (*Terre Haute*) (noting that the legislative history for the Act, 29 U.S.C. § 254, specifically includes checking in as a non-compensable activity).
[111] Exceptions at 33.
[112] *Id.* (quoting *Terminal Island*, 63 FLRA at 623) (internal quotation marks omitted).
[113] Award at 78 (internal quotation marks omitted).
[114] *Metro*, 63 FLRA at 429, 430 (explaining that employees who did not pick up equipment did not begin their principal activity – their compensable workday – until they reached their posts).
[115] Exceptions at 39 (internal quotation marks omitted).
[116] *E.g.*, *Int'l Bhd. of Police Officers, Local 591*, 61 FLRA 239, 239 n.* (2005) (declining to consider arguments pertaining to a different case as those arguments were "not properly before" the Authority).
[117] Exceptions at 43-44.
[118] *Id.* at 45.
[119] *See Terre Haute*, 58 FLRA at 329 ("unless employees are required to engage in principal activities during their travel, their time spent traveling to and from the actual place of performance of their principal activities" within a prison is not compensable); *cf. Coleman II*, 68 FLRA at 55-56 (Authority denied exceptions challenging arbitrator's finding that walking within a prison was compensable, where arbitrator found that employee engaged in principal activities, including restraining inmates, when walking).
[120] *Warner Robins*, 68 FLRA at 106.
[121] Exceptions at 30.

argument provides no basis for finding the award contrary to law.

The Union's argument regarding the continuous-workday doctrine assumes that the activities discussed above are compensable and, thus, that at least one of them began the continuous workday. But, for the reasons discussed above, the Union has not demonstrated that any of those activities are compensable. Therefore, the Union provides no basis for finding that the Arbitrator erroneously failed to apply the continuous-workday doctrine.

For the foregoing reasons, we find that the Union has not demonstrated that the award is contrary to law.

V. Decision

We deny the Union's exceptions.