68 FLRA No. 8

UNITED STATES
DEPARTMENT OF JUSTICE
FEDERAL BUREAU OF PRISONS
UNITED STATES PENITENTIARY
COLEMAN II, FLORIDA
(Agency)

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
COUNCIL OF PRISON LOCALS
LOCAL 506
(Union)

0-AR-4956

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DECISION

October 29, 2014

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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

The Union filed a grievance alleging that the Agency violated the Fair Labor Standards Act (FLSA)[1] by failing to pay certain correctional officers for work that they performed on overtime. Two categories of officers are at issue: (1) officers who relieve other officers from their posts (relief officers), and (2) officers who do not relieve other officers from their posts (non-relief officers). Arbitrator Patricia S. Plant found that the relief officers engage in principal activities – and, thus, are entitled to overtime pay – for the period after they pass through a particular gate (the gate) and before they relieve other officers. She also found that the non-relief officers are entitled to overtime pay for certain preliminary and postliminary activities. We must answer three substantive questions.

The first question is whether the award of overtime pay for the period after the relief officers enter the gate, and before they relieve other officers, is contrary to the FLSA and the Portal-to-Portal Act.[2] Because the Arbitrator found that the relief officers engage in principal activities during this period, and the Agency has not shown that this finding is contrary to law, the answer is no.

The second question is whether the award is contrary to 5 C.F.R. § 551.412(a)(1) because it grants overtime pay to employees who did not engage in certain compensable activities for more than ten minutes per day (the ten-minute rule). Because the ten-minute rule does not apply to the relief officers' activities here, we find that the award is not deficient with respect to those officers. But we find that the award is deficient to the extent that it awards overtime pay to non-relief officers whose activities do not satisfy the ten-minute rule, and we modify the award to exclude any award of such pay.

The third question is whether the award is contrary to law to the extent it awards both liquidated damages and interest. Because an employee may not recover the full amount of both liquidated damages and interest under the FLSA, the answer is yes. Accordingly, we modify the award to exclude the award of interest.

II. Background and Arbitrator's Award

The Agency is a high-security prison. As stated previously, this case involves two categories of correctional officers: relief officers and non-relief officers.

When relief officers arrive at the prison, they: enter the front lobby, pass through a metal detector, enter a control sallyport, flip an accountability chit in the sallyport, and pass through two additional sallyports to enter the west corridor. The gate is the final sallyport in this progression. After entering the gate, relief officers travel to a particular office to notify their first-line supervisors that they are present and to get any information or directions necessary for their shift. Then they walk to particular posts where they relieve other officers.

By contrast, when non-relief officers arrive at the prison, they: enter the front lobby, pass through the metal detector, stop at a control center to pick up equipment, and walk to their particular duty posts.

The Union filed a grievance alleging that the Agency violated the parties' collective-bargaining agreement and the FLSA by "suffer[ing] or permit[ting]"[3] both relief and non-relief officers to work before and after their assigned shifts without proper compensation. The grievance went to arbitration.

[1] 29 U.S.C. §§ 201-219.
[2] *Id.* §§ 251-262.
[3] Award at 16.

The parties jointly submitted the following issue to the Arbitrator: "Did the [Agency] suffer or permit [the officers] to perform work before and/or after their scheduled shifts in violation of the [FLSA], [f]ederal [r]egulations[,] and the parties' [agreement]? If so, what is the remedy?"[4]

With regard to the relief officers, the Arbitrator stated that their

> first principal activity begins once they enter the . . . gate[,] when they are locked in the facility and are on alert due to inmate presence. The time spent in this activity is not simply "travel time." Instead[,] it is time spent performing the employee's primary duty, that being the protection and safety of the institution. [The Agency] is a maximum[-]security facility that houses around 1500[-]1700 high[-] and maximum[-]security inmates. This is a unique environment that requires employees to be in a heightened state of awareness. As one [unit] employee . . . testified[,] "[W]hen you come into [the gate], that's the point you're considered down range; the kill zone. The kill zone is where the inmates are, the point at which you have to watch your back[.]" In addition, another [unit] employee . . . confirmed in his testimony the high[-]alert status needed once entering [the] gate. On one occasion he personally assisted staff in restraining inmates who'd been fighting while he was walking in the corridor after he'd passed through [the] gate. This expectation is further supported by the General Post Order documentation that provides that "[s]taff are to be alert at all times[.]" Even an Agency witness . . . confirmed in his testimony that inmates are present [inside the gate] and that violence could and does take place.[5]

The Arbitrator concluded that the Agency should have paid the relief officers overtime for the period after they enter the gate.

With regard to the non-relief officers, the Arbitrator found that the Agency should have compensated them for the period of time after they visit the control center and before they arrive at their duty posts.

Next, with regard to both relief and non-relief officers, the Arbitrator addressed whether the amount of time spent engaged in their respective activities was "de minimis"[6] and, thus, not compensable. The Arbitrator acknowledged[7] 5 C.F.R. § 551.412(a)(1), which pertinently provides that certain activities are compensable only if employees engage in those activities for "more than [ten] minutes per workday."[8] But the Arbitrator then said:

> There is no precise amount of time that may be denied overtime compensation as de minimis; common sense must be applied to facts of each case. For purposes of determining whether otherwise compensable overtime is de minimis, the size of the aggregate claim must also be considered. . . . Generally, if an employee's aggregate claim is insubstantial, it may be dismissed as groundless and unreasonable.[9]

The Arbitrator then found

> the de minimis doctrine inapplicable to the claims articulated by the Union and its witnesses in this case. While there may be something to the Agency's assertion that all witnesses asserted working pre- and post-shift minutes totaling ten minutes or more is convenient and untrustworthy, in the instant case the regularity of the work, day in and day out, over a significant period of time has taken this case past the envelope of the de minimis principle. As correctly articulated by [another arbitrator], "Prevailing jurisprudence rejects the de minimis defense when the additional work is repetitive and regular." [That arbitrator] indicated that strict application of 5 [C.F.R. §] 551.412, as it pertains to the [ten-minutes-per-day] standard, should not apply when the uncompensated time re-occurs every shift. He points out that the practice does not comply with [the] FLSA, and is precisely what Congress intended to

[4] *Id.* at 330.
[5] *Id.* at 426.
[6] *Id.* at 427.
[7] *Id.*
[8] 5 C.F.R. § 551.412(a)(1).
[9] Award at 428 (citation omitted).

> outlaw. In the instant case[,] the regularity of the pre-shift or post-shift work is clear.[10]

The Arbitrator further stated that "the aggregate amount of compensable time over the years is substantial" and that "[t]he amounts of time are therefore not de minimis."[11] And the Arbitrator concluded: "The Arbitrator finds that the Union's evidence and testimony supports this premise that the de minimis doctrine is inapplicable[,] and[,] therefore[,] this Arbitrator holds for the Union."[12]

The Arbitrator did not determine the exact amount of time for which each officer should be compensated. Instead, she gave the parties sixty days to agree on the amount of damages, and retained jurisdiction to determine the amount in the event the parties were unable to agree, as well as to resolve questions regarding the application of the award. Finally, she directed the Agency to pay both liquidated damages and interest.

The Agency filed exceptions to the award, and the Union filed an opposition to the Agency's exceptions.

III. Preliminary Matter: The Agency's exceptions are not interlocutory.

In its opposition, the Union argues that the Agency's exceptions are interlocutory.[13] And the Authority issued an order directing the Agency to show cause as to why its exceptions should not be dismissed as interlocutory.[14] In its response to the order, the Agency argues that the award is final – and that its exceptions are not interlocutory – because the Arbitrator completely resolved the issues submitted to arbitration[15] and ordered a remedy.[16] According to the Agency, "that the Arbitrator did not identify the specific employees to whom overtime compensation was owed and did not determine the amount of overtime compensation owed . . . does not render the award non-final."[17]

Section 2429.11 of the Authority's Regulations provides that the Authority ordinarily will not consider interlocutory appeals.[18] Thus, the Authority ordinarily will not resolve exceptions to an arbitration award unless the award completely resolves all of the issues submitted to arbitration.[19] If an arbitrator's award resolves all of the issues submitted, including remedial issues, then the award is final even if it directs the parties to determine the identities of affected employees or the particular amounts of damages to be paid to those employees.[20] Further, an arbitrator's retention of jurisdiction solely to assist with the implementation of any awarded remedies does not prevent the award from being final.[21] In this regard, such an award is final for purposes of filing exceptions because, while the award may leave room for further disputes about compliance, the award does not indicate that the arbitrator or the parties contemplate the introduction of some new measure of damages.[22]

Here, the parties submitted the following issue to the Arbitrator: "Did the [Agency] suffer or permit [the officers] to perform work before and/or after their scheduled shifts in violation of the [FLSA], [f]ederal [r]egulations[,] and the parties' [agreement]? If so, what is the remedy?"[23] The Arbitrator resolved that issue, including awarding remedies. Consistent with the principles set forth above, the award is final, even though the Arbitrator: (1) directed the parties to determine the identities of affected employees and the particular amounts of damages, and (2) retained jurisdiction to assist the parties in the event that they are unable to determine the amount of damages.

Although the Union cites several decisions to support its argument, those decisions do no support a conclusion that the award is not final. In four of the cited decisions, parties had presented remedial issues to the arbitrators, and the arbitrators did not issue remedies.[24] And in the fifth cited decision, the parties and the arbitrator contemplated the introduction of some new measure of damages.[25] By contrast, here, the Arbitrator awarded remedies, and the award does not indicate that she or the parties contemplated the introduction of some new measure of damages. Accordingly, the decisions that the Union cites are distinguishable.

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[10] *Id.*
[11] *Id.*
[12] *Id.*
[13] Opp'n at 11-17.
[14] Order to Show Cause at 1.
[15] Agency's Resp. at 2.
[16] *Id.* at 2-3.
[17] *Id.* at 3.
[18] 5 C.F.R. § 2429.11.
[19] *NTEU, Chapter 164*, 67 FLRA 336, 337 (2014) (*Chapter 164*).
[20] *U.S. DOJ, U.S. Marshals Serv.*, 66 FLRA 531, 534 (2012).
[21] *Chapter 164*, 67 FLRA at 337.
[22] *Id.*
[23] Award at 330.
[24] *U.S. Dep't of Transp., FAA, Wash., D.C.*, 60 FLRA 333, 333 (2004); *U.S. Dep't of HHS, Navajo Area Indian Health Serv.*, 58 FLRA 356, 357 (2003); *U.S. GPO, Wash., D.C.*, 53 FLRA 17, 18 (1997); *Navy Pub. Works Ctr., San Diego, Cal.*, 27 FLRA 407, 408 (1987).
[25] *U.S. Dep't of the Treasury, BEP, W. Currency Facility, Fort Worth, Tex.*, 58 FLRA 745, 745-46 (2003) (arbitrator awarded nonmonetary remedies but did not yet make a disposition as to monetary remedies, which were still pending).

For the above reasons, we find that the Arbitrator's award is final, and that the Agency's exceptions to the award are not interlocutory.

IV. Analysis and Conclusions

The Agency argues that the award is contrary to law in various respects.[26] When an exception involves an award's consistency with law, the Authority reviews any questions of law raised by the exception and the award de novo.[27] In applying the standard of de novo review, the Authority determines whether an arbitrator's legal conclusions are consistent with the applicable standard of law.[28] In making that determination, the Authority defers to the arbitrator's underlying factual findings unless the appealing party establishes that those findings are deficient as "nonfacts."[29]

A. The award of overtime pay to relief officers for the period after they enter the gate is not contrary to the FLSA and the Portal-to-Portal Act.

The Agency claims that the Arbitrator's award of overtime pay to the relief officers for their travel after they enter the gate is contrary to the FLSA and the Portal-to-Portal Act.[30] Citing Authority precedent,[31] the Agency claims that, 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 is non-compensable, even if it is on the employer's premises.[32] According to the Agency, the relief officers' first principal activity "begins when they arrive on post," not when they are "walking to a post."[33] The Agency further contends that "[t]he Arbitrator is simply trying to import as a principal activity the fact that correctional officers must be on heightened alert when walking through [the] gate[, b]ut this heightened alert is not special to [the] gate[, because it is] true in *every* area of the federal correctional environment."[34]

Under the FLSA, principal activities are duties that employees are "employed to perform."[35] As relevant here, the Portal-to-Portal Act provides that employers are not liable under the FLSA for failing to pay overtime to an employee for traveling to and from the actual place of performance of the employee's principal activity or activities.[36] Thus, "*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 is non-compensable, even if it is on the employer's premises, and even if it occurs after the employee checks in."[37]

Here, the Arbitrator found that the relief officers' "first principal activity begins once they enter the . . . gate."[38] Specifically, she found that time spent inside the gate "is time spent performing the employee's primary duty, that being the protection and safety of the institution."[39] In this connection, the Arbitrator noted witness testimony that officers are among the inmates once they pass through the gate, and that incidents involving the inmates can and do occur inside the gate.[40]

The record discloses no precedent supporting a conclusion that, as a matter of law, the Arbitrator erred in finding that the relief officers engage in principal activities after they enter the gate. In this regard, the precedent cited by the Agency and the dissent is easily distinguishable. Specifically, in the Authority decisions that the Agency cites, unlike here, the arbitrators made no findings that the officers were engaged in principal activities during the time they traveled to their posts.[41] And in the Authority decision cited by the dissent, the Authority held only that "the act of passing through screening *before* engaging in principal activities [was] not compensable."[42]

Here, by contrast, the Arbitrator's undisputed factual findings establish that the relief officers are not merely passing through a metal detector on their way to the place where they perform principal activities. Rather, immediately after passing through the metal detector, relief officers are in the immediate presence of inmates and have been called upon to, among other things,

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[26] Exceptions at 4-11.
[27] *E.g., U.S. DOJ, Fed. BOP, U.S. Penitentiary, Marion, Ill.*, 61 FLRA 765, 770 (2006).
[28] *E.g., id.*
[29] *E.g., U.S. DOJ, U.S. Marshals Serv., Justice Prisoner & Alien Transp. Sys.*, 67 FLRA 19, 22 (2012).
[30] Exceptions at 6-8.
[31] *Id.* at 6 (citing *U.S. DOJ, Fed. BOP, U.S. Penitentiary, Leavenworth, Kan.*, 59 FLRA 593, 597-98 (2004) (*Leavenworth*); *U.S. DOJ, Fed. BOP, U.S. Penitentiary, Terre Haute, Ind.*, 58 FLRA 327, 329, *recons. denied*, 58 FLRA 587 (2003) (*Terre Haute*)).
[32] *Id.* at 7.
[33] *Id.* at 6.
[34] *Id.* at 6-7 (emphasis added).
[35] *U.S. DOJ, Fed. BOP, Fed. Prisons Camp, Bryan, Tex.*, 67 FLRA 236, 238 (2014).
[36] 29 U.S.C. § 254(a)(1).
[37] *Terre Haute*, 58 FLRA at 329 (emphasis added).
[38] Award at 426.
[39] *Id.*
[40] *Id.*
[41] *Leavenworth*, 59 FLRA at 594; *Terre Haute*, 58 FLRA at 328.
[42] *U.S. DOJ, Fed. BOP, Fed. Corr. Inst., Allenwood, Pa.*, 65 FLRA 996, 1000 n.9 (2011) (*Allenwood*) (emphasis added).

restrain those inmates.[43] In the words of the Arbitrator, such a relief officer is "performing the employee's primary duty, that being the protection and safety of the institution."[44]

The dissent claims that the protection-and-safety responsibility is "not a task or action that guards are required to perform; it is the mission that they support."[45] But surely this is a distinction without a difference. Other considerations aside, common sense dictates that the mission of the Agency must include the requirement that prison officers maintain order when they are in the presence of inmates.

Finally, the court decisions cited by the dissent are distinguishable. In one of those decisions, a court found that certain employees' walking time was compensable because it was "closely related to and indispensable to the performance of their principal activity."[46] In the other two decisions, courts held that employees were not entitled to compensation for their commutes when they did not otherwise engage in principal activities during those commutes.[47] Unlike this case, the court decisions did not address (one way or the other) whether walking time inside a prison – after passing through security, and in the presence of inmates – involved the performance of principal activities.

For the foregoing reasons, we find that the Agency has not demonstrated that the award is contrary to the FLSA and the Portal-to-Portal Act to the extent that it awards overtime pay to relief officers for their activities after they enter the gate.

B. The award is not contrary to 5 C.F.R. § 551.412(a)(1) with regard to relief officers; with regard to non-relief officers, we modify the award to set aside any award of overtime pay for preparatory or concluding activities that last ten or fewer minutes per workday.

The Agency argues that the award is contrary to 5 C.F.R. § 551.412 because the Arbitrator awarded overtime pay for officers' preparatory and concluding activities that did not last more than ten minutes per workday.[48] Section 551.412 provides, in pertinent part:

> If an agency reasonably determines that a preparatory or concluding activity is closely related to an employee's principal activities, and is indispensable to the performance of the principal activities, *and that 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.[49]

In resolving the Agency's exception, it is necessary to distinguish between the relief officers and the non-relief officers. With regard to the relief officers, as discussed previously in section IV.A., the Arbitrator found that those officers were engaged in principal activities after they entered the gate and before they arrived at posts to relieve other officers. And we have denied the Agency's exception to that finding. Further, by its plain terms, the ten-minute rule in § 551.412 applies only to "preparatory or concluding activit[ies]" that are "closely related to," and "indispensable to the performance of[,] . . . principal activities"[50] – not to principal activities themselves. Thus, the ten-minute rule does not apply to the relief officers' activities in this case. Although the Arbitrator discussed both the relief officers and the non-relief officers in her "de minimis" discussion,[51] her statements regarding the relief officers were dicta – and, thus, provide no basis for finding the award deficient.[52] For these reasons, we find that the award is not contrary to § 551.412 with respect to the relief officers.

With regard to the non-relief officers, although the Arbitrator acknowledged[53] § 551.412(a)(1), she also made several statements indicating that she was not applying it,[54] including statements that she was considering the "aggregate amount of compensable time over the years."[55] But the Authority has held that such an "aggregate" analysis is inconsistent with

[43] Award at 426.
[44] *Id.*
[45] Dissent at 14.
[46] *Amos v. United States*, 13 Cl. Ct. 442, 449-50 (1987).
[47] *Morgan v. United States*, 84 Fed. Cl. 391, 395-97 (2008); *Reich v. N.Y.C. Transit Auth.*, 45 F.3d 646, 651-52 (2d Cir. 1995).
[48] Exceptions at 8-10.
[49] 5 C.F.R. § 551.412(a)(1) (emphasis added).
[50] *Id.*
[51] Award at 428.
[52] *AFGE, Local 2431*, 67 FLRA 563, 564 (2014) (arbitrator's statements that constituted dicta did not provide a basis for finding award deficient).
[53] Award at 427.
[54] *See, e.g., id.* at 428 ("[t]here is no precise amount of time that may be denied overtime compensation as de minimis."); *id.* (citing another arbitrator's "indicat[ion] that strict application of 5 [C.F.R. §] 551.412, as it pertains to the [ten-minutes-per-day] standard, should not apply when the uncompensated time re-occurs every shift" because "the practice does not comply with [the] FLSA, and is precisely what Congress intended to outlaw.").
[55] *Id.*

§ 551.412(a)(1).[56] To the extent that the Arbitrator held that non-relief officers may receive overtime pay for preparatory or concluding activities that lasted ten or fewer minutes a day, that holding is inconsistent with law.

The Union argues that "the evidence established that the work at issue *exceeded* ten uncompensated minutes per day."[57] But the Arbitrator did not make such a finding. Instead, she noted that "all [Union] witnesses asserted working pre- and post-shift minutes totaling *ten minutes or more*"[58] – which is distinct from *exceeding* ten minutes – and, in any event, she made no findings as to whether that testimony was credible. Accordingly, the Union's argument does not provide a basis for finding that the award is consistent with § 551.412. And we find that the award is contrary to § 551.412(a)(1) to the extent that it awards relief officers overtime pay for preparatory or concluding activities that last ten or fewer minutes per day.

Where the Authority is able to modify an award to bring it into compliance with applicable law, it will do so.[59] Applying this principle, we modify the award to exclude the payment of overtime for any preparatory or concluding activities that last ten or fewer minutes per day.[60]

We acknowledge the Union's claim – citing[61] *U.S. DOJ, Federal BOP, Federal Correctional Institution, Allenwood, Pennsylvania* (*Allenwood*)[62] – that the Agency's exception is premature because "the Arbitrator did not award any specific amounts of overtime."[63] In *Allenwood*, the Authority remanded an arbitrator's award to make further findings regarding the nature of the activities at issue,[64] and those further findings could have affected his determinations regarding the amount of time that employees spent in compensable activities.[65] As a result, the Authority found that it would be "premature" to resolve the agency's claim that the award was inconsistent with the ten-minute rule in § 551.412.[66] By contrast, here, we are not remanding for further findings. Thus, unless the parties are unable to resolve the details of the remedies on their own, there may be no further proceedings before the Arbitrator. As a result, declining to resolve the Agency's exception would leave standing an award that requires the parties to comply with an award that is unlawful, to the extent that it violates the ten-minute rule in § 551.412. Accordingly, *Allenwood* is distinguishable, and we reject the Union's claim that it is premature for us to the resolve the Agency's exception.

C. We modify the award to set aside the award of interest.

The Agency also claims that the award is contrary to law because it awards both liquidated damages and interest.[67]

As a preliminary matter, the Union argues – as it argued with regard to the exception discussed in section IV.B. above – that the Agency's exception regarding liquidated damages and interest also is premature.[68] Specifically, the Union claims that "the Arbitrator has not yet awarded any monetary relief, be it back[pay], interest, liquidated damages, or some combination of the above."[69] But the Arbitrator *has* awarded monetary relief, including backpay,[70] interest,[71] and liquidated damages;[72] she merely directed the parties to work out the specific details of these remedies.[73] Therefore, the Union's contention provides no basis for finding the Agency's exception to be premature.

With regard to the merits of that exception, the Authority has held that an employee may not recover the full amount of both liquidated damages and interest under the FLSA.[74] Although the Union cites *Brown v. Secretary of the Army*,[75] that decision is inapposite. Specifically, that decision addresses only whether interest is recoverable on a backpay award under Title VII of the Civil Rights Act of 1964 – not whether both liquidated damages and interest may both be recovered under the FLSA.[76]

Accordingly, we find that the award is contrary to law to the extent that it awards both liquidated damages and interest. As stated previously, where the Authority is able to modify an award to bring it into

[56] *See, e.g., AFGE, Local 331*, 67 FLRA 295, 296 (2014) (rejecting union's claim regarding "aggregate" time being compensable).
[57] Opp'n at 39 (emphasis added).
[58] Award at 428 (emphasis added); *see also id.* at 369 (Agency closing brief); Opp'n at 38.
[59] *Allenwood*, 65 FLRA at 1001.
[60] *Id.* at 1001-02; *see also U.S. Dep't of Transp., FAA*, 66 FLRA 441, 447 (2012) (*FAA*).
[61] Opp'n at 38.
[62] 65 FLRA 996.
[63] Opp'n at 39.
[64] *Allenwood*, 65 FLRA at 1000-01.
[65] *Id.* at 1001.
[66] *Id.*; *see also Terre Haute*, 58 FLRA at 330.
[67] Exceptions at 10.
[68] Opp'n at 40.
[69] *Id.*
[70] Award at 432.
[71] *Id.* at 433.
[72] *Id.* at 432.
[73] *Id.* at 433.
[74] *Allenwood*, 65 FLRA at 1001 (citation omitted).
[75] 918 F.2d 214 (D.C. Cir. 1990).
[76] *See id.*

compliance with applicable law, it will do so.[77] Applying this principle, we modify the award to exclude the award of interest.[78]

V. Decision

We modify the award to set aside any award of overtime pay to non-relief officers who do not engage in compensable activities for more than ten minutes per workday, as well as the award of interest. We deny the Agency's remaining exceptions.

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

I agree with my colleagues' decision to modify the award with respect to overtime awarded to non-relief post officers for preparatory or concluding activities lasting ten minutes or less. But I disagree with their determination that the Arbitrator's award of overtime pay to relief officers is consistent with the Fair Labor Standards Act (FLSA)[1] and the Portal-to-Portal Act.[2]

My colleagues uphold the award on the theory that, even though she used the term "principal activity" to mean "integral and indispensable activity" throughout her award, the Arbitrator clearly meant something else when she discussed the relief officers. But, while my colleagues' statement that "[u]nder the FLSA, principal activities are duties that employees are 'employed to perform,'"[3] is accurate (or would be if qualified as only applying to federal employees), it is misleading because that is not the definition of "principal activities" that the Arbitrator was using.

Based on a reading of the award as a whole, it is clear that the Arbitrator was applying the Supreme Court's holding in *IBP, Inc. v. Alvarez* (*Alvarez*)[4] that "any activity that is 'integral and indispensable' to a 'principal activity' is itself a 'principal activity.'"[5] Indeed, the Arbitrator began her analysis by quoting *Alvarez*.[6] She then went on to explain that, under this standard, "[a]n employee's workday . . . begins at the time he engages in the first activity that is integral and indispensable to his principal activities."[7]

The Arbitrator held that non-relief post officers' "first principal activity . . . is picking up necessary equipment"[8] because it "is a pre-shift activity that is indispensable to the performance of the principal work activity."[9] She also held that, "[f]or [relief officers,] their first principal activity begins once they enter the . . . gate."[10] The Arbitrator later reiterated both of these

[77] *Allenwood*, 65 FLRA at 1001.
[78] *Id.* at 1102 (setting aside interest award where Arbitrator also awarded liquidated damages under the FLSA); *see also FAA*, 66 FLRA at 447 (same).

[1] 29 U.S.C. §§ 201-219.
[2] *Id.* §§ 251-262.
[3] Majority at 7 (quoting *U.S. DOJ, Fed. BOP, Fed. Prisons Camp, Bryan, Tex.*, 67 FLRA 236, 238 (2014) (*Bryan*)).
[4] 546 U.S. 21 (2005).
[5] *Id.* at 37.
[6] Award at 425 (quoting *Alvarez*, 546 U.S. at 37).
[7] *Id.*
[8] *Id.*
[9] *Id.* at 426 (quoting *U.S. DOJ, Fed. BOP, Fed. Corr. Inst. Jesup, Ga.*, FMCS No. 04-07225 at 131-32 (2006) (La Penna, Arb.) *exceptions granted in part*, 63 FLRA 323, 325 (2009) (*Jesup*)).
[10] *Id.*

findings,[11] and she sustained the grievance based on her finding that the Agency failed to compensate employees "for daily pre-shift and post-shift work activities which are integral and indispensable to their principal activity."[12]

Further, the Arbitrator conducted a de-minimis analysis for both the relief officers and non-relief officers[13] – a point the majority concedes[14] – even though the de minimis exception only applies to integral and indispensable preparatory or concluding activities.[15] In an attempt to avoid this inconsistency, my colleagues deem the Arbitrator's de-minimis discussion regarding the relief officers "dicta."[16] But the application of a legal test to the facts of a case – like the Arbitrator's application of the de-minimis doctrine to the relief officers – is *always* part of the case's holding and, therefore, *not* dicta.[17]

The majority also errs in its reliance on *U.S. DOJ, Federal BOP, U.S. Penitentiary, Terre Haute, Indiana* (*Terre Haute*).[18] That case held that "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 is non-compensable."[19] But the Authority decided *Terre Haute* at a time when it routinely "suggested that 'activities that are integral and indispensable to an employee's principal . . . activities are themselves principal activities,'"[20] relying on precedent regarding integral and indispensable activities.[21] Quite simply, *Terre Haute* is a decision about when travel time is compensable because it is integral and indispensable. Thus, in relying on *Terre Haute*, my colleagues are conducting the very integral-and-indispensable analysis that they claim the Arbitrator did *not* conduct.

Given that the Authority has held that "the dangerous nature of the correctional environment"[22] does not transform non-compensable activities into integral and indispensable activities, I would hold that the Arbitrator's conclusion that relief officers begin performing integral and indispensable activities once they enter the gate is contrary to law.

Finally, even under the majority's reading of the award, it is still contrary to law. "[T]he characterization of a duty as a principal activity is a legal conclusion, which the Authority reviews de novo."[23] Further, the relevant definition of the word "duty" is "a task or action that someone is required to perform."[24] The "protection and safety of the intuition"[25] is not a task or action that officers are required to perform; it is the mission that they support. And the Arbitrator made no findings as to *any* tasks that the relief post officers are required to perform between entering the gate and reaching their posts.

My colleagues claim that the difference between a tasks or action that officers are required to perform and the mission that they support "is a distinction without a difference."[26] But it is the distinction between what officers do and why they do it. Correctional officers are ordered to do things such as conducting rounds, checking for contraband, and recording rule infractions – i.e., their assigned job duties – in order to maintain a safe prison environment – i.e., the portion of the Agency's mission that they support.

Moreover, the majority's contention that "after passing through the metal detector, relief officers . . . have been called upon to, among other things, restrain those inmates"[27] only shows that officers *might* be called upon to perform their principal activities before reaching their post, not that they are performing principal activities from the moment they walk through the gate. The courts have held that, while work that occurs during travel may be compensable, the mere possibility that an employee might have to perform work while traveling does not make all travel time compensable.[28]

Finding, as a matter of law, that prison guards' workdays begin when they first enter the secured area is a

[11] *Id.* at 427 ("[T]he first principal activity that . . . [non-relief officers] perform is picking up necessary equipment . . . . For [relief officers], . . . their first principal activity begins once they enter the . . . gate . . . .").
[12] *Id.* at 431; *see also id.* at 432.
[13] *Id.* at 428.
[14] Majority at 8 (citing Award at 428).
[15] *See* 5 C.F.R. § 551.412(a)(1).
[16] Majority at 9.
[17] *See* 21 C.J.S. *Courts* § 229 (2006) ("An adjudication on any point within the issues presented by a case is not dictum.").
[18] 58 FLRA 327 (2003).
[19] *Id.* at 329.
[20] *Bryan*, 67 FLRA at 238 (quoting *U.S. DOJ, Fed. BOP, Fed. Corr. Inst., Allenwood, Pa.*, 65 FLRA 996, 999 (2011) (*Allenwood*) (Member DuBester dissenting in part); *Jesup*, 63 FLRA at 327-28.
[21] *Aiken v. City of Memphis*, 190 F.3d 753 (6th Cir. 1999); *Reich v. N.Y.C. Transit Auth.*, 45 F.3d 646 (2d Cir. 1995); *Vega v. Gasper*, 36 F.3d 417 (5th Cir. 1994); *Dolan v. Project Constr. Corp.*, 558 F. Supp. 1308 (D. Colo. 1983); *Tanaka v. Tom*, 299 F. Supp. 732 (D. Haw. 1969).
[22] *Allenwood*, 65 FLRA at 1000.
[23] *Bryan*, 67 FLRA at 238.
[24] *New Oxford American Dictionary* 541 (Angus Stevenson & Christine A. Lindberg eds., 3d ed. 2010); *accord Black's Law Dictionary* 581 (9th ed. 2009) ("Any action, performance, task, or observance owed by a person in an official or fiduciary capacity.").
[25] Majority at 7 (quoting Award at 426).
[26] *Id.* at 8.
[27] *Id.* at 7 (citing Award at 426).
[28] *Reich*, 45 F.3d at 651-52; *accord Morgan v. United States*, 84 Fed. Cl. 391, 396-97 (2008).

sharp departure from (if not flatly inconsistent with) our precedent,[29] as well as that of the U.S. Claims Court.[30] Even if I were willing to consider such a radical result, I would not do so based on a single statement that is ambiguous at best, in a case that was prepared, argued, and excepted to under a different legal standard than the one the majority now applies. Accordingly, I dissent.

Further, I note that the Arbitrator devotes several pages of her decision to criticizing the Agency for "setting up the room to [its] liking" with "[n]o consideration . . . given as to how this Arbitrator might like the hearing room laid out" and "attempting to intimidate this Arbitrator so as to render her less effective in the management of the hearing."[31] She concluded this discussion, somewhat paradoxically, by asserting that "[p]ersonality, the cluttered condition of the room, attempts to provide a less than balanced setting so as to disempower one's opponent; all these are irrelevant to this Arbitrator."[32]

With no intention of offending any subscribers to *Architectural Digest Magazine* who may also read FLRA decisions, when the cost of arbitration is borne, even in part, by the federal government, arbitrators undermine "the effective conduct of [government] business"[33] when they render awards that needlessly recount perceived personal affronts that are not germane to the case.

Thank you.

[29] *Allenwood*, 65 FLRA at 999-1000.
[30] *Amos v. United States*, 13 Cl. Ct. 442, 449 (1987) ("If they did not have to obtain . . . items in the control room, the time spent passing through the control room and walking to their duty station clearly would not be compensable.").
[31] Award at 422-23.
[32] *Id.* at 423-24.
[33] *U.S. DHS, CBP*, 67 FLRA 107, 113 (2013) (Concurring Opinion of Member Pizzella) (alteration in original) (internal quotation marks omitted).