

FEDERAL MEDIATION AND CONCILIATION SERVICE

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In the Matter of the Arbitration

Case No.: FMCS 13-55485A

Between

Grievant: AFGE Local 480

Federal Bureau of Prisons  
(the Agency)

Issue: Portal-to-Portal Pay

And

Place: Welch, WV

Council of Prison Locals – AFGE  
(the Union)

Hearing Dates: April 1, 2, 3, & 4  
and April 15, 16, & 17, 2014

Date of Award: October 15, 2014

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APPEARANCES

For the Union:

Gregory G. Watts, Esq., (Presenting) Attorney for AFGE  
Daniel Bethea, (Assisting) Nat'l Rep., Council for Prison Locals, AFGE  
Kevin Hamm, Senior Corrections Officer Specialist, FCI McDowell  
Lonnie Ayers, Garage Forman, FCI McDowell  
Jason Canada, Senior Corrections Officer, FCI McDowell  
Adam Carver, Senior Corrections Officer, FCI McDowell  
Scott Greer, Senior Corrections Officer, FCI McDowell  
Charlie Yates, President, AFGE Local 480

For the FBOP:

Jennifer Grundy-Hollett, Esq., (Presenting) Attorney for FBOP  
Jessica Childress, Esq., (Assisting) Attorney for FBOP  
Craig Allen, (Assisting) Human Resources Manager, FCI McDowell  
Gregory Nix, Lieutenant, Corrections Officer, FCI McDowell  
Tyler Nunn, HR Specialist, FCI McDowell  
Keith Martin, Lieutenant, Corrections Officer, FCI McDowell  
Joseph Davis, Lieutenant, Corrections Officer, FCI McDowell  
Carl Bailey, HR Specialist, FCI McDowell  
Frederick Saunders, Lieutenant, Corrections Officer, FCI McDowell  
Andrew Mouse, Lieutenant, Corrections Officer, FCI McDowell

Before

Michael Fischetti  
Arbitrator

## BACKGROUND

In accordance with the procedure set forth in Article 32 – ARBITRATION, of the Master Agreement between Federal Bureau of Prisons (the Agency) and Council of Prison Locals, American Federation of Government Employees (the Union), hearings were held before me on April 1, 2, 3, 4, 15, 16, and 17, 2014. The issue in this case to be resolved involved portal-to-portal pay, which has been denied by the Agency. The Union has protested this matter, and Local 480 of AFGE brought forth the grievance.

Michael Fischetti, upon mutual consent of the Union and the Agency, was appointed Arbitrator and conducted the hearings in the above referenced matter. The witnesses scheduled for appearances at the hearings were sworn and sequestered. The Union presented its opening statement while the Agency deferred until presentation of its case in chief. During the hearings, all parties in interest were afforded full and fair opportunity to present any and all evidence. They were able to present and to examine or to confront and cross-examine any and all witnesses, and to present any and all arguments in support thereon as each desired or deemed appropriate. At the end of the presentations, the parties informed the Arbitrator that they wanted to submit written post hearing briefs. The parties mutually agreed that they would forward their post hearing briefs to each other and to the Arbitrator, and that they would be post marked no later than July 14, 2014. On July 1, 2014, the Agency requested that the deadline for submission of the post hearing briefs be extended to August 14, 2014. The request was granted. On August 11, 2014, the Agency requested an additional extension until August 28, 2014. The

extension was granted. The Union's post hearing brief arrived on August 31, 2014. The Agency had technical difficulties in retrieving its brief from its computer, and the brief arrived via email on September 18, 2014, and then by FedEx on September 19, 2014. At that time the record was closed pending submission of the decision and award. The Arbitrator has duly noted the Union's strenuous objections to the Agency's delays in completing its post hearing brief.

### ISSUE

Did the Agency, FBOP, FCI McDowell, suffer and permit bargaining unit employees to perform work before and/or after their scheduled shifts without compensation in violation of the Fair Labor Standards Act (FLSA) and the parties Master Agreement, and if so, what is the appropriate remedy?

### POSITIONS OF THE PARTIES

The Union contends that the Agency has violated the Master Agreement between the parties, specifically Articles 18 and 6. Moreover, the Union alleges that the Agency has violated 5 USC § 6101, Program Statement P3000.03, and Operations Memorandum 214-95. In addition, the Union maintains that the Agency has not complied with rules and regulations that require the Agency provide a reasonable amount of time for employees who are relieving or changing shifts. Moreover, the Union asserts that the Agency violated the FLSA by knowingly and willingly, among other things, to stand in line to proceed through a screening process, pick-up equipment, travel through the various control doors and sally ports to their post, exchange pertinent information and equipment with other officers and supervisors prior to the start of their shifts, and to perform this work, in reverse order after the conclusion of their shifts, without compensation.. Finally, the Union posits that

officers are on duty as soon as enter the institution, as they are required to respond to emergencies and be aware of inmates they encounter.

The Agency contends that it has not violated the Master Agreement or any rules and regulations pertinent to employee work schedules. The Agency maintains that it has not suffered or permitted to work without compensation. Moreover, the Agency posits that the time-distance study performed by the Union on official time was flawed and unreliable. In addition, the Agency asserts that Union witnesses' testimony was not credible as demonstrated by photographic and video evidence.

### FINDINGS

The following witnesses offered testimony.

#### Testimony of Daniel Bethea:

Daniel Bethea testified that he started as a corrections officer, and was promoted to a correctional counselor in January 2000 at FCC Coleman, and that he has collateral duty since 2011 as national representative for the Council of Prison Locals. Mr. Bethea stated that he has had extensive experience with portal to portal cases beginning when he filed a case at USP Coleman. He noted that the Coleman case went to settlement, and that he has been involved with almost a dozen cases since. He cited two national cases, which went back to the early 1990's. Moreover, he pointed out that as a result of the filed cases, HRM Manual Section 610.1 was created to address the issue of starting and stopping times. According to Mr. Bethea, the portal to portal issue has involved proposed solutions such as overlapping shifts and duty-free lunches. He opined that perhaps the solution could involve what he termed "creative roster management." He maintained that the

problems have been addressed repeated in such institutions as Coleman and Devens, but that because of turnover of personnel, the portal-to-portal issue has remained unresolved.

Under cross-examination, Mr. Bethea stated that he was involved in Coleman, but that besides Coleman there were other institutions such as Florence in 2003, 2004, and 2005. Florence had several distinctive characteristics. Moreover, there was Herlong in 2005 or 2006. In addition, there was Chicago between 2001 and 2005, Oxford in 2008 and 2009, and Waseca, IL in 2006 and 2007 among others. In addition, there was FDC Miami in 2013. In responding to questions about management's post orders, Mr. Bethea stated that management has given such orders, but that the supervisory officer, the lieutenant, might expect and require a different outcome. Regarding settlements between the Agency and the Union, Mr. Bethea stated that sometimes the settlements did not resolve the issue, and the Union has had to re-file. Responding to a question about the issue of roll calls, Mr. Bethea stated that this was an issue quite some time ago when officers were required to be present at roll calls, which took place twenty to thirty minutes before their shift. The ultimate result was that roll calls were eliminated. According to Mr. Bethea, not all of the officers need to stop to pick up equipment because some of the equipment in various institutions has been moved closer to the applicable duty stations. As a consequence, some staff no longer need to stop to pick up keys. Mr. Bethea readily conceded that not all of the institutions in the FBOP system have filed a portal grievance, but although the installation of time clocks has been proposed

several times in the past, he was on the opinion that neither side was looking at this as a probable solution to the portal issue.

In redirect, Mr. Bethea stated that while numerous institutions have not filed portal grievances, this did not mean that they did not take issue with the situation. He noted that some Union Locals simply did not want the hassle. He noted that portal issues are some times satisfactorily resolved at the local level.

In re-cross, Mr. Bethea responded to questions about why certain Union Locals did not file a grievance. He noted that he encouraged Locals to try to work out differences with local management. He conceded that it was speculation on his part as to why certain Locals did not file, but he stated that it was not his position to question the decisions of Local Union Presidents.

Testimony of Kevin Hamm:

Kevin Hamm testified that he began working at FCI McDowell in June 2010, and that since September 2012 he has been a Senior Officer Specialist. Prior to coming to FCI McDowell, he worked at a state correctional facility in Virginia. Mr. Hamm stated that he has worked at the mobile post two, on the day shift, 8 - 4. He described the procedures that he has followed when reporting in to his mobile post. This included being picked up and driven around to the clearing can, and counting all of the ammunition for the three weapons involved. He stated that these procedures take from five to eight minutes. Moreover, there are other procedures that require the inventory of equipment such as a radio, the battery, vehicle key, bulletproof vests, and a helmet. In addition, there is the vehicle check and the items on the vehicle check sheet. Further, there is the "pass down" of information about

any significant events such as the perimeter fence and any alarm related issues. Mr. Hamm stated that the second mobile unit continuously drives around, in effect, "roving." He indicated that these procedures take from fifteen to twenty five minutes. Once these procedures are completed, he would drive around to the front and let out the relieved officer, who would get his lunch from the back of the van. At that point, he would begin his roving.

Regarding the housing units, Mr. Hamm stated that he had worked the 6 to 2, 8 to 4, 4 to 12, and the 12 to 8 shifts. For the 6 to 2 shift, Mr. Hamm stated that he had to clear the metal detector and run his bags through the x-ray machine. He stated that this process could take anywhere from five to ten minutes depending on the number of people in line, and his place in it. From there, he would move on to the control center, and hand over two chits, and get a radio, a detail pouch, and keys. According to Mr. Hamm, this process takes about five to ten minutes. Once this process has ended, then he proceeded to the sally port. He estimated that from the time of entry to exiting the sally port takes about three to five minutes. After exiting the sally port, he would proceed on to the grille. This requires about one to two minutes. At that point, he would proceed to the office and chit out a pair of handcuffs. He also has to unlock the cage for the shadow board, and chit out a flashlight and mirror. This takes about one to two minutes. After that, he must turn on the lights and begin the logbook. He estimated that the total time from entry into the facility to starting work on his post is about fifteen to twenty minutes. Regarding exiting the facility after he is finished, he stated it took about five to ten minutes, depending on how fast he can get through the grilles. Mr. Hamm stated

that in order to be on his post on time, he would need to arrive at the facility between fifteen to thirty minutes early. He indicated that he has never put in a request for overtime pay. In response to questions about reporting in on the day shift, 8 to 4, he stated that the process of reporting in was essentially similar to the reporting in on the 6-2 shifts. The time lines were also quite similar. Regarding the 4 to 12 shift, Mr. Hamm stated that he took about twelve to fifteen minutes to clear. Moreover, regarding the 12 to 8 shift, the procedures are similar to the other shifts as are the time lines of entering and leaving. In addition, in recounting his experiences with the day shift, 8 to 4, on the Special Housing Units (SHU), he stated that the procedures associated with inventory and equipment took about fifteen minutes.

Under cross-examination, Mr. Hamm stated that assignments go out according to a bidding procedure every three months. He noted that his preference was for the day shift, and that he preferred to work in visitation because of the three day off opportunity. He noted that the last full quarter that he worked in the Housing Units was from March to June 2013, and that a typical workweek would include two days on SHU 1, two days on SHU 2, and one day on SHU 3. Regarding the use of a government vouchered van service, Mr. Hamm stated that he did not like to use the service, and on the times that he used the service, it included travel only on the 8 to 4 shift. According to Mr. Hamm, the van would arrive twenty to thirty minutes prior to the beginning of a shift. He also explained the procedures he followed when working the control office. In reviewing Jt. 13, Specific Post Orders, Mr. Hamm acknowledged that these applied to all of the Housing Units. He also

acknowledged that there were General Post Orders, and that they applied to all the posts at FCI McDowell. In reviewing p. 17 of Jt. 13, Mr. Hamm was requested to read aloud the following: "These post orders are guidelines, not orders to work before or after regularly scheduled shift." In response to questions about how long he would wait and if he has ever had to call for relief, he responded that he would wait at least fifteen to twenty minutes, and that he has had to call for relief on one occasion.

According to Mr. Hamm, a relief usually comes about five to eight minutes prior to the scheduled time for a shift to begin. He stated that he usually arrived at a SHU post about five to eight minutes before the beginning shift time. He reiterated that he begins his tour at a post with an inventory of equipment and the pass on, which takes about three to five minutes. When questioned about the total time an employee might spend in the facility on a tour, Mr. Hamm answered that there were no time clocks, and that time and attendance were not recorded. He stated that there were several occasions when he was not relieved on time. On one of those occasions he did have to stay over fifteen minutes beyond his tour. The lieutenant offered him overtime, but he declined to put in for it. Regarding the "big count" that takes place every day, he stated that the prisoners are put in "lock down" fifteen minutes prior to the count. He noted that the count takes between twenty to twenty-five minutes from start to finish. The clearing of the count can take between thirty to forty minutes, and in certain circumstances it can take an hour. Mr. Hamm stated that he was hardly ever late, but that on one occasion he was four or five hours late. He was delayed because of a major crash on route 52 that delayed many

officers, and he put in a leave slip at the time, but because of the circumstances he was not charged leave.

In response to questions about the day shift mobile patrol, Mr. Hamm stated that he normally arrived at the front entrance about fifteen to twenty minutes early. The mobile unit would pick him up, and drive him to the clearing barrel near the rear gate. He then described how he would clear the three weapons-- the pistol, shotgun, and the rifle, count all the ammunition, and re-secure the weapons. In addition, he would have to do a vehicle inspection and inventory of equipment.

In redirect, Mr. Hamm stated that if he had a watch, it would not have had any impact on his arrival time or his arrival at his assigned post. He noted that the lieutenants pass down information in the conference call for the entire facility. Moreover, he reiterated that the equipment needed to be checked carefully because as a relief officer, he was responsible for the inventory and functional operation of the equipment. He also stated that the reason why he did not ask for overtime in the one instance when his relief was late was because it would have impacted negatively on the relief officer.

Under re-cross, Mr. Hamm stated that an inventory of equipment could take from five to ten minutes or more. He observed that on one occasion there was a set of handcuffs that was missing, but they were found soon afterward. He did not request leave or overtime.

Testimony of Lonnie Ayers:

Lonnie Ayers testified that he has worked at FCI McDowell as a corrections officer since November 2010, and for eleven years prior to that he worked at FCI

Beckley. Currently, he also serves as Executive Vice President of Local 480. Mr. Ayers stated that he was involved in a time study related to this instant case. According to Mr. Ayers, he had sent a communication to the Associate Warden's Office, requesting that Management participate in the time study so that it could be conducted jointly. At that point the Union presented Union 1, the September 10, 2013, document requesting Management participation in the time study. He stated that Management replied orally that it would not participate. The Union then offered Union 2, the Time Study, into evidence. He noted that he, Mr. Carver, and Mr. Greer conducted the study.

Ms. Hollett, the FBOP Counsel, requested to voir dire the witness.

Accordingly, she asked who prepared which part of the study—the narrative, the typing, and the creation of the charts and other sections. Mr. Ayers responded that Mr. Greer was the primary creator of the study document. He described how the study team picked six individuals, three who went through the key line and three who did not. He noted that the Union had requested forty hours of official time for the study, but it was granted only twenty.

Mr. Ayers went on to describe how the measurements were taken and how the distances to each unit were established. Moreover, he stated that he used his stopwatch to record the time that each person took to walk the measured distance. The stopwatch was also used to record the equipment exchanges and the entries in to the logbook. The study was accomplished in two-ten hour days toward the end of September in 2013. He described the process of entering the SHU, and the amount of time it took to exchange information and inventory equipment such as handcuffs,

leg irons, metal detectors, rubber gloves, radios and batteries, and tools such as screwdrivers, channel locks, and equipment to unstop toilets. Additionally, there were two sets of keys and the handcuff key.

Under cross-examination, Mr. Ayers stated that he was elected Executive Vice President of the Local in September 2011, but that he was not involved in the drafting of the instant grievance. Mr. Yates requested that he do the time study, and he appointed Mr. Carver and Mr. Greer to work along with him. Mr. Ayers conceded that there were some discrepancies in the distance measurements, and also with the pattern of movement of some of the officers. He answered questions detailing the findings associated with U-2. The Agency introduced A-1, Assignment Card, into evidence. Mr. Ayers reviewed A-1, and answered questions about his post assignments during the quarterly period in question in 2012. He acknowledged that he had worked in some of the units and posts in a very limited basis. Regarding questions about the Mobile post and the three weapons associated with that post, he described how he rode along in the vehicle to the clearing barrel. Moreover, he described how the weapons were cleared, and how the cartridges and magazines were counted and secured. This was similar to the manner in which he simulated the exchanges of other posts in the time study. Mr. Ayers stated that generally it was his practice to arrive at FCI McDowell about fifteen minutes early, and then enter the front gate about ten minutes before he had to be on his assigned post. Regarding overtime pay, Mr. Ayers stated that it was his experience that a lieutenant would not consider a request for overtime pay unless it was at least fifteen minutes.

According to Mr. Ayers, in the instance when he was asked to work overtime, he was compensated with overtime pay and compensatory time.

In re-direct, he stated that in regard to the duty posts that he had actually worked, he was testifying to the best of his recollection. He also clarified that the term "slider" was the same as the gate or grille.

Under re-cross examination, Mr. Ayers stated that the Agency issued him his duty belt, and he thought that there was a requirement to wear it. He also indicated that officers have used different kinds of duty belts, but virtually everyone attaches their keys and clips to them.

Testimony of Jason Canada:

Jason Canada testified that he began as a corrections officer at FCI McDowell in June of 2010, and prior to that he worked for five years at the Southern Regional Jail, a State prison in West Virginia. He recounted how he would enter the compound for the 2 to 10 shift, and he described the procedures and amount of time it would take for him to enter on and begin the duties of his assignment post. Moreover, he explained that he arrived about twenty minutes early everyday in order to accomplish all of the procedures so that he would be able to start his duties on his assigned post on time.

Under cross examination, Mr. Canada stated he was not sure of the units that he had or had not worked in, but that since the third quarter of 2012, he has worked almost exclusively in the SHU. Mr. Canada answered questions about how and when he would make entries in to the logbook, and the types of equipment concerns that would necessitate additional attention. Regarding logbook entries, the Agency

introduced A-2, Housing Unit Daily Log for Unit B2. The Union objected to the introduction of the document on the basis of relevance, but the Arbitrator admitted the document into evidence over the Union's objection. In reviewing A-2, Mr. Canada acknowledged that the logbook entries in question were his entries, and that to the extent possible, the entries were accurate.

In redirect, Mr. Canada stated that he received chits from the Agency. Moreover, he noted that he carried them with him. He also stated that the times entered in the logbook were approximate, but that the lieutenants generally did not question the timeliness of an entry.

Testimony of Adam Carver:

Adam Carver testified that he first starting working at FCI McDowell in May 2010, and that he was promoted to a senior officer in May 2011. He stated that he has been working on the Mobile morning watch post. He also described the procedures that he goes through in terms of taking charge of the vehicle, inspecting equipment, and clearing the weapons and counting the ammunition. He observed that the procedures were the same for Mobile 1 and 2, and that he generally arrived about twenty to twenty-five minutes early to be on time for his post.

Under cross-examination, Mr. Carver stated that he normally commuted to work by vanpool from Beckley, and that the van usually arrived about thirty minutes early. He noted that during the period in question, he used his personal auto to commute to work. He stated that has been a shop steward for the Local for about two years.

Testimony of Scott Greer:

Scott Greer testified that he came to FCI McDowell in April 2010, and that prior to that he worked at FCI Cumberland, MD for three and one half years. The Union entered into evidence, U-3, an assignment card for the fourth quarter of 2010 and the first quarter of 2011 for Mr. Greer. In reviewing U-3, Mr. Greer observed that this period was probably the last time he worked morning watch. He also reviewed Jt. 19, Inventory Report by Location, and stated that the approximate time to properly inventory equipment when coming on to a post is about ten minutes. Regarding the Running Count, Mr. Greer stated that it is assisted by a computer program call SENTRY.

Under cross-examination, Mr. Greer stated that he has served as Chief Steward of the Local for a little over two years. He indicated that he worked Control No. 2 during the first quarter of 2012. During that time he acknowledged that he rode in the vanpool, but he was not sure when he started or stopped doing so. He observed that he would meet the van around 10:30am in Crab Orchard and arrive at FCI McDowell around 11:30am. He stated that the number of other officers coming into the facility varied, and that his order in the line for the metal detector could be anywhere from one to fifteen. He also acknowledged that he worked on Control No. 2, the a.m. shift, and that the count time were scheduled for 12, 3, 4, and 10. Regarding overtime, he stated that he never requested overtime for late relief at his post.

In redirect, Mr. Greer stated that there have been very few equipment changes in the last two years. He also reiterated that it was not the practice to

report overtime for a few minutes of overage on a shift. He also noted that there were no major changes in equipment since 2012

Under re-cross, Mr. Greer reviewed A-3, Staff Roster Detail (3/26/2014). He acknowledged that he was paid one hour of overtime (from 8 to 9) on November 6, 2011. Regarding his chits, Mr. Greer stated that he keeps the chits on his duty belt.

Testimony of Charlie Yates:

Charlie Yates testified that he has served at FCI McDowell since October of 2010, and that he was first hired in 1991 at FCI Ashland, transferred to ADX Florence in 1994, and then to FCI Beckley in 1995. He acknowledged that he has been involved in the Union as Steward, Chief Steward, and that he currently serves as President of Local 480. He explained that the Local made a request for forty hours to conduct a time study in this instant case, but that the Agency did not respond initially. The Union reinitiated contact with the Agency, and the Agency, while not participating, authorized twenty hours for the study. The Union introduced U-4, Response to Official Time Request. Regarding the issuance of chits, Mr. Yates stated that he believed that the Agency issued five or six chits per officer. In reviewing Jt. 1, Article 28, Section 3B, which states that officers should ensure that they will have adequate supplies of security and safety equipment. Moreover, in reviewing Jt. 13, Specific Post Orders, he noted that key rings must be secured to a belt by clips and a metal chain.

Under cross-examination, Mr. Yates stated that he filed the instant grievance of behalf of the Union on March 26, 2013. He also stated that he has never been a corrections officer at FCI McDowell. Mr. Yates stated that it was traditional for the

Agency to issue chits on an officer's first assignment. He observed that the chits are issued from institution to institution so that look different from one another.

Regarding duty belts, Mr. Yates stated that he wears one everyday, but that he has been issued two or three during his service with the Agency. He also answered questions regarding (Jt. 1) Article 6, Section Q, of the contract between the parties which states: "The employer and its employees bear a mutual responsibility to review documents related to pay and allowances in order to detect any overpayment or underpayment as soon as possible." Mr. Yates conceded that he knew of no policy requiring employees to work over their scheduled hours without compensation.

In redirect, Mr. Yates stated officers can not use their own helmets, guns, hand cuffs, radios or vests. He noted that the provisions Article 6, Section Q, did not mention anything about duties performed pre and post shift.

The following witnesses testified on behalf of the Agency.

Testimony of Gregory Nix:

Gregory Nix testified that he is a correctional lieutenant at FCI McDowell, and that previously he began in 1996 at FCI Estill, SC, transferred to USP Big Sandy, KY, in 2003, and then came to FCI McDowell in 2010. Mr. Nix stated that he has worked all shifts as operations lieutenant, and also as the SHU lieutenant. He observed that portal-to-portal means working at a specific time, and leaving at a specific time.

According to Mr. Nix, officers take only a few minutes to clear the screening process, and they usually put on their duty belts only after going through screening. He also noted that some officers wear no duty belt, and there is no requirement that they

have a duty belt. Regarding the Housing Units, Mr. Nix observed that officers pick up detail pouches outside the control center, and that all of the information in the pouch can be pulled off a computer program, HOPWARE. He stated that less than one in ten officers stop by the mailbox before their shift. He also differentiated between 16 hour and 24 hour posts. The 16-hour posts begin at 6am, and the second shift ends at 10pm. The SHU 5 is also a 16-hour post, but it begins at 8am. Mr. Nix estimated that most shift exchanges take about three to five minutes. According to Mr. Nix, many of the officers adjust their schedules so that they begin a little early and they leave a little early. He observed that no officers were working more than their scheduled shift hours without compensation. Moreover, there was no policy that required officers to work more than their required shift without compensation.

Under cross examination, Mr. Nix stated that he was not sure if officers received payments as a result of the Big Sandy portal to portal case decision that occurred while he was working there as a lieutenant between 2003 and 2010. In reviewing Jt. 13, p. 5, Specific Post Orders for the Housing Units, Mr. Nix conceded that it was not possible for officers to turn on the lights and unlock the cells at the same time. He also conceded that if an officer was relieved of his post that he would still have to respond to any emergency situation that might arise. Moreover, he acknowledged that he has not done a control inventory at FCI McDowell although he still maintained that a control inventory should take no longer than three to five minutes. In reviewing Jt. 19, Inventory Report by Location, Mr. Nix stated when

officers do a full inventory and find something missing, they write it down in the logbook. He conceded that he was rarely in the housing units.

In redirect, Mr. Nix was asked to review Article 28, Section B, page 59, Jt. 1, and he acknowledged that utility belts are normally issued by the Agency, but officers can buy their own if they prefer to wear a different kind of belt. In reviewing Jt. 13, Specific Post Orders, Mr. Nix stated that these post orders are a guideline of what officers are supposed to be doing at a specific time. He differentiated between the various types of orders. These were the Specific, which applied to certain post. There were the General that applied to all posts, and there were the Special, which give additional guidance to specific orders. In addition, he read Jt. 13, p.17, which stated, in part, "Post orders are issued as guidelines for the officers assigned to this post and are not intended to describe in detail all of the duties assigned to this post." Further, in quoting from Jt. 13, p. 5, he stated: "Post: Housing units. No work be started prior to the posted shift hours." According to Mr. Nix, officers can use chits to check out equipment.

Under further cross-examination, Mr. Nix stated that he was not involved in the negotiations for the collective bargaining unit. In reviewing Jt. 13, p. 11, he conceded that watch calls were a requirement to ensure staff safety, and that they were not merely a guideline.

Testimony of Tyler Nunn:

Tyler Nunn testified that he started working at FCI McDowell in November of 2010 as a corrections officer, and then moved into his current position as a human resources specialist in September of 2012. Mr. Nunn stated that Agency Counsel

had requested that he look at seven days of video footage of the over three hundred cameras that are located throughout the facility. He observed that some of the camera system was stationary while other parts were mobile. He reviewed A-5, Daily Assignment Roster, February 24 – March 2, 2014, and other Surveillance Photos and Daily Assignment Rosters for February 21 (A-6), 23 (A-7), 26 (A-8), 27 (A-9), 28 (A-10), March 1 (A-11), 2 (A-12). The Union strongly objected to the introduction of the exhibits, particularly the captions or texts for the pictures. The first video purports to show the front entrance and compound side of the sally port. Mr. Nunn stated that of the notations on exhibits associated with the video were his, and that he was the only person to review the videos initially. He did acknowledge that the Agency Counsel asked him to look for officers who were on the Union's witness list. He observed that the dates and times on the video were a part of the Vicon System camera. According to Mr. Nunn, A-13 shows surveillance photos of Mr. Carver in the period between February 18 – 24, 2014. He stated that he obtained photos by playing the video, pausing, taking a screen shot of it, and putting it on Microsoft Word, and then creating the document. He observed that he was able to identify individuals by facial features, by what they were carrying, and how they walked. He noted that he knew practically all of the officers at the facility from his personal contact with them. In like manner, Mr. Nunn identified other officers, namely Charles Gibson, Jason Harold, Andrew O'Quinn, and Virgil Phillips. The video and photos purport to show corrections officers leaving the facility fifteen to thirty minutes before the scheduled end of their shift. The Agency also introduced A-13 through A-16 into evidence. The Union voiced the same objections. The

exhibits covered the following periods. A-13 covered February 18 – 24, 2014. A-14 covered February 8, 2014. A-15 covered February 15 and 16, and A-16 covered February 10 -19, 2014. The videos show various officers reporting in on their shifts to the housing units or to the SHU's. It also showed exchanges between officers, but Mr. Nunn could not identify some of the equipment being exchanged. He commented that the exchanges took place fairly quick, perhaps within a minute. He cited one instance in a housing unit exchange, B-3, where the officers were coming and going simultaneously. The Agency introduced A-17 and A-18, videos that were taken on March 30, 2014, of the Mobile units that circulate around the prison. Mr. Nunn stated that the video was taken from 7:54:00am to 8:01:51am. He was not able to identify which vehicle was Mobile 1 or 2, nor was he able to give a complete account of the video because the cameras did not have a proper angle to view portions of the exchange. Mr. Nunn also answered questions about whether any Union official had spoken to him about this instant case. He responded that Mr. Yates had questioned why he was on the Management witness list, and that in a second encounter with Mr. Yates asked if it was because of the vanpool. He stated that Mr. Yates told him that he should respond that he did not know about the arrival time if he was asked about the vanpool.

Under cross-examination, Mr. Nunn admitted that he had mixed up the roster for A-17 and the picture for A-18. He also conceded that he was not aware as to when he created the different pictures for the exhibits because the process lasted about three weeks. Moreover, he could not answer definitively what the difference was between A-6 and A-10 other than Mr. Canada being on a medical trip part of the

shift. In addition, he was unable to describe the characteristics of Mr. Canada's walk although he had previously stated that he recognized Mr. Canada by his walk. He observed that he also could recognize Mr. Canada by the book bag, but he conceded that other officers carry the same book bag. He admitted that he changed housing unit A-3, but could not recall why he did so. He also acknowledged that he used "white out" on A-5, p. 2, but could not recall when he used it. He stated that the total amount of time that he spent on studying and summarizing the video was about five or six days, about forty hours. He stated that the work involved a lot of pausing and fast forwarding, reviewing footage, but not actually any live real time footage. He maintained that the live video helped him in identifying various officers. He conceded that in A-18 he did not know which vehicle was Mobile 1 and which was Mobile 2. He also acknowledged that he did not record, A-6, Mr. Canada entering or leaving times. Moreover, in A-10, he could not identify Mr. Carver or Mr. O'Quinn's "walk" characteristics. Regarding A-11, he conceded that the officers in the videos were carrying the same types of book bags, and the photos in A-13 were from the housing units. According to Mr. Nunn, he received the videos from Mr. Allen. He did not choose the dates involved, and he spent about eight to ten days compiling the information for A-6 through A-18. He stated that he could slow down the video when he saw some movement such as a vehicle coming into view. The video did not have any audio so there was no way to hear what information officers might have exchanged.

In redirect, Mr. Nunn reiterated that he was able to identify officers in A-6 by various characteristics. In A-5, p. 2, he acknowledged that he did use "white out,"

but he restated that there were no alterations made to the video. Regarding A-6, he pointed out that Mr. Canada did not work a complete shift.

Testimony of Keith Martin:

Keith Martin testified that he worked at USP Lee in Virginia from 2004 to 2013, was promoted to lieutenant in 2008, and that he came to FCI McDowell in September of 2013. He stated that he has served as operations, activities, and SHU lieutenant. He observed that as an operations lieutenant he did not see shift exchanges take place, but that he has worked all of the SHU's – 1, 2, 3,4, and 5. He maintained that in the SHU-1, it would take officers about three to five minutes to do the base count, exchange information, keys, radio, and examine the shadow board. He noted that the other SHU's – 2,3,4, and 5 would take only two to three minutes to execute an exchange. He estimated that an officer should not take more than ten minutes to go from his car to actually entering into the SHU.

Testimony of Joseph Davis:

Joseph Davis testified that he started working at USP Lee in Virginia in 2003, was promoted and transferred to USP McCreary in 2011, and came of FCI McDowell in February of 2013. He stated that he has worked in the Special Investigative Staff (SIS), and he has worked all three shifts including day watch in the SHU. Currently, he is the administrative lieutenant and he is responsible for training and creating the duty rosters. Mr. Davis stated that at USP Lee, officers were paid for portal-to-portal activity. Regarding mailboxes, Mr. Davis stated that officers rarely check mailboxes, and that he has not ever put anything into the boxes. He cited the SHU as being unusual because it was a sixteen-hour post that begins at 8am and ends at

midnight. According to Mr. Davis, exchanges on posts in the SHU and in the housing units are generally accomplished within three to five minutes. Regarding overtime pay, he stated that one officer was paid one half hour in one instance of which he was aware. He stated that he takes the vanpool to work, that it usually arrives around 7:20am, and it leaves about 4pm. He has observed that the van has left prior to 4pm in some instances.

Testimony of Carl Bailey:

Carl Bailey testified that he started as a correctional officer at FCI Beckley in December 2011, switched to FCI McDowell in August 2012 and became a Time and Attendance Clerk, and then transferred in HR in January 2013. Mr. Bailey stated that he participated in a time study that he was asked to perform in the last week of March of 2014. The Agency introduced A-19, Time Study, where Mr. Bailey timed himself in going through various segments of the facility such as from the compound slider to the lower C Units, other housing units and the SHU. He acknowledged that he reviewed video of a shift exchange from the evening of March 30, 2014. The Agency introduced A-20, Pictures of the March 30 Shift Exchange. In reviewing A-20, Mr. Bailey stated that he viewed the evidence by looking at a DVD, and would hit the control/print screen to copy and paste it to Microsoft Word. According to Mr. Bailey, the pictures show the evening watch relief of a Mobile unit. The exchange is beginning to occur at 11:20:01pm, and finishing at 11:21:31pm. Mr. Bailey commented that he did not see the exchanging officers do an inventory or use the clearing barrel. He noted that when he was an officer in one instance on mobile patrol that it was his experience that the clearing barrel was not used. The Agency

introduced, A-21, Video Transcript (12 pages), on a video taken on March 28, 2014. Mr. Bailey stated that the DVD reflected the 10pm shift coming off, evening watch shift coming off, and the 2 – 10 shift. He described how the video began at 9:42:17pm, and that two staff members came into view at 9:43:21pm, and exited the institution at 10pm. Another frame depicts a staff member leaving out the front gate at 9:46:50pm. Additional frames depict staff members leaving at 9:47:38, 9:48:43, and 9:49:54. The video also shows the vanpool leaving the front entrance at 9:51:03pm. He conceded that Mr. Allen had given him a camcorder to use, and all of the videos were taken from a tripod in an administrative office without the knowledge of any of the employees. Mr. Bailey related an incident whereby Mr. Yates approach him and Mr. Nunn. He stated that Mr. Yates did not think it was right that Management was asking him and Mr. Nunn to testify against fellow officers, particularly when Mr. Nunn rides the vanpool to work. Mr. Bailey works from 7:30am to 4pm, and he uses the vanpool to commute.

Mr. Bailey acknowledged that Ms. Hollett instructed him to do the time study (A-19). He stated that Mr. Allan set up the camera/camcorder in DVD direct, and that the study took about two days of work. He conceded that while he could identify most of the officers he could not identify all of them. He also conceded that there was no audio, and that he could not see off camera. He noted that he did Mobile 2 one time, but that it did not follow post orders. He verified that he was together with Mr. Nunn when Mr. Yates approached them, and Mr. Yates stated that he did not think it was proper for the two of them to testify in this case.

Testimony of Frederick Saunders:

Frederick Saunders testified that he is a lieutenant in the Special Investigation Services (SIS) unit at FCI McDowell. He stated that he had also worked at SIS in FCI Beckley. Mr. Saunders indicated that the SIS unit used handheld video cameras, and that they have been used to make medical assessments, to record crimes, and also to record cases where there was a need to use force. The Agency introduced A-28, Generalized Property Retrieval Active Property Listing. The video camera showed times and dates on the recorder for accuracy.

Under cross-examination, Mr. Saunders stated that lots of corrections officers have access to the video cameras. He stated that he has never been asked to record corrections officers entering and leaving FCI McDowell.

Testimony of Andrew Mouse:

Andrew Mouse testified that he is a lieutenant at FCI McDowell, and that he has been with the BOP since September 1995. Prior to coming to FCI McDowell in 2011, he had previously worked at USP Hazelton and FCI Beckley. Mr. Mouse stated that he has been involved in operations and he has worked all shifts. Moreover, he has had extensive experience as a lieutenant in SIS, activities (both shifts), and operations (all shifts). He explained that cameras are used frequently in cases where force is employed. These include calculated use of force where officers need to extract a violent prisoner from his cell, and immediate use of force where a 586 after action review takes place. According to Mr. Mouse, he has had some previous experience with the portal-to-portal issue when he was at USP Hazelton and FCI

Beckley. He stated that he was directly involved with the portal-to-portal issue at both places, and that he did receive compensation from the FCI Beckley case. He explained that there was recovery at USP Hazelton, but that was because of the schematics of the institution. Hazelton was a more secure institution with multiple grilles in between assignments and posts, and it requires a lengthy time for staff to move from point A to point B. He noted that he has attended LMR meetings at FCI McDowell, and that there has been no suggestion of overlapping shifts. The Agency introduced A-22, Daily Assignment Roster, 2-18-14; A-23, Daily Assignment Roster, 2-17-14; A-24, General Post Orders-Responsibilities of Corrections Officers, p. 62; A-25, Special Orders-SHU Officers; A-26, Special Orders-Control Center Offices; and A-27, Special Orders-Housing Units. Regarding A-24, Mr. Mouse noted that General Post Orders are a general guideline for responsibilities. Also, he observed that "No work will be started to the posted shift hours." He stated that officers should report early or stay over without being compensated. He stated also that protective equipment such as vests should be inspected at the beginning of the shift. He noted that A-24 stated that, "You are to report directly to your duty station at your specific duty time." Moreover, he observed that, "As soon as you are properly relieved of duty you are to exit the institution." Regarding the screening process, Mr. Mouse stated that he goes through in a matter of seconds. According to Mr. Mouse, he has seen all of the shift exchanges at FCI McDowell. He stated that the exchange SHU-1 takes three to five minutes, that the SHU-2 takes two to four minutes, and the SHU-3 and 4 take about three to five minutes. He estimated that at 6am, there are about twenty to twenty-five staff members in the key line, but that they can get through in

three to five minutes. The longest exchange would be on Control No. 1 with the SHU-1 because there is more accountability for equipment. He estimated that this could take five to seven minutes. Regarding the Mobile Units, Mr. Mouse stated that he has seen the exchanges. He estimated that five to seven minutes would be an accurate time frame because of the need to account for weapons and ammunition. He acknowledged that he was aware that sometimes officers used a "thumb count," a method of depressing the cartridges in the magazine rather than actually counting each cartridge individually.

Under cross-examination, Mr. Mouse reiterated that he used camcorders in cases involving the use of force. In reviewing U-5, Daily Assignments, he conceded that his assignments at FCI McDowell with SIS were infrequent. Regarding his involvement in portal-to-portal cases, he stated that he has either testified or done investigations at all three of the institutions in which he worked—USP Hazelton, FCI Beckley, and now FCI McDowell. In reviewing Jt. 13, p. 5, Specific Post Orders, Housing Units, Mr. Mouse explained that the orders are used as a guideline, and that officers were not expected to perform and complete specific tasks if it was impracticable to do so. In reviewing Jt. 1, at p. 59, Sec. b, Mr. Mouse conceded that the Agency is required to make sure that duty belts are available to officers. Regarding the SHU-1, Mr. Mouse stated that officers typically have two sets of keys. In reviewing Jt. 17, SHU Specific Post Orders, Mr. Mouse conceded that he would not be in a position to see a shift change in a housing unit from the lieutenant's office. Mr. Mouse stated that he has ridden, at one time or another, all of the shifts in the vanpool.

In redirect, Mr. Mouse stated that from his experience with a mobile unit exchange, it takes about five minutes to complete the exchange. In reviewing Jt. 1, p. 59, paragraph B, Mr. Mouse noted that there was no requirement that an officer have a duty belt, but that duty belts were available at FCI McDowell. In reviewing Jt. 17, posted shift hours, at p. 17, it stated that, "These post orders are a guideline, not orders to work before or after regularly scheduled shift."

The following witness was called by the Union as a rebuttal witness.

Rebuttal Testimony of Charles Yates:

In rebuttal, Charles Yates testified that he spoke to the Warden and Associate Warden in addition to Mr. Nunn and Mr. Bailey, but that he did not mention anything about vanpools. He stated that he was not attempting to intimidate anyone. Regarding the use of a camera, he stated that officers contacted him as local Union President. They told him that they noticed a flash coming from the warden's conference room where they could see a camera in the window. Mr. Yates stated that he filed a ULP (U-7) on March 31, 2014 as a result of the situation with the camera.

Under cross-examination, Mr. Yates stated that he received a couple of text messages and telephone calls regarding the camera use. He stated that he told the Warden that he was filing the ULP, and also that he thought that it was wrong for Management to have placed Mr. Nunn and Mr. Bailey into such a situation with their fellow employees.

## DISCUSSION

The salient issue in this case is whether the Agency violated the Master Agreement or any laws, rules and regulations pertinent to the Fair Labor Standards Act (FSLA) and/or the Portal-to-Portal Act. FCI McDowell is a medium security institution operated by the Federal Bureau of Prisons. It is entirely enclosed with a high wall and razor wire. It has a controlled entry point at the entrance with an additional sally port, which controls entrance into the compound. Housing units and Special Housing units are spread out in the compound, and each unit has a separate controlled entry point. Excluding the buildings, the internal facility area is largely an open area almost rectangular in shape. The Agency has many facilities throughout the nation, and they vary considerably in size, structure, security requirements, and other factors. Because of the variations from one facility to another, there is a need to consider the conditions particular to the FCI McDowell facility. Before proceeding to the particulars of the facility at issue, however, there is a need to review the applicable laws, rules, and regulations pertinent to portal-to-portal and wage and hour issues.

### Applicable Statutes

Section 7(a) of the Fair Labor Standards Act (FSLA) requires employers to pay employees overtime at the rate of one and one half times their regular rate of pay for each hour over forty hours per week. Accordingly, the Office of Personnel Management (OPM) has issued guidance policy directives in this regard. Agencies are required to compensate employees in the following instances 29USC § 207:

(a) All time spent by an employee performing an activity for the benefit of an agency, and under the control or direction of the agency is 'hours of work.' Such time includes:

- (1) Time during which an employee is required to be on duty;
- (2) Time during which an employee is suffered or permitted to work; and
- (3) Waiting time or idle time which is under the control of an agency, and which is for the benefit of the agency.

Moreover, 5CFR § 551.401 (a) and 29USC § 203 (g) specify that work "Suffered or permitted to work" is defined as "any work performed by the employee for the benefit of an agency, whether requested or not, provided the employee's supervisor knows or has reason to believe that the work is being performed and has an opportunity to prevent that work from being performed." Employers have the right and the obligation to control employees' work time so that if the employer does not want the work to be performed it can stop it. The Department of Labor (DOL) and the OPM have promulgated regulations in this regard. OPM has provided as follows: "§ 551.402 Agency responsibility (a) An agency is responsible for exercising appropriate controls to assure that only the work for which it intends to make payment is performed." As per 5CFR § 551.402(b), an agency is responsible to keep accurate and complete records of all hours worked by its employees. Moreover, DOL regulations, § 785.13, Duty of Management, specify that "it is the duty of management to exercise its control and see that the work is not performed." According to DOL, the workday is defined as "the period between the

commencement and completion of the same workday of the employee's principal activity or activities." 29CFR § 790.6(b).

### Pertinent Arbitration Decisions

The Union and the Agency have offered numerous arbitration decisions that have upheld their respective positions. The Union has cited AFGE Local 1013, Yazoo City and BOP, FMCS Case No. 07-51562 (April 30, 2014) where Arbitrator Hanson found for the Union, and awarded and ordered overtime back pay, liquidated damages and/or interest, and attorney's fees for portal violations. The case was broader in scope than this instant case because it involved other classes of employees besides corrections officers. In general, Arbitrator Hanson did not provide any recovery for the non-corrections officers, but he did provide for compensation for most, but not all, of the corrections officers because he found violations of FLSA. It should also be noted that he differentiated among the corrections officer, depending upon individual circumstances and post requirements. In AFGE 1570, FCI Tallahassee and Federal Bureau of Prisons, 113URP 6243 (2012), Arbitrator Williams found in favor of the Union when he held that the Agency had violated the FLSA due to the lack of overlapping shifts and the requirement of a screening process. He ordered back pay, liquidated damages, and attorney's fees. Moreover, he stated that the Agency "By failing to compensate or to make significant and proper adjustment to either pay or schedule, the Agency is in violation of the FLSA." (at p.18). In addition, in his Award, Arbitrator Williams held that "the Agency willfully and in bad faith violated the FLSA and the Agreement . . ." In AFGE Council of Prisons, Local 1242 and Federal Bureau of Prisons, U.S.

Penitentiary, Atwater, Calif., FMCS Case No. 05-57849 (2008), Arbitrator Calhoun awarded thirty (30) minutes of overtime pay for every day for three years preceding the date of the grievance to the affected bargaining employees plus interest and attorney's fees. In Council of Prison Locals 801 and Federal Bureau of Prisons, Waseca, MN, FMCS Case No. 07-53583 (2010), Arbitrator Daly found for the Union and held the Agency liable for fifteen (15) minutes per day for each affected employee for three years preceding the date of the grievance plus interest and attorney's fees. In American Federation of Government Employees, Local 3981 and U.S. Department of Justice, Bureau of Prisons, FCI Jesup, GA, 106 LPR 49982 (2006), Arbitrator LaPenna found for the Union, and he held that employees were entitled to twenty-seven to forty-six minutes of overtime pay depending upon their respective duty posts. In AFGE Local 3652, MCC Chicago and BOP, FMCS Case No. 01-10146, Arbitrator Greco found for the Union, and he awarded thirty to forty minutes to various employees depending upon their circumstances. Some of the employees were involved in having to wait for elevators and some were not. The Agency also submitted this case. On appeal to the FLRA, a part of Arbitrator Greco's Award was set aside. This involved the time that employees had to wait for an elevator. The FLRA determined that such an activity was contrary to the FLSA, and not compensable. The FLRA found Arbitrator Greco's decision deficient only on the issue of elevator wait time. All of the other contentions of the Agency were denied. While this Arbitrator does not have full knowledge of the MCC Chicago situation, it appears that it took the parties considerable time to come to agreement. In Federal Bureau of Prisons, MCC, Chicago and AFGE Local 3652, FMCS Case No. 10-59408

(June 25, 2014), Arbitrator Berman found for the Agency. He pointed out that conditions, at MCC, Chicago, had changed in the following manner:

1. Officers “no longer had to stop at Control to receive or return equipment at the beginning or the end of their shifts”;
2. Internal Security gathered charge batteries from the Control Center and gave them to Officers who needed them as they boarded the elevator; and
3. Post orders were revised to make starting time when an officer reported to his/her post or relieved an officer on duty (at p. 15).

In arriving at his Award, Arbitrator Berman gave greater weight to the video evidence he received from the Agency rather than oral testimony of the Union’s witnesses. He referred to much of the testimony as “self serving” because the Union witnesses would stand to gain a substantial monetary award if they prevailed. He pointed out that there were deficiencies on both sides, but that the visual evidence offered better insight into actual time spent on compensable activities. I cannot evaluate the videos that Arbitrator Berman used in making his judgment. In this instant case, however, I can say that some of the video provided contained blurry and unclear images of poor quality resolution. Moreover, in some instances the lighting was not sufficient, and the camera placement did not provide good angles from which to view the subjects. Even the Agency’s witness, Mr. Nunn, admitted that he did not conclusively recognize some of the subjects because of the lack of clarity or sharpness, but he stated that he recognized them instead by their “walk” or “clothing.” In AFGE Local 3020 and Federal Bureau of Prisons, FCI Schuylkill, FMCS No. 05-04730 (October 9, 2008), Arbitrator Nagy denied the Union’s grievance, in part, and affirmed it, in part. He reasoned that some of the Union’s claims were valid while others were not. Numerous posts were awarded fifteen

minutes, and several were awarded up to twenty-five minutes. In U.S. Department of Justice, Federal Bureau of Prisons, FCC Tucson, Ariz. and Council of Prisons, AFGE Local 3955, Tucson, Ariz. 111LRP 58596 (2011), Arbitrator Hammond found for the Union. He noted that, "Employees at a penal institution face unique circumstances in their normal duties." (at p. 27). He awarded some bargaining unit employees twenty minutes, and others thirty minutes, depending upon their circumstances in coming to and exiting their duty posts. In American Federation of Government Employees, Local 3979, Sheridan, Ore., 110 LRP 16651 (2010), Arbitrator White ordered that each corrections officer be paid fifteen minutes of overtime for each workday. In American Federation of Government Employees, Local No. 525 and Federal Bureau of Prisons, FCI Williamsburg, South Carolina, FMCS Case No. 08-56529 (May 22, 2012), Arbitrator Harris found for the Union, and that the Agency had violated the FLSA. He ruled that certain employees should receive twenty-six minutes of overtime pay, plus liquidated damages, and that the Union should be entitled to attorney's fees and expenses. Some of the above cases show that the Agency violated the FLSA. Moreover, some of the Arbitrators cited instances of "bad faith," and willful disregard to exercise reasonable diligence. In AFGE Local 4044 and USDOL, Bureau of Prisons, FCI Three Rivers, Texas FMCS Case No. 07-60658 (June 11, 2010), Arbitrator Ponder found for the Agency. The issue involved the Union's claim that the Agency was making day shift employees work during the thirty-minute lunch break. In Federal Bureau of Prisons, Department of Justice (USP Hazelton and AFGE Local 420, FMCS 09-00421 (December 9, 2010), Arbitrator Vaughn found for the Union when he stated: "The Agency violated the Portal to

Portal Act and the Agreement by failing to pay Corrections Officers . . . .” (at p. 103). Arbitrator Vaughn based his conclusion, in part, on data supplied by the Agency. He noted that there were 170 Corrections Officers at USP Hazelton, and that according to the Agency’s data there were forty-seven who worked under forty hours, eighty-two who worked between eight hours and eight hours and ten minutes, and forty-one who worked over eight hours and ten minutes (at pp. 97-98). He left it to the parties “to consult to determine the appropriate remedies and damages, if any, based on the findings of this Fourth D&O.” (at p. 103). He also retained jurisdiction in case the parties were unable to resolve all of the remaining pertinent issues. It needs to be noted the USP Hazelton, as Arbitrator Vaughn described, is a “maximum security” facility. Consequently, it has a different schematic from FCI McDowell. Also, in USP Hazelton, the Agency did a two-week analysis of the posts in question. Arbitrator Vaughn was able to use the data from the analysis by “filling in the hole,” i.e., to determine which officers worked which amount of time.

#### Observations and Considerations

In this instant case, I have inconclusive evidence from both sides. The Union, of course, has the obligation of proving by the preponderance of the evidence that it should prevail. There are some factors that need elaboration regarding the staffing of posts within a penal institution. First, in general, any post that is staffed on the 24/7 requires that certain conditions be met. If each shift performs only eight hours of work, then it would have to be assumed that shift relief takes place in an instantaneous or simultaneous manner, or on a minimal time basis. Realistically, all transfers have to take some minimal amount of time. Second, what conditions must

be met by the employees from the time they enter the facility, and how much time will elapse before the employee can actually begin “work” at an assigned post? If consideration is given to the time it takes to get through the sally port, walk to an assigned post, and follow the general orders, special orders, and other applicable rules, then realistically time would need to be allocated to these activities. It is inconceivable to assume that transfers of keys, radios, batteries, handcuffs, and other equipment can be properly accomplished in an instantaneous manner.

Accomplishing properly executed reliefs at the various posts at FCI McDowell in accordance with applicable rules and regulations may not take as long as the Union has portrayed. Conversely, such transfers may not be properly executed in as shorter period of time as the Agency has portrayed. In this instant case, the Union offered to conduct a joint study with Management to determine the amount of time needed at each post to accomplish a proper transfer. Management did not choose to participate in the study, but granted the Union about one half of the official time the Union requested to do the study. The Union presented its findings in U- 2. The study was quite extensive in that it measured distances from the front door to the metal detector, from the metal detector to the sally port exit, from the sally port exit compound door to the compound slider grill, and then from the compound slider grill to the mailboxes back to the lieutenant’s office exit door. Times and distances from all of the relevant posts were included in the data presented. The times varied from as little as 4:12 minutes to 24.51 minutes. Distances to certain posts were longer than others given the schematics of the facility.

In its post hearing brief, the Union has offered a proposed remedy. In calculating additional time to the corrections officers, the Union has offered the following as proposed overtime pay. First, the Union proposes that the Mobile posts 1 and 2 be awarded thirty minutes of overtime. Second, the Union proposes that Control 1 be awarded fifteen minutes of overtime. Third, the Union proposes that Housing Units (Even Side AM/PM Watch) be awarded a minimum of thirty minutes of overtime. Fourth, the Union proposes that Housing Units (Odd Side MW, DW, EW) be awarded a minimum of twenty-five minutes. Fifth, the Union proposes that SHU-1 be awarded twenty-eight minutes for all shifts. Sixth, the Union proposes that SHU-2 be awarded twenty-five minutes for all three shifts. Seventh, the Union proposes that SHU-3 and 4 be awarded twenty-five minutes each for both shifts. Eighth, the Union proposes that SHU-5 be awarded twenty-five each for both shifts.

The Agency has relied upon video evidence and the testimony of two HR Specialists, Mr. Nunn and Mr. Bailey. As noted previously, the video evidence is of poor quality; however, it does highlight that there are corrections officers who are coming and going at times other than the established shifts times. Moreover, it also highlights that exchanges or shift reliefs have occurred with seemingly less protocol than might be expected given the official requirements set forth in the General and/or Special Orders applicable for a properly executed exchange. In addition, the testimony of Mr. Nunn is particularly damning because he alleges that post reliefs have occurred, such as Mobile 1 and 2, without using the clearing barrel for clearing weapons or proper counting of ammunition or a proper inventory of equipment.

Mr. Bailey also affirmed this allegation. He cited one instance where he observed that post orders were not followed. These allegations add significantly into the conflict between Union and Agency testimony.

It is not fully feasible to reconcile the conflict between the Union and the Agency based on the evidence and testimony presented in this instant case. This is in spite of the fact that there are twenty-two joint exhibits, seven Union exhibits, twenty-nine Agency exhibits, and more than eleven hundred pages of testimony. Much of the testimony of both sides appeared to be based on conjecture and surmise. Unfortunately, I am left with less than ideal documentation to arrive at a sound and reasoned judgment. Unlike Arbitrator Vaughn, however, I do not have a reliable analytical study, which would assist me in “filling in the hole.”

Acknowledging that there is a gap between what actually takes place in some relief posts at FCI McDowell and what is supposed to take place in a properly executed relief is a source of complication. The Agency has presented videos, which appear to show that properly executed shift reliefs have not occurred in some instances at FCI McDowell. The Agency needs to deal with improper shift exchanges as a separate matter, however. If informal arrangements are being substituted for official policies or employees are not following official directives, then Agency management bears the responsibility for taking appropriate measures. The Arbitrator can only decide on the amounts of time needed for a properly executed relief. Agency management needs to decide how it wants to deal with the problems, if any, of improperly executed reliefs. The question of how much time needs to be allocated to properly execute shift changes and post reliefs is the salient issue

herein. The Agency, in its post hearing brief (at p. 48), has readily acknowledged that “Management cannot be expected to be constantly aware of the precise comings and goings of each employee at the institution—an institution with over 130 officers working in the Correctional Services Department—24 hours a day, 365 days, who are supervised by a (sic) between one and two Lieutenants per shift . . . .” It is obvious that such supervisors cannot be in multiple places at the same time. Moreover, the Agency acknowledged that, “Lieutenants do not stand outside and check roll when officers come in.” (at p. 49).

The video evidence that the Agency presented has numerous physical problems such as lack of clarity, no audio, poor resolution, awkward camera angles, and inadequate lighting among others. It also has the procedural problem of what might be considered “surprise evidence.” The Agency and the Union have had an extended history of portal-to-portal cases. In a previous arbitration, Arbitrator Berman used video evidence submitted by the Agency, and found it to be of greater weight than the testimony of Union witnesses. Arbitrator Berman stated that the testimony of Union witnesses could be considered “self serving.” In this instant case, for whatever reason, the Agency did not see fit to participate a joint study or analysis to determine which posts, if any, might be in violation of the Agreement. In addition, the Agency did not see fit to exchange information about the videos until it presented its case in chief. At that point, the Agency presented selective videos. The Union voiced strong objections to the admission of the videos. The Arbitrator accepted the videos into the record as evidence for what they are worth. The videos were given full consideration, but given their obvious physical and procedural

deficiencies, they fall short of being afforded the weight the Agency has credited to them. There is no rule that requires either party to disclose their case strategy, however. As a general rule, however, whenever one party fails to disclose evidence that could have been exchanged prior to the arbitration hearings, it brings about an element of distrust. This is unhealthy to the grievance process. Such tactics should be avoided in the interest of fair play and respect for the arbitration process.

The Agency has the prerogative of changing rules and regulations, and also to minimize potential overtime costs. Program Statement 3000.03, Human Resource Management (12/19/2007), and Chapter 6, § 610.1, "Institution Shift Starting and Stopping Times," seek to "establish basic parameter for shift starting and stopping times for employees working at Bureau institutions and the procedures to establish practices at all Bureau institutions." By promulgating these policies, the Agency can attempt to regulate and control the amount of time necessary for properly executed shift exchanges to take place in a timely and reasonable manner.

There are numerous difficulties in trying to determine which activities are compensable and which ones are not. Regarding the allotment of time for compensate activities, there is no rigid rule that can be applied with mathematical certainty. When Union witnesses and Agency witnesses were questioned about the precise amount of time they spent or estimated they spent on a particular activity, the common answer was, in numerous instances, "it varies." Obviously, this takes away from the ability to exercise precise judgment when assigning specific amounts of time to a shift exchange on any particular post. Moreover, it creates an element of variability that impedes the desire for preciseness.

### The Proper Remedy for Each Post

Regarding the various posts at issue herein, it is important to focus on the activities of each. Moreover, it is important to be as precise as possible to determine which activities are compensable. In addition, it is important to be as precise as possible in demonstrating how much time is reasonably taken up by a given compensable activity. In examining Mobile 1 and 2, there are the following considerations. First, they are twenty-four hour posts with three shifts, MW, DW, and EW. Second, these posts differ from other posts because they do not require an officer to enter into the compound of the facility. Third, the officers who are assigned to these posts spend the bulk of their tour of duty riding around in a vehicle. There are preliminary and postliminary activities that need to be performed, however. The question is whether these activities are compensable, and if so, how much time will it take to complete them. The officers on these posts are assigned three weapons—an AR-15 rifle, a 12-gauge shotgun, and a 9mm pistol. According to applicable rules and regulations, the weapons must be cleared in a clearing barrel, and all of the ammunition must be checked and counted. In addition, the vehicle must be checked along with the equipment in it, which includes a helmet, and three bulletproof vests among other items. According to Union testimony, Mr. Hamm and Mr. Carver, a properly executed shift exchange takes about 15-20 minutes for each side of the exchange. In its post hearing brief, the Union is requesting a minimum award of thirty minutes.

The Agency takes a different view of the situation with regard to Mobile 1 and 2 posts. Mr. Nunn and Mr. Bailey cited the videos that they analyzed on behalf

of the Agency. They both testified that when they were serving as corrections officers that some standard procedures pertinent to Mobile 1 and 2 were not followed. Moreover, they testified that such occurrences were consistent with their experiences when they were corrections officers. Both Mr. Nunn and Mr. Bailey work in Human Resources. Except for the videos, neither of them has had the opportunity to personally observe Mobile relief exchanges in the recent past. Moreover, Mr. Bailey testified that he was assigned to the Mobile post only one time. In addition, neither he nor Mr. Nunn appeared to have extensive experience with the mobile unit shifts. Lt. Mouse offered what was perhaps the most realistic assessment of a properly executed Mobile shift relief. As part of his direct testimony, he stated that such a relief would take, "Five to seven minutes "tops." (Tr., 1141). In sum, the Union's estimate of thirty minutes is too generous. Mr. Nunn and Mr. Bailey's allegations are damning because they raise concerns about operational issues at FCI McDowell. Such concerns are beyond the scope of this instant grievance, however. Moreover, the video evidence submitted by the Agency is of limited value for reasons already stated. The five to seven minute estimate appears to be plausible and reasonable. Although there is much that needs to be done in the mobile unit shift relief, officers are familiar with the weapons, the types of ammunition, the vehicle, and the equipment involved. This means that a properly executed shift exchange is a matter of regularity and routine. The five to seven minute shift relief equates to a ten to fourteen minute time line when the both ends of the exchange are considered. The average equates to twelve minutes, and that is a reasonable and rational amount of time to be allocated for a properly

executed exchange to take place. All of the work is prescribed by rules and regulations, Jt. 14, 15, and 16, which the Agency has promulgated. Thus, corrections officers assigned to Mobile Units 1 and 2 are entitled to twelve minutes of overtime pay per shift.

Control 1 is a 24-hour post that is assigned to work in the Control Center. The Union has requested a minimum of fifteen minutes of overtime for this post. The Union contends that applicable case law warrants that Control 1 has at least fifteen minutes of compensable time. The Arbitrator is persuaded that the time it takes to accomplish a Control 1 exchange is compensable. The Arbitrator is not persuaded that a properly executed exchange takes at least fifteen minutes. Mr. Greer testified about this, but his testimony was not only inconsistent, but it was also equivocal. Mr. Mouse was much more precise. He described the details of a proper exchange. He noted that a proper exchange took less time. He stated that there is only one key, and it is maintained within the control center. Moreover, the equipment is accounted for in the logbook and on an inventory sheet. In addition, many equipment items are accounted for by looking at the shadow board. Nevertheless, a properly executed shift exchange takes between five to seven minutes as per Agency witness, Mr. Mouse, who testified to this (Tr. 1102). The front and back of the shift exchange comes out to ten to fourteen minutes. The average of this comes out to twelve minutes. Thus, each post watch of Control 1 is entitled to twelve minutes of overtime pay.

Control 2 is a 16-hour post. It requires a lesser exchange of equipment than Control 1. It does not require as much as ten minutes to accomplish assigned tasks. Hence, it is considered de minimus.

FCI McDowell has three Housing Units, A, B, and C, even side. Within each of these main housing units there are four separate units. They are numbered 1, 2, 3, and 4. The even numbered Housing Units are as follows: A-2, A-4, B-2, B-4, C-2 and C-4. Each of these uses two separate eight-hour shifts, AM (6am-2pm) and PM (2pm-10pm). Officers at these posts are required to do a pass-down of information, an accountability check of equipment, a visual and physical inspection of keys and departure. The Union's estimate of the time required for these procedures to occur, thirty minutes, appears inflated. Some of the time that it takes to get to and from a housing unit is not a compensable activity. This is particularly true of the 6AM arrival and the 10PM departure because the prisoners are in their respective units. Consequently, corrections officers are not going to encounter prisoners in the open common areas. The total time for a properly executed exchange to take place is ten minutes or less. However, when walking time is added as compensable, the total exceeds ten minutes. In other words, the compensable time would occur only between the AM and PM shift exchange. This is the time when the AM shift is departing the compound and the PM shift is entering into the compound, i.e. 2PM. Accordingly, the total time is eleven minutes. Hence, officers on both shifts are to be compensated for eleven minutes overtime.

FCI McDowell also has Housing Units, A, B, and C, odd side. These are designated as follows: A-1, A-3, B-1 B-3, C-1 and C-3. The odd side units are 24-hour

units with three shifts, MW (12AM-8AM), DW (8AM-4PM), and EW (4PM-12AM). The exchange process for the odd side housing units is somewhat similar to the even side. Once an officer assigned to these posts has cleared the metal detector and screening process, he/she can proceed to the key line. Once in the key line, an officer can hand in chits to Control in exchange for the chits of the officer he/she is relieving. The officer then waits for Control to open the first sally port gate and flips an accountability chit to signify that they are in a secure area. Once the officers are cleared out of the sally port door, they can proceed to their assigned Housing Unit. When the officer arrives at the Housing Unit, he/she must be let in by the officer who is being relieved. Once inside the unit, the officer must inspect equipment, perform inventory, and the like. Since officers are on a 24-hour post, they do not need to stop at Control to pick up radios or batteries since that equipment is already at their assigned post. The time it takes getting to and from the assigned post is not a completely compensable activity. Only the time between 6AM and 10PM is compensable. Once the officer enters into the open common area when and where prisoners are present, he/she is engaging in a compensable activity. Accordingly, the Housing Unit, odd side, relief post exchanges are entitled to overtime pay in the following manner: MW – eleven minutes, DW – fourteen minutes, and EW – eleven minutes.

FCI McDowell has Special Housing Units (SHU's). These units are designated as follows: SHU 1, 2, 3, 4, and 5. SHU 1 is responsible for the overall operation of the SHU's. It is a 24-hour post with three shifts, MW, DW, and EW. The Union has requested twenty-eight minutes of overtime per shift for the SHU-1 post. Based on

the compensable activities relevant to the SHU-1 post, that estimate is too generous. Agency witnesses have testified as to the broad number of activities associated with SHU-1. It is responsible for all of the equipment in the SHU's, and each shift is responsible for an inventory of that equipment. Given the responsibilities of the SHU-1 post, the Agency's estimate is too conservative. A reasonable and rational estimate of the pre and post shift activities for SHU-1 overtime pay is as follows: MW- twelve minutes, DW – fifteen minutes, and EW twelve minutes.

Regarding SHU-2, it is not responsible for the detailed SHU equipment inventory. Consequently, the SHU-2 post does not require as much exchange time as the SHU-1 post. It does require almost as much time as the SHU-1, and the officers are entitled to overtime pay per shift as follows: MW – eleven minutes, DW – fourteen minutes, and EW – eleven minutes.

Regarding SHU-3, SHU-4, and SHU-5 require slightly less exchange time than SHU-2 or SHU-1. Their exchange time could possibly take as much as ten minutes, but probably less. When the walking time is added, however, only the officers on DW rise to the level of compensable overtime pay. Accordingly, SHU-3, SHU-4, and SHU-5, except for the DW shift, officers are not entitled overtime pay. Accordingly, the following applies: MW – de minimus, DW – eleven minutes, and EW – de minimus.

One problem that the Union has faced regarding activities that could be considered compensable is that the courts over time have been more restrictive in counting preliminary and postliminary time. Activities such as passing through the metal detector (See Bonila v. Baker Concrete, Co. 487 F.3d 1340, 1343 (11<sup>th</sup> Cir.

2007), walking to a post (See IBP v. Alvarez, 546 U.S. at 37) checking a mail box, donning a duty belt (See Anderson v. Mt. Clemons Pottery Co. 328 U.S. 680 (1946), and picking up a detail pouch are all relevant herein. Accordingly, the following activities are not considered integral and indispensable to the principal activity for which the corrections officers are employed. Included in these are the following: passing through the metal detector, donning a duty belt, flipping an accountability chit, picking up detail kits, waiting time at the sally port, checking in at the lieutenant's office, stopping by the mail box, and picking up or dropping off paperwork.

The Union has attempted to outline a legal framework, which would encompass what it contends is compensable time. The prime question to be answered is: Are the activities cited above integral and indispensable to the principal activity for which the corrections officers are employed? There is no question that activities such as picking up batteries and shift exchanges are compensable. The questionable activity concerns walking from the sally port exit door to the assigned post and the return. Given the lay out of FCI McDowell, once the corrections officers exit the sally port they enter into an open area. At this point they can encounter prisoners. This is true for the period after 6AM and before 10PM, but not before 6AM or after 10PM when prisons are in their housing units, and not in the open common area. This means that corrections officers are engaging in an activity that is integral and indispensable to the principal activity for which they are employed. Generally, walking to a post has not been regarded as compensable, but in an exceptional situation such as a penal institution where the

corrections officers are directly encountering scores of convicted felons the nature of their duties favors that this be a compensable activity. It is compensable at FCI McDowell because of the conditions particular to that facility. If the schematics at FCI McDowell were different the ruling might have been different.

#### AWARD

The grievance is sustainable in part and denied in part as follows:

The Union has met its burden of proof through representative testimony and other evidence to establish that the bargaining unit employees are entitled to be paid at time and one-half their regular rate of pay for the following number of minutes for pre- and post- shift work for which they have not been compensated. Compensable time under the FLSA or the denial thereof, is as follows with respect to the various posts and claims:

1. Control 1: 12 minutes per shift
2. Control 2: de minimus
3. Mobile 1 and 2: 12 minutes per shift
4. SHU 1: DW, 15 minutes per shift, MW and EW, 12 minutes per shift
5. SHU 2: DW 14 minutes per shift, MW and EW, 11 minutes per shift
6. SHU 3, 4, and 5: DW 11 minutes per shift, MW and EW, de minimus
7. Housing Units (even side): 11 minutes per shift
8. Housing Units (odd side): DW 14 minutes per shift, MW and EW 11 minutes per shift

The Agency is liable to the bargaining unit employees for this unpaid work time under the FLSA because the Agency knew or should have known that the work was being performed.

The Agency is also liable for liquidated damages under Section 216(b) of the FLSA.

The statute of limitations shall be three years rather than two years as provided for in Section 255(a) of the FLSA.

The Union is entitled to an award of attorney's fees and expenses under 29 USC § 216(b)

The parties shall have 120 calendar days from the date of this Award on liability to attempt to agree on the damages owed related to the posts and shifts described above.

In the event that the parties are unable to agree on any of these matters, the Arbitrator will retain jurisdiction to decide them.

October 15, 2014

Date

Michael Fischetti

Michael Fischetti, Arbitrator