

IN THE MATTER OF ARBITRATION BETWEEN

AFGE LOCAL 1010,	§	FMCS No. 15-54685
	§	
<i>Union,</i>	§	
	§	
and	§	
	§	<i>Portal to Portal</i>
U.S. DEPT OF JUSTICE	§	
U.S. BUREAU OF PRISONS	§	
FCC BEAUMONT, TX,	§	
	§	
<i>Agency</i>	§	Arbitrator: Angela D. McKee

AWARD

This matter was heard at arbitration before Angela D. McKee, on May 25-26 and June 6-7, 2016, at FCC Beaumont, TX. The parties selected the Arbitrator pursuant to the terms of their Collective Bargaining Agreement (“CBA”), and agreed that the matter was properly before the Arbitrator for final and binding decision. The hearing was transcribed by a certified court reporter, and the parties submitted written briefs dated October 28, 2016. Following the receipt of closing briefs, the Agency sought leave to supplement the record with further argument. After consideration of motions by the undersigned, both parties submitted additional briefing, the last of which was received on November 22, 2016, at which point the hearing closed. Upon request, the parties agreed to extend the Arbitrator’s deadline for the award to January 27, 2017.

APPEARANCES

For the Union:	Joshua L. Klinger Minahan & Muther, PC
For the Agency:	Jennifer Spangler K. Tyson Shaw Assistant General Counsel Federal Bureau of Prisons

I. BACKGROUND

The Agency operates a Federal Correctional Complex in Beaumont, Texas (“FCC Beaumont” or the “Complex”). The Complex consists of a penitentiary (“USP”), a medium security institution (“Medium”), a low security institution (“Low”), and a Camp. These institutions are staffed on a 24-hour basis.

At FCC Beaumont, the Agency employs approximately 1,000 staff to work with and secure over 5,500 inmates. Corrections officers bid on assignments by seniority on a quarterly basis. Assignments vary by post and schedule. The Complex schedules employees on eight-hour shifts. Posts that are manned on a 24-hour basis are staffed around the clock in morning watch, day watch and evening watch shifts. There is some staggering within these shifts, but the majority of Morning, Day and Evening Watch shifts begin at midnight, 8:00 a.m. and 4:00 p.m., respectively. Posts that are not manned on a 24-hour basis are staffed on AM and PM watch. The majority of AM watch shifts begin at either 5:30 or 6:00 a.m. PM watch shifts are more staggered, but begin between noon and 4:15 p.m.

Employees on AM or PM watch are considered to be on time for their shifts if they are in line at the Control Center to pick up keys and equipment, or to exchange accountability chits for the keys and equipment that the officer they are relieving picked up on the previous shift. These officers are allotted time to return equipment to the Control Center at the end of their shifts. There is a fifteen-minute overlap built into AM and PM watch shifts. For instance, the outgoing officer is on the clock until 2:00 p.m., while the shift for his or her relief starts at 1:45 p.m. This overlap is intended to allow time for the incoming officer to exchange chits at the Control Center and walk to the post.

As a general rule¹, officers assigned to 24-hour posts exchange equipment on post rather than picking up those items at the Control Center. They are required to be at post at the beginning and end of their scheduled shift times, and cannot leave their posts until their relief arrives. The Agency-assigned equipment they assigned while on duty is maintained at the post. There is no overlap in shift time for 24-hour posts.

The Union filed the instant grievance on January 23, 2015, stating in relevant part:

The grievance applies to all past, current, and future Bargaining Unit employees of the Federal Correctional Complex FCC Beaumont, TX.

It has been and continues to be the practice of the Federal Bureau of Prisons, specifically at Federal Correctional Complex Beaumont, TX, to require employees to be at their work sites prior to the beginning of and after the completion of their tour of duty.

This reporting time requires employee's [sic] custody and non-custody to pass through a security checkpoint where an x-ray of their property and Agency issued equipment "chits" is conducted, and all staff custody and non-custody are required to pass a metal detection screening. Many times on off shifts staff custody and non-custody must wait in the front lobby area for staff from inside the facility to arrive to process them through the metal detection screening sites. They are also required to remove all personal property to include Agency issued equipment "chits," 24 hour key sets, duty belts, key clips and security chains, etc., that would activate an alarm on the metal detection device, and subsequently Don this property and equipment again. Removing (Doffing) and Putting on (Donning) of this Agency issued equipment is a condition of employment and a daily requirement as the first work related activity for custody staff and non-custody staff.

Many staff custody and all non-custody have to stop at the Control Center to pick up required equipment (radio, keys, and detail pouches). On many occasions staff who do not have equipment to pick up the Control Center are required to wait for the Control Center Officer to finish issuing equipment to other staff before proceeding through the Control Center Sally port into the secure confines of the institution. Staff who are relieving others already on duty exchanging equipment and are required to do joint inventories of property and equipment prior to

¹ There are certain positions, such as Tower 6, SHU Property, the rear gates and other positions, which are staffed for only eight hours per day (on a Day Watch schedule). The officers assigned to these posts pick up keys at the Control Center before reporting to their posts, and return the keys at the end of their shifts. They do not have relief on either end of their shifts. According to Post Orders, they are considered on time for the start of their shift when they are in line at the Control Center to pick up keys. These officers are allotted time to return the keys to the Control Center at the end of their shifts.

assuming the post. They are also required to pass on pertinent information and annotate electric logs to acknowledge the shift change. These obstacles are also in place for custody staff and all non-custody staff attempting to leave work and are required to stop the Control Center to turn equipment in. This period of pre-/post work activity can vary between 15 to 45 minutes depending on variable factors such as congestion in the front lobby area, functioning grill gates, appropriate staff assigned to areas (front lobby and Control Center) and the distance from the control center to the duties assignment. This activity, by the Agency, violates Article 18 Section A of the Master Agreement, which indicates that the standard workday is eight (8) hours.

Once entering the front lobby of the institutions and blocked in the facility, all staff are under the direct control of the Agency. As such they are demanded to be on alert due to inmate presence and required to be ready to respond to any and all emergencies that may develop. The time spent in this activity is not simply “travel time” to and from a particular duty post but instead it is time spent performing the employee’s primary duty, that being the protection and safety of the institution and public. Staff not being alert and responsive or responding to an emergency while in the process of walking to or from their duty location inside the institution can be subject to Standards of Employee Conduct “disciplinary action,” of “up to and including removal.”

The grievance form specified that the “Date(s) of violation(s)” was “December 31, 2014 ongoing.”

The parties did not resolve the grievance at the local level. On March 16, 2015, the Union submitted an Invocation to Arbitration. The Invocation to Arbitration incorporated the “issues and facts as alleged in the grievance filed on or [sic] January 23, 2014,” but did not specify a date on which the grievance occurred or on which the remedy began to accrue.

II. ISSUE

The parties did not stipulate to the issue for this case, but agreed that the Arbitrator could frame the issue(s) as deemed appropriate. As framed in their closing briefs, the issue statements proposed by the parties are quite similar – the differences are only a matter of semantics. Because it is the Union who carries the burden of proof in this case, I will accept the Union’s proposed framing of the issue:

Did the Agency violate the parties' Collective Bargaining Agreement and the FLSA by suffering and permitting staff to work before or after their assigned shifts without proper compensation? If so what is the appropriate remedy?

III. RELEVANT CONTRACT AND OTHER PROVISIONS

ARTICLE 31 – GRIEVANCE PROCEDURE

* * * *

Section d. Grievances must be filed within forty (40) calendar days of the date of the alleged grievable occurrence. . . A grievance can be filed for violations within the life of this contract, however, where the statutes provide for a longer filing period, then the statutory period would control.

* * * *

ARTICLE 32 – ARBITRATION

Section a. In order to invoke arbitration, the party seeking to have an issue submitted to arbitration must notify the other party in writing of this intent prior to expiration of any applicable time limit. The notification must include a statement of the issues involved, the alleged violations, and the requested remedy. If the parties fail to agree on joint submission of the issue for arbitration, each party shall submit a separate submission and the arbitrator shall determine the issue or issues to be heard. However, the issues, the alleged violations, and the remedy requested in the written grievance may be modified only by mutual agreement.

* * * *

GENERAL POST ORDERS PRE AND POST SHIFT EXPECTATIONS AND PROCEDURES²

This is to remind all staff of the requirements and procedures already in place regarding work outside of scheduled hours and to further remind staff they may not work outside their scheduled hours of work without approval and compensation. Pursuant to these established requirements, all staff working outside their scheduled hours without prior approval and compensation is directed to cease any such activities.

While we recognize it may, at times, be necessary to work beyond your scheduled hours to accomplish a particular task, worked. All such time must be requested and approved,

² **Bolded** language appears in the General Post Orders dated March 7, 2013, but appears to have been removed from the General Post Orders dated September 10, 2014. The language appears again in the General Post Orders disseminated in 2015. Otherwise, the language of the General Post Orders did not change between the three versions.

in writing, by your supervisor and appropriate executive staff member, in advance of being worked.

While we appreciate the time and effort put forth to make sure the job is done right, it is imperative that we address all issues associated with staff being properly compensated for their work time. Staff members not compensated for any work time are to report it immediately to the Captain.

As a reminder, staff are required to pick up keys and/or equipment at the Control Center at the start of their shift (i.e., 7:30 a.m., for a 7:30 a.m. to 4:00 p.m. shift). Staff exchanging their keys and/or equipment on post are considered “on time” if they are exchanging their equipment on post at the start of their shift (i.e., 8:00 a.m., for an 8:00 a.m. to 4:00 p.m. shift). **Staff is not to remain past their shift for equipment to be accounted for by relieving staff.** Staff issued 24-hour keys who are not required to retrieve equipment from the Control Center are considered “on time” if they are at their assigned work areas at the start of their shift.

Employees who are required to drop off keys and/or equipment at the Control Center at the end of their shift are allotted reasonable travel time prior to the end of their shift to travel from their duty post to the Control Center. An employee whose shift ends at 4:00 p.m. should be at the Control Center dropping off his/her keys and/or equipment no later than 4:00 p.m.

* * * *

Staff members being relieved from their posts will not stay or remain on their post while the relieving officer accounts for equipment. The staff member being relieved is to immediately depart as they have been relieved of their duties.

Control Center Officers will not pass out batteries or any other equipment to staff assigned to a 24 hour post. Staff assigned to 24 hour posts will begin their tour of duty at the time they arrive at their assigned post. Staff assigned to 24 hour posts will not stop at the Control Center for any reason. Furthermore, these staff will not pick up radio batteries, mail bags, call outs or detail crew kit cards. These items will be delivered to them by the Compound Officer after they assume the duties of their post.

If for any reason you are required to start work early (emergency situation, etc.) or work past your established quitting time, you will ensure you notify the Operations Lieutenant of the time worked and the reasons for the time worked outside of your scheduled hours. The Operations Lieutenant will then prepare an overtime form for your signature to ensure you are compensated for time spent working outside of your established working hours.

**WARDEN MEMORANDA TO STAFF RE: PRE AND POST SHIFT
EXPECTATIONS (8/28/14 AND 1/16/15)³**

This purpose of this memorandum is to remind staff of the requirements and procedures already in place regarding working outside their scheduled hours and to further remind staff they may not work outside their scheduled hours of work without prior approval and compensation. Pursuant to these established requirements, all staff working outside their scheduled hours, without prior approval and compensation, are directed to cease any such activities.

While there may be times you work beyond your tour of duty to accomplish a particular task, federal regulations require you to be compensated for work performed. All such time must be requested and approved, in writing, by your supervisor and appropriate executive staff member, in advance of being worked.

While we appreciate the time and effort put forth to make sure the job is done right, it is imperative that we address all issues associated with staff being properly compensated for their work time. Staff members not compensated for any work time are to report it immediately to their respective department head.

As a reminder, employees who pick-up/drop-off keys and/or equipment at the Control Center at the beginning/end of their shift are allotted reasonable travel time from/to the Control Center. An employee whose shift is 7:30 a.m., to 4:00 p.m., is to be at the Control Center by 7:30 a.m. to pick up their keys/equipment, and be at the Control Center no later than 4:00 p.m. to drop-off their keys/equipment. Employees are not authorized to depart the institution prior to the end of their tour of duty, without prior notification and approval from their supervisor.

Those employees who relieve, exchange keys and/or equipment at the duty location (post/office), the starting and stopping time of their tour will be at the duty location. For example, if your starting time is 8:00 a.m. you must provide relief at 8:00 a.m. Staff are not authorized to be at their post prior to the start of their tour, in this example 8:00 a.m. Likewise, if your stopping time is 4:00 p.m., your relief is to be there at 4:00 p.m. Staff are not authorized to be on post after their shift ends. Employees working these posts are not allowed to pick up/drop off batteries or equipment at the Control Center prior to/after reporting to his or her duty location, or after leaving post at the end of the shift.

Those employees who are issued 24-hour keys who are not required to retrieve equipment from the Control Center are considered on time if they are at their assigned work areas at the start of their shift.

* * * *

³ The documentary evidence showed that these memoranda were disseminated to all staff via email. The Agency introduced memoranda dated May 6, 2015 and June 22, 2015 with identical language, but did not have documentary proof of their dissemination to employees.

Information contained in official electronic government logs must be accurate and properly documented to ensure all staff are aware of significant incidents on any post to eliminate the need to verbally pass on information to the relieving employee. If the information is important enough to pass on to the next shift, then it is important enough to document in the electronic log. This includes the recording of appropriate times of assuming and departing your post/office (the actual time you report to and depart from the post). Official electronic government logs are official documents of the Bureau of Prisons and as such, may be called upon to be used in various courts of law. Providing inaccurate statements or information in any official Bureau of Prisons document is a violation of the Standards of Employee Conduct, and can lead to disciplinary action.

I am further instructing all staff they are required to review post orders prior to assuming their posts, the posted picture file (either monthly or quarterly) the contingency plans (annually) and their mandatory background investigations during their normal tour of duty. Employees may request proper relief as necessary to ensure these required reviews are conducted during their normal tour of duty. The supervisor will determine when the employee will be relieved from their post to complete the proper review(s). Staff may not take it upon themselves to accomplish these tasks during non-tour of duty hours.

Should you respond to an emergency situation, or inmate incident, while traveling to or from your post/office, prior to or after your shift, you must notify your supervisor immediately, prior to your departure. It is the expectation, if staff become aware of an emergency situation prior to or immediately after their assigned duty hours, they should immediately report and provide assistance. Once the emergency is under control, we will make arrangements to ensure employees receive appropriate compensation.

IV. PARTIES' ARGUMENTS

The Union makes the following arguments in support of its position:

- Bargaining unit employees at FCC Beaumont perform compensable work for which they are not compensated on a daily basis.
- The first compensable activity that each employee performs each day is going through security screening procedures. Being subjected to security screening procedures is one aspect of the primary duty of correctional officers – to ensure the safety and security of the institution.
- Security screening should be construed as a “principal activity” under *IBP v. Alvarez*, 546 U.S. 21 (2005). Once an employee performs a “principal activity,” all other activities are compensable under the “continuous work day” doctrine. *Id.*; *Allenwood v. AFGE Local 404*, 65 FLRA 996 (2011).
- The next compensable task that employees perform is donning their duty belts after passing through security. Duty belts are used to attach and carry mandatory and items used in the performance of their jobs. Employees testified that it is necessary to done their duty belts immediately after clearing security so that they can be prepared to

handle incidents that may occur as they walk to their posts, such as responding to body alarms. Donning duty belts is integral and indispensable to the performance of these employees' duties.

- Before walking to their posts, certain housing unit officers are required to pick up paperwork (food service slips) to take to their housing units. This time should be compensated.
- Some employees are required to pick up equipment and/or exchange chits at Control before reporting to their posts. Some of these officers, such as Rear Gate and Tower posts, must then leave the building and drive to their posts. At the end of their shifts, these employees must then travel back to Control to turn in the equipment and/or exchange chits.
- All employees spend time walking to their posts. Travel to post is a principal activity of a correctional officer. *BOP Coleman v. Local 506*, 68 FLRA 52 (2014). As they travel to their posts, officers engage in vigilance, respond to body alarms, correct inmates' behavior, answer inmates' questions and confiscate weapons, which is part of the primary activity of providing safety and security within the institution. Staff perform the same functions even when inmates are locked down. Accordingly, the Arbitrator should make an explicit factual finding that officers engage in safety and security tasks as they walk to and from their posts.
- The primary job responsibility of all correctional staff is to ensure the safety and security of the institution. As such, at all times there are inside one of the institutions they must be alert and vigilant and cannot, as employees in other types of jobs, use walking time to talk on the phone, send text messages or listen to music.
- As they walk through the institutions to their posts, officers are subjected to continuing security screenings for the sole benefit of the Agency. They must stop at each locked gate or grill and be visually inspected before the grill or gate is opened remotely.
- The same activities and duties occur as employees return to Control at the end of their shifts. This takes an additional 15-20 minutes of time that is not compensated.
- Once they arrive at post employees pass down information and equipment with the officers they are relieving. The pass down of information is for the safety of staff and the security of the institution. The exchange of equipment includes taking an inventory and counting and inspection of keys, which is also done for the benefit of the Agency and to ensure proper accountability of equipment. This aspect of shift exchange takes several minutes at the beginning and end of each shift. In certain units, such as SHU, towers, control room and mobile patrol, there is a more extensive equipment exchange, which increases the time necessary to conduct shift exchange.

- It is clear that the activities performed by officers at the beginning and end of their shifts benefit the Agency and fall within the discretionary responsibilities of officers to ensure a safe and efficient hand off.
- The uncompensated overtime worked by bargaining unit employees is significantly more than *de minimis*.
- The Agency is aware that employees are working uncompensated overtime
- Many other arbitrators have sustained similar grievances and awarded overtime compensation for time correctional officers spent doing the types of duties described in this case.
- Even if there is no uncompensated overtime, the Arbitrator should find that bargaining unit employees are engaged in “standby duty time” and should be compensated for this time. Standby duty time is compensable where the employee is “assigned to be in a state of readiness to perform work with limitations on the employee’s activities so substantial that the employee cannot use the time effectively for his or her own purposes.” 5 CFR §551.431(a)(1).
- The Agency should be ordered to pay 30 minutes of overtime to all affected bargaining unit employees for preliminary and postliminary work. This remedy should extend back for two years pursuant to the statute of limitations provided in the FLSA.
- The Agency should further be ordered to pay liquidated damages in an amount equal to actual damages pursuant to FLSA §206(b) because the Agency did not show that the violation was in good faith and that it had reasonable grounds for believing that the act or omission was not a violation of the FLSA.
- The Arbitrator should award the Union appropriate attorneys’ fees and set a schedule for briefing regarding the amount of the attorneys’ fees.

The Agency makes the following arguments in support of its position:

- The Union has failed to establish that the Agency has violated the Master Agreement and/or the FLSA.
- Time that employees spend going through security screening is not compensable as a matter of law. This is not a principal activity or integral and indispensable to the work these employees are hired to perform. The Agency requires everyone who enters the secured areas of the institutions to go through security screening – both staff and visitors.
- Donning a duty belt is also not integral and indispensable to these employees’ principal activities. This issue was conclusively resolved in *BOP Bastrop and AGE Local 3828*, 69 FLRA 176 (2016). FCC Beaumont does not require corrections

officers to wear a duty belt. While officers are required to wear a stab-resistant vest inside certain of the institutions, they are not required to remove their vests when going through security screening.

- The Union has not established that time employees spend walking to their posts is compensable. Where walking time is not accompanied by active engagement in a principal activity, it is not compensable as a matter of law. *USP Atwater and AFGE, CPL, Local 1242*, 68 FLRA 857 (2015). The possibility that a principal activity may occur is insufficient to make this task compensable. The Union failed to establish that any uncompensated principal activity which the employee is required to perform actually occurs with any regularity (i.e., on a daily basis) while an officer is walking to or from his or her assigned post.
- The Union should not be permitted to argue that employees are entitled to “standby pay” under 5 CFR §551.431(a)(1) because it did not assert a claim to standby pay in the grievance or at the hearing.
- The Agency requires employees to report any overtime that they actually work. Should employees be required to perform principal activities – such as responding to a body alarm – while walking to or from their posts, the Agency requires them to report that time as overtime and would provide appropriate compensation. Employees are made aware of their responsibility to seek permission to work overtime in advance, or to report any overtime they work where advance permission is not possible.
- The Union has not established that the shift exchange is compensable. While Agency concedes that the activities it requires employees to perform during a shift exchange are integral and indispensable to the officers’ primary duties, the time employees spend performing shift exchange does not exceed ten minutes and is thus subject to the *de minimis* rule. The Agency has taken affirmative steps to ensure that shift exchange can occur within ten minutes or less: use of an electronic log book to record pertinent information, elimination of the requirement that staff conduct a joint inventory of equipment, and making overtime available in instances when the shift exchange exceeds ten minutes.
- The Agency has no actual or constructive knowledge that shift exchanges last more than ten minutes. There is no evidence of any specific portal-related complaints brought to the Agency’s attention. It is impossible for supervisory staff to observe the actions of all correctional officers before and after their scheduled shifts. Furthermore, the Agency is entitled to require employees to report the overtime they actually work. Time keeping records would not capture the length of a shift exchange.
- The Union did not present representative testimony. There are a number of positions in each institution regarding which the Union did not present any testimony. A total of twelve witnesses purported to testify on behalf of 1,000 employees staffed at FCC Beaumont. This was inadequate to establish a representative sample.

- The Union’s witnesses were not credible. Their testimony was internally inconsistent and contradictory. Some of the testimony was contradicted by photographic and video evidence.
- The Union’s potential recovery period only extends from the date of the violation listed in the Grievance to the present. The Master Agreement requires that the alleged violation be specifically identified in a grievance. The extended statute of limitations or filing period permitted under the FLSA does not excuse the Union from its obligation to specifically identify the alleged violation. In this case, Box 7 of the Grievance states that the alleged violation began on December 31, 2014.
- The grievance should be denied because the Union has failed to prove a violation of the Master Agreement.

V. OPINION

Scope of Award

The Union brought the instant grievance on behalf of “all past, current, and future Bargaining Unit employees of the Federal Correctional Complex FCC Beaumont, TX.” At the hearing, the Union clarified that the grievance was intended to address bargaining unit employees who are assigned to Custody posts, including Non-Custody employees who are “augmented” to work Custody posts on an ad-hoc basis. Union Exhibit 1 was a Daily Assignment Roster for the entire FCC Beaumont Complex. The Union represented that every bargaining unit Post listed in that roster was a subject of this grievance.

In its closing brief, the Agency asserts that the Union failed to present any evidence regarding uncompensated overtime allegedly worked by employees in a number of posts identified in Union Exhibit 1. The Agency asks the Arbitrator to exclude all posts for which there was no representative testimony from the scope of this award. Many of the posts that the Agency asks be excluded are housing units or posts for which there is a “1” and a “2,” possibly more (e.g., Control 1, Control 2, etc.). Some posts are posts for which the Union presented testimony regarding one of the institutions but not all of the institutions.

Although not every specific position on the Daily Assignment Roster was specifically addressed at the hearing, the testimony that was presented was sufficiently representative to encompass most of these posts into the scope of this award. For instance, while not every specific housing unit post was addressed, there were witnesses who testified about the time they spend or have spent pre- and post-shift in housing units in each of the institutions. The testimony indicated that the housing unit posts all involve passing through security, walking to post (the distance varies mainly by institution and whether the post was upstairs), waiting to be allowed to pass through gates and grills, the same equipment and information exchange at the beginning and end of each shift, and walking back through the institution and gates to the front lobby at the end of the shift. Similarly, SHU officers – whether SHU 1, SHU 2, etc. – have the same security to clear, distance to walk, gates to pass through and equipment and information to exchange within each institution. The only difference between SHU posts within an institution is whether the post is an AM/PM or 24-hour post. The same is true for other posts where there was sufficiently representative testimony.

The following are the posts listed on Union Exhibit 1 for which no testimony or other evidence was presented:

- P – FRONT LOBBY
- P – Comp Tower
- P – IM COM MON
- P – HOSP OFFICER
- P – SHIFT REL 1, 2, 3 and 4
- P – SHU REC
- P – CAMP 1 and 2
- P – TOOL ROOM
- P – SIS IRS
- P – SIS TECH 1, 2, 3 and 4
- P – SEC OFFICER
- M – FRONT LOBBY
- M – HOSP OFFICER
- M – COUNT OFF

- M – SHU REC
- M – TOOL ROOM
- M – SIA TECH
- M – SIS TECH 1, 2, 3 and 4
- M – SEC OFFICER 1 & 2
- L – FRONT LOBBY
- L – HOSP OFFICER
- L – SHU REC
- L – SEC OFFICER
- L – SIS TECH
- T&A CLERK 1(P)
- T&A CLERK 1 (L&M)

The posts listed above are not included within the scope of this Award. All other bargaining unit posts listed in Union Exhibit 1 are included in this Award.

Allegations of Uncompensated Overtime

The Union presented evidence of activities in which bargaining unit employees engage before and after their shifts. Some of these activities apply to all officers and some apply only to officers in certain posts. These activities take place in each of the institutions within the FCC Beaumont complex (i.e., there is no central or common area for the complex as a whole – each institution has its own security screening, Control Center, etc.) In somewhat chronological order, these activities and the evidence supporting them is as follows:

1. Security Screening

All corrections officers – with the exceptions of the Mobile 1 and 2 officers at each institution⁴ – must enter the institution’s front lobby and pass through security screening. The security screening is much like an airport security screening. There is a conveyor belt upon which the officer places her personal belongings, which are then viewed through an x-ray

⁴ Mobile officers proceed directly from the parking area to a designated meeting place outside of each institution where they engage in shift exchange with the officer they are relieving. Mobile officers do not undergo security screening, do not pick up equipment at Control, do not go through sally ports/gates/grills and do not walk through the institutions to reach their posts.

screening by a monitor. The officer must pass through a stand-up metal detector, which means he or she must remove shoes, clothing or accessories that contain metal, including a duty belt. Sometimes the x-ray scanners and/or metal detectors malfunction and employees must have their belongings inspected manually and/or be wanded.

The testimony was that the screening process can take between one to several minutes. The video evidence presented by the Agency showed employees passing through security (none of it manual) in approximately one minute or less.⁵

2. *Donning Duty Belts*⁶

Corrections Officers at FCC Beaumont are not required to wear duty belts, but the evidence suggests that all of them do because, while on duty, they are required to have various items on their persons (keys, a radio, handcuffs and in some institutions OC spray) that would be cumbersome to carry without a duty belt. Duty belts must be placed on the conveyor belt to go through the scanner at security. Just as they are not required to wear duty belts in the first instance, officers are not required to put the duty belts back on as soon as they clear security, but most all officers do so in order to have their hands free as they walk through the institutions to their posts. Officers testified that it takes two minutes or so to don their duty belts and the keepers, or clips, that keep the belts in place on their pants. The Agency's video evidence showed employees donning duty belts and keepers in less than one minute.

⁵ References to the Agency's video evidence are for the purpose of describing what the Agency's evidence at the hearing was. I am aware that the video evidence portrayed only a handful of occurrences of the activities at issue, and that the Agency had the opportunity to cherry-pick the video that was most favorable to its case. For purposes of my Award, I have assumed that the video excerpts reflect the absolute minimum amounts of time that the activities they portray may take to complete.

⁶ The parties do not dispute that employees in certain institutions are required to wear stab-proof vests. However, the testimony of the Union's witnesses who wear these vests was that they put them at home and are not required to remove them in order to pass through security screening. No witness testified that he or she puts on a stab-proof vest after arriving at the complex.

3. *Picking Up Equipment/Exchanging Chits at Control*

After employees clear security and (possibly) put on their duty belts, what they do next depends upon whether they are working a Morning, Day or Evening watch post that is staffed on a 24-hour basis (most, but not all, Morning, Day and Evening watch posts) or an AM or PM post. Employees working 24-hour posts who make relief do not stop at Control before proceeding to their duty locations.

Officers who work AM and PM posts, and other posts not staffed on a 24-hour basis, must either pick up keys and equipment at Control (if they are not making relief at the start of their shift) or exchange chits⁷ for those of the officer currently on duty if they are making relief.⁸ These employees are deemed by the Agency to be “on time” for the start of their shifts if they are in line at Control at the appointed time. However, some officers testified that they arrive early in order to be at their post at the appointed time, or in order to leave time to make relief without requiring the outgoing officer to stay beyond his or her shift time.

4. *Passing Through Sally Ports/Gates/Grills*

All employees (with the exception of Mobile, Control, Visitation, Tower and Rear Gate officers) must pass through the sally port adjacent to the Control Center in order to enter the secured part of each institution. A Control officer must open the sally port doors to allow the employees through. As they walk to their duty locations, employees must pass through additional locked gates or grills. Each time an officer reaches one of these gates or grills, he or she must wait to be visually inspected via surveillance camera by a Control officer and for the Control officer to then open the gate or grill remotely. The number of gates or grills that employees must

⁷ “Chits” are metal tags identifying each employee which are used to track the equipment/keys for which that employee is accountable during his or her shift.

⁸ This excludes Control Officers who, regardless of shift, do not have to stop at Control, but rather proceed directly inside the Control Center.

pass through depends on which institution they are in and where their duty locations are within that institution. In all institutions, the housing units – where most of the corrections officers are staffed – are the farthest from the Control Center and require passing through the most gates or grills.

Officers testified that the amount of time they spend waiting to be allowed to pass through the sally ports, gates and grills varies depending on how busy the Control officers are. The testimony was that an employee could wait multiple minutes at each stop.

5. *Walking to Post*

All employees must walk or drive⁹ varying distances through the institutions to reach their duty locations. Most of the testimony regarding time spent walking to post was specific to employees assigned to the housing units, which are located the greatest distance from the lobby of each institution. The consensus of the testimony was that it takes approximately ten minutes to walk from the front lobby to a housing unit, with the caveat that some housing units are slightly farther than others and/or up a flight of stairs. This includes time spent waiting to pass through gates and grills. The Agency presented video evidence of one instance in which an officer reaches a housing unit within approximately a minute after passing through the sally port in the front lobby; this instance happened at the 12:00 a.m. shift exchange when there were no inmates moving around the institution.

Officers who walk through the secured parts of each institution may come into contact with or observe inmates, depending on the time of day.¹⁰ Employees testified that, as they travel to and from post, they remain vigilant about the inmates' activity and take action to correct any improper inmate behavior they observe, such as leaning on gates or having their shirts untucked.

⁹ Tower and Rear Gate officers exit the institutions after picking up equipment/exchanging chits at Control and then drive to parking areas adjacent to the towers/gates outside of the institutions where they are stationed.

¹⁰

Agency witnesses – supervisors – testified that they have not witnessed corrections officers correcting inmates when not on duty.

All officers who are inside an institution, whether on duty or not, are expected to respond when an on-duty officer sets off a “body alarm” (which is actually activated on his or her assigned radio) to indicate that there is an emergency situation. Employees testified that they have been required to respond to body alarms when walking to and from their posts. The Agency does not dispute that officers are required to respond to body alarms, but contends that if they are required to respond while on duty, they should request overtime on an incident-by-incident basis.

6. Exchange of Equipment and Information

All officers who make and/or accept relief must undergo an exchange of equipment. For most posts, the equipment consists of a radio, handcuffs, one or more sets of keys and, in some institutions, a can of OC spray. This is the equipment that each officer inside the secured part of the institution must carry on his or her person, usually affixed to a duty belt. Additional equipment, such as a flashlight, mirror, extra cuffs, and metal detector wand are kept in housing units on a shadow board. Officers testified that when they take possession of the equipment they inspect it to make sure that it is in sound condition – which may include counting and inspecting each of the keys.

Certain posts house significantly more equipment than the housing units. Control officers testified that they arrive twenty to thirty minutes early to take inventory of the large amount of keys and equipment stored in the Control Center. Special Housing Unit (“SHU”) officers also have additional equipment on-post for restraining and controlling inmates who are isolated from the general population for various reasons. Mobile officers carry binoculars, emergency keys,

firearms and multiple rounds of munitions, and are also accountable for the trucks they drive to keep watch outside of the institutions. Tower officers also have firearms and munitions on-post.

Union witnesses explained that it is necessary to conduct an inventory of all keys and equipment before the out-going officer leaves post because the incoming officer is accountable for the keys and equipment once the out-going officer leaves. There was no evidence presented about officers being disciplined for being in possession of faulty equipment or incomplete sets of keys, but there was testimony regarding a somewhat recent incident in which an entire institution was put on lockdown, and employees recalled to work, due to a missing key.

Officers also testified that they exchange information about activity on the post during the previous shift – particularly regarding whether the inmates exhibited behavior that might signal some impending fight or concerted misconduct. Officers have an electronic log book in which they are expected to record any pertinent activity that occurred during their shift. The Agency argues that the electronic logs eliminate the need for officers to verbally exchange information during shift exchange.

7. Other Pre-Shift Activities

There was testimony that Housing Unit officers are sometimes issued detail pouches or food service slips when they first enter the compound, before walking to post. These detail pouches or food service slips identify the inmates who need to be released early to go to their jobs.

One employee, a Lock and Security Specialist who works in the administration building, testified that he arrives fifteen minutes early so that he can help the Control officers issue equipment to incoming officers and open gates.

On average, the employees who testified at the hearing stated that they typically arrive fifteen to twenty minutes early to complete all of these pre-shift activities. Control officers stated that they arrive as much as thirty minutes early solely to conduct an inventory of keys and equipment before the outgoing officer leaves. All of the witnesses said that they arrive at post early for shift exchange so that the officer they are relieving can leave the post on time at the end of his or her shift. The evidence indicated that officers on 24-hour posts stay within the institutions beyond the ends of their shifts only to walk back through the institutions to the front lobby.

FCC Beaumont does not utilize time clocks or other time keeping records.

There are instances when an officer's relief is late and he or she cannot leave on time. Some officers testified that they have been discouraged by their supervisors from requesting overtime in such instances where the time they overstayed was ten minutes or less. These officers identified particular Lieutenants who had discouraged them from requesting overtime. While the Agency presented supervisory witnesses who denied denying requests for overtime, the specific Lieutenants identified by the Union witnesses did not testify.

Employees who work 24-hour posts with no overlap for relief have to walk back through the institution at the end of their shifts, including waiting to be allowed through gates and grills, without compensation. Employees on posts with overlapping relief said that they typically leave the complex on time at the end of their shifts. Officers on PM shifts who do not have to wait for relief acknowledged that they are permitted to leave post a few minutes early to walk back to the Control Center to return equipment and keys.

The Agency introduced limited video evidence showing employees arriving in the front lobby only one or two minutes before their scheduled shift times, or even after their shift times

had begun. There was also video of some employees (who did not have to wait for relief to leave their posts) leaving the institution fifteen or twenty minutes before the scheduled time. Some officers denied that this occurs.

Under the Fair Labor Standards Act (“FLSA”), a federal agency must compensate employees for all hours of work that the agency suffers or permits, regardless of whether it has requested or even desired that the work be performed. 29 U.S.C. § 201 *et seq.* This includes paying overtime. 29 U.S.C. § 207(a). “Suffered and permitted to work” is defined as “any work performed by an 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.” 5 C.F.R. § 551.104. The Portal-to-Portal Act of 1947 amended the FLSA by exempting employers from liability to pay employees for certain work-related activities, namely “(1) walking, riding or traveling to and from the actual place of performance of the principal activity or activities which such employee is hired to perform; and (2) activities which are preliminary or postliminary to said principal activities or activities” and which occur prior to or after the employee’s scheduled work time. 29 U.S.C. § 254(a).

Employees are entitled to compensation for all “principal activity or activities” that they perform which the employer knows or should know are occurring. This includes activities “integral and indispensable” to the performance of a principal activity. *IBP, Inc. v. Alvarez*, 546 U.S. 21 (2005). Once an employee performs a principal activity, or one which is “integral and indispensable” to the performance of his or her job, the “continuous work day” has started and all time spent in the course of employment thereafter is compensable, up to the employee’s last performance of a compensable task. *Id.* at 906.

However, the continuous work day is not triggered, and employers are not required to compensate employees for certain small, or *de minimis*, increments of time that would otherwise be compensable as “integral and indispensable” to a principal activity. Courts commonly employ a three-prong test to determine whether time is *de minimis*: (1) “the practical administrative difficulty of recording the additional time”; (2) “the aggregate amount of compensable time”; and (3) “the regularity of the additional work.” *Lindow v. US*, 738 F.2d 1057 (9th Cir. 1984). Many courts hold that activities that take less than ten minutes are eligible to be considered *de minimis*.

The Agency’s position in this case is that passing through security screening and traveling to and from post are not compensable as a matter of law. It seems to concede that an officer’s taking possession of equipment assigned to his or her post is a compensable activity but urges that: (1) employees on AM/PM shifts and others who do not make relief are considered to be “on time” and on the clock when they are in line at the Control Center to pick up their equipment, therefore they are already paid for this activity; and (2) the time it takes for employees to exchange equipment on post falls into the *de minimis* exception.

The most recent Supreme Court authority on the issue of what constitutes compensable work comes from *Integrity Solutions, Inc. v. Busk*, 135 S. Ct. 513 (2014). That case had a transformative impact on limiting the kinds of pre- and postliminary activities that can be deemed compensable. The Court announced that the standard is no longer whether the employer requires the employer to perform the activity or if it is beneficial to the employer, but rather whether the task at issue is “an intrinsic element of [the employee’s principal activities] and one with which the employee cannot dispense if he is to perform those activities.” *Id.* at 518.

Using that standard, the Court held that time spent waiting to undergo and undergoing security screenings required of warehouse workers at the end of each shift were not compensable – irrespective of whether the employer could have taken action to make the wait time shorter. It reasoned that security screenings were neither the principal activity that employees were hired to perform nor integral and indispensable to the performance of their principal duties of retrieving and packaging products. The Court specifically noted that the employer “could have eliminated the screenings altogether without impairing the employees’ ability to complete their work.” *Id.*

The Union contends that the *Integrity Solutions* holding with respect to security screening is inapplicable to this case because it did not involve a correctional setting where screening is imperative to maintain the safety and security of the institution. The Union urges that this case should be distinguished from *Integrity Solutions* and other cases that involved non-correctional workplaces. It asserts that employees in a workplace such as FCC Beaumont are hired to ensure the safety and security of the institutions in which they work and that, consequently, every activity they engage in while inside the institution is integral and indispensable to performance of that core duty. For instance, the Union argues that time spent going through security screening is not merely for the Agency’s benefit to prevent theft, but is necessary to prevent weapons or contraband from being brought into the institution, which would compromise safety and security. It also contends that, due to the nature of activity within each institution, officers walking to and from post must be vigilant and, therefore, that their time is not their own and constitutes compensable work.

Before *Integrity Solutions* changed the standard, the FLRA held in *FCC Allenwood and AFGE Local 4047*, 65 F.L.R.A. 996 (2011) that federal corrections officers were not entitled to compensation for time spent passing through security screening because that activity was not

integral and indispensable to the officers' principal duties. The Authority specifically rejected the Union's claim that security screening is compensable due to the "dangerous nature of the correctional environment." *Id.* at 1000. That case cited federal court decisions where security screening was held not compensable in airports and nuclear power stations. *Id.* After *Integrity Solutions*, the FLRA remanded a case where the arbitrator had held time spent passing through security screening to be "integral and indispensable" but had used the pre-*Integrity Solutions* standard.¹¹ *FCC Bastrop and AFGE Local 3828*, 69 F.L.R.A. 176 (2016).

Passing through security screening is not a principal activity. It is not what corrections officers are hired to do. Rather, it is a mechanism to ensure that contraband and weapons are not brought into a safety-sensitive environment such as a prison. The job of preventing the introduction of contraband does not fall upon officers who work inside of the secured areas of the institution. That is the responsibility of the screeners (for whom there was no evidence presented at the hearing), Mobile officers, and Rear Gate and Tower officers, all of whom work outside of the secured parts of the institution.

The FLRA has not definitively ruled as to whether the holding in *Integrity Solutions* regarding security screening not being "integral and indispensable" applies to federal correctional institutions. However, the citations in *FCC Allenwood* to cases where security screening was held non-compensable in similarly safety-sensitive institutions such as airports and nuclear power stations persuades me that the security screening within a federal correctional complex is not "integral and indispensable" to an officer's principal duties.

Security screening is utilized to ensure that contraband is not brought into the institution. The presence of contraband can impede an officer's ability to carry out his or her duties, but I

¹¹ The Authority noted that *Integrity Solutions* had been issued after the arbitrator made his findings of liability in the case, but before he had issued his decision with regard to remedy. Therefore, the FLRA determined that the *Integrity Solutions* standard was applicable to the award as a whole.

cannot conclude that it would completely prevent any officer from performing his or her duties. In other words, it is useful but not indispensable.

Moreover, because security screening is not a principal activity, it would only be compensable as “integral and indispensable” if it exceeded the *de minimis* standard. All evidence presented at the hearing indicated that security screening takes one to two minutes, which renders it *de minimis*.

Because passing through security screening is not a compensable activity, all employees who are deemed to be “on time” for their shifts once they are in line to pick up equipment or exchange chits at the Control Center – which is located mere feet from the screening site – are effectively being paid immediately after they clear security.¹² AM shift officers have no obligation to get to post early in order to relieve an outgoing officer, as there is none. PM shift officers have fifteen minutes of overlap between getting on line at Control and completing shift exchange with the outgoing AM officer. According to the Warden’s memoranda to staff since 2014, there is no requirement that an officer who picks up equipment or chits at Control be on post at the designated start time for their shift. Rather, the memoranda state that “employees who pick-up/drop-off keys and/or equipment at the Control Center at the beginning/end of their shift are allotted reasonable travel time from/to the Control Center. An employee whose shift is 7:30 a.m., to 4:00 p.m., is to be at the Control Center by 7:30 a.m. to pick up their keys/equipment, and be at the Control Center no later than 4:00 p.m. to drop-off their keys/equipment.”

Although some AM/PM officers testified that, notwithstanding these published expectations, they still arrive early for a PM shift to ensure prompt relief – or for an AM shift to ensure being able to participate in activities that start at the top of the hour – the Agency has

¹² These employees can put on their duty belts as they wait in line or after they receive their equipment and keys but before proceeding through the sally port.

explicitly told them that are on time if they are in line at Control at the designated shift start time. If employees arrive early despite these published directives, there is no evidence that the Agency “suffers and permits” their doing so because the officers did not identify any supervisory or management official who witnesses their coming in early.¹³ Nor was there other evidence to support a finding that the Agency has been aware of AM/PM officers arriving at work early.

The remainder of this Award applies only to employees assigned to or required by General Post Orders to be at their duty posts at the scheduled shift start time.

The next activity that the Union asserts employees engage in after passing through security screening is donning their duty belts. The *Allenwood* decision by the FLRA held that donning protective duty gear was not compensable where the gear is not specialized or unique and required by the employer to be donned at a particular point in the workday. *Allenwood*, 65 F.L.R.A. at 996. In this case, the duty belts that most correctional officers wear are not specialized or unique to this Agency. The question of whether wearing duty belts is required by the employer seems obsolete in light of *Integrity Solutions*, but the evidence showed that duty belts are not required by the Agency although they are constructively required for the employees to carry out their duties effectively (i.e., to be able to work without holding handcuffs and a radio and OC spray in their hands at all times).

Donning a duty belt is not a principal activity; it is not what officers are hired to do. Whether donning a duty belt is “integral and indispensable” to the officers’ duties is a more ambiguous issue. In *Bastrop*, the FLRA remanded the issue of donning duty belts to the arbitrator to decide whether that activity, along with other pre-shift activities, passed the *de*

¹³ One officer who has worked in the Control Center testified that supervisors have called him on the phone in the Control Center before shift and/or seen him there after shift. The officer did not identify any particular supervisors. Nor did he explain whether and how a supervisor who called or observed the Control Center would recognize that he was working outside of his regular shift time (i.e., that he was not the officers scheduled to be on duty at that time).

minimis limitation, indicating that this could be a compensable preliminary activity. 69 F.L.R.A. 26. The Agency's position is that employees who do not have radios, keys, etc. until they reach their posts do not need to don their duty belts before they arrive at post and begin their paid workdays. Officers testified that they put on their duty belts before walking through the institution so that they can have their hands free in case they need to respond to an emergency.

Although the Agency does not require corrections officers to wear duty belts, I am inclined to believe that it would be practically impossible for these officers to carry out their duties without them. However, pausing to don on a duty belt immediately after passing through security screening is purely discretionary on each employee's part. This is something that could be done while the officer walks or waits for a gate to be opened, or when the officer arrives at his or her post. For employees who do not take possession of assigned equipment and keys until they reach their posts, putting on a duty belt before arriving at post is not integral and indispensable to the performance of their principal duties.

Moreover, whether donning a duty belt before arriving at post is compensable is relevant only if the time it takes to exceeds the *de minimis* standard. The video evidence, which is persuasive on this point, showed that officers are able to affix their duty belts around their waists in a matter of seconds. Employees do not need to affix the keepers to their belts in order to have their hands free, although it appeared that affixing the keepers took a few seconds as well. This does not exceed the *de minimis* standard.

After passing through security and donning duty belts, employees walk varying distances to their duty locations, including passing through sally ports, gates and grills. Most of the testimony regarding walking time involved officers assigned to housing units. Housing unit officers walk a considerable distance to their duty locations. According to many of the officers,

the walking time, combined with waiting to pass through gates and grills, could approximate or exceed ten minutes. On the other hand, the Agency's video evidence showed one housing unit officer traveling from the front lobby to post within a minute or so. I take note, however, that this instance occurred at midnight when there were no inmates moving around the institution, which could significantly impact travel time.

In *FCC Atwater and AFGE Local 1242*, 68 F.L.R.A. 857 (2015), the FLRA held that an award of overtime pay to officers for time spent walking to their posts was contrary to the FLSA and the Portal-to-Portal Act. I am persuaded that walking to post, by itself, is not a compensable activity. There must be some other, principal activity which occurs simultaneously with walking in order to make that time compensable. *Id.* at 859.

The Union distinguishes *Atwater* based on the contention that FCC Beaumont employees perform principal duties as they walk to post because they interact with inmates – correcting their behavior and answering questions – and are required to be vigilant and to respond to body alarms. Body alarms are not infrequent, but do not occur on a daily or even weekly basis. Officers testified that the interaction with inmates occurs regularly.

In a 2014 decision, the FLRA upheld an arbitrator's decision finding that all time that relief officers spend inside the gates of a correctional facility is compensable as a principal activity. *FCC Coleman and AFGE Local 506*, 68 F.L.R.A. 8 (2014). The Authority's decision in that case preceded *Integrity Solutions*, which was issued in December 2014. The FLRA deferred to the arbitrator's explicit finding that relief officers performed the principal activity of "protection and security of the institution" whenever they were on premises in a "unique environment that requires employees to be in a heightened state of awareness." *Id.* In 2016, Arbitrator Hauck held similarly in the *FCC Tucson* matter.

The Agency acknowledges that responding to body alarms is a principal activity and argues that officers who are required to do so should request overtime. The FLRA has held that merely “be[ing] prepared to respond in the event of an emergency” is not sufficient to constitute a principal activity. *Allenwood*, 996 F.L.R.A. at 1000. While the Union cites arbitration awards in which all time officers spend inside the secured confines of federal correctional complexes has been held to be a principal activity, including *Coleman*, I believe that the vigilance associated with body alarms does not rise to the level of vigilance necessary to constitute a principal activity. By all accounts, a body alarm is not a subtle occurrence. Every officer within the institution can hear it. It is not something that an officer must keep an eye or an ear open for.

Because body alarms are not regular events that require constant vigilance, I agree with the Agency in this regard; officers should request overtime on those occasions when they are required to respond to a body alarm before or after shift when they are not being compensated. There was testimony that employees have been discouraged by their supervisors from requesting overtime in such instances, and while I agree with the Union that supervisors discouraging overtime requests when they know overtime work has occurred is problematic at the very least, it is beyond the scope of this grievance.

On the other hand, I conclude that interacting with and correcting inmates is a principal activity of corrections officers. To the extent that such correction occurs on a regular basis and involves inmate activity that can be subtle, I would be inclined to agree that remaining vigilant in order to make corrections in this regard would be sufficient to make all time where an officer is exposed to inmate interaction compensable as a principal activity. Witness testimony that this kind of interaction occurs on a regular basis was credible, in part. There is insufficient evidence that all officers are always or regularly required to engage with inmates as they walk to post.

Most if not all of the employees who have long walks through the institution and interact with inmates are housing unit officers whose shifts begin at midnight, 8:00 a.m. and 4:00 p.m. The evidence established that inmates are locked in their cells for the night at around 10:00 p.m. until 6:00 a.m. (with certain exceptions for inmates who are released before 6:00 a.m. – but not at midnight – for job details). Inmates are also required to be in their cells at 4:00 p.m. for daily count. Again, there are exceptions for inmates who are on job detail, etc.

At midnight, there would be no reason for an inmate to be moving around the institution unless he was having a medical emergency (and would presumably be escorted). As a factual matter, I am not persuaded that officers who come on or leave post at midnight are required to engage with inmates on anything resembling a regular basis. Similarly, although the number of inmates out of their cells at 4:00 p.m. may be slightly higher than at midnight, most of those inmates who are exempted from count would presumably be at job details, medical appointments, etc., not walking the corridors. Accordingly, the only evidence I find compelling with regard to inmate correction being a regular occurrence pertains to those housing unit officers who come on or leave duty when large numbers of inmates are moving around the institutions – those who come on/leave post at 8:00 a.m.

Yet, the fact that this principal activity occurs is only half of the inquiry. In order to be compensable, there must be proof that the Agency “knows or has reason to believe that the work is being performed and has an opportunity to prevent that work from being performed.” 5 C.F.R. § 551.104. In this case, the record simply lacks concrete proof that the Agency knew or had reason to believe that officers have been monitoring and/or correcting inmate behavior pre- or post-duty on a regular basis. Unlike in the *FCC Tucson* case, there are no post orders or memoranda directing officers to engage – or not to engage – in this activity. Agency witnesses

said that they have seen non-duty officers interacting with inmates only “rarely.” The grievance itself references officers being required to be vigilant for emergencies, but not mundane interactions with inmates such as telling them to tuck in their shirts or stop leaning on gates.¹⁴

For the reasons stated above, the Union has not established that employees are entitled to overtime compensation for time spent walking to and from post.¹⁵

The final regular activity that the Union claims is compensable is shift exchange. Once relief officers arrive at post, they take possession of keys and equipment stored on post and exchange information with the outgoing officer. There is no dispute that the equipment exchange occurs. The Agency contends that the use of electronic log books supplants any need to exchange information verbally. I disagree. While the log books may be used to record specific details, Union witnesses credibly testified that there are certain nuanced aspects of activity involving inmates that is probably best conveyed verbally. Specifically, I find that a verbal exchange of information is particularly necessary in housing units and SHU posts, where inmates are housed. Verbal exchange is not relevant for Control, Mobile and other posts where inmates are not present or are transient (i.e., where patterns of behavior are not likely to be repeated).

All employees subject to this aspect of this Award exchange equipment on post. The equipment exchange ranges from relatively minimal in the housing units to extensive in the Control Center. Housing unit officers can exchange equipment – keys, radios, handcuffs and items stored on a shadow board – in one or two minutes. The General Post Orders have directed employees “not to remain past their shift for equipment to be accounted for by relieving staff.” I

¹⁴ The kinds of interactions that the employees testified occur regularly have never been so serious as to prompt an officer to file an incident report. Therefore, the evidence indicates that these interactions are not of a serious nature.

¹⁵ While I find that the Union was not precluded from asserting an argument related to “standby duty time,” there was no authority presented which would cause me to alter my conclusions regarding whether time spent walking to and from post is compensable – i.e., authority indicating that the standard for finding activities compensable as “standby duty time” is different from the standard for determining whether it is a principal activity or a compensable pre- or postliminary activity.

interpret this to mean that officers are not expected to inspect and count each item individually before the outgoing officer leaves post, i.e., to conduct a “joint inventory.”¹⁶

The activities involved in shift exchange are not principal activities of corrections officers – they are not what these employees are hired to do. However, exchanging equipment and information is integral and indispensable to the primary activities of corrections officers. As such, in order to be compensable it is subject to the *de minimis* standard and the requirement that the Agency knows or has reason to know that it is occurring.

The Agency knows that equipment exchange occurs at all posts where equipment is stored on post. I find that there is sufficient evidence to support that the Agency also knows that verbal information exchange occurs in housing units and at SHU whenever relief is made. The issue is whether any of these exchanges exceed the *de minimis* standard.

There is insufficient evidence that housing unit officers spend ten minutes or more conducting shift exchange. The testimony of the housing officers themselves was that they arrive fifteen minutes before shift, and their descriptions of the time it takes to go through screening, don a duty belt, and walk to post accounted for more than ten minutes of that time. Based on the descriptions of the items that are exchanged on post, I do not find it credible that equipment exchange would take more than a minute or two. There is also verbal exchange of information, but absent the occurrence of a significant event (for which there should be an Incident Report), I again find that the idea that information exchange could take five minutes on either end of the shift lacks credibility.

¹⁶ The Union introduced Specific Post Orders for Mobile 1, 2 and 3 which direct employees to conduct a “joint inventory of weapons, keys, equipment and post orders folder.” However, these orders were undated. There is no way to know whether they were in place after the General Post Orders instructing all employees not to conduct joint inventories.

There are posts where employees do not have a designated station. These include Corridor, Compound and Education Corridor. Officers assigned to these posts testified that, while the equipment they exchange is similar to that at housing units, their shift exchange time is sometimes extended because, upon arriving at post, they cannot always immediately locate the officer they are relieving. However, there is insufficient evidence that the additional time this would take could cause shift exchange to exceed ten minutes on a regular basis. The evidence does not support a finding that shift exchange on these posts requires ten minutes or more.

Mobile is a post that requires an exchange of firearms, munitions and a truck. Officers testified that they expel all rounds of ammunition from each firearm to count it individually and complete thorough inspections of the firearms and vehicle. If all of these things were done while the outgoing officer was still on post, the shift exchange would exceed the *de minimis* limitations. The issue is whether performing all of these activities while both officers are still on post is integral and indispensable to the officers' ability to perform their principal duties – or whether the activities do occur with the Agency's actual or constructive knowledge.

At some point there were Specific Post Orders instructing Mobile officers to conduct joint inventories of their equipment. It is unclear from the record whether or when those Specific Post Orders, which are not signed or dated, were modified. However, as the Union has the burden of proof in this case a finding in its favor would require evidence that those Specific Post Orders were in place during periods of time relevant to this grievance. There is no such proof. The General Post Orders in place at times relevant to this grievance instructed employees not to conduct joint inventories, and not to stay on post beyond the ends of their shifts.¹⁷ There was no

¹⁷ In this case, all of the Union witnesses testified that they come in early to conduct shift exchange so that the outgoing officer can leave on time. The General Post Orders and memoranda published in 2014 directed officers not to stay past the ends of their shifts. Therefore, I do not interpret the General Post Orders and memoranda as an

evidence presented to show that the Agency is or has been aware of Mobile officers coming to work early in order to conduct joint inventories during the time period relevant to this grievance.¹⁸ There are no supervisors present in the areas where Mobile officers conduct shift exchange, and those officers do not even need to enter the institution before or after reporting to their posts.

I do not find that conducting joint inventories of all equipment is integral and indispensable to the Mobile officers' abilities to perform their primary duties. These employees work outside of the secured areas of the institutions. They have little, if any, inmate interaction. There is no evidence that Mobile officers are subject to discipline if a piece of equipment or a key is missing or defective. Nor was there evidence of any particular job duty that they are required to perform immediately upon the start of their shift that would prevent them from conducting the necessary inventories and inspections immediately after making relief.

Because there was no evidence that simply exchanging equipment and information between incoming and outgoing officers – without conducting joint inventories – takes more than ten minutes, the Mobile shift exchange is not compensable.

The posts with the most equipment stored on post are SHU and Control posts. SHU posts house extra equipment used to control, inspect and restrain problematic inmates. Control houses all of the radios, keys and other equipment that is distributed to AM/PM officers entering the institution, as well as additional medical kits, tools, firearms and munitions.

acknowledgement that the Agency was aware of any issues with employees arriving early and performing compensable work prior to the start of their shift times.

¹⁸ The Union's grievance did raise the issue of employees conducting "joint inventories." The Agency's response was that the grievance was deficient in that it did not identify specific staff members or posts were performing the activities complained of. Of all of the Union's allegations regarding employees performing joint inventories, the allegation regarding Mobile officer is the most salient because that is the one post where there is evidence that officers were at some point specifically required to conduct joint inventories. However, the grievance did not put the Agency on notice of any issue with Mobile officers being unable to comply with the more recent General Post Orders, memoranda and training.

In *FCC Forrest City*, Arbitrator William McKee found that officers assigned to the powerhouse – which housed a significant amount of tools and equipment – were entitled to overtime compensation for time spent at shift exchange taking possession and inventorying those tools and equipment. There are several important aspects of the *Forrest City* award which distinguish it from the instant case. First, *Forrest City* involved an unsecured powerhouse post where inmates would come in and out to take tools needed to complete their duties. This created an enhanced need to account for all tools and equipment on a regular basis, to ensure that inmates had not absconded with anything. Second, that case involved a 24-hour operation that was staffed one officer at a time, with no overlap. Third, the arbitrator found that the powerhouse operation routinely involved ongoing maintenance and repair projects – sometimes involving outside contractors – that necessitated particularly lengthy verbal exchanges between incoming and outgoing officers. The Arbitrator awarded fifteen minutes of overtime per day to account for all of those factors.

At FCC Beaumont, the SHU units are always staffed by at least two officers. Indeed there are five SHU officers on duty at all times at the USP and four SHU officers on duty at all times in Medium and Low, other than between 9:45 p.m. and 6:00 a.m., when there are two in each institution. No single officer takes responsibility for all keys and equipment stored on post, and there is no need for two officers arriving at the same time to each conduct a full inventory and inspection of all equipment, particularly when there are three officers already on duty who overlap with them. There was no evidence that inmates have access to equipment stored in the SHU units. Although there was testimony that there is additional information to exchange verbally due to the fluid nature of the SHU unit (inmates being moved in and out of it for various reasons, etc.), again most of the activity in SHU occurs at a time when there are two or three

officers already on duty who can inform incoming officers of pertinent activities in the unit once they begin their shifts.

Control Centers at FCC Beaumont are manned by two officers at all times, except between 9:15 p.m. and 5:30 a.m. The only time a Control officer arrives and does not overlap with another officer is the midnight Morning Watch shift. The officer who comes on duty at midnight is the only officer accountable for all equipment and keys stored on post at any time. Inmates do not have access to the Control Centers. Testimony established that it is the Control 2 officer who is generally responsible for accounting for all keys and equipment. Control 2 is an AM/PM post, with fifteen minutes of overlap between shifts. The officer who comes on post alone at midnight is Control 1.

Forrest City is not applicable to the SHU and Control posts at FCC Beaumont because there is no evidence that any one officer in those units can be held accountable for all tools and equipment that could go missing due to inmate access. The General Post Orders instruct all officers against conducting inventories of equipment while their outgoing counterparts are still on post, and there is no compelling evidence to support a finding that the Agency does or should know that SHU and/or Control officers have been contravening those instructions out of legitimate concern of being held accountable for missing or defective items. Nor is there evidence to support a finding that SHU or Control officers need additional time to conduct a verbal exchange of information, given that there are multiple officers on duty during times of significant activity on each of those posts.

Finally, the Union presented evidence of other pre-shift activities that it urges are compensable. Several witnesses testified that they are sometimes issued detail pouches or food service slips, indicating which inmates are to be awoken and released early for morning job

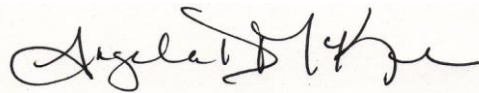
details. Were this a routine activity, there would be a question whether requiring employees to carry information to post for use later on post is compensable. However, the evidence was that officers are issued these slips “sometimes,” not on a regular basis. Therefore, the record is insufficient to support a finding that officers are routinely assigned compensable work carrying detail pouches or food service for which they are not paid.

In addition, there was testimony from a Lock and Security Specialist that he arrives fifteen minutes early to assist Control officers in issuing keys and equipment to officers coming on post. There is no evidence that assisting officers at another post is the work this employee was hired to perform or is integral or indispensable to his own duties. Nor is there evidence that the Agency had any actual or constructive knowledge of his doing so. None of this work is compensable.

VI. AWARD

Having found that the Agency did not suffer and permit the FCC Beaumont officers at issue in this case to perform compensable work in greater than *de minimis* amounts during the time period relevant to this grievance, the grievance is DENIED. The record does not support a finding that the Agency violated the Master Agreement and/or FLSA. All other requested relief not expressly granted is hereby DENIED.

January 27, 2017



Angela D. McKee
Arbitrator