

**IN THE MATTER OF THE ARBITRATION
BETWEEN**

AMERICAN FEDERATION OF)	
GOVERNMENT EMPLOYEES,)	
LOCAL NO. 171,)	
)	
UNION,)	FMCS CASE NO. 14-02317-7
and)	
)	
U.S. DEPARTMENT OF JUSTICE)	BEFORE: MARK L. REED
FEDERAL BUREAU OF PRISONS,)	ARBITRATOR
FEDERAL CORRECTIONAL INSTITUTION)	
EL RENO, OKLAHOMA,)	
)	
AGENCY.)	

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DATES OF HEARING: JULY 13, 14, 15, 27, 28, 29, 2015

HEARING LOCATION: FEDERAL CORRECTIONAL INSTITUTION
EL RENO, OKLAHOMA

In accordance with the provisions for arbitration contained in the Collective Bargaining Agreement entered into by the Federal Bureau of Prisons (Agency) and the National Council of Prisons Local 171 (Union), an arbitration hearing on this matter was held on July 13, 14, 15, 27, 28, 29, 2015, at the Federal Correctional Institution El Reno, Oklahoma (FCI El Reno). At the hearing the parties were afforded the opportunity to examine and cross-exam witnesses, to present and submit documentary and other evidence, and to argue their respective positions. Post-hearing briefs were filed, the last being submitted January 15, 2016, and the record was closed by the undersigned arbitrator on January 25, 2016.

STATEMENT OF THE CASE

FCI El Reno Union representatives Donald Boyt and Ronal Davis met with Associate Warden William Woods on March 12, 2014, in an attempt to informally resolve the grievance. The Union asserted that Correctional Officers are required to perform pre- and post-shift work for which they are not compensated in violation of the Fair Labor Standards Act (FLSA) 29 U.S.C. §§ 201-219 by requiring correctional officers to check in with the shift Lieutenant, traverse through various controlled doors, sallyports, don duty belts, exchange pertinent information and equipment, all prior to starting their shifts, and performing the outlined duties in reverse order after the completion of their shifts, without compensation.

On March 25, 2014, the Union met with Warden John Fox to attempt informal resolution. Warden Fox told the Union he would speak with Regional Director, Jeffrey Keller. A resolution was not reached and the Union filed a formal grievance with the Regional Director on April 17, 2014.

The formal grievance, applicable to "All Bargaining Unit Members" at the Federal Correctional Institution ("FCI") El Reno, alleged:

"On March 12, 2014, Local 171 became aware of a portal to portal issue at FCI El Reno. Management at FCI El Reno has assigned work to employees in violation of the law, agency rules and regulations. Employees are not being compensated for work they are performing on their own time at the Federal Correctional Institution El Reno in Oklahoma. The agency is requiring work above and beyond what is compensating its employees for. It has and continues to be the practice of management officials to require employees to perform pre and post shift work at the benefit of the agency without appropriate compensation. Employees are required to perform tasks such as clearing metal detectors, picking up equipment, check mail boxes, sign documents, pass through controlled doors, wait for gates, inventory weapons, count ammunition etc..., before assuming a post. Employees are further required/directed to communicate the day's events, exchange and account for equipment such as keys, radios, after a shift is complete. The FCI in El Reno is a medium security prison with a satellite prison camp on an area of over 52 acres with multiple housing units with a population in excess of 1500 inmates. Staff are expected perform pre/post shift – which varies between fifteen (15) minutes and thirty (30) minutes per day – in order to fulfill their duties. Staff are being held up by the metal detector, Control Center and by electronically controlled doors. The major problem that continues at the Federal Correctional Institution is there is no way staff can arrive at work, clear metal detectors, carry equipment, pass through controlled doors, check mail boxes, account for equipment, etc..., (performing pre and post shift duties) at the same time the officer their relieving is leaving.

5 CFR 550.401 allows that all time spent by an employee performing an activity for the benefit of an agency is hours of work. 5 CFR 550.402 requires the agency to exercise appropriate controls to assure only the work in intends to make payment is performed. 5 CFR 551.412 allows for preparatory time and concluding time to be paid to employees. Human Resources Manual PS 30000.03D section 610.1, Master Agreement Article 18, ad Operations Memorandum 214-95 (3000) dated November 1995 Subject: Institutional Shift Starting and Stopping Times. Specifically, the OPS Memo established basic shift overlaps in shift starting and stopping times for employees working at the Bureau of Prisons. Staff shall have their shifts and schedules to include reasonable time to travel from the control center to their assigned duty posts and return. Per section 2(b) of the Ops Memo, overlaps must be provided for shifts which require relief, as employees must be given time to arrive

later and leave earlier to be at the control center on time. Article 18 indicates that the standard work day is eight (8) hours. Staff at FCI El Reno are working more than eight hours without compensation. This is a clear violation of the Master Agreement, Ops Memo 214-95, section 610.1 of the Human Resources Manual.

The Master agreement Article 6 requires the agency to abide by all laws rules and regulations and by not complying with 5 CFR and 5 USC the agency violates the contract. The Master Agreement Article 6 requires the agency to treat all staff fairly in matters of personnel management and to watch for overpayments and under payments. The FLSA is codified in 5 CFR 551 and by violating 5 CFR section 551 the agency has violated this act by assigning work to Law Enforcement officers, and not compensating theme for this work the agency is in violation of all policies.

On March 13, 2014 the Union attempted to informally resolve this issue with Management in a meeting with the Warden. The parties could not reach a resolution."

(Joint Exhibit 2)

The grievance was denied by the Agency through the acting Human Resource Manager on May 16, 2014, initially on grounds included lack of specificity and the failure to properly identify affected bargaining unit members. (Joint Exhibit 3) The Union invoked arbitration on May 19, 2014. (Joint Exhibit 4).

RELEVANT PROVISIONS

Relevant provisions of the Master Agreement (Joint Exhibit 1) between the Federal Bureau of Prisons and the Council of Prison Locals, AFGE; Fair Labor Standards Act; Portal-to-Portal Act; Office of Personnel Management (OPM) Regulations; Department of Labor (DOL) Regulations; FCI El Reno Human Resources Manual; FCI El Reno Operations Memo 214-95; and the Portal Memorandums are referenced below.

MASTER AGREEMENT

ARTICLE 6 – RIGHTS OF THE EMPLOYEE

Section q. The Employer and its employees bear a mutual responsibility to review documents related to pay and allowances in order to detect any overpayments/underpayments as soon as possible.

1. should the Employer detect that an employee has received an overpayment/underpayment, the Employer will notify the affected employee in writing;
2. should an employee realize that he/she has received an overpayment/underpayment, the employee will notify their first line supervisor in writing;

ARTICLE 18 – HOURS OF WORK

Section a. The basic workweek will consist of five (5) consecutive workdays. The standard workday will consist of eight (8) hours with an additional thirty (30) minute non-paid, duty-free lunch break. However, there are shifts and posts for which the normal workday is eight (8) consecutive hours without a non-paid, duty-free lunch break.

RELEVANT AGENCY POLICY

Annual Portal-to-Portal Memorandums/Assigned Work Hours Reminders (“Portal Memorandums”) were submitted at the arbitration hearing. (Agency Exhibits 1, 2, 4, 5, 7)

NEGOTIATED 2013 PORTAL MEMORANDUM

The purpose of this annual notice is to remind 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 are directed to cease any such activity.

While I recognize that it may, at times, be necessary to work beyond your scheduled hours to accomplish a particular task, federal law provides that you are to be compensated for time worked. All such time must be requested and approved, in writing, by your supervisor and appropriate executive staff members, in advance of being worked.

While I appreciate the time and effort staff 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, staff who are required to pick up keys and/or equipment at the control center are considered on time if they are picking up their equipment from the control center at the start of their shift (e.g. 7:00a.m. for a 7:00 a.m. – 3:00 p.m. shift). 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 3:30 p.m. should be at the control center dropping off his/her keys and/or equipment at the control center no later than 3:30 p.m. Post orders, posted picture card files, contingency plans, etc., will be reviewed and read during scheduled duty hours. Management will schedule the appropriate duty time for staff to review these documents. Employees are not authorized to review these documents during non-duty hours. Staff may not take it upon themselves to accomplish these tasks during non-duty hours.

Those employees electing to remain at the institution for personal reasons, i.e., using government equipment in accordance with applicable regulations, etc., must receive prior approval from their supervisor.

I am confident that by working together we will continue to meet the needs of the agency while at the same time providing staff with proper compensation.

(Agency Exhibit 4)

STATUTORY PROVISIONS AND REGULATIONS

FAIR LABOR STANDARDS ACT

29 U.S.C. § 207(a)(1) of the Fair Labor Standards Act requires that all covered employees be paid overtime at the rate of one and one-half times their “regular rate” of pay for hours worked in excess of 40 hours a week.

PORTAL-TO-PORTAL ACT

29 C.F.R. 785.50 - Section 4 of the Portal-to-Portal Act.

(a) Except as provided in paragraph (b), of this section, no employer shall be subject to any liability or punishment under the Fair Labor Standards Act of 1938, as amended, the Walsh-Healey Act, or the Davis-Bacon Act, on account of the failure of such employer to pay an employee minimum wages, or to pay an employee overtime compensation, for or on account of any of the following activities of such employee engaged in, on, or after May 14, 1947:

(1) Walking, riding, or traveling to and from the actual place of performance of the principal activity or activities which such employee is employed to perform, and

(2) Activities which are preliminary to or postliminary to said principal activity or activities, which occur either prior to the time on any particular workday at which such employee commences, or subsequent to the time on any particular workday which he ceases, such principal activity or activities.

FEDERAL REGULATION

5 C.F.R. § 551.412 Preparatory or concluding activities.

(a) (1) If an agency reasonably determines that a preparatory or concluding activity is closely related to an employee's principal activities, and is indispensable to the performance of the principal activities, and that the total time spent in that activity is more than 10 minutes per workday, the agency shall credit all of the time spent in that activity, including the 10 minutes, as hours of work.

(2) If the time spent in a preparatory or concluding activity is compensable as hours of work, the agency shall schedule the time period for the employee to perform that activity. An employee shall be credited with the actual time spent in that activity during the time period scheduled by the agency. In no case shall the time credited for the performance of an activity exceed the time scheduled by the agency. The employee shall be credited for the time spent performing preparatory or concluding activities in accordance with paragraph (b) of § 551.521 of this part.

(b) A preparatory or concluding activity that is not closely related to the performance of the principal activities is considered a preliminary or postliminary activity. Time spent in preliminary or postliminary activities is excluded from hours of work and is not compensable, even if it occurs between periods of activity that are compensable as hours of work.

ISSUE

The parties stipulated to the following issue at the arbitration hearing:

Did the Federal Bureau of Prisons, FCI El Reno, Oklahoma, suffer and/or permit bargaining unit employees to perform work before and/or after their scheduled shifts without compensation, in violation of the Fair Labor Standards Act and the Parties' Master Agreement? If so, what is the remedy?

THE UNION'S POSITION

The Union argues that the Agency did suffer or permit bargaining unit employees to perform work before and/or after their scheduled shift without compensation, in violation of the FLSA and the parties' Master Agreement. The Union contends that the Agency is engaged in the practice of extracting compensable work from its employees and has skillfully avoided paying the officers the pay to which they are entitled. This uncompensated time reoccurs at the beginning and again at the end of each work shift, five work shifts per week. Relying on Lindow v. U.S., 738 F.2d 1057 (9th Circ. 1984), the Union urges that prevailing jurisprudence rejects the *de minimis* defense when the additional work is repetitive and regular. The Union argues that an application of the factors in Lindow results in the conclusion that the pre- and post-shift work is not *de minimis* and, therefore, must be compensated. Citing the holding in Integrity Staffing, the Union states that although the decision narrows the definition of integral and indispensable, the decision does not serve as a bar to its case.

The Union's position regarding the specific activities for which it seeks compensation is set forth below.

THE UNION'S WITNESSES

Donald Boyt worked as a Correctional Officer at the El Reno facility until May 2014, when he retired after 25 years of service. He did not testify as to any specific post, shift or positions. During a period spanning 18 years he held the following positions in the Union: Sergeant-at-Arms, Secretary/Treasurer, Chief Steward and President of Local 171. He met with Warden Fox in an informal effort to resolve the instant grievance.

Lisa Ann Bright formerly worked as Camp Secretary at the El Reno facility and retired after 32 years of service. Her testimony did not cover any period of time relevant to the recovery period. She acknowledged that when she received portal-related compensation in 1996, the Agency required staff to attend pre-shift Lieutenant's meetings.

Ronal Timothy Davis is a Senior Officer Specialist. He has worked at the El Reno facility in excess of 25 years. He currently holds the position of Sergeant-at-Arms with Local 171, as well as being on the E-Board. He believes that compensation should begin when he arrives at the key line to pick up his keys at the Control Center. He first met with Assistant Warden Woods to discuss the portal-to-portal issue in 2014. Mr. Davis testified to the duties he performed while working Housing Unit A Officer #1, day watch and the Special Housing Unit. Officer Davis testified that officers respond to emergencies approximately two times per month. He testified that the duties for SHU A, B, C and D units are pretty much the same. He always gets to the facility 30-35 minutes early in order to make "good relief." When he

arrives at "A" unit it is approximately 15 minutes prior to the time his shift is to begin at 8:00. He exchanges pertinent information with the officer he relieves, who in turn leaves at approximately 8:15. Arriving at the unit 15 minutes early means "good relief." He testified that when he is relieved, it is approximately 20 minutes prior to the time his shift is scheduled to end. He stated that when he relieves an officer he receives a radio, a cuff key ring and a housing key ring. It takes about 15 seconds to count the keys. When he is scheduled to work as SHU Rec Officer, he arrives to work at 6:30 a.m., although the assigned hours are from 7:00 to 3:30. The shift includes a 30 minute uninterrupted lunch period. Officer Davis said that as SHU Rec. Officer, he draws his equipment at the Control Center and does not relieve another officer. He testified that management's expectation on the post order is that his workday was to begin at 7:00.

Officer Mike Keller has been a Correctional Officer at the facility for approximately 19 years. He currently works in the Lock Shop Armory. He supplies the Control Center with weapons, ammunition, gas, pepper gas, explosives, locks, keys and other emergency equipment. Sometime in the spring he was asked by management to place battery chargers in the housing units. He did not testify as to working on a particular post or performing uncompensated work during the relevant period.

Brian Coker is a Senior Officer Specialist. He started working at El Reno in 2006 and he is a Senior Officer Specialist. He has held the position of Steward with Local 171 for the past five years. He testifies as to the SHU posts, two of which are 24 hour posts and SHU 3 and 4. The day watch for those two posts are 6:30 a.m. to 2:30 p.m. and the evening watch from 2:15 p.m. to 10:15 p.m. The SHU 3 and SHU 4 posts overlap. When he arrived for the

evening watch, he would usually arrive early enough to be at his post by 2:00. It would normally take him about 4-5 minutes to pass through the screening process. After the screening process he would put on his duty belt that has his radio holder, key clips and chain. He testified that in the time he has been working the SHU #4 evening watch post, he has never been told that he was at work too early by a lieutenant, nor has he ever been disciplined for arriving at work too early. Officer Coker testified that the duties hours for Mobile 1 and 2 are the same. When he relieves the other staff member, he asks if everything is accounted for, if anything is going on and at that point the staff member leaves, at which time he takes over the vehicle, drives back to the clearing barrel to check his inventory of weapons. Inventory consists of going down a list of items to make sure all the items are accounted for. He also ensures that all weapons are cleared for duty carry. His relief takes several minutes unless the relieving officer wants to check his inventory. He has never been told by a lieutenant that he is arriving at work too early. He testified that Compound #2 duty hours on evening watch are 4:00 to 12:00 p.m. He usually arrives at 3:15 and goes through the same procedures. He does not have to stop at Control since it is a 24-hour post. Relief usually takes place at the Compound Shack taking only a few minutes. He arrives at the shack around 3:30 and the officer he relieves leaves at 3:35. On a good day his relief arrives at 11:30 p.m. and exits the facility around 11:40 or 11:45. When asked if he had any trouble getting paid for working overtime, he replied no. When Union counsel asked how he was working more than eight hours he said it takes time to get in and out of the facility. When asked if ever responded to an emergency from the parking lot, he said probably twice within a nine year period. Agency counsel asked Coker what time he arrived at work when on Mobile Patrol and was told 3:00, although the post orders say that watch is to run from 4:00 until 12:00. When asked why he

came to work an hour early, Coker replied, "that's how it's done. Everyone does it." His explanation for arriving that early was due to not having to go through security. He did not say that the officers were adjusting their shifts, only that they were working eight hours and coming in early. When asked about relief at Compound #2, he stated the shift starts at 4:00 p.m. although he arrives at 3:30. It only takes 3-4 minutes for him to make relief, at which time the officer working the previous shift leaves 25 minutes before his scheduled departure. Officer Coker's reason for departing early was it constituted good relief and the officer needed to exit the facility.

Codie Phelps is a Tool and Die foreman in the UNICOR factory. He has been employed in that capacity ever since he was hired on in December 2008. He is also a steward with Local 171. UNICOR is not a 24 hour post and he does not relieve any other employee. His duty hours are from 7:00 until 3:00. He does not take a lunch break; therefore, his shift works a straight eight hours. He arrives at the facility around 6:45 a.m. in order to "beat the inmates" out to his shop. After clearing screening and donning his duty belt, he goes to Control to obtain a key ring, radio, cuffs and other material he may need. It takes him about ten minutes to walk from Control to UNICOR. The inmates arrive at his gate at 7:10 and their starting time for work is 7:20. Phelps stated that UNICOR is not the type of facility that uses overtime, since the work is dictated by product workload. He admitted on cross examination to receiving a memorandum from the Warden in September 2013 stating that his shift was to begin at the Control Center. He did acknowledge that his pay started upon passing through the Control Center.

Dustin Kevin Vigil is a Senior Officer Specialist at FCI El Reno. He has been employed with facility since September 2011. He testified as to his experience working as Housing Unit Officer #1 on units C and D Day Watch, Control Officer #1 on Day Watch, Control Officer #2 on the a.m. shift SHU #1 and SHU #2 Officer on Day Watch and Compound #2 officer on Day Watch. When assigned to the Day Unit Watch, he arrives at 7:30 because it is the time when a big rush occurs at the body scanner. Despite the fact the body scanner is no longer used, he still arrives at 7:30. On a good day it takes him several minutes to process through both sallyports. On a bad day it takes about 5-10 minutes. He then proceeds to Control to determine if there is anything he needs to take to the unit. Prior to April 2015, he was picking up a radio battery and detail pouch there. Upon relief, the other officer leaves around 8:10 or 8:15. He usually leaves the unit around 4:10 or 4:15. He said that the duties for C Unit are identical to D unit. When working the Control Officer #2 the hours are from 6:00 a.m. to 2:00 p.m. he arrives at 5:45 because he is not relieving an officer. He leaves around 2:05 or 2:10 upon being relieved and has never been told he is arriving early. The duty hours for SHU #1 Officer are 8:00 a.m. to 4:00 p.m., although he shows to the facility at 7:30. He goes through the same screening process as that outlined above and he gets down the SHU #1 unit at 7:50 or 7:55. He said that when processing through the front entrance, he does so with about 10-15 other officers. It takes him about 10 minutes to make relief, chiefly because there are so many handcuffs to account for. It is 4:10 or 4:15 when he is relieved. When asked, he said the only difference between SHU #1 and SHU #2 was that SHU #2 is upstairs. His duties as Compound Officer #2 are basically the same as those for Compound Officer #1. It takes 2-5 minutes for him to make relief. Although he was denied overtime approximately 1 ½ years prior to the arbitration, he admitted he was given an hour

overtime one month prior to the hearing for responding to an emergency. He said he was required to check in with the Lieutenant although that is not a requirement in the post order. The post orders for the Day Unit Watch require that he report to his assigned unit and relieve the morning watch, after which he is to make his presence known to the Lieutenant. It does not require that he drop by the Lieutenant's office. No activity is to take place until he relieves the day watch. He stated that it takes 5-10 minutes to relieve the Housing Unit Officer, but agree that at times the exchange between officers is nothing more than "here's keys, radio, quiet night, I'm out."

Donald Ferrebee is a Senior Officer Specialist at FCI El Reno. He has been employed with the facility since November 2003. His post for the quarter was Compound 1 morning watch. At the time of the arbitration he had been a Union steward for approximately six months. He stated he gets to the facility between 11:45 and 11:50 at which time he processes through security and then goes to meet with the Lieutenant to see if anything is going on that day. He then proceeds to the Compound Shack to relieve the officer at 12:00. Although the official count is to begin at 12:01 he said in all actuality it did not start until 12:05 or there about. After doing all of his paperwork, he arrives at the unit around 12:10 or 12:15. On several occasions he was told he was arriving too early to work.

Gregory John Strider is a Senior Officer Specialist at FCI El Reno. He has been employed at that facility for ten years. Prior to coming to El Reno, he was employed as a Correction Officer at FCI Oxford Wisconsin. He testified that when he works SHU #1 the duty hours are from 8:00 to 4:00 p.m. He arrives at 6:45 and reaches his post at 7:00, the relieved officer leaving at 7:15. His relief shows between 3:00 and 3:30. When asked about

duty hours for the SHU Rec. day watch post, he said he has seen up to 3:30. He arrives between 6:30 and 6:45 a.m. Although there is no relief for that position, he usually leaves at 3:00. He has never been cautioned about leaving prior to the scheduled departure hour. He skips his lunch hour in order to leave his post 30 minutes earlier than mandated. Although the duty hours for Camp 1 Day Watch Officer are from 8:00 to 4:00, he said that he and the other officers had an agreement that they would arrive an hour early for their shift. By doing so and adjusting their shifts, the officers leave one hour prior to their posted departure time. The Lieutenant was not present to see the officers' one hour adjustment.

The Union presented testimony of Officers Davis, Coker, Vigil, Ferree and Strider for evidence regarding posts in the Correctional Services Department. The witnesses testified to the pre- and post-shift activities they perform while assigned to the following posts, shifts, and positions within the Custody Department.: SHU (Special Housing Unit) #1 Day Watch; SHU #2 Day Watch; SHU #3, p.m. Shift; SHU #4, p.m. Shift; SHU Rec. Officer; Housing Unit A #1, Day Watch; Housing Unit C #1, Day Watch; Housing Unit D #1, Day Watch; Mobile Patrol #1, Evening Watch; Mobile Patrol #2, Evening Watch; Compound #1, Morning Watch; Compound #2, Day Watch; Compound#2, Day Watch; Control #1, Day Watch; Control #2, Day Watch; Control #2, Evening Watch. Regarding the Unicor factory, the Union presented the testimony from Officer Cody Phelps.

THE AGENCY'S POSITION

The Agency contends there should be no recovery in this case. The majority of testimony provided at the hearing by the Union's witnesses pertained to pre- and post-shift

activities which are non-compensable as a matter of law. There is only one preliminary or postliminary activity in question and that is a relief procedure which takes no more than 1 to 3 minutes, and work performed which is under 8 hours and 10 minutes is considered *de minimis* under the law. The Agency argues that the Union has misapplied both statutory and case law regarding the activities at issue. The Agency also submits that the Union misrepresents the Agency when it alleges that FCI El Reno has been operating in violation of the FLSA for over twenty years and trying to avoid paying the officers compensation to which they are entitled. The Agency contends that significant efforts have been made to eliminate any potential portal-related issues at FCI El Reno.

The Agency's position regarding the activities for which the Union seeks compensation is set forth below.

THE AGENCY'S WITNESSES

Michael Patrick is the Administrative Lieutenant at FCI El Reno. He has been employed with the Agency since 2002. He previously served as an Operations Lieutenant and was the Agency representative during the instant arbitration. The following items are exchanged with other Operations Lieutenants during a shift equipment exchange: keys, radio and the passing on of pertinent information such as inmates in the hospital and those out on med trips. The entire process takes about two minutes. Formerly, he was a Correctional Officer at USP Lee and USP McCreary. He testified that from what he has observed at the facility, the Correctional Officers' relief is not as time consuming as that of lieutenants. His expectation is that Correctional Officers' shifts begin and end on their respective posts and that he is in his office during their shift exchange. There is no need for officers to stop by his

office as information is not disseminated in that manner. Any information dissemination is telephonically via conference call. Lt. Patrick stated that a SHU #1 morning watch officer should be on post at 8:00 a.m. The exchange would entail any information passed on to him by the evening watch, confirm base count, confirm meal count and then exchange equipment i.e., keys, radio and cuffs. The entire process takes several minutes. The shift exchange for SHU #2 takes about a minute. SHU #3 and #4 have an overlap of about 15 minutes. He has observed the relief of Compound Officers which entails relaying pertinent information and the exchange of cuffs, radio and keys. That process takes approximately one minute. He testified the term good relief means you get what you give. That is, if you arrive at 7:30 to your post, then he is expecting to get 3:30. Meaning in essence, if a shift is scheduled to begin at 8:00 and end at 4:00, the officer is still working eight hours, notwithstanding the fact he is arriving and leaving 30 minutes early. He confirmed that there is a good relief practice at FCI El Reno. Regarding overtime, he said that any work that is done in excess of five minutes, he approves 15 minutes. Upon cross examination he stated that he has never disciplined any officer for coming in early. He has been aware of officers arriving and leaving early for their shifts at FCI El Reno, as well other prisons he worked. He said he considers himself good relief and arrives to work about 30 minutes early. Any discussions he has had with officers arriving to work too early involved those officers designated as extras.

Richard Salmon is a Unit Manager at FCI El Reno. He has worked at the facility since 1990. From 1994 until 2013 he served in the capacity as Lieutenant. He testified as to the duties of Activities and Operations Lieutenants. After 4:00 on weekends and holidays, the Operations Lieutenant serves basically as the Warden of the institution. An Activities Lieutenant is gaining experience to be an Operations Lieutenant. Additionally an

Administrative Lieutenant is responsible for the maintenance and compiling all daily rosters, quarterly rosters, yearly annual leave schedules, firearms, and maintenance of post orders. Basically he serves as the Captain's administrative assistant. He stated that policies came down from either Congress or the Central Office and that the Agency is policy driven. In his position he communicates post orders to employees, typically in memo form. During the time he was Operations Lieutenant in 2011 until 2013, it typically took officers two to three minutes to make an exchange of equipment in the housing units. He has had the opportunity to observe officers make shift changes to date and said it takes the same amount of time as it did in 2011 to 2013.

Tom Glenn retired from the Agency in 2013, after 22 years of service. His last position at FCI El Reno was General Foreman. He supervised the powder paint shop, the welding foreman, press department, tool and die and the tool room. The work hours at the time of his retirement were 7:00 to 3:30. The starting point for the UNICOR staff is the Control Center as that was the place designated in an earlier arbitration award. He stated that it normally took about 10-15 minutes for the water in the paint machines to warm up in the shop. He denied ever telling Phelps he needed to come to work early.

Ted Carey is currently employed as UNICOR General Foreman. He started at FCI El Reno in 2001 in Food Service, then went to UNICOR as Relief Foreman and started helping in the Quality Assurance Department in 2009. He was promoted to General Foreman in 2013. He stated that he expects his staff to be the Control Center at 7:00 because that is when their shift begins and that information has been conveyed to his staff. No one has ever told him he needed to be at work earlier than 7:00 to heat up the machines in UNICOR.

Sean Janson is the Captain at FCI El Reno. He has been employed at the facility for two years. He began his employment with the Agency 1996. As Captain of the facility, he is responsible for the day-to-day security of the institution, which covers 14 shifts. The facility has thirteen 24 hour posts and three 16 hour posts. He was first put on notice about a portal issue in 2014, but does not believe the institution has a portal issue because they do not conduct any kind of roll call. From what he has been able to observe at the prison, there is nothing different during a shift exchange then what he observed when at his prior assignments when he was a Correctional Officer. As the captain he authorizes overtime compensation and has never denied overtime. He stated he arrives at work during high traffic time and it takes him five minutes from the time he parks his vehicle until he reaches his office. Prior to arriving at his office, he draws a radio from Control.

Brannon Grady has been the Associate Warden at FCI El Reno since 2013, in charge of Industries, Education and Recreation. He has been employed with the Agency since 1995. When he started at the facility the hours were 7:00 to 3:30, but recently changed to a straight eight hours, 7:00 to 3:00. His office is in the Administration Building where he can observe employees coming and going from the facility. He works 7:00 to 3:30. He comes to work at the same time as Correctional Officers and processes through security with them. He said it usually takes him about 2-3 minutes to clear security. Tool call is around 2:40-2:45 so at the end of the day, staff is proceeding toward the main gate. UNICOR is self-sustaining and does not receive funding through the Agency. However, lately it has not shown a profit. When questioned if he had ever instructed his staff to come in early to warm up equipment, he said not and he has never denied any staff member overtime for work performed.

DISCUSSION

As provided above, the Fair Labor Standards Act 29 U.S.C. § 201 et seq. (FLSA) was enacted to ensure that workers get paid fairly for the time they work. The FLSA requires that all employers, in both the private and public sectors, pay employees who are not exempt, premium or overtime pay for each hour of work over forty (40) hours per week. The Portal-to-Portal Act (29 U.S.C. § 254) narrowed the coverage of the FLSA by exempting employers from liability for future claims based on two categories of work-related activities: (1) walking, riding, or traveling to and from the actual place of performance of the principal activity or activities which such employee is employed to perform, and (2) activities which are preliminary to or postliminary to said principal activity or activities which occur either prior to the time on any particular workday at which such employee commences, or subsequent to the time on any particular workday at which he ceases, such principal activity or activities.

Under federal-sector regulations and case law the terms “principal activity” and “integral and indispensable activity” apply to different classes of activity. Principal activities are the duties that an employee is “employed to perform,” and are always compensable, whereas activities that are “closely related” and “indispensable to” the performance of principal activities are “preparatory” or “concluding” activities that are only compensable if they are performed for more than ten minutes per workday. OPM 5 C.F.R. § 551.412 provides: If an agency reasonably determines that a preparatory or concluding activity is closely related to an employee’s principal activities, and is indispensable to the performance of the principal activities, and that the total time spent in that activity is more than 10 minutes

per workday, the agency shall credit all of the time spent in that activity, including the 10 minutes, as hours of work.

The Union argues for the application of the regulations found at 29 C.F.R. Part 785. However, as the Agency correctly states in its closing brief, those regulations are promulgated by the Department of Labor, not the Office of Personnel Management (OPM), and implement by the FLSA in the private sector only. Citing *Haviland v. Catholic Health Initiatives-Iowa, Corp.*, 729 F.Supp. 2d 1038, 1055 (S.D. Iowa 2010)(citing cases); *AFGE Local 1815 and U.S. Dept. of the Army, U.S. Army Aviation Center and Fort Rucker, Fort Rucker, AL*, 53 FLRA 606, 624 (September 30, 1997). Title 5 C.F.R. Part 551 implements the FLSA in the federal sector. In implementing the FLSA in the federal sector, OPM specifically noted the administration of the FLSA need not be, and is not, consistent with the regulations promulgated by DOL. 5 C.F.R. § 551.101. Only the regulations promulgated by OPM at Title 5 C.F.R. Part 551 are applicable to and controlling in this case. Additionally, the FLRA stated in *BOP and Federal Medical Center, Lexington*, 68 FLRA 932 (2015) that it has previously held that there is no merit to the argument that § 551.412(a)(1) must be construed consistently with various authorities. Citing among other cases *FCC Yazoo*, 68 FLRA at 270 and *BOP Bryan*, 67 FLRA at 238. The Authority went on to state in *Lexington* that “while several of the decisions that the Union cites did involve the judicial doctrine of de minimis, those decisions are inapposite because they do not involve application of § 551.412(a)(1), a government-wide regulation that is generally applicable to civilian employees of the federal government and that contains the ten-minute requirement.” Citing 5 C.F.R. §§ 551.102(a) and 551.101(b).

The FLRA reiterated this principal in BOP Bastrop and AFGE, Local 3828, 69 FLRA 176 (2016), wherein it provided examples of both Authority and federal court precedent establishing clearly that §551.412 prohibits an overtime award of ten minutes or less for preparatory or concluding activities. FLRA precedent included U.S. DOJ, Fed. BOP, Fed. Corr. Inst, Sheridan, Or., 65 FLRA 157, 159 (2010); U.S. DOJ Fed. BOP, Fed. Corr. Inst, Terminal Island, Cal., 63 FLRA 620, 624-25 (2009); U.S. DOJ, Fed. BOP, U.S. Penitentiary, Leavenworth, Kan., 59 FLRA 593, 598 (2004) (Leavenworth); and federal-court precedent included *Riggs v. United States*, 21 Cl. Ct. 664, 683 (1990).

Also potentially relevant to this case is the continuous-workday doctrine which provides that activities that take place between the first and last principal activities of the day – including those that otherwise would be non-compensable under the FLSA – are compensable because they occur during the continuous workday. FCI Allenwood, 65 FLRA at 999 (citing IBP, Inc. v. Alvarez, 546 U.S. 21).

THE PRE- AND POST-SHIFT ACTIVITIES

The central question presented is whether the officers are performing work before and/or after their scheduled shifts without compensation. The United States Supreme Court provided clarity regarding what constitutes an integral and indispensable activity in Integrity Staffing Solutions, Inc. v. Busk, (135 S. Ct. 513, 2014). The case involved employees of Integrity Staffing Solutions, Inc., who are employed by the company to retrieve products from warehouse shelves and package them in boxes for delivery. For the purpose of theft prevention, Integrity Staffing requires the warehouse workers to undergo security screening, taking up to twenty-five minutes, before leaving the warehouse each day. In 2010, two

employees sued Integrity Staffing, Inc., on behalf of a putative class of the company's employees, alleging violations of the FLSA, as amended by the Portal-to-Portal Act of 1947.

In reversing the U.S. Court of Appeals for the Ninth Circuit, the Supreme Court held that employee's time spent waiting to undergo and undergoing security screening before leaving the workplace is not an integral and indispensable part of the employee's principal activities, and therefore is not compensable. The Supreme Court reasoned that the principal task the workers were employed to perform was stocking warehouse shelves and packing products in boxes.

Expressly rejecting the Ninth Circuit's analysis, which had focused on whether an employer required an employee to engage in a particular activity and whether it benefited the employer. The Court explained even activities required by the employer and for the employer's benefit are "preliminary" or "postliminary" if not integral and indispensable to "the productive work that the employee is employed to perform. An activity is "integral and indispensable to the principal activities that an employee is employed to perform if it is an intrinsic element of those activities and one with which the employee cannot dispense if he is to perform his principal activities." The Court determined that the security screenings at issue were not the principal activity the employees were employed to perform; that the screenings were not integral and indispensable to the employees' duties; and the employer could have eliminated them without impairing the employees' ability to complete their work. The integral and indispensable test is tied to the productive work that the employee is employed to perform and the focus of the test is on the nature of the activity and its relationship to the principal activity.

The Union argues “Prior to the Supreme Court's 2014 Integrity Staffing v. Busk decision, an 'integral and indispensable' activity commenced the continuous workday and marked the beginning of the employee's compensable work time. Alvarez, 546 U.S. at 37.” This argument is contrary to 5 CFR 551.412(a)(1), which clearly provides that if a preliminary or postliminary activity is closely related to an employee's principal activities, and is indispensable to the performance of those activities, the total time spent is compensable only if those activities amount to more than ten minutes per work day.

Since Integrity Staffing, decisions of the Federal Labor Relations Authority (FLRA) have provided guidance in applying that standard in similar “portal” cases to determining whether an activity is compensable. In FCI Tallahassee and AFGE Local 1570, 68 FLRA 863, 866 (August 2015), citing Integrity Staffing, the FLRA reiterated that an activity is integral and indispensable to the principal activities that an employee is employed to perform if it is an intrinsic element of those activities and one with which the employee cannot dispense if he is to perform his principal activities. Noting that Integrity Staffing had been decided while the arbitration was pending, it remanded the case to the arbitrator to determine if the officers in question performed preparatory and concluding activities for more than ten minutes per workday, and if so, apply the Integrity Staffing standard to assess whether those individual activities are integral and indispensable activities.

Security Screening

The Union alleges that the "Agency has violated the FLSA by requiring officers to perform work for which they are not compensated. Management at FCI El Reno requires employees on all shifts to proceed through a metal detector, pass through secured doors, receive and return equipment such as keys, batteries, details pouches, etc. to the institutional control center before and after their shifts, and exchange pertinent information before coming on to a shift. It routinely takes officers anywhere from 5-10 minutes to perform these duties before and after their shifts. This amounts to 10-12 minutes per day that the officers are performing work for the Agency for which they are not compensated."

Witness for the Union and the Agency testified at the regarding the amount of time the security screening takes at FCI EL Reno. Union Witness Officer Brian Coker, testified to the SHU #4 evening watch post, stated that would take him about 4-5 minutes at the most to pass through the screening process. Arriving and departing times for staff vary considerably from post to post, and shift to shift, and most witnesses testified that the time the screening took varied depending on the number of other people also processing through.

Agency witness Brannon Grady, Associate Warden at FCI El Reno since 2013, confirmed that it usually takes about 2-3 minutes to clear security. While the testimony regarding security screening was fairly consistent, the Agency argues that for the majority of the posts at issue, the Union presented the testimony of only a single employee, intentionally chosen to testify due to his own personal habits. For example, Union witness Virgil testified that even after the security procedures changed and shorten the length of time it took to complete security screening, he continued to arrive early "out of habit."

The Union has made no showing that the security screening is a compensable activity. The Union's closing brief states that the security screening is non-compensable under Integrity Staffing, and that the officers should be compensated immediately after clearing the metal detectors when the officers put on their duty belts.

The Agency argued at hearing and in its closing brief that the security screening is not a compensability activity as a matter of law. Noting the Court's statement in Integrity Staffing that the company in that case "did not employ its workers to undergo security screenings" and the screenings were not "integral and indispensable" to the employees duties as warehouse workers, the screening time was not compensable.

The Agency argues that the screening procedures are not integral and indispensable under the FLSA and the Portal to Portal Act, citing cases prior to Integrity Staffing, for example, Bonilla v. Baker Concrete Constr., Inc., 487 F.3d 1340, 1344 (11th Cir. 2007), wherein it was held that time construction workers spent going through airport security to report to work was not compensable under the FLSA, and Gorman v. Consol. Edison Corp., 488 F.3d 586, 593 (2d Cir. 2007), where the Court determined that while security procedures including waiting in line and passing through a radiation detector, x-ray machine, and explosive material detector were necessary in the sense that they were required and serve the essential purpose of security, they were not integral to the nuclear power station's employees' principal activities and therefore non-compensable.

The Agency urges application of the reasoning of Balestrieri v. Menlo Park Fire Prot. Dist., 800 F.3d 1094, 1101 (9th Cir. 2015), decided after Integrity Staffing. The Ninth Circuit stated in that case that loading up turnout gear is "two steps removed" from the activity a

firefighter is employed to perform – fighting fires – therefore it is not integral and indispensable to it. The Agency urged application of Balestrieri in their argument regarding the other preparatory and concluding activities at issue also.

In Balestrieri, the Court determined that firefighters are not entitled to overtime compensation for the time spent taking gear to temporary duty stations. The Court stated that because the Fair Labor Standards Act provides that firefighters are “employed by a fire department of a municipality,” have “the legal authority and responsibility to engage in fire suppression” and are “engaged in the prevention, control, and extinguishment of fires or response to emergency situations where life, property, or the environment is at risk,” and loading turnout gear to report to a shift at a visiting station is “two steps removed” from that activity, and not “integral and indispensable” to it. “[I]t is not enough to make an activity compensable under the Fair Labor Standards Act that the employer requires it and it is done for the benefit of the employer. Even activities required by the employer and for the employer's benefit are “preliminary” or “postliminary” if not integral and indispensable to “the productive work that the employee is employed to perform.” Id. (quoting *Integrity Staffing Solutions, Inc. v. Busk*, 135 S. Ct. at 519).

As with each of the activities in question, the Union has the burden of showing by a preponderance of the evidence that such work is being performed and the work is not being compensated. The officers’ testimony regarding the time it takes to pass through the security screening as set forth above was credible.

The evidence supports the finding that the security screening takes on average between two and three minutes. The Union presented no evidence however that the officers

at FCI El Reno would be unable to accomplish their principal activity of securing the prison without the security screening. The Union has not met its burden in establishing that the security screening is a compensable activity.

Donning and Doffing of Duty Belt

The Union contends that donning a duty belt is necessary for the officers to perform their work and that the officers' compensation should begin once they pass through the security screening. A metal agency-issued keychain is required by the Agency to affix keys to the officers' body and the metal detectors have made it so donning must occur on FCI El Reno premises. If the officers do not have a duty belt, key chain, or OC spray holder, they will not be issued keys or OC spray, and they will not be able to perform their principle duties of securing inmates. Thus, the donning of this equipment starts the workday for the officers at FCI El Reno. The donning of this equipment is intrinsic to the Correctional Officers' work because they cannot be dispensed with if they are to perform their principle duties.

The Union argues that before Integrity Staffing, an 'integral and indispensable' activity commenced the continuous workday and marked the beginning of the employee's compensable work time, citing among other cases, IBP Inc. v. Alvarez, 546 U.S. 21, at 37, (2005). The Union also relies on the Department of Labor Wage and Hour Advisory Memorandum No. 2006-02 statement that no matter how minimal, the time that an employee is required to spend putting on and taking off gear on the employees is compensable work under the FLSA, and that any clothes changing on the employers' premises, which is required by law, the employer or the nature of the work

is compensable.

The Agency rejects the Union's contention that donning a duty belt is a compensable activity. The Agency cites FCI Allenwood, wherein the FLRA cited three factors to evaluate in determining whether duty belts are compensable: 1) whether officers are actually required by the employer to wear the duty belts; 2) whether the belts must be donned immediately after passing through the screening site; and 3) whether the duty belt is a type of protective gear and, if so, whether it is unique or generic. FCI Allenwood, 65 FLRA at 999-1001. The Agency argues that the officers are not required to wear of a duty belt and it is a compensable activity as a matter of law. Under the standard set in Integrity Staffing, donning and doffing a duty belt is clearly not an integral and indispensable to the employees' duties as Correctional Officers nor is it an intrinsic element of their duties. The Agency urges application of Balestrieri, arguing that donning a belt is "two steps removed" from the activity the officers are employed to perform therefore it is not integral and indispensable to it. In this case, the Agency argues putting on a duty belt – with no management directive as to when to put the belt on, how to wear the belt, or what kind of belt to buy – is too far removed from the duties a correctional worker is employed to perform.

The FLRA held in BOP and Federal Medical Center, Lexington, 68 FLRA 932, 936 (2015), that the Integrity Staffing standard is to be applied to the security screening, and if the security screening is compensable, then donning duty belts and chains and traveling would be compensable as part of the continuous workday. However, if the security screening is not compensable under Integrity Staffing, then donning duty belts and chains and traveling to the control center are compensable only if they are either principal

activities or integral and indispensable to principal activities and last over ten minutes per workday.

The Union provided no evidence in this case that the donning of a belt is a principal activity or an integral and indispensable activity. Testimony contradicts the contention that donning a belt is necessary to the officers' principal activity. Importantly, the Union's witnesses Davis, Ferree, and Strider each testified in great detail to the sequence of events that start their shift but they did not describe donning a duty belt.

Based on the above, the Union has not met its burden in establishing that the donning of a security belt is a compensable activity.

Walking and Passing through Secured Doors

The Union argues that the officers should be compensated for the time it takes to travel through various controlled doors and sallyports. It argues that the officers are engaging in a compensable activity as they travel through the facility to their posts.

The Agency argues that the Union's relies on cases like Anderson v. Mt. Clemons Pottery, 328 U.S. 680, 690-92 (1946) and Tennessee Coal, Iron & R. Co. v. Muscoda Local No. 123, 321 U.S. 590 (1944), although these cases were overturned by statute. The Agency notes that the precise aspect the Union cites in Anderson was overturned by the Portal-to-Portal Act more than fifty years ago (that the FLSA requires compensation for all time during which an employee is necessarily required to be on the employer's premises, on duty or at a prescribed workplace, including time spent walking to work on the employer's premises.) As the Supreme Court noted in Integrity Staffing, after the Anderson

and Tennessee Coal decisions, Congress responded to the flood of litigation that ensued by passing the Portal-to-Portal Act, exempting employers from liability for “(1) walking, riding, or traveling to and from the actual place of performance of the principal activity or activities which such employee is employed to perform, and (2) activities which are preliminary to or postliminary to said principal activity or activities which occur either prior to the time on any particular workday at which such employee commences, or subsequent to the time on any particular workday at which he ceases, such principal activity or activities.” Id. at 517.

The Agency opposes the Union’s contention that travel without work is compensable. Citing Fed. Bureau of Prisons U.S. Penitentiary Atwater, California and Am. Fed’n of Gov’t Employees Council of Prison Locals Local 1242, 68 FLRA 857, 859 (Aug. 27, 2015); United States Dep’t of Justice Fed. Bureau of Prisons United States Penitentiary Terre Haute, Indiana (Agency) & Am. Fed’n of Gov’t Employees Local 720 Council of Prison Locals, Council 33 (Union), 58 FLRA 327, 329 (2003).

In Atwater, 68 FLRA at 860, the FLRA stated “Generally, under the Act, the time that an employee spends traveling to his or her post is not compensable unless the employee is required to engage in a principal activity during that travel. In both Allenwood and Terre Haute, arbitrators found that certain prison employees were entitled to compensation for their travel time in a secured area on the way to their duty posts. In both cases, the Authority found the awards contrary to law because the arbitrators had made no findings that the employees performed principal activities during their travel. Thus, consistent with Reich, as well as the Authority’s decisions in Allenwood and Terre Haute, it found that the mere possibility that the officers could be called upon to perform a principal duty while traveling is not sufficient, by

itself, to make the travel here compensable under the Act. See *id.*, Allenwood, 65 FLRA at 1000, explaining that “be[ing] prepared to respond in the event of an emergency” was not sufficient to make an activity a principal activity; Terre Haute, 58 FLRA at 330, noting that the secure nature of an institution does not make travel within the institution, by itself, a principal activity.

The Agency contends there should be no recovery for any posts. Some posts have built in walk times and travel time may depend on the particular posts’ relief. However, individual officer’s arrival or departure time is irrelevant. Rather the inquiry is when – and for how long – an officer begins performing a principal activity. See Atwater, 68 FLRA at 859 (2015). And even then, those activities must exceed eight hours and ten minutes. See Yazoo City, 68 FLRA at 269, 270 (2015).

The Union has not presented any evidence that the officers engage in a principal activity while traveling and passing through sallyports to reach their posts. Based on the above, the Union has not met its burden in establishing that the donning of a security belt is a compensable activity.

Batteries and Equipment

The Union argues that throughout much of the recovery period, Correctional Officers have been required to retrieve and sometimes return batteries and other equipment at the control center. The Union asserts that these activities are integral and indispensable to the employees’ principal activity and thereby commence, and sometimes end, the compensable, continuous workday.

Regarding the batteries, the Union asserts that some officers had to stop by

Control to pick up a fresh radio battery until April 2015, when battery chargers were placed at all posts. Battery chargers were placed in the SHU and Compound shack before the filing of the March 2014 grievance, so employees working in those areas would have had to pick up a battery at the control center.

The Agency counters that when an officer reports to a post to relieve another officer, the radio is functioning. It is the Corridor Officer's responsibility to collect and return used batteries to the control center and it is the Corridor Officer's to deliver a fresh battery, should one be needed, after an officer assumes a post. It is also not essential to an officer's job to return a battery at the end of a shift. The Corridor Officers collect and return used batteries to the Control Center during their shift.

The Agency argues that of nine testifying witnesses for the Union, only Officer Vigil purported to pick up an extra battery at the control center prior to commencement of his shift, and no witness testified to dropping off a battery at the conclusion of his shift. Officers Davis, Coker, Ferree, Phelps, and Strider testified at length as to their practice commencing a shift. None testified to picking up a battery from the control center. Officer Coker stated at the hearing that the Compound Officer is responsible for delivering a charged battery to housing unit officers. Officer Keller stated that in twenty years working at FCI El Reno, he has never received a radio with a low/chirping battery at a shift exchange.

The Agency cites AFGE Local 1325 and FDC Philadelphia, FMCS No. 06119-01660-7 (2012), wherein the arbitrator stated "obtaining and returning of a battery to and from (or adjacent to or from) the control center upon ingress or egress does not constitute

“work” within the meaning of the FLSA and, hence, is not compensable pursuant to that statute and, within the context of Alvarez, does not commence the workday. Likewise, the arbitrator in AFGE Local 148 and BOP, USP Lewisburg, FMCS No. 05-01739 (2011), reasoned: “While having an operating battery is essential to performing the duties in the prison, obtaining a fresh battery without a radio before an officer assumes a post, is not.” When an officer reports to a post to relieve another officer, the radio is functioning. If it were not, the previous officer would have obtained a fresh battery from the Control Center. The Agency has tasked the Corridor Officers with the responsibility to deliver a fresh battery, should one be needed, after an officer assumes a post. It is also not essential to an officer’s job to return a battery at the end of a shift. The Corridor Officers collect and return used batteries to Control during their shift.

The Union also alleges that some officers have to get other equipment that they need and they have to exchange chits with the Control Room Officer in order to get the equipment or the chits of the officer that they are relieving. The Union contends that it can take between 1 and 15 minutes to wait in the key line to pick up equipment and that management observed and was aware that Correctional Officers obtained equipment from the Control Center.

The Agency cites to the Negotiated 2013 Portal Memorandum, which states in pertinent part:

As a reminder, staff who are required to pick up keys and/or equipment at the control center are considered on time if they are picking up their equipment from the control center at the start of their shift (e.g. 7:00a.m. for a 7:00 a.m. – 3:00 p.m. shift). 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 3:30 p.m. should be at the control center dropping off his/her keys and/or equipment at the control center no later than 3:30 p.m.

The Agency states that every post and shift must be analyzed to determine which officers the Union is alleging are entitled to compensation. However, the burden is on the Union to identify with sufficient clarity the post and shift and the activity for which compensation is sought, then present evidence that the activity is compensable. The Union did not present evidence that the officers are required to retrieve or return batteries to the control center and the activity is non-compensable as a matter of law. Regarding the retrieval or return of other equipment, the Agency established that it provides an overlap in shifts for those post and shifts.

Based on the above, retrieving or returning batteries is non-compensable as a matter of law. Regarding the retrieval and return of other equipment, the Union has not met its burden in establishing that the activity is a compensable activity.

Checking in with Lieutenant

The Union maintains that it is impossible for officers to check-in with lieutenants, even by phone, walk to their post, and relieve the off-going officer during their shift hours when there is no overlap. Under the holding set forth in Lindow v. United States, 738 F.2d 1057, 1062, 1063 (9th Cir. 1984), the Agency is unable to establish a *de minimis* defense. In its decision, the Court looked at the practical administrative difficulty of

recording the additional time; the size of the aggregate claim; and whether the employees performed the work on a regular basis.

The Agency counters that checking with the Lieutenant is not required by many of the post orders, and for posts that do require check in, the post orders instruct to report for duty, relieve the off-going officer, and only then, establish presence with the Lieutenant. Additionally, the only officers who provided testimony at the hearing regarding checking-in with the Lieutenant stated that it is not required by their respective post orders.

In support of its argument, the Agency quotes Arbitrator Berman's reasoning in MCC Chicago and AFGE, Local 3652, FMCS Case No. 10-59408, (2014), decision affirmed, 68 F.L.R.A. 394 (2015):

On balance, the evidence did not establish that, generally, the "meetings" between a Lieutenant and the correctional officers who checked in with him were little more than "taking attendance" and advising employees of their assignment. As in *Terminal Island*, employees who took part in such meetings or encounters were not engaged in activities "'indispensable to the performance of their principal activities,'" and are not, therefore entitled to compensation for this time. In short, a correctional officer's day did not begin when he/she checked in with a Lieutenant in the lobby.

The Agency also cites BOP U.S. Penitentiary Atwater and AFGE Local 1242, 68 F.L.R.A. 857, 859 (2015), wherein the Authority affirmed that "[u]nder the Act, checking in is not ordinarily regarded as a compensable preparatory activity." Also, "The legislative history of [29 U.S.C.] § 254 specifically includes "[c]hecking in or out" as non-compensable activities. BOP, United States Penitentiary, Terre Haute and AFGE Local 720, Council of Prison Locals 33, 58 F.L.R.A. 327, 329-30, rehearing denied 58

FLRA 587 (2003).

Based on the evidence presented, the checking in with the Lieutenant is not a compensable as a matter of law.

SHIFT EXCHANGE

The Union alleges that officers have to 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.

The Agency concedes that there is arguably compensable time in the relief process which takes between 1 and 3 minutes. Lieutenant Patrick testified that it takes 1-3 minutes for an incoming officer to relieve the officer coming off of duty.

The Union counters that while it might take that long to exchange pertinent information, Lieutenant Patrick's time estimation is not correct. The officers still have to go through all of the secured doors, turn in any equipment and paperwork to the control center and leave the institution. The bargaining unit employees testified that it can take anywhere from 2-10 minutes to properly relieve an officer with all of the necessary equipment needed to perform their duties.

The Agency contends that work performed which is under 8 hours and 10 minutes is considered *de minimis* under the law, and is not compensable, even if the activity in question is found to have been integral and indispensable activity. Carlsen v. United States, 72 Fed.Cl. 782, 798-99, aff'd 521 F.3d 1371 (Fed. Cir 2008)(citing 5 C.F.R. § 550.112);

Lindow v. United States, 738 F.2d at 1062. The Agency witnesses testified that the relief procedure takes 1-3 minutes, making the preliminary and postliminary activity *de minimis*, which even by the Union witnesses testimony is *de minimis*.

Based on the evidence presented, the shift exchange is *de minimis*.

GOOD RELIEF

The Union argues that all of the its witnesses who testified about shift starting and stopping times testified that they arrive at the institution anywhere between 10 and 60 minutes prior to the start of their shift regardless of which post they are working. The Union contends that there is a culture of officers making sure that they come to work early so that they may relieve their colleagues in such a manner so that they can leave their posts at or a little before the end of their shifts. Coming in early to make relief is a fact of life at FCI El Reno and if management officials know that it happens, condone the practice, and are participating in the practice, it stands to reason that the bargaining unit employees will follow suit. This is a benefit to the Agency because employees are coming in and performing work either before their shifts or after the shift has ended without being paid for the overtime that they work.

Agency witness Captain Janson explained that there is a tradition of providing “good relief.” As he explained, a good relief to me just means that it’s an old tradition that was started years ago and basically they’ll show up at least a half hour early to relieve the guy that they were relieving. Still working their 8 hours, but just showing up early, normally everybody is on the same page and gets there a half hour early, leaves a half hour early. Lieutenant Patrick testified that even if he is being relieved by Lieutenant Felsted he knows he will be relieved late, but he still comes in 30 minutes early.

The testimony from Union and Agency witnesses varied regarding how early each officer gets to work. In FCI Jesup, and AFGE, Local 3981, 69 FLRA 197 (2016), the Authority noted the arbitrator's findings that employees arrived early in order to permit their coworkers to leave early and claims that this indicates that "employees informally altered the starting *and ending* time[s] of their shifts by arriving *and departing* early." In other words, the early arrivers "were not working any extra minutes entitling them to overtime, but rather modifying the time period during which they performed the number of hours in their shifts." Remanding the case, the Authority stated that to establish that an employer suffered or permitted employees to work, the employee must show that: (1) the employee performed the work for the benefit of the employer, whether requested or not; (2) the employee's supervisor knew or had reason to believe that the work was being performed; and (3) the supervisor had an opportunity to prevent the work from being performed.

From the evidence presented, the Union's contention that the Agency suffered or permitted the officers to work is unfounded. It appears more likely the early arrivers "were not working any extra minutes entitling them to overtime, but rather modifying the time period during which they performed the number of hours in their shifts." *Id.* at 202.

CONCLUSION

Based on the above, the Union has not proven by a preponderance of the evidence that the Federal Bureau of Prisons, Federal Correctional Institution, El Reno, Oklahoma did suffer or permit the 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.

AWARD

The grievance is denied in its entirety.

Mark L. Reed, Arbitrator

April 15, 2016