ARBITRATION OPINION AND AWARD

BEFORE

ROBERT B. MOBERLY, ARBITRATOR

IN THE MATTER BETWEEN

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, AFL-CIO, LOCAL 83
Union

FMCS Case No. 15-02429-3
Contract Language #5087

And

U.S. DEPARTMENT OF JUSTICE
FEDERAL BUREAU OF PRISONS,
FEDERAL CORRECTIONAL INSTITUTIO,
LA TUNA, TEXAS
Employer

RE: FAIR LABOR STANDARDS ACT-PORTAL TO PORTAL

REPRESENTATIVES

For the Employer: Darrel C. Waugh, Esq., Assistant General Counsel, Federal Bureau of Prisons, Employment Law Branch, WRO, 7338 Shoreline Drive, Stockton, CA 95219

For the Union: Megan Kathleen Mechak, Esq., Woodley & McGillivary LLP, 1101 Vermont Ave., N.W., Suite 1000, Washington, DC 20005

Pursuant to the contract between the above parties, the undersigned was designated as Arbitrator in the above dispute. An arbitration hearing was conducted at the Federal Correctional Institution (FCI) in La Tuna, Texas, on April 12-15 and April 26-28, 2016, at which time the parties were given full opportunity to present evidence and arguments. The proceedings were transcribed, and both parties submitted post-hearing briefs, reply briefs, and subsequent recent cases, the last of which was received on January 30, 2017.

STATEMENT OF THE CASE

The American Federation of Government Employees, AFL-CIO, Local 83 (hereinafter "Union," and the Bureau of Prisons, Federal Correctional Institution, La Tuna, Texas (hereinafter "Agency") are parties to a collective bargaining agreement, called the "Master Agreement." On March 2, 2015, the Union filed the instant grievance on behalf of "all affected bargaining unit employees" at FCI La Tuna, alleging that from April 9, 2014, to the present, and as an ongoing matter, the Agency "has been suffering or permitting bargaining unit employees… to perform work prior to and after their shifts without compensation." As examples of such work, the Union cited clearing the "staff screening site" (the front lobby metal detector); donning a duty belt & required equipment; obtaining equipment; observing & correcting inmate behavior en route to an assigned post; and "exchanging information."

On April 3, 2015, the Agency's Regional Director denied the Union's grievance, citing various procedural bases for rejection (improper filing, lack of specificity, failure to attempt informal resolution, and untimeliness). On April 17, 2015, the Union invoked arbitration. At the start of the arbitration hearing, the Agency withdrew its procedural objections, and the hearings proceeded to the merits of the grievance.

ISSUES

Did the Agency suffer or permit bargaining unit employees to perform work before and/or after their scheduled shifts without compensation in violation of the Fair Labor Standards Act and the parties' Master Agreement? If so, what is the remedy?

FACTS

General Information

The Bureau of Prisons Federal Correctional Institution at La Tuna, Texas, is a low

security correctional institution and Federal Satellite Low at Ft. Bliss, Texas. The American Federation of Government Employees, AFL-CIO, Local 83, is the bargaining representative for non-supervisory employees at the facility. The Union represents all correctional officers and other non-supervisory correctional workers. The bargaining unit is comprised of about two hundred and seventy-five members, including one hundred and forty-two correctional officers. The Union also represents staff members in departments such as education, food services, facilities, and UNICOR.

There are three locations at La Tuna: the Federal Correctional Institution (FCI) (the institution at which the majority of the posts at issue in the instant grievance are located); the adjacent Federal Prison Camp (FPC); and the Federal Satellite Low (FSL) (located in El Paso, Texas, approximately 30 minutes away from the FCI & FPC). FCI La Tuna is a low security correctional institution.

The FCI has security measures in place to ensure that the inmates do not escape, including two exterior fences with razor wire and alarm sensors, armed mobile patrols twenty-four hours per day, and secured doors. Two armed correctional officers patrol the perimeter of the institution twenty-four hours per shift, seven days per week.

Inmates at the FCI reside in dormitory-style housing. Housing Units 1, 3, 5, and 6 have cubicles for inmates. Housing Units 2 and 4 have rows of bunks. The FCI utilizes controlled movement, which means that inmates can only move outside of their housing units at certain times of the day, and for specific reasons. Inmate moves occur every hour on the half hour starting after 6:30 a.m. Approximately seven hundred inmates are incarcerated at FCI, about half of its inmate population in April 2014.

The Camp (FPC) has a fence, with no razor wire, partially surrounding the facility, and open movement. About two hundred and seventy inmates are assigned to the Camp, about 10%

less than the number in April 2014.

The third location, the FSL, is located at Biggs Army Air Field, at Ft. Bliss. It is a low security institution, and has the same security features as the FCI. Presently, there are approximately two hundred inmates at the FSL, about half of the number assigned there in April 2014.

Since April 2014, correctional officers' shifts at FCI/FSL have been scheduled to be eight hours long. The main shift hours ate 8:00 a.m. to 4:00 p.m. (Day Watch), 4:00 p.m. to midnight (Evening Watch), and midnight to 8:00 a.m. (Morning Watch).

Until March 2016, there were no scheduled and paid overlap for any correctional officers' shifts since before April 2014. In March 2016, the institution implemented overlapping shifts for certain posts staffed sixteen hours per day.

Required Security Screening

Staff members are required to clear an upright metal detector in the Front Lobby prior to entering the secured confines of the institution. The security screening process is the same for every post and shift. To complete the security screening, correctional officers take off any metal items and place them, along with other personal items, in a bin to be x-rayed, and walk through a metal detector. The security screening is performed by an on-duty employee. The employee performing it checks correctional officers off on a roster, to confirm they have arrived, and may provide information to the oncoming officers about incidents or other pertinent information. Security screening was implemented to prevent the introduction of contraband into the institution, and to ensure the safety and security of the staff, inmates, and visitors. It was implemented Agency-wide after a correctional officer brought a firearm into FCI Tallahassee and shot multiple federal workers. The Agency implemented the present security screening on January 15, 2008.

Donning Duty Belts

Correctional Officers are not required to wear duty belts. However, the testimony was that all do because, while on duty, they are required to have various items such as key clips, key chains, radio holsters, handcuff holders, and other work related items. Duty belts must be placed on the conveyor belt to go through the scanner at security. They then don their duty belts in the front lobby after completing the screening process.

Walking to and From Duty Posts

Once Officers enter the institution, they must be alert to their surroundings. They also interact with inmates as they walk to and from their posts by greeting them, responding to questions, and correcting behavior if necessary. They also occasionally respond to institutional emergencies. Some Officers testified that they were not compensated for responding to such emergencies, even when they reported to Management. However, Management testimony was that Officers have always received overtime for such instances upon request, and even sometimes by management initiative when no request was forthcoming.

Further facts will be stated in the discussion.

POSITION OF THE UNION

The Union alleges that the Agency Violated the FLSA by suffering and permitting bargaining unit employees to perform work before and/or after their scheduled shift times without compensation, and that employees are entitled to compensation from the moment they perform the first principal activity or integral and indispensable activity until they perform the last principal activity or integral and indispensable activity.

It further contends that:

- Correctional Officers perform their principal activity when they participate in the security Screening Process.

- If the security screening does not start the employees' compensable workday, donning the duty belt and other equipment starts the compensable work day.
- If donning the duty belt and other equipment does not start the employees' compensable workday, correctional officers who obtain batteries, equipment, and/or chits for the same at the control or message center are performing work.
- Correctional Officers perform work once they enter the secure perimeter and walk to and from their assigned work sites.
- The information and equipment exchange constitutes work.

The Union also argues that:

- An employer "suffers or permits" its employees to work when it has actual or constructive knowledge of the work performed.
- Management has actual knowledge that correctional officers regularly perform pre- and/or post-shift work without pay.
- At a minimum, Management should have known that employees were performing work before and/or after their shifts.
- The Union has established the amount and extent of the work performed as a matter of just and reasonable inference.
- The Union's evidence establishes that employees perform work in excess of eight hours per day.
- The Agency failed to present evidence of the precise amount of work performed, and has not negated the reasonableness of the inference to be drawn from the Union's evidence.
- An award of liquidated damages is warranted, and the Agency cannot establish that its violation of the FLSA was done in good faith or was objectively reasonable.

In conclusion, the Union requests that the Arbitrator rule that the Agency violated the FLSA by failing to compensate bargaining unit employees for the time spent performing work that the Agency has suffered or permitted before and/or after the employees' shifts. The Union requests that the Arbitrator make the following findings:

1. Since April 9, 2014, for all Correctional Officers, the continuous work day begins in the front lobby;

2. Since April 9, 2014, for all Correctional Officers assigned to FCI and FSL La Tuna, the

continuous workday ends when correctional officers exit the Control or Message Center sally port;

3. The Union met its burden of proof to establish that the bargaining unit staff are entitled to be paid at time and one-half for the number of minutes for pre- and post-shift work for which they were not compensated;

4. The Agency is liable for this unpaid work time under the FLSA because the Agency knew or should have known that the work was being performed;

5. The Agency is liable for liquidated damages equal to the correctional officers' back pay in accordance with Section 216(b) of the FLSA because the Agency failed to establish that it acted in subjective good faith and with objective reasonableness;

6. The Union is entitled to an award of reasonable attorneys' fees and costs in accordance with the FLSA, 29 U.S.C. § 216(b);

7. The Parties shall have sixty (60) days from the date of the Arbitrator's award on liability to attempt to agree on the damages owed. If the parties are unable to agree, the Arbitrator shall retain jurisdiction to decide the issue of damages; and

8. The Union shall submit its petition for attorneys' fees and expenses within thirty (30) days of the date that the Arbitrator issues an order on damages.

POSITION OF THE AGENCY

The Agency contends that the Union failed to prove that bargaining unit employees performed compensable work before or after their scheduled shifts, or that the Agency "suffered or permitted" such work to be performed. It notes this is the fourth portal-related grievance filed by the Union at FCI La Tuna since 2006; that the first resulted in a 2009 written decision by an arbitrator in favor of the Union; and that the second and third grievances were resolved by the parties in 2012 and 2014. The Agency further stated that following the 2014 settlement of the

third grievance, the Agency took numerous corrective actions to eliminate any potential portal-related violations, including the placement of battery chargers in the housing units; revision of "Post Orders" for correctional posts; repeatedly notifying and educating staff of their portal-related rights and responsibilities; and introducing electronic versions of log books and files, which can be reviewed on-post.

The Agency also states that the U.S. Supreme Court decision in *Integrity Staffing Solutions, Inc. v. Busk,* 135 S.Ct. 513 (2014), held that time spent by employees waiting for and undergoing security screenings before leaving their workplace was not compensable under the FLSA; that since this decision arbitrators have rejected portal grievances filed by unions at numerous federal prisons identical to issues raised by the Union in the instant case; and that per *Integrity Staffing*, as a matter of law, the Union cannot recover for pre- and post-shift activities that are not "integral and indispensable."

The Agency argues that applying *Integrity Staffing* and other cases, recovery is barred as a matter of law for the pre- and post-shift activities for which the Union seeks compensation. Specifically, the Agency contends that the following activities are not "integral and indispensable," or are otherwise not compensable because they constitute a *de minimis* amount of work: passing through the metal detector/security screening procedure in the Front Lobby; donning a "duty belt"; obtaining equipment or other items at the Control Center; and being "vigilant" or observing/correcting inmate behavior while walking to and from one's post.

The Agency further argues that management paid overtime when supervisors were aware of the performance of work of a non-*de minimis* nature outside of the employees scheduled hours; that all Union witnesses stated that Management pay their overtime requests, or they had not made such requests for routine pre-or post-shift activities; that even if the employees

performed compensable duties outside of the regular hours, such time was *de minimis* and not compensable; that post–Portal III, the agency identified portal–related issues, took corrective actions to eliminate them, and communicated these actions to all staff; and that there should be no "suffer or permit" liability. It further argues that the Union witnesses were not credible.

In conclusion, the Agency argues that the Union failed to prove that employees performed compensable work before or after their shifts; that the Agency did not "suffer or permit" such work to be performed; and that the grievance should be denied.

DISCUSSION

Legal Background

The applicable law and regulations in this case were recently well stated by Arbitrator Angela McKee in a case involving similar issues, *AFGE Local 1010 & FCC Beaumont, TX,* FMCS No. 15-54685, at 21-23 (2017):

> "Under the Fair Labor Standards Act ('FSLA'), 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*.
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> 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.
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> 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.*"

Arbitration awards Post-*Integrity* have naturally applied the standards contained therein, rather than pre-*Integrity* standards. Arbitration awards involving issues similar to the instant case will be included in the discussion below.

<u>Security Screening</u>

The Union contends that Correctional Officers perform a principal activity when they participate in the security screening process, is indispensable to the Officers principal activity of ensuring safety and security within the prison, and thus begins the compensable, continuous workday. However, arbitrators since *Integrity* have concluded otherwise, with

one exception.[1] Upon full consideration of these and earlier cases, the undersigned considers the Arbitrator's view in *FCI Manchester* to be the better reasoned and is herewith adopted:

> "While at first blush the Union's position(s) would seem logical, it cannot be concluded that screening is primary job activity or is an intrinsic element of the principal activities that the grievants are employed to perform and one with which the correction officers cannot dispense if they are to perform their principal activities. Not only must all persons entering the institution submit to screening, which for non-correctional personnel has nothing to do with the performance of a job, but the officers could still perform the primary functions of their jobs if they did not participate in the screening. Stated another way, the evidence does not support a finding that the officers would be unable to accomplish their principal activity of securing the prison without the security screening. This fact is exemplified by observing the principal activity of Camp correctional officers. Correctional officers at the Camp are hired to perform the same duties as the correctional officers at the other FCI Manchester posts. They are able to perform the principal activity of their job without any screening. As such, the activity of participating in the screening process cannot be considered integral or indispensable to the employees' principal job duties as required by *Integrity Staffing, supra, and FCI Bastrop, supra*. It also cannot be considered a primary job activity, for they are not conducting the screening, they are only participating in the activity. It cannot be concluded that the screening procedure is productive work that they are hired to perform. It has more to do with basically screening out contraband rather than performing the duties by the officer of ensuring the security and safety of the prison."[2]

<u>Donning Duty Belts</u>

The Union contends that if the security screening does not start the employees' compensable workday, donning the duty belt and other equipment starts the compensable workday. Again, however, post-*Integrity* arbitration awards have not accepted this argument. <u>See</u> *FCI Manchester,* at 76, concluding that the donning of duty belts is neither "a primary activity [n]or an integral and indispensable activity of a corrections officer. It is not required by the Agency,

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[1] *AFGE Local 1010 & FCC Beaumont, TX,* FMCS No. 15-54685 (Arb. A. McKee, 2017); *AFGE Local 171 and FCI El Reno*, FMCS No. 14-02317-7 (Arb. M. Reed, 2016); *AFGE Local 4051 and FCI Manchester*, (Arb. J. Sellman, 2016); *AFGE Local 171 and FTC Oklahoma City*, FMCS No. 14-56494, (P. Halter, 2016). A contrary result was reached in *AFGE LOCAL 3828 & FCI BASTROP,* FMCS Case No. 12-50057 (on remand) (Arb. T. Reeves, 2016). However, the rationale was rather conclusionary in nature and less persuasive.

[2] *AFGE Local 4051 and FCI Manchester*, at 74 (Arb. J. Sellman, 2016).

it is not required to be donned after the screening process, and it is not protective gear. Moreover, the officers can perform the duties of their job without it, as long as they comply with the Agency requirements of attaching keys to their person"; *FCI El Reno* at 28-30 (same); *FTC Oklahoma City* at 21 (same); and *FCC Beaumont* at 26 (same).

Undisputed hearing testimony established that duty belts are neither required to be worn by employees at FCI La Tuna nor issued by the Agency; that they are purchased by individual employees with their own money and only if they so choose to purchase one, for their own convenience; that they take only a minute or less to put on; and that policy merely requires that Agency-issued keys be affixed to *any* type of personally-owned belt with a chain and clips. Accordingly, as stated by the Arbitrator in *FCI Manchester*, "the donning of a duty belt is not a compensable activity and does not start the continuous workday. Since it has been determined from the facts that participating in the security screening does not start the continuous workday, the donning of a duty belt cannot be considered as part of or included in a continuous work day." *Id*., at p. 76.

Obtaining Equipment or Other Items from Control

The Union contends that if donning the duty belt and other equipment does not start the employees' compensable workday, correctional officers who obtain batteries, equipment, and/or chits for the same at the control or message center are performing work. With regard to batteries, numerous arbitrators have ruled that obtaining a battery at Control to be non-compensable. See, e.g., *AFGE Local 1325 and FDC Philadelphia*, FMCS No. 06119-01660-7, at 51 (2012) ("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 … does

not commence the workday); *AFGE Local 148 and BOP, USP Lewisburg*, FMCS No. 05-01739 (October 4, 2011); *FCI Manchester*, at 32-35; and *MCC Chicago*, at 77-78.

Further, it should be noted that battery chargers were installed in the housing units and other 24-hour posts throughout the institution commencing in July 2014. This would seem to negate any reason from that date onward for relief/non-"key line" officers to stop at Control before or after their scheduled shift to obtain or return an extra radio battery. Additionally, there was little evidentiary support for battery-based compensation. Only one of the 11 union witnesses claimed to have picked up and returned batteries at control during the time period at issue. Additionally, there was little testimony regarding other equipment, paperwork, "detail pouches," etc. Nor was there evidence that the idiosyncratic practices of a few employees were made known to management. Accordingly, the evidence is insufficient to support this claim for compensation for obtaining equipment or other items from Control.

Walking To Or From Duty Posts

The Union contends that Correctional Officers perform work once they enter the security perimeter and walk to and from their assigned work site. However, the FLRA has recently stated that "the mere possibility that an employee *might* be called upon to perform work while traveling [to or from his post] does not make all travel time compensable," nor does "vigilance and heightened awareness … make an activity compensable." *U.S. Dept. of Justice, Federal Bureau of Prisons, USP Atwater and AFGE Local 1242*, 68 FLRA 857, 859 & 860 n.49 (August 27, 2015) (emphasis in original), *request for reconsideration denied,* 69 FLRA 33 (March 11, 2016); *AFGE Local 171 and FTC Oklahoma City*, FMCS No. 14-56494, at 21 (Arb. P. Halter, 2016) (vigilance in the presence of inmates, by itself, is not compensable) (citing *Atwater*).

In *Atwater*, the FLRA distinguished a pre-*Integrity* decision, *U.S. Dept. of Justice, Federal Bureau of Prisons, USP Coleman II and AFGE, Local 506*, 68 FLRA 52 (2014). In *Coleman*, the FLRA, in a portal case arising out a maximum security-level penitentiary, upheld an arbitrator's finding that after the officers passed through the metal detector and entered the secure confines of the institution (described by one officer as the "kill zone … the point at which you have to watch your back"), they were "engaged in principal activities during the time they traveled to their posts," because they were "in the immediate presence of inmates and have been called upon to, among other things, restrain those inmates"; specifically, the arbitrator found that on one occasion, an officer en route to his post "personally assisted staff in restraining inmates who'd been fighting…." *Id*., pages 53, 55-56. In *Atwater*, the FLRA rejected the Union's attempt to say that *Coleman* stood for the principle that merely "maintaining vigilance in secure areas of the prison" makes the officers' travel time compensable. *Atwater*, at 859-60. Instead, the FLRA stated that *Coleman* is "limited to the circumstances in which an arbitrator expressly found that employees performed a principal activity, not merely an integral and indispensable activity, when they actually engaged with inmates," and emphasized 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." *Id*. at 860 (emphasis in original). Accordingly, the FLRA ruled that the Arbitrator's conclusion (that officers' travel in the main corridor to reach their duty posts is compensable) was contrary to law. *Id*.

In the opinion of the Arbitrator, the evidence in the instant case is more analogous to *Atwater* than *Coleman*. In *Atwater*, the Arbitrator found that "violent circumstances and inmate misconduct have occurred," and that officers "may encounter inmates" when passing through the main corridor, but "he did not find that officers en route to their posts have had to address

such circumstances or misconduct." Similarly in the present case, *none* of the officers who testified claimed to have been "called upon" to "personally assist staff in restraining inmates who'd been fighting" in the corridor as the officers entered the institution and proceeded to their posts (or while they were departing from same).

Nor did any of the officers describe their institution's main corridor in terms such as "kill zone," as was the case in the Coleman maximum security-level Penitentiary. Nor did they refer to their Low Security and Camp facilities in such terms. Their testimony was quite the opposite. They acknowledged that it is easier to work at the institution now than two years earlier, since the inmate population had been reduced by 50%. Witnesses stated that the institution is a "nice easy place," and that the "more violent" caliber of inmates housed at a high security institution result in more frequent assaults on inmates and staff than occur at La Tuna. The testimony also indicated that it was "very rare" for a "body alarm" to be activated upon arrival to or departure from the institution, such that staff would be required to respond to an emergency inside the institution. When it happens, officers do or should request overtime.

Additionally, FCI La Tuna officers normally do not encounter inmates in the corridor when the officers are entering or leaving the institution, and when they do the inmates are supervised by a correctional worker who is already on duty. During two of the three major shift change times (at 4:00 p.m. and midnight), there are no inmates in the corridor because they are locked down in their Housing Units at those times. During the third major shift change time (at 8:00 a.m.), there is little inmate traffic in the corridor, because the brief authorized window for inmate movement in the corridor (for "work call," from 7:30 a.m. – 7: 40 a.m.) has concluded.

Even if officers encountered inmates on a regular basis before assuming their post or on their way out of the institution, there was no evidence that they undertake any sort of compensable

corrective action upon encountering them. For example, officers did not testify that they routinely pat search inmates while en route to their posts, or claim that they notified management of same. According to Lieutenants, such searches simply do not occur.

Upon full consideration of the evidence, and for the reasons stated above, the Arbitrator finds that recovery for walking to or from duty posts is not warranted.

Information And Equipment Exchange

The Union contends that the information and equipment exchange constitutes work; that when Correctional Officers relieve a post, the oncoming and outgoing officers at each shift exchange information and equipment, such as a radio, keys, and handcuffs; that they also account for any other equipment assigned to the post before the departing officer exits the post; that the information exchange includes vital information that the oncoming officer needs to safely perform his duties; that the equipment and information exchange takes approximately 5 to 10 minutes; and that once the ongoing officer is properly relieved, he walks back to the Control Center and exits the institution.

The Agency points to video evidence reviewed in such claims, showing that employees are either not working beyond their schedule shifts, or working only to a degree that does not exceed the de minimis standard of ten minutes or less. Such videos are commonly used in portal-to portal cases, and the videos submitted in the instant case are admitted as well.

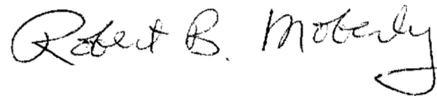
The Agency maintains that the Union is not entitled to compensation for such exchanges because, by its own admission, it failed to prove that they take longer than a *de minimis* amount of time. On this point the Agency is correct. Pursuant to governing regulations (5 C.F.R. §551.412) and case law, activities amounting to 10 minutes or less for preparatory or concluding activities are *de minimis* and not compensable. See, e.g., *FCI Bastrop and AFGE*

Local 3828, 69 FLRA 176, 178 (2016).

The Union contends that the shift exchanges take 5 to 10 minutes. However, Agency witnesses testified that the exchanges take less than five minutes, and typically are completed within 1 to 3 minutes. This testimony was backed up by video evidence. The undersigned concludes that the testimony of the Agency witnesses, as supported by video evidence, is more persuasive and credible then the testimony presented by Union witnesses. Accordingly, the Arbitrator finds that because the time it takes for information and equipment exchanges is *de minimis*, the Officers are not entitled to compensation for this preliminary and post luminary activity.

CONCLUSION AND AWARD

After full consideration of the evidence and arguments, and for the reasons stated above, the Arbitrator concludes that there was insufficient evidence to show that bargaining unit employees perform compensable work before or after their scheduled shifts, or that the agency "suffered and permitted" such work to be performed. Accordingly, the grievance is denied.



Robert B. Moberly, Arbitrator
February 14, 2017