

**IN THE MATTER OF ARBITRATION BETWEEN**

**AMERICAN FEDERATION OF  
GOVERNMENT EMPLOYEES, AFL-CIO,  
LOCAL 3828,  
Union,**

**T. ZANE REEVES, ARBITRATOR**

**v.**

**OPINION AND AWARD**

**DEPARTMENT OF JUSTICE, BUREAU  
OF PRISONS, FEDERAL  
CORRECTIONAL INSTITUTION,  
BASTROP, TEXAS,  
Agency**

**FMCS Case No. 12-50057**

**Issue:** Portal-to-Portal Pay

**For the Union:** Megan K. Mechak, Esq.

**For the Agency:** Suzanne Courtney, Esq.  
Bradley Breslin, Esq.

**Location:** Federal Correctional Institution  
Bastrop, Texas

**Master Agreement:** March 9, 1998-March 8, 2001 (extended)

**Hearing Dates:** October 1-5, 29-31, 2012

**Post-hearing briefs:** December 21, 2012

**Reply briefs:** January 22, 2013

**Date of Award:** February 20, 2013

## BACKGROUND

The American Federation of Government Employees, Local 3828 (hereinafter “Union” or “AFGE Local 3828”) and the Bureau of Prisons, Federal Correctional Institution, Bastrop (hereinafter “Agency,” “FCI Bastrop,” or “Institution”) are parties to a collective bargaining Agreement (Master Agreement). On August 9, 2011, after attempts to informally resolve the issue presented in this case, the Union filed a formal grievance with the Bureau of Prisons’ Regional Director for the South Central Region, Gerardo Maldonado, Jr. The Regional Director denied the Union’s grievance in a letter dated September 8, 2011. In accordance with the Master Agreement, the Union invoked arbitration on October 4, 2011.

The parties agreed that the case was to be bifurcated as to liability and damages. The issue in the first stage is liability and, if found, for which posts and how many minutes per shift. A hearing in this matter commenced on October 1, 2012 before Arbitrator T. Zane Reeves and continued until October 5, 2012; three additional hearing dates were held from October 29 through October 31, 2012. The parties introduced ten (10) Joint Exhibits, the Union introduced twenty (20) Union Exhibits, and the Agency introduced fifteen Agency Exhibits. Through sixteen (16) witnesses, the Union presented representative testimony regarding the uncompensated pre- and post-shift work performed by bargaining unit members assigned to the following posts: General Population Housing Units, Compound Nos. 1 and 2, Special Housing Unit (“SHU”) Nos. 1 and 2, Control Center, Visiting Room Nos. 1 and 2, and Camp. The Agency called seven witnesses. In addition, the Arbitrator and the parties’ representatives toured the Institution and Camp.

The parties agreed to submit closing argument through post-hearing briefs to be filed with the Arbitrator. The parties initially selected December 14, 2012 as the deadline for submitting post-hearing briefs. On December 3, 2012, the parties agreed to a joint extension of the briefing schedule with a deadline of December 21, 2012. The parties subsequently agreed to file reply briefs to the post-hearing briefs on January 22, 2013.

### **STATEMENT OF THE ISSUE**

The parties agreed to present the following issue for decision:

Whether the Agency suffered or permitted Correctional Officers assigned to Control Center, Visiting Room Nos. 1 and 2, Compound Nos. 1 and 2, SHU Nos. 1 and 2, Austin, Crockett, Houston, and Travis Units, and the Camp to perform work before and/or after their shifts without compensation during the period from October 23, 2010 to the present? If so, what shall be the remedy?

### **POSITIONS OF THE PARTIES**

#### **Position of the Union**

The Union detailed Statement of Material Facts, in excess of three hundred paragraphs, described the uncompensated pre- and post-shift work performed by bargaining unit staff assigned to the posts at issue i.e., Housing Units, Control Center, SHU5 Nos. 1 and 2, Compound Nos. 1 and 2, Visiting Room Nos. 1 and 2, and Camp. The Statement of Material Facts also sets forth facts which show: (1) that the Agency knew or should have known that the pre- and post- shift work was being performed by correctional workers assigned to these posts; and (2) that the Agency failed to establish that it acted in subjective good faith and on objectively reasonable grounds to comply with the FLSA to avoid an otherwise mandatory award of liquidated damages. The threshold question in this case is whether Correctional Officers were “suffered or permitted” to perform “work” prior to

their scheduled shift start time and/or after their scheduled shift end time. This requires an examination of whether the pre- and post-shift activities at issue constitute “work” within the meaning of the FLSA, and whether the Agency knew or should have known that the bargaining unit employees were performing the work.

The FLSA requires an employer to compensate its employees at one and one-half times their regular rate of pay for all hours worked in excess of forty per workweek. 29 U.S.C. §207 (a) (1). Under controlling case law and arbitral decisions, the Correctional Officers’ compensable continuous workday begins when they engage in the first activity that is integral and indispensable to their principal activities. *I.B.P. v. Alvarez*, 546 U.S. 21, 32-33 (2005).

Agency employees must be compensated at their overtime rate for all hours worked in excess of eight per day. 5 C.F.R. § 551.501(a). Here, the Agency is liable to the Union, and to all affected bargaining unit employees, because it has violated, and continues to violate, the FLSA by suffering or permitting Correctional Officers to work without compensation. Specifically, it is undisputed that prior to each and every shift, without compensation, Correctional Officers must: maintain a state of alertness and vigilance on the Institution’s premises, complete Institution-mandated security screening, don duty belts, metal chits, metal chains, and metal key clips or keepers, pick up batteries and, in some cases, other equipment, such as chits, keys, and radios at the Control Center, denote that they are present on the accountability board, respond to Institution emergencies, interact with inmates and correct inmate behavior while walking to their assigned posts, checking their Institutional mailboxes, and exchange equipment and information with relief officers

### **Position of the Agency**

The Union has failed to meet their burden of proof. A necessary part of the Union's prima facie case in actions for uncompensated off-the-clock overtime under FLSA is to show that the employer suffered or permitted employees to perform such work. The evidence submitted by the Union does not meet this burden. The Union has failed to prove that it is necessary for bargaining unit employees to perform work before or after their scheduled shift or that the Agency was aware of such activity. Furthermore, the Union did not demonstrate that the work performed was more than *de minimis* compensable working time, as determined by three criteria outlined in the Lindow court decision: 1) practical administrative difficulty of recording the additional time; in the underlying case, overtime could be as little as 5 minutes but the Agency had no policy to pay for less than 15 minutes, 2) the aggregate amount of compensable time, 3) and the regularity of the additional work. Even if the Arbitrator finds the work compensable, it should be considered as *de minimus* and not a significant amount.

### **FINDINGS OF FACT**

1. The American Federation of Government Employees, AFL-CIO, Local 3828 is the bargaining representative for non-supervisory employees at the Bureau of Prisons Federal Correctional Institution at Bastrop, Texas, a low security correctional facility. As such, the Union represents all of the approximately two hundred Correctional Officers and other correctional workers at the Institution.

2. Approximately eighty-five of the bargaining unit members are Correctional Officers and the complete correctional complement is one hundred and three, including correctional officers, and

correctional supervisors. The correctional supervisory and management complement includes one Captain, seven GS-11 Lieutenants, two GS-9 Lieutenants, and Wardens.

3. Although FCI Bastrop is a low security correctional Institution, it has Agency-mandated security measures in place to ensure that the inmates do not escape or commit violence against themselves or staff. The Institution is surrounded by two exterior fences with razor wire and alarm sensors. There are two roving patrol vehicles that drive around the perimeter of the institution and Correctional Officers manning those vehicles are armed at all times.

4. There are approximately 1,250 inmates incarcerated at FCI Bastrop, and 180 inmates housed at the Camp on the Institution premises, numbers that have remained consistent since October 2010. The inmates assigned to FCI Bastrop have committed a variety of crimes and include murderers, bank robbers, pedophiles, drug dealers, drug traffickers, and conspirators. Tr. (Chamblin) Vol. 1, 36:17-23. Officer Brian McCravey, who had previously been assigned to higher security institutions, including penitentiaries, testified that he has encountered the same inmates both at his earlier facilities and at FCI Bastrop. Tr. (Vol. 6, 54:25-55:7). Therefore, it is undisputed that dangerous and even life-threatening incidents could occur at any moment at FCI Bastrop. For example, Officers Ellen Chamblin, and Brian McCravey testified about two incidents that occurred in September 2012, in which inmates were seriously assaulted. Tr. (Chamblin) Vol. 1, 39:4-23; (McCravey) Vol. 2, 10:5-8. Warden Claude Maye testified that Institutional inmates regularly tried to kill one another and described FCI Bastrop as a “very volatile environment.” Tr. (Maye) Vol. 8, 74:13-22; 76:22-77:5.

5. There are several rival inmate gangs and security threat groups at FCI Bastrop, including Piasas, Vallucos, and Tangos, which are associated with the home cities of various inmates. Tr. (Chamblin) Vol. 1, 36:24-37:9. The presence of these rival inmate gangs affects

Correctional Officers' day-to-day job duties because gang activity makes problems among inmates more difficult and dangerous to manage. Tr. (Chamblin) Vol. 1, 37:13-15.

6. The underlying danger at FCI is intensified by the presence of contraband weapons made by inmates. Correctional Officers have confiscated numerous weapons because inmates construct weapons from items found within the Institution, including garden rakes, mops, brooms, and toothbrushes melted with imbedded safety razors. Tr. (Chamblin: Vol. 1, 49:21-25; 50:1-3). As noted in General Post Order at 6, "In order to maintain security, all employees must be on constant alert for contraband, particularly any article which can be used as a weapon against another person or aid in an escape."

7. The main shift hours at FCI Bastrop are 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). Since October 23, 2010, the Correctional officers' shifts at FCI Bastrop have been scheduled to be eight hours long and there has been no scheduled or paid overlap for any Correctional Officers' shifts at FCI Bastrop. Tr. (Chamblin) Vol. 1, 92:10-13; JE 8 (Quarterly Assignment Rosters).

8. The FLSA requires a qualifying employer to compensate its employees at one and one-half times their regular rate of pay for all hours worked in excess of forty per workweek. 29 U.S.C. § 207(a)(1). Federal Agency employees must be compensated at their overtime rate for hours worked in excess of eight per day. 5 C.F.R. § 551.501(a).

9. In this dangerous environment, it is undisputed that the principal job duty of Correctional Officers is ensuring the safety and security of the institution, staff, and inmates. Tr. (Chamblin) Vol. 1, 43:22-25, 145:18-22; (Alvarado) Vol. 1, 185:6-11; (Avila) Vol. 2, 6:7-10; (Matthews) Vol. 2, 147:4-6; (Atkins) Vol. 3, 59:3-6; (Jackson) Vol. 3, 197:13-15; (Flores) Vol. 4, 76:19-22; (Sawyer) Vol. 5, 5:12-16; JE 6 (Position Description -- Senior Officer) at 1 ("Serves

as a Senior Officer and performs the full range of duties and responsibilities for detention, correctional supervision, protection, control and accountability of inmates.”); JE 7 (Position Description -- Senior Officer Specialist) at 1 (same) ; JE 9A (General Post Order) at 15 (“Inmate accountability is the responsibility of all employees.”); JE 9A (General Post Order) at 39 (“The primary duty, and first consideration of all personnel, is to protect the public by confining the prisoners placed in our custody.”).

10. The Correctional Officer’s Position Description provides that the officer is “subject to arduous, adverse and stressful working conditions and environments,” including “being in such hostile or life-threatening situations as riots, assaults, and escape attempts.” JE 6 (Position Description – Senior Officer) at 1; JE 7 (Position Description – Senior Officer Specialist) at 1. In order to complete their primary job duties, Correctional Officers must “exercise sound judgment in making instantaneous decisions affecting life, well-being, civil liberties and property which cannot be reviewed prior to implementation and which may subject the decision-maker to legal liabilities, including personal sanctions.” JE 6 (Position Description – Senior Officer) at 1; JE 7 (Position Description – Senior Officer Specialist) at 1.

11. Thus, Correctional Officers are expected to maintain a state of alertness and vigilance at all times, including on their walks to and from their assigned posts. Tr. (Chamblin) Vol. 1, 38:1521, 40:19-41:7 ; (Alvarado) Vol. 1, 192:7-10, 200:22201:11; (Avila) Vol. 2, 15:11-15; (Matthews) Vol. 2, 154:12-16; (Randall) Vol. 3, 54:11-16; (Pratz) Vol. 3; 165:7-12, (Jackson) Vol. 3, 216:14-18; (Smith) Vol. 4, 17:5-15; (Sawyer) Vol. 5, 15:24-16:8; (McCravey) Vol. 6, 10:14-20; (Lt. Figueroa) Vol. 6, 241:5-18; (Lt. Figueroa) Vol. 6, 241:24-242:2; (Lt. Rangel) Vol. 7, 231:11-23; (Pearce) Vol. 7, 270:11-19; JE 6 (Position Description -- Senior Officer) at 3 (“Remains constantly alert[.]”); JE 7 (Position Description -- Senior Officer



Specialist) at 3 (“Remains constantly alert[.]”); JE 9A (General Post Order) at 5 (“Staff are to be alert at all times...); JE 9A (General Post Order) at 12 (“All unusual conditions, circumstances or suspicious actions should be reported to the Lieutenants Office. Many of these may appear seemingly unimportant, but events or circumstances may be hints or cause to impending trouble. All Officers must be alert to the total situation surrounding them.”). Management also expects Correctional Officers to exercise sound correctional judgment in carrying out their job duties. Tr. (Capt. Emberton) Vol. 7, 164:9-165:5.

12. Correctional Officers at FCI Bastrop are ordered to “arrive at the institution early enough to be on [their] assigned post at the designated time and make [their] relief in a timely manner.” JE 9A (General Post Order) at 1. Likewise, Correctional Officers at FCI Bastrop cannot leave their assigned posts unless they are properly relieved. Tr. (Chamblin) Vol. 1, 112:10-17; (Avila) Vol. 2, 31:5-23; (Matthews) Vol. 2, 164:19-165:3; (Lt. Rangel) Vol. 7, 230:3-8; JE 9A (General Post Order) at 2 (“Do not leave your post unless you are properly relieved or instructed to do so by your supervisor. ... Officers will not leave their post without the approval of the Operations Lieutenant until proper relief has been provided. Unless directed by the Operations Lieutenant, you are not authorized to leave the institution prior to the completion of your duty hours.”

13. FCI Bastrop requires all Correctional Officers to keep their keys in their possession at all times JE 9A (General Post Order) at 18; Tr. (Chamblin) Vol. 1, 71:3-10. This is because “[k]ey control is vital to the security of this facility. Key control is an important part of custody and control” JE 9A (General Post Order) at 18. In fact, the Agency requires all staff to count their keys, and to ensure that they are all in working order, each time they retrieve them. Tr. (Chamblin) Vol. 1, 119:1-12; JE 9A (General Post Order) at 18 (“Count your keys when

receiving them from the Control Center or another officer, making sure the count is the same as the number indicated on the key ring.”).

14. When Correctional Officers receive keys from another Correctional Officer on post, they must also count their keys. Tr. (Matthews), Vol. 2, 160:3-7. The Agency also requires all staff to secure their keys to their person using a key chain and key clips, and issues that equipment to staff. Tr. (Chamblin) Vol. 1, 71:3-10, 118:13-25; (Alvarado) Vol. 1, 204:3-5; (Davis) Vol. 2, 107:21-108:8, 110:17-19; (Matthews) Vol. 2, 166:8-19; (Atkins) Vol. 3, 87:7-12; (Sawyer) Vol. 5, 25:9-19; (McCravey) Vol. 6, 28:4-8; (Lt. Figueroa) Vol. 6, 110:1-3; (Capt. Emberton) Vol. 7, 171:22172:17; (Lt. Sandeen) Vol. 7, 284:5-10.

15. There is a sign at FCI Bastrop’s Control Center reminding employees that they will not be issued keys without a key chain and key clips. Tr. (Chamblin) Vol. 1, 71:3-10. To comply with this policy, and because of the volume of equipment they must carry on their persons, many Correctional Officers wear a duty belt -- a sturdy belt designed for use in the correctional setting which, in addition to key clips and key chains, holds Correctional Officers’ radio holsters, handcuff holders, and other work-related items, such as flashlights on certain shifts, and CPR masks). Tr. (Chamblin) Vol. 1, 70:13-71:2, 156:20157:2; (Alvarado) Vol. 1, 190:6-11; (Avila) Vol. 2, 13:1-19; (Davis) Vol. 2, 73:2-9.

16. Correctional Officers also maintain “chits,” which are round brass coins with each Correctional Officer’s name, by which they account for other Institutional equipment. JE 9D (Control Center Special Instructions) at 6 (“Keys will be issued to authorized employees only upon receipt of a (chit) metal name tag for each set of keys.”). Institutional “chits” are issued to each Correctional Officer by the Agency and are personalized to each Correctional Officer. Chits are used to account for keys and other equipment. By securing their key clips and key chains to

two locations on their duty belts, Correctional Officers ensure that one end of the key chain remains clipped to their person at all times, including when the keys are in use. Tr. (Chamblin) Vol. 1, 118:13-25, (Alvarado) Vol. 1, 188:23-189:10.

17. Correctional Officers are permitted to put on their duty belts in the front lobby after completing FCI Bastrop's mandated security screening process. Since the installation of the metal detector, Correctional Officers cannot put on their duty belts at home or in the parking lot and walk to their assigned post because the duty belt, which contains metal key clips and chits, must be removed for screening in order for Correctional Officers to meet the Agency's requirement of clearing the metal detector upon entering the Institution. Tr. (Capt. Emberton) Vol. 7, 76:20-77:6.

18. Many Correctional Officers testified that they don their duty belts in the front lobby after completing the staff screening process. Tr. (Chamblin) Vol. 1, 73:20-74:6; (Alvarado); (Avila) Vol. 2; 12:17-22, (Davis) Vol. 2; 71:4-19; (Matthews) Vol. 2, 152:13-22; (Randall) Vol. 3, 11:16-23; (Atkins) Vol. 3, 67:2-12; (Anderson) Vol. 3, 123:12-20; (Pratz) Vol. 3, 163:11-164:4; (Jackson) Vol. 3, 201:4-13; (Smith) Vol. 4, 15:7-18; (Flores) Vol. 4, 80:3-19 ; (Sawyer) Vol. 5, 9:18-24; (McCravey) Vol. 6, 9:2-6. The testimony confirms that it is a common practice for many Correctional Officers to put on their duty belt after passing through the upright metal detector at tables provided by the Agency adjacent to the screening area. Tr. (Alvarado) Vol. 1, 190:15-18; (Avila) Vol. 2, 13:1-19; (Davis) Vol. 2, 72:24-73:1; (Matthews) Vol. 2, 152:13-22; (Randall) Vol. 3, 15:9-12; (Atkins) Vol. 3, 68:3-24; (Pratz) Vol. 3, 163:11-164:4, 164:1620; (Jackson) Vol. 3, 201:19-22; (Flores) Vol. 4, 80:3-19; (Sawyer) Vol. 5, 9:18-24; (McCravey) Vol. 6, 9:13-23.

19. As testified at the hearing, Correctional Officers consider donning their duty belts at this location as an exercise of sound correctional judgment because it permits them to travel through the Institution, potentially respond to emergencies, and interact with inmates, with their hands free. Tr. (Chamblin) Vol. 1, 284:25-285:6; (Alvarado) Vol. 1, 208:2-14; (Sawyer) Vol. 5, 40:22-41:8.

20. No written guidelines were introduced at the hearing regarding when or where officers should put on their duty belts. Tr. (Chamblin) Vol. 1, 284:22-24; (Avila), Vol. 2, 62:6-8; (Randall) Vol. 3, 39:7-9; (Jackson) Vol. 3, 227:14-17; (Lt. Figueroa) Vol. 6, 109:20-23; (Capt. Emberton) Vol. 7, 176:10-177:3; (Lt. Sandeen) Vol. 7, 283:5-11. Correctional Managers admitted that they observed Correctional Officers donning their duty belts with chits, key chains, and key clips in the Front Lobby. Tr. (Lt. Figueroa) Vol. 6, 197:2-6; (Capt. Emberton) Vol. 7, 176:1-9; (Lt. Rangel) Vol. 7, 245:24-246:4; (Lt. Sandeen) Vol. 7, 283:12-16. Testimony corroborated the fact that Correctional Officers don their duty belts *two to five minutes* after arriving at FCI Bastrop. Tr. (Jackson) Vol. 3, 201:14-18; (McCravey) Vol. 6, 10:24-11:9

21. Once Correctional Officers enter the secured confines of the Institution by passing through Gate 2, they are expected to be alert to their surroundings. Tr. (Alvarado) Vol. 1, 192:7-10, 199:716; 200:22-201:11; (Avila), Vol. 2, 15:11-15; (Davis) Vol. 2, 82:25-83:17; (Matthews) Vol. 2, 154:12-16; (Randall) Vol. 3, 18:2-5; (Anderson) Vol. 3, 133:1-5; (Pratz) Vol. 3, 165:7-12; (Jackson) Vol. 3, 222:9-14; (Smith) Vol. 4, 17:5-15; (Flores) 92:15-93:19; (Sawyer) Vol. 5, 15:24-16:8; (McCravey) Vol. 6, 10:14-20.

22. Correctional Officers are expected and required to be alert at all times while they are inside the Institution. Tr. (Chamblin) Vol. 1, 38:22-24 ; (Smith) Vol. 4, 17:16-21; (Lt. Figueroa) Vol. 6; 241:5-18, 24-242:2; (Capt. Emberton) Vol. 7, 179:4-17; (Lt. Rangel) Vol. 7, 231:11-23;

(Warden Pearce) Vol. 7, 270:11-19; JE 9F (SHU No. 1 Post Orders) at 1 (“It is the responsibility of all officers to conscientiously carry out all orders, instructions, and to remain constantly alert.”).

23. Inmates may be moving around the Compound at certain times as the Correctional Officers walk to their posts. Tr. (Alvarado) Vol. 1, 192:7-16; (Matthews) Vol. 2, 154:17-18; (Sawyer) Vol. 5, 16:1523. When this occurs, Correctional Officers interact with inmates on the Compound by greeting inmates, responding to questions, and, if necessary, correcting inmate behavior. Tr. (Avila), Vol. 2, 20:16-21:21; (Atkins) Vol. 3, 70:9-21; (Sawyer) Vol. 5, 16:24-17:9.

24. Management requires Correctional Officers who observe inmate infractions to take steps to remedy those infractions. Tr. (Lt. Figueroa) Vol. 6, 241:19-23. For example, Officer Chamblin testified that she observed an inmate carrying pizza made with food from the Food Services department towards his Housing Unit during the Summer 2011.2 Tr. (Chamblin) Vol. 1, 41:21-42:1, 161:23-162:2. Officer Chamblin, who had not yet assumed her post and did not have her radio or Institutional keys, instructed the inmate to walk with her to the assigned Housing Unit, where she confiscated the pizza. Tr. (Chamblin) Vol. 1, 42:21-43:1. Officer Chamblin did not prepare an incident report because she informally resolved the situation when the inmate agreed to complete extra duties in his Housing Unit. Tr. (Chamblin) Vol. 1, 42:21-43:1. According to SIS Lieutenant Rangel, pizza that an inmate is not authorized to have by management is considered to be contraband. Tr. (Lt. Rangel) Vol. 7, 235:21-236:2.

25. As a Correctional Officer walks to his or her assigned duty posts, he or she may be the only staff member in the vicinity. Tr. (Chamblin) Vol. 1, 160:20-161:4. Correctional Officers are prepared and expected to respond to emergencies at any time. Tr. (Chamblin) Vol. 1, 51:2-

52:1; (Alvarado) Vol. 1, 201:3-11; (Davis) Vol. 2, 82:25-83:17; (Smith) Vol. 4, 17:5-15; (Sawyer) Vol. 5, 44:8-12; (McCravey) Vol. 6, 54:6-14; (Capt. Emberton) Vol. 7, 81:17-82:4; (Warden Pearce) Vol. 7, 270:20-25; (Lt. Sandeen) Vol. 7, 314:512. Obviously, Correctional Officers do not know in advance when there will be an institutional emergency and they are subject to discipline, up to and including termination, should they fail to respond to an institutional emergency. Tr. (Chamblin) Vol. 1, 52:17-53:10; UE 2 (Standards of Employee Conduct) at 9.

26. After donning their duty belts with metal chains, key clips or keepers, and chits, Correctional Officers pass through Gates 2 and 3 (the front lobby sally port) and enter the secured confines of the institution. Tr. (Alvarado) Vol. 1, 191:24-192:6; (Avila) Vol. 2, 17-22; (Davis) Vol. 2, 73:10-21; (Matthews) Vol. 2, 154:1-11; (Randall) Vol. 3, 17:21-18:1; (Atkins) Vol. 3, 69:16-20; (McCravey) Vol. 6, 10:11-13. Once through the sally port, Correctional Officers enter an open area with access to the Warden's Complex, Human Resources Department, Visiting Room, Control Center, "hot trash" bin, and accountability chit board. Tr. (Alvarado) Vol. 1, 192:16-193:14; (Avila) Vol. 2, 13:23-14:1; JE 10 (FCI Bastrop Institutional Schematic).

27. The distance from the staff screening site to the Control Center is approximately one hundred and seventy-four (174) feet. JE 10 (FCI Bastrop Institutional Schematic); UE 17 (Union Distance Measurements). The walk from the front lobby to the Control Center area with the accountability chit board was estimated to take *one to two minutes*. Tr. (Randall) Vol. 3, 19:9-13, 25:25-26:3. Correctional Officers flip their accountability chits to indicate their presence inside the institution and pass through Gate 4 to enter the Compound. Tr. (Alvarado) Vol. 2, 208:20-209:17; (Avila), Vol. 2, 14:16-23; (Randall) Vol. 3, 18:6-11; (Capt. Emberton) Vol. 7; 75:16-76:4. By

flipping their accountability chits, Correctional Officers notify management that they are inside the institution.

28. A number of Correctional Officers testified that it is their practice to stop at the Lieutenants' Office to "check in," sign for management-assigned overtime if necessary, and check their mailboxes multiple times per week. Tr. (Chamblin) Vol. 1, 82:21-83:22; (Alvarado) 209:18-210:8; (Avila), Vol. 2, 14:16-23; (Davis) Vol. 2, 76:12-77:18; (Randall) Vol. 3, 18:16-23; (Randall) Vol. 3, 30:11-20; (Pratz) Vol. 3, 189:2-11; (Simon) Vol. 4, 40:24-41:2; (Sawyer) Vol. 5, 28:8-20. The Lieutenants' Office is located approximately three hundred feet from the staff screening site. JE 10 (FCI Bastrop Institutional Schematic); UE 17 (Union Distance Measurements). The walk from the staff screening site to the Lieutenant's Office takes *approximately four minutes* from the staff screening location and each Correctional Officer is assigned an institutional mailbox. Tr. (Jackson) Vol. 3, 231:23-232:7; (Lt. Sandeen) Vol. 7, 291:4-8.

29. Institutional post orders require Correctional Officers to check their mailboxes daily, but they presently are discouraged by management from doing so during shift exchange. Tr. (Pratz) Vol. 3, 188:11-19; JE 9A (General Post Order) at 23 ("Check your mail box daily for information concerning changes in your job assignment and for other job related items/ activities." Institutional mailboxes contain Correctional Officers' time and attendance sheets, assignment change sheets, and other work-related information. Tr. (Alvarado) Vol. 1, 209:25-210:8; (Avila) Vol. 2, 49:16-21; (Matthews) Vol. 2, 155:1-4, (Randall) Vol. 3, 18:16-23; (Lt. Figueroa) Vol. 6, 128:14-21, 207:6-11; (Capt. Emberton) Vol. 7, 65:12-19; (Lt. Sandeen) Vol. 7, 291:9-12. Also, when Correctional Officers are assigned overtime, they must sign an overtime authorization form in the Lieutenants' Office before they can be paid for their work. Tr. (Avila) Vol. 2, 49:16-21; (Davis) Vol. 2, 139:16-21; (Pratz) Vol. 3, 189:2-11.

30. A number of Correctional Officers testified that, except on rare occasions, Correctional Managers have not stopped Correctional Officers from checking their mailboxes during shift exchange on a regular basis. Tr. (Avila), Vol. 2, 62:12-14; (Davis) Vol. 2, 137:7-9. Testimony indicated that since October 2010, management has not regularly arranged for Correctional Officers to be relieved to check their institutional mailboxes during shift time. Tr. (Lt. Figueroa) Vol. 6, 231:17-232:6; (Lt. Rangel) Vol. 7, 239:9-240:6; (Lt. Sandeen) Vol. 8, 10:14-11:1. Lt. Figueroa testified that he expects Correctional Officers to exercise sound correctional judgment in determining when to check their mailboxes. Tr. (Lt. Figueroa) Vol. 6, 230:16-24.

31. Correctional Officers are responsible for working their assigned post, even if the assigned shift or post changes. Tr. (Davis) Vol. 2, 119:12-24. There is generally a shift Lieutenant in the Lieutenant's Office when the Correctional Officers arrive, with whom they may interact. Tr. (Alvarado) Vol. 1, 195:13-18; (Avila), Vol. 2, 62:24-63:1; (Davis) Vol. 2, 76: 13-77:5, 120:16-23; (Randall) Vol. 3, 19:2-4; 30:21-24; (Pratz) Vol. 3, 192:14-21. Correctional Officers testified that this presents an opportunity for the lieutenants to pass along pertinent information, such as a list of urinalyses to run during their shifts, or a list of inmates who will depart the facility early the next day. Tr. (Davis) Vol. 2, 77:6-18. The Correctional Officers then proceed to their assigned posts throughout the Institution. Tr. (Alvarado) Vol. 1, 192:17-193:14; (Avila), Vol. 2, 15:3-6; (Davis) Vol. 2, 77:19-21; (Randall) Vol. 3, 19:14-17. At the end of their shifts, Correctional Officers depart from their assigned posts, reverse their arrival path, and depart from the Institution. Tr. (Atkins) Vol. 3, 77:15-22; (McCravey) Vol. 6, 16:7-15.

32. Until July 5, 2011, FCI Bastrop management permitted Correctional Officers to pick-up a freshly charged battery from the Control Center prior to the start of their shifts and to return a spent battery to the Control Center at the shift conclusion. However, effective July 5, 2011, Agency



management installed radio battery chargers on Austin, Crockett, Houston, and Travis Housing Units, and on the Special Housing Unit (“SHU”). Tr. (Alvarado) Vol. 1, 198:4-12; (Davis) Vol. 2, 73:22-74:9; (Matthews) Vol. 2, 187:20-24; (Anderson) Vol. 3, 121:10-17; AE ( (July 1, 2011 Email from G. Emberton to FCI Bastrop Staff, re: Battery Chargers). As indicated, prior to the installation of the battery chargers, Correctional Officers assigned to those posts picked up charged radio batteries at the Control Center on their way to post. Tr. (Chamblin) Vol. 1, 60:17-61:10, 231:21-232:6; (Davis) Vol. 2, 73:22-74:9, 111:20-25’ (Matthews) Vol. 2, 155:5-24, 188:6-11; (Anderson) Vol. 3, 121:18-122:4; (Pratz) Vol. 3, 165:13-17, 183:24-184:13; (Sawyer) Vol. 5, 11:419, 18:18-19:6; (McCravey) Vol. 6, 34:17-35:2.

33. Radios are considered to be the Correctional Officers’ most important piece of equipment and a lifeline because they use their Institutional radios to communicate with one another and notify Control of emergencies. Tr. (Chamblin) Vol. 1, 58:17-25, 59:5-15; (Alvarado) Vol. 1, 188:4-13; (Matthews) Vol. 2, 155:25-156:4; (Anderson) Vol. 3, 151:5-9; (McCravey) Vol. 6, 35:3-12. These radios are equipped with “body alarms,” that the Correctional Officers can activate to notify the Control Center of an emergency. Tr. (Chamblin) Vol. 1, 79:25-80:21. Radios chirp or beep for a short period before the battery is depleted to notify Correctional Officers that they require a new battery. Tr. (Davis) Vol. 2, 115:6-13; (Lt. Figueroa) Vol. 6, 131:13-23. Lieutenant Figueroa estimated that the Institutional radios will chirp for approximately ten minutes before the battery is depleted. Tr. (Lt. Figueroa) Vol. 6, 131:13-23. Several officers testified that Compound Officers deliver freshly charged batteries to the Housing Units and SHU on an “as needed” basis, but their delivery may be delayed by other activities. Tr. (Chamblin) Vol. 1, 61:22-62:2; (Davis) Vol. 2, 75:1-16, 112:13-113:2; (McCravey) Vol. 6, 34:1735:2; (Lt. Rangel) Vol. 7, 198:21-199:6.

34. Several Correctional Officers testified that they still return depleted batteries to the Control Center for re-charging when they depart the facility. Tr. (Chamblin) Vol. 1, 61:18-21; (Davis) Vol. 2, 81:21-82, 130:10-14; (Matthews) Vol. 2, 188:16-20; (Anderson) Vol. 3, 112:5-19; (Pratz) Vol. 3, 170:7-12; (Sawyer) Vol. 5, 22:13-17. Officer Anderson, who was assigned to the Control Center regularly since October 2010, testified that most officers both picked up and returned depleted radio batteries on a daily basis. Tr. (Anderson) Vol. 3, 122:16-19. Officer Anderson testified that management occasionally instructed the Control Center officers not to hand out freshly charged batteries in order to save time, but they did not discipline Control Center Officers for handing out batteries. Tr. (Anderson) Vol. 3, 150:17-151:11.

**Job Duties and Responsibilities; Uncompensated Pre- and Post-Shift Work Performed by Correctional Officers (by Position):**

***Control Center***

Correctional Officers testified that the Control Center is the heart of the Institution and it is one of the busier posts at FCI Bastrop. Tr. (Smith) Vol. 4, 14:12-17-15:3. Tr. (Anderson) Vol. 3, 129:11-13.

**Description of Post**

The Control Center post is staffed twenty-four hours per day, seven days per week and maintains the Institutional count of all inmates. Tr. (Anderson) Vol. 3, 109:1-9, 114:9-11. The Control Center instructs Correctional Officers and other workers to count the inmates under their supervision at designated times throughout the day. Tr. (Anderson) Vol. 3, 116:22-117:4; (Jackson) Vol. 3, 242:10-23. After the counts are complete, the Control Center confirms the accuracy of the counts. Equipment for Correctional Officers and other correctional workers, including radios, keys, hand restraints, and non-lethal munitions are maintained in the Control Center and most of this

equipment is maintained on shadow or peg boards. Each time an employee wants to retrieve a piece of equipment, he or she must notify the Control Center officer and provide an appropriate number of chits. The Control Center officer exchanges the chits for the requested equipment, and provides the requested equipment to the requesting worker, or vice versa Tr. (Anderson) Vol. 3, 110:3-7; 110:13-24; 110:25-111:19; 117:5-118:2118:23-119:10.

There is only one Correctional Officer assigned to the Control Center per shift, although other staff, including the Visiting Room officers, may assist in the equipment exchange process during busy times. The Correctional Officer assigned to the Control Center is also responsible for monitoring and operating all electronic doors at FCI Bastrop, including Gates 2, 3, and 4, and the SHU sally port. Before opening any of the electronic gates, doors, and grilles, the Control Center officer must look at the appropriate camera to identify the person seeking entrance or exit to ensure they are a correctional worker and not an escaping inmate. Additionally, on off hours, i.e., during hours when the Receptionist post is not staffed, the Control Center officer is responsible for answering all institutional telephone calls. At all times, the Control Center officer must monitor all Institutional radio channels and cameras to dispatch responders to an emergency. Finally, the Control Center officer is responsible for institutional paperwork, including the daily log, equipment inventories, watch call sheets, alarm sheets, and basic fire and security reports. Tr. (Anderson) Vol. 3, 111:20-23, 112:8-14, 114:12-22, 116:1-3, 7-12, 125:20-126:8, 126:9-24; (Smith) Vol. 4, 18:10-21, 28:15-19.

Amount of Uncompensated Work Performed During Pre- and Post-Shift Activities:

Testimony from representative Correctional Officers indicated that officers assigned to the Control Center arrive at FCI Bastrop approximately *fifteen to twenty minutes* before their shift starting time. Tr. (Anderson) Vol. 3, 123:6-11, 133:18-24, 216:24-217:4; (Smith) Vol. 4, 15:4-6.

Like all other Correctional Officers, they *complete the staff screening process*. Tr. (Anderson) Vol. 3, 123:12-20, 133:25-134:5; (Jackson) Vol. 3, 217:21-218:15; (Smith) Vol. 4, 15:7-18.

These officers enter the institution through the Front Lobby sally port and are granted access to the Control Center by the officer they have arrived to relieve. Tr. (Anderson) Vol. 3, 124:21-25, 125:8-14, 134:6-20. The Control Center is located about one hundred and seventy-four feet from the staff screening site. JE 10 (FCI Bastrop Institutional Schematic); UE 17 (Union Distance Measurements). Once inside the Control Center, the on-coming officer scans the equipment shadow and peg boards to ensure that all keys, radios, and other equipment are either in their assigned storage locations or accounted for with a chit. Tr. (Anderson) Vol. 3, 127:3-21; 134:21-25, 143:1-7, 219:10-25, 242:2-5; (Smith) Vol. 4, 18:22-19:9. The on-coming Control Center officer also ensures that all fire alarms, body alarms, and equipment are functioning properly. Tr. (Anderson) Vol. 3, 127:22-128:3, 134:21-25. The off-going officer provides information to the arriving officer, including details about incidents on the previous shifts, the number of inmates assigned to FCI Bastrop, and whether any inmates have left the institution for a medical trip. Tr. (Anderson) Vol. 3, 129:3-10, 134:21-25; (Smith) Vol. 4, 18:10-21. As they are exchanging information, other Correctional Officers and workers arrive at the Control Center to pick up and drop off equipment. Tr. (Anderson) Vol. 3, 128:4-21, 134:21-25.

During the shift exchange, Control Center Officers continue to answer telephone calls, open electronic gates and doors, and monitor the Institutional radio system for emergencies. Tr. (Smith) Vol. 4, 18:10-21. Testimony indicated that this shift exchange process takes approximately *five (5) minutes* and it is not unusual for the shift exchange to take longer, especially if there are discrepancies or other unusual occurrences during the exchange, or if the shift is busier than usual. Tr. (Anderson) Vol. 3, 130:5-15; (Jackson) Vol. 3, 220:17-25, 221:10-16, Tr. (Smith) Vol. 4; 21:7-

10. The departing Correctional Officer is able to leave the Control Center at the end of his or her shift time. Tr. (Anderson) Vol. 3, 130:13-15, 132:13-16, 148:16-22, 149:7-8; (Jackson) Vol. 3, 221:1-9, 17-19; (Smith) Vol. 4, 21:11-19. The departing Correctional Officer leaves from the institution through Gate 3, which testimony indicated that it takes approximately *two minutes*. Tr. (Jackson) Vol. 3, 221:20-222:5; (Smith) Vol. 4, 15:7-18.

*Composite testimony from Corrections Officers, when assigned to the Control Center, indicates that for all watches would require approximately eight (8) minutes of pre-shift work, from entering the front lobby, screening, walking and briefing exchange, with about two minutes to exit the facility, for a total of about ten (10) minutes of uncompensated work.*

### ***Visiting Room Nos. 1 and 2***

#### Description of Post

The Visiting Room officers are responsible for supervising inmates' visits with family and other approved visitors. Tr. (Flores) Vol. 4, 77:11-22. Visiting occurs five days per week at FCI Bastrop, with no visiting on Tuesdays or Wednesdays. Tr. (Flores) Vol. 4, 77:23-78:1. The Visiting Room Nos. 1 and 2 posts are staffed from 8:00 a.m. to 4:00 p.m. Thursday, Friday, Saturday, Sunday, and Monday. Tr. (Chamblin) Vol. 1, 86:12-24; (Flores) Vol. 4, 77:510; (Lt. Figueroa) Vol. 6, 155:16-2; (Capt. Emberton) Vol. 7, 111:14-18; (Lt. Sandeen) Vol. 7, 310:3-5; JE 8 (Quarterly Assignment Rosters). Inmate visiting commences at 8:00 a.m. and ends at 3:00 p.m. every day except for Thursday, which is from 8:00 a.m. to noon and for SHU inmates only. Tr. (Flores) Vol. 4, 78:615; (Lt. Figueroa) Vol. 6, 155:23-25; (Capt. Emberton) Vol. 7, 111:19-21.

Correctional Officers process inmate visitors quickly so that they can spend more time with the inmates they are visiting. Tr. (Flores) Vol. 4, 83:15-19. Correctional Officers cannot delay the

start of visiting without permission from a Lieutenant; a delayed start to visiting start has occurred rarely -- approximately three times since October 2010. Tr. (Flores) Vol. 4, 108:12-21. Visitors for inmates are escorted from the Front Lobby to the Visiting Room by the Visiting No. 2, and generally begin arriving in the Visiting Room shortly after 8:00 a.m. Tr. (Flores) Vol. 4, 79:13-20; (Lt. Figueroa) Vol. 6; 250:20-25.

The Visiting Room officers pat down the inmates, write their information in a logbook, and require them to provide their BOP identification to the correctional officer manning the front desk of the Visiting Room. Tr. (Flores) Vol. 4, 96:5-12. At the end of visiting period, Visiting Room No. 1 officer announces that visiting has ended and inmates and visitors must separate. Tr. (Flores) Vol. 4, 83:20-84:2; (Lt. Figueroa) Vol. 6, 162:10-23. Once the separation of inmates and visitors is complete, one Visiting Room officer escorts inmate visitors out of FCI Bastrop in several small groups of five adults at a time. Tr. (Flores) Vol. 4, 83:20-84:15; (Lt. Figueroa) Vol. 6, 162:10-23; (Lt. Rangel) Vol. 7, 219:25-220:3; (Lt. Sandeen) Vol. 7, 311:4-10.

The other Visiting Room officer supervises the inmates, who must remain seated in the Visiting Room until all visitors have been escorted out of the Institution by a Visiting Room officer. Tr. (Flores) Vol. 4, 83:20-84:2, 84:20-21. Once all of the institutional visitors have been escorted out of FCI Bastrop, the Correctional Officers visually search the inmates and their clothing. Tr. (Flores) Vol. 4, 84:2285:4; (Lt. Figueroa) Vol. 6, 162:24-163:3; (Capt. Emberton) Vol. 7, 113:3-12; (Lt. Rangel) Vol. 7, 220:4-8; (Lt. Sandeen) Vol. 7, 311:4-10. One Visiting Room officer supervises the inmates while the other conducts the searches. Tr. (Flores) Vol. 4, 85:5-8. Once they have completed the searching process, they search the Visiting Room and take out the trash. Tr. (Flores) Vol. 4, 86: 16-87:11; (Capt. Emberton) Vol. 7, 113: 3-12.

#### Amount of Uncompensated Work Performed During Pre- and Post-Shift Activities

Correctional Officer Flores testified that when assigned to the Visiting Room, he arrives at FCI Bastrop approximately *fifteen to twenty minutes* before his shift start time. Tr. (Flores) Vol. 4, 80:319. As with all other Correctional Officers, Visiting Room Officers complete the staff screening process, and enter the institution through the Front Lobby sally port and walk to the Control Center to retrieve their required keys and radio. Tr. (Flores) Vol. 4, 80:3-19, 81:20-82:5. After retrieving this equipment, these officers proceed to the Visiting Room, which they search, including the chairs used by inmates and visitors, the snack vending area, the children's play area, and the rest rooms. Tr. (Flores) Vol. 4, 82:10-83:1; (Lt. Figueroa) Vol. 6, 156:5-11; (Capt. Emberton) Vol. 7, 111:22-112:4.

The Visiting Room No. 1 officer starts the Visiting Room computer and prepares paperwork necessary for the day while the Visiting Room No. 2 officer proceeds to the Front Lobby to assist with processing inmate visitors into the Institution. Tr. 78:25-79:12. At the end of the shift, the Visiting Room Nos. 1 and 2 officers escort visitors from the Institution, visually search all inmates, and search the Visiting Room, including the chairs used by inmates and visitors, the snack vending area, the children's play area, and the rest rooms (See, supra, ¶¶ 137-42). Once these officers have completed their tasks, they return their Visiting Room equipment to the Control Center and seek additional assignments from the Operations Lieutenant. Tr. (Flores) Vol. 4, 86: 16-87:24; (Lt. Rangel) Vol. 7, 220: 9-15. Visiting Room officers may be assigned to "cover" a Housing Unit for the remainder of the shift, to assist the Control Center officer in exchanging equipment, or, on weekends, to relieve the Front Entrance officer. Tr. (Flores) Vol. 4, 87:25-88:10; (Flores) Vol. 4, 89:10-90:1; (Lt. Sandeen) Vol. 7, 311:19-312:2.

When the Visiting Room officers "cover" a Housing Unit, they are relieved like all other Housing Unit officers, and depart from the Housing Unit at the end of their shift. Tr. (Flores)

Vol. 4, 91:1-11. Samuel Flores, Jr., testified that normally, when the Visiting Room officers “cover” a Housing Unit, they drop their hot trash at the hot trash bin between 4:05 p.m. and 4:08 p.m. Tr. (Flores) Vol. 4, 91:24-92:3. When the Visiting Room officers assist the Control Center officer in exchanging equipment, they depart from the Control Center at 4:00 p.m. Tr. (Flores) Vol. 4, 91:1-11. When the Visiting Room officers relieve the Front Entrance officer, they remain in the Front Lobby until 4:00 p.m. Tr. (Flores) Vol. 4, 88:24-89:9. The Visiting Room officers are relieved by the Compound No. 2 officer with whom they exchange keys. Tr. (Flores) Vol. 4, 88:18-89:9. The Visiting Room officers place the Front Entrance officer’s radio in a drawer in the Front Lobby filing cabinet. Tr. (Flores) Vol. 4, 88:24-89:9.

*Testimony by Corrections Officer Samuel Flores, Jr., is that when assigned to the Visiting Room on visitor days, he spends about eight (8) minutes of pre-shift work, from entering the front lobby, screening, walking and preparing the room for visitors, with about two minutes to exit the facility if he is reassigned to a housing unit for the final hour, for a total of ten (10) minutes of uncompensated work.*

### ***Compound Nos. 1 and 2***

#### Description of Post

There are two Compound Officers on duty twenty-four hours per day, seven days per week and they are responsible for controlling all movement inside the Institution.. Tr. (Chamblin) Vol. 1, 87:13-22, 88:11-19; JE 8 (Quarterly Assignment Rosters); (Atkins) Vol. 3, 60:22-61:4; (Jackson), Vol. 3, 199:23-200:2. The Compound No. 1 officer “calls” each inmate move, which means determining when the Compound is open for inmates to move from location to location. Tr. (Atkins) Vol. 3, 61:5-16. During the Day shift, inmate moves occur approximately one time per



hour. JE 9A (General Post Order) at 8. During the moves, the Compound No. 1 officer roams the Compound, supervising and pat searching inmates. Tr. (Atkins) Vol. 3, 63:6-10. During the moves, the Compound No. 2 officer processes inmates through the metal detector shack between the recreation yard and the Housing Units. Tr. (Atkins) Vol. 3, 64:2265: 5.

When inmates pass through the metal detector shack, they must clear a metal detector and show their Institutional identification cards to the Compound No. 2 officer. Tr. (Atkins) Vol. 3, 65:6-20. The Compound No. 2 officer generally completes this task alone. Tr. (Atkins) Vol. 3, 65:21-25. The Compound officers are also responsible for performing checks of the Institution's fences, ensuring that all doors are locked overnight, and checking to make sure that the Institution's emergency call systems ("deuces" and "no dials") are operable. Tr. (Jackson), Vol. 3, 204:23-205:5. One of the Compound officers supervises inmates taking trash from the Institution to be hauled away. Tr. (Jackson) Vol. 3; 200:10-18. The Compound officers are also responsible for a large inmate work detail of 20 to 30 inmates. Tr. (Atkins) Vol. 3, 70:9-21. The Compound officers also deliver information, paperwork, and equipment to Housing Unit officers on an as needed basis. Tr. (Atkins) Vol. 3 102:12-16. On the Morning Watch shift, Compound officers assist the Housing Unit officers in counting their assigned inmates. Tr. (Jackson), Vol. 3, 200:3-9.

#### Amount of Uncompensated Work Performed During Pre- and Post-Shift Activities

Correctional Officers assigned as Compound Numbers 1 and 2, testified that they arrive *fifteen to twenty minutes* before their shift start time. Tr. (Atkins) Vol. 3, 66:16-23; (Jackson), Vol. 3, 200:23-201:13; (Sawyer) Vol. 5, 18:2-5; (McCravey) Vol. 6, 8:13-21. As with all other Correctional Officers, they are required to complete the staff screening process. Tr. (Atkins) Vol. 3, 67:2-12;

(Jackson), Vol. 3, 201:4-13; (Sawyer) Vol. 5, 18:6-17; (McCravey) Vol. 6, 9:2-6. After finishing the staff screening process and donning their duty belts, the Compound Number 1 and 2 officers walk to the Lieutenants' Office, where their office is located. Tr. (Atkins) Vol. 3, 66:1-7, 71:1-5; (Jackson), Vol. 3, 201:19-22, 202:15-19; (Sawyer) Vol. 5, 18:18-19:6; (McCravey) Vol. 6, 10:11-13. Testimony indicated that it takes approximately four minutes to walk from the staff screening site to the Lieutenants Office. Tr. (Jackson) Vol. 3; 231:23-232:7.

The on-coming Compound officers exchange equipment with the out-going officers, including two sets of keys, handcuffs, and a radio. Tr. (Atkins) Vol. 3, 72:7-19; (Jackson), Vol. 3, 204:13-22, 208:6-8, 215-209:4, 214:1-7; (Sawyer) Vol. 5, 20:10-19, 22:1-12; (McCravey) Vol. 6, 12:16-19, 15:20-16:1. When the Compound officers assume their post, they account for all of the keys and affix them to their duty belts using their key keepers. Tr. (Atkins) Vol. 3, 72:17-74:3; (Sawyer) Vol. 5, 20:20-21:1; (McCravey) Vol. 6, 12:20-13:3, 15:20-16:1. The Compound officers' keys are permanently affixed to a chain. Tr. (Atkins) Vol. 3, 74:4-10. The Compound No. 1 officer is also responsible for metal detectors, breathalyzers, and other equipment, which are maintained in a drawer in the Compound area of the Lieutenants' Office. Tr. (Sawyer) Vol. 5, 21:2-9.

The Compound officers also exchange information during the shift exchange, including whether there are any out counts, and unusual occurrences on earlier shifts. Tr. (Atkins) Vol. 3, 74:20-75:6; (Jackson), Vol. 3, 204:13-22, 208:15-24; (Sawyer) Vol. 5, 20:2-9, 22:1-12; (McCravey) Vol. 6, 12:6-11; 15:20-16:1. Witnesses testified that the *shift exchange takes approximately three to five minutes*. Tr. (Atkins) Vol. 3, 75:21-23; (Jackson), Vol. 3 205:6-9, 209:5-7; (Sawyer) Vol. 5, 21:10-13; (McCravey) Vol. 6, 14:17-22, 16:2-6. After the shift exchange is complete, the off-going Correctional Officer departs from the Lieutenants' Office. Tr. (Atkins) Vol. 3, 77:15-22; (Jackson),

Vol. 3, 205:15-18, 209:8-17; (Sawyer) Vol. 5, 21:14-16. The off-going officer then walks to Gate 4, flips over his accountability chit, and exits the institution. Tr. (Atkins) Vol. 3, 77:15-22; (Jackson), Vol. 3, 209:8-17; (Sawyer) Vol. 5, 22:1317; (McCravey) Vol. 6, 16:7-15.

Correctional Officers assigned to the Compound posts testified that they depart from FCI Bastrop at their shift end times. Tr. (Atkins) Vol. 3, 78:1-4; (Jackson), Vol. 3, 214:21-23; (Sawyer) Vol. 5, 22:21 23; (McCravey) Vol. 6, 16:19-25. The Correctional Officers testified that their practice is the same regardless of which shift they are assigned to work, and has been consistent since October 2010. Tr. (Jackson), Vol. 3, 210:20-211:14. For the Compound No. 2 officer, the departure practice at the end of Day Watch, and the arrival practice at the beginning of Evening Watch, varies slightly because the shift exchange occurs in the Front Lobby. Tr. (Atkins) Vol. 3, 81:16-25.

Near the end of the Day Watch shift, the Compound No. 1 officer takes the Camp mailbag and key control slip to the Front Lobby. Tr. (Atkins) Vol. 3, 81:5-82:7. The Camp officer picks up the mailbag and key control slip when he drops off the 4:00 p.m. count forms. Tr. (Atkins) Vol. 3, 82:8-15. When the Compound No. 2 Evening Watch officer arrives, they exchange equipment, which includes two sets of keys, handcuffs, and a radio. Tr. (Atkins) Vol. 3, 82:16-23. The Correctional Officers also exchange information, including information about out counts, suicide watches, and other unusual shift occurrences. Tr. (Atkins) Vol. 3, 82:4-83:6.

The Compound No. 2 Day Watch officer departs directly from the Front Lobby. Tr. (Atkins) Vol. 3, 83:7-15. On other occasions where the Compound No. 2 officer exchanges equipment and information in the Front Lobby because the Compound No. 2 officer has been temporarily used to screen entering staff, the off-going Compound No. 2 officer must go back

inside the institution to retrieve his or her personal belongings. Tr. (Jackson), Vol. 3, 212:22-213:8, 215:5-2. The Compound No. 2 officer departs at approximately the same time, at the end of the shift, and he is relieved in the Lieutenants' Office on those occasions. Tr. (Jackson), Vol. 3, 216:19-23.

*Composite testimony from Corrections Officers, when assigned to the Compound Numbers 1 and 2 posts, indicates that Day and Evening watches would require approximately fifteen (15) minutes of uncompensated pre-shift work, from entering the front lobby, screening, walking to post, equipment checks and briefing exchange. Testimony indicates that both officers leave at the shift end time.*

### ***The Special Housing Unit ("SHU") SHU No. 1***

The Special Housing Unit ("SHU") at FCI Bastrop can house a total of approximately forty-nine inmates. Tr. (Chamblin) Vol. 1, 77:10-16; (Pratz) Vol. 3, 158:14-16. Inmates may request to be assigned to SHU because they fear for their safety, or they may be assigned to SHU because of disciplinary violations, such as insolence or violence towards FCI Bastrop staff. Tr. (Chamblin) Vol. 1, 76:25-77:7; (Pratz) Vol. 3, 158:17-22 Inmates assigned to SHU are not afforded the same freedom of movement as general population inmates, and are only permitted to leave their cells for specific reasons including recreation, showers, disciplinary hearings, or medical visits. Tr. (Pratz) Vol. 3, 159:1-9. When inmates leave their assigned cells, they are restrained, searched with a metal detector, and escorted by Correctional Officers. Tr. (Pratz) Vol. 3, 160:22-162:1. Inmates are permitted to engage in recreation, which occurs in an area attached to SHU, one hour per day, five days per week and are also entitled to shower three times per week, on Mondays, Wednesdays, and Fridays. Tr. (Pratz) Vol. 3, 159:10-25, 160:16-21; (Lt. Figueroa) Vol. 6, 136:3-

19. Inmates assigned to SHU are fed in their cells at 6:00 a.m., 10:30 a.m., and approximately 3:45 p.m. Tr. (Pratz) Vol. 3, 171:12-20; (Sawyer) Vol. 5, 8:11-21.

#### Description of Post

The SHU No. 1 post is staffed twenty-four hours per day, seven days per week. Tr. (Chamblin) Vol. 1, 77:23-79:9; (Pratz) Vol. 3, 163:1-2; (Lt. Figueroa) Vol. 6, 134:20-135:2; JE 8 (Quarterly Assignment Rosters). Equipment for the SHU No. 1 post includes keys and a radio. Tr. (Lt. Figueroa) Vol. 6, 135:3-13. The SHU No. 1 officer is also responsible for accounting for a number of restraints, including hand restraints, leg irons, belly chains, and others. Tr. (Lt. Figueroa) Vol. 6, 135:3-13. The SHU No. 1 officer must also account for basic hand tools, barbershop equipment, and a video camera. Tr. (Lt. Figueroa) Vol. 6, 135:3-13.

The Correctional Officer assigned to SHU No. 1 is responsible for ensuring the smooth operation of SHU. Tr. (Sawyer) Vol. 5, 6:11-19; (Lt. Figueroa) Vol. 6, 134:20, 135:2; JE 9F (SHU No. 1 Post Orders) at 1 (“The officer assigned to this post is responsible for the safe, secure and orderly operation of the segregation unit. This officer will maintain constant supervision of the unit, and will ensure all regulations and directives pertinent to this unit are carried out. This officer is responsible to the Captain for the general welfare, custody, and inmate discipline of all inmates assigned to this unit.”). The SHU No. 1 officer is responsible for identifying and admitting staff or other visitors to SHU, completing paperwork and computer work for new inmates, and completing paperwork for inmates assigned to SHU. Tr. (Pratz) Vol. 3, 162:8-16. On a daily basis, the SHU No. 1 officer must ensure that records are maintained of whether each inmate ate, engaged in recreation, showered, or completed other activities. Tr. (Pratz) Vol. 3, 162:17-21. The SHU No. 1 officer is also responsible for conducting thirty-minute checks on inmate during the overnight hours. Tr. (Sawyer) Vol. 5, 6:11-19.

On Morning Watch, the SHU No. 1 officer must check each cell to ensure that its inmate occupants remain alive and well throughout the overnight hours. Tr. (Sawyer) Vol. 5, 6:20-24. The Morning Watch SHU No. 1 also reviews and revises the Institution's detail kits. Tr.(Sawyer) Vol. 5, 7:7-19; (Capt. Emberton) Vol. 7, 52:25-53:21. Additionally, the Morning Watch SHU No. 1 counts inmates at midnight, 3:00 a.m., and 5:00 a.m. Tr. (Sawyer) Vol. 5, 6:25-7:6. The SHU No. 1 officer also prints recreation rosters and other rosters listing the inmates assigned to SHU on Morning Watch. Tr. (Sawyer) Vol. 5, 7:20-8:3.

#### Amount of Uncompensated Work Performed During Pre- and Post-Shift Activities

Correctional Officers assigned to SHU No. 1 must arrive at FCI Bastrop in adequate time to be on their assigned duty post by their shift start time. Tr. (Lt. Figueroa) Vol. 6, 140:24, 141: 2-12. Correctional Officer Randolph Pratz testified that officers assigned to SHU No. 1 would arrive at FCI Bastrop approximately *fifteen (15) minutes* before their shift star time. Tr. (Pratz) Vol. 3, 163:3-10. As with all other Correctional Officers, they must complete the staff screening process. Tr. (Pratz) Vol. 3, 163:11-164:2; (Sawyer) Vol. 5, 9:18-24. Once inside the secured confines of the institution, they retrieved freshly charged batteries from the Control Center until July 5, 2011, when battery chargers were installed in the housing units. The officers flip their accountability chits and proceed through Gate 4. Officer Gerald Sawyer testified that after entering the Compound, his practice is to check his mailbox in the Lieutenants' Office and proceed to his assigned duty post (Vol. 5, p. 11: 16). However, Officer Samuel Pratz testified that his practice after entering the Compound is to go straight to his duty assignment (Vol. 3, p. 165: 17).

On Morning Watch, the SHU No. 1 officer collects the detail kit. Tr. (Sawyer) Vol. 5, 11:4-22. The SHU is located about three hundred feet from the staff screening site. JE 10 (FCI Bastrop Institutional Schematic); UE 17 (Union Distance Measurements). The entrance to SHU is

approximately *one minute* from the Control Center. Tr. (Pratz) Vol. 3; 165:23-25; A7 (Agency Travel Times). Upon arrival at SHU, they notify the on-duty SHU No. 1 officer of their arrival by telephone. Tr. (Pratz) Vol. 3, 166:1-15; (Sawyer) Vol. 5, 12:2-12. The SHU No. 1 officer confirms a staff member is at the SHU door and that the inner SHU door is secure with the Control Center. Tr. (Pratz) Vol. 3, 166:1-15; (Sawyer) Vol. 5, 12:212. The Control Center opens the outer door to SHU; once the outer door is secure, the SHU No. 1 officer opens the inner door. Tr. (Pratz) Vol. 3, 166:1-15; (Sawyer) Vol. 5, 12:2-12. The on-coming and off-going SHU No.1 officers exchange equipment, including keys and a radio, and account for other equipment, including hand restraints. Tr. (Pratz) Vol. 3, 166:16-25, 168:14-24; (Sawyer) Vol. 5, 12:2-20. They also exchange information about the number of inmates assigned to SHU, and other occurrences on the preceding shift. Tr. (Pratz) Vol. 3, 166:16-25, 168:14-24; (Sawyer) Vol. 5, 13:22-14:6; (Lt. Figueroa) Vol. 6, 138:25-139:13.

Witnesses testified that the *shift exchange process takes approximately five (5) minutes* to complete. Tr. (Pratz) Vol. 3, 167:5-8, 168:25-169:2; (Sawyer) Vol. 5, 14:10-13. After the shift exchange process is completed because the off-going officer has handed over his keys and radio, the on-coming officer has scanned the equipment to ensure it is all accounted for, and the Correctional Officers have exchanged information, the off-going SHU No. 1 officer departs. Tr. (Pratz) Vol. 3, 167:9-19; 169:6-13; (Sawyer) Vol. 5, 14:14-19. The off-going SHU No. 1 officer departs from the SHU at his scheduled shift end. Tr. (Pratz) Vol. 3, 169:3-5; (Sawyer) Vol. 5, 14:14-19, 15:8-10. The SHU No. 1 officer then drops a depleted battery and any hot trash, arriving at Gate 3 three or four minutes after the shift end time. Tr. (Pratz) Vol. 3, 170:7-12.

In summary, testimony from SHU 1 Corrections Officers indicates the following amounts of pre- and post-shift time that is not compensated:

- Arrival at front gate in first building at approximately 7:45 a.m. Place metal items in bucket and screened by metal detector, retrieve items and put back on duty belt, etc., stand in front of Gate 2 for Control Center to open Gate 2.....**5 minutes**
  - Wait for Gate 2 to be closed while in Sally Port and Gate 3 to be opened by Control Center and retrieve chits, walk to SHU door.....**2 minutes**
  - Wait for SHU door to be opened, account for all equipment on shadow board and exchange information with SHU officer.....**5 minutes**
  - Relief at shift end with SHU and briefing; depart SHU at 4 pm, arrive at Gate 3 at approximately 4:03-4:05 pm, exit.....**5 minutes**
- Total uncompensated work.....17 minutes***

Testimony by Correctional Officers regarding exact times is necessarily approximate, depending on the number of prison staff and officers all passing through security screening just before 8 a.m. Also, the amount of equipment and keys to be accounted for and potentially high number of inmate issues to be discussed in shift exchange briefing could affect the amount of time required.

### ***The Special Housing Unit (“SHU”) SHU No. 2***

#### Description of Post

The SHU No. 2 post is staffed two shifts per day, which are from 6:00 a.m. to 2 p.m. and 2 p.m. to 10 p.m., seven days per week. Tr. (Chamblin) Vol. 1, 77:23-79:9; (Pratz) Vol. 3, 177:24-172:4; (McCravey) Vol. 6, 17:1-5; (Lt. Figueroa) Vol. 6; 136:20-137:8; JE 8 (Quarterly Assignment Rosters). SHU No. 2 is responsible for feeding inmates, and escorting inmates to and from recreation, showers, disciplinary hearings, medical visits, and anywhere else they might go. Tr. (Pratz) Vol. 3, 171:7-11; (Sawyer) Vol. 5, 8:22-9:5



Amount of Uncompensated Work Performed During Pre- and Post-Shift Activities

As indicated, the SHU No. 2 officers' shifts are from 6:00 a.m. to 2:00 p.m. ("AM"), and 2:00 p.m. to 10:00 p.m. ("PM"). Tr. (Pratz) Vol. 3, 172:5-6; (McCravey) Vol. 6, 17:1-5. The witnesses testified that the AM SHU No. 2 officer arrives at FCI Bastrop approximately *fifteen minutes* before his shift starting time. Tr. (Pratz) Vol. 3, 172:10-17; (McCravey) Vol. 6, 17:6-12; (Lt. Figueroa) Vol. 6, 145:4-8. As with all other Correctional Officers, they complete the staff screening process and enter the Institution. Tr. (Pratz) Vol. 3, 172:10-17; (McCravey) Vol. 6, 17:13-23. Once inside the secured confines of the Institution, the AM SHU No. 2 retrieves his equipment from the Control Center, including a radio, three sets of keys, and a spare battery. Tr. (Pratz) Vol. 3, 172:22-173:6.

As with all correctional workers, the AM SHU No. 2 must supply one chit for each piece of equipment received at the Control Center. Tr. (Pratz) Vol. 3, 173:20-24. The AM SHU No. 2 immediately attaches the keys to his chain and key clips, and clips the radio into its holster. Tr. (Pratz) Vol. 3, 174:6-13. The PM SHU No. 2 retrieves the AM SHU No. 2's chits from the Control Center. Tr. (McCravey) Vol. 6, 17:13-23. The SHU No. 2 officers proceed to SHU, although some may stop at the Lieutenants' Office to check in. Tr. (Pratz) Vol. 3, 174:14-21; (McCravey) Vol. 6, 17:13-23. The AM SHU No. 2 enters SHU approximately *five minutes* before his shift start time, and verifies the SHU base count with the Morning Watch SHU No. 1. Tr. (Pratz) Vol. 3, 175:4-16. The AM SHU No. 2 immediately begins serving the morning meal and preparing for recreation and/or inmate showers. Tr. (Pratz) Vol. 3, 175:17-25.

The officers testified that the PM SHU No. 2 arrives at SHU *five minutes* before their shift starting time. Tr. (Pratz) Vol. 3, 176:1-8; (McCravey) Vol. 6, 18:18-22. The AM SHU No. 2 and the PM SHU No. 2 exchange information and equipment, including a radio, three sets of keys, and

chits for the same. Tr. (Pratz) Vol. 3, 176:9-25; (McCravey) Vol. 6, 19:1-5; (Lt. Figueroa) Vol. 6; 143:14-23.

After completing the shift exchange, the AM SHU No. 2 departs from SHU. Tr. (Pratz) Vol. 3, 177:1-10. The shift exchange takes a few minutes, and the AM SHU No. 2 departs SHU at his shift ending time. Tr. (Pratz) Vol. 3, 177:1-10; (Pratz) Vol. 3, 194:15-17; (McCravey) Vol. 6, 20:613, 42:22-43:2. The AM SHU No. 2 officer completes his business at the institution, including dropping off depleted batteries and hot trash at the Control Center approximately one minute after he departs SHU, and exits the institution. Tr. (Pratz) Vol. 3, 177:15-178:1. There is no relief for the PM SHU No. 2, who departs SHU at 9:50 p.m. and returns his keys to the Control Center at 10:00 p.m. Tr. (McCravey) Vol. 6, 20:14-21:13; (Lt. Figueroa) Vol. 6, 144:22-24.

In summary, testimony from SHU 2 Corrections Officers indicates the following amounts of pre- and post-shift time that is not compensated:

- Arrival at front gate in first building at approximately 5:45 a.m. or 1:45 p.m. respectively. Walking and then place metal items in bucket and screened by metal detector, retrieve items and put back on duty belt, etc..... **3 minutes**
- AM SHU No. 2 retrieves his equipment from the Control Center, including a radio, three sets of keys, and a spare battery. AM SHU No. 2 supplies one chit for each piece of equipment received at the Control Center and immediately attaches the keys to chain and key clips, and clips the radio into its holster..... **5 minutes**
- Wait for Gate 2 to be closed while in Sally Port and Gate 3 to be opened by Control Center and retrieve chits..... **1 minute**

- Proceed to SHU and waits for SHU door to be opened, and enters SHU approximately *five minutes* before shift start time; verifies the SHU base count, accounts for all equipment on shadow board and exchanges information with SHU Morning Watch No. 1 officer officer.....**5 minutes**
  - Relief at shift end with PM SHU 2 officer and briefing; depart SHU at 2 pm, arrive at Gate 3 at approximately 2:03-2:04 pm, exit.....**3 minutes**
- Total uncompensated work: AM SHU.....17 minutes***
- Total uncompensated work: PM SHU.....15 minutes***

Because there is no relief for the PM SHU officer, there would be no delay in leaving the facility at 10 p.m., thereby eliminating any compensable post-shift work by several minutes.

Testimony by Correctional Officers regarding exact times is necessarily approximate, depending on the number of prison staff and officers all passing through security screening just before 8 a.m. Also, the amount of equipment and keys to be accounted for and potentially high number of inmate issues to be discussed in briefing could affect the amount of time required.

### ***Austin, Crockett, Houston, and Travis Housing Units***

#### Description of Post

The Housing Unit officers are responsible for ensuring the safety and security of the housing unit to which they are assigned. Tr. (Chamblin) Vol. 1, 82:4-11; (Alvarado) Vol. 1, 187:2-10; (Randall) Vol. 3, 9:1-10:11. Correctional Officers assigned to the Housing Units are required to enforce Housing Unit rules, ensure that inmates do not commit any crimes or Institutional infractions in the Housing Unit, and ensure that inmates complete their daily tasks and attend their daily appointments. Tr. (Chamblin) Vol. 1, 82:4-11; (Alvarado) Vol. 1, 187:2-10; (Matthews) Vol. 2, 149:25-150:6.

There are four Housing Units at FCI Bastrop: Austin, Crockett, Houston, and Travis. The Travis Unit is located closest to the Control Center and is approximately six hundred and forty-four (644) feet from the staff screening site. The Crockett Unit is located furthest from the Control Center and is approximately eight hundred and six (806) feet from the staff screening site. Officers testified that the difference in walking time between the closest and furthest Housing Unit is approximately *two minutes*. Tr. (Randall) Vol. 3, 20:1-8. They also testified that without stopping for any purpose, it takes approximately two minutes to walk from the Travis Unit to Gate 3. Tr. (Alvarado) Vol. 1, 212:13-21; AE 7 (Agency Travel Times).

Approximately 315 to 330 inmates are housed in each Housing Unit. Tr. (Alvarado) Vol. 1, 185:15-20; (Matthews) Vol. 2, 150:7-13. They are housed in cells, with three inmates per cell and are locked in their cells during the 4:00 p.m. count, and from approximately 11:00 p.m. to 5:00 a.m. At other times during the day, inmates may be assigned to a work detail or educational program that requires them to leave the Housing Unit, or they may chose to leave the Housing Unit for recreation, medical services, meals, or religious programs. There is one Correctional Officer assigned to each Housing Unit twenty-four hours per day. From 3:30 p.m. to 11:30 p.m., there is a second Correctional Officer assigned to each Housing Unit.

Equipment for the Housing Unit officers consists of two sets of keys, handcuffs, and a radio. Correctional Officers assigned to the Housing Units must also account for two flashlights, a suicide knife, a hand-held metal detector, two screwdrivers, one wrench, an extendable mirror, a ladder, and two pairs of handcuffs. Most of the equipment is stored in a locked cabinet on a shadow board, but the ladder is on hooks in the officers' station. When Correctional Officers utilize this equipment during their shifts, they must account for it with a chit.

### Amount of Uncompensated Work Performed During Pre- and Post-Shift Activities

Correctional Officers assigned to the Housing Units must arrive at FCI Bastrop in time to be on their assigned duty post at their shift start time. JE 9B (Housing Unit Post Order) at 1. The Union witnesses testified that Housing Unit officers arrive *fifteen to twenty minutes* before their shift start times. Tr. (Chamblin) Vol. 1, 122:20-124:4; (Alvarado) Vol. 1, 190:19-191:7; (Avila) Vol. 2, 12:9-12; (Davis) Vol. 2, 71:20-25; (Matthews) Vol. 2, 151:15-21; (Randall) Vol. 3, 11:9-15, 28:10-21. As with all other Correctional Officers, they must enter the institution and complete the staff screening process. Tr. (Chamblin) Vol. 1, 122:20-124:4; (Alvarado) Vol. 1, 189:21-190:5; (Avila) Vol. 2, 12:17-22; (Davis) Vol. 2, 71:4-19; (Matthews) Vol. 2, 152: 13-22; (Randall) Vol. 3, 11:16-23, 28:10-21. Once inside the secured confines of the institution, they retrieved freshly charged batteries from the Control Center until July 5, 2011. They flip their accountability chits, and proceed through Gate 4.

After entering the Compound, the officers testified that they check their mailboxes in the Lieutenants' Office and proceed to their assigned duty posts. When they enter the Housing Unit, the officers exchange equipment with the off-going Correctional Officer. Tr. (Chamblin) Vol. 1, 122:20-124:4, 125:11-126:6; (Alvarado) Vol. 1, 193:20-194:12; (Avila) Vol. 2, 15:7-10; (Davis) Vol. 2, 77:22-78:15, 80:2-19; (Matthews) Vol. 2, 158:3-10, 174:13-19; (Randall) Vol. 3, 20:15-21; 22:9-14, 24:21-25:1, 31:19-25. When the officers receive their keys, they count them and affix them to the metal key clips and chains attached to their duty belts. Tr. (Matthews), Vol. 2, 160:3-7. These officers account for the equipment that is maintained in each Housing Unit's cage on a shadow board. Tr. (Chamblin) Vol. 1, 122:20-124:4; (Avila) Vol. 2, 16:9-18; (Davis) Vol. 2, 77:22-78:15, 80:2-19; (Randall) Vol. 3, 22:15-23:5. The Housing Unit officers also exchange information about activities on the previous shift, and other unusual occurrences. Tr. (Chamblin) Vol. 1, 122:20-

124:4, 125:11-12:66; (Alvarado) Vol. 1, 193:20-194:12; (Avila) Vol. 215:7-10; (Davis) Vol. 2, 79:2-16; 80:219; (Matthews) Vol. 2, 158:11-16, 174:20-175:1; (Randall) Vol. 3, 21:9-23, 25:2-7, 32:1-3.

Witnesses testified that the shift exchange takes approximately *two to five minutes*. Tr. (Chamblin) Vol. 1, 264:12-20; (Alvarado) Vol. 1, 215:3-14; (Avila) Vol. 2, 17:12-16; (Davis) Vol. 2, 78:24-79:1; (Matthews) Vol. 2, 158:17-19, 160:8-10, Vol. 3, 23:6-8, 31:19-25. After the shift exchange is complete, the out-going Correctional Officer departs from the Housing Unit. Tr. (Chamblin) Vol. 1, 125:11-126:6; (Alvarado) Vol. 1, 194:13-15; (Davis) Vol. 2, 81:11-20; (Matthews) Vol. 2, 158:23-25, 160:11-16, Vol. 3, 23:14-17, 25:13-20, 32:19-23, 33:25-34:13. In addition to his personal belongings, the Correctional Officers testified that the out-going officer takes hot trash and, until July 5, 2011, a depleted battery. Tr. (Chamblin) Vol. 1, 125:11-126:6, 266:6-24, (Davis) Vol. 2, 81:11-20; (Matthews) Vol. 2, 160:17-25; (Randall) Vol. 3, 23:22-24:1, 25:13-20, 32:19-23, Vol. 3, 33: 25-34:13.

Correctional Officers testified that common practice is that the out-going officer walks to Gate 4, flips over his accountability chit, drops any hot trash in the Institutional hot trash bin, and exits the institution. Tr. (Chamblin) Vol. 1, 125:11-126:6; (Avila) Vol. 2, 20:12-15, 21:22-22:2; (Davis) Vol. 2, 81:11-20; 161:19-21; (Randall) Vol. 3, 33: 25-34:13. Until January 5, 2011, Correctional Officers also returned depleted batteries to the Control Center. Tr. (Davis) Vol. 2, 81:11-20; (Matthews) Vol. 2, 188:16-20. Correctional Officers returned depleted batteries a few minutes after their shift ending times. (Davis) Vol. 2, 81:21-82:11.

Correctional Officers testified that they drop off their hot trash at *their shift ending times or a few minutes after their shift ending times*. Tr. (Chamblin) 125:11-126:6; (Alvarado) Vol. 1,

198:23-199:3; (Alvarado) Vol. 1, 221:19-24; (Avila) 22:16-19; (Davis) Vol. 2, 81:21-82:11; (Matthews) Vol. 2, 161:19-21; (Randall) Vol. 3, 26:4-9; (Randall) Vol. 3, 34:14-20. The Correctional Officers testified that their practice is the same, regardless of which shift or Housing Unit they are assigned to work, and has been consistent since October 2010. Tr. (Chamblin) Vol. 1, 126:18-24; (Alvarado) Vol. 1, 195:1-12; (Avila) Vol. 2, 18:19-19:2; (Matthews) Vol. 2, 159:9-12; (Randall) Vol. 3, 26:13-21.

Testimony by Correctional Officers who have worked in the Housing Units supported the following amounts of pre- and post-shift work that has been uncompensated since October 2010:

- Arrival at front gate in first building at approximately *15 to 20 minutes* prior to shift start. Place metal items in bucket and screened by metal detector, retrieve items and put back on duty belt, etc., retrieved freshly charged batteries from the Control Center until July 5, 2011, flip their accountability chits, proceed through Gate 4...*5 minutes*
- Enter Compound, walk to assigned Housing Unit, enter Housing Unit, exchange equipment with off-going Correctional Officer, count their keys and affix them to the metal key clips, attach chains to duty belts, account for equipment maintained in each Unit's cage on shadow board, exchange information about activities on previous shift, and other unusual occurrences..... *5 minutes*
- Out-going Officer departs from the Housing Unit with personal belongings, takes hot trash and a depleted battery (until July 5, 2011), walks to Gate 4, flips over his accountability chit, drops any hot trash in the Institutional hot trash bin, and exits the institution. Until July 5, 2011, Correctional Officers also returned depleted batteries to the Control Center a few minutes after their shift ending times.....*5 minutes*

*Total uncompensated work.....15 minutes*

Testimony by Correctional Officers regarding exact times is necessarily approximate, depending on the number of prison staff and officers all passing through security screening just before 8 a.m.

Also, the amount of equipment and keys to be accounted for and potentially high number of inmate issues to be discussed in briefing could affect the amount of time required.

### *Camp*

#### Description of Post

There is one Correctional Officer assigned to the Camp during twenty-four hours per day, seven days per week. The Camp houses 180 minimum security inmates and the job duties of the Camp officer are to ensure the safety and security of the Camp and the inmates assigned to that facility.

#### Amount of Uncompensated Work Performed During Pre- and Post-Shift Activities

Correctional Officers Joseph Avila and Kenneth Davis testified that when assigned to the Camp they would arrive fifteen minutes before their shift start time and are not required to complete a security screening process. Tr. (Avila) Vol. 2, 24:18-25; (Davis) Vol. 2, 84:6-17. Accordingly, the Camp Officers report directly to the Camp Officers' station, which is located about twenty feet from the Camp entrance and about a two minute walk from the parking lot. Tr. (Avila) Vol. 2, 24:22-25:8, 34:14-19; (Davis) Vol. 2, 84:11-17. The officers exchange information, such as the number of inmates assigned to the Camp, whether any inmates are on call outs or otherwise outside of the Camp, and if any unusual occurrences occurred on the previous shift. Tr. (Avila) Vol. 2, 25:25-26, 26:19-27:7, 28:19-25; (Davis) Vol. 3, 84:18-85:13, 87:20-88:10.



The Correctional Officers also exchange equipment, including a set of keys, handcuffs, and a radio. Tr. (Avila) Vol. 2, 24:15-17, 28:19-25; (Davis) Vol. 3, 87:20-88:10. The on-coming Correctional Officer must also account for approximately ten institutional radios, as well as key boxes for UNICOR vehicles and keys for non-correctional officers who work outside of the institution's secured perimeter. Tr. (Avila) Vol. 2, 25:12-24; (Davis) Vol. 3, 85:14-86:3. This equipment is maintained on a shadow board. Tr. (Avila) Vol. 2, 35:9-13; (Davis) Vol. 3, 86:4-25.

Representative Officers testified that the *shift exchange normally takes three to ten minutes*. Tr. (Avila) Vol. 2, 27:16-20; (Davis) Vol. 2, 87:5-8. After completing the shift exchange, the outgoing Correctional Officer departs the Camp and generally departs at his shift end time. Tr. (Avila) Vol. 2, 27:21-28:1, 29:4-7; (Davis) Vol. 3, 88:18-20. The Correctional Officers testified that their practice is similar regardless of which shift they are assigned to work. Tr. (Avila) Vol. 2, 28:19-25.

Lieutenant Armando Figueroa testified that he expected the Camp Officer to be at the camp at the start of their shift, 12 a.m. for example if working morning watch (Vol. 6, p. 101). As the officers' supervisor, he would expect that any exchange be a brief summary of activities that may affect oncoming shift and that much information would be contained in the logbook, such as base counts. (pp. 102-03). Lieutenant Figueroa testified that lieutenants do not regularly go out to the Camp and indicated if the exchange took a long period of time between Camp Officers that he would have no way of knowing without being told. (pp.104-105). Lieutenant Figueroa also stated that there was nothing in the post orders for the Camp Officer that would require them to work beyond their shift.

Captain Gregory Emberton testified that the exchange between camp officers would be similar to that of housing unit officers, lasting 2-3 minutes (Vol.7, pp. 102-03). He acknowledged that he and his lieutenants do not make it down to the camp very often. (p. 103). Lieutenant Roberto Rangel testified that he did not get to the Camp much but it was his expectation as the supervisor

that the exchange should entail little more than showing up and exchanging equipment. (Vol. 7, p. 217).

Officer Kenneth Davis testified about working morning watch as Camp officer. He indicated that he arrived at the camp at “about a quarter till” [midnight] and it then took him *two minutes* to walk from the building to the office. (Vol. 2, p. 84) Once in the office he exchanges information with the off-going officer and accounts for the equipment. (pp. 84-86). He estimated it to take “*about 10 minutes.*” (p. 87). His relief arrives “about five, eight minutes prior” [to 8 a.m.]. (p. 87). Officer Davis indicated that exchange then takes “about 10-15 minutes,” and he said that he departs the camp “about 8:00, 8:02, 8:05.” (p. 88).

The Agency Advocate contends that Officer Davis’ testimony was “inconsistent” and that on cross-examination, Officer Davis attempted to change his stated arrival time from 11:45 to “11:40, give or take.” (p. 90). The Agency Advocate concluded that Officer Davis:

“...indicted the evening watch officer typically departed around midnight, despite the exchange previously only indicated at 10 minutes. See *id.* p 95. He did concede that the evening watch officer sometimes departs before midnight. See *id.* p. 96. He also acknowledged that much of the information that he previously indicated was exchanged is contained in the log book. See *id.* p. 97. Officer Davis also was confronted with the discrepancy between his arrival time of 15 minutes till and that of his relief being only 5 minutes early. See *id.* p. 98. His explanation was that he could not control what other people do. See *id.* Officer Davis then changed his departure time to 8:05 being the earliest that he ever departed the Camp. See *id.* p. 104. He then eased to 8:00-8:02. See *id.* p. 105. Officer Davis also stated that there was no a lieutenant at the Camp. See *id.* p. 104.”

Disallowing the time taken to cross the parking lot, it is not clear precisely how long the exchange took place. Given the testimony of representative Corrections Officers, the length of time can generally be assumed to be closer to 3 to 5 minutes, given that inmates were not active during the morning watch.

Officer Joseph Avila testified about working as day watch as Camp officer. He indicated that he would typically arrive about 7:45 a.m. (Vol. 2: 24). He stated that he would get his stuff out of his car, walk to the camp and then go inside and do “a *quick* briefing, they’ll give me a *quick* rundown.” (p. 25). Officer Avila estimated the exchange to take 3-5 minutes. (p. 27). The morning watch officer would then depart. (p. 28). The evening watch officer would arrive to relieve him at about 3:50 p.m. (p. 28). The relief was again estimated by Officer Avila at 3-5 minutes. Officer Avila indicated that he would depart anywhere from 3:55 p.m. to 4 p.m. ( p. 29).

On cross-examination, Officer Avila indicated that he was not always there at 7:45 a.m. because during the school year when he worked the post, his arrival could be affected by school buses and traffic. (p. 34). He also stated the lieutenant did not know that he arrived early. (p. 44). Officer Avila stated that when he arrived at 7:45, he would be walking in the door at approximately 7:47 a.m. (p. 44). Officer Avila also testified that on occasion the off-going officer indicated it was a quiet night, handed him the equipment and left. (p. 39). Officer Avila also agreed that based on his estimates of the shift exchange that the off-going officer could be departing around 7:55. (p. 40). Officer Avila conceded that there was no lieutenant present for the shift exchange at the camp. (p. 41).

With respect to the end of his shift, Officer Avila stated that some people were better reliefs than others and the person could arrive either before or after 3:50 p.m. (pp. 41-42). Officer Avila also acknowledged that he was estimating the time but that it had been two years since he worked the post. (pp. 42-43). He admitted that he had left early on occasion, the earliest being 15 minutes [3:45 p.m.] (p. 43). Again, Officer Avila noted that the lieutenant would have no idea that he left early and sated there was nothing in the post orders requiring him to come in before

his shift or stay after and work without compensation.(p. 58). Officer Avila also stated that others may have different arrival habits than him. (p. 59).

Lieutenant Mark Sandeen indicated that correctional supervisors do not regularly make rounds at the Camp (Vol.7, pp. 305-06). Lieutenant Sandeen testified that, based on his experience and expectations, the exchange should be relatively quick (Vol. 7, p. 306). Lieutenant Sandeen indicated these expectations were conveyed to the officers in the post orders. See HT 10/31/12, p. 6.

The Union presented no testimony from anyone regarding evening watch on the Camp post. Therefore, the Agency asserted that they should not permitted to recover for this shift of the Camp post. The Arbitrator considered the Agency's argument in the section of this award regarding whether representational witnesses should be considered as credible.

*The fact that it could take longer to commute to and from work during the school year is not relevant in determining the amount of compensable time for the Day Watch Camp Officer. Again, given the lack of a security check and the close proximity to the parking lot, it does appear that a quick exchange or relief period for Camp Officers would not usually exceed more than 2 to 3 minutes, which is a de minimis amount of time.*

## **DISCUSSION AND CONCLUSIONS**

It is undisputed that Correctional Officers at FCI Bastrop have not been compensated for the regular pre- and post-shift work performed since October 2010 as enumerated herein. The Agency argues such work is not compensable and even if it is determined by the Arbitrator to be compensable, the work is de minimus. The Union asserts it is compensable work and not insignificant. Correctional Officer witnesses uniformly testified that they have not been compensated for any of the regular pre- or post-shift work they performed when assigned to any of the posts at issue in this case. Tr. (Alvarado) Vol. 1, 202:6-9; (Avila) Vol. 2, 22: 20-23:6, 32:2-12;

(Davis) Vol. 2, 82:12-24, 89:17-90:1; (Matthews) Vol. 2, 163:7-14, Vol. 3, 34:21-35:6; (Atkins) Vol. 3, 79:25-80:3, 84:3-17; (Anderson) Vol. 3, 135:20-23; (Pratz) Vol. 3, 170, 178:9-20; (Smith) Vol. 4, 26:6-15; (Flores) Vol. 4, 92:4-14; (Sawyer) Vol. 5, 17:10-19, 22:24-23:7; (McCravey) Vol. 6, 21:14-25.

The witnesses' quarterly and daily assignment cards confirm that FCI Bastrop did not regularly provide overtime compensation to Correctional Officers for performing pre- and post-shift activities. UE 4 (Chamblin Quarterly and Daily Assignment Cards); UE 7 (Alvarado Quarterly and Daily Assignment Cards); UE 8 (Avila Quarterly and Daily Assignment Cards); UE 9 (Davis Quarterly and Daily Assignment Cards); UE 10 (Matthews Quarterly and Daily Assignment Cards); UE 11 (Randall Quarterly and Daily Assignment Cards); UE 12 (Atkins Quarterly and Daily Assignment Cards); UE 13 (Anderson Quarterly and Daily Assignment Cards); UE 14 (Pratz Quarterly and Daily Assignment Cards); UE 15 (Jackson Quarterly and Daily Assignment Cards); UE 16 (Smith Quarterly and Daily Assignment Cards); UE 18 (Sawyer Quarterly and Daily Assignment Cards); AE 3 (McCravey Quarterly and Daily Assignment Cards); AE 14 (Suzette Matthews Quarterly and Daily Assignment Cards). See also AE 10 (Compilation of Overtime Authorization Forms). The Union's witnesses uniformly testified to their understanding that they were not entitled to compensation unless they work at least fifteen minutes of post- and pre-shift overtime. Tr. (Davis) Vol. 2, 131:15-132:3; (Randall) Vol. 3, 27:16-18; (Anderson) Vol. 3, 147:2-6; (Pratz) Vol. 3, 195:18-21; (McCravey) Vol. 6, 37:16-25.

The Union asserts that employees were not paid for these work activities because Management officials at FCI Bastrop received no training in the requirements of the FLSA, specifically regarding the types of activities that constitute "Compensable Work." The Union alleged that Claudia Hammers, the Institution's Acting Human Resource Manager from

approximately October 2010 through February 2012, was the management official at FCI Bastrop responsible for ensuring the Institution complied with pay statutes, such as the FLSA. In that capacity, the Union contended that Ms. Hammers received no recent training in the Fair Labor Standards Act or the circumstances under which employees should be compensated for performing activities on Institutional grounds.

The Union also argues that Claudia Hammers never engaged in any self-study, such as reviewing arbitration, Federal Labor Relations Authority rulings, or court decisions that define the term “work” under the FLSA. Nor did Hammers conduct any research into the Portal-to-Portal Act of the FLSA or ask anyone outside of the Agency whether FCI Bastrop’s practices complied with the FLSA. Furthermore, Claudia Hammers testified that she did not investigate, nor did she order anyone to investigate, the Union’s allegations of continuing FLSA violations at FCI Bastrop. Tr. (Hammers) Vol. 4, 66:24-67:3, 67: 4-6, 14-16, 74:10-17.

Ms. Hammers testified that she did not, nor did she order anyone to, conduct time studies to determine what activities Correctional Officers engage in before or after their paid shifts. Tr. (HRM Hammers) Vol. 4, 59:22-60:8. FCI Bastrop and Hammers did not survey Correctional Officers since October 23, 2010, to determine what types of activities they engage in without compensation. Tr. (Hammers) Vol. 4, 63:22-64:2. Likewise, she did not speak to any bargaining unit members about the activities they engage in without compensation, or order anyone else to discuss that issue with Correctional Officers. Tr. (Hammers) Vol. 4, 64:3-20; (Lt. Figueroa) Vol. 6, 239:18-20.

*The issue of Ms. Hammers’ competence or performance as Acting Human Resources Manager during this period, including whether she was adequately trained in provisions of the FLSA are not grievable items under terms of the Master Agreement and it is not within the*

*jurisdiction of the Arbitrator to consider how well Ms. Hammers performed her job duties and responsibilities.*

The Union also argues that Management Officials at FCI Bastrop Failed to investigate the Union's claims of uncompensated work. The instant grievance is the second one filed by AFGE Local 3828 alleging that Correctional Officers assigned to FCI Bastrop performed pre- and post-shift work without compensation. Tr. (Chamblin) Vol. 1, 140:4-141:5. When the Union settled the earlier grievance on October 22, 2010, Vice President Ellen Chamblin testified that she and President Jeff Ormsby informed then-Warden Claude Maye that the Institution's FLSA violations had not been fixed. Tr. (Chamblin) Vol. 1, 135:5-22. The Union additionally raised its concerns regarding FCI Bastrop's ongoing FLSA violations during the one Labor Management Relations meeting that occurred between October 2010 and the grievance filing date. Tr. (Chamblin) Vol. 1, 135:23-136:18; (Hammers) Vol. 4, 65:3-7. Finally, prior to filing the grievance, Vice President Chamblin contacted then-Warden Maye about the Union's concerns. Tr. (Warden Maye) Vol. 8, 43:6-16.

The Agency asserts that a "necessary part of the Union's *prima facie* case in actions for uncompensated off-the-clock overtime under FLSA is to show that the employer "suffered or permitted" them to perform such work. The Agency also contends that the evidence submitted by the Union does not meet this burden, it has failed to prove that it is necessary for liability. The Agency argues that the Union did not prove that bargaining unit employees performed work before or after their scheduled shift or that the Agency was aware of such activity.

However, the evidence and testimony given at the arbitration proceeding are convincing to the Arbitrator that the Agency was well aware of pre- and post-shift activities being performed by Correctional Officers. It perhaps did not believe such activities constituted "compensable work." Agency managers were well aware that officers were coming in before their shift start

time, going through security screening, gathering up equipment necessary, walking to their posts and participating in a shift exchange of information and equipment before starting work.

Therefore, the Agency knew, permitted and depended on this practice.

There are numerous indicators that management knew about necessary pre- and post-shift daily activities by officers. Warden Claude Maye at FCI Bastrop issued a memorandum on January 5, 2012 “reminding staff observing “Portal-to-Portal/Assigned Work Hours” (UE 6):

The purpose of this memorandum is to remind staff of the requirements and procedures already in place regarding work outside 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 such activity.

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 shift (e.g. , 7:30 for a 7:30 a.m.- 4:00 p.m. shift). Staff exchanging their keys and/or equipment on post are considered “on time” if they are exchanging their equipment on post at the start of their shift (e.g., 7:30 a.m. for a 7:30 a.m.-4:00 p.m. shift).

Warden Maye published his memorandum well after the Union had filed the present grievance on August 9, 2011 and without consulting with the Union. Tr. (Chamblin) Vol. 1, 134:1-9; (Warden Maye) Vol. 8, 70: 25-71:2. Unfortunately, the memo’s attempt to somehow equate “hours of work” with compensable work is confusing at best.

Warden Maye testified to the following facts (Tr. Vol. 8, p. 71: 3-21:

A. He did not provide training on the FLSA to Correctional Officers;

B. He did not instruct anyone else to provide training as to what constitutes

“work” under the FLSA;



C. He followed a “common sense” definition of “work”, e.g., “Work was anything...actually performed on your work shift. Anything performed outside of your scheduled shift were not authorized.”

D. Work is what is stated in “post orders and position descriptions and that’s what they should be working in accordance with.”

Captain Emberton provided similar testimony. Tr. (Capt. Emberton) Vol. 7, 60:17-61:1. Other agency’s witnesses provided similar testimony, e.g., that they relied on lower-level management representations to claim that there were no on-going FLSA violations at FCI Bastrop. Tr. (Warden Pearce) Vol. 7, 256:19-257:20. Warden Maye testified that he relied upon Lieutenant Figueroa to inform him that there were no on-going violations at FCI Bastrop. Tr. (Warden Maye) Vol. 8, 73:20-74:6. Lieutenant Figueroa testified that he confirmed there were no violations by using his “common sense” definition of the term “work” and without investigating the Union’s claims. Tr. (Lt. Figueroa) Vol. 6, 246:13-21. Lieutenant Figueroa testified that he never asked Corrections Officers if they had performed work prior to shift start and that he did not have a duty to investigate whether Institutional practices violated the FLSA. Tr. (Lt. Figueroa) Vol. 6, 239:8-17.

A “common sense definition of work” is not synonymous with “compensable work” or work that is “integral and indispensable.” There is subjective good faith obligation by management to investigate and determine if extra-shift activity, which they know occurs on a regular and daily basis meets the definition of compensable work. It must compensate its employees for all hours of work that it “suffered and permitted” to be performed. After all, an employee cannot volunteer to work for free (C.F.R. § 551.104). By allowing Correctional Officers to take time not requested by the employer, yet still allowed, such hours become compensable.

The Agency contends that the Union’s witnesses are not credible on the following counts:

- 1) They are a “representative sample” rather than all employees filling these positions;
- 2) Union witness testimonies are contradicted by video tape record;
- 3) Certain activities are in violation of management directives.

**1) Does a “Representative Sample” of employees constitute reliable witnesses?**

The Fair Labor Standards Act (FLSA) allows, but does not require, that actions filed in federal or state court to be certified as a class action on behalf of similarly situated employees. See 29 U.S.C. 216(b) (Attachment 8). The FLSA, while allowing for class actions, does not mandate them. For an action to be brought on the basis of a representative sample, the grievant bears the burden of demonstrating that the testifying witnesses are similarly situated to non-testifying employees.

The case of *Proctor v. Allsup's Convenience Stores*, 250 F.R.D. 278 (2008) outlines the process for determining representative samples in class action FLSA cases in federal court. The first step of the process is to determine if opt-in notice should be sent to potential class members. The second stage of the analysis involves determining if the individual class members are similarly situated using factors such as disparate factual and employment settings of the individuals, various defenses available to the defendant which appear individual to each plaintiff, and fairness and procedural considerations. See *id.* The case of *Dole v. De Sisto*, 929 F.2d 789 (1st Cir.1991) also outlines factors to be considered in determining whether a sample is representative. In that case, the adequacy of sample testimony was determined by factors such as: nature of the work involved, working conditions and relationships, as well as detail and credibility of the testimony.

As a general matter, the Agency objects to any post or position where the testimony of only one individual has been presented. The Agency argues that it defies reason that one person can adequately represent officers or a whole department for a period of eight years. In addition,

for practical purposes, it makes no sense to only have one employee testify. The moving party then has every incentive to put someone on who will testify as to the maximum amount of time rather than getting a clear picture of what is the norm. It is the Agency's contention that many of these tasks are either not required, not done regularly, and/or not compensable; in addition, the witnesses were not uniform in their arrival/departures times, shift exchange times and duties, and workplace practices. Nor can the Union cannot cite to any case, which has reached a final decision that supports their contention that only one witness per post is sufficient.

The Union contends that all its witnesses performed the same general tasks, i.e., proceeding through the screening site, obtaining batteries, etc., and thereby representative testimony is appropriate. The Union contends that the Agency cannot cite to any case where more than one witness per post is required.

The burden of proof is significant in these cases. The case of *Anderson v. Mt Clemens Pottery Co.*, 66 S. Ct. 1187, set for the burden in FLSA cases. An employee who brings suit under the FLSA for unpaid wages or overtime compensation has the burden of proving that he performed work for which he was not properly compensated (See *id.* At p. 1192). If an employer keeps proper records of wages, hours, and other conditions of employment then that meets the employee's burden (See *id.*). However, if the records are not adequate or accurate, then the employee carries out his burden if he shows: (1) that he performed work for which he was not compensated and (2) if he produces sufficient evidence to show **the amount and extent of that work** as a matter of just and reasonable inference. ( *Id.*, emphasis added) It is at that point the burden shifts to the employer to either present evidence of the precise amount of work performed or evidence to negate the reasonableness drawn from the employee's evidence (*Id.*). If the employer fails to produce such evidence, then damages are awarded to the employee (See *id.*).

Therefore, it is clear that in order to show representative testimony, the amount and extent of the work must be similar for each post.

The Union contends that where an employer fails to accurately record employees' arrival and departure times, the complaining party can rely on the evidence available to it – in this case, witness testimony, and institutional post orders. *USP Marion and AFGE Local 2343*, 61 F.L.R.A. 765, 771 (FLRA 2006); 5 C.F.R. § 551.402.

The Union asserts as supporting evidence that numerous arbitrators considering similar records have concluded that the Union carried its burden based on representative testimony. *See* For example, in *AFGE Local 3974 and FCI McKean*, FMCS No. 08-50621, at 15 (Jan. 28, 2011) Arbitrator Barbara Zausner issued a ruling finding that:

...the testimony presented by the Union was representative of each post and position at issue...The FLSA and interpreting decisions...require only that the employees be similarly, not identically, situated. All correctional workers engage in the same or similar pre- and post-shift work 'that is integral and indispensable to th[e] primary job duty,' the safety and security of staff, Institution, and inmates...In the absence of overlapping shifts, the pre- and post-shift duties are necessarily completed before arriving at a post and/or after leaving it.

Similarly, Arbitrator David Vaughn found that the Union "met its initial burden to submit evidence representative of the positions and posts at issue" after the Union put forth the testimony of seven witnesses to testify about three posts, combined with documentary evidence similar to that the Captain at FCI Bastrop is responsible for determining how staff resources are allocated. Tr. (Figueroa) Vol. 6, 221:16-20.

Likewise, Arbitrator Gerard Scola (*AFGE Local 4047 and FCI Allenwood*, FMCS No. 09-57336, at 38, Aug. 18, 2010) ruled that eight witnesses testifying about 11 posts were representative, noted that all of the witnesses had "closely related responsibilities even though they had different posts.... After four and a half days of testimony the Union felt that further

testimony of other witnesses would only burden the record and that the testimony of other witnesses would have only duplicated what had already been offered in previous testimony.”

Arbitrator Bernard Fabian (*AFGE Local 148 and USP Lewisburg*, FMCS Case No. 06-03725, at 12, Feb. 15, 2008), in ruling that four witnesses were representative of the entire prison industries and laundry staff (non-correctional officer positions), concluded the same, finding that “the [employees] who testified at the subject hearing provided a representative sampling of the testimony of what other employees in those positions or similar positions would have testified.”

In the instant matter, the Union presented *fourteen* witnesses who testified about six Correctional Officer posts involved in this case, and who confirmed that their practices were similar to the practices of other Correctional Officers. These witnesses testified *uniformly* that they were suffered or permitted to perform uncompensated pre-shift and post-shift work when assigned to the posts and positions for which the Union now seeks to recover. As detailed in the Union’s Statement of Facts, the witnesses testified that the core duties and responsibilities of all correctional workers at FCI Bastrop are the safety and security of the Institution, inmates and staff, no matter the assigned post or position (Statement of Facts at Part II. *See also* Agency Brief at 7)(describing the “primary function of the institution” as “to house inmates and maintain the security of the staff, public, and inmates.”). *See, e.g., FCI Tallahassee and AFGE Local 1570*, FMCS Case No.10-54593, at 28 (Nov. 14, 2012) (Williams, Arb.) (“The use of representative testimony in this case was allowable since the evidence established all Correctional Officers on all watches ...perform essentially the same activities during shift changes for all posts.”).

As in *AFGE Local 420 and USP Hazelton*, the representative evidence “establishes that the core duties and responsibilities of all COs at the Penitentiary are virtually identical, no matter

their specific posts and shifts. Indeed, security requirements dictate an extremely high level of uniformity in work procedures from post-to post and shift to shift within the Institution.” *AFGE Local 420 and USP Hazelton*, FMCS Case No. 09-00421, at 12. Likewise, here, the core duties Likewise, the Agency’s argument that the Union cannot recover for shifts where only one witness presented testimony is incorrect.

First, as the Arbitrator observed, Correctional Officers’ practice does not differ by shift. Tr. Vol. 6, 58:3-60:13. Second, in this case, multiple witnesses testified about each *post* and the general tasks that must be completed upon arrival at FCI Bastrop for each, as well as each *shift* and the differences between them. *Id.* From this information, the Arbitrator can reasonably infer that the testimony provided by those witnesses is representative of the other Correctional Officers assigned to those posts who did not testify. This is especially true given the extremely short time frame involved in this case. *See FCI McKean*, FMCS No. 08-50621, at 14 (“The emphasis is on “representative” and not on “each.”)

Representative testimony means that the testimony represents the various posts and positions whether or not someone from every single post or position testified.” The practice of surveying a sample rather than the total number of group members has long been a valid method in social science survey research. As long as the selected sample is representative of the whole, the method is statistically and behaviorally valid.

In the instant matter, multiple employees provided substantially similar testimony about their practices, which allows an Arbitrator and other reasonable individuals to infer that the practices for other shifts are the same or very similar. Even though the Union witnesses testified primarily about one or two shifts, many had worked other shifts as well. Duties and responsibilities of Correctional Officers are virtually identical, regardless of whether they are assigned to work a Housing Unit,

SHU, Compound, or Control post. Only the Camp duty assignment varied significantly from the others.

Not only did all of the witnesses testify as to their primary job duties as Correctional Officers, *all* the witnesses also consistently described the pre- and post- shift practices of correctional workers assigned to work the posts and positions at issue. For example, the Union's witnesses uniformly testified, without substantive dispute, that Correctional Officers put on their duty belts with metal chains, key clips, and chits in the Front Lobby after completing the required staff screening. Additionally, the witnesses testified that prior to July 2011, *all* Correctional Officers who did not otherwise stop at the Control Center stopped for a freshly charged battery at the beginning of their shift and returned a depleted battery to the Control Center at the end. SOF at Part III.E. Unsurprisingly, each Correctional Officer testified that he/she is required to remain vigilant and observant, performing the primary job duty of maintaining a safe and secure institution.

The Union's witnesses testified that they donned their duty belts in the Front Lobby (SOF at Part III.B). Lieutenant Figueroa testified that he observed some Correctional Officers who donned their duty belts in the Staff Lounge, but did not detail the frequency with which he observed that. Tr. (Figueroa) Vol. 6, 283:7-10. Further, Lt. Figueroa did not testify about whether the staff donning their duty belts in the lounge did so for the first time, or were putting on their belts after using the restroom. Additionally, Lt. Figueroa testified that *all* Correctional Officers, even those few occasions on which he observed officers donning their duty belts in the staff lounge, did so by the time they passed the staff lounge. Tr. (Figueroa) Vol. 6, 282:23-283:2.

The Agency also asserted that individual Union witnesses gave self-serving testimony that was most exaggerated and favorable to the Union position. For example, Agency witnesses claimed that employees engaged in personal discussions while exchanging information, utilized

staff computers for personal purposes prior to the start of their shifts, or watched television in the staff lounge prior to their shift starting times. However, the Agency did not provide any specific details regarding these allegations. Further, Captain Emberton testified that he did not actually determine whether employees engaged in personal activities, such as watching television in the staff lounge, prior to or after their shifts. Tr. (Emberton) Vol. 7, 149:7-12.

These type of accusations without solid evidence is an example of focusing on expectations, conjectures, and possibilities, rather than the demonstrated practices at FCI Bastrop shift exchange at the beginning and end of their shift with the outgoing/oncoming Correctional Officer, during which only one of the Correctional Officers is paid. As such, the Arbitrator finds that the Union's witnesses testified competently and consistently regarding the job duties of correctional workers, and the pre- and post-shift work performed by correctional workers assigned to the posts at issue.

The Arbitrator accepts the reasonable proposition that the Union's sampling of witnesses was provided in the interest of efficiency and of avoiding repetitive testimony. Accordingly, the Arbitrator should conclude, consistent with other arbitrators, as well as courts, that the testimony provided by the Union's witnesses was sufficient to establish what other Correctional Officers would have testified to regarding their own pre-shift and post-shift work practices with respect to the posts and positions at issue in this case.

In essence, the Agency presented no evidence or relevant legal authority to support its contention that the witnesses called by the Union are not representative of the practices at FCI Bastrop during the recovery period for this case or that they were individually not credible or distorting the facts, as viewed from their own perspectives.



## 2) Union witness testimonies are contradicted by video tape record

Secondly, the Union argues that the Agency's video evidence should be ignored because it was hand-picked by the Agency and not produced to the Union prior to the start of the hearing. (See Post-Hearing Brief at footnote 14). Furthermore, the video does not capture the time that the employees' workday starts (Post-Hearing Brief at footnote 14). Even so, the Union contends that a review of the video presented by the Agency supports the Union's argument that employees on affected posts work in excess of eight (8) hours without being compensated. The Union also asserts that the Agency's cherry-picked video, which the Agency relies upon extensively in its post-hearing brief, does not show the Front Lobby, where employees' workday starts because that is where they don their duty belts (with metal chits, chains, and other equipment) after completing the mandatory staff screening. Tr. (Soza) Vol. 7, 10:7-9, 32:2-9; (Emberton) Vol. 7, 51:12-16.

Despite the failings of the Agency's late-produced video actually supports the Union position because it depicts Correctional Officers performing work in excess of their paid duty time. For example, the Agency presented a chart for the Day Watch Housing Unit posts that includes *twenty-one* instances, out of twenty-two total records, where the bargaining unit member was within the secure confines of the institution in excess of eight hours. Of those twenty-one instances, there are *fourteen* instances in excess of eight hours and seven minutes (the Agency's own cut off for fifteen minutes of overtime). See Agency Brief at 46-47 (Matthews: 8 hours, 25 minutes; Simon: 8 hours, seven minutes; Griffin: 8 hours, seven minutes; Simon: 8 hours, 13 minutes; Duhon: 8 hours, 40 minutes; Simon: 8 hours, 23 minutes; Duhon: 8 hours, 16 minutes; Camacho: 8 hours, 8 minutes; Duhon: 8 hours, 23 minutes; Chamblin: 8 hours, 13 minutes; Duhon: 8 hours, 7 minutes; Chamblin: 8 hours, 14 minutes; Matthews: 8 hours, 14 minutes; Alvarado: 8 hours, 24 minutes). Of those

fourteen instances, there are *five* instances in excess of eight hours and twenty minutes. *Id.* A review of the daily rosters provided by the Agency demonstrates that none of the employees who worked in excess of their eight hours received overtime compensation for that additional time (AE 8).

The Arbitrator cannot give credible weight to the Agency's selective and incomplete video evidence. As Arbitrator Gordon noted: "the Agency should not gain advantage from its *unfathomable* failure to track time or document instructions after it became apparent the information was essential to a hotly contested dispute that would result in litigation and/or substantial liability." *USP Leavenworth*, FMCS No. 01-08257, at 47-48. A surveillance camera is not designed to record employee work hours or determine if those hours are in excess of eight hours each day. That responsibility of management is better left to time clocks or electronic badge systems. This particular video actually supports the Union's contentions and demonstrates that employees assigned to FCI Bastrop perform work outside of their scheduled shifts for which they are not compensated.

### **3) Certain activities are in violation of management directives**

Management at Bastrop FCI has argued that three activities commonly practiced by Correctional Officers during shift exchanges have been prohibited, yet are still being carried out by some officers: a) picking up fresh batteries and returning them to Control Room, b) checking mailbox, c) dropping off "hot trash" when exiting. The Agency contends that the consequences of these prohibited activities is to increase the amount of pre- and post-shift activity time.

#### **a. Picking up fresh batteries and returning them to Control Room**

Battery chargers were installed in the housing units July 5, 2011, "in order to assist the compound officers with having to bring replacement batteries to the units." (See Agency Ex. 9).

Prior to the installation of the battery chargers, staff at FCI Bastrop would commonly pick up batteries from Control prior to assuming their post and/or return them at the end of their shift.

The Agency argues that batteries are not integral and indispensable pieces of equipment as there is a working radio on the post and batteries are readily available for delivery by the Compound Officers. (See AFGE Local 1325 and FDC Philadelphia, FMCS NO. 06-01660, p. 48-53 [Attachment 15]; see also AFGE Local 148 and USP Lewisburg Attachment 14 at p. 139, which found that picking up a fresh battery was not required as the radio on post was working and fresh battery could be obtained by calling Control and having one delivered).

Testimony revealed that Correctional Officers are neither required to pick up batteries at the start of their shift or return them at the end of their shift. Obtaining a fresh battery from the Control Center before an officer assumes his post is not essential job requirement. When an officer reports to his/her post to relieve another officer, the radio is functioning. If it were not, the previous officer would have obtained a new battery from one of the Compound officers. It also is not essential to an officer's job to return a battery at the end of his/her shift and the evidence is clear that did not take place. The evidence demonstrates that there is no regularity to officers picking up and dropping off batteries. Finally, there is a sign at the Control Center directing staff not to pick up batteries.

Officer Matthews provided testimony that management had tried to stop officers from picking up equipment at Control and indicated that Control officers were instructed not to hand out batteries (Vol. 2, p. 188). He even indicated that on occasions a lieutenant was posted at Control to prevent batteries from being handed out and he had been told that batteries were not being given out because of portal concerns (Vol. 2, pp. 191-192). Officer Anderson also recounted that he had been given instructions by more than one supervisor not to issue batteries

to staff. (Vol. 3, p.140). He recalled being given that instruction once a month (Vol. 2, pp. 150-151).

Lieutenant Figueroa indicated that prior to battery chargers being placed in the housing units, officers were expected to contact compound officers, who would deliver them (Vol. 6, p. 117). He personally witnessed this as he would hear the radio transmissions where officers would call for batteries (p. 117). Lieutenant Figueroa admitted that he had observed officers stopping at Control to pick up a battery, however, he corrected the behavior.(p. 117).

Based on the foregoing, the Agency requests that the Arbitrator find the Agency neither suffered nor permitted staff to pick up batteries, nor return them prior to the installation of the battery chargers in the housing units. Therefore, no compensation is required. To the extent liability is found as to the batteries, the Agency request that it ended once battery chargers were installed in the housing units in July 2011.

The Arbitrator finds that picking up or dropping off batteries was no longer a compensable activity once management installed battery chargers in the units.

#### b. Checking mailbox

Each Correctional Officer has a mailbox in the Lieutenants' Office and some officers testified that they commonly would check their mailbox en route to a work assignment. Even so, testimony underscored the fact that Officers at FCI Bastrop were not required to stop and check their mailboxes outside of their shifts. The Agency did not suffer and permit this practice to the extent it existed. Further, the evidence shows that attempts were made by management to prevent staff from engaging in this behavior.

Officer Alvarado testified that there is no requirement to check his mailbox on a daily

Basis (Vol. 1, p. 210). He also stated that the post orders indicate that he is to report directly to his unit and does not refer to going by the lieutenants' office (Vol. 1, pp. 217-18). There was less likely to be a change notice in his box if he was not working the Sick and Annual post. See (id. pp. 211-12). Officer Alvarado also indicated that he could call the lieutenant and ask what was in his box and also stated change sheets were sent to him via electronic mail (id. p. 230).

Lieutenant Figueroa testified that officers working sick and annual posts typically find out the posts and shifts they are working through the weekly change sheet (Vol. 6, p. 85). He also testified that changes can be made on shorter notice and the officers will find out through daily change sheets and electronic mail (Vol. 6, p. 207). Other information put in the boxes included pay stubs or Combined Federal Campaign information (id. p. 128). Lieutenant Figueroa did not expect officers to stop by and check their box on their way to their posts. Not all officers would have to check the on a daily basis but the expectation was when they were checked that it was to be done during the course of their shift One need only contact a lieutenant and request a relief. (id. p. 128-29). Lieutenant Figueroa testified that Compound officers can also deliver information such as pay stubs and change sheets (id. p. 130). He also stated that he and the other lieutenants communicate with one another with respect to instances where they have had to counsel Correctional Officers on this issue (id. pp. 169-70). The Lieutenant testified that he has asked Compound officers to relieve officers working posts such as perimeter and SHU to come and check their mailboxes (id. pp. 230-31).

Testimony and evidence presented at the hearing confirm that the activity of checking one's mailbox prior to the shift start is neither essential nor required. Therefore, checking one's mailbox during shift exchange is not a compensable activity.

c. Dropping off “hot trash” when exiting

Correctional Officers from the four housing units and Special Housing Unit testified that they commonly deposit contraband “hot trash” in a trash bin next to the Control Center when exiting during shift exchange. Specifically, the SHU No. 1 officer testified that he drops a depleted battery and any hot trash, arriving at Gate 3 three or four minutes after the shift end time. Tr. (Pratz) Vol. 3, 170:7-12. The AM SHU No. 2 officer testified that he completes his business at the institution, including dropping off depleted batteries and hot trash at the Control Center approximately one minute after he departs SHU, and exits the institution. Tr. (Pratz) Vol. 3, 177:15-178:1. In addition to his personal belongings, the Correctional Officers testified that the out-going officer takes hot trash and, until July 5, 2011, a depleted battery. Tr. (Chamblin) Vol. 1, 125:11-126:6, 266:6-24,(Davis) Vol. 2, 81:11-20; (Matthews) Vol. 2, 160:17-25; (Randall) Vol. 3, 23:22-24:1, 25:13-20, 32:19-23, Vol. 3, 33: 25-34:13.

Correctional Officers testified that common practice is that the out-going officer walks to Gate 4, flips over his accountability chit, drops any hot trash in the Institutional hot trash bin, and exits the institution. Tr. (Chamblin) Vol. 1, 125:11-126:6; (Avila) Vol. 2, 20:12-15, 21:22-22:2; (Davis) Vol. 2, 81:11-20; 161:19-21; (Randall) Vol. 3, 33: 25-34:13.

However, the General Post Orders, “Pre and Post Shift Activities,” dated December 30, 2009 States, “Staff are not authorized to perform any pre or post shift activities without prior permission from the Operations Lieutenant. Any batteries, property, hot trash, memorandums, etc., will be delivered during regular duty hours... The compound officers will normally handle most of these issues.” Local Vice President Chamblin complained that this action was a change in working conditions without negotiations. She was informed in an email from Warden Maye on November 8,

2011 that he did not consider these changes to be a change in working conditions. The instant grievance was filed the next day.

The previous practice of taking out hot trash by housing officers was performed occasionally and not a duty or responsibility of Correctional Officers. Even when performed, it probably less than thirty (30) seconds to toss the trash into a bin as one passed by the Control Center.

The exchanging of batteries, checking one's mail box, and taking out hot trash were activities that did not need to be performed during shift exchange. It certainly is reasonable for management to find more efficient ways of performing these non-essential activities during regular duty hours.

### **Fair Labor Standards Act, Related Regulations, Court Decisions**

The Fair Labor Standards Act (FLSA) proscribes the minimum wage and overtime pay in both private and public employment for employees who are not otherwise exempt. 29 U.S.C. § 201 et seq. The Office of Personnel Management (OPM) promulgated regulations for pay administration under the FLSA for federal employees. See generally 5 C.F.R. Part 551. Under the FLSA, any and all time spent by an employee performing an activity for the benefit of the agency and under the control of the agency are considered "hours of work." See 5 C.F.R. § 551.401 (a). This time includes: (1) time the employee is required to be on duty; (2) time where the employee is suffered or permitted to work; (3) and waiting time or idle time which is under the agency's control and for its benefit. The term "suffered and permit" refers to the knowledge of the employer. Specifically, it means does the employer know or have reason to know that the employee is performing overtime. See *Lindow v. United States*, 738 F.2d 1057, 1060-61 (1984).

Shortly after the FLSA was enacted, the Supreme Court decided the case of *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680 (1946). In *Anderson*, the Court found certain preliminary activities compensable, such as "putting on aprons and overalls, removing shirts, taping or greasing

arms, putting on finger cots, preparing the equipment for productive work, turning on switches for lights and machinery, opening windows and assembling and sharpening tools.” Id. at 692-93.

In response to Anderson and other litigation, Congress passed the Portal-to-Portal Act. That act provided relief from liability under the FLSA for failure to pay minimum wage or overtime compensation. See 29 U.S.C. § 254. Specifically, it determined that certain activities were not compensable, such as “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 “activities which are preliminary to or postliminary to said principal activity or activities.” Id. at subsection a.

After the Portal-to-Portal Act, the Supreme Court, in *Steiner v. Mitchell*, again addressed the matter of what is a compensable activity under the FLSA.. See 350 U.S. 247 (1956) (Attachment 5). In *Steiner*, the Court held that preliminary and postliminary activity that is an integral part of the principal activity is compensable. See id. At 252-53. OPM regulatory guidance with respect to preparatory or concluding activities reads:

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.

5 C.F.R. §551.412(a)(1)(Attachment 6). It further adds:

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.

5 C.F.R. §551.412(b)(Attachment 6). In *Lindow v. United States*, the Court of Appeals for the Ninth Circuit applied the *de minimis* doctrine to overtime claims under the FLSA by employees of the Army Corps of Engineers. The court wrote that [w]hen the matter at issue concerns only a few seconds or minutes of work beyond the scheduled working hours, such trifles may be disregarded.



Split second absurdities are not justified by the actualities of working conditions or by the policy of the Fair Labor Standards Act. It is only when an employee is required to give up a substantial measure of his time and effort that compensable working time is involved. See 738 F.2d 1057, 1062 (1984). The Lindow court looked at three factors when determining if otherwise compensable work was *de minimis*. See *id.* At 1063. The first factor was the practical administrative difficulty of recording the additional time. See *id.* In the underlying case, overtime could be as little as 5 minutes but the Agency had no policy to pay for less than 15 minutes. See *id.* The second factor was the aggregate amount of compensable time. See *id.* The third factor was the regularity of the additional work. See *id.*

Thus, there is no question that Correctional Officers are required to perform certain pre-shift and post-shift activities in order to begin at their shift start time and post-shift activities in order to exit the facility at their shift end times. The fact that Correctional Managers at Bastrop FCI may apply “common sense” to determine that these activities are not really compensable work at the overtime rate is not an adequate criterion. Nor does using solely a “common sense” a measurement of work reflect a “good faith” effort on management’s part to comply with the standards of the FLSA and Portal-to-Portal Act. Rather, these activities performed prior to and following the duty shift must be assessed by applying the appropriate legal principles and guidelines set forth.

### ***Pre- and post-shift activities***

Correctional Officers, supervisors and managers at FCI Bastrop testified extensively regarding the tasks and activities that officers perform after entering the front door and prior to officially reporting for work at the appointed shift start times. Although testimony at times varies or is

contradictory, the following tasks were addressed under direct and cross examination concerning whether they should be considered as compensable work under standards of the FLSA:

### 1. Security screening

All correctional staff and visitors must go through the screening site that is staffed by a designated, on duty staff member, who conducts the screening. It is obvious and reasonable for security purposes that screening is an essential and required activity for the security of the facility.

The Agency argues that the screening process has been found in other cases to not be compensable (See U.S. Dept. of Justice, Federal Bureau of Prisons, FCI Allenwood and AFGE Local 4047, 65 FLRA No. 207, p. 999-1000, June 30, 2011,[Attachment 11]); see also *Bonilla v. Baker Concrete Constr. Inc.*, 487 F.3d 586, 593, 2d Cir. 2007,[Attachment 12] and *Gorman v. Consol. Edison Corp.*, 488 F.3d 586, 593, 2d Cir. 2007, [Attachment 13]; and AFGE Local 148 and Federal Bureau of Prisons USP Lewisburg, FMCS No. 05-01739, p. 7 fn. 7, Oct. 4. 2011,[Attachment 14].

However, the testimony and evidence indicate that the security screening process is an employer-mandated activity not subject to collective bargaining with the Union. It a principal activity that happens on a daily basis in order to report for a duty assignment. It is an integral and indispensable activity and therefore should be considered compensable work.

### 2. Donning duty belts

Unlike the required security screening process, the Agency contends that the common practice by Correctional Officers of donning of a duty belt after passing through the screening site is neither required nor a compensable activity. First, it argues, the duty belt itself is not required, only that a clip and chain are mandatory to attach institution keys, once they are received, to one's person. Second, there is no requirement for staff that have a duty belt to put it on immediately after the screening site. The Agency contends that in order to be compensable,

the donning of the duty belt must be an integral and indispensable activity. Further it must be required to be done immediately after successfully passing through the screening site (See U.S. Dept. of Justice, Federal Bureau of Prisons, FCI Allenwood and AFGE Local 4047, 65 FLRA No. 207, pp. 999-1001, June 30, 2011, [Attachment 11]).

The testimony from eleven (11) Correctional Officers and four (4) clearly indicates that wearing a duty belt, although a common practice, is not required by the Institution. While a clip and chain is required, there is no requirement that they be put on immediately after the screening site and at least one post, Control #1, does not even have a duty belt. Therefore, the Agency requests that this activity be found not compensable.

The Union disagrees and argues that the need to be alert on the Compound dictates that a Correctional Officer immediately put on the duty belt after exiting security screening so that his or her hands are free and ready to react if needed. Besides, it is a long standing past practice to wear duty belts and therefore has been condoned by management over a long period of time. It is an established *past practice* of the workplace. The duty belt is a work aid and permitted by management. After considering the evidence and testimony, the Arbitrator finds that donning a duty belt is a compensable activity.

### 3. Accountability Board

The Agency asserts that the turning of a chit on the accountability board is not a compensable activity. The Federal Labor Relations Authority (FLRA) previously ruled on this matter. Their decision is controlling authority. In United States Dept. of Justice, Federal Bureau of Prisons, United States Penitentiary Terre Haute, IN and AFGE Local 720, Council of Prison Locals 33, 58 F.L.R.A. 327 (2003)(Attachment 16), the Authority held:

“With regard to the second disputed activity -- moving a marker on the

accountability board in the administrator's office -- the legislative history of § 254 specifically includes “[c]hecking in or out” as non-compensable activities. Vega, 36 F.3d at 425 (quoting S. Rep. No. 48, 80th Cong., 1st Sess. p. 47 (1947) (emphasis deleted)). The employees in this case are required to move a marker on the accountability board in order to show that they are “inside” the institution. Award at 26. Thus, this activity is analogous to “checking in” with the Agency, and the legislative history of § 254 supports a conclusion that this activity is not compensable. In addition, the Arbitrator made no findings, and there is no basis for concluding, that the employees perform any other activities at the administrator's office. Accordingly, we conclude that moving a marker on the accountability board is not compensable. See *id.* p. 330.”

Despite the FLRA ruling that moving a marker on an accountability board is not compensable, such as action is an essential and required job activity. At FCI Bastrop, a Correctional Officer does not “check in” when he or she moves a chit on the accountability board; that happens when the officer walks through the front door. By moving a chit with his name on it, an officer becomes “accountable” and on-duty. Furthermore, it could result in serious negative consequences if an officer failed to flip his or her chit. Thus, moving the chit becomes an integral and indispensable requirement by management.

#### 4. Correcting Inmate behavior

It is undisputed that a Correctional Officer who is on duty has a responsibility to correct the behavior of any Inmate observed violating FCI rules on the Compound. The Union also asserts that Correctional Officers are obligated to correct inmate behavior on their way in or out of the institution. However, the Agency contends that at certain times of day doing so would be almost impossible as inmates would not be present on the Compound. Lieutenant Figueroa stated that at midnight there would not typically be inmates on the Compound, nor at 4 p.m., and perhaps “some” at 8 a.m. Those out at 8 a.m. would typically be inmate orderlies who required only intermittent (every two hours) supervision. (Vol. 6, p. 141). He also stated that if an officer corrected inmate behavior then he would expect that officer to tell a lieutenant (*id.* p. 241).

Captain Emberton indicated that staff arriving for morning watch should not encounter inmates on their way in and the same should be true at 4 p.m. except for a few who may be out, but most should be in for count. When staff enters the Compound for day watch, they could encounter inmates but it is not a peak movement time, but some orderlies could be out. (Vol.7, pp. 80-81).

The testimony and evidence indicate that correcting inmate behavior is an important job requirement while on duty. However, the opportunity to correct inmate behavior very infrequently occurs during shift exchange and is therefore not compensable work.

#### 5. Responding to emergencies

It is undisputed that Correctional Officers are expected to respond to emergency calls, if they become aware of one. They are obligated to respond to emergencies from the time they enter the institution until they leave. An employee could be subject to discipline for not responding. However, the reality is that the probability of a body alarm emergency occurring during a shift exchange is evidently very low. In fact, many officers could not remember such an event and others recalled one instance when officers on one shift had to stay over because of an emergency, and they were all compensated at the overtime rate.

Although the ability to respond to an emergency on duty or during a shift exchange is an essential job duty, Correctional Officers should not be compensated for merely being “ready” to respond.

#### 6. The Information and equipment shift exchange

The Union contends that the information and equipment exchange is “integral and indispensable” to the Correctional Officers’ job duties, and constitutes work. On each of the posts where Correctional Officers are relieved on post, the oncoming officer and the outgoing

officer at each shift exchange vital information and equipment, at minimum, a radio and keys. The officers also account for any other equipment assigned to the post before the departing officer exits the post. The information exchange includes vital information that the oncoming officer needs in order to safely perform his duties of safety and security throughout the course of the scheduled shift.

The shift exchange is not optional; it is required by the Institutional post orders. See JE 9B (Austin No. 1 Specific Duties -- Morning Watch): "12:00 AM: Report to the unit officer's station and relieve the evening watch officer. Account for equipment, key rings, radio body alarm, handcuffs, handcuff case, and flashlight..." The shift exchange is not an instantaneous event. It takes time to pass on the significant events of the shift and to exchange equipment. The post orders allow approximately five minutes to occur before count time.

A similar information and equipment exchange occurs at the end of each shift. Once the off-going officer is properly relieved, he walks back to the Control Center, and flips his accountability chit back over. Until July 5, 2011, Correctional Officers also returned depleted batteries to the Control Center and they took hot trash to the hot trash bin located by the Control Center.

Thus, it is undisputed that Correctional Officers must conduct a proper relief once they arrive at their assigned post, and that the officer concluding his or her shift may not leave until that relief process has concluded. Furthermore, it is undisputed, and a matter of common sense, that it takes time for an officer to walk from the Front Lobby to his assigned post and from his assigned post to the Front Lobby. Based on this record, time spent during shift exchange by Correctional Officers sharing pertinent information is compensable work.

## 7. Travel times

Obviously, it requires time for Correctional Officers assigned to Housing Units and SHU to walk from the Front Entrance sally-port doors to their assigned units, and return by the same path at the shift end. As noted in AE #7, a simulated walk to each of the housing units from door #3 (without stopping by the Lieutenants' Office) yielded the following times:

- Austin Unit: 2 min. 42 sec.
- Crockett Unit: 3 min. 14 sec.
- Houston Unit: 2 min. 18 sec.
- Travis Unit: 2 min. 16 sec.
- Special Housing Unit: 1 min. 5 sec.

Walking to and from the Front Entrance to the assigned unit may not seem like “work” if judged by the vague principle of “common sense,” yet if it is an integral and indispensable activity to the work performed by the Correctional Officer, for the benefit of the Employer, it becomes compensable work.

### **Is the compensable work *de minimis*?**

Numerous Arbitrators have applied the *de minimis* standard and regulation. See AFGE Local 3020 and Federal Bureau of Prisons, FCI Schuylkill, FMCS No. 05-04730, p. 76-78. As indicated, the Lindow court looked at three factors when determining if otherwise compensable work was *de minimis* (See *id.* At 1063). The first factor was the practical administrative difficulty of recording the additional time. See *id.* In the underlying case, overtime could be as little as 5 minutes but the Agency had no policy to pay for less than 15 minutes (See *id.*). The second factor was the aggregate amount of compensable time. See *id.* The third factor was the regularity of the additional work (See *id.*).

Regarding the first *de minimis* test of administrative difficulty of keeping track of employee work time, it is evident that management at FCI Bastrop has not prioritized tracking employees' hours of work. *Tr. (Figueroa) Vol. 6, 174:2-19; (Emberton) Vol. 7, 92:8-17.* Indeed, *Lt. Figueroa*

testified that it is not part of the Lieutenants' job duties to keep track of employees' daily arrival and departure times. Tr. (Figueroa) Vol. 6, 259:8-260:7. However, he also testified that, if he were assigned the task of tracking employees' daily arrival and departure times, or their daily hours of work, he would comply with that order. Tr. (Figueroa) Vol. 6, 260:8-17. Thus, the Agency's own scheduling and staffing decisions should *not* serve to insulate it from liability for its FLSA violations submitted here. *USP Hazelton and AFGE Local 420*, FMCS No. 09-00421, at 15 (June 4, 2010) (Vaughn, Arb.). The Agency cites no cases supporting its argument that, simply because of its own staffing decisions, it is excused from the FLSA's requirement to track hours of work. No such decisions exist, as there are no exceptions to the FLSA's requirements under the circumstances described by the Agency.

Bastrop FCI management, unlike many employers, has chosen not to invest in a time clock and time card system or an electronically automated badge system for tracking the start and exit time of each employee, even though they are widely available and relatively inexpensive. Such systems record the amount of regular hours and overtime each employee accumulates and thereby eliminates the guesswork regarding the actual amount of compensable time worked. Because the Agency has decided not to track employee time, the testimony by representative employees is a reasonable alternative available to the Union to determine the amount of time involved.

Finally, as Arbitrator Samuel Nicholas, Jr., noted in a November 26, 2008 award (FMCS #07-04342) between the AFGE and BOP, in 1995 filed a national grievance that the Portal-to-Portal Pay Act was being violated at all federal correctional institutions throughout the country and in 2000 the parties reached a settlement, which resulted in the Agency to pay over 100 million dollars to correctional employees nationwide (p. 4). Yet the matter of establishing appropriate shift start and stop times is evidently still in dispute at many correctional institutions,



including Bastrop FCI. In its Post-Hearing Brief on Liability, the Union offered twenty-two (22) arbitration awards that were supportive of its position on portal-to-portal pay. By comparison, the Agency submitted three arbitration awards involving the Agency and Union that were not found by the Arbitrator to be supportive of the Agency's position in the instant matter:

- Arbitrator Theodore Simon in FMCS Case #060119-01660-7 (1/8/09) in FDC Philadelphia held that the Agency violated collective bargaining agreement and FLSA with respect to shift overlap and obtaining equipment. As a result, Arbitrator Simon ordered the Agency to pay all affected personnel overtime pay, liquidated damages in the same amount, and attorney fees and costs.
- Arbitrator John D. Nagy in FMCS Case #05-04730 (10/9/08) in FCI Schuylkill sustained and denied the grievance in part. Arbitrator Nagy awarded compensable time to the following officer posts: Activities, Compound, Control Center, Count Officer, Housing Units, Outside Perimeter, Recreation, and Special Housing. The Arbitrator retained jurisdiction to decide whether to award liquidated damages and attorney fees were warranted.
- Arbitrator David K. Monsour in FMCS Case #05-01739 (10/04/11) in USP Lewisberg involving six named grievants. Arbitrator Monsour did not find that the Agency had violated the FLSA and noted it was based: 1) "primarily on the unique compact physical characteristics and scheduling practices at Lewisberg," and 2) "both Agency and Union witnesses testified employees did not work in excess of eight hours without compensation," including a former Union president.

### **AWARD**

The Arbitrator, having heard arguments, weighed the evidence, and considered testimony, considered whether the Union met its burden of proof to demonstrate that the Agency suffered or permitted Correctional Officers assigned to the Control Center, Visiting Room Nos. 1 and 2, Compound Nos. 1 and 2, SHU Nos. 1 and 2, Austin, Crockett, Houston, and Travis Units, and the Camp to perform work before and/or after their shifts without compensation?

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

Compensable work under the FLSA, or denial thereof, is as follows with respect to the particular posts and activities:

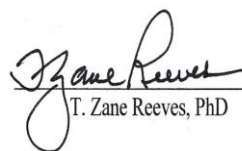
A. Control Center #1 Officer:	10 minutes per shift
B. Control Center #2 Officer:	10 minutes per shift
C. Visitor Room #1 Officer	10 minutes per shift
D. Visitor Room #2 Officer	10 minutes per shift
E. Compound Officers	15 minutes per shift
F. Housing Unit Officers	15 minutes per shift
G. AM SHU #1 Officer	17 minutes per shift
H. PM SHU #2 Officer	15 minutes per shift
I. Camp Officers	No award

The parties had agreed that the case was to be bifurcated as to liability and damages. The issue at this stage is liability and, if so, for which posts and how many minutes per shift. The Agency is liable to the employees in the posts identified above for this unpaid work time under the FLSA.

The next stage of the hearing is to be determine damages, namely whether liquidated damages are warranted; whether the recovery period goes back 2 or 3 years; and what amount is due each employee. The Agency knew or through reasonable diligence should have known that the work was being performed, yet did not make a good faith effort to determine how much work was being performed or stop it.

The Agency is also liable for liquidated damages equal to the Correctional Officers' back pay in accordance with Section 216(b) of the Fair Labor Standards Act.

Furthermore, the Union is entitled to an award of reasonable attorneys' fees and costs in accordance with the FLSA, 29 U.S.C. §216(b), should it choose to submit its petition within thirty (30) days of receipt of this award. The Parties shall have sixty (60) days from the date of this award to attempt to agree on the damages owed. In the event the Parties are unable to agree, the Arbitrator shall retain jurisdiction to decide the issue of damages.



T. Zane Reeves, PhD

February 20, 2013