IN THE MATTER OF ARBITRATION BETWEEN

FEDERAL BUREAU OF PRISONS, BEAUMONT, TEXAS,

EMPLOYER

AND

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, COUNCIL OF PRISON LOCALS, UNION

FMCS NO. 05-54516

PORTAL TO PORTAL GRIEVANCE

BEFORE BERNARD MARCUS, ARBITRATOR

DECISION AND AWARD

The arbitrator, selected by the parties through the facilities of the Federal Mediation and Conciliation Service, presided at the hearings held at the Federal Correctional Complex, Beaumont, Texas, March 21, 22, and 23, and June 20 and 21, 2006.

The arbitrator has fully considered the transcripts of testimony and exhibits introduced at the hearings, the arguments of the parties at the hearings, the Agency's pre-hearing memorandum and the post-hearing briefs of the parties, which were received on November 14 and 16, 2006, in formulating the hereinbelow award.

The grievance in this case, filed February 18, 2005, was addressed to the Federal Bureau of Prisons, Ronald Thompson, South-Central Regional Director, Dallas, Texas. The grievance alleges that the employer has violated the Fair Labor Standards Act, 29 USC ¶ 201 et seq. ("FLSA"), the Federal Employees Pay Act of 1945, 5 USC ¶5542("FEPA" or the "Back Pay Act"),

the Bureau of Prisons "Program Statement" 3000.02, the Bureau of Prisons Human Resource Management Manual, Section 610.1, the Bureau of Prisons Operations Memorandum Number 214-95, the Nationwide Settlement Agreement of August 2000, and the Collective Bargaining Agreement between the parties, specifically Articles 6, Section B(2) and Article 18, Section A.

In its grievance the Union seeks overtime compensation for all present and former bargaining unit employees for hours worked in excess of their scheduled 40-hour work week for the period from August 1996 to date. The Union further asks that the Beaumont Federal Correctional Complex ("Agency" or "Employer") implement schedules in compliance with Program Statement 3000.02 and HR Manual Section 610.1. Finally, the Union seeks, in addition to back overtime pay, an award of liquidated damages, and attorney fees and other costs which are chargeable in event of a successful action pursuant to FLSA and/or the Federal Employees Back Pay Act.

The Employer answered the Union's grievance on March 18, 2005. The Employer, over the signature of Linda K. Rivera, Employee Services Administrator, Federal Bureau of Prisons, South-Central Region, asserted that the grievance was fatally defective because it should have been filed at the local level with the warden of the Beaumont Federal Correctional Complex. The answer also raises other procedural contentions which the Employer contends invalidate the validity of the grievance. Nevertheless, Ms. Rivera's response invites the Union to continue pursuing the grievance up to and including arbitration.

More than a year later, in its pre-hearing memorandum, filed in March 2006, the Agency also argued that the Union's grievance should be dismissed for untimeliness.

THE ISSUES

1. Is the grievance fatally defective because (1) it was lodged with the Bureau of Prisons Regional Director rather than with the Warden FCC Beaumont, or (2) it was filed more than forty days after the asserted contract violation?

2. Are the corrections employees at FCC Beaumont entitled to compensation at overtime rates for pre-shift and post-shift activities.

If so, what is the appropriate remedy.

THE COLLECTIVE BARGAINING AGREEMENT

The applicable master Collective Bargaining Agreement between the parties, originally effective by its terms between March 9, 1998, and March 8, 2001, provides in relevant part as follows:

> ARTICLE 3, "GOVERNING REGULATIONS":
>
> Section a. Both parties mutually agree that this Agreement takes precedence over any Bureau policy, procedure, and/or regulation which is not derived from higher government-wide laws, rules, and regulations.
>
> 1. Local supplemental agreements will take precedence over any Agency issuance derived or generated at the local level.

Section b. In the administration of all matters covered by this Agreement. Agency officials, Union officials, and employees are governed by existing and/or future laws, rules, and government-wide regulations in existence at the time this Agreement goes into effect.

ARTICLE 5, "RIGHTS OF THE EMPLOYER":

Section a. Both parties mutually agree that this Agreement takes precedence over any Bureau policy, procedure, and/or regulation which is not derived from higher government-wide laws, rules and regulations.

1. local supplemental agreements will take precedence over any Agency issuance derived or generated at the local level.

Section b. In the administration of all matters covered by this Agreement, Agency officials, Union officials, and government-wide regulations in existence at the time this Agreement goes into effect.

ARTICLE 6, "RIGHTS OF THE EMPLOYEE":

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

1. should the Employer detect that an employee has received an overpayment/underpayment, the Employer will notify the affected employee in writing;

2. Should an employee realize that he/she has received an overpayment/underpayment, the employee will notify their first line supervisor in writing . . .".

ARTICLE 31, "GRIEVANCE PROCEDURE":

Section d. Grievances must be filed within forty (40) calendar days of eh date of the alleged grievable occurrence. . . . A grievance can be filed for

violations within the life of this contract, however, where the statutes provide for a longer filing period, then the statutory period would control.

* * *

Section f(1) when filing a grievance, the grievance will be filed with the Chief Executive Officer of the institution/facility, if the grievance pertains to the action of an individual for which the Chief Executive Officer of the institution/facility has disciplinary authority over . . ."

ARTICLE 32, " ARBITRATION" provides that any remedy requested in a written grievance may be modified "only by mutual agreement", and also cautions that "the arbitrator shall have no power to add to, subtract from, disregard, alter or modify any of the terms of . . . this agreement or published Federal Bureau of Prisons policies and regulations".

CONTENTIONS OF THE PARTIES

1. The Union's Contentions

The Union contends that the Agency should compensate all present and former bargaining unit employees (corrections officers) at overtime for hours worked in excess of the scheduled forty-hour work week, for all time from 1996 to when Agency pay practices are brought into compliance with FLSA and Program Statement 3000.02. The Union also seeks implementation of work schedules which comply with FSLA, the Portal to Portal Act and the Program Statement and HR Manual regarding when employees must be compensated (are "on the clock") at the beginning and end of the work shift. Further, the

Union seeks FLSA liquidated damages in an amount equal to the overtime award, interest and all attorney fees and other costs incurred in handling the grievance and the arbitration.

The Union contends that the record establishes that overtime pay is due for 15-20 or 30 minutes of time which was worked each workshift and not paid, dating from August 1996, more than eight years prior to the February 18, 2005, filing date of the grievance. Alternatively, the Union seeks a back pay remedy for the time period commencing February 18, 2002.

The Union asks that the arbitrator retain jurisdiction in order to determine in post-Award proceedings any disputed questions of back pay and attorney fees and to monitor compliance.

2. The Agency's Contentions

a. Procedure. The Agency asserts that the labor agreement between the parties requires that grievances be filed with the "Chief Executive Officer", if they pertain to actions of employees over whom the Chief Executive Officer has disciplinary authority, and that for this grievance, the Chief Executive Officer is the warden of the Beaumont Federal Correctional Complex. The Union filed the grievance with the Bureau of Prisons Regional Director, who is located in Dallas, Texas, not in Beaumont. The contract language is clear and unambiguous. This grievance, in order to be properly lodged, had to be lodged

with the Beaumont complex warden and it was not. Accordingly, the grievance is procedurally invalid.

Further, the labor agreement (Art. 31, section d) requires that grievances be filed within 40 days of the date of occurrence of the grievable event. The grievance at issue, which claims that the Agency, beginning in August 1996, violated the wage payment provisions of the labor agreement and the governing laws, was filed on February 18, 2005. The grievance is untimely and must be rejected for that reason.

b. Merits. The Union's witnesses and documents failed to establish by a preponderance of the evidence, to say nothing of clear and convincing evidence, that bargaining unit employees performed compensable work for which they were not paid.

The Agency contends that the Union did not prove through testimony and exhibits at the hearings that any bargaining unit employees performed compensable services for which they were not properly compensated. It claims that all of the compensable services discussed in the record arguably were rendered during scheduled work shifts.

Further, the Agency argues that it is important because of security concerns that a prison employer be given more latitude in assigning work than is given to employers in other environments. (See pp. 34-35, post).

According to the Agency, waiting in the key line at the control center prior to the start of a work shift is not a compensable activity, nor is picking up keys, pocket

knives, work detail pouches, the occasional spare battery, etc., turning over an identity chit to signify the employee's arrival on the job or his notifying or signaling to his supervisor that he is on his way to his duty post. The scheduled work shift for the employees commences upon their arrival at the assigned duty post.

Further, if employees arrive at the control center early, it is for their own convenience in order to have coffee, socialize with fellow employees or use Agency equipment such as telephone, computer, etc. This time is not compensable.

Finally, those employees who pick up equipment at the control center which is necessary to the performance of the work duties, such as weapons, handcuffs, flashlights, restraints, etc., do not do so until after their scheduled work shift begins and they are on the clock (are getting paid). The record shows that these employees are paid from the instant they receive such equipment from the control room custodian. Moreover, there is no proof in the record that any employees were unable to clear the control center and arrive on the outside prior to or at the end of the paid work shift.

Accordingly, the Agency contends that since there is insufficient evidence to justify the award of a remedy, the grievance should be denied and the case dismissed. However, should the arbitrator award a remedy, he should deny the request for any liquidated damages, or application of a three year statute of limitations or interest on any award, and

should defer any questions regarding attorney fees for a post-award proceeding to be held after all other issues have been resolved.

I. PROCEDURAL ISSUES

The Employer has raised two procedural issues which challenge substantive arbitrability of the Union's grievance. First, the Employer points out that per Article 31, Section (d) of the Labor Agreement, a grievance must be filed within forty calendar days following the date of the grievable occurrence. Although the Union asserts that the grievable occurrence occurred in August 1996, its grievance was not filed until February 18, 2005. Accordingly, (a) the grievance must be dismissed as having been untimely filed, or, alternatively, (b) the grievance must be interpreted to cover events which occurred no earlier than January 9, 2005.

Second, the Employer contends that Article 31, Section f(1) of the Labor Agreement requires that a grievance must be filed with the Chief Executive Officer of the facility, if the grievance pertains to activity for which the chief executive has direct supervisory responsibility. The instant grievance asserts failure to pay required overtime. The warden of the Beaumont Correctional Complex has direct responsibility over payment of wages to bargaining unit employees. The Union filed its grievance with the Bureau of Prisons Regional Director, who is located in Dallas, Texas. Accordingly, the grievance is fatally defective. The Employer's March 18, 2005, answer to the grievance alluded to this procedural defect.

A. THE ARBITRATOR'S DISCUSSION OF PROCEDURAL ISSUES

1. Timeliness. There is no merit to the Employer's claim that the grievance was untimely filed. This grievance asserts a statutory offense. Article 31, Section d of the Labor Agreement provides that "where the statutes provide for a longer filing period, the statutory period would control". The Fair Labor Standards Act provides a statute of limitations of two years, three years for a willful offense. The statute prevails. The grievance here at issue is effective from either February 18, 2002, or February 18, 2003. See discussions at page 29-30, post.

Moreover, the Employer's timeliness objection lacks legal substance. In Gilmer v. Interstate/Johnson Lane, 500 U.S. 20 (1991), the Supreme Court held that arbitrators may, in appropriate circumstances and when agreeable with the parties, arbitrate and decide statutory claims (The Agency has at all times been agreeable to arbitration of this grievance). The Supreme Court and inferior federal courts hold that the arbitrator must be free to apply the governing statute as it would be applied in a United States District Court and must have authority to grant a remedy substantially equivalent to the remedial authority of a United States District Court. Per Cole v. Burns International Security Service, 105 F.3d 1465, 1480 (DC Cir.,1997), the arbitrator applies the substance of the law and grants a remedy, if appropriate, "in accordance with statutory requirements and prevailing judicial interpretation". As the DC Court of Appeal held, "the arbitrator is bound to apply applicable public law both as to substance and remedy, in accordance with statutory

requirements and prevailing judicial interpretation" (p. 1480). Accordingly, FLSA's statute of limitations prevails over timeliness provisions of a labor agreement. Louis v. Geneva Enterprises, Inc., 128 F. Supp. 2d 912 (ND Ca., 2000)

The Agency relies on the award of arbitrator Toomey in Federal Bureau of Prisons, FCI Ray Brook, New York, attached to its post-hearing brief, to support its argument that the grievance in this case was filed untimely. I reject the result reached by arbitrator Toomey. The grievance in the Ray Brook case sought compensation at overtime rates for work which bargaining unit employees under orders from the agency performed during their 30 minute uncompensated lunch break. The Ray Brook grievance was filed more than 40 days after the union became aware of existence of a claim, and arbitrator Toomey dismissed the grievance as having been untimely filed. However, the gravamen of the Ray Brook grievance asserts a violation of the Fair Labor Standards Act, which carries a two or three year statute of limitations. According to Gilmer v. Interstate/Johnson Lane, 500 U.S. 20, 26, an arbitrator hearing a statutory claim under a collective bargaining agreement must be empowered to grant remedies substantially similar to those available had if the claimants filed a court action;" . . . by agreeing to arbitrate a statutory claim [the union] does not forego the substantive rights afforded by the statute . . . only submits to their resolution in an arbitral, rather than a judicial, forum."

2. Grievance not filed with correct official. There is further no merit to the Employer's contention that the grievance is fatally defective because it was not filed with the warden

at the Beaumont Complex. Aside from the fact that the common law forms of action, developed in England after the Middle Ages, have not been applied in American jurisprudence since passage of the Judiciary Act of 1797, the whole concept of arbitration is to remove meaningless technicalities from the adjudicatory process. The Employer's citation from Elkouri, How Arbitration Works, (4th Edition) is inapposite.

In the award in Federal Bureau of Prisons, Federal Correctional Institution, Yazoo City, Mississippi, attached to the Agency's post-hearing brief, Arbitrator Sheldon Adler, dismissed the Union's grievance on procedural grounds without reaching the merits. One of the procedural grounds for dismissal was that the original grievance had been filed with the warden of the institution, rather than informally with a supervisory captain who reported to the warden. Several other procedural objections were also lodged. Although, as stated, arbitrator Adler dismissed the grievance on procedural grounds, he never resolved the Agency's procedural objection regarding which agency manager should have been named as the employer representative in the original grievance. Accordingly, to the extent that the Agency relies on arbitrator Adler award in the Yazoo City case as supporting its contention that the grievance at issue in this case is fatally defective because it was filed with the Regional Director of the Bureau of Prisons in Dallas, rather than with the warden at Beaumont, the Adler award is inapposite.

Finally, the Employer failed to raise the issue that the grievance was improperly addressed until it included the contention in its post-hearing memorandum, some twenty-one months

after the grievance was lodged, and until after extensive pre-arbitration proceedings between the parties, five days of hearings and an opportunity accorded at the conclusion of the fifth hearing day to supplement the record with post-hearing depositions and other submissions. Accordingly, the Employer waived its timeliness objection to the grievance long before it submitted same.

The Agency's procedural objections are denied.

II. MERITS

A. STATEMENT OF THE CASE

1. The Agency's Workplace

The Employer operates a large prison known as the Federal Correctional Complex, Beaumont, Texas. The bargaining unit consists of approximately 600 employees, some 500 of whom are correctional officers with direct responsibility for prisoners. The Union's grievance seeks additional pay at overtime rates for correctional officers and for non-correctional employees when they are assigned to and work as correctional officers.

The Beaumont Federal Correctional Complex houses three classes of federal prisoners: maximum security (penitentiary), medium security and low security. Each of these is housed in a separate center. With some exception not here relevant, corrections employees enter each of the three centers through its secure control center, where they report at the beginning, and exit at the end, of their workshifts.

At the beginning of the workshift, employees line up in what is known as a key line where they are checked in, and are in most cases issued equipment required for the job, and permitted to enter the prison's secured area through gates known as sallyports.[1]

2. The Dispute

The parties are in dispute regarding when the law requires that non-exempt correction officers must be compensated for their time (be "on the clock"). During five days of hearings, the parties explored myriad different hypotheses and factual situations, some of which are described and analyzed in detail in this Award. Suffice it to say that there is profound disagreement between the Agency and the Union regarding when the law requires that employees be on the clock.

At issue in this dispute are the Federal Fair Labor Standards Act, 29 USC ¶201 et seq. (FLSA), the Federal Portal to Portal Amendments of FLSA, 29 USC ¶251 et seq. the Federal Employees Pay Act of 1945, 5 USC ¶5542 (FEPA), the Bureau of Prisons' Program Statement 3000.02, its Human Resource Management Manual, Section 610.1, its Operations Memorandum 214-95, a settlement in 2000 of a grievance which resulted in the payment of more than $120,000,000.00 in back pay to Bureau of Prisons bargaining unit employees on a nation-wide basis

[1]A sallyport is a secured enclosure. The entering employee is permitted to enter the enclosure. A secured gate is locked behind him. Another secured gate at the other end of the enclosure is opened and the employee is permitted to enter the prison's secured area. The second gate is locked after the employee has left the sallyport. There may be more than one such sallyport. This process is repeated in reverse when the employee exits the facility at the end of his workshift.

in respect of the period of time, May 17, 1989 - January 1, 1996, and several Articles of the Master Labor Agreement between the parties reprinted at pages 3-5 above.

As noted, the Union seeks payment for (1) time spent prior to the start of a shift at the control center waiting for the issuance of a key or keys and other necessary equipment and in traveling (walking) to the assigned duty post; and (2) for time spent after the end of the shift in walking from duty post through the control center exit.

3. Facts and Contentions

The Union contends that the Agency should pay overtime, commencing August 1996, to present and former bargaining unit employees for hours worked in excess of the regularly scheduled forty-hour work week. The Union also seeks FLSA liquidated damages, interest, FLSA and USCA Title 5 attorney fees and other unspecified costs and expenses incurred in processing this case through grievance and arbitration.

Issues discussed in this Award on the merits of the grievance are liability vel non of the Agency for overtime pay plus liquidated damages and interest, determination of the period of time during which overtime pay is due, and entitlement of the Union to attorney fees. The governing legal principles include:

> ". . . it is the duty of the management to exercise its control and see that the work is not performed if it does not want it to be performed. It cannot sit back and accept the benefits without compensating for them. The mere promulgation of a rule against such work is not enough. Management has the

power to enforce the rule and must make every effort to do so." 29 CFR ¶785.13, and

". . . where an employee is required to report to a meeting place, to perform work or pick up tools, the travel time from the meeting place to the work site must be counted as hours worked". 29 USCA ¶203.

Some of the correctional officers in the bargaining unit work three shifts of eight hours each around the clock, 24 hours, seven days a week. Other correctional officers work one of two eight-hour shifts during each 24-hour period, some of which are covered five days a week and others are covered seven days a week. Finally, some correctional officers work a daily eight-hour shift, five days per week.

Although the overwhelming majority of correctional officers arrive at and leave work through a control center, there are some who bypass the control center and go directly to their assigned duty posting. Some correctional officers check in at the control center, receive nothing and perform no functions there and proceed directly through the control center and sallyports to their assigned duty posts.

The Union presented a number of witnesses who testified that the process of checking in at the control center, receiving keys, information and necessary equipment and walking various distances to their assigned posts can take from 15 to 30 or more minutes when starting the workshift

and a roughly equal amount of time when leaving work.[2] The Agency's witnesses, also provided estimates of time required for these functions, generally shorter times than those testified to by the Union's witnesses.[3]

The equipment issued at the control center, in addition to keys, may include tools, radio, battery, security equipment such as handcuffs, restraints, transfrisker, other inmate pacifications, weapons, ammunition, metal detectors, mirror, flashlight, stamp and stamp pad, detail pouches,[4] etc., or some of these. In addition, an incoming employee, having passed through the control center window, walks several feet to a chit board where he turns, places or removes a chit, thus informing supervision that he has arrived at work. The incoming employee then walks past his lieutenant's post or office and signals that he has arrived on the job.

Further, when a correction officer relieves his predecessor at the duty post, he will usually receive custody of equipment and other property assigned to that post and which he

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[2]These estimates include time spent waiting in the key line before equipment is issued. The time estimates vouchsafed by the Union's witnesses range from 15 to more than 30 minutes per day, depending upon the length of the line at the control center, the amount of the equipment required to be furnished, the distance from the secured area outside the control center to the duty post and the amount of time required to receive and sign for inventory handed over by the predecessor on shift.

[3]Some Agency witnesses, who were assigned to duties other than at a control center, testified that they never saw bargaining unit employees line up at a control center before the assigned shift start or after the assigned shift end.

[4]A detail pouch contains curriculum vitae of those inmates who will perform work duties under the direction of the correction officer during the workshift. By consulting the contents of the detail pouch, the correction officer can determine if he has control of the inmates assigned to him.

presumably will require in handling his assigned work. The incoming and departing correction officers check the inventory. The incoming officer signs that he has received the equipment, and the departing officer signs that he has delivered same to the incoming officer. The departing officer then leaves the duty post, walks through the sallyports to the control center and departs via the unsecured area outside the control center.

It is surprising, but true, that the Agency keeps no time records for correction officers. There are no sign-in or sign-out sheets or time clocks. Moreover, during the years since the 2000 settlement, the Agency took no action to correct its failure to comply with its FLSA timekeeping obligations. Post orders issued in advance of each quarter-year inform correction officers as to starting and quitting times and assigned duty posts, but post orders are not attendance records.

The Union introduced documentation, unchallenged by the Agency, which details the distance in feet from the control center to each duty post in the penitentiary area of the prison complex. Distances range from a low 44 and 57 feet to more than a mile.[5]

I compute walking time on the basis of 2.7 miles per hour, an adaptation from the infantry standard march pace of 120 paces per minute. Walking speed is rounded off to 240 ft/minute.

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[5]The more than mile duty post is approached by motor vehicle, not on foot. Some employees work at duty posts, such as the towers, which are not accessible by walking. Some employees drive directly to their duty posts or do so after reporting through a control center.

There is no evidence that any correction officer at the Beaumont facility ever requested overtime payment for these preliminary and postliminary duties, that management at Beaumont ever disclosed to its correction officers that such overtime would be available if requested on the requisite forms, or that management at Beaumont ever implemented the affirmative action requirements of the 2000 settlement agreement or acknowledged or indicated that relief might be available for employees who were required to perform preliminary and postliminary duties on a daily basis over a period of years.

B. THE ARBITRATOR'S DISCUSSION

Introduction.

29 CFR ¶790(4) provides:

(b) Under Section 4 of the Portal Act, an employer who fails to pay an employee minimum wages or overtime compensation for or on account of activities engaged in by such employee is relieved from liability or punishment therefor if, and only if, such activities meet the following three tests:

(1) They constitute "walking, riding, or traveling" of the kind described in the statute, or other activities "preliminary" or postliminary" to the "principal activity or activities" which the employee is employed to perform: and

(2) They take place before or after the performance of all the employee's "principal activities" in the workday; and

(3) They are not compensable, during the portion of the day when they are engaged in, by virtue of any contract, custom, or practice of the kind described in the statute.

1. Preliminary and Postliminary Time Spent by Correction Employees and Uncompensated is not de minimis.

The Agency argues that pursuant to 5 CFR 551.412(a)(1), if a federal employer reasonably determines that a preliminary or postliminary activity is closely related to an employee's principal activities, and is indispensable to the performance of those activities, the total time spent is compensable only if those activities amount to more than ten minutes per work day. There is no merit to this contention in this case.

First, in this case the uncompensated time reoccurs every work shift. Accordingly, for the average full-time correction employee, uncompensated time occurs at the beginning and again at the end of each workshift, five workshifts per week. Prevailing jurisprudence rejects the de minimis defense when the additional work is repetitive and regular. Lindow v. U.S., 738 F2d 1057 (9th Cir. 1984).

Second, the Agency's argument defies logic. According to the Agency, eight hours a day means either eight hours nine minutes (or eight hours eighteen minutes) per day, and the Agency can extract from its employees forty-five minutes (or ninety minutes) per week of work for which it does not have to pay. This practice not only does not comply with the Fair Labor Standards Act but is precisely what Congress intended to outlaw.

Third, the Fair Labor Standards Act preempts regulation 5 CFR 551.412(a)(1) regarding the obligation of an employer to pay for requiring an employee to perform unpaid work for up to ten minutes per shift on a daily basis.[6]

2. Payment for Preliminary and Postliminary Duties.

A unanimous United States Supreme Court recently held "that the term principal activity or activities in Section 4 [of the Portal to Portal Act] embraces all activities which are an integral and indispensable part of the principal activities . . . Thus, under Steiner [Steiner v. Mitchell, 450 U.S. 247 (1956)] activities . . . that are performed either before or after the regular work shift on or off the production line, are compensable under the Portal to Portal provisions of the Fair Labor Standards Act if those activities are an integral and indispensable part of the principal activities for which covered workmen are employed and are not specifically excluded by Section 4(a)(1)." Alvarez v. IBP, Inc. 126 S Ct. 514, 10 WH Cases 2d 1825 (U.S., 2005).

As Alvarez and preceding cases hold, an employer must pay its employees for time spent in preliminary duties before commencing the actual work for the day at the assigned post if the preliminary duties are "integral and indispensable" to the required and assigned duties. Thus in Alvarez, donning protective gear prior to going to work in an abattoir was compensable. Alvarez

[6]The 10th Circuit Court of Appeals held in Reich v. Monfort, Inc., 144 F3d 1329, 4 WH cases 2d 1106 (1998) that ten minutes per day is not de minimis, although it suggests that ten minutes once or twice in a year or two might be de minimis. Accord, Reich v IBP, 38 F3d 1123, 1126 (10th Cir., 1994).

also holds that the time an employee has to spend walking from the locker room, where he dons the protective gear, to his work station, was compensable. See IBP v. Alvarez, 339 F2d 894, 8 WH Cases 2d 1601 (9th Cir. 2003).

As Arbitrator Gordon recently held, "work time for employees who obtain items at the control center begins when the first item is in hand and ends after the last item is returned. Work time for employees who do not obtain control center items begins and ends at their posts". Bureau of Prisons, (Leavenworth, KS), 103 FLRR2-125, p. 17[7] (2003).

I hold that time spent waiting in the key line at the control center prior to issuance of keys or other equipment is not compensable, and if no other duties are rendered, time spent passing through the key line at the control center, receiving keys (including locker and/or vehicle keys) and/or generic knives such Swiss Army knives, traversing sallyports, handling chits, and checking in with the lieutenant, is not compensable. .

Further, I hold that time spent at the control center receiving equipment necessary for the employee to perform his duties when he reaches his post is compensable from the moment the employee requests the equipment. As stated, included in such equipment are: radio, batteries, security equipment, weapons, ammunition, handcuffs, pacification equipment, flashlights, stamp pad and stamp, written orders placed in the officer's mail box, detail pouches, etc. Moreover, regardless

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[7]The Leavenworth award notes that ". . . the Agency errs by ignoring time between obtaining control room items and arriving at the post and time required for any hand offs from one shift to another". Such extra time each day is not de minimis (p. 18).

whether compensable time starts when equipment is issued at the control center or when the employee reaches his assigned duty post, all time spent checking and signing for and releasing inventory is compensable to both the incoming and departing employee.

With respect to correction officers assigned to three shifts around-the-clock whether five or seven days a week, the Agency has violated the Portal to Portal Act by limiting compensation to all three employees to a total of 24 hours per day.[8] In all circumstances, even if he does not pick up necessary equipment at the control center when coming on duty, if an employee has to spend time receiving or releasing inventory at the duty post, there is an inescapable time overlap at the duty post. At a minimum, time spent in this activity must be compensated either to the oncoming or the outgoing employee. Although the Agency struggled valiantly at the hearing and in its post-hearing brief to sustain the contention that three and two shift employees did not overlap, the struggle was in vain. The contention that there is no overlap defies logic. Moreover, the employee job descriptions document that compensable preliminary and postliminary duties are required.

In its defense, the Agency relies on the award of Arbitrator Richard R. Allen in a case which arose at the Federal Correctional Institution, Milan, Michigan (January 2006), in which

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[8]An employee working one of two daily shifts in a 24-hour period, when coming to work and traversing the control center, is governed by the same principles regarding receipt of equipment and regarding receipt and release of inventory at the duty post. An employee who works a day shift is also governed by the same principle when he traverses the control center, but since he is not relieving anyone at his duty post, he does not spend time signing for inventory.

Arbitrator Allen held that the employer's liability under a Portal to Portal Act grievance seeking overtime compensation would commence on the date the parties jointly appealed to arbitration. I disagree with Arbitrator Allen's conclusion. Arbitrator Allen would accord a claimant under the Fair Labor Standards Act a much diminished remedy than the remedy that individual could get if his case were tried in a court. Arbitrator Allen's conclusion is inconsistent with the decision of the United States Supreme Court in Gilmer v. Interstate/Johnson Lane, (500 U.S. 20, 1991) and numerous Federal Court of Appeals decisions.

Further, I do not agree with the view expressed by Arbitrator Allen that an employer cannot be expected to be responsible for the exact arrival time of each employee, even if supervising employees were in the area when claiming employees arrived at and left work. Management is responsible to pay for time worked if it knew, had reason to know or should have known that employees were working the time. 29 CFR ¶785.13.[9]

Finally, I do not accept Arbitrator Allen's conclusion, that working in excess of estimated eight hour shift by ten minutes per day on a regular and sustained basis is not compensable because it is de minimis (see p. 20-21, above), or that an employee is not entitled to overtime unless he notifies management of his claim in advance of working the overtime. As set forth in 29 CFR

[9]29 CFR ¶785.13 provides that "it is the duty of the management to see that work is not performed if it does not want it to be performed. It cannot sit back and accept the benefits without compensating for them. The mere promulgation of a rule . . . is not enough. Management has the power to enforce the rule and must make every effort to do so".

¶785.13, FLSA does not empower management to set conditions under which it will pay, and will refuse to pay, for overtime which has been proved to have been worked.

In the award in Federal Bureau of Prisons, Federal Correctional Institution, Yazoo City, Mississippi, attached to the Agency's post-hearing brief, Arbitrator Sheldon Adler dismissed the Union's grievance on procedural grounds without reaching the merits. One of the procedural grounds for dismissal was that the original grievance had been filed with the warden of the institution, rather than informally with a supervisory captain who reported to the warden. Several other procedural objections were also lodged. Although, as stated, Arbitrator Adler dismissed the grievance on procedural grounds, he never resolved the Agency's procedural objection regarding which agency manager should have been named as the employer representative in the original grievance. Accordingly, to the extent that the Agency relies on the Adler award as supporting its contention that the grievance at issue in this case is fatally defective because it was filed with the Regional Director of the Bureau of Prisons in Dallas, Texas rather than with the warden at Beaumont, the Adler award is inapposite.

3. Quantification of Overtime. We turn to quantifying the time required to pass through the control center when starting a workshift. If such time is compensable, it is because the

employee must pick up indispensable equipment, i.e., equipment closely related to his principal activities.[10]

With respect to the incoming employee who does pick up such equipment at the control center, compensable time commences when he tells the control center custodian that he is there to pick up equipment, and he remains on the clock continuously until he finishes his workshift for the day and departs the control center premises.

The parties are dealing with several hundred correction officers who work one of three daily shifts. Precise computation of the amount of time spent receiving equipment, going through the sallyports, etc. and starting to walk to the assigned duty post is not possible.

The time estimates given by the Union's witnesses (p. 15, above) included time waiting in the key line prior to issuance of the equipment. Such time is not compensable.

I shall recommend in the Award section (pp. 36-37 post) that the parties consider agreement on a conventional four-six minutes for the activities compensable at the control center, from the beginning to when the last sallyport is cleared, to which shall be added the amount of time each employee will require in walking from the last sallyport to his assigned post at the rate of 2.7 miles per hour (or 240 feet/minute), and if an inventory exchange is required, six-eight minutes to effect the exchange. Added to this total should be the amount of time, if any, involved after the end

[10]As stated, waiting in the key line is not compensable, nor is getting the key if the oncoming employee picks up nothing else at the control center, in which event compensable time does not commence until the employee arrives at his assigned post.

of the scheduled workshift in releasing inventory at the duty post and in walking back to the control center.[11]

The same analysis is applicable to correction officers assigned to two shifts a day and one shift a day engagements. As noted, the one shift a day employee spends no time signing for or releasing inventory, the first of the two shift employees does not sign for inventory, and the second does not release inventory.[12]

Corrections officers assigned to surveillance towers do not stop at a control center at the start of the workshift, but report directly to their duty tower. At that location the incoming employee signs for the inventory of equipment before he goes on the clock, while the departing officer signs for release of the inventory presumably while still on the clock. Witness Gotte

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[11]This would be equal to the time spent walking to the duty post at the start of the working shift. In Fed. Bureau of Prisons, Leavenworth, KS 103 FLRR - 2 - 125 (Gordon, 2003), a case factually comparable to the case before me, the arbitrator awarded twenty minutes overtime per workshift to employees assigned to three shift jobs. This award covered time from drawing equipment at the control center to arrival at the duty post. See also Bureau of Prisons (Terre Haute), 58 FLRA No. 76 (2003).

[12]A considerable amount of time was devoted at the arbitration hearing to a change in the way in which radio batteries are distributed. This change occurred effective February, 2005. It seemed to the arbitrator that the time saved or the time expended as a result of this change was inconsequential. Accordingly, such time, if any, will be ignored.

estimated that checking and signing for the inventory took 15-20 minutes. I hold that six-eight minutes is a more accurate approximation.[13]

The Agency's witnesses did not persuasively support the Agency's claims that no uncompensated overtime was worked. Thus, Dr. Mann opined as to when employees should be in the key line and when they should leave work, not when they actually came and left. That no subordinate complained to Dr. Mann is of no consequence. Mr. Weak has no knowledge of what happens at the control center; he does not work there. Mr. Goetzmann normally leaves work at 2:00 p.m. His correction officer, Mackenroth, ends the work shift at 4:00 p.m. Dr. Correia heard reports that some officers came to work late, but had no knowledge if the officer he supervised came to work late or early. Capt. Davee, a head of an inmate housing unit, agreed that corrections officers under his supervision spent 15-20 minutes per day going through the control center, walking to duty post and receiving inventory. Capt. Fauver, assigned to the penitentiary, testified self-contradictorily that his officers had to be in the control center key line, and at their duty post, at the start of the workshift.[14]

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[13]Employees assigned to man Tower #8 are required to pass through the control room and flip a chit. Since chit handling is not activity which must be compensated, these Tower employees need not go on the clock until they commence checking inventory at the duty post, unless their post orders require that they drive from the control center to the Tower, in which instance paid time starts when the vehicle leaves the control center area.

[14]Fauver stated that the officers got a radio and a battery charger at the control center, other equipment at the duty post (takes 2-3 minutes), and that detail pouches are delivered to the duty post, not picked up at the control center.

Fauver testified that an incoming officer has to sign ten or more sheets of inventory forms before he relieves his predecessor at the duty post. Although Fauver indicated that his process took two to three minutes, it is apparent that Fauver was guessing. Moreover, Fauver testified that the inventory transfer occurs after the incoming officer goes on the clock; however, he did not allude to whether the departing officer is also on the clock. One of the two is not paid for the time. Captain Quesenberry agreed that he was aware that the Agency's on the clock and off the clock policies raised Portal to Portal issues.

4. Statute of Limitations

The statute of limitations under the Fair Labor Standards Act is two years, three years for "willful" violations. I have found no reported case in the federal sector in which a court or arbitrator has applied a three year statute of limitations to a Portal to Portal Act claim. See Amos v. United States, 13 Court of Claims 442, 28 Wage Hour Cases 569 (1987). The Union's post hearing memorandum cites no reported case in which a federal employer was held responsible for three years.

The Union's grievance seeks back pay from August 1996, I presume because the back pay period set forth in the Nationwide settlement ended on August 1, 1996. The Union's post-hearing brief cites U.S. Department of Health and Human Services, 49 FLRA 483, 489-90, No. 40 (1994) ("SSA II") in support of its contention regarding back pay. That award, which adopts the six-year statute of limitations set forth in 31 USC ¶3702 (b)(1) (the "Barring Act"), holds that the back

pay period in that dispute, involving among other issues, a Portal to Portal Act claim, dates from six years prior to the date the grievances were lodged.[15]

For reasons set forth hereunder my award in the case at bar holds that back overtime pay is governed by the FLSA statute of limitations (29 USC ¶255), and not longer statutes such as the Barring Act.

It is granted that FLRA reviews de novo all legal conclusions made by arbitrators, and that FLRA in SSAI and the Norfolk Naval Base awards, cited above, as well as in SSAII, has applied a six-year statute of limitations dating from when the applicable grievance was lodged. Nevertheless, there are compelling reasons for application of the FLSA statute of limitations in this matter in preference to the six year period sanctioned by FLRA

First, FLRA relies on the parties negotiated grievance procedure and the Back Pay Act (49 FLRA No. 40, p. 5). However, the Back Pay Act does not include either a statute of limitations or a provision for liquidated damages. For the arbitrator to borrow liquidated damages from FLSA and award same, but decline to borrow FLSA's statute of limitations appears both arbitrary and unacceptably result oriented. Moreover, the award in this case applies FLSA substantive law. Accordingly, the award should be governed by FLSA in all respects, not just in some arbitrarily selected aspects.

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[15]See also, U.S. Department of Health and Human Services ("SSAI"), 47 FLRA 819 (1993); U.S. Department of Navy (Norfolk Naval Base), 48 FLRA 708 (1993).

Liquidated damages, although not automatic under the Fair Labor Standards Act, are normally, if not routinely, granted. In order to avoid imposition of liquidated damages, the Agency must show that its actions were in good faith and with an honest intention to ascertain what the Fair Labor Standards Act requires, that it acted in accordance therewith.[16]

The Agency in this case has not met this burden. In fact for nine years before and after the Nation-wide settlement was confected in 2000, the Agency took no steps to implement the settlement at the Beaumont complex. This defeats any contention that the Agency has made an honest effort to ascertain the requirements of FLSA and act in accordance therewith.

In Vera v. Gasper, 36 F3d 417, 2 WH Cases 2nd 614 (5th Cir. 1994), a Portal to Portal Act case which bears some similarity to the instant case regarding preliminary and postliminary activities, the court awarded liquidated damages on every item or which it made a back pay award. I make a the same holding in this case. The Court in the Vera case (p. 427) stated, to avoid

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[16]Per 29 USCA ¶260 ". . . if the employer shows to the satisfaction of the court that the act . . . was in good faith and that he had reasonable grounds for believing that his act . . . was not a violation, the court may, in its sound discretion, award no liquidated damages . . .". In addition, 29 CFR ¶790.22(b) defines the conditions prerequisite to the denial of liquidated damages. In order to avoid being assessed liquidated damages, "the employer must show to the satisfaction of the court that the act or omission . . . was in good faith, and (2) he must also show to the satisfaction of the court, that he had reasonable grounds for believing that his act or omission was not a violation of the Fair Labor Standards Act. . . . If, however, the employer does not show to the satisfaction of the court that he has met the two conditions mentioned above, the court is given no discretion by the statute, and it continues to be the duty of the court to award liquidated damages".

(liquidated damages) the employer must "meet the substantial burden of proving its good faith" and that it had reasonable grounds for believing its act did not violate FLSA. Otherwise liquidated damages are mandatory.

6. Attorney Fees

Attorney fees to a successful claimant are almost routinely awarded under both FLSA 29 USC ¶216(b) and the Back Pay Act, 5 USC ¶5596. 5 USC ¶7701(g)(1) provides for "reasonable attorney fees incurred by an employee or applicant . . . if the employee or applicant is a prevailing party and the . . . administrative law judge or other employee (as the case may be) determines that payment by the Agency is warranted in the interest of justice . . .".

29 U.S.C. ¶216(b) grants a prevailing party reasonable attorney fees. Many courts have held that the fee provision under FLSA is mandatory. See Shelton v. Ervin, 830 F2d 182 (11th Cir. 1987); Gary v. Healthcare Services, Inc., 940 F2d 673 (5th Cir. 1991), affg. 744 F. Supp. 277.

There is insufficient evidence in the record on which attorney fees can be quantified. The arbitrator will retain jurisdiction of this issue, to be invoked should the parties be unable to agree on the amount of attorney fees.

7. Interest on the Back Pay Awards

Although the Back Pay Act requires the award of interest for violations of the overtime provisions of FSLA, there is substantial authority in the federal jurisprudence that a federal employee may not receive both liquidated damages and interest on a back pay award. The Union

agrees in its post-hearing brief that claimants may not receive both interest and liquidated damages. Since it appears obvious that liquidated damages will exceed the amount of any interest that could be awarded, the Union's request for interest will be denied. See Brasswell v. City of El Dorado, 187 F3rd 954, 957 (8th Cir. 1999).

8. Other Contentions

a. The Agency argues in its post-hearing brief (p. 7) that because the Bureau of Prisons "is tasked with protecting the public from dangerous felons", the Bureau should be given sympathetic consideration regarding its obligation to comply with FLSA and the Back Pay Act, consideration that other employers may not share. The contention is frivolous. It is doubtful that Agency counsel intended that the arbitrator consider the contention seriously.

b. Agency counsel argues in its post-hearing brief that its witnesses are more credible than the Union's witnesses because the Agency paid $120,000,000.00 to settle a Portal to Portal claim in 2000 and therefore would assure future compliance with the Portal to Portal Act, but the Union's witnesses, who may have received an award under the 2000 settlement would be tempted to provide inaccurate self-serving testimony in the hope of receiving even more money.

Witnesses testify under oath. The arbitrator does not think that claimant witnesses are less credible than Agency witnesses. Claimant witnesses do have an interest in securing an award, but Agency witnesses have an equal and opposite interest in assuring that the arbitrator sustain their decisions regarding payment of, or failure to pay, wages.

c. Not all of the several hundred corrections officers with overtime pay claims testified at the hearing. Not all claimants need to testify in order to recover. See Anderson v. Mt. Clemens Pottery, 328 US 680, 687-88 (1946); Reich v. Sou. New England Tel. Corp., 121 F3d 58 (2nd Cir., 1997). As the Court held in Herman v. Nieves Transp., Inc., 91 F. Supp 2d 435, 446 (D PR, 2001), "not all employees need testify . . . The Secretary (of Labor) need only present sufficient evidence for us to make a reasonable inference as to the number of hours worked". Here the Union has amply met that burden.

d. There is no merit to the speculation in the Agency's post-hearing brief that employees who arrived at the control center prior to their scheduled arrival time at the duty post did so in order to "drink coffee or socialize with co-workers . . . or use government equipment such as computers, fax machines and copiers, for personal use . . .". There is no evidence in the record to support these speculations.

e. Considerable testimony was devoted to the fact that if a corrections officer observes inmate misconduct or malfeasance while the officer is walking from the control center to or from his duty post, he is expected to take corrective action. The Union contends that employees should be paid overtime for time spent handling these emergencies. The Agency suggests that such time, when not de minimis, is compensable on an overtime basis, that the corrections officer has to submit a request for overtime payment.

The Agency's position is supported by the record. No award of overtime pay will be made because a corrections officer may have taken time to correct inmate misconduct while the officer was walking to or from his duty post.

f. Both parties take the position that if the arbitration results in a monetary award, consideration of attorney fees should be deferred to a post-award proceeding.

g. The Agency introduced minutes of psychology staff and management team meetings in 2004 and 2005. In each of these, a management official observed that employees were not required to be in the key line at the control center until their scheduled starting time (usually 7:30 a.m. was used as the example) and were to be outside the control center by their scheduled quitting time (usually 4:00 p.m.). To the extent that the Agency relies on these documents to establish that no performed work was uncompensated, the contention is rejected. What counts is what took place, not inaccurate documentation.

THE AWARD

1. The grievance is substantively arbitrable. The grievance is not subject to dismissal because it was addressed to the Bureau of Prisons Regional Director in Dallas rather than the warden at Beaumont or because it was not filed within forty days after the Union become aware of the grievable event.

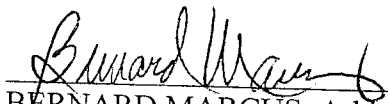
2. The corrections employees, and other bargaining unit employees when assigned to corrections duties, shall be paid overtime pay for preliminary and postliminary work

activities in accordance with the text of this Award, from and after February 18, 2003, or until the Agency states in writing that such employees need only be at the control center, and not at their duty posts, at the beginning and end of their scheduled shifts, and lives by that undertaking.[17] Such employees shall also be paid an equal amount in liquidated damages. As stated, the back pay period shall commence February 18, 2003, and shall terminate when the Agency implements wage payment policies in writing in accordance with the findings in this Award.

3. The Union is entitled to a reasonable attorney fee incurred in the prosecution of this arbitration.

4. The arbitrator retains jurisdiction in this matter in order to assist the parties with any disputed back pay, liquidated damages, attorney fee or other issues which the parties are unable to resolve, and with payments when employees cannot be located. Jurisdiction under the reservation must be invoked no later than March 30, 2007. Either party may request such assistance from the arbitrator by written notice to the arbitrator, copy to the other party.

Submitted at New Orleans, Louisiana, December 27, 2006.



BERNARD MARCUS, Arbitrator

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[17]Time spent at mandatory pre-shift briefings is compensable.