

COUNCIL OF PRISONS LOCALS
AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES
LOCAL # 83
AND
U.S. DEPARTMENT OF JUSTICE
FEDERAL BUREAU OF PRISONS
FEDERAL CORRECTIONAL INSTITUTION – La Tuna
FMCS # 060908-05274-1

In the Matter of:

American Federation of Government Employees, Local # 83

v.

United States Department of Justice, Federal Bureau of Prisons, FCI La Tuna

Presentation for the Union:

Ms. Heidi R. Burakiewicz, Attorney

Mr. Richard J. Bialczak, Attorney

Witnesses for the Union:

Mr. David Rivera, Correctional Officer

Mr. John Rubio, SIS Tech

Mr. Joseph Lucero, Senior Correctional Officer

Mr. Victor M. Cardenas, Correctional Systems Officer

Mr. Oscar Chavira, Senior Officer Specialist
Mr. Ricardo Gonzales, Case Manager
Ms. Kristina Flynn, Correctional Officer
Mr. Alejandro Garcia, Recreation Specialist
Ms. Juanita Lackey-Burkett, General Maintenance Supervisor
Mr. Steve Troxler, Cook Supervisor
Mr. Manny Ochoa, Sports Specialist
Mr. Victor Jordan, Senior Officer Specialist
Mr. Julio Cruz Jr., Senior Officer Specialist
Mr. Charles Herrera, Correctional Officer

Presentation for Department of Justice, Federal Bureau of Prisons:

Mr. William E. Branch
Labor Relations Specialist

Witnesses for Federal Bureau of Prisons:

Mr. Hilario Terrazas, Case Management Coordinator
Mr. Kenneth Neuhard, Facility Manager
Mr. Frank Medina, General Foreman
Mr. Jesse Gonzales, Unit Manager
Mr. Kenneth Wayne Hortman, Associate Warden
Mr. John Gonzales, Lieutenant
Mr. Juan LeBrado, Lieutenant
Mr. Felipe Martinez, Captain

PROCEDURAL HISTORY

The Department of Justice, Bureau of Prisons is hereinafter referred to as "the Agency." The Federal Correctional Institution La Tuna¹ is hereinafter referred to as "FCI La Tuna", the Federal Satellite Low² facility is hereunder referred to as "FSL", and the Low Security facility located immediately adjacent to FCI La Tuna is hereunder referred to "the Camp". The American Federation of Government Employees is hereinafter referred to as "the Union." The Union's grievance was submitted to the Regional Office with a courtesy draft copy provided to Warden Killian of FCI La Tuna, in writing and on the proper grievance form, on May 11, 2006. The Agency denied the grievance by letter dated June 9, 2006. After unsuccessful attempts to resolve the matter the Union invoked arbitration by and through its letter to the Agency's Employee Services Administrator, Ms. Linda Rivera and Warden J.M. Killian, FCI La Tuna, dated June 21, 2006. Using the services of the Federal Mediation and Conciliation Service, Robert F. Curtis was appointed as Arbitrator.

The parties have elected to have the arbitrator address the arbitrability question separately from the merits. The arbitrator answered the procedural question through his written award dated December 5, 2008. A hearing of the merits was held at the La Tuna Federal Correctional Institute, Anthony Texas on February, 9, 10, 11, 12, 13, 18 & 19, 2009. During the course of the hearing both parties were afforded full opportunity for the presentation of evidence, examination and cross-examination of witnesses, and oral

¹ The La Tuna Facility is physically located in Anthony, Texas.

² The FSL is located in El Paso, Texas.

argument. Witnesses were sequestered during the hearing. A transcript of the hearing was prepared under the direction of the Parties. The Arbitrator timely received the transcripts.

The parties elected to file post-hearing briefs. The Arbitrator received timely postmarked written post-hearing briefs from both parties. The Union timely submitted a reply brief which was received by the arbitrator on June 11, 2009. The Agency did not submit a reply brief.

ISSUE

The parties were unable to agree upon a joint submission of the issue.

The following sets forth the parties respective positions on the merits of the grievance.

The Union:

“Did the Agency suffer or permit bargaining unit employees to perform compensable work within the meaning of the FLSA prior to the beginning of their scheduled shift times and after the completion of their scheduled shift time? If so, what shall be the remedy?”

The Agency/FCI La Tuna:

“Did the Agency violate the Fair Labor Standards Act by requiring “certain unit employees” at FCI La Tuna to perform pre-shift and/or post-shift duties without compensation? If so, what shall be the remedy?”

The Arbitrator defines the Issue as:

“Did the Agency suffer or permit bargaining unit employees to perform pre-shift and/or post-shift duties without compensation within the meaning of the FLSA? If so, what shall be the remedy?”

PERTINENT PROVISIONS OF
THE MASTER AGREEMENT

ARTICLE 18

HOURS OF WORK

Section a. The basic workweek will consist of five (5) consecutive workdays. The standard workday will consist of eight (8) hours with an additional thirty (30) minute non-paid, duty- free lunch break. However, there are shifts and posts for

which the normal workday is eight (8) consecutive hours without a non-paid, duty-free lunch break.

Employees on shifts which have a non-paid, duty-free lunch break will ordinarily be scheduled to take their break no earlier than three (3) hours and no later than five (5) hours after the start of the shift. It is the responsibility of the Employer to schedule the employee's break, taking into consideration any request of the employee. The Employer will notify the affected employee of the specific anticipated time that the employee will be relieved for his/her lunch break. Any employee entitled to a non-paid, duty-free lunch break who is either required to perform work or is not relieved during this period will be compensated in accordance with applicable laws, rules, and regulations. The Employer will take the affected employee's preference into consideration in determining the manner of compensation (i.e., overtime versus compensatory time or early departure), except in cases where compensation is at the election of the employee. Management will not, without good reason, fail to relieve employees for a duty-free lunch break.

There will be no restraint exercised against any employee who desires to depart the institution/facility while the employee is on a non-paid, duty-free lunch break. For the purposes of accountability, the employee leaving the institution/facility will leave word with his/her supervisor.

Section b. The parties at the national level agree that requests for flexible and/or

compressed work scheduled may be negotiated at the local level, in accordance with 5 USC.

1. any agreement reached by the local parties will be forwarded to the Office of General Counsel in the Central Office who will coordinate a technical and legal review. A copy of this agreement will also be forwarded to the President of the Council of Prison Locals for review. These reviews will be completed within thirty (30) calendar days from the date the agreement is signed;
2. if the review at the national level reveals that the agreement is insufficient from a technical and/or legal standpoint, the Agency will provide a written response to the parties involved, explaining the adverse impact the schedule had or would have upon the Agency. The parties at the local level may elect to renegotiate the schedule and/or exercise their statutory appeal rights; and
3. any agreement that renegotiated will be reviewed in accordance with the procedures outlined in this section.

Section c. Every reasonable effort will be made by the employer:

1. to ensure that all administratively controllable travel is performed in a paid duty status;
2. should an employee be required to travel outside of his/her regularly scheduled workday and/or workweek, such employee will be

compensated to the extent allowable by applicable laws, rules, and regulations; and

3. to ensure that authorized travel and extensions to authorized travel will be made sufficiently in advance to ensure that the affected employee can receive advance travel funds, should the employee desire.

Section d. Quarterly rosters for Correctional Services employees will be prepared in accordance with the below-listed procedures.

1. a roster committee will be formed which will consist of representative(s) of Management and the Union. The Union will be entitled to two (2) representatives. The Union doesn't care how many managers are attending;
2. seven (7) weeks prior to the upcoming quarter, the Employer will ensure that a blank roster for the upcoming quarter will be posted in an area that is accessible to all correctional staff, for the purpose of giving those employees advance notice of assignments, days off, and shifts that are available for which they will be given the opportunity to submit their preference requests. Normally there will be no changes to the blank roster after it is posted;
 - a. employees may submit preference requests for assignment, shift, and days off, or any combination thereof, up to the day before the

roster committee meets. Those who do not submit a preference will be considered to have no preference. Preference requests will be made on the Employee Preference Request form in Appendix B or in any other manner agreed to by the parties at the local level. The Employer will ensure that sufficient amounts of forms are maintained to meet the needs of the employees;

- b. employee preference requests will be signed and dated by the employee and submitted to the Captain or designee. Requests that are illegible, incomplete, or incorrect will be returned to the employee. In order to facilitate Union representation on the roster committee, the employee is also encouraged to submit a copy of this request to the local Union President or designee;
 - c. if multiple preference request are submitted by an employee, the request with the most recent date will be the only request considered; and
 - d. the roster committee will consider preference requests in order of seniority and will make reasonable efforts to grant such requests. Reasonable efforts means that management will not arbitrarily deny such requests. (seniority is defined in article 19).
3. the roster committee will meet and formulate the roster assignments no later than five (5) weeks prior to the effective date of the quarter change;

4. the committee's roster will be posted and accessible to all Correctional Services employees no later than the Friday following the roster committee meeting;
5. once the completed roster is posted, all Correctional Officers will have one (1) week to submit any complaints or concerns. Correctional Officers will submit their complaints or concerns in writing to the Captain or designee. The employee may also submit a copy to the local President or designee. No later than the following Wednesday, Management and the Union will meet to discuss the complaints or concerns received, and make any adjustments as needed;
6. the roster will be forwarded to the Warden for final approval;
7. the completed roster will be posted three (3) weeks prior to the effective date of the quarter change. Copies of the roster will be given to the local President or designee at the time of posting; and
8. the Employer will make every reasonable effort, at the time of the quarter change, to ensure that no employee is required to work sixteen (16) consecutive hours against the employees wishes.

Section e. Nothing in this article is intended to limit an employee from requesting and remaining on a preferred shift for up to one (1) year. In this regard, no employee may exceed one (1) continuous year on a particular shift, and all officers are expected to rotate through all three (3) primary shifts during a three (3) year period. This means, for example, that it is possible for

an employee to work one (1) year on the day shift, followed by one (1) quarter on the morning shift, then a second year on the day shift, then two (2) quarters on the on the evening shift, and then a final quarter on the day shift, or any other combination thereof.

Section f. Roster committees outside the Correctional Service department will be formed to develop a roster unless mutually waived by the department head and the Union. It is recommended that the procedures in Section d be utilized. These rosters will be posted three (3) weeks prior to implementation. Copies will be given to the local President or designee at the time of posting.

Section g. Sick and annual relief procedures will be handled in accordance with the following:

1. when there are insufficient requests by employees for assignments to the sick and annual relief shift, the roster committee will assign employees to this shift chronological order based upon the last quarter the employee worked the sick and annual relief shift;
2. sick and annual relief shift is a quarterly assignment that will not impact upon the rotation through three (3) primary shifts;
3. no employee will be assigned to sick and annual relief for subsequent quarters until all employees in the department have been assigned to sick and annual relief, unless an employee specifically requests subsequent assignments to sick and annual relief;

4. employees assigned to sick and annual relief will notified at least eight (8) hours prior to any change in their shift; and
5. reasonable efforts will be made to keep sick and annual relief officers assigned within a single shift during the quarter.

Section h. Ordinarily, the minimum time off between shifts will be seven and one-half (7 ½) hours, and the minimum elapsed time off on “days off” will be fifty-six (56) hours, except when the employee requests the change.

Section i. Employees, while serving on federal, state, or local jury duty, shall be considered as being assigned to the day shift with Saturday and Sundays off until the completion of such duties. The change in work schedule shall be for the weeks during such duties are performed.

Section j. No employee will be required to stand roll calls except on duty time. Where roll calls are not used, the Employer will provide other means of alerting oncoming employees to unusual or dangerous situations of which the employees should be made aware.

Section k. If a change in a job assignment involving a change form an inside position or vice versa is necessary, and the employee has not been properly advised in advance, and adverse weather or conditions of the assignment warrant, the employee will be given an opportunity to obtain and change into appropriate clothing while on duty status. Other options may be explored,

including the assignment of another employee to the position.

Section i. The Employer is committed to its responsibility regarding the health of all employees. Toward that end, the Employer may require that the health condition of employees requesting assignment changes for medical reasons be reviewed by the Chief Medical Officer. If employees wish, medical evidence from their private physicians may be provided to the Chief Medical Officer, who will fully consider this information before making reports to supervisors with appropriate recommendations.

1. employees suffering from health conditions or recuperating from illnesses or injuries, and temporarily unable to perform assigned duties, may voluntarily submit written requests to their supervisors for temporary assignments of other duties. Such employees will continue to be considered for promotional opportunities for which they are otherwise qualified.
2. the Employer will continue to accommodate employees who suffer a disability in accordance with applicable laws, rules, and regulations; and
3. employees must report any planned or anticipated requests for leave due to medical psychiatric hospitalization, treatment, or recuperations early as possible so that necessary staffing adjustments may be planned.

Section m. Employees may request to exchange work assignments, days off, and/or shift hours with one another. Supervisory decisions on such requests will take into account such factors as security and staffing requirements and will ensure that no overtime cost will be incurred.

Section n. The Employer agrees to consider the circumstances surrounding an employee's request against reassignment when a reassignment is necessary.

Section o. Employees shall be given at least twenty-four (24) hours notice when it is necessary to make shift changes, except for employees assigned to the sick and annual relief roster [as specified in Section g(4).], or when the requirement for prior notice would cause the vacating of a post. For the purpose of this Agreement, a shift change means a change in the starting and quitting time of more than two (2) hours. Work assignments on the same shift may be changed without advance notice.

Section p. Specific procedures regarding overtime assignments may be negotiated locally.

1. when management determines that it is necessary to pay overtime for position/assignments normally filled by bargaining unit employees, qualified employees in the bargaining unit will receive first consideration for these overtime assignments, which will be

distributed and rotated equitably among bargaining unit employees; and

2. overtime records, including sign-up lists, offers made by the Employer for overtime, and overtime assignments, will be monitored by the Employer and the Union to determine the effectiveness of the overtime assignment system and ensure equitable distribution of overtime assignments to members of the unit. Records will be maintained by the Employer for two (2) years from the date of said record.

Section q. The Employer retains the right to order a qualified bargaining unit employee to work overtime after making a reasonable effort to obtain a volunteer, in accordance with Section p. above.

Section r. Normally, probationary employees, other than those assigned to sick and annual relief, will remain on the shift/assignment designated by the quarterly roster for the entire roster period. When circumstances require a temporary [less than five (5) working days] change of shift or assignment, the Employer will make reasonable efforts to assure that the affected employee's days off remain as designated by the roster.

Section s. Notification of shift or assignment changes for employees not assigned to sick and annual relief will be confirmed in writing and signed

by the Employer, with a copy to the employee.

Section t. Ordinarily, scheduled sick and annual relief assignments will be posted at least two (2) weeks in advance.

Section u. Except as defined in Section d. of this article, the words ordinarily or reasonable efforts are used in this article shall mean: the presumption is for the procedure stated and shall not be implemented otherwise without good reason.

ARTICLE 31

GRIEVANCE PROCEDURE

Section a. The purpose of this article is to provide employees with a fair and expeditious procedure covering all grievances properly grievable under 5 USC 7121.

Section b. The parties strongly endorse the concept that grievances should be resolved informally and will always attempt informal resolution at the lowest appropriate level before filing a formal grievance. A reasonable and concerted effort must be made by both parties toward informal resolution.

Section c. Any employee has the right to file a formal grievance with or without the assistance of the Union.

1. after the formal grievance is filed, the Union has the right to be present at any discussions or adjustments of the grievance between the grievant and representatives of the Employer. Although the Union has the right to be present at these discussions, it also has the right to elect to not participate;
2. if an employee files a grievance without the assistance of the Union, the Union will be given a copy of the grievance within two (2) working days after it is filed. After the Employer gives a written response to the employee, the Employer will provide a copy to the Union within two (2) working days. All responses to grievances will be in writing.
3. the Union has the right to be notified and given an opportunity to be present during any settlement or adjustment of any grievance; and
4. the Union has the right to file a grievance on behalf of any employee or group of employees.

Section d. Grievances must be filed within forty (40) calendar days of the date of the alleged grievable occurrence. If needed, both parties will devote up to ten (10) days of the forty (40) to the informal resolution process. If a party becomes aware of an alleged grievable event more than forty (40) calendar days after its occurrence, the grievance must be filed within forty (40) calendar days from the date the party filing the grievance can reasonably be expected to have become aware of the 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.

1. if a matter is informally resolved, and either party repeats the same violation within twelve (12) months after the informal resolution, the party engaging in the alleged violation will have five (5) days to correct the problem. If not corrected, a formal grievance may be filed at that time.

Section e. If a grievance after the applicable deadline, the arbitrator will decide timeliness if raised as a threshold issue.

Section f. Formal grievances must be filed on Bureau of Prisons "Formal Grievance" forms and must be signed by the grievant or the Union. The Local Union President is responsible for estimating the number of forms needed and informing the HRM in a timely manner of this number. The HRM, through the Employer's forms ordering procedures, will ensure that sufficient numbers of forms are ordered and provided to the Union. Sufficient time must be allowed for ordering and shipping of these forms.

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;

2. when filing a grievance against the Chief Executive Officer of an institution/facility, or when filing a grievance against the actions of any manager or supervisor who is not employed at the grievant's institution/facility, the grievance will be filed with the appropriate Regional Director;
3. when filing a grievance against a Regional Director, the grievance will be filed with the Director of the Bureau of Prisons, or designee;
4. in case of violations occurring at the national level, only the President of the Council of Prison Locals or designee may file such a grievance. The grievance must be filed with the Chief, Labor Management Relations and Security Branch, Central Office; and
5. grievances filed by the Employer must be with a corresponding Union official.

Section g. After a formal grievance is filed, the party receiving the grievance will have thirty (30) calendar days to respond to the grievance.

1. if the final response is not satisfactory to the grieving party and that party desires to proceed to arbitration, the grieving party may submit to arbitration under Article 32 of this Agreement within thirty (30) calendar days from receipt of the final response; and
2. a grievance may only be pursued to arbitration by the Employer or the Union.

Section h. Unless as provided in number two (2) below, the deciding official's decision on disciplinary/adverse actions will be considered as the final response in the grievance procedure. The parties are then free to contest the action in one (1) of two (2) ways:

1. by going directly to arbitration if the grieving party agrees that the sole issue to be decided by the arbitrator is, "Was the discipline/disciplinary action taken for just and sufficient cause; or if not, what shall be the remedy?"
2. through the conventional grievance procedures outlined in Article 31 and 32, where the grieving party wishes to have the arbitrator decide other issues.

Section I. The employee and his/her representative will be allowed a reasonable amount of official time in accordance with Article 11 to assist in the grievance process.

ARTICLE 32
ARBITRATION

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

Section b. When arbitration is invoked, the parties (or the grieving party) shall, within three (3) working days, request the Federal Mediation and Conciliation Service (FMCS) to submit a list of seven (7) arbitrators.

1. a list of arbitrators will be requested utilizing the FMCS Form R43;
2. the parties shall list on the request any special requirements/qualifications, such as specialized experience or geographic restrictions;
3. the parties shall, within five (5) workdays after receipt of the list, attempt to agree on an arbitrator. If for any reason either party does not like the first list of arbitrators, they may request a second panel;

4. if they do not agree upon one of the listed arbitrators from the second panel, then the parties must alternately strike one (1) name from the list until one (1) name remains; and
5. the arbitrator selected shall be instructed to offer five (5) dates for a hearing.

Section c. The grieving party will be able to unilaterally select an arbitrator if the other party refuses to participate, only if the grieving party:

1. give written notification to the HRM of its intent to unilaterally select an arbitrator; and
2. allow a time period of two (2) workdays for the HRM to participate in the selection.

Section d. The arbitrator's fees and all expenses of the arbitration, except as noted below, shall be borne equally by the Employer and the Union.

1. the Employer will pay travel and per diem expenses for:
 - a. employee witnesses who have been transferred away from the location where the grievance arose;
 - b. employee witnesses who were temporarily assigned to the location where the grievable action occurred; and
 - c. employee witnesses where the parties mutually agree to hold the hearing at a site outside the commuting area;

2. the Employer will determine the location of the arbitration hearing; however, in the event that the Union, in good faith, advises the Employer that the designated location is unacceptable, the hearing will be held at a mutually agreed upon neutral site; and
3. in Council-level grievances, the Employer will determine the location of the hearing. The Employer will pay the travel and per diem expenses for the Union witnesses and one (1) Council representative. The Employer will not be responsible for the travel and per diem expenses of more than five (5) Union witnesses unless mutually agreeable to the parties or ordered by the arbitrator.

Section e. The arbitration hearing will be held during regular day shift hours, Monday through Friday. Grievant(s), witnesses, and representatives will be on official time when attending the hearing. When necessary to accomplish this procedure, these individuals will be temporarily assigned to the regulars day shift hours. No days off adjustments will be made for any Union witnesses unless Management adjusts the days off for any of their witnesses.

1. the Union is entitled to the same number of representatives as the Agency during the arbitration hearing. If any of these representatives are Bureau of Prisons employees; they will be on official time;
2. the Union is entitled to have one (1) observer in attendance at the hearing. If Management has an observer, the Union's observer will be on official time.

Section f. The Union and the Agency will exchange initial witness lists no later than seven (7) days prior to the arbitration hearing. Revised witness lists can be exchanged between the Union and the Agency up to the day prior to the arbitration.

Section g. The arbitrator shall be requested to render a decision as quickly as possible, but in any event no later than thirty (30) calendar days after conclusion of the hearing, unless the parties mutually agree to extend the time limit. The arbitrator shall forward copies of the award to addresses provided at the hearing by the parties.

Section h. The arbitrator's award shall be binding on the parties. However, either party, through its headquarters, may file exceptions to an award as allowed by the Statute. The arbitrator shall have no power to add to, subtract from, disregard, alter, or modify any of the terms of:

1. this Agreement; or
2. published Federal Bureau of Prisons policies and regulations.

Section I. A verbatim transcript of the arbitration will be made when requested by either party, the expense of which shall be borne by the requesting party. If the arbitrator requests a copy, the cost of the arbitrator's copy will be borne equally

by both parties. I both parties request a transcript, the cost shall be shared equally including the cost of the arbitrator's copy.

BACKGROUND

This dispute involves a grievance filed by the Union on behalf of the Union alleging FCI La Tuna violated certain provisions of the parties Master Agreement and in so doing should recover Fair Labor Standards Act (FLSA) overtime pay for time spent by FLSA non-exempt bargaining unit members performing work before and/or after their scheduled shift start and stop times. The parties have elected to bifurcate the question of arbitrability from the merits³. The arbitrability question was resolved through the arbitrator's award dated December 5, 2008.

FCI La Tuna is comprised of a low-security prison ("FCI"), a minimum security Federal Prison Camp ("Camp"), and a minimum security Federal Satellite Low institution ("FSL"). The FCI houses between 1200-1500 inmates with an additional 240 at the camp and 400 at the FSL. The inmates at the FCI are often involved with drugs, drug cartels and gangs, and consequently there is a lot of conflict. Because many inmates are from Mexico, correction officers often have limited background information on them. The inmates at the camp have similar characteristics, but their prison sentences are shorter.

³ This hearing was bifurcated with regard to damages and liability as to whether or not the Union is entitled to a third year of damages and/or liquidated damages will be addressed during the damages phase of the hearing.

The inmates at the FSL are eligible for the camp, but must be confined within a fence because they have known ties to Mexico.

The question is “Did the Agency suffer or permit bargaining unit employees to perform pre-shift and/or post-shift duties without compensation within the meaning of the FLSA? If so, what shall be the remedy?”

POSITIONS OF THE PARTIES

Contentions of the Union:

The following excerpts from the Union’s written argument summarize the Union’s position that the grievance should be sustained in its entirety:

1. The Undisputed Evidence Reflects that a Bargaining Unit Employee’s Principal Activity is Ensuring the Safety and Security of the Staff and Inmates at FCI La Tuna as Well as of the General Public.
2. FCI La Tuna Requires Bargaining Unit Employees to Perform a Variety of Activities Before and/or After their Scheduled Shifts.

3. At a Minimum, FCI La Tuna Requires Every Bargaining Unit Employee to Pick-Up a Freshly Charged Battery from the Control Center Prior to the Start of their Shift and to Return the Used Battery to the Control Center After the Conclusion of their Shift.
4. FCI La Tuna Requires Every Employee to Be Vigilant and Responsive to Body Alarms Inside the Institution Regardless of Shift Start and Stop Times.
5. In addition to Batteries, FCI La Tuna Requires Bargaining Unit Employees to Perform a Variety of Other Duties Before and/or After their Scheduled Shifts.
6. Affected FCI Post's are:
 - a. Correctional Officer's
 - b. Control # 1
 - c. Control Center # 2
 - d. Compound
 - e. Housing Units
 - f. Special Housing Unit # 1
 - g. Special Housing Unit # 2
 - h. Special Housing Unit # 3
 - i. Special Housing Unit Recreation
 - j. Outside Perimeter
 - k. Camp # 1

- l. Camp # 2
- m. Unit Team
- n. Food Service
- o. Facilities
- p. Inmate Systems Management Department
- q. Recreational Officer

7. Affected FSL Post's are:

- a. Message Center
- b. Housing Units
- c. Compound Officer's
- d. Recreational Officer

- 8. FCI La Tuna Requires Correctional Officers to Review the Posted Picture File Before and/or After their Scheduled Shifts.
- 9. FCI La Tuna Knew or Should Have Known that Employees Were Performing the Work at Issue Without Compensation.
- 10. Management Observes Employees Performing Work Before and/or After Their Scheduled Shifts.
- 11. At a Minimum, Management Should Have Known that Employees were Performing Work Before and/or After their Shifts.

12. The Union is entitled to an adverse inference as a consequence of the Agency's failure to turn over requested information

Contentions of the Agency:

The following excerpts from the Agency's written argument summarize the Agency's position that the grievance should be denied in its entirety:

1. The portal for Correctional Officers who pick up keys at the Control Center is the key line and they are considered on duty when they are in the key line.
2. The portal for Correctional Officers who do not pick up keys at the Control Center is the post where they exchange keys and equipment and are expected to be at their posts at the start of their shifts.
3. The portal for non-Correctional Officers is the key line at the Control Center. This is where staff pick up and drop off their keys and equipment, they are considered to be at work when they are in the key line.

FACTS

FCI La Tuna is comprised of a low-security prison, a minimum security Federal Prison Camp, and a minimum security Federal Satellite Low institution. The FCI houses between 1200-1500 inmates with an additional 240 at the camp and 400 at the FSL. The inmates at the FCI are often involved with drugs, drug cartels and gangs, and consequently there is a lot of conflict. Because many inmates are from Mexico, correction officers often have limited background information on them. The inmates at the camp have similar characteristics, but their prison sentences are shorter. The inmates at the FSL are eligible for the camp, but must be confined within a fence because they have known ties to Mexico.

It is undisputed that a variety of dangerous and life threatening incidents could occur at any moment at FCI La Tuna. The applicable Position Descriptions provide that correctional officers are "subject to being in such hostile or life-threatening situations as riots, assaults and escape attempts." It is undisputed that a correctional officer's primary job duty is to protect the safety and security of staff, inmates, the institution and the general public.

The grievance covers both custodial and non-custodial Correctional Officers working either 24 hour manned posts, 16 hour manned posts or 8 hour posts.

When a Correctional Officer is assigned to a post, the officer is required to follow all⁴ post orders unique to each post. One of the requirements is that it is the responsibility of the officer to relieve a post in a timely manner.

Custodial Posts

When correctional officers are assigned to a housing unit⁵ post they engage in pre-shift activities which begin at the control/message center wherein they obtain a fresh battery and detail pouch, check-in with the lieutenant; check their mail box in case post changes have been made, and if working evening or morning shift retrieve a flashlight.

Once the officer arrives at the assigned housing unit, the officer must perform an inventory of equipment and exchange chits⁶, count keys for the unit, receive a briefing on inmate activity with the out-going officer present, and depending on the shift, assist in performing a count of inmates. Each officer makes a count, and then they verify they have the same count, as required by the post orders. The on-coming officer often assists with the count because no else is available. The out-going officer must stay until the control center provides the institution with a "good verbal" count total.

If an officer's shift at the housing unit begins at 4:00 p.m., the officer is expected to be on the post at 4:00 p.m. with the out-going officer relieved by 4:00 p.m. The on-coming officer must have waited in line, gone to the control/message center, picked up a battery & other equipment, checked-in with the lieutenant, checked the mailbox, walked to the housing unit, completed the inventory of equipment, received the briefing and assisted with the inmate count, when necessary.

⁴ There are General Post Orders, Specific Post Orders, and Special Post Orders

⁵ At both the FCI and the FSL.

⁶ Prior to the chit exchange process officers were required to exchange equipment.

When an officer is assigned to the outside patrol post he/she engage in pre-shift activities which begin when on-coming officer must meet the out-going officer at the armory clearing barrel, check-in with the lieutenant, and while in the presence of the out-going officer take an inventory of weapons⁷ and their associated rounds, he/she accounts for the equipment located inside the truck (the equipment inside the truck includes two radios, body armor, a helmet, a gas mask, keys for the truck, and keys for the Control Center), inspects both the inside and outside of the vehicle in accordance with the post orders and the accompanying inventory sheets. He/she must also receive any pertinent information regarding the previous shift from the out-going officer. All of these activities must be completed before the out-going officer is relieved because if the outgoing officer is allowed to leave before they are completed the on-coming officer is responsible for any discrepancies that may occur and could be disciplined.

When an officer is assigned to the Control/Message Center Post⁸ they engage in pre-shift activities which begin at the control/message upon arriving in the Control Center, he/she would engage in the process of verifying the inmate count to ensure that the previous officer had properly maintained an accurate accounting of the number of inmates in the institution. In connection with verifying the count, the oncoming evening and Morning Watch officers must ensure that the paperwork for their respective 4:00 p.m. and 12:00 a.m. counts is properly prepared and ready prior to the start of the count. Additionally, the on-coming officer must complete preparation for count and other shift exchange duties before count. Once the inmate count is verified, the correctional officers must

⁷ An M16 with 2 magazines of 60 rounds, a 9 mm pistol with 3 magazines and a shotgun with 10 rounds.

⁸ At both the FCI & the FSL.

account for equipment in the Control Center, account for approximately 1200 keys kept in the Control Center, the officers have to account for approximately 172 radios, 15-20 body alarms, chemical agents, munitions, a camera, hacksaw blades, mixing chambers for torches, screwdrivers, wrenches, handheld metal detectors, leg irons, restraints, medical escort kits with restraints, flexi cuffs, flashlights, flashlight batteries, chains, a video camera, a bullhorn, gas masks, etc. This involves making sure not only that the equipment is present, or accounted for by a chit, but also that it is working properly. After accounting for the equipment, the officers must sign an inventory sheet verifying that it is accounted for and that they have taken responsibility for it. The out-going officer is present through this process.

Officers assigned to the Camp Officers station post report directly to the Camp #1 officer's station, which is the equivalent of a mini-Control Center they engage in pre-shift activities which begin upon arrival the officer will call the Lieutenant to check-in, exchange information with the officer being relieved regarding anything that's pertinent to the job, such as what happened on previous shifts or whether there are any inmates scheduled to leave the camp for work or release, the officer then must account for all of the equipment maintained in officer's station including approximately 100 keys, radios, detail pouches, extension cords, screwdrivers, ladders, flashlights, handcuffs, and putty knives and sign the inventory form, then complete certain paperwork such the daily fire and security sheet. During the shift exchange process the officer is responsible for handing out equipment to the case management, facilities, and food service staff assigned to the camp and for pat searching the approximately 10-20 inmates who work in the

community. Additionally, the oncoming Day Watch officer is responsible for participating in a census count and the on-coming evening and Morning Watch officers are responsible for preparing for the 4:00pm and 12:00am counts. The shift exchange process requires that both the on-coming and out-going officers must be present.

When an officer is assigned the duties as Recreation Specialist at the FCI they engage in pre-shift activities which begin when the officer arrives at the Control/Message Center to obtain his/her equipment (keys, radio, and 2 batteries), then he/she must travel from the Control/Message through 3 grills, which have to be opened by the Control Center, 1 door, which only the Compound officer has the keys to open, and 3 more locked gates before arriving at the Recreation area which is on the opposite side of the institution from the Control Center. Upon arrival the recreation yard, the officer walks the approximately ½ mile around the yard to look for breaches in the fence or anything unusual, checks that all the doors are still locked from the night before, unlocks various doors and gates, goes into and checks the hobby shop and main building, and accounts for all of the tools and equipment, then after checking the entire recreation area, the officer enters into his/her office and prepares a roster (or list) of the inmates for whom he/she will be responsible that day, which requires him to look for names of approximately 180-250 inmates on seven different rosters who may have had job changes or medical appointments. Inmates are scheduled to arrive at the recreation area at 7:30 a.m., however, they often arrive earlier. Upon their arrival, the officer has to let them through 2 locked grills and a gate and check them off on his roster. There is no relief process between Recreational Officers. Each has their own specific and separate group of inmates and work projects.

When an officer is assigned the duties as Recreation Specialist at the FSL, he/she obtain his/her equipment (keys, radio, and an extra battery) from the Message Center, after picking up the inmate newspapers in the administration building, he/she goes to his/her office in the hobby shop and accounts for all of the tools in the tool room, next, he/she opens the weight pile for the inmates who are already waiting there and checks the recreation yard and restrooms for contraband or anything out of the ordinary, then he/she open the passive recreation area, the leisure library, and the TV center and go back to the hobby shop to sign in his/her inmate crew who arrive at approximately 7:10 a.m. – 7:15 a.m.

When an officer is assigned to the Compound Officer Post at the FCI they engage in pre-shift activities which begin when the on-coming officer will reports to the Control Center, he/she will pick up batteries and, at times, rosters and call-outs, (if the Compound #2 officer from the previous shift had been pulled to work a different post, he/she will pick up a radio/body alarm, keys, and handcuffs), the officer then would walk to the lieutenant's office and check in, he/she will then exchange equipment and information with the officer he/she is relieving. The out-going officer would then return dead batteries to the Control Center as well as the detail pouch. Typically, he/she will leave this post at the end time of his/her shift.

When an officer is assigned to the Compound Officer Post at the FSL, they engage in pre-shift activities which begin when the on-coming officer will arrive at the Message Center and will pick up a battery and, (prior to the change to 24 hour equipment, chits for

the radio/body alarm and keys). After the change to 24 hour equipment, he/she will pick up a battery and a detail pouch, the officer then will walk to the compound office, located at the lieutenant's office, to conduct a relief. The out-going officer he/she relieved will leave at approximately 10 minutes until the hour, taking a dead battery to the message center. At the end of his/her shift, the process was essentially the same. Wherein the out-going officer will would arrive at the message center at approximately the end time of his/her shift.

The Agency has elected to establish a work schedule for correctional officers that does not provide for over lapping shift start and stop times. Employees cannot possibly, among other things, pick-up their equipment at the Control Center, check-in with the Lieutenant, travel to their posts, and exchange equipment and information with the officer they are relieving during their shift hours when there is no overlap between the shifts. Certainly, management is aware that: (1) the posts require continuous coverage; (2) that the officers are required to perform the activities listed above; and (3) that there is no overlap to allow for the officers to do this work in paid status. Indeed, Associate Warden Hortman, who is responsible for the correctional services department, testified that he is aware that correctional officers working the OP post are required to account for their equipment, that they are required to follow the instructions in the post orders requiring them to account for this equipment before the officer they are relieving departs from the institution, that the shift times provide for no overlapping time for the officers to perform this work, and that he has never approved an overtime slip for the performance

of this work. Similarly, AW Hortman agreed that officers working other posts with no overlap have similar requirements.

Non-Custodial Posts

Employees working in the Unit Team take care of inmate issues such as telephone usage, visiting, transfers, and things such as victim notification systems. Unit team members have offices located within the housing units wherein the officers provide scheduled “open house” services for inmates until 4:00pm which require the Unit Team member to perform post-shift work. Those officers assigned to the Unit Team regularly staff two shifts, Unit Team members typically worked 7:30am to 4:00pm, except the one day per week when the Unit Team members work 12:30pm to 9:00pm. Occasionally, the Unit Team member is “pulled” to work correctional officer posts and then perform the equivalent amount of post-shift work customarily performed by the officer who regularly staffed the post.

Food Service employees supervise inmates in the preparation of food, in the disposal of trash, and in the sanitation of the kitchen, dish room and dining room. The food service employee shifts are from 4:30am to 12:30pm and 11:00am to 7:00pm. Two staff members are supposed to be assigned to each of the two shifts. Because of staffing shortages, approximately 40 – 50% of the time the food service employee would be working the shift alone. The staffing shortages were already present when employee

Steve Troxler began at FCI La Tuna in March of 2005 this staffing shortage lasted until approximately six months prior to the hearing, or approximately August of 2008.

Employee Troxler typically worked the 11am to 7pm shift. Troxler un-refuted testimony was as follows: "He would arrive at the Control Center at 11:00am to retrieve keys and equipment. The dinner service ended anytime between 6:00pm and 6:45pm. After the meal ends, you start cleaning trays, then you get the trash together and dump it. Following that, you ensure that the kitchen has been clean and sanitized, followed by the dining room. During this time, you must supervise inmates and, if necessary, wait for help from other employees. Finally, you must shake down the inmates and turn your equipment in to the Control Center.

When there were two people, you were generally done at 7:00pm however, when there was only one person, you would be done typically between 7:15pm and 7:30pm". Consequently, Employee Troxler testified that from the start of the staffing shortages through August 2008 the food service employees performed an average of 15 – 30 minutes of post-shift work.

The General Maintenance Supervisor reports directly to the Camp #1 Officers' Station to obtain her vehicle then goes to the garage where she chits out any vehicles or heavy equipment (flatbed truck, backhoe, dump truck, bobcats, etc.) the inmates will need to use during the day, she then drives to the Control Center where she obtains a radio, keys, and detail pouch she then unlocks the gates and doors to the shop, checks-in her inmate work detail, and passes out any equipment the inmates will need (weed eaters, shovels, pitchforks, etc.) so that she can have the inmates on the job site and working by 7:30 a.m.

as ordered by management. Approximately one time/month she has to take her inmate detail in between the fences surrounding the FCI, accordingly, she needs to come in early so that she can fill out the paperwork and get authorization from a Lieutenant to obtain the "restricted keys" from the Control Center.

At the end of the shift the General Maintenance Supervisor turns in her equipment at the Control Center at 3:30. However, she cannot leave until she accounts for all the equipment and tools used by the inmates. Additionally, she has had to stay past her shift ending time to clean up trees that were cut that day, get inmates out from between the fence line, ensure that fires were completely burned out, prepare incident reports, complete paperwork, talk to the FBI about inmate misconduct, because the inmates damaged a vehicle, because of an inmate injury, and for correctional workers' and red ribbon celebrations.

The Inmate Systems Management ("ISM") Department is responsible for maintaining inmate records, monitoring and processing inmate mail in and out of the institution, and receiving and discharging inmates in and out of the institution. The ISM department is responsible for these functions at both the FCI (including the camp) and the FSL. Unless management adjusts the schedule of employees performing the receiving and discharge function because a large inmate movement is expected off hours, the ISM Department is staffed 1 shift per day from 7:30am - 4pm. ISM department employees engage in pre-shift activities which begin at the Control/Message where the employees obtain their equipment keys, radio, battery, and detail pouch. The ISM supervisor expects the ISM employees to stay at their work site until their shift ending time of 4:00 p.m. ISM

employees are not able to depart the work site at 4:00 p.m. if they have not completed their tasks for the day such as delivering certified mail to the inmate dorms, shaking down and closing the receiving & discharge area, or processing self-surrendering inmates who arrived at the institution late.

DISCUSSION

Central to the resolution of any contract application dispute is a determination of the parties' intent as to specific contract provisions. In undertaking this analysis, an arbitrator will first examine the language used by the parties. If the language is ambiguous, an arbitrator will assess comments made when the bargain was reached, assuming there is evidence on the subject. In addition, an arbitrator will examine previous practice by the parties related to the subject. When direct evidence is not available, circumstantial evidence may be determinative. This arbitrator has reviewed the identified contract provisions, the parties written arguments and relevant case citations, the parties past practices and based upon a preponderance of the evidence the underpinned award has drawn its essence from the parties collective bargaining agreement. For the reasons that follow, I conclude that the Agency did suffer or permit certain bargaining unit employees to perform pre-shift and/or post-shift duties without compensation within the meaning of the FLSA and the Collective Bargaining Agreement.

As the moving party in this merits portion of the case, the Union has the burden of proof to establish that the Agency violated the FLSA and the Collective Bargaining Agreement when it permitted certain bargaining unit employees to perform pre-shift and/or post-shift duties without compensation. I find that the Union has met its burden of proof to establish the Agency permitted certain bargaining unit employees to perform pre-shift and/or post-shift duties without compensation within the meaning of the FLSA.

When does the compensable workday begin?

The Union asserts that the compensable workday begins when the officer's engage in the first activity that is integral and indispensable to their principal activities. Here, the record is replete with testimony that correctional officers have retrieved freshly charged batteries (and depending on their assigned post, other equipment in addition to the batteries) prior to the start of their shifts and have returned their used batteries after the end of their shifts. These activities are integral and indispensable to the correctional officers' principal activity of ensuring safety and security.

The Agency asserts that the portal for Correctional Officers who pick up keys at the Control Center is the key line and they are considered on duty when they are in the key line; and the portal for Correctional Officers who do not pick up keys at the Control Center is the post where they exchange keys and equipment and are expected to be at their posts at the start of their shifts; and the portal for non-Correctional Officers is the key line at the Control Center. This is where staff pick up and drop off their keys and equipment, they are considered to be at work when they are in the key line. Moreover,

that the act of voluntarily picking up and carrying small items along the walk to the job site does not alter the place of performance of principal activity.

There was ample credible testimony from both parties witnesses that officers customarily and routinely draw a fresh battery, and other equipment, sign the safety and security inspection sheet, receive detail pouches, check their mailbox and check in with the lieutenant prior to reporting to their assigned posts. I find that the requirement to acquire a freshly charged battery is neither discretionary nor voluntary. The General Post Orders (UX 13 at page 25) require Unit Officers to pick up a battery for their radio/body alarm at the time the keys are drawn from the control/message center and the old battery will be returned to the control/message center by the Officer going off duty. Additionally, Officer's are required to pick up crew kits prior to assuming their posts and must be turned in at the termination of the regular working day (UX 13 at page 13) and, as such, mark the commencement and end of the compensable, continuous workday. Moreover, correctional officer's assigned to morning and evening shifts are routinely required to complete the shift relief process by the shift starting time to enable the officer to begin the 12:00 am and also the 4:00 pm census counts. The credible evidence establishes that the correctional officer's are expected to arrive early to their post resulting in the performance of pre-shift duties and subsequently (due to the construct of the shift schedule's which do not allow for the overlapping shifts or other methods to mitigate or eliminate the pre and post-shift duties) perform post shift duties and have not been compensated for such activities.

When does the compensable workday begin and end? Subsequently, when does the overtime period begin? The parties Agreement at Article 18 makes reference that employees shall be compensated to the extent allowable by applicable laws, rules, and regulations. The applicable law here is the FLSA wherein under Section 4(f) it authorizes the Office of Personnel Management (“OPM”) to administer the statute to federal employees {5 C.F.R. § 551.102(a)}. OPM is obligated to “exercise its administrative authority in a manner that is consistent with the Secretary of Labor's implementation of the FLSA.” *Am. Federation of Gov't Employees v. Office of Personnel Mgmt.*, 821 F.2d 761, 770 (D.C. Cir. 1987). Here the Agency is required to compensate employees at their overtime rate for hours worked in excess of eight per day.

There is no issue before the arbitrator as to whether overtime compensation is due an employee after working forty (40) hours or after working in excess of eight (8) hours in a day. Additionally, the evidence shows that all regular shifts are minimally eight hours in duration. Rather the question is whether or not the tasks or duties performed by the employee's during pre and post-shift time is compensable and is the time associated with these tasks sufficient enough to be deemed compensable

Was the Agency aware that employees were performing pre and post-shift activities?

The Agency and Warden Bragg were well aware of Portal-to-Portal issues. Warden Bragg by and through his September 27, 2007 memorandum, issued to all staff, stated in pertinent part:

The purpose of this memorandum is to clearly define that staff may not work outside their scheduled hours of work without approval or compensation. All staff are directed to cease any such activity.

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

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

The review of the evidence provided establishes that the Agency has actual and/or constructive knowledge that employees have been performing work off-the-clock.

Specifically, the evidence establishes that:

- (1) Employees had discussions with management regarding the work being performed before and/or after employees' shifts.
- (2) Management instructed employees to arrive to work prior to the start of their shifts via:
 - (a) Post Orders; and

- (b) verbal discussions.
- (3) Employees have requested compensation for performing before and/or after their shifts and management has denied those requests;
 - (4) Employees check-in with a Lieutenant prior to the start of their shifts;
 - (5) Management observes employees performing work before and/or after their shifts including arriving and departing from the Control/Message Center;
 - (6) Management is present when employees review the Posted Picture File in the Lieutenant's office before and/or after their shifts;
 - (7) Management is present when employees respond to emergencies before and/or after their shifts;
 - (8) As a matter of common sense, it is not possible to perform the work required, i.e. picking-up equipment, traveling to the posts, exchanging information and equipment, during the employees' 8 hour shifts because there is no overlap and the posts require continuous coverage, and;
 - (9) Because staff accountability is an important job duty of each Lieutenant, they are obligated to know where the employees working correctional posts are at all times.

From the authority cited above the law is clear that when an employer has actual or even constructive knowledge that work is being performed, employees must be duly compensated. The case law shows that actual or constructive knowledge of management is imputed to the employer. (Reich v. Dept. of Conservation & Nat'l Resources. 28 F.3d 1076, 1082 (11th Cir. 1994).

The law does not allow employers to enjoy the fruits of an employee's labor without paying overtime by placing the burden the employees to claim it. In other words, an employer cannot claim as a defense to a claim for overtime pay that the employee never asked to be compensated for the work performed. Under relevant case law neither an employee nor a Union can voluntarily agree to not be paid for performing work in excess of the regular work day. Therefore the notion or defense that employees' non request for pay is deemed as a waiver is not credible nor supported by relevant case law. Instead, it is the duty of management to exercise control to see that the work is not performed if it does not want to pay for it. 29 CFR § 785.11 ("Work not requested but suffered or permitted is work time."). Indeed the courts have had no difficulty applying these principles to reject employers' attempts to defend against the failure to pay overtime by claiming that employees did not fill out the proper time records or that they violated an employer's rule or an agreement with the employer against working overtime. Moreover, for the most part, an employee's right to have his or her overtime computed in accordance with the methods approved by the FLSA and its implementing regulations is a right that cannot be waived and that cannot be estopped from asserting. I find that the Agency had actual and/or constructive knowledge that correctional officers perform the work at issue before and/or after their shifts.

Are the pre & post-shift activities de-minimus?

The fact that the Agency has failed to timely and sufficiently honor the Union's proper information request's and subsequent repeated failure to provide the requested information as directed by this arbitrator in his Award dated December 5, 2008 cannot be

without consequence⁹. The Agency's continued "Cavalier" response's as to why the requested information was neither produced nor delivered to the Union have not been credible. The Agency's only defense to the Union's estimated pre and post-shift times at issue in this grievance was testimony from Lieutenants' and Captains' who had a very stale recollection¹⁰ of how shift relief occurred and have not performed recent work as a Correctional Officer. Although I do believe the Lieutenants do observe shift relief from time to time they do not observe the relief process daily at each post. The Agency has not sufficiently rebutted the Union's evidence concerning the precise amount of work performed. The Agency's failure to track employee time or document instructions to employees is surprising. The Agency has a duty to maintain proper records of employee hours. *USP Marion and AFGEL 2343*, 61 F.L.R.A. 675, 771 (Sept. 13, 2006); 5 C.F.R. § 551.402. Because the Agency failed to maintain the required records, the Union is entitled to make its case purely through testimonial evidence. *Id.* According to the Supreme Court, an employee who alleges, as here, that his employer failed to record their hours of work:

Has carried out his burden if he proves that he has in fact performed work for which he was improperly compensated and if he produces sufficient evidence to show the amount and extent of that work as a matter of just and reasonable inference. The burden then shifts to the employer to come forward with evidence of the precise amount of work performed or with evidence to negate the reasonableness of the inference to be drawn from the employee's evidence. If the

⁹ Elkouri & Elkouri (6th Edition) at pages 352 – 353.

¹⁰ Through Direct Testimony the witness with the most recent first-hand experience occurred some 8.5 years ago with the others averaging 10 plus years since they worked as Correctional Officers.

employer fails to produce such evidence, the court may then award damages to the employee, even though the result may be only approximate.

The Agency has chosen to either not make use of time clocks, time sheets, sign in sheets, logbooks etc., or has chosen not to retain¹¹ such records. In the absence of this valuable information as well as Post Orders, video tapes etc., the arbitrator must rely wholly upon the sworn testimony of the Union's witnesses, who have immediate first-hand knowledge of the pre and post-shift activities, and make a credibility determination of each witness's testimony to arrive at an informed conclusion.

When determining whether otherwise compensable work is de minimus, arbitrators generally consider three factors: (1) the practical administrative difficulty of recording the additional time; (2) the size of the claim in the aggregate; and (3) whether the work is performed on a regular basis, arbitrator's need then to apply a common sense interpretation in evaluating these factors within the context of each case.

The record in this case is quite clear the regularity of the pre and post-shift activities occur every time an officer relieves another officer at the beginning of the shift. There are no practical difficulties in determining when pick up of equipment at the Control/Message Center or on determining when equipment is dropped off at the Control/Message Center. Additionally, the aggregate amount of compensable time over a

¹¹ In preparation for this arbitration the Agency could have established some form of record tracking instrument to assist in the determination of what, if any, amounts of time officer's spent performing both pre and post-shift activities. This type of information might have had a mitigating influence in determining what, if any, liability and damages the agency might incur. The Agency has had 3 years to accrue such information. The Agency has elected not to make a record of such events.

year is substantial. The amounts of time are therefore not de-minimus. After a review of the record, the evidence and cited authorities I find the Agencies argument is not persuasive. The Agency has failed to compensate correctional officers for pre and post-shift work performed by employees who work correctional posts at FCI La Tuna, the Camp, and the FSL. These work activities are repetitive and regular and constitute an extension of the time spent by them in their principal activity of safety and security and is compensable under the FLSA and are not de-minimus.

AWARD

1. For the reasons discussed above the grievance is sustained.
2. The Agency violated Article 18 of the Master Agreement and the Fair Labor Standards Act and Federal Employee Pay Act by not compensating employees for pre and post-shift work activities which are integral to their principle activity during the period from May 6, 2006 to the date of the Award.
3. All affected bargaining unit employees, except employees assigned to Unicore, are to be paid back pay for the time associated with pre and post-shift work activities.
4. Back Pay shall begin to run continuously from May 6, 2004 until the Agency implements practical remedies that eliminate the violation(s) associated with this grievance.
5. The parties are directed to appoint a joint labor-management committee whose obligation shall be to submit within 90 calendar days from the date of this award a stipulation on the number of hours to be compensated each affected employee (alive or dead), the affected employee's (alive or dead) who are to be compensated, the amount of back pay due each affected employee (alive or dead). The Union representative's serving on this committee are to be compensated for their time. Should the parties fail to have a meeting of the minds pursuant to the

above identified calculations; the Arbitrator will make the calculations upon receiving advice from the parties.

6. The Agency shall immediately expend all reasonable efforts in trying to locate all former employees of record who worked for the Agency at any time during the recovery period identified in section 4 above. The Agency shall document in writing all such efforts and work with the Union in trying to locate these affected employees.
7. Provide the Union within thirty (30) calendar days of this award all time and attendance records dating back to May 6, 2004, to the present. If any portion of these records are not available or have not been retained give a detailed written explanation as to when and why such records were destroyed, and who authorized such destruction. In the event such destruction has occurred the Agency is immediately barred from destroying any such records until all back pay issues raised in this grievance have been resolved.
8. All costs incurred in gathering and producing the above information shall be borne by the Agency.
9. Bargain in good faith with the Union over the implementation of this Award.
10. The Union is entitled to reasonable attorney fees incurred in the processing of this grievance.

I hereby retain jurisdiction of this matter for the sole purpose of resolving any dispute that may arise over the implementation of this Award.

Dated: July 7 , 2009



Robert F. Curtis

Arbitrator

The Arbitrator intends to submit this award for publication. If either party objects to such publication then advise this arbitrator within thirty (30) days from issuance. Failure to respond to this inquiry within 30 days will be considered an implied consent to publish.