
IN THE MATTER OF ARBITRATION

BETWEEN

FMCS No. 08-51179

**AMERICAN FEDERATION OF
GOVERNMENT EMPLOYEES, LOCAL 1298
(Union)**

INTERIM AWARD

-and-

**U.S. DEPARTMENT OF JUSTICE,
FEDERAL BUREAU OF PRISONS,
FEDERAL CORRECTIONAL INSTITUTION
FORT WORTH, TEXAS
(Agency)**

**Fair Labor Standards Act
Pre- and Post-Shift Activities**

Arbitrator: Lynne M. Gomez, selected through the procedures of the Federal Mediation and Conciliation Service.

HEARINGS

Hearings were held in the above matter on July 23 and 24 and August 19 and 20, 2008, at the Federal Correctional Institution in Fort Worth, Texas, and a telephonic conference was held on November 7, 2008 for the purpose of hearing additional testimony. The witnesses were sworn and excluded from the Hearings. The proceedings were transcribed and the transcripts were provided to the Arbitrator. Post-hearing briefs were received by the Arbitrator by February 3, 2009. The time for issuance of this Award was abated between March 19 and 31, 2009 for clarification of which issues were to be addressed herein. The Parties were given full opportunity to present testimony and evidence at the Hearing.

APPEARANCES

FOR THE UNION

David Ricksecker	Counsel for Union, Advocate
Warren Crockett	Correctional Officer, Former Local President, witness
Mark Pilcher	Correctional Officer, Local President
Michael Keen	Cook Supervisor, Local 2 nd Vice President, witness
Nick Girgenti	Correctional Officer, Chief Steward, witness
David Mott	Powerhouse Operator, witness
Michael Finn	Powerhouse Foreman, witness
Reginald Hayes	Correctional Officer, witness
Gregory G. Watt	Correctional Officer, witness
Darrell Gilbreath	Correctional Officer, witness

APPEARANCES (CONTINUED)

FOR THE AGENCY

Michael A. Markiewicz	Agency Representative, Advocate
Mark Lowe	Employee Services Manager, witness
Barry Mann	Employee Services Specialist
Victor Orsolitz	Associate Warden, USP Hazelton, witness
Douglas Thamze	SIS Lieutenant, witness
Robert Brown	Outside General Foreman, witness
Les Phillips	Camp Administrator, USP Beaumont, witness
Cole Jeter	Retired Warden, FCI Fort Worth, witness
Rebecca Tamez	Warden, FCI Fort Worth, witness
Miguel Gonzalez	Captain, witness

ISSUES

As discussed at the outset of the Hearings, and as had been proposed in the Union's Pre-Arbitration Brief, this matter is to be bifurcated with respect to liability and damages in hopes that, if liability is determined, the Parties potentially can reach an agreement as to damages and other remaining issues. As to the matters to be considered herein, the Union proposes the following statement of the issues:

- (1) Did the Bureau of Prisons, FCI Fort Worth suffer or permit AFGE Local 1298 bargaining unit employees to perform work before and/or after their scheduled shifts without compensation in violation of the Fair Labor Standards Act and the Parties' Master Agreement? If so, what is the remedy?
- (2) Did the Bureau of Prisons meet its plain and substantial burden to show that it acted in good faith and on reasonable grounds regarding these FLSA violations to avoid an otherwise mandatory award of liquidated damages on any backpay amounts found due during the damages phase?
- (3) Did the Bureau of Prisons willfully violate the FLSA, thus entitling the Grievants to a recovery period that extends back three years from the date the grievance was filed, i.e., to November 20, 2003?

The Agency states the issue as follows:

Did the Agency fail to pay pre-shift and post-shift overtime? If so, what shall be an appropriate remedy?

Having considered the Parties' proposed issues, this Arbitrator formulates the issue as follows:

Did the Agency fail to pay pre-shift and post-shift overtime compensation in violation of the Fair Labor Standards Act and the Parties' Master Agreement? If so, what is the appropriate remedy including but not limited to a potential award of backpay, liquidated damages, time period of damages and/or attorneys' fees and costs?

BACKGROUND

The Union initiated a grievance dated November 20, 2006 alleging that from October 31, 2003 and before, FLSA non-exempt classified bargaining unit members were being required to perform work before and after their shifts without compensation. The Agency denied the grievance as having been untimely filed and lacking in specificity, and also referred the Union to the Parties' Settlement Agreement dated September 26, 2005 as having conclusively addressed the portal-to-portal issues at FCI-Fort Worth.

The grievance was appropriately processed and remains unresolved. The Parties seek an Interim ruling and request that the Arbitrator retain jurisdiction for the purpose of resolving any remaining issues – including damages -- if the Parties are not able to do so within a reasonable time following issuance of this Interim Award.

RELEVANT PROVISIONS OF THE AGREEMENT

ARTICLE 3: GOVERNING REGULATIONS

(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.

* * *

OTHER RELEVANT PROVISIONS

29 U.S.C. § 254 Relief from liability and punishment under the Fair Labor Standards Act of 1938, the Walsh-Healey Act, and the Bacon-Davis Act for failure to pay minimum wage or overtime compensation

(a) Activities not compensable. Except as provided in subsection (b) of this section, no employer shall be subject to any liability or punishment under the Fair Labor Standards Act of 1938, as amended [29 U.S.C. 201 et seq.], the Walsh-Healey Act [41 U.S.C. 35 et seq.], or the Bacon-Davis Act, (!1) on account of the failure of such employer to pay an employee minimum wages, or to pay an employee overtime compensation, for or on account of any of the

following activities of such employee engaged in on or after May 14, 1947 :

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

(2) activities which are preliminary to or postliminary to said principal activity or activities, which occur either prior to the time on any particular workday at which such employee commences, or subsequent to the time on any particular workday at which he ceases, such principal activity or activities. For purposes of this subsection, the use of an employer's vehicle for travel by an employee and activities performed by an employee which are incidental to the use of such vehicle for commuting shall not be considered part of the employee's principal activities if the use of such vehicle for travel is within the normal commuting area for the employer's business or establishment and the use of the employer's vehicle is subject to an agreement on the part of the employer and the employee or representative of such employee.

(b) Compensability by contract or custom

Notwithstanding the provisions of subsection (a) of this section which relieve an employer from liability and punishment with respect to any activity, the employer shall not be so relieved if such activity is compensable by either -

(1) an express provision of a written or nonwritten contract in effect, at the time of such activity, between such employee, his agent, or collective-bargaining representative and his employer
or

(2) a custom or practice in effect, at the time of such activity, at the establishment or other place where such employee is employed, covering such activity, not inconsistent with a written or nonwritten contract, in effect at the time of such activity, between such employee, his agent, or collective-bargaining representative and his employer.

* * *

**Settlement Agreement
between
Federal Medical Center (Employer)
Fort Worth, Texas
and
AFGE Local 1298 (Union)
Regarding
Bargaining Unit Portal to Portal/Lunch Reliefs Grievance
(Signed September 26, 2005)**

In order to amicably and jointly resolve the issues raised in the above referenced grievance, the parties agree as follows:

1. The Employer agrees to pay each bargaining unit employee as defined in this agreement a one-time lump sum payment of \$1,200.00 (less applicable taxes and deductions) in full and final settlement of all past and present portal to portal and lunch relief claims.
2. The parties agree that this agreement applies solely to staff in the following positions as of January 9, 2005 (pay period #1 of pay year 2005): correctional officers assigned to the Correctional Services Department, the two dental assistants, and those practical/clinical nurses assigned to the institution inmate outpatient clinic.
3. The Union agrees to immediately notify the Employer of any subsequent allegations of employees performing work while in a non-pay status (e.g. portal to portal and/or lunch relief violations) so the Employer may address such allegations prior to the filing of any formal grievance or other third-party actions on the part of the Union.

* * *

UNION CONTENTIONS

The Union makes the following arguments and contentions in support of its position:

The Federal Correctional Institution ("FCI") - Fort Worth is a high security segregation and jail unit, including a medical care unit, housing 1,500 to 1,700 inmates. FCI-Fort Worth inmates have been convicted of a variety of crimes, including murder and other violent misconduct, and multiple prison gangs are present within the prisoner population. AFGE Local 1298 is the bargaining representative for non-supervisory employees at FCI - Fort Worth.

The primary job of Correctional Officers is security, as reflected in the GS-007-07 Senior Officer position description which provides in part that a Correctional Officer "remains constantly alert." Correctional Officers are subject to being in life-threatening or hostile situations including riots, assaults and attempted escapes. Correctional Officers must be aware of their surroundings as well as inmate attitude, identification, association and behavior at all times when inside the facility in order to prevent injury to themselves and other inmates. Correctional Officers must respond to any emergencies whenever they are inside the institution and, if they observe anything unusual, they are required to report it to a supervisor immediately regardless of being on or off-duty. While walking through the institution, the Correctional Officers are not merely "traveling" to their job sites; rather, they are performing their principal job duty of maintaining safety and security of FCI-Fort Worth inmates and employees. Thus, Correctional Officers are on-duty from the moment they

enter the institution, as their responsibilities begin before they reach their assigned posts and do not end until after they have left their posts at the end of their shifts.

In order to perform their job duties Correctional Officers must have radios and batteries, equipment which is vital to communication and safety. All posts have a radio, and radios contain a body alarm that can be activated in case of emergency. The batteries that power the radios are as crucial as the radios. Batteries hold a charge for four or five hours so Correctional Officers sometimes pick up extra batteries at the Control Center to make sure their radios are functioning at all times. Other obviously important items in any prison environment are keys, handcuffs, flashlights and other equipment. Many Correctional Officers pick up handcuffs at the Control Center to protect themselves and inmates should handcuff use become necessary. Correctional Officers may be required to pick up other equipment, such as flashlights and chits, or weapons in the case of employees assigned to Perimeter Patrol, to exchange with the outgoing officer at shift change. Additionally, each post with a detail of inmate workers has a "detail pouch" that identifies the inmate and gives other information about the daily assignments of inmate details. Detail pouches are located in a box near the Control Center and accountability chit board. Some posts are required to pick up or return paperwork at the Control Center, such as out-count forms and daily security sheets for the Powerhouse. Housing Unit Morning Watch Officers must pick up wake-up lists and bed-book count breakdowns for their units, and each night a bed-book audit is required to ensure accurate inmate counts. Correctional Officers also must flip accountability chits when entering FCI-Fort Worth to begin work, and when leaving the institution. The Union considers the accountability chit as "equipment" because they serve as notice to the Agency of which employees are inside the institution, and because Correctional Officers are required to flip the chits upon entry and exit.

Correctional Officers are assigned to a variety of locations within FCI-Fort Worth such as the Control Center, the Powerhouse, Jail Control, the Special Housing Unit, Housing, the Compound and the Perimeter. The Control Center is sometimes described as the "brain of the institution" and is a 24-hour post located in the front lobby. The Control Center is the institution's communication hub, and coordinates inmate counts and inmate movements. Correctional Officers and other staff members must pass through the Control Center when entering the institution to begin working, and when leaving the institution at the end of their shift. Correctional Officers assigned to the Control Center perform multiple duties, including distribution and collection of paperwork and equipment, and monitoring and controlling numerous sliders, gates, doors and sallyports. Control Center Correctional

Officers also are responsible for equipment such as batteries, radios, keys, handcuffs and flashlights, all of which are stored in the Control Center.

The Powerhouse is similar to a utility plant, and is responsible for high voltage electricity, high voltage breakers, water, and high pressure steam used for hot water, cooking and heating. The Powerhouse has three (3) high pressure boilers, numerous water tanks, pumps, switch gears and other such engineering plant equipment.

Jail Control is a smaller version of the Control Center. Jail Control is responsible for the Special Housing Unit and the Jail, both of which are more secure environments than the general prison population. The Jail generally houses about one hundred inmates who are awaiting trial or sentencing.

The Special Housing Unit (referred to as "SHU" or "Seg" or "the Hole") is also known as Administrative Segregation. It is the most secure unit in the institution, in which inmates are locked up in circumstances similar to solitary confinement. Typically the SHU houses 30 to 70 inmates including those in protective custody, jail status, or those who have been violent towards staff or other inmates. The SHU 1 post is located on the ground floor of the SHU building, and the SHU 2 post is on the second floor.

Housing Unit officers generally monitor inmates to prevent fighting and other misconduct. They also pass out supplies to inmates and make sure the inmates keep the Housing Units – which are named after various Texas cities – clean.

The Compound Officer post basically monitors and controls inmate movement on the compound. This post involves roaming through the compound, making sure inmates are where they are supposed to be and controlling gates, such as the work gate area.

The Perimeter post provides security around the perimeter of the institution. This post involves patrolling, monitoring gates and answering fence alarms. Perimeter post Officers are heavily armed and equipped to perform their duties.

Witnesses presented by the Union testified about the uncompensated pre- and post-duty work they must perform. Management is aware that this work is being performed, as supervisors observe employees working before and after their shifts end. Moreover, supervisors can easily look at the accountability chit board to determine who is working. The Grievants testified that they have to arrive early in order to be at their posts by the time their shifts begin and that, because most overlapping shifts have been abolished, employees must perform pre- or post-shift work, or both, in order to be able to properly relieve the prior shift and exchange information and equipment. Since overlapping shifts have been eliminated at the institution, for the most part, either the in-coming or outgoing

officer is still having to work without compensation after his shift ends, and this is in addition to his having to maintain a constant alertness and vigilance while within the institution.

In 2002 Bureau of Prisons issued a directive that employees picking up equipment at the Control Center "shall have their shifts scheduled to include reasonable time to travel" and that "schedules may have to be adjusted and shifts overlapped for posts which require relief." Nevertheless, the Agency has done little to enforce this directive or otherwise comply with the FLSA. Although in practice there obviously is overlap, the Agency has instituted overlapping shifts at FCI-Fort Worth only for Day Watch ("DW") Housing and Lock Shop. Additionally, supervisors refuse to pay overtime for pre- and post-shift work activities. Officer Gilbreath testified about a time when he worked for approximately ten (10) minutes after his shift ended and the Lieutenant and Captain refused his request for overtime. When he mentioned this situation to the Warden, the Warden offered to approve overtime if Officer Gilbreath would identify the officer who was late in relieving him, so that employee's pay could be docked. Officer Gilbreath declined to do so, as the Warden knew he would. Moreover, Captain Phillips testified that overtime is paid only in 15 minute increments. The Bureau's failure to compensate employees at FCI-Fort Worth prior to and after their scheduled shifts violates the FLSA.

The Agency bears the burden of proof on the threshold issue as to whom this grievance applies and what time period it covers. This issue should be considered waived as it was not raised during the pre-hearing procedural and threshold issue briefing period. In any event, the prior Settlement Agreement was limited to employees in the Corrections Department, dental assistant and nurse positions, and it covered the time period up to and including January 9, 2005. As to all other Bargaining Unit member positions, the FLSA statute of limitations, either two (2) or three (3) years from the date of the grievance's filing (i.e., November 20, 2003 or November 20, 2004), applies. A general presumption exists favoring arbitration over dismissal or limitation of grievances on technical grounds, and any doubts should be resolved in favor of arbitrability. Thus, the Agency's threshold arguments should be rejected.

The FLSA requires that the Bureau pay overtime for time worked in excess of eight (8) hours per day or forty (40) per workweek. The term "work" is to be construed broadly. The Supreme Court has made clear that any walking time occurring after the beginning of the employee's first principal activity and the end of the employee's last principal activity is to be covered by the FLSA and that, despite FLSA exceptions, pre- and post-shift activities are to be compensated if they are "integral and indispensable" to the employee's principal

work activities. A Department of Labor Wage & Hour Advisory Memorandum (2006-2, May 31, 2006) likewise directs that time spent after beginning the first principal activity, including time walking, is compensable.

To be considered "integral and indispensable" to a principal activity depends on whether the activity constitutes "work." Some of the factors to such a finding are whether the activity is made necessary by the nature of the work performed by the employee; the activity is undertaken primarily for the employer's benefit; the employer knew or should reasonably have known that the activity was being performed; and the activity was controlled or required by the employer. Regulations of the Office of Personnel Management ("OPM") define "hours of work" to include the time during which the employee is required to be on duty; the time during which an employee is suffered or permitted to work; and waiting time or idle time which is under the agency's control and which is for the agency's benefit. 5. C.F.R. § 551.401. "Suffered or permitted to work " means "any work performed by an employee for the benefit of an agency, whether requested or not, provided the employee's supervisor knows or has reason to believe that the work is being performed and has an opportunity to prevent that work from being performed." *Id.* at § 551.104. Employees cannot volunteer to work without compensation, and employers have a duty to prevent employees from performing work for which the employers do not intend to compensate them. Merely issuing a rule prohibiting such work is insufficient, and the Wardens' 2008 Memoranda advising employees not to perform any pre- or post-shift work do not protect the Agency from liability under the FLSA. If the Agency did not want to compensate its employees for such work, it should have ensured that such work was not performed.

The Agency had actual or constructive knowledge that Correctional Officers and other bargaining unit employees were performing pre- and post-shift work. Supervisors were in a position to observe such work being performed yet made no inquiries about it and did not attempt to stop it. The Correctional Officers and other bargaining unit staff are entitled to be compensated for time spent picking up equipment, maintaining a constantly vigilant state while inside the institution, and performing information and equipment exchanges and inventories. Numerous arbitrators have held that the Correctional Officers' continuous workday begins when they pick up equipment in the Control Center because such equipment is integral and indispensable to the performance of their duties. The Agency has recognized this in the Human Resource Management Manual Statement P3000.02, 610.1 which states, in part, that employees who pick up equipment at the Control

Center shall have their shifts scheduled to include reasonable travel time to their assigned duty post and back at the end of their shifts. Clearly, FCI-Fort Worth employees are entitled to compensation from the moment they pick up equipment or use a piece of assigned equipment. These actions are sufficiently related to the employees' primary duties so as to start and end the Correctional Officers' "continuous work day." Radios, batteries, detail pouches, keys, chits, handcuffs, paperwork and other miscellaneous equipment are all integral and indispensable to the performance of the employees' duties. Yet even if equipment did not need to be picked up in the Control Center, these employees would still be entitled to compensation from the time they entered FCI-Fort Worth because in a correctional facility – a potentially dangerous, secured environment – in which employees must be constantly alert to inmate activities, and they are required to constantly monitor inmates while inside the institution. Travel time in a prison environment is not the normal to-work and from-work travel generally found to be non-compensable, and the "travel" at issue in this case is not comparable to the kind of "travel time" that generally is excluded by regulations. Correctional Officers are performing integral job duties the minute they flip their accountability chits and enter the facility. The Grievants are entitled to compensation under the FLSA from the time they enter the Control Center sallyport until they exit through it.

The *de minimus* rule applies only to insubstantial or insignificant hours that, as a practical administrative matter, cannot be recorded for payroll purposes. However, as the Supreme Court has made clear, an initial activity at the workplace begins the continuous workday and any time thereafter, including walking time to duty posts, is to be counted as work time. The Agency takes the position that, because the initial activity may be *de minimus*, walking and waiting time is non-compensable. However, that same argument has been rejected by the Supreme Court. Moreover, the *de minimus* defense does not apply when the disputed work is routine and occurs on a regular basis. It is not to be applied separately to each activity viewed in isolation; instead it requires consideration of the aggregate amount of time spent by the employee, including pre- and post-shift activities. The testimony of the Union's witnesses showed that the subject work is "repetitive and regular." Additionally, the Agency is able to record this time; there is no administrative difficulty in doing so. There is no basis to apply the *de minimus* defense.

The Grievants need only provide an approximation of the hours worked. Precise computation is not required and when exact time cannot be conclusively established, presumptions disfavor the employer. It is not the employees' obligation to submit requests

for overtime payment, and their knowledge of overtime procedures is irrelevant. It is the Agency's duty to make sure employees are compensated for overtime or else to take affirmative steps to prevent overtime work from occurring. The Agency cannot rely on its policies regarding pre- and post-shift work, such as Program Statement 3000.2, Section 610.1 or Section Q.2 of the CBA, as the existence of a policy that is not enforced does not equate to compliance. Moreover, simply letting employees know of the Agency's overtime policy does not satisfy Management's FLSA duties. The evidence showed that Lieutenants, Captains and Wardens refused to compensate employees who performed pre- and post-shift work. The Agency had actual and constructive knowledge that uncompensated pre- and post-shift work was occurring, as demonstrated by the detail pouch MOU between the Parties. Moreover, the Agency's decision to eliminate all overlapping shifts other than for DW Housing and Lock Shop demonstrates its awareness of how to prevent portal-to-portal violations and, thus, reflects a flagrant disregard for the FLSA.

An award of liquidated damages, which are compensatory in nature rather than punitive, is warranted. The limited defense to such damages requires the employer to show good faith and reasonable grounds for believing that it was not violating the FLSA. The Agency has the plain and substantial burden of making such a showing, yet has little evidence of compliance or even efforts to comply with the FLSA. There is no evidence that the Agency questioned or sought any opinions as to whether it was complying with the FLSA as to the employees' pre- and post-shift activities, or that it reviewed other arbitration or FLRA decisions evaluating compensation practices in other institutions, or that it conducted any time and motion studies of Correctional Officers. It appears that the Agency did nothing to ascertain FLSA compliance. Wardens Tamez and Jeter's Memoranda do not suffice to constitute good faith and reasonableness. Additionally, there was no evidence that these Memoranda were enforced. The statute of limitations should be extended to three (3) years due to the Agency's willful and reckless disregard of the FLSA's overtime provisions.

The grievance should be sustained. The Arbitrator should find the following in her Interim Award:

1. The grievance recovery period for the Corrections Department, dental assistants and nurse runs from January 9, 2005 to the present;
2. The grievance period for all other bargaining unit employees is from November 20, 2004 or November 20, 2003 if a willful violation is found;

3. The FCI-Fort Worth employees' picking up equipment at the Control Center or actual use of 24-hour take home equipment begins such employees' continuous work day, and such work day does not end until the picked-up equipment is returned or upon the last daily use of the 24-hour take home equipment.
4. The FCI-Fort Worth employees' act of entering the institution after flipping their accountability chits begins their continuous work day, and their continuous work day does not end until they exit the institution at the end of the day.
5. The employees performed the amount of uncompensated pre- and post-shift work as they testified during the Hearings;
6. The Agency is liable to the Grievants under the FLSA for the amounts of uncompensated pre- and post-shift work time to which the employees testified;
7. The Agency is liable for liquidated damages equal to the Grievants' backpay in accordance with Section 216(b) of the FLSA'
8. An Order that the statute of limitations is three years, rather than two years, per Section 255(a) of the FLSA;
9. Reasonable attorneys' fees and costs, per Section 216(b) of the FLSA; and
10. Any other relief consistent with law.

The Union further requests that if liability is found, the Parties be given sixty (60) days after entry of the Interim Award within which to attempt to resolve any remaining issues including but not limited to other bargaining unit posts and positions, calculation of backpay damage amounts, and reasonable attorney's fees and costs. If the Parties are not able to agree to such matters by the end of the sixty (60) day period, additional arbitration dates can be scheduled for additional Hearings to resolve such issues.

AGENCY CONTENTIONS

The Agency makes the following arguments and contentions in support of its position:

Portions of this grievance are barred as a result of previous settlement agreements and a Memorandum of Understanding ("MOU") negotiated by the Parties. Such contractual provisions relieve the Agency of liability pursuant to 29 C.F.R. § 790.4(a). These clear contractual provisions are pertinent and should be applied herein. The Settlement

Agreement signed on September 26, 2005 was negotiated by the Parties and provided that it was a full and final settlement of all past and present portal to portal and lunch relief cases. This Settlement Agreement could not have been finalized and effective as of January 9, 2005, as the Union claims, as the grievance underlying it was not filed until June 7, 2005. Rather, January 9, 2005 is the employment cut-off date relevant to employees who would be paid as a result of the settlement. Thus, the Arbitrator should only consider the alleged pre- and post-shift claims, if at all, from September 26, 2005 through the date of the hearing.

The Agency did not fail to pay pre- and post-shift overtime as alleged by the Union. Specific Post Orders direct that, with regard to shift changes, the departing officer should document all pertinent information and equipment discrepancies in the log book thirty (30) minutes prior to the end of the shift. Reporting officers are directed to conduct an inventory of all keys and equipment within the first thirty (30) minutes of their shift. Thus, there is no reason for the departing or arriving officers to be detained at shift change. The institution also has instructed employees not to work beyond their regularly scheduled shifts, and has advised employees who are not relieved of duty at the conclusion of their shift to contact the Operations Lieutenant immediately.

The Agency has responded to Union concerns. After the Union raised the issue of having to pick up and drop off spare batteries, battery chargers were placed in the units during the summer of 2006. In November of 2005, Powerhouse Operators were furnished with 24-hour keys to pass through various security gates within the prison. As a result, Powerhouse Operators no longer had to pick up and drop off keys. There is no requirement that Correctional Officers at Housing Unit posts pick up handcuffs, nor are Perimeter Patrol posts required to pick up batteries.

Courts have held that the only tasks considered pre- or post-shift activities occur when officers relieve each other and exchange keys, radios and information. Arbitral awards to the contrary are not binding, and many of those cited by the Union are on appeal with the Federal Labor Relations Authority. The Union's witnesses testified that the same amounts of time were spent performing pre- and post-shift activities despite the location of their posts. Clearly, travel time to the Control Room will be shorter than travel time to the Powerhouse. However, as courts have ruled, travel time and time processing through security doors and gates prior to assuming one's duties using "integral" equipment is non-compensable. Additionally, Correctional Officers were not required to pick up extra batteries prior to the summer of 2006, when battery chargers were installed, as post radios

already had a battery. Additionally, the Institution had a method of delivering re-charged batteries when necessary, through the Compound Officer, Count Officer or Lieutenant. Thus, picking up spare batteries was a choice, and not a requirement.

The legislative history of 29 U.S.C. § 254 includes checking in or out of work as non-compensable activities. 29 U.S.C. § 254 (a) generally states that walking, riding or traveling to and from the actual place of performance of one's principal activity or activities, and activities that are preliminary or postliminary to such principal activity or activities, are not compensable. Moreover, various subsections of 29 C.F.R. § 790.7 indicate that walking or riding to and from one's duty post and voluntarily arriving early at one's place of employment constitute preliminary or postliminary activities and, therefore, are non-compensable. 29 C.F.R. § 790.8(b) states that the term "principal activities" includes all activities which are an integral part of a principal activity, and § 790.8(c) provides that activities such as checking in and out and waiting in line are not ordinarily considered to be integral parts of the principal activity.

A prison work environment differs significantly from most other workplaces. As a result, the Supreme Court has recognized that prison officials are entitled to more deference on issues of internal security. The FLRA also notes that a Federal correctional facility has special security concerns which may not be present at other locations. A Federal agency has the right to determine what duties are to be assigned, as well as when they will occur and to whom or to what positions they will be assigned. Such rights have been incorporated in Article 5, Section a. of the Parties' Master Agreement.

The Union has not met its burden of proof. Its case is based on assumptions and misconceptions, and its general inferences do not establish or prove a FLSA violation. The Agency has recognized starting and stopping times as a major issue, due to a nationwide grievance filed in May of 1995. The Agency paid a large amount of money and took action to ensure compliance with the Portal-to-Portal Act. The Agency issued its Policy 3000.02, Section 610.1 in response to the May 1995 grievance, providing institutions with specific information about shift starting and stopping times and which falls in line with court decisions. The Policy states that waiting in line for keys is not considered "work time" but gives the option of assigning equipment and keys to posts, if appropriate. FCI-Fort Worth incorporated this option with as many Correctional Officer Posts as possible. Given these circumstances, it is unlikely that the Agency would have continued to violate the Act. The testimony of those employees who were paid as a result of the 1995 grievance should be considered self-serving.

The Union presented evidence as to the following Relief Posts of the Correctional Services Department:

- Control Room
- Jail Control Room
- Compound
- Housing Unit
- Perimeter Patrol
- Special Housing Unit
- Powerhouse Operators

These posts have necessary equipment maintained at the post 24 hours a day. To arrive at his post, the employee enters the lobby, passes through the metal detector, enters the sallyport, flips an accountability chit – which takes a few seconds, at most -- exits the sallyport and travels directly to his post. These activities constitute non-compensable travel time. These employees do not wait in line and perform no work until they arrive at their duty posts. When their shift ends, these employees are relieved by another Correctional Officer.

The Union's grievance centers on allegations that Correctional Officers had to pick up spare batteries, prepare joint inventories, check in at the Lieutenant's office, and flip accountability chits. These activities are not integral to the Correctional Officers' work. The evidence showed that keys and a radio/body alarm with a battery is already located at the post and that, if a spare battery is needed, the Institution has a method and means of providing fresh batteries to employees. A specific on-duty position, a Building Patrol Officer, has the task of delivering a new battery if needed. Thus, if an Officer stops at the Control Center to pick up a spare battery, it is done by choice and is not compensable. Correctional Officers cannot perform their duties, or open locked doors, or send radio messages, or respond to emergencies while carrying a spare battery. Post Orders do not require joint inventories, nor do they direct employees to arrive early or stay late to complete them. The Agency has specifically directed that inventories be conducted within thirty (30) minutes of arriving on-duty. Checking in or out is not a compensable pre- or post-shift activity, as shown by statute, regulation and court opinions. Moreover, the accountability chits are not used to account for time. Rather, the chits are a security procedure that benefit employees because it allows determination of who is inside the prison fence should an emergency occur. The evidence showed that flipping a chit takes

only a few seconds, and is not "work." Therefore, the action of flipping a chit is not compensable.

The Union did not present evidence of Non-Relief Posts, which occur when there is one eight (8) hour shift per day and no relief on either end is required. For duty posts where equipment is not maintained at the duty post, the employees must stop at the Control Center to pick up equipment. For these positions, travel time from the Control Center to the assigned post, and from the post back to the Control Center, is done on-duty. The Union's spare battery and joint inventory arguments do not apply to non-relief positions as these employees report to control for their equipment and do not relieve other employees. Thus, the Union has failed to satisfy its burden of proof as to any Non-Relief Posts.

The Union suggests that Correctional Officers may have to correct inmate misconduct while walking to their duty posts. Such an argument is speculative and unsupported by evidence. Moreover, if the alleged inmate misconduct is so minor that it need not be reported it obviously would take no more than a few minutes to address and, therefore, would qualify as *de minimus*, and non-compensable. Additionally, the "suffer and permit" concept is not applicable unless it is shown that a supervisor knew or had reason to know that the activity was occurring, and had the opportunity to prevent the work from being performed. The Union did not meet these criteria. Although some employees picked up spare batteries at the Control Center, or came in early to perform inventories, these actions were undertaken by choice rather than being required by the institution. Moreover, all Supervisors who testified stated they were not aware of employees coming in early to work, and the Warden had put out a Memorandum instructing employees not to come in early or stay late to perform work. Thus, the Union failed to show that the Agency suffered or permitted employees to perform work for the benefit of the Agency which was not intended to be compensated.

Although some employees may have arrived early or left late at shift change, the Agency believes that no more than a few minutes were involved when this occurred. Therefore, under the *de minimus* standard, such work is not compensable. Federal regulations require that the time spent in any additional work total at least ten (10) minutes; anything less is non-compensable. The mere allegation that certain employees came to the work site before their shift began, or stayed after it ended, does not establish that they were working or that they are entitled to compensation. Those employees possibly were socializing with coworkers, or using government phones or other government equipment for personal use as they are allowed to do during off-duty time.

FCI-Fort Worth employees clearly understood portal issues as a result of earlier settlements, and should not be allowed to accumulate alleged overtime claims for years in hope of receiving a lump sum payment. In the Parties' September 26, 2005 Settlement Agreement, the Union agreed to:

" * * * immediately notify the Employer of any subsequent allegations of employees performing work while in a non-pay status (e.g. portal to portal and/or lunch relief violations) so the Employer may address such allegations prior to the filing of any formal grievance or other third-party actions on the part of the Union."

The Union did not comply with this provision. Additionally, the Union did not produce any documentation that any employee had requested payment for pre- or post-shift activities, or that any supervisor or manager had been approached by employees complaining about portal-to-portal issues. Article 6, Section q. of the Master Agreement obligates employees who believe they have been underpaid to submit a written request.

The evidence does not support a finding of liquidated damages because the Agency instituted policies on shift starting and stopping times; furnished specific post orders; and issued Memoranda from the Warden instructing employees not to perform work outside of their regularly scheduled shifts. Additionally, the evidence demonstrated that employees voluntarily chose to engage in activities, such as picking up spare batteries and handcuffs, which were not directed by the Agency. Any such extra activities occurred without the knowledge of, or direction from, supervisors or managers. The Agency has acted in good faith since the 2000 national settlement.

As the FCI-Fort Worth does not use time clocks, accounting for time is difficult if not almost impossible. The Arbitrator should consider the following in determining whether otherwise compensable time, if any, should be disregarded because it is *de minimus*:

1. The practical administrative difficulty of recording any additional time;
2. The aggregate amount of compensable time; and
3. The regularity of the additional work.

The additional work allegedly performed by the Union's witnesses was not done on a regular basis, would create substantial administrative difficulty to track and record, and would amount to a very small aggregate amount of compensable time. The evidence presented does not satisfy the Union's burden of proving its claim. The grievance should be denied.

OPINION
THE FACTS

The Federal Correctional Institution ("FCI") - Fort Worth is located outside of Fort Worth, Texas, on five (5) acres of land. It includes the FCI, a high security segregation and jail unit, and a medical care unit. The FCI-Fort Worth houses approximately 1,500 to 1,700 inmates, who have been convicted of a variety of crimes, including murder and other violent misconduct, and some who are awaiting sentencing. Multiple prison gangs are present within the prisoner population. AFGE Local 1298 is the bargaining representative for non-supervisory employees at FCI - Fort Worth.

The primary job of Correctional Officers is security, as reflected in the GS-007-07 Senior Officer position description which provides, in part, that a Correctional Officer "remains constantly alert." The Senior Correctional Officer Position Description states, in part, that an employee in such position:

(i)s subject to being in such hostile or life-threatening situations as riots, assaults and escape attempts. Exercises sound judgment in making instantaneous decisions affecting life, well-being, civil liberties and property ...

Correctional Officers must be aware of their surroundings and inmate attitude, identification, association and behavior at all times when in the facility to maintain security and prevent injury, or worse, to themselves and inmates. Correctional Officers' responsibilities begin as soon as they enter the institution, whether they are at their assigned posts or not. They must respond to any emergencies and, if they observe anything unusual, they are required to report it to a supervisor immediately regardless of whether they are on or off-duty.

Correctional Officers need radios, batteries and other equipment which is vital to communication, security and safety. All posts have a radio, which contain a body alarm that can be activated in case of emergency. The batteries that power the radios hold a charge for four or five hours. Before battery chargers were installed on most posts during the summer of 2006, Correctional Officers frequently picked up extra batteries at the Control Center to make sure their radios would function at all times. Although handcuffs are not required for many of the posts worked by Correctional Officers, some of them pick up handcuffs at the Control Center to have available if needed. Correctional Officers are sometimes required to pick up other equipment, such as flashlights, equipment/key chits, detail pouches, and weapons in the case of employees assigned to Perimeter Patrol, to exchange with the outgoing officer at shift change. Some posts are required to pick up and/or return paperwork, such as out-count forms and daily security sheets for the

Powerhouse, at the Control Center. Morning Watch Officers are required to pick up wake-up lists and bed-book count breakdowns for their units, and each night a bed-book audit is required to ensure accurate inmate counts. Correctional Officers also must flip accountability chits when entering FCI-Fort Worth to begin work and when leaving the institution, so the Agency knows which employees are inside the institution.

Correctional Officers are assigned to a variety of posts, at different locations, within FCI-Fort Worth such as the Control Center, the Powerhouse, Jail Control, the Special Housing Unit, Housing, the Compound and the Perimeter. Correctional Officers and others who work or have worked Control Center, the Powerhouse, the Compound, Housing Units, Jail Control, SHU2 and Perimeter posts testified as to various activities performed before and after their assigned shifts and for which they are not compensated. Officer Reginald Hayes testified that he often has worked in the Control Center since 2005. According to Officer Hayes, it takes five (5) to seven (7) minutes for him to be processed through the metal detector, which procedure began in early 2008. Officer Hayes stated he enters the Control Center about fifteen (15) minutes before his shift begins and that he begins working immediately, handing out keys, being briefed by the outgoing Officer, exchanging keys and visually inventorying all equipment maintained in the Control Center. Officer Hayes also testified that, although his relief generally arrives about fifteen (15) minutes before the end of Officer Hayes' shift, Officer Hayes still exits approximately ten (10) minutes after the end of his shift because he exchanges information and equipment with the in-coming relief officer.

Officer Gregory Watt, who also has worked in the Control Center, testified to a pre- and post-shift process similar to that described by Officer Hayes. Officer Watt likewise testified that he arrived ten (10) or fifteen (15) minutes before his shift began, and that he left his post ten (10) or fifteen (15) minutes after it ended. Officer Nick Girgenti's testimony about working in the Control Center was very similar to that of Officers Hayes and Watt, although Officer Girgenti testified he arrived twelve (12) or fifteen (15) minutes before his shift begins, and that he left his post five (5) to ten (10) minutes after it ended.

Powerhouse Operators David Mott and Michael Finn testified as to the uncompensated pre- and post-shift activities they normally perform. Officer Mott, who has worked all three (3) Powerhouse shifts, testified that it generally takes him fifteen (15) to twenty (20) minutes to be processed through the Control Center and walk to the Powerhouse so that he can reach his post at his actual shift starting time. Officer Mott also stated that, on average, he and other outgoing officers leave the Powerhouse five (5)

minutes after the end of the shift. Officer Finn testified to similar procedures and timing involved in being processed through the Control Center and getting to his post by the time his shift starts, and stated that he spends a total of thirty (30) to forty (40) minutes daily performing such activities. Officer Finn also stated that Powerhouse Operators were issued 24-hour keys, allowing them access through various security gates inside the institution, in November 2005, and that prior to that time the Powerhouse Operators were on an overlap shift because they had to pick up and then drop off keys at the Control Center.

Officer Watt also has worked the Compound Officer post. Although the Compound Officer post is a "roaming" post, Officer Watt testified that he arrived at the institution about ten (10) minutes before his shift began, picked up equipment at the Control Center and spoke with the on-duty Control Center officer to find out where the on-duty Compound officer is located. Officer Watt then proceeded to that officer's location, where they would exchange equipment and information, with the outgoing officer leaving his post ten (10) to fifteen (15) minutes after its end. According to Officer Watt, the in-coming relief officer would go through a similar procedure prior to relieving Officer Watt at the end of his shift, and Officer Watt generally would exit the Control Center fifteen (15) minutes after his shift had ended.

Officer Watt has worked as a Housing Officer since 2005. With regard to that post, Officer Watt stated that he arrives and begins picking up equipment in the Control Center approximately ten (10) minutes before his shift begins, and that typically he exits the housing unit five (5) to ten (10) minutes after his shift ends due to exchanging information and equipment with the officer relieving him. After retuning equipment at the Control Center, Officer Watt testified he exits the institution ten (10) or fifteen (15) minutes after his shift ends.

Officers Hayes and Watt also testified about uncompensated pre- and post-shift activities performed while working the Jail Control Post. They testified that they arrived approximately fifteen (15) and ten (10), respectively, minutes prior to the start of their shifts to arrive at their posts, and exchange limited equipment (as the Jail Control Post maintains much of the necessary equipment, and is like a mini-Control Center) and information with the outgoing officer, who generally leaves the post five (5) or ten (10) minutes after the end of his shift. When being relieved by the in-coming officer, Officer Hayes testified that he leaves the post five (5) or ten (10) minutes after his shift ends, walks to the Control sallyport, flips his accountability chit and exits the institution approximately five (5) minutes later. Officer Watt described a similar exit from the institution which, he testified, takes five

(5) minutes. Officer Hayes' testimony indicated that he spends a total of twenty-five (25) to thirty (30) minutes of uncompensated pre- and post-shift activities each day; Officer Watt's testimony indicated that he spends a total of twenty (20) to twenty-five (25) minutes in such activities.

Officer Girgenti also has worked SHU posts. The SHU 1 post has 24 hour equipment, but SHU 2 does not. When working SHU 2, Officer Girgenti testified, he spends twenty (20) to thirty (30) minutes per work day performing uncompensated activities such as picking up equipment at Jail Control including an extra battery, as the SHU posts do not have a battery charger, and exchanging information and equipment with the outgoing officer, activities which he performs in reverse at the end of his shift.

Officer Watt testified about the Perimeter post, a 24-hour post with straight eight (8) hour shifts. Officer Watt stated that he arrives about five (5) minutes before his shift begins and, with the outgoing officer he is releasing, travels to the weapon clearing barrel on the other side of the parking lot. He then clears the weapons and removes and counts the rounds, ensuring that the inventory sheets match, in the presence of the outgoing officer. Officer Watt also visually inspects equipment (such as radio, keys, logbook, and so on) and the vehicle he will use, and he is briefed by the outgoing officer. This process also occurs when Officer Watt's shift ends and, he testified, he normally leaves the Perimeter post fifteen (15) to twenty (20) minutes after his shift ends.

Management has instructed employees not to work before, or after, their regularly scheduled shifts and has advised them to contact the Operations Lieutenant immediately if they are not relieved of duty at the conclusion of their shift. Yet Management is able to observe employees working before and after their shifts; the employees' pre- and post-shift presence within the institution also can be determined by looking at the accountability chit board. Although Supervisors do not necessarily observe shift changes between Correctional Officers, the frequency and regularity of the type of pre- and post-shift work about which the Union's witnesses testified suggests that Supervisors were aware or should have been aware that such work was occurring yet did not stop it. While a 2002 Bureau of Prisons directive provided that employees who picked up equipment at the Control Center "shall have their shifts scheduled to include reasonable time to travel" and that "schedules may have to be adjusted and shifts overlapped for posts which require relief," nevertheless Management has eliminated overlapping shifts at FCI-Fort Worth, for the most part. As of the time of the Hearings, only DW Housing and Lock Shop posts had overlapping shifts at FCI-Fort Worth.

The evidence indicated that the Agency pays overtime only in 15 minute increments. Officer Gilbreath testified that he once requested overtime for working approximately ten (10) minutes after his shift ended. According to Officer Gilbreath, both the Lieutenant and Captain refused his request for overtime, and the Warden offered to approve overtime if Officer Gilbreath identified his colleague who relieved him late, so that employee's pay could be docked. Powerhouse David Mott related an incident in which he believed he had been denied overtime when he was relieved a half-hour late, but other evidence indicated that he, in fact, had been compensated for such overtime.

The instant grievance was initiated on November 20, 2006, alleging violations of the Master Agreement, the Fair Labor Standards Act, and OPM regulations. The violations alleged state as follows:

From October 31, 2003, as well as before, and continuing and ongoing to the present the Agency is requiring bargaining unit employees currently classified as FLSA non-exempt, to perform work prior to and after their shifts. The Agency requires certain unit employees to perform work prior to the start of their tour of duty, such as obtaining equipment, exchanging information, etc. as well as after the completion of their tour of duty, such as returning equipment, exchanging information, etc. The employees have been performing work for the benefit of the agency during this pre and post-shift time yet it has not paid them for this work time. As a result, management has violated the rights of these employees set forth under the articles and laws referenced in paragraph 5 above.

To resolve a national grievance concerning shift starting and ending times, which was filed in 1995, the Agency paid a multi-million dollar settlement and issued various policies concerning portal-to-portal matters. On September 26, 2005, the parties entered into a Settlement Agreement to resolve certain to "portal to portal and lunch relief claims" at the FCI – Fort Worth.

THE ARGUMENTS

Prior Settlement Agreement¹

By a Settlement Agreement signed on September 26, 2005, the Agency agreed to pay "each bargaining unit employee **as defined in this agreement** a one-time payment of

¹ The Union suggests that the Agency has waived this issue, and that it should have been raised and briefed pre-Hearing rather than during the Hearing. Waiver is generally defined as a voluntary relinquishment or abandonment of a legal right, and requires that the party alleged to have waived such right not only have knowledge of the right but also intend to forego the right. In this Arbitrator's opinion, the Agency raising this issue at the outset of the Hearings, rather than pre-Hearing, does not constitute waiver.

\$1,200.00 (less applicable taxes and deductions) in full and final settlement of all past and present portal to portal and lunch relief claims". (Emphasis added). The employees who were to receive the payment were defined in paragraph 2 of the Settlement Agreement, which states as follows:

The parties agree that this agreement applies solely to staff in the following positions as of January 9, 2005 (pay period #1 of pay year 2005):
correctional officers assigned to the Correctional Services Department, the two dental assistants, and those practical/clinical nurses assigned to the institution inmate outpatient clinic.

The Union recognizes that the Settlement Agreement applies to Corrections Department, dental assistants and nurse, and contends that if the recovery period for such employees is to be limited at all, the instant grievance should run from January 9, 2005, the date identified in paragraph 2 of the Settlement Agreement, to the present. The Agency counters that January 9, 2005 refers to the date as of which the employees referred to in paragraph 2 had to be employed, in order to receive the settlement payment discussed in paragraph 1 of the Settlement Agreement.

Former Local President Warren Crockett testified that January 9, 2005 was the date the settlement was reached with then-Warden Cole Jeter. However, he also stated that the Settlement Agreement was not signed until some eight (8) months later, because:

* * * It's just that I didn't like the language, so I kept kicking it back. And then he had other parties that he had to take care of, that he had to do. And finally in September, we were able to put ink to paper and put this behind us.

Transcript ("Tr.") at p. 24, lines 15-19.

Employee Services Manager Mark Lowe, who was the Agency's primary negotiator for the Settlement Agreement, testified that no settlement was reached until after the grievance underlying the Settlement Agreement had been filed and after arbitration thereof was invoked. According to Employee Services Manager Lowe:

(T)he parties were then preparing to set up for an arbitration hearing. Around that time, the parties then started talking about potential settlement. It was an ongoing process between (Former Local President Crockett) and I on several occasions. We met to discuss, would the parties be willing to settle, and if so, what the terms would be. And after several very intense, fruitful sessions, we came up with compromised language which resulted in the Settlement Agreement dated September 2005.

Tr. at p. 36, lines 10-19.

The evidence persuades the undersigned that, although the Parties may have discussed the issue earlier, the final terms of settlement were not agreed to until September 26, 2005. Moreover, the language of paragraph 2 of the Settlement Agreement makes clear that it will apply:

* * * solely to staff in the following positions **as of January 9, 2005** * * *
(emphasis added).

In light of that language, and inasmuch as the grievance underlying the Settlement Agreement was not filed until June 7, 2005, and the terms of the Settlement Agreement were not finalized until September 26, 2005, this Arbitrator concludes that the recovery period for the instant grievance could not have begun on January 9, 2005 as the Union asserts. Rather, this Arbitrator concludes that, as set forth in the Settlement Agreement dated September 26, 2005, the grievance recovery period herein for the Corrections Department, dental assistants and nurse employed as of January 9, 2005, runs from September 26, 2005. However, this Arbitrator finds that this limitation does not apply to other employees not identified in paragraph 2 of the Settlement Agreement. Rather, the clear terms of the Settlement Agreement demonstrate that only those employees in the Correctional Services Department, the two dental assistants, and those practical/clinical nurses assigned to the institution inmate outpatient clinic as of January 9, 2005 are to be affected. As to all other employees, the FLSA statute of limitations applies.

Compensation for Pre- and Post-Shift Activities

This dispute concerns whether employees must be compensated for pre- and post-shift activities. This grievance is not the first time the Parties have grappled with the issues presented herein. A nationwide grievance filed in May of 1995 addressed shift starting and stopping times. To settle that matter, the Agency ultimately paid a multi-million dollar settlement and issued certain policies designed to comply with the Portal-to-Portal Act. For example, Policy 3000.02, Section 610.1 gave institutions specific information about shift starting and stopping times which was intended to comply with court decisions. That Policy states that waiting in line for keys is not considered "work time" but gives institutions the option of assigning equipment and keys to posts, if appropriate, in order to reduce the time employees spend waiting in lines. FCI-Fort Worth exercised this option with some of its Correctional Officer Posts. Yet the evidence presented in the instant grievance indicates that, despite the policies announced by the Agency, yet some Correctional Officers still must engage in certain pre- and post-shift activities in order to fulfill their job duties.

The FLSA, implemented through and administered by the Office of Personnel Management (“OPM”) in the federal sector, generally requires that the Bureau pay overtime at a rate of one and one-half times the employee’s regular rate of pay for time worked in excess of eight (8) hours per day or forty (40) per workweek. The Supreme Court broadly construes “work” to include mental or physical exertion that is controlled or required by the employer, and which is performed for the benefit of the employer and its business. See **Tennessee Coal, Iron & R.R.Co. v. Muscoda Local 123**, 321 U.S. 590, 598 (1944). It is well established that the term “principal activity or activities” embraces all activities that are an “integral and indispensable part” of the principal activities. **Steiner v. Mitchell**, 350 U.S. 247, 252-53 (1956). As noted by the Fifth Circuit in **Dunlop v. City Electric, Inc.**, 527 F.3d 394 (1976):

* * * it is not only an employee’s single predominant principal activity (and activities indispensable to it) which are compensable under the F.L.S.A., but rather **all principal activities and any tasks incidental to them**. By narrowly defining the principal activity of the employees in the instant case as that of “installing and repairing electrical wiring”, the district court severely limited the range of potentially compensable activities, thus committing the precise error which Congress sought to avoid in its careful wording of the statute. Such a restrictive characterization of the employees’ principal activities is neither consistent with the legislative history of the Portal-to-Portal Act nor compelled by cases construing it. (Emphasis added).

In **IBP Inc. v. Alvarez**, 546 U.S. at 37, the Supreme Court instructs that any activity that is “integral and indispensable” to a “principal activity” is, itself, a principal activity that must be compensated under the FLSA. Some of the factors used to determine whether an activity is “integral and indispensable” to a principal activity include whether the activity is made necessary by the nature of the work performed by the employee; the activity is undertaken primarily for the employer’s benefit; the employer knew or should reasonably have known that the activity was being performed; and the activity was controlled or required by the employer. In this Arbitrator’s opinion, the pre- and post-shift activities described by the Union’s witnesses satisfy these criteria.

Although the Portal-to-Portal Act, 29 U.S.C. § 251 *et seq.* provides a limited exception for so-called “travel time”² and other activities that occurred preliminary and

² In any event, the evidence leads this Arbitrator to conclude that “travel time” in a dangerous prison setting should not be compared to the non-compensable “travel time” identified in 29 U.S.C. § 254(a).

postliminary to the employee's workday, yet the Supreme Court has held that during an employee's continuous workday,

* * * any walking time that occurs after the beginning of the employee's first principal activity and before the end of the employee's last principal activity * * * is covered by the FLSA.

IBP Inc. v. Alvarez, 546 U.S. 21, 37 (2005).

Thus, it is now clear that an employee's continuous workday begins as soon as an "integral and indispensable" activity occurs, and all activities that occur between the first and last such activity are compensable. As the Union points out, this also has been recognized by the Department of Labor Wage & Hour in its Advisory Memorandum issued post-*Alvarez* (2006-2, May 31, 2006), which states that:

"time spent after the beginning of the first principal activity, including time spent walking is not affected by section 4(a) of the Portal-to-Portal Act, 29 U.S.C. § 254(a), and is therefore compensable.

Having carefully considered the evidence, the well-crafted arguments of counsel and the authorities submitted by the Parties – including, but not limited to, their Master Agreement, the FLSA, OPM and other regulations and case law implementing the FLSA, this Arbitrator concludes that the Union's witnesses indeed performed compensable "work" before and after their scheduled shift and that, in accordance with the FLSA, they should be compensated for that work. This Arbitrator is persuaded that the Correctional Officers' "continuous workdays" begin when they pick up equipment which, the evidence demonstrated, is integral and indispensable to the principal activity for which they are employed and which activity is performed primarily for the Agency's benefit and necessary to its business of operating FCI-Fort Worth. Further, the Correctional Officers' "continuous workdays" end when such equipment is returned after their scheduled shifts have ended. Such equipment includes but is not limited to spare batteries, handcuffs, flashlights, detail pouches, chits, paperwork and keys. This conclusion is reinforced by the witnesses' testimony that, from the moment they enter the institution, they must be constantly alert and vigilant to prevent³ any life-threatening or hostile situations that can arise in a correctional facility such as FCI-Fort Worth.

³ The Agency asserts that such incidents are rare. While this may be true, nevertheless a prison environment housing inmates like those at FCI-Fort Worth presents an ever-present possibility of violence or other emergency situations that will require immediate action.

Computing Time to be Compensated

The Grievants are not required to compute the exact amount of uncompensated pre- and post-shift work they performed. Yet their testimony indicates that such activities fell within certain ranges of time varying, by witness and by post, between 17 and 40 minutes per shift. Inasmuch as the Parties have agreed to attempt to resolve some remaining issues in light of this Interim Award, including backpay calculations and attorneys' fees, it makes sense to this Arbitrator to give the Parties the opportunity to resolve these computations as well.

De Minimus Defense

Under certain circumstances, out-of-shift work that takes ten (10) minutes or less can be termed "*de minimus* overtime" and the controlling regulation, 5 C.F.R. § 9,112(b)(1)(i) implies that such work need not be compensated. **See *Bishop v. United States***, 74 Fed. Cl. 144, 2006 U.S. Claims LEXIS 380 at **12 -**13, and cases cited therein. Yet, as the ***Bishop*** court notes,

There is not a hard and fast rule as to what constitutes *de minimis* overtime. Factors include: '(1) the practical administrative difficulty of recording additional time; (2) the aggregate amount of compensable time; and (3) the regularity of the work.' *Id.*, citing ***Bobo v. United States***, 136 F.3d 1468 (Fed. Cir. 1998) (quoting ***Lindow v. United States***, 738 F.2d 1057, 1063 (9th Cir. 1984))

The evidence did not indicate that the Agency will encounter much, if any, administrative difficulty in recording this time. Additionally, the evidence demonstrated that the pre- and post-shift activities at issue in the instant grievance are performed on a daily, repetitive and regular basis. Moreover, since the witnesses' continuous workdays begin when they pick up equipment, all activities performed thereafter constitute "work" for which they are entitled to compensation. Thus, in this Arbitrator's opinion, the *de minimus* rule does not apply herein.

Liquidated Damages

The evidence persuades the undersigned that an award of liquidated damages, which are compensatory rather than punitive in nature, is warranted per 29 U.S.C. § 216(b). The limited defense to such damages requires that the employer show good faith and reasonable grounds for believing that it was not violating the FLSA. Although the evidence indicates that the Agency took some steps toward FLSA compliance, such as installing

battery chargers on some posts and issuing some employees 24-hour equipment, including keys, yet Management knew or should have known that employees had to arrive at the institution early in order to reach their posts by their assigned shift start time, and that they were not able to exit the institution at the time their shifts ended. Thus, Management knew or should have known that employees in fact were "working" while performing pre- and post-shift activities. Moreover, although Wardens Tamez and Jeter issued Memoranda in 2008 advising employees not to work outside of their scheduled duty hours without supervisory approval, yet the evidence indicated that these Memoranda were not enforced. As noted in *Chao v. Gotham Registry, Inc.*, 2008 U.S. App. LEXIS 1327, *16-*17 (2d Cir. Jan. 24, 2008),

(a)n employer who has knowledge that an employee is working and who does not desire the work be done, has a duty to make every effort to prevent its performance * * * This duty arises even where the employer has not requested the overtime be performed or does not desire the employee to work, or where the employee fails to report his overtime hours.

Thus, the undersigned concludes that the Agency "suffered or permitted [the Union's witnesses] to work" within the meaning of 5 C.F.R. § 551.104. In addition, it seems to this Arbitrator that when the Agency abolished most of the 15-minute overlapping shifts previously in effect, it should have realized that such action would impact the employees' ability to perform all necessary work activities within the shortened shift time. Therefore, the undersigned concludes that an award of liquidated damages is appropriate.

Extending Statute of Limitations

Nevertheless, the evidence did not persuade this Arbitrator that the Agency willfully and recklessly disregarded the FLSA's overtime provisions so as to warrant extending the statute of limitations to three (3) years. As noted above, the Agency fact took some action to comply with the FLSA although such efforts were not successful. Specific Post Orders direct that, with regard to shift changes, the departing officer is to document all pertinent information and equipment discrepancies in the log book thirty (30) minutes prior to the end of the shift, while reporting officers are directed to conduct an inventory of all keys and equipment within the first thirty (30) minutes of their shift, to speed up shift changes. Additionally, the institution has instructed employees not to work beyond their regularly scheduled shifts, and to contact the Operations Lieutenant immediately if they are not relieved of duty at the conclusion of their shift. Although these directives do not appear to

be monitored by Management -- or to be effective in practice -- yet they reflect some attempt to minimize pre- and post-shift work.

Moreover, the evidence demonstrated that the Parties have been dealing with these types of issues for many years, and section 3 of the Parties' September 26, 2005 provides as follows:

The Union agrees to immediately notify the Employer of any subsequent allegations of employees performing work while in a non-pay status (e.g. portal to portal and/or lunch relief violations) so the Employer may address such allegations prior to the filing of any formal grievance or other third-party actions on the part of the Union.

While the Union's delay, if any, in bringing the underlying issues to Management's attention does not absolve the Agency of liability under the FLSA, yet the above-cited provision of the Settlement Agreement reflects the Agency's recognition and agreement that similar issues might be resolved without the necessity of a grievance which, in the undersigned's opinion, does not indicate willful or reckless disregard. Therefore, the grievance period for bargaining unit employees other than those identified in the September 26, 2005 Settlement Agreement runs from November 20, 2004. Yet this Arbitrator observes that, had the evidence indicated other incidents similar to what Officer Gilbreath testified occurred when he requested overtime, there may have been a different finding as to willful and reckless disregard of the FLSA.

For the reasons hereinabove set forth:


AWARD

The grievance is sustained in part, as follows:

1. The grievance recovery period for the Corrections Department, dental assistants and nurse employed as of January 9, 2005 runs from September 26, 2005 to the present;
2. The grievance period for all other bargaining unit employees runs from November 20, 2004;
3. The FCI-Fort Worth employees' picking up equipment at the Control Center or actual use of 24-hour take home equipment begins such employees' continuous work day, and that work day does not end until the picked-up equipment is returned or upon the last daily use of the 24-hour take home equipment.

4. The Union's witnesses performed uncompensated pre- and post-shift work such as they testified during the Hearings, and the Parties will be given an opportunity to agree, if possible, to an exact amount of such time for each such witness ;
5. The Agency is liable to the Grievants under the FLSA for the amounts of uncompensated pre- and post-shift work time to be determined per paragraph 4, above;
6. The Agency is liable for liquidated damages equal to the Grievants' backpay in accordance with Section 216(b) of the FLSA'
7. The Union is entitled to recover its reasonable attorneys' fees and costs, per Section 216(b) of the FLSA;
8. The Parties will be given sixty (60) days after entry of the Interim Award within which to attempt to resolve any remaining issues including but not limited to other bargaining unit posts and positions, calculation of backpay damage amounts (including amount of time worked by each of the Union's witnesses), and reasonable attorney's fees and costs. If the Parties are not able to agree to such matters by the end of the sixty (60) day period, they may schedule additional Hearing dates to resolve such issues.

Signed this 14th day
of April, 2009, in
Houston, Texas



Lynne M. Gomez
Arbitrator