

IN THE MATTER OF ARBITRATION BETWEEN

FEDERAL BUREAU OF PRISONS,
UNITED STATES PENITENTIARY,
ATWATER, CALIFORNIA

AND

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES (AFGE), LOCAL #1242

FMCS CASE NO. 12-59003

RONALD HOH, ARBITRATOR

APPEARANCES

For Federal Bureau of Prisons:

Steven Simon, Senior Labor Law Attorney
Darrell Waugh, Attorney

For AFGE Local #1242:

Heidi Burakiewicz, Attorney
Pia Winston, Attorney

JURISDICTION

Pursuant to the provisions of their collective bargaining agreement, the above-named parties have submitted this case to the undersigned arbitrator for resolution. The arbitrator was selected by the parties from a list provided by the Federal Mediation and Conciliation Service. The hearing was held on September 24, 25, 26 and 27, 2013 and March 11, 12, 13 and 14, 2014 in Merced and Atwater, California and was completed on the March 14 date. All parties appeared at the hearing and had full opportunity to present evidence and argument in support of their respective positions. There were no procedural issues, and the parties agreed at the beginning of the hearing that this matter was properly before the arbitrator. Upon conclusion of the evidence submitted at the hearing, the parties agreed to file simultaneous written post-hearing briefs and arguments, as well as reply briefs, with the arbitrator. This case was deemed submitted by the arbitrator upon

receipt of the last of those briefs on July 15, 2014.

THE ISSUE

The parties agreed at the hearing to the following description of the issue before the arbitrator:

1. Did the Bureau of Prisons, USP Atwater, suffer or permit bargaining unit employees to perform work before and after their scheduled shifts without compensation in violation of the Fair Labor Standards Act and the parties' Master Agreement?
2. If so, what shall be the remedy?

RELEVANT PROVISIONS OF THE CONTRACT, INSTITUTIONAL SUPPLEMENT, NEGOTIATED PORTAL TO PORTAL PROVISIONS, AND GENERAL POST ORDERS

CONTRACT

ARTICLE 3 - GOVERNMENT REGULATIONS

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

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

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

ARTICLE 6 - RIGHTS OF THE EMPLOYEE

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

NATIONAL NEGOTIATED PORTAL TO PORTAL POLICY

SECTION 2 - COVERAGE

This section applies to all institution employees who are required to pick up keys or other equipment while passing through Control on their way to their assigned duty post.

SECTION 3 - CRITERIA

Each institution shall have approved work schedules with the shift starting and stopping times, for employees who work at the institution, to begin and end at the point employees pick-up and drop-off equipment (keys, radios, body alarms, work detail pouches, etc.) at the Control Center. Therefore, employees who pick-up equipment at the Control Center, shall have their shifts scheduled to include reasonable time to travel from the Control Center to their assigned duty post and return (at the end of the shift).

LOCAL NEGOTIATED PORTAL TO PORTAL POLICY

SECTION VI - GENERAL INFORMATION

For positions that do not require an employee to draw equipment or keys from the Control Center, the appropriate starting and stopping time is at the duty location. Normally, an employee who does not draw equipment or keys should be at his/her duty location at the beginning and end of his/her work day (For) Shift starting and stopping times for employees who must draw equipment or keys from the Control Center, the appropriate starting and stopping time will begin and end at that location. Employees who are drawing keys and/or equipment from the Control Center will be allowed a reasonable amount of time, usually no more than 15 minutes, to travel from the Control Center to their assigned duty location at the beginning of their shift, and a reasonable amount of time, usually no more than 15 minutes, to travel from their duty location to the Control Center at the end of their shift...

SECTION VIII - F: CLAIMS FOR COMPENSATION

If at any time an employee believes he/she may be entitled to overtime under the provisions of this supplement, he/she must notify his/her supervisor in writing using the approved overtime form as soon as possible, but not later than 30 calendar days.

LOCAL SUPPLEMENTAL AGREEMENT

SECTION A: The Employer and Union agree to jointly support and enforce the provisions of the current Master Agreement, Local Supplement Agreement and any items which are mutually agreed to in Local Labor Management Relations meetings.

HRM MANUAL SECTION 601.1 - INSTITUTION STARTING AND STOPPING TIMES

SECTION 7 - GENERAL INFORMATION

For positions that do not require an employee to draw equipment or keys from the Control Center, the appropriate starting and stopping time is at the duty location. Normally, an employee who does not draw equipment or keys should be at his/her usual duty location at the beginning and end of his/her work day.

Shift starting and stopping times for employees who must draw equipment or keys from the Control Center will begin and end at that location. Employees who are drawing keys and/or

equipment from the Control Center will be allowed a reasonable amount of time to travel from the Control Center to their assigned duty location at the beginning of their shift and a reasonable amount of time to travel from their duty location to the Control Center at the end of their shift.

For example, an employee who must draw equipment or keys from the Control Center whose shift starts at 7:30 AM must be at the Control Center to draw his/her equipment or keys no later than 7:30 AM to be considered "on time" for the start of his/her shift. When that employee's shift ends at 4:00 PM, he/she should be at the Control Center to drop off any equipment or keys by 4:00 PM, the schedule stopping time.

For employees involved in relieving other employees at the duty location and who do not draw equipment at the Control Center, but instead exchange keys and/or equipment on the duty location, the starting and stopping time will be at the duty location. For instance, Unit 13 day watch (6:00 AM - 2:00 PM) officer relieves the morning watch (10:00 PM - 6:00 AM) officer at 6:00 AM on the duty location.

In order to reduce the key line at the Control Center, starting and stopping times will be staggered for various departments. In some cases, rosters for some departments may contain a variety of starting and stopping times, which must be followed. An Associate Warden (AW) will be delegated responsibility to approve all schedules.

Those departments with rosters will be reviewed as the roster expires. Any changes of starting and stopping times to rosters will be provided to the bargaining unit representatives at least 30 days prior to implementation to resolve any I&I issues. Post orders will be revised to be consistent with this Supplement and the consequent roster for that department.

Agency policy in that area further provides on Page 7, Section (6)(a) of the HRM Manual that "Reasonable travel time to and from the duty post to the Control Center would be compensable as part of the employee's tour of duty;" and in Section 6(b) that "...schedules may have to be adjusted and shifts overlapped for posts which require relief, as employees must be given time to arrive later and leave posts earlier to be at the Control Center on time. The length of time necessary to provide the overlap depends on the post location and the reasonable travel time to and from the Control Center to that post."

GENERAL POST ORDERS - CORRECTIONAL SERVICES

RESPONSIBILITIES OF CORRECTIONAL OFFICERS

PAGE 6 - EMERGENCY RESPONSE

1. INTRODUCTION

During a routine day, at any given time, without any notice or warning, an emergency may occur. Depending on the emergency, all available staff will respond. If you are the first responder to arrive at the emergency, you must take immediate action. The action you take will depend on the type of emergency.

2. ANNOUNCEMENT / NOTIFICATION

Once staff are alerted of an emergency situation, they must immediately take action. Staff can be notified by one of the following:

A. RADIO

All staff members working a correctional post should have a hand-held radio. Additional staff can be alerted that an emergency is occurring by contacting the Control Center via your hand-held radio. The person requesting assistance should, if possible, notify the Control Center Officer of all pertinent information (i.e. type of emergency, number of inmates involved, weapons, etc.).

B. BODY ALARM

Assigned post radios have body alarms that will alert the Control Center Officer of required assistance in your area. To activate the body alarm, press the orange button on the top of your hand-held radio. This will set off an alarm in the Control Center. You will have an "open microphone" for a few seconds. If possible, utilize this "open microphone" to relay pertinent information that will assist the Control Center Officer when notifying additional staff.

PAGE 19 - PERFORMANCE AND CONDUCT ON POST

It is the responsibility of each officer to report in with the lieutenant and to be on your assigned post at the start of your assigned shift. Keys and equipment assigned to a post which is manned 24 hours will be accounted for with a 24 hour issue chit and post assignment title chit on the designated key hook in the Control Center. Staff assigned to these posts shall account for their keys and equipment by indicating in the post log books the key ring number and type of equipment. These staff will not be required to place a personal chit on the appropriate key hook in the Control Center. When you begin your shift, receive pertinent information from the officer you are relieving and by reviewing the Unit Log Book. Familiarize yourself with the post and, when relieved, pass on important information to your relief which might effect his/her shift.

As department staff members arrive, they are required to report to the Lieutenant's Office for direction. The Activities Lieutenant will assign staff as needed to assist in overseeing the feeding of the meal, supervising inmate movement within the secure corridors and providing perimeter patrol procedures.

PROCEDURAL HISTORY

Initially in this case, although the parties did agree that each of their cases would require four hearing days before the arbitrator, they were unable to agree prior to the start of the hearing here upon the amount of time that would elapse between the completion of the Union's case and the beginning of the Agency's case – and specifically whether that elapsed time period would be one week or two weeks.

Subsequent to receipt of written arguments by the parties in this area, the arbitrator determined, by written decision of March 8, 2013 consistent with the Agency's argument, that there would be a nearly two week interlude between the presentation of those cases, and that the Agency's case would be presented beginning on October 8, 2013.¹

In addition, the Agency filed a "Motion to Dismiss on Threshold Issues" on March 25, 2013, contending that the grievance should be dismissed on claimed threshold issues related to: 1) lack of contractually required informal resolution of efforts; 2) delays in invocation of arbitration; 3) a claim that the grievance improperly presented national issues at the local level; and 4) a claim that the grievance was "inconsistent with binding contractual obligations to promptly raise all wage and hour claims."

¹ Due to the federal government shutdown because of Congressional inability to agree on a budget beginning with the new fiscal year starting on October 1, 2013 and continuing throughout the four originally scheduled days of the Agency presentation, the Agency ultimately did not begin its presentation in this case until March 11, 2014.

After receiving the written arguments of the parties concerning that Motion, the arbitrator denied that Motion in a sixteen page Decision dated April 25, 2013; and further determined that the potential employee recovery period in this grievance was that set forth in the Fair Labor Standards Act - 29 USC Section 255(a) et. seq. (hereinafter FLSA) – rather than that set forth in Article 21 of the contract.

In a previous portal case involving the same parties as those involved here, Arbitrator Calhoun awarded thirty minutes of overtime per work day for classifications in dispute in that case in his decision dated September 18, 2008. That Calhoun decision found, inter alia, that when an employee picked up a battery at the Control Center, that was a compensable task that began that employee's work day. That decision was affirmed by the Federal Labor Relations Authority (hereinafter FLRA) on May 27, 2010.

This grievance was filed on January 25, 2010 alleging a Prison violation of the FLSA portal to portal provisions, and to recover overtime pay for bargaining unit employees performing work before and/or after their scheduled shift start and stop times, for the period of September 18, 2008 through the date of the grievance, liquidated damages equal to the employees' back pay, and attorneys fees and costs.

The parties agreed at the hearing to bifurcate this case before the arbitrator to address only the liability, if any, concerning work time before and after the employees' regular shifts, and not to have determined in this proceeding any actual total amounts of overtime owed, whether Agency action was "willful" under the FLSA, any liquidation damages due, and/or any attorney's fees that might be owed under the federal Back Pay Act.

FACTUAL BACKGROUND

The Federal Bureau of Prisons (hereinafter Agency), United States Penitentiary, Atwater, California (hereinafter Prison of Facility) is a maximum security federal prison and lower security

satellite camp, which houses about 1,400 inmates in the Prison maximum security area and about 130 in the camp. The Facility houses the worst of the federal prison inmates, with the majority of such inmate serving life sentences. American Federation of Government Employees, Local #1242 (hereinafter Union) represents about 226 non-supervisory correctional services employees up to the rank of lieutenant, and the majority of non-correctional, non-supervisory, non-custody Prison positions. The Facility has a total of twelve housing units in six separate buildings, including a Special Housing Unit for particularly dangerous inmates and those requiring protective custody, which are all staffed on a 24 hours per day, seven days per week basis. In the regular Prison Housing Units, there is normally one correctional officer per Housing Unit per shift, who is in charge of an average of 132 inmates within that unit. The Union also represents non-supervisory Prison employees in non-custody positions, including among others recreation, case management, education, food service, correctional services, special investigations, and unit management.

The parties stipulated at the hearing that: 1) safety and security of the inmates and staff is the primary job duty of all Prison employees; 2) there is a necessity for alertness and vigilance by all officers and employees once inside of the secured area of the Prison where inmates may be encountered; and 3) actual violence can and has occurred anywhere in the Prison. It is further largely undisputed: 1) that inmate violence is common; 2) that correctional officer position descriptions indicate that such officers are "subject to such hostile or life threatening situations as riots, assaults and escape attempts;" 3) that Agency policy prohibits lethal weapons inside of correctional institutions where inmates are present except in emergency escape attempts or riot situations; 4) that the Prison houses many inmates who are part of volatile race-based gangs; and 5) that violence within the prison is common due to many different factors in the Prison.

The parties placed before the arbitrator as a Joint Exhibit the Prison's "General Post Orders - Responsibilities of Correctional Officers," last revised on January 1, 2012. That Exhibit, set forth

in pertinent part on Page 5, infra, provides that: 1) "It is the responsibility of each officer to report in with the Lieutenant and to be on your assigned post at the start of your assigned shift; 2) when you begin your shift, receive pertinent information from the officer you are relieving and by reviewing the Unit Log Book; 3) "...when relieved, pass on important information to your relief which might effect his/her shift; and 4) "as department staff members arrive, they are required to report to the Lieutenant's Office for direction." The parties also introduced as Joint Exhibits portions of the Prison's negotiated Portal to Portal provisions, resulting both from local and national level negotiations, set forth on Pages 2 and 3, infra. Those documents provide in pertinent part that, for positions not requiring an employee to draw equipment and keys from the Prison Control Center, when beginning work they are to be at their duty location at the beginning and ending time of their shifts, while employees drawing such keys and equipment from the Control Center are to begin and end their shifts at that Control Center location.

The Agency through its witnesses made several references to certain claimed updated Post Orders for positions at issue in this proceeding. They had not, however, previously provided such claimed Post Order updates to the Union prior to the hearing despite repeated requests and as ordered by the arbitrator in this proceeding.

A. FACTUAL CIRCUMSTANCES APPLICABLE TO ALL DISPUTED POSITIONS

Upon arrival at the Prison, employees subsequent to going through a metal detector next arrive at the Control Center. The Control Center regulates all traffic that enters into and goes out of the Prison secured areas, issues equipment to key line staff, maintains batteries and radios, and operates all security portal doors and sliders. Equipment picked up at the Control Center – which normally includes keys, radios, pepper spray and sometimes other equipment – requires an exchange of chits for such equipment. The Control Center also operates about 100 secured doors in the Prison, including the Rear Gate.

Among the equipment provided to most bargaining unit employees at the Control Center is a two-way radio, which both parties agree is the unit employee's communication lifeline essential to the safety and security of the correctional officer. Union witnesses testified that virtually all bargaining unit employees, and particularly those receiving their equipment and keys at the Control Center prior to going to their posts, received a charged battery for such radios at the Control Center. That testimony further indicated that, at least until battery chargers were installed at the posts in January, 2013, those batteries often gave out during the shift, and it was necessary to have the on-duty Compound Officer bring a charged battery to the post during the shift; and such used batteries were then dropped off at the Control Center at the time of the employee's departure from the Prison.

Agency witness Lieutenants provided varying testimony in this area. One said that Compound Officers always since 2008 have taken replacement batteries to bargaining unit employees at Housing Units when necessary during their shifts. Another testified that he had never seen any officer on day shift carrying batteries to/from the units. A third stated that 24 hour post Housing Unit officers at roll call and staff meetings were told not to pick up batteries at the Control Center. No bargaining unit employee has ever been disciplined for picking up or returning a battery at the Control Center. Subsequent to the installation of battery chargers in the units, bargaining unit employees generally no longer picked up batteries at the Control Center.

The Operations Lieutenant has the authority to change the scheduled assignment of a particular employee prior to and at the start of that employee's shift. The Operation Lieutenant's Office is located immediately after the Control Center where virtually all employees come to work.

Union witnesses testified that, subsequent to leaving the Control Center and prior to when entering into the secured Main Corridor of the Prison, they normally stopped at the Operations Lieutenant's Office on the way to their posts to exchange information and learn of any assignment

changes, and again to drop off incident reports and communicate information at the end of their shifts – consistent with the pertinent General Post Order in that work area. Facility witnesses testified that employees learned of any assignment change either from the Front Lobby Officer or in the Lieutenant's Office. In at least one situation, a bargaining unit Correctional Officer was told by the Operations Lieutenant, in a situation where that officer initially arrived for work at the wrong post, than he would have known his proper assignment had he checked in as required at the Lieutenant's Office. No bargaining unit employee has ever been disciplined for stopping at the Lieutenant's Office either at the beginning or end of their shifts.

The Prison also maintains a Posted Picture File, which is an electronic file of current inmates who are escape risks, who have assaulted officers, or who have special skills such as the ability to pick locks. There are generally pictures of about one hundred inmates in that File at any one time. Each bargaining unit employee is required to review that File on a monthly basis, and to certify in writing that he/she had done so.

Prior to installation of computer access to such a File at all Prison posts in about March of 2012, bargaining unit employees were required to come to the Lieutenant's Office to review that file – an action that normally took about fifteen minutes each month. At that time, in virtually all circumstances, such review took place either before or after the employee's scheduled shift start/end, in order not to interfere with the employee's regular duties. Subsequent to the installation of computers on the various posts, that review now occurs on the post, normally during the involved employee's regular shift.

Once employees other than the Rear Gate Officer and the Tower 5 Officer clear the Control Center, those employees pass through a secured door into the Main Corridor. With the exception of the morning shift of midnight to 8:00 AM or similar times when no inmates are present, this is the first time officers come upon inmates – normally those involved in Main Corridor cleaning and

related functions, or in movement of inmates to other non-custodial Prison areas. However, violent circumstances and inmate misconduct have occurred in the Main Corridor during such times. Employees are therefore required to be alert and vigilant when entering into and passing through the Main Corridor.

B. TWENTY-FOUR HOUR POSTS - CORRECTIONAL

Many posts at the Prison are staffed 24 hours per day, seven days per week. Those posts have shift starting/stopping times of Midnight to 8:00 AM, 8:00 AM - 4:00 PM, and 4:00 AM to Midnight, with no built-in overlap between shifts. Because keys and equipment are exchanged for each such shift at the posts, officers working such posts are required to be at those posts by no later than their shift starting time. They must therefore don their equipment after going through security and travel to the post site or assignment, in addition to the activities discussed above, prior to their shift starting time. Once on the post or assignment, they exchange information with the employee leaving the post or assignment concerning activities/problems at the post experienced by the off-going officer, and receive the radio and keys in the possession of that off-going officer – which must be checked to assure operational status. At the end of their shifts upon being “properly relieved,” the officers reverse the above tasks. The relieved officer normally then passes on any pertinent information and/or drops off incident report paperwork at the Lieutenant's Office, returns any used batteries to the Control Center, then departs the premises.

(1) HOUSING UNITS

The Prison's eleven Housing Units – the living quarters for inmates – consist of six sets of units, with a middle connecting corridor in each building. Each side of all such buildings is denoted as A (Alpha) or B (Bravo), such as Housing Unit 6 Alpha and Bravo. In part because an inmate count occurs at the shift starting time for the morning and evening watch shifts for such units, Housing Officers must be at their posts at the shift starting times, and may not depart until they are

properly relieved at the beginning of the next shift. By the time the inmate count occurs, officers coming on and leaving their Housing Unit shifts must have completed their exchange of equipment and information on the posts. While it is essentially undisputed that the duties and responsibilities for all housing units and all shifts are the same, the evidence varies between Union and Prison witnesses concerning the time necessary to perform the exchanges of equipment and information once both the on-going and off-coming Correctional Officers are present on the Housing Units. The two Union witnesses who testified stated that the times involved for such actions varied between fifteen and thirty minutes prior to the scheduled shift depending upon its proximity to the Control Center, and departure within ten to fifteen minutes of the scheduled shift end after a good day, with some days totaling one to two hours of time before/after their scheduled shifts if late relief or the necessity to write and file an incident report. They testified that something happens to delay their shift departure to a total of forty-five minutes about 50% of the time. Facility supervisors testified that such shift changes took no more than a few minutes within the Housing unit.

The farthest Housing Unit from the Control Center is at a distance of about one-third of a mile, and once arriving at the Housing Unit front door, oncoming Housing Unit officers must be let into the Housing Unit by the Control Center through a locked door, and then be identified by the current Housing Unit officer before the locked inner door to the unit is opened to allow them entry to that Unit.

According to Prison witness Lieutenant Morgan, when the shift change occurs on the Housing Units, the departing officer merely hands the equipment to the on-coming officer without any chat exchange, and the verbal exchange between these two employees concerning what has occurred in the Housing Unit therefore takes five minutes or less.

(2) CONTROL CENTER #1

The Control Center provides a number of functions vital to the Prison, including monitoring

security cameras, controlling staff and inmate movement, controlling Prison communications, maintaining inmate counts, and maintaining, accounting for, and issuing equipment to staff. The position is staffed 24 hours per day in the normal shift times set forth above.

Upon entering the Control Center, the Control Center #1 position must check the more than one hundred radios and more than two thousand keys to assure that they are accounted for, plus accounting for other equipment such as flashlights and handcuffs. That officer must do so before the officer he/she is relieving leaves the premises, because that relieving officer would be held responsible and potentially subject to discipline if equipment was missing but not discovered until after the relieved officer left the premises. The relieving officer also receives pertinent information concerning such areas as inmate medical trips and inmate inter-unit movement from the officer who is being relieved. Additionally, officers coming on duty at the Control Center must verify that all inmate count paperwork is correct and that it matches other inmate movement records.

Union witness Isho testified that, in completing these functions, she works about fifteen minutes per day beyond her regular shift in the Control Center, and about twenty to thirty minutes more on occasions when there is an inaccurate inmate count.

(3) MAIN CORRIDOR

Main Corridor officers patrol and monitor for anything that happens in the Main Corridor – the area from the inner sally port door to the entrance to the Food Service area. That position is staffed for all three shifts with shift times as set forth above for such 24 hour posts.

According to Union witness Fraguglia, prior to the installation of battery chargers, he obtained a battery from the Control Center about ten to fifteen minutes prior to his scheduled shift start, checked in with the lieutenant, and exchanged information and equipment with the officer he was relieving. He further testified that at the end of his shift upon being relieved, he would return to the Lieutenant's office to check out, submit his count slips to the Control Center, and return his

radio battery by about five to ten minutes after his scheduled shift end. He stated that the only change in the shift exchange functions resulting from the time of the installation of battery chargers was that he was no longer required to obtain or return batteries to the Control Center.

(4) COMPOUND OFFICER 1 AND 2

There are two Compound Officers on each eight hour shift, and their basic duty is to monitor inmates on the large yard area between the three sets of housing units on each side of the yard. They work the normal shift times set forth above for such 24 hour posts. Because of the size of the yard, the relieving Compound Officer may have to go through several locked doors requiring opening by the Control Center, or have them opened by someone with a key, before arriving on the Compound itself; because until he/she finds the outgoing Compound Officer, he/she has no radio or keys. Once that contact is made, those employees exchange equipment and keys, as well as information about pertinent inmate occurrences including any inmate fights or tension among inmates. This process also occurs in the same way when that employee is relieved. The Compound Officer during his/her shift may also deliver charged batteries to Housing Unit or other officers requesting them.

The Compound Officer who testified stated that the installation of battery chargers did not impact his work time in that position, and that he averaged a total of about twenty minutes of work beyond the times of his regularly scheduled shifts in the performance of these duties.

(5) PERIMETER TOWERS

Prior to March 20, 2011 the Prison's six perimeter towers were staffed twenty-four hours per day and seven days per week before they became non-operational on that date. These Towers are located within the Prison's second perimeter. During dates when such Towers were in operation, upon coming on duty, the Perimeter Tower Officer does not go to the Control Center, but instead drives up to the Prison's rear gate to be identified by the Rear Gate Officer, who then

contacts the existing on-duty Perimeter Tower Officer to tell him/her that the relief is coming. At that point, the relieving Perimeter Tower Officer drives up to the assigned Tower door, rings a button to notify the relieved Tower Officer of his/her presence, climbs about one hundred steps to the Tower observation level, and is let in. Once in, the relieving perimeter Tower Officer calls the lieutenant for pertinent information and to assure that his/her assignment is not elsewhere in the Prison, and then exchanges information with the Tower Officer to be relieved, including in the inmate telephone and e-mail monitoring areas. At that point, both officers account for and double count each piece of equipment in the Tower, including guns and ammunition, and assure that all equipment is serviceable. Perimeter Tower Officers are held responsible if any guns or ammunition are not accounted for, and may be subject to discipline if that occurs. Union witness Blaylock testified that such activities usually take about thirty uncompensated overtime work minutes each day.

(5) TOWER 7

In contrast to the perimeter Towers addressed above, Tower 7 has been manned 24 hours per day during all time periods involved here, and is located in the center of the Recreation Yard. The Tower 7 Officer monitors the entire yard, as well as the sidewalks on either side of the yard, for staff and inmate movement. Both Post Orders for Tower 7 and officer training for that position require such officers to account for all guns and all ammunition rounds in that Tower.

According to the testimony of the Tower 7 Officer and Union witness Brown, prior to installation of the battery charger in the Tower, he reported to work about thirty minutes prior to his scheduled shift; obtained the Tower 7 keys for the outer gate from the Operations Lieutenant – the only location for such keys – and then buzzed the outgoing Tower 7 Officer from the inner gate for Tower access once he had gotten through the outer gate via access provided by the Control Center. Once both officers are in the Tower, according to Union witness Brown, they both count

an extensive amount of equipment, guns, ammunition, and chemical agents; then exchange pertinent information, and ultimately the outgoing officer leaves the Tower via the keys brought by the incoming officer. The incoming officer may also make two trips to the Tower to bring in guns and ammunition, since both cannot be taken to or from the Tower at the same time for safety reasons. Brown testified that the guns, ammunition and equipment inventory normally takes fifteen to twenty minutes at the time of any shift change for both Tower 7 officers, since all such equipment needs to be accounted for at that time, and failure to do so could result in disciplinary action. Brown further testified that at the end of the shift, he returns to the Lieutenant's Office with the keys and to relay information – and then leaves the Prison premises about ten to fifteen minutes after his scheduled shift end.

At some point during the time period involved here – which date the parties agreed could be determined by the Tower Log Book – Tower 7 was staffed for two shifts: 5:30 AM - 1:30 PM and 1:30 AM - 9:30 PM. In that situation, Brown testified that he normally arrived at 5:00 AM for the morning shift, and that he took the Tower keys back to the Lieutenant's Office at about 1:45 PM. He further testified that the only effect on shift work times of the installation of the battery chargers at that post was that he no longer had to obtain and return batteries to the Control Center. There was no testimony in the record concerning the 1:30 PM - 9:30 PM Tower 7 Officer work time since the advent of the above shifts.

Prison witness Lieutenant Shank testified that the shift change in all of the Towers takes only about one minute, not counting the time necessary to climb the stairs. He further testified that if the departing and on-coming Tower officers disagree concerning who is responsible for missing Tower ammunition, the matter is referred to an Internal Affairs investigation. He stated, however, that he is normally in the Lieutenant's Office during shift changes.

(7) SPECIAL HOUSING UNIT #1 AND #2

The Special Housing Unit (hereinafter SHU) is the Prison's solitary confinement location, where inmates are locked up 24 hours per day except for one hour of recreation, for their safety if under threat by rival gangs or inmates, or if they commit improper actions calling for such confinement. The SHU Officer Posts #1 and #2 are staffed 24 hours per day, and staffing in SHU also includes a SHU lieutenant. There are a total of five SHU units, plus SHU Recreation and SHU Property, and 15 different custody posts within the SHU.

When coming on duty in the SHU #1 or #2 positions, officers after getting batteries and checking in with the lieutenant must wait for several SHU doors to be opened by SHU security prior to arriving in the SHU. Those employees do not pick up keys or other equipment at the Control Center. Upon such arrival, the on-coming SHU #1 or #2 Officer must review with the officer he/she is relieving all equipment, log books, cell assignments and other information vital to the shift, as well as voluminous equipment in the SHU Control Room and SHU Ready Room. Like other similar positions, the departing officer may not leave SHU until all equipment is accounted for. Officers must be present at their posts at the shift starting time because a count occurs at the beginning of the day and afternoon shifts, and the outgoing SHU Officer may not leave until an accurate count is completed. The SHU #1 and #2 Officers also have the keys necessary to let other officers working in SHU into the areas where inmate cells are located. At the shift change time, the on-coming SHU #1 and #2 Officers must also review a cell assignment board for correctness and pertinent information concerning SHU inmates, as well as any problems that occurred during the prior shift.

Union SHU witness Fontes testified that all of these elements require the SHU #1 and #2 Officer to arrive at the post about fifteen minutes prior, and to leave fifteen minutes after, his/her schedule shift times, on normal days. He testified, however, that due to the busy nature of SHU

and the clientele served, many things happen to delay the above SHU departure times, including medical emergencies, fights in the yard or housing unit, or use of force in SHU or One Bravo. In those cases, which occur about one-half of the time, the SHU #1 and #2 Officers work an average of about sixty minutes beyond their scheduled times, according to Fontes.

SHU Lieutenant Morgan testified that at the SHU shift exchange, the off-going officer merely hands the equipment to the on-coming officer with no chits required and discusses any SHU-related issues; and that the SHU shift exchanges take no more than about eight minutes. He also testified that SHU officers were told about three years ago after installation of the battery chargers that they were not to pick up batteries at the Control Center, and that instead Compound Officers would bring them fresh batteries if necessary.

(8) ONE BRAVO #1 AND #2

The Prison also utilizes the One Bravo unit as a Special Housing Unit due to inmate lock-up space shortages, and that unit thus serves the same function as the SHU unit. Like the SHU, One Bravo officers maintain the daily operations of that unit including feeding inmates and controlling their movement into and out of cells. The One Bravo #1 and #2 posts are manned twenty-four hours per day. One Bravo generally consists of inmates in protective custody.

Like SHU Officers, One Bravo #1 and #2 Officers must have arrived at their posts and exchanged information and equipment by the beginning of their shift in order to perform the inmate count at their shift starting time. The One Bravo #1 and #2 Officers at the beginning of their shifts perform the same duties as described above in the areas of obtaining a radio battery, waiting for sally port doors to open or close, taking equipment inventory, exchanging information, and verifying information on the inmate board; and go through the same relief process as those described above concerning the SHU #1 and #2 posts.

Union witness Ontiveros testified that when working One Bravo #1 or #2, he normally begins

work about twenty minutes prior to his scheduled shift and leaves work ten minutes after his scheduled shift end, performing the above duties and shift change functions. Facility witness Lieutenant Putnam testified that while working as a Lieutenant in SHU or One Bravo, such One Bravo shift exchanges took between two and five minutes absent extenuating circumstances. He also testified that he instructed such SHU and One Bravo officers to e-mail incident reports to him so that he can make necessary changes and have them ready for employee signature by the end of their shifts, and that One Bravo and SHU shift exchanges take no more than five minutes.

C. POSITIONS STAFFED TWO SHIFTS PER DAY

There are seven correctional posts which are staffed for two shifts per day. Until March, 2013 those posts were generally staffed 6:00 AM - 2:00 PM and 2:00 PM - 10:00 PM. After that 2013 date, the PM shifts overlapped with the AM shifts by fifteen minutes, with shift hours changed for that shift to 1:45 PM - 9:45 PM. No one is assigned to the overnight shift for such two shift staffed posts.

The AM shift officer must pick up keys, radios and equipment from the Control Center. These items are exchanged via chits with the afternoon/evening shift officer, who returns them to the Control Center upon his evening shift departure.

(1) SHU #3 and #4

SHU #3 and #4 Officers feed, monitor and transfer SHU inmates to/from recreation and showers, and during medical escorts and cell movements. Because there are normally 144 inmates in the SHU, the SHU #3 and #4 Officers have been instructed by their Lieutenants to be on their posts at the time of their scheduled shift start, because once inside SHU they must immediately start feeding inmates and/or preparing for inmates' recreation, so that all such inmates receive their one hour of recreation per day. Those functions therefore fill the work day of these classifications. At the end of the day shift, the departing SHU #3 and #4 Officers exchange chits

with on-coming officers for those posts, pass on any pertinent information, and exchange equipment.

Union witness Fontes testified that SHU #3 and #4 Officers on the AM shift generally pick up equipment about fifteen minutes prior to their scheduled shifts, in order to be on duty in SHU at their designated work start time. He further testified that about two days per week, he was able to return equipment to the Control Center five to ten minutes after his shift end, but that on the remaining work days the demands of the position did not allow the return of such equipment to the Control Center until twenty to forty-five minutes after that scheduled shift end.

Union witness and PM SHU #3 and #4 Officer Scott testified that officers on the PM shift irrespective of its start time exchanged chits for equipment at the Control Center about fifteen minutes prior to the scheduled beginning of their shifts, and that they returned the equipment to the Control Center about fifteen minutes after the scheduled shift end, because the SHU officers are still completing their duties until about that time.

(2) ONE BRAVO #3 AND #4

One Bravo Posts #3 and #4 perform generally the same duties in the One Bravo unit as the SHU #3 and #4 posts perform in SHU. Ontiveros testified that at the time when there was no shift overlap, AM shift officers in those positions averaged about twenty-seven minutes work daily beyond their regular workday; and on the PM shift, twenty additional daily minutes of work time two days per week and thirty minutes per day the other three days per week when they had to assist in the 9:30 PM inmate count. He further testified that once the PM shift was switched to a shift ending time of 9:45 PM, officers in those positions were able to return their equipment to the Control Center by the scheduled ending time of that shift.

(3) TOWER 7 AM AND PM

Tower 7 was staffed for two shifts 5:30 PM - 1:30 PM and 1:30 PM - 9:30 PM until it became

a 24 hour post on March 20, 2011. The duties for that position during that time period were the same as those described infra for that position, with the exception that weapons and ammunition were required to be brought in each day by the AM Tower 7 Officer and removed each day after the PM shift by the Tower 7 PM officer, because weapons could not be left unsecured when no Tower 7 Officer was on duty. That action in each such case required two separate trips, since weapons and ammunition could not be removed from or brought to the Tower at the same time for safety reasons. There were occasions, however, when the Morning Watch Officer was available to help move the weapons/ammunition.

Union witness Brown testified that for the AM shift, such additional duties required Tower 7 Officers to begin the above process thirty minutes prior to his scheduled starting shift time, and that he would return equipment to the Control Center on that shift about twenty minutes after that shift was scheduled to end. According to Brown, for the PM shift, the Tower 7 officer arrived about thirty minutes before the shift and did the shift exchange, including counting of guns/ammunition with the departing officer in the Tower; and with the assistance of the Compound Officer would lower and bring out the guns and ammunition about fifteen to twenty minutes after his normal shift ending time.

(4) URINALYSIS - AM SHIFT

The Urinalysis Post is staffed for two shifts 6:00 AM - 2:00 PM and 2:00 PM - 10:00 PM, and is required to collect and test urine samples of inmates for controlled substances. Union witness Ontiveros testified that, while he was functioning in that position on the AM shift, he retrieved keys and equipment about fifteen to twenty minutes prior to his scheduled shift start time. During his shift and at its end, the Urinalysis Officer could be anywhere in the Prison performing his duties or in the Special Investigative Services (hereinafter SIS) Office performing a urinalysis test. At the shift change according to Ontiveros, the departing and the on-coming officers in that position exchange

information concerning work completed and that left to be done, and such conversation generally prevented him from returning his equipment until five to fifteen minutes after the expiration of the scheduled AM shift. The evidence in this area at the hearing did not otherwise address the PM shift Urinalysis Officer.

(5) CONTROL CENTER #2 AM SHIFT

The Control Center #2 Post is staffed for two shifts per day, 6:00 AM - 2:00 PM (the AM shift), and 2:00 PM - 10:00 PM (the PM shift). That position is primarily responsible for normal Control Center duties of issuing staff keys and equipment and monitoring Prison cameras and doors.

Union witness Isho testified that officers working the Control Center #2 Post during the AM shift arrive at the Control Center at about 5:45 AM, with the officer first beginning to line up the radios to hand out to oncoming staff. Isho further testified that it is necessary to arrive early and prepare in that manner because staff working the 6:00 AM - 2:00 PM shift begin arriving at the Control Center at approximately 5:40 AM - 5:45 AM to receive their equipment.

At the end of the shift, the AM officer is relieved by the PM officer. According to Isho, the AM and PM officers then conduct a shift exchange similar to the shift exchange conducted between the Control Center #1 Officers and described above, which includes an audit of all the equipment in the Control Center. Isho testified that during the shift exchange process, the environment in the Control Center is "hectic," because officers must still issue and receive equipment to/from incoming/outgoing officers and keep up with all of their duties. According to Isho, after completing the shift exchange, the AM Control Center #2 Officer is able to leave at approximately 2:15 PM, resulting in a total outside of regular shift work time of thirty minutes. The evidence did not address the Control Center #2 PM shift officer.

(7) EDUCATION/PROGRAMS / RECREATION CORRIDOR

The Education / Programs / Recreation Corridor Officer position patrols, monitors and coordinates inmate movement for the Prison building at the far end of the Compound which houses the education, recreation, religious services, and psychology areas. The work hours for that position were 6:00 AM to 2:00 PM and 2:00 PM to 10:00 PM. At some point – to be determined by the parties from shift records – the PM shift was moved to 1:45 PM to 9:45 PM.

According to Union witness Kowalski, the AM position of this classification, after picking up keys and equipment at the Control Center at about 5:50 AM, is responsible to man the Facility's Front Lobby post until that officer arrives for his/her shift beginning at 7:30 AM, after which the above referenced officer proceeds to the Programs building. After exchange of information and equipment with the PM officers in this position at the time near the scheduled end of his shift, the AM officer walks to the Prison's Main Building, and normally leaves the Control Center at about 2:10 PM, for according to Kowalski a total of twenty minutes of work time beyond his normal work shift. Both the AM and the PM officers in this position must pass through approximately ten gates when coming to and leaving from their work location.

The PM officer in this position performs similar duties, including the about fifteen minutes necessary to reach his/her post prior to his/her shift beginning. At the end of his/her shift, that position assists when the shift was 2:00 PM - 10:00 PM in counting inmates at the Camp, conducting a "fence check," and collecting paperwork from the Towers when all of them were in operation. Those fence check duties were eliminated when the PM officers' shift was changed to 1:45 PM - 9:45 PM. In both cases, however, that employee was able to return equipment/keys to the Control Center by 9:55 PM or 10:00 PM. According to Kowalski, the total additional work time beyond the scheduled shift was about twenty minutes before the shift change was made, and about seventeen minutes after when the shift was changed to 1:45 PM - 9:45 PM.

D. POSITIONS STAFFED ONE SHIFT PER DAY

The remaining Correctional Officer shifts subject to this case are staffed for one shift per day. Because such officers are not relieved, they must pick up/return all keys and equipment at the Control Center.

(1) REAR DOCK

The Rear Dock Officer position is staffed 7:30 AM - 3:30 PM, and is responsible for the Prison's Receiving Dock, which houses the Food Service, Commissary, Facilities, Laundry and UNICOR areas. This position monitors and escorts vehicles loading and unloading materials at the Receiving Dock, and supervises inmates who collect trash throughout the Facility.

This position, in contrast to virtually all others, reports to the Facility Rear Gate to get equipment from the Rear Gate Officer, who obtains keys and equipment for both positions from the Control Center. According to Union witness Kowalski, the Rear Dock Officer must get his equipment from the Rear Gate officer prior to his 7:30 AM shift start at about 7:15 AM, because the Rear Gate itself must be operational by not later than 7:30 AM.

At shift end, according to Kowalski, that position secures the Rear Dock and locks all doors and gates, then assists the Rear Gate Officer in securing that gate before returning his equipment to the Control Center at about 3:30 PM scheduled shift end. Kowalski thus testified that he works about fifteen minutes each day beyond his scheduled shift in these functions.

(2) REAR GATE

The Rear Gate Officer's scheduled shift is 7:30 AM - 3:30 PM. That position controls vehicles in and out of the Prison secured areas, including those set forth above as well as buses bringing in or taking inmates out from the Facility, largely to assure that no contraband comes into the Facility via such vehicles.

Union witness Hernandez testified that the officer working the Rear Gate post has to pick up his equipment and the Rear Gate Key Box from the Control Center approximately twenty minutes prior to the start of the shift. Hernandez also testified that once the equipment is retrieved, the Rear Gate officer then must go back through the sally port, through the Front Lobby, out to the parking lot, and into his or her personal vehicle. That officer, according to Kowalski, then drives around the Facility to the Rear Gate, meets the Rear Dock and Tower 5 officers, and begins distributing keys to them from the Key Box so that those officers can begin their duties for the day. The Tower 5 Officer then uses that key to enter the Tower and requests power from Control, which allows the Rear Gate officer access to the Rear Gate. After gaining access to the Rear Gate, the officer immediately begins identifying vehicles and staff who have been waiting to get into and out of the Rear Gate.

Hernandez testified that he needs to pick up his keys and equipment before his scheduled shift start at about 7:10 AM both because his functions include letting into the Facility's secured area both the Tower 5 Officer and the Rear Dock Officer, and because late opening of the Rear Gate could result in outgoing inmates not timely making scheduled medical appointments. He further testified that he reverses these functions at the end of his shift, and generally makes it back to the Control Center five minutes before the end of his scheduled shift.

(3) TOWER 5

The Tower 5 Post has been staffed on one shift from 7:30 AM to 3:30 PM since December 18, 2011. The primary function of that post is to process vehicles, contractors and some employees through the Prison's Rear Gate in conjunction with the Rear Gate Officer.

According to Union witness Martin, the Tower 5 Officer reports directly to the Tower upon arrival at the institution and obtains his/her keys and equipment from the Rear Gate officer at approximately 7:15 AM – fifteen minutes prior to his scheduled shift start. The Perimeter Patrol

Officer then opens the outer gate of Tower 5 so that the Tower 5 officer can access the front door and climb to the top of the Tower. According to Martin, once at the top of the Tower, the officer takes inventory of the substantial weaponry and equipment in the Tower, and then calls the Control Center to request power over the Rear Gate. Once the Tower receives power, the Tower 5 Officer and Rear Gate Officer work together as a team to open and close the Rear Gate.

Martin further testified that the Tower 5 Officer may only leave the Tower at the end of his/her shift when the Rear Gate Officer has secured his area and is ready to leave. The Tower 5 Officer then returns his keys and is able to depart the premises at his normal 3:30 PM shift completion time.

(4) FRONT LOBBY

The Front Lobby position's one shift per day runs from 7:30 AM to 3:30 PM. Its main function is to security X-ray screen all entrants into and out of the Prison.

Union witness Maldonado testified that when serving in that position, she obtains keys and equipment from the Control Center about fifteen minutes prior to the scheduled shift beginning, then relieves the officer in the Front Lobby -- normally the Recreation Corridor Officer -- who has worked there since his 6:00 AM shift starting time. Maldonado also stated that since there is no designated relief for her position, she waits to be relieved at the end of her shift, because she cannot leave until properly relieved, and that relief often arrives as much as fifteen minutes after her scheduled shift end. At that point, according to Maldonado, she returns her equipment to the Control Center and leaves the Prison.

(5) VISITING ROOM

The Visiting Room Post is staffed by four Correctional Officers one shift per day from 8:00 AM to 4:00 PM. Its primary function is to account for all inmates and visitors who use that room, and to assure that no contraband comes into or goes out of the Prison through the Visiting Room.

Union witness Fraguglia testified that, after picking up equipment at the Control Center and checking in with the Lieutenant about ten to fifteen minutes prior to the scheduled shift beginning, the Visiting Room Officer will “shake down” that room to assure there is no contraband in it before any inmates or visitors are allowed access. He/she then sets up the Visiting Room by putting up tables and adjusting cameras, and prepares necessary paperwork.

At the end of visiting hours, the Visiting Room Officers escort visitors out in groups of ten or less and then strip search the inmates, before releasing them back into the general population of the Prison. According to Fraguglia, after all visitors and the inmates are gone, the officers do another shake-down of the Visiting Room, tabulate points concerning how many visiting hours each inmate has remaining, and then notify the Control Center of how many visitors came in that day. The officers then assist the Housing Unit Officers with locking down their units for the 3:30 PM count, and assist with that count. Fraguglia testified that once a good count is called, the Visiting Room Officers go back to the Lieutenant’s Office to make sure that nothing else needs to be done, then return to the Control Center and turn in their equipment approximately five to ten minutes after their scheduled shift ending time unless something unusual has occurred, such as a bad count, which can further detain them until fifteen to twenty minutes after their scheduled shift ending time.

(6) WORK CORRIDOR

The Work Corridor Post is staffed on one shift per day from 7:00 AM to 3:30 PM. Its primary function is to monitor and control movements into and out of the Work Corridor, which includes the Barbershop, Commissary, Facilities, Safety, Laundry and UNICOR areas.

Union witness Kowalski testified that the Work Corridor Officer obtains keys and equipment from the Control Center at about 6:50 AM – ten minutes prior to his shift start – and then proceeds to the Food Service Department to assist other officers with the supervision of the inmate breakfast meal.

The Work Corridor Officer at the end of his/her shift must wait for Work Corridor inmates to be screened and released by their departments before leaving for the day, which, according to Kowalski normally occurs via return of his/her equipment to the Control Center at about the 3:30 PM end of his/her shift.

(7) OBSERVATION EAST/WEST

The Observation East and West Posts are staffed one shift per day 2:00 PM to 10:00 PM. Their primary function is to monitor/patrol housing units on either the East or West side of the Prison, and to provide additional eyes and ears for the Housing Officers.

Union witness Pullings testified that in that position after obtaining keys and equipment, he checks in with the lieutenant concerning inmate issues on the yard or in the units about fifteen minutes prior to his scheduled shift start. His shift is spent mostly in the Prison Interior Compound.

According to Pullings, at the end of his/her shifts, this position assists with the 9:30 PM inmate count, performs a fence check, passes on information to the Lieutenant, and then returns equipment to the Control Center.

Pullings testified that these duties result in a five minute addition to their work time two days per week, and an additional ten to twenty minutes three days per week.

(8) SPECIAL HOUSING UNIT #5

The SHU #5 position – which generally assists other officers in the operation of the SHU – is staffed for one shift 8:00 AM to 4:00 PM five days per week. According to Union witness Fontes, after picking up keys and equipment at the Control Center about fifteen minutes before his scheduled shift start time, the SHU #5 Officer provides assistance to SHU officers already on duty in the “very hectic” SHU activities during the daytime period. Fontes further testified that the SHU #5 Officer must stay in SHU during times nearing the scheduled end of his shift until all inmates are accounted for in the 3:30 PM count. He further stated that, while he one to two days per week

returned his equipment to the Control Center at his normal 4:00 PM shift end, such elements as a bad count, a SHU inmate fight, a body alarm or a medical emergency can occur three to four days per week and detain his work departure until fifteen to thirty minutes beyond his scheduled shift end time.

(9) SPECIAL HOUSING UNIT - PROPERTY

The SHU Property Unit position is staffed 6:00 AM to 2:00 PM five days per week. Its primary function is accountability for the property of all inmates who come into and go out of the SHU and One Bravo.

Union witness Ontiveros testified that the SHU Property Officer obtains his equipment from the Control Center approximately fifteen to twenty minutes before the start of his shift, because the officer is required to be on his post in the SHU at his shift starting time. According to Ontiveros, the SHU Property Officer returns his equipment to the Control Center approximately five to ten minutes after the end of his shift.

(10) SHU AND ONE BRAVO RECREATION

The SHU Recreation and One Bravo Recreation positions (hereinafter collectively "Rec Officers") are staffed one shift per day from 6:00 AM to 2:00 PM five days per week. The Rec Officers are responsible for determining whether SHU and One Bravo inmates would like an hour of recreation, identifying which inmates cannot take recreation together, escorting inmates to recreation, and monitoring the SHU/One Bravo Recreation areas.

According to Union witnesses Ontiveros and Fontes, the Rec Officers working these posts pick up their equipment, and a roster of inmates who must be kept apart from each other, at the Control Center approximately fifteen to twenty minutes prior to the start of their shifts. They testified that upon arriving at the post, the officers either begin the recreation process or assist with feeding breakfast to the SHU inmates. They further testified that Rec Officers are not able to leave

at the normal end of their shift unless recreation is complete or they have been relieved by another employee, because the SHU inmates can never be left in the Recreation Areas unattended. Because neither Rec Officer position is automatically assigned a relief, they must contact the Lieutenant and ask that relief be sent if inmate recreation has not been completed by the scheduled end of their shifts. They further testified that, after either being relieved or waiting until recreation is completed, the officers leave their posts and stop by the Lieutenant's Office to check out and pass on any pertinent information before returning their equipment to the Control Center – which normally occurs approximately ten minutes after the end of the shift on a good day. Both officers testified that things such as bad counts or emergencies usually happen about three times per week to delay their departure from the Prison.

Fontes and Ontiveros testified that they pick up their equipment approximately fifteen to twenty minutes prior to the start of their shifts. They both testified that events such as those set forth above usually delay their departure, and that they cannot return their equipment until twenty to forty-five minutes after the end of their shifts, for a total of about fifty minutes worked beyond the scheduled shift. Because the testimony shows that something goes wrong affecting their work departure time three days a week, these employees request fifty minutes of overtime three days per week.

(11) SHAKEDOWN TEAM

The Shakedown Team is responsible for searching for and finding contraband in various Prison locations. Its normal hours are 2:00 PM to 10:00 PM.

Tool Room Officer Freitas testified that, while he was on the Shakedown Team from August 2009 through March 2013, Shakedown Team members normally got their equipment from the Control Center at about 1:30 PM, performed an inventory of the Shakedown Box, then spoke with the Special Investigation Services Lieutenant and technicians concerning any information of which

such Shakedown Team members should be aware. If contraband was found during his shift, Freitas testified that the required incident report would necessitate fifteen to forty-five minutes beyond the regular shift end to complete such documents, and that such employees 90% of the time could not return their keys and equipment at that scheduled shift end time. Fontes testified, however, that the Special Investigative Services Lieutenant did not tell him that members of the Shakedown Team needed to be in the Special Investigative Services Department rather than in the key line at the start of their shifts, although he understood that he was to be in the Special Investigative Services Department at the time his shift began.

D. NON-CUSTODY SERVICES EMPLOYEES

The Union also represents certain employees not in the Correctional Services Department who believe they are be eligible for overtime pay at issue in this proceeding.

(1) UNIT SECRETARY

The Unit Secretary classification works with the Unit Team/Management Department, is generally responsible for administrative tasks within the Unit Team, and functions within the Housing Units with Case Managers. They also conduct rounds within the Housing Units relating to inmates whose cases are assigned to them. The shift time for this classification is 7:30 AM to 3:30 PM. According to Unit Secretary Maldonado, Unit Secretaries generally get their equipment and keys from the Control Center about fifteen to twenty minutes prior to their scheduled shift start because they must be in their unit offices by their shift starting times. Maldonado testified, however, that she had not been told this by her current lieutenant.

According to Maldonado, once the Unit Secretaries tasks and paperwork are completed, they return their keys and equipment to the Control Center by the 3:30 PM shift end if there is correctional officer help available to lock down the unit – which occurs three to four times per week. Maldonado testified, however, that if there was no such available help, the Unit Secretaries help

Housing Unit officers lock down the units beginning at about 3:15 PM, and in those circumstances they would not be able to return those items to the Control Center until about ten minutes after their shift end time, and would be required to stay longer if there was a bad inmate count.

Supervisor of Unit Managers Ciofo testified that Unit Managers are normally in the Key Line to depart the Prison five to ten minutes before the end of their shift, and that Maldonado had never claimed to her either that she arrives fifteen to twenty minutes before her shift or that she stays late after her shift. Supervisor of Unit Managers Tyson testified that: 1) he allows his team members to leave their work locations ten minutes before the end of their shift to get into the Key Line; 2) his employees should be able to complete their work within their normal eight hour shifts; and 3) he is not aware of any of his subordinate employees claiming to work five to ten minutes beyond their shift end time on a regular basis.

(2) FOOD SERVICE

The Food Service Department is responsible for preparing meals for the inmate population and for supervising inmates during those meals. There are two areas of the Food Service Department which must be monitored, the kitchen area where approximately thirty-three inmates work, and the dining room area where approximately twenty to fifty inmates work. Food Service is staffed two shifts per day, from 4:30 AM to 12:30 PM (AM Shift) and from 10:30 AM to 6:30 PM (PM Shift). From 2008 until sometime in 2012 – a date which the parties agreed could be determined from shift records – the Food Service Department was staffed by only two officers per shift. Since 2012, both shifts have been staffed with three officers per shift.

(a) AM SHIFT

Prior to about March, 2013 the Prison served the inmates a hot breakfast. According to Union witness Aslam, because food needs to be prepared and ready to serve when the first inmates arrive at 6:00 AM, if during this time a hot menu item was to be made from scratch – such

as pancakes or French toast – those AM shift Food Service employees were directed to begin their shift at 3:30 AM.

Aslam further testified that, at the end of the AM shift, Food Service employees were required after the lunch meal to completely clean up; assure that all food stuffs were taken off the line and secured; exchange and account for tools including knives with the PM shift cook, and complete the Knife Report for the next morning. He stated that the lunch meal itself was generally not completed until 12:30 PM or 12:45 PM absent an emergency situation, which generally required an additional twenty to twenty-five minutes of work time.

Aslam also testified that in such circumstances, the AM shift worked an average of thirty-seven minutes of time before and after their scheduled shifts if no emergency; fifty-four minutes if an emergency occurred; and one hour and fifteen minutes twice a week if making hot food from scratch.

After March of 2013, the hot breakfast in Food Service was replaced by cold cereal. Union witnesses Aslam and Coyle testified, however, that Food Service employees still needed to arrive at the Control Center to pick up their equipment at about 4:25 AM because they were required to be present to account for inmate workers, who report to work at approximately 4:30 AM, and to retrieve SHU and One Bravo food carts.

Although such employees are again not allowed to leave their posts until the lunch meal is completely served and cleanup has concluded, several changes were implemented by Food Service that resulted in inmate lunch completion early enough that the AM shift employees could finish their work and return their equipment by their shift ending time. First, in late 2012, a third Food Service employee was added to the schedule on the AM shift. In addition, a wall was installed in Food Service that prevented the inmates who were serving food from seeing the inmates who were being served. Finally, the Lieutenants started calling the inmates to the dining

hall faster so that the last inmate was finished with lunch by around 12:10-12:15 PM, thus enabling the AM Food Service employees to return their equipment by their 12:30 shift ending time. Aslam testified, however, that incidents still occur about 30% to 40% of the time that delay the lunch meal by fifteen to twenty minutes, which ultimately prevents the Food Service staff from turning in the equipment until thirty to forty minutes after their shift ending time.

(b) PM SHIFT

With regard to the PM shift, according to Union Witness Heck, employees pick up their keys and equipment at the Control Center about ten minutes before their 10:30 AM shift start so that they can be in Food Service by 10:30 AM to assist in serving inmate lunches, which begin at that time. He stated that after completion of the dinner meal, such employees must: 1) completely clean the entire kitchen area, including all pots, pans and inmate trays; 2) conduct sanitation activities; 3) again account for all tools and knives; and 4) contact the Lieutenant to open the Rear Dock in order to dispose of accumulated Food Service trash. Heck further testified that the speed by which the Lieutenant called the units to the meals and the popularity of the meal being served affected the time the meal ends and the officers depart. According to Coyle, prior to the installation of the wall in Food Service, PM Food Service staff were able to return their equipment to the Control Center approximately twenty minutes after their shift ending time 35-40% of the time. Coyle testified that, after the wall was erected, PM Food Service staff were able to return their equipment to the Control Center at their shift ending time 60-70% of the time. However, Facility emergencies, days when popular meals are served, and days when the lieutenants call the units slowly to the dinner meal, prevent the PM Food Service staff from leaving at their normal shift ending time. Such circumstances occur 30-40% of the time according to Coyle, and prevent Food Service staff from returning their equipment to the Control Center until approximately twenty minutes after their shift ending time.

In summary, these Union witnesses claimed that PM Food Service employees work thirty minutes beyond their scheduled work times 35-40% of the time, including after March, 2013.

Food Service Administrator and Prison witness Madan testified that: 1) inmate workers come to Food Service about 4:45 AM prior to the breakfast service; 2) Aslan had never told him that he arrives at the Control Center at 4:15 AM for his 4:30 AM shift; 3) because the shifts overlap, there is no reason for employees to come in early or to stay late; and 4) it is very rare for staff, including Union witness Heck, to have to stay fifteen to twenty minutes beyond the end of his shift as Heck claims.

(3) RECREATION DEPARTMENT

The Recreation Department is responsible for all recreation yards in the center area of the Prison and the indoor recreation area located at the north building of the institution, and for facilitating all recreation activities. They do recreation and fence checks, check out recreation equipment to the inmates, and run the inmate sports leagues. The Recreation Officer may be responsible for monitoring as many as four hundred inmates in Recreation at one time in what is the Prison's largest physical area. The Recreation post is staffed two shifts per day from 7:00 AM to 3:00 PM and 12:30 PM to 9:00 PM. There is also a compressed work schedule shift in Recreation from 10:30 AM to 9:00 PM four days per week.

Union witness Yang testified that on the AM shift, the Recreation Officers in shifts where no emergency occurs pick up their equipment ten to fifteen minutes before the 7:00 AM start of their shifts, assist in supervising the end of the breakfast inmate move, then report to the Recreation area to prepare for the inmate recreation move. At the end of that shift in such situations, they are able to return their equipment to the Control Center at their shift end time.

Yang testified that on the PM shift, Recreation Officers pick up equipment about ten minutes before their shift start time, in order to be on the Recreation Yard before the 12:30 PM

inmate move to assist with that move. According to Yang, although about half of the time they are able to return their equipment to the Control Center by the end of their shift at 9:00 PM, in the other two or three days they must be on stand-by and/or respond to emergencies, which results in them not being able to return their equipment to the Control Center until 9:30 PM to 9:45 PM.

Yang testified concerning the compressed four day shift that, like in the other shifts, the Recreation Officer picks up his/her equipment ten to fifteen minutes before the scheduled shift in order to be on the Recreation Yard by the shift start time. At the shift end, that position clears all indoor and outdoor yards, and checks in any recreation equipment checked out. Yang further testified that about half the time when working that position, he was able to return equipment to the Control Center by his shift end time, but that in the other half of his time, there was a yard incident or he was requested to "stand-by" while inmates were locked into their cells for the night – either of which required an additional thirty-five to forty-five minutes of work time after his scheduled shift end.

Prison witness and Supervisor of Education Chavez testified that he knows of no Recreation staff that come in early to the Control Center, or stay late. Prison witness and Supervisor of Recreation Case testified that in most circumstances, Recreation personnel leave that Department ten to fifteen minutes before the end of their shifts in order to be in the key line by their shift end times because the Recreation Yard is normally cleared by 3:00 PM due to the 3:30 PM count. Case testified that for the PM shift, most inmates are back in the Housing Units by 7:30 PM, with all of them back not later than 8:30 PM. He further stated that such staff sometimes help lock up inmates in the Housing Units in preparation for the 3:30 PM count.

(5) CORRECTIONAL SYSTEMS

Correctional Systems Officers perform three main functions one shift per day, either 6:00 PM to 4:00 PM four days per week, or 6:30 AM to 3:00 AM five days per week: 1) Receiving and

Discharge; 2) Records Maintenance; or 3) Staff and Inmate Mail. Prior to March, 2013 all such employees worked 7:30 AM to 4:00 PM.

Union witness Capel testified that both Receiving and Discharge and Mail Room employees, when beginning their eight hour work days prior to March, 2013, retrieved their equipment at the Control Center at about 6:15 AM or 7:15 AM, respectively – about fifteen minutes prior to their scheduled shift start – and usually returned that equipment ten to fifteen minutes after their scheduled shift end. Capel testified that such pre- and post-shift additional work time of about thirty minutes also occurred in the compressed work shift, because such employees immediately report to the Food Service mainline to assist with the 6:00 AM meal.

On days when a bus full of inmates arrives at the Prison, however, according to Capel, such employees normally do not leave the Prison until thirty to forty-five minutes after their scheduled shift end, because such new inmates must be screened by their Department, Psychology, Medical and the Unit Team; and all such screenings must be coordinated and processed by the Unit Team before the inmate is released into the Prison's general population. Capel further stated that Department supervisors are aware of such additional staff work times because they know the dates and the early times when such buses arrive.

Unit Manager and Prison witness Tyson testified, inter alia, that he was unaware of anyone claiming to work fifteen minutes beyond their shift hours on a regular basis, but that some of them came to work earlier than his 7:30 AM shift start time. Systems Management Coordinator and Prison witness Lewag testified that he approves overtime for his employees in buses of new inmates situations about three times per year, and that the smallest increment of overtime in those situations was one to two hours.

(6) UNIT TEAM

The Unit Team's duties include, inter alia, logging of information into the Prison's Unit

Systems program, handling inmate paperwork, and computing inmate sentences and release dates.

(a) CASE MANAGER

The Case Manager as part of the Unit Team duties handles all inmate paperwork including inmate issues or incidents, and generally is responsible for a caseload of between 130 and 160 inmates. The shift for that position is 7:30 AM to 4:00 PM, and those inmates are located within one of the Special Housing Units. One day per week, incumbents of this position work 12:30 PM to 9:00 PM.

Union witness Capel testified that she picks up her equipment at approximately 7:05 AM to 7:10 AM, because the Unit Team members cannot complete all their work unless they do so, and because all Unit Teams are expected to be at their desks and in their offices by their shift start times.

According to Capel, after retrieving their equipment, the Case Managers report to the Associate Warden's office to pick up any signed paperwork regarding transfers of inmates, halfway-house packets, and any other relevant paperwork pertaining to their caseloads. After leaving the Associate Warden's office, the Case Managers report to the Lieutenant's Office to pick up any incident reports pertaining to the inmates on their caseloads, before traveling through several locked slowdown gates to the Housing Units where they work.

According to Capel, at the end of the shift, the Case Managers leave their units and go back to the Associate Warden's and Lieutenants' offices to drop off paperwork in need of signatures. and to turn in any incident reports. Capel testified that, after dropping off this paperwork, they are usually able to return their equipment to the Control Center about 4:00 PM or 4:05 PM.

Capel testified that on her weekly late night, she comes in to work between one hundred five and ninety minutes early to get her equipment. She testified that her early arrival on such days

is necessary because, on late nights, she must go to the SHU and One Bravo to check in with inmates housed there to provide requested documentation for inmates in such areas as available inmate funds or phone list slips. She stated that she is then generally able to return her equipment by the time of the scheduled shift end at 9:00 PM. According to Capel, no Case Manager have been paid for such additional work.

Capel also testified that there are a number of situations that prevent the Unit Team staff from leaving at their shift ending time. She stated that once a week she stays even later than usual to complete her assignments because the supervisors put pressure on Case Managers to complete their assignments within specified timeframes, and that during Program Review, the Case Managers have to stay later than one to two hours after their shift ending time so that they can finish auditing their files. According to Capel, the Unit Team supervisors know how long it takes to prepare for Program Review; however, the staff has never been paid under these circumstances. She further stated that Case Managers must also stay thirty to forty-five minutes past their scheduled shift end time when a late bus full of new inmates arrives at the Prison, because the Unit Team staff must screen all inmates before they can be allowed into the general population, and this function takes significant time. Capel also stated that her supervisors know when late buses come in and how long it takes to screen inmates; however, the Unit Team staff has never been paid for work time under these circumstances.

According to Capel, problems also arise when Case Managers are transferred from one unit to another, because when this occurs they must take on the files of their predecessors and audit them. She stated that in such circumstances, the Case Manager must come to work sixty to ninety minutes prior to their scheduled shift and stay one to two hours after the end of the shift two to three times a week for three to four weeks to complete the "cleaning" of the files. She testified that the Unit Team supervisors know that files must be "cleaned" when staff are transferred, and they

also know how long this process takes; however, the Unit Team members have never been paid in these circumstances.

Case Manager Supervisor Ciufu testified that she was unaware of her employees coming to work fifteen minutes early for their normal shift times, and that her employees generally leave their work locations ten to fifteen minutes early to get into the Control Center Key Line. Case Manager Supervisor Gardea testified that neither Case Managers Capel, Maldonado nor Overstreet has ever claimed or had denied any work time beyond their regular shifts.

E. OTHER PERTINENT PRISON SUPERVISOR TESTIMONY

Prison supervisors, generally in the Lieutenant classification, testified that in at least some overtime situations, they have moved employees from the top of the mandatory overtime list to the bottom of that list rather than pay such employees overtime, and have not allowed employees the choice of overtime or compensatory time in such situations. They further testified that employees involved in an emergency or similar situation for a significant amount of extra work time were required to complete an incident report describing their involvement in such an emergency in order to be paid overtime. Several of them also testified that the passing between shifts of pertinent information was a function of sound correctional judgment.

According to Prison witness Captain Keilman, the shift change for employees working the Housing, Compound, Work Corridor and Observation posts takes place in the Lieutenants' Office and takes two minutes or less. He further testified that he did not monitor whether employees picked up batteries at the Control Center or whether such batteries were delivered to the requesting Post Officer by the Compound Officer.

According to Prison witness Lieutenant Morgan, he has held conference calls with all working staff about one-half hour after the start of a new shift to communicate pertinent information. He also testified that no one has ever told him they were working beyond their

scheduled shift and not being paid for such work.

Several supervisors testified that subsequent to the Calhoun decision and the installation of battery chargers at the Housing Units, they advised officers at staff meetings and role calls not to pick up batteries at the Control Center for such 24 hour posts. Several of them also testified they had seen no employees picking up batteries at the Control Center since that time. Prison witness Lathrop testified that the Prison starting in 2008 began buying new batteries sixty or seventy cases at a time, that such batteries generally lasted for an entire shift, and that when batteries did not they were brought to the Housing Unit Post involved by the Compound Officer, after receiving notice from the Post employee of the need for a battery either by radio or the telephone available in the Housing Units.

According to the testimony of Prison witness Captain Serna, as a result of the Calhoun decision, pertinent Post Orders were changed concerning on-coming and off-going employee work times; there were to be no verbal exchanges between such employees at that shift change and only an equipment change; and there was no need to stop at the Control Center for any equipment or keys.

Prison supervisors, largely in the Lieutenant classification, testified that on-site shift changes for 24 hours and AM-PM posts took only a few minutes, with none over eight minutes, and that clearing the security metal detector took one minute or less. They also testified that staff encountered no inmates during their on-site walking to/from 24 hour posts during the Evening Watch to Morning Watch shift change, since inmates at that time are confined to their cells for the night.

There has never been any disciplinary action taken against any employee for coming in early or for leaving at times after the scheduled shift end.

POSITIONS OF THE PARTIES

In view of the eight day duration of the hearing in this case, as well as the multitudinous number of issues raised by the parties both pre-hearing, at the hearing and post-hearing, including the more than 240 pages of the Union's brief, reply brief and sur-reply brief; and the more than forty positions and shifts at issue here; it is the arbitrator's view that an extensive recitation of the various positions of the parties on these issues and job duties would turn what will already be a long and detailed decision into a book length missive that is not in the best interest of either the parties or the arbitrator.

Therefore, the parties are hereby advised that the arbitrator has read, fully considered, researched and in appropriate circumstances applied the parties' post-hearing arguments concerning at minimum the following issues:

1. The Claimed De Minimus Nature of Employee Preliminary and Postliminary Work.
2. The Claimed Union Failure to Establish a Prima Facie Case.
3. HRM Manual Section 610.1 – Program Statement 3000.03
4. The National and Local Negotiated Portal-to-Portal Provisions.
5. The Recovery Period Here if the Grievance is Granted.
6. The Claimed "Willful" Violation.
7. Facility Management Knowledge of Claimed Compensable Overtime Work.
8. The Claim that Facility Management Should Have Known of Compensable Overtime Work.
9. The Impact of Facility Post Orders.
10. The Applicability of the Doctrines of Issue Preclusion and/or Collateral Estoppel.
11. The Question of the Union Meeting Its Proof Burden by "Just and Reasonable Inference."
12. The Evidentiary Impact of the Videos Produced by the Facility.
13. The "Adverse Inference" Union Argument.
14. The "Suffer and Permit" Issue.
15. The "Continuous Work Day" Issue.
16. The "Donning Equipment After Clearing the Metal Detector" Issue.
17. The "Picking Up and Dropping Off of Equipment at the Control Center" Issue.
18. The "Alternative Means to Get Needed Equipment" Contention.
19. The Legal Definition of "Work," Including "Integral and Indispensable."
20. Facility "Notice" of Employees' Performance of Overtime Work.
21. Facility Ability to Stop or Prevent Any Overtime Work.
22. Facility Local Policy verses FLSA Requirements.
23. Coverage of the Grievance.
24. Representative Testimony.

25. Sections 6(q) of the Contract and VIII-F of the Local Supplement.

DISCUSSION

The federal Fair Labor Standards Act (hereinafter FLSA), originally enacted in 1938, was designed to protect “the rights of those who toil (and) sacrifice the full measure of their freedom and talents to the use and profit of others,”² and is intended to be broadly construed, since the statute “is remedial and humanitarian in purpose.”³ In pertinent part, it defines the term “employee” as “any individual employed by an employer,”⁴ and the term “employ” as “to suffer and permit work.”⁵ If the hours worked by an eligible employee total more than forty in a week, or eight in a day for federal employees involved in this case,⁶ the employer must pay for work hours in excess of those thresholds at the overtime rate of one and one-half times the employee’s regular rate of pay,⁷ or with employee agreement pay compensatory time at the time and one-half rate. All hours that an employer “suffers or permits” must be compensated, irrespective of whether the employer requested or desired that the work be performed.⁸ Under federal court decisions, FLSA-compensable work involves exertion or loss of an employee’s time that is: 1) suffered and permitted by the employer; 2) necessarily and primarily pursued for the benefit of the employer; and 3) if performed outside of the employee’s scheduled work time, an integral and indispensable part of

² Tennessee Coal, Iron and Railroad Company v. Local #123 321 U.S. 590, 597 (1944).

³ Ibid.

⁴ 29 U.S.C. Section 203(e)(1).

⁵ 29 U.S.C. Section 203(g).

⁶ 5 Code of Federal Regulations (hereinafter CFR) Section 551.501(a).

⁷ 29 U.S.C. Section 207(a).

⁸ Chao v. Gotham Registry, Inc. 514 F.2d 280, 288 (2nd Cir., 2008).

the employee's principal activities.⁹

The federal Portal to Portal Act of 1947 sought to clarify the FLSA by indicating that the overtime provisions of the FLSA would not be applicable for the following activities/circumstances: 1) walking, riding or traveling to and from the actual place of performance of the employee's principal activity or activities; and 2) activities which are preliminary or postliminary to those principal activities, which occur either prior to the time on a workday at which the employee commences, or subsequent to the time on any workday at which he/she ceases, such principal activity or activities.¹⁰

The same year that the Portal to Portal Act was passed, the U.S. Department of Labor adopted a regulation which defined the "workday" as "the period between the commencement and completion on the same workday of the employee's principal activities," and stated that "...to the extent that the activities engaged in by an employee occur after the employee commences to perform the first principal activity on a particular workday and before he ceases performance of the last principal activity on a particular workday, the provisions of ... [the Portal to Portal Act] have no application." That regulation – adopted in 1947 and still in effect today – also indicates that the Portal to Portal Act has no effect upon the compensability of activities performed during the continuous workday.¹¹

The U.S. Supreme Court later held, in a case involving both the FLSA and the Portal to Portal Act, that activities indispensable and closely related to the employee's principal activities were as compensable as the principal activities themselves,¹² and that activities performed either

⁹ Ibid., at 285.

¹⁰ 29 U.S.C. Section 254(a).

¹¹ 12 Code of Federal Regulations Section 7658 (1947).

¹² Steiner v. Mitchell 350 U.S. 247, 252-53 (1955).

before or after the regular work shift were likewise compensable under the Portal-to-Portal Act provisions if they are an “integral and indispensable part of the principal activities for which covered workmen are employed.”¹³

More recently, as a clarification of its holding in Steiner, the Supreme Court, citing among other things a Department of Labor regulation providing that “where an employee is required to report at a meeting place to receive instructions or to perform other work there, or to pick up and to carry tools, the travel from the designated place to the work place is part of the day’s work, and must be counted as hours worked...,”¹⁴ and “...any activity that is integral and indispensable to a principal activity is itself a principal activity under . . . the Portal to Portal Act, [and] during a 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 excluded from the scope of [the Portal to Portal Act], and as a result is covered by the FLSA.”¹⁵ An employer must compensate its employees for all hours of work that it suffers or permits, regardless of whether it requested or even desired that the work be performed, if it had knowledge of the unauthorized work but failed to stop it, and notwithstanding whether employees voluntarily arrived at work early or stayed late to perform work. If an employer fails to take steps to prevent an employee from performing work, up to and including discipline, an employer has “permitted” an employee to perform work and is obligated to pay for this time.¹⁶

“Suffer and permit” is defined in pertinent Federal Regulations as “...any work performed by the employee for the benefit of the (employer), whether requested or not, provided the

¹³ Ibid., at 256.

¹⁴ Iowa Beef Processors v. Alvarez 546 U.S. 21 (2005) quoting 29 CFR Section 785.38.

¹⁵ Ibid. at Page 37.

¹⁶ Chao v. Gotham Registry, Inc., supra, Note 8, at 288.

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.”¹⁷ Unless an employee is performing work that the supervisor could not know about and prevent, such work is “suffered and permitted” and is compensable work time.¹⁸

In Kosakow v. New Rochelle Radiology Association, P.C.,¹⁹ a radiological technologist claimed that although her work shift officially began at 8:00 AM, she had to arrive at 7:45 AM because the employer “was open to accept walk-in patients at 8:00 AM, and the office policy was to be ready to serve those patients when they arrived.” The employee alleged that “[i]n order to accomplish this, [she] needed to turn on the x-ray processing machine, allow it to warm up, perform tests on the machine, and help to prepare the office for receiving patients by pulling client files and preparing and performing pre-testing procedures for certain tests.” The Second Circuit Court of Appeals held that the duties described were “necessary for the proper performance of her job” and were therefore compensable, even if the employees were never expressly “required” to arrive early, so long as the employer knew or had reason to believe that the employee was performing work and that it was “suffered or permitted” by the employer.²⁰

Moreover, an employee’s subjective reasons for arriving early at work or leaving after his/her scheduled shift end are not determinative in deciding whether pre- or post-shift activities constitute “work.”²¹ So long as the activities involved are performed as part of the regular work of

¹⁷ 5 CFR Section 551.104.

¹⁸ 29 CFR Section 785.11.

¹⁹ 274 F.3d 706 (2nd Cir., 2001).

²⁰ Ibid. See, also, Strohl v. Brite Adventure Center, Inc., 2010 U.S. Dist. LEXIS 82427 (F.D. N.Y., 2010).

²¹ See, e.g., Dunlop v. City Electric, Inc. 527 F.2d 394, 400 (5th Cir., 1976); Keller v. Summit Seating, Inc. 664 F.3d 169, 176 (7th Cir., 2011).

the employee in the ordinary course of business, are known to the employer, and are for the benefit of the employer, they are “integral and indispensable” to the employer’s business.²²

A. SUBSTANTIVE ISSUES APPLICABLE TO ALL EMPLOYEE CATEGORIES

Before specifically addressing the overtime eligibility of the Facility classifications involved here, the arbitrator believes it appropriate to deal with several of the above set forth substantive issues which are applicable to all such employee classes at issue in this case. Those areas are addressed and determined below.

1. THE REPRESENTATIVE TESTIMONY ISSUE

The Agency contends in this area that the Union has not met its proof burden by presenting only one witness addressing each of the Facility’s custody posts and non-custody departments.

In this area, it is well settled law that all affected employees need not testify in order to establish an FLSA violation and recover back pay. Instead, federal courts have consistently held that representative testimony may be used to meet that burden.²³ Courts have further held that the weight to be given to representative testimony is a function of quality and not quantity, and depending upon the nature of the facts addressed, a small sample of representative evidence can suffice.²⁴

Here, employees performing work in each post, position and shift at issue in this case generally engage in the same activities, go through the same channels and traverse the same distances for each shift on a daily and largely routine basis. In addition, arbitrators in a large

²² 29 CFR 785.11.

²³ Anderson v. Mt. Clemens Pottery Company 328 U.S. 680 (1946); Reich v. Gateway Press, Inc. 13 F.3d 685, 701-2 (3rd Cir., 1994); Grochowski v. Phoenix Construction Company 318 F.3d 80, 88 (2nd Cir., 2003).

²⁴ Reich v. Southern New England Telephone Company 121 F.3d 58, 67 (3rd Cir., 1997).

number of portal-to-portal cases involving the Agency have relied on such representative testimony. Finally, even Agency representatives in this proceeding described management witnesses as having provided probative representative testimony, and in many cases likewise had only one witness address the post, position and/or shift involved.

In these circumstances, it is clear that such representative testimony as that provided here by the Union is not only approved in pertinent cases by the courts and by arbitrators, but also has also been used here by Agency representatives in the presentation of the Agency's case. That representative testimony here is, therefore, sufficient in the Union's attempt to meet its proof burden in this case.

2. THE AGENCY'S DE MINIMUS CONTENTION

The Agency further argues that any time worked by bargaining unit employees involved here is de minimus, because the pre-and post-shift tasks undertaken by the employees are themselves de minimus.

The arbitrator cannot agree. The Supreme Court and the FLRA, as well as numerous arbitrators, have held that integral and indispensable tasks performed before or after a scheduled work shift are compensable under the FLSA at the beginning and end of a continuous work day.²⁵ In addition, "where an employee is required to report at a meeting place to receive instructions or to perform other work there, or to pick up and to carry tools, the travel from (that) place to the work place is part of that day's work, and must be counted as hours worked..."²⁶ Therefore, "...any walking time that occurs after the beginning of the employee's first principal activity...is covered by

²⁵ See, Steiner v. Mitchell, *supra*, Note 12; Iowa Beef Processors v. Alvarez, *supra*, Note 15; United States Prison, Leavenworth; 59 FLRA 593, 597 (2004).

²⁶ Ibid.

the FLSA.”²⁷ In addition, where as here the additional work is repetitive and regular, pertinent case law rejects the de minimus defense.²⁸ Finally in this area, pertinent court cases have held that the de minimus exception applies in FLSA cases only where there is a “practical administrative difficulty in recording additional time,” such as an employee’s commuting time.²⁹ Such “administrative difficulty” is not the case in these circumstances, in that the Prison has chosen not to utilize equipment or procedures that would have much more clearly tracked employee work time.

Therefore in this case, so long as the employee's pre- and post-shift work time and tasks are “integral and indispensable,” and because there is no shown “administrative difficulty in recording additional time,” that work is not de minimus and must therefore be compensated.

3. THE COVERAGE OF THE GRIEVANCE ISSUE

The Agency further argues that the grievance does not cover all of the pre- and post-shift work that bargaining unit employees allegedly perform, because the grievance does not explicitly list the following reasons that employees must perform pre- or post-shift work: “volume of work...; emergency responses during a shift change; posted picture file review; occasional staff hold over to facilitate the identification of the next person in line for mandatory overtime, and/or a volunteer to fill a suddenly vacant post for the on-coming shift; (and) checking in with the Lieutenant;” or address the “granting of credit on the mandatory overtime roster in lieu of short increments of overtime.” It contends that such matters are therefore not properly before the arbitrator.

Arbitrators generally hold in this area that a grievance should not be treated similarly to a pleading in a court of law, but it must instead be sufficient to notify management of the conduct,

²⁷ Alvarez, supra, 546 U.S. at 36, 39.

²⁸ Lindow v. United States 738 F.2d 1057 (9th Cir., 1984).

²⁹ Singh v. City of New York 524 F.3d 361, 371 (2nd Cir., 2008); Reich v. New York City Transit Authority 45 F.3d 646, 652 (2nd Cir., 1995).

action or inaction of which the union complains.³⁰ Those cases further hold that the critical question in such cases is whether the employer had sufficiently specific notice to enable it to address the claim.³¹ In addition, arbitrators normally hold that because equity abhors a forfeiture, “the party seeking to nullify a grievance or any portion thereof on a technicality has a heavy burden.”³²

A review of the grievance itself shows that it lists examples of the claimed pre- and post-shift work performed by the employees, and demands overtime payment for such work. While that list of examples may not be exhaustive, it is in my judgment specific enough to allow Facility management to address the claim, and to be informed of the contended Facility actions and inactions of which the Union complains.

In view of the above, the arbitrator finds no merit to the Agency’s contention that pre- and post-shift work performed by bargaining unit employees is not covered by the grievance.

4. THE CLAIMED REVISED POST ORDERS AND THE ISSUE OF ADVERSE INFERENCE

The Union further argues that because the Agency did not produce claimed changes to Facility Post Orders until the March 11, 2014 hearing date, the Union is entitled to an arbitral adverse inference concerning those matters.

Applicable arbitral and court cases hold that, if a party withholds pertinent information to which another party is entitled and has timely requested, it is appropriate for the arbitrator or court to assume that the withheld information would be detrimental to the party that controls such

³⁰ See e.g., Ralston Purina Company 71 LA 519 (Andrews, 1978).

³¹ See, e.g., Monroe Concrete Company 56 LA 15 (Weckstein, 1971); Colson Company 54 LA 806 (Roberts, 1970).

³² See, e.g., Township of Neville 75 LA 668, 672 (Freeman, 1980).

information.³³ An adverse inference is also appropriate when the party controlling such information does not provide it until long after it is requested, particularly if such information may be highly relevant.³⁴

In this situation, the Union requested any updated Post Orders from the Agency well before the September, 2013 first day of the Union's case, and the arbitrator clearly directed the Agency to provide that information by the time of the beginning of the presentation of the Union's case in September, 2013 during a conference call on September 19 – five days before the hearing began. Despite the timely Union request for such information and the arbitrator's clear direction to the Agency to provide that information, it was not provided to the Union by the Agency until nearly six months later when the second set of hearing dates occurred in March, 2014 – a time by which the Union's case in chief was nearly completed. In my judgment, given the high potential relevance of such information, the fact that such data was within the Agency's full custody and control at all times, and the lack of any shown reason for such an unreasonable delay, the arbitrator has little choice but to make an adverse inference that had such data been timely provided, that information would have been adverse to the Agency's case.

In addition, even assuming, arguendo, that the Post Orders were modified consistent with the Prison's claims concerning pre and post regular work shift performed by bargaining unit employees involved here, those revised Post Orders changes were apparently not enforced by the Prison, in view of the testimony of the witnesses here that they continued to perform such work outside of their regular shift times, even after the claimed effective date of those revised Post Orders. The Prison, assuming the efficacy of such claimed revised Post Orders, had the authority

³³ See, e.g., Langford v. Norris 2010 U.S. App. LEXIS 14800, 39-40 (8th Cir., 2010); Social Security Administration 86 LA 1205, 1211 (1986).

³⁴ See, e.g., Ellis v. Navarro 2012 U.S. Dist. LEXIS 116491 (N.D. Cal., 2012); Hill and Sincropi, Evidence in Arbitration, 2nd Edition, at 31 (1987).

to enforce them via at minimum disciplinary action, and utterly and totally failed to do so.

Moreover, even if Post Orders were changed to eliminate verbal exchanges at the posts during shift changes as testified by Captain Serna, the evidence clearly shows that such verbal exchanges continued in the same frequency, manner and length subsequent to such claimed Post Order changes.

In view of the above, the arbitrator must make an "adverse inference" concerning the Agency's failure to timely provide to the Union claimed changes in Post Orders. I therefore find that the claimed revision of Post Orders made by the Prison does not impact the pre- and post-shift work performance by bargaining unit employees determined herein.

5. THE EVIDENTIARY UTILITY OF THE FACILITY'S VIDEO PRESENTATION

The parties further disagree in these circumstances concerning the evidentiary utility of the Facility's video presentation.

A review of the Agency's video evidence by the arbitrator shows that such evidence, inter alia: 1) was for non-consecutive days; 2) was never at least a continuous hour long; 3) did not show the same vantage point for any twenty-four hour period; 4) failed to show employee post entry times and departure times for any given shift; 5) is motion sensitive and capture movement only in thirty second periods; and 6) skips ahead as much as thirty-two minutes within a one hour recorded timeframe.

As such, it is the arbitrator's considered judgment that such videos are not sufficiently reliable to counter the testimony of Union witnesses who actually serve in the Facility posts in dispute in this proceeding. The Union witness testimony will, therefore, be credited where it differs from the "evidence" produced via the videos, in that such video testimony in my judgment is inherently unreliable in these circumstances.

6. THE ISSUE OF "JUST AND REASONABLE INFERENCE"

The Union further argues that in the circumstances involved here relating to the Prison's work hours record keeping, the Union's evidence should be credited where, as here, the amount and extent of employee overtime work may be demonstrated by "just and reasonable inference."

Supreme Court and other federal court decisions hold that, where an employer has kept inadequate records in an action for unpaid wages under the FLSA, an employee need only prove that "he has in fact performed work for which he was improperly compensated" and produce "sufficient evidence to show...the amount and extent of that work as a matter of just and reasonable inference..."³⁵ Once that evidentiary threshold is met, the burden shifts to the employer to "come forward with evidence of the precise amount of work performed or with evidence to negate the reasonableness to be drawn from the employee's evidence."³⁶ If the employer does not meet that burden, "...the court may award damages to the employee even if the result is "only approximate."³⁷ This standard is utilized by the courts so that the employee is not penalized by the employer's failure to maintain adequate records"³⁸ and so that employers will not be "...reward[ed] for violating federal law."³⁹

In this situation, the Prison has chosen not to keep adequate records of any pre- and post regular shift work performed by bargaining unit employees here, by either: 1) installing time clocks; 2) utilizing a sign-in sheet at the Control Center or Lieutenant's Office by which to track employee

³⁵ Carter v. Panama Canal Company 463 F.2d 1289, 1293 (D.C. Cir., 1972); Reich v. Southern New England Telecommunications Corporation 121 F.3d, 58, 69 (2nd Cir., 1967); Dove v. Coupe 759 F.2d 167, 174 (D.C. Cir., 1985).

³⁶ Anderson v. Mt. Clemens Pottery Company 328 U.S. 680, 687 (1946).

³⁷ Id. See, also, Brock v. Seto 790 F2 1446, 1448 (9th Cir., 1986).

³⁸ Mt. Clemens, supra, Note 36; Brock, supra, Note 37.

³⁹ Southern New England Telecommunications Corporation, supra, Note 35.

work time; 3) having a supervisor in the Front Lobby or Control Center to track employees' arrival and departure times from a shift; or 4) taking any other action to come forward with evidence of the precise amount of work performed or to negate the reasonableness to be drawn from the Union's evidence. In view of this failure and the clear standards set forth in pertinent court cases interpreting the FLSA, the arbitrator has no choice but to make a "just and reasonable inference" in the Union's favor concerning the amount and extent of that work, subject to the arbitrator's credibility findings, infra.

7. THE IMPACT OF THE NEGOTIATED PORTAL TO PORTAL PROVISIONS

A major argument here by the Agency is that its actions concerning employee overtime pay were consistent with both the nationally and locally negotiated Portal to Portal provisions set forth on Pages 2 and 3 of this Decision. Among other things, those negotiated provisions – also contained Agency Program Statement 610.01 – set forth that shift starting and stopping times for employees drawing equipment and keys at the Control Center are the times the employee picks up and returns keys and equipment at the Control Center, and that such employees are to be allowed a "reasonable amount of time, usually no more than fifteen minutes" to travel each way to and from the Control Center to and from their work locations at the beginning and end of their shifts. Those negotiated provisions further set forth that employees who do not draw equipment and keys at the Control Center should be at their duty stations at the beginning and end of their shifts.

Although the Prison contends that those negotiated Portal to Portal provisions are controlling here, and in essence that the Union negotiated away its right to the claims it makes in this case, the arbitrator cannot agree, for several reasons. First, the designation of shift starting and stopping times and locations contained in those contract provisions is by its clear terms limited to the location for such starting and stopping times, and neither addresses nor takes into account

the impact of FLSA law on any additional actions and/or work that may be covered by the FLSA and addressed herein, which occur either at such posts or prior to employee arrival at or after departure from such posts. Those areas include the FLSA recognized concepts of “suffer and permit,” “continuous work day,” and “integral and indispensable” work functions.

Second, the nationally negotiated Portal to Portal provisions clearly provide that, for employees who pick up keys and equipment at the Control Center, shifts shall be scheduled “...to include reasonable time to travel from the Control Center to their assigned duty post and return at the end of the shift.” It is thus clear that for those employees, the shift is to begin at the Control Center and includes “reasonable travel time” to and from their posts. Nonetheless, such shifts at the Prison are in the large majority of cases not overlapping, a significant portion of the testimony of Union witnesses here addresses the time necessary to travel from the Control Center to the pertinent post and back, those employees are generally required by their supervisors to be on the post at the shift change time, and such employees regularly are compensated for only for eight hours of work despite the necessity to go through the Control Center prior to their normal shift start in order to be at the post by that shift start time, and to return to the Control Center after such regular shift end time. Those employees thus have not received the “reasonable travel time” guaranteed to them by the negotiated Portal to Portal provisions, and that Facility inaction is a clear violation of that negotiated provision.

Third, with regard to employees who under the locally negotiated Portal to Portal provisions do not draw keys and equipment from the Control Center, and who “normally” are to be at their usual duty location at the beginning and end of their work days, that provision recognizes by use of the word “normally” that such place and time for the beginning and ending of shifts does not occur in all circumstances. In addition, and more important, that provision does not take into account in any way the elements of FLSA law mentioned above in this “Discussion” section that

relate to additional employee actions and/or work outside of those “normal” shift start and stop times that may be covered by the FLSA. Indeed, none of these provisions take into account in any way the additional protections of the FLSA – legal rights which cannot be waived in negotiations, because such rights are “derived from higher government-wide laws, rules, and regulations” under Article 3, Sections (a) and (b) of the parties’ National contract.

Based upon the above, the arbitrator does not find that the Union’s claims here are negated by the national or locally negotiated Portal to Portal contract provisions. Instead, I find that the Prison’s actions here are contrary to its duty to provide “reasonable travel time” for employees to travel to and from the Control Center to and from their duty assignment posts, set forth within those negotiated provisions.

8. FACILITY MANAGEMENT KNOWLEDGE OF CLAIMED COMPENSABLE OVERTIME WORK

In the arbitrator’s considered judgment, it cannot be seriously argued that Facility management was not aware that bargaining unit employees were performing work prior to the scheduled start and after the scheduled end of their shifts. This is so for several reasons. First, Prison General Post Orders require that virtually all employees “report to the Lieutenant’s Office for direction when they arrive (at the Facility) and have cleared the Control Center,” and before they proceed to their assigned posts prior to their shift starting times. Indeed, three of the Lieutenants who testified on behalf of the Prison stated that such a requirement is designed so that the Lieutenant knows who is working at each post, and can make last minute shift location assignments and exchange pertinent information with the employee at the beginning and end of the employee’s shifts. No bargaining unit employee has ever been told not to make such a Lieutenant Office stop before or after their scheduled shifts – a denial which would clearly be contrary to the General Post Orders in that area. Second, prior to installation of computer terminals at the posts, employees dropped off incident reports (often compiled after normal work hours), and

even after such computer installation still drop by the Lieutenant's Office after their scheduled shift end time to sign such incident reports. Third, the evidence is largely unrefuted that before installation of computers on the posts, employees were required to come monthly to the Lieutenant's Office – largely before and after their regular shift times – to review the posted picture files. In all of these areas, the Lieutenant would have known that the employees involved were working before and after their regular shifts by the fact that they reported to the Lieutenant's Office during such before and after shift times. Fourth, the Union previously won a grievance involving many of the same portal issues at the Prison. In that case, Arbitrator Calhoun explicitly determined that supervisors knew that correctional officers picked up batteries at the Control Center as a common practice, and that they were required and did check in at the Lieutenant's Office before going to and when coming back from their posts. Fifth, Lieutenants and other supervisors have observed employees arriving early, obtaining pertinent information from the Lieutenants, picking up equipment, and/or performing other work prior to the start of their shifts and after the end of their shifts. Sixth, Post Orders and job requirements require the employees to perform certain tasks prior to the beginning of their shifts, such as being alert and vigilant inside the secured areas of the Facility, and reporting to the Lieutenant in the Lieutenant's Office. Additionally, Prison staff must perform work at their posts both before their scheduled shift starting times and after their scheduled shift ending times, and thus their work time is not limited to the designated start and stop times for their posts. Facility Lieutenants are aware of these employees' job duties required before/after scheduled shift times. Seventh, Prison supervisors are present when employees respond to emergencies before and/or after their shifts. Eighth, it is not possible to perform the work required, i.e., picking up equipment, traveling to the posts, and exchanging information and equipment, during the eight hour shift, because in most cases there is no shift overlap and the posts require continuous coverage.

Similarly, that Facility supervisors knew or should have known that employees were working beyond their regular shifts is repeatedly manifest throughout the record here, in that supervisors repeatedly denied overtime requests and discouraged employees from requesting overtime in innumerable situations; refused to pay any overtime, with limited exception, for time periods of less than thirty to forty-five minutes despite employee eligibility for such payment, with some refusing to pay any overtime at all irrespective of substantial work performed by those employees beyond the employees' regular shifts; and instead of paying overtime many of those supervisors required employees often without employee agreement to move their names to the bottom of the mandatory overtime list rather than receiving statutorily-required overtime or compensatory time payment -- all contrary to FLSA requirements.

Finally in this area, the Facility could have recorded and thereby arguably prevented any times spent by bargaining unit employees in work before and after their regular shifts. The installation of time clocks would likely have prevented virtually the entirety of the dispute here, and at minimum would have limited a large degree of disputed Agency liability. The Prison also could have utilized a sign in, sign out sheet at the Control Center, or assigned a supervisor to record Front Lobby arrival and departure times. It chose to take none of these proactive steps.

Moreover, even assuming, arguendo, that many non-correctional employee supervisors as they testified were unaware that such employees as Unit Managers and Recreation Department employees were coming in early to and leaving late from their work shifts, Operations Lieutenants with whom such employees checked in and out at the beginning and end of their actual work time would by virtue of such check-in be aware of pre- and post-shift work time for such employees. In addition, to the extent that supervisors may not have been aware of such work, they could have

become aware of that work via the exercise of “reasonable diligence.”⁴⁰

In view of the entire above, it is apparent to the arbitrator that Facility management in these circumstances had knowledge of, or should have known of, the claimed compensable overtime worked by employees involved here.

9. CREDIBILITY

A major disagreement exists between the parties concerning which witnesses to credit and what testimony to accept, where substantial differences exist in some of that testimony. For example, the testimony produced at the hearing differs between Union and Prison witnesses in the area of the time necessary for the exchange of information on Housing Unit posts from 10-15 minutes per day on a good day (Union witnesses) to a “few seconds” (Prison witnesses).

Although the arbitrator does not believe it proper or helpful to completely discredit the witnesses presented here by either party, it is my considered judgment that the testimony in disputed areas of the Union’s witnesses, who actually work the posts involved, merits more credit than that of Prison supervisors, who with limited exception spend little or no time in such Prison posts. At the same time, however, because bargaining unit employees in relative terms have more to gain from coloring their testimony in favor of more work hours than do supervisors (who also have an interest in an outcome in this area favorable to management), it is my determination that, where Union witnesses set forth in their testimony a range of time in which they claim to be working pre- and post-shift overtime, the arbitrator will award only the lower amount of time claimed to be worked in that range in such circumstances. In my view, there is no perfect calculation of the amount of actual overtime worked in such circumstances – including the claimed averages of such times set forth in the Union’s brief. Given the elements set forth above, I believe such a solution

⁴⁰ See, e.g., Reich v. Department of Conservation & Natural Resources 28 F.3d 1076, 1078 (11th Cir., 1994); Gulf King Shrimp Company v. Wirtz 407 F.2d 508, 512 (5th Cir., 1969).

is not only appropriate, but is the best in these circumstances given the relatively poor relationship existing between the parties.

In view of the above, the arbitrator determines that questions of credibility between the testimony of Union and Prison witnesses concerning pre- and post- shift work times shall be resolved under the method and procedure set forth above.

10. THE CLAIM OF UNION FAILURE TO ESTABLISH A "PRIMA FACIE" CASE

The Agency also argues in its brief that the Union has not met its burden of establishing a prima facie case, in that it has not shown by a preponderance of the evidence that bargaining unit employees have performed work for which they were improperly compensated, or that the Prison "had actual knowledge of the employees' overtime work."

The arbitrator cannot agree. Based upon the extensive factual findings, infra, as well as my determinations here in the areas of "just and reasonable inference," credibility, and specifically in supervisor knowledge of the overtime work claimed here, I find that the Union has indeed met its burden of demonstrating the existence of a prima facie case.

11. THE AGENCY'S CONTENTIONS UNDER SECTIONS 6(q) OF THE CONTRACT AND VIII-F OF THE LOCAL SUPPLEMENT

The Agency also argues that, irrespective of any employee work time before and after scheduled shifts, overtime payments should be denied to those employees because they did not timely notify the Prison of such work time under Sections 6(q) of the contract and VIII-F of the Local Supplement.

The arbitrator cannot agree. Although as the Agency contends Section VIII-F of the Local Supplement requires employees who believe they may be entitled to overtime to "...notify his/her supervisor in writing...not later than thirty calendar days" of such overtime work, the record is rife with circumstances where supervisors repeatedly denied employee overtime requests despite the merits of such requests; laughed at and/or ridiculed such requests; refused to pay any overtime

despite employee eligibility for such pay; and verbally discouraged such overtime requests for time periods less than thirty to forty-five minutes, with some supervisors refusing in any occasion to approve clearly earned overtime amounts; and many supervisors instead of paying earned overtime required employees often without employee agreement to move their names to the bottom of the mandatory overtime list rather than paying such employees overtime or compensatory time – all contrary to FLSA requirements. In such circumstances, the Agency simply cannot hide behind the Local Supplement employee overtime notice provisions.

Turning next to Article 6(q) of the contract, that Section requires the Prison and the employee to bear mutual responsibility to review documents related to pay and allowances in order to detect any overpayments/underpayments...” Here, as set forth above, the Prison has repeatedly refused to pay earned overtime in a multitude of situations, and thus to create “documents related to (overtime) pay.” Any “mutual responsibility to review...” such documents has, therefore, been rendered impossible by the Prison’s failure to track or pay such earned overtime.

In view of the above, the arbitrator finds no merit in the Agency’s contentions relating to Section 6(q) of the contract or Section VIII-F of the Local Supplement.

12. THE ISSUE OF “SUFFER AND PERMIT”

A major issue in this case – and one closely related to the discussion immediately above – is whether the Agency “suffered and permitted” the actions of the employees involved here concerning pre- and post-shift work provided by those employees, under case decisions cited above.

Based upon the arbitrator’s findings, infra, concerning the areas of: 1) representative testimony; 2) Facility management knowledge of claimed compensable overtime work; and 3) credibility; it is my finding that the Prison “suffered and permitted” pre- and post-shift overtime work by bargaining unit employees at issue here. That work was universally for the benefit of the Prison,

was “necessary for the proper performance of (their jobs);” and “constituted “performance of a valuable security service for the (Prison);” “during times when employees were restricted to the (Prison) site for that purpose.”⁴¹ In addition in these circumstances, the employees involved here “were subject to real limitations on their freedom that inure[d] to the benefit of the [Prison]”⁴² and performed functions during these periods predominantly for the benefit of the Prison⁴³ under pertinent federal regulations and case decisions. Moreover, such work times were known to Prison supervisors consistent with the findings above. Also, under General Post Orders cited above, bargaining unit employees are to be “...on constant alert for irregular or unusual movement of inmates,” and failure to do so can result in disciplinary action under those Post Orders.

In view of the entire above, I find that Facility management had knowledge at minimum in general terms of the claimed compensable overtime worked by bargaining unit employees, and “suffered and permitted” that work at those times and in those amounts determined in this case.

13. THE “INTEGRAL AND INDISPENSABLE” ISSUE

Finally in these substantive areas, the arbitrator must address the issue of whether the work performed by bargaining unit employees and at issue here is an “integral and Indispensable part of their principal activities” under pertinent case law.

In my judgment, retrieving and returning equipment at the Control Center, checking in and out with the Lieutenant, and walking through the secured areas of the Prison to get to the employees’ posts outside of the employees’ normal work time, as well as reversing these functions when leaving work, are matters essentially undistinguishable from the employees’ overall duties

⁴¹ Reich v. Southern New England Telecommunication Corporation 121 F.3d 58, 61 (2nd, Cir., 1977)

⁴² Kohlheim v. Glenn County 915 F.2d 1473, 1477 (4th Cir., 1990).

⁴³ Rushing v. Shelby County 8 F.Supp 2d 737, 745-746 (W.D. Tenn.,1997),

related to the safety and security of the Prison. They are, therefore, an “integral and indispensable part of the employees’ principal activities” performed outside of the employees’ normal work times, under pertinent case law set forth above.

B. SPECIFIC FINDINGS CONCERNING OVERTIME AMOUNTS

1. THE ISSUE OF COLLATERAL ESTOPPEL

In this area, the Union argues that the Agency, subsequent to Arbitrator Calhoun’s 2008 ruling in the first portal decision involving these parties⁴⁴ finding that the Agency was liable for payment of certain pre- and post-shift overtime work, has reasserted in this case previously raised defenses involving the same issues that were rejected by Arbitrator Calhoun. The Union asserts that the Agency is prevented from re-litigating the same issues before this arbitrator under the doctrines of issue preclusion and collateral estoppel.

Arbitrators generally hold that where the same issue was litigated in a prior proceeding involving the same employer and union, the collateral estoppel doctrine provides that the earlier ruling on such issues should control in the latter case.⁴⁵ The collateral estoppel doctrine is designed to prevent repetitious litigation or arbitration of issues that have already been decided.⁴⁶ Adherence to the prior arbitrator’s ruling on an issue identical to that raised in the prior proceeding is desirable in maintaining a stable labor-management relationship. If either party is convinced that subsequent arbitrators will not honor the results of a prior arbitration decision on the same claim, the result could be endless arbitrations until the resources of one or both of the parties are exhausted.⁴⁷ As found

⁴⁴ FMCS Case No. 05-57849; affirmed 64 FLRA No. 150

⁴⁵ See, e.g., Timken Roller Bearing Company 32 LA 595, 598 (Boehm, 1958); Zack and Block, Labor Agreement in Negotiation and Arbitration, 24-25 (1983).

⁴⁶ Timken Roller Bearing Company, supra, Note 38, at 599.

⁴⁷ See, e.g., Mead Corporation 43 LA 391, 394 (Hawley, 1964); Marley Cooling Tower Company 71 LA 306, 313 (Sergeant, 1978); Vestal and Hill, Preclusion in Labor

by well known arbitrator Whitley McCoy, "Where, as here, the prior decision involves the interpretation of an identical contract provision between the same company and union, every principle of common sense, policy and labor relations demands that it stand until the parties annul it by a newly worded contract provision."⁴⁸ Only where the prior decision is "clearly erroneous," "clearly and significantly wrong," or "egregiously in error" should an arbitrator not be bound by the prior decision on the same issue in such circumstances.⁴⁹

The Union asserts that the following issues in this case were previously heard and decided by Arbitrator Calhoun, and that those issues should therefore be subject to collateral estoppel:

1. Picking up a battery is compensable work, and the compensable workday begins if and when an employee picks up a battery from the Control Center.
2. Stopping at the Lieutenant's Office is compensable. An employee's workday starts, if it has not started already, when he/she stops by the Lieutenant's Office to check in at the beginning of his shift.
3. Inventorying keys and equipment and conferring with the relieved officer on inmate activity is an integral and indispensable principal activity of Housing Unit officers' work that is performed for the benefit of the Prison.
4. It is a normal practice for both officers to be present to perform shift exchanges at the Towers and for that reason, the shift exchange takes a minimum of thirty minutes to perform properly.

The arbitrator has reviewed Arbitrator Calhoun's decision and finds both that he heard and decided these issues in the Union's favor, and that the same issues were presented for determination before this arbitrator. I further find that, while the circumstances concerning the battery pick up and return are somewhat different in this case from those before Arbitrator Calhoun, in that a battery charger has since been installed at each work Unit, to the extent that bargaining

Controversies 35 Oklahoma Law Review 281, 301 (1982).

⁴⁸ Pan American Refining Company 9 LA 131, 732 (McCoy, 1948).

⁴⁹ Grenig, "Collateral Estoppel," in Bornstein and Gosline, Eds., Labor and Employment Arbitration (Matthew Bender and Company, 1995), Page 15-16.

unit officers still pick up and return batteries at the Control Center, the decision of Arbitrator Calhoun properly serves as a matter already determined under the doctrine of collateral estoppel. Finally in this area, this arbitrator does not find that Arbitrator Calhoun's determinations in these areas were "clearly erroneous," "clearly and significantly wrong" or "egregiously in error." The Facility is therefore bound by the decision of Arbitrator Calhoun in these areas, for purposes of the same issues being brought before the instant arbitrator.

2. THE BEGINNING / END OF COMPENSABLE WORK TIME

There remains for the arbitrator to determine the beginning and end of compensable work time for positions not covered by my above findings concerning collateral estoppel.

With regard to employees who obtain their keys and equipment at the Control Center, it is apparent to the arbitrator that their compensable work time begins and ends when they go through the Control Center when coming to and leaving from work. The parties' Portal to Portal Agreements – both national and local – make clear that the work day for these employees under normal circumstances starts when they go through the Control Center on the way to their posts, and ends when they leave the Control Center to exit the Facility to go home – and that such compensable work time includes all time between those two actions. Not only are those employees entitled to "reasonable travel time to/from their posts" under those negotiated agreements, they are also entitled to pay for picking up equipment and keys (including batteries) when such occurs, subsequently checking in at the Lieutenant's Office as required by pertinent General Post Orders, passing through the Main Corridor where in many circumstances they may encounter inmates, and waiting for and passing through locked sally ports on the way to and from their posts as an element of the contractually-required "reasonable travel time," as well as any time reasonably necessary to exchange equipment or keys and share information with the on-duty or on-coming employee on a post; since these functions are an "integral and indispensable part of the employee's principal

activities” and are compensable even if those employees are “not required to arrive early (or stay late)” under pertinent case decisions.

With regard to Facility employees who do not receive their keys and equipment at the Control Center, it is my considered judgment that their work day begins when they pick up and return a battery at the Control Center. If they do not do so, their work time begins and ends when they check in and out at the Lieutenant’s Office; and if they do not do that, when they enter and leave the Main Corridor area where they may encounter an inmate or inmates. In my judgment, those functions are an “integral and indispensable part of the employee’s principal activities” under pertinent FLSA case decisions.

Additionally, it is clear that maintaining vigilance and monitoring inmate activity while traveling within the secured Prison areas constitutes “work” under the above case law. In my view, that action still meets the “work” definition when no inmates are in the Main Corridor, since once an employee enters the secured area, he/she must be prepared to respond to emergencies, inmate assaults, and similar inmate conduct, in his/her overall function of maintaining the safety and security of the Prison. Similarly, the time spent by employees traveling to their posts, and exchanging keys, equipment and pertinent information, is work time and must be compensated under those cases. This is so even if the employee is not required to arrive early or stay late, and the employee’s subjective reason for doing so is irrelevant to the question of proper paid time in such cases.

Finally, for those employees who as part of their duties do not go through the main Prison building or Control Center when coming to or leaving the Prison, such as the Rear Dock Officer, it is my determination that those employees’ work day begins and ends at the time he/she gets/returns equipment at the Rear Gate.

C. WORK BEFORE / AFTER REGULAR SHIFTS BY CLASSIFICATION / SHIFT

Consistent with the extensive above factual findings, as well as the prior legal determinations in areas placed before the arbitrator by the parties, the arbitrator determines that the Prison suffered

and permitted unit employees in classifications set forth below to perform work before and after their scheduled shifts without compensation in violation of the FLSA and the parties' Master Agreement in the following Prison positions, shifts and amounts. The data below does not include times when these bargaining unit employees were required to come in early or stay late due to Facility emergencies.

POSITIONS STAFFED 24 HOURS PER DAY

Control Center #1

Fifteen Minutes

Housing Units

Twenty-five Minutes 50% of the Time

Forty-five Minutes 50% of the Time

Main Corridor

Fifteen Minutes

and

Compound #1 and #2

Twenty Minutes

Perimeter Towers 1-6

Thirty Minutes Until March 20, 2011

Tower 7 When Staffed 3 Shifts Per Day

Forty minutes

SHU #1 and #2

Thirty Minutes 50% of the Time

Sixty Minutes 50% of the Time

One Bravo #1 and #2

Thirty Minutes

POSITIONS STAFFED TWO SHIFTS PER DAY

SHU #3 and #4

AM Shift

Twenty Minutes 2 Days Per Week

Thirty-five Minutes 3 days per week

PM Shift

Thirty Minutes

One Bravo #3 and #4

AM Shift

Twenty-seven Minutes

PM Shift

Twenty Minutes 40% of the Time

Thirty Minutes 60% of the Time

Tower 7 When Staffed 2 Shifts Per Day

Fifty Minutes (AM Shift)

Forty Minutes (PM Shift)

Urinalysis AM Shift

Twenty Minutes

Control Center #2 AM Shift

Thirty Minutes

Education / Programs / Recreation Corridor

AM Shift

Twenty Minutes

PM Shift

Twenty Minutes When Shift Was Staffed 2-10 PM

Seventeen Minutes When Shift Was Staffed 1:45-9:45 PM

POSITIONS STAFFED ONE SHIFT PER DAY

Rear Dock

Fifteen Minutes

Rear Gate

Fifteen Minutes

Tower 5

Fifteen Minutes until December 18, 2011

Front Lobby

Twenty-five Minutes

Visiting Room #1 - #4

Fifteen Minutes 50% of the Time

Work Corridor

Ten Minutes

Observation East and West

Twenty Minutes 2 days a week
Twenty-five Minutes 3 days a week

SHU Property

Twenty Minutes

SHU and One Bravo Recreation

Twenty-five Minutes 2 days per week
Fifty Minutes 3 days per week

SHU #5

Thirty Minutes 3 days per week
Fifteen Minutes 1 day per week

Shakedown Team

Thirty Minutes 10% of the Time
Forty-five Minutes 90% of the Time

Posted Picture File - All Employees

Fifteen Minutes One Day per Month until Posted Picture File was installed on Computers in March 2012

NON-CUSTODY POSITIONS

Unit Secretary

Fifteen Minutes Four Days Per Week
Twenty-five Minutes When Assisting with Lock Down - One Day Per Week

Food Service Department

AM Shift

Thirty-seven Minutes
Seventy-five Minutes 2 Times Per Week When Making Hot Food From Scratch Prior to March, 2013

AM Shift After March 2013

Thirty-five Minutes 30% of the Time

PM Shift

Twenty Minutes 35% of the Time
Thirty Minutes 30% of the Time After March 2013

Recreation Department

10:30 AM - 9:00 PM Compressed Shift

Ten Minutes

Forty-five Minutes 2 Times Per Week on Standby

12:30 - 9:00 PM Shift -
Forty Minutes 2 Times Per Week on Standby
7:30 AM - 3:30 PM Shift -
Ten Minutes

Correctional Systems Department

Receiving and Discharge / Mailroom
Twenty-five Minutes – 6:30 AM - 3:00 PM, 6:00 AM-4:00 PM, and
7:30 AM - 4:00 PM Shifts
Forty-five Minutes on New Inmate Intake Bus Days

Unit Team Management Department

Case Manager
Twenty Minutes 7:30 AM - 4:00 PM Shift
Ninety Minutes 12:30 PM - 9:00 PM Late Night

Miscellaneous Delays
Fifty Minutes - New Inmate Intake Bus Days
Eighty Minutes When Preparing for Program Review
Two Hours Two Times Per Week for Three Weeks When Transferred to a New Unit

AWARD

1. The Prison suffered and permitted bargaining unit employees to perform work before and after their scheduled work shifts without compensation in violation of the FLSA and the parties' contractual agreements in the weekly minute, day, and percentage amounts set forth immediately above.
2. With regard to the appropriate remedy, the arbitrator hereby remands this matter to the parties for the purpose of jointly determining the dollar amounts owed to bargaining unit employees involved here under the findings set forth above. In addition, although emergency situations are not specifically covered by the above overtime amounts, it is clear that at least in some of those circumstances, employees have not been compensated for such emergency responses. The parties are hereby directed to discuss this area and endeavor to remedy those non-paid emergency circumstance responses. In the absence of agreement in this area, the arbitrator will entertain claims in this area under the jurisdiction retention in #3 below.

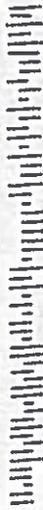
3. The arbitrator also hereby retains jurisdiction over the issue of damages, including potential liquidated damages, as well as the issue of attorney's fees and costs. Such jurisdiction of the arbitrator may be re-established any time subsequent to 90 days after the date below.

October 1, 2014



RONALD HOH
Arbitrator

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