UNITED STATES OF AMERICA

FEDERAL MEDIATION AND CONCILIATION SERVICE

In the Matter of Arbitration **Between** **U.S. DEPARTMENT OF JUSTICE** **FEDERAL BUREAU OF PRISONS** **FEDERAL CORRECTIONAL INSTITUTION** **TERMINAL ISLAND, CALIFORNIA,** **Agency,** **And** **COUNCIL OF PRISON LOCALS,** **AFGE LOCAL NO.1680, AFL-CIO,** **Union.** **Re: Fair Labor Standards Act (FLSA),** **29 U.S.C. Section 201, *et seq.***	**IMPARTIAL ARBITRATOR'S** **FINDINGS** **AND** **AWARD** **FMCS Case No. 05-57929** **Authority Case No. 0-AR-4179**

The above-entitled matter is conducted pursuant to the provisions of the Master Agreement between U.S. Department of Justice, Federal Bureau of Prisons ("Agency") and Council of Prison Locals, AFGE Local No. 1680, AFL-CIO ("Union"). The matters at issue are presented for adjudication before Impartial Arbitrator Kenneth A. Perea.

I. THE HEARING

This dispute was heard in Long Beach and San Pedro, California, over the course of six days on January 26, March 27 and 28, 2006, March 10, 2010, September 5, 2012, and June 24, 2013. Throughout the course of the hearing, both parties were afforded full opportunity to present sworn testimony, cross-examine witnesses and introduce documentary evidence. Verbatim transcripts of the proceedings conducted on January 26, March 27 and 28, 2006, and September 5, 2012, were prepared. Written closing briefs regarding damages were exchanged and received on July 15, 2014. Each member of the class of Grievants, upon whose behalf the subject grievance was prosecuted consisting of all Correctional Officers working at the Agency's Federal Correctional Institution, Terminal Island

("Terminal Island") in San Pedro, California, during a seven-year period or any portion thereof from May 31, 2002 to June 21, 2009, was fully and fairly represented by the Union.

II. THE APPEARANCES

The Union and the Grievants were represented at the hearing by Michael Posner and Jason C. Marsili, Posner & Rosen, LLP. The appearance on behalf of the Agency was made by Michael A. Markiewicz, Labor Relations Specialist.

III. THE MATTERS AT ISSUE

The issues presented for adjudication in the final remedy phase of the instant proceedings may be stated in the following terms:

1. What damages, including interest, should be awarded Correctional Officers for the period May 31, 2002 through November 30, 2006, inclusive?

2. Did the Agency fail to compensate Correctional Officers pursuant to the Fair Labor Standards Act for compensable pre-shift and post-shift overtime hours worked during the period December 1, 2006 to June 21, 2009?

3. If the answer to Issue No. 2 above is in the affirmative, what damages should be awarded to Correctional Officers for the period December 1, 2006 to June 21, 2009?

4. Is an award of liquidated damages to Correctional Officers pursuant to the Fair Labor Standards Act warranted for the period December 1, 2006 to June 21, 2009?

5. What award of a reasonable attorney's fee should be paid by the Agency to the Union pursuant to the Fair Labor Standards Act?

6. What method of distribution of awarded damages to Correctional Officers for the periods May 31, 2002 to November 30, 2006, inclusive, and December 1, 2006 to June 21, 2009, is appropriate?

IV. STATEMENT OF THE CASE

Following three days of hearing conducted in Long Beach, California, on January 26, March 27 and 28, 2006, and receipt of voluminous post-hearing briefs, on November 30, 2006, Impartial Arbitrator Kenneth A. Perea ("Impartial Arbitrator Perea") issued his initial Findings and Award ("Award I") in the

matter of arbitration between the Agency and the Union regarding the former's failure to compensate Correctional Officers working at Terminal Island for pre-shift and post-shift overtime hours worked for the period May 31, 2002 through November 30, 2006, inclusive. Following issuance of Award I, the Agency filed exceptions thereto with Federal Labor Relations Authority ("Authority") on January 3, 2007. On August 12, 2009, the Authority remanded Award I to the parties for resubmission to Impartial Arbitrator Perea for purposes of addressing specified deficiencies found therein. (*Federal Bureau of Prisons, Federal Correctional Institution Terminal Island, California* and *American Federation of Government Employees Local 1680*, ("FCI Terminal Island I"), 0-AR-4179, 63 FLRA No. 174 (2009).)

Pursuant to the Authority's direction in *FCI Terminal Island, supra*, Impartial Arbitrator Perea reconvened the proceedings in San Pedro, California, on March 10, 2010. During the reconvened proceedings, the Union raised an issue regarding the Agency's continuation despite issuance of Award I of its policy and practice requiring Correctional Officers to pick up and return equipment from and to its Control Center before and following conclusion of their duty shifts. The Union accordingly requested Impartial Arbitrator Perea issue a supplemental award addressing the Agency's continuing Fair Labor Standards Act ("FLSA") violations pursuant to its unchanged policy and practice which occurred from December 1, 2006, to June 21, 2009, when the Agency ultimately issued new post orders instructing Correctional Officers to not pick up and return equipment from and to its Control Center.

In response to the Union's request regarding alleged continued violations during the period December 1, 2006 to June 21, 2009, the Agency asserted Impartial Arbitrator Perea's jurisdiction was limited to clarification of the remedy issued in Award I. The Agency thus contended Impartial Arbitrator Perea was *functus officio* and without jurisdiction to address alleged continued violations which occurred from December 1, 2006 to June 21, 2009.

During the the March 10, 2010 proceedings, the parties agreed to submit briefs addressing Impartial Arbitrator Perea's authority to issue a remedy for alleged FLSA violations occurring after November 30, 2006. Impartial Arbitrator Perea, in turn, advised he would issue an Interim Award adjudicating whether, pursuant to the Union's grievance alleging FLSA violations due to the Agency's post orders requiring Correctional Officers to participate in pre-shift and post-shift work activities without providing overtime compensation therefor, he had jurisdiction to adjudicate alleged violations under the

Agency's then existing post orders for the period from December 1, 2006 to June 21, 2009, when the Agency changed its post orders. Further proceedings regarding remedy were scheduled to commence on June 30 and July 1, 2010. The Agency and Union also agreed to defer submission to the Authority of any potential interlocutory exceptions regarding the forthcoming Interim Award addressing jurisdiction until after Impartial Arbitrator Perea issued his final Findings and Award.

Following receipt of the parties' briefs, on May 26, 2010, Impartial Arbitrator Perea issued his Interim Findings and Award ("Award II") concluding, pursuant to the Union's May 31, 2005 grievance contesting the before-mentioned post orders and failure to pay FLSA overtime compensation therefor, that he did have jurisdiction to issue findings and a potential remedy for alleged violations which allegedly occurred from December 1, 2006 to June 21, 2009, in view of the fact the Union's grievance contested the Agency's post orders requiring Correctional Officers perform pre-shift and post-shift duties without overtime compensation which remained unchanged during the foregoing time period. Despite having agreed with the Union to defer the Authority's review of Award II, however, the Agency promptly initiated exceptions to Award II on June 24, 2010. On December 19, 2011, the Authority issued its Order dismissing the Agency's exceptions, without prejudice, as interlocutory. (*Federal Bureau of Prisons, Federal Correctional Institution Terminal Island, California* and *American Federation of Government Employees Local 1680*, ("FCI Terminal Island II"), 0-AR-4179, 66 FLRA No. 74 (2011) [63 FLRA 620] (2009).)

During pendency before the Authority of the Agency's exceptions to Award II, the parties submitted briefs to Impartial Arbitrator Perea regarding the issues identified by the Authority in *FCI Terminal Island*, *supra*, specifically identifying the post positions for which Correctional Officers picked up and returned equipment from and to the Control Center and accounting for any variances in the amounts of time Correctional Officers assigned to various posts throughout Terminal Island engaged in such compensable pre-shift and post-shift overtime work activities. On December 19, 2011, Impartial Arbitrator Perea issued a Second Interim Award ("Award III"), finding all Correctional Officers obtained and returned necessary and essential equipment from and to the Control Center for purposes of performing their assigned custodial responsibilities and delineating the specific number of minutes of compensable overtime daily worked at each post position by shift. Pursuant to Paragraphs 4 and 5 of

Award III, the matter was remanded to the parties for final calculation of the damages to be awarded each Correctional Officer, with the Impartial Arbitrator retaining jurisdiction to resolve any disputes regarding remedy.

Due to the parties' inability to agree on the amounts of damages to be awarded each Correctional Officer, subsequent proceedings were reconvened on September 5, 2012. During the hearing, the parties presented evidence conditioned upon the Agency's standing objection regarding the continuation of compensable pre-shift and post-shift activities during the period of December 1, 2006 to June 21, 2009. Submission of post-hearing briefs was scheduled and thereafter extended to January 8, 2013.

On January 7, 2013, however, the Union's counsel requested additional hearing dates to address any variances in the pay rates of Correctional Officers in light of the Authority's precedential decision in *United States Dep't of Justice, Fed. Bureau of Prisons, Fed. Med. Cntr. Carswell, TX* and *American Fed'n of Gov't Employees Local 1006* ("*Carswell*"), 65 FLRA 960 (2011). Over the Agency's objection, additional hearing dates were scheduled for June 24 and 25, 2013, in order to supplement the evidence record in the interests of justice and avoidance of another potential remand by the Authority in light of its decision in *Carswell, supra.*

Following resumed proceedings on June 24, 2013, at which time Union Exhibit Nos. 38 and 39 were received into the evidence record, on June 25, 2013, Impartial Arbitrator Perea issued an Interim Award on Remedy Phase ("Award IV") which, in light of the Agency's inability to produce, pursuant to the Union's Subpoena Duces Tecum for Production of Documents, "[a]ll payroll records, including grade and step, for all correctional department employees during the period June, 2002 through June, 2009," ordered an exchange of information pertaining to damages, including the grade and step rates of each affected Correctional Officer as reflected in Union's Exhibit Nos. 38 and 39, the opportunity for either party to provide any rebuttal evidence or argument to such exchanged information and delineated the remaining issues subject to arbitral adjudication. No additional rebuttal evidence or argument pursuant to the before-mentioned exchange of information, however, was submitted to the Impartial Arbitrator.

V. RELEVANT FLSA PROVISIONS

29 U.S. Code Section 216 – Penalties

. . .

(b) Damages: right of action; attorney's fees and costs; termination of right of action

> Any employer who violates the provisions of section 206 or section 207 of this title shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages. Any employer who violates the provisions of section 215 (a)(3) of this title shall be liable for such legal or equitable relief as may be appropriate to effectuate the purposes of section 215(a)(3) of this title, including without limitation employment, reinstatement, promotion, and the payment of wages lost and an additional equal amount as liquidated damages. An action to recover the liability prescribed in either of the preceding sentences may be maintained against any employer (including a public agency) in any Federal or State court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated. No employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought. The court in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action. . . .

VII. DISCUSSION AND CONCLUSIONS

1. ***Calculation of Damages for the Period May 31, 2002 through November 30, 2006***

Proposed damages to be awarded Correctional Officers in the aggregate sum of $1,697,119.58 were calculated by creating a matrix which accounted for each of the following relevant factors: (1) each duty post; (2) each morning, day and evening shift for each duty post; and (3) each workday during the period May 31, 2002 through November 30, 2006, inclusive.

Utilizing the Agency's daily rosters for the identical May 31, 2002 through November 30, 2006 period, the specific Correctional Officers who worked on each of the foregoing duty posts on each shift were identified.

Using official Office of Personnel Management's Grade and Step Rates of Pay for the affected Correctional Officers in conjunction with their reported grades and steps during the period May 31, 2002

through November 30, 2006, inclusive, as set forth in Union's Exhibit Nos. 38 and 39, which the Agency did not dispute, the total overtime hours worked and the aggregate sum owed to all affected Correctional Officers for the foregoing period was thus calculated.

Simple interest on the award of damages in the aggregate sum of $847,864.22 was then computed using the 1-Year Constant Maturity Treasury Rate of 5.01 % effective in November 2006.

2. *Failure to Compensate Correctional Officers for Compensable Pre-Shift and Post-Shift Overtime During the Period December 1, 2006 to June 21, 2009*

Credible testimony presented during the September 5, 2012 proceedings supports a finding that from December 1, 2006 up to June 21, 2009, Correctional Officers continued to perform pre-shift and post shift protocols in substantial accordance**?????** with Agency's policy and procedures in effect during the preceding May 31, 2002 to November 30, 2006 period.

The foregoing testimony thus established Correctional Officers continued during the December 1, 2006 to June 21, 2009 period, with the possible exception during some unspecified period, to perform pre-shift duties of reporting to the Control Center and collecting necessary and essential equipment therefrom. Correctional Officers also continued without exception to walk to their assigned duty posts and exchange reports with the Correctional Officers to be relieved.

Correctional Officers without exception continued during the December 1, 2006 to June 21, 2009 period to perform pre-shift duties of reporting to the Control Center to collect fresh batteries therefrom which are necessary for the proper operation of essential items of electronic equipment utilized in the performance of their assigned custodial duties.

During the period December 1, 2006 to June 21, 2009, following completion of their duty shifts, it is undisputed Correctional Officers furthermore continued to perform post-shift work activities in exchanging reports with Correctional Officers who were relieving them and then walking from their assigned duty posts in order to exit Terminal Island.

Until the Agency specifically changed post orders effective June 21, 2009, the foregoing practices and procedures concerning pre-shift and post-shift work activities continued from December 1, 2006 until June 21, 2009. Credible testimony furthermore establishes a finding that Correctional Officers did not cease from picking up extra batteries at the Control Center until sometime after June 2009. During the

period December 1, 2006 until June 21, 2009, Correctional Officers assigned to the Housing Unit continued to obtain and return hand-held metal detectors, handcuffs, crew kits and door key "chits" from and to the Control Center.

While the Agency presented testimony that its security level changed from "medium" to "low" since the initial arbitration proceeding resulting in Award I, the evidence record is unspecific as to when the foregoing change in security levels became effective. Furthermore, the evidence record fails to indicate how the pre-shift and post-shift duties of Correctional Officers at issue herein were affected due to the Agency's change in security levels.

The Agency furthermore asserts that sometime following issuance of Award I, supervisors began to advise Correctional Officers not to perform certain activities including picking up fresh batteries from the Control Center. The evidence record is, however, once again vague as to when the foregoing verbal admonitions were issued, which supervisors issued same and to which Correctional Officers they were issued. According to Correctional Officer Thomas Valeriote ("Correctional Officer Valeriote"), he continued to pick up batteries at the Control Center between 2006 and 2009. While Correctional Officer Valeriote admittedly ceased picking up batteries from the Control Center, the foregoing did not occur until sometime after June 2009.

The Agency also presented post orders dated December 10, 2007, which include the direction, "It should be clearly understood that none of these activities [specified post duties to be performed upon relieving Correctional Officers] are to take place until the Morning Watch officer is relieved." No evidence, however, is presented in the evidence record regarding how long the foregoing order remained in effect despite the fact post orders are to be revised annually. It is, however, clear post orders were specifically amended with respect to the subject pre-shift and post-shift work activities on June 21, 2009, thus terminating the Agency's exposure to FLSA overtime damages in the subject action.

The Agency additionally argues procedures were changed so that necessary equipment became "24-hour shifted" and "everything they [Correctional Officers] needed for the post was on the post" unless certain Correctional Officers at some post were not relieving other Correctional Officers. The foregoing assertion, however, is unspecific as to when such a change in procedure was implemented.

Finally, the Agency argues it is undisputed that "shift exchanges" between on-coming and off-going Correctional Officers take between one to two minutes to complete. While the Agency correctly observes the foregoing is undisputed, shift exchanges are but one element of the multiple pre-shift and post-shift work activities which are the subject to this FLSA dispute. It is also evident that if an on-coming Correctional Officer timely arrives at his duty post at the specified time and thereafter performs a shift exchange with the off-going Correctional Officer, in doing so the latter has necessarily engaged in a post-shift work activity.

In view of the conclusion the Agency's policy and practice remained consistent from May 31, 2002 to November 30, 2006, inclusive, and was substantially consistent therewith from December 1, 2006 to June 21, 2009, when amended post orders affecting pre-shift and post-shift work duties were ultimately issued, it is concluded the Agency failed to compensate Correctional Officers for compensable pre-shift and post-shift overtime work activities during the latter period in the identical amounts of time as specified in Award III.

3. Calculation of Damages for the Period December 1, 2006 to June 21, 2009

The identical methodology utilized for purposes of calculating proposed damages for the period May 31, 2002 to November 30, 2006, inclusive, as described under heading A. above, was employed with respect to the calculation of damages for the period December 1, 2006 to June 21, 2009, utilizing the reported grades and steps of Correctional Officers during the latter period. No calculation of interest on the aggregate sum thus calculated in the amount of $1,002,581.36, however, was performed since under applicable Authority precedent, both interest and liquidated damages cannot be awarded due to an FLSA violation. (*United States Dep't of Commerce, NOAA, Office of Marine & Aviation Operations, Marine Operations Ctr., VA,* 57 FLRA 430, 436 (2001).)

4. Liquidated Damages

In Award I, it may be recalled the Impartial Arbitrator concluded the Agency failed to properly compensate affected Correctional Officers for pre-shift and post-shift overtime hours worked. Despite the foregoing Findings and Award in Award I, however, as detailed above, the Agency continued its policy and practice regarding Correctional Officers performing certain pre-shift and post-shift work activities including obtaining fresh batteries from the Control Center, walking to and from their assigned duty posts

and exchanging reports with on-coming Correctional Officers during the period December 1, 2006 to June 21, 2009. In light the Impartial Arbitrator's finding of the Agency's continuing failure to compensate Correctional Officers for such pre-shift and post-shift overtime work activities, it must be noted FLSA Section 16 requires the following:

> Any employer who violates the provisions of section 206 or section 207 of this title shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages. (29 U.S.C. § 216(b).) (Emphasis added.)

Just as a court of law is required to award liquidated damages against an employer who willfully violates FLSA requirements, so also must the Impartial Arbitrator conclude that absent the Agency's demonstration its actions were taken in good faith with reasonable grounds for believing its act or omission was not a violation of FLSA provisions, the Agency is liable to pay Correctional Officers an additional equal amount as liquidated damages. In this instance, the Agency has failed to demonstrate its actions were taken in good faith with reasonable grounds for believing its act or omission was not in violation of FLSA requirements, particularly in light of the issuance of Award I. (*Brock* v. *Claridge Hotel and* Casino, 846 F.2d 180, 187 (3d Cir. 1988) (citing 29 U.S.C. § 260).) In the absence of such positive and compelling proof of good faith by the Agency, the Impartial Arbitrator concludes the award of the Union's requested liquidated damages is mandatory.

5. Reasonable Attorney's Fee

The Union's counsel furthermore seeks an award of a reasonable attorney's fee to date in the amount of $771,533.35.

As noted above, FLSA at 29 U.S. Code Section 216(b) provides, as follows:

> The court in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action. . . . (Emphasis added.)

When similarly addressing the award of attorney's fees pursuant to Section 7122(a) of the Federal Service Labor-Management Relations Statute in Part 2425 of the Authority's regulations, the Authority concluded:

> The requirement of § 7701(g) (1) that the amount of fees be reasonable has two components: reasonableness of the hourly rate; and reasonableness of the number of hours expended. *See U.S. Dep't of Homeland Sec., Immigration & Customs Enforcement*, 64 FLRA 1003, 1007 (2010) (*ICE*). . . .

A similar analysis pursuant to an award of "a reasonable attorney's fee" pursuant to FLSA requirements shall accordingly be employed by the Impartial Arbitrator in this instance.

a. <u>The Reasonableness of Hourly Rates</u>

In addressing the reasonableness of the hourly rates utilized for purposes of calculating attorney's fees, the court *In re HPL Tech., Inc., Sec. Litig.* 366 F.Supp. 2d 912 (2005) noted,

> But the court must find some objective source for setting counsel's hourly rates; the court cannot simply look at a lone out-of-context dollar figure and pronounce it "reasonable." Because the court has rejected the use of a blended rate here, another problem arises: The court will need a variety of rates to account for the various attorneys' different levels of experience. One well-established objective source for rates that vary by experience is the *Laffey* matrix used in the District of Columbia. See http://www.usdoj.gov/usao/dc/Divisions/Civil_Division/Laffey_Matrix_4.html (citing *Laffey* v. *Northwest Airlines, Inc.*, 572 F.Supp. 354 (D.D.C. 1983), aff'd in part, rev'd in part on other grounds, 746 F.2d 4 (D.C. Cir. 1984)).

For many years, the United States Attorney's Office has used the *Laffey* matrix as the basis for determining reasonable attorneys' fees in litigation. Guidelines for reasonable hourly rates for attorneys were thus set by a federal court in *Laffey* v. *Northwest Airlines, Inc., supra, at 371* which held that hourly rates for attorneys practicing civil law in the Washington, D.C. metropolitan area could be categorized by years and practice and adjusted for yearly inflation.

The adjusted *Laffey* matrix has also been found by some California federal courts to serve as an objective source for reasonable attorney rates in California when adjusted upwards based on the higher costs of living in Los Angeles and other California cities. (*In re HPL Tech., Inc., Sec. Litig., supra.*)

The *Laffey* matrix has also been cited as good evidence of the Market Rate for attorneys practicing in federal employment arbitration matters. (*Department of Health and Human Services, Social Security Administration* and *AFGE*, 93 FLRR 1-4011 (1993); *Department of the Treasury, Internal Revenue Service, Washington, DC* and *NTEU*, 93 FLRR 1-1283, 48 FLRA No. 100, 48 FLRA 931 (1993); *Hatfield* v. *Garrett*, 90 FEOR 1046 (EEOC 1989).)

The initial estimate of a reasonable attorney's fee, or so-called lodestar fee, is properly calculated when multiplying the number of hours reasonably expended on the litigation times a reasonable hourly rate. (*Sexcius* v. *District of Columbia*, 839 F.Supp. 919, 921 (D.D.C. 1993).) Normally, a prevailing party must establish a reasonable hourly rate, usually with affidavits and other evidence of the market rate. (*Kling v. Department of Justice*, MSPB Dkt. No. AT075299048 (July 22, 1980).) "Affidavits are a particularly appropriate means of establishing the reasonableness of the amount of fees claimed." (*Kling, supra.)*

According to the Declaration of Union counsel Jason C. Marsili, Posner & Rosen LLP, filed concurrently with the Union's Brief Regarding Final Award and Application for Attorneys' Fees, the calculation of "a reasonable attorney's fee" to be paid by the Agency in this instance was made pursuant to the adjusted *Laffey* matrix. It must be noted the adjusted *Laffey* matrix was similarly utilized to determine "a reasonable attorney's fee" pursuant to the FLSA in *United States Dep't of the Navy, United States Naval Acad. Non-Appropriated Fund Program Div.* and *American Fed'n of Gov't Employees, Local 896* (63 FLRA 100, 103 (2009).

Union counsel Marsili thus calculated a reasonable attorney's fee in this matter based upon the rates set forth in the adjusted *Laffey* matrix existing at the time of performance of each specific legal service to date but without any "adjustment upwards" based on the higher costs of living in Los Angeles, California.

The Agency, however, generally avers that the time charged "seems excessive for the experience of the law firm [Posner & Rosen, LLP] considering they have handled similar cases in the past" and "[m]any items are general office services and some deductions should be made."

The Impartial Arbitrator concludes the Agency's assertions in the foregoing regard are vague and unspecific. While the Union's counsel does not ask the adjusted *Laffey* matrix be further recalculated upwards based upon the higher costs of living in the Los Angeles metropolitan area where the present dispute arose, the Impartial Arbitrator should not thus conclude the adjusted *Laffey* matrix relied upon in this instance fails to provide some objective source for setting counsel's hourly rates. As noted above, the adjusted *Laffey* matrix has been utilized by both California federal courts as well as the Authority for purposes of determining statutorily prescribed reasonable attorney's fees. Based upon all of the

foregoing, the Impartial Arbitrator concludes the Union has established the first of the two before-mentioned components—reasonableness of the hourly rate.

b. The Reasonableness of the Number of Hours Expended

Turning to the reasonableness of the number of hours expended, the Impartial Arbitrator observes this matter was initially heard over the course of three days on January 26, March 27 and 28, 2006, in Long Beach, California. Following receipt of extensive post-hearing briefs and issuance of Award I, it was reviewed by the Authority which then remanded the matter to the parties for further proceedings.

Following issuance of Award II, it was again reviewed by the Authority pursuant to the Agency's exceptions and again remanded to the parties for further proceedings.

Additional days of hearing were thereafter conducted on March 10, 2010, September 5, 2012, and June 24, 2013, in San Pedro, California, in order to (1) identify the post positions for which Correctional Officers picked up and returned equipment from and to the Control Center and (2) account for any variances in the amounts of time Correctional Officers assigned to different posts throughout the Agency engaged in such compensable pre-shift and post-shift overtime work activities, and (3) calculate damages therefor to include any variances in the rates of pay among the affected Correctional Officers. Throughout the course of the foregoing lengthy proceedings, voluminous written briefs were prepared and submitted to the Impartial Arbitrator by the Union's counsel.

A detailed Pre-Bill Worksheet was attached as Exhibit "B" to Union counsel Marsili's Declaration dated June 13, 2014, detailing the Dates, Lawyer Tasks, differing Hourly Rates depending on which counsel performed the described tasks, and Amounts of Time expended by each member of Posner & Rosen, LLP, who provided legal services in prosecuting the subject grievance.

Based upon the Impartial Arbitrator's careful review, it is concluded the Union has met the second of the before-mentioned two components—reasonableness of the number of hours expended.

Having thus met both reasonableness requirements of both (1) the hourly rate based upon the utilization of the adjusted *Laffey* matrix, and (2) the number of hours expended pursuant to Union counsel Marsili's Declaration and supporting documentation, the Impartial Arbitrator concludes the Union should be awarded requested sum of $771,533.35 as a reasonable attorney's fees to date.

6. ***Method of Distribution of Awarded Damages to Correctional Officers***

The Union urges the Impartial Arbitrator require the Agency to deposit the sums awarded for damages, interest, liquidated damages and a reasonable attorney's fee with the Union for the latter's distribution. The Impartial Arbitrator concludes, however, he is without authority to do so. Despite the Union's reference to *United States Dep't of Justice, Fed. Bureau of Prisons, U.S. Pen. Atwater* and *American Fed'n of Gov't Employees Local 1242*, 66 FLRA 737 (2012) as support for the foregoing request, the Impartial Arbitrator concludes Arbitrator Joe Henderson, while ordering an aggregate lump sum payment of $200,000 due to a lack of records in the record, did not order the foregoing lump sum be deposited with Local 1242 for distribution to affected correctional officers. Arbitrator Henderson thus awarded, as follows:

> For the period . . . where "overtime offers" and "sign up list" records were not provided, the Agency pursuant to Append[cies] B and C . . . will disburse the aggregate of $200,000 in back pay. . . . Each employee listed in Appendix C shall receive an amount equal to $200,000, divided by the total number of "qualified employees" listed in Appendix C. (Emphasis added.)

Arbitrator Henderson's award does thus not indicate Local 1242 was to disburse the aggregate back pay sum awarded.

The Union's proposed approach furthermore presents fundamental practical difficulties since as the Correctional Officer's bargaining representative it does not in the usual course of operations administer, calculate and disburse payroll funds to Correctional Officers. It is therefore unclear how it could process and remit payroll checks, including all debits for required withholding taxes and other authorized deductions, to be issued to Correctional Officers for overtime hours worked.

As the bargaining representative for all Correctional Officers at the Agency's Terminal Island, however, the Union clearly has both a duty and responsibility to faithfully monitor whether the affected class members are properly compensated for all overtime hours worked, interest thereon and liquidated damages as awarded pursuant to the Impartial Arbitrator's Findings and Award.

The Impartial Arbitrator therefore concludes the most pragmatic approach to ensuring the Union's duties and responsibilities in the foregoing regard are fulfilled and which provides reasonable measure of assurance to each Correctional Officer that his back pay award is properly calculated pursuant

to the Impartial Arbitrator's Findings and Award is to require the Agency, following the processing of payroll checks payable to each affected Correctional Officer for the damages awarded, to forward those checks to the Union for its review and distribution to each represented Correctional Officer. Prior to the Agency forwarding the Correctional Officers' payroll checks in the forgoing manner, however, the Union must seek and obtain from each Correctional Officer a signed written authorization form, the format of which shall be mutually agreed upon by the parties, to receive their respective payroll checks for purposes of the Union's review and distribution. In this manner, each Correctional Officer will be assured the damages thus awarded them have been reviewed by the Union to confirm their correct calculation in accordance with the Impartial Arbitrator's Findings and Award.

It is so awarded:

AWARD

1. The class of affected Correctional Officers is hereby awarded the aggregate sum of $1,697,119.58 in back pay damages for the period May 31, 2002 to November 30, 2006, inclusive. The foregoing sum shall be allocated on an individual basis to all affected Correctional Officers following the Agency's computations in accordance with its daily rosters and respective time and attendance records of each Correctional Officer.

2. The class of affected Correctional Officers is hereby awarded the aggregate sum of $847,864.22 in interest on unpaid back pay in the amount specified in Paragraph No. 1 above for the period May 31, 2002 to November 30, 2006, inclusive. The foregoing s sum shall be allocated on an individual basis to all affected Correctional Officers following the Agency's computations in accordance with its daily rosters and the respective time and attendance records of each affected Correctional Officer.

3. The Agency did fail to properly compensate the class of affected Correctional Officers for compensable pre-shift and post-shift overtime hours worked during the period December 1, 2006 to June 21, 2009.

4. The class of affected Correctional Officers is hereby awarded the aggregate sum of $1,002,581.36 in back pay damages for the period December 1, 2006 to June 21, 2009. The foregoing sum shall be allocated on an individual basis to all affected Correctional Officers following the Agency's computations in accordance with its daily rosters and the respective time and attendance records of each affected Correctional Officer.

5. The class of affected Correctional Officers is hereby awarded the aggregate sum of $1,002,581.36 in liquidated damages for the period December 1, 2006 to June 21, 2009. The foregoing sum shall be allocated on an individual basis to all affected Correctional Officers following the Agency's computations in a manner fully consistent with the award of back pay damages as set forth in Paragraph No. 4 above.

6. The Union is hereby awarded a reasonable attorney's fee in the sum of $771,533.35. Subject to proof, the Union shall be furthermore awarded a reasonable attorney's fee for all additional time expended responding to the "Agency's Brief on Arbitrator's Continual Interim Awards" and prosecuting and/or defending any potential exceptions before the Authority to the Impartial Arbitrator's Findings and Award.

7. The Agency shall compute on an individual basis the pro rata dollar amounts due to each affected Correctional Officer from the combined sums awarded in Paragraph Nos. 1, 2, 4 and 5 above. The Agency shall then authorize preparation of written checks payable to each affected Correctional Officer in accordance with the number of overtime hours worked by each Correctional Officer. Following receipt from the Union of signed written release forms, the format of which shall be mutually agreed upon by the parties, from the affected Correctional Officers, the Agency shall immediately deposit the foregoing checks with a designated Union official for review and distribution to each affected Correctional Officer by the Union.

8. The Impartial Arbitrator hereby retains jurisdiction to resolve any issues which may arise in implementing the remedy specified in the above Paragraph Nos. 1, 2, 4, 5, 6 and 7.

September 12, 2014
Del Mar, California

KENNETH A. PEREA, ESQ.
IMPARTIAL ARBITRATOR

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Impartial Arbitrator's Invoice

September 12, 2014

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3600 Wilshire Boulevard, Suite 1800
Los Angeles, CA 90010-2679

RE: IMPARTIAL ARBITRATOR'S BILLING IN THE MATTER OF ARBITRATION BETWEEN FEDERAL CORRECTIONAL INSTITUTION, TERMINAL ISLAND and AFGE LOCAL NO. 1680 (FMCS Case No. 05-57929)

Review and Preparation of E-Mail	.75 days @ $1500.00/hr.	$1,125.00
Review of Briefs, Declaration and Attachments	5.0 days @ $1,500.00	$7,500.00
Preparation of Award	7.0 days @ $1,500.00	$10,500.00
	TOTAL FEES	**$19,125.00**

Payable by Federal Bureau of Prisons $9,562.50

Payable by AFGE Local No. 1680 $9,562.50

Impartial Arbitrator's EIN No.: 33-0207335

Remittance is due immediately upon receipt of invoice.

Thank you.

KAP:pp