

FEDERAL MEDIATION AND  
CONCILIATION SERVICE

IN THE MATTER OF ARBITRATION

between

AMERICAN FEDERATION OF  
GOVERNMENT EMPLOYEES,  
LOCAL 3020

Union,  
and

UNITED STATES DEPARTMENT OF  
JUSTICE, FEDERAL BUREAU OF  
PRISONS, FCI SCHUYLKILL  
Agency,

FMCS Case No. 05-04730

ARBITRATOR: John D. Nagy, Esq.

APPEARANCES:

For the Agency: R. Suzanne Courtney, Esq.

For the Union: Heidi R. Burakiewicz, Esq.  
Richard J. Bialczak, Esq. (On the Reply Brief)

OPINION AND AWARD

INTRODUCTION

The undersigned was designated arbitrator for the above captioned grievance by the parties pursuant to the rules and procedures of the Federal Mediation and Conciliation Service (hereinafter "FMCS"). Hearings were held on August 1-3 and October 16-19, 2007, March 11-14, April 15-18 and April 22-24, 2008 at the Training Center of the Federal Correctional Institution, Schuylkill, Pennsylvania. Both parties appeared with their witnesses and proof. Full opportunity was afforded to the parties to be heard, examine and cross examine witnesses, and to offer evidence and argument. Briefs postmarked no later than July 9, 2008 and Reply Briefs postmarked no later than September 10, 2008 were submitted.

## ISSUES (Stipulated By The Parties)

- (1) Whether the Union's grievance is barred because it failed to attempt to informally resolve the grievance.
- (2) Whether the Union's grievance is barred because it failed to state the specific ways Agency policy, Executive Order or statute were violated.
- (3) Did the Bureau of Prisons, FCI Schuylkill (hereinafter "Agency") suffer or permit bargaining unit employees as stated in the grievance assigned to work correctional posts to perform work before and/or after their scheduled shifts without compensation in violation of the Fair Labor Standards Act and the parties' Master Agreement? If so, what is the remedy?

### A. PROCEDURAL ISSUES (ISSUES NO. 1 and 2)

#### FACTS

On January 23, 2004, at a Labor Management Relations (hereinafter "LMR") meeting, management (also referred to herein as "the Agency") raised an issue with regard to working times vis a vis scheduled shifts (commonly referred to as a portal to portal issue). Agenda item 4 on that date stated as follows:

"M[anagement]: Beginning immediately, all staff must adhere to their scheduled shift starting and stopping times. Staff are to begin their (sic) shift no earlier than five minutes before their shift is to begin, or end their shift five minutes after the scheduled end of their shift, without compensation. This includes Correctional Officers. Prior approval must be made with a supervisor for a staff member to begin or end their shift at any different time than scheduled." (AgEx A1)

James Seidel testified that he had just become President of the union and did not

understand what the foregoing agenda item was about in January, 2004. He testified that he talked to other locals about the problem in an effort to understand management's point.

On March 24, 2004, at an LMR meeting, agenda item 4 was denominated "Portal to Portal". The minutes stated the following:

"M: We are requesting you submit any portal to portal issues or concerns that you may have at this time. We are requesting this response be provided by the next meeting, if not sooner. Our goal is to review your response and address any concerns."

U: What do you mean by 'identifying portal to portal issues?'

M: The time it takes when a person arrives at work to get to their post or when they leave their post at the end of their shift and arrive at the front door. Staff are on the clock when they arrive in the key line or when switching keys at a post."(AgEx A1)

Mr. Seidel testified he had no idea what management was talking about and believed management's definition of when staff were on the clock to be contradictory. The current union President, then the Chief Steward, Pati Manbeck testified that there was a 15 to 20 minute discussion about the agenda item with the union taking the position that every employee should be considered on the clock at the prison Control Center. She stated that the union explained that it did not make sense for a non-correctional officer such as a case manager to be on the clock when he or she passed the Control Center, but that a correctional officer would not be until he or she arrived at a post. Ms. Manbeck testified that the union argued that correctional officers had to pick up equipment at the Control Center (e.g. radio holders, batteries, and crew kits) but management took the position that duty status for correctional officers only depended on where keys were exchanged.

By memo dated May 11, 2004 from Mr. Seidel to Neil Robinson, Associate Warden and LMR Chairperson, the union requested that the following agenda item be placed on the calendar

for the LMR meeting the next day: "Correctional Services Manual, Posted Picture File, and Post Orders - scheduling times for custody staff to review." (That was union agenda item #4.) (UnEx A1) While these items were never reached, the minutes of the meeting held on May 12, 2004 reflected a lengthy discussion about the general concept of portal to portal. The union advised: "There are portal to portal issues and we are working on a time and Motion Survey. We will address this further in our agenda item #4." The minutes further quoted the union as stating that it had received conflicting information about starting and stopping times, and asked for a verbal definition of starting and stopping times. After caucusing, the management team responded that "staff have a ten (10) minute window for the day. The shift begins when and where you draw keys or exchange keys." (AgEx A1)

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Management stated that it was not aware this had occurred. However, Mr. Seidel testified that a Lieutenant, Judy Poling, was the individual preventing staff from entering the institution; and, that he had spoken about the problem with Lieutenants Breckon, Kovach and Chmely who told him Lt. Poling had been directed by her supervisors to keep staff in the front lobby until five minutes before their shift starting times because management was afraid of a big lawsuit similar to ones which had been filed at other institutions.

At the August 25, 2004 LMR, the union advised that it had "portal issues recognized at this time" including "issues when staff need to stop at the control center for signing the Security Inspection Sheets, picking up batteries, pagers, crew kits and rosters." The minutes prepared by management further quoted the union as stating it had additional issues "for the exchanging and accountability of equipment in the OP trucks for oncoming and relief staff." The union's notes stated, under "Portal Issues":

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Correctional Officer James Shaup, who was taking notes at the meeting, testified that the discussion that day took 15 to 20 minutes and that in addition to the items mentioned in the

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Former Associate Warden Neil Robinson testified he did "not recall what the outcome was of the issue relating to inspection sheets, picking up batteries, pagers, crew kits and rosters." He acknowledged that "all of these things can take place and do for a number of the staff that they're doing their shift change"; and, "it's something that is an all-in-one issue."(Tr, 312)

Warden Robinson recalled that Captain Bebow and the Lieutenants looked at the issue, as well as the issue raised about relief on the OP truck, but did not recall anyone coming back to him and saying "yeah, we do have a problem."(Tr,313)

Ms. Manbeck testified that Captain Bebow talked to the union about changing the shift start and stop times for the OP truck because he recognized a portal issue. In October, 2004 he advised the union that start/stop times for the OP trucks would not be changed, but that a 15 minute grace period would be instituted for the inventorying of equipment. No "grace period" was ever implemented, however.

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At the next LMR meeting on April 27, 2005, the minutes kept by management indicate that management asked if the union had identified any portal to portal issues since the last meeting. The minutes quote the union response as being "Not at this time. We are still researching and if any are found we will bring them to your attention." The minutes then quote management as stating: "We will continue to ask this at every meeting." (AgEx. A1) Mr. Seidel denied that management's minutes were accurate and testified that the union did not sign off on them for that reason.

On May 25, 2005, the date of the following LMR meeting, Robert Bastian, an Associate Warden who was acting LMR Chairman that day, asked at the outset of the meeting whether the union had any portal to portal issues to submit. Mr. Seidel handed management a document which was essentially a grievance form (but with those preprinted sections which identified it as a formal grievance form apparently deleted) which alleged the following:

"A continuing violation of the Master Agreement between the Federal Bureau of Prisons and the Council of Prison Locals including . . . Article 3, Section b . . . [and] a continuing violation of the overtime laws under Section 7 of the Fair Labor Standards Act, 29 U.S.C. § 207 (a) and the Office of Personnel Management regulations implementing the FLSA in the federal sector, which are set forth at 5 CFR Part 551." (Joint Ex. 2)

The form alleged that informal resolution had been attempted with Neil Robinson, and further alleged the following:

"From May 24, 2002, as well as before, and continuing and ongoing to the present the Agency is requiring bargaining unit employees . . . to begin work prior to the start of their shift. There are approximately 123 correctional officer posts in which this occurs each time there is the start of a shift and the end of a shift. Specifically, all employees who work at these posts are not being paid for compensable pre-shift and post-shift duties."

Mr. Seidel testified that the union advised Mr. Bastian that the purpose of the form was to start informal resolution (Transcript, 59; Un.Ex. A5). He stated the following:

"We had pointed out to management different things, such as the OPs, such as basically every custody post that was in there. . . Management said okay, noted. But then they never came back with any kind of resolve for it and management had even stated . . . that they would fix it . . . they weren't doing it . . . So when we handed this in, this was in hopes that management would say okay. . . we were hoping to get management to comply with what they said they were going to do, and they never did." (Tr, 62-63)

Mr. Seidel further testified that before the May 25, 2005 LMR meeting, he had a conversation with Warden Robinson in the latter's office (Tr, 197) . He recalled the following:

"[Warden Robinson] said, well, Mr. Seidel before you leave, do you have any portal issues? And I started laughing . . . I'm like, why are you going to ask me that? You know we have portal issues. And he basically said, we know that you have portal issue (sic). In fact, we know that the whole Bureau has portal issues. If they didn't have portal issues, they would put a time clock out in the front lobby, and let everybody stamp their card when they walk in and stamp their card when they walk out. It would save the Bureau millions if they didn't have a portal issue.

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Mr. Seidel stated that after he handed the document to Warden Bastian at the May 25, 2005 meeting, he attempted to speak to Warden Holt about the problem. According to Mr. Seidel, however, Warden Holt: "basically said, that's okay, I already heard it from my LMR, We're good. We're good." (Tr, 115) Mr. Seidel testified that Warden Holt "didn't want to hear anything about it. . . It was basically that subject was closed to talk about." (Tr, 115)

Thereafter, by Formal Grievance Form dated June 8, 2005, the union filed a grievance with the Agency's Northeast Regional Director. The grievance is substantially similar to the document tendered (and dated) May 25, 2005, except that it stated (1) it is a "Formal Grievance



Form", (2) that informal resolution was attempted with Bob Bastian, Acting LMR Chairperson and Ronnie R. Holt, and (3) the person with whom it was filed was D. Scott Dodrill, Northeast Regional Director, and not Ronnie R. Holt, Warden - FCI Schuylkill.(JtEx 2)

Two letters in response were written by the Agency. By letter dated June 22, 2005, Warden Holt advised counsel for the union that Mr. Robinson had stated he had no knowledge of or attempt by a union representative to informally resolve a portal to portal issue, and that at numerous LMR meetings during the last 18 months, management had inquired if any portal to portal issues had been identified by the union. The letter stated that the union had provided a number of "possible" portal to portal issues and management "made the necessary changes, successfully addressing each issue presented by the union." Warden Holt added that to Mr. Robinson's knowledge, "there were no items that were unresolved . . . by management."(JtEx 3) Additionally, Warden Holt wrote that more specific information was needed to determine whether management was requiring union members to begin work prior to the end of their shifts and to end after the end of their shifts. He stated that "Due to a lack of specificity, I am unable to determine that any violation occurred, therefore your grievance is denied."(JtEx 3)

Regional Director Dodrill wrote to the union's counsel on June 29, 2005 and summarized management's LMR meeting minutes since January, 2004. He concluded that management "has continually discussed possible portal-to-portal issues with the Union . . . [but] Even though, for at least the past three years, the Union indicated they would provide any concerns to management, they instead filed a grievance on May 25, 2005 . . ."(JtEx 3) Mr. Dodrill cited Article 31, Section b of the Master Agreement by which the parties strongly endorse the concept that grievances should be resolved informally. He then wrote that "when the Union presented specific issues to

management, they were successfully addressed." He stated that no "recent issues" had been presented to management, and consequently Article 31, Section b of the Master Agreement had not been followed. Finally, Mr. Dodrill cited the Agency's Program Statement 3000.02, Chapter 6, page 3b for the proposition that employees were responsible for promptly reviewing their time and attendance reports and notifying their timekeepers of any discrepancies. He concluded that because no evidence was presented to demonstrate that staff requested and were denied compensation, he was unable to find that any violations occurred.

Thereafter, this grievance was submitted to the FMCS for arbitration.

### **MANAGEMENT'S ARGUMENT**

Management contends that contrary to the requirements of Article 31, Section b of the Master Agreement, the union failed to make either a reasonable or concerted effort toward informal resolution. Management states that it pro-actively attempted to address any potential portal to portal issues by frequently raising the issue at the monthly LMR meetings beginning with the January and March, 2004 meetings; and, that no portal to portal issues were raised by the union until the August 25, 2004 meeting. It is stated that management indicated it would look into the issues presented. Subsequently, management again raised portal to portal at the March and April, 2005 meetings and was told by the union at the April meeting that it was still researching.

Management states that if the issues were not, in fact, being resolved, a question arises as to why the union did not continue to raise the issues at LMR meetings. It is argued that although union officials testified that they repeatedly brought up portal to portal issues, the union failed to produce any of its LMR meeting minutes to support this allegation. Management contends that

"What the record shows is that issues were raised in the one and one-half years preceding the grievance and never raised again"; and, that "no written support was provided for the Union's contention." (AgBr, 8) Management concludes that because the union had no intention of informally resolving the matter, but of proceeding directly to arbitration, the grievance should be dismissed.

Management further argues that the grievance should be dismissed because of a lack of specificity. It states that although the Master Agreement does not specifically mention specificity, it does mandate that grievances be filed on the Bureau of Prisons "Formal Grievance" forms (citing Article 31, Section f); and, that Box 6 of that form states: "In what way were each of the above [Federal Prison System Directive, Executive Order, Statute] violated? **Be specific.**" (emphasis in Agency Brief, 9) Management states that in the formal grievance form, the specific posts involved are not included, nor are the alleged activities being performed before and after the shifts. Accordingly, management requests the grievance be dismissed because it is not specific enough.

### UNION'S ARGUMENT

The union states that the Agency has the burden of proof to establish its procedural defenses; and, cites authority for a general presumption that favors arbitration over dismissal of grievances on technical grounds. The union argues that Article 31, Section b does not require informal resolution but simply states that it is "strongly endorse[d]" by the parties. It further contends that assuming the Master Agreement does require informal resolution, the union satisfied that obligation. The union states that it did not file the grievance on May 25, 2005 but rather "presented management with a copy of the grievance to further its informal resolution attempts because management had not been taking [its] effort to informally resolve it seriously."

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Thereafter, by Formal Grievance Form dated June 8, 2005, the union filed a grievance with the Agency's Northeast Regional Director. The grievance is substantially similar to the document tendered (and dated) May 25, 2005, except that it stated (1) it is a "Formal Grievance

Form”, (2) that informal resolution was attempted with Bob Bastian, Acting LMR Chairperson and Ronnie R. Holt, and (3) the person with whom it was filed was D. Scott Dodrill, Northeast Regional Director, and not Ronnie R. Holt, Warden - FCI Schuylkill.(JtEx 2)

Two letters in response were written by the Agency. By letter dated June 22, 2005, Warden Holt advised counsel for the union that Mr. Robinson had stated he had no knowledge of or attempt by a union representative to informally resolve a portal to portal issue, and that at numerous LMR meetings during the last 18 months, management had inquired if any portal to portal issues had been identified by the union. The letter stated that the union had provided a number of “possible” portal to portal issues and management “made the necessary changes, successfully addressing each issue presented by the union.” Warden Holt added that to Mr. Robinson’s knowledge, “there were no items that were unresolved . . . by management.”(JtEx 3) Additionally, Warden Holt wrote that more specific information was needed to determine whether management was requiring union members to begin work prior to the end of their shifts and to end after the end of their shifts. He stated that “Due to a lack of specificity, I am unable to determine that any violation occurred, therefore your grievance is denied.”(JtEx 3)

Regional Director Dodrill wrote to the union’s counsel on June 29, 2005 and summarized management’s LMR meeting minutes since January, 2004. He concluded that management “has continually discussed possible portal-to-portal issues with the Union . . . [but] Even though, for at least the past three years, the Union indicated they would provide any concerns to management, they instead filed a grievance on May 25, 2005 . . .”(JtEx 3) Mr. Dodrill cited Article 31, Section b of the Master Agreement by which the parties strongly endorse the concept that grievances should be resolved informally. He then wrote that “when the Union presented specific issues to

management, they were successfully addressed.” He stated that no “recent issues” had been presented to management, and consequently Article 31, Section b of the Master Agreement had not been followed. Finally, Mr. Dodrill cited the Agency’s Program Statement 3000.02, Chapter 6, page 3b for the proposition that employees were responsible for promptly reviewing their time and attendance reports and notifying their timekeepers of any discrepancies. He concluded that because no evidence was presented to demonstrate that staff requested and were denied compensation, he was unable to find that any violations occurred.

Thereafter, this grievance was submitted to the FMCS for arbitration.

### **MANAGEMENT’S ARGUMENT**

Management contends that contrary to the requirements of Article 31, Section b of the Master Agreement, the union failed to make either a reasonable or concerted effort toward informal resolution. Management states that it pro-actively attempted to address any potential portal to portal issues by frequently raising the issue at the monthly LMR meetings beginning with the January and March, 2004 meetings; and, that no portal to portal issues were raised by the union until the August 25, 2004 meeting. It is stated that management indicated it would look into the issues presented. Subsequently, management again raised portal to portal at the March and April, 2005 meetings and was told by the union at the April meeting that it was still researching.

Management states that if the issues were not, in fact, being resolved, a question arises as to why the union did not continue to raise the issues at LMR meetings. It is argued that although union officials testified that they repeatedly brought up portal to portal issues, the union failed to produce any of its LMR meeting minutes to support this allegation. Management contends that

“What the record shows is that issues were raised in the one and one-half years preceding the grievance and never raised again”;and, that “no written support was provided for the Union’s contention.”(AgBr, 8) Management concludes that because the union had no intention of informally resolving the matter, but of proceeding directly to arbitration, the grievance should be dismissed.

Management further argues that the grievance should be dismissed because of a lack of specificity. It states that although the Master Agreement does not specifically mention specificity, it does mandate that grievances be filed on the Bureau of Prisons “Formal Grievance” forms (citing Article 31, Section f); and, that Box 6 of that form states: “In what way were each of the above [Federal Prison System Directive, Executive Order, Statute] violated? **Be specific.**” (emphasis in Agency Brief, 9) Management states that in the formal grievance form, the specific posts involved are not included, nor are the alleged activities being performed before and after the shifts. Accordingly, management requests the grievance be dismissed because it is not specific enough.

### UNION’S ARGUMENT

The union states that the Agency has the burden of proof to establish its procedural defenses; and, cites authority for a general presumption that favors arbitration over dismissal of grievances on technical grounds. The union argues that Article 31, Section b does not require informal resolution but simply states that it is “strongly endorse[d]” by the parties. It further contends that assuming the Master Agreement does require informal resolution, the union satisfied that obligation. The union states that it did not file the grievance on May 25, 2005 but rather “presented management with a copy of the grievance to further its informal resolution attempts because management had not been taking [its] effort to informally resolve it seriously.”

(UnProcBr, 20) It states that the unrefuted testimony reflects that after the document was handed to management at the May 25, 2005 meeting, the parties engaged in a discussion lasting approximately 10 minutes regarding the circumstances surrounding the union's potential grievance. The union also states that it attempted informal resolution with Warden Holt following the May 25, 2005 meeting but that Warden Holt closed off discussion. It concludes that it was the Agency, not the union, which failed to participate in good faith during the informal resolution discussions.

The union further states that even if it had filed the grievance on May 25, 2005, it still satisfied the informal resolution requirement because (1) it had a contemporaneous discussion with management at the LMR meeting that day, and (2) it exhaustively discussed the portal issue with management prior to May, 2005. The union contends that the undisputed evidence presented during the hearing demonstrates that beginning on January 23, 2004, the parties discussed the portal issue on numerous occasions over the span of more than one year; and, that "it took over two days to present testimony and evidence regarding the substance of those conversations." (UnProcBr, 26) The union argues that it exhausted itself attempting to informally resolve the grievance with management and that it eventually became apparent that management was not going to resolve any of the issues raised by the union. It states: "At that point the Union determined that future efforts would be futile and that it was necessary to formally deal with the portal issue." (UnProcBr, 27) The union concludes that it satisfied the purpose and intent of the informal resolution provision.

With regard to the specificity argument, the union contends that no such requirement is found in the Master Agreement. It argues that a grievance is not a pleading at law, and that if it had pursued the case in court it would have only been required to provide "notice pleading". It

concludes that the Agency cannot impose an even higher burden on it in this less formal arbitration forum. The union states that with the exception of the very few posts for which it subsequently decided not to pursue a claim, it pursued the grievance for every post at FCI Schuylkill - "Thus, the language concerning approximately 123 posts sufficiently put the Agency on notice about which posts it needed to prepare to defend itself - i.e., every post." (UnProcBr, 31) The union contends that this is not a grievance which suddenly surprised the Agency. It further states that the grievance was sufficiently specific on its face, and concludes that with a group grievance it is not possible to list each post and employee or to list the specific date on which each violation occurred.

## DECISION

### Informal Resolution

Article 31, Section b of the Master Agreement between the parties states as follows:

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

Contrary to the union's assertion that the above cited section does not require informal resolution of an issue prior to the filing of a grievance, I find that informal resolution is mandatory. The first sentence of the subsection quoted above is couched in terms of a strong endorsement by the parties. The second sentence is rendered mandatory by the words: "must be made."

An objective review of the facts previously stated establishes that the union did attempt to informally resolve the substance of this grievance, or parts thereof since at least March, 2004. At the LMR in that month there was a 15 to 20 minute discussion between the parties as to when a shift commenced for correctional officers. Management took the position that shifts began when



keys were exchanged or when a correctional officer arrived in the key line. The union took the position that shifts began when a correctional officer arrived at the control center and had to pick up equipment such as batteries, radio holders and crew kits. The parties fundamentally disagreed at the March 24, 2004 meeting over when shifts for correctional officers began.

At the May, 2004 LMR meeting (the next LMR meeting for which management minutes were placed into evidence by management) there was a lengthy discussion between the parties about management's interpretation of starting and stopping times. The minutes quoted the union as stating it had received conflicting information about starting and stopping times:

"For example, if a staff member is reporting for duty, walking between the front entrance and control and there is an emergency, are they required to respond? At what point is staff under the duress of a correctional environment? What is the definition of when a staff member is on duty? . . ." (AgEx "1")

The discussion at that meeting continued with management asking whether those were "the only portal to portal issues you are now aware of?" - and the union requesting a verbal definition "of starting and stopping times, and when these times take place." Following a caucus, management replied that "staff have a ten (10) minute window for the day" and continued by reiterating that a shift begins when keys are drawn or exchanged. As of May, 2004, one must conclude that the parties were engaged in discussions regarding the starting and stopping times of correctional officers.

As previously noted, the union had requested that an agenda item regarding the review of certain documents be placed on the agenda. Time did not permit consideration of these items which were then raised at the June, 2004 LMR meeting. Two of the items - review of the Correctional Services Manual and the Post Orders were apparently resolved. The issue of compensation for correctional officers to review the Posted Picture File has never been resolved and, indeed, forms a part of the substance of this grievance. In June, 2004, the parties were still

discussing portal to portal issues, albeit ones peripheral to the main dispute.

It must be concluded that management was, at this point, concerned over the possibility of a portal to portal claim for unpaid overtime - possibly under the Fair Labor Standards Act ("FLSA", 29 U.S.C. §§ 201 et seq) because at some point during the summer of 2004 it attempted, for a brief time at least, to bring its correctional officers within the purview of the so-called *de minimis* rule, most commonly cited in Lindow v. U.S., 738 F.2d 1057 (9<sup>th</sup> Cir., 1984). Lindow notes that "Most courts have found daily periods of approximately 10 minutes *de minimis* even though otherwise compensable [under the FLSA]". A Lieutenant, Judy Poling, was preventing correctional officers from entering the institution until five minutes before their shift starting times. I credit Mr. Seidel's testimony that three other lieutenants had told him Lt. Poling had been directed to do so because of concern about a major lawsuit. While the practice was abandoned rather quickly, I find management's statement that it was unaware of the restriction (made at the July 23, 2004 LMR meeting) to be incredible. It is well established that "Knowledge of its supervisors is imputed to the employer" (Cunningham v. Gibson Electric Co., Inc., 43 F. Supp.2d 965 (1999)).

A month after the meeting at which the union questioned the restriction on entering the Institution, at the LMR meeting on August 25, 2004, the union raised numerous specific issues with regard to starting and stopping times. I credit the union's notes for this meeting which reflect that equipment pick-up for all correctional staff, including pagers, batteries and crew kits were discussed, that the accountability of weapons (especially for personnel in the Outside Perimeter or "OP" trucks) was discussed (see also AgEx "1"); and, I credit Correctional Officer Shaup's testimony that the checking of mailboxes and checking in with the lieutenant was also discussed. Therefore, as of August 25, 2004, substantially all the issues raised in this grievance

were on the table.

What happened? It appears that management did nothing to address any of the union's concerns. Associate Warden Robinson testified that Captain Bebow and the lieutenants looked at what had been raised but nothing was done. I credit Ms. Manbeck's testimony that Captain Bebow told the union in October, 2004 that nothing would be done with regard to the OP trucks except for a so-called 15 minute grace period, which in any event was never implemented. (Shifts were, however, staggered by 15 minutes in 2007 - two and a half years later.)

The record then essentially went silent for months. Agency Exhibit "1", its LMR minutes, skip from August, 2004 to March 16, 2005. Counsel for management has valiantly attempted to defend her client by arguing that the union simply let things lapse after raising their issues in August, 2004. But if no serious attempt was made by management to address the union's concerns, it is understandable why the union declined to keep raising the same points at every LMR meeting thereafter - if there were any LMR meetings from August, 2004 to March, 2005. Management, however, did work hard at repeating the mantra, "Do you have any portal to portal issues?" at both the March and April, 2005 LMR meetings. At the April meeting, management is actually quoted in its minutes as stating it "will continue to ask this at every meeting." (AgEx"1") One comes away with the conclusion that management was largely interested in making a record, but declined to actually address portal to portal issues when they were raised by the union.

Accordingly, I find that the union did make a reasonable and concerted effort to informally resolve the grievance at LMR meetings before the document outlining its objections was handed to Associate Warden Bastian on May 25, 2005. Aside from the union's approaches at LMR meetings, I credit Mr. Seidel's testimony about his meeting with Associate Warden Robinson in Warden Robinson's office, Ms. Manbeck's testimony about her conversations with

Captain Bebow in October, 2004, and testimony by Correctional Officer Eugene Jacobs that he discussed the portal to portal issues with Captain Bebow in the latter's office, that Captain Bebow agreed there was a "portal problem", and that the two of them always concluded that "it can't be handled at a local level . . . It has to be taken care of at a national level." (Tr 800-801, 818) Correctional Officer Jacobs is a union officer. Thus, informal attempts to discuss the subject of this grievance were made outside of LMR meetings.

It has already been noted that on May 25, 2005 the union handed management a document which stated its portal to portal complaints in writing. Although the union had already attempted informal resolution of its portal to portal complaints, I find that it handed management the document out of an overabundance of caution in seeking to comply with Article 31, Section b of the Master Agreement. Arbitrator David K. Monsour, in A.F.G.E. Local 148 and Federal Bureau of Prisons, USP Lewisburg, PA, FMCS No. 07-52364 (2008) found that the Master Agreement revealed "no prescriptive form that the informal resolution process must take"(at p.8) and concluded that the submission of a written memorandum followed by a meeting between the warden and union president was sufficient to meet the requirement for informal resolution.

In the instant case, Mr. Seidel attempted to speak to Warden Holt following the submission of the May 25, 2005 document, but was told, in essence, that the warden did not want to discuss the issues,. These facts are substantially similar to those in FCI Miami and AFGE Local 3690, FMCS No. 06-00504-3 (2006) in which Judge/Administrative Officer Robert B. Hoffman found that the union's efforts in filing a petition, followed by no effort at negotiation by management started the informal process.

Accordingly, I find that the union complied with Article 31, section b both before submitting the May 25, 2005 document ;and, in its submission of that document and

management's response.

### Specificity

While the Master Agreement does not contain a particular requirement with respect to the detail which must be contained in a grievance, nor a definition of the term, "grievance" (Federal Bureau of Prisons, FLS, La Tuna and AFGE Local 83, FMCS No. 02-13623 (2003)), elementary fairness would require that the written grievance not mislead, or deprive the employer of an opportunity to defend against the alleged violation (FCI Milan and AFGE 1741, FMCS No. 01-09332 (2004)). As Judge/Administrative Officer Richard Edward Allen put it in FCI Milan and AFGE Local 1741, supra, at 10:

"... the precise wording of a grievance should not be held to the same strict procedural requirements as required by a court of law. Many Arbitrators will not dismiss a grievance because the author of the grievance failed to cite exactly all the details involved in an alleged violation. Certainly if a grievance is so vague and misleading, that it fails to place the alleged offender on notice of the claimed violation, then that type of grievance may be dismissed because it is inherently unfair to expect a party to defend itself against unknown or misleading charges. The alleged offender should be given sufficient information to be able to investigate the charges, and form an adequate defense against the charges. This does not imply every single item must be listed in detail." (emphasis supplied)

In this case, the grievance allegations advised that from May 24, 2002 and ongoing to the date of the grievance, management was requiring all correctional officers to begin work prior to the start of their shifts and that these employees were not being paid for compensable pre-shift and post-shift duties. I find that the grievance was quite specific and did not deprive management of an opportunity to defend itself.

It should further be noted that the response letters from Warden Holt and Regional Director Dodrill questioned the specificity of the grievance based upon the assumption that all issues presented to management over the course of the prior year had been successfully resolved.

This was not the case. The evidence established that for the most part, virtually all of the complaints raised by the union with regard to specific portal to portal issues were not addressed.

### **B. Merits of the Dispute (ISSUE NO. 3)**

#### **Activities Officer**

##### **Facts**

Correctional Officer Shawn Quirk testified that there had been two shifts for the Activities Officer - 6 am to 2 pm, and 2 pm to 10 pm. (Tr, 1147-1148). The post was on the roster through the first quarter of 2005, but has not been on the roster since that time (JtEx "5"). Officer Quirk stated that he worked the 2 pm to 10 pm (evening watch) shift and would report to the Control Center 10 to 15 minutes prior to the start of his shift. He said that at the Control Center he would pick up keys, a radio, a battery and handcuffs (Tr, 1148-49). He checked his mailbox and would walk to the lieutenant's office to find out where he was to assigned that day (Tr, 1149). Officer Quirk testified that he would be posted wherever needed that day, which could include the chapel if there were chapel services and no chaplain, the recreation yard if "something big" was going on there, the compound if "they were short", or even a housing unit if needed there (Tr, 1150). He said that at the end of his shift he would turn in the keys, handcuffs and radio at the Control Center, stopping first at the lieutenant's office if he had any paperwork to submit (Tr, 1150). He said he arrived at the Control Center at 10 pm.

Lieutenant Thomas Chmely, testified that the day watch (6 am to 2 pm) Activities Officer picked up his keys and was supposed to be on post, normally the recreation area at 6 am to do a search of the area. He said that the recreation area would normally open at 6:15, but might open later if the Operations Lieutenant had to do something else ( Tr, 2730). The specific post orders for the day watch required the Activities Officer to check in with the Operations Lieutenant to

“Receive any pertinent information or instructions “, but Lt. Chmely stated that “they were required to check in so we know they’re here or not.” (Tr, 2729-30) He said some of them would call on the phone or by radio to say they had arrived at work (Tr, 2730-31). The post orders which permitted correctional officers to check in with the lieutenant by phone were changed in the second quarter of 2006 (Tr, 2735-36). Lt. Chmely stated this was not a change in procedure, but rather a clarification of existing practice because “More people would check in by phone or on the radio” (Tr, 2734, 2737).

Lt. Chmely testified that with regard to the relief of the day watch by the evening watch (2 pm to 10 pm), he wrote the post orders to require the day watch to go to the Control Center at 10 minutes to 2 pm to meet their relief at that location (Tr, 2731). He said this was not always possible because on Fridays, for example, there might be a Muslim service going on in the chapel and the day watch could not leave. He stated the Control Center would then tell the evening watch where his relief could be found (Tr, 2732-33). Lt. Chmely said that the exchange of information for most posts ( including, presumably, Activities Officer) takes about two minutes.

#### **Position of the Parties**

The Agency relies heavily on the testimony of Lt.Chmely and concludes there should be no recovery for the position of Activities Officer. In addition, counsel for the Agency states that any recovery must be limited to the evening shift as there was no testimony regarding the morning shift.

Based upon the testimony of Officer Quirk, the union presents a claim of 12.5 minutes for this post (splitting the difference between the 10 and 15 minutes that Officer Ouirk said he arrived early for his shift).

## **Camp Officers**

### **Facts**

Correctional Officers Scott Chiglinsky and Thomas Margetanski testified for the union with regard to the position of Camp Officer #1. Officer Chiglinsky testified that the Camp houses approximately 300 inmates and that a Camp #1 Officer is present for all three shifts, 24 hours a day (Tr, 1296). He stated that on day watch (8 am to 4 pm) he would report first to the Control Center about 10 minutes to 8 in order to get a fresh radio battery (Tr, 1298). However, since a battery charger was installed at the Camp, he need not pick up a battery at the Control Center anymore (Tr, 1312)( the battery charger was installed at the Camp on July 26, 2007). He would report to the Camp by 8 am and exchange information about what happened during the night with the officer he was relieving. He said that in addition he would physically check all keys there to make sure they were all present and that none were bent or broken, would receive a radio and hand restraints, and would call the lieutenant on the phone to let him know he was on post (Tr, 1300, 1311-12). He said he would take the radio from the officer he was relieving and put in a fresh battery, which he termed "vital" since he might be the only officer at the camp with 300 inmates (Tr, 1299). Officer Chiglinsky testified that the exchange of information and equipment took 10-15 minutes (Tr, 1299). Officer Chiglinsky testified that the relief on day watch and that on evening watch takes the same amount of time (Tr, 1301).

Officer Margetanski's testimony was of similar import, except he testified that the Camp#1 Officer also needed to account for flashlights, a metal detector and a breathalyzer (Tr, 1975). He also stated that the evening watch (4 pm to midnight) and morning watch (midnight to 8 am) officers needed to be prepared to begin the 4 pm and 12 am counts of inmates (Tr, 1943,



1947-48). He testified that he would report to the Control Center to draw batteries about 20 minutes before the beginning of his shift, and that the departing officer was able to leave anywhere from 5 minutes before the nominal end of his shift to right at the scheduled end of his shift (Tr, 1936, 1939).

At the beginning of the third quarter of 2005, the shift start and stop times for Camp Officer were changed from 10 pm-6 am, 6 am-2 pm, 2 pm-10 pm to midnight-8 am, 8 am-4 pm, 4 pm-midnight. Both Officers Chiglinsky and Margetanski testified that the change had no effect on the pre or post-shift work performed or the amount of time it took to perform that work (Tr, 1317, 1943).

Officers Chiglinsky and Margetanski both testified that after management installed a battery charger at the camp on July 26, 2007, they no longer needed to go to the Control Center prior to reporting to their posts. Both testified that the exchange of information and equipment took 10-15 minutes (Tr, 1299, 1938).

Both officers also testified that they had worked the position of Camp#2 Officer, which was abolished in March, 2005. Officer Chiglinsky stated that he reported to the Control Center at 11:50 pm to exchange his chits for the officer he was relieving and to pick up a freshly charged battery (Tr, 1303). He said he would drive to the Camp so that he would be on post at midnight. He stated that at the end of his shift at 8 am, he would drive to the Control Center, arriving there about 8:05 am (Tr, 1305). He testified that he turned in his equipment and departed the premises about 8:10 am (Tr, 1306). Officer Margetanski stated that he worked at 10 pm to 6 am watch as Camp#2 Officer (Tr, 1951). (It should be noted that at the beginning of the second quarter of 2003, the shifts were changed from 4 pm-midnight, midnight-8 am to 2 pm-10 pm, 10 pm-6 am - see Jt Ex "5") He said he would first stop at the Camp at 9:40 pm to determine whether there was

a Camp#2 Officer on evening watch (2 pm-10 pm)( Tr, 1951-53). He said a lot of the time that officer was “pulled” to work elsewhere (Tr, 1951). If a Camp#2 Officer was present, he could exchange equipment at the Camp. Whether or not the officer was present, he would have to go to the Control Center to draw a fresh battery. He would also have to pick up vehicle keys if no Camp#2 Officer was present so he could drive to the powerhouse at the institution following the midnight count of inmates to count the inmates working at that location, and to later transport inmates to the main institution to work (Tr, 1952-54). Officer Margetanski stated that he left the institution at 6 am (Tr, 1954-55).

Lt. Chmely testified that he had been in the Camp on occasion during a shift exchange, and said the exchange took “about as long as it takes to take the radio out and hand it to the other person and give them the key.” (Tr, 2774-75) In his opinion, “That’s probably one of the easiest.” (Tr, 2775) According to Lt. Chmely, prior to the installation of the current battery charger at the Camp, there had been one with “the old radio system.” (Tr, 2774) He testified that therefore, the Camp Officers did not need to come down to the main institution for anything at the start of their shifts(Tr, 2773)

Former Captain Andre Matevousian testified that the exchange between camp officers lasted “maybe a minute.” (Tr, 2957)

### **Position of the Parties**

The Agency contends that battery chargers were located at the Camp from the beginning of the grievance period until January, 2005, then again from July, 2007 to the present. Counsel cites Attachment 13 to her brief for the former and Union Ex. “TT” for the latter. The Agency questions Officer Chiglinsky’s testimony about picking up batteries at the Control Center because camera footage admitted into evidence as Agency Ex. “32” failed to show any camp

officers entering the main institution. Chiglinsky's testimony is further questioned because he said he arrived at the Camp at 7:50 am after battery chargers were installed, which was the same time he said he had arrived at the Control Center to get a fresh battery.

Officer Margetanski's testimony is also questioned on the basis that he testified his relief would arrive 10 minutes prior to the hour, a 10-15 minute briefing and exchange of inventory would occur, and he would depart on the hour or five minutes to the hour (see Tr, 1938-39). The Agency concludes there should be no recovery for camp officers.

The union argues that Officer Chiglinsky's total pre and post-shift time spent working as a Camp#1 Officer is 20-25 minutes, and that Officer Margetanski's time varies between 15 and 20 minutes. It concludes that the average amount of time spent on shift exchange was 20 minutes until July 26, 2007. Since that date, a claim is presented for 10-15 minutes, or an average of 13 minutes.

For Camp Officer#2, it is claimed that both Chiglinsky and Margetanski worked 20 minutes pre and post-shift.

### **Camp Visiting Room**

#### **Facts**

Two officers were assigned to staff the Camp visiting room, one shift per day, two days per week until March, 2005. Officer Chiglinsky testified that even when there were two such officers on the roster, one was frequently reassigned to work elsewhere (Tr, 1283). He stated that the position is responsible for processing inmate visitors into and out of the Camp visiting room, and processing inmates into and out of the room. This entails making sure the area is properly set up for visiting that day which means the room must be searched for contraband such as drugs, weapons and cell phones (Tr, 1285). He said he arrived at the Control Center at 7:45 am to draw

all keys and equipment (Tr, 1286-87). He stated he arrived at the Camp about 8 am, signed the log book, prepared the files and paperwork needed for visiting and searched the visiting areas. Officer Chiglinsky estimated that the search took 15-20 minutes (Tr, 1287-90). He said he would finish up those activities by 8:20-8:25, and visiting would commence at 8:30 am (Tr, 1290).

Officer Chiglinsky stated that he would announce at 3 pm that visiting hours were over; and, that all visitors would have departed by 3:35 pm. He said once the last visitor had left the parking lot, he searched each inmate, conducted another search of the visiting room, completed his paperwork, and returned his equipment to the Control Center (Tr, 1290-93). He said the search of the inmates, which could number 45, could take as long as 20-25 minutes (Tr, 1293). Officer Chiglinsky testified "it hasn't been uncommon to leave [the visiting room] at five after 4:00"; and, he said he was at the Control Center turning in his equipment "right before ten after." (Tr, 1294)

Lt. Chmely testified that Camp Visiting Officers were expected to be at the Control Center at 8 am to pick up their equipment. He said that if the Camp Visiting Officer was not ready to start visiting at 8:30, visiting would wait; and, he said he knew of instances where camp visiting was late getting started (Tr, 2798-2800, 2816-17). He denied there was anything on a normal day which would keep a Camp Visiting Officer working past 4 pm; and, he said he had seen such officers in the lieutenant's office well before 4 o'clock (Tr, 2820).

#### **Position of the Parties**

Relying largely on the testimony of Lt. Chmely, the Agency contends that the Camp Visiting post cannot recover under this grievance.

Relying on the testimony of Officer Chiglinsky, the union seeks pay for 25 minutes per shift.

## **Compound Officers**

### **Facts**

Officer Eugene Jacobs testified that Compound Officers are responsible for controlling all inmate movements on the compound ( the open area within the institution which is fenced more or less in the middle to separate the housing units from the recreation area, the food service area, the chapel and other areas where the inmates carry on activities. He stated that there can be up to 1,200 inmates on the compound at one time and that they must move through the Compound officers' shack where they pass through an X-ray machine, metal detectors and are pat searched by the Compound officers (Tr, 653-55). Officer Jacobs stated that the shift times for the post were 6 am-2pm, 2 pm-10 pm, and 10pm-6 am (791). He testified that he would arrive at the Control Center about a 5:45 am, check his mailbox for assignment changes (Tr, 658-62), pick up a detail crew kit advising which inmates are on a work detail that day (Tr, 663), and pick up a freshly charged battery - which he described as "your lifeline with your radio." (Tr, 658) Officer Jacobs testified he would arrive at the so-called shakedown shack (the Compound officers shack between the housing units and the activity areas) about 10 minutes to the hour on average(Tr, 671-72). At the shack he must make sure the X-ray machine and metal detector are working, and must inventory handcuffs, leg irons, handheld metal detectors and a breathalyzer (Tr, 673). Vests worn by inmates who are on the compound working are also inventoried (Tr, 673). In addition, information is exchanged with the officer to be relieved. Officer Jacobs testified that the relief process at the shakedown shack took 9-10 minutes on average(Tr, 674). The officer being relieved would turn in his battery at the Control Center unless he needed to file paperwork at the Lt's office (Tr, 676). He testified that the relieved officer would leave the institution between 5 and 7 minutes after the hour(Tr, 677).

Officer David Seresky stated he arrived at the Control Center a half hour before his shift was to commence (he worked the 2 pm to 10 pm shift), checked his mailbox for shift changes and grabbed a fresh battery. He then proceeded to the compound where the exchange of information and equipment would take about 10 minutes. He stated he would be at the shakedown shack between 1:40 and 1:45 and that the person he was relieving would leave the compound 10-15 minutes after he got there (Tr, 2029-34). His relief would arrive at about 9:40 pm, he left the compound about 9:55 pm, and took 3-4 minutes to get to the Control Center to drop off the battery (Tr, 2035).

Officer Jacobs testified about an anomaly in the scheduling of Compound officers. During the second quarter of 2007, the Compound officers were directed to make their reliefs at the Control Center rather than on the compound. Officer Jacobs testified that he would come in five minutes before the shift during this period and "leave a little bit earlier" (Tr, 687). He said the officers would attempt to comply but couldn't always because other duties would prevent a Compound officer from leaving for the Control Center 10 minutes before the end of his shift (Tr, 686). Officer Jacobs testified that the policy was rescinded after one quarter because Warden Sniezik "wanted [the officers] on the compound" and not "hanging out at the administrative building." (Tr, 685)

Former Captain Matevousian described the relief of Compound officers as being "very simple" and said it merely consisted of "Handing the keys and radio over", which took "Maybe a minute." (Tr, 2967)

Lt. Chmely testified that he had worked Compound and that the relief only took "A couple of minutes." (Tr, 2757) He said it didn't take very long to count keys and hand over a radio (Tr, 2758).

In addition to the testimony about this post, there was video evidence presented by the Agency (AgEx "32") which is discussed infra

### **Positions of the Parties**

The Agency argues that Officer Jacobs acknowledged, on cross examination, that the typical shift exchange took only a couple of seconds or minutes (citing Tr, 674, 737). Counsel states that it strains credulity to think that Jacobs would arrive only 5 minutes before his shift during the second quarter of 2007 when he had previously testified that the average shift exchange took an average of 10 minutes. It is further argued that Seresky's numbers do not make sense because if his relief arrived at 9:40 pm and the exchange took 10 minutes, he would be at the Control Center earlier than 9:55 pm. Finally, Counsel states that the video footage in Agency Ex. "32" indicated (1) eight people worked less than 8 hours on the Compound posts, (2) another 15 worked less than 8 hours and 10 minutes which would be *de minimis*, and (3) the time between one officer coming on and the person being relieved departing was typically 5-9 minutes.

The union contends that Jacobs' average time spent on the shift exchange was 23.5 minutes while Seresky's was 26 minutes. The claim is for 26 minutes pre and post-shift time worked. As for the second quarter of 2007, the union's claim is for 11.5 minutes. The claims are based on the testimony of Officers Jacobs and Seresky.

### **Control Center**

#### **Facts**

All persons entering the secure area of FCI Schuylkill must pass through the Control Center (with the exception of limited traffic allowed through the rear gate). The officers who work there are responsible for monitoring and sending assistance to any alarms or emergencies in

the prison, tracking the movement of employees' body alarms, monitoring radio communications on approximately 7 channels, and handling and maintaining the counts of the inmates in the institution. The officers in the Control Center are also responsible for maintaining and passing out equipment to each of the over 300 employees who work at the prison; and, for opening numerous doors once they have visually confirmed by camera that a staff member, and not an inmate, is waiting to be let through. Equipment kept there includes keys, radios, body alarms, gas, gas guns, leg irons and soft restraints (see testimony of Officer Petch, Tr, 828-30).

The Control Center is staffed 24 hours per day by the Control#1 Officer, and during the day and evening watch shifts by the Control#2 Officer (JtEx "5"). The shifts for Control#1 are 8 am-4 pm, 4 pm-midnight, and midnight-8 am. The shifts for Control #2 had been 6 am-2 pm and 2 pm-10 pm until the third quarter of 2007, when they were changed to 5:45 am-1:45 pm and 1:45 pm-9:45 pm.(JtEx "5").

Officer Keith Petch testified that when working Control#1, he would arrive at the Control Center 15-20 minutes before the beginning of his shift and would leave 5-7 minutes after the end of his shift (Tr, 832-33, 867). Officer David Seresky testified that when he was working Control#1 he would arrive at the Control Center 30 minutes before the start of his shift and the officer he was relieving would depart "12 to 15 minutes after" (Tr, 2036, 2041). He stated it took "a good 25 minutes for shift to change in the Control Center . . . Sometimes longer." (Tr, 2041) Officer Seresky further testified that when he was working the morning watch, his relief would arrive by 7:30 and he would be leaving at 7:55 or 8 am (Tr, 2042-43, 2163).

Both officers testified that they had to account for all equipment listed on the inventory sheet. Approximately 1800 keys were kept in the Control Center, as well as the equipment previously listed. ( see Tr, 835, 846-47, 849, 907) Seresky testified that ". . . there's pretty much



equipment everywhere in there.” (Tr, 2159) The officers testified that they had to make sure that all equipment which was not there was replaced by a chit indicating who had possession of the equipment (Tr, 835, 846, 2159). Officer Seresky said the inventory sheet for the equipment amounted to roughly 6 pages (Tr, 2159-60).

In addition, the officers testified that they had to compare counts of inmates to make sure all inmates were in the institution. They are also responsible for opening doors and passing out equipment to arriving employees, and receiving equipment from employees departing the institution. The oncoming evening and morning watch officers need to begin their 4 pm and midnight counts at those times (Tr, 868, 870, 2038). Officer Seresky testified that Lt. Poling was present in the Control Center 95% of the time for the midnight count, and that Lt. Breckon was usually present for the 4 pm count when he worked that shift; and, that regardless of who was on duty a lieutenant was present for the 4 pm count approximately 50% of the time (Tr, 2041-42, 2045-46).

Officer Seresky testified that the Control#2 Officer assists the Control#1 Officer and is primarily responsible for passing out and receiving equipment and tracking the movement of employees who carry body alarms (Tr, 2057). He stated that as Control#2 he would arrive at 5:30 am in order to take some of the pressure off the Control#1 Officer (Tr, 2054-55). He said the starting time has been changed to 5:45 to help the Control #1 Officer (Tr, 2056). Officer Seresky testified he left at 1:50-1:55 pm (Tr, 2058), but not until 2 pm if the evening watch Control#2 Officer was pulled off the post (Tr, 2059). He further testified that 90% of the time, the Activities Lieutenant was in line by 5:45 am and observed him performing work in the Control Center prior to the start of his shift (Tr, 2175).

Officer Seresky stated that when he worked evening watch, he would arrive at 1:30 pm

and would leave at 10 pm (Tr, 2062-63).

Former Captain Matevousian testified that he observed that evening watch relief in the Control Center on numerous occasions. He stated: "they would just come in, briefly ask the officer what had happened. Their major concern was that the count was ready and all the numbers were correct on the count sheet. After the count is completed, that's when the officer would initiated (sic) his or her inventory . . ." (Tr, 2951) He said it was not feasible to do the count and an inventory while both the day watch and evening watch officers were standing there (Tr, 2952). He said that on numerous occasions he would receive a call at 6, 6:30 or 7 pm from a Control Center officer reporting that equipment was missing (Tr, 2952). He testified that the exchange of information and equipment took "About three minutes maybe." (Tr, 2951)

Captain Brent Taggart testified that the relief of a Control#1 Officer took 1-2 minutes; and, that Control#2 took about 5 seconds (Tr, 2607-08).

Lt. Chmely testified that during the relief process, Control Center officers were not accounting for all of the equipment, but were primarily interested in making sure the count was correct (Tr, 3120-21). He said the exchange took about 5 minutes; and that Control#2 took about 2 minutes (Tr, 3136, 3155).

There was also camera footage admitted into evidence for the Control Center officers. This is discussed infra.

### **Positions of the Parties**

The Agency contends that Officer Seresky's times do not add up in that he testified it takes 25 minutes to do a shift relief, that he arrived 30 minutes early, and yet testified that the person he was relieving would depart 12-15 minutes after the hour. The Agency further points to the video footage as showing that the times for Control#1 range from 8 hours, 7 minutes to 8

hours, 28 minutes. Counsel states that with the exception of Officer Witkowski, who appears to overlap for extended time periods, the time between the oncoming entering the building and the outgoing exiting, is about 7 to 10 minutes. Counsel further states that for Control#2, all except one worked less than 8 hours 10 minutes. The Agency concludes that the Control posts should not recover.

The union, relying on the testimony of Officers Petch and Seresky, states that Petch's average pre and post-shift working time was 23.5 minutes, while Seresky's was 27.5 minutes. It contends that Control#1 officers should be paid for 25.5 minutes. Relying on the testimony of Officer Seresky, the union argues that Control#2 worked 30 minutes on the day watch up until the change in the second quarter of 2007, and 15 minutes since. It further contends that the evening watch officer for Control#2 worked 30 minutes pre and post-shift.

#### **Count Officer**

#### **Facts**

At the beginning of the second quarter of 2005, a Count Officer post was created to assist with the counting of inmates on the morning watch. With the exception of the second quarter of 2005, when the shift was 10 pm-6 am, the hours for this post have always been midnight to 8 am. Officer Ray Archer testified that he reported for duty at the Control Center at 11:40-11:45 pm (Tr, 1672). He picked up his keys and radio and called the lieutenant at 11:50 to find out whether he would be counting inside the institution first or if there was enough staff for that night. At times he would be directed to go to the Camp to help the Camp Officer do his count (Tr, 1673-74). Officer Archer testified the count began both in the Housing Units and at the Camp at midnight, "on the dot" most of the time (Tr, 1730). He stated that the post orders directed him to report to the Control Center at 7:50 am to turn in his keys and equipment (Tr, 1682). He said he

left at 8 am.

Lt Chmely stated that the Count officer was needed for midnight in the Housing Units "when the B side officers have already departed." (Tr, 3247)

Video footage will be discussed infra.

### **Positions of the Parties**

The Agency states that the camera footage showed one Count Officer present for only 7 hours 47 minutes, while another was present for 8 hours 19 minutes. Counsel notes that the footage showed the Count officer leaving every day prior to the end of his shift.

The union argues that the Count Officer should be paid for 17.5 minutes (the difference between the 15 and 20 minutes that Officer Archer claimed he came in early).

### **Front Lobby**

#### **Facts**

Officer Joseph Bickelman testified that when working the Front Lobby post he would report to the Control Center approximately 15-20 minutes prior to the shift starting time (Tr, 1543). The hours of the one shift per day were 6 am-2 pm. Officer Bickelman stated that the Front Lobby Officer was responsible for processing all packages and visitors, including inmate visitors, contractors and law enforcement officials, passing through the lobby into the institution. At the Control Center Officer Bickelman drew a radio, keys, a box of contractor and volunteer badges, a stamp pad and stamp (for visitors), and a roster for incoming phone calls about inmates (Tr, 1543-44). He said he walked to the front lobby, which took 1-2 minutes, got out 2 sets of telephones and 2 log books, calibrated an ION machine (a drug detecting machine), and made sure the metal detector and X-ray machine were functioning (Tr, 1546, 1550). He stated that by

the time he unlocked the doors there would already be contract employees, such as lab techs and pharmacy techs, waiting to be processed into the institution (Tr, 1554-55). He acknowledged that if he had not completed the above-described duties, people had no choice but to wait a little bit for entry (Tr, 1554). Officer Bickelman testified that he did not have to go back to the Control Center at the end of his shift (Tr, 1558-59). The lobby was normally kept open until 4 pm and someone would come to relieve him at 1:50-1:55 (Tr, 1556,-57). He testified that he generally left his post at 2:05-2:10 (Tr, 1559).

Lt. Chmely testified that there was no need for the Front Lobby Officer to arrive early because visitors cannot enter until that officer is ready to let them in (Tr, 3180). He said equipment testing in the front lobby could occur at 6:15 am, which would allow over two hours before inmate visiting began (Tr, 3191).

### **Positions of the Parties**

The Agency points to the video footage as evidence that the Front Lobby officers rarely put in 8 hours, and when they did, it was only by a minute or two, which would be covered by their walk from the Front Lobby to the Control Center at the beginning of their shift.

Based on the testimony of Officer Bickelman, the union claims 25 minutes since the second quarter of 2005. Prior to that time it seeks 17.5 minutes, since prior to that time there was a Reception post which also covered the front lobby from 8 am to 4:30 pm. It concludes that since the Front Lobby Officer did not previously have to wait for relief to arrive at the end of his shift, the claim is for the average time between 15 and 20 minutes pre-shift work.

### **Housing Units**

#### **Facts**

There are 4 housing units at FCI Schuylkill, each with an A-side and B-side. At the

beginning of the grievance period, both sides were manned 24 hours a day (10 pm-6 am, 6 am-2 pm, and 2 pm-10 pm). Beginning with the second quarter of 2005, the B-side no longer had a morning watch (10 pm-6 am), so one officer was responsible for both the A-side and B-side of that building during that watch. In the third quarter of 2005, B-side still had no morning watch and the start and stop times changed for the shifts. A-side was 8 am-4pm, 4 pm-midnight, midnight-8 am; and, B-side was 8 am-4 pm and 4 pm-midnight. In the third quarter of 2006, B-side stayed the same while A-side went to 10 pm-6 am, 6 am-2 pm, 2 pm-10 pm (JtEx "5").

Officers Scott Chiglinsky and Doug McIllwain both testified that they began work prior to the start of their shifts when working this post. Both testified that they report for duty at the Control Center to pick up freshly charged batteries, sign the safety and security sheet, and turn their chits on the accountability board.(the board has chits with numbers assigned to each officer - the chits are red on one side and white on the other - officers would turn the chits to the red side if in the institution, and would turn them back to white when absent from the prison) (Tr, 1330-32, 1839). During day watch shifts, Chiglinsky would check to see if a detail pouch was there for him to pick up (Tr, 1330). Both officers testified they would then go to the Lieutenant's Office to check in, receive pertinent information, and would then proceed to their post (Tr, 1330, 1840).

Officer Chiglinsky stated that he arrived at the Control Center approximately 10-15 minutes before the beginning of his shift. (Tr, 1330) Officer McIllwain stated that he arrived at the Control Center about 15 minutes before the start of his shift (Tr, 1839). The two officers testified they would exchange information and equipment, including radio, body alarm, keys and hand restraints. Additionally, they would account for equipment kept in cages secured to the wall in the unit officer's office such as four extension cords, a scraper, a telescoping mirror, a mallet for conducting bar taps, a radio pouch holder, a metal detector, a flashlight, leg restraints, leg

irons, and safety glasses (Tr, 1332-33, 1840-41). They would sign off on the equipment inventory sheet because if any of the equipment was missing or broken, disciplinary action could be brought against the officer (Tr, 1334). The officers then had to call the Control Center and test their body alarms with Control to make sure they were working (Tr, 1334).

Officer Chiglinsky testified that he would be on his post in the Housing Unit on the hour (6 am in his case) and that the exchange would take 5-10 minutes (Tr, 1331,1335). He said he would leave the Housing Unit at 2:05-2:10 pm depending upon how much information needed to be passed to his relief (Tr, 1336). He stopped at the Lieutenant's Office if any paperwork needed to be dropped off, but generally proceeded to the Control Center where he dropped off his battery and detail pouch; and, he left the Control Center about 2:10-2:15 pm (Tr, 1336-40). Officer McIllwain testified when working a 2 pm to 10 pm shift, he left the Control Center a little bit after 10 pm, "five after . . . at the most." (Tr, 1850)

The foregoing testimony pertained to the period from the beginning of the recovery period claimed in the grievance until the end of the first quarter, 2005. Officer Chiglinsky testified that the amount of pre and post-shift time worked would have been the same for the morning watch as well (Tr, 1366-67). He stated that the removal of the B-side watch officer from the morning watch at the beginning of the second quarter 2005 had no effect on the amount of pre and post-shift work for the A-side post (Tr, 1384).

From the second quarter of 2005 until the shifts changed again in the second quarter of 2006, there was a great deal of confusion by the witnesses who tended to testify about shifts that were not in existence during that period (Tr, 1385 (Chiglinsky testified about a 6 am to 2 pm B-side watch when, in fact, the B-side day watch was from 8 am to 4 pm from the third quarter of 2005 to the present time), 1955 (McIllwain was correct that the B-side evening watch shift was 2

pm to 10 pm during the second quarter of 2005, but the evening watch changed to 4-midnight in the very next quarter). Officer Seresky did testify about working the midnight to 8 am morning watch during that period - which must have been an A-side watch (Tr, 2012-13). He testified that he arrived at Control 30 minutes before the start of his shift where he picked up a battery, signed the safety security sheet, checked his mailbox, and made sure there were no shift changes. He then went to the front lobby to pick up his "wake-ups", which were inmates who must be awakened at 4 am so they can work in food service (Tr, 2013-14). He testified that he arrived at the Housing Unit about 11:45 pm and exchanged with both the A and B-side officers which took 10-15 minutes (Tr, 2015-16). At the end of his shift, his reliefs would arrive about 20 minutes early (Tr, 2017). If both reliefs arrived simultaneously, he would be able to leave the Housing Unit between 7:50 and 7:55 am. (Tr, 2020). Officer McIllwain testified that during this period there was no substantial change in the hours worked (Tr, 1851-54).

From the third quarter of 2006 through the present memories were far fresher. Officer Chiglinsky testified that because there was not a B-side officer on morning watch, the A-side morning watch officer must brief his A-side day shift relief on what was taking place on the B-side as well, and the A-side day watch officer must account for equipment on both sides of a unit (Tr, 1372-75). He stated the relief took 5-10 minutes longer for the A-side officer (Tr, 1376).

With regard to the A-side evening and morning watches, Officer McIllwain stated that he arrived at the Control Center at 1:45 pm, and at the Housing Unit at 1:50-1:55. He said his relief arrived at 9:50-9:55 pm and he was finished in Control at 10-10:05 pm (Tr, 1876-78). Officer Seresky testified that he arrived at Control a half hour before his shift for the morning watch and left the Control Center right around 6 am (Tr, 2021, 2026).

As for the B-side watches, Officers Chiglinsky and McIllwain testified that their pre and



post-shift work amounted to 20 and 15 minutes respectively (Tr, 1377-1380, 1870-73).

Captain Taggart testified that he observed the shift exchange in the Housing Units and that it took a minute (Tr, 2605-06). Likewise, former Captain Matevousian said it took 1-2 minutes (Tr, 2944). Lt Chmely also testified that the exchange took "a couple of minutes." (Tr, 3314)

Camera footage with regard to these posts will be discussed infra.

### **Positions of the Parties**

The Agency attacks the credibility and recollections of the union's witnesses. In addition, the Agency points out that the camera footage shows numerous individuals whose time door to door is less than 8 hours. It notes that there "is also [a] large number whose time door to door is less than 8 hours 10 minutes." (AgBr, 59) it concludes that: "As such, . . . it would be administratively impossible to keep track of all the individual times." (AgBr, 59)

The union, relying on the testimony of its witnesses, contends as follows:

- (1) All officers working from the beginning of the recovery period until the end of 1<sup>st</sup> quarter 2005 should be credited with 22.5 minutes per shift.
- (2) For the period from the 2<sup>nd</sup> quarter 2005 through the 2<sup>nd</sup> quarter 2006, A-side officers should be credited with 22.5 minutes and B-side officers should receive 19 minutes per shift.
- (3) From the 3<sup>rd</sup> quarter 2006 through the present A-side day watch should receive 32.5 minutes, A-side evening and morning watch should receive 25 minutes, and B-side officers should be credited with 17.5 minutes per shift.

### **Outside Perimeter**

#### **Facts**

The Outside Perimeter (hereinafter "OP") post consists of trucks that drive around the

perimeter of the institution on the road that goes around the whole institution (Tr, 1111). Officer Quirk testified that it is the last line of defense in case of an escape, and it is an armed post (Tr, 1111). Through the end of the second quarter of 2003 there were 3 separate posts, and since then there have been two (JtEx "5"). Officer Quirk stated that there are no differences between the OP posts (OP-1 and OP-2 currently) which affect the pre and post-shift work that must be performed (Tr, 1132).

Officer Quirk testified that he reported to the Control Center approximately 15 minutes before the scheduled start of his shift, got his battery, checked his mailbox, and either called or went to see the lieutenant depending on what he was instructed by the Control Center (Tr, 1114). He said he checked his mailbox for roster changes - for example, if an inmate was in the hospital (off the premises) one could be sent to the hospital to work a shift there rather than his regular post (Tr, 1115). If he did not show up on the expected post, he would be marked AWOL (Tr, 1116). Assuming he was, in fact, working the OP shift, Control would call the person he was relieving, who would drive the OP truck to the front of the institution to pick him up (Tr, 1118-19). He said he was picked up about five minutes prior to the scheduled start time of his shift, but if the OP truck was checking a problem, e.g. a zone alarm, it might be late (Tr, 1119). He noted that one of the two OP trucks must stay mobile at all times, so if the other truck was in the process of relief, he would have to wait until that was completed (Tr, 1119-20).

Once he was picked up by the OP truck, Officer Quirk would proceed to what is known as the clearing barrel in order to inventory ammunition. The OP officers carry a 9 mm handgun with three magazines, each holding 15 rounds. They also carry an M-16 rifle, also with three magazines, each holding 25 rounds (see Tr, 1122-23, 1135). Officer Quirk testified that OP officers must manually unload each round out of the magazines one by one, and reload them one

by one (Tr, 1124). In addition, all ammunition must be removed from a shotgun carried on the OP trucks (1192). Officer Quirk stated that other equipment - binoculars, handcuffs, a helmet and spotlight, must be inventoried; and, the vehicle must be inspected for any damage (Tr, 1121). After all equipment is exchanged, the OP officer drives the officer he has relieved to the front lobby and drops him off (Tr, 1125). At that point the OP officer would begin to patrol the road around the perimeter. Officer Quirk testified that from the time he was picked up by the OP truck until he dropped off the outgoing shift, approximately 15 minutes would elapse (Tr, 1126). He added that on average, he was dropped off 15-20 minutes past the end of his shift. Officer Quirk further testified that the relieving officers who arrive last at the front of the institution must wait for the other OP officers to complete their exchange of equipment and information before they can drive to the clearing barrel to begin (Tr, 1140-41). When he was not the first officer to arrive he did not finish the shift exchange process until about 25 minutes after the end of his shift (Tr, 1276).

Officer Quirk testified that during the period of time that OP-3 was used, management often vacated the post so that the OP-3 equipment was kept by either the OP-1 or OP-2 post. The oncoming officer would therefore have to inventory twice as much equipment which doubled the amount of time spent at the clearing barrel (Tr, 1127-28).

At the beginning of the first quarter of 2007, the OP shift start and stop times were staggered so that both OP trucks do not perform shift exchange at the same time. One OP post is on a 10 pm-6 am, 6 am-2 pm, and 2 pm-10 pm schedule while the other is 9:45 pm-5:45 am, 5:45 am-1:45 pm, and 1:45pm-9:45 pm. (JtEx "5") According to Officer Quirk, staggering the shifts has eliminated the need for one truck to remain mobile and wait for the other truck to complete its shift exchange before it can begin its own shift exchange (Tr, 1124). He said, however, that

while the wait for the other truck to finish is no longer a factor, "You're still having to do all that same stuff." (Tr, 1192) He said that whereas before the staggered shifts he would leave his post upwards of 25 minutes after his shift ended, he would now leave approximately 15 minutes later (Tr, 1276).

Former Captain Matevousian testified that once the actual relief process started, it would take 3-5 minutes at the most (Tr, 2955). He acknowledged that the total process depended on "how long it took for the officer and the OP truck to come around front and pick up the other officer, what clearing barrel they went to, whether both the OP trucks came at the same time." (Tr, 2955)

Captain Taggart testified that OP relief took 2-3 minutes "because you're counting ammunition." (Tr, 2607)

Lt. Chmely testified that the OP officers needed to account for their ammunition and other equipment during the course of their shift and that they had a reasonable amount of time so to do (Tr, 3231). He distinguished between "Making sure the weapon is safe so you can pass it to the other person" and "accounting for all your ammunition." (Tr, 3231) In describing Capt. Bebow's 15 minute period for staggering shifts, he testified: "the reasonable amount of time is normally perceived to be approximately 15 minutes in order to accomplish the accounting for all the ammunition." (Tr, 3232) Lt. Chmely testified, however, that the shifts were staggered to enhance security because prior to the change both trucks had pulled up to the lobby at the same time; and, one should always be mobile (Tr, 3236-37).

### **Positions of the Parties**

The Agency argues that Officer Quirk's testimony about when he arrived at the Control Center should not be deemed credible because in the video footage, OP officers were seen

entering the institution on only one day out of five, and on that day they entered 5 minutes before the start of their shift. Counsel questions Quirk's time calculations stating that if it took 15 minutes from pick up to drop off at the lobby, "the person being relieved would be dropped off anywhere from 10 to 15 minutes after the end of their shift" (AgBr 60), and yet Quirk testified that he would typically be dropped off 15-20 minutes after the end of his shift. Counsel states that he later expanded it to 25 minutes. Counsel further states Quirk's testimony was significantly undermined by a union witness, Joseph Evans, who testified that Quirk was known for coming in right at the start of his shift (AgBr 61).

The union claims the evidence established that OP officers worked 30 minutes pre and post-shift, and 40 minutes up until the first quarter of 2007 if the officer was the second officer to arrive to perform relief (and thereby had to wait until the first to arrive had completed counting ammunition.

## **Rear Gate**

### **Facts**

The Rear Gate post operates 8 hours per day, 5 days a week during day watch (JtEx "5"). The rear gate of the institution is used to allow vehicular traffic, e.g. for the delivery of food (Tr, 1616), and the pick-up of garbage; and, some pedestrian traffic, e.g. contractors (Tr, 1616) in and out of the institution. Officer Joseph Evans testified that when working the post he reported to the Lieutenant's Office about 7:45 am (the shift begins at 8 am). He said he then went to the Control Center where he picked up a radio, keys, handcuffs, gate passes and a hand stamp (Tr, 1617). He proceeded to the front lobby where he called for the OP vehicle to drive him around to the rear gate (Tr, 1618). Officer Evans said he generally arrived at the rear gate between 7:55 and 8 am (Tr, 1618). At the rear gate Officer Evans opened the crash barriers along the gate, opened

the office, started the log book, and accounted for some equipment stored at the rear gate such as a metal detector, tools, and padlocks (Tr, 1618-19).

Officer Evans testified that there was usually a vehicle or a pedestrian waiting to go through when he arrived. He recalled a few instances where lieutenants made it clear to him that they expected the rear gate to be open by 8 am. On one occasion, he was in the office with Lt. Gates, it was about 7:55, and someone was calling about getting through the rear gate. Lt. Gates told him: "This is why I need you guys to be on post by eight o'clock." (Tr, 1621, 1624-25) He testified that on the few occasions he did not have the rear gate open by 8 am, the people seeking access complained to the lieutenants who would contact him (Tr, 1620-21). Officer Evans stated that he left the institution at 4 pm (Tr, 1624).

Lt. Chmely testified that the Rear Gate Officer needed only to be in Control at 8 am. He said if a vehicle came up before 8 am, and "if it really needed to be there, we would open [the gate]." (Tr, 3269-70) He said OP would let Control know there was a vehicle there, and Control would decide whether someone should be sent to open the rear gate. Lt. Chmely said there was no reason for the Rear Gate Officer to come in prior to 8 am "because the traffic doesn't go until you get there." (Tr, 3271) He stated that vehicle traffic stopped long before the officer finished his shift so the officer "had a ton of time." (Tr, 3271)

### **Positions of the Parties**

The Agency relies on Lt. Chmely's testimony as well as video footage which is said to show that the times worked range from 8 hours 2 minutes to 8 hours 19 minutes. Counsel states that all of the times except the one are 8 hours 10 minutes or less.

Based on Officer Evans' testimony, the union claims 15 minutes pre-shift work for this post.

## **Reception**

### **Facts**

Until March, 2005 one officer was assigned to the Reception post in the front lobby, one shift, five days a week (JtEx "5"). Officer Matthew Munson testified that he would initially report to the Control Center at 7:45 am and would check out a radio. He said he would go to the front lobby, arriving there at 7:55. He said he would begin his duties which consisted of processing visitors, answering phone calls, and transferring phone calls to the appropriate destination (Tr, 2269-70). When he arrived at his post, the front lobby was already open and manned by the Front Lobby Officer (Tr, 2297). He was asked, on cross examination, whether he could have come in later than 7:45 and still been on post at 8 am. He responded: "I don't know." (Tr, 2296)

Officer Munson stated that at 4:30, when his shift ended, he locked the front door, the telephone, the computer, and the cabinets. He then dropped off his keys, radio and a box of badges that were issued to contractors and other visitors throughout the day, at the Control Center (Tr, 2271-72). He testified that he dropped this equipment off at 4:35-4:40 pm (Tr, 2272).

Lt. Chmely testified that there was no reason for the Reception Officer to arrive prior to 8 am, and by 4:30 pm he should have turned everything into the Control Center (Tr, 3278).

### **Positions of the Parties**

The Agency states that as this post is similar in its requirements to those of the Front Lobby Officer, which rarely works 8 hours, the post should not recover.

The union claims 22.5 minutes based on Officer Munson's testimony of 15 minutes pre-shift work and the average between 5 and 10 minutes post-shift work.

## **Recreation Officer**

### **Facts**

This position was only in effect until the end of the first quarter of 2003 (JtEx "5"). There was one shift per day, from 6 am to 2 pm, five days per week. Officer James Shaup said he arrived at the Control Center at 5:40-5:45 am, where he would get his radio, handcuffs, keys, crew kit and whatever he needed to get recreation up and running (Tr, 2226, 2240). He said he proceeded to the recreation area where he would have to conduct a thorough search of the entire area - the whole gymnasium, the bathrooms, beneath the bleachers, two rooms where the inmates worked with ceramics, a pool table area, and music rooms - to make sure no contraband such as knives, "hooch", or drugs had been left there the day before. He would then have to check the handball courts, the weight room, the "sweat lodge", the track and the fence (he would have to walk the whole fence line around the outdoor recreation area) before any part of the area could be opened up for inmates (Tr, 2227). He described the recreation area as "a couple of football fields big (Tr, 2225). Officer Shaup testified that the recreation area was supposed to be open by 6 am, the same time "mainline" (the breakfast line) opened, and if it was not open, "The inmates would be out there hooting and hollering and cursing" and threatening to go to officers above him to complain recreation wasn't open on time (Tr, 2228). Officer Shaup recalled that the lieutenants wanted the recreation area opened by 6 am "Because they would tell you, 'Get it done. Get whatever you have to do to get that open when they call mainline.'" (Tr, 2229) He testified that management knew he was coming in early because there was no other way to have the recreation area ready to go by 6 am (Tr, 2232-34).

Officer Shaup testified that he left the recreation area at 2 pm, explaining that his post was from 6:00 to 2:00 (Tr, 2231). He turned in his equipment at Control and was off duty at



2:05-2:06 pm. (Tr, 2231-32) On cross examination, Officer Shaup testified that the post was "typically pulled" so he would actually go and work someplace else if relieved by the lieutenant (Tr, 2242).

Lt. Chmely testified that there was nothing about the Recreation Officer's duties which would require him on a normal basis to stay beyond 8 hours (Tr, 3339).

### **Positions of the Parties**

The Agency relies on Lt. Chmely's testimony for the proposition that no recovery should be had by the Recreation Officer.

The union claims 23 minutes, apparently based on 15-20 minutes pre-shift work (17.5 minutes average) and 5-6 minutes post-shift work (5.5 minutes average).

### **Reservation Patrol**

#### **Facts**

The Reservation Patrol post was in existence only through the first quarter of 2003 according to the union. Management states that it was removed from the roster in 2005. I have been unable to confirm the date on which it was abolished from the rosters (JtEx "5") In any event, one officer was assigned on inmate visiting days (Saturdays and Sundays) and was responsible for monitoring Camp inmates who could walk away from the Camp (there is no fence around the Camp), and looking out for contraband which could be dropped off for camp inmates (Tr, 1143). Officer Shawn Quirk testified that he would report at the Control Center 15 minutes before his shift starting time (Tr, 1135). He said the pre-shift procedures were the same as for OP-1 (Tr, 1135). A Reservation Patrol or OP truck would pick him up and take him to the clearing barrel where he would account for 45 rounds for a 9mm handgun, inventory his equipment, and inspect the vehicle (Tr, 1136-37). There was no evidence of post-shift work. On

cross examination, Officer Quirk said he could not be sure if he worked this post during the period of the grievance (Tr, 1200).

Lt. Chmely testified there was no reason for the Reservation Patrol Officer to come in before the shift started at 8 am because visiting did not commence until 8:30 am (Tr, 3244).

### **Positions of the Parties**

Counsel argues that the testimony of Officer Quirk should be disregarded because there was no testimony that he worked the post from June 2002 to the present. Counsel further relies on the testimony of Lt. Chmely.

The union seeks 15 minutes pre-shift pay for each shift worked.

### **Special Housing Unit**

#### **Facts**

The Special Housing Unit ("SHU") is occupied by inmates who are serving disciplinary confinement, are in protective custody or are awaiting transfer to another institution (Tr, 990). It is staffed 24 hours a day, 7 days a week by the SHU #1 Officer. In addition, officers are assigned to work the SHU #2, #3 and #4 posts 16 hours per day, 5 days per week. The SHU #3 and #4 posts have had shifts of 6 am-2pm and 2 pm-10pm throughout the recovery period. The SHU #2 shifts were 8 am-4 pm and 4 pm-midnight from June 2002 until the end of the first quarter 2003. From the second quarter 2003 until the present, the shifts have been 6 am-2 pm and 2 pm-10pm. (JtEx "5") In addition, there is a post called SHU Recreation/Property which works 8 hours per day, 5 days per week during day watch (JtEx "5").

Officer Robert Gottshall, Jr. testified that when working SHU #1 he would report for duty at the Control Center at 5:45 am, 15 minutes before his shift starting time (Tr, 997). He said he picked up a freshly charged battery and a detail pouch which listed those inmates in segregation

("SHU" and "segregation" are used interchangeably by the officers) (Tr, 997-98). He checked in at the lieutenant's office and walked over to SHU, arriving there at 5:55 (998-99). To gain access to the SHU, an officer inside that unit had to verify him to Control which opened the first of two sally port doors electronically; and, then the SHU #1 Officer he was relieving opened a second sally port door using a key (Tr, 999, 1023). Officer Gottshall stated that after being let in, he would put a fresh battery in his body alarm, turn it on, and proceed to exchange equipment. That equipment consisted of two sets of keys, and four shadow boards containing cords, handcuffs, Martin chains, a knife, screwdrivers, a bar tap, a hammer, a mirror, a strip machine, a recorder and a camera (Tr, 999-1000). He further testified that information about the inmates had to be exchanged, and that it took 5-10 minutes depending on what had been going on (Tr, 1001).

Officer Gottshall stated that the same procedure took place at the end of his shift, and that he would return the used battery and the detail pouch to the Control Center at 2:00-2:05 pm (Tr, 1002-03). He testified that at some point the post orders were changed so that he no longer had to check in at the lieutenant's office. He said this made a five minute difference, so he arrived at the Control Center at 5:50 instead of 5:45 (Tr, 1006-07). Officer Gottshall testified that the only difference between the three shifts was that the day watch officer picked up a detail pouch (Tr, 1008-09).

With regard to the SHU #2, #3, and #4 posts, Officer Gottshall testified that there was no difference between their duties at the beginning of their shifts (Tr, 1018-19). He said that when working SHU #2 he reported for duty at 5:45 am (for a 6 am shift) (Tr, 1011). He said he arrived at the SHU at 5:55 after picking up keys and a radio at the Control Center. The procedures to gain access to the SHU were the same as those described for the SHU #1 Officer. Officer Gottshall said his relief on the day shift arrived about 1:55 to 2:00 pm, and he left the Control Center at

## Visiting Room

### Facts

Three officers (#1, #2, and #3) are theoretically assigned to staff the visiting room for the institution from 8 am until 4 pm, five days per week (JtEx "5"). Officer Archer testified that for most of the time he worked the post, only two officers worked the visiting room (Tr, 1694-95). He said #1 was responsible for processing the inmates and visitors, #2 was responsible for strip searching the incoming inmates and for doing the same at the end of their time in the visiting room, and #3 was responsible for escorting the visitors (Tr, 1688, 89).

Officer Archer testified that he reported for the shift between 7:30 and 7:45 am, drew a radio, keys and handcuffs from the Control Center, and reported to the visiting room where he searched the room (Tr, 1692). He then testified that it was his "habit" to report to work 15 to 20 minutes early (Tr, 1729). He said there were different rooms including the strip search room, the TV room and the main visiting area, all of which had to be searched. In addition, the fence around the institution, which is approximately one mile long, had to be searched to make sure no holes had been cut into it during the night (Tr, 1693-94). He stated #1 officer would get the paperwork ready while #2 (and #3 if present that day) would do the fence check which took between 20 and 25 minutes (Tr, 1693-95). Officer Archer further testified that two days a week one of the Visiting Room officers would have to escort the vending machine service man who would fill up the vending machines for the inmates and visitors (Tr, 1695). Visiting began at 8:30 am and the officers would be ready to take visitors at 8:25-8:30 (Tr, 1695). Officer Archer stated that there were times when the officers were a little late in allowing visitors entry, the "visitors complained and [the officers] would get told about it" by either the captain or the lieutenants (Tr, 1697). They would be told they "need to be prepared and ready to go by 8:30." (Tr, 1697)

Officer Archer testified that visiting hours ended at 3 pm. One officer commenced escorting visitors out in groups of five adults, first to the Control Center where visitors' hand stamps were checked under a black light to make sure no inmates had gotten mixed in with the visitors, and then to the front lobby where the Front Lobby Officer again checked the hand stamps. Officer #2 began to strip search the inmates before they returned to the compound. He said that officer could only do one inmate at a time, and it took 2-3 minutes per inmate if they were being cooperative. The third officer stayed in the Visiting Room because the remaining visitors could not be left unsupervised. Officer Archer said the visitors were all out of the unit around 3:30-3:40. At that point another search of the area was performed by the officers. Officer Archer said the officers turned in their equipment at the Control Center at 3:55-4:00 pm (Tr, 1698-1703).

Lt. Chmely testified that two Visiting Room officers would frequently do the fence check so "it's done twice as fast." (Tr, 3326) He said the Visiting Room consisted of a big open floor with some plastic chairs, so the search was around the perimeter of the room. He testified that the "entire room is easy to search." (Tr, 3327) He said the Visiting Room officers would not get in trouble if visiting did not start at 8:30 because "Visiting is a privilege. . . not a right." (Tr, 3327) Lt. Chmely testified that there was nothing which would require the Visiting Room officers to be in prior to 8 am because they had a half hour before visiting began; and, at the close of their shift, he usually saw them between 3:30 and 3:45 pm in the lobby (Tr, 3329-3337). He said he usually just let them leave early when they were finished before 4 pm (Tr, 3337). Lt. Chmely testified that if visiting was especially heavy, he would assign someone else to help out the officers (Tr, 3338).

#### **Positions of the Parties**

The Agency points to the camera footage and notes that the beginning and ending time for

these officers ranged from 7 hours 56 minutes to 8 hours 4 minutes (citing Agency Exhibit "32").

The union claimed 17.5 minutes pre-shift work, apparently based upon Officer Archer's testimony that he always arrived 15-20 minutes before the start of his shift.

### **Visiting Escort**

#### **Facts**

From the beginning of the recovery period until March, 2005 one officer was assigned on weekends only as Visiting Escort to assist the other officers assigned to the visiting room. Officer Munson testified that the Visiting Escort Officer walked with visitors from the front lobby to the visiting room and back, and monitored activity in the visiting room. The shift hours were 8 am to 4 pm. Officer Munson stated that he arrived at the Control Center at 7:45 where he would get a radio and a set of handcuffs. He said he would go to the visiting room, search it, and conduct fence checks. He stated the visiting room officers were ready for visiting to begin at 8:40. At the end of his shift, he dropped off his equipment at Control at 3:55 pm, but he said he left at 4 pm (Tr, 2274-75).

### **Positions of the Parties**

The Agency states that this post was simply an extra for the visiting room and should not recover for the same reasons stated in the section on Visiting Room Officers.

The union asks for 15 minutes pre-shift pay based on Officer Munson's testimony.

### **Non-Custody Staff Working Custody Posts**

#### **Facts**

Patricia Manbeck, who holds the non-custody title of Case Manager, testified that non-correctional officers such as herself, are sometimes assigned to work correctional posts. She said there is no difference in the duties such personnel perform from those performed by correctional

officers working the same post. She said "It's a function of the position, not the person." (Tr, 2321) Ms. Manbeck recalled that she knew she would be working a correctional post in advance but did not know what post, or even if she would be working a post, until she arrived and spoke to the Lieutenant in charge that day (Tr, 2324-25). Ms. Manbeck testified:

"I believe it was Lieutenant Reed that would call us and say, 'You're going to be day watch, evening watch or morning watch. You report at this time. Report in to see the lieutenant, and he'll let you know if, in fact, you have a post.'" (Tr, 2325)

Ms. Manbeck testified that she worked a 6:00 to 2:00 shift in Housing Unit 4A. She said she arrived no later than 5:45 "In order to find out where I was going . . . and accomplish the relief." (Tr, 2325) She said she picked up a battery at the Control Center, walked by the Lieutenant's Office to check in, and walked to her housing unit, arriving at 5:55. She testified the exchange of equipment and information with the person she was relieving took 5-10 minutes, so that person would be leaving the Housing Unit about 6:05. She said most of the time the people who were relieved by non-custody personnel were non-custody personnel themselves so the exchange was probably a little longer (Tr, 2325-30).

Alice Frederick, a drug treatment specialist, testified about working a Housing Unit from 10 pm to 6 am. She testified that she came in a half hour before her shift starting time and report to the Lieutenant's Office because she did not know where she would be working at that time let alone what equipment she needed. She said if she was not familiar with the post she was working, she pulled the post orders, reviewed them to find out what equipment she would need, and asked the Lieutenant any questions she might have. She stated she would then proceed back to Control to get a battery and then go to her assigned post, arriving between 9:50 and 10 pm. Ms. Frederick testified the actual relief took between five and fifteen minutes depending on how much information needed to be conveyed. When her relief showed up, Ms. Frederick said she would be

leaving the Housing Unit anywhere from 5 minutes before the hour to 5 minutes after; and, it was a five minute walk to the Control Center where she would drop off her battery. Ms. Frederick testified that a lot of times people relieving her were non-custody staff as well so they came in early to make sure where they were going to be assigned (Tr, 2348-53).

Joseph Gudonis, a Case Manager, also testified about working a Housing Unit. He said he arrived at 1:40 for a 2:00 to 10:00 shift, picked up a battery at Control and arrived at the Housing Unit at 1:50. The officer he relieved left the unit close to 2:00. He said when he was relieved, he would depart the unit a couple minutes after 10 pm. He said he dropped his battery off at Control at 10:10-10:12 pm (Tr, 2384-95).

### **Positions of the Parties**

The Agency takes the position that these individuals are not entitled to recover unless they can show that the Agency suffered and permitted their work.

The union simply argues that non-correctional officers are required to perform the same pre and post-shift work when working correctional officer posts.

### **Posted Picture File**

#### **Facts**

Correctional officers are required to review the Posted Picture File (hereinafter "PPF") at least monthly. The inmates whose pictures are contained in this file are potentially disruptive, escape risks, and/or present a threat to staff or institution security (UnEx "N"). A number of officers testified that they were unable to leave their posts during their shifts, and hence were obliged to review the PPF before or after their shifts.

Officer Jacobs testified that each officer was required to read and sign the PPF, and that it was kept in the lieutenant's office (Tr, 640). He was asked if he had ever been able to look at the



PPF at his post and answered that he had, but only about 10-15 months out of the 16 years he had worked at FCI Schuylkill (Tr, 788-89). He did not recall ever being relieved to look at the PPF (Tr, 812). Officer Jacobs stated it took him anywhere from 15-30 minutes to review the PPF (Tr, 643).

Officer Petch testified that when he worked Control #1 there was no time to go to the lieutenant's office to review the PPF. He said it took him 15-20 minutes to review the file (Tr, 913-14). He acknowledged that when he worked Compound on day watch he would review the PPF during his shift because he was in and out of the lieutenant's office all day long. But when working the Control Center, he never asked to be relieved to review the PPF because "it's a tough post to be relieved with." (Tr, 933)

Officer Gottshall testified that it took him 5-10 minutes to review the PPF, which he did before his shift (Tr, 1035-36).

Officer Quirk testified that the review took him 15-20 minutes (Tr, 1164). He stated that he had been able to review the PPF during his shift when working as a Compound Officer (Tr, 1219)

Officer Chiglinsky testified that it took him 15-20 minutes to review the PPF (Tr, 1405). He also stated that he was able to review the PPF when working Compound, and also when he was assigned as an extra officer (special assignment) (Tr, 1509-10).

Officer Bickelman testified that since 2002 he had to go to the lieutenant's office 95% of the time to review the PPF (Tr, 1586).

Officer Evans testified that it took him 5-10 minutes to review the PPF, generally before his shift (Tr, 1627).

Officer Archer testified that it took him 10-15 minutes to review the PPF. He said he was

able to review the file during his shift when he worked as a Count Officer (Tr, 1707-08).

Officer McIlwain testified that it took him 15-20 minutes to review the PPF, which he would do either before assuming duties in the Housing Unit or after he had been relieved (Tr, 1883). On cross examination, Officer McIlwain was asked whether he had asked for relief to review the PPF when working in the Housing Units. He responded that he had asked, and "Sometimes if they have extra people, which there doesn't seem to be too many nowadays, they would get you up there to do it, but not very often." (Tr, 1898-99)

Officer Margetanski testified that it took him 10-15 minutes to review the PPF. He was able to review the PPF during his shift when working "on the compound". (Tr, 1980)

Officer Seresky testified it took him 20-25 minutes to review the PPF. He also stated he had been able to review the PPF during his shift when working Compound (Tr, 2194-95).

Officer Shaup testified it took him 15-20 minutes to review the PPF either before or after his shift (Tr, 2238). He said he asked for relief during his shift once, but was told: "Nope. There's no relief." (Tr, 2247) He said he never asked for relief again.

Officer Munson testified it took him 10 minutes to review the PPF which he did either at the beginning or end of his shift (Tr, 2277-78).

Former Captain Matevousian was asked if he was aware of people reviewing the PPF prior to the start of their shifts. He replied:

"I've seen individuals come into the lieutenant's office for a host of other reasons, a variety of different reasons. They may have viewed it during that time frame. But, once again, I'm not sure whether they're coming to work or going home or if they're on the clock. But there was probably times that people have done that." (Tr, 2963)

He testified that if someone had told him they were reviewing the PPF before the start of their shift, he would have compensated them and told them not to do that (Tr, 2963).

Former Captain Bebow testified that he did not recall if anybody was relieved so they

could review the PPF. If said if management was capable of relieving them, management would relieve them. He testified that otherwise, the lieutenants were supposed to take the PPF around to the staff so they could review it and sign it while on duty. He said the PPF was on the computer for awhile, where staff could review it and e-mail a signature sheet to the lieutenant. However, management had to take it off the computer, at which point he had the lieutenants take it around to people (Tr, 2841).

Captain Taggart testified that the PPF could be taken into the Housing Units if they were secured. He explained that the units were secured when the inmates were locked down from 10 pm until 6 am (Tr, 2666). He further testified: "A lot - - some reviewed it in the lieutenant's office." (Tr, 2611)

Lt. Chmely also testified that he had seen people in the lieutenant's office reviewing the PPF but he did not know of anybody reviewing it outside of their shift. He added that he did not necessarily know what their shifts were. He could not recall how long the PPF was on the computer (Tr, 3359). He stated that certain areas, such as the Housing Units, the Control Center, and the SHU, had more than one officer, so one officer could be relieved to review the PPF (Tr, 3548-49).

### **Positions of the Parties**

The Agency contends that the evidence failed to show that it suffered or permitted any officers to review the PPF without compensation.

The union argues that the average pre and post-shift time spent by officers reviewing the PPF was 14.75 minutes per month.

### **UNION'S GENERAL ARGUMENTS**

The union argues that each correctional officer must pick up a freshly charged battery from

the Control Center before the start of the employee's shift and must return the battery at the end of the shift so that it can be recharged. In support of this assertion, the union cites the General Post Orders (JtEx "6" at 10) (UnBr, 8, UnRepBr, 6). The union states that fresh batteries are necessary so that body alarms which must be on the belt of correctional officers at all times (citing JtEx "6" at 11 - General Post Orders) (UnBr, 9) will be operable if needed. Certain testimony is cited by the union as to the importance of picking up a fresh battery - e.g Officer Gottshall stating that he picks up a battery "Because my life may depend on that battery." (Tr, 997-98; UnRepBr, 6) The union quotes management witnesses as well regarding the importance of a fresh battery, and points out that it is the Agency itself which provides batteries at the Control Center (UnRepBr, 3, 8).

The union contends that picking up a battery is an "integral and indispensable" activity that begins the continuous workday for which correctional officers must be compensated (UnRepBr, 4). The union rejects management's alleged claim that Compound officers deliver batteries at the beginning of each correctional officer's shift, and points out that if a battery dies during mid-shift, it could take 15 minutes, if not longer, from the time of a request until the Compound Officer drops off the battery (UnRepBr, 7). The union notes that the Agency has never issued any written directives to employees to cease the practice of picking up and returning batteries at the Control Center (UnRepBr, 8).

The union states that management knew or should have known that correctional officers were performing the work at issue without compensation. It is noted that the General Post Orders (JtEx "6") require all correctional officers to report to the institution in time to draw keys and equipment, check for pertinent information, check in with the Shift Supervisor and be on one's assigned post at the designated time. The union contends that because employees must perform the work enumerated in the General Post Orders prior to arriving at their posts, management had

actual knowledge that the employees were performing work off-the-clock (UnBr, 80). The union quotes testimony from a number of witnesses, including ones manning Housing Units, the Rear Gate, Recreation, and Count, that management gave officers verbal instructions to begin work prior to the start of their shifts (UnBr, 81-84). Testimony about repeated instances of management refusing to pay for pre or post-shift work is cited, and it is claimed that management would move people to the bottom of the Mandate List (a rotating list of employees used when it is necessary to mandate or require an employee to remain at work into the next shift) when it knew the people had performed pre or post-shift work, but did not compensate them as required by the FLSA (UnBr, 84-88). The union further states that correctional officers checked in with the Lieutenant in person at the beginning of their shifts until the second quarter of 2006, so their supervisors were aware if they were there early. The union notes that on foggy days, which can happen quite frequently in the spring and fall, lieutenants stand in the administration building in front of the Control Center with a copy of the daily roster to check off correctional officers as they arrive for work and to assign fog duties to other employees. Other instances of lieutenants being present when correctional officers were arriving or departing are cited by the union (UnBr, 88-91). The union cites evidence of Lieutenant's logs which documented body alarm checks of correctional officers performed by the Control Center before and after those officers' scheduled shifts (UnBr, 11, 93-95). In this regard, the testimony of former Warden Holt is cited to show that one of the first things he did each morning was to read the Lieutenants' logs (Tr, 2444) (UnRepBr, 18). Other management testimony is cited to show actual knowledge (UnRepBr, 18-21).

The union states that at a minimum, management should have known that employees working correctional officer posts were performing work before and/or after their shifts. The union argues that "It is common sense that employees cannot possibly . . . pick-up their equipment

at the Control Center, check-in with the Lieutenant, travel to their posts, and exchange equipment and information with the officer they are relieving during their shift hours when there is no overlap between the shifts.” (UnBr, 95) Counsel continues that “management is aware that (1) the posts require continuous coverage; (2) that the officers are required to perform the activities listed above; and (3) that there is no overlap to allow for the officers to do this work in paid status.” (UnBr, 95) The testimony of Officer Jacobs is cited as evidence that FCI Schuylkill previously had overlapping shifts, but management removed the overlap shortly before the recovery period in this case began. (UnBr, 95) It is further claimed that each bargaining unit employee witness testified that management never instructed them not to perform work before and/or after their shifts (UnBr, 96).

The union cites section 7(a) of the FLSA as requiring employers to pay overtime at the rate of one and one-half times their regular rate of pay for each hour of overtime they work over 40 hours per week (29 U.S.C. § 207(a)). It cites 5 C.F.R. § 551.401(a) to establish that “hours of work” include time during which an employee is “suffered or permitted” to work; and, it cites Brennan v. General Motors Acceptance Corporation, 482 F.2d 825, 827 (5<sup>th</sup> Cir., 1973) for the notion that an employer is liable for work whether it has actual or constructive knowledge that the work is performed. Reich v. Dep’t of Conservation & Natural Resources, 28 F.3d 1076, 1082 (11<sup>th</sup> Cir, 1994) and Cunningham v. Gibson Electric Co., supra, are cited for the proposition that actual or constructive knowledge of supervisors is imputed to the employer. The union contends that an employer has actual knowledge of employees’ overtime worked where the person responsible for approving overtime has observed the overtime worked by the employee but made no objection to it and knew the employee was not being paid for it (citing, inter alia, Kappler v. Republic Pictures Corp., 59 F. Supp. 112 (S.D. Iowa. 1945)). The union argues that constructive knowledge of

overtime work has been attributed to the employer where a supervisor observed employees in the workplace during hours outside of the employees' scheduled work hours and made no inquiry of the employees' activities there (citing Cunningham v. General Electric Co., supra)(UnBr, 97-100). It is asserted that management has a duty and responsibility to see that work is not performed if it does not want it to be performed (UnBr, 101-104). In addition, the union claims that management has observed employees responding to emergencies off-the clock and has not compensated them (UnBr, 92-93).

The union argues that employees are entitled to compensation from the moment they perform the first "integral and indispensable" activity until they perform the last activity that is integral and indispensable to the performance of their jobs. (UnBr, 104-05) Counsel contends that activities that are integral and indispensable to an employee's principal activity begin and end the "continuous workday" and that employers must compensate employees for all time comprising the continuous workday (citing IBP v. Alvarez, 546 U.S. 21 (2005)). The union states that bargaining unit employees working correctional officer posts are therefore entitled to compensation from the moment the continuous workday begins at the Control Center until it ends at the Control Center (UnBr, 108-09) It claims that picking up a battery is an integral and indispensable activity that begins the continuous workday (UnRepBr, 4). The union contends that numerous arbitrators considering the exact same issue as that presented in this case have concluded that a correctional officer's work day begins when he or she picks up the first piece of equipment and ends when he or she returns the last piece of equipment (UnBr, 109) (citing inter alia AFGE Local 3981 and FCI Jesup, FMCS No. 94-07225 (2006); FCC Beaumont and AFGE Council of Prison Locals, C-33, FMCS No. 05-54516 (2006)).

The union charges that the Agency has failed to maintain proper records of employee

hours, and it is therefore entitled to make its case purely through testimonial evidence. It cites Anderson v. Mt. Clemens Pottery Co., 328 U.S. 680, 687-88 (1946) for the concept that “The burden then shifts to the employer to come forward with evidence of the precise amount of work performed. . .” (UnBr, 114) The union asserts that the Agency has not negated the inferences to be drawn from the union’s evidence (citing DeLeon v. Trevino, 163 F. Supp. 2d 682 (D. Tex., 2001) and several arbitration decisions)(UnBr, 117).

With respect to management’s video footage, the union refers to it as “cherry-picked” because it consisted of 5 days during one quarter, and yet the recovery period is in excess of 6 years. In its brief, the union claims it is entitled to an inference that the video footage for the dates not produced by the Agency is beneficial to its claims (UnBr, 118-19). In its reply brief, the union contends that the video evidence demonstrates that on a daily basis, employees almost always work more than 8 hours; and, that the video evidence should be considered as the Agency’s best-case scenario for the amount of time worked by employees. The union points out that the videos show that on April 10, 2007, 34 employees worked more than 8 hours and 22 of those employees worked over 8 hours and 10 minutes; on April 11, 2007, 34 worked more than 8 hours and 24 worked more than 8 hours and 10 minutes; on May 14, 2007, 35 worked more than 8 hours and 11 worked over 8 hours and 10 minutes; on May 24, 2007, 36 worked more than 8 hours and 24 worked more than 8 hours and 10 minutes; and, on June 5, 2007, 39 worked more than 8 hours and 26 worked more than 8 hours and 10 minutes (UnRepBr, 13). The union asserts that its evidence establishes that employees work an even greater amount of regular and recurring overtime.

The union argues that the additional work performed is not *de minimis* Relying to a large extent on the standards set forth in Lindow v. U.S., *supra*, the union contends (1) it would not be



administratively difficult to record the additional time because video surveillance, check-ins with supervisors or a time clock could be used (UnBr, 121; UnRepBr, 17), (2) the aggregate amount of compensable time is significant, and (3) the pre and post-shift work is regular (UnBr, 121-22; UnRepBr, 10-12, 15-16).

Finally, the union contends that employee knowledge of overtime procedures is irrelevant. It cites Newton v. City of Henderson, 47 F.3d 746, 748 (5<sup>th</sup> Cir., 1995) for the proposition that an employer cannot stand idly by and allow an employee to perform overtime work without proper compensation even if the employee does not make a claim for overtime compensation. (UnRepBr, 23-24) Additionally, it questions the credibility of the Agency's witnesses noting that since correctional officer shifts begin at one of six times, "it is ridiculous for management witnesses to state that they would have no way of knowing that numerous employees arriving at, for instance, 7:45 am would be arriving for the 8:00 am shift." (UnRepBr, 26)

### **AGENCY'S GENERAL ARGUMENTS**

Management argues that the evidence shows that a lot depends on the individual employee and his or her habits, rather than an Agency policy requiring employees to come in early or leave after their shifts. Counsel points out that such variation, even if it were found that people worked in excess of their 8 hours, would be administratively impossible to track (AgBr, 14).

Management contends that correctional services staff are not required to either pick up batteries at the start of their shift or return them at the end of their shift. Management notes that it is stated in the Specific Post Orders for Compound Officer (and has been since the beginning of the recovery period) that it is one of their duties to deliver freshly charged batteries to other officers (AgBr, 15, citing JtEx "6", vol. 5, p.1). The testimony of numerous management

witnesses is cited including that of Captain Taggart who testified that based on his experience, the average battery life was 10 hours (AgBr, 18). The testimony of Lt. Chmely was also quoted as evidence that even if some staff picked up batteries, there was no regularity to who picked up and who returned (AgBr, 19). It is pointed out that “the contention that all officers picked up a battery before their shift and returned the used one at the end of the shift was not demonstrated by the evidence, especially with respect to certain posts such as Camp and Outside Patrol.”(AgRepBr, 15, 47). Management contends that posts that are manned 24 hours, such as Compound and the Housing Units, are not even required to stop at Control (AgRepBr, 47).

Management states that correctional officers have never been required to check in with lieutenants, in person, prior to the start of their shift. Management contends that the evidence, sharply conflicting, demonstrates that people more often checked in from the post via telephone or radio and were not required to check in personally (AgBr, 20). It is noted that at a point during the life of the grievance, the language in the post orders changed to specifically reflect that officers could check in by telephone or radio (AgBr, 22).

It is also contended by management that “the evidence did not show that officers were required to check their mailboxes before the start of their shift.” (emphasis in original)(AgBr, 22) Former Captain Matevousian is quoted as describing how he put a computer in one side of each housing unit beginning in 2002 and continuing into 2003, so that it would cut down on the officers’ need to check mailboxes (AgBr, 23).

Management states that Security Inspection forms, which were required to be signed by correctional officers, were signed by some staff before they performed the actual work, which was the inspection itself. Management contends that signing the sheet is not compensable work, but rather an act done for the staff member’s convenience so that he or she does not have to remember

to sign the form later (AgBr, 24). Management claims that detail pouches (also referred to as crew kits) were delivered to staff by the Compound Officer, who also picked them up. The testimony of former Warden Nash is quoted in support (AgBr, 25-26).

Management contends that the correctional officers who testified readily admitted that they were familiar with the institution's overtime procedures, and says "it is axiomatic that they now claim overtime but failed to do so at the time . . ." (AgBr, 86) Article 6, section q of the Master Agreement is cited for the proposition that both management and the employee are required to review pay documents to detect over and underpayments (AgBr, 86) Counsel quotes the testimony of the union's witnesses and concludes it is nonsensical to think that staff who are fully aware of how to request payment and who are routinely granted it when necessary would allegedly work without compensation." (AgBr, 86-90) Management concludes that the officers either did not ask for overtime compensation or were paid (AgRepBr, 38-41).

Management states that correctional officers are solicited for changes and suggestions for the post orders on a quarterly basis, and argues that "It strains the bounds of reason that if officers were being made to work beyond their shift that no one would comment on it using this mechanism or suggest a change to alleviate it." (AgBr, 90) Management says it made it clear that officers were not to work in excess of their 8 hours without compensation (AgRepBr, 44-45). Agency Exhibit 30, a January 16, 2004 memo from former Warden John Nash to all department heads and supervisors, is said to have reminded them that staff are to be given a reasonable time to report to their post, if drawing equipment, and a reasonable amount of time to return it at the end of the day. The memorandum is quoted as stating: "Reporting to work early, staying late or working on a day off, without being compensated, is not to occur. Compensatory time and overtime cannot occur unless previously approved by your Associate Warden." (AgBr, 93)

Counsel also quotes Warden Thomas Sniezak as having testified that staff should arrive at work on time, put in their hours, then leave on time; and, that Warden Sniezak could not think of a staff member who worked more than a *de minimis* amount past his or her shift who had not been compensated (AgBr, 94).

Management contends that correctional officers have worked out their own way of performing their duties since some arrived early and left early. Counsel points out that this also shows the administrative difficulty of tracking the officers' comings and goings (AgBr, 96-99). Management states that one of the more unbelievable claims by the union is that management should know whether a staff member is working in excess of 8 hours by simply observing staff coming and going (AgRepBr, 43). With respect to the lieutenants' logs showing body alarm testing, management cites the testimony of former Captain Bebow and Lieutenant Chmely to the effect that (1) the testing can include both custody and non-custody staff, (2) sometimes the Control Center Officer will go ahead and test body alarms "even if the day watch staff were still on post to save the evening watch some time when they came in, testing them", and (3) they did not know where the officer testing body alarms was getting his times. (AgBr, 100) Management further contends that there are several different clocks in Control all with different times (AgRepBr, 43).

Management denies being familiar with the scheduled hours of individual correction officers. Testimony by Officer Seresky that management knew he was working over 8 hours because he often would walk in with the lieutenant when he worked morning watch Control, is contradicted on the basis that he conceded the lieutenant would not know what time he left (AgBr, 103). Officer Jacobs' testimony about having discussed the portal to portal problem with former Captain Bebow (Tr, 800-01) is dismissed as having been categorically denied by Captain Bebow

(AgRepBr, 37, citing Tr, 2842). Management argues that it did not instruct officers to arrive prior to their shift start time and asks, "If the employees truly were told to arrive early, why do they all not arrive consistently at the same time?" (AgRepBr, 38)

Management cites testimony by its witnesses that staff talk about personal things on occasion during a relief (AgBr, 101). Counsel states that management tried to take a pro-active approach to portal issues and address them before they happened. For example, former Captain Matevousian is quoted as having moved equipment into the Housing Units so officers did not have to stop at Control, and installing computers on one side of the Housing Units to create less of a need to check mailboxes. Former Captain Bebow is quoted as providing a 15 minute leeway to the OP Officer to account for equipment (but not out of a portal concern - rather, in order to keep both trucks from relieving at the same time); and, he had crew kits distributed to day watch officers by the Compound Officers (AgBr, 109-12).

Management states that officers have been compensated in a variety of ways for times they have worked beyond their shift hours, including lowering people on the mandate list (AgBr, 113). Management also contends that most of the union's witnesses were led through their answers and prompted when they forgot something. Officer Jacobs is accused of misleading testimony in connection with the admission of Union Exhibit "PP" into evidence. That exhibit consists of walking times from various locations in the institution to other such locations. Counsel for the union did the actual timing but on direct examination it appeared that Officer Jacobs did so. Management requests a finding that all of Mr. Jacobs' testimony at any point in the hearings be found to be not credible. Likewise, because of its allegation of leading questions, it asks that any credibility determinations be resolved in favor of the Agency (AgBr, 118-23).

With regard to the video footage, management quotes former Captain Bebow's testimony

that the dates were chosen at random (AgRepBr, 48 citing Tr, 2902). Management quotes SIS Tech James Tomlinson's testimony that it took him 8 hours a day to review each chosen day's footage. The video, which encompassed five days during the period from April 10, 2007 through June 5, 2007, is described as a helpful tool in evaluating some of the claims made by the union (AgBr, 116-17).

Management argues that any work that may be done outside of employees' shifts is *de minimis*. Management points to the administrative difficulty in recording the additional time and notes that if video footage were utilized, multiple cameras would be necessary and review would take more than the 8 hours per day the instant review took. Carlsen v. United States, 521 F.3d 1371, is cited in support of the concept that a similar shift exchange between lieutenants was deemed difficult to track. Management further states that the aggregate amount could vary widely based on the fact officers do not work over 8 hours on a daily basis; and, therefore this factor cannot be measured. Also, management alleges that any work in excess of 8 hours is not done on a regular basis (AgRepBr, 50-51).

In its Reply Brief, management makes a number of additional points. It notes that the Union Brief does not mention the testimony of Agency witnesses and therefore asserts that their testimony be deemed undisputed (AgRepBr, 11). Management claims that the methodology employed in the Union Brief of averaging pre and post-shift times between two or more officers is improper, and that no authority is cited in support of the method (AgRepBr, 12).

With respect to the Compound Officer it asks why Officer Jacobs comes to work 15 minutes early, while Officer Seresky arrives a half hour early. It concludes that the habits of individual officers vary (AgRepBr, 17).

Regarding SHU #1, it alleges the union did not take into account Officer Gottshall's

testimony that he saved 5 minutes when the Post Orders were changed to have him check in with the lieutenant by phone. Management also notes that the video on Agency Exhibit "32B" shows Officer Gottshall working less than 8 hours (AgRepBr, 19-20).

Management notes that none of the video footage shows a Camp officer coming into the main institution (AgRepBr, 21).

With regard to Control Center #1, management quotes Officer Seresky as filling out the 6 page inventory of equipment during the night (i.e. during his shift)(AgRepBr, 21-22).

Management states that the video showed OP officers entering the institution on only one day; and, that the Post Orders do not require the officers to enter the institution any further than the front lobby (AgRepBr, 22-23).

Management argues that the union calculation of 22.5 minutes for Housing Unit Officers from the beginning of the grievance period until the first quarter of 2005 is based on the averaging of two individuals who testified about different shifts. It questions Officer Chiglinsky's testimony that picking up a battery, signing a security inspection form and turning the accountability chit takes 10 minutes. It points to the video footage for A-side day watch officers, notes that the times worked vary from less than 8 hours to 8 hours, 9 minutes, and argues that these times are nothing near the 32.5 minutes claimed by the union for the period, third quarter 2006 to the present. It also points to the videos of Officer McIlwain while working Housing Unit 2B which show him working less than 8 hours twice, and 8 hours, 7 minutes on a third date, and claims his conduct should preclude any recovery for the B-side during the period, third quarter 2006 to the present (AgRepBr, 23-27).

With regard to SHU #2, #3, and #4 management states the videos show these officers reporting early and leaving early, often before 8 hours is up (AgRepBr, 27-28).

The testimony of Officer Margetanski that a briefing between Camp #2 officers would take 10-15 minutes, is deemed to strain belief (AgRepBr, 28).

The video for Control #2 is said to vary from 8 hours 2 minutes to 8 hours 9 minutes for day watch, and from 8 hours 5 minutes to 8 hours 14 minutes for evening watch. Management concludes that this evidence merely shows that people arrive based on their personal habits (AgRepBr, 29).

Management acknowledges that the video footage indicates officers report early for the Rear Gate post, but claims they leave prior to the end of their scheduled shift time. It states the videos show a range of times worked from 8 hours 2 minutes to 8 hours 19 minutes. Management concludes that there is nothing about this post which requires an officer to work in excess of 8 hours (AgRepBr, 30).

The video is cited as showing a broad range of times for Count Officer with one individual working 11 minutes short of 8 hours and another 19 minutes over. Management concludes that the post need not work more than 8 hours, and if it does, the officer "should have contacted a lieutenant." (AgRepBr, 30-31)

Based on the video footage, management notes that 3:46 seems to be a popular departure time for Visiting Room officers; and, it notes they often work less than 8 hours (AgRepBr, 31).

With regard to the Reception Officer, it is noted that Officer Munson testified he went from Control to the Front Lobby, and that he did not mention checking his mailbox. Management concludes that post does not work more than 8 hours (AgRepBr, 32).

The videos are cited as showing that the Front Lobby Officer only worked more than 8 hours on one occasion (AgRepBr, 33).

The time claimed for Visiting Escort is questioned because Officer Munson testified he



never left early but was captured on video doing so (AgRepBr, 33).

Management states that it defies belief that the claim for Camp Visiting would exceed that for the Visiting Room at the main institution since the search procedures are more stringent at the latter location. In addition, Lt. Chmely is quoted as having seen Camp Visiting officers sitting in the lieutenant's office at the end of the day (AgRepBr, 33-34).

Management argues that most of the union witnesses acknowledged they had reviewed the PPF during their shift at least on occasion (AgRepBr, 37).

Finally, management contends that the Union's assertion that correctional officers respond to emergencies before and after their shift without compensation is vague at best (AgRepBr, 35).

## DECISION

### THE LAW

The law regarding FLSA claims is fairly well settled. The statute states that no covered employer, including the Federal government, "shall employ any of his employees . . . for a workweek longer than forty hours unless such employee receives compensation for his employment in excess of [40 hours] at a rate not less than one and one-half times the regular rate at which he is employed." (29 U.S.C. § 207 (a)(1)) Neither "work" nor "workweek" is defined in the statute (IBP, Inc v. Alvarez, supra). In Alvarez the Supreme Court noted that its early cases under the FLSA defined those terms broadly. It stated that, for example, in Anderson v. Mt. Clemens Pottery Co.(supra), it defined the statutory workweek to "include all time during which an employee is necessarily required to be on the employer's premises, on duty or at a prescribed workplace." In the context of the Anderson case this meant that the time necessarily spent by employees walking from time clocks near the factory entrance gate to their workstations must be treated as part of the workweek.

The Court in Alvarez continued its review of the judicial history of the FLSA by noting that the year after its decision in Anderson, Congress passed the Portal to Portal Act which, inter alia, narrowed the coverage of the FLSA by excepting two activities that had been treated as compensable under the Supreme Court's cases, viz - walking on the employer's premises to and from the actual place of performance of the principal activity of the employee, and activities that are "preliminary" or "postliminary" to that principal activity. These exceptions were contained in Section 4(a) of the Portal to Portal Act. The Court in Alvarez then stated that a regulation promulgated by the Secretary of Labor shortly after the enactment of the Portal to Portal Act concluded that the Act had no effect on the computation of hours worked "within" the workday. It noted that the Department of Labor had adopted "the continuous workday" rule "which means that the 'workday is generally defined as 'the period between the commencement and completion on the same workday of an employee's principal activity or activities.'" Stating that these regulations have remained in effect since 1947, the Court quoted the "continuous workday" regulation in full. In relevant part, the regulation (29 CFR § 790.6(a)) reads: ". . .to the extent that 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 the performance of the last principal activity on a particular workday, the provisions of [section 4(a) of the Portal to Portal Act] have no application." (emphasis supplied)

In Alvarez, one of the precise issues was whether employees at a poultry processing plant were covered by the FLSA for time spent donning and doffing protective gear, and walking to and from the plant's production line. The "principal question", stated the Court, was "whether postdonning and predoffing walking time is specifically excluded [from the ambit of the FLSA] by § 4(a)(1)." The Court concluded it was not, and held that activities such as the donning and

doffing of specialized protective gear that are performed either before or after the regular work shift are compensable under the portal-to-portal provisions of the Fair Labor Standards Act because those activities are “an integral and indispensable part of the principal activities for which the covered workmen are employed. . .”

Alvarez makes it clear that under the FLSA, activities that are integral and indispensable to an employee’s principal activities begin and end the continuous workday, and an employer must compensate its employees for all time during the continuous workday.

In the case of a Federal agency, such as the Bureau of Prisons, regulations of the Office of Personnel Management shed additional light on what constitutes “hours of work.” Basic principles are set forth in 5 CFR 551.401 which states:

“(a) All time spent by an employee performing an activity for the benefit of an agency and under the control or direction of the agency is ‘hours of work.’ Such time includes:

- (1) Time during which an employee is required to be on duty.
- (2) Time during which an employee is suffered or permitted to work; and
- (3) Waiting time or idle time which is under the control of an agency and which is for the benefit of an agency.”

Another regulation of the Office of Personnel Management, 5 CFR 551.104 defines “suffered or permitted [to] work” as “any work performed by an employee for the benefit of an agency, whether requested or not, provided the employee’s supervisor knows or has reason to believe that the work is being performed and has an opportunity to prevent the work being performed.” Application of this rule would require proof that the agency had actual or constructive knowledge that work was being performed. By its explicit terms, it would apply even if the work was not “requested” by the agency.

The law with regard to the FLSA further provides that management has a duty to control

employees' work hours. The duty is found in yet another Federal regulation, 29 CFR § 785.13, which states:

“...it is the duty of the management to exercise its control and see that the work is not performed if it does not want it to be performed. It cannot sit back and accept the benefits without compensating for them. The mere promulgation of a rule against such work is not enough. Management has the power to enforce the rule and must make every effort to do so.”

The case law is replete with instances where management repeatedly directed employees that they were not to work in excess of 40 hours per week, and yet damages were awarded under the FLSA because the employer did not enforce its stated prohibition (Kappler v. Republic Pictures Corp., supra, (memo to all employees from supervisor); Brennan v. G.M.A.C., supra (immediate supervisors “persistently reminded” the employees that their jobs were to be performed in 40 to 42 hours); Reich v. Dep’t of Conservation and Natural Resources, supra (Department used weekly report form which advised that officers were not allowed to work more than forty hours per week unless directed otherwise by the Commissioner). In upholding a finding of a violation of the FLSA, the court in Reich v. Dep’t of Conservation and Natural Resources, supra, noted that “There is no indication in the record that the Department did anything at any time relevant to this litigation to discourage the overtime required by the vast majority of its officers to properly perform their duties other than to promulgate its policy against such work and to urge the officers to ‘work their best 40.’” It remarked that “no officer was ever disciplined for violating the forty-hour rule.” Another aspect of management’s duty is that it can be held liable under the FLSA even if an employee fails to claim overtime compensation. (Newton v. City of Henderson, supra (“An employer who is armed with [knowledge that an employee is working overtime] cannot stand idly by and allow an employee to perform overtime work without proper compensation, even if the employee does not make a claim for the overtime compensation.”))

In addition, employers have the duty under the FLSA of maintaining proper records of wages, hours and other conditions and practices of employment (United States Penitentiary, Marion, Illinois and AFGE Local 2343, 61 FLRA No. 154 (2006) (citing Anderson v. Mt. Clemens Pottery Co., *supra*). The rules in this aspect of FLSA practice are set forth in Anderson, *supra*, which, after stating that the employee bears the burden of proof, held as follows:

“When the employer has kept proper and accurate records, the employee may easily discharge his burden by securing the production of those records. But where the employer’s records are inaccurate or inadequate and the employee cannot offer convincing substitutes, a more difficult problem arises. The solution, however, is not to penalize the employee by denying him any recovery on the ground that he is unable to prove the precise extent of uncompensated work. Such a result would place a premium on an employer’s failure to keep proper records . . . In such a situation we hold that an employee has carried out his burden if he proves that he has in fact performed work for which he was improperly compensated and if he produces sufficient evidence to show the amount and extent of that work as a matter of just and reasonable inference. The burden then shifts to the employer to come forward with evidence of the precise amount of work performed or with evidence to negative the reasonableness of the inference to be drawn from the employee’s evidence. If the employer fails to produce such evidence, the court may then award damages to the employee, even though the result be only approximate.”

In the event the employee may exercise his or her right to estimate the hours worked by a just and reasonable inference (as provided in Anderson), the employee must show by a preponderance of the evidence that compensable work was performed without proper compensation (DeLeon v. Trevino, *supra*).

Notwithstanding the existence of an otherwise valid FLSA claim, the law provides that if the overtime work performed is *de minimis*, no recovery will be granted. In its rules, the Federal Office of Personnel Management provides as follows in 5 CFR § 551.412:

“If an agency reasonably determines that a preparatory or concluding activity is closely related to an employee’s principal activities, and is indispensable to the performance of the principal activities, and that the total time spent in that activity is more than 10 minutes per workday, the agency shall credit all of the time spent in that activity, including the 10 minutes, as hours of work.” (emphasis supplied)

The regulation was upheld by the Federal Labor Relations Authority in United States Penitentiary,

Leavenworth, Kansas and AFGE Local 919, 59 FLRA No. 106 (2004), which noted that court decisions, including Lindow v. United States, *supra*, did not involve this regulation and are “not controlling.”

Lindow appears to be the leading case on the question of what constitutes *de minimis* work. The court acknowledged that most courts have found daily periods of approximately 10 minutes *de minimis* even though otherwise compensable, but stated that “There is no precise amount of time that may be denied compensation as *de minimis*.” It set out a three pronged test for determining whether a claim is *de minimis*: (1) whether the daily time is so minuscule that it cannot, as a practical administrative matter, be recorded for payroll purposes; (2) the size of the aggregate claim (stating relief may be granted for claims that might have been minimal on a daily basis but, when aggregated, amount to a substantial claim); and, (3) whether the employees performed the work on a regular basis. The Lindow court denied relief finding that the defendant Army Corps of Engineers would have had difficulty recording the overtime as an administrative matter; seven to eight minutes a day were spent by the employees reading the log book and exchanging information, but the work was not always performed before their shifts; and, the two afore-mentioned factors took precedence despite the fact the aggregate claim may be substantial. Office of Personnel Management regulation 5 CFR § 551.412 was not mentioned in the decision.

Recently, the 10 minute rule was questioned in Spoerle v. Kraft Foods Global, Inc., 527 F. Supp. 2d 860 (W.D. Wis., 2007) which stated “no court has explained why 10 minutes of work is worthy of compensation but 9 minutes and 59 seconds is not.” The court went on to say that “Taken to its logical conclusion, a ‘*de minimis*’ rule that focuses only on time could swallow up an entire shift.” The court further quoted from a Third Circuit case, DeAsencio v. Tyson Foods, Inc., 500 F. 3d 361 (2007), which quoted the following from 29 CFR § 785.47:

“...An employer may not arbitrarily fail to count as hours worked any part, however small, of the employee’s fixed or regular working time or practically ascertainable period of time he is regularly required to spend on duties assigned to him.”

5 CFR § 551.412 was not mentioned, nor was it at issue in either Spoerle or DeAsencio. It was held to be preempted by the FLSA in an arbitration decision, FCI Beaumont, Texas and AFGE, Council of Prison Locals, supra (Arbitrator Bernard Marcus). In an excellent analysis, Arbitrator Marcus noted that strict application of the 10 minute rule could result in the Agency extracting from its employees 45 minutes per week of work (assuming they worked 9 minutes over their scheduled time five days a week) for which it does not have to pay. He concluded that “This practice not only does not comply with the Fair Labor Standards Act but is precisely what Congress intended to outlaw.” I am in agreement with Arbitrator Marcus’ analysis but can find no authority in the courts which holds 5 CFR § 551.412 to be preempted or otherwise unlawful. Therefore, I am constrained to apply that regulation in my analysis.

### GENERAL ISSUES

My findings of fact commence with the humble battery. The evidence established that with the exception of certain posts (during certain periods) each correctional officer must pick up a freshly charged battery from the Control Center before beginning his or her shift. The General Post Orders (JtEx “6”) state, in the section on radio transmissions:

“A. Each employee who is assigned a radio should insure a freshly charged battery is installed in the radio when beginning the tour of duty. Oncoming Officers will pick up a new battery and ensure the departing staff member returns the discharged battery to Control.” (emphasis supplied)

In addition, the General Post Order with respect to body alarms states:

“Body alarms are issued to assigned staff . . .to expedite assistance in case of an emergency where the staff member cannot easily access a telephone. Body alarms are to be on the belt at all times and never laid down or left unattended. . . The Control Center will be notified by telephone whenever a Body Alarm is moved outside its respective area. Personnel assigned to posts requiring a body alarm will draw a fresh battery at the

beginning of the shift. Relieved staff will turn in the used battery.” (emphasis supplied)

The testimony of the correctional officers established that freshly charged batteries were routinely picked up at the Control Center at the start of a shift. Officer Gottshall’s testimony was the most dramatic as to the importance of this task when he stated that he picks up a fresh battery: “Because my life may depend on that battery.” (Tr, 997-98) The practice was confirmed by Officer Seresky who testified that based upon his experience working in Control, every correctional officer picked up a battery there at the start of the shift, and every correctional officer dropped off a used battery there at the end of the shift (Tr, 2069-70). Associate Warden Patricia Rodman testified that correctional officers pick up and drop off batteries at the Control Center, and Captain Brent Taggart acknowledged the obvious when he said that it would be a benefit to the Agency that the correctional officers have working batteries because it would not do one any good to have a radio without a battery that works (Tr, 2588-89, 2630).

I cannot agree with the Agency’s assertion that correctional officers need only contact the Compound Officer to have a fresh battery delivered to their post. Officer Jacobs testified that when a Compound Officer receives a request for a fresh battery in mid-shift, it could take 15 minutes for the battery to be delivered. (Tr, 804-05) Officer Gottshall testified that when a fresh battery is requested from the Compound Officer: “you don’t know when you’re going to get that battery. It could be awhile. Compound may be backed up in trash, or they might have something they’re doing down in the unit or back in food service. There’s a lot of responsibility that they have too.” (Tr, 1077-78) Captain Taggart testified that the average battery life was 10 hours (Tr, 2629). That fact underscores the need to pick up fresh batteries at the start of a shift and to drop off used batteries for recharging at the close of a shift. Any other approach would be imprudent, and might well endanger the lives of correctional officers. In AFGE Local 981 and FCI Jesup,



Georgia, supra, Arbitrator Jerome J. LaPenna noted that, as here, the Agency at no point required the pick-up of batteries at the Control Center to stop. He found that the pick-up of a freshly charged battery at the start of a shift is a pre shift activity that is indispensable to the performance of the principal work activity of an employee (see also Federal Bureau of Prisons, Beaumont, Texas and AFGE, Council of Prison Locals, supra). I am in accord that the picking up of a battery at the Control Center is an activity that is integral and indispensable to most of the employees' principal activities (with exceptions to be discussed, infra), begins the continuous workday, and ends it when the used battery is returned to the Control Center.

The evidence also established that a number of correctional officers checked their mailboxes in the administration building before beginning their shifts. For example, Officer Jacobs testified that he checked his mailbox to make sure there were no shift changes (Tr, 662), and Officer Seresky testified that he checked it for the same reason, explaining that "they wouldn't e-mail it to you, but print out a hard copy and put it in your mailbox." (Tr, 2029-30) Union Exhibit "Q" is a memo dated September 16, 2005 sent from Lt. Judy Poling to what appears to be all correctional institution personnel. It reads as follows:

"I am sure most of you have seen the new box on the wall in the Administration Building between the Visiting Room and Control. This box has now been labeled with all the Housing Units and Compound. Please place all wake ups, call outs, etc ... in this box for the Unit Officers. This mailbox is not for mail for individual Officers but for the operation of the units.

Please refrain from placing any further paperwork in the windows of the Control Center and use the new boxes for any information you wish to have passed on to the housing units.

To Officers working in housing units, please ensure you check this box daily on each shift for any information such as your wake ups, call outs, etc.

Thank you."

Although the Agency has argued that officers were not required to check their mailboxes

before the start of their shift, it would appear prudent to do so for those posts which would be affected by assignment changes. The September 16, 2005 memo virtually mandates that the mailbox be checked by Housing Unit officers; and, although the memo does not specifically say that the mailbox must be checked before a shift, (1) that would be the rational time to check for "wake ups, call outs, etc...", and (2) given the distance from the Housing Units to the Administration Building and the evidence that Housing Unit officers could not easily be relieved, it would make no sense for a Housing Unit Officer to try to peruse his or her mailbox during a shift ( AgEx "33" showed a walking time from Control to Unit 3A of 3 minutes 50 seconds - UnEx "PP" showed a walking time from the first door of the Control sally port (Administrative Building) to the second door of the Control sally port (Compound) of 1 minute 20 seconds - in total it would be about a 5 minute walk from the Housing Unit to the Administrative Building, plus time spent looking at the contents of the mailbox, plus a 5 minute walk back to the Housing Unit). Accordingly, with regard to those posts where there was evidence that the correctional officer checked his or her mailbox, that action should be considered compensable time.

Likewise, there was testimony by some correctional officers that detail pouches were picked up on the way to their post. Former Captain Matevousian testified that management had the detail pouches distributed to the Housing Units before the day watch officer arrived on post (Tr, 2995). Ms. Manbeck confirmed that at some point correctional officers no longer had to pick up crew kits (detail pouches). Apparently the change had occurred by March, 2005 (Tr, 2327-28). I am unable to ascertain from the evidence exactly when the change took place. Time spent picking up detail pouches should be considered compensable time until the change in practice took place. This will affect only those posts where there is evidence that detail pouches had to be obtained.

Checking in with a lieutenant in the latter's office varied post by post. At some point officers were advised to check in with the lieutenant via telephone. ( compare Specific Post Orders dated March 30, 2003 for SHU #1 which state "Check in with the Lieutenant . . ." and Specific Post Orders dated March 8, 2006 for SHU #1 which state "Check with the Lieutenant via telephone from your post . . ."). As in the case of detail pouches, time spent checking into the Lieutenant's Office should be considered compensable time until the change in post orders took place. Again, this will only affect those posts where there is evidence that correctional officers physically checked into the Lieutenant's Office.

The evidence showed that a number of officers signed the Security Inspection forms on the way to their posts. Former Captain Matevousian was quite right when he testified that the officers should not have been signing the forms before their shift because the forms were intended to report what occurred during their shift. He characterized the practice as "a bad habit [which] should have been corrected." (Tr, 2995) He said it took "maybe two seconds to sign." (Tr, 2995) I agree with the Agency's contention that signing the sheet was simply an act done for the staff member's convenience so that he or she did not have to remember to sign the form later; and, therefore, is not compensable.

The Agency's defense that correctional officers should not recover because they failed to previously ask for pre and post-shift overtime is contrary to law and fact. As cited earlier, an employer who knows that an employee is working overtime cannot allow the employee to perform overtime work without proper compensation "even if the employee does not make a claim for the overtime compensation." (Newton v. City of Henderson, supra) (With respect to this employer's knowledge, see infra.) Article 6, section q of the Master Agreement deals essentially with mathematical errors and is not applicable to a general overtime dispute. The section deals

overwhelmingly with overpayments to employees and the procedures to be followed in that event.

There was substantial testimony by correctional officers that they had, in fact, requested overtime but had run into a general attitude that they should "suck it up." Officer Jacobs testified:

"... if we would ask, they would tell you it was part of the job more or less. That was in the beginning. As we went through the years, you just didn't even think about it. You just did it. I mean - like I said, I can go back to years ago when they said you got to come in - you got to come in early to do your job. But now, you really don't even think about it. You just do it." (Tr, 808)

Officer Quirk testified that he had complained about being relieved late, and had been told by the lieutenants, "Well, just suck it up" or "just deal with it." (Tr, 1155) Officer Margetanski testified that he asked the Operations Lieutenant to be paid for a late relief, and was told, "Suck it up." (Tr, 1958) Officer Seresky testified that he called the Lieutenant one day to tell him he was getting out late. He testified the Lieutenant's response was that if he gave Seresky overtime he would have to deduct time off Seresky's relief. Seresky continued with his testimony as follows:

"I said, 'Why would you have to do that?'

Because I have to account for overtime. The only way I can account for overtime is if he was late.

I'm like, 'Well, he's not late. Things are running a little bit late today. We have extra information and stuff like that.'

'Come on now. You can suck it up. It's only a little bit of time.'" (Tr, 2065-66)

Officer Archer testified that while working a Housing Unit, he was leaving the institution at 8:10 or 8:15 am and was walking towards the Control Center. He testified that he passed Lt. Poling who was walking towards the Lieutenant's Office. He continued:

"And I asked her, 'Do you see what time it is?' And, of course, Lieutenant Poling, she said, 'It's eight o'clock.'

And I looked at my watch, and I noticed it says 8:15. I went to the Control Center, and the Control Center clock said exactly the same time as my watch - well, maybe not exactly, but within a minute or two either way." (Tr, 1713)

The evidence established that correctional officers did ask for overtime pay but found themselves in a culture where management strongly disapproved of overtime.

Management's defense that it made it clear that officers were not to work in excess of eight hours without compensation, is misplaced. As noted above, cases under the FLSA have frequently awarded damages despite repeated management directives that employees were not to work more than 40 hours per week (Kappler v. Republic Pictures Corp., supra; Brennan v. G.M.A.C., supra; Reich v. Dep't of Conservation and Natural Resources, supra). In addition, the January 16, 2004 memo from Former Warden John Nash to all Department Heads and Supervisors, is internally contradictory and would necessarily require the overlap of shifts. The memo reads, in relevant part:

" This is a reminder to all department heads and supervisors of your responsibility to ensure your staff are leaving their work site prior to the end of their shift, allowing for a reasonable amount of time to return their keys and equipment to Control Center. They should be exiting the institution at the time designated as the end of their shift. Also, at the beginning of their shift, your staff should not be receiving their keys and equipment from Control Center prior to the time designated as the beginning of their shift and they should be given a reasonable amount of time to report to their work site. . . a reasonable amount of time is defined as ten (10) minutes. In other words, you should not be requiring your staff to be at their work site at the time designated as the beginning of their shift, nor should you be allowing your staff to leave their work site at the time designated as the end of their shift. Obtaining keys and equipment from Control Center and returning them at the end of the day are activities that are to be performed during their duty hours. If your staff are not currently following this policy, either by their own choice or your request, and not being properly compensated, it must cease and desist immediately.

. . . Reporting to work early, staying late or working a day off, without being compensated, is not to occur. . . overtime cannot occur unless previously approved by your Associate Warden. . ." (AgEx "30)

Warden Nash's memo states the requirements of the FLSA perfectly. It recognizes that employees must be compensated from the time they pick up equipment at the Control Center until they drop off equipment at the Control Center. The problem is that it mandates an impossible task where, as here, many posts require continuous coverage. If a correctional officer were to arrive at

the Control Center at the time designated as the beginning of his or her shift, let's say 6 am, and was then given 10 minutes to report to the post, the officer being relieved would necessarily be leaving the post no earlier than 6:10 am and would be leaving the institution more than 10 minutes after the end of his or her shift. Literal compliance with the first paragraph of the memo would mean that overtime would be earned in all cases; and yet, the second paragraph bars overtime unless previously approved by an Associate Warden. The memo underscores the point that if continuous coverage of a post is required, the only way there can be compliance with the FLSA is to have overlapping shifts. (Theoretically, if all relieving officers arrived exactly five minutes before their shifts and all departing officers left exactly five minutes after their shifts, the *de minimis* exception to the FLSA could be satisfied - but that was not what Warden Nash proposed in the memo).

As stated above, one of the prerequisites of an award of damages under the FLSA is that management had actual or constructive knowledge that employees were performing pre and/or post-shift work. The evidence established that management had such knowledge, both actual and constructive. Lieutenants routinely insisted that correctional officers arrive at the institution before their shifts began. For example, Officer Margetanski testified that he and another officer arrived at the institution later than usual because of a traffic accident. He testified that he was at Control drawing his battery at 3:55 pm (for a 4 pm shift) and the evening watch lieutenant was in Control taking count; and, she instructed him that he was late at 3:55. Officer Margetanski said he replied "I'm not late - I still have five minutes to get down to the housing unit." He testified that the lieutenant replied, "You're never going to make it on time to start count. So you're late." Officer Margetanski said the lieutenant told the other officer he was late as well (Tr, 1958-59).

Officer Shaup testified that he would be pressured by lieutenants to have the recreation

area open by 6 am even though his shift did not begin until that time. He testified that he would be told by lieutenants, "Get it done. Get whatever you have to do to get that open when they call mainline [breakfast]." (Tr, 2229)

Officer Seresky testified that one night, he was running late, and Lt. Poling called his house at a quarter to midnight and asked his wife why he wasn't at work. He testified that his shift started at midnight (Tr, 2047).

In addition, there was testimony from Officer Seresky that he had called the lieutenant at 6 am to ask if he had a relief for a Housing Unit post that morning. He testified he was yelled at and asked why he didn't call ten minutes earlier (Tr, 2048).

The prevailing attitude among supervisors at the institution may be summed up by the testimony of Officer Chiglinsky who recalled that when he began his employment at FCI Schuylkill, the lieutenant who taught his Institution Familiarization class "stressed the importance of being a good relief" - "So it was vital that you were there beforehand." (Tr, 1388)

The foregoing testimony, which is representative and not all-inclusive, was corroborated by Lieutenants' Logs showing the times of body alarm testing. Officer Seresky testified that when working the Control Center on a morning watch shift, the lieutenant will usually be calling him up by 6:00 or 6:30 requesting the log. He said the lieutenant will review the log Control had prepared, add anything he wishes to add, print it out and place it in his binder (Tr, 2203). Officer Seresky testified that the logs kept by Control, which were then included in the Lieutenant's logs, were consistent with the times Control performed body alarm testing (Tr, 2125-27). Officer Seresky further testified that he attempts to get the body alarm tests started as soon as possible because he knows "how important the radios are." (Tr, 2124) He said he didn't want a correctional officer on post with a radio that didn't work.

The Lieutenant's Daily Logs in evidence confirm that correctional officers are on post prior to their shift time. Union Exhibit "HH" shows that for January 13, 2008 and January 17, 2008, body alarm tests for day watch Unit Officers commenced at 5:50 am; on February 10, 2008, body alarm tests for day watch Unit Officers commenced at 5:51 am; and, on March 26, 2005, body alarm testing for the evening watch shift commenced at 1:55 pm. Union Exhibit "GG" shows body alarm testing commencing generally about 10 minutes before the scheduled start of a shift on 25 dates during 2004.

With respect to management's defense, it is a stretch to say that the testing can include both custody and non-custody staff. The evidence indicated that most non-custody staff worked a day watch. The exhibits cited above covered day watch, evening watch and morning watch. In addition, most of Union Exhibit "HH" specifically referred to Housing Unit Officers. Secondly, if in fact the Control Center Officer were testing body alarms on day watch staff and reporting the tests as having been performed on evening watch personnel in order to save time, such action would be grossly negligent and improper because it could endanger the lives of the evening watch staff. This theory is, I believe, nullified by Officer Seresky's testimony which showed a genuine concern for the safety of the officers. Finally, I reject the notion that the clocks in the Control Center vary enough to make the entered times unreliable, nor was any logical explanation given by management witnesses as to why there should be a great variance between the clocks in the Control Center.

Management raises an excellent question when it asks, "If the employees truly were told to arrive early, why do they all not arrive consistently at the same time?" This lends credence to management's argument that a lot depends on the individual employee and his or her habits. I agree that this is true to some extent. For example, Officers Chiglinsky and Margetanski both



testified about working the morning watch Camp #2 post. Officer Chiglinsky testified that he arrived at the Control Center at approximately 11:50 pm (Tr, 1302-03). Officer Margetanski testified that he arrived at the Camp at 11:40 pm to see if there was a Camp #2 evening watch since that post was very often transferred elsewhere. The difference in starting times at that post should not be attributed to management. However, it appears that many of the differences in starting times are attributable to institution actions which take place at different times during the day.

Officer Jacobs testified that as a Compound Officer, he arrived 15 minutes early for day watch. Officer Seresky testified that for evening watch he arrived 30 minutes prior to the start of his shift. But, when day watch ends at 2 pm, the Compound officers must be on the Compound monitoring the 2 pm inmate education move (Tr, 659, 687-88, 2029). The need to assume monitoring duties by a particular time could account for a particularly early start time. In fact, a perusal of the video monitor times for Compound Officer #2 (AgEx "32") indicates that most Compound #2 officers arrived before or shortly after 1:30 pm for their 2 pm shift, whereas Compound #2 officers on the other shifts did not arrive quite as early. Similarly, Officer Petch testified that he arrived for day watch in the Control Center at 7:40-45 am, while Officer Seresky testified that he arrived for a morning watch at 11:30 pm. The difference can be accounted for by the fact the morning watch officer needs to begin his or her midnight count at midnight whereas there is no count at 8 am. (Tr, 2041) In any event, variances in the pre and post-shift working times of some posts do appear to be attributable to personal habits and management should not be charged with the longer time period in those cases.

Management has argued that it took a pro-active approach to portal issues in order to address them before they became a problem. At some point in time, the post orders were changed

so that the SHU #1 Officer was no longer required to check in with the Lieutenant at the start of his shift (Tr, 1006). Officer Gottshall testified this made a five minute difference so he would arrive at the Control Center at 5:50 am rather than 5:45 (Tr, 1007). This was a good effort by management to save on labor costs and will be recognized, infra, in the post by post analysis. On July 26, 2007, management placed a battery charger at the Camp so that Camp officers (and possibly OP officers) no longer had to pick up fresh batteries at the Control Center. The union, in its brief, acknowledged a 7.5 minute difference, in its claim for the Camp #1 Officer. Again, management made a sound effort here to save on labor costs. A full analysis will be made, infra.

In other instances, the management moves to streamline the process, did not work as well. Captain Matevousian testified about moving "all the equipment from the Control Center" to the Housing Units in order to avoid having officers stop at the Control Center (Tr, 2939). However, officers still needed to pick up fresh batteries at the Control Center. Captain Matevousian also testified about installing computers on one side of the Housing Units - but acknowledged, "... a lot of the information that we disseminated to the staff was electronic, resulting in less need for them checking their mailboxes." (emphasis supplied) (Tr, 2939) Apparently, there still was a need for Housing Unit Officers to check their mailboxes. Likewise, OP trucks were staggered in the first quarter of 2007 by 15 minutes on their relief so that one truck could remain mobile while the other conducted a relief, most notably with the counting of ammunition. Lt. Chmely testified that Captain Bebow had determined, after consultation with somebody, that "the reasonable amount of time is normally perceived to be approximately 15 minutes in order to accomplish the accounting for all the ammunition." (Tr, 3232) The union concedes that the change made a 10 minute difference for the second officer to arrive to perform relief, and the change therefore made some difference in saving labor costs. I note, however, that the recognition by management that a

reasonable time for counting ammunition is 15 minutes, supports the OP officers' general claim for pre and post-shift work.

Management's argument that officers have been compensated in other ways (e.g. mandate list) for pre and post-shift work is misplaced. The FLSA requires "compensation . . . at a rate not less than one and one-half times the regular rate at which [the employee] is employed." (29 U.S.C. § 207 (a)(1)) "Regular rate" is defined as "remuneration." (29 U.S.C. § 207(e)). Any form of compensation other than monetary compensation is outside the statute.

I reject management's request that all of Officer Jacobs' testimony be rejected because of his testimony with regard to the times between locations at the prison clocked by Counsel for the union (UnEx "PP"). A fair assessment of Officer Jacobs' testimony is that he did not try to deceive - he was simply used to introduce evidence compiled by Union Counsel. In retrospect, it was not an artful way of introducing the evidence but it was not misleading. Union Counsel is an officer of the court and I credit her calculations. I further reject management's contention that because the Union Brief does not mention the testimony of Agency witnesses, such testimony should be deemed undisputed. There is no duty imposed upon either side to comment on the testimony of witnesses called by the opposing party, and no adverse inference should be drawn because of a failure to do so.

I also find that because pre and/or post shift work was not accounted for by the Agency's record keeping procedures, the union may, through testimonial evidence, show the amount and extent of that work by a preponderance of the credible evidence (Anderson v. Mt. Clemens Pottery Co., supra; DeLeon v. Trevino, supra). The burden shall then be on management to prove the precise amount of work performed or to negative the reasonableness of the inference to be drawn from the employee's evidence.

As for management's claim that the union's case was tainted by leading questions, I would point out that I did sustain a number of objections to questions which I determined to be leading particularly when I believed they were suggestive as well. I would remind management that legal rules restricting the admission of evidence are not strictly applicable in an arbitration hearing. As stated in Elkouri and Elkouri, How Arbitration Works, 6<sup>th</sup> Edition, at 345-46:

"The inapplicability of the legal rules restricting the admission of evidence results in the parties being given a free hand to present any type of evidence thought to strengthen and clarify their case. Indeed, it has been observed that 'the more serious danger is not that the arbitrator will hear too much irrelevancy, but rather that he will not hear enough of the relevant.

In fact, the liberal reception of evidence is not as extreme a departure from traditional judicial practice as many persons might believe. Judges who are trying cases without a jury typically receive evidence very freely, on the basis that they can determine its weight and relevancy after the entire case has been presented."

Finally, with regard to the video footage, I credit Captain Bebow's testimony that the five dates selected were chosen at random (Tr, 2901). While the tapes cover only five days over a period of five plus or six plus years, I believe they are, as Counsel for the Agency put it, a helpful tool in evaluating the claims made by the union.

## **SPECIFIC POSTS AND OTHER CLAIMS**

### **Activities Officer**

Curiously, the Agency argues that "any recovery must be limited to the PM shift only as there was no testimony regarding the AM shift." (AgBr, 28, n.3) In fact, the evidence established that this post had a day watch (6 am to 2 pm) and an evening watch (2 pm to 10 pm), but not a morning (AM) watch. Therefore, it must be assumed that management is referring to the evening watch which it calls "PM shift" and the day watch which it calls "AM shift."

Officer Quirk's testimony about arriving for the evening watch 10 to 15 minutes prior to his shift was undisputed. In fact, Lt. Chmely's testimony that he wrote the post orders to require

the day watch to go to the Control Center to meet their relief at 10 minutes to 2 pm serves to confirm Quirk's testimony about his arrival time. Officer Quirk's testimony about his departure time from the Control Center at 10 pm was undisputed. I therefore credit Officer Quirk's testimony that he performed pre-shift work of 10 to 15 minutes. The mean amount of pre-shift work spent was 12.5 minutes, and I find that the evening watch officer serving as Activities Officer should be granted compensation for that amount for each shift worked.

As for the day watch officer, the only testimony offered was that of Lt. Chmely who denied that any pre or post-shift work was performed. The union offered no testimony that the duties of the day watch officer took the same amount of time as that of the evening watch officer. Hence, there is no award of compensation for the day watch Activities Officer.

#### **Camp Officers**

Both Officer Chiglinski and Officer Margetanski testified that prior to the installation of a battery charger at the Camp on July 26, 2007, they would report to the Control Center before their shifts to draw fresh radio batteries when working Camp Officer #1 - Chiglinski arrived 10 minutes early at the Control Center and Margetanski arrived 20 minutes early. Chiglinski testified that the relief process then took another 10 to 15 minutes, while Margetanski's numbers came out to 15 to 20 minutes.

Their testimony with regard to pre and post-shift duty at the Camp is seriously undermined by the fact that on none of the video footage, comprising five days during the period April 10, 2007 through June 5, 2007 - a period before the battery charger was installed at the Camp - does any Camp Officer enter the institution. Given this evidence, I am obliged to credit the testimony of Lt. Chmely that the shift exchange at the Camp is "one of the easiest" which takes "about as long as it takes to take the radio out and hand it to the other person and give them the key." (Tr,

2774-75). This is a situation where, in the language of Anderson v. Mt. Clemens Pottery Co., supra, the employer has come forward with evidence to negative the reasonableness of the inference to be drawn from the employee's evidence. In view of the foregoing, there is no award of FLSA compensation for Camp officers.

### **Camp Visiting Room**

Officer Chiglinsky testified that when working this post, he would arrive at the Control Center at 7:45 am to draw all keys and equipment, then drive to the Camp, arriving there at 8 am. He then testified that he did various paperwork and searched the visiting areas. He said the search took 15 to 20 minutes. Officer Chiglinsky testified he would complete those activities by 8:20 to 8:25 and open for visitors at 8:30 am. On the other end, he testified that all visitors would have departed by 3:35 pm and he would search the inmates, which could take as long as 20-25 minutes. His testimony was that he departed the Control Center right before 4:10.

During the course of the hearings, I was given a tour of FCI Schuylkill by both parties. I find it hard to believe that it would take anybody 15 minutes to draw equipment at the Control Center and drive to the Camp. The drive itself would take no more than five minutes. Depending on how much time was spent in the Control Center, the pick-up of equipment at that location and the drive to the Camp should take no more than ten minutes. At the Camp, I noted that the visiting area was rather small, so the search time testified to by Officer Chiglinsky seems excessive. My observations indicate that the union has failed to establish a need for the Camp Visiting Officer to arrive at the institution prior to the shift starting time. In that regard, I credit the testimony of Lt. Chmely. I also find it incredible that the Camp Visiting Officer would work a total of 25 minutes pre and post-shift, while the claim for Visiting Room Officers - who have much more stringent search duties (e.g. they must perform a fence search, they search a larger visiting area, and they

must strip search all inmates, as opposed to the pat downs permitted in Camp Visiting) - is 17.5 minutes. Assuming *arguendo* that the Camp Visiting Officer leaves for the day just prior to 4:10 pm, I find the total of his pre and post-shift minutes to be less than 10, and hence *de minimis*.

Furthermore, I credit Lt. Chmely's testimony that he has often seen Camp Visiting Officers in the lieutenant's office well before 4 o'clock. This is not a post which has proven an FLSA claim.

### **Compound Officers**

Officer Jacobs testified that his pre-shift duties on day watch amounted to 15 minutes and included various tasks at the Control Center which, together with his walk to the shakedown shack took about five minutes. He described a nine to ten minute relief which included inventorying numerous items of equipment, checking an X-ray machine and metal detector, and exchanging information. Officer Seresky testified that he arrived for the evening watch 30 minutes early, performed his duties at the Control Center, arrived at the shakedown shack 10 to 15 minutes later (1:40-1:45), and performed a 10 minute relief (1:50-1:55) which enabled the officer he was relieving to depart between 1:50 and 2 pm (the numbers fail to add up perfectly). In sum, Officer Jacobs' pre-shift duties took 15 minutes, while Officer Seresky's took between 20 and 25 minutes, viewed conservatively.

Officer Jacobs testified that the officer he would relieve left the institution between 5 and 7 minutes after the hour, after turning in his battery at the Control Center. Officer Seresky testified that he performed no post-shift work since he left the compound about 9:55 and took 3-4 minutes to get to the Control Center.

The video footage for Compound Officers shows that on no fewer than nine occasions, the officers worked in excess of 8 hours and 10 minutes, with 8 hours and 19 minutes having been worked on two occasions. The footage consistently shows Compound Officers arriving for work

before their shifts, with a range of 8 to 33 minutes. Because the five days of footage does not purport to be a definitive record of the five or six years at issue in this grievance, it is treated strictly as a tool with which to gauge the testimony and exhibits adduced by the parties. In that light, it tends to confirm that (1) Compound Officers tend to perform pre-shift work, and (2) Compound Officers work in excess of 10 minutes a day overtime a fair amount of the time.

Because Officer Seresky's calculations did not add up, whereas Officer Jacobs was certain as to the time involved with his pre-shift work, I find that Compound Officers should be awarded 15 minutes of pre-shift damages. In view of Officer Seresky's testimony that he performed no post-shift work, no award is made for post-shift work. In fact, the video footage shows very little post shift work performed by Compound Officers.

During the second quarter of 2007, the Compound Officers were directed to make their reliefs at the Control Center. Officer Jacobs testified that during this period he would come in five minutes before his shift and leave "a little bit earlier." This would reduce his pre-shift work by ten minutes, and result in only five minutes pre-shift work. That amount is *de minimis* and no compensation may be awarded for that quarter.

### **Control Center**

Officer Petch testified that for a day watch, he arrived at the Control Center between 7:40 and 7:45 am when working Control #1. For a morning watch he arrived at 11:40 to 11:45 pm. Officer Seresky testified that for a morning watch he arrived at 7:30 (this was an obvious slip of the tongue because the morning watch commenced at midnight - I take his testimony to mean that he arrived 30 minutes before the starting time of his shift, or 11:30 pm).

Officer Petch testified that he left the Control Center at 4:05 to 4:07 pm. That would mean he had worked 15 to 20 minutes pre-shift and 5 to 7 minutes post-shift for a total of 20 to 27



uncompensated minutes per shift. Officer Seresky testified that his relief arrived at 7:30 am and he departed the Control Center at 7:55 or 8:00 am. So in his case he testified to working 30 minutes pre-shift and minus five minutes to no post-shift work for a total of 25 to 30 minutes uncompensated work.

With respect to the Control Center #2 post, Officer Seresky testified that he would report at 5:30 am to assist the Control Center #1 Officer. He testified that his relief arrived at 1:40 pm and he was able to leave the institution at 1:50 to 1:55 pm. When working evening watch, Officer Seresky arrived at 1:30 pm and departed at his shift ending time of 10 pm because there is no relief at that time for the Control Center #2 Officer. Officer Seresky further testified that within the last year, the day watch shift hours for the Control Center #2 Officer have been changed to 5:45-1:45 in recognition of the many duties required just prior to 6 am - the evening watch hours have correspondingly changed to 1:45-9:45. In sum, Officer Seresky testified to 20 to 30 minutes work prior to the change in shifts. The union seeks 30 minutes compensation for day watch prior to the change, 15 minutes for day watch since the change, and 30 minutes for evening watch both before and after the change.

The video footage tends to support the employees' claims with regard to the Control Center Officer #1 post. Twelve shifts were captured in total (three shifts had only ending times). Of those twelve shifts, in ten cases the Control Center #1 Officers worked in excess of ten minutes beyond their eight hour shifts. The longest shift filmed was 8 hours and 28 minutes. The average was in the range of 8 hours 15 minutes to 8 hours 20 minutes. The videos indicate there was some exaggeration in the testimony of Officers Petch and Seresky, but not much. I credit the lower end of Officer Petch's estimate and find that Control Center #1 Officers should be credited 20 minutes compensation per shift.

There was very little video footage of the Control Center #2 Officers. The fact the shifts were changed by management is a good indication that the Agency believed those officers were needed 15 minutes earlier than their previous shift to assist the Control Center #1 Officer. I credit Officer Seresky's estimate of 20 minutes compensable time for day watch and have applied the same period of time to evening watch because there was no credible evidence to explain why the Control #2 Officer would work more time on the latter watch. After the shift change was made, Control Center #2 Officers would have performed 15 minutes less compensable time and thus come within the *de minimis* rule. Therefore, the award of 20 minutes per shift does not extend to the period after the shift change.

#### **Count Officer**

Officer Archer testified that he reported for duty at the Control Center at 11:40-45 pm, picked up his keys and radio and called the Lieutenant at 11:50 to find out where he was assisting with the count. He testified that most of the time the count started "on the dot" at midnight. He testified that he left at 8 am.

As in the case of the Control Center #2 Officers the amount of video footage was extremely sparse with regard to this post. Only two complete shifts were filmed - in one instance the Count Officer worked 27 pre-shift minutes and left 8 minutes early working a midnight to 8 am shift for a total of 19 minutes uncompensated time; and, in the second case, the officer arrived one minute late (at 10:01 pm - it is not clear why that shift differed from the midnight to 8 am shift - and left 12 minutes early). The video footage was not helpful with this post.

I credit Officer Archer's testimony but I question why it would take him 10 minutes in the Control Center before he could call the Lieutenant. Therefore, I find that he (and Count Officers) spent 15 minutes pre-shift time on each of their shifts and should be compensated for that amount.

## **Front Lobby**

Officer Bickelman testified that he reported to the Control Center 15 to 20 minutes prior to his shift so that he would be ready to admit contractors and contract employees at 6 am. He acknowledged that someone would relieve him at 1:50-55 pm so the lobby could be kept open until 4:00. However, he testified that he generally left his post at 2:05-10.

While there was very little footage of the Front Lobby Officer, it was remarkably consistent. On April 10, 2007, the Front Lobby Officer entered the institution at 5:56 am and departed at 1:43 pm. On April 11, 2007, the actual post hours ran from 5:54 am to 1:50 pm. On May 14, 2007, the actual hours were 5:49 am to 1:53 pm. On May 24, 2007 the actual hours were 5:42 am to 1:45 pm. On June 5, 2007, the actual hours were 5:54 am to 1:55 pm. I find the foregoing to be a fair sampling, and it showed that on the first two enumerated dates, the Front Lobby Officer worked less than 8 hours, while the last three dates varied from 8 hours, 1 minute to 8 hours, 4 minutes. I find that the video footage discredited the union's testimony about pre and post-shift hours worked, and that there should be no award of FLSA compensation to the Front Lobby Officer.

## **Housing Units**

### **1. Beginning of Recovery Period Until End of 1<sup>st</sup> Quarter, 2005**

Officer Chiglinsky testified that he arrived at the Control Center 10-15 minutes prior to the beginning of his shift, and would be on post on the hour. He testified that he left the Control Center 10-15 minutes after the scheduled shift end and departed the institution. Thus, his claimed compensable time was 20-30 minutes per shift.

Officer McIlwain testified that he arrived at the Control Center 15 minutes before his shift and left the Control Center a little bit after the end of his shift - 5 minutes after the hour at the

most. Therefore, his claimed compensable time was largely 15 minutes, and 20 minutes "at the most."

The walking times calculated by the respective parties are useful in determining the compensable time earned by Housing Unit Officers. Agency Exhibit "33" shows a walking time of 3 minutes, 50 seconds from the Control Center to one of the Housing Units (Unit 3A). Union Exhibit "PP" indicates that it takes 1 minute, 20 seconds to get from the first door of the Control Center sally port (which leads into the Control Center from the Administration Building) to the second sally port (which leads to the compound). Even assuming that an employee's work day has not commenced the moment he or she walks from the Administration Building into the Control Center, one would expect that the picking up of a battery, the turning of chits, and the check for a detail pouch, followed by the entrance through the second sally port on to the compound would take on the order of 1 minute, 20 seconds. It follows that the trip from the Control Center, after the Housing Unit Officer completes his or her business there, to the assigned Housing Unit takes about 5 minutes, or 10 minutes round trip.

Officer Chiglinsky testified that the exchange of equipment and information between the officers took 5-10 minutes. Former Captain Matevousian testified the exchange took one to two minutes while Lt. Clmely testified it took a couple of minutes. The range of compensable time thus varies from 11 minutes to 20 minutes. I find that there was some exaggeration by the witnesses for both sides, and conclude that 15 minutes compensable time should be awarded per shift for Housing Unit Officers in this category. I note that finding largely comports with the testimony of Officer McIlwain as well.

## **2. Second Quarter, 2005 Through Second Quarter, 2006**

### **(a) A-side**

The evidence was undisputed that the removal of the B-side watch officer from the morning watch had no effect on the amount of pre and post-shift work for the A-side post. Therefore 15 minutes compensable time is awarded for this period.

### **(b) B-side**

The only non-confused testimony about this period came from Officer Seresky who testified about working a midnight to 8 am morning watch shift. However, there was no B-side morning watch shift during this period. Although the union failed to present evidence of compensable time for B-side Housing Unit Officers during this period, I note that the walking time described above would still apply, the day watch B-side officer would still need to be briefed, this time by the A-side officer, and the evening watch B-side officer would still have a relief. Under the circumstances, 15 minutes compensable time is awarded to B-side officers on day watch. Evening watch B-side officers were given additional time on their shifts to secure their area and depart their Housing Units in Specific Post Orders dated April 25, 2005. Those post orders provide that the evening watch B-side officers can secure their area and head to the Control Center as of 11:50 pm. Although this 10 minute dispensation does not necessarily mean that 10 minutes should be deducted from compensable time, because part of the time may be taken up with securing the officer's area, on average it appears to have lowered the pre and/or post shift time worked to less than ten minutes. For example, the videos show that on April 10, 2007, an evening watch B-side officer worked 8 hours, 3 minutes; on April 11, 2007, an officer worked 8 hours, 6 minutes; on May 14, 2007, one officer worked 8 hours, 7 minutes, while another worked

8 hours, 9 minutes; on May 24, 2007, an officer worked 8 hours, 2 minutes; and, on June 5, 2007, two officers each worked 8 hours, 7 minutes, while a third worked 8 hours, 9 minutes. (While taken two years after the period at issue, the videos cover the same shift time and the same post orders as those in effect in 2005-06.) Therefore, under the *de minimis* rule, no award is made to evening watch B-side officers for the period in question.

### **3. Third Quarter, 2006 Through the Present**

#### **(a) A-Side Day Watch**

In the Third Quarter, 2006 the B-side watch stayed at 8 am-4 pm and 4 pm-midnight while the A-side watch shifted back to the pre-Third Quarter, 2005 shifts of 10 pm-6 am, 6 am-2 pm and 2 pm-midnight. Officer Chiglinsky testified that the change meant that when the A-side officer arrives for the 6 am post, he is responsible for both the A and B sides of the Housing Unit until 8 am, when the day watch B-side officer's shift begins. He testified that the A-side day watch officer now had to account for twice the equipment, because in addition to the A-side equipment, he had to account for the B-side equipment as well; and, he had to be briefed not only on what was happening on the A-side, but what was happening on the B-side as well. Officer Chiglinsky testified that an additional 5-10 minutes was required for the day watch A-side officer.

The video evidence for this watch varied from 7 hours, 58 minutes to 8 hours, 19 minutes. I find there was sufficient corroboration in the videos to justify compensation of 19 minutes pre and/or post shift time for this post.

#### **(b) A-Side Evening and Morning Watches**

The video evidence for these two watches indicated they were two of the hardest working posts in the entire institution. Averaging the times worked by the A-side evening watch (after throwing out one shift of less than 8 hours, which appeared to be an anomaly ), I calculated an

average daily working time of 8 hours, 20.84 minutes. Likewise, where video was available for full morning watch A-side shifts (referred to as A-B shifts because of the absence of a B-side morning watch officer) the average daily working time was 8 hours, 21.125 minutes. Both posts are awarded 21 minutes per shift compensable time for the period in question.

**(c) B-Side**

Officers Chiglinsky and McIlwain testified that their compensable time amounted to 20 and 15 minutes respectively. The video footage showed a substantial amount of compensable time for B-side officers working the day watch. A total of 12 complete shifts were documented. One was less than 8 hours, and I have discarded that as an anomaly. Of the remaining 11 shifts, employees worked in excess of 8 hours, 10 minutes on 6 occasions ( with a maximum of 8 hours, 17 minutes); and, on two occasions, 8 hours, 10 minutes were clocked. So on 8 of the 11 shifts, the footage showed employees working at least 8 hours, 10 minutes. (I am mindful of the fact that the *de minimis* rule requires work in excess of 8 hours, 10 minutes. However, the videos were not broken down into minutes and seconds, so a showing on the videos of 8 hours, 10 minutes is, in my view, sufficient evidence since the true time might have been 8 hours, 10 minutes, 1 or more seconds.) Fifteen minutes compensable time should be awarded to day watch B-side officers based on the testimony of Officers Chiglinsky and McIlwain and the video evidence.

For the reasons stated previously with regard to B-side officers working the evening watch during the period, second quarter 2005 through second quarter 2006, no award of compensation is made.

**Outside Perimeter**

Officer Quirk testified that he reported to the Control Center 15 minutes before the start of his shift to pick up a freshly charged battery and commence his work. He testified that he was then

picked up by the OP truck five minutes before the start of his shift and driven to the clearing barrel where ammunition and other equipment were inventoried. He testified that at the end of a shift, the departing OP Officer would be dropped off at the front of the institution 15-20 minutes after the shift stopping time. He subsequently testified that he left approximately 15 minutes after the end of his shift. Therefore, 15 minutes pre-shift work is claimed and 15 minutes post-shift work is claimed as well. Because Officer Quirk testified that prior to the 15 minute staggering of shifts in the first quarter of 2007, the second officer to arrive would have to wait for the first officer to count the ammunition, and would leave upwards of 25 minutes after the shift ended, the claim for the second officer to arrive prior to 1<sup>st</sup> quarter, 2007, is 15 minutes pre-shift and 25 minutes post-shift work

I reject management testimony that the OP relief took 2-3 or 3-5 minutes. I credit Lt. Chmely's testimony that 15 minutes is normally perceived to be the reasonable amount of time to account for all ammunition. The fact the shifts were staggered in 2007 by 15 minutes is virtually an admission of this fact by management. Therefore, the claim of 15 minutes post-shift work is borne out by the evidence. I also credit Officer Quirk's testimony that the second officer to arrive prior to the 1<sup>st</sup> quarter of 2007 had 25 minutes post-shift work because of the need to wait for access to the clearing barrel.

I have difficulty with the claim for pre-shift work because out of ten shifts filmed in Agency Exhibit 32, only two OP officers entered the institution before their shifts. On April 11, 2007, Officer Malarkey entered five minutes before his shift; and, on May 24, 2007, Officer Hart entered 34 minutes before his shift! It is quite possible that OP officers are now obtaining freshly charged batteries at the Camp, but the video evidence predates the installation of a battery charger at the Camp. Because it appears that pre-shift work by OP officers was not undertaken on a



regular basis, the compensable time should be for post-shift work only.

### **Rear Gate**

Officer Evans' testimony was that this post worked 15 minutes pre-shift and no time post-shift. The video footage confirmed that the Rear Gate Officer arrived before the 8 am start time of the shift (anywhere from 7:33 to 7:43), but also showed the Rear Gate Officer leaving the institution before the 4 pm shift ending time. The times worked ranged from 8 hours, 2 minutes to 8 hours, 19 minutes. Three of the five shifts captured on camera were for less than 8 hours, 10 minutes. One was for exactly 8 hours, 10 minutes. Then there was the 8 hour, 19 minute shift, where the Rear gate Officer arrived at 7:33 am.

Even assuming Officer Evans' testimony about needing to arrive at the Lieutenant's Office at 7:45 am was valid (and this was hotly contested by the testimony of Lt. Chmely), it would not explain why the officers in the video evidence arrived two to twelve minutes earlier. If a 7:45 start time is coupled with the departure times shown on video, the times worked would have been (a) 8 hours, (b) 7 minutes, 59 minutes, (c) 8 hours, 2 minutes, and (d) 8 hours, 7 minutes on two occasions. In view of the foregoing, any time worked in excess of 8 hours by the Rear Gate Officer is *de minimis* and shall not be compensated.

### **Reception**

Officer Munson testified that he reported to the Control Center at 7:45 am, and arrived at the front lobby at 7:55 am. He acknowledged the front lobby was already open at that time. His response, when asked if he could have come in later than 7:45 and still been on post by 8 am was, "I don't know." Officer Munson testified that he locked the front door at 4:30 pm, and dropped his equipment off at the Control Center between 4:35 and 4:40 pm.

I credit Lt. Chmely's assessment that there was no reason the Reception Officer needed to

arrive in the front lobby prior to 8 am, in large part because it was already manned. I cannot believe the Reception Officer would be unable to check out a radio, keys and badges from the Control Center in less than five minutes and walk the short distance from the Control Center to the front lobby. Likewise, one would expect that the front door could be locked and the same equipment could be returned to the Control Center in less than five minutes. In my view, any working time by this post in excess of 8 hours would be *de minimis*, and therefore no compensation is awarded.

#### **Recreation Officer**

Officer Shaup testified that he started his shift at the Control Center at 5:40-5:45 am and proceeded to the recreation area which had to be thoroughly searched (including the entire fence line around the outdoor recreation area) and be ready to be opened by 6 am. I credit Officer Shaup's testimony that his supervisors insisted and placed pressure on him to open the recreation area by 6 am. Therefore, I find that this post required 15-20 minutes pre-shift work.

Officer Shaup further testified that he left the recreation area at 2 pm, turned in his equipment at the Control Center at 2:05-06 pm, and left the institution. This tends to comport with Union Exhibit "PP" which shows a walking time of 3 minutes, 1 second to the Chapel. The recreation area is further from the Control Center than the Chapel. Thus, I find five to six minutes of post-shift work by the Recreation Officer. The total compensable work for this post therefore varied between 20 and 26 minutes. Under the circumstances, a compensable award of 23 minutes is appropriate.

#### **Reservation Patrol**

Officer Quirk testified to 15 minutes of pre-shift work with regard to this post, largely consisting of accounting for 45 rounds for a 9 mm handgun in a clearing barrel, inventorying other

equipment, and inspecting a truck for damage. He was not, however, sure if he ever worked the post during the period of the grievance. Lt. Chmely disputed the need to arrive for this post at 7:45 am because visiting did not commence until 8:30 am. I credit Lt. Chmely's testimony especially since the officers on the OP trucks had even more ammunition to count and could do so in 15 minutes. Therefore, 8 am to 8:30 would have been plenty of time to perform the pre-visiting duties described before visiting hours commenced. In addition, the testimonial evidence in support of compensation is suspect because Officer Quirk did not know if he even worked this post during the period of the grievance. There should be no recovery for this post.

### **Special Housing Unit (SHU)**

#### **1. SHU #1**

Officer Gottshall testified that he would report for duty at the Control Center 15 minutes before his shift starting time. He testified that he walked to the Lieutenant's Office to check in and arrived at the SHU five minutes before his shift. Officer Gottshall testified that the relief would take 5-10 minutes; and, that at the close of his shift, the same time limits would apply so that he would be leaving the Control Center between the end of his shift stopping time and five minutes after. He testified that when the post orders were changed so that he no longer had to check into the Lieutenant's Office, he arrived 10 minutes before the start of his shift. It appears that this change in the Specific Post Orders for the SHU #1 Officer took place on March 8, 2006.(JtEx "6"). Thus, Officer Gottshall's testimony was that he worked 15 minutes pre-shift before the change in the post orders, and 10 minutes pre-shift thereafter; and, that he worked 0-5 minutes post-shift for a total compensable time of (a) 15-20 minutes before the post orders change, and (b) 10-15 minutes after the change.

The video evidence for the SHU #1 (which was taken after the change in the post orders)

shows that out of a total of 12 shifts, six were worked in excess of 8 hours, 10 minutes; two were clocked at exactly 8 hours, 10 minutes; three were between 8 hours and 8 hours, 10 minutes; and, one was less than 8 hours. In summary, 8 out of the 12 shifts were worked 8 hours, 10 minutes or more (including shifts exceeding 8 hours by 28 minutes, 22 minutes, and 17 minutes). The video evidence tends to corroborate Officer Gottshall's testimony. Therefore, I find compensable time before the change in the post orders of 16 minutes per shift, and compensable time after the change of 11 minutes per shift.

## **2. SHU #2, #3, #4 and SHU Recreation and Property**

Officer Gottshall's testimony with regard to the SHU #2, 3 and 4 Officers and the SHU Recreation and Property Officer was that they would arrive at the Control Center 15 minutes before their shift starting time and depart from the Control Center five minutes after the end of their shift. In 2006, there was a change in the post orders which required these officers to depart the SHU for the Control Center 10 minutes prior to the end of their shifts. Officer Gottshall testified that the change made no difference because 90% of the time, inmates were still out of their cells 10 minutes before the scheduled shift end, and therefore the SHU #2, #3 and #4 Officers could not leave.

The video evidence shows otherwise. In most cases, these officers left the institution before the end of their shifts. Out of a total of 24 shifts where the entire starting and ending times were recorded (as opposed to partial times), four officers worked less than 8 hours, 14 worked 8 hours to less than 8 hours, 10 minutes, and six officers worked more than 8 hours, 10 minutes. Thus 18 out of 24 shifts were worked a *de minimis* amount. This may be due to the change in the post orders and no compensable time may be awarded for the period subsequent to the change in the post orders. Management has "negatived" the reasonableness of the inference to be drawn

from the employees' evidence. It would be speculative on my part to make a pre-post order change award, especially since Officer Gottshall's testimony was that the change made no difference 90% of the time. Therefore, no award of compensable time is made to the SHU #2, #3, #4 and SHU Recreation and Property Officers.

### **Visiting Room**

Officer Archer testified that he reported to the Control Center between a half hour and 15 minutes before his shift starting time. He testified that the required searches, including the one mile long fence around the institution, were performed by himself and one or two other officers, and the officers would be ready to take visitors by 8:25-8:30 am. At the close of visiting, the officers' equipment was turned in at the Control Center between 3:55 and 4:00 pm.

Lt. Chmely disputed this testimony, stating that at the end of their shift, he usually saw the Visiting Room Officers in the lobby between 3:30 and 3:45 pm. He testified that he usually let them leave early when they finished before 4 pm.

Only two days of video footage showed the working times of Visiting Room Officers, which is too small a sample for serious comparison with the testimony. Because the union's testimony with respect to Visiting Room Officers conceded that the post was finished working prior to the end of the scheduled shift, I credit Lt. Chmely's testimony about the early completion times for these officers. His testimony, coupled with the starting time alleged by Officer Archer (and no persuasive reason was given for starting a half hour early so I find the reporting time was more like 15 minutes before the hour) leads me to a finding that less than 8 hours, 10 minutes work was being performed by these officers. (See also Agency Exhibits "32C" and "32D" which, while a very tiny sample, are remarkable in showing all but one of the Visiting Room Officers leaving the institution at 3:46 pm on both days.) Compensation under the FLSA is denied for this

post.

### **Visiting Escort**

No video footage was available for this post which was abolished in March, 2005. Officer Munson testified that he walked with visitors from the front lobby to the visiting room and back, and that he arrived at the Control Center at 7:45 am. Officer Munson testified that he dropped off his equipment at the Control Center at 3:55 pm but would not depart the institution until 4 pm.

While Officer Munson's testimony, for himself as an individual, was believable, the post was an adjunct to the Visiting Room Officer posts. For the reasons stated above with regard to Visiting Room Officers, no compensation under the FLSA is awarded.

### **Non-Custody Staff Working Custody Posts**

The evidence established that when non-correctional officers were required to perform custody posts, they worked at least the same pre and post-shift work performed by correctional officers working those posts. Indeed, the evidence indicated that they worked more pre and post-shift time than regular correctional officers because (1) they needed to confer with a lieutenant about exactly where they would be working, (2) if they were unfamiliar with the post they needed to read the post orders, and (3) they tended to take longer on relief because they were often unfamiliar with the post.

While this is an area which is difficult to quantify, I find that non-custody staff working correctional officer posts should receive five minutes additional compensation for each shift spent working posts which have been awarded FLSA compensation.

### **Posted Picture File**

The evidence established that with the exception of the Count Officer and the Compound Officer, both of whom worked in close proximity to the Lieutenant's Office, correctional officers

were obliged to review the PPF pre-shift or post-shift once a month. While management argues that most of the officers acknowledged they had reviewed the PPF during their shift "at least on occasion" (AgRepBr, 37), a fair review of the testimony indicates that during the overwhelming period of time, the officers were unable to secure reliefs during their shifts in order to review the PPF. Management witnesses confirmed the presence of correctional officers in the Lieutenant's Office reviewing the PPF. Former Captain Matevousian equivocated when he testified: "They may have viewed it during that time frame [i.e. prior to the start of their shifts]." (emphasis supplied)(Tr, 2963) Former Captain Bebow could not recall if anybody was relieved so they could review the PPF. Captain Taggart testified: "A lot - - some reviewed it in the lieutenant's office." (Tr, 2611) While he said the PPF could be taken into the Housing Units if they were secured, he acknowledged they were secured only from 10 pm until 6 am. Lt. Chmely conceded having seen personnel in the lieutenant's office reviewing the PPF.

The union witnesses testified unequivocally about using pre and post-shift time to review the PPF. The amount of time needed ranged from a low of 5-10 minutes to a high of 15-30 minutes. The average time was 14.75 minutes. I find that all correctional posts, with the exception of Count Officer and Compound Officer, should be awarded 14.75 minutes per month as compensation for reviewing the PPF.

### **Emergencies Before and After Shift**

There was one final claim presented, for time spent by correctional officers responding to emergencies which occurred before and after one's shift. Counsel for the Agency has referred to the evidence with respect to this issue as being "vague at best." (AgRepBr, 35) I find that the evidence regarding this issue is impossible to quantify. In some such cases, the testimony of the officers was that they did not let anyone know they were responding on their own time (Tr, 935-

36, 1062), or they had no specific recollection of incidents (Tr, 1504), or no specific recollection of dates or times (Tr, 2236), or they were, in fact, compensated (Tr, 1158, 1502-03). I note that in the Union Brief, no specific time claim is made for such emergencies (UnBr, 125-26). Nor is any award made therefor.

### **Miscellaneous**

The union has requested that I retain jurisdiction until the issue of damages (including whether liquidated damages are warranted, whether the recovery period should extend to 2002 or 2003, and regarding the issue of attorneys' fees and costs) is resolved (UnBr, 126). Although I understand the damages portion of this grievance has been bifurcated, I will retain jurisdiction because of my familiarity with this complex case and will be happy to render whatever assistance I can to the parties in the future.

### **AWARD**

The grievance is sustained in part and denied in part as follows:

1. The grievance is arbitrable and is not barred for either of the reasons advanced by management.
2. Compensable time under the FLSA, or a denial thereof, is as follows with respect to the various posts and claims:
  - a) Activities Officer: 12.5 minutes per shift for the evening watch officer.  
No award for the day watch officer.
  - b) Camp Officers: No award.
  - c) Camp Visiting Room: No award.
  - d) Compound Officers: 15 minutes per shift with the exception of 2<sup>nd</sup> Quarter, 2007.  
No award for 2<sup>nd</sup> Quarter, 2007.
  - e) Control Center #1 Officer: 20 minutes per shift.
  - f) Control Center #2 Officer: 20 minutes per shift through 2<sup>nd</sup> Quarter, 2007.  
No award after 2<sup>nd</sup> Quarter, 2007.



g) Count Officer: 15 minutes per shift.

h) Front Lobby: No award.

i) Housing Units: Start of recovery period through 1<sup>st</sup> Quarter, 2005 - 15 minutes per shift.

2<sup>nd</sup> Quarter, 2005 Through 2<sup>nd</sup> Quarter, 2006: A-side - 15 minutes per shift.

B-side (day watch) - 15 minutes per shift.

B-side (evening watch) - No award.

3<sup>rd</sup> Quarter, 2006 Through Present: A-side (day watch) - 19 minutes per shift.

A-side (evening/morning watches) - 21 minutes per shift.

B-side (day watch) - 15 minutes per shift.

B-side (evening watch) - No award.

j) Outside Perimeter: 15 minutes per shift.

25 minutes per shift for the 2<sup>nd</sup> officer to arrive prior to 1<sup>st</sup> Quarter, 2007

k) Rear Gate: No award.

l) Reception: No award.

m) Recreation Officer: 23 minutes per shift.

n) Reservation Patrol: No award.

o) Special Housing Unit #1 Officer: 16 minutes per shift prior to change in post orders (re: Lt. check-in).

11 minutes per shift after change in post orders.

p) Special Housing Unit #2, #3, #4  
and Recreation and Property Officers: No award.

q) Visiting Room: No award.

r) Visiting Escort: No award.

s) Non-Custody Staff Working Custody Posts: Same compensation as custody post plus 5 additional minutes per shift.

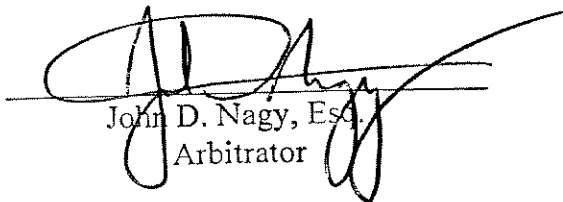
t) Posted Picture File: 14.75 minutes per month for all correctional posts except Count and Compound.

u) Emergency Responses: No award.

3. Jurisdiction is retained until the issue of damages (including whether liquidated damages are

warranted, whether the recovery period should extend to 2002 or 2003, and regarding the issue of attorneys' fees and costs) is resolved.

Dated: October 9, 2008  
Sea Cliff, New York



John D. Nagy, Esq.  
Arbitrator