

FEDERAL MEDIATION & CONCILIATION SERVICE

In the matter of the arbitration between:

FMCS Arb. No. 08-50318

**AMERICAN FEDERATION of
GOVERNMENT EMPLOYEES,
Local 307**

ARBITRATION DECISION

- and -

**US DEPT. of JUSTICE / FEDERAL
BUREAU of PRISONS,
USP ALLENWOOD**

Re: "Portal-to Portal" Pay

Arbitrator: Lawrence E. Katz, Esq.

Hearings: White Deer, Pa., January 11-14, 2011
January 25-27, 2011

View: White Deer, Pa., January 11, 2011

Transcripts: received, January 25, 2011 - c. February 10, 2011

Briefs: received, March 21, 2011

Reply Briefs: received, April 4, 2011

Appearances: Molly A. Elkin, Esq., and Diana J. Nobile, Esq., Woodley &
McGillivray, for the Union

Steven R. Simon, Esq., Counsel, USFBP, Labor Law Branch
(West), for the Employer

ISSUE(S)

The parties were unable to agree upon the exact framing of the issue(s).

The following suggestions were made:

Union: Did the Bureau of Prisons, USP Allenwood suffer or permit bargaining unit employees to perform work before and/or after their scheduled shifts without compensation in violation of the Fair Labor Standards Act and the parties' Master Agreement?

If so, what is the remedy?

Employer: Did the Agency fail to compensate USP Allenwood correctional officers in accordance with the Fair Labor Standards Act as amended by the Portal-to-Portal Act, for alleged pre-shift or post-shift work activities which were: (1) principal activities or integral and indispensable to a principal activity; (2) suffered or permitted by management officials; and (3) more than *de minimis*?

If the answer is in the affirmative for each and every one of the above elements for a particular claimed work activity or activities, what should the remedy be?

The parties indicated that the arbitrator would be empowered to frame the issue, pursuant to Article 32.a of the national Master Agreement (quoted *below*). I find that the following framing is appropriate:

Did the Employer violate the collective bargaining agreement and/or the Fair Labor Standards Act incorporated thereunder (including "Portal-to-Portal" amendments), as alleged in the grievance, by its failure to pay the aggrieved CO's for certain allegedly covered work activities performed before or after their officially-scheduled eight-hour shifts?

If so, what shall be the remedy?

**CONTRACTUAL, STATUTORY, REGULATORY
AND POLICY PROVISIONS**

A. Collective Bargaining Agreement

[National] Master Agreement (1998-2001)

ARTICLE 3 – GOVERNING REGULATIONS

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

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

* * *

Section d. All proposed national policy issuances, including policy manuals and program statements, will be provided to the Union. If the provisions contained [therein] change or affect any personnel practices, or conditions of employments, such policy issuances will be subject to negotiation with the Union, prior to issuance and implementation. * * *

ARTICLE 5 – RIGHTS OF THE EMPLOYER

Section a. Subject to Section b of this Article, nothing in this section shall affect the authority of any Management official of the Agency ...

1. to determine the mission, budget, organization, number of employees, and internal security practices of the Agency, and in accordance with applicable laws
 - a. to hire, assign, direct, layoff and retain employees in the Agency ...
 - b. to assign work ... and to determine the personnel by which Agency operations shall be conducted; ...
 - d. to take whatever actions may be necessary to carry out the Agency mission during emergencies.

ARTICLE 6 – RIGHTS OF THE EMPLOYEE

* * *

Section q. The Employer and its employees bear a mutual responsibility to review documents related to pay and allow-

ances in order to detect and correct overpayments/underpayments as soon as possible.

* * *

1. should the Employer detect that an employee has received an overpayment/underpayment, the Employer will notify the affected employee in writing;
2. should an employee realize that he/she has received an overpayment/underpayment, the employee will notify their first line supervisor in writing; * * *

ARTICLE 18 – HOURS OF WORK

Section a. ...The Standard workday will consist of eight (8) hours with an additional thirty (30) minute non-paid, duty-free lunch break. ...

* * *

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

* * *

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

ARTICLE 31 – GRIEVANCE PROCEDURE

* * *

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

* * *

Section d. [1] Grievances must be filed within forty (40) calendar days of the date of the alleged grievable occurrence. [2] If needed, both parties will devote up to ten (10) days of the forty (40) to the informal resolution process. [3] If a party becomes aware of an alleged grievable event more

than forty (40) days after its occurrence, the grievance must be filed within forty (40) calendar days from the date the party filing the grievance can reasonably be expected to have become aware of the occurrence. [4] A grievance can be filed for violations within the life of this contract, however, where the statutes provide for a longer filing period, then the statutory period would control. (bracketed sentence numbers added)

* * *

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

ARTICLE 32 - ARBITRATION

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

B. STATUTES

1. Fair Labor Standards Act [29 U.S.C. §§ 201 et seq.]

§ 207(a)(1) [Overtime Rate]

Except as otherwise provided in this section, no employer shall employ any of his employees who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, for a workweek longer than forty hours unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

§ 216. Penalties

(a) Fines and imprisonment

[details omitted]

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

Any employer who violates the provisions of section 206 or section 207 of this title shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages. ... The court in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action.

2. Portal-to-Portal Act [29 U.S.C. §§ 251 et seq.]

§ 251 Congressional findings and declaration of policy

(a) The Congress finds that the [FLSA] has been interpreted judicially in disregard of long-established customs, practices and contracts between employers and employees, thereby creating wholly unexpected liabilities, immense and amount and retroactive in operation, ...

§ 254 Relief from liability and punishment Under the Fair Labor Standards Act...

(a) Activities Not Compensable

No employer shall be subject to any liability or punishment under the Fair Labor Standards Act ... on account of the failure of such employer to pay an employee ... overtime compensation, for or on account of any of the following activities ...

- (1) walking, riding or traveling to and from the actual place of performance of the principal activity or activities which such employee is employed to perform, and
- (2) activities which are preliminary to or postliminary to said principal activity or activities ...

§ 255 Statute of limitations

Any action commenced on or after May 14, 1947, to enforce any cause of action for unpaid minimum wages, unpaid overtime compensation, or liquidated damages, under the Fair Labor Standards Act ...

- (a) may be commenced within two years after the

cause of action accrued ... except that a cause of action arising out of a willful violation may be commenced within three years after the cause of action accrued ...;

§ 260 Liquidated damages

In any action commenced ... to recover unpaid minimum wages, unpaid overtime compensation, or liquidated damages, under the Fair Labor Standards Act ... if the employer shows to the satisfaction of the court that the act or omission giving rise to such action was in good faith and that he had reasonable grounds for believing that his act or omission was not a violation of the Fair Labor Standards Act ... the court may, in its sound discretion, award no liquidated damages or award any amount thereof not to exceed the amount specified in section 216 of this title.

C. CODE OF FEDERAL REGULATIONS

1. 5 CFR CH. I – OFFICE OF PERSONNEL MANAGEMENT¹

Subpart A – General Provisions

* * *

5 CFR § 551.104 Definitions

In this part –

* * *

Hours of work means all time spent by an employee performing an activity for the benefit of an agency and under the control or direction of the agency. Hours of work are creditable for the purpose of determining overtime pay under subpart D of this part. Section 551.401 of subpart D further explains this term. However, whether time is credited as hours of work is determined by considering many factors, such as the rules in subparts D and E of this part, provisions of law, Comptroller General decisions, OPM decisions and policy guidance, agency policy, negotiated agreements, ...

* * *

Suffered or permitted work means any work performed by an employee for the benefit of an agency, whether requested or not, provided the employee' supervisor knows or has reason to believe that the work is being performed and has an opportunity to prevent that work from being performed.

¹ Section 204(f) of the FLSA authorizes the Office of Personnel Management (OPM) to administer the FLSA for federal employees. These are the OPM regulations.

* * *

Subpart D – Hours of Work

5 CFR § 551.401 Basic principles.

(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 any agency.

5 CFR § 551.402 Agency responsibility

(a) An agency is responsible for exercising appropriate controls to assure that only work for which it intends to make payment is performed.

(b) An agency shall keep complete and accurate records of all hours worked by its employees.

5 CFR § 551.411 Workday

(a) For the purpose of this part, workday means the period between the commencement of the principal activities that an employee is engaged to perform on a given day, and the cessation of the principal activities for that day. All time spent by an employee in the performance of such activities is hours of work. ...

5 CFR 551.412 Preparatory or Concluding Activities

(a) (1) 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.

(2) If the time spent in a preparatory or concluding activity is compensable as hours of work, the

agency shall schedule the time period for the employee to perform that activity. An employee shall be credited with the actual time spent in that activity during the time period scheduled by the agency. In no case shall the time credited for the performance of an activity exceed the time scheduled by the agency. The employee shall be credited for the time spent performing preparatory or concluding activities in accordance with paragraph (b) of § 551.521 of this part.

(b) A preparatory or concluding activity that is not closely related to the performance of the principal activities is considered a preliminary or postliminary activity. Time spent in preliminary or postliminary activities is excluded from hours of work and is not compensable, even if it occurs between periods of activity that are compensable as hours of work.

* * *

Subpart E – Overtime Pay Provisions

5 CFR 551.501 Overtime pay

(a) An agency shall compensate an employee who is not exempt ... for all hours of work in excess of 8 in a day or 40 in a workweek at a rate equal to one and one-half times the employee's hourly rate of pay.

**2. 29 CFR CH. V – WAGE & HOUR DIVISION,
DEPARTMENT OF LABOR**²

Subchapter A – Regulations

Part 578 – Minimum Wage and Overtime Violations – Civil Money Penalties

* * *

29 CFR § 578.3 What types of violations may result in a penalty being assessed?

* * *

(c) Willful violations (1) An employer's violation of section 6 or section 7 of the Act shall be deemed to be "willful" for purposes of this section where the employer knew that its conduct was prohibited by the Act or showed reckless disregard for the requirements of the Act. All of the facts and

² Pursuant to 5 CFR §551.101, OPM's administration of the FLSA is generally consistent with the Department of Labor's. The FLRA refers to DOL regulations if OPM regulations are silent on an issue.

circumstances surrounding the violation shall be taken into account in determining whether a violation was willful.

(2) For purposes of this section, an employer's conduct shall be deemed knowing, among other situations, if the employer received advice from a responsible official of the Wage and Hour Division to the effect that the conduct in question is not lawful.

(3) For purposes of this section, an employer's conduct shall be deemed to be in reckless disregard of the requirements of the Act, among other situations, if the employer should have inquired further into whether its conduct was in compliance with the Act, and failed to make adequate further inquiry.

Subchapter B. STATEMENTS OF GENERAL POLICY
OR INTERPRETATION NOT DIRECTLY RELATED
TO REGULATIONS

Part 785 – Hours Worked

* * *

29 CFR 785.11 General

Work not requested but suffered or permitted is work time. ... The reason is immaterial. The employer knows or has reason to believe that [the employee] is continuing to work and the time is working time.

* * *

29 CFR §785.13 Duty of management

In all such cases 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.
...

29 CFR § 785.47 Where records show insubstantial or insignificant periods of time

In recording working time ... insubstantial or insignificant periods of time beyond the scheduled working hours, which cannot as a practical administrative matter be precisely recorded for payroll purposes, may be disregarded. The courts have held that such trifles are *de minimis*

29 CFR § 790.6 Periods within the "workday" unaffected

(a) Section 4 of the [Portal-to-Portal Act] does not affect the computation of hours worked within the "workday" proper. ... Accordingly, 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 that section have no application. Periods of time between the commencement of the employee's first principal activity and the completion of his last principal activity on any workday must be included in the computation of hours worked to the same extent as would be required if the [Portal- to- Portal Act] had not been enacted. ...

(b) "Workday" as used in the [Portal-to-Portal Act] means, in general, the period between the commencement and completion on the same workday of an employee's principal activity or activities. It includes all time within that period whether or not the employee engages in work throughout all of that period. ...

D. AGENCY POLICIES AND PROCEDURES

1. Shift-to-Shift Accountability of Funds {ALX-2000.02D(2)}

[Effective January 1, 2010]

* * *

4. PROCEDURES. The following procedures will be implemented for inmate releases and other funds to be left in the Control Center for after-hour releases:

a. A Prisoner's Personal Funds and [Voucher Form] ... will be delivered to the Control Center Officer by an Accounting Technician. The Control Center Officer will count the funds and sign the [Form] acknowledging the receipt. Documentation detailing the amount, purpose of the receipt and the name and number of the inmate(s) must be entered in the Control Center's log. ...

b. When it is necessary to transfer funds ... from one officer to another officer due to shift changes, the oncoming officer will make the appropriate entry in the log book. By making this entry in the log book, the oncoming officer relieves the outgoing officer of all responsibility for the funds and documents. ...

When funds are released, the Control Center Officer issuing the funds will ensure that the inmate signs the original [accounting form] and that original [form] is turned into the Accounting Department that day. ...

2. PROGRAM STATEMENT P3000.03 – Human Resources Management Manual

[Effective 12/19/07]

Part 610.1 Institution Shift Starting and Stopping Times

1. **Purpose and Scope.** To establish basic parameters for shift starting and stopping times for employees working at Bureau institutions and the procedures to establish these practices at all Bureau institutions.

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

3. **Criteria.** Each institution shall have approved work schedules with shift starting and stopping times, for employees who work at the institution, to begin and end at the point employees pick-up and drop-off equipment (keys, radios, body alarms, work detail pouches, etc.) at the control center. Therefore, employees who pick-up equipment at the control center, shall have their shifts scheduled to include reasonable time to travel from the control center to their assigned duty post and return (at the end of the shift). If an employee arrives at the key line in a reasonable time to get equipment by the beginning of the shift, this employee is not to be considered late.

4. **Procedures.** Institution posts that meet the above criteria must have approved rosters which meet required shift starting and stopping times. Wardens shall formulate a plan for all affected posts. Union participation at the local and regional levels in formulating plans is strongly encouraged. The Warden must submit a plan to his/her appropriate Regional Director only if the plan includes an overlap in work schedules. The plan, at a minimum, will include the following:

- a. List of affected positions/duty posts;
- b. Complete custodial roster;
- c. Detailed summary of any costs incurred by the implementation of this plan.

5. Schedule Approval and Implementation. The authority to approve the work schedules rests with the Regional Director. Once approval is received, each Warden shall ensure that requirements for shift starting and stopping times, and details of the approved institution plan, are clearly communicated to all institution employees ...

6. **Scheduling Considerations**

a. An institution employee whose shift starts at 7:30 a.m. must be at the control center and have received his/her equipment no later than 7:30 a.m. to be considered "on time" for the start of his/her shift. To accomplish this, each location should ensure minimum waiting time for the employee in the key line. If that same employee's shift ends at 4:00 p.m., he/she should drop off his/her keys/equipment in the control center at 4:00 p.m., the scheduled quitting time. Reasonable travel time to and from the duty post to the control center would be compensable as part of the employee's tour of duty. Local supervisors should establish expectations that require employees to arrive and leave their duty post in a timely and reasonable manner. ...

b. Due to these parameters, schedules may have to be adjusted and shifts overlapped for posts which require relief, as employees must be given time to arrive later and leave posts earlier to be at the control center on time. The length of time necessary to provide the overlap depends on the post location and the reasonable travel time to and from the control center to that post.

c. Although waiting time in key lines prior to the beginning of a shift is not "work time," such waiting time is to be reduced to a minimum to assist in a smooth transition from shift-to-shift and more timely and predictable movement from the control center to the post. ...

* * *

Overtime regulations, procedures, and requirements are not affected by this policy.

3. Post Orders

The specific orders for the individual posts at issue herein are excerpted in Background Section B.7(a)-(f), *below*). At this point, however, it is appropriate to provide the more general post orders, applicable to all posts.

GENERAL POST ORDERS

[There appear to be no differences in the two versions of the GPO which were presented – that of 9/7/06 and that of 9/30/09]

* * *

INMATE CONDUCT:

It is the duty of all employees to correct violations of conduct when observed, even if observed while outside your normal work area, which are contrary to good order and discipline. **Do not hesitate to stop inmates at any time for questioning or search purposes.** ...

* * *

PERFORMANCE AND CONDUCT ON POST:

...It is the responsibility of each Officer to report to the Operations Lieutenant and to be on the assigned post at the start of the shift. When Beginning a shift, bring yourself up-to-date by receiving pertinent information from the Officer being reliev[ed] and by reviewing the unit log book. Familiarize yourself with the post and when relieved pass on important information to your relief. ...

* * *

RADIO EQUIPMENT:

... Radios should only be used when a telephone is not available or time does not allow you to reach a telephone. You should constantly monitor radio transmissions in the event an Officer may request assistance. ...

* * *

STAFF ACCOUNTABILITY (CHIT BOARD):

It is important to maintain staff accountability inside the institution as it relates to serious incidents involving disturbances, hostages, incapacitating injuries, etc. An in/out chit board has been mounted on the wall in the Control Center sally port to be utilized to account for staff presence in the facility. ... Each staff member is assigned a number and will turn the red numbered side out when entering and turn the white side out when departing the institution. ...

BACKGROUND

Prisons (FBP) executed a nationwide "Master Agreement," which originally ran from 1998-2001, but which remains in effect and is applicable herein.

The instant grievance involves one of the three facilities at the Allenwood Federal Correctional Complex (FCC) in White Deer, Pennsylvania – the United States Penitentiary (USP), a maximum security institution. The rank-and-file Correctional Officers ("CO's") at the USP (as well as certain non-custodial employees) are represented by AFGE Local 307.³ It does not appear that Local 307 and the FBP have negotiated a "local agreement" which is relevant to the issues presented herein.

As noted above, Article 3.b. of the Master Agreement incorporates applicable provisions of current and future federal laws, rules and regulations. This gives the AFGE and its locals the option of presenting statutory claims under the FLSA in the grievance-arbitration procedure (as well as in administrative proceedings before the OPM or US Department of Labor and/or in the federal courts).

On both a national and local level, the parties are not strangers to FLSA-related grievances (and/or administrative proceedings and court litigation).

In May, 1995, the AFGE filed a nationwide "class action" grievance involving so-called "portal-to-portal" issues. In August, 2000, the parties settled the matter, with the Employer paying \$120 million for claims that arose from 1989 to 1995. However, the settlement agreement did not bar new claims (arising on and after January 1, 1996).

³ The complex also includes two other correctional facilities, a low security correctional institution (LSCI); and a medium-security correctional institution (MSCI). The CO's at these other facilities are represented by two other locals of the AFGE – Locals 306 and 4047, respectively.

Although the facilities are physically separate, the responsibility for managing all three is vested in the Allenwood FCC Warden (now Ricardo Martinez, who assumed that position on September 17, 2007).

In April, 1996, even before the settlement, the Federal Bureau of Prisons had issued an initial version of the above-quoted Program Statement with respect to "Shift Starting and Stopping Times" (Part 610.1), indicating, as in the current version (quoted at pp. 12-13, above), that "employees who pick-up equipment at the control center, shall have their shifts scheduled to include reasonable time to travel from the control center to their assigned duty post and return (at the end of the shift)"⁴ – a provision which arguably requires overlapping shifts, rather than non-overlapping shifts (a/k/a "straight eights" – that is, three eight-hour shifts, covering the full 24-hour workday, without any overlap). The policy appears to have been revised after the execution of the national settlement agreement, with the input of the Union, seemingly in an effort to address and/or cure the underlying portal-to-portal issues.⁵

Notwithstanding the above-noted requirement of the Program Statement, it appears that the FBP, on both a national and local basis (including Allenwood FCC) was reluctant to utilize overlapping shifts. In many instances, non-overlapping shifts were retained, in arguable violation of the Program Statement, as well as the FLSA. As a result, notwithstanding the August, 2000 national settlement, AFGE locals filed numerous "portal-to-portal" grievances, which, in large part were successful (many of the decisions will be referenced more specifically in ensuing portions of this opinion).

Indeed, there have been two FLSA-related arbitration decisions involving other facilities within the Allenwood FCC. One, a duty-free lunch case, involving

⁴ There was some testimony in the instant proceeding as to the 2000 national settlement agreement. However, I have taken most of the above-noted information from one of the arbitration cases presented herein – **AFGE Local 3981 & USDJ/BP, FCI Jesup**, FMCS No. 04-97225 (La Penna, July 14, 2006); *aff'd in part and rev'd in part*, 63 FLRA No. 107 (2009). See also, **AFGE Local 1741 & USDJ/BP, FCI Milan**, 62 FLRA No. 31 (2007).

⁵ The Employer has suggested that the various versions of this Program Statement were negotiated with the Union, which would be consistent with Article 3.d. of the Master Agreement (as quoted above)

the Allenwood LCSI – which is not on point herein – was decided in 2004.⁶

However, the other case, involving the MCSI, presented essentially similar "portal-to-portal issues" arising out of the use of non-overlapping shifts. The arbitrator's decision, in favor of sister Local 4047 (with one minor exception), was issued in August, 2010. ***AFGE, Local 4047 & FBP, Allenwood FCI (Medium Security)***, FMCS Arb. No. 09-57336 (Scola, Aug. 18, 2010).⁷

A. The Portal-to-Portal Grievance at USP Allenwood

We have just noted that the issue of overtime compensation for pre- and post-shift work was hardly new to the Agency, or indeed to the Union. Those issues were involved in the national grievance, which was settled in August, 2000. And those issues were treated in the various versions of what is now Program Statement P3000.03, Part 610.1, governing "Institution Shift Starting and Stopping Times" (as quoted at pp. 12-13, *above*).

Although, as previously noted, the Program Statement, in its various forms, has arguably required overlapping shifts in the case of "employees who pick-up equipment at the control center," FCC Allenwood, just as many other FBP facilities, generally failed to institute such shifts.

One exception, albeit not directly related to the picking up of equipment at the Control Center, involved the am/pm shifts for certain posts at USP Allenwood, which, as discussed below (at pp. 26-27), were revised in July, 2007 to provide for a 15-minute overlap, shortly before the instant grievance was filed.

⁶ ***USDOJ, FBP, Allenwood (LSCI) & AFGE, Local 306***, FMCS Arb. No. 020515-10324-4 (Stein, 2004).

⁷ The arbitrator's decision was recently affirmed in part and reversed and/or remanded in part by the FLRA. ***FCI, Allenwood***, 65 FLRA No. 207 (June 30, 2011). The FLRA upheld the determination that the continuous work day commenced when batteries were picked up at the Control Center. It reversed the determination that security screening was compensable (2-1). It remanded the "donning of duty belt" issue to the arbitrator.

The instant grievance, involving other posts at the USP with non-overlapping shifts, was preceded by a letter from Local 307, dated August 3, 2007, seeking "informal resolution" of certain FLSA-related issues – a procedure envisioned under Article 31.b. of the National Agreement. The letter was presented to William Ey, who was then serving as the Acting Warden and the Labor-Management Relations Chair. The request stated that the Agency was requiring CO's to perform certain work before and after their eight-hour shifts without compensation, including "obtaining batteries, information exchange, weapons and ammunition accountability ... staff accountability board, detail pouches..." Mathna offered to meet "during the next ten days to discuss any settlement offers the Agency is willing to present." Ey did not respond.

On August 13, 2007, the Union filed the instant grievance, alleging in pertinent part as follows:

A continuing violation of the Master Agreement ... including but not limited to ... Article 3, Section b, Governing Regulations. This is a continuing violation of the overtime laws under Section 7 of the Fair Labor Standards Act ... This is a portal-to-portal issue, and is a violation of Article 18, section a of the Master Bargaining Agreement. ... In addition, under the last sentence of Article 31, section d, this matter is governed by 29 U.S.C. § 255 as it relates to statutes of limitations for portal-to-portal cases. ...

From July 5, 2004, there was never any overlap in shifts, even though each employee/union member was required to perform duties that were essential to their respective posts which took at least thirty minutes per day to perform. On July 5, 2007, I was informed by management that it had recently come to their attention a potential portal issue existed with the AM ... and PM ... shifts. On July 19, 2007, a memorandum was issued...which indicated effective July 22, 2007 [the AM and PM shifts would be modified to overlap]. The intent of this change is to create an overlap of the AM/PM shifts allowing for the exchange of equipment and information on duty time....

After this matter was brought to the Union's attention ... the following portal to portal matters were also brought to the Union's attention. The Agency requires the employees to

obtain their equipment and/or return their equipment prior to the beginning of their tour of duty and upon completion of their tour of duty. Such activities include but are not limited to obtaining batteries, information exchange, weapons and ammunition accountability, review of posted picture files, staff accountability board, detail pouches, and daily fire and security check forms. All employees who are required to relieve other employees are not compensated for pre-shift and post-shift duties. No time is provided within the employees' assigned paid shifts to obtain the employee's equipment and/or return their equipment and employees have not been compensated for this additional work. With the exclusion of the AM/PM shifts this is a continuing violation. The AM/PM violation existed from July 5, 2004 until July 21, 2007 when management created an overlapping shift for these posts.

AFGE Local 307 seeks relief to the full extent available under law ... from July 5, 2004. This is a continuing violation for all employees who require relief and a violation from July 5, 2004 until July 21, 2007 for employees working the AM/PM shifts. AFGE Local 307 requests that each affected bargaining unit member be made whole in every way including but not limited to an award of back pay... 100% liquidated damages ... interest on their damages ... and attorney fees...

On September 12, 2007, Ey denied the grievance, stating:

... The orders for posts that involve weapons indicate that inventory occurs after the officer has assumed the post. The Housing Unit Officer post orders specify that detail pouches will be brought to individual posts. The Compound Officer provides batteries during the shift as needed. ... Therefore, the only activity officers must accomplish prior to assuming their respective posts is the staff accountability board. The time spent on this is not compensable ... as it is for the purpose of accounting for staff in the institution, and not pre-shift work.

As you indicated, the AM/PM shift times were adjusted as of July 22, 2007 to create an overlap between shifts. This change was made after management became aware of three instances where an officer was relieved late; the officer was compensated accordingly. Had other employees been performing work without compensation as alleged, they had an equal obligation to follow the reporting requirements set forth in Bureau of Prisons Program Statement...3000.02, Chapter 6, page 3b [and] Article 6(q)(2) of the Master Agreement. ...

On October 2, 2007, the Union invoked arbitration via a memo to Warden Ricardo Martinez (who, as previously noted, had started in the job less than a month earlier). The memo indicated that it was designed "to provide you official notice Local 307 intends to invoke arbitration on the grievance filed August 13, 2007 concerning portal to portal issues for the bargaining unit/union members at ... Allenwood." The balance of the memo consisted of a verbatim restatement of the grievance.

During the course of the instant hearing, the Employer presented minutes of the periodic meetings of the joint Labor-Management Relations Committee at the Allenwood USP.⁸ The Employer has noted that the only time the Union raised any of the claims in its above-noted grievance was during the course of the November, 2007 meeting. The minutes of that meeting indicated:

Portal to Portal issues addressed in the grievance filed 8/13/07 – closed. The Union asked where does Portal begin? Control has always been stated as the starting point but with staff searches this will be changed.

The Union reviewed the 8/13/07 grievance. The first item, am/pm issue, it was resolved. The second item is the battery exchange. The Union stated supposedly the post orders were written to cover up the problem.⁹ The Union suggested adding battery chargers to the units like other institutions have done. The third item was the posted picture file for tower staff. The issue was caused by no reliefs. The Union suggests electronic signatures. The Union asked if

⁸ The minutes are kept by one of the management representatives, rather than a union representative. The notes are not verbatim and they may reflect the perspectives of the note-taker.

⁹ This appears to be a reference to the September 23, 2007 revision of the Post Orders for Compound Officer #1, which, for the first time, included a purported requirement for the CO's on this post to make trips to and from the Control Center at the beginning of their shifts, in order to deliver fresh batteries and remove used batteries from all units and posts. However, it does not appear that the various CO's holding this post ever performed this mass battery delivery/removal function; nor did management require them to do so. Rather, they continued to perform a far more limited form of battery delivery on an *ad hoc* basis, limited to situations where there was an unanticipated mid-shift battery failure. See, pp. 32-34, *below*.

these issues are trying to be fixed.
Management stated yes. ...

Without regard to what occurred at the above-noted meetings of the Labor-Management Committee, the instant grievance remained pending for several years until it was finally scheduled and heard in January, 2011 (as noted *above*).

It does not appear that the parties made efforts to settle the matter during that period of more than three years. Indeed, we might also note that the arbitration decision in the companion case involving the Allenwood FCI (MSCI) (p. , *above*) was issued in August, 2010, less than five months before the scheduled start of the instant hearings. Although the instant case appears to share some significant similarities to that at the FCI, it does not appear that the issuance of the decision resulted in any further efforts to settle the instant case. As a result, this matter proceeded to hearing in January, 2011, as noted *above*.

B. The Operational Situation at USP Allenwood

USP Allenwood houses about 1,100 inmates. Their crimes include murder, bank robbery, sexual abuse of children and drug trafficking, as well as less violent offenses.

The bargaining unit includes several hundred employees (CO's and others). On any given 24-hour day, some 75-100 of these employees will be working (including special assignments such as off-premise hospital escorts).¹⁰ The CO's are responsible for maintaining the security and safety of the institution, the staff and the inmates, as well as visitors.

It is hardly necessary to state that the CO job may be quite dangerous. The job description states that it involves "arduous, adverse and stressful working

¹⁰ The evidence did not include the exact numbers. I have estimated the numbers using the various assignment sheets/rosters that were presented into evidence.

conditions," including "such hostile or life-threatening situations as riots, assaults and escape attempts." Inmate-on-inmate attacks, as well as assaults on staff, are fairly common, and murders of inmates by other inmates are not unknown. A number of violent gangs are active within the institution. The Union submitted photographs of some of the weapons that CO's have confiscated from inmates. They include an assortment of "shivs" that inmates fabricated from metal scraps, nails, wire and even a hairbrush, and then secreted under a floor tile, on top of an exit sign, in a mop closet, in a clothes dryer and in the leg of a rowing machine. In short, the potential for extreme physical violence is ever-present.

1. The Physical Layout of the USP

The USP consists of the prison itself (the "compound") and an administration building outside the fenced perimeter. The administration building contains a lobby and front desk, administrative offices (including a Union office). In addition, it now includes a staff screening room, with a metal detector.¹¹

The administration building is linked to the correctional compound by a tunnel, which is entered through the Control Center, which is on the northern side of the building, at the entrance to the tunnel.

CO Kurt Middernacht, who has worked in the Control Center since August of 2004, described it as the "nerve center" of the institution. It contains the central computer system for recording the status of the institution and the inmates and monitors for the many security cameras throughout the institution. CO's assigned

¹¹ The use of the staff screening room commenced in January, 2008. All CO's must now pass through the metal detectors in the screening room before donning their duty belts and entering the Control Center.

The Union had initially claimed that the compensable work day should be viewed to commence when the CO's don their duty belts after this screening. However, in its post-hearing Brief, the Union effectively waived any such claim, noting, in view of the proximity of the screening room to the Control Center, that the act of donning the duty belt would not appreciably add to the length of the compensable workday (Un. Br., p. 20, n. 8). Thus, the "belt-donning" issue will not be afforded any further consideration.

to the Control Center oversee the inmate counts five times each day; monitor and open all doors in the institution; monitor the fence alarms and the radio communication system; distribute and account for keys and other equipment; hold inmate funds; and record inmate movement into, out of and within the institution.

Virtually everything that happens in the institution is entered into the computer system. As CO Middernacht testified, "Anything and everything goes through the Control Center."

Incoming CO's enter the USP through the administration building. After they pass through the staff screening room (metal detector), they proceed to the center window of the Control Center, to allow themselves to be identified (and, as discussed below, to pick up keys, batteries or other items).

The tunnel to the prison compound is accessed through a "sally port" – an entry vestibule with a pair of grilled doors (which are opened one at a time) – located to the right of the front window of the Control Center. On the wall of the sally port is the accountability or "chit" board, essentially an in/out chart showing which staff are in the compound. The board holds two-sided chits, which are white on one side and colored on the other (red, or perhaps, grey or green). Both sides of each chit have an identifying number for each CO. The white side indicates that the CO is not present inside the secure perimeter. The colored side indicates that the CO is present.

After being identified and allowed to enter the sally port, an incoming CO will turn his chit from the white side (absent) to the colored side (present). Outgoing CO's reverse the process (flipping the chit from colored to white). Assuming, as appears to be the case, that the CO's flip the chits correctly, it will be apparent at a glance which of them are present in the compound at any given point in time.

After the second sally port door is opened, incoming CO's will proceed through the tunnel (which passes below the outer perimeter of the compound), climb a stairway, and emerge inside the compound in a hallway, facing another locked door (no. 205.1) which is remotely-controlled from the Control Center.

The compound is roughly rectangular. The perimeter includes six observation towers (T1 to T6), which, viewed clockwise, begin at the southwestern corner (T1), proceed along the west side, the north side and the east side, to the southeastern corner (T6). There are three more towers inside the perimeter – on the southern end, above the Lieutenants' office (T7); on the northern end, above the recreational center (T8); and in the center (T9).

After one crosses through door 205.1, one may reach the various areas of the compound. One of the inmate housing blocs, the Special Housing Unit (SHU; a/k/a "segregation") is located at one end of this hallway, to the left, in the southwestern corner of the compound. The SHU, which is separate from the other housing units, is where high-risk inmates are isolated from the general population. Access to the SHU is achieved through another sally port.

Most incoming CO's (namely, those who are not assigned to the SHU), will proceed straight after they pass through door 205.1 – towards another locked door (no. 205.2) which provides access to the main compound.

The compound includes an open courtyard in the inner perimeter, which may be used for recreational/sports activities, or as a passageway from one building in the compound to another. There is now a "slow-down" fence in the courtyard, which, as its name suggests, blocks immediate access to the centrally-located interior courtyard tower (T9).¹²

A number of buildings surround the courtyard. During the course of our view of the premises (on the first hearing day), we took a counter-clockwise path

¹² The slow-down fence was installed in August, 2009.

after we passed through door 205.2. This led us, in the first instance, to the Lieutenants' office, where, as discussed below, incoming CO's may check in. We then proceeded outside along the eastern pathway, passing the four pairs of general population housing units, which are on the eastern side of the compound. As we headed along the pathway we passed Units 4A and 4B; 3A and 3B; 2A and 2B; and, finally at the northeastern end, 1A and 1B.

All four pairs of housing units are identically arranged in an M shape. The individual units occupy separate V-shaped (triangular) halves of the "M." We entered Unit 1B, the most distant unit. This unit, as the others, contains a V-shaped double-tiered row of cells along two of its three walls. The third wall, opposite the vertex of the V, houses the unit office. The office includes a telephone, as well as prison-related tools and equipment, some of which is kept on shadow boards (showing their shape) to make it easier to keep track of. Each of the eight units houses approximately 128 inmates.

After we left Unit 1B we crossed the inner courtyard, passing by the recreation building on the northern perimeter. We then entered the northern end of the interior corridor – which runs the length of the western side of the compound buildings, providing access (as one goes from north to south) to offices, classrooms, food services and dining hall, the Unicor furniture workshop (prison industries) and the Hospital. The northern and southern ends of this corridor are known as Corridor 2 and Corridor 1, respectively.

2. Shifts and Posts – Overview

Generally speaking, the CO's have fixed posts at a particular location. For our present purposes, these posts include the Control Center (2); the two above-noted corridors (2); the regular housing units (8); the special housing unit (2); and the towers (8).¹³ In addition, there are two "roaming" Compound Officer posts.

¹³ It does not appear that a post is maintained at Tower 8 (northern end of compound
(continued...))

Most of the posts are covered 24 hours per day (the details will be considered with more particularity in sub-sections B.7.(a)-(f), *below*, the post-by-post discussion). The CO's work the following eight-hour shifts, which are designated on the schedules with the noted parenthetical numbers:

- (1) Morning Watch (MW) 00:00AM-8:00AM
- (2) AM Watch 5:00AM – 1:00 PM
- (3) " " 6:00AM – 2:00PM
- (no #) Day Watch (DW): 7:30AM – 3:30PM
- (4) " " 8:00AM – 4:00PM
- (5) PM Watch 12:45PM – 8:45PM (on and after 7/22/07)
- (5) " " 1:00 PM – 9:00 PM (before 7/22/07)
- (6) " " 1:45PM – 9:45PM (on and after 7/22/07)
- (6) " " 2:00PM – 10:00PM (before 7/22/07)
- (7) Evening Watch (EW): 4:00PM – 12:00AM

The 24-hour one-man posts (as in the housing units) are operated without any built-in overlap, utilizing three consecutive shifts (nos. 1, 4 and 7, *above*). The shift changes occur at midnight, 8 a.m. and 4 p.m.

The Control Center may be staffed with five or six CO's during a 24-hour period. Three of the CO's, on the Control 1 post, work "standard" 8-hour shifts without any overlap (nos. 1, 4 and 7). The two or three additional CO's, on the Control 2 post work other less standard 8-hour shifts (such as nos. 3 and 6, *above*). With six-man staffing there will be double-coverage throughout the entire 24-hour period. But even with five-man staffing, there will be two officers working during the prime daytime and evening hours (6 a.m. - 10 p.m.). Single staffing will only occur during the overnight period (10 p.m. - 6 a.m.).

¹³ (...continued)
above the recreation center). It appears to be omitted from the various rosters and assignment sheets that were presented into evidence.

As previously noted, the two pairs of AM and PM watch shifts (nos. 2 and 5, and nos. 3 and 6, above), which have been utilized at a number of posts, used to run consecutively, with the changes of shift occurring at 1:00 p.m. or 2:00 p.m., without any overlap. However, effective July 22, 2007, the schedules of the two PM watches (5 and 6) were moved up by 15 minutes (12:45 p.m. - 8:45 p.m.; 1:45 p.m. - 9:45 p.m.). This has produced a 15-minute overlap during the changes of shift (12:45 - 1:00 p.m.; 1:45 - 2:00 p.m.).

The July 19, 2007 memo announcing the change in the PM shifts stated that management's intent was "to create an overlap ... allowing for exchange of equipment and information on duty time." The change in the shift times affected five bargaining unit posts: Control #2, Tower #7, Tower #9, SHU #3 and Corridor #2. As a result, the Union is not making any claim on behalf of CO's working those posts during the period of time that the 15-minute overlap was in effect.¹⁴

The net result is that the posts at issue herein are: Control #1, the Housing Units (8), Compound (#1 and #2), SHU (#1 and #2), Corridor #1 and Tower #9 (partial; see, n. 14, *below*). All of these posts are staffed around-the-clock using the above-noted "standard" MW, DW and EW shifts (nos. 1, 4 and 7, *above*).

3. Time-keeping Procedures; Actual Arrival and Departure Times; Agency Program Reviews

As is typically the case at federal prisons, time clocks have not been installed to record the actual arrival and departure times of the employees. Nor are sign-in sheets or other forms of manual record-keeping utilized (with the exception of certain authorized overtime, involving post-shift holdovers, as

¹⁴ The use of the overlapping schedule for the Tower #9 post was fairly short-lived (approximately two months). The post was placed on a 24-hour schedule, with three "standard" non-overlapping shifts, as of September 22, 2007.

discussed *below*). Rather, the Employer utilizes what might be termed an "exception-based" system. That is, employees are assumed to have worked eight hours, without regard to whether that time was worked during the official hours of the shift, or otherwise; and without regard to whether they worked more or less than eight hours – unless information to the contrary is reported and processed.

As will be discussed further *below*, the Union's case is premised upon its claim that the elapsed compensable time, from arrival at the Control Center until departure therefrom, is typically 8¼ to 8½ hours. The claimed "extra time" is worked during the time period preceding the official start-times of the various shifts.

This appears to be due to the fact that timely end-of-shift relief/departures are considered sacrosanct (pursuant to applicable Employer rules, as well as a seeming "code of honor" amongst the CO's). In order to ensure that the end-of-shift relief will be timely, CO's engage in a nearly universal practice of reporting to the administration building considerably in advance of their official start-times – some 30 to 45 minutes early, according to the Union. This enables the CO's to clear security, clear control, walk to their posts and perform the necessary change-of-shift procedures, thereby enabling their mates on the outgoing shifts to leave their posts significantly in advance of the official end-times of the shifts, and to exit through the Control Center sally port some 15-25 minutes before their official end-time.

Based on this practice, the likely arrival and departure times at the Control Center sally port for an 8-hour shift might be, using a day shift as an example, 7:30 a.m. to 3:45 p.m. – a total of 8 hours and 15 minutes.¹⁵ Moreover, instead of

¹⁵ This example, with an extra 15 minutes of work, is at the lower end of the range. Another example, at the higher end of the range, involving an extra 30 minutes of work, would be a reporting time of 7:15 a.m. (45 minutes early), followed by a departing time of 3:45 p.m. (15 minutes early).

following the prescribed hours of the shift (8:00 a.m. to 4:00 p.m.), there is a deviation of 15-30 minutes (an arrival which is a half-hour early; a departure which is 15 minutes early).

However, since, with the possible exception of security camera footage (some of which is discussed *below*), no contemporaneous and accurate time records are kept, documentary evidence of the actual arrival and departure times is difficult to come by. In any event, based upon the Union's anecdotal evidence, as well as material in its brief, I have prepared a tabulation showing the claimed duration of the work day at the various posts, which is appended to this Decision as Table 1. It indicates that the claimed compensable work day ranges from 8 hours and 15 minutes to 8 hours and 30 minutes (*see, n. 14, below*).

In one instance, by quirk, the security camera footage, while presented for other reasons (the duration of the change-of-shift process), happened to establish the actual arrival and departure times of one particular CO who worked an overnight shift (MW; 12 - 8 a.m.) on November 19, 2010 at housing unit 3A. CO Coolidge arrived at the unit at 11:27:21 p.m. (33 minutes before the official start-time of the shift) and departed the unit at 7:41:06 a.m. (19 minutes before the official end-time of the shift). The elapsed time on the unit was eight hours and 14 minutes.¹⁶

As the Employer noted in its above-quoted September 12, 2007 grievance answer (p. 19, *above*), the CO's have not reported their claimed pre-shift overtime on a contemporaneous basis. Thus, management has not evaluated the validity of their claims; nor have they been paid for the alleged extra time.

The one exception is post-shift overtime. CO's apply for and receive overtime when, for example, they are held over after their shift for a medical

¹⁶ This does not include the travel time from and to the Control Center, or the time spent at the Control Center picking up or turning in equipment. That would add at least 20 more minutes to the total, and perhaps as much as 30.

emergency; or when they handle an inmate incident that arises towards the end of their shift, but which concludes afterwards; or if they continue working because their relief is late; or, if they cover a shift when no one else is available.

Notwithstanding the absence of time clocks, the Employer, consistent with FBP requirements, engages in periodic reviews of the employees' entry and exit practices as part of its Program Review process (which includes numerous other issues, other than portal-to-portal issues).

Raymond Briggs, then an Examiner in the Program Review Division, performed the 2007 and 2009 reviews at USP Allenwood. With respect to "portal-to-portal" issues, BOP's forms and instructions indicate that the Examiner is to "[r]andomly choose five relief posts and observe to determine if staff assigned to these posts enter and depart the facility within the 8 hour shift or no more than a total of 10 minutes beyond the shift."

On May 21-22, 2007, Briggs went to the lobby of the administration building in order to observe the arrival and departure times (at the Control Center) of CO's on five posts – the tool room, Control #2 and three posts in the SHU. In his narrative, Briggs noted that "staff enter and depart the shift within 8 hours were observed [sic] within the 10 minute window." However, none of these appeared to be relief posts (contrary to the instructions). And, in any event, rather than monitoring the arrivals and departures on the same work shift, Briggs used a "mix and match" method. He observed the COs' departures on May 21 and their arrivals on May 22. While he appears to have extrapolated the duration of the shift from those numbers, he actually had no record of the duration of any individual CO's continuous work day for a single shift.

In addition, the Union demonstrated that Briggs' notes conflicted to some extent with some of the institution's attendance records. Briggs purportedly

recorded the arrival times of CO's Eddy and Rogers on May 22, but according to the daily roster for that day, both officers were on leave.

Briggs also conducted the July 23, 2009 review. However, because of a conflict with his own work schedule, he was unable to observe CO's entering or leaving the institution; nor was he able to determine whether they were reporting to work before, or leaving after, their scheduled shifts. He testified that instead, he interviewed five CO's on this subject and that none of them reported any extra work time. But he did not record their names or take notes on the interviews.

4. Radios and Batteries

Except for those assigned to the Towers, CO's do not carry weapons. In an emergency – which can be anything from an attack on an officer to an inmate having a seizure – their "lifeline" (as several CO's called it) is the portable radio assigned to each post. Each radio's transmissions are electronically identified with its post; the radio itself remains with the CO, and is transferred to his relief during the change of shift. CO's in the Control Center, who receive every transmission from every radio, can automatically tell from whom the transmission originates. The General Post Orders (p. 14, *above*) require all CO's, not just those in the Control Center, to "constantly monitor radio transmissions in the event an Officer may request assistance."

Most radios have a "body alarm," which is activated by a button on top of the radio. In an emergency, a CO can send an alarm to the Control Center simply by pressing the button. The Control Center immediately dispatches assistance to that post.¹⁷

There are hard-wired phones throughout the institution. Several CO's testified that these were seldom useful in emergencies. CO Sharon Uzialko, who

¹⁷ CO's assigned to the Compound are an exception to this. The job duties of Compound Officers take them all over the institution. Their radios do not have body alarms because the signal would identify only the roving post, but not the CO's actual location.

has worked at Allenwood for 18 years, and who is assigned to the Housing Units, testified that she spends most of her time patrolling the unit: "...I'm not going to be sitting in my office, I'm going to be out walking around, I don't have access to a phone, so I would need that radio in case there was a cell fight or in case there's a medical emergency of some sort."

CO David Hughes, who has worked on both Compound posts, testified that although there are many telephones in the compound, he was "very rarely near the phone" while working. Both officers explained that if a medical emergency or cell fight arises, they could not leave the scene and run to the phone to call for assistance. Rather, they must continue keeping an eye on the inmate(s) while they call for help. In some situations - escorting an inmate to recreation, for example - there may not be a phone nearby at all.

The radios at Allenwood all operate on rechargeable batteries. The batteries are detachable from the phones, but are not separately listed as necessary equipment in the post orders. Nor are they "accountable" items, subject to the "chitting" process (in which a CO will turn in one of his chits in order to receive the item; or, in which that chit will be returned to the CO when the item is returned to the place of issuance, or transferred to another CO).

Nevertheless, CO Uziako testified that a charged battery and a working radio are "absolutely 100 percent needed" to do the job. She further testified that it is not necessary for CO to leave a chit when they receive a battery because "the battery falling into somebody's hands isn't that big of an issue," compared with, say, a key.

A fully charged battery is supposed to last for about eight hours, but in practice, battery life varies considerably. Lt. Timothy Burns testified that the battery "could last for an entire shift ... it could last for four hours ... it could go dead in an hour." When the charge is low, the radio starts beeping, but the

duration of those warning beeps also varies from an hour to five minutes. CO Hughes testified that sometimes the battery goes dead without beeping at all.

Chargers cannot be kept at the posts, seemingly due to "technical" or security reasons.¹⁸ As a result, the batteries are kept and recharged in the Control Center. The post orders that were in effect in August, 2007, when the grievance was filed, indicated that the Compound Officer 1 was responsible for delivering freshly-charged batteries, as needed. However, as a matter of practice, this delivery activity was limited to situations when there was an unexpected mid-shift battery failure.

At that time (August, 2007), there was no express rule or procedure addressing the picking up or delivery of charged batteries, or the removal or drop-off of expired batteries at the Control Center. That is, there was no rule or procedure requiring the CO's to perform such pick-ups or drop-offs; nor was there a rule or procedure prohibiting them from doing so.

In the face of this silence, the CO's followed a practice of picking up a charged battery at the Control Center on their way in to work, and returning a spent battery to the Control Center on their way out.

As indicated in sub-section B.7.(d), *below*, the Compound 1 Post Order was revised on September 23, 2007, to include a reference to the delivery of fresh batteries and the removal of used batteries at the inception of each shift. However, notwithstanding this change in the language of the Post Order, it does not

¹⁸ The possible use of on-post battery chargers was discussed during the November, 2007 Labor-Management Committee meeting (p. 20, *above*). There was some indication that on-posts chargers were in use in other federal prisons.

There was some evidence of possible security concerns, which arose out of an incident at the Talladega facility, in which inmates took hostages. During the course of that incident, the inmates were able to monitor the radio communications within the facility for a relatively long time because the on-unit battery chargers enabled them to keep the captured radios in use. This situation was referenced in the *FCI Jesup* arbitration decision (p. 16, n. 4, *above*), at pp. 73 and 128.

appear that there was any change in the real-world practice. The Compound 1 CO's are so busy at the inception of their shifts that it appears to be impracticable for them to perform such an en masse battery and removal task; and they have not done so.¹⁹

Moreover, notwithstanding the Compound Officers' failure to adhere to the nominal battery delivery and removal duty, there was no evidence that management took any action to ensure that they performed the newly-listed duty. Rather, the pre-existing practice continued. The incoming CO's picked up fresh batteries at the Control Center and the outgoing CO's returned spent batteries to the Control Center. The Compound Officers have only performed the battery delivery function on an *ad hoc* basis, when a radio battery unexpectedly dies during the middle of a shift.

Approximately a month before the commencement of the instant hearings, on December 10, 2010, Capt. Ken Gabrielson issued a memo to the Control Center officers ordering them to refrain from "advising staff to bring expired radio batteries to Control at the end of their shift." Instead, Control was to have the Compound #1 Officer retrieve them during his shift and bring them to the Control Center. There was no evidence that the Control CO's, the Compound CO's and the other CO's complied with this instruction.

CO's Bastian, Middernacht, Gautsch, Uzialko and Reed uniformly testified that it is their regular practice to pick up charged batteries at the Control Center on their way to their post, and to drop off the spent batteries at the Control Center on their way out. Collectively, those witnesses have covered every post at issue. CO

¹⁹ For example, as discussed further in sub-section B.7.(d), *below*, when the day watch Compound 1 CO reports to the compound (at 7:40-7:45 a.m., rather than 8:00 a.m.), he must first effectuate the change-of-shift with the outgoing morning watch CO; then, he is busy handling the inmate work details, which commence at 7:45 a.m.; and then, there is an inmate count. In view of their "busy-ness" during the change-of-shift period, the Compound 1 CO's have not had time available to perform such an across-the-board delivery and removal of batteries.

Robert Rearick, who has worked in the Control Center for four years, similarly testified that all CO's working 24-hour posts pick up charged batteries at the Control Center on their way into the compound and return spent batteries on their way out. Lieutenants Brian Stahl and Leo Engel testified that some supervisory officers also do the same. Indeed, Warden Martinez agreed that this was the custom.

On the other hand, while there was no evidence presented of any particular CO's entering the facility without taking a battery from the Control Center, anecdotal evidence was presented by a number of superior officers, suggesting that not all of the officers drew batteries all of the time. Lieutenants Burns, Konkle, Marr and Womeldorf have all observed CO's picking up batteries from the Control Center before the start of their shifts; but they testified that the practice is not universal. Lieutenants Burns and Konkle testified that only about half of the CO's obtained and returned batteries in this manner; while Lt. Marr testified that only 20 - 30% do so; while Lt. Womeldorf suggested that only one or two CO's per shift did so. On cross-examination, the lieutenants admitted that these were estimates; that they have not made any systematic observations or studies of the COs' practice.

The witnesses on both sides agreed that mid-shift battery replacements have been made by having a Compound Officer deliver one from the Control Center to the post. Ralph Hanson, formerly a Captain at Allenwood, testified that this was "normal." Lieutenant George Nye testified that there were many ways to obtain a battery during a shift, including calling a lieutenant or calling the Control Center. CO Hughes testified that while he was a Compound Officer he delivered batteries to CO's two or three times on every shift.

However, the CO's testified that these procurement methods are impractical for both the Compound Officer and the CO's on post. CO's only resort to

calling the Compound Officer if their battery dies unexpectedly in the course of a shift. CO Rearick (who has worked as a Compound Officer) testified that if Compound Officers had to deliver charged batteries to all CO's on post, they "would be delivering batteries all day." CO Hughes testified that as a Compound Officer, he can't leave "an inmate in handcuffs standing in a corridor" to deliver a battery.

6. The Walk to and from the Post

During our view of the facility, discussed in sub-section B. 1, *above*, we walked (with a good number of interruptions) to the most distant housing unit (1B). Testimony was also presented as to the nature of "the walk," as well as the time it may take.

For example, CO David Hughes, who works in a Housing Unit on the Day Watch, described the route from the Control Center to the unit. Hughes testified that he regularly arrives at the administration building approximately 45 minutes before his scheduled 8:00 a.m. start-time. By c. 7:20 a.m., he would have cleared the metal detector in the staff screening room; donned his duty belt; and proceeded to the nearby Control Center to pick up a charged battery.

Hughes then waits for the door to the sally port to open, enters the sally port, flips his chit on the accountability board, and waits for the second door to open. He then walks through the tunnel and up the stairs, arriving at door 205.1; after it opens, he proceeds down the hall to door 205.2; after it opens, he turns right, walks down a hall, and passes by the lieutenants' office, and then enters the long pathway outside the four housing units. CO Hughes (and CO Uzialko, who takes the same route) testified that the lieutenant on duty often sees them as they pass by his office.

CO's working the Compound, Corridor #1 and Tower #9 posts take the same route from door 205.2 to the lieutenants' office. Like Hughes, CO's who

worked these posts testified that the lieutenant on duty sees them as they pass through the office.

In preparation for the arbitration, Captain Ken Gabrielson, an Agency witness, timed the walk from the Control Center to the farthest Housing Unit, 1B. He testified that he began the walk at about 11:00 a.m., and it took ten minutes.

There is no doubt that CO's are expected to shift to "vigilance mode" as soon as they enter the compound. Written agency policy so requires, and supervisory officers, from the Warden on down, testified that CO's must be alert and vigilant at all times, including on their way to and from their post. CO David Couch, a 17-year employee at Allenwood, testified that the administration has "drilled it in our head [that] once we enter the compound ... we are required to respond to any incidents ... [and] to correct any inmate behavior We cannot just say 'I'm not on duty' "

A number of CO's testified to quasi-disciplinary interactions with inmates during the walk to and from their posts. CO William Bastian testified that he has patted down inmates who "didn't look right" while on his way to his post. CO Uzialko has responded to "several incidents" while coming on or off her post. She testified that at one point inmates were causing problems at shift change "on a fairly regular basis." CO Hughes regularly orders inmates to "tuck in your shirt, pants up at a normal level ... out of the rocks, off the grass." While walking to his post, CO Gautsch has responded to inmates' questions about "commissary, laundry, food, services, work, anything."

On the other hand, supervisory officers testified that they seldom see CO's responding to incidents or correcting inmates during the walk to or from their posts. Lt. Burns testified that CO's "typically" walk straight to their post at the beginning of a shift and straight out of the institution at the end. He hardly ever sees them doing correctional work on these walks. Capt. Gabrielson, Lt. Todd

Matthews, Lt. Womeldorf, Lt. Dressler and Lt. Marr all testified to the same effect. Former captain Hanson pointed out that the post orders require CO's to walk directly to and from their posts, and that they are not supposed to interact with inmates on the way "unless it was a blatant security violation or potential weapon or assault ."

6. Responses to Emergencies While Off-shift

As long as they are on Allenwood grounds, or even nearby (en route to or from the parking lot on their way in or out), CO's are expected to respond to emergencies within the institution, without regard to whether they occur during their official hours of work. Theoretically, failure to do so could be grounds for serious discipline; but in fact, the impetus for such a response arises more as a matter of group solidarity for their fellow CO's. As CO Bastian testified, it is "what you do in this environment to take care of your fellow staff."

None of the CO's who testified received overtime for these off-shift responses to emergencies, nor did they apply.²⁰ It seems that the CO's view such emergency responses to be a part of the job (as well as a matter of mutual aid). Several supervisory officers testified that unless a CO applies for overtime, they have no way of knowing that he responded to an off-shift emergency. They "can't see everywhere at once," in the words of Lieutenant Heath.

7. Shift Changes at the Affected Posts

A fair amount of the evidence in this case focused on the amount of time consumed by shift-change procedures for each post at issue. Certain procedures are common to all posts. The outgoing CO always gives the incoming CO a summary of the pertinent events of the previous shift. There is always some

²⁰ In this respect, the potential emergency response overtime is treated differently than other forms of post-shift work (such as medical trips), which have been reported and resulted in the payment of overtime (as indicated at pp. 29-30, *above*).

exchange of equipment, including the radio and keys. The incoming CO always counts the keys and checks their condition in the outgoing CO's presence so that if a key is broken or missing, there will be no question about who is responsible. For the same reason, the incoming CO always conducts a brief inventory of any equipment assigned to the post before the outgoing CO leaves.

The Union and the Employer both presented anecdotal evidence of the nature and duration of the shift change activities at the various posts. In addition, the Employer presented more objective evidence of 15 actual shift-changes in November and December, 2010, based upon time-stamped security camera footage from several of the housing units, as well as the Control Center. The information from this camera footage is summarized in Table 2, appended to this Decision. It indicates that the elapsed time for the shift changes at the housing units ranged from as little as 44 seconds to as much as six minutes and 51 seconds; while at the Control Center, the elapsed time ranged from five minutes and 55 seconds to eleven minutes and 40 seconds.

In addition to the security camera evidence, management witnesses (superior officers) suggested, on a more generalized basis, that the CO's were grossly exaggerating the length of time it takes to change shifts. Lt. Burns testified that if a shift exchange takes more than "30 seconds to a minute" it can only be because the officers are socializing, not performing necessary work. Capt. Hanson and Lts. Shepard and Engle testified that shift change on any post took a maximum of four minutes. Lt. Matthews thought that the maximum was three minutes, and Capt. Womeldorf no more than five. Lt. Nickerson testified that shift change took only "a minute or two."

In any event, beyond the above-noted generalities, the evidence as to the individual posts at issue herein is discussed below.

(a) Control 1

We previously noted that the Control Center may be staffed by five or six CO's during any given 24-hour period (resulting in two-man coverage all of the time, or most of the time; see, p. 26, above). The posts are known as Control 1 and Control 2. As previously discussed, the Control 1 CO's work the "standard" non-overlapping 8-hour shifts. The Union's claim herein is limited to the Control 1 post (seemingly, because the Control 2 post involves a "non-standard" schedule, the CO's assigned thereto are not involved in change-of-shift activities which extend their work day).

The Post Orders for Control 1 were amended on September 23, 2007 (about a month after the Union filed this grievance). The Orders provide in pertinent part as follows (with the amendments underlined):

[Applicable to beginning of all three shifts:] Report to the Control Center.... Once inside the Sally port the Control Center Officer will observe the sally port to ensure it is free of inmates or unauthorized staff. When this has been determined he/she will key the door and allow you access into the Control Center.

It should be clearly understood that none of these activities are to take place until the [outgoing] officer is relieved.

* * *

These post orders are guidelines, not orders to work before or after regularly scheduled shifts.

CO's Middernacht, Rearick and Reed testified about shift changes in the Control Center. All three officers have worked the Control 1 post, Middernacht on Morning and Day Watch, and Rearick and Reed on Evening Watch.

Rearick and Reed testified that they customarily arrive 35 to 40 minutes before the official start time of the shift; Middernacht does so about 30 minutes before his shift.

Shift-change activities in the Control Center are basically the same on all three shifts. The shift changes at the beginning and end of the Day Watch (at 8 a.m. and 4 p.m.) are the busiest, because there are more employees coming in (or out), and also, because there is more radio traffic, more buses taking inmates to court or medical appointments, and more inmate movement.

On each shift, the outgoing CO lets the incoming CO into the Control Center, and the incoming CO immediately starts working, "running doors, or getting returned equipment from officers departing ... issuing equipment and batteries to officers going in," as Middernacht testified. Meanwhile, the outgoing CO summarizes events since the incoming CO's last shift.

The incoming CO reviews the master count sheet and the inmates' movements to make sure they match the count. He briefly surveys all the equipment and keys stored in the Control Center. If an inmate is scheduled to be released on the Evening or Morning Watch, staff from the business office bring a check for the funds owing to the inmate (from work details, for example) to the Control Center, where it is logged in and locked up. At shift change, the incoming officer makes an entry in the log book relieving the outgoing officer of accountability for the funds.

There was a factual dispute as to whether the Control Center distributes detail pouches to incoming CO's who work on posts where there are work details – generally, the Housing Units, the Compound and the Corridor.²¹ CO's on the Housing Units testified that this was how they got their detail pouches, but Agency witnesses testified that management delivers the detail pouches to the units.

The Union witnesses indicated, on an anecdotal basis, that the outgoing Control 1 CO's leave the Control Center approximately 15-25 minutes before the

²¹ The detail pouch (sometimes called a "detail kit" or "crew kit") contains documentation for inmates assigned to a work detail on the unit, including photographs of each inmate on the detail.

official end-times of their shifts.

The December 20-21, 2010 security camera footage (summarized in Table 2) indicated that in those three particular changes of shift, the incoming Control 1 CO's arrived from 21 to 46 minutes "early" (that is, before the official start-time of their shifts; rounded to the nearest minute). The change-of-shift endured for six minutes to twelve minutes (rounded to the nearest minute). This enabled the outgoing CO's to leave the facility 15 to 35 minutes "early" (that is, before the official end-time of their shifts; rounded to the nearest minute).

(b) "Regular" Housing Units

The post orders for "regular" (that is general population) housing unit posts (1A to 4B) indicate in pertinent part as follows (with the most recent amendments underlined):

EQUIPMENT: Key rings...body alarm, radio. ...

* * *

SHIFT: Morning Watch

* * *

12:00 AM Report to the unit ... Report by telephone to the morning watch Operations Lieutenant and receive any pertinent information. It should be clearly understood that none of these activities are to take place until the Evening Watch Officer is relieved.

Verify key count against key tag. Receive body alarm, radio and any pertinent information from the officer being relieved. ...

3:30 AM (Monday-Friday) After the count has cleared the Compound Officer will deliver the detail pouches and cell door keys to the unit. ...

5:00 AM ... (Weekends and Holidays) After the count is verified the Compound Officer will deliver the cell door keys to the unit. ...

* * *

SHIFT: Day Watch

4:00 PM ... Report to the unit ... Verify key count against key tag. Receive body alarm, radio and any pertinent

information from the officer being relieved. ... It should be clearly understood that none of these activities are to take place until the Morning Watch officer is relieved. ...

* * *

SHIFT: Evening Watch

* * *

4:00 PM ... Report to the unit ... Report by telephone to the evening watch Operations Lieutenant. At this time all daily pertinent information will be passed on to you. It should be clearly understood that none of these activities are to take place until the Morning Watch officer is relieved. ...

Verify key count against key tag. Receive the radio, body alarm and any pertinent information concerning the unit.

...

* * *

11:30 PM Prior to departing make one last round of the unit shaking the doors to confirm all doors are locked. ...[R]elinquish your cell door key and paperwork to the Compound Officer for delivery to Control.

These post orders are guidelines, not orders to work before or after regularly scheduled shifts.

CO's Uzialko, Hughes and Gautsch testified about shift changes in the Housing Units. At one time or another, all three officers have worked all three shifts in those units.

Hughes and Gautsch testified that they customarily arrive at the Control Center 40 minutes before their shifts begin, while Uzialko put the figure at 45 minutes before. All three indicated that they drop off their detail pouches (on the Day Watch) and/or battery at the Control Center about 15 minutes before their official end-time of their shifts.

The November 18-19, 2010 security camera footage (summarized in Table 2) indicated that in those twelve particular changes of shift, the incoming CO's arrived in the unit from 27 to 39 minutes "early" (that is, before the official start-time of their shifts; rounded to the nearest minute). The changes-of-shift endured from one minute to seven minutes (rounded to the nearest minute). This enabled

the outgoing CO's to leave the unit 24 to 37 minutes "early" (that is, before the official end-time of their shifts; rounded to the nearest minute).²²

Also, as previously noted (p. 29, *above*), in one instance, the security camera footage provided the exact times of CO Coolidge's arrival and departure from housing unit 3A – the elapsed time was 8 hours and 14 minutes (which did not include the travel time from and to the Control Center).

Shift-change activities in the Housing Units are basically the same on all three shifts. When the incoming CO arrives at the unit, he waits for the CO in Tower 7 to see him (because he does not yet have a radio) and open a sliding door. The CO knocks on a second door, which the outgoing CO unlocks. The two CO's go to the officer's station, where the outgoing CO turns over the unit keys, the cell-door key, the radio and the detail pouch. The incoming CO counts and inspects the keys. The outgoing CO makes sure that all his equipment (e.g., flashlight, portable metal detector) is back in the equipment cage and reviews the equipment in the cleaning-supply cage. When cleaning supplies are given to an inmate, the CO on duty accounts for them by putting chits in their place. At shift change, accountability passes to the incoming CO, so the outgoing CO removes his chits and the incoming CO replaces them with his.

The outgoing CO brings the incoming CO up to date on the events of the unit: which inmates are new, which are sick, which are feuding and whether there are any signs of gang activity. The outgoing CO then leaves the unit and the compound, walks to the Control Center and returns his dead radio battery and/or the detail pouch (at the end of the Day Watch) to the rear window of the Control

²² These times involve the change-of-shift activities at the housing units. They do not include the additional travel time to or from the Control Center, or the time spent at the Control Center. As previously noted (p. 37, *above*), Capt. Gabrielson indicated that the walk to the farthest housing unit (1B) took approximately ten minutes. This would mean that the above-noted CO's, after leaving the unit 24-37 minutes early, would have exited the Control Center approximately ten minutes later – some 14 to 27 minutes early.

Center. He then exits through the sally port, flipping over his chit on the accountability board, as he passes through.

There was testimony from the CO's that at the end of the Evening Watch the outgoing CO returns the cell-door key to the Control Center. However, Lt. Brian Stahl and former Deputy Captain Joseph Bludworth testified that procedure requires the Evening CO to turn over the cell-door key to a Compound Officer after the 10:00 PM count, who in turn brings it to the Control Center. Indeed, the post order so provides.

(c) Special Housing Unit #1 and #2

The SHU 1 Post Order is representative for both posts. It provides in pertinent part, as follows (with recent amendments underlined):

EQUIPMENT: Key rings...radio, flashlight. ...

SHIFT: Morning Watch

* * *

12:00 AM Report for duty...Relieve the evening watch Officer, accept keys and equipment and pertinent information regarding the post. Verify the key count against key tag and ensure all equipment is accounted for. ... It should be clearly understood that none of these activities are to take place until the Evening Watch officer is relieved. ...

* * *

SHIFT: Day Watch

8:00 AM Report for duty ... Relieve the morning watch Officer, accept keys and equipment and pertinent information regarding the post. Verify the key count against key tag and ensure all equipment is accounted for. ... It should be clearly understood that none of these activities are to take place until the Morning Watch officer is relieved. ...

* * *

SHIFT: Evening Watch

* * *

4:00 PM Report for duty ... Relieve the morning watch Officer, accept keys and equipment and pertinent information regarding the post. Verify the key count against key tag and

ensure all equipment is accounted for. ... It should be clearly understood that none of these activities are to take place until the Day Watch officer is relieved. ...

* * *

These post orders are guidelines, not orders to work before or after regularly scheduled shifts.

The SHU houses up to 155 inmates in disciplinary segregation or protective custody. SHU inmates are locked in their cells 23 hours per day, with one hour per day of recreation in "recreation cages." They do not eat with the general population but receive all their meals on trays in their cells.

There are two CO's on each shift in the SHU. CO's Bastian, Rearick and Reed described the shift-change procedures. According to these witnesses, the incoming CO picks up a radio battery at the Control Center 40-45 minutes before the beginning of the shift. He also "chits out" an extra set of cell keys. Bastian testified that the Day Watch CO needs the extra keys to allow authorized institution staff, such as psychologists, to visit the SHU inmates throughout the day. However, Lt. Burns testified that it is a violation of Agency policy for CO's assigned to the SHU to draw extra cell keys, and that management was completely unaware they were doing so. According to Lt. Burns and Lt. Joel Stover, because SHU CO's carry range-door keys (which allow access to their particular tier of the SHU), having cell keys as well is a security risk. Former Associate Warden Francisco Lara testified that the two kinds of keys should "never be on the same person."

Upon arriving at the SHU, the incoming CO waits for the outgoing CO to radio the Control Center and have them open the door to the unit. The outgoing CO hands the incoming CO the keys and radio. The incoming CO examines and counts the keys, and the two exchange information about the unit, such as "which inmates might be acting out, which inmates might not be getting along, maybe sanitation," according to CO Bastian.

SHU equipment such as restraints, metal detectors, flashlights and mirrors are kept in metal cages on the unit and "chitted out" as needed. The incoming CO reviews the inventory in the presence of the outgoing CO, again in order to preserve accountability. The outgoing CO then leaves, taking the expired radio battery with him. The outgoing CO turns in the battery to the Control Center 20 to 25 minutes before the official end-time of his shift. He then exits the facility through the sally port (flipping his chit on the way out).

(d) Compound 1 and 2

The Post Orders for these two positions are similar. Thus, I have only produced certain divergent portions of the Compound 2 Orders which may be relevant to the instant grievance. One significant difference is that as of the September 23, 2007 revision, the Compound 1 Post Orders now include the below-quoted reference to the delivery and removal of batteries at the beginning of each shift (underlined). The Compound 2 Orders include no such reference. The Orders provide in pertinent part as follows (with the recent amendments underlined):

COMPOUND OFFICER 1

EQUIPMENT: Key rings B-26, E-2, radio, handcuffs. All equipment assigned to this post will be accountable on the shift to shift inventory form. A hand held metal detector will be drawn and carried by the officer.

* * *

SHIFT: MORNING WATCH

* * *

12:00 AM Report for duty. ... Verify the key ring count against the key ring chit. Receive the radio, equipment and any pertinent information from the officer being relieved. Deliver fresh radio batteries to all units and inside posts. Remove used batteries and return them to the Control Center.

It should be clearly understood that none of these activities are to take place until the Evening Watch officer is relieved. ...

3:00 AM ... (WEEKDAYS): Pick up unit cell door keys and detail pouches from the Control Center and deliver them to the respective units/details.

SHIFT: DAY WATCH

* * *

8:00 AM Report for duty. ... Verify the key ring count against the key ring chit. Receive the radio, equipment and any pertinent information from the officer being relieved. Deliver fresh radio batteries to all units and inside posts. Remove used batteries and return them to the Control Center.

It should be clearly understood that none of these activities are to take place until the Morning Watch officer is relieved. ...

Ensure all inmates assigned to your work detail are present and on their job.

The AM Census count will be conducted at this time.

...

SHIFT: EVENING WATCH

* * *

4:00 pm Report for duty. ... Verify the key ring count against the key ring chit. Receive the radio, equipment and any pertinent information from the officer being relieved. Deliver fresh radio batteries to all units and inside posts. Remove used batteries and return them to the Control Center.

It should be clearly understood that none of these activities are to take place until the Day Watch officer is relieved. ...

* * *

These post orders are guidelines, not orders to work before or after regularly scheduled shifts.

COMPOUND OFFICER 2

* * *

SHIFT: MORNING WATCH

* * *

4:00 AM ... (WEEKDAYS): Pick up unit cell door keys from the Control Center and deliver them to the respective units.

* * *

These post orders are guidelines, not orders to work before or after regularly scheduled shifts.

As noted earlier, the Compound posts are mobile. Compound Officers assist in taking the counts; collect count slips and deliver them to the Control Center; conduct daily security inspections, searches and "shakedowns" and log in any contraband found; pick up and deliver paperwork and other material; escort inmates to medical treatment or to the SHU; supervise inmates in the dining hall, the yard and during the moves; and generally ensure safety and security throughout the compound. The Compound Officers also "call the moves" (ten-minute periods during which inmates may move to designated areas in the institution) throughout the shift.

The reported shift-change activities for the Compound Officers are basically the same on all three shifts, except for the Compound #1 change from Morning to Day Watch. The incoming CO picks up a battery at the Control Center, flips his chit on the accountability board, enters the compound and walks to the lieutenant's office, where he meets the outgoing CO. (If relief takes place during a mealtime, the CO's meet at the food services area.) The outgoing CO gives him the keys, radio, handcuffs and metal detector and summarizes the events of the previous shift. The outgoing CO turns in his spent battery at the Control Center around 15 minutes before the end of the shift.

One of the reported responsibilities of the Compound #1 Day Watch is to supervise an inmate work detail that begins at 7:45AM, even though the shift does not begin until 8:00 a.m. CO's Hughes and Bastian, who have been assigned to the post, testified that they customarily picked up their battery and the detail pouch at the Control Center at 7:20 a.m. They prepared for the work detail by assembling the cleaning supplies and, depending on the season, made sure another CO was standing by to access lawn mowers, weed whackers or snow shovels. CO Bastian testified that the lieutenant on duty saw him making these preparations before his shift "all the time ... [T]hat's the way it's been for...almost thirteen

years that I've been here." At the end of the shift they turned in the detail pouch along with their spent battery.

CO's Bastian, Hughes and Mitternacht testified about shift change procedures on the two Compound posts. They testified that they customarily arrive 40 minutes before their shift and leave 15 to 20 minutes before the shift ends. According to these CO's, the Compound #2 officer always carries an extra set of cell keys. One of the Compound #2 CO's exchanges a chit for these keys at the Control Center. The incoming Compound #2 CO on each subsequent shift exchanges his chit for the outgoing CO's chit at the Control Center, and then return the outgoing CO's chit to him during the shift change, in exchange for the extra cell keys.

(e) Corridor 1²³

The Post Orders for the Corridor 1 CO indicate in pertinent part as follows (with recent amendments underlined):

EQUIPMENT: Key rings...radio, handcuffs...

* * *

SHIFT: Morning Watch

* * *

12:00 AM ...Report for duty. ... Receive keys and equipment. Verify key count against key tag. Receive pertinent information from the officer being relieved. ... It should be clearly understood that none of these activities are to take place until the Evening Watch officer is relieved. ...

* * *

4:00 AM (Weekdays) Assist the Compound Officers in picking up unit cell door keys from the Control Center and delivering them to the respective units.

* * *

²³ The Union has not made a claim with respect to the adjacent Corridor 2 post, insofar as it was one of the posts with am/pm shifts, that were placed on an overlapping schedule in July, 2007 (see, p. 27, above).

7:40 AM Begin preparations for your relief to ensure a smooth timely transition.

SHIFT: Day Watch

* * *

8:00 AM ... Report for duty. ... Receive keys and equipment. Verify key count against key tag. Receive pertinent information from the officer being relieved. ... It should be clearly understood that none of these activities are to take place until the Morning Watch officer is relieved. ...

* * *

SHIFT: EVENING WATCH

* * *

4:00 pm ... Report for duty. ... Verify key count against key tag. Receive pertinent information from the officer being relieved. ... It should be clearly understood that none of these activities are to take place until the Day Watch officer is relieved. ...

* * *

These post orders are guidelines, not orders to work before or after regularly scheduled shifts.

We previously noted the location of Corridor 1, which provides access to food services, the hospital and UNICOR. As a result, it is heavily-traveled. During the day, there may be hundreds of inmates there. The CO's assigned to the Corridor posts are responsible for screening inmates through a metal detector as they enter food services or any of the other adjacent offices, making 30-minute rounds of the hospital and generally monitoring all activity. On the day watch, the Corridor #1 officer prepares for and supervises an inmate work detail, which begins at 7:45 a.m.(15 minutes before the official start of the day watch).

CO's Middernacht and Gautsch described shift changes on the Corridor #1 post. The incoming CO arrives at the Control Center and receives a radio battery 37 to 40 minutes before the shift begins. After passing through the Control Center and the sally port, the incoming CO meets the outgoing CO either in the lieuten-

ant's office or the corridor itself, depending on the shift. The incoming CO receives the keys, a report on the events of the past shift, a portable metal detector and a set of hand restraints. The outgoing CO returns the spent battery to the Control Center 15 minutes before the end of his shift.

The CO's testified that on the Evening and Morning Watch, they may also need to chit out a hospital cell key if inmates are in the hospital overnight, but Agency witnesses disagreed. Lts. Burns, Stover, Dressler and Marr testified that the CO on the Evening Watch is supposed to receive the key from the physician's assistant at 10:00 PM, when the P.A. goes off duty, and chit it over to the Morning Watch CO at midnight. In any event, it is rare for an inmate to stay in the hospital overnight, according to Lts. Stover and Stahl.

(f) Tower 9

The more recent Post Orders for the Tower 9 CO – as a 24-hour post rather than a 16-hour post – indicate in pertinent part as follows (with recent amendments underlined):

EQUIPMENT: Radio, weapon ...

* * *

SHIFT: Morning Watch

* * *

12:00 AM Begin making your scheduled Watch Calls to the Control Center... It should be clearly understood that none of these activities are to take place until the Evening Watch officer is relieved. ...

* * *

SHIFT: Day Watch

* * *

8:00 AM Assume your assigned post. Inventory all equipment and complete your inventory forms. ... It should be clearly understood that none of these activities are to take place until the Morning Watch officer is relieved. ...

* * *

SHIFT: Evening Watch

* * *

4:00 PM Assume your assigned post. Inventory all equipment and complete your inventory forms. ... It should be clearly understood that none of these activities are to take place until the Morning Watch officer is relieved. ...

* * *

These post orders are guidelines, not orders to work before or after regularly scheduled shifts.

As previously noted, Tower 9 is one "internal" towers, located within the courtyard of the compound. The CO's assigned to the internal towers monitor the entire compound. Just as the other towers, and unlike the other posts in the institution, the tower posts are armed. The weaponry includes M16 rifles, shot-guns, smoke bombs and "flash-bangs."

Tower 9 has been operated on a two-shift (16 hours) and three-shift (24 hours) basis during the time periods relevant hereto. From March 27, 2005 until September 22, 2007, it was a 16-hour post, with AM/PM shifts. As previously noted, the AM/PM posts were placed on an overlapping schedule effective July 22, 2007. However, in the case of Tower 9, that overlapping schedule only lasted two months (*see, p. 27, n. 14, above*).

Since September 22, 2007 Tower 9 has been a 24-hour post, with three "standard" non-overlapping shifts (one CO per shift). CO's Middernacht and Bastian testified about shift changes after the post changed to a 24-hour schedule. The incoming CO arrives at the Control Center around 40 minutes before the shift begins. He receives a battery, exchanges his chit for the tower key for the outgoing officer's chit, and receives a key (the so-called "549 key") to the locked gate in the "slow-down fence," which surrounds T9.²⁴ Several lieutenants testified that management was unaware that CO's were drawing the 549 key; only one

²⁴ As indicated previously (p. 24, n. 12) the slow-down fence was installed in August, 2009.

Agency witness, Lt. Lamar Shepard, had ever seen a Tower #9 CO with the 549 key. According to these lieutenants, the Corridor #1 officer is supposed to admit the Tower #9 officer through the slow-down fence.

Once inside the tower, the incoming CO takes a visual inventory of the guns, which are stored at the base of the tower. He then goes upstairs, passes the keys and chit to the outgoing officer, and receives the radio. The outgoing CO describes the incidents of the previous shift, including any assaults, suspicious inmate activity or inmate groupings indicative of gang tension. The outgoing officer then leaves the tower and proceeds to the Control Center, where he drops off his spent battery, at approximately 15 or 20 minutes before the official end-time of his shift.

When Tower 9 was a 16-hour post, the shift-change procedure was more extensive, because the weapons and ammunition could not be left there overnight; rather, it had to be brought out to the tower each morning and brought back each evening. CO Couch, who worked both the AM and PM shifts during that time, described the process.

The weaponry was kept in an armory in the administration building. The CO on the AM shift turned in two chits to the Control Center, one for the keys to the tower and one for the radio and an extra charged battery. He then picked up the weaponry at the armory, where he met the CO's assigned to Compound #1 and #2 and Corridor #1. The incoming CO proceeded to Tower #9, and once secure in the tower, he radioed the three other CO's and told them to bring the weapons.

After verifying that the compound was clear of all inmates, the three CO's brought the weapons and then the ammunition to the tower, making two separate trips with two CO's on each trip. According to CO Couch, the entire maneuver had to be completed before 6:00 AM, when inmates came out of their cells for break-

fast. He indicated that the Compound and Corridor officers who performed this task were on a "standard" morning watch (midnight to 8:00 a.m.). Thus, they were performing this work as part of their paid shift. In contrast, the incoming Tower 9 CO was on an AM watch (6:00 a.m. to 2:00 p.m.). Thus, he was performing this work before the official start-time of his shift, and he was not paid therefor.

At the end of the AM shift, the incoming CO received a radio at the Control Center and exchanged his chits for the chits of the AM officer to account for the radio and keys for Tower #9. At the end of the PM shift, the procedure was reversed. The weapons and ammunition were returned to the armory, and the PM CO then returned the keys, radio and battery to the Control Center.

Couch testified that he used to arrive for the AM shift 20 minutes before the official start-time. On the reverse journey, he cleared the Control Center five minutes before the shift ended. On the PM shift, he arrived at the Control Center 30 minutes before the shift began, and left the Control Center 15 minutes before the shift ended.

C. Management's Knowledge of FLSA Requirements and/or the Aggrieved COs' Alleged Work Activities and Times

Several of the disputed issues in the instant case may turn on Management's knowledge/awareness of FLSA portal-to-portal requirements, as well as its knowledge/awareness of arguably-covered work activities that might trigger overtime liability under the FLSA.

We have already discussed the time-keeping procedures, including the lack of time clocks (which, if installed outside the security screening room or the Control Center, would provide very precise records of the COs' arrival and departure times). The absence of time clocks may give management a "cover,"

so to speak – an ability to claim that it was unaware of the COs' seemingly universal practice of arriving early.

However, the anecdotal evidence indicates that superior officers are regularly present at the Control Center when the rank-and-file CO's enter the sally port, which would put them in a position of knowing whether the COs' arrivals were significantly in advance of the official start-times of the shifts. In some instances, higher-level managers have observed some of these activities.

Also, with respect to the CO's assigned to the Control 1 post, the presence of superior officers or managers during the pre-shift period would enable them to see two CO's assigned to that post working concurrently (even though they were on different shifts), because the incoming CO had arrived significantly early and the outgoing CO had not yet left). CO Middernacht testified that lieutenants and managers have seen him and the outgoing Control 1 CO working together in the Control Center before the official start of his shift.

The early arrivals have also been observed by Lieutenants in the Lieutenants' office. A number of the CO's indicated that they checked in with the Lieutenants on the way to their posts. CO Uzialko testified that she often encounters the lieutenant as she passes through the office on her way to the Housing Unit, well before her shift is due to start. This would make the Lieutenants aware that the CO's were regularly arriving in the compound well in advance of the scheduled start-times of their shifts.

Superior officers and/or Managers (including Warden Martinez) have also been able to observe the COs' seemingly-universal practice of picking up fresh batteries on the way in, and dropping off spent batteries on their way out. Indeed, superior officers indicated that they follow the same practice. Moreover, they have continued to adhere to that practice even after the Post Orders for the Compound 1 CO's were amended in September, 2007, so as to give them, rather than the

individual CO's, the nominal responsibility for picking up and returning batteries from and to the Control Center. The superior officers were well aware that the Compound Officers were not performing the *en masse* battery delivery/pick-up function and that the CO's, including the superior officers themselves, were continuing the pre-existing practice of picking up and dropping off their own batteries.

In addition to these two main points (early arrivals; battery pick-ups/drop-offs), there were some other instances in which CO's on particular posts and shifts were assigned to perform certain duties in advance of their scheduled start-times. This includes the day watch CO's on both the Compound 1 post and the Corridor 1 post, who, as previously noted, assume supervision of inmate work details at 7:45 a.m., 15 minutes before the official start-time (see, pp. 49 and 51, *above*). CO Bastian testified that the lieutenant on duty sees him preparing for the inmate work details before his shift "all the time."

Another example involved Tower 9. When it was a 16-hour post, the CO assigned to the AM watch (commencing at 6:00 a.m.) was assigned the task of delivering weaponry to the Tower during the half-hour preceding the official start-time his shift (see, p. 54, *above*).

Clearly, Management was fully aware of these regularly-scheduled pre-shift activities on these three posts. And, as previously discussed, Management was also aware that CO's were on the premises working before, and sometimes after, the official hours of their shifts. A number of CO's testified that supervisory officers had frequently seen them performing such work before or after their official shifts, and that they had never been instructed to refrain from working off-the-clock.

Several superior officers, including Capt. Wombeldorf and Lts. Engel and Dressler, confirmed that they have seen CO's working before or after their shifts.

They indicated that they did not question the CO's or tell them not to work while off-shift.

* * *

Warden Martinez, who bears the ultimate on-site responsibility for portal-to-portal requirements, indicated that he learned of the two pending grievances involving the Allenwood USP and the FCI shortly after his arrival (in September, 2007). However, he did not participate in the grievance-answering process.

In the first instance, when called as a witness by the Union, he indicated that he had not received any formal training with respect to portal-to-portal issues. However, when he was subsequently called as a witness by the Employer, he indicated that after coming to Allenwood, he had attended a regional training meeting for wardens, at which portal-to-portal issues were discussed.

Warden Martinez indicated that he had some general familiarity with portal-to-portal issues, not only as a result of the two grievances at Allenwood, but also because those issues have arisen throughout the various facilities of the USBP. Martinez also indicated that he had reviewed of the August, 2010 decision of Arbitrator Scola in the Allenwood FCI case (p.17, *above*). However, he indicated that he had not read the full opinion (52 pp.).²⁵

²⁵ The Union has also noted that Martinez previously worked at two facilities where portal-to-portal arbitration cases had arisen. He was a Unit Manager FCI Jesup between 1995 and 1997 – which was part of the "recovery" period in the *Jesup* case (p. 16, n. 4), which also involved CO's picking up and dropping off batteries on their way in and out of the institution.

Also, Martinez was an Associate Warden at USP Beaumont at or around the time arbitrator Bernard Marcus issued his decision in *FBP, Beaumont & AFGE*, FMCS No. 05-54516 (Marcus, 2006). That case also involved CO's picking up equipment, including batteries, on their way in and out.

Notwithstanding Martinez's presence at these two other facilities, he indicated that he was not familiar with the cases, insofar as his then-positions (Unit Manager and Associate Warden, respectively) did not include responsibility for such portal-to-portal issues.

Without regard to Martinez's familiarity (or non-familiarity) with the applicable legal principles, he did indicate that he was aware of the COs' practice of picking up and returning batteries at the Control Center on their way in and out of the USP. He further indicated that Management had never instructed the Control Center CO's to refrain from issuing fresh batteries to incoming CO's or to refrain from accepting spent batteries from outgoing CO's.

Martinez indicated that he was familiar with Program Statement P3000.03, including Part 610.1 governing shift starting and stopping times (p. 12, *above*). This included the requirements, set forth in ¶¶3-4, that the shifts should include reasonable travel time in the case of employees who pick-up equipment at the Control Center and that the Warden shall submit a plan for dealing with the same – which, if it involves an overlap in the schedules, must be submitted to the Regional Director.

When questioned by the Union as to whether he had formulated such a plan and/or submitted one to the Regional Director (which would be required if it involved overlapping shifts), Martinez indicated that he had not. He also indicated that since coming to Allenwood and learning of the two pending grievances, as well as the CO's practice of picking up equipment on the way in to the facility, he had not sought legal advice from the USBP or the US Department of Labor on the question whether the various facilities' pay practices were in compliance with FLSA/P-T-P requirements.

POSITIONS OF THE PARTIES

Union — the Union maintains that the Agency "suffered or permitted" CO's to work before and after their scheduled shift within the meaning of 5 CFR §551.104. "Suffered or permitted" work is that which is performed for the Agency's benefit, whether requested or not. Regardless of whether supervisors

directed CO's to perform it, the Agency is liable for payment for that work if supervisors knew or had reason to know that CO's were doing the work and could have prevented them from doing it.

Under the FLSA, the compensable continuous workday begins when the employee engages in the first activity that is "integral and indispensable" to his principal activities. An activity is integral and indispensable if it is made necessary by the nature of the work that employees perform. Even activities excluded from FLSA coverage by the Portal-to-Portal Act, such as traveling and preliminary and postliminary activities, are compensable if they take place after employees have performed compensable work. This "continuous workday" rule requires employers to compensate its employees for all activities that occur between the first and last integral and indispensable activities of the employee's workday. See, *IBP, Inc. v. Alvarez*, 546 U.S. 21, 32-33 (2005); see also, USDOL, *Wage and Hour Advisory Memorandum No. 2006-2* (interpreting *Alvarez*).²⁶

At Allenwood, the compensable continuous workday starts with obtaining equipment that is integral and indispensable to a CO's job. The Department of

²⁶ The memorandum provides in pertinent part as follows:

This memorandum advises staff of the state of the law after the Supreme Court's decision in *IBP v. Alvarez* ...

... the Supreme Court's central holding in *Alvarez* is that time spent after the beginning of the first principal activity, including time spent walking, is not affected by Section 4(a) of the Portal-to-Portal Act...and is therefore compensable. ...

Although the Supreme Court did not define "donning and doffing," the First Circuit [in the consolidated companion case of *Tum v. Barber Foods*, 331 F.3d 1 (2004)] held that donning includes the obtaining of equipment. ... That finding is consistent with the Department's long held view.

... Since, like donning, obtaining the gear (as opposed to waiting to obtain the gear) "is always essential if the worker is to do his job," the compensable day starts once the employee has obtained the gear required to be stored on the premises by taking an item out of a bin, a locker or another designated storage area. ...

Labor has long held the view that obtaining essential equipment is part of the continuous workday and is compensable. Also Part 610.1, ¶3 of the FBP's own policy requires its institutions to have shifts that "begin and end at the point employees pick up and drop off equipment ... at the control center."

Obtaining a charged battery from the Control Center is the first and last integral and indispensable activity that CO's perform. Each and every CO-witness uniformly testified that it is their practice to pick up a battery at the Control Center on the way to their post and drop off a dead battery at the Control Center after their shift. Some CO's obtain other equipment, but every CO in the institution picks up a freshly charged battery.

In this dangerous work environment, a working radio/body alarm is an absolute necessity, without which CO's cannot do their jobs. The Agency's attempt to minimize the importance of a working radio is disingenuous. The Agency itself requires CO's to constantly monitor the radio during their shift. The telephone is hardly a practical alternative, since CO's seldom have immediate access to a phone. In the **FCI Allenwood** case (p. 17, *above*), Arbitrator Scola rejected the Agency's effort to play down the importance of a working radio (Decision, p. 40 n.51).

CO's cannot rely on Compound Officers to deliver fresh batteries. Given the Compound Officers' numerous job duties, including escorting inmates, patting them down, conducting the ten-minute moves and generally ensuring institution security, it is impossible for them to simply drop what they are doing to deliver batteries. In the **FCI Jesup** case (p. 16, n.4, *above*), Arbitrator La Penna observed that CO's could not and should not rely on the Compound Officer to deliver a fresh battery (Decision, pp. 129-131).

The continuous compensable workday of CO's who work the Control Center #1 post begins when they arrive in the Control Center and ends when they

leave. During shift exchanges, the Agency suffers or permits the Control Center #1 officer to perform many necessary pre- and post-shift tasks. The evidence shows that the incoming CO starts working as soon as he steps into the Control Center, but unlike the outgoing CO he is not getting paid.

In federal prisons all over the country, many arbitrators have considered the exact same issue that is presented here and have ruled in favor of the unions. In those cases, as here, CO's picked up batteries and other equipment at the Control Center before each and every shift. In addition to the above-noted decisions involving FCI Allenwood and FCI Jesup, numerous other arbitrators have concluded that the COs' work day begins when they pick up the first piece of equipment, and that it ends when they return the last piece of equipment. **AFGE Local 420 & USP Hazelton**, FMCS No. 09-00421 (Vaughan, 2010); **AFGE Local 3979 & FCI Sheridan**, FMCS No. 08-522128 (White, 2010), 110 LRP 16651; **AFGE, Local 801 & FCI Waseca**, FMCS No. 07-53583 (Daly, 2010); **AFGE Local 83 & FCI La Tuna**, FMCS No. 06-0908-0524-1 (Curtis, 2009); **AFGE, Local 171 & FTC Oklahoma City**, FMCS No. 07-00183 (Shieber, 2009); **AFGE Local 1298 & FCI Fort Worth**, FMCS No. 08-51179 (Gomez, 2009); **AFGE Local 1242 & USP Atwater**, FMCS No. 05-57849 (Calhoun, 2008); **AFGE Local 1006 & FMC Carswell**, FMCS No. 07-04342 (Nicholas, 2008)²⁷; **AFGE Local 1741 & FCI Milan**, FMCS No. 010418-09332-8 (Allen, 2006); and **FCC Beaumont**, p. 56, n. 24, *above* (Marcus, 2006).

In many of these cases, as here, the relevant piece of equipment was the batteries for the radios. Significantly, the FLRA has upheld such an arbitral ruling with respect to batteries. See, **FCI Jesup**, *above* (May, 2009).²⁸ The FLRA

²⁷ The FLRA recently affirmed **Carswell**, in pertinent part. **FMC Carswell**, 65 FLRA No. 202 (June 29, 2011).

²⁸ In addition, although the point could not yet have been addressed in the Union's Briefs, (continued...)

found that obtaining a charged battery at the Control Center was integral and indispensable to the COs' principal activities; that the battery pick-up constituted the start of the continuous workday; , and therefore, that the Cos' subsequent travel to their assigned posts was also compensable.

After picking up a fresh battery, CO's uninterruptedly engage in necessary and mandatory job duties. Some obtain necessary equipment such as detail pouches. They flip over their accountability chit, and once inside the institution must be vigilant and ready to respond to emergencies at any moment as they walk to and from their posts. Management expects them to interact with inmates as needed and correct inmate behavior on the spot. Upon arrival at the post, CO's must spend time exchanging vital information and equipment with outgoing officers.

The Union met its burden of proving that CO's worked more than eight hours per day by producing representative witnesses for each post. It is reasonable to infer the total amount and extent of work from these witnesses. The Union need not produce every CO in the institution. It is appropriate for the Union to rely purely on testimony, since the Agency failed to maintain the required records of overtime actually worked.

The Agency failed to rebut the Union's case by presenting evidence of the precise amount of work performed, nor did it negate the reasonable inference to be drawn from the Union's evidence. The Agency cannot avoid paying overtime by placing the burden on the CO's to report every instance of overtime work. Under OPM regulations, it is the Agency that must exercise appropriate controls, not CO's.

²⁸ (...continued)

the Union would undoubtedly note that two other arbitral decisions involving battery pick-ups were recently affirmed by the FLRA (on June 29 and 30, 2011). See, **FMC Carswell**, n. 27, above; and **FCI Allenwood**, p. 17, n. 7, above.

The COs' practice of arriving early so they can start their shifts on time is hardly voluntary. Since CO's must pick up a battery, must walk to their posts, and must conduct a proper and timely relief, it is a mathematical certainty that they will work beyond their shifts. And because the shift exchange occurs as part of the continuous compensable workday, the Agency's *de minimis* defense is inapplicable. Once the continuous workday begins, the Agency must pay employees for all time that elapses between the first and last integral and indispensable activity, regardless of the time each discrete activity takes. Taken to its extreme, the Agency's argument would allow employers to whittle the continuous workday down to a series of "*de minimis*" segments.

Under the FLSA, an employer is liable for compensation if it has actual or constructive knowledge that employees are performing the work. It is indisputable that management at Allenwood has actual knowledge that CO's perform unpaid work before and after their shifts, because it requires them to perform the work and has seen them doing so. Management knows that CO's must pick up fresh batteries before their shift and drop off the dead batteries after their shift. Management officials as high as the Warden testified to that effect. Supervisory officers have observed CO's getting batteries at the Control Center, working on their way to their post, and exchanging information and equipment before and after their shifts.

Management has also assigned some CO's duties that can only be performed before the start of their scheduled shift, such as preparing for inmate work details. Finally, since management instituted the policies and practices that require CO's to work beyond their shift, management must have actual knowledge of the uncompensated overtime.

At a minimum, management should have known that employees were working before and after their shifts. It is common sense that CO's cannot

possibly pick up a battery at the Control Center, turn their accountability chit, walk at least ten minutes to their posts, and exchange equipment and information with the outgoing CO during shift hours when there is no scheduled overlap between shifts.

Indeed, the Agency's Program Statement (P3000.03, Pt. 610.1, *above*), as most recently revised in 2007, implicitly recognized this. Furthermore, any member of management that reviews the staff accountability board knows which CO's are in the institution before their shift. Management never instructed CO's not to do these tasks off-shift. Under both OPM and DOL regulations, the Agency had an affirmative duty to stop CO's from performing the work if it did not want to compensate them.

The Agency's argument that the Union waived its claims by failing to specify each and every activity that comprises the continuous compensable workday in its grievance is preposterous. The Agreement contains no such requirement. Rather, to invoke arbitration, Article 32(a) simply requires notification in writing of the issues involved, the alleged violations and the requested remedy. The Union's invocation fully complied with these mandates. It is immaterial that the Union did not reiterate its grievance at labor-management meetings, because the Agreement contains no requirement for ongoing attempts at informal resolution.

On the record of this case, liquidated damages are mandatory. Section 216(b) of the FLSA provides that an employer "shall be liable...in the amount of...[employees'] unpaid overtime compensation...and in an additional equal amount as liquidated damages." Section 11 of the Portal-to-Portal Act, 29 USC § 260, creates a limited exception to these mandatory liquidated damages if and only if the employer can prove both good faith and reasonable grounds to believe it was not in violation of the statute. "Good faith" requires more than ignorance of

or uncertainly about the prevailing law. Rather, the employer must take active steps to ascertain its obligations under the FLSA and move to comply with them.

The Agency cannot meet this heavy burden. The overwhelming evidence shows that even though the Agency knew that unpaid overtime was a significant problem at Allenwood, it did nothing to determine its obligation under the FLSA and comply. Warden Martinez was not aware of this grievance until the summer of 2010, and even then did not attempt to address the issues raised. The Warden's purported ignorance of the FLSA is particularly egregious given his previous assignments to institutions with the exact the same problems, not to mention the 2010 decision of Arbitrator Scola involving another security at the Allenwood FCC (the FCI). Even though Martinez is responsible for FLSA compliance, as of the date of the instant hearings, he had not even read that decision in its entirety.

Agency official Briggs' negligent program reviews at Allenwood in 2007 and 2009 exemplify the Agency's overall lack of concern for FLSA issues. Briggs utterly failed to gather any information that would enable the Agency to monitor FLSA compliance. He did not observe a single complete shift; he recorded times for CO's who were on leave; and he failed to observe CO's entering or leaving the institution at the actual beginning and end of their shifts.

On records that are far less damning than this one, arbitrators have awarded liquidated damages. See, ***FCI Allenwood***, above, at 50-51; ***FTC Oklahoma City***, above, at 35-36; ***AFGE Local 1034 & USP Pollock***, FMCS Case No. 06-56077 (Wetsch, 2008), at 8; ***FCI Fort Worth***, above, at 28; ***FMC Carswell***, above, at 13.

For the same reasons that the Union is entitled to liquidated damages, the contractually-incorporated FLSA statute of limitations should be extended so that bargaining unit employees receive relief for three years preceding the filing date of the grievance. The statute extends the ordinary two-year limitations period to

three years if the employer's violation is "willful." The Agency misguidedly argues that the 40-day limit of Article 31(d) precludes this, but the last sentence of that provision clearly and expressly states that the statutory time limit applies to grievances brought under a statute. Arbitrator after arbitrator has rejected the Agency's strained interpretation of Article 31(d). **AFGE 1030 & FDC Houston**, FMCS No. 02-16247 (Gomez, 2005); **Allenwood FCI**, p.17, n. 6, *above*; **AFGE Local 506 & FCC Coleman**, FMCS 03031807888-3 (Anderson, 2004); **AFGE, Local 919 & USP Leavenworth**, FMCS No. 01-08257 (Gordon, 2003); **AFGE, Local 2001 & FCI Ft. Dix**, FMCS No. 01-823-15274-7 (Weinstein, 2003); **USP Pollock**, *above*.

Moreover, the FLRA adopted the Union's interpretation of Article 31(d) in **AFGE, Local 3882 & BOP, FCI Ray Brook**, 59 FLRA 469, 471 (2003), noting that "the last sentence of Article 31, Section d provides that where a particular statute establishes longer time limits for claims filed under that statute, those time limits, rather than the 40-day contractual limit, shall apply under the grievance procedure."

A violation of the FLSA is willful if the employer knew its conduct violated the FLSA or showed reckless disregard for the requirements of the statute. To prove recklessness, the Union need only demonstrate that the Agency should have inquired further into whether it was in compliance with the FLSA, but did not. By the neglectful conduct described above, the Agency showed both willful and reckless disregard for the overtime provisions of the FLSA. The Agency has created a system that manifestly requires CO's to work overlapping shifts, but obstinately refuses to pay them for the overlap. Even if not willful, that action was in reckless disregard of the Agency's obligations under the FLSA.

As a remedy, the Union asks that the arbitrator conclude that for CO's assigned to the posts at issue, the continuous compensable workday begins when

the officers obtain a charged battery or other equipment from the Control Center and ends when the officers returned a spent battery or other equipment to the Control Center. For the Control #1 post, the day begins when CO's begin the information and equipment exchange before their shifts and ends when they conclude same after the end of their shifts.

The arbitrator should further order CO's to be paid at time and one-half their regular rate of pay for the following number of minutes:

- Control #1: 21 minutes per shift
- Housing Units: 26 minutes per shift
- Compound #1 and #2: 23 minutes per shift
- SHU #1 and #2: 26 minutes per shift
- Corridor #1: 24 minutes per shift
- Tower #9 (24-hour post): 24 minutes per shift, or
- Tower #9 (16-hour post): 15 minutes per shift

The arbitrator should also order the Agency to pay liquidated damages equal to the employees' back pay. In accordance with §255(a) of the FLSA, back pay and liquidated damages should be retroactive to August 13, 2004, which is three years before the date the grievance was filed, and continue through the present. Additionally, the arbitrator should order payment of reasonable attorneys' fees and costs in accordance with 29 U.S.C. §216(b). The Union will submit its petition for attorneys' fees and expenses within 30 days of the date the Arbitrator issues an Order on Damages.

The arbitrator should order the parties to attempt to agree on the damages owed within sixty days from the date of the award, and should retain jurisdiction to decide the issue of damages in the event the parties are unable to agree.

Employer — Under Article 32(a) the Union may arbitrate only those issues that it expressly raised in the grievance. During the entire statutory period

preceding the grievance, the Union knew or should have known about all the FLSA issues that it raised for the first time at arbitration. Yet the Union did not mention them in its grievance, nor at any meetings of the labor-management relations committee.

The grievance made no claim for time spent "donning and doffing," walking to and from posts, obtaining keys, handling inmate funds for after-hours release, or responding to emergencies pre- and post-shift. If the Union truly believed that the overlapping shifts implemented on July 19, 2007 did not meet the requirements of the Program Statement, surely it would have specified the purported inadequacies in the grievance or during the LMR process. But the record is clear that the Union only raised the battery pickup, which management simply declined to compensate (based upon its views that this activity was not "required," as discussed further, *below*).

Therefore, the Union's only properly presented claims are relief for the pick-up and drop-off of batteries and detail pouches, for shift turnover on the posts, and retrospectively for the AM and PM shifts. The grievance expressly excluded any claim for prospective relief on the AM and PM posts, seeking only retrospective relief from the beginning of the statutory period to the effective date of the overlapping shifts.

The Union knew or should have known of any FLSA claim in connection with the AM/PM Tower shifts as early as August 2005, well before the 40th day preceding the grievance. CO Middernacht, a member of the Union's Executive Board, worked many AM shifts in Tower #7 in 2005. CO Bastian worked AM shifts in the towers in 2005, 2006 and 2007; CO Reed worked Tower #9 PM shifts in 2006 and 2007, and CO Couch worked the Tower #9 shift from March through June, 2007.

The Union did not meet its burden of proof to establish entitlement to overtime. To establish a *prima facie* case under the FLSA, the Union must produce sufficient evidence to show the amount and extent of uncompensated work as a matter of just and reasonable inference. Except for the Control #1 post, the Union only showed an aggregate amount of time for pre- and post- shift activities. It did not prove its claim that "each and every" officer invariably picks up and drops off a battery. Even assuming that the Union made a *prima facie* case, the Agency rebutted it with the Daily Assignment records, showing the precise hours worked by the Union's witnesses, as well as evidence that the tasks at issue were *de minimis*, non-integral and/or non-indispensable.

Contrary to the Union's contention, the negotiated 2007 Program Statement actually precludes compensation. Part 610.1, ¶2 expressly indicates that coverage is limited to "institution employees who are **required** to pick up keys or other equipment while passing through control on their way to their assigned duty post." There is no requirement for CO's to pick up or drop off a battery at the Control Center.

If the Union at the national level had truly believed that picking up a battery was integral and indispensable to the job of a CO, it would have insisted on listing batteries in the Program Statement; however, the only equipment specifically referenced in Part 610.1, ¶3 is "keys, radios, body alarms [and] work detail pouches;" batteries are not mentioned. The doctrine of *expressio unius est exclusio alterius* forces the conclusion that neither party perceives picking up or dropping off a battery to be "work." If some officers voluntarily pick up or drop off a battery at the Control Center, that does not create FLSA liability.

Even if they are integral and indispensable, *de minimis* preliminary activities do not start the continuous compensable work day. If the Union's litany of purported preliminary and postliminary activities were more than *de minimis*, the

Union would have mentioned them in the grievance or the LMR process. The simple act of flipping the accountability chit in the sally port on the way into the institution is tantamount to checking in and therefore not compensable under the FLSA. Stopping in at the Lieutenant's office before reporting to the post is *de minimis*.

That CO's must remain vigilant as they walk across the compound to their posts, and that they must respond to emergencies whenever they are in the institution, does not make those activities compensable. The absence of any claim in the grievance for those activities corroborates the supervisors' consistent testimony that CO's do not engage in them. The General Post Order that CO's must "correct violations...even if observed...outside the normal work area" does not establish an FLSA claim where supervisors credibly testified that employees simply do not do this during their cross-compound commutes. In any event, under the Portal-to-Portal Act, the presence of danger in an on-site commute is not compensable under the FLSA.

Time measurements in FLSA cases are based on a "reasonable time" to perform the task in question. The Agency's evidence, including the credible testimony of supervisors, showed that shift changes on posts take five minutes or less; therefore, they are *de minimis*. Any time used for voluntary social conversation is not compensable.

The SHU #1 officer is not entitled to compensation for surreptitiously drawing an extra cell door key. He has no use for that key, and possessing it is a violation of policy. Similarly, the Tower #9 officer should not receive compensation for unnecessarily drawing the 549 key when other staff are available to open the slow-down fence. There is no reason for any officer on the Morning Watch to pick up a detail pouch at the Control Center, since according to the post orders it

is the Compound Officer's job to deliver the detail pouches during the Morning Watch.

The Union did not establish that management knew of the COs' pre- and post-shift activity. The most that can be said is that some supervisors knew that some CO's picked up and dropped off batteries at the Control Center; that on rare occasions a CO might enforce minor rules while walking to their shift; that CO's sometimes responded to emergencies pre- and post-shift, and received compensation if they applied for it; that some CO's engaged in a voluntary practice of early relief (including the Compound Officer, who voluntarily began the morning shift at 7:45 AM to supervise a work detail); and that all CO's briefly exchanged information and equipment during shift change. None of those activities are compensable under the FLSA because they are either *de minimis*, or not integral and indispensable to principal activities, or were only occasional events, or were otherwise compensated.

In any event, Article 31(d), sentence [1] of the Agreement restricts any FLSA liability to the 40 days preceding the grievance. The subsequent reference to the "statutory period" in sentence [4] is not an exception to the 40-day rule of sentence [1]; rather, it serves as an exception to the "life of the contract" rule set forth in sentence [4]. This is the only interpretation of Article 31(d) that gives meaning and effect to the entire provision. The Union's interpretation effectively cuts the reference to the "statutory period" from the end of the fourth sentence, where it appears, and seeks to paste it onto the end of the first sentence. This leaves the first three sentences of §(d) completely nugatory, because grievances could be filed at any point, for any matter, at any time during the life of the Agreement.

Although the Employer disputes its liability for any damages herein, it further submits that the narrowness of the Union's grievance, and its profound

silence during the labor-management process, should preclude any award of liquidated damages. Since management was unaware of any FLSA issue before July 2007, it cannot possibly have willfully violated the FLSA. The Arbitrator should strictly limit any remedy to matters specifically alleged in the grievance.

DISCUSSION and DECISION

Introduction / Overview

At the present time – well into the second decade of the 21st century – the "portal to-portal" issues presented by the instant grievance bring us into relatively well-chartered waters. In 1995, AFGE's Council of Prison Locals filed a national grievance raising portal-to-portal issues, which led to a national settlement agreement in the year 2000. The issues have also been treated in various revisions of Part 610.1 of the FBP's Program Statement P3000.03.

Perhaps, if the FBP had applied the settlement agreement and Program Statement more diligently, the portal-to-portal issues would have been put to rest. Instead, numerous FBP facilities have persisted in their use of non-overlapping shifts to cover 24-hour posts, leading to ongoing FLSA/Portal-to-Portal violations, which have been considered in a host of grievance arbitration decisions, as well as FLRA decisions, which have been largely consistent and largely favorable to the various AFGE locals which were involved.

Strictly speaking, since none of these precedents involved this particular facility (USP Allenwood) and this particular Local of the AFGE (No. 307), principles of *res judicata* would not govern the result herein. Nevertheless, since those cases involved other FBP facilities and other AFGE Locals which are subject to the very same Master Collective Bargaining Agreement, such a well-established body of precedents would likely be viewed as persuasive, in the absence of facts which would distinguish the present case from the prior cases.

On the evidence and arguments presented herein, I am unable to find the instant case distinguishable from many of those involved in the cited precedents. Thus, as will be considered in more detail in ensuing portions of this opinion, I have followed those precedents, resulting in rulings in the Union's favor.

I. PRELIMINARY ISSUES

A. Specificity and Scope of Grievance

The Employer has suggested that the grievance and/or demand for arbitration did not raise a number of the specific elements of the Union's portal-to-portal claim as presented in arbitration (as indicated in the above-noted summary of the Employer's Position, pp. 68-69, *above*). In response, the Union submits that its grievance and demand for arbitration adequately identified the issues, in accordance with Article 32.a., and that it was not further obliged to specify each and every activity that comprises the continuous compensable workday.

In my view, the FLSA/Portal-to-Portal issues have been properly raised, at the pre-grievance stage (the August 3, 2007 request for "informal resolution;" pp. 17-18, *above*); the grievance stage (the August 13, 2007 grievance; pp. 18-19, *above*); and the arbitration stage (the October 2, 2007 invocation of arbitration; pp. 19-20, *above*). Whether viewed individually, or in combination, these "pleadings" fairly apprised the Employer of the Union's basic claim – that overlapping shifts had not been officially implemented and, in the absence thereof, that employees were being required to perform at least 30 minutes of uncompensated essential work each day. In addition to the basic claim, these "pleadings" did reference a number of specific duties/activities, including picking up and returning equipment (such as batteries); change-of-shift information exchanges and related activities. In my view, this complied with the only applicable contractual require-

ment, as set forth in Article 32.a. There was a sufficient "statement of the issues involved." *Accord, FCI Sheridan*, p. 62, *above* (Decision, p. 7).

These pleadings could not yet raise issues involving the security-screening procedures, since they were not implemented until January, 2008. While it might have been better practice for the Union to amend its grievance in light of this operational change, I do not believe its failure to do so precluded it from raising FLSA/Portal-to-Portal claims involving that aspect of the operation, as long as those new claims were the same or similar to those previously raised – which is true herein. In any event, the issue may be largely academic, insofar as the Union has effectively waived any claims involving the security-screening or the subsequent donning of belts in the security screening room (*see*, p. 22, n. 11, *above*).

* * *

The Employer has also intimated that some form of preclusion might be appropriate here in view of the Union's claimed failure to adequately raise the issues in the informal resolution process and/or in the meetings of the joint Labor-Management Committee. However, it is not clear whether such efforts are a precondition to the subsequent filing of a grievance. In any event, the Union did raise the issues informally in its above-noted August 3, 2007 informal resolution letter. Moreover, both parties remained free to invoke informal resolution procedures at any point before the instant grievance proceeded to hearing (and even beyond that, if they were so inclined, up to the point that the instant Decision was issued) – a point that was well-noted by Arbitrator Scola in the *FCI Allenwood* case, which involved an adjacent Allenwood FCC facility (Decision, pp. 41-42). Indeed, as previously noted, the rendering of that decision, on essentially similar facts, should have provided an impetus for the parties to resume their informal resolution efforts.

In any event, I am unable to conclude that anything which occurred or failed to occur during the informal resolution process is sufficient to preclude the Union from pursuing the merits of its claims.

B. The Duration of the "Recovery" Period

We previously noted that Article 3.d. of the Master Agreement "contractualizes" statutory claims. This alone might have been sufficient to permit FLSA claims to relate back two or three years, consistent with the statute of limitations set forth in §255(a) of the Portal-to-Portal Act (pp. 6-7, *above*).

However, as has been noted in several of the prior FBP arbitrations, as well as FLRA decisions, the Master Agreement includes another provision which seems to indicate that a statutory period of limitations will "trump" the shorter 40-day limit which applies to non-statutory grievances – Article 31.d.[4].

The Employer's contrary argument is not implausible. The reference to the statutory period appears in sentence [4], which deals with the life of the contract; it does not appear in sentence [1], which sets forth the 40-day limit. If this were a matter of first impression, there might be some merit to the Employer's argument.

However, it is no longer a matter of first impression. Rather, the arbitral and administrative precedents have uniformly favored the unions' interpretation – that the statutory time limit takes precedence over the 40-day limit for non-statutory grievances. See, e.g., ***FCI Sheridan***, ***USP Pollock*** and ***FCC Beaumont***, *above* (as well as the other arbitration cases cited by the Union, at p. 67, *above*). See also, ***FCI Ray Brook*** (p. 67, *above*) and ***FCI Milan***, 62 FLRA 113, at 118 (2007), in which the FLRA indicated that the statutory time limit was applicable. It may also be noted that Arbitrator Scola applied the three-year statutory limit in ***Allenwood FCI*** (Decision, p. 51). When the matter proceeded to the FLRA (p. 17, n. 7, *above*), it does not appear that the Agency contested that aspect of the arbitrator's ruling.

Based upon these precedents, I conclude that the statutory time limit is applicable. However, I will defer to the Remedy section of this opinion the determination whether to apply the two-year limit or the three-year limit.

II. THE DE FACTO EXTENSION OF THE GRIEVANTS' WORK DAYS

The situation of the CO's assigned to interior posts, within the secure perimeter of the compound, is different from that of the CO's assigned to the Control 1 post at the Control Center. Thus, we will afford separate consideration to those groups of posts.

A. The Interior Posts

1. The Aggrieved COs' Performance of Extra Work That is Integral and Indispensable to Their Principal Work Activities

There are two separate, but inter-related aspects of the operational situation at USP Allenwood, which have effectively resulted in the aggrieved CO's being forced to work extended shifts which endure for approximately 15 to 30 minutes more than their nominal eight-hour shifts. The first operational factor leading to this situation involves the need for freshly-charged radio batteries to be delivered from the Control Center to the posts – where the radios are located (and the inter-related return of the spent batteries from the posts to the Control Center). The second operational factor is that a certain amount of time is required to effectuate a change of shift, which is difficult, if not impossible to accomplish when non-overlapping eight-hour shifts are used to cover each 24-hour work day.

Notwithstanding the requirements of Part 610.1 of the Human Resources Management Manual, Program Statement P3000.03 (pp. 12-13, *above*; hereinafter "HRMM 610.1"), USP Allenwood, just as many other FBP facilities, has refrained from scheduling overlapping shifts on 24-hour posts, based on what I might term the fictional notion that a change-of-shift may be accomplished on an instantaneous basis (*see*, p. 81, n. 29, *below*).

That might be true at some other workplaces with rapid and unrestricted access from the entry point to the employees' actual work sites. But USP Allenwood presents the antithesis of that optimal scenario. Even assuming for the moment that it would be proper to ignore the issue of equipment pick-ups and drop-offs at the Control Center, passage from the administration building, through the Control Center, and thence to the posts, is neither rapid nor unrestricted. Rather, as is appropriate for a maximum security prison, the access is slow and restricted by at least three sets of locked sally ports or doors. Moreover, the distance from the Control Center to even the nearest of the posts is not short. And the most distant posts, such as Housing Unit 1B, are relatively farther away – perhaps several hundred yards.

In these circumstances, irrespective of any equipment pick-ups or drop-offs, ¶6.b. of HRMM 610.1 indicates that relief posts may have to be overlapped insofar as "employees must be given time to arrive later and leave posts earlier to be at the control center on time." The provision goes on to indicate that "the length of time necessary to provide the overlap depends on the post location and the reasonable travel time to and from the control center to that post." In and of itself, this provision indicates that the use of non-overlapping shifts was not appropriate for the relief posts at issue herein.

Other portions of HRMM 610.1 impose similar requirements with respect to overlapping posts when employees are required to pick up and drop off equipment at the Control Center (¶¶3 and 4).

In combination, these two sets of requirements, in light of the operational situation, demonstrate that overlapping shifts should have been utilized. Instead, due to management's inaction, both in terms of arranging an official overlap in the shifts, and/or arranging for some other method of delivering and removing batteries from the posts, the CO's themselves were forced into devising *de facto*

overlapping shifts, and they were also forced to continue to make their own deliveries and drop-offs of their radio batteries.

Management's inaction in these two areas created a vacuum, which has been filled by the CO's, who have acted in an altogether responsible and conscientious manner to ensure that timely relief at the end of the shift will be provided, and to ensure their own safety by arranging for the delivery of freshly-charged batteries to the on-post radios. We will consider the methods utilized by the CO's momentarily.

At this point, however, it may be interesting to examine the question whether more proactive initiatives by management might have obviated the need for the CO's to resolve the issues themselves. As discussed *below*, the applicable regulations and precedents indicate that management is obliged to be proactive in this area, lest it ends up paying for work which it could have prevented from being performed. It is somewhat ironic, perhaps, that the Employer has argued that this grievance impinges upon its management rights, under Article 5, to determine methods of operation. One of those management rights is to determine what work the employees will perform and when it will be performed.

If management had taken affirmative steps to manage these two aspects of the operation, we might well not be here today, issuing a decision on this grievance. If another way of effectuating battery deliveries and pick-ups was available, management should have implemented it (rather than running the risk that it would have to pay the CO's for making such deliveries and pick-ups during their *de facto* extended work days). If management did not want to enjoy the benefits of the work which the CO's performed during their *de facto* extended work days, it should have implemented some other method for effectuating the change-of-shift (whether that be overlapping shifts, or a strict directive against early arrivals, which was strictly enforced).

With respect to the possible need for overlapping shifts, Management did implement a 15-minute overlap in the case of the 16-hour posts using AM/PM shifts. This effectively changed those posts to 15 ³/₄-hour posts (with the shortfall occurring at the end of the PM watch). But a continuous 24-hour post, with three straight eight-hour shifts is not amenable to such an "easy fix." If each shift is advanced by 15 minutes to provide the necessary overlap, the full 24-hour day will not be covered (presumably, an unacceptable operational situation). Overlap can only be achieved in such an around-the-clock coverage situation if the basic shifts are longer than eight hours (possibly including an unpaid, duty-free meal period, which would present further scheduling problems of its own).

Admittedly, this is not an easy issue to solve. But here, management has abdicated its responsibility of taking charge of the situation. Instead of dealing with the situation, management has allowed responsibility for an effective change-of-shift to devolve, by default, to the CO's.

The same holds true with respect to the battery delivery and removal function. If the Compound 1 CO's were less busy, they might well be able to perform that task, consistent with the September, 2007 revision of the post orders (discussed at pp. 33-34, *above*). Alternatively, management might be able to find some other employees who could perform that task. Once again, however, management has failed to act. It has not actually required the Compound Officers to perform the purported battery delivery/removal activity. Nor has management assigned any other employees to perform that task.

While the above analysis indicates how the two issues might have been handled by a more proactive management, the evidence indicated that no effective "real world" action was taken with respect to either issue.

At the same time, however, in what could be viewed in the vernacular as an attempt to "cover one's ass," management did take certain actions, which, at least

"on paper," might make it look like it was taking charge. Shortly after the filing of the instant grievance, management did see fit to revise the applicable post orders, for all the relief posts, paying lip service to the idea that incoming CO's should not be working until the outgoing CO's are relieved, and that the post orders are mere guidelines and do not constitute "orders to work before or after regularly scheduled shifts." Notwithstanding these lip-service pronouncements, in the "real world," management has not taken affirmative steps to prevent the CO's from performing work before their shifts.

Similarly, as just noted, while the post orders for Compound 1 were revised at the same time (a month after the grievance), assigning them nominal responsibility for en masse battery deliveries and removals, that purported requirement was never enforced in the real world.

In the face of this managerial inaction, the CO's have taken it upon themselves to devise *ad hoc* methods for handling both issues.

Since, as previously noted, an instantaneous change-of-shifts is impossible²⁹ due to the physical layout of USP Allenwood, the aggrieved CO's on the 24-hour relief posts, notwithstanding their nominal "straight-eight" schedules, have followed the practice of reporting to work a half-hour or more in advance of their shifts (as discussed in Background Section B.3, *above*). This has created *de facto* overlapping shifts, with at least 15 minutes of overlap occurring prior to the official end-time of the outgoing shift (which also constitutes the official start-time of the incoming shift).

²⁹ Several of the arbitrators considering these issues have commented on the impossibility of achieving what I have termed "instantaneous" changes-of-shift. They have suggested, as I believe, that in the real world, some overlap between the shifts must occur, without regard to whether management sees fit to officially recognize and schedule it. See, e.g., **USP Hazelton**, *above* (Decision, p. 95; "Inevitability of Shift Overlap"); **USP Pollock**, *above* (Decision, pp. 7-8); **FCC Beaumont**, *above* (Decision, p. 23; "The contention that there is no overlap defies logic."); **FCI Sheridan**, *above* (110 LRP 16651, at p. 17; "In a sense, the eight-hour shift for [CO's] at ... Sheridan ... is a fiction").

And the CO's have also continued their pre-existing practice of picking up fresh batteries at the Control Center on their way in to work, and delivering the spent batteries back there at the end of their shifts.

Nevertheless, management seeks to avoid financial liability for these work activities. With respect to the early arrivals, management has argued that the COs' actions are strictly voluntary and that it should not be held financially responsible for them. With respect to the battery pick-ups and drop-offs, management has argued that these actions were not mandated or required, since they could have been performed by the Compound Officers.

In my view, these "defenses" do not pass muster under the applicable regulations which implement the FLSA, nor the arbitral and administrative precedents under the Master Agreement.

With respect to the *de facto* overlap during the change-of-shift period, the supposedly "voluntary" actions of the CO's have been undertaken because they, unlike management, have recognized that adherence to the official start-times would make it impossible for the official end-times to be adhered to. If CO's on the day watch started reporting to the Control Center at 7:55 a.m. (much less 7:59 a.m.), they would not be able to provide timely relief to their outgoing mates on the morning watch (whose scheduled end-time is also 8:00 a.m.).

In that sense, the CO's "voluntary" use of these *de facto* overlapping schedules (based on early arrivals by the incoming CO's), actually constitutes a form of involuntary action – since it is necessary to ensure timely relief of the outgoing CO's. In either event, however, the practice benefits the institution. Yet management, while sitting back and enjoying the fruits of the COs' labor, maintains that it is not obliged to pay for it. This is contrary to several of the cited regulatory provisions.

Management knew, as well it should have, that the CO's were following this early arrival practice. Without regard to whether management requested the CO's to do so, management took no steps to prevent that work from being performed. In that sense, it has "suffered or permitted" the work within the meaning of 5 CFR §551.104 (p. 7, *above*), since it knew it was being performed; it knew that work was of benefit to the Agency; it had an opportunity to prevent the work from being performed; but it declined to avail itself of the opportunity to do so. These actions were also contrary to 29 CFR §785.13 (p. 10, *above*), indicating that management has the duty to "exercise ... control to 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."

I believe the same analysis is applicable with respect to the battery pick-ups and drop-offs, since management was aware that the CO's were performing this work on a continuing basis (both before and after the nominal revision of the Compound 1 CO post order, nominally giving them the responsibility for this task).

The Employer has disputed the applicability of HRMM 610.1. It argues that ¶¶3 and 4 are not applicable because USP Allenwood does not "require" employees to pick up or drop off batteries (within the meaning of ¶2). It also argues that ¶3 limits itself to certain specified types of equipment (keys, radios, body alarms and work detail pouches); whereas there is no reference to the batteries. I do not believe that either of these arguments is meritorious.

The negative implication which the Employer seeks to draw from the omission of an explicit reference to batteries in the list of equipment set forth in ¶3 ignores the fact that the battery is an essential part of one of the listed items (the radios). In any event, the final word of the listing – "etc." – indicates that the list is not all-inclusive. Rather, "etc." connotes that other like items of equipment would be covered. Here, since the battery is an indispensable portion of one of the

explicitly listed items (the radios), and since the provision includes the word "etc.," I conclude that radio batteries are covered, just as much as the radios themselves.

The Employer's other argument is based upon an unduly narrow reading of the word "required" (in ¶2). It is true that the Employer has not issued a written mandate which requires CO's on relief posts to pick up and drop off batteries. Indeed, as previously noted, the post orders for the Compound 1 CO, purport to give them that responsibility. Thus, in that theoretical sense, one might say that the relief post CO's are not "required" to pick up or drop off batteries.

Nevertheless, in the "real world" situation which confronts the CO's each and every day, the Compound Officers are not delivering batteries to them. As a result, to ensure their own safety, they must take matters into their own hands, so to speak – which they do by picking up batteries on the way in, through the Control Center; then, to ensure a fresh supply of recharged batteries for subsequent CO's, they also return the spent batteries to the Control Center on their way out.

In terms of the preservation of their own safety, a paramount concern at USP Allenwood, as well as other FBP facilities, this activity must be viewed as "required" within the meaning of Part 610.1, ¶2. Charged batteries are essential to the proper operation of the radios, which, are admittedly, their "life-line," so to speak.

Thus, the time needed to pick up and drop off those batteries should have been taken into account in devising the COs' official shift starting and stopping times, pursuant to HRMM 610.1. Management violated that provision when it failed to do so. Moreover, in view of the applicable regulatory requirements and precedents, the picking up of the batteries should be regarded as the first integral and indispensable activity of their workday; and, conversely, the dropping off of

the batteries should be regarded as the last integral and indispensable activity of their workday. See, e.g., **Allenwood FCI**; **FCI Sheridan**; **FCI Jesup**; **USP Hazelton**; **FMC Carswell**; and **FCC Beaumont**, above. Moreover, as previously noted, three of those decisions involving battery pick-ups and/or drop-offs have now been affirmed by the FLRA. See, **FCI Jesup**, **FMC Carswell** and **Allenwood FCI**, above.

Since, as discussed in sub-section II.A.2., below, the overall time which the aggrieved CO's spend on both of these inter-related work tasks (early arrivals in furtherance of shift change; battery pick-up and delivery) exceeds their nominally-scheduled eight-hour workday by far more than ten minutes per day (it's more like 15-30 minutes per day), it is beyond the limits of the 10-minute *de minimis* rule/exception set forth in 5 CFR §551.412(a)(1) (if applicable). As a result, the Employer was obliged to credit all of the time spent on both these activities as part of the COs' continuous workday.

The Employer has raised a factual issue with respect to the battery pick-up and drop-off work. It suggests that the practice is far less universal than the supposedly "representative" testimony of the eight Union witnesses might suggest. It bases this argument on the contrary testimony of four Lieutenants (pp. 34-35, above), indicating that only 20%-50% of the CO's pick up and return batteries from the Control Center.

While, on the one hand, the Lieutenants did present those estimates, we must note, on the other hand, that none of the Lieutenants disputed the testimony of the eight Union witnesses, which, as I understood it involved not only their own practices, but those of their fellow CO's.³⁰ Nor did the Lieutenants identify any particular CO's who failed to pick up or drop off batteries. Nor did they indicate

³⁰ At least three of the CO's who testified (Middernacht, Rearick and Reed) have worked at the Control Center. Thus, they had first-hand knowledge of the other COs' battery-drawing practices.

the manner in which the CO's who allegedly failed to pick up batteries were able to keep their radios functioning during their shifts (in view of the Compound Officers' limited ability to perform beginning-of-shift battery-delivery functions).

In these overall circumstances, while I might otherwise hesitate to generalize or "universalize" a claimed practice, in the absence of particularized evidence to the contrary (beyond unsupported estimates), I conclude that the Union's evidence was sufficient to establish that all the grievant CO's did pick up and drop off batteries on their way in and out of the USP.

Since the battery pick-ups and drop-offs define the outer limits of the COs' continuous work day, that also means that the "walk" time, as well as the time for the change-of-shift activities, is also compensable, since it falls within the continuous work day. See, e.g., *FCI Allenwood*, above.³¹ Thus, we need not decide whether, in and of themselves, the travel time spent on "the walk," as well as the time spent on the change-of-shift activities, viewed in isolation, would be considered compensable (rather than a *de minimis* exception).

2. The Duration of the Aggrieved COs' Extra Work

With the exception of some of the regular housing unit posts, for which there was some security camera footage of the arrival and departure times at the unit (but not the Control Center), the evidence as to the amount of extra time worked by the aggrieved CO's on the interior posts at issue was largely anecdotal – based on the COs' recollection of their reporting and departure times.

Since, as previously noted in sub-section II.A.1, the CO's on these posts pick up and drop off batteries at the Control Center, their continuous workday is measured based on their arrival and departure times at that location (rather than

³¹ In its recent affirmance of this aspect of the arbitrator's decision, the FLRA noted that travel time occurring after the battery pick-up was compensable as part of the continuous work day. It distinguished *USP Terre Haute*, 59 FLRA 327 (2003), where the travel occurred before the start of the continuous work day.

those at their units). As a result, the amount of time that is required to perform change-of-shift activities at each post is less relevant (except to the extent that it affects the entry and departure times at the Control Center). Thus, in the ensuing sub-sections involving the individual posts, we need not focus on the exact duration of the in-unit change-of-shift process.

With respect to the anecdotal evidence as to the overall duration of the shifts, we should note, in the first instance, that we would not now be in a position of having to guess whether the anecdotal evidence as to the extra work time was accurate, if the Agency had kept complete and accurate time records, as is required by 5 CFR §551.402(a) – such as those provided by a time-clock, or, in the absence of a time-clock, by a recording of the times shown on the security camera footage at the Control Center. Since the Agency, rather than the Union, is obliged to maintain these records, in their absence, anecdotal evidence presented by the employees, or other forms of evidence, while arguably less precise, may be utilized to determine the duration of the employees' work-time. *See, e.g., FCI Jesup, above* (Decision, pp. 145-146 *et seq*); *FCC Beaumont, above* (Decision, p. 18 *et seq*).

(a) Regular Housing Units

There is relatively more information about the arrival and departure times of the CO's in these units because of the existence of security camera footage which establishes the duration of the in-unit change-of-shift process, and, in one instance, the overall in-unit duration of one CO's shift.

The Union has claimed, on average, that the uncompensated overlap is 26 minutes – based on arrival times at the Control Center that are 40-45 minutes early and departure times that are 15-20 minutes early. It is said that this produces overall workdays ranging from eight hours and 20 minutes to eight hours and 30 minutes (that is, 20 to 30 minutes of extra time).

The relatively short duration of the on-unit change-of-shift process, as revealed in the twelve pairs of pictures from the security cameras, does not speak directly to the overall duration of the COs' shifts (as measured at the Control Center). However those pictures do provide a check on the accuracy of the anecdotal evidence, because we know that the walk from the Control Center to the posts is approximately ten minutes. Thus, we can extrapolate the time of the incoming COs' arrival at the Control Center (by subtracting ten minutes from their in-unit arrival times); and we can extrapolate the time of the outgoing COs' departure from the Control Center (by adding ten minutes to their in-unit arrival times).

We have already noted (at pp. 43-44, *above*), that the incoming CO's arrived at their units 27 to 39 minutes early. This means that they would have arrived at the Control Center approximately 37 to 49 minutes early. These figures are quite consistent with the figures provided in the anecdotal testimony (40-45 minutes).

The security camera photos also indicated that the outgoing CO's left their units 24 to 37 minutes early. This means that they would have arrived at the Control Center approximately 14 to 27 minutes early. While the lower figure is consistent with the figure provided in the anecdotal testimony (15 minutes), the higher figure is not.

In these overall circumstances, I will accept the 40-45 minute early arrival figures of the anecdotal testimony (which averages out to 42.5 minutes), since it is corroborated by the security camera photos. With respect to the departure times, there is a conflict. I will accept a reported range of 15 to 25 minutes, which averages out to 20 minutes. This means that, on average, the overall duration of the shifts for the Housing Unit CO's is eight hours and 22.5 minutes – meaning

they worked 22.5 extra minutes on each workday ($42.5 - 20 = 22.5$).³²

(b) Special Housing Unit 1 and 2

The anecdotal arrival and departure information for these posts was the same. Thus, I will treat both posts in the same manner.

The Union has claimed, on average, that the uncompensated time is 26 minutes – based on arrival times at the Control Center that are 40-45 minutes early and departure times that are 20-25 minutes early. It is said that this produces overall workdays ranging from eight hours and 20 minutes to eight hours and 35 minutes (that is, 20 to 35 minutes of extra time).

In this instance, there is no other evidence as to those times. However, it does appear that there was a minor error in computing the extra time of one of the CO's (which should have been 20-25 minutes, rather than 25-35 minutes). As a result, the actual range should be 20-25 minutes for both of the CO's who testified as to this unit. I will accept the average figure of 22.5 minutes.

(c) Compound 1 and 2

Once again, the anecdotal arrival and departure information for these posts was essentially the same. Thus, I will treat both posts in the same manner.

The Union has claimed, on average, that the uncompensated time is 23 minutes – based on arrival times at the Control Center that are 40 minutes early and departure times that are 15 to 20 minutes early. It is said that this produces overall workdays ranging from eight hours and 20 minutes to eight hours and 25 minutes (that is, 20 to 25 minutes of extra time). In the absence of any evidence to the contrary, I will accept the 23-minute average suggested by the Union.

³² This means that the time for CO Coolidge on November 18-19, 2010 (p. 44, *above*) – eight hours and 14 minutes on unit, which extrapolates to 8 hours and 34 minutes in and out of the Control Center – was at the higher end of the reported range. While his extra work time on that shift was higher than the above-noted average, it does tend to demonstrate that the 22.5 minute average is not an artificial figure; the work time is real.

(d) Corridor 1

The Union has claimed, on average, that the uncompensated time is 24 minutes – based on arrival times at the Control Center that are 37 to 40 minutes early and departure times that are 15 minutes early. It is said that this produces overall workdays ranging from eight hours and 22 minutes to eight hours and 25 minutes (that is, 22 to 25 minutes of extra time). In the absence of any evidence to the contrary, I will accept the 24-minute average suggested by the Union.

(e) Tower 9

As indicated in Background Section B.7.(f), *above*, the Tower 9 CO's have worked three different schedules during the "recovery" period. It was a 16-hour post from March 27, 2005 to September 22, 2007. However, overlapping AM/PM shifts schedules were used during the final two months of that period (for which there is no liability). Since September 22, 2007, Tower 9 has been a 24-hour post, with non-overlapping shifts.

With respect to the 16-hour post with non-overlapping schedules, the Union has claimed, on average, that the uncompensated time is 15 minutes – based on arrival times at the Control Center that were 20 to 30 minutes early and departure times that were 5 to 15 minutes early. It is said that this produced overall workdays of eight hours and 15 minutes (that is, 15 minutes of extra time). In the absence of any evidence to the contrary, I will accept the 15 minute average suggested by the Union.

With respect to the 24-hour post, the Union has claimed, on average, that the uncompensated time is 21 minutes – based on arrival times at the Control Center that are 37 to 40 minutes early and departure times that are 15 to 20 minutes early. It is said that this produces overall workdays ranging from eight hours and 20 minutes to eight hours and 22 minutes (that is, 20 to 22 minutes of

extra time). In the absence of any evidence to the contrary, I will accept the 21 minute average suggested by the Union.

B. The Control 1 Post

1. The Aggrieved COs' Performance of Extra Work That is Integral and Indispensable to Their Principal Work Activities

We have previously noted that Control 1 is a 24-hour post, with non-overlapping "standard" eight-hour shifts (MW, DW and EW). Nevertheless, the evidence indicated that the Control 1 CO's, just as the other CO's, through a universal practice of early arrivals, have created a *de facto* overlap in the shifts, which occurs during the final half-hour of each watch. However, the parties do not agree as to the duration of the overlap.

The evidence as to the duration of the overlap will be considered momentarily. In the first instance, however, we may note that the nature of the change-of-shift activities is integral and indispensable to the Employer's mission. The outgoing and incoming CO's on that post must exchange information; review paperwork (such as that involving inmate counts); and, in some instances, account for inmate funds. Certainly, that constitutes work that is necessary, integral and indispensable to their principal duties.

In theory, if the two CO's could devote themselves exclusively and continuously to the change-of-shift activities, once the necessary information exchange occurred, the outgoing CO might be able to immediately exit the Control Center. This could be a process that would endure for approximately ten minutes; perhaps less. In actuality, however, it appears that both CO's remain there a bit longer, since they are unable to perform the change-of-shift activities without interruption. Rather, they must concurrently continue to perform the regular duties of the Control 1 post, including the critical duty of handling the incoming and

outgoing CO's who need to pass through the Control Center at these busy times of the day.

This normal work may not be put on hold simply because the outgoing and incoming Control 1 CO's need to perform their change-of-shift activities. If the incoming and outgoing CO's simply stopped what they were doing to perform the change-of-shift, long lines would likely develop on the way into or out of the Control Center.

The end result of these operationally-necessary interruptions is that the change-of-shift overlap period is extended. Rather than being able to dedicate five, ten or 15 minutes exclusively to the change-of-shift activities, the two CO's must fit it in along with the continued performance of the regular duties of the post. Both types of work are necessary, indispensable and integral to the Agency's operation. Indeed, the regular duties of the post, by definition, are the principal work activities of the CO's at the Control Center.

Notwithstanding the Employer's intimation to the contrary, there was no evidence that the incoming or outgoing Control 1 CO's were lingering at the post in order to "socialize." Rather, at these extremely busy times of the day, they were performing necessary work, including the important task of getting incoming and outgoing CO's into and out of the secure portion of the facility in a timely manner. This benefits the overall prison operation by minimizing the time the CO's must spend in the key line – a matter of major concern, which is addressed in the FBP's Policies and Program statements.

The *de facto* overlap enables one additional CO to assist in the change-of-shift entry and exit process at three critical times during the 24-hour workday. In my view, their performance of this work, even if, in one sense "voluntary," is of considerable benefit to the Agency's operation. So too is the exchange of information between the outgoing and incoming CO.

And once again, management has been content to sit back and enjoy the benefits of the Control 1 COs' extra labor. Although management knew or should have known that there was an extra CO working in the Control Center at those three critical times during the workday, it took no steps to prevent them from performing that work (as would be required under 5 CFR §551.104); nor did it exercise appropriate controls to assure that the work actually performed was limited to that for which it intended to make payment {as would be required under 5 CFR §551.402(a)}. In these overall circumstances, I conclude that management suffered or permitted the work, within the meaning of 5 CFR §551.104 and numerous arbitral precedents involving other FBP facilities.

2. The Duration of the Aggrieved COs' Extra Work

In turn, this brings us to the time issue. The Union has claimed, on average, that the uncompensated overlap is 21 minutes – based on arrival times that are 30-40 minutes early and departure times that are 15-25 minutes early. It is said that this produces overall workdays ranging from eight hours and 15 minutes to eight hours and 35 minutes (that is, 15 to 35 minutes of *de facto*, if not "official" overlap).

However, the anecdotal evidence on which those estimates were based was not fully corroborated by the three changes of shift shown in the security camera footage on December 20-21, 2010 (p. 42, *above*). On those three occasions, the arrival times were 21 to 46 minutes early; and the departure times were 15-35 minutes early. Thus, in these three instances, the period of pre-shift overlap ranged from just six to twelve minutes – substantially less than the 21-minute average claimed by the Union.

We previously noted in Sub-section II.A.2., *above*, that the Agency was obliged to keep complete and accurate time records. Had it done so, we would not now be in a position of having to guess whether the range of overlap claimed

by the Union (15-35 minutes, with 21 minutes as the average), or that claimed by the Employer (6-12 minutes), was more accurate.

Here, in view of the conflict, I have concluded that it would be appropriate to choose a mid-range figure between the maximum number in the range noted by management (12 minutes) and the minimum number in the range noted by the Union (15 minutes). I find that the compensable extra time spent by the Control 1 CO's was 13.5 minutes per workday.

III. CONCLUSION AND REMEDY

For the above-noted reasons, I have concluded that the aggrieved CO's are entitled to be compensated for additional work (as specified in sub-sections II.A.2.(a)-(e) and II.B.2., *above*), integral and indispensable to their principal work activities, which was performed above and beyond the nominal eight-hour limit of their "official" shifts. Since this work was in excess of eight hours per day, it qualifies for overtime rates.

In addition to this make-whole compensation for the grievants' unpaid work time, there are several other issues involving remedy and/or "damages" or other payments.

A. The Duration of the Recovery Period

In sub-section I.A., *above*, I concluded that the statutory limitations period applied, rather than the 40-day contractual period. However, I deferred ruling on whether to apply the two-year limit or the three-year limit. Under 29 USC §255(a), the three year period is to be applied in cases of a "willful violation" of the statute. This point is addressed further in 29 CFR §578.3(c) (pp. 9-10, *above*).

We considered the issue of management's knowledge of the COs' work activities, as well as the applicable statutory and regulatory standards, in Background Section C., *above*. We also considered management's efforts, if any, to

ensure compliance with those standards. The finding that the Employer is liable for the COs' extra work time was premised on the fact that the work was suffered or permitted; that management knew or should have known that the work was being performed.

Nevertheless, it is not crystal clear whether knowledge of those arguable or possible work activities would have led a layperson, even one serving as the CEO of an FCC (namely, the Warden), to determine that there was financial liability. Rather, such a determination could well require sophisticated legal analysis. However, that is precisely the point. If a Warden, as CEO, finds himself unable to engage in that legal analysis himself, it seems fairly obvious that outside help should be obtained (*e.g.*, from attorneys employed by the FBP).

In the instant case, Warden Martinez, who had received some training on FLRA/Portal-to-Portal issues, and who knew they were endemic throughout the prison system, absolutely failed to secure any such legal advice – either with respect to the Employer's potential liability for what was occurring, or with respect to his own possible obligation to implement overlapping shifts for the 24-hour posts, as indicated in HRMM 610.1. Even if he had not looked into the issues earlier, once he learned of the instant grievance, as well as the similar grievance involving the FCI, that should have led him (or his predecessor) to initiate such inquiries. This did not occur then.

Nor did it occur on or after August 18, 2010, when Arbitrator Scola issued a decision involving another Allenwood FCC facility (the FCI) that was unfavorable to the Employer. Given the similarity of the claims in both cases, the ongoing refusal to seek such guidance and/or to deal with the underlying issues, was a classic case of sticking one's head in the sand.

When management's inaction is viewed in light of 29 CFR §578.3(c)(3), it is sufficient to render the instant violations "willful" under §255(a) of the statute,

which means that the three-year statute of limitations is applicable.³³ The Employer should have inquired further into whether its conduct was in compliance with the Act, but it failed to do so. This result is also consistent with arbitral precedents, including that at the adjacent Allenwood FCC facility. ***Allenwood FCI, above*** (Decision, p. 51).³⁴

B. Liquidated Damages

Section 216(b) of the FLRA provides for double-damages – the actual under-payments and an amount equal thereto, which constitutes "liquidated damages." A limited exception, discretionary with the decision-maker, is provided in §260 – if the employer is able to demonstrate that it acted in good faith or that it had reasonable grounds for believing that its acts or omissions were not in violation of the FLSA. No such demonstration has been made herein. To the contrary, the circumstances discussed in sub-section A., *above*, indicate that management, having failed to seek legal guidance, did not have a reasonable basis for believing it was not in violation of the statute.

Moreover, as the Union has noted, the FBP's biennial reviews of the Allenwood USP's adherence to portal-to-portal requirements, in both 2007 and 2009, were fundamentally flawed. They appear to have been designed more to sweep any potential problems under the rug, rather than to deal with them.

In sum, the evidence does not justify a discretionary denial of liquidated damages. Thus, those damages shall be provided. This result is also consistent with arbitral precedents, including those cited by the Union (p. 67, *above*). This

³³ Since the grievance was filed on August 13, 2007, the remedy shall be retroactive to August 13, 2004.

³⁴ When the case proceeded to the FLRA (p. 17, n. 7, *above*), the Agency did file an exception with respect to one aspect of the monetary remedy – an award of post-judgment interest (the FLRA upheld that exception). But it did not challenge the arbitrator's application of the three-year statutory limitation period (which was necessarily based upon a finding that the FLSA violations were willful).

includes the case at the adjacent Allenwood FCC facility. *Allenwood FCI, above* (Decision, pp. 50-51).³⁵

C. Attorney's Fees and Costs

Section 216(b) of the statute, in addition to liquidated damages (considered in sub-section B., *above*), also mandates an award of "a reasonable attorney's fee ... and costs of the action." However, unlike the situation with respect to liquidated damages, there is no exception to such an award of attorney's fees and costs. As a result, they shall be awarded.

The Union has indicated that it will submit a petition for attorney's fees and costs within 30 days. That request seems reasonable and it will be allowed (along with an additional five days from the issuance date of the Decision and Award, to account for time in the mail).

D. Retention of Jurisdiction

The remedy issues discussed herein will be remanded to the parties in the first instance. They shall attempt to agree upon the calculation of the back pay (overtime), which will also constitute the measure of the liquidated damages. Also, once the Union files its petition for attorney's fees and costs, the parties shall attempt to agree upon those calculations as well.

As requested by the Union, jurisdiction will be retained in the event that the parties should be unable to reach agreement as to the calculation or implementation of these various aspects of remedy. If so, either party may invoke that jurisdiction within 65 days after the issuance of this decision (*i.e.*, by September 9, 2011), by filing a written or e-mail request with the arbitrator, with a copy to their opponent.

³⁵ When the case proceeded to the FLRA (p. 17, n. 7, *above*), the Agency did not challenge the arbitrator's decision to award liquidated damages.

This time period may be extended by written agreement of the parties, or, in the absence of agreement, by a motion submitted to and allowed by the arbitrator. Also, in the event that an administrative agency or court of competent jurisdiction should stay this Award pending administrative or judicial review, the time period for invoking the retained jurisdiction shall be tolled.

Newton, Mass.
July 6, 2011



LAWRENCE E. KATZ, Esq.
Arbitrator