

In the arbitration matter between:)	OPINION AND AWARD
)	
U. S. DEPARTMENT OF JUSTICE,)	OF ARBITRATOR
FEDERAL BUREAU OF PRISONS,)	
FCI TALLAHASSEE, FLORIDA,)	
Agency)	FMCS NO. 10-54593
And)	
)	PORTAL TO PORTAL
AMERICAN FEDERATION OF)	
GOVERNMENT EMPLOYEES,)	NOVEMBER 14, 2012
NATIONAL COUNCIL OF PRISONS)	
LOCAL 1570,)	
Union)	

ARBITRATOR: Cary J. Williams, chosen by the parties under the terms of their Master Agreement dated March 9, 1998 (JX 1) and through the Federal Mediation and Conciliation Service.

APPEARANCES:

FOR THE UNION: Akua Laplanche, Legal Rights Attorney, Office of General Counsel, AFGE, AFL-CIO, Washington, DC.

FOR THE AGENCY: John T. LeMaster, Assistant General Counsel, U. S. Department of Justice, Federal Bureau of Prisons, Washington, DC.

The Union filed the present grievance with Regional Director R. E. Holt on January 22, 2010 alleging the Agency was in violation of the Fair Labor Standard Act, 29 U.S.C. § 207(a), (“FLSA”) and the Master Agreement (“the Agreement”) when it required Correctional Officers scheduled on the evening watch (4:00 P.M. to 12:00 A.M.) and morning (midnight) watch (12:00 A.M. to 8:00 A.M.) to perform activities prior to the beginning of their shift and after the end of their shift without compensation. (JX 3)

The Agency denied the grievance substantively and procedurally on February 19, 2010 (JX 4), and the Union invoked arbitration on March 9, 2010 (JX 5). When the matter was not resolved it was submitted to arbitration at a hearing held in Tallahassee, Florida on October 26-28, 2011 and April 31-May 1, 2012. At the hearings the parties were afforded the opportunity to present testimony and evidence and the arbitrator received post-hearing briefs on September 4, 2012. The parties mutually agreed to waive the provision of Article 32, Section g. requiring the arbitrator to render a decision within 30 days after the conclusion of the hearing.

PERTINENT CONTRACT PROVISIONS

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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, in accordance with 5 USC, Section 7106:

.....

2. in accordance with applicable laws:

- a. to hire, assign, direct, layoff and retain employees in the Agency, ;
- b. to assign work, ;

* * * * *

ARTICLE 18 – HOURS OF WORK

Section a. The basic workweek will consist of five (5) consecutive workdays. The standard workday will consist of eight (8) hours with an additional thirty (30) minute non-paid duty free lunch break.

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ARTICLE 31 – GRIEVANCE PROCEDURE

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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 c.

.....

4. the Union has the right to file a grievance on behalf of any employee or group of employees.

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

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Section f. Formal grievances must be filed on Bureau of Prisons "Formal Grievance" forms

1. when filing a grievance, the grievance will be filed with the Chief Executive Officer of the institution/facility, if the grievance pertains to the action of an individual for which the Chief Executive Officer of the institution/facility has disciplinary authority over;

2. when filing a grievance against the Chief Executive Officer of an institution/facility, or when filing a grievance against the actions of any manager or supervisor who is not employed at the grievant's institution/facility, the grievance will be filed with the appropriate Regional Director;

.....

(JX 1)

HUMAN RESOURCES MANUAL/ P3000.03

Chapter 6

.....

610.1 Institution Shift Starting and Stopping Times

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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 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 a reasonable time to travel from the control center to their assigned duty post and return (at the end of the shift). ...

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. ... The Warden must submit a plan to his/her appropriate Regional Director **only if the plan includes an overlap in work schedule**. ...

.....

5. SCHEDULE APPROVAL AND IMPLEMENTATION. The authority to approve the work schedule rests with the Regional Director. ...

6. SCHEDULING CONSIDERATIONS

a. 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.

.....

d. Physical layout of facilities is to be taken into consideration when establishing a work schedule.

.....

(JX 6)

While not reproduced here, the majority of the language found in Section 610.1 of the Human Resources Manual set out above is incorporated from Operations

Memorandum 214-95 (3000), dated November 1, 1995, cancellation date, April 26, 1996.

(JX 7)

The parties generally agree to the following legal background statements. The FLSA requires employers, including the federal government, to pay employees overtime

for all time worked over forty hours per week. 29 U.S.C. § 207(a) The Office of Personnel Management (“OPM”) provides that all time spent by an employee performing an activity for the benefit of the Agency and under Agency control are considered hours of work, and this time includes “time during which an employee is required to be on duty”, “time during which an employee is suffered or permitted to work” and “waiting time or idle time which is under the control of an agency and which is for the benefit of an agency”. 5 CFR § 551.104 (a)(2) After the FLSA was enacted, the U.S. Supreme Court decided Anderson v. Mt. Clemens Pottery Co., 328 U.S. 680 (1946) ruling that certain preliminary activities are compensable. Congress then passed the Portal-to-Portal Act, 29 U.S.C. § 251 et seq in 1947 that provided employers relief from FLSA liability for failure to compensate employees for certain activities that are preliminary to or postliminary to the principal activity or activities which such employee is employed to perform. After passage of the Portal-to-Portal Act, the U.S. Supreme Court held in Steiner V. Mitchell, 350 U.S. 247 (1956) (“Steiner”) that preliminary and postliminary activity that is “an integral part” of the principal activity is compensable. Cases cited by the parties then generally held that to be compensable an activity must be an “integral part” and “indispensable to” the performance of the principal activity or activities.

ISSUES

1. Whether the grievance is arbitrable?
2. If the grievance is arbitrable, did the Agency violate the Fair Labor Standards Act or the Master Agreement by suffering or permitting correctional officers on the evening watch and morning watch to perform work before and/or after their scheduled shift change at 12:00 A.M. without compensation? If so, what is the remedy?

GENERAL BACKGROUND

FCI Tallahassee is a low security federal prison located in Tallahassee, Florida. There are two separate facilities located at the site, the Federal Correctional Institution ("FCI"), a low security prison housing approximately 150 female inmates, and the Federal Detention Center ("FDC"), an administrative facility housing male pretrial and sentenced inmates on a temporary basis. Staffing at the facility includes correctional officers ("officers") and non-custodial employees. Officers are responsible for maintaining the custody and control of federal inmates and maintaining security. Both FCI and FDC are staffed on a 24 hour basis by officers who are assigned primarily to the following shifts: Morning watch (12:00 A.M. to 8:00 A.M.); Day watch (7:45 A.M. to 4:15 P.M.); and Evening watch (4:00 P.M. to 12:00 A.M.). There is therefore a 15 minute overlap during the shift changes that occur at 8:00 A.M. and 4:00 P.M. but there is no overlap during the 12:00 A.M. shift change which is the time frame at issue in this case. There is no time clock at either FCI or FDC but officers are required by post orders to be present at their posts during shift changes on the hour, ie. 12:00 A.M., 8:00 A.M. and 4:00 P.M. Officers are paid bi-weekly for 80 hours of work and are paid overtime in 15 minute increments. There are approximately ten officers assigned to morning watch at FCI and five or six officers assigned to that shift at FDC.

The FCI compound, the larger facility, consists of several buildings within a fenced area including an administrative building, A, B, C, D, and F housing units, a special housing unit ("SHU") and other non-housing buildings including a chapel, food service, etc. There are open outdoor spaces between the buildings including recreational areas. Within the administrative building is the control center that controls access and

egress to the secured compound, G housing unit, the hospital and various electronic security doors. According to the diagram of FCI introduced at the hearing (JX 8), the distances between control and the housing units varies from 200 feet to G unit to 665 feet to F unit. Employees on all shifts enter the compound area through the administrative building entrance where they first must pass through security that includes a metal detector and x-ray screening. Officers are assigned to 24 hour posts at FCI on all shifts that include all housing units, control room, compound, SHU, corridor, and perimeter patrol. Perimeter patrol guards the areas outside the fences surrounding the FCI and FDC and is the only post that does not require entrance into the secured area of the two compounds.

The FDC compound is separate from FCI and consists of one large building that includes the control center, A and B housing units, D Unit (SHU), corridor and other areas. Personnel enter FDC through the front entrance and also must pass through security screening like FCI consisting of metal detector and x-ray. Officers are assigned to 24 hour posts throughout FDC including control, C corridor, housing units, SHU and perimeter patrol.

To gain access to the secured areas of both FCI and FDC officers and all other personnel must first remove items from their person and place them in a tray, they then must pass through a metal detector and wait while their personal items pass through x-ray screening, they then retrieve their personal items and pass through a door into an area where they wait to be buzzed through a secure door by the control officer on duty. They then enter the sallyport area outside the control room. The sallyport has two doors providing a secured area before entering FCI or FDC. The first door is opened by control

allowing entry into a small room, and the second door remains closed until the first door is closed. Once secure the second door is opened by control to allow entrance into the prison. While officers are in the sallyport area they receive any equipment necessary for their particular post such as a radio, battery, keys or flashlights through a secured drawer from the control room by the officer on duty. Once equipment is secured or the control officer is satisfied the person in the sallyport area can pass, another secured door is buzzed open by control and the officer passes into the facility to travel to his or her assigned post. There are other secured doors within the compound, such as the SHU, that can only be opened either by the control room or the officer on duty within that particular post area.

THRESHOLD ISSUES TESTIMONY

Maurice Britt, Senior Officer Specialist, testified he has worked for 23 years as a correctional officer and has served as Local Union President for six years. He stated he has worked all shifts and posts at FCI and FDC during his employment. Britt testified he has attended Labor Management Relations ("LRM") meetings with the Agency in the past and portal-to-portal ("portal") issues were rarely raised by the Union. He stated that Associate Warden Gena Pedroni routinely asked during each meeting whether there were any portal issues.

Britt testified the Union first became aware there was a portal issue at the facility on December 14, 2009, when it received a copy of Operations Memorandum 214-95 (JX 7) that was incorporated in the Human Resources Manual P3000.03, Section 610.1 (JX 6) concerning shift starting and stopping times. He stated in an attempt to informally resolve the issue the Union sent a memo dated January 12, 2010 to Warden Paige

Augustine setting out its allegations regarding a portal issue involving correctional officers on evening watch and morning watch. (JX 2) This memo states in part as follows:

Subject: Portal to Portal Issue/Mission Critical Roster -1200 am to 800 am and 400 pm to 1200am Shifts

This is Labor's attempt to informally resolve this issue with Management at FCI/FDC Tallahassee. On December 14, 2009, Local 1570 became aware of an issue concerning a Portal to Portal issue with the Midnight Shift (1200am to 800am) and evening shift (400pm to 1200am) which is currently being applied by Management on the Institutional Roster for Correctional Services. It has been and continues to be the practice of Management at FCI Tallahassee to require its employees to receive and return equipment (keys, radio, detail pouches etc.) from institutional control center prior to beginning their tour of duty and after the end of their shift on the 1200am to 800am shift and 400pm to 1200am shift.

The Institutional Roster for Correctional Services currently applied at FCI Tallahassee violates the Human Resources Manual. PS 3000.02D section 610.1, Master Agreement Article 18, and Operations Memorandum 214-95 (3000) dated November 1, 1995 subject: Institutional Shift Starting and Stopping Times. Specifically, the Ops Memo established basic shift overlaps for shifts starting and stopping times for employees working the Bureau of Prisons. Staff shall have their shifts and schedules to include reasonable time to travel from the control center to their assigned duty post and return. It takes employees 10-15 minutes to perform pre and post shift activities daily. Per section (2) (b) Ops Memo 214-95 (3000) it clearly establishes shifts overlap for post which require relief, as employees must be given time to arrive later and leave earlier to be at the control center on time. ... The mission critical roster implemented by Management at FCI Tallahassee clearly violates the Ops Memo by not allowing a 15 minute shift overlap for the 1200am to 800am shift. Because of this violation, this also has effected (sic) staff working the evening shift (400pm to 1200am) per the CBA, Master Agreement dated 1998, Article 18 which indicates the standard work day as eight (8) hours. The staff working the 400pm to 1200am shift are clearly working more than eight (8) hours a shift for the mere fact that the midnight shift is only required to relieve the evening shift at 1200am. Furthermore, this does not give the employee working the evening shift time to leave early to be at the control center at quitting time 1200am

Labor requests Management cease and desist the current roster hours for the 1200am to 8am shift on the correctional service roster. Implement new hours from 1145pm to 800am to provide a 15 minute overlap per Ops Memo 214-95 (3000). Management compensate all employees past, present and future in accordance to the Back pay Act for all staff affected on the Midnight shift (1200am to 800am) and Evening Shift (400pm to 1200am) for a minimum of (2) years in accordance with applicable rules, law and regulations.

Labor is requesting Management to respond as soon as possible due to time frames outlined in the Master Agreement Article 31, section D.

Britt testified he did not recall discussing the matter with Pedroni after filing the memo and the Union received no response from Augustine. He acknowledged the minutes from a January 20, 2010 LRM meeting (AW 9) indicates a portal issue was briefly discussed, but stated it was not resolved at that time. Since the Union was concerned about meeting the 40-day deadline to file a grievance contained in Article 31, Section d. of the Agreement and it had received no response from Warden Augustine, Britt testified the Union filed a formal grievance with Regional Director R.E. Holt on January 22, 2010 that essentially contains the specific language of the January 12, 2010 memo to Augustine. (JX 3) He stated that the December 14, 2007 date on the formal grievance in the box entitled "7. Date(s) of violation(s)" is a typographical error and should have read "December 14, 2009". Britt testified that the grievance was filed with the Regional Director because he has the authority to approve work schedules and the Warden can only adjust work schedules if they do not include an overlap under Section 610.1 of the Human Resources Manual. (JX 6)

Britt testified he received an email from David Monds, Employee Services Manager, on January 29, 2010 (AX 10) in response to the Union's memo of January 12, 2010 that stated the Agency was gathering information and sought the Union's patience in the matter. He stated this email was received after the Union had filed the formal grievance. Britt testified Holt eventually responded to the grievance on February 19, 2010 alleging it was procedurally rejected because it was inappropriately filed with the Regional Director and untimely filed. (JX 4)

Manuel Palido, a correctional counselor, testified he has been employed at FCI Tallahassee since 1998 and has served as Local 1570 Secretary since 2007 or 2008. He stated he attended stewards training in Marianna, Florida on December 13-14, 2009, and that during the training he received a copy of the Human Resources Manual P3000.03, Section 610.1 (JX 6). Palido testified that after reading the document he became aware there was a portal issue at FCI Tallahassee for the evening watch and morning watch shifts that transition at midnight and after discussions with Britt helped draft the memo of January 12, 2010 (JX 2) to present to Augustine.

Monds testified he is presently Human Resources Manager at the U.S. Penitentiary in Atlanta, Georgia, but was in a similar job at FCI Tallahassee from December 2008 through August 2010 and also worked there beginning in 1992 as a correctional officer. Monds testified that Warden Augustine received the Union's memo of January 12, 2010 (JX 2) the following day and referred it to Personnel. He stated at the time Augustine was still acting in the capacity of warden at Tallahassee even though she had been named warden at another location and Warden William Taylor did not replace her until February 2010. Monds testified he was responsible for responding to the memo and sent the email to Britt on January 29, 2010 requesting more time to research the matter. (AX 10) He stated that he did not talk to Britt about the specificity of the Union's memo.

Antonio Jenkins testified he was a Captain at FCI Tallahassee from April 2007 to December 2008 and had good relations with Britt and the Union during that time. He stated no portal issues were ever raised with him by the Union during his employment.

Gena Pedroni, Associate Warden at FCI Tallahassee, testified she has been at this location four years and with the Agency for 20 years. She stated the Custody Department (including officers) comes under her Programs Division. Pedroni testified a portal to portal violation occurs when staff are required or partake in work related pre-shift or post-shift activities when they are not actually within their set duty hours. She stated that Augustine was at FCI Tallahassee in January 2010 and that she (Pedroni) was Acting Warden at that time. Pedroni testified that even in that capacity a portal issue or grievance was something that she could not act on and had to refer to Augustine. Pedroni testified that after Augustine tasked her with the responsibility to respond to the Union's January 12, 2010 memo, she brought up the portal issue with Britt at the LMR meeting on January 20, 2010, and he informed her that the Union intended to file a grievance.

TESTIMONY ON THE MERITS

Britt, upon being recalled, testified he had worked all shifts and all posts at both FCI and FDC during his 23 years at the facility. He stated there are no time clocks at the facility and the supervisor at the front desk located at the entrance to both compounds checks off an officer's name on the daily roster as he or she arrives for a shift. Britt testified that once an officer is at the front lobby he is required to respond to any emergency that might arise at the prison and can be disciplined if he or she violates this requirement. Thus, officers are on duty when they arrive at the metal detector area or the perimeter area waiting to be picked up by the off-going officer.

Britt testified to the procedure involved in relieving on evening watch perimeter patrol FCI and FDC. He stated he arrives at the parking lot and waits for the on-shift

perimeter officer to complete his or her trip around the compound in the assigned vehicle. It is not necessary to go into the administrative building on this shift. When the officer arrives he gets in the vehicle and radios the supervisor on duty that he is present. The two officers then proceed in the vehicle to the rear gate and make sure all three weapons (a 9mm pistol, a rifle and a shotgun) and ammunition (45 9mm rounds, 40 rifle rounds and 5 shotgun rounds) are clear and accounted for. The relieving officer then checks the vehicle for any damage or problems using the Vehicle Daily Inspection Report form (UX 2). The relieving officer also signs a form acknowledging receipt of all equipment including handcuffs, binoculars, ballistic helmet and spot light. In addition, the two officers discuss any problems that might have occurred during the evening shift. The off-going officer is then dropped off at the front of the facility and is free to leave.

Britt next testified to relieving the D unit SHU officer FDC on evening watch. He stated he arrives early at around 3:40 PM or 3:45 PM and enters the front lobby of FDC. He is then checked off as present by the Lieutenant on duty and takes off his duty belt and passes through the metal detector. This takes about two to three minutes depending on how many others are in line waiting. He then signs a sign-in sheet and enters the inner lobby door to the sallyport door that must be opened by the control room officer on duty. Once inside the sallyport he moves a chit (a small piece of metal with the employee's name on it) on the staff chitboard to show he is in the facility, and gets equipment from the control room needed to assume the SHU post. This equipment is distributed from the control room through a drawer and sometimes includes a radio or fresh battery, a radio pouch, handcuff key, and a mailbag containing mail for SHU inmates. Receiving equipment takes anywhere from two to three minutes. Once he has received his

equipment, control electronically unlocks the inner sallyport door and he proceeds to the D unit SHU down the corridor. When he arrives at D unit he radios control that he has arrived so they can electronically open the D unit door or the on duty officer in D unit can buzz him in. Once inside D unit he exchanges information with the off-going officer regarding events or problems that might have occurred during the previous shift and also verifies the number of inmates in the SHU. The off-going officer then leaves and turns in various paperwork that has been filled out during the shift to the Lieutenant on duty on his way out. Britt testified that when he is relieved at the same post at 12:00 AM when working evening shift his morning shift relief must get there five or ten minutes before midnight to get him out of the facility on time.

Britt testified he has worked B unit FDC morning watch in the past and normally arrives for this shift about 11:40 PM or 11:45 PM so he can be sure to relieve the evening watch officer by midnight. He stated that normally there are four or five people in the lobby area when he arrives and he follows the same activities through the sallyport as recounted above for the D unit SHU post. He stated he probably makes relief with the B Unit officer at about 11:50 PM or 11:55 PM and it takes about ten minutes to complete that process.

Britt then recounted the procedures being relieved on C corridor evening watch at FDC. This post is only about ten feet away from control and takes two or three minutes to complete relief. According to Britt, in order to get off before midnight it is necessary for his relief to arrive early a five or ten minutes before midnight.

Britt next testified regarding relief procedures for morning watch control center FDC. He stated it takes between four to five minutes to go through the security screening

at the front of the facility and then the control officer lets him into the control room. The control center is approximately ten to fifteen feet from the metal detector area and it takes seven to nine minutes to relieve at this post. Britt testified that if he arrived at the front lobby at midnight the off-going control officer would probably not leave until ten minutes after midnight. He stated that if he is working evening watch or morning watch at this post he normally arrives at the facility 15 or 20 minutes early.

Britt testified the relieved officer on all posts always brings back a radio or dead battery to turn in at control along with the daily forms noted above to give to the Lieutenant. He stated that many times during his employment he has stayed past his normal shift hours and has not informed his Lieutenant even though his manager would have probably compensated him for this time. In addition, he stated no Lieutenant has ever told him he was at work too early or leaving too late.

Britt testified that he received an email dated October 19, 2011 from Pedroni stating officers should no longer stop at control on their way in or out to chit out radios or get fresh batteries. (UX 6)

Robert Turlington, Senior Officer Specialist at FCI Tallahassee since 1995, testified he has worked all correctional posts and shifts during his employment and stated he usually arrives early for evening and morning shifts so he can relieve the off-going officer on the hour. Turlington stated he has worked G unit FCI morning watch which is the closest housing unit to the control room and he usually arrives at the facility at 11:30 pm because if he arrives at midnight the person he relieves will leave late. He testified to much the same procedure as Britt recounted regarding entry through the lobby and metal detector and passing through the sallyport to receive equipment. Turlington testified it

takes approximately 11 minutes to complete the entire relief procedure including security screening, equipment pick up, travel to post, key exchange, and information briefing from officer on duty. He stated that it sometimes takes longer to relieve the evening watch officer if he is performing rounds because this unit is a three floor dormitory and he or she might not be near the secured door. He stated that when he has worked the same post on evening watch it has taken five to ten minutes to be out the front door if his relief arrives at midnight. His testimony listed the same duties for the off-going officer when relieved as those mentioned by Britt.

Turlington testified officers perform the same basic activities when making relief at the D SHU at FDC as all the other posts with the exception of perimeter patrol. He stated the SHU at FDC is the farthest unit from the control center. He estimated it takes a few minutes to pass through security and draw equipment and four to seven minutes to proceed to the post, gain admittance and exchange information. Again he stated that when being relieved at this post it takes five to ten minutes to be out the front door if his relief arrives exactly at midnight.

Turlington confirmed Britt's testimony of the activities performed entering the facility and traveling to the post when relieving on morning watch at the control center FCI. He stated when working that shift the control officer must brief the on-coming officer while also conducting the business of processing employees in and out of the sallyport doors and exchanging equipment through a secured drawer. Turlington testified he tries to arrive at the facility one-half hour early when working morning watch so the evening watch control officer can get off on time at midnight. He estimated that if he arrives at midnight the evening watch officer will not leave for five to seven minutes.

Turlington testified he has worked C corridor at FDC on evening watch which covers the large open hallways at that compound that lead to the housing units, R & D, medical and laundry. He related that once a relieving officer passes through security, picks up equipment and leaves the sallyport area he or she is at the post. He stated on a good day a corridor relief is pretty quick.

Turlington testified to the following general facts. He stated he has his own duty belt, radio pouch and handcuff case but he draws a flashlight, body alarm and battery from control when working posts at FCI and FDC. He testified he has never asked for compensation for coming in early and no Lieutenant has ever mentioned it to him before. He stated the off-going officer on evening watch always gives the paperwork compiled during the previous 24 hours to the Lieutenant on duty before he leaves the facility during the midnight shift change.

Manuel Pulido was recalled and testified regarding several documents. He stated that he went through Union files and found a roster for officers from September to December 1996 that showed the morning watch starting and stopping times at that time were 11:45 P.M. to 8:00 A.M. (UX 5) He testified he spoke with Ms. Reinhart, an Agency secretary, who told him this schedule was in place until January 1999 according to rosters from that timeframe. Pulido testified further regarding a memorandum from Warden Taylor dated October 11, 2011 that stated among other things that, "... National policy allows for staff required to draw keys and/or other equipment from the Control Center a reasonable period of time to draw equipment and report to their post. Custody staff who are relieving a 24-hour post are expected to report directly to their job-site and exchange equipment. ... Both FCI/FDC Tallahassee are compact institutions. There

should not be a position at either facility requiring more than (10) ten minutes for staff to draw equipment and report to their job-site.” (UX 7)

Carmen Bryant, Senior Officer Specialist at FCI Tallahassee since 2001, testified to the same procedure as related by Britt and Turlington for affecting relief when working morning watch control FDC. She stated she arrives at 11:40 pm or 11:45 pm and performs the same activities testified to by other witnesses. Bryant testified it takes her one to one and one-half minutes to go through the metal detector screening and three to five minutes to get into the control room and complete a briefing and equipment check. She also testified she has worked morning watch perimeter patrol FDC. Regarding this post she stated there was not much difference in relieving an officer on perimeter at FDC or FCI and she normally comes in about 20 minutes early to make relief.

Brian Heckler, Lieutenant at FCI/FDC Tallahassee for over five years, testified his duty is to supervise officers and run the shifts at the facility. He stated there is no post order requiring officers to arrive early for their shifts or to stay late. Heckler testified that a person is not on shift until they get to their post and an officer's shift begins when he gets the keys from the officer being relieved. When asked what time a person has to get to work in order to clear security and get to their post he initially replied two or three minutes, then stated he did not know. He testified that he expects morning watch officers to be on post at 12:00 A.M. the start of their shift and the evening watch officer to be in the front on the way out the door. Heckler stated compound officers are relieved anywhere on the compound including the sallyport area. He stated he has seen officers arrive early and stay late but has said nothing to them.

Heckler verified that officers have to respond to emergencies once they enter the facility and the Code of Conduct (PS 3420.09) states that, "Failure to respond immediately to an emergency situation" is punishable by discipline from official reprimand to removal for the first offense. (JX 14) On cross examination Heckler testified that as far as coming in and relieving, day watch officers are not doing anything different from morning watch officers even though there is a 15 minute overlap between day watch and evening watch. Heckler confirmed that starting some time in 2011 officers were no longer required to stop at control for equipment since it is now on post.

At this point in the proceeding the Agency made a proffer to expedite the proceeding that Heckler's testimony would be the same as all first line supervisors that would be involved in this case. The Union accepted the Agency's proffer.

AGENCY CONTENTIONS ON THRESHOLD ISSUES

The Agency contends the grievance lacks specificity as required by Box 5 of the formal grievance form required to be used under Article 31, Section f. of the Agreement and therefore impedes the Agency's ability to evaluate and address the subject matter of the grievance. The Agency contends the Union has attempted to expand the grievance beyond the document itself which can only be done by mutual consent under Article 32, Section a., and it has limited any potential recovery class to only those individuals who worked correctional posts at the shift exchange between evening and morning shifts. The Agency contends the Union failed to make a good faith attempt to informally resolve this matter in accordance with Article 31, Section b. before filing a formal grievance which should bar them from seeking recovery on this issue. The Agency contends the use of representative testimony should be excluded in this case as a representative sample of the

class. The Agency contends a finding cannot be made that the testimony of each of the Union witnesses is credible such that their testimony forms the basis for a finding that they should be credited as representatives of the posts and shifts about which they have testified. The Agency contends, therefore, the grievance should be dismissed.

UNION CONTENTIONS ON THRESHOLD ISSUES

The Union contends it complied with the time limits contained in Article 31, Section d. of the Agreement when it filed a grievance within forty (40) days after it became aware of a grievable occurrence on December 14, 2009. The Union contends the grievance was properly filed with the Regional Director Holt under Article 31, Section f. after it first made an unsuccessful attempt to informally resolve the matter with Warden Augustine. The Union contends it made a good faith attempt to informally resolve the grievance when it sent the memo of January 12, 2010 to Warden Augustine but received no response. The Union contends the Agreement does not require that grievances be specific and the required formal grievance form noted in Article 31 is promulgated by the Agency. The Union contends, regardless, the present grievance was sufficiently specific to inform the Agency what the grievance was about and why it was being filed. The Union therefore contends the grievance is arbitrable.

UNION CONTENTIONS ON THE MERITS

The Union contends all corrections officers at FCI Tallahassee assigned to all posts on morning watch and evening watch performed uncompensated pre-shift and post-shift work due to the absence of an overlap between shifts and should receive 15 minutes overtime for all shifts worked from a period of time three years prior to the filing of the grievance on January 22, 2010. The Union contends the FLSA requires that the Agency

must compensate its employees for all hours worked regardless of whether it “suffers or permits” the work to be performed and in this case it “suffered or permitted” employees to work when it had actual or constructive knowledge that the pre-shift and post-shift work at issue was being performed and did nothing to prevent its performance. The Union contends the officers on evening watch and morning watch are entitled to compensation from the moment they perform the first integral and indispensable activity until they perform the last activity that is integral and indispensable to the performance of their jobs. The Union contends in this case the first integral and indispensable activity for officers on morning watch relieving the evening watch is to pass through the metal detector at the entrance to FCI and FDC. The Union contends the Agency violated the FLSA by knowingly and willfully requiring officers to proceed through security screening (metal detector), check in with the Lieutenant, pick up equipment from control (including radios, batteries keys, etc.), travel through the sallyport and various controlled doors to their posts, exchange information and equipment with the on shift officer, and perform this work in reverse order at the end of their shifts, all without compensation. The Union contends all these activities are performed for the benefit of the Agency and management should have known correctional officers were performing it without compensation. The Union contends officers at FCI Tallahassee are entitled to compensation from the moment the continuous workday begins at the metal detector until it ends at the control center. The Union contends officers at the facility are on duty as soon as they enter the lobby security area since they are required to respond to emergencies at that time and can be disciplined if they fail to do so. The Union contends the Agency acknowledged from at least September 1996 to January 1999 that officers on

morning watch were performing pre-shift work because the shift at that time began at 11:45 P.M. providing an overlap period to relieve evening watch at 12:00 A.M. The Union contends the Agency also acknowledges and realizes the need for this overlap during shift changes since it provides a 15 minute overlap period at 8:00 A.M between morning watch and day watch and at 4:00 P.M. between day watch and evening watch even though those officers perform the same activities during relief as those performed by the morning watch officers and evening watch officers during the midnight shift change. The Union contends the Agency requires officers to provide continuous coverage of all posts but does not provide any overlap between evening and morning watch shifts for them to perform the activities listed above in violation of Human Resources Manual PS 3000.03, Chapter 6, Section 610.1 (JX 6). The Union contends the Agency did not establish that the activities performed by the officers in question during the shift change at midnight were de minimis even if less than ten minutes and they should be ruled compensable. The Union contends that since morning shift officers are required to be at their post at midnight they must arrive early to perform the pre-shift activities required by the Agency so they will be at their post on time since it is physically impossible to be at his or her post without first performing those pre-shift activities. The Union finally contends the Agency's FLSA violation was willful and intentional thereby triggering the three year back pay period rather than the two year period under 29 U.S.C. § 255(a). The Union requests liquidated damages in an amount equal to the unpaid wages awarded to each employee under 29 U.S.C. § 216(b) since the Agency's violation was not in good faith and it had no reasonable grounds to believe that its act or omission was appropriate. The Union requests that the grievance be sustained;

that the Agency be ordered to cease and desist the current roster hours for morning watch officers (12:00 A.M. to 8:00 A.M.) and adjust those roster hours to 11:45 P.M. to 8:00 A.M. to provide a 15 minute overlap; that unpaid wages be awarded to the officers who performed preliminary and postliminary work on evening watch and morning watch for the period in question; and that the case be remanded to the parties for a determination of the amount of unpaid wages, liquidated damages and attorney's fees.

AGENCY CONTENTIONS ON THE MERITS

The Agency contends the activities at issue performed by correctional officers during shift changes on all shifts, including passing through the metal detector, donning a duty belt, entering the sallyport, turning a chit on the accountability board, picking up or dropping off equipment (radios, batteries, body alarms, etc.) at control, checking in with supervisors, passing through locked doors, checking personal mailboxes, walking to assigned post, exchanging equipment and information once on post, and turning in paperwork to Lieutenants at the end of a shift are not preliminary or postliminary activities that are integral and indispensable to the employee's principal activities and therefore are not compensable. The Agency contends management did not suffer or permit officers to perform the activities in question without compensation because it had no notice from officers that it was being performed. The Agency contends there was no evidence presented that management has ever been notified by any officer that he or she has ever arrived early or left late for a shift change or that they were ever denied overtime for such work when properly requested. The Agency contends no management official ordered or required an officer to perform duties prior to or after their shift without compensation, and if officers came in early or stayed late he or she did so at their own

choosing, not at the direction of management. The Agency contends post orders clearly define when and what specific duties a staff member is required to perform and the start and stop times of each shift. The Agency contends, therefore, the Union's claims amount to ignoring or flagrantly violating management's instructions in an effort to gain financially and receive compensation for work they have not done. The Agency contends that three factors that must be considered in tandem with whether preliminary or postliminary activities are integral and indispensable are: (1.) whether the activity is required by the employer; (2.) whether the activity is necessary for the employee to perform his or her duties, and; (3.) whether the activity primarily benefits the employer. Dunlop v. City Electric, 527 F.2d 394 (5th Circ. 1976) The Agency contends the mere act of walking on institution property to a duty post does not constitute compensable activity unless employees are required to engage in principal activities during their travel and in this case officers are not expected or required to do their jobs until they assume their posts unless there is an emergency or suspicious activity in which case they will be compensated. The Agency contends even if the activities complained of are integral and indispensable parts of officers' principal activities, they are still not compensable under the FLSA if the activities are *de minimis*. The Agency contends that such pre-shift and post-shift activity is credited as hours of work only if the total time spent on the activity is more than ten minutes per workday, and if not, such activity is *de minimis*. Carlsen V. United States, 72 Fed. Cl. 782 (2006); Lindow v. United States, 738 F.2d 1057 (1984); 5 CFR § 551.412 The Agency contends since the Union witnesses testified to spending no more than ten minutes performing the pre-shift and post-shift activities during shift

changes, the time involved was *de minimis* and therefore not compensable. The Agency therefore contends the grievance should be denied.

OPINION ON THRESHOLD ISSUES

The Agency's allegation of a lack of specificity in the formal grievance is not supported by the evidence and testimony. The formal grievance filed with Regional Director Holt on January 22, 2010 plainly identifies a "Portal to Portal issue with the Midnight Shift (1200am to 800 am) and evening shift (400pm to 1200am) which is currently being applied by Management." (JX 3) The grievance also contains sufficient information regarding one of the activities complained of (picking up equipment from control) and an assertion the officers have insufficient time to perform their pre and post-shift duties, citations to the Human Relations Manual, Master Agreement and Operations Memorandum 214-95 as the basis for the grievance, the date of violation, and a clear statement of the remedy requested. In addition, the memo sent to Warder Augustine a few weeks before the formal grievance contained almost the exact language and thus gave the Agency additional notice of the subject matter of the Union's complaint. Even though the Agreement requires the use of the Agency's formal grievance form that contains the words, "Be specific", there is nothing in the Agreement or the formal grievance form that sets out the degree of specificity required. So long as the Union provides sufficient information in the formal grievance to put the Agency on notice of the basis for the Union's complaint and provides enough information for the Agency to respond, the Union has complied with Article 31. The evidence proved the Agency was aware of similar portal issues that have been raised at other locations and in this case the

formal grievance provided a sufficient degree of specificity for the Agency to adequately defend itself.

The Agency initially raised the issue of timeliness at the hearing based on the “December 14, 2007” date found in box 7. of the formal grievance that would have violated the 40 day time limit for filing a formal grievance under Article 31. (JX 3) When Union testimony indicated that date was a typographical error that should have read “December 14, 2009”, Agency’s counsel stated timeliness would not be an issue. Since the Agency did not argue a timeliness issue in its brief, and there was no testimony or evidence to rebut the Union’s contention that the date was a typographical error, it is assumed that the Agency is satisfied the date on the formal grievance was a typographical error and I find the grievance was timely filed.

While also not raised in the Agency’s brief, there was an inference at the hearing that the Union did not file the formal grievance with the proper party because it was filed with Regional Director Holt rather than Warden Augustine. Article 31, Section f. 1. states a “grievance will be filed with the Chief Executive Officer of the institution/facility if the grievance pertains to the action of an individual for which the Chief Executive Officer ... has disciplinary authority over.” Here the Warden was the Chief Executive Officer at FCI Tallahassee but she also had authority to adjust work schedules. Thus the grievance in effect was filed against the Warden not an individual she had disciplinary authority over and Article 31, Section f. 2. controlled. The Union therefore properly filed the grievance with the Regional Director in accordance with Section f.2.

The Agency raises the issue that the Union has attempted to expand the grievance beyond the formal document to include correctional officers on shifts other

than evening and morning watch in violation of the Agreement. Having read the Union's brief and considering the testimony presented, I am convinced that the remedy sought by the Union only concerns officers during the shift change between evening watch and morning watch at 12:00 A.M. Accordingly, there has been no apparent attempt to expand the grievance beyond the formal document (JX 3) that only identifies the evening and morning watch officers and the only potential recovery class would be those individuals who worked correctional posts at the shift exchange between evening watch and morning watch.

The evidence and testimony proved the Union complied with Article 31, Section b. of the Agreement when it attempted to informally resolve this grievance with Warden Augustine by sending her the memo dated January 12, 2010. (JX 2) Augustine was the proper person with whom to attempt informal resolution since there was no lower member of management at the facility who had authority to address the portal to portal issue or to adjust work schedules. The memo set out sufficient information for the Agency to discuss the issue and therefore provided notice of the complaint. The language of Article 31, Section b. does not specify how long the Union must continue to attempt informal resolution but merely makes a general statement that the parties will make an attempt. In the present case the Union made a good faith attempt to raise the issue with Augustine but received no response. It appears from the testimony of Monds and Pedroni that Augustine received the memo and tasked them with responding. The Agency thus had the opportunity to at least discuss the matter with the Union but chose not to. Since the Union had become aware of a potential portal problem on December 14, 2009, it knew there was a limited window during which it could discuss the matter

informally before the 40-day time limit found in Article 21, Section d. to file a formal grievance would expire. The evidence also showed the Union attempted to discuss the portal issue at a LMR meeting on January 20, 2010, but apparently little if any discussion took place. Considering the time constraints facing the Union to file a formal grievance it was not unreasonable for it to suspend informal resolution attempts and file a formal grievance on January 22, 2010.

The use of representative testimony in this case was allowable since the evidence established all correctional officers on all watches at both FCI and FDC perform essentially the same activities during shift changes for all posts. Accordingly, the use of representative witnesses expedites the hearing process and provides adequate proof of the preliminary and postliminary activities alleged in this case. The testifying officers all have worked at the institution for at least ten years and also have worked the posts they described within that timeframe. The officers who appeared for the Union presented credible testimony concerning their duties upon entering the facility to relieve the on-duty shift and the fact that they also have a financial interest in the outcome of the arbitration does not exclude consideration of their testimony in this action on behalf of all other affected officers.

The grievance, therefore, is arbitrable and will not be dismissed based on the threshold issues raised.

OPINION ON THE MERITS

The FLSA dictates that the Agency must compensate employees at one and one-half times the regular rate of pay for all hours worked in excess of forty per week and permits up to two years back pay for failing to do so or three years back pay if the

Agency willfully violates this requirement. 29 U.S.C. §201 et seq. The Agency also must compensate employees for all work “suffered or permitted” that is performed for the Agency’s benefit, whether requested or not, if supervision knows or has reason to believe the work is being performed. 5 CFR §551.401. The Portal to Portal Act, 29 U.S.C. §251 et seq, excludes preliminary and postliminary activities from FLSA coverage unless they are an integral and indispensable part of the principal activity for which a covered employee is employed in which case the activities are compensable. Considering the testimony, evidence, authorities and arguments of the parties, I find that the pre-shift and post-shift activities performed by correctional officers on all posts during the 12:00 A.M. shift change between evening watch and morning watch at both FCI and FDC have been suffered and permitted by the Agency; that all these activities are integral and indispensable parts of the principal activity for which the officers are employed; that these activities have been performed continually at least during the three year period prior to the filing of this grievance until the present time; and that they are therefore compensable.

While there was testimony regarding all shift changes at FCI and FDC, this grievance only concerns pre-shift and post-shift activities performed before and after the 12:00 A.M. shift change between evening watch and morning watch. The discussion will therefore be limited generally to officers on all custodial posts during that shift change.

Correctional officers at the institution are employed to guard and manage inmates and to provide security at the various posts located throughout the two facilities at the prison, FCI and FDC. In order perform this job each officer must perform the various activities described during the hearing including passing through security, signing in,

picking up equipment at control, traveling to their specific post, passing through security doors, exchanging equipment and information with the off-going officer and performing the same activities in reverse on their way out of the facility when relieved. These activities are basically the same for all posts when changing shifts, with the exception of perimeter patrol, and enable officers to enter the facilities and travel to their posts to relieve the officer on duty on the hour. The activities are an integral and indispensable part of an officer's job. He or she cannot gain access to their duty post without completing these activities that are required by the Agency and for its benefit. He or she must pass through security, procure necessary equipment, travel to his or her post, and exchange equipment and information in order to do their job. All these activities are therefore integral and indispensable to an officer's principal activity, ie. guarding and managing inmates. Even if passing through the metal detector is deemed not to be an integral and indispensable part of the officer's job, and I find that it is, the remaining activities take a sufficient amount of time to complete to make the total time nevertheless compensable.

The testimony established that during the time in question supervisors on duty at both FCI and FDC have seen morning watch officers come in early and evening watch officers leave late at shift change and thus "suffered or permitted" them to do so without question. The Agency also had knowledge that morning watch officers, like all other officers, had to perform preliminary activities from the time they arrived at the metal detector until they actually arrived at their post and that the off-going evening watch officer had to perform most of these same activities to exit the facility even though they received no complaints from staff. While it perhaps did not know the total amount of

time the activities took to complete, management had to be aware through these supervisors that these activities took some period of time to accomplish in order to complete the midnight shift change. After all, the supervisors were present during each shift change and were well aware of the activities officers had to perform to attempt to relieve on time. I am convinced, therefore, that the Agency allowed officers to perform these activities without question in violation of the FLSA.

As stated above morning watch officers are required by the Agency to relieve evening watch officers precisely at 12:00 A.M. midnight. Some of the posts at FCI Tallahassee are farther from the entrance than others. For instance, F unit at FCI is 665 feet from control according to the diagram introduced at the hearing (JX 8) whereas the control center at both FCI and FDC and C corridor at FDC are both only a few feet away from the metal detector area. All of the other housing units and SHU at FCI are a considerable distance from the control center and it takes some period of time to reach them. But from touring both FCI and FDC it is clear that a significant amount of time must be expended performing activities between entering the metal detector area and actually arriving at an assigned post, even if the time varies from post to post. Some of this time is walking or waiting for doors to be opened but these are still compensable activities. The same basic tasks must be completed before a relieving officer can actually arrive at his or her post. It would therefore only be possible to relieve an on-duty post exactly on the hour if the relief were carried out at the front entrance metal detector area. This is not allowed, however, even for corridor relief. The simple fact, therefore, is that evening watch and morning watch officers have spent an appreciable period of

uncompensated time performing activities during the midnight shift change without compensation.

The testimony of the officers established that morning watch officers arrive early to relieve evening shift to ensure that the off-going officer can leave the facility on time. The Lieutenant who testified for the Agency was unsure when an officer would have to get to work in order to clear security and get to his or her post on time. If the morning watch officer gets to the relief post exactly at midnight the evening watch officer will be late leaving the facility because he or she must first perform postliminary activities before actually exiting the institution. In order for the evening watch officer to be out the front door on the hour or within a reasonable time, the morning watch officer must come in early. Thus if the morning watch officer arrives at the metal detector 15 minutes early, he or she has adequate time to arrive at the assigned post before midnight so the evening watch officer can be at the front entrance at the scheduled end of the shift.

Arbitrator Harris in AFGE, Local 525 and Federal Bureau of Prisons, FCI Williamsburg, South Carolina, FMCS No. 08-56529 (2012) at page 58 states that several arbitrators have concluded it is a “fictional notion that a change-of-shift can be accomplished on as instantaneous basis” when non-overlapping eight hour shifts are used to cover each 24-hour workday. See USP Allenwood and AFGE, Local 307, FMCS No. 08-50318 (Katz) Harris logically observes that such an instantaneous shift change is impossible and that even management witnesses in that case agreed that it took at least a few minutes to change every shift. The same principles apply at FCT Tallahassee. Based on the testimony and evidence presented I find that even the quickest relief posts at FCI

and FDC still require a minimum of five minutes or more to complete and this time is compensable as overtime.

The most convincing factor that indicates the Agency has acknowledged the necessity for this overlap period is the day watch schedule itself that has an arrival time of 7:45 A.M. and a departure time of 4:15 P.M. even though all other officers perform the same procedures and activities during the 12:00 A.M. shift change. This overlap allows sufficient time for both the 8:00 A.M. and 4:00 P.M. shift changes to take place near the hour while allowing the off-shift officers to leave the facility on time. This is only logical considering the time necessary to perform the preliminary and postliminary activities on each shift change. There was no reason given to explain why this same overlap is not provided for the 12:00 A.M. shift change that follows the same procedures as other shifts during relief even though it is suggested in the Human Resources Manual, 610.1 (JX 6). The only plausible reason for day watch officers coming in 15 minutes early is to enable morning watch officers to leave on the hour at 8:00 A.M. and day watch stays an extra 15 minutes at the end of the shift so evening watch officers do not have to arrive early to be at their posts at 4:00 P.M. These starting and stopping times for day watch are also the same for all posts including perimeter, control and corridor, so the Agency has made no distinction between the posts on this shift even though some take less time to relieve than others. They all start and stop at the same time. Accordingly, there should be no distinction made between perimeter, control and corridor posts and the other posts on evening shift and morning shift. They should all be provided a similar overlap to complete the 12:00 A.M. shift change in a reasonable manner.

Further evidence the Agency has been aware of the need for an overlap between all shifts is the fact that the duty hours for morning shift were 11:45 P.M. to 8:00 A.M. according to rosters from September 1996 through January 1999 and information received from the Agency by Pulido. Thus the Agency acknowledged at least for a period of time the need for a 15 minute overlap during the 12:00 A.M. shift change and there was no evidence presented that there was any change of circumstances that occurred in 1999 to cause this modification of the starting and stopping times for morning shift.

Time estimates from the three officers who testified regarding how long it takes to carry out a shift change varied for each post based on several factors including the number of people coming and going during the shift change, the equipment involved, the amount of information exchanged and the distance to the particular assigned post. But generally the time ranged from three to ten minutes or more both on-coming and off-going. All of them estimated it takes two or three minutes to go through the metal detector and a minute or two to exit the sallyport to proceed to their post, and several more minutes to actually arrive at their post. Regardless, the physical layout of the institution is such that it takes at least a minimum of four or five minutes to arrive at and relieve any post. Since the Agency pays overtime in 15 minute increments without setting a minimum time to qualify, the specific time necessary to relieve each post is not critical to recovery.

The Agency argues that the preliminary and postliminary activities enumerated by the Union are de minimis and therefore not compensable. For time spent performing work to be excluded based on the de minimis principle the time involved must be so brief as to be almost fractional or nominal. I am convinced from the testimony and evidence

that the time spent during shift change without compensation by the officers who testified is not nominal but cumulatively amounts to a significant period of time especially when considering it is necessary to expend that time before and/or after every midnight shift change. This applies even to perimeter patrol, C corridor and control posts that can be relieved faster than other posts at the facility. The activities involved here, therefore, are not de minimis.

The Agency cites 5 CFR §551.412 (a)(1) for the premise that a preparatory or concluding activity is de minimis and not compensable if it takes less than ten minutes to perform. Arbitrator Burton White addressed this question in AFGE, Local 3979 and U.S. Department of Justice, Federal Bureau of Prisons, FCI, Sheridan, Oregon, 110 LRP 16651 (2010). In applying this principal to a similar case Arbitrator White ruled the ten minute rule did not apply because overtime at that institution was paid in increments of one-quarter hour, with odd minutes rounded up or down to the nearest quarter hour. Applying this reasoning to the present case, the evidence proved that at FCI Tallahassee overtime is paid in the same increments of one-quarter hour regardless of the number of minutes worked. (UX 4) Accordingly, the preliminary and postliminary activities performed during the midnight shift change are not de minimis and are compensable.

The Agency also cites Lindow v. United States, 738 F.2d 1057 (1984) for the proposition that the time spent by the officers during the midnight shift change is de minimis and not compensable. Arbitrator Douglas Hammond in applying Lindow in U.S. Department of Justice, Federal Bureau of Prisons, FCC Tucson, Arizona and AFGE, Local 3955, 111 LRP 58596 (2011) stated as follows:

In Lindow the Court listed three criteria necessary to assess if otherwise compensable time should be considered de minimis; (1) the practical administrative difficulty of

recording additional time; (2) the size of the aggregate claim; (3) if the work claimed was performed on a regular basis. All three criteria have been exceeded here. The work performed and compilation of time spent is not administratively difficult or onerous. It can be easily determined and recorded for each post and employee. The claims here are beyond a mere few seconds or minutes. The employees spend enough time, each shift, to warrant extra pay consideration. As has been shown, the work is performed on a regular and ongoing basis.

The present case likewise meets the criteria set out in Lindow. There is no evidence of administrative difficulty in recording the time spent by officers during the 12:00 A.M. shift change. Since there is no time clock, on site supervisors would only have to check morning watch officers in early before the midnight shift change and they do for day watch officers. The aggregate claim is substantial when considering at least five or ten minutes per shift times five days per week and 52 weeks per year. And finally, there is no question the credible testimony established that officers on all shifts, including evening and morning, perform the work claimed on a regular basis. I therefore conclude the requirements of Lindow have been satisfied in the present case and the work is not de minimis.

The testimony and evidence presented in this case leads to the conclusion that the Agency has known or should have known that it has been necessary for officers on morning watch FCI and FDC to come in early and officers on evening watch to stay late due to the pre-shift and post-shift activities they have been required to complete during that shift change at least during the timeframe involved in this case. It violated its own policy in the Human Resources Manual 610.1 by failing to take any action to adjust evening and morning watch shift starting and stopping times to solve this problem. The conclusion made by Arbitrator Hammond in FCC Tucson and AFGE, Local 3955 cited above applies equally to the present case wherein he states:

The Agency has long been aware of the problem regarding the concern over pay for time worked. Several Arbitration and FLRA decisions have addressed the issue of compensable time for hours outside the announced schedule at numerous institutions throughout the BOP. Yet nothing appears to have been done about it. The management at FCC Tucson has the responsibility and requirement to schedule employees in a fair and reasonable manner, insuring pay for time worked within the realm of the employees' principal activities. They have willfully ignored this responsibility by doing little or nothing to ameliorate the problems brought by this grievance. Management cannot merely sit back and enjoy the results of an employee's labor without compensation. By failing to compensate or to make significant and proper adjustments to either pay or schedule, the Agency is in violation of the FLSA.

I find that the Agency has willfully and intentionally ignored the pre-shift and post-shift work performed by all correctional officers assigned to all posts on evening and morning watch at FCI and FDC and this violation of the FLSA requires the period of calculation of the back pay remedy to begin three years prior to January 22, 2010, the date of the filing of the grievance, the time set forth in 29 U.S.C. § 255 as amended of the Portal to Portal Act for limitation of actions under the FLSA.

AWARD

- 1.) The grievance is arbitrable.
- 2.) The grievance is sustained. All past and present correctional officers who worked all 24-hour correctional posts at FCI and FDC (including perimeter patrol, control room, C corridor, compound, all housing units and SHU) on morning watch and evening watch shall be paid fifteen (15) minutes pay, at the appropriate overtime rate, including interest allowed by law, for all morning and evening shifts worked from the period of January 23, 2007, three years prior to the date of the filing of this grievance, until such time as the Agency adjusts current roster hours to provide a fifteen minute overlap period for the 12:00 A.M. shift change similar to the 8:00 A.M. and 4:00 P.M. shift changes either by adjusting the roster hours for morning watch to 11:45 P.M. to 8:00 A.M. or by

implementing an acceptable alternative adjustment to the roster hours that is satisfactory to the parties.

3.) Since the Agency willfully and in bad faith violated the FLSA and the Agreement by failing to pay officers assigned to evening watch and morning watch for all time worked in the performance of their principal activities at FCI and FDC Tallahassee and had no reasonable grounds to believe the omission was appropriate under the FLSA, it is also liable for liquidated damages and reasonable Union's attorneys' fees and expenses.

4.) The arbitrator retains jurisdiction to resolve any disputes that may arise over the implementation of this Award if the parties are unable to agree.

November 14, 2012
Date

Cary J. Williams
Cary J. Williams, Arbitrator