FEDERAL MEDIATION AND CONCILIATION SERVICE

IN ARBITRATION

JOE M. HARRIS, JR., ARBITRATOR

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL NO. 525,	)	
UNION,	)	FMCS File No. 08-56529
and	)	Issue: Portal to Portal Dispute
FEDERAL BUREAU OF PRISONS, FCI WILLIAMSBURG, SOUTH CAROLINA,	)	
AGENCY.	)	

SECOND OPINION AND AWARD

May 22, 2012

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TABLE OF CONTENTS

I. INTRODUCTION 1

II. FACTUAL BACKGROUND 3

III. DISCUSSION AND ANALYSIS 5

A. Legal Background 5

B. Compound One and Two Posts 8

1. Picking Up and Dropping Off Batteries at Control Center 8

a. Prior Arbitration Decisions 10

b. The Evidence on Batteries 16

i. Union Evidence 17

ii. Agency Evidence 19

iii. Comparing the Evidence on Batteries 22

2. Walking the Prison Grounds 33

3. The Agency Suffered or Permitted the Activities 37

i. The Legal Standard 37

ii. The Testimony 40

iii. The General Post Orders 42

C. Control Center 1 Post 45

1. Arriving Early and Working 45

2. Early Shift Exchanges Were Suffered or Permitted 49

D. FCIW Post Orders 51

E. COs Are Not Allowed To Leave Early.............................. 55

F. De Facto Overlapping Shifts.. 57

G. The Continuous Workday Rule...................................... 60

H. The Time Involved is not De Minimis..............................63

I. Evidence on the Amount of Overtime.............................. 65

J. The Union's Evidence Was Sufficiently Representative......67

K. Donning Duty Belts on Agency Premises......................... 68

L. Liquidated Damages... 73

M. The Statute of Limitations.. 80

N. Attorneys' Fees and Costs... 81

IV. FINDINGS AND CONCLUSIONS...................................... 81

I. INTRODUCTION

On June 16, 2008, at the request of the parties, the undersigned Arbitrator was appointed by the Federal Mediation and Conciliation Service to hear and decide the above matter, initiated by a grievance filed March 11, 2008 ("the Grievance"). On April 8, 2010, an "Order Regarding Interim Awards and Other Pre-Hearing Matters" was entered by the Arbitrator (the "April, 2010 Order").

The April, 2010 Order set up two weeks of hearings, to be at least one month apart. In the first round of hearings, the Union was asked to "present background evidence and as much evidence as it is able concerning the following posts: Perimeter Patrol, Compound, and Control." In the second round of hearings, the Agency was to "present any evidence it has concerning those posts represented in the initial case put on by the Union." There was also time set aside for rebuttal evidence.

The hearing was convened on Tuesday, April 12, 2011, and extended through Friday, April 15, 2011. It was reconvened on May 17, 2011, and extended through May 20, 2011. A final hearing day was convened for rebuttal purposes on July 6, 2011. The Agency asked for permission to call one additional witness on that day, and that request was granted over the objection of the Union. There have been a total of nine days of hearings in this case thus far.

There were 5 joint exhibits, the Union introduced 24 exhibits, and the Agency introduced 44 exhibits. In the time allotted, the Union was only able to present

evidence regarding the Control Center post and the Compound 1 and Compound 2 posts, so those are the only posts at issue here.

On Thursday, April 14, 2011, a dispute broke out as to whether the Union would waive its right to present evidence concerning the Perimeter Patrol posts if those posts were not reached by the end of that week due to time constraints. As it turned out, those posts were not reached that week, and the same argument arose on Thursday, May 19 and Friday, May 20, 2011. I am not sure whether the Agency has continued to insist on that waiver claim or not, although it did reserve the right to argue whether the Union's evidence presented a representative sample of the three posts that were covered. 4/14 Transcript, pp. 160-162.

Just in case a waiver argument has been raised, or might be raised later in these proceedings or on appeal, this will confirm for the record that it was, and still is, my decision that the Union did not waive its right to present evidence at a later date regarding the Perimeter Patrol posts, which were not reached or covered by the evidence heard during the first week, due to no fault of the Union's.[1]

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[1] In the event that I need to explain the basis for this decision, I note that the Union had no control over the length of time taken by the Agency cross-examining Union witnesses, which was extensive, and had a limiting effect on the Union's ability to present evidence. An example of this problem is found at page 159 of the transcript taken on April 14, 2011: "Ms. Elkin: Before we resume, I would just point out that direct examination of this witness was less than 40 minutes. The cross-examination has been over two and a half hours. It was the same ratio, if not worse, when ... the Union called Mr. Peavy and he testified for two and one half hours on direct and then well over six hours on cross.... [This] is hindering our ability to put on our case ...". April 14, p. 159. This footnote is not intended to be a criticism of the Agency's

The parties elected to submit post-hearing briefs; the opening post-hearing briefs were received on November 29, 2011, and the rebuttal post-hearing briefs were received on December 19, 2011 and on that date the hearing was declared closed. The parties graciously consented to my request for an extension of time to complete this Opinion and Award through May 31, 2012.

II. FACTUAL BACKGROUND

The American Federation of Government Employees, AFGE Local No. 525 ("the Union") and the Federal Bureau of Prisons ("FBP" or "the Agency"), Federal Correctional Institution, Williamsburg ("FCI Williamsburg" or "FCIW" or "the Institution") are parties to a collective bargaining agreement dated March 9, 1998 and extended by mutual agreement (the "Master Agreement" or the "CBA") which governs this proceeding.

FCIW "is a medium security" institution housing prisoners who "run the gamut" from "white collar crime, homicide, child molestation, embezzlers, tax cheats, drug dealers and illegal aliens." Peavy, 4/12, pp. 75-76.[2] There are approximately 1,830[3] inmates housed at FCIW, and "camp inmates" who are lodged

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presentation, it is only an explanation for why the Perimeter Patrol posts were not reached and have been preserved for a subsequent hearing, if necessary.

[2] References to the transcripts are identified by the person testifying, the date of the testimony, and the page number of the transcript.

[3] Union Exhibit 2 shows the population at FCIW as of April 1, 2011, as "1,676." It is not clear whether this number includes the "camp inmates."

outside the perimeter fence "on the honor system." Peavy, 4/12, p. 75. Almost every day there is a change in the inmate population at FCIW. Peavy, 4/12, p. 75.

Portal to Portal disputes are not new to the Agency nor the Union and its locals. There has been a "series of cases involving disputes between Union locals and the Agency relating to premium pay for pre-shift and post-shift activities under the [Fair Labor Standards Act, 29 USC § 201 *et seq.* (the "FLSA")] and the [Portal-to-Portal Act, 29 USC § 254 (the "P2P Act")]." *United States Department of Justice, Bureau of Prisons, FCI Jesup, Georgia*, 63 FLRA 323, 323 (2009).

These cases "followed an Agency-wide grievance filed by the [National] Union in 1995 and settled by the parties in August, 2000"; "the [s]ettlement [a]greement ... preserved the right of employees to file claims for premium pay covering pre-shift and post-shift work after January 1, 1996." *United States Department of Justice, Bureau of Prisons, FCI Jesup, Georgia*, 63 FLRA 323, 323 (2009). This grievance is one of those claims. There have been many others.

At present, this case is confined to the issue of liability only, under the FLSA and the P2P Act, and concerns only three posts: the Control Center 1 post and the Compound 1 and 2 posts. Compound 1 and 2 are 24 hour posts with a correctional officer (hereinafter "CO") assigned to each post during the Day Watch shift from 8:00 a.m. to 4:00 p.m. ("DW"), the Evening Watch shift from 4:00 p.m. to 12:00 a.m. ("EW"), and the Morning Watch shift from 12:00 a.m. to 8:00 a.m. "MW"). The Control Center 1 post is also a 24 hour post, and follows the same shift schedule as

that set forth above.[4] The Compound 1 and 2 posts will be addressed first, followed by the Control Center post. But first, the legal backdrop will be sketched in briefly.

III. Discussion and Analysis.

A. Legal Background.

The FLSA, 29 USC Section 207(a), prohibits employment "for a workweek longer than forty hours unless [the] employee receives compensation for his employment in excess of [forty hours] at a rate not less than one and one-half times the regular rate at which he is employed." The Grievants in this case are "employees" covered by the FLSA (under the FLSA, an "employee" includes "any individual employed by the Government of the United States ... (ii) in any executive agency..."). 29 USC Section 203(e)(2).

"In passing the [P2P Act], Congress distinguished between 'the principal activity or activities that an employee is hired to perform,' which are compensable, and 'activities which are preliminary to or postliminary to said principal activity or activities,' which are not compensable." *United States Department of Justice, Bureau of Prisons, FCI Jesup, Georgia*, 63 FLRA 323, 327 (2009). In *Steiner v. Mitchell*, 350 U.S. 247 (1956), the Supreme Court "clarified that a given activity constitutes a 'principal activity,' as opposed to a preliminary or postliminary task, if

[4] During a portion of the relevant time period in this case, the shifts for the Control Center 1 post were 7:00 a.m. to 3:00 p.m. for DW, 3:00 p.m. to 11:00 p.m. for EW, and 11:00 p.m. to 7:00 a.m. for MW. The Union asserts, and the evidence supports the Union's assertion, that "the change in shift times did not affect the practice[s] [and] activities performed by the Control Center 1 officers" shown by the evidence.

it is 'an integral and indispensable part of the principal activities for which covered [employees] are employed.'" *United States Department of Justice, Bureau of Prisons, FCI Jesup, Georgia*, 63 FLRA 323, 327 (2009).

These basic legal principles have been accepted and applied by the FLRA in several cases involving FBP employees; many of them are cited in *United States Department of Justice, Bureau of Prisons, FCI Jesup, Georgia*, 63 FLRA 323, 323 (2009), and there have been many more arbitrations since then, some of which have also reached the FLRA on appeal.

In the case which prompted the P2P Act, *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680,687, 66 S. Ct. 1187, 1192, 90 L.Ed. 1515 (1946), the U.S. Supreme Court explained how the burden of proof works in cases such as this one, and it is still applicable today: "the employee bears the burden of proving that he performed work for which he was not properly compensated," but to prevent employees "from being penalized [in cases where] the employer fails to keep adequate records," the Supreme Court held that "the employee carries his burden of proof" by establishing that he "has in fact performed work for which he was improperly compensated and [producing] sufficient evidence to show the amount and extent of that work as a matter of just and reasonable inference." *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680,687, 66 S. Ct. 1187, 1192, 90 L.Ed. 1515 (1946).

"Upon such a showing, the burden shifts to the employer to produce evidence of the precise amount and extent of work performed or to negate the reasonableness of the inference drawn from the employee's evidence," *Anderson v. Mt. Clemens*

Pottery Co., 328 U.S. 680,687, 66 S. Ct. 1187, 1192, 90 L.Ed. 1515 (1946), and "[i]f the employer does not rebut the employee's evidence, then damages may be awarded even though the result is only approximate." *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680,687, 66 S. Ct. 1187, 1192, 90 L.Ed. 1515 (1946).

Although the Department of Labor is generally charged with the administration of the FLSA, the Office of Personnel Management ("OPM") administers the FLSA "with respect to any individual employed by the United States...". 29 USC Section 204(f). Pursuant to that authority, OPM has promulgated federal regulations applicable to these matters.[5]

5 CFR Section 551.501(a) requires the Agency to pay overtime "for all hours of work in excess of 8 in a day or 40 in a workweek." 5 CFR Section 551.401 defines "hours of work" to include "[t]ime during which an employee is suffered or permitted to work." The question of whether the Agency "suffered or permitted" the COs in this case to perform the disputed pre-shift and post-shift activities is governed by 5 CFR Section 551.104, which provides:

> "Suffered or permitted work means any work performed by an employee for the benefit of an agency, whether requested or not, provided the employee's supervisor knows

[5] OPM is to "exercise its administrative authority in a manner that is consistent with the Secretary of Labor's implementation of the FLSA," *AFGE v. Office of Personnel Mgt.*, 821 F.2d 761m 770 (D.C. Cir. 1987), and "the DOL regulations can be used to shed light on the [FLSA]," *Adams v. U.S.*, 26 Ct. Cl. 782, 786 (Fed. Cl. 1992).

or has reason to believe that work is being performed and has an opportunity to prevent that work from being performed."

Finally, 5 CFR Section 551.501(a) requires the Agency to pay overtime "for all hours of work in excess of 8 in a day or 40 in a workweek," and 5 CFR Section 551.402(a) provides that "an agency is responsible for exercising appropriate controls to ensure that only work for which it intends to make payment is performed." These legal principles and regulations guide the resolution of the issues involving the Compound One and Two Posts and the Control 1 Post, which will be addressed below.

B. Compound One and Two Posts.

1. Picking Up and Dropping Off Batteries at Control Center.

The primary issues pertaining to the Compound 1 and 2 posts are (i) whether picking up and dropping off batteries at the Control Center is "integral and indispensable" to their principal activities at FCIW' and (ii) whether the Agency suffered or permitted such activities. The parties vehemently disagree over these issues. The Agency says first that picking up and dropping off batteries pre-shift and post-shift are not integral and indispensable to Compound Officers' principal activities; and second, even if it was integral and indispensable to a principal

activity, the Agency did not "suffer or permit" it, but instead prohibited it.[6] The Union contends that picking up and dropping off batteries pre-shift and post-shift are integral and indispensable to Compound officers' principal activities and that the Agency did suffer or permit the practice, in that it knew or should have known about it and did very little, if anything, to stop it. Under the application of both standards, the Agency contends that it is not liable for premium pay under the FLRA, and the Union says that it is.

Batteries have been at the center of numerous disputes between the Agency and the Union locals for years. The Agency's position has evolved from allowing, but not requiring, COs to pick up batteries at a control center[7] (at USP Allenwood) to the General Post Orders in this case that outright prohibit certain COs[8] from picking up or dropping off batteries at the Control Room.

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[6] Actually the Agency contends that the standard is that it must have "suffered *and* permitted" the practice, but the standard is phrased in the disjunctive, not the conjunctive. *See, e.g.,* 5 CFR Section 551.104.

[7] *See, for example, AFGE Local 307 and USP Allenwood*, FMCS No. 08-50318 (Katz, July 6, 2011), at p. 33, where the arbitrator noted that at USP Allenwood in 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 COs to perform such pick-ups or drop-offs; nor was there a rule or procedure prohibiting them from doing so."

[8] See General Post Orders, Union Exhibit 11, p. 6. The parties disagree about the scope of this Post Order, the Agency contending that it applies to all 24 hour posts, including Compound Officers, and the Union contending that by its express terms the prohibition applies only to COs assigned to the Housing Units. I agree with the Union in view of the limiting introductory language therein: "On your assigned shift, report to the housing *unit* and receive your equipment from the *unit* officer."

a. **Prior Arbitration Decisions.**

The Union has cited an *overwhelming* number of prior arbitration decisions addressing the issue of picking up and dropping off batteries, and holding that these activities are integral and/or indispensable to prison employees' principal activities, and are therefore compensable under the FLRA.

See, e.g. FCC Oakdale and AFGE Locals 3957 and 1007, FMCS No. 08- 55478 at 32 (Moreland, Arb) (November 4, 2011) (correctional officers' "procurement and return of the battery alone is integral and indispensible to the correctional employees as if they were picking up/returning the radio/body alarm itself. There is no difference"); *USP Allenwood and AFGE Local 307,* FMCS Case No. 08-50318 (Katz, Arb) (July 6, 2011) (correctional officers' picking up of batteries should be regarded as the first integral and indispensible activity of their workday; and conversely, the dropping off of the batteries should be regarded as the last integral and indispensible activity of their workday); *AFGE Local 420 and USP Hazelton,* FMCS Case No. 09-00421 (Arb. Vaughn) (December 8, 2010) at p. 85 (correctional officers' act, no matter what their specific post might be, of picking up a fresh battery at the Control Center at the start of their shift and returning it to the Control Center at the end of their shift is integral and indispensable to the principal activity for which correctional officers are employed, is performed primarily for the Agency's benefit and is necessary to the Institution's operation and thus starts the compensable workday); *AFGE Local 4047 and FCI Allenwood,* FMCS Case No. 09-57336, at p. 40 ("an officer needs a battery to make sure that his radio and body

alarm is working at all times, as required by the Agency. Accordingly, picking up the battery at the control center " is an activity that is 'integral and indispensable' to that principal activity, and therefore according to *Alvarez,* it should be compensated."); *AFGE Local 3979 and FCI Sheridan*, FMCS Case No. 08-522128 (Feb. 11, 2010) (White, Arb.) at p. 44 ("Stopping at one of the Control Rooms to pick up a charged battery was work that was 'suffered and permitted' by the administration of the facility and this action–even if standing alone—began the compensable workday for Correctional Officers"); *AFGE Local 83 and FCI La Tuna*, FMCS Case No. 06-0908-0524-1 (July 7,2009) (Curtis, Arb.) at p. 41 ("The compensable workday begins when the officers engage in the first activity that is integral and indispensable to their principal activities. Here, the record is replete with testimony that correctional officers have retrieved freshly charged batteries ... prior to the start of their shifts and have returned their used batteries after the end of their shifts. These activities are integral and indispensable to their principal activities of ensuring safety and security.") *AFGE Local 171 and FTC Oklahoma City*, FMCS Case No. 07-00183 (April 28, 2009) (Shieber, Arb.) at pp. 18-19 ("The Arbitrator finds that picking up a charged battery constituted securing equipment that was indispensable to an officer's performance of his/her job because the battery powered the officers radio and body alarm."); *AFGE Local 1242 and USP Atwater*, FMCS Case No. 05-57-57849 (Sept. 18, 2008) (Calhoun, Arb.) at p. 11 ("The need for a fresh battery each shift is beyond question given the nature of correctional officer work among inmates. It is their lifeline."); *AFGE Local 3981 and FCI Jesup*, FMCS

Case No. 94-07225 (July 14, 2006) (LaPenna, Arb.) at 131-32 ("[T]he pick up of a freshly charged battery at the start of a shift is a pre-shift activity that is indispensable to the performance of the principal work activity....[and] is compensable, as is the post requisite travel to the duty post"); *AFGE Local 1298 and FCI Fort Worth*, FMCS Case No. 08-51179 (Apr. 14, 2009) (Gomez, Arb.) at p. 26 (picking up and dropping off equipment, including batteries, at Control Center begins and ends compensable work day); *AFGE Local 1006 and FMC Carswell*, FMCS Case No. 07-04342 (Nov. 26, 2008) (Nicholas, Arb.) at p. 11 (adopting the reasoning in *Jesup*, and holding that picking up a battery starts the workday); *FCI Petersburg*, FMCS Case No. 01-04534, at p. 61 (picking up equipment at Control Center starts compensable workday); *AFGE Local 1741 and FCI Milan*, FMCS Case No. 010418-09332-8 (June 21, 2006) (Allen, Arb.) at p. 12 (concluding that keys and other equipment are an integral and indispensable part of the principal work activity, and that "[t]herefore, obtaining keys, and other equipment, at the Control Center marks the beginning and end of the compensated 'workday'."); *FCC Beaumont and AFGE, Council of Prison Locals, C-33*, FMCS No. 05-54516 (Dec. 27, 2006) (Marcus, Arb.) at p. 22 ("[T]ime spent at the Control Center receiving equipment necessary for the employee to perform his duties when he reaches his post is compensable from the moment the employee requests the equipment. As stated, included in such equipment are: radio, batteries, security equipment, weapons, ammunition, handcuffs, pacification equipment, flashlights, stamp pad and stamp, written orders placed in the officers' mail box[es], detail pouches, etc.");

AFGE Local 801 and FCI Waseca, FMCS Case No. 07-53583 (Feb. 3, 2010) (Daly, Arb.) (activities required at the Control Center, checking batteries, and walking to assigned posts are all principal activities of the workday and cannot be excluded from FLSA coverage).

Faced with this daunting array of arbitral precedents, the Agency seeks to avoid them by devising an ingenious argument that shifts the question, framing the first element of the dispute over batteries as follows:

> "The appropriate analysis is not whether a battery is integral and indispensable to the workings of a radio but whether the pre-shift activity of picking up a battery is integral and indispensable to principal activities. Such a pre- or post-shift activity is not integral and indispensable to a principal activity because the Agency has designated a means for picking up and returning batteries *during duty hours*."

Agency Brief, p. 26 (emphasis in original).

Thus, the Agency says, "[i]f Compound or Control Officers conduct themselves contrary to Agency requirements, it is not only unnecessary but inures to their own benefit rather than the Agency's." Agency Brief, p. 26. Therefore, the Agency says, the activity of picking up batteries and dropping them off is "not integral and indispensable" to the COs' principal activities.

However, this argument, too, has been advanced before, and rejected by other arbitrators under similar circumstances. In *AFGE Local 307 and USP Allenwood*, FMCS No. 08-50318 (Katz, July 6, 2011), Arbitrator Lawrence Katz addressed the Agency argument that "battery pick-ups and drop-offs" were "not mandated or required, since they could have been performed by the Compound Officers," as in this case. Arbitrator Katz found that, notwithstanding other means of availability, the COs at USP Allenwood had developed "the *ad hoc* routine" of picking up batteries "to ensure their own safety," and found that the activity "must be viewed as required" ... "in terms of the preservation of their own safety, a paramount concern at USP Allenwood as well as other FBP facilities." *AFGE Local 307 and USP Allenwood*, FMCS No. 08-50318 (Katz, July 6, 2011), pp. 83-84.

In *FCC Oakdale and AFGE Locals 3957 and 1007*, FMCS No. 08-55478 (Moreland, November 4, 2011), the Agency relied on similar rules and memoranda, as well as a "red sign" posted at "the control centers" stating, "STAFF ASSIGNED TO 24 HOUR POSTS ARE PROHIBITED FROM STOPPING AT CONTROL FOR EQUIPMENT." *FCC Oakdale and AFGE Locals 3957 and 1007*, FMCS No. 08-55478 (Moreland, November 4, 2011), at p. 25. Notwithstanding the management rules and memos and the "red sign," Arbitrator Moreland noted that "the Agency does not dispute the fact that correctional officers can face life threatening situations at any moment." *FCC Oakdale and AFGE Locals 3957 and 1007*, FMCS No. 08-55478 (Moreland, November 4, 2011), p. 27. As a result, Arbitrator

Moreland found that COs "take every conceivable precaution to secure their own safety as an instinctive matter of institutional and self-preservation," and that:

> "Safety and inarguable concern for their own well being in their dangerous job, drives the officers in this case to defy the Agency's directive that they not stop at the control center between their shifts for the equipment they deem indispensable. In what can only be described as widespread disregard to the Agency's superficial directives, the correctional officers continue, unimpeded by the Agency, to procure the equipment they deem necessary to insure their personal and institutional safety before assuming their posts, inevitably resulting in overtime. Certainly, this safety benefits the Agency. Logically, the Agency allowed it."

FCC Oakdale and AFGE Locals 3957 and 1007, FMCS No. 08-55478 (Moreland, November 4, 2011), p. 28.

Finally, the FLRA has addressed just such a finding, and affirmed it. In *FMC Carswell and AFGE Local 1006*, 65 FLRA 960 (6/29/2011) at p. 961, the FLRA noted the arbitrator's holding that "batteries are essential to operative radios and body alarms" and "without operative radios and body alarms," the grievants "could not perform their principal work activity effectively and safely both for themselves and the inmates for whose safety they are responsible." *FMC Carswell and AFGE Local 1006*, 65 FLRA 960 (6/29/2011), at p. 961.

The arbitrator in *Carswell* had "rejected the Agency's claim that picking up batteries is not necessary because charged batteries are already in place or can be delivered to employees at their posts," holding that "because of safety concerns pertaining to operative radios and body alarms, employees cannot rely on the batteries in place or risk that the batteries might not be delivered to their posts." *FMC Carswell and AFGE Local 1006*, 65 FLRA 960, at p. 961 (6/29/2011). The FLRA affirmed this decision.

Under similar circumstances, the FLRA also affirmed an arbitrator's finding that "the creation of 24 hour custodial posts ... did not affect the need to stop at the control center to obtain and return batteries" because custodial employees continued to "pick up a fresh battery in order to ensure their personal safety and security prior to starting their shift." *United States Department of Justice, Bureau of Prisons, FCI Jesup, Georgia*, 63 FLRA 323, 325 (2009).

b. The Evidence on Batteries.

The evidence in this case establishes exactly the same thing as those precedents cited above. Despite the Agency's *pro forma* (and ambiguous, if not confusing, directives), the enforcement of which has not been particularly stringent, *all* of the COs at FCIW who testified at the hearing have, and continue to, routinely pick up and drop off batteries at the Control Center. Furthermore, all of them save one (Aron Davis)[9] testified that they do not do this simply for convenience, but for

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[9] Mr. Aron Davis, a member of the bargaining unit called by the Agency to testify, said that he picked up and dropped off batteries at the Control Center, but that he

"safety concerns pertaining to operative radios and body alarms," as the evidence summarized below will show.

In September, 2010, the Institution put battery chargers "in the housing units and in the compound office." Peavy, 4/12, p. 97. Prior to then, "all of the" COs "picked up batteries in the control room," Peavy, 4/12, p. 97, and they did so "prior to the[ir] paid shift times." Peavy, 4/12, pp. 97-98. Mr. Peavy testified to this based on his observations while working at the Control Center during the time in question. Peavy, 4/12, p. 98.

In addition, every one of the COs who testified said they picked up and dropped off batteries at the Control Center as a matter of routine, on a daily basis, picking up them up some 25 to 30 minutes prior to the beginning of their shift and dropping them off a few minutes before, or right at the end, of their shift. The Agency asserts that this is simply not true, or even if it were, it is not happening consistently or as part of an ongoing pattern, and even if COs are following this practice, they are doing it in violation of Post Orders and instructions from supervisors. As one might expect, the evidence on all of these subjects is in sharp conflict.

(i) Union Evidence.

Officer Fleming testified that when he works as a Compound 2 Officer, MW, his normal schedule is "12:00 a.m. to 8:00 a.m.". He "arrive[s] around 11:30, 11:35

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did so only as a matter of personal convenience, because it's "just easier." Davis, 5/19, pp. 44-45.

[p.m.]" and picks up "a bag of [charged] batteries" so he can "distribute batteries through [his] shift." Fleming, 4/14, p. 20. He said he has also worked Compound 2, DW, and although there is no battery bag for the DW shift, he still "picks up four or five batteries" prior to the beginning of that shift. Fleming, 4/14, p. 25.

Officer Fleming also testified that when he worked the Control Center post, he saw COs "normally coming in, ... [they would] stop by and get their equipment, including batteries." Fleming, 4/14, p. 35. Fleming testified that he handed out fresh batteries to COs "coming in ... on the way to their post ... prior to their shift." Fleming, 4/14, p. 36. He also said that lieutenants have picked up batteries from him while he was working the Control Center "prior to the start of [their] shift," Fleming, 4/14, p. 36, and "they have" returned batteries "at the end of [their] shift on the way out of the institution." Fleming, 4/14, p. 37.

Crystal Owens likewise testified that she had worked in the Control Room, where she observed "staff pick[ing] up batteries from the drawer in the front of the Control Room," Owens, 4/14, T-192, and where she saw the relieving officers "turn them in in (sic) the drawer on the other side of the Control Room" on their way out. Owens, 4/14, T-192. Like Officer Fleming, she also handed out fresh batteries to lieutenants and accepted spent batteries from them. Owens, 4/14, T-192-193.

Kender Floyd testified that when working Compound EW, he would "stop by" the Control Room "and pick up a bag of batteries" and "a battery for myself" as well

as two "detail pouches"[10] for the upcoming work details. The detail pouches are for the CO to "check your guys [i.e., inmates] off as they report to work." Floyd, 4/15, p. 17.

Finally, Samuel Arnold, who has worked the compound post on all three watches, testified that he generally arrived at "the control center" about thirty minutes prior to his shift starting time, where he would pick up detail pouches "and my battery for my radio." Arnold, 4/15, p. 123-124. During shift change activities, Mr. Arnold said he would be "checking the equipment ... and changing the battery out on the radio." Arnold, 4/15, p. 125. Asked why he picks up a fresh battery on the way in, he replied, "I have a new battery with me because I assume the other one has been on 8 hours." Arnold, 4/15, p. 142.

(ii) Agency Evidence.

The Agency cites FCIW General Post Orders, Union Exhibit 11, p. 6, that instructs certain COs not to pick up batteries at the Control Center, and says that "there is no reason for them to pick up batteries [at Control] since they can go back to Control after they are on duty and pick [them] up." Cheatham, 5/18, p. 44. All of the management witnesses testified that they have not seen this activity occurring, or only rarely, and those who have seen it have "corrected it on the spot."

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[10] Officer Floyd said that "a detail pouch is ... a roster of inmates [with photos] that are on your work detail." Floyd, 4/15, p. 16. When he worked EW, Officer Floyd actually picked up two detail pouches, one for the "compound p.m. detail" and another for the "trash p.m. detail." Floyd, 4/15, p. 17.

Steve Langford, Associate Warden at FCIW for five years preceding the hearing in this case, testified that he has "never observed" COs picking up batteries from the Control Center, and if he saw it, he "would take appropriate measures to put an end to it." Langford, 5/17, p. 107.

Captain Tammy Phillips likewise testified that she "never observed" any compound officer "picking up batteries on their way to their posts," or "dropping them off on the way out." Phillips, 7/6, pp. 47-48. She stated that "there was no need to" pick up batteries on the way into the Institution, because compound officers were free to pick up and deliver batteries throughout the shift. Phillips, 7/6, pp. 47-48. She said that if she did (hypothetically) see such a thing, she would "tell them they shouldn't be doing that, because their duty doesn't start until they get on post." Phillips, 7/6, p. 48.

Captain Phillips said that she "was at control at least once a week [observing] the DW to EW shift exchange," and she saw Compound Officers picking up fresh batteries "throughout the shift." However, she testified that she had never seen compound officers picking up batteries at control on their way in, Phillips, 7/6, p. 36, or dropping them off on their way out. Phillips, 7/6, p. 36. She stated that although she had never seen these things, if she ever "saw it, [she] would stop it." Phillips, 7/6, 48.

Former Captain Cheatham, who served at FCIW for about two years, from July, 2004 "to about July, 2006," Cheatham, 5/18, p. 174, testified that Control Center COs "should not be" passing out any batteries for officers to pick up as they

walk by control," because "that's just a form of tempting staff to do something that we're directing them not to do." Cheatham, 5/18, p. 123. He testified that there "shouldn't be any reason" for any CO assigned to a 24 hour post[11] to stop at the Control Center, Cheatham, 5/18, p.118, that "everything on a 24 hour post is actually on post." Cheatham, 5/18, p. 118.

Cheatham stated that he drafted the Post Orders for FCIW when it was originally activated "around July, 2004," Cheatham, 5/18, pp.114-116, that "those are pretty much my post orders." Cheatham, 5/18, p. 116. He testified that in drafting the Post Orders for FCIW, he "wanted to put some post orders together that would give staff some direction ... and at the same time, try to address the portal concerns that were there for bargaining unit staff." Cheatham, 5/18, p. 115.

He testified that he "wanted to make sure they shouldn't be stopping by picking up batteries or anything," that "[t]hey should just report directly to the post." Cheatham, 5/18, p. 118. In fact, Former Captain Cheatham testified that "it was my understanding that if the staff stopped by the control center and picked up any equipment (including batteries], ... we actually put them on the clock right there," and "that would start their time." Cheatham, 5/18, p. 175.

Former Captain Cheatham testified that while at FCIW, he instructed his lieutenants to not allow COs assigned to 24 hour posts to pick up "anything" at the

[11] Former Captain Cheatham said that a "24 hour post is any post that the keys stay on post for 24 hours. They don't have to go to the Control Center. They're to report directly to that post." Cheatham, 5/18, p. 118.

Control Center, and "if they see it, they [should] correct it on the spot." Cheatham, 5/18, p. 126. He said he told his lieutenants that if they saw "control center push the little box up with batteries in it, they should close it up." Cheatham, 5/18, p. 128.

Although Cheatham acknowledged that Compound Officers did come up to the Control Center to pick up batteries, he stated that they shouldn't do that on their way in, they should "only do that when they are on duty." Cheatham, 5/18, p. 129. In addition, Cheatham admitted on cross-examination that he had seen Control officers "making batteries available" to compound officers on their way into the Institution, but he said, "that wasn't their job," and "just because I see something once or twice doesn't make it a practice, and when I saw it, I corrected it on the spot." Cheatham, 5/18, p. 198.

When Lt. Vaught was asked if COs were instructed to not pick up batteries at control, he replied, "zyes," and explained that in addition to the Post Orders, supervisors would "direct them" not to do so. Vaught, 5/20, p. 167. He stated that he had "never witnessed" any COs "coming over" to control and "dropping batteries off." Vaught, 5/20, p. 209. He also said that he had not disciplined any COs for relieving early, prior to their shift beginning, explaining that "I can't discipline somebody [when] I don't know what they're doing." Vaught, 5/20, p. 210.

(iii). Comparing the Evidence on Batteries.

Unfortunately for the Agency, it was trying to demonstrate the existence of a negative, that COs do not pick up batteries or drop them off at the Control Center

on their way in or out of the Institution. Trying to demonstrate a negative is notorious for being virtually impossible.[12] Considering all of the Agency's evidence as a whole, there were too many gaps in it, too much time was not covered when management was not around to actually see what was going on, and the Agency's evidence failed to show that the COs were not routinely picking up and dropping off batteries at Control. All that the Agency witnesses could testify to was that they had not seen it happening, or that it only happened very rarely, and whenever they saw it, they stopped it.

That does not mean that it wasn't going on, nor does it mean that it wasn't happening on a regular basis. Management's evidence was necessarily piecemeal in nature, because all they could testify to was what they had observed or not observed. Just because managers didn't see it does not mean that it didn't happen, and the managers' testimony was not necessarily inconsistent with the universal testimony of all of the Union witnesses who swore that they have been picking up and dropping off batteries all the time, and have been for years.

As a matter of fact, the only way to harmonize and give full credence to all of this testimony would be to find that the COs have been sneaking the batteries in and out of Control, and that they just don't do it whenever there is a manager around. But if that were true, it would have been a self-defeating ruse, since hiding the activity would have prevented management from being aware of it and would

[12] This comment is not intended to imply a shifting of the burden of proof to the Agency. As already noted, the Union bore the burden of proof in this case.

have destroyed the "knew or should have known" element of suffering or permitting the activity.

Such a conclusion would also be inconsistent with the testimony of Officer Peavy, who testified that managers saw him handing out batteries to COs as they arrived on shift. And it would also be in conflict with the testimony of A.W. Cheatham, who was asked, "isn't it true that control also [passed out batteries] prior to the shift of compound officers on their way into the Institution so that they would not have to come back later?" Mr. Cheatham replied only, "that wasn't control center's job," but admitted when pressed, "I've seen it," and added, "just because I see something once or twice doesn't make it a practice," and "when I saw it, I corrected it on the spot." Cheatham, 5/18, p. 198.

Mr. Cheatham also testified that he has "addressed [Mr. Peavy] about coming in early," and "I have addressed Mr. Peavy about pushing out batteries on this side, because he has done it too," Cheatham, 5/18, p. 201, and stated that Mr. Peavy has "pushed the box out there so staff can walk by and pick up batteries." Cheatham, 5/18, p. 201-202. Mr. Cheatham argued that "Mr. Peavy, just like other staff, failed to follow my directions, failed to follow supervisor's instruction," that "they choose to do what they want to do ... so we can be here right now." Cheatham, 5/18, p. 202.

In addition, there were managers who testified that they instructed Mr. Peavy to not make announcements over the radio asking officers to return spent batteries to the Control Center.

If all of management's testimony is credited, that means that many staff members, including but certainly not limited to, Mr. Peavy were dispensing or picking up batteries right out in the open and regardless of whether there was a management person around or not. I think that is how this all happened, and I do not believe that the Union's witnesses were involved in a sub-rosa conspiracy to manufacture a portal to portal case. I am sure that the Agency is convinced to the contrary, but I am not willing to attribute such bad faith to all of the Union witnesses. And in fact they all testified that not only did they pick up and drop off batteries at Control, but that lieutenants saw them doing it and did not stop them. This inevitably results in a conflict in the evidence, and somebody is just plain wrong.

In weighing evidence where testimony is in sharp conflict, as in this case, an arbitrator, or any fact-finder, simply has to make a judgment, and decide which version of events rings more true and sounds more reasonable, plausible, and believable. There is no magic formula as to how this can be done, and it is always, to a large extent, a subjective and imperfect exercise, involving human impressions and perceptions.

As noted in the *Elkouri* textbook on arbitration, "in arriving at the truth in such a case, an arbitrator must consider whether conflicting statements ring true or false" and "credit or discredit testimony according to his or her impression of the witnesses' veracity", *Elkouri and Elkouri*, How Arbitration Works (6th Ed.), pp. 413-414, keeping in mind that "arbitrators are not equipped with any special divining

rod which enables them to know who is telling the truth and who is not where a conflict in testimony develops" – they "can only do what courts have done for centuries – a judgment must be made." *Elkouri and Elkouri*, How Arbitration Works (6th Ed.), pp. 414-416.

In this case, I have arrived at a judgment, and it has not been easy. This case was hard fought, both sides were well represented by good lawyers, at times emotions ran high, and most (though not all) of the witnesses on both sides came across as honest and credible. Yet it is my job to reconcile contradictions if possible, and if not, then to arrive at a fair, impartial, and dispassionate assessment of where the truth lies. In this case, I believe that it is more likely that lieutenants have walked by, or have been present at, the Control Center when batteries were picked up and dropped off, and looked the other way, or ignored it.

I do not mean by this that they didn't see what was happening; I think they did. But I think that these incidents were seen as minor at the time, and were passed by, because lieutenants and managers were very busy and preoccupied with other pressing matters. In other words, they saw it, and they let it go.

In reaching this conclusion, I do not mean to attribute any bad faith on the part of any management witnesses. In courtrooms and arbitration tribunals, I have seen so many cases where both sides of a dispute are absolutely convinced that the other side is just plain lying, and in most of those cases, it has been my honest impression that they are both telling the truth as they remember it. I think that is the case here, and I do not attribute "lying" to any witnesses.

But both sides of this dispute cannot be right. I find it easier to believe that rule violations were seen and overlooked, than to believe what the Agency's case implies: a widespread conspiracy by all of the Union witnesses to lie about their habits over the years. I can only assess that contention based on the Union witnesses' demeanor and credibility, the plausibility of their testimony, and its consistency with other evidence. Based on those considerations, I am led to reject the argument that they were all lying.

I realize that the Union members who testified have a "vested interest" in the outcome of this case. But so do all of the management witnesses. It would be very naïve indeed to believe that a management witness would suffer no consequences should he testify under oath in a hearing such as this that he saw batteries being picked up or dropped off when they should not have been, and "just let it go." Nobody in his right mind would admit that under these circumstances.

The Agency goes even further, and asserts that COs are not only picking up batteries at the Control Center for their own personal convenience, but that they have continued the practice despite all of management's efforts to stop it, with a view toward this very arbitration. A.W. Cheatham was the strongest advocate for this position. He testified that staff members "do what they want to do ... so that we can be here right now," Cheatham, 5/18, p. 202, and said, "when you have a control officer who knows they're not supposed to do it, and they push the batteries out anyway, to me, that's somebody with ill intent. Excuse the language." Cheatham, 5/18, p. 199.

I understand why management and the Agency take that view, but I am not willing to attribute "ill intent" to all of the COs who testified at the hearing, and I think the Agency's position undervalues and diminishes the level of danger faced by an unarmed CO who is locked inside a penitentiary with hundreds of convicted felons whose criminal acts "run the gamut" from "white collar crime, homicide, child molestation, embezzlers, tax cheats and drug dealers." Peavy, 4/12, T-75-76.

There are times when as many as "1,000 inmates are moving on the compound," and only "two compound officers" are in their immediate presence. Peavy, 4/12, T-100. In the Housing Units, the ratio of inmates to COs is "in general 138 to one," Peavy, 4/12, p. 96, although it can run down to 130 or 135 to one. Yet no matter how the evidence is viewed, the COs are vastly outnumbered by the inmates, and they depend on a working radio for their safety, and in fact for their very lives.

Whenever any CO "walks across the compound," he or she is "in a heightened state of alert" and vigilant, "because we don't know what's going to happen at any given moment." Peavy, 4/12, pp. 92-93. The position descriptions for the COs acknowledge this fact: COs are "subject to being in such hostile or life threatening situations as riots, assaults and escape attempts" and must "exercise sound judgment in making instantaneous decisions affecting life, well-being, civil liberties and property." Union Exhibit 5, 4/12, pp. 110-111. Asked "at what point" an officer might face "a hostile or life threatening situation," Mr. Peavy replied, "any time you're on an inmate, because you have no idea what's going through their mind,"

and "that's obvious because they're incarcerated, and they couldn't control themselves." Peavy, 4/12, p. 111.

Finally, in a truly chilling bit of testimony, Mr. Peavy gave a convincing explanation of how the prison environment works:

> "I learned this when I first started. The inmates allow you to be in charge. So if the inmates are allowing you to be in charge at that time, that's why you're in charge. When they decide you're not in charge, they're going to stop you from being in charge. So you have to pay attention at all times."

Thomas Peavy, 4/12, p. 93.

That is compelling testimony, and in view of the ratio of inmates to COs, it is not only logical, it is indisputable. In this regard, other arbitrators have referred to hostages being taken in an Agency prison.

In addition, there are gangs inside every prison, including FCIW. Gangs create danger in and of themselves, particularly where there are rival gangs as in this case such as "Pisces, Sureno, Barrio Azteca, Bloods, Crips, Skinheads and the Aryan Brotherhood." Peavy, 4/12, pp. 76-77. In fact, testimony was uncontradicted that "when an individual comes to prison, [he has] to make a decision" to "affiliate in varying degrees" with a gang, and "if an individual is going to survive within the prison, you become a member of [a] gang, [and] "you have to produce." Peavy, 4/12, pp. 76-77. I hate to think about what "produce" may mean in that context, but it

must mean "producing" money, drugs, alcohol, or even harming or killing someone, since inside or outside a prison, rival gangs are notorious for their violence toward each other.

In this regard, handmade weapons have been found inside FCIW, including nasty little devices called "shivs" or "shanks," made "by sharpening a toothbrush, a piece of sheet metal, a piece of steel [or] a piece of a table"; in other words "anything that would be durable enough to be sharpened." Peavy, 4/12, T-82. There are also illegal drugs and homemade alcohol, which could make an inmate more aggressive or more passive, depending on the substance, but either one of which could create a safety problem for a CO. In short, a prison is a "microcosm society" and "anything that happens out there also happens [in prison] – it's just made a little more difficult." Peavy, 4/12, p. 82.

In this dangerous and potentially violent atmosphere, whenever a CO is attacked or in danger, "his only recourse is his radio." Peavy, 4/12, p. 96. It is therefore understandable, to say the least, that an officer entering such an environment would want to make *very* sure his radio is working and that his battery is fully charged. And it would make sense to err *well* on the side of caution. Although the Agency says the batteries are designed to last at least 8 hours, that covers an entire shift, and the COs testified that the 8 hour battery life works only "in theory." Peavy, 4/12, T-100.

When Mr. Peavy was asked whether radio batteries might "sometimes last fewer than 8 hours," he replied emphatically, "Absolutely. Much less." Peavy, 4/12,

p. 100. Mr. Peavy also testified, "based on my experience, I became aware that batteries were not lasting for the shift, and staff needed those batteries on post, [so]to be safe and secure, we provided the batteries [to them]." Peavy, 4/13, p. 89-90.

Peavy's testimony was confirmed by all of the other COs who were asked the same question. Kender Floyd testified that "those batteries have a tendency to go dead on you; sometimes you get one that lasts 8 hours, sometimes [they last] only two hours." Floyd, 4/15, p. 19. He said that in his experience, "someone was constantly having a dead battery." Floyd, 4/15, p. 20. Asked if he returned to the Control Center during his shift to pick up some more batteries, Mr. Floyd said, "I do that," but added that "batteries are dying all the time." Floyd, 4/15, p. 201. He said that picking up fresh batteries and dropping off spent batteries "is an ongoing process" that lasts "the whole shift." Floyd, 4/15, p. 201.

The Agency has pointed out that when the radio batteries are running low, they emit a signal, in the form of a "chirping" sound. (It is obvious, to me at least, that it would be a much better practice to never reach that point). Officer Kender Floyd said that when the battery begins chirping, "there's no way to know exactly when it will go dead or won't transmit anymore." Floyd, 4/15, p. 143. A CO standing near a group of inmates while his battery is chirping would seem to me to be involuntarily giving off an audible signal that he has a problem, that he may not, or soon may not, be able to communicate with any other officers – a problem that

nobody would want while standing alone and unarmed in the presence of convicted felons.

Finally on this point, the Agency contends that lieutenants can and do deliver fresh batteries when the need arises, and says that is another reason why it is not necessary to pick up batteries at the Control Center. However, again the collective testimony of the COs seriously undermined this claim. When Sam Arnold was asked, "wouldn't that lieutenant bring you a battery," he replied, "it doesn't work that way, no." Arnold, 4/15, p. 144. When Kender Floyd was asked about this, he replied with a very blunt, frank, and believable answer: "ain't no lieutenant going to deliver no battery." Floyd, 4/14, p. 47.

The foregoing is a good example of a theme that recurred throughout the hearing of this case – the Agency asking whether some practice "could" or "would" happen, and the Union witnesses responding that things "could" happen that way, but saying, "that's not the way it works" or "that's not how it's done" in the real world, on the ground, where inmates are supervised and watched by rank and file COs.

On cross-examination, Mr. Floyd finally agreed that "possibly he could, but I have never seen a lieutenant do it." Floyd, 4/15, p. 49. I think Mr. Floyd made his point, and it seems neither feasible nor believable that lieutenants are actually delivering any batteries at FCIW, except on very rare occasions. They have too many other serious responsibilities.

The sum of all this evidence is that prisons are dangerous places, which emphatically includes FCIW, despite all the assurances presented that FCIW is one of the best managed, least dangerous institutions within the Agency. Unarmed COs standing out on the compound at FCIW (where I have been) while hundreds of convicted felons are moving around, are in a dangerous environment. So are all COs who are in close proximity to inmates in housing units when they are outside their cells. As Mr. Peavy accurately described the inmates, "you have no idea what's going through their minds," because "they're incarcerated, and they couldn't control themselves." Peavy, 4/12, p. 111. Under these conditions, a CO's "only recourse is his radio," and a radio requires a charged battery in order to function.

In fact, the FCIW Post Orders require COs to "have a working radio at all times." Since a CO's radio is his "lifeline" to safety, and freshly charged batteries are integral and indispensable to the operation of the radios, it is my finding that picking up fully charged batteries on the way into the Institution at the Control Center is an integral and indispensable part of the principal activities for which COs are employed. Dropping off spent batteries is also integral and indispensable to the principal duties.

2. Walking the Prison Grounds.

The Agency contends that even when Compound Officers pass through the Sally Port door onto the Compound itself, they are still not on duty, and that they are not on duty until they actually relieve their fellow officer, which is normally done at or near the Compound office. The P2P Act provides that an employer is not

required to pay employees for "walking, riding, or traveling to and from the actual place of performance of the principal activity or activities which [an] employee is employed to perform." 29 USC Section 254(a)(1).

However, walking is compensable under the FLSA in spite of the P2P Act, when it occurs after the "continuous workday" has begun. (See Part G below, "The Continuous Workday"). Under that analysis, it is probably unnecessary for me to address whether the Compound Officers are engaged in work once they enter upon the Compound and before they arrive at the place where they make their relief. But the parties have devoted a lot of energy and time to the issue, and it could become a live issue depending on what the FLSA does with other portions of this Opinion. Therefore, this issue will be considered; and I really have very little trouble in reaching the conclusion that Compound Officers are "on duty" and on the clock, the moment they exit the sally port door and enter the compound area.

As a matter of fact, the Agency came close to admitting as much, twice, at the hearing. *See* 5/17 Transcript, p. 157 ("[o]nce they walk through the breeze – they have to be on the other side of the breezeway to be on duty" and "... the compound officer can't be on duty any earlier than being on the compound ... just walking ...". 5/17 Transcript, p. 160. And "... therefore if they're already at their duty post at that breezeway, they're not – that is not – that clock is – is already running in that area." 5/17 Transcript, p. 160.

However, despite these apparent misstatements, I do not believe the Agency intended to waive its position that Compound Officers (and other officers) are not on

duty until they make their relief, wherever that may be. So I accept that as the Agency position, but I disagree with it. As soon as a compound officer enters the compound and the sally port door shuts and locks behind him, he is in a dangerous environment. He is locked in a prison, unarmed, in the company of convicted felons who outnumber him, as discussed at length above. So walking across the compound is not the same thing as walking through an ordinary industrial plant. But beyond that, once the CO enters through that door, he is working – i.e., he is performing one of the most important duties that he has – maintaining the safety and security of the Institution, the other COs, the inmates, and himself.

I agree with Arbitrator Briggs that once "COs emerge from the Sally Port onto the correctional institute grounds, they enter a dangerous work environment populated by convicted felons, many of whom have been incarcerated for violent acts," including homicide. *AFGE Local 1304 and FCI Greenville*, FMCS Case No. 05-05187 (May 7, 2009) (Briggs, Arb.). They are "readily identifiable to the inmates as prison guards, and the fact that they are unarmed makes them especially vulnerable to physical harm." *AFGE Local 1304 and FCI Greenville*, FMCS Case No. 05-05187 (May 7, 2009) (Briggs, Arb.)

Equally important to me is the fact that while in transit to their posts, they are required to monitor inmate conduct and enforce rules – not just major rule infractions, but small ones too. That statement is made with full knowledge that some management witnesses testified that they don't expect a CO to enforce rules until he is actually "on duty," i.e. when he arrives at his post. However, that is so

unworkable that it borders on ludicrous. The inmates do not know whether a uniformed guard is "on duty" or not, and they all expect, or should expect, a uniformed guard to enforce rules and be in charge, everywhere within the confines of the prison grounds.

Officer Tom Peavy said it very well when he testified that "the inmates allow you to be in charge; so if the inmates are allowing you to be in charge, that's why you are in charge," and "[w]hen they decide you're not in charge, they're going to stop you from being in charge." Peavy, 4/12, p. 93. He emphasized how this works: as soon as a CO enters the prison grounds, he "has to act in a professional manner" and "correct behavior that's improper." Peavy, 4/12, p. 93. Examples he gave were "inmates can't walk on the grass" and "their shirttails must stay tucked in." Peavy, 4/12, p. 94.

Mr. Peavy said, "it may sound simple, but if they're not obeying the small things, then it's much more difficult to try to bring them in compliance with the larger issues." Peavy, 4/12, p. 94. Not only has Officer Peavy done this, he has seen other COs "doing the same thing while on the way to their posts." Peavy, 4/12, p. 94. Kender Floyd agreed with Peavy, stating that if they don't enforce the rules, "the inmates would get all over us" and "if you don't enforce the small stuff, you're never going to be able to enforce the big stuff." Floyd, 4/15, p. 36. And when Officer Floyd was asked whether he encountered inmates on his way to his assigned post, he replied, "most definitely." Floyd, 4/15, p. 35.

I agree with these COs and find that if they walked silently by an obvious rule violation, even a small one, because they were not yet "on duty," they would be taking one step toward losing their position of authority over the inmates, which is crucial, and they would not be exercising sound correctional judgment. Nor would they be fulfilling their responsibilities to each other, to the inmates, and to the Agency. COs' position descriptions confirm that they are required to "enforce rules and regulations governing facility security, inmate accountability and inmate conduct to ensure judicial sanctions are carried out and inmates remain in custody." Union Exhibit 5; Union Exhibit 6.

As can be seen, there are compelling reasons for enforcing rules at all times when a CO is inside the Institution, and it seems to me to be counterproductive, and frankly, a resort to "the ostrich approach" for management to try to limit or evade those responsibilities until a CO actually arrives at the point where he makes his relief. In my opinion, the COs are performing the very work for which they were hired as soon as they exit the sally port onto the prison grounds. Whether that is before the start of their shifts or not, they are performing compensable work at that point.

3. The Agency "Suffered or Permitted" the Activities.

(i) The Legal Standard.

The Agency makes an impassioned plea that even if the foregoing activities were integral and indispensable to the principal activities of COs at FCIW, the Agency has not "suffered or permitted" the practices.

> "Work not requested but suffered or permitted is work time. For example, an employee may voluntarily continue to work at the end of his shift. He may be a pieceworker, he may desire to finish an assigned task or he may wish to correct errors, paste work tickets, prepare time reports or other records. The reason is immaterial. The employer knows or has reason to believe that he is continuing to work and the time is working time."

29 CFR Section 785.11

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

29 CFR Section 785.13

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

has an opportunity to prevent that work from being performed."

5 CFR Section 551.104.

In determining whether an employer has constructive knowledge of overtime worked, "a court 'need only inquire whether the circumstances were such that the employer either had knowledge of overtime worked or else had the opportunity through reasonable diligence to acquire knowledge." *Dept. of Conservation and Natural Resources*, 28 F.3d at 1082 (*citing and quoting Gulf Shrimp Co. v. Wirtz*, 407 F.2d 508, 512 (5th Cir. 1969).

Here the Agency says that it has not "suffered or permitted" the COs' practices, because management was unaware that they were going on. As Lieutenant Vaught said, "I can't discipline somebody [if] I don't know what they're doing." Vaught, 5/20, p. 210. But the same evidence discussed and analyzed above also establishes that management was either aware of the practice and let it go, or that at least management should and could have known about it by exercising "reasonable diligence." Under 29 CFR Section 785.11, "[i]n all such cases it is the duty of management to exercise its control and see that the work is not performed if it does not want it to be performed."

Specifically, the evidence established that management at FCIW knew or should have reasonably known that COs were picking up and dropping off batteries at the Control Center, and failed to "exercise its control" to "see that the work [was] not performed if it [did] not want it to be performed."

(ii). The Testimony.

As already noted, every single one of the COs who testified stated unequivocally that they routinely picked up and dropped off batteries at Control, on every shift, all the time. They also uniformly testified that it was not unusual for management to see them doing it. In contrast, the Agency was only able to present evidence that management didn't see it happening, or that if they did, it was rare, and those who have seen it have "corrected it on the spot."

Steve Langford, Associate Warden at FCIW for the preceding five years, testified that he has "never" observed COs picking up batteries from the Control Center, and if he saw it, he "would take appropriate measures to put an end to it." Langford, 5/17, p. 107.

Captain Tammy Phillips likewise testified that she had "never observed" any compound officer "picking up batteries on their way to their posts," or "dropping them off on the way out." Phillips, 7/6, pp. 47-48. She testified that during the time she was at FCIW (for eighteen months),[13] she "was at control at least once a week [observing] the DW to EW shift exchange," and she had "never observed" compound officers picking up batteries at control on their way in, Phillips, 7/6, p. 36, or dropping them off on their way out. Phillips, 7/6, p. 36. She stated that although

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[13] Captain Phillips served at FCIW as a lieutenant for eighteen months, from the date of its activation to the end of the second quarter of 2006. Phillips, 7/6, pp. 63-64.

she had never seen these things, if she ever "saw it, [she] would have stopped it." Phillips, 7/6, 48.

Former Captain Cheatham testified that while at FCIW, he instructed his lieutenants to not allow COs assigned to 24 hour posts to pick up "anything" at the Control Center, and "if they saw it, they [should] correct it on the spot." Cheatham, 5/18, p. 126. He said he told his lieutenants that if they saw "control center push the little box out with batteries in it, they should close it up." Cheatham, 5/18, p. 128. Although Cheatham admitted on cross-examination that he had seen Control officers "making batteries available" to compound officers on their way into the Institution, he said, "that wasn't their job," and "just because I see something once or twice doesn't make it a practice, and when I saw it, I corrected it on the spot." Cheatham, 5/18, p. 198.

Lt. Vaught also testified that he had "never witnessed" any COs "coming over" to control and "dropping batteries off." Vaught, 5/20, p. 209. He also said that he had not disciplined any COs for relieving early, prior to their shift beginning, explaining that "I can't discipline somebody [if] I don't know what they're doing." Vaught, 5/20, p. 210.

I agree with the Union that this uneven, patchwork testimony leaves too many gaps and too much time unaccounted for when nobody in management was present to see what was happening, and also leaves open the possibility of the "ostrich approach," i.e., that management didn't see, or didn't want to see, what was going on, yet through exercising reasonable diligence, they could and should have

known about the practice because it was so widespread and common. And finally, it is fair to charge FCIW management with absolute knowledge that there is no such thing as an instantaneous shift change (see the discussion below), and that there are necessarily and indisputably overlapping shifts on all 24 hour posts. Any other contention defies logic and common sense.

(iii). The General Post Orders.

The Agency also cites General Post Orders, Union Exhibit 11, p. 6, that instructs certain COs not to pick up batteries at the Control Center, and says that "there is no reason for them to pick up batteries [at Control] since they can go back to Control after they are on duty and pick [them] up." Cheatham, 5/18, p. 44. There was quite a dispute over which of the 24 hour posts were covered by the Post Order found at Union Exhibit 11, p. 6, which states in pertinent part:

> REPORTING FOR DUTY (24 Hour Key Issue): On your assigned shift, report to the housing unit and receive your equipment from the unit officer. ... After assuming duty, and if you are in need of a battery, notify the Operations Lieutenant or the Control Room Officer to have the Compound Officer have a battery delivered to you. Prior to assuming duty, do not stop by the Control Center or pick up any equipment."

General Post Orders, Union Exhibit 11, p. 6.

Although the parties strenuously disagree over the meaning of this language, it is plain and unambiguous. It instructs Housing Unit COs to report to the housing unit" and to "receive your equipment from the unit officer." It does not mention compound officers at all, except to state that if an officer is "in need of a battery," he should "have the Compound Officer have a battery delivered to" him. This would of course be a nonsensical statement if applied to a compound officer, since that would mean that he would be delivering the battery to himself.

Former Captain Cheatham admitted some of these inconsistencies, but he insisted that the confusing language was "just an example." Cheatham, 5/18, p. 127. He pointed out that the title of the paragraph is "24 Hour Key Issue," and averred that the quoted paragraph applies to "all 24 hour posts," including compound posts. Cheatham, 5/18, p. 177. But the language is plainly limited to "housing unit" COs and Mr. Cheatham admitted that the word "example" is not used in that paragraph. Cheatham, 5/18, pp. 177-178.

In addition, when A.W. Langford was asked about these rather obvious inconsistencies in his initial testimony, he did not shy away from admitting them.

> "Q. Okay. Prior to assuming duty, do not stop by the control center to pick up any equipment. Again, that's an instruction to the housing unit officers?
>
> A. Yes ma'am.

Q. Okay. So you would agree that this paragraph as written does not instruct the compound officers not to pick up a battery bag; is that right?

A. Yes ma'am."

Langford, 5/17, p. 185.

The next day, A.W. Langford changed his view of the language, testifying that it applied to all 24 hour posts. But in my opinion, the General Post Orders at p. 6 simply do not apply to compound officers, and A.W. Langford should be credited for admitting the obvious.

Furthermore, even if the instruction applied to compound officers, the rule was "honored more in the breach" of it than by abiding by it. "The mere promulgation of a rule is not enough. Management has the power to enforce the rule and *must make every effort* to do so." 29 CFR Section 785.13 (emphasis supplied). The Post Order quoted above is the "mere promulgation of a rule," and the evidence does not demonstrate that FCIW management has "made every effort" to enforce it. Although I think the Union may very well rue the day that it brought this up, the evidence failed to establish that anybody in the bargaining unit has ever been written up or disciplined for picking up batteries at Control, dropping them off, or handing them out.

Based on the foregoing, it is my conclusion that not only is picking up and dropping off batteries at Control an integral and indispensable part of the COs'

daily work, but the Agency knew or should have known it was going on, and allowed it to continue. Therefore the practice was "suffered or permitted" by the Agency.

C. Control Center 1 Post.

1. Arriving Early and Working.

The Union witnesses who work the Control Center 1 post universally testified that as a matter of daily routine and practice they arrive approximately 30 minutes prior to their shift starting times – and when they do so, they do not just sit around and drink coffee or waste time. They all testified that as soon as they arrive in the Control Room, they begin performing the very work for which they were employed. Officer Crystal Owens testified that she begins working in the Control Center upon her arrival at approximately 7:30 a.m. when assigned to the DW, at 3:30 p.m. when assigned to the EW, and at 11:30 p.m. when assigned to the MW. Owens, 4/14, pp. 189, 195, 196. Officer Thomas Peavy described exactly the same routine. Peavy, 4/12, pp. 162, 171, 178.

Officer Fleming testified that he enters the Control Center and begins working about 30 minutes before the end of the DW shift. Fleming, 4/14, p. 29. Even Aron Davis, a member of the bargaining unit who testified on behalf of the Agency, said that when he worked in Control, he would "come in at least 30 minutes prior to the end (sic) [clearly Davis meant the beginning] of my shift." Davis, 5/19, p.16. When Davis relieved Peavy at Control, Davis "would show up as my usual at least 30 minutes ahead of time," Davis, 5/19, p. 21, and when he did so, Mr. Peavy

would not leave immediately, but departed around "3:45, 3:50 [p.m.]." Davis, 5/19, p. 22.

In addition, Davis testified that when he arrived early, he began working as soon as he walked in the door to the Control Center. He also described in some detail what the Control 1 Officer does during shift exchange time. He said, "working the doors and using the cameras, that's going to be his area, ... he'll be standing there and that's when his exchange is taking place; ... so when his relief comes in, they're standing there talking, and sometimes they'll push the doors while they're talking while we're doing the key exchange, and if they get busy, turn around, then we'll take over the doors if we see a line of people ... so it just rotates back and forth." Davis, 5/19, pp. 14-15.

That testimony describes a scenario wherein <u>everybody</u> in the Control Room is working during shift exchange time, including both Control 1 officers, i.e., they are all doing the job for which they were employed. That means that there are two Control 1 officers working at the same time, but only one of them is being paid.

It is during this time that the Control 1 "shift exchange" takes place, where information is verbally passed on from one officer to the other (in addition to the written log entries). The outgoing officer provides the incoming officer with "a rundown of the events" that occurred during the preceding shift, including systems that are malfunctioning, incidents within the institution, emergency medical trips, and upcoming counts and out-counts. Peavy, 4/12, pp. 157-158. The incoming officer would also be briefed if there had been any body alarms, any inmate fights,

whether any buses were coming in, and whether any inmates should be "pulled off" the count. Davis, 5/19, pp. 82-84.

There was quite a lot of testimony about how much time this "information exchange" takes. Officer Davis said that it takes "around two minutes." Davis, 5/19, pp. 13, 15. Captain Tammy Phillips said it takes "three to five minutes." Phillips, 7/6, p. 41. Lt. Stivers said it takes "about 2 or 3 minutes" on "all shifts." Stivers, 5/19, pp. 126-127. Lt. Vaught said that he had not observed Control shift exchanges, "because they had different hours." Vaught, 5/20, p. 179.

In my opinion, the length of time that the actual "information exchange" takes to accomplish is irrelevant, because the Control officers (including Aron Davis who was called by the Agency) all testified that they began working as soon as they arrived in the Control Room. In other words, they were doing exactly what the Agency hired them to do, performing the work of the Control 1 officer. Nobody disputes that work is compensable. And they were doing this prior to the time that their paid shifts started.

Crystal Owens testified that she arrives at the Control Room about 30 minutes prior to the beginning of her shift, no matter what watch she is working; and upon her entry into the Control Room, the outgoing officer begins briefing her on what happened during the previous shift. She said that during this time, she is scanning equipment to ensure that it is all there, and she also answers the phone, opens and closes sally port doors, she "visually checks" to see who is asking for a

door to be opened or closed, and she hands out and receives batteries and other equipment. Owens, 4/14, pp. 190-192.

Officer Tom Peavy testified that he has worked in the Control Room "almost constantly" since the Institution was activated. During that entire time, he said, he has been arriving in the Control Room "at or before" 7:30 a.m., at which time the information exchange begins. Peavy, 4/14, pp. 161-162. Officer Peavy was asked whether he began the information exchange and other work "immediately" on his arrival, or if he "hangs around drinking a cup of coffee." Peavy, 4/14, p. 161. He replied emphatically, "there's no hanging." Peavy, 4/14, p 161. He said that as soon as the incoming Control 1 officer arrives in the Control Room, he "immediately begins with the information exchange," the "scanning of equipment," and "tossing [of] keys and accepting stuff back." Peavy, 4/14, pp. 160-161.

Former Captain Cheatham testified that he had seen Mr. Peavy "in the Control Center a lot." Cheatham, 5/18, p. 200. When asked if he had seen Peavy "in the Control Center handing out equipment or doing his job at least 30 minutes prior to his start of his paid shift," Cheatham replied, "I have probably seen Peavy" and "I have seen him in there (i.e. in Control) prior to 8:00." Cheatham, 5/18, p. 200. Former Captain Cheatham also said, "I have seen him on occasions in there [at 7:30 a.m.]." Cheatham, 5/18, p. 201.

All of this testimony considered as a whole presents the same problem for the Agency that arose from the evidence regarding batteries: *all* of the Union witnesses who worked the Control 1 post (again including Aron Davis, a bargaining unit

member called to testify by the Agency) testified unequivocally that they arrived "around" or "at least" 30 minutes prior to the beginning of their shift; that this practice was followed on all three shifts; and that upon their early arrival in the Control Room, they immediately began to work, the normal ordinary work that they are called on to do every day by the Agency at the Institution.

In contrast, the Agency witnesses were limited to what they had seen or not seen, which once again left too much time where no management witness was around during shift changes, so none of them could foreclose the possibility that early arrivals, early working and normal quitting times were not continuously going on.

2. Early Shift Exchanges in Control Were Suffered or Permitted.

29 CFR Section 785.11 states that "work not requested but suffered or permitted is work time," and "the reason is immaterial." The work is compensable if "the employer knows or has reason to believe that he is continuing to work and the time is working time."

Similarly 5 CFR Section 551.501(a) defines "hours of work" to include "time during which an employee is suffered or permitted to work," and 5 CFR Section 551.104 states:

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

has an opportunity to prevent that work from being performed."

In this case, the Control 1 officers all testified that they arrived around 30 minutes early for their shifts, and that upon arrival, they began to work, i.e., they began doing the very things that they were hired to do by the Agency as Control Room officers. In addition, all of them testified that supervisors had seen them working in the Control Room prior to their shift beginning.

Benji Fleming testified that during his shift exchanges in Control at the beginning and the end of his shifts, lieutenants and other management personnel had "passed by" the Control Room, and none of them ever told him he shouldn't be in there performing work. Fleming, 4/14, p.35. Crystal Owens likewise testified that when she was in the Control Room during the shift exchange process, she has seen lieutenants pass by "through the sally port door,"[14] and none of them has ever instructed her to stop working prior to the beginning of her shift. Owen, 4/14, pp. 192-193.

The Agency says that supervisors would not know whose shift was ending or beginning, and can't be charged with such knowledge. I agree that supervisors may not know when a specific officer's shifts were ending or beginning. But they knew or should have known what was going on when they saw two Control 1 officers, in addition to the others that were helping out, inside the Control Room performing

[14] Owens was referring to the sally port adjacent the Control Room, where there is a glass window, so there is a plain view of the Control Room from the breezeway.

their assigned work at the same time. That means that there were two Control 1 officers working in the Control Room at the same time. Based on all of the foregoing, it is my conclusion that the Agency either knew, or through reasonable diligence should have known, that Control 1 officers were arriving early and beginning work prior to the start of their shifts, yet it did not make "every effort" to stop the practice. This means that the practice was "suffered or permitted" by the Agency.

D. FCIW Post Orders.

At FCIW, there are General Post Orders, Union Exhibit 11, that apply throughout the Institution, and there are Specific Post Orders applicable to specific posts. Former Captain Cheatham supervised the preparation of all of the FCIW Post Orders when the facility was originally activated. He testified that "those are pretty much my post orders" and "my name is on all the post orders" at FCIW. Cheatham, 5/18, pp.115-116. A.W. Langford described the post orders as "basic – they're foundational" and "elemental." Langford, 5/17, p.71. He said, "they're going to tell you what you need to do your job." Langford, 5/17, p. 71. He testified that "a post order is an order." Langford, 5/27, p. 72. However, A.W. Langford admitted that portions of the FCIW post orders were "poorly written," and I certainly found them to be confusing and self contradictory at times.

Furthermore, the evidence established that there are times when post orders are just not followed. The way that some of the FCIW Post Orders have been ignored or disregarded represent excellent examples of the dichotomy between the

way things "could" or "should" be, and the way the Institution actually operates on the ground, in the real world of rank and file COs, as a matter of daily routine.

One example is the "one for one exchange" pertaining to batteries. The Special Post Orders for Control No. 1 state that "radios and body alarms will be issued with one battery only. Additional batteries will be issued on a one-for-one exchange basis when needed." Agency Exhibit One. The Agency says "that means you get a battery, you give up a battery," 4/13, p. 90, and "a one-for-one exchange" means "I give you one, you get one back; there's not a lapse in time." 4/13, pp. 91-92.

But that is not how it is done. I have already summarized the evidence demonstrating that COs pick up fresh batteries on their way into the Institution. When the COs do that, they are not dropping batteries off at the same time. In addition, the evidence, including the Agency's video evidence, established that Compound Officers routinely pick up "battery bags" and carry them around to housing unit posts to deliver fresh batteries to COs. And the evidence was uncontradicted that charged batteries are left in the shift lieutenant's office where they can be picked up by Compound Officers "to save steps." Those are not one for one exchanges of batteries.

Through extensive cross-examination, A.W. Langford admitted that Compound Officers "are not required to return dead batteries prior to getting live batteries from the control center to deliver...," Langford, 5/17, p. 190, because

"otherwise that would mean that people are on their posts with radios that don't work." Langford, 5/17, p.190.

Also, the specific Post Orders for Compound Officers do not actually prohibit them from picking up bags of batteries prior to the beginning of their shifts, even though A.W. Langford was cross-examined on this point for nearly sixteen pages of transcript and never conceded the point. Langford, 5/17, pp. 186-202. In sum, the evidence demonstrated that the "one-for-one exchange" order is not followed.

In addition, although the Post Orders do not require it, management at FCIW has decided that DW work details are to begin at 7:45 a.m., fifteen minutes prior to the beginning of the DW Compound Officer's shift. Yet the DW Officer is the one who is responsible for "actually supervising" the DW work detail. Langford, 5/17, p. 111. Lt. Stivers testified to the same thing. Stivers, 5/20, p. 94.

If the DW Compound Officer is going to supervise the work detail and be responsible for the inmates on that work detail, he needs to be there when the work detail begins. There are detail pouches or kits with pictures of inmates so that the CO in charge can account for all of the inmates assigned to the detail. To do this, there must be some sort of roll call or counting process. The Compound Officer actually starts the DW work detail by calling Control "to have them announce work call," and "the inmates report to the Compound Officer for his work detail." Peavy, 4/12, p. 116.

Kender Floyd testified that prior to 7:45 a.m. the Compound Officer also opens the "utility closet there on the compound ... to store like brooms," and "you

have to check to make sure all of your equipment is there" before the inmates show up for work detail. To me, all of this means that the DW Compound Officer needs to be there at 7:45 a.m. or even earlier to start and supervise the work detail, and to be accountable for the inmates.

There are other inconsistencies in the Post Orders. The Specific Post Orders for Compound 1 and 2, Evening Watch shift, instruct the EW Compound Officer that at "11:20 p.m." that "your relief will arrive, and you are to brief them on any pertinent information." Union Exhibit 21B; Langford, 5/17, p. 9. Of course the MW shift does not begin until 12:00 a.m., so if the MW Compound Officer actually arrives on post at "11:20 p.m.," he is going to be on post for his briefing and shift exchange forty minutes early – forty minutes for which he is not being paid.

It is recognized that former Captain Cheatham's "intent" using that language was "just to let staff know don't wait until the last minute to start logging your information." Cheatham, 5/18, pp. 150-151. However, that is not what the language says – it says at 11:20 p.m. "your relief will arrive." Once again that is plain and unambiguous language, and it tacitly acknowledges two things: one, that a shift exchange does take at least some time, and two, that relieving staff are arriving early, prior to the start of their shifts.

When pressed about this language, A.W. Langford admitted that the language was there, but he said, "those post orders are poorly written," and the MW officer "is not to report for duty until 12:00 a.m." Langford, 5/17, p. 15, so "the post orders here are in conflict." Langford, 5/17, p. 15. He was right.

In sum, there are portions of the Post Orders that are "poorly written" and "in conflict" – and there are Post Orders that are not strictly enforced nor strictly adhered to in actual practice. For these reasons, the Post Orders did not provide much support for the Agency's defenses against the Union's claims.

E. COs Are Not Allowed to Leave Early.

The Agency also makes an argument that was best described by Captain Cheatham: "If Officer Peavy, I use that example, if he comes in at 20 minutes till the hour, and then the next person comes in at 20 minutes till the hour, and the next person comes in at 20 minutes till the hour, that means every one of them would have done 8 hours, and they was relieved on time." Cheatham, 5/18, p. 208.

The Agency argues that if all of the COs really do relieve early, as described above by Former Captain Cheatham, then it "is illogical" to conclude that anyone is working more than 8 hours. But it is only illogical if it is assumed that the departing CO actually leaves as soon as, or very shortly after, his relief arrives. As noted below, there was substantial evidence that there is a common practice of Control 1 officers to the contrary: not only do they arrive early, they also stay and work until very near the end of their shifts.

In addition, the evidence established that FCIW management has been giving decidedly mixed signals to the staff as to whether they are really free to go once they are relieved, or whether they must stay to the actual end, or very near the end, of their shifts. In this regard, Captain Cheatham testified that once someone is properly relieved, "they are free to go." Cheatham, 5/18, p. 159. Captain Phillips

also testified that "staff are free to go when properly relieved." Phillips, 7/06, p. 77. The Agency says that "officers are working the same cycle, and therefore no officer is working more than 8 hours." Agency Brief, p. 84.

Former Captain Cheatham also testified, "we assume [that] once an officer has done their 8 hours, that's the expectation in the guidelines and the directions that we try to give the staff that once you have completed your 8 hour shift, then you should be going home." Cheatham, 5/18, pp. 231-232. And finally, Aron Davis testified that when he was relieved early, he left early, so he only worked 8 hour shifts. Davis, 5/19, p. 16 ("if [my relief] showed up at 3:30, I'm leaving at 3:30").

However, there was considerable evidence to the contrary that COs who relieved early did not leave early, and that indeed they were not <u>allowed</u> to leave their posts early. For example, Crystal Owens testified that even though she might be relieved early, and even complete her shift exchange early, she is "not free to leave" her post. Owens, 4/14, pp. 250-251. The reason, she said, is that "if the lieutenant calls for me [near the end of my shift] and I'm not there, then I'm held accountable for not being there." Owens, 4/14, pp. 250-251.

Benji Fleming also testified that he does not leave his post until right at the end of his shift, "or a few minutes before," Fleming, 4/14, p. 34, and Samuel Arnold testified similarly that when he is relieved early, he is "not free to leave" his post, and he does not do so. Arnold, 4/15, p.176.

Management witnesses actually confirmed this evidence. Lt. Stivers testified that he has told compound and control officers "not to come in early," Stivers, 5/19,

p. 122, "or to leave early". Stivers, 5/19, p. 122. Lt. Stivers confirmed these instructions in writing. *See* Agency Exhibit 39 ("Leaving a post prior to the end of the shift can result in an AWOL case against the departing staff member"); *and see* Agency Exhibit 26 ("Staff should be in the institution at their post when the shift ends" and "staff departing prior to the end of their shift without supervisory approval is not authorized"). In addition, Agency Exhibit 26 also addresses supervisors: "you should be watching for staff departing early or arriving late." (emphasis supplied).

Captain Rayburn sent a memo to all staff titled "8 hours," stating "I know this is a touchy subject with some staff, this is my opinion on this matter: ... if you are being paid for 8 hours of work you need to be in the institution for those 8 hours and available to perform work assigned." Agency Exhibit 27. Captain Rayburn concluded his memo with this sentence: "I put this out because staff [has] gotten into the habit of leaving the inside of the institution prior to the end of their shift." Agency Exhibit 27.

Despite the contradictory testimony on this point from some witnesses called by the Agency, the evidence was very clear that staff members are not allowed to leave their posts prior to the end of their shifts, and they do not do so. That means that if they arrived early in order to relieve early, then they were working in excess of 8 hours per day. This leads to the issue of *de facto* overlapping shifts at FCIW.

F. *De Facto* Overlapping Shifts.

In *USP Allenwood and AFGE Local 307*, FMCS Case No. 08-50318 at 77, Arbitrator Katz observed the obvious fact that at least "a certain amount of time is required to effect a change of shift, which is difficult, if not impossible to accomplish when non-overlapping eight hour shifts are use to cover each 24 hour work day." Arbitrator Katz concluded that "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." *USP Allenwood and AFGE Local 307*, FMCS Case No. 08-50318 at 78.

There have been numerous arbitrators who reached the same conclusion. Yet despite these mounting adverse arbitration decisions, the Agency continues to advance the fictional notion of an instantaneous shift change, as demonstrated in the following questions and answers, where A.W. Langford became ensnared in the faulty logic behind that notion:

> Q. It's your testimony that these officers do their shift exchange at exactly at 8 a.m. and at exactly at 4 p.m. and exactly at midnight? Is that your testimony now?
>
> A. That's -- that is.
>
> Q. Okay.
>
> A. That's what the post orders call for.
>
> Q. And that's your testimony that that's what happens in practice?"
>
> A. No ma'am. The post orders call for that.

Q. It's your testimony that that is what happens in practice?

A. I have not observed it.

* * *

A. I have not had direct observation of the individuals handing keys, radios and so forth back and forth.

Q. At 4:00 p.m.?

A. Correct.

Q. Or at 12:00 a.m.?

A. Correct.

Q. Or at 8:00 a.m.?

A. Correct."

Langford testimony, 5/18, pp. 74-75.

The upshot of this testimony reveals another glaring disparity between what the Post Orders "call for" and the way things actually work. I would venture to say that A.W. Langford is not alone in this quagmire, by a long shot, and that no one else has witnessed an instantaneous shift change, on any shift, at any institution. That's because they are impossible. Yet A.W. Langford was absolutely correct, "that's what the post orders call for."

On this point, it is my view that the Post Orders at FCIW are engaging in a fiction. There is no such thing as an instantaneous shift change. Even management witnesses agreed that it took at least a few minutes, on every shift. As Arbitrator Marcus noted, "[t[here is an inescapable time overlap at the duty

post" and that "the contention that there is no overlap defies logic." There are *de facto* overlapping shifts at FCIW as well, and the Agency has to know that.

G. The Continuous Workday Rule.

The "continuous workday rule" applies to all of the posts covered in this Opinion. A "workday" is defined in 29 CFR Section 790.6(b) as "the period between the commencement and completion on the same workday of an employee's principal activity or activities" and "includes all time within that period whether or not the employee engages in work throughout all of that period." As the Supreme Court held in *Steiner v. Mitchell,* 350 U.S. 247 (1956), "any activity that is 'integral and indispensable to a principal activity' is itself a 'principal activity' under Section 4(a) of the [P2P Act]," and therefore compensable.

I agree with the Union that the continuous workday rule does not permit "certain discrete segments of the compensable workday" to be broken out for separate, piecemeal consideration. Union Brief, p. 26. Instead, as the Union has argued, "all time spent in between these bookend [principle] activities ... is compensable as part of the continuous compensable workday." Union Brief, p. 26.

5 CFR Section 551.412(b) provides that:

> "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."

The last sentence of this OPM pronouncement appears to be in direct conflict with the "continuous workday rule" promulgated by the Secretary of Labor in 1947 and applied by the U.S. Supreme Court in *IBP v Alvarez*, 126 S. Ct. 514 (2005),[15] where the Court found that walking and waiting time occurring after the employee engages in his first principal activity of the day is part of a "continuous workday" and compensable under the FLSA. *See IBP v. Alvarez*, 126 S. Ct. 514 (2005) ("[d]uring a continuous workday, any walking time that occurs after the beginning of the employee's first principal activity and before the end of the employee's last principal activity is excluded from the scope of the [P2P Act], and as a result is covered by the FLSA." *And see* Wage and Hour Advisory Memorandum No. 2006-2.

Furthermore, the FLRA "has applied" the continuous workday rule to "Agency prison employees" in several cases. *United States Department of Justice, Bureau of Prisons, FCI Jesup, Georgia*, 63 FLRA 323, 327 (2009). In the *Jesup, Georgia* case, the FLRA stated:

"Thus, as the Supreme Court held in *Alverez*, 'during a continuous workday, any walking time that occurs

[15] In *IBP, Inc. v. Alvarez*, 126 S. Ct. 514, 546 U.S. 21 at p. 29 (2005), the Supreme Court noted that "the Department of Labor has adopted the continuous workday rule, which means that the 'workday' is generally defined as 'the period between the commencement and completion of the same workday of an employee's principal activity or activities," and noted that "these regulations have remained in effect since 1947," shortly after the adoption of the P2P Act.

after the beginning of the employee's first principal activity and before the end of the employee's last principal activity ... is covered by the FLSA."

United States Department of Justice, Bureau of Prisons, FCI Jesup, Georgia, 63 FLRA 323, 327 (2009).

The DOL regulation applied by the Supreme Court in *Alvarez* has remained essentially the same since it was promulgated in 1947. 29 CFR Section 790.6 states:

> "(a) Section 4 of the [P2P 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 [P2P Act] had not been enacted."
>
> (b) 'Workday' as used in the [P2P 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."

The continuous workday rule has stood for over 60 years without challenge. It was applied by the U.S. Supreme Court in *IBP v. Alvarez*, 126 S. Ct. 514 (2005), and it is applicable to this case; which means that all of the activities undertaken by COs at FCIW after their first and before their last principal activities are compensable. As noted in *Steiner v. Mitchell*, 350 U.S. 247 (1956), "any activity that is 'integral and indispensable to a principal activity' is itself a 'principal activity' under Section 4(a) of the [P2P Act]," and therefore compensable.

H. The Time Involved Is Not *De Minimis.*

Citing 5 CFR Section 551.412, the Agency asserts that "[t]ime consisting of ten minutes or less is considered *de minimis* for federal employees." Agency Brief, p. 107. But the cited regulation does not support that statement. Section 551.412 states in pertinent part:

> "If an agency reasonably determines that a preparatory or concluding activity is closely related to an employer'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."

5 CFR Section 551.412(a)(1).

This language creates a mandatory, *per se* rule that any time spent by an employee engaged in work that is more than ten minutes must be paid time and cannot be considered *de minimis.* It establishes a floor, above which time must be characterized as more than *de minimis.* But it does not require, or even state, that time in amounts of less than ten minutes cannot be characterized as more than *de minimis*. In fact, time in amounts of less than 10 minutes can, and has been, characterized as more than *de minimis.* This reading of Section 551.412(a)(1) is consistent with court decisions holding that employers "must compensate employees for even small amounts of daily time unless that time is so miniscule that it cannot, as an administrative matter, be recorded for payroll purposes." *Lindow v. U.S.*, 738 F.2d 1057, 1062-1063 (9th Cir. 1984).

Furthermore, an activity that takes a *"de minimis"* amount of time to perform <u>can</u> start the continuous work day as long as such activity is integral and indispensable to a principal activity, because "the *de minimis* rule applies to the aggregate amount of time for which an employee seeks compensation, not separately to each discrete activity." *DOL Wage & Hour Advisory Memorandum No. 2006-02*, at p. 2 (May 31, 2006). In this case, as explained below, the aggregate amount of time proved by the evidence in this case is more than ten minutes per shift, and is therefore not *de minimis.*

I. Evidence on the Amount of Overtime.

5 CFR Section 551.402 provides that "[a]n agency shall keep complete and accurate records of all hours worked by its employees." In this case the Agency has kept no records of the grievants' time worked. Because of this failure, the Union is entitled to make its case purely on testimonial evidence from which "just and reasonable inference[s] may be drawn." *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 687, 66 S. Ct. 1187,1192, 90 L.Ed. 1515 (1946) (the Supreme Court case that prompted the P2P Act).

In *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 687, 66 S. Ct. 1187, 1192, 90 L.Ed. 1515 (1946), the U.S. Supreme Court explained how the burden of proof works in cases such as this one, and it is still applicable today: "the employee bears the burden of proving that he performed work for which he was not properly compensated," but to prevent employees "from being penalized [in cases where] the employer fails to keep adequate records," the Supreme Court held that "the employee carries his burden of proof" by establishing that he "has in fact performed work for which he was improperly compensated and [producing] sufficient evidence to show the amount and extent of that work as a matter of just and reasonable inference." *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680,687, 66 S. Ct. 1187, 1192, 90 L.Ed. 1515 (1946).

"Upon such a showing, the burden shifts to the employer to produce evidence of the precise amount and extent of work performed or to negate the reasonableness of the inference drawn from the employee's evidence," *Anderson v. Mt. Clemens*

Pottery Co., 328 U.S. 680,687, 66 S. Ct. 1187, 1192, 90 L.Ed. 1515 (1946), and "[i]f the employer does not rebut the employee's evidence, then damages may be awarded even though the result is only approximate." *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680,687, 66 S. Ct. 1187, 1192, 90 L.Ed. 1515 (1946).

The Union produced sufficient testimonial evidence from which to draw just and reasonable inferences that can be used to establish the amount of overtime worked by the COs assigned to the three posts at issue. In addition, the Union has used the Agency's own video evidence to draw similar just and reasonable inferences.

Using the Agency's video evidence, the Union recorded the entrance and exit times for those COs shown on the video. The compilation of this information is found in Union Exhibit 16. Based on this data, the COs assigned to the Compound 1 and 2 Posts were in the Institution an average of 21 minutes and 44 seconds beyond their paid eight hour shifts, and Control 1 Officers were inside the Institution on average 20 minutes and 44 seconds beyond their 8 hour shifts. This data, coupled with the uniform testimony of the COs assigned to those posts, sufficiently establishes that they all worked a range of between approximately 20 minutes and 44 seconds to 30 minutes beyond their 8 hour shifts.

Based on the foregoing evidence, it is my finding that Control 1 Officers worked an average of 25 minutes per shift for which they were not compensated, and that the Compound 1 and 2 Officers worked an average of 25 minutes of overtime per shift as well, but beginning as of January 15, 2010, they are entitled to

add to that amount a total of 1 minute per shift for donning their duty belts on Agency premises and walking into the sally port doors that lead to the inside of the Prison.

J. The Union's Evidence Was Sufficiently Representative.

The Agency asserts that the Union's evidence was not sufficiently "representative" of those posts at issue here. "Representative evidence" is "commonly recognized" in these kinds of cases, and "[i]t is well established that not all employees need [to] testify in order to prove violations or recoup back pay" under the FLSA or the P2P Act; back pay awards have been allowed to groups of employees "where only some of those employees testified as to hours worked and wages paid, the overall damage award being reasonably inferred." *See, e.g., Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 687, 66 S. Ct. 1187, 1192, 90 L.Ed. 1515 (1946); *and see, Reich v. Southern New England Telecom. Co.*, 121 F.3d 58, 66-68 (2nd Cir. 1997) (where 39 of approximately 1500 employees testified); *and Donovan v. New Floridian Hotel, Inc.*, 676 F.2d 468, 472-473 (11th Cir. 1982) (where 23 of 207 employees testified).

The Union presented the testimony of six witnesses who had worked hundreds of shifts during the time period at issue. Their testimony amply covered all three posts at issue here: Control 1 and Compound 1 and 2. In addition, the Agency presented the testimony of Aron Davis, a CO who had worked "almost every position in this institution since activation," Davis, 5/19, p. 7, predominately the

Control Center. Davis, 5/19, pp. 7-8. Some of Officer Davis's testimony was considered herein as support for some of the Union's assertions.

In my opinion any further testimony beyond those 7 witnesses would have been duplicative and more than needed. Based on all of the evidence received in this case, I find that the testimony and evidence pertaining to the Control 1 Post and the Compound 1 and 2 posts was sufficiently representative of those posts as well as all pertinent shifts.

K. Donning Duty Belts on Agency Premises.

The Union also contends that "Compound Officers' compensable workday begins approximately two minutes before they pick up batteries when they don their duty belts after clearing the staff dedicated metal detector" in the lobby entrance to the Institution. Union Brief, p. 29. On my first cursory reading of this, I thought it was a "throw away" claim. To my surprise, on reading both briefs and the supporting documentation, I discovered that this is not only a substantive, but meritorious claim on behalf of the Compound Officers.

As stated by the Agency in its brief, the Agency and the National Union reached an agreement by which all staff at FBP Institutions must undergo a security screening before entering FBP buildings. Pursuant to that agreement, on January, 2008, a metal detector was installed in the lobby entrance at FCIW, and since then, all FCIW staff has been required to walk through a metal detector in order to gain access into the building.

DOL Wage and Hour Advisory Memorandum No. 2006-02 states that "the time, no matter how minimal, that an employee is required to spend putting on and taking off gear on the employer's premises is compensable 'work' under the FLSA." The Union says that since January, 2008, Compound Officers (and others who are not at issue yet in this case) are required to remove their duty belt (or not wear their duty belt) before entering the metal detector, and that fact is undisputed, because it can't be disputed. That means that arriving officers can only "don" the duty belt <u>after</u> clearing the metal detector, i.e., on Agency premises. DOL Memorandum No. 2006-02 and related case law make this compensable "work" under the FLSA.

The Agency contends that "security screening does not constitute compensable hours of work," Agency Brief, p. 87, citing cases, and I agree. But that is not the Union's claim. It seeks no compensation for clearing security, and such a claim would fail, as the Agency says. The Union's claim is based on the fact that the security screening necessarily results in COs having to don their duty belts (or some sort of belt that will accommodate chains, clips, keys, and radios) on the Agency's premises. There is no way around that fact.

The Agency tries to tie the doffing and donning of the belts to the actual screening, terming it "part and parcel of the security screening itself." However, I disagree. The duty belt itself, and the equipment that must be "securely fastened" to it, are integral and indispensable to the principal job activities of Compound Officers. It is only because of the security screening that they are required to don

their duty belts on Agency premises; that makes this relatively minor activity compensable, and triggers the continuous workday one additional minute prior to those activities discussed above.

The Agency says that "there is no requirement that any officer wear a duty belt" at all, and the Agency's Program Statement for uniforms merely requires "a belt." Agency Brief, pp. 88-89. That is a distinction without a difference; and there are other, more specific Post Orders that apply. Agency Post Orders require that "[a]ll institution keys will be securely fastened to the staff member's belt" and "[a] metal chain will be attached between the key ring and metal clip for all keys and key rings." Union Exhibit 11, General Post Orders, p. 37.

In addition, the Post Orders require that "[w]hen a radio is issued, it should be clipped on the staff member's belt or placed in a radio holster." Union Exhibit 11, General Post Orders, p. 64; Peavy, 4/12, p. 182. In other words, Compound Officers' radios must either be clipped to their belts or placed in a radio holster, which must then be attached to their belts, unless they want to carry their radios around with them in their hands – not a feasible or reasonable alternative, since COs should certainly have both hands free as much as possible inside the prison environment.

The uniform practice has been for COs "to put on their duty belts after clearing the metal detector at tables provided by the Agency adjacent to the screening area." Agency Brief, p. 33; Peavy, 4/12, p. 137; Davis, 5/19, p. 88; Langford, 5/17, p. 220. As the Union points out, the COs "must put on their duty

belts in this location so that their hands are free and they are able to respond to an emergency" (or so that they can protect themselves once inside the prison) and "so they are prepared to receive equipment." Union Brief, p. 33; Peavy, 4/13, p. 110; Floyd, 4/15, p. 96. I agree with the Union's contention.

I acknowledge Arbitrator Curry's opinion in *AFGE Local 820 and FCC Terre Haute*, FMCS Case No. 08-54922, at p. 17, where Arbitrator Curry states that "[t]he duty belt that employees wear cannot be put in the same category as unique items mentioned above." But her finding flies in the face of DOL Advisory Memorandum No. 2006-2, which states in pertinent part:

> "The Supreme Court in *Alvarez* did not rule directly on the compensability of donning and doffing of 'non-unique' gear such as hairnets, goggles, hardhats and smocks, because it was conceded or the courts below held that donning and doffing of the gear at issue in these cases was a principal activity.
>
> * * *
>
> And the regulation at 29 CFR Section 790.8, fn. 65 provides that any clothes changing on the employer's premises, which is required by law, the employer, or the nature of the work is compensable. The Court in *Alvarez* ruled that the principles enunciated in *Steiner* were applicable to the cases before it, and endorsed the Secretary's reg-

> ulations. Accordingly, whether required gear is 'unique' or non-unique' is irrelevant to whether donning and doffing is a principal activity."

DOL Advisory Memorandum No. 2006-02, p. 2.

Under these pronouncements from DOL, it is irrelevant whether the "belt" or "duty belt" is unique or non-unique. All that is required is that the gear be necessary for the COs to perform their work and that "the employer or the nature of the job mandates that [the donning and doffing] take place on the employer's premises." DOL Advisory Memorandum No. 2006-02, p. 2. The same general principle has been applied in several cases cited by the Union. *See, Jordan v. IBP, Inc.*, 542 F. Supp. 2d 790, at p. 805 (M.D. Tenn. 2008) (where employees were required to don "cotton frocks" (certainly not unique articles)[16] to help maintain sanitary conditions on the production floor).

Based on the foregoing, I am led to agree with the Union that the duty belts, metal clips, chains, radios and metal chits are required and necessary equipment for the COs to perform their jobs, they primarily benefit the Agency, and because of the security screening implemented in January, 2008, the duty belts are required to be donned on the Agency's premises. Therefore the donning of those belts is compensable and begins the Compound Officers' compensable workday.

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[16] In *Jordan*, the parties disputed whether the "frocks" could be characterized as "specially designed," but the court granted summary judgment in favor of the plaintiffs anyway. *Jordan v. IBP, Inc.*, 542 F. Supp.2d 790, 816, fn. 3.

L. Liquidated Damages.

Section 216(b) of the FLSA, 29 USC Section 216(b), provides that "[a]ny employer who violates the provisions of [the FLSA] ... shall be liable to the employee or employees affected in the amount of their unpaid minimum wages ... and in an additional equal amount as liquidated damages." The language is mandatory. However, the P2P Act permits the decision maker "in its sound discretion," to award a lesser amount of liquidated damages, or none at all, "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 [FLSA]." 29 USC Section 260.

This "limited exception" places upon the "delinquent employer who would escape the payment of liquidated damages" the "plain and substantial burden of persuading the court by proof that his failure to obey the statute was both in good faith and predicated upon such reasonable grounds that it would be unfair to impose on him more than a compensatory verdict." *Marriott Corp. v. Richard*, 549 F.2d 303 at p. 306 (4th Cir. 1977).

This issue has given me trouble for a number of reasons. First and foremost, once the Department of Justice finally got involved in this case, the Agency put up a spirited and extremely thorough defense to many of the Union's claims. Some of the evidentiary calls made in this Opinion and Award were not easy to make, because the evidence was in irreconcilable conflict, and that in itself tends to justify the Agency's all-out defense here.

In addition, I find the Human Resources Management Manual, Program Statement P3000.03 singularly unclear and vague. First it states that its "purpose and scope" is "to establish basic parameters for shift starting and stopping times for employees working at Bureau institutions" (note that the term "employees" is unqualified and unlimited except that they must be "working at Bureau institutions"). The Program Statement adds the following, also unqualified, language:

> "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."

Union Exhibit 13, Program Statement P3000.03, Human Resources Management Manual.

All of the language quoted above from the Program Statement is open ended and could reasonably be construed as applicable to *all* "employees who work at the institution." Yet the second paragraph, entitled "coverage" states that "[t]his section" (there are no "sections" In Part 610.1, only paragraphs) applies to all institution employees who are <u>required</u> to pick up keys or other equipment while passing through control on the way to their assigned posts" (emphasis supplied).

Since specific language normally controls the general, it is a reasonable and defensible reading of Part 610.1 that it applies only to those employees "who are required to pick up keys or other equipment while passing through control on their way to their assigned duty post." Although some FBP institutions have "required" employees to pick up keys and other equipment at control, FCIW has never required this of COs assigned to 24 hour posts.[17]

It follows that if Part 610.1 is limited in scope to those employees who are "required" to pick up equipment at control, it does not apply to the 24 hour posts at FCIW. Furthermore, this language was "negotiated" with the National Union and was republished on December 19, 2007, while FCIW's Post Orders have been in effect since the fall of 2004. It is therefore a reasonable argument that the parties understood that at least at some institutions, there were COs who were not required to pick up anything at control, and therefore they intended to exclude them from coverage under Part 610.1. I do not know which interpretation of the Program Statement is correct, but I find that either interpretation described above is reasonable, and therefore the Agency cannot be faulted for taking its position on this point.

In addition, of course, there were many other lines of defense raised by the Agency in this case. By far the most impressive and troubling to me was Agency

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[17] As noted above, the parties dispute the scope of the paragraph entitled "24 hour key issue" in the General Post Orders, p. 6, but there is no doubt that it does not expressly *require* COs assigned to 24 hour posts to pick up anything at the Control Center.

Exhibit 17, created by A.W. Langford based on video evidence "which began capturing breezeway in and breezeway out times" on August 12, 2010 (Langford, 5/17, p. 114-115; Agency Brief, p. 71, and extended through August 18, 2010. (Langford, 5/17, pp. 114-115.

By noting the times when the relieving officer entered the breezeway door and the times when the officer being relieved exited the same door, A.W. Langford was able to establish what he termed "the maximum times together," i.e., the most time that the two officers could have possibly been together on that date. Langford, 5/17, pp. 128-129; Agency Brief, p. 73. The Agency emphasizes that these "maximum times together" are not the times spent in actual shift exchanges, but they do establish the outer parameters that a shift exchange could possibly be occurring. This evidence was strong, and very nearly overcame the Control 1 Officers' testimony that they arrived at least 30 minutes early each shift and departed only a few minutes prior to the end of their shifts.

According to Agency Exhibit 17, as described by A.W. Langford, the "maximum times together" that he saw on the video were predominately less than ten minutes each (6 minutes, 3, 2, 1, 5, 6, 3, 7, 9, 3, 8, 7, 9, and 4 minutes), although there were also several that extended well beyond ten minutes (19 minutes, 19, 24, and 25 minutes). Agency Brief, pp. 72-73.

This evidence was considered in reaching the conclusions herein; but on balance, I still had to weigh all of the evidence together as a whole; and I still cannot conclude that the Union witnesses were lying or scheming to get overtime

pay. Once again the Agency's evidence was quite limited in scope. It only covered seven days and came up with a handful of examples of less than ten minute times together, while this dispute covers over seven years of shift changes. I am not a statistician, and I do not know what would constitute a "statistically significant" sample of all of those several thousand shift changes.

This evidence was considered at length and all of it was weighed together, but in the end, I found that the otherwise unimpeached testimony of all Control Center officers was uniform and without exception, that all of them come in at least thirty minutes early and all of them stay to very near the end of their shifts. The Agency's evidence on the "maximum times together" is mentioned here because it did tend to support the idea that the Agency defended this case in good faith and that it had some reasonable basis for believing that the Control 1 officers were spending less than the amounts of time they were claiming in performing the information and shift exchange in the Control Room.

On the other hand, the standard to be met by the Agency under Section 216(b) is that it had reasonable grounds for believing that none of its acts or omissions were in violation of the FLSA, and that standard has not been met. To the contrary, there is significant evidence tending to establish a lack of good faith or any reasonable belief at the level of the Institution itself and at the national level, that the Agency was in all respects in compliance with the FLSA.

As already noted, the grievance in this case was filed on March 11, 2008. It was promptly denied. On June 16, 2008, this Arbitrator was appointed by FMCS to

hear and decide this case, and on June 23, 2008, I wrote the first of multiple letters to both parties requesting that they contact me to provide dates available to them on which this case could be heard.

Although I received a prompt response from the Union, I never heard a single word from FCIW until two years later. I even wrote to the then warden of FCIW and suggested that he might want to contact his lawyers, since the process appeared to be stalled indefinitely. Still there was no response from the Institution. Moreover, someone from the Union actually contacted the Director of FMCS, who contacted me to ask why this case had not been scheduled, since the appointment had been made so long ago. Through all of this, there was no word or response of any kind from FCIW or the Agency. In fact, I heard nothing from FCIW or the Agency until early 2010, and nearly two years elapsing for nothing more than a simple response to my (and the Union's) letters and pleas does not add up to good faith.

In addition, once the grievance was filed, the Agency's response at the Institution level denied that there had been any informal attempts to resolve it, and wrote that "there is no record in the minutes of the labor management meetings that this issue was identified by the Union." Joint Exhibit 3. When the case finally came to a hearing, Mr. Peavy, President of the Local Union, testified that this statement by the Agency was "patently false," Peavy, 4/12, p. 196, and the Union produced meeting minutes to confirm his testimony.

In fact, the evidence was undisputed that the Portal to Portal issue was raised by the Union as early as December, 2006, over a year before the grievance was filed. Peavy, 4/12, p. 196-197; Union Exhibit 14A. The minutes reflect that the discussions actually involved the then warden of the Institution. The Institution's response (or lack thereof) to the grievance, coupled with the total lack of responsiveness once FMCS appointed an arbitrator to hear the dispute, can only be characterized as stonewalling and delaying the issue, and is not evidence of good faith.

On the national level, the Agency has accepted the benefit of many FBP employees' overtime work for many years, and instead of negotiating or seeking a solution, it has apparently determined to aggressively defend all of the grievances, all the way through arbitration and some of them through appeals to the FLSA, on a case by case basis. It has continued to do this despite the growing volume of adverse arbitration decisions on all of the points covered in this Opinion and Award, as well as affirming decisions by the FLRA.

In summary, the Agency has failed to carry its "substantial burden" of proving good faith. Instead, like the employer in *Richard v. Marriott Corp.*, 549 F.2d 303 at p. 306 (4th Cir. 1977), "it took a chance, acted at its peril, and lost." The Union is correct that on the whole, considering all of the evidence and lack of evidence in this case, liquidated damages under 29 USC Section 126 are warranted, and are therefore awarded.

M. The Statute of Limitations.

Section 255(a) of the P2P Act imposes a two year statute of limitations on FLSA actions, unless the employer's violations are deemed "willful," in which case a three year statute of limitations applies. The Supreme Court has decided that a violation of the FLSA is "willful" if the employer knew its conduct violated the FLSA or demonstrated "reckless disregard" for terms of the FLSA. *McLaughlin v. Richland Shoe Co.*, 486 U.S. 128, 135 (1988).

Employees who cannot prove a knowing violation of the FLSA may still prove that their employer's actions (or lack of action) were in reckless disregard of the FLSA and therefore willful, under 29 CFR Section 578.3(3), which provides that "an employer's conduct shall be deemed to be in reckless disregard of the requirements of the [FLSA]" if "the employer should have inquired further into whether its conduct was in compliance with the [FLSA] and failed to make adequate further inquiry."

Here the evidence makes it clear that at the Institution level, the employer should have inquired further into whether its conduct was in compliance with the FLSA, yet there is no evidence that any such inquiry was made by management. Instead, local management stonewalled the issue and delayed the matter from even being heard for nearly two years after the grievance was filed. No lawyer was even involved in this case until early 2010, and that means that the Institution was doing nothing about this case while it stood stagnant for nearly two years. This delay extended for another year even after the Institution found legal

representation. For these reasons, the statute of limitations in this case is extended from two years to the three years authorized under Section 255(a) of the P2P Act.

N. Attorneys' Fees and Costs.

The Union has also applied for an award of attorneys' fees and costs. Section 216(b) mandates an award of "a reasonable attorney's fee ... and costs of the action," and in this instance, there is no qualifying language through which the losing party may escape liability under Section 216(b). Therefore, as mandated by Section 216(b), reasonable attorneys' fees and costs incurred in this case are awarded to the Union.

In this regard, the Union states that it will "submit its petition for attorneys' fees and expenses within 30 days of the date that the Arbitrator issues a Final Order on all issues in this case." As made clear at the outset of this Opinion and Award, it is an interim award and not final. Nor does this decision dispose of "all issues in this case." Therefore, based on my understanding of the Union's request, I will allow the Union to either (i) submit a petition for an award of attorneys' fees and expenses within 30 days following its receipt of this Opinion and Award, or (ii) wait until a full and "final order" is entered by the Arbitrator in this case, and then file its petition within 30 days thereafter.

IV. FINDINGS AND CONCLUSIONS

Based on the foregoing, it is the Arbitrator's finding and conclusion that the Agency violated the FLSA by failing to compensate those bargaining unit employees who were assigned to the Compound 1 and 2 Posts and the Control 1 Posts for time

spent performing work that the Agency suffered or permitted before and after those employees' paid shift times.

1. For correctional officers assigned to Compound 1 and 2 Posts, the correctional officers' acts of picking up equipment, specifically including charged batteries, at the Control Center begins their compensable workday because obtaining this equipment as they did and when they did is integral and indispensable to their primary job duty of maintaining safety and security within the Institution; and
2. In addition, I find that the Compound 1 and 2 Officers are "working" as soon as they exit the sally port door and enter upon the prison grounds, for the reasons set forth in the foregoing Opinion; and
3. For officers assigned to Compound 1 and 2 Posts, their compensable workday ends when they return depleted batteries and/or other equipment to the Control Center at the end of their workday, or when they exit the sally port door leading into the lobby area; and
4. For officers assigned to Control 1, the continuous workday begins when the officers enter the door to the Control Room and begin their information and equipment exchange, as well as beginning their normal work activities, all of which is begun at approximately the same time, prior to the beginning of their paid shifts, and ends when they conclude their information and equipment exchange at the end of their shifts; and

5. The Union met its burden of proof through representative testimony and other evidence to establish that the correctional officers assigned to the posts referenced above are entitled to be paid at time and one-half their regular rate of pay for the following number of minutes for pre-shift and post-shift work for which they were not compensated:
   a. Control 1 Post: 25 minutes per shift
   b. Compound 1 and 2 Posts: 25 minutes per shift; and
   c. As of January 15, 2010, the Compound 1 and 2 Posts are also entitled to one additional minute of compensation for the time spent donning the required duty belt with the capacity to hold keys, metal chits, chains, and radios on Agency premises, and thereafter walking through the incoming Sally Port door, for a total of 26 minutes of compensation owed for each shift since January 15, 2008; and
6. The Agency is liable to the employees identified above for this unpaid work time under the FLSA because the Agency knew or through reasonable diligence should have known that the work was being performed, yet did not make a diligent effort to stop it; and
7. The Agency is also liable for liquidated damages under Section 216(b) of the FLSA; and
8. The statute of limitations shall be three years rather than two years as provided for in Section 255(a) of the FLSA, and shall date back to March

11, 2005, which is three years prior to the date that the grievance in this case was filed; and

9. The Union is entitled to an award of attorneys' fees and expenses under 29 USC Section 216(b); and

10. The parties shall have 90 days from the date of this Award on liability to attempt to agree on the damages owed related to the posts described above, as well as how they may apply this Award to other posts at FCI Williamsburg. In the event that the parties are unable to agree on any of these matters, the Arbitrator retains jurisdiction to decide them.

It is so ordered this 22nd day of May, 2012.

Joe M. Harris, Jr., Arbitrator
Atlanta, Georgia