

106 LRP 49982

**American Federation of Government
Employees, Local 3981 and U.S.
Department of Justice, Bureau of Prisons,
FCI Jesup, Ga.**

Federal Arbitration

0-AR-4124

July 14, 2006

Judge / Administrative Officer

Jerome J. La Penna

Full Text

APPEARANCES:

For U.S. Bureau of Prisons, FCI Jesup, Ga.,
Michael A. Markiewicz

For AFGE Local 3981, Daniel Bethea, VP
Southeast Region Council of Prison Locals (AFGE)

Opinion and Award

Background

The grievance which is the subject of this arbitration, ("subject grievance") was filed on July 6, 2004 by an officer of the American Federation of Government Employees (AFGE) Local 3981, (hereinafter "Union") which Union local represents bargaining unit employees employed at the Federal Correctional Institution at Jesup, Georgia, ("FCI Jesup") ("Agency").

The subject grievance involves the alleged failure or refusal by the Agency to compensate bargaining unit employees for pre-shift and post-shift work activities on a daily basis retroactively from January 1, 1996 through to present date. It may also involve other overtime compensation matters.

The subject grievance is set forth at length hereinafter.

Prior to the filing of the subject grievance, two or more relevant events occurred which may have a bearing on determinations to be made as to the subject

grievance.

The earlier event occurred in October 2002 when it is alleged by the Agency that the Union filed a similar grievance covering the same matter as the subject grievance which had not as of September 22, 2005, the last day of hearings on this matter, entered the actual arbitration stage. (Agency exh. 1; Transcript p. 48-50).

The later event or events consisted of communications between the Union and the Agency through the Warden, McFadden on four occasions; three (3) e-mails in May 2004; one (1) on June 2, 2004; and a memorandum dated June 17, 2004 relative to a resolution of "The Portal to Portal Issue at FCI Jesup, Ga." (Union exh. 4; Agency exh. 6 and 9).

There was another earlier relevant series of events which commenced on May 17, 1995 by the filing of a national grievance by the president of the Council of Prison Locals, AFGE, the national union, herein, on behalf of all of the then present and former bargaining unit employees of the Federal Bureau of Prisons ("BOP" or "Agency") at all of its penal facilities or institutions nationally. The national grievance had for its subject, retroactive and possibly future compensation for portal to portal pre-shift and post-shift work activities.

On November 1, 1995, the Agency issued its Operations Memorandum 214-95 (3000) (OM 214-95) which had for its stated purpose:

"To establish parameters for shift starting and stopping times for employees working in bureau institutions and the procedures to initiate practices at all bureau institutions which incorporate these parameters."

(Union exh. 1)

The memorandum continued in effect until April 1996 when its contents were essentially incorporated into Program Statement (P.S.) 3000.2, section 610.1 of the Agency's Human Resource Management Manual effective April 19, 1996, (H.R.M. 610.1 Joint exh. 2. H.R.M. 610.1 is set forth at length hereinafter.

The National Settlement Agreement between the Union and the Agency which settled the National Grievance, was entered into on August 10, 2000, provided for the pay out to past and present Agency employees of sums based upon the number of years during the period May 17, 1989 through January 1, 1996 that each employee worked for the Agency and specifically excluded certain persons who were involved in a specified federal court case. The said agreement also provided for negotiations by the Agency with five (5) specified institutions of the Agency which had not implemented certain changes in their pre-shift and post-shift procedures as set forth in H.R.M. 610.1 after the issuance of the Agency's Operations Memorandum 214-95 on November 19 1995 and its successor H.R.M. 610.1 in April 1996. The apparent purpose of the provisions providing for such negotiations was to attempt to cause the parties to arrive at an agreement as to any payment which was due bargaining unit members at these five (5) institutions for the period from January 1, 1996 through to the date of the implementation of the pre- and post-shift changes provided for under OM 214-95 and its progeny H.R.M. 610.1. FCI Jesup was not one of the five (5) institutions named in the National Settlement Agreement.

The National Settlement Agreement, however, went on to provide:

"Both parties understand that this settlement covers the period from May 17, 1989 through January 1, 1996. This agreement does not preclude employees from pursuing claims after January 1, 1996 subject to the Master Agreement requirements rules and/or regulations". (Union exh. 2.)

The subject grievance is, in effect, the grievant local Union's pursuit of its claims for overtime compensation for pre-shift and post-shift work activities for the period January 1, 1996 through the present date as provided in the National Settlement Agreement. Indeed, the grievance refers specifically to the National Settlement Agreement and to certain of its provisions.

The subject grievance, in addition to charging

that the Agency breached its own policy as set forth in H.R.M. 610.1 by not implementing the necessary changes to meet the parameters and provisions of H.R.M. 610.1 charges that the Agency violated the Fair Labor Standards Act, the Federal Employees Pay Act of 1945, as amended, (FEPA) and by use of general inclusionary language, The Portal to Portal Act of 1947 and Article 18 of the Master Agreement titled "Hours of Work", "and any other laws, rules, regulations, statutes, policies, program statements, understandings and anything else that would apply" -- by not compensating bargaining unit employees for compensable pre-shift and post-shift work activities which such members perform daily as generally described in Section 6 of the subject grievance.

The remedy sought in the subject grievance is compensation for all bargaining unit employees at FCI Jesup for time worked at pre-shift and post-shift work activities for the period from January 1, 1996 through present date and that the arbitrator retain jurisdiction to ensure enforcement of the award.

The subject grievance, as referred to herein above, was filed on July 6, 2004. The relevant provisions of the Master Agreement governing both the filing of the grievance and submission of the grievance to arbitration together with other Master Agreement provisions pertinent to this case are set forth hereinafter.

The subject grievance was denied by the Agency on or about July 23, 2004.

A request was then made to the Federal Mediation and Conciliation Service (FMCS) for a list of arbitrators. The FMCS complied with the request and the parties selected this arbitrator from said list. The parties for a relatively lengthy period were unable to agree upon a date or dates for the arbitration hearing and one or more scheduled hearings were cancelled. The hearing dates were finally scheduled and held on September 20, 21, and 22, 2005 at an agreed upon location in Jesup, Georgia, the location of FCI Jesup.

At the outset of the first hearing day, the

Agency, in its opening raised threshold issues alleging procedural non-arbitrability of the subject grievance among which were specific claims that the subject grievance had not been filed timely and that the requirements for the invocation of arbitration under the Master Agreement were not complied with. These matters will be dealt with in a subsequent part of this opinion.

Among the other preliminary matters discussed at the outset of the first hearing date, was the availability, as a Union witness, of Captain Anthony Chamness. The Agency in response to the Union's raising of this matter stated that Chamness had been transferred from FCI Jesup to another BOP facility and that counsel for the Agency would attempt to arrange for the testimony of Chamness by phone or other means before the conclusion or the hearing. In the absence of such testimony, it was agreed late in the hearings, that an affidavit of Chamness would be admitted into evidence after the actual hearings with allowance of a response by the Agency.(Chamness did not testify at the hearing by phone or otherwise nor did he execute an affidavit relative to the issues before the arbitration).

The parties did not frame an issue or issues by agreement but the Agency submitted a set of issues in its post-hearing brief and in accordance with the provisions of the Master Agreement, the arbitrator has framed the following issues:

1. Is the subject grievance arbitrable or not arbitrable by reason of the procedural defects asserted by the Agency of:

A. Untimely filing of the grievance.

And B. Failure to adhere to the contractual requirements to invoke arbitration?

2. Did the Agency violate the Fair Labor Standards Act the Portal to Portal Act of 1947 and other statutes, the Master Agreement, its own policy set forth in H.R.M. 610.1 and/or any other applicable legal or contractual obligation or anything else that would apply by not compensating bargaining unit members for the pre-shift and post-shift work

activities performed during the period January 1, 1996 to the date of filing of the grievance and thereafter? If so, what should be the remedy?

Applicable Master Agreement Provisions

"ARTICLE 18 -- HOURS OF WORK

Section a. The basic work week will consist of five (5) consecutive workdays. The standard workday will consist of eight (8) hours with an additional thirty (30) minute non-paid duty-free lunch break. However, there are shifts and posts for which the normal workday is eight (8) consecutive hours without a non-paid duty-free lunch break.

ARTICLE 31 -- GRIEVANCE PROCEDURE

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

...

Section d. Grievances must be filed within forty (40) calendar days of the date of the alleged grievable occurrence. If needed, both parties will devote up to ten (10) days of the forty (40) to the informal resolution process. If a party becomes aware of an alleged grievable event more than forty (40) calendar days after its occurrence, the grievance must be filed within forty (40) calendar days from the date the party filing the grievance can reasonably be expected to have become aware of the occurrence. A grievance can be filed for violations within the life of this contract. However, where the statutes provide for a longer filing period, then the statutory period would control.

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

...

Section g. After a formal grievance is filed, the party receiving the grievance will have thirty (30) calendar days to respond to the grievance.

1. if the final response is not satisfactory to the grieving party and that party desires to proceed to arbitration, the grieving party may submit the grievance to arbitration under Article 32 of this agreement within thirty (30) calendar days from the receipt of the final response; and ...

...

Article 32 -- Arbitration

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

...

Section k. The arbitrator's award shall be binding upon the parties. However, either party, through its headquarters, may file exceptions to an award as allowed by the statute. The arbitrator shall have no power to add to, subtract from, disregard, alter or modify any of the terms of:

1. this agreement, or
2. published Federal Bureau of Prisons Policies and Regulations."

There follows on the succeeding pages, copies of the subject grievance entered into evidence as Joint Exh. 3, the P.S. 3000.2 Human Resource Management Manual, Section 610.1 (H.R.M. 610.1), "Institution Shift Starting and Stopping Times" entered as Joint Exh. 2 into evidence and Operating Memorandum 214-95 (3000) (OM 214-95) dated November 1, 1995, entered as Union Exh. 1.

FORMAL GRIEVANCE FORM

1. Grieving(s) 2. Duty Station Local 3981 (July 6, 2004) Federal Correctional Institution Jesup Georgia
3. Representative of Grieving(s) 4. Informal resolution attempted with (name person) D.E. Spell, Local 3981 Treasurer Robert E. McFadden, Warden
5. Federal Prison System Directive, Executive Order, or Statute Violated: Fair labor Standards Act (FLSA), 29 U.S.C. 201, the Federal Employees Pay Act of 1945, as amended (FERPA), 5 U.S.C. 5542, 5544, 5546, and any other pay acts, Program Statement 3000.02, Human Resource Management Manual, Chapter 6, Sec. 610.1, Institutional Shift Starting and Stopping Times. Any other laws, rules, regulations, statutes, policies, program statements, understandings, or anything else that would apply. 6. In what way were each of the above violated? Be specific: Management officials of the Federal Correctional Institute located in Jesup, Ga. violated the above listed pay acts by requiring bargaining unit employees to perform work in excess of the established forty (40) hour work week. Bargaining unit employees were required to perform the following work without being properly compensated for such work in accordance with the above cited pay acts: 1. Draw keys and equipment from the control center, and exchange chits for such keys and equipment. This frequently required bargaining unit employees to stand in line for long periods of time. 2. Report to the Lt's Office to check in, receive any pertinent instructions, check institutional mail boxes for work related correspondence, review and sign post orders, review and sign posted picture files, prepare and sign various work related documentation, i.e. (annual and sick leave forms, performance evaluations, significant incident logs, etc.), and other duties as required. 3. Travel to and from assigned duty post. 4. Turn in keys and equipment to the Control Center, upon completion of their assigned hours of work (shift). Again, this frequently required bargaining unit employees to stand in line for unreasonably long periods of time. Management officials at FCI Jesup ignored and did not comply with Operations Memorandum 214-95, dated November 1, 1995,

which required all BOP institutions to establish basic parameters for shift starting and stopping times for employees working in BOP institutions, and procedures to initiate practices at all BOP institutions which incorporate these parameters. Institutional Wardens were required to ensure that approved plans were incorporated into action, which met the specified parameters for shift starting and stopping times, no later than November 26, 1995. No such plan was ever developed, negotiated, approved, or incorporated at FCI Jesup facilities. Therefore, FCI Jesup is not in compliance with Section 610.1 of Program Statement 3000.02. SEE ATTACHMENT # 1 7. Date(s) of Violations: January 1, 1996 to present. This a continuing violation. 8. Requested remedy (i.e. what you want done) That all bargaining unit staff assigned to the FCI Jesup compl. be compensated for time worked during pre and post job requirements. That the arbitrator retain jurisdiction over the grievance to ensure enforcement of [missing text] award. 9. Person with whom filed 10. Title Robert E. McFadden Warden 11. Signature of recipient 12. Date Sign I hereby certify that efforts at informal resolution have been unsuccessful. 13. Signature of Grievant(s) 14. Signature of Representative

Continuation of Section # 6 "Portal to Portal Grievance"

In the year 2000, the Federal Bureau of Prisons (BOP) and the Council of Prison Locals, American Federation of Government Employees (UNION), reached a settlement agreement in regards to a formal grievance filed on May 17, 1995. This formal grievance was filed in regards to the same portal to portal (pre-shift and post-shift) issues raised in this formal grievance, and covered the period May 17, 198.9 thru January 1, 1996. In the settlement agreement, the parties agreed that certain institutions may not have implemented changes to comply with section 610.1 of the Human Resource Manual on institutional starting and stopping times. The parties further acknowledged that if changes were not made to comply with section 610.1 of this Manual, negotiations would take place to negotiate ant

payment due bargaining unit employees for the period January 1, 1996, and the implementation date, if any, of pre- and post procedures to comply with section 610.1 of the Human Resource Manual. Such changes as noted above have not been made at FCI Jesup and therefore, bargaining unit employees are due payment. Officials of the American Federation of Government Employees (AFGE) Local 3981, were not aware that certain specific institutions were going to be cited in the settlement agreement, nor were they given any opportunity to demonstrate that required changes had not been implemented at FCI Jesup. Section 3 (A) of the Operations Memorandum 214-95 stated that Wardens must review all posts, evaluate any effects these established parameters may have on shift starting and stopping times, and determine if changes are necessary to meet the parameters. Wardens were required to submit to the Regional Director a plan which included all work schedules, rosters, and a summary addressing any proposed changes in practice at the institution. The Warden at FCI Jesup did not comply with this section, and never submitted any plan to the Regional Director as required. It is clear that changes were necessary to meet these parameters, as the same procedures as the same procedures for shift starting and stopping times in place prior to January 1, 1996 are still in place at FCI Jesup as of the present date. Since required changes have not been made, and bargaining unit employees received compensation for the violations committed prior to January 1, 1996. In accordance with the settlement reached between the Union and the BOP, bargaining unit employees are due payment for the same violations committed between January 1, 1996 and the present date.

In addition, management officials at FCI Jesup have not complied with section 7 of the agreement reached between the Union and BOP, which states that negotiations will take place to negotiate any payments due bargaining unit employees for the period between January 1, 1996 and the implementation date, if any, of pre- and post-procedures in order to comply with section 610.1

of the Human Resource Management Manual. Such negotiations to negotiate payment due bargaining unit employees have not taken place as of the present date.

610.1 INSTITUTION SHIFT STARTING AND STOPPING TIMES

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

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

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

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

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

5. **SCHEDULE APPROVAL AND IMPLEMENTATION.** The authority to approve the work schedules rests with the Regional Director. Once approval is received, each Warden shall ensure that requirements for shift starting and stopping times, and details of the approved institution plan, are clearly communicated to all institution employees. If at any time the schedule needs to be revised, follow procedures stated in this section.

6. SCHEDULING CONSIDERATIONS

a. An institution employee whose shift starts at 7:30 a.m. must be at the control center and have received his/her equipment no later than 7:30 a.m. to be considered "on time" for the start of his/her shift. To accomplish this, each location should ensure minimum waiting time for the employee in the keyline. If that same employee's shift ends at 4:00 p.m., he/she should drop-off his/her keys/equipment in the control center at 4:00 p.m., the scheduled quitting time. Reasonable travel time to and from the duty post to the control center would be compensable as part of the employee's tour of duty. Local supervisors should establish expectations that require employees to arrive and leave their duty post in a timely and reasonable manner. If an employee arrives at the keyline in a reasonable time to get equipment prior to the shift, but does not receive the equipment by the beginning of the shift because of unforeseen circumstances, this employee is not to be considered late.

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

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

post. One way to accomplish this is through staggered shift starting and stopping times for day watch positions and placing additional personnel in the control center during busy shift changes. Another option is to assign equipment and keys to posts. If appropriate, assign key ring to 24 hour posts instead of requiring staff to wait in keyline to exchange their chit upon arriving and departing work.

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

e. If one equipment issue pass is insufficient, institutions should consider installing a second equipment issue pass at the control center.

f. Compressed work schedules may be an appropriate option (follow procedures for compressed work approval).

g. Each institution should consider incorporating practices which include increased costs or resources only after all other options have been exhausted.

h. Overtime may be considered for certain posts/shifts; however, this option is not meant to restrict the employer's management of overtime.

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

U.S. DEPARTMENT OF JUSTICE FEDERAL BUREAU OF PRISONS

NUMBER: 214-95 (3000)

DATE: NOVEMBER 1, 1995

SUBJECT: INSTITUTION SHIFT STARTING AND STOPPING TIMES

CANCELLATION: APRIL 26, 1996

OPERATIONS MEMORANDUM

1. PURPOSE AND SCOPE. TO ESTABLISH BASIC PARAMETERS FOR SHIFT STARTING AND STOPPING TIMES FOR EMPLOYEES WORKING IN BUREAU INSTITUTIONS AND THE PROCEDURES TO INITIATE PRACTICES AT ALL BUREAU INSTITUTIONS WHICH INCORPORATE THESE PARAMETERS.

SHIFT. STARTING AND STOPPING TIMES

FOR EMPLOYEES WHO WORK INSIDE AN INSTITUTION SHALL BE SCHEDULED TO BEGIN AND END AT THE POINT EMPLOYEES PICK-UP AND DROP-OFF EQUIPMENT (KEYS, RADIOS, BODY ALARMS, WORK DETAIL POUCHES, ETC.) AT THE CONTROL CENTER. THEREFORE, EMPLOYEES WHO WORK INSIDE INSTITUTIONS AND PICK-UP EQUIPMENT AT THE CONTROL CENTER, SHALL HAVE THEIR SHIFTS SCHEDULED TO INCLUDE REASONABLE TIME TO TRAVEL FROM THE CONTROL CENTER TO THEIR ASSIGNED DUTY POST AND RETURN (AT THE END OF THE SHIFT). SHIFTS SHALL NOT INCLUDE TIME SPENT WAITING IN THE KEY LINE PRIOR TO RECEIVING EQUIPMENT BEFORE THE SHIFT.

OVERTIME REGULATIONS, PROCEDURES, AND REQUIREMENTS ARE NOT AFFECTED BY THIS OPERATIONS MEMORANDUM.

THE CONTENTS OF THIS OPERATIONS MEMORANDUM WILL BE INCORPORATED INTO P.S. 3000.02, THE HUMAN RESOURCE MANAGEMENT MANUAL (11/01/93).

2. SCHEDULING CONSIDERATIONS

A. AN INSTITUTION EMPLOYEE WHOSE SHIFT STARTS AT 7:30 A.M. MUST BE AT THE CONTROL CENTER AND HAVE RECEIVED HIS/HER EQUIPMENT NO LATER THAN 7:30 A.M. TO BE CONSIDERED "ON TIME" FOR THE START OF HIS/HER SHIFT, TO ACCOMPLISH THIS, EACH LOCATION SHOULD ENSURE MINIMUM WAITING TIME FOR THE EMPLOYEE IN THE KEY LINE.

IF THAT SAME EMPLOYEE'S SHIFT ENDS AT 4:00 P.M., HE/SHE SHOULD DROP-OFF HIS/HER KEYS/EQUIPMENT IN THE CONTROL CENTER AT 4:00 P.M., THE SCHEDULED QUITTING TIME. REASONABLE TRAVEL TIME TO AND FROM THE DUTY POST TO THE CONTROL CENTER WOULD BE COMPENSABLE AS PART OF THE EMPLOYEE'S TOUR-OF

DUTY. LOCAL SUPERVISORS SHOULD [MISSING TEXT]

B. [MISSING TEXT] EACH INSTITUTION SUBMITS FOR APPROVAL. THE REGIONAL DIRECTOR MUST APPROVE PLANS. INCLUDING ANY NECESSARY [MISSING TEXT], AND NOTIFY THE INSTITUTION NO LATER THAN NOVEMBER 21, 1995.

C. COMMUNICATION TO EMPLOYEES. ONCE APPROVAL IS RECEIVED, EACH WARDEN SHALL ENSURE THAT REQUIREMENTS FOR SHIFT STARTING AND STOPPING TIMES, AND DETAILS OF THE APPROVED INSTITUTION PLAN, ARE CLEARLY COMMUNICATED TO ALL INSTITUTION EMPLOYEES.

4. EFFECTIVE DATE. UARDENS SHALL ENSURE THAT THE INSTITUTION INCORPORATES THE APPROVED PLAN INTO ACTION AND MEETS THE SPECIFIED PARAMETERS FOR SHIFT STARTING AND STOPPING TIMES NO LATER THAN NOVEMBER 26, 1993. FOLLOUING IMPLEMENTATION (WITHIN 30 DAYS), THE LOCAL UNION MAY REQUEST BARGAINING OVER THE IMPACT AND IMPLEMENTATION OF THE PLAN.

5. ASSISTANCE. QUESTIONS MAY BE DIRECTED TO THE PAY AND POSITION MANAGEMENT SECTION, HUMAN RESOURCE MANAGEMENT DIVISION, AT (202) 307-3073.

/S/

PETER.M. CARLSON
ASSISTANT DIRECTOR
CORRECTIONAL PROGRAMS DIVISION

/S/

CALVIN R. EDUARDS
ASSISTANT DIRECTOR
HUMAN RESOURCE DIVISION
FEDERAL CORRECTIONAL INSTITUTION

Testimony of Witnesses

The arbitrator has reviewed in detail the full transcript consisting of about 550 pages numerous times and has annotated virtually all of the pages of the relevant testimony in the transcript with detailed notes summarizing the contents of each of those pages. That, which follows under the heading of "Summary of Testimony" is the product of the multiple reviews and the annotations by the arbitrator.

The summary of testimony follows the order of the appearance and testimony of the witnesses at the hearing as reported in the transcript. The references, if any, to exhibits (Exh.) are to exhibits in evidence as numbered and appropriately titled "Union", "Agency" or "Joint" exhibits.

There were a total of twenty-six (26) witnesses; sixteen (16) Union witnesses including five (5) rebuttal witnesses and ten (10) Agency witnesses. Of the total of twenty-six (26), one (1) witness, Captain Bruno Ierulli testified three (3) times: once as a witness in the Union's main case; once as an Agency witness in its main case; and once as a Union rebuttal witness and one (1) other witness, Leonard Spell, the local Union grievant's president appeared as a Union witness in its main case and as a Union rebuttal witness.

Summary of Testimony

Leonard Spell, the first Union witness and President of grievant local Union AFGE 3981, testified that he sent the Union's letter of intent to invoke arbitration to Warden McFadden and received no notice prior to the arbitration hearing of the non-receipt of the Union's invocation by the Agency.

Spell further testified that he discussed portal to portal issues with Captain Chamness and associate Warden Duncan about two days prior to March 12, 2002, the date of the LMR meeting (Union Ex.6). Duncan asked for time to fix portal to portal problems but claimed that due to national settlement the Agency didn't have to pay any more retroactive overtime. Duncan agreed to memorialize his agreement to fix the portal to portal issues at the LMR

meeting on March 12, 2002. The notation on the minutes of the LMR meeting that there were no concerns with portal to portal issues meant that the Agency and the Union had an agreement to fix the issues. Thereafter nothing was done by the Agency to fix the portal to portal issues. As discussed with Chamness and Duncan, Spell testified that the pre-shift activities included: keyline wait; pick up keys, radios, batteries, detail pouches and other equipment at the control center; stop at the lieutenant's office to check in and get information on any action in prior shift, check the officers' mailbox to see if new orders were issued that were applicable to the officers' assignment or shift; travel through sally port(s) after waiting to have them opened; and then walk to post.

Spell refers to Union Exh. 8 the F-1 unit post order which required officer to be at post at start of shift at 12 midnight at 7:30 a.m., and at 4:00 p.m. etc. At post the officer takes inventory of tool equipment locker which contains handcuffs, leg irons, flashlight and putty knives.

Spell testified as to Custodial Officers prior to equipment based 24 hour post implementation at a few posts, the time required to relieve at post from keyline was at least 20 minutes at start of shift and from post to keyline at conclusion of shift.

As to multiple Perimeter Patrols, they must be relieved one at a time so that one patrol is operating at all times. Relieving a perimeter patrol involves the taking of an inventory of all weapons and ammunition involving M-16 rifles, 9 mm pistols and a shotgun with a total of 173 individual rounds of ammunition and other equipment in vehicle including bullhorn and gas mask. The pre-shift perimeter patrol activity required is in excess of 30-45 minutes.

There are no overlapping shifts in perimeter patrol. If relief officer does not arrive early the officer being relieved will exit the shift late.

There are only a few equipment based 24 hour posts where equipment is acquired by exchange with the relieved officer. There are non-custodial

departments whose bargaining unit employees are not relieved at shift end, such as the education department.

Spell did not recall the October 2002 grievance of the local Union signed by Walter Spence, Secretary of the local. (Agency Exh. 1) (Representation by Agency Advocate during Spell's testimony that this 2002 grievance is still open and in process of selecting arbitrators and that Union's allegedly implied concession to go back three years as to remedy satisfies Agency to a point).

Aside from e-mail correspondence between Spell and the Warden they engaged also in verbal discussions prior to the grievance filing with respect to the Union's portal to portal issues.

Prior to filing the grievance, Spell sent a copy of the FCI Petersburg, Va., arbitration decision to the Warden to clarify the portal to portal issues alleged by the local Union.

Spell testified that the September 1998 Post Order (Union Exh.8) as it related to the pick up of equipment at the control center may have been changed in the neighborhood of 2004 by Captain Oliver or possibly another captain.

The Union after filing the grievance requested copies of all post orders from I the Agency but did not receive them up to and including the arbitration hearings.

Referring to Union Exh. 7 which consisted of e-mail correspondence from the Food Service Administrator who wanted to change starting and quitting times because of portal issues, Spell referred him to the pending arbitration of portal to portal issues.

The shift hours in the Food Service Department were changed after the e-mails on May 1, 2005 by the Agency.

Brian Ruley is a Union witness and a former lieutenant and acting captain and is now a GS-8 officer. As a lieutenant he attended a meeting in May of 2002 with Captain Chamness and Warden Hobbs to discuss matters that were ongoing and of which the

Warden should be aware and during the meeting Chamness stated to Hobbs that he was going to have to address the portal to portal issues pressed by the Union. Hobbs responded he wasn't going to do that right now. As acting captain or lieutenant, he required his officers to be present at post at shift start. Those not at post at start time and after warnings would be docked pay.

Prior to taking their post in a housing unit, officers would have to pick up equipment at control center; go to lieutenant's office to check in and check their mail box; and do turnover activities with relieved officer. Officer would then take over post As a lieutenant he observed his staff of Housing Unit Officers coming in prior to start of shift to get job done between 15 to 20 to 30 minutes early and observed keylines at start and stop of shift daily. The same keyline time requirements existed at the end of shift.

As a lieutenant and acting captain, he knew that the perimeter patrol can only be relieved while other patrol continues to rove and later only after first is back on patrol. Relieving and relieved officers on perimeter patrol jointly must count ammunition prior to take over of post and to do this and to wait for other patrol to be relieved, the officers must report early. Discipline would be imposed if one round is missing. As a GS-8 officer working control he now sees non-custodial officers arriving in keyline early to get keys and to return keys on a daily basis waiting in long keylines. The non-payment of overtime pay is standard practice and if overtime is required, the policy is to grant compensatory time if possible.

Management was well aware of portal to portal issues but chose not to address it. From his meeting with Captain Chamness and Warden Hobbs, he was convinced that Chamness and Union President Spell had early conversations on portal to portal issues and that Chamness would have seen to payment on overtime for pre-shift and post-shift activity as would he.

On cross examination, Ruley stated that most employees pick up batteries from control. Evening

watch housing unit officers pick up call-outs and batteries at control. He gave no response to question of whether employees are required to pick up batteries but added that employees who don't pick up batteries will not be able to do their job. Further he stated there are radios on the "A" side housing unit on all shifts but not on "B" side since "B" side officers do not relieve anyone and only one shift watches "B" side at evening. "B" side officers must stop at control to pick up radio and other equipment.

There are batteries on post with the radio on "A" side with battery but no assurance that that battery will get through the next shift. There are compound officers and activities officers on shifts but they may be too busy to deliver batteries to unit officers who need them. He knows when custodial officers leave shift late past quitting time but line staff employees usually leave job at the same time every day and wait in the keyline to drop off equipment the same as they do upon entering the control center area at start of shift.

He has little knowledge as to compressed shift units working ten (10) hours. He was demoted from lieutenant to GS8 officer in 2004 as a result of release of official information in 2002.

On re-direct, Ruley stated that portal to portal plan from the warden to the regional director in November 1995 provided for fifteen (15) minutes over time for shift starting at 11:45 p.m., to 8:00 a.m., but was not implemented at least since 2000 to present. (UN. Ex. # 3)

Barbara Latham a Union witness and former Human Resource Manager at FCI Jesup from March 23, 2004 to July 23, 2005 first testified that she did not proceed to arbitration by selecting arbitrators without a letter of intent to invoke arbitration.

Latham on cross examination testified that Article 32 Section a of the Master Agreement requires written notification of invocation of arbitration containing issues, violations and remedy. She doesn't recall if she received notice to invoke arbitration on the subject grievance. Only in the grievance

procedure is there a time limit to invoke arbitration which she does not remember. No employees came to her to claim overtime for pre- and post-shift activities. She remembers at times, line staff employees leaving shifts early viz., unit managers, Unicor and Medical. She didn't feel there was a portal to portal problem at FCI Jesup because no one ever came to her advising of such problem and she went through LMR meeting minutes in which Union responded none to an inquiry by the warden as to if there were any portal to portal issues.

Latham on re-direct however, testified that it was not a common practice for the Union to invoke arbitration by a letter of intent. Arbitration was invoked during her term by many means. Sometimes the Union president, Leo Spell, walked into her office and advised her that the Union would take a case to a arbitration. Sometimes arbitration would be invoked by phone from the Union.

On one occasion, the Union came to her with an arbitrators' list without her having received anything in writing or orally relative to the case. She called the region and they said "we got this". On more than one occasion Leo Spell would bring the actual list of arbitrators to her for striking purposes. The invocation of arbitration has been done more than one way on more than one occasion and in this case, the arbitration would have gone forward only if the Union advised her in some way, that they were going to arbitration.

She also testified that she reported late arriving employees when she observed such events.

Paul Edward Barnard a Union witness, a GS 11 shift operations lieutenant, testified that he performed perpetual audits which were used to continually monitor the institutions procedures and processes. One of his last audits performed about one (1) year ago (c.2004) mentioned the FLSA in connection with claims of portal to portal issues and failures to compensate officers who were transferred from lunch posts to no lunch posts and worked the half hour lunch period. In connection with his reference in the work papers and audit, he read the FLSA and

included it in his working papers. He recommended that some of his people be compensated.

As a shift lieutenant on all three (3) shifts, he required his officers to be on post at shift start time. Keys and equipment are at post at shift change and don't have to go through control to get keys but they may have to go by the control center to pick up a battery. Some units do not have the keys and equipment at post. Vacated unit officers must pick up keys and equipment at control.

A relieving officer and a relieved officer have to conduct a turnover in the unit after going through the control center and the lieutenant's office to check in and check their mailbox. The turnover in the unit includes inventorying the equipment locker, relay pertinent information and this must be done before relieving officer can leave the unit. It takes more than 10 minutes and up to one half (1/2) hours to effect a turnover and relieve the duty officer. If the incoming officer is late he can be docked a minimum of fifteen (15) minutes and we should pay the late relieved officer overtime. Technically, the officers who comes in early to be on time should be paid overtime if they are providing a service to the Agency.

Perimeter patrols should be relieved at different times. One should be moving all the time and he quotes the post orders relative to this rule. Perimeter patrol relief inventory of guns and ammunition alone can take five (5), ten (10) or fifteen (15) minutes. Together with other inventory and a possible wait for first mobile patrol to be relieved, officers are not paid for the 15-20 minutes overtime for coming in early. There should be two (2) officers in control but a percentage of the time there is only one (1).

On cross-examination, he testified that if a unit is vacated such as the "B" side, the officer for "B" side duty must stop off at control to pick up keys and equipment. Relief for the "A" side which is not vacated but has three (3) shifts, the relieving officer is not required to go through control but goes through the sally port doors, straight to the post except that he, as operations lieutenant does not like an officer not having a battery for a radio. The common practice for

years is an officer grabs a battery and carries a spare because you don't know when the one you've got is going off line. The officers usually pick up a spare, take it to the post, change them with the used battery and send the used batteries out at the 10 o'clock count with the compound officer to have recharged.

There is no Agency requirement to pick up a battery. He doesn't require incoming officers to check their mail at the lieutenant's office. They are required to check their mail but he doesn't require it to be done before the shift.

Since 1998, they changed the post orders because they changed the hours on it after he did his audit.

After examining Union Exh. 8, the September 1998 post order for F1 unit officer, he states that although the post order states that the incoming officer must pick up his detail pouch and then report to the lieutenant's office to be check off, receive any information relative to his shift and check his mailbox and then report to his assigned post unit and relieve the evening watch officer after which he completed an equipment inventory, it was not accurate since both officers have to complete inventory before the relieved officer can leave. He also commented that detail pouches are delivered at 5 a.m., but made no further comment about an incoming officer being required to perform activities at the lieutenant's office prior to arriving at the post.

Those officers on lunch time posts who are reassigned to non-lunch time posts should get overtime for lost lunch periods since they work eight and one-half (8-1/2) hours.

On re-direct, Lt. Barnard testified that Union Exh. 8, the September 1998 post order, required the incoming officer to first go to the lieutenant's office to check in and to check his institutional mailbox before going to the unit post.

An incoming officer picking up a spare battery at central is not required but it is a common practice and is needed to be done. If officers did not pick up spare batteries at control and used battery failed, they could

call for a battery but there is no guarantee it would be delivered within fifteen (15) minutes. It is not smart to go to post without a spare battery when the officer knows that the used battery already on post will die in an hour after post relief.

As it is not required to pick up a spare battery at control, it is also not specifically required to come in early to relieve and exchange equipment on perimeter patrol. In the perimeter patrol, it is expected that the officer will come in early and the post order required such officer to report in a timely manner. The perimeter patrol situation of coming in early, though not required is virtually identical to the picking up of a spare battery at control coming on shift.

On re-cross Barnard testified that in about 2000 they periodically had activity officers and two (2) compound officers.

Paulette Walker, a Union witness, is a nurse who works in the Medical Department, testified about Union Exh. 5, "Daily Closeout Report, Health Services Program Review" which cited as a deficiency that two (2) of five (5) of staff interviewers had worked beyond their tour without receiving compensation for overtime hours and management was aware of the overtime. Her current work hours as a nurse are 12 p.m., to 10 p.m., and one (1) weekend a month 7 a.m. to 5 p.m. and PA's in the department, work from 6 a.m., to 2 p.m., and 7:30 a.m., to 4 p.m. When they all come to work, they must stop at control center and pick up keys and equipment; body alarm and radio. She must come in 15-20 minutes early to be on post at shift start. The keyline on leaving is a long line. They are usually clearing count. Usually only one officer is in control center. On leaving perhaps keyline is longer than at entering.

There are outside doors that are locked from 4 p.m., to 7:30 a.m., and employees seeking ingress to control or egress at shift end must wait until control officer buzzes them in. There is no one in the front lobby during this time. Sometimes she has to wait 5 to 10 minutes to be buzzed in to the lobby all before she must press a new button to notify control that she's waiting to get into the control center to enter the

keyline. The delay getting in the outside door is frequent she says. They should put an extra person in control.

Walker on cross examination testified as to procedure when entering the institution. Before picking up equipment at control center must get through outside lobby doors by buzzing in from control and then she goes through some locked doors opened by control officer to get to outside sidewalk and walk down the sidewalk through three (3) locked doors to get to building where control is located and go through some unlocked doors to get to control where there may be up to fifteen (15) to eighteen (18) medical department personnel going through keyline. After receiving equipment she goes through one (1) locked door opened by control officer and then walks to the medical department which walk takes about one minute and one half. She states that she is not one (1) of the two (2) staff members who worked past shifts end at undisclosed duties but that she also worked overtime at her principal nursing duties but did not claim it and was not included with the two (2) referred to in the program review of the Health Services Department, Union Exh. 5.

Rickey Frank Pasley, a Union witness who worked in Custody and now works in Unicor as a fabric supervisor, testified that he is required to be at Unicor at start of shift 7:30 a.m., and must arrive at control center and pick up equipment and keys 15 to 20 minutes before his shift starts. Leaves Unicor at 4 p.m., and it takes 15-20 minutes in keyline to turn in keys and equipment Time entering or leaving could be cut by added control officer.

Pasley Cross X -- Inmate work call is 7:40 a.m.

Pasley Re-Direct -- It takes ten minutes or more to walk from control center to Unicor since the distance is about two (2) city blocks. Having worked in F unit the distance from control to F unit is four (4) to five (5) city blocks and takes 16-20 minutes to walk the distance.

Pasley Re X -- Estimate of walking time to "F" unit based on walking daily as correction officer to

unit. No times study.

Janet Medders, a Union witness who works as a case manager who now works a compressed schedule shift of 7 a.m., to 5:30 p.m., and prior to the compression worked a shift of 7:30 a.m., to 4 p.m., testified that under both schedules she was required to be at her desk in the unit at the start of her shift. She is and was required to pick up keys and radio at the control center prior to the commencement of each of her shifts after waiting in the keyline. As a consequence she is required to come in fifteen (15) to twenty (20) minutes earlier to be at her post at shift start time and impliedly at least an equal amount of time to return the equipment at shift end of 15-20 minutes. When she is pulled from her job to do work as a corrections unit officer, she loses her one-half (1/2) work lunch period and works eight and one-half (8-1/2) hours on that day. She has been pulled from the job about three (3) or four (4) times since she started at FCI Jesup in 1996 and has not been paid overtime for the overtime work.

On cross examination she stated that her job did not involve shifts on relief by others and she also stated that on one occasion in the spring of 2005, she was made perimeter patrol officer.

Waldemar Rosario, a Union witness, works in the Facilities Department as an electronic technician daily from 7:30 a.m., to 4 p.m. He picks up keys, equipment and radio at the control center and has to come into work on an average 15 to 17 minutes early and he must stand in keyline. He does the same at end of shift at 4 p.m., to turn in his keys, radio and equipment. On cross examination, he testified that he does not relieve anyone nor is he relieved.

Bruno Ierulli, a Union witness is the Captain at FCI Jesup and has been for about ten months, (prior to September 21, 2005), testified with respect to Union Exh. 11 a perpetual audit of March 9, 2005 by Lieutenant Barnard which reflected that he as Captain had been interviewed for the audit and was informed that staff members were working during lunch breaks, that the information was "more of a speculation" and "no specific evidence was brought on this." He stated

that the members of the bargaining unit involved, the T&A clerk and the tool room officer "relieve themselves" for lunch break. He compensated all bargaining unit members who worked overtime that he was aware of. With respect to perimeter patrols, he agreed that they could not be relieved at the same time and one had to keep moving. He stated that the relief of a perimeter patrol should only take a couple of minutes. He admitted that the officers have to make a joint inventory of arms and ammunition and equipment and he doesn't know how long it takes to count ammunition. He stated that the perimeter officers have to account for the equipment or answer for missing items. He testified further that no one brought to his attention to the claim that perimeter patrol officers were coming in early or staying late to effect a relief and no one requested compensation. When questioned about the sense of staggering shifts on perimeter patrol to avoid the necessity of officers coming in fifteen (15) minutes early to relieve a perimeter patrol officer and he has to wait until the other perimeter patrol officer is fully relieved, he responded that he had not looked at the schedules but "it might be something we need to look at."

There was no cross examination of this witness at this juncture.

Note: the parties stipulated to the accuracy of Union Exh. 7 consisting of e-mail communications from Fred Santiago, Food Service Department Manager, that there existed portal to portal problems in Food Services Department.

Van F. Crews Sr., a Union witness, works as a vocational training instructor in the Education Department. His shift is 7:30 a.m., to 4 p.m., and he is required to be at his job post at 7:30 a.m. To do this he must come in daily 15-20 minutes early so that he can get in keyline and receive his equipment, a pouch, keys and a radio from the control center. As to leaving at the end of the shift prior to the last six (6) months, during which his supervisor stressed that he was supposed to be at the control center on time at shift end. He usually did not get up to the control center until 4:30 p.m., and then he had to wait in the

keyline to turn in his equipment. There is usually only one officer working the control center. Management is aware of the waiting in the keyline. On cross examination he testified that he neither relieves another employee nor is he relieved by another employee.

Jodi Nolan, a Union witness currently working as a correctional officer and the current Union secretary of the executive board, who has worked every correction post except male shakedown and strip search including perimeter patrol. When on perimeter patrol, she first goes to the lieutenant's office to check in, confirm the day's assignment and check her mailbox after which she goes to the post. At the perimeter post she must inventory three (3) guns, ammunition and other equipment including a bulletproof vest, a helmet, a gas mask and a radio. She inventories, together with the officer to be relieved, an M-16 with one hundred twenty (120) rounds; a nine millimeter pistol with forty-five (45) rounds; and a shotgun with eight (8) rounds. To inventory the said guns, ammunition and equipment, it takes thirty (30) to thirty-five (35) minutes. The inventory occurs daily on the perimeter post and at every housing shift change. She has to come in to work at least thirty (30) minutes early to relieve perimeter patrol and when the other patrol is being relieved, she has to wait additional time until the other patrol is relieved and moving. She has asked for overtime for such work but was refused overtime by Captain Chamness on her first occasion to request overtime. Chamness told her coming in early to relieve perimeter is part of the job and no overtime for it. She continued to come in early to do job.

With respect to her work in housing units and F unit, she testified that just the walk from the control center to F unit takes ten (10) minutes. On the 4 p.m., to 12:00 p.m., shift, she must be on post at 4 p.m., for 4 o'clock count and before assuming the post, if its "B" side, she would stop at control to pick up equipment, stop at the lieutenant's office to check in, check mailbox and check the change sheet for possible change of duty post. She would then proceed

to post and together with the outgoing officer, would inventory keys and equipment and tools in the mechanical room where the equipment and tools are stored, including handcuffs, leg irons, flashlight, bar tap and scraper. After inventory, she would relieve the outgoing officer. If she was assigned to the "A" side of F unit, the keys and regular equipment e.g., radio, alarm are on post but she would pick up a battery and call-outs which are inmates assignments and changes to post them so the inmates know where they have to be on the next morning. The battery from control is charged and should be picked up to replace used battery at post which has been operating for eight (8) hours and will die during the next shift. Without a charged battery, neither her radio nor her body alarm will work which in emergencies, could be dangerous to officers or inmates. The body alarm is activated by pressing its red button. It was her experience that a unit officer with a dead battery could wait about one and one-half (1-1/2) hours to leave her post to get a fresh battery. During her five (5) years as a correctional officer at FCI Jesup, it has been the common practice for all correction staff to pick up a battery at control center when they come in for their tour of duty.

As the secretary for the Union Executive Board, she has been contacted no less than three (3) times a week during the last year by unit members advising that they have been refused overtime pay for such work and she has requested through Captain Ierulli that they be paid overtime which he has denied with the explanation that Associate Warden Taylor told him that he could not pay overtime. He further stated that we were not approved to pay any overtime at FCI Jesup. On cross-examination, Officer Nolan testified that when she relieved the perimeter patrol, the inventory of guns and ammunition must take place with the vehicle at the gun barrel which is located at the rear of the institution so that unloading of weapons for counting is done in the gun barrel for safety purposes. In response to a question positing a premise that she did not have to stop at the control center to pick up the M-16 rifle or nine millimeter

pistol and/or the shotgun, which were in the vehicle, she stated that the only thing we pick up from the control center is a spare battery for the walkie-talkie we carry in the perimeter truck. When asked about her direct testimony, she restated that she would have to come in thirty (30) to thirty-five (35) minutes early prior to shift starting time for all that she needed to do to effect the relief, which included checking in at the lieutenant's office and checking her mailbox. She stated that it was her estimation that it took her ten (10) minutes to walk from the control center to unit F-1.

With respect to the housing units "A" side and "B" side, she stated that on the "A" side the keys, radio and body alarm are always in the unit at times but in the last six (6) months (prior to September 21, 2005), everything may be in control because at times the unit staff are actually working and they have their own keys so the officers' keys would be in control. With respect to the "B" side which has two (2) shifts, 8 a.m., to 4 p.m., and 4 p.m., to midnight, the first officer must always draw his keys from control and the second officer return them.

As to the call-out sheet, it is posted to notify inmates and staff of scheduled assignment of inmates for the following day or a late evening pill call for the current evening. It is possible that a compound officer might deliver a call-out sheet if the officer forgot to pick it up but there has not been a compound officer on evening watch for the past six (6) months (prior to September 21, 2005).

She has never had a compound officer pick up a battery from her to be recharged at ten (10) p.m., as suggested in a question.

As to her testimony on direct that she asked Captain Ierulli for overtime to staff, the overtime requested had to do with those who came in to work one shift and latter were made to work another longer shift. She did not file a grievance for these claimants because this portal to portal grievance is inclusive of these overtime claims.

She provided the names of the specific overtime

claimants to Captain Ierulli, A.W. Taylor, A.W. Ruiz, Warden Vasquez and Regional Director Holt. On questions posed by the arbitrator, Officer Nolan testified that she considers her shift to start at point when she initially picks up her equipment from control which generally occurs thirty (30) minutes before her scheduled shift starts.

Terry Tillman, an Agency witness and the facility manager at FCI Jesup for about six (6) years is responsible for maintenance of equipment, buildings, grounds and security equipment. The department has twenty-two (22) bargaining unit members as staff. He requires his staff to be in the keyline at start of shift. They need to have their keys by 7:30 the start of their shift. They should have their keys turned in by four (4) p.m., the end of shift. From control to facilities department takes five (5) minutes. They do not have to be at their duty post at 7:30 a.m. Inmates report for work at department at 7:40 a.m. He considers his staff on duty at 7:30 when they pick up their keys at control. Inmates are finished and out of the department by 3:30 p.m.

For security, one foreman is assigned each week to check doors as locked at end of shift. Each foreman must sign sheet saying their shop is secure and the assigned foreman will make a final check before he or they sign the sheet then take it to the lieutenant. It would take 10 minutes for the selected foreman to ensure the entire shop is secure. Except for getting delayed at the door, it should take five minutes to walk from the control center to the facilities department. Employees turn in time sheets once a week and the T&A keeper keys the information.

On cross-examination, Tillman stated that someone has to be in the department prior to the inmates arrival. If the staff is not there at 7:40 or when inmates arrive, he receives the inmates because he's always there at 7:30 a.m. He considers staff on time if they are in the keyline at 7:30. He has never gone to keyline to observe. He does not know what time his staff gets into keyline. To a hypothetical situation posed of a staff member arriving in keyline at 7:30 a.m., and it takes ten minutes to wait for keys

and another five minutes to walk to the department, in the absence of trouble at the doors, for a total of fifteen minutes to 7:45 a.m., which is past the 7:40 work call, then the staff member would not be present at 7:40 to receive inmates and testimony from his staff indicating they had to be in the department to receive the inmates, to which he agreed. He did not respond to the question based upon that hypothetical situation as to how it would be possible for staff to be in the department at work call at 7:40 to receive inmates. Work recall of inmates at 3:30., but tool room is cleared first at 2:30 p.m. Staff begins the shakedown of inmates at 3:00 p.m., and usually by 3:30 p.m., the shakedown is concluded and the inmates leave the department but sometimes as late as 3:45 p.m. At 3:45 p.m., the staff then secures the department which takes two to five minutes. At that point, about 3:50 p.m., the staff can proceed to control which takes five minutes so they arrive at 3:55 p.m., in the keyline at control to turn in equipment. He does not know how long the staff must wait in the keyline at end of shift. On re-direct examination, Tillman was asked if he felt that from the time his employees picked up their equipment in the morning until the time they drop off the equipment at shift end, did his employees work more than eight hours, to which he responded, no. Tillman on re-cross examination restated that if employee is in keyline at 7:30 a.m., he is on time.

In response to arbitrator's inquiry, he stated that the staff after securing the department usually go into the break room and watch CNN until ten minutes to shift end at 4:00 a.m., or a little later and then go to the control center to get into the keyline to turn in equipment.

Deborah Ann Forsyth, an Agency witness and associate warden at FCI Jesup for a little over two years. She supervises Unicor, education, recreation and recently (to September 2005) medical and safety.

In Unicor, recreation and education, inmates work in said departments and they are required to arrive on the work site by 7:50 a.m., although work call is at 7:40 a.m., Monday through Friday. Inmates

actually leave Unicor at 3:30 p.m., or 3:40 p.m., after tool call at 3:10 p.m. It takes about ten minutes for shakedown including metal detectors, time to walk from control center to Unicor two minutes. She expects employees to be at the work area at 7:40 a.m. Shifts actually start at 7:30 a.m. At quitting time she requests that the employees not leave the department before 3:45 p.m., because she expects work after inmates leave. In her opinion the employees are not now working more than eight hours.

During cross examination, she testified that there are three hundred and twelve (312) inmates at FCI Jesup working at Unicor. There are two metal detectors at the exit of Unicor. It take ten minutes to process 312 inmates through two detectors and inmates have to take shoes off and pass all other stuff on to a table before going through a detector. To the statement that Unicor processes out 312 inmates through two metal detectors in ten (10) minutes while the Facilities Department processes only eighty to one hundred in ten to fifteen minutes through one metal detector, she replied she probably does process inmates out twice as fast as facilities.

She testified that it is less than one hundred yards from Unicor to the control center but upon hearing that there has been testimony from two staff members of Unicor that the distance is much longer than one hundred yards Unicor to control, she replied that doesn't know yards and feet. She testified that education department is the same distance as Unicor from control and it takes two to three minutes to travel.

Nanette Barnes, an Agency witness, is the supervisor of education at FCI Jesup and has been for almost two (2) years. She has approximately eighteen (18) bargaining unit employees who are required to pick up equipment and be in the keyline at the 7:30 a.m., shift start. Her staff arrives in department at about 7:35/7:40 a.m. Their shift ends at 4 p.m., at which time she expects her staff to be turning in equipment at control after leaving the department at 3:50 p.m. Inmates appear for work at 7:45/7:50 a.m., and leave at 3:15/3:30 p.m.

Department has two shifts with about twenty inmates. No staff has complained for compensation for pre- and post-shift activities but she had discussions with staff at meetings relating to portal to portal issues and time in the keyline in the morning and evening. She doesn't approve of overtime so if someone told her they worked beyond eight hours she would assume they actually were doing personal things. Employees must receive approval from her before working it. There is no keyline at FCI Jesup.

On cross-examination she admits that she knows that if someone works overtime and she knows it, the Agency must pay overtime even if not preapproved or requested. She further testified that she has seen keylines at FCI Jesup and actually testified that she had so stated on direct.

Staff must be in keyline at 7:30 a.m., and at worksite at 7:40 a.m., for work call. It is acceptable if employee arrives at site at 7:50 due to long keyline and no docking on pay. She heard that supervisors had to cut back overtime. On re-direct examination, she testified that Van Crews testimony that there are times he worked until 4:30/4:45 p.m., is not possible and she has never observed it. On re-cross she states that she does not see keyline at low site.

Edith Weir, an Agency witness who worked at FCI Jesup from 1991 to 2004 as assistant and personnel director, testified that when she was personnel director during 1991-2004, she attended LMR meetings with Union and other management personnel She identified Agency Exh. 7 as minutes of the LMR meeting of March 6, 2000 which she signed as an attendee which referred to National Settlement and that the Union did not mention any ongoing portal to portal issues. Identified Agency Exh. 8 as minutes of LMR meeting of January 9, 2001 which she attended and which notes that when Union representative was asked if there were any portal to portal issues, he replied none.

On cross examination, she testified that Agency 7 does not say there was no portal to portal issue. When she was shown Union Exh. 2, the National Settlement Agreement of August 10, 2000, she

admitted that Agency 7, the LRM minutes of March 6, 2000, discussed the settlement before it was signed. She was not aware of an agreement between Captain Chamness and the Union local president, not to file a grievance on portal issues until they tried to work it out which may have been the reason for the notation of none as to portal to portal issues. She was also not aware of a specific conversation between Chamness and Warden Hobbs on portal to portal issues.

Youlanda Tubbs, an Agency witness who is and has been for about ten years, a Unit Manager at FCI Jesup. She supervises case manager counselors and secretary. As to 7:30 a.m.-4 p.m., shift she expects them to be in the keyline at 7:30 a.m., and at end of shift leave department between 3:45 and 3:50 p.m., and be out of institution at 4 p.m. On cross examination, she states that she works at F-2 in same building where Unit F-1 is located and that it takes four to five minutes to walk to control without stops. If they leave job at 3:50, walk five minutes to control and arrive at control at 3:55, they may have to stand in keyline.

Warden Jose N. Vasquez, is the current warden (2005) and has been for about one year. Except for an e-mail to the captain from Officer Nanoy about loss of a lunch period due to transfer to another job and working eight and one-half (8-1/2) hours on one day which he assumed was taken care of, he has had no meetings with the Union relative to pre- and post-shift activities compensation. As a result, he does not feel there is a problem with pre- and post-shift activities.

He considers an employee who has to pick up equipment at control on duty once they get their equipment and put it on. Perimeter patrols and housing unit officers exchange equipment at post. At a program review interview of the Medical Department he was notified that Nurse Nanoy and P.A. Adaia stated that they had to spend their own time to get a job done and were not compensated. He referred the claims to the Internal Affairs Department to make sure that there was no fraud or waste abuse involved. The I.A. Department reported that the supervising nurse had not authorized any overtime

and told the claimants that they couldn't do that and that was the end of it. The subject grievance was not filed during his tenure as warden. On cross examination, Vasquez denied that he referred overtime claims to I.A.D. because he thought supervisors were making employees work overtime without paying them. He will not refer everybody to I.A.D. He is not familiar with the FLSA but he knows that if any of his supervisors knows of overtime being worked, the Agency must pay it without the employee requesting it or making a claim. He further stated that "nobody can work overtime at FCI Jesup unless they're authorized by their department head". No one other than the warden or in his absence, an associate warden, can approve overtime. When asked about the stagger of relief of perimeter patrols so that one always moves while the other is relieved, he replied that was aware of that but he was unaware the relief officers had to come in early to effect the relief because he is "upstairs doing so much work". That's why he has managers to watch what everyone is doing.

He further stated that the relieved officer can leave when the relief officer arrives and only the relief officer must conduct the required inventory. When advised that the post orders require that the perimeter patrol equipment has to be counted by both relieving and relieved officers jointly and that the captain testified to this process, he responded, "I don't agree or disagree because I'm not the subject matter expert in there. The captain is". After some colloquy about his reliance on managers to know about counting ammunition, he was shown Union Exh. 9 post order on mobile patrol and to a particular paragraph provision stating "conduct a joint inventory of all the equipment".

Vasquez further testified that he has had no complaint about employees inventorying their equipment at perimeter patrol relief from his captain and lieutenants and as a consequence, the officers are coming in and double inventorying the equipment at perimeter patrols. When asked if he should have called the Union in relation to the pending subject

portal to portal grievance to try to resolve it he responded, "that would have been a good course of action I didn't do."

On re-direct examination, the warden asserted that post orders may stay the same for 6 or 7 years or be changed. In all cases they are reviewed.

On re-cross examination, Vasquez testified that it would surprise him that even though the post order, Union Exh. 9 relating to the process of relief of perimeter patrols and that there cannot be simultaneous relief of two patrols and that a joint inventory must be taken is dated 1998, that his captain and lieutenants confirmed in testimony that the current post orders state the same thing. He has not been told by a superior that there is no overtime nor has he ever stated that to his department heads.

Robert McFadden, an Agency witness was the warden at FCI Jesup from April 2003 to September 2004. Prior to the filing of the subject grievance on July 6, 2004, no employees complained to him that they should be paid for pre- and post-shift activities.

After being shown Agency Exh. 6, an e-mail from the Union about portal to portal issues sent on May 18, 2004, he remembered that this was the first time the Union communicated with him about portal to portal issues. He didn't know what the Union was talking about in the e-mail of May 18, 2004.

He confirmed that he sent his reply to the Union on June 17, 2004 by identifying the document, Agency Exh. 9 which states he was unclear as to why the Union wanted to negotiate portal to portal issues.

During his tenure at FCI Jesup, some of the departments had to pick up their equipment at control such as education, food service, Unicor, medical, inmates systems. As to posts at which the equipment was located, he thought some of those posts started that system before he arrived in April, 2003.

He considered employees on time when they are on the keyline and as to those where equipment was already on post at the time the employee arrived on post. As to employees using keyline the shift ends when they are on the keyline.

He recognized the memo from Warden Wooten to regional director of BOP dated November 16, 1995 which reflected proposed changes and non-changes in start and end shift times for safety, psychology, inmate systems management, unit management and correction services in response Operations Memorandum 214-95 (3000) as an initial plan for FCI Jesup which he made sure was being followed at FCI Jesup.

None of the program reviews conducted during his term as warden stated findings that FCI Jesup was violating the Portal to Portal act.

McFadden on cross examination was shown Union Exh. 1, the OM Memo 214-95, which he had never seen but stated that it was probably the source of Wooten's memo. He was then referred to Warden Wooten's memo again and shown that Wooten proposed a change in a correctional services shift from a then current midnight to 8 a.m., to a proposed 11:45 to 8:15 shift as was other custodial shifts increased by one-half hour. He commented that the added half-hour could have been lunch. He was shown the fourth page of the Wooten memo in Union Exh. 3 and agreed that this was a memo from Wooten to the regional director dated November 29, 1995 changing the prior plan dated November 16, 1995 by making the earlier 4 p.m., to midnight shift, a proposed 4 p.m., to 12:15 a.m., shift giving the proposed shift fifteen minutes of overtime.

Warden McFadden was then referred to joint Exh. 4 which he recognized as his own response to the subject grievance and he acknowledged that it stated that the changes in shift schedules proposed by Wooten in November 1995 including the proposed 4 p.m., to 12:15 a.m., shift change were complied with and that schedule was in effect. McFadden was then shown Union Exh. 12, a quarterly roster for Jesup covering period from effective December 16, 2004 to March 26, 2005 which showed a correctional department roster showing as shift 13, the 4 p.m. to 12 p.m. shift and not the proposed and implemented 4 p.m. to 12:15 a.m. and McFadden stated it was changed somewhere in between his arrival at FCI

Jesup and his leaving and that someone has adjusted this schedule so that the overlap on the 4 p.m. to 12:15 a.m. with overtime of fifteen minutes was abandoned.

He further testified that in spite of Agency Exh. 9, his memo of June 17, 2004 stating that he was "unclear as to why the Union is requesting to negotiate with management over back pay in regards to portal to portal issues", he contends that he was not aware of the Union's raising of portal to portal issues.

As to a packet of information including an arbitrators decision out of FCI Petersburg, Va., he said he received it but didn't know what the portal to portal issues of the Union were. He admitted however that the Union requested to negotiate with him over portal to portal issues.

On re-direct, McFadden stated that the first time that the Union told him of portal to portal issues was by the e-mail of May 18, 2004.

On re-cross, McFadden stated that if he knew an employee was working in excess of eight hours a day and he was not being compensated for the overtime; he would be violating Article 18 of the Master Agreement. In response to the question of the arbitrator McFadden testified that if an employee is in the keyline at his shift start time regardless of how much earlier he gets in the line, then he is starting his shift in the keyline.

John Oliver, an Agency witness was the former captain at FCI Jesup from September 2002 to August 2004.

He testified that he could not recall that any line staff came to him and complained that they should have been compensated for pre- or post-shift activities during his captaincy at FCI Jesup. As captain, he was the department head for correctional services. He described Union Exh. 12 as a quarterly roster. As captain he was responsible for reviewing post orders. Referring to Union Exh. 8, a post order dated September 18, 1998, he testified that it was changed while he was captain at Jesup as to the housing units.

Referring to Agency Exh. 10, Oliver testified

that it was a post order dated September 23, 2003 and he was responsible for the post order which was issued while he was at Jesup. He stated that the words, "Report for Duty" meant report to their post directly and impliedly without stopping at the control center and words, "notify the lieutenant's office to be checked off" he believed, meant to call the office by radio. This was how the post orders were changed.

With reference to Agency Exh. 11, a post order dated July 1, 2004, Oliver stated that it referred to all unit officers and by the language of the order, there was no requirements for a relieving officer to stop at the lieutenant's office to check in or check mailboxes. It was argued that Agency Exh. 11 was issued to respond to the Union's portal issues. He stated that reporting to the lieutenant's office continued in effect until he changed it in September 2003 or July 1, 2004. (Transcript p. 368-380). Officers required to pick up equipment at control center were considered to be on duty in line at control.

Oliver on cross examination stated that post orders might or might not be changed every quarter. He stated that non-custodial employees must be at control center at shift start but unit officers must be on post at shift start. He further testified that perimeter patrol requires a joint inventory of all equipment on post and that one patrol must continue roving while the other gets inventoried and relieved. He agrees that if the Agency is aware of these factors, it should compensate the perimeter patrol officers for coming in early.

Oliver, in response to the arbitrator's questions, testified that on the twenty-four hour posts, officers such as housing unit officers and perimeter patrols where officers are relieved by relieving officers, all of their equipment is already on the post so they don't have to stop at control to pick up equipment so that their shift starts at the post. As to posts which are eight hour posts without a relief, their shift starts at the control center when they pick up keys.

On re-direct, Oliver repeats most of his prior testimony except he refers to a log book in the unit officers office which may be examined by the relief

officer after relieving the prior officer.

On re-cross, Oliver testified that when relief on a housing unit 24 hour post take place, the officers exchange keys and equipment, count keys and inventory in a locked grill tool cage in another location away from inmates.

On the 4 p.m. shift, there is a 4 o'clock count which takes place at 4 p.m. He has no idea of how this relief takes place or if relieving officer must come in earlier than 4 p.m. to count keys etc., and start count at 4 p.m. He saw the keylines while at FCI Jesup. He never required 24 hour post officers or any officers to pick up spare batteries at control but would expect dead batteries to be replaced by compound officers at some time during shift. He doesn't recall officers picking up spare batteries at control.

Captain Bruno Ierulli, an Agency witness, is the present captain at FCI Jesup who supervises the correctional services department.

The captain was shown what was marked as Agency Exh. 12 which he identified as a post order, dated June 26, 2005. This exhibit objected to by Union on grounds, among others, that it covers a post grievance period i.e., after July 6, 2004. Ierulli also testified Agency Exh. 13, an e-mail from Ierulli to Leonard Spell, President of the local Union grievant on June 13, 2005, which referred to attached post orders for the upcoming quarter. He identified Agency Exh. 12 which consisted of several different post orders dated June 26, 2005 which included the post order of that date marked Agency Exh. 14 and upon which were numerous hand written notes referring to items in the post orders. In response to a question as to a note on the marked post order in Agency Exh. 14, he stated that with respect to the printed provision, "establish your presence with the lieutenant" was the handwritten notation question, "by phone, radio or in person?". As to this reference, Ierulli testified that unit officers are not required to stop at the lieutenant's office and some do but typically they report by calling the lieutenant.

There are housing unit posts that are not manned

24 hours per day. Some are manned 16 hours on two shifts and in those cases, most of their equipment would have to be picked up by one shift at the control center and returned to the control center by the officer on the second shift.

There is no requirement that incoming officers have to stop at control and pick up a battery. If an officer needs a charged battery, there are compound officers and occasionally an activities officer to deliver the battery to the officer in heed. In the last six months, (prior to September 23, 2005), we have always had compound officers working. A review of Agency Exh. 16, the daily roster for May 5, 2005 and Agency Exh. 17, the daily roster for August 16, 2005, reflect a full complement of compound officers. The Union stipulated that Agency exhibits 16 and 17 reflect full complements of compound officers for those two days during the last six months.

Relative to a claim for overtime for Lawrence Nanoy, as set out in an e-mail of May 26, 2005 from Ms. Nolan to Ierulli which reflected that he was offered compensation time. Nanoy was paid the one-half hour overtime claimed. The claim arose out of an assignment from an already commenced regular shift of 7:30 a.m.-3:30 p.m. to a housing unit shift which ended at 4 p.m. The Agency paid him overtime for the overtime worked. He states he never told Nolan he was not going to pay the overtime. No staff or Union officials have come to him in his eleven months at FCI Jesup complaining about or seeking compensation for pre- or post-shift activities.

On cross examination of Captain Ierulli, admits that he did not negotiate the post orders he sent to L. Spell on June 13, 2005, Agency Exh. 13, but unilaterally signed same and implemented the post orders on June 26, 2005 thus violating Article 3, Section C of the Master Agreement. In the past he had negotiated post orders with the Union. He signed and implemented the post order of June 26, 2005 in spite of a written notation on the Union's copy in reference to post order requirement to "establish your presence with the lieutenant" which notation asked "by phone, radio or in person?" in an administrative

oversight.

Prior to the June 26, 2005 post order, officers were required to check in personally at the lieutenant's office as per the post order of September, 1998, Union Exh. 8.

Compound officers, in addition to delivering batteries to unit officers when needed have other duties including standing mainline, doing fence checks, run to body alarms, do inmate movement, do escorts to segregation, do paperwork for the lieutenant and clean the visiting room (VR).

The Custodial Department is not fully staffed and may be at 80/90% of full staff and as a consequence its possibly likely to have only one compound officer.

For the majority of the past ten years his department program review was "superior". However, the most recent program review rated custody as "acceptable", a drop in the ratings since he took over as captain in 2004. Recently FCI Jesup had an Institution Character Profile (ICP) which it failed in that it was left unrated to be reviewed in four months and after the four month period the regional director came to FCI Jesup to assure that it passed the ICP. It is not normal for a BOP, institution to fail an ICP.

FCI Jesup is currently (Sept. 2005) understaffed. Morale is extremely low because of security concerns.

Some custodial staff get batteries at the control center because of the staff shortage and because they don't want to be assaulted in the unit and doing it is "not a bad idea."

On re-direct, Ierulli stated that Article 5 of the Master Agreement states that the employer has the absolute right to determine its internal security practices and the right to assign work.

The duty responsibility of the compound officer is the entire compound of the institution.

The arbitrator inquired as to the terms, "compound", "institution", "camp", "low" and "medium". Captain Ierulli stated that the compound is everything inside the fence line of the institution and

is basically the whole institution which includes the camp. He further states that there are two separate institutions, the low and the medium. The FCI compound is the medium institution. The medium and the low are two separate institutions. The compound officers are located in an office in both the low and the medium depending on where they are assigned. A compound officer may support as little as nineteen officers on the morning watch which has the lowest staff and in day watch there would be more officers supported by one compound officer. The compound officers are located throughout the institution.

On re-direct, Capt. Ierulli stated that the Federal Correction Institution and the low facility are each surrounded by a fence. Each has a housing unit and that the daily rosters included assignments to both the FCI (medium) and the low.

On re-cross he stated that he didn't know the exact distance around the perimeter fence but said it's a pretty good distance.

The arbitrator citing entries in the daily assignment roster referring to FCI Compound 2 and low compound 1, asked whether the FCI Compound 2 meant two officers located in the same place and the low compound would be in the low institution and he responded in the affirmative.

The arbitrator and counsel placed on the record facts about the current and continuing non-availability of Chamness to testify by phone. The Union asked the arbitrator to draw an adverse inference from Chamness not testifying but the arbitrator indicated that the problem might be solved by a Chamness affidavit to be filed with post-hearing briefs with the right to the Agency to file opposing material and they will be considered as evidentiary.

William Taylor, an Agency witness and currently an associate warden at FCI Jesup testified that he signed authorization form to pay Lawrence Nanoy the overtime required, that it was a bit late in getting paid and he did not know whether e-mail to the captain from Nolan had anything to do with the approval for overtime.

Brenda A. Hearn, a rebuttal witness for the Union is currently the CS 11 Seg. Lieutenant and has been a lieutenant since 1989. She has worked as an administrative lieutenant whose duties include scheduling staffs completing daily roster assignments, compiling annual leave, training schedules and occasionally acting in the capacity of the captain.

The post orders have been changed recently and prior thereto housing unit officers were required to check in with the lieutenant's office and check mail. Notwithstanding recent post order change, she still expects her staff to check in at lieutenant's office.

She believes there are two compound officers on duty only half the time and one the other half.

The general common practice is that officers on 24 hour posts pick up batteries at control daily because the batteries on post run out.

The captain makes changes on the daily roster on a daily basis and officers may not get notice in advance and as a consequence they should stop at lieutenant's office to see if they've been changed.

Referring to Union Exh. 13 consisting of two pages; the first a diagram of the institution and on the second page, measurements from control to various posts or departments, she testified that the diagram is accurate and that she and several officers measured the distances from control to Education, (243-36" paces or yards), Unicorn (329 yards), Facilities (259 yards) and F unit (405 yards) which she signed on September 21, 2005 and she measured the distances herself. It would probably take her about five minutes to walk 329 yards to or from Unicorn. No time given for walk to and from control to and from F unit at 405 yards.

FCI Jesup is short of staff. It's a common practice to occasionally operate the compound with just one compound officer. Several times a week one of two compound officers is pulled so during these times there is only one compound officer.

She occasionally observes her staff waiting in keylines for keys, batteries and/or call-outs. She expects her staff to be on their posts at start of shift

(and end of shift). They cannot do this if they don't come in early to pick up a battery at control, go to the lieutenant's office and check in. If they are not on post at shift start, they can be docked.

In her opinion there is an ongoing problem at FCI Jesup with officers coming in early to get their equipment and not being paid for it.

As to perimeter patrols, the two (2) patrols are now changing at the same time to shorten time and they are violating Agency policy in so doing. One patrol must keep roving while the other is relieved. It would take from ten to fifteen minutes to inventory equipment and inspect vehicle. The relieving party must wait to relieve if the other patrol is being relieved in accordance with post orders but now they normally don't wait, to save time. Occasionally someone gets relieved late. The captain or the lieutenant has not been paying overtime to the perimeter patrol officers.

On cross examination Lieutenant Hearn testified that staff equipment based at twenty-four hour post exchange equipment at post. Non twenty-four hour post officers, stop at control for equipment.

She has not instructed employees to pick up batteries at control on the way in nor has she ever explicitly told staff they had to stop at the lieutenant's office. She is now Seg. Lieutenant but has only been so for a week. She is now Administrative Lieutenant.

She has never docked an officer for relieving someone late.

She did not participate in drawing of map of the institution, Union Exh. 13, nor does she know who drew it. On the map, the control center is located in building marked "Admin." As to the second page of the Union Exh. 13, the paces referred to are her paces and she estimated that one pace was 36" long.

On re-direct examination, she reiterated that prior to the current post order, her officers were required by the prior post order to come to the lieutenant's office to check in and check mail.

Guy Lee D. Washington, a rebuttal Union witness is an assistant security officer responsible for

maintaining weapons, keys, locks, ammunition and repairing specific pieces of equipment. He has worked as a compound officer and has been pulled to work custody.

If someone called him as compound officer for a fresh battery, the officer would have to wait until he is finished with prior duties before he could get a battery to him/her. The officers know its their responsibility to pick up the battery at control prior to assuming the shift since they have to do a body alarm test on taking post and it can't be done with a dead battery.

If he is required to deliver a battery as compound officer it could take twenty to thirty minutes or more to deliver.

He has never seen a lieutenant deliver a battery and its not common practice.

The practice at FCI Jesup is that staff must go to control center and pick up a battery prior to assuming the post. Management knows that it is the practice to pick up batteries at control

The Agency determined that there will be no battery chargers in the units after the Talladega incident during which inmates took over a unit and hostages and by recharging captured batteries were able to continue charging them and monitor the communications of the institution.

While working as a correction officer in 1994 and thereafter, he had to report to the lieutenant's office at shift start to check in. Since the new post order omitting this was issued, he has observed no change in that the officers still check in at the lieutenant's office.

On cross examination he testified that he was currently vice-president of the Union Local Grievant.

Leonard Spell a Union rebuttal witness testified that according to Union Exh. 14, all of the compound officers and activities officer posts were vacated from 9/11 through 9/17/05. He notified by e-mail the warden, Regional Director Holt and the captain and more particularly he noticed the warden by e-mail (Union Exh. 15) of the Union's safety concerns for vacations of posts and that contravenes testimony that

for the past six months the posts have not been vacated.

On cross examination, Mr. Spell testified that the Union filed a separate grievance relative to the matter referred to in Union Exh. 15.

Captain Bruno Ierulli, an Agency rebuttal witness who testified earlier and in such testimony stated that during the last six months (prior to September 23, 2005) there never was a time that we had no compound officers on post, was shown Union Exh. 14 and subsequently admitted that to the best of his knowledge, this was the first time he was aware that there were no compound officers on post during the evening shift for the week 9/11/05 through 9/17/05.

On cross examination, Captain Ierulli modified his testimony on direct by saying there may have been a second page to Union Exh. 15 which showed unassigned posts for the week 9/11/05 through 9/17/05 on which there was reported "special assignments" which might have included compound officers assigned to the evening shift.

On re-direct examination, he stated that there may have been some manipulation of the document even though he agreed that the document having been run on 9/17/05. It could not reflect a change to the unassigned posts of 9/11 through 9/17 because "this is past the fact now".

Lt. Marvin Dunn, a rebuttal witness for the Union has been a GS-11 lieutenant at least since he came to FCI Jesup in July 1991 and testified that the document Agency Exh. 14 was printed in his office in his presence and that it could only be changed if it were put into word perfect which this document wasn't because the lines on Agency Exh. 14 would not appear on a printing of a word perfect draft and thus, this document was not changed. He also stated that for the past six months, we have vacated the compound on a pretty regular basis.

On cross examination, he stated that at times he would draw such a document as Agency Exh. 14 several weeks in advance of September 11, 2005 and

might make changes to it which would be reflected in daily rosters.

On re-direct, Lt. Dunn reiterated his testimony that it has been a common practice pulling an officer during the last six months to have a vacated post on compound. He further testified that since the copy of Union Exh. 14 was printed on 9/22/05, the document reflects what was contained in the daily rosters for the week 9/11 through 9/17/05.

On examination by the arbitrator, Lt. Dunn testified that although some might use a document of this type two weeks in advance of the dates it covers, when the document was printed after the fact on 9/22/05, the daily rosters will reflect that what appears on Agency Exh. 14 and reflect what actually happened on 9/11/05 through 9/17/05 exactly.

On re-cross Lt. Dunn, the last witness, did not vary from the testimony he gave to the arbitrator's inquiries.

Positions of the Parties

The Unions Position

On the Threshold Issues

The Agency addressed at least two threshold issues in its opening statement and in its post-hearing brief. The first was the lack of timeliness of the Union in filing the grievance and, the second, the Union's failure to properly invoke arbitration as contractually required.

The Union also appeared to state in its post-hearing brief that the Agency raised another threshold issue relating to the extent of any retroactivity if an award is made in favor of the Union granting retroactivity of compensation and yet another Agency threshold issue that it, the Agency, was not made aware of any portal to portal issues prior to the filing of the grievance.

The Union takes the position impliedly if not expressly, in its post-hearing brief that the grievance was filed in a timely fashion based upon the statute of limitations contained in the Portal to Portal Act of 1947, 29 U.S.C. 255, which provides that a claim

under the FLSA can and must be made within two (2) years of the violation or three (3) years if the violation was willful, notwithstanding the forty day requirements in Article 31 of the Master Agreement. As to the Unions' perception that the Agency raised the issue that it was not made aware by the Union or otherwise, of portal to portal issues at FCI Jesup, the Union refers to the grievance filed by Walter Spence for the Local Union in 2002 and the testimony of Union witnesses Ruley and Spell that discussions of portal to portal issues with Captain Chamness took place long before the grievance was filed.

As to the issue of failure to properly invoke arbitration, the Union argues that this issue was not raised until the arbitration hearing, some 16 months after the grievance was filed and by so doing, the Agency waived its right to raise that procedural objection. Additionally, the Union relies upon the testimony of Leo Spell, that he sent the letter invoking arbitration and of Barbara Latham, the H.R.M. manager at the time, that it was common practice for the Union to give oral notice of intent to arbitrate without a formal notice invoking arbitration and even strike arbitrators' lists without such notice.

Additionally, the Union raises apparently as its own threshold issue, the refusal of the Agency to produce former Captain Chamness for phone testimony in the Union's case and as to executing an affidavit in lieu of phone testimony, Chamness stated to the Union advocate in a post-hearing conversation that he could not make any statement for the record in the case, clearly implying that his testimony was denied to the Union on purpose and intentionally and as a consequence, has moved for an adverse inference to be applied where Chamness' testimony would on the merits have or might have been used in support of the Union's position.

On the Merits

The Union asserts that the Agency did not comply with its own Operations Memorandum 214-95 by developing a plan for shift starting and stopping times, which it did, and by implementing the

plan which it did not fully do.

The Union cites the testimony of its main case and rebuttal witnesses to support its positions that staff has to come in from 15 to 40 minutes early of which some time was spent in the keyline at the control center at start and end of shift; that all correctional staff stop at the control center to pick up fresh batteries which their lieutenants' expect; that all perimeter patrol officers as well as housing unit officers must inventory all of their equipment at the time of the relief with the relieved officer and as to perimeter patrol reliefs, only one (1) patrol may be relieved at a time while the other continues to rove. This requires a relieving officer to come in to work about 30 to 35 minutes early. Prior to a most recent post order change all correctional officers were required to stop at the lieutenant's office to check in before relieving the post and to a large extent, the practice has continued, check in and check mail, the distance to travel by employees to and from control to post; control center to various departments or units were approximately 235 yards to 400 yards; the keyline wait was repeated at end of shifts; and other relevant factors to support compensation for pre- and post-shift activities.

Additionally, the Union in its opening statement, pre-hearing memo and post-hearing brief asserted that the following positions inside the institution are affected by the portal to portal issues:

- Custody Officers
- Facilities Foreman
- Food Service Foreman
- Recreation Specialists
- Unicor Foreman
- Warehouse Foreman
- Education Teachers
- Medical Staff
- Unit Management Staff
- Mechanical Services Foreman
- ISM Staff

This assertion was made notwithstanding that the subject grievance includes or covers "all bargaining unit staff."

The Agency's Position On the Threshold Issues

The Agency consistently contends that the late filing of the grievance on July 6, 2004 is in violation of the Master Agreement Article 31 provision that the grievance must be filed within forty (40) days of the occurrence of the grievable event or within that period from the date upon which the grievant became aware of the event. The Agency's alternative or fall back position apparently is if a finding is made that the filing was timely, then the Union may not go back beyond December 5, 2002 on the matter of retro-activity of any award which date is the date by which the Union could have invoked arbitration under the grievance filed by Walter Spence, (Agency Exh. 1) for the Union on the same issues in October 2002.

Additionally, its position with respect to procedural deficiency issues, is that the grievance should be denied because the Union cannot prove that it complied with the provision of Article 32 of the Master Agreement requiring a written invocation of arbitration a statement of the issues involved, the alleged violations and the requested remedy.

Although they are not specifically spelled out in its post-hearing brief as threshold issues, the Agency has made repeated allegations throughout the case that it was not made aware of the claim of the Union that there existed portal to portal issues and further that the Union made no attempts to informally resolve those issues prior to the filing of the grievance and by reason of these failures, the grievance should not be arbitrable.

On the Merits

There are several peripheral positions which the Agency has taken relative to the scope or coverage of the subject grievance.

The first of these positions involves the scope of the grievance and more particularly that the grievance

only pertains to whether compensation should be paid for certain pre-shift and post-shift activities of the type commonly perceived as portal to portal activities and not ordinary overtime work such as work during non-paid lunch period and work in their principal work activities beyond their normal shift hours.

The second peripheral position of the Agency is that the grievance is based upon alleged violations of the Fair Labor Standards Act of 1938 and that the Act provides for exemptions of employees from coverage of the Acts protections. In this case, the grievance only affects non-exempt employees.

As to the actual merits, the Agency asserts without equivocation that the Union seeks to prove that the Agency violated its own policy on shift starting and stopping times by generalization and inferences. It argues that a federal agency and particularly a correctional institution has special security concerns and that its right to determine and assign duties including the nature of the duties and the times or hours of work. It denies all violations.

The Agency relies to a great extent on the provisions of the Portal to Portal Act, 29 U.S.C. 254 which declares that "walking, riding or traveling" to and from the place of their principal work, and "activities which are preliminary to or postliminary to their principal activities", are not compensable. The Agency further defines "principal activity" to include all activities which are indispensable to the performance of the principal activity. However it raises the de minimis rule which holds that pre-shift or post-shift work lasting ten minutes or less is not compensable.

The Agency contends that employees who are required to pick up their keys and equipment at the control center and walk to their principal work activity are entitled to compensation from the time they pick up their equipment, to the time they arrive at their post to start their principal activity.

More particularly as it applies to FCI Jesup, the Agency cites the actions of former Warden Wooten who developed a plan to deal with the portal to portal

issues required by Agency Operations Memorandum 214-95 in 1995. Warden McFadden testified that staff who picked up equipment at the control center must be in the keyline at the control center when the shift begins and those who pick up equipment at post must be at post at shift start. This is repeated in the testimony of other Agency witnesses.

The Agency reviewed three (3) activities which the Union cites as compensable acts: Drawing keys and equipment from the control center by some employees or all employees; reporting to the lieutenant's office to check in and check mail; and traveling to and from a duty post.

The Agency, in order to categorize all of its employees insofar as it relates to time of shift start, divided them into:

A. Category 1 employees which consist in the main, of correctional officers who work three (3) eight (8) hour shifts on a post and who pick up their keys and equipment at the post and not at the control center and

B. Category 2 employees -- those employees who man duty posts generally consisting of posts having one (1) shift or at least less than three (3) shifts; do not relieve other employees; and who must pick up keys and equipment at the control center. They start their shift once they obtain their equipment at control or alternatively, once in the keyline at control at the time of the start of their shift and end their shift when they return their keys and equipment at the end of the shift.

Among other points relating to Category 1 employees, the Agency states that the pick up of batteries at the control center is not required and as such, the time of pick up waiting in the keyline and moving to the post is not compensable. The same argument was made relative to stopping at the lieutenant's office and to picking up pouches and call-outs.

With respect to Category 2 employees who oversee the work of inmates, the Agency changed the inmate call-out (for work) from 7:30 to 7:40

ostensibly to allow for employees late at post because of keyline and pick up of equipment. This is the Agency's support for its premise that Category 2 employees don't have to be at their posts at shift start (7:30 a.m.) but only in the keyline at control center.

The Agency applies this position to various departments at FCI Jesup.

Discussion on the First Threshold Issue

Time Limits for the Filing of the Grievance

The Agency argues that the filing of the grievance in this matter on July 6, 2004 was not timely and thus violative of Article 31 of the Master Agreement in that the filing took place more than forty (40) days after the Union first became aware of the grievable event which in the view of the Agency, occurred on May 18, 2004, the date upon which the Union sent an e-mail to the Warden alleging the existence of portal to portal issues at FCI Jesup.

The Warden did not respond to the allegation on the merits but requested more information or clarification.

Prior to the filing of the grievance by the Union, the Union president continued to communicate with the warden by e-mail and for purposes of clarifying the Union's claims sent a copy of an arbitrator's decision relating to what the Union felt were similar if not identical, portal to portal compensation issues at another Agency institution, FCI Petersburg, Virginia most recently issued, in which the arbitrator found for the Union. The parties further carried on e-mail correspondence with each other.

The Agency denied the grievance and at the arbitration hearing, the Agency first raised this issue of timeliness and urged that the grievance be dismissed.

The Agency in what appears to be corollaries to its claim and objection of lack of timeliness also urges further considerations in connection with the alleged late filing relating to remedies in this case if one or more is awarded and other matters.

The first corollary to the timeliness issue argued by the Agency appears to suggest that if the Union cannot prove a violation of the Master Agreement within the forty (40) day period immediately preceding the filing of the grievance then the Union may not seek retroactive compensation as claimed in the grievance.

The second corollary appears to deal either with a limitation on the extent of relief which may be awarded if an award is made in favor of the Union on the merits or a limitation on how far back in time the Union can go to prove a violation to support this grievance ostensibly based upon an earlier grievance on the same or similar issues as those in this case which was filed by the Union in October 2002. The Agency seems to be asserting that the Union cannot combine or incorporate the October 2002 grievance with or into the subject grievance. The Agency concludes that the subject grievance should be dismissed.

These corollaries will be discussed later in this opinion as they deal with remedies or related subjects and to the extent they are material, relevant or comprehensible.

The arbitrator finds as to the threshold issue of timeliness on the filing of the grievance, that the filing was timely. The basis for the finding is twofold. Firstly, the objection to the lack of timeliness of the filing of the grievance was itself untimely in that it was initially raised at the arbitration hearing and not prior there to at any time during the pendency of the grievance process and the arbitration scheduling which encompassed about fourteen (14) months; from July 6, 2004, the date of the filing of the grievance, to September 20, 2005, the first arbitration hearing date.

Additionally, the arbitrator finds that the subject grievance was filed timely because the violation upon which the grievance is based is a continuing violation as described in the grievance. The alleged violation in this case continually recurs daily and has according to the grievance, continued to recur daily after and since January 1, 1996, the end date of the retroactivity agreed to by the parties in the National Settlement

Agreement of 2000 at least to the date of the grievance and possibly thereafter.

The arbitrator at this juncture must point out that Article 31, section d, clearly states that although "grievances must be filed within forty (40) calendar days from the alleged grievable occurrence ... *where statutes provide for a longer filing period, then the statutory period would control*" (emphasis supplied). In this case the subject grievance alleges a continuing violation of the FLSA, 29 U.S.C. 201 et seq., as amended by the Portal to Portal Act of 1947, 29 U.S.C. 255, which provides that a claim under the FLSA must be filed within two (2) years of a violation of the FLSA or within three (3) years if the violation is willful. In this case, the arbitrator finds that the FLSA and Portal to Portal Act statute of limitations is the statute or one of statutes referred to in the Master Agreement Article 31 section d and thus the grievance in this case would have been timely if filed within the two (2) year period or the three (3) year period provided for in the Portal to Portal Act of 1947 from the date of a grievable occurrence and a statutory violation. This finding may have some relevancy in other issues to be considered later in this opinion. The subject grievance is arbitrable.

Discussion on the Second Threshold Issue

The Invocation of Arbitration Issue

The Agency raised as a procedural objection and defense, the allegation that the Union failed to notify the Agency in writing of its intent to invoke arbitration in this case as required by Article 32 Section a of the Master Agreement which further states that the notification of intent to arbitrate must include a statement of the issues involved, the alleged violations and the remedy sought.

There was no copy of the notification of intent introduced into evidence by the Union. However, the president of the grievant local union testified that he had sent the notification to Warden McFadden but he could not locate a copy of the notification.

Warden McFadden was called as a witness by the Agency. The Agency did not rebut Spell's

testimony relative to the sending of the notification to Warden McFadden during the testimony of McFadden nor was the subject of the notification addressed by the Agency in its examination of McFadden.

The Union called, as its own witness, Barbara Latham, the former Human Resource Manager of the Agency at the institution at Jesup, who held that position during and prior to the time of the filing of the grievance, the time within which the notification of intent to arbitrate would have been required to be transmitted to the Agency and the time of the selection of an arbitrator from a list provided by the Federal Mediation and Conciliation Service (FMCS) to the parties at their request. Latham, in direct testimony, testified that she did not specifically recall receiving or seeing the notice of intent to invoke arbitration but that ordinarily she or her department would not participate in the selection of an arbitrator unless they received an invocation or demand. However, on re-direct, she testified that the notice to invoke arbitration in past instances were made or had occurred in a number of ways other than in writing and without the specificity as required by the Master Agreement such as by e-mail, by telephone and by in-person advices and all of these modes of notification of intent to arbitrate were honored during her time at Jesup as Human Resource Manager and the matters ostensibly proceeded to or through the arbitration process without objection. Her testimony on this subject was not rebutted by the Agency.

The arbitrator finds no merit in the objection relating to the notification of intent to invoke arbitration and dismisses that objection on the grounds that the only evidence presented that such a notification was properly sent to the Agency to invoke arbitration, was the testimony of Leo Spell that he sent it to Warden McFadden. The said Warden McFadden, an Agency witness, did not deny or otherwise rebut Spell's testimony.

Additionally, the testimony of Barbara Latham though not decisive as to whether a notification was sent as to the instant grievance, did, without

equivocation and decisively testify that such formal written notice of intent was not deemed necessary by the Agency and it had become common practice to accept other types of much less formal notification, even non-written notices, to effectuate the Agency's participation in the arbitration process without objection. Thus, we have by this unrefuted testimony of Latham of an ongoing and continuing practice of waiver by the Agency of the requirement of written notification of intent to arbitrate as apparently required by Article 32 of the Master Agreement.

There is also the lack of timeliness in raising this issue since it was raised in an impromptu manner on the first date of the hearing. The subject grievance is arbitrable.

The Other Possible Threshold Issues

The failure of the Union (grievant) to notify the Agency of claimed grievances before the filing of the formal subject grievance and the failure to attempt to informally resolve these issues prior to the filing have been raised collaterally as claims of non-arbitrability of the subject grievance.

The evidence is clear on this dual claim of lack of notice and failure to attempt to informally resolve the issue(s) as required by the Master Agreement that the Agency was in fact, on notice of the portal to portal issues at least as early as October 2002 when the Walter Spence grievance (Agency Exh. 1) on portal to portal issues was filed and the exhibits evidencing dialogue between the Union and the Agency offering to negotiate and resolve on the portal to portal issues in May 2004 as well as the uncontroverted inferential evidence that Captain Chamness discussed these issues with the warden. Thus these other possible threshold issues are without merit and the arbitrator so finds.

The subject grievance is arbitrable.

Discussion on the Merits of the Substantive Issues

The ultimate issue in this case is whether or not bargaining unit employees of FCI Jesup worked daily, in excess of their eight (8) hour workday, performing

activities integral and indispensable to the performance of their principal work activity prior to the start of their shift and after their shift was ended for which they should be compensated.

There is what must be perceived as a minor issue in light of the magnitude of the ultimate issue and that is whether the subject grievance involves as a violation, the non-payment of overtime for other than what is referred to herein as pre-shift and post-shift activities.

This minor issue evolved during testimony related to the apparently common practice by the Agency of reassigning employees from assignments already commenced which provided for a non-paid lunch half hour to an assignment which provided for no lunch period and as a consequence, the employee works eight and one-half (8-1/2) hours for the day.

Another case of non-payment of overtime involving working at the principal activity beyond the end of shift was also presented as evidence of a violation in its main case by the Union. The Agency objected citing the subject grievance as limiting the issue to pre-shift and post-shift work. The arbitrator at this early stage finds that the grievance is limited to pre-shift and post-shift activities as clearly described in the grievance.

There are a number of pre-shift and post-shift activities that are under consideration in this case and most of these activities have their own history and background in the portal to portal context. Some of those activities and issues related to those activities relevant to this case, are referred to in H.R.M. 610.1 issued by the Agency on April 19, 1996 and in its source, OM214.95 issued on November 1, 1995. H.R.M. 610.1 states:

"3. Criteria -- Each institution shall have approved work schedules with shift starting and stopping times, for employees who work at the institution, to begin and end at the point employees pick-up and drop-off equipment, (keys, radios, body alarms, work detail pouches, etc..) at the control center. Therefore, employees who pick-up equipment

at the control center shall have their shifts scheduled to include reasonable time to travel from the control center to their assigned duty post and return (at the end of the shift). If the employee arrives at the keyline a reasonable time to get equipment by the beginning of the shift, this employee is not to be considered late.

...

6. Scheduling Considerations

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

...

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

The provisions of H.R.M. 610.1 set forth hereinabove were issued in 1996 and assumedly were correct at the time of their issuance that all employees of the Agency's institutions picked up their necessary keys and equipment at a control center before moving to their duty post site and starting their principal work activity. However, it is evident that at some point in time after 1996, the Agency adopted and implemented a practice whereby the equipment which, up to that time, had to be picked up at the control center, was permanently located at some 24 hour custodial duty posts obviously, in an attempt to eliminate the requirement to stop at the control center for the equipment. However, the record in this case insofar as FCI Jesup is concerned, is confusing as to the exact

date of the implementation of the equipment based 24 hour post and the number of such posts. This date is important in the context of this case.

The Agency argues that the employees who are not required to pick up their equipment at the control center, presumably the custodial officers, start their shift at the duty post after relieving the duty officer and end their shift at the post when relieved themselves. The Agency claims that these employees do not perform pre-shift or post-shift work activities indispensable to their principal work activities. These employees are generally considered custodial employees.

The Agency further argues that all other employees who must stop at the control center to pick up equipment, start their shift when they pick up their equipment at the control center and end their shift when they drop it off at the control center. However, there is an open conflict in whether if they arrive in the keyline a reasonable time before the time of shift start, they will be deemed to be on time apparently irrespective of whether they receive their equipment by start of shift time.

According to the Agency's position, these other employees do not perform pre-shift or post-shift work activities that are indispensable to their primary work activity and thus compensable. They are mainly non-custodial employees.

The Union has claimed that a series of work activities which it claims are pre-shift and post-shift work activities that are indispensable to an employees principal work activity have been and continue to be performed by bargaining unit employees from January 1, 1996 to present date and for which the employees should be compensated. Those activities as stated heretofore, can be described as Activities and Time From Keyline to Duty Post and Return include:

1. Waiting in the keyline at the control center to pick up keys and equipment and picking up the keys and equipment
prior to shift start.
2. Reporting to the lieutenant's office to check in,

check mail boxes, to pick up pertinent work information.

3. Traveling between control center and the duty post.

4. Waiting in keyline to turn in keys and equipment after completion of scheduled shift.

5. Picking up of spare charged battery at control center through keyline before start of shift by custodial officer and others and return.

6. Perimeter patrol at shift change, inventorying of equipment on site and the wait for completion of other patrols relief.

7. Relief of prior housing unit shift officer including inventorying tool room equipment and conferring with relieved officer as to past and current status of the post.

It can be seen from the description of the named activities that one or more than one activity may apply to one or more employees or group of employees dependent perhaps in some cases, on the date of the implementation of the equipment based 24 hour duty post and other purported activity changes. That which follows is an analysis and discussion of their activities and times involved as to the activities based upon, where possible, testimony and documentary evidence in the record of the case.

Activities and Time From the Key Line to the Duty Post and Return

The keyline wait at the control center and the control center itself, is an appropriately named event or activity since it is virtually the key element in describing or defining the daily work day and work schedule at FCI Jesup and, it appears to be so from the past arbitrators' opinions and awards relating to the parties herein generally and to similar if not identical issues, submitted by the parties as persuasive, at most, if not all, Agency institutions. It is so key to the operation of an Agency institution that it is specifically referred to repeatedly in OM 214-05 (3000) and H.R.M. 610.1 which set the parameters for the shift starting and stopping times of the Agency's

institutions for employees who must pick up keys and equipment at the control center. Indeed, it is the only activity referred to in both of those Agency policy documents as "not work time" and consequently noncompensable. It is then somewhat surprising that the initial activity cited by the Union in the subject grievance as requiring compensation in terms of overtime, is the time spent by employees in the keyline waiting to pick up their keys and equipment prior to the start of a shift and the final activity it cites is the time in the keyline when the keys and equipment are returned to the control center at the end of the shift. However, the surprise fades when the relationship between the keyline and the start and stop or end of shifts is addressed in H.R.M. 610.1. That section states quite clearly and unequivocally that the shift starting time is the time the employee picks up his keys and equipment at the control center and the shift end is at the time the keys and equipment are returned to the control center. Taken literally, this provision requires all of the affected employees to pick up and return keys and equipment simultaneously at the scheduled shift starting and ending time at the control center.

To avoid this impossible situation, the Agency in Section 3 of H.R.M. 610.1, allows that if an employee enters the keyline at a "reasonable time to get equipment by the beginning of the shift", the employee will not be deemed to be late, and presumably, on the clear meaning of the words, even if it develops that the employee is delayed by any unforeseen circumstances and does not pick up the keys and equipment by the scheduled time for the start of the shift. It might be further presumed that in such case, not only is the employee deemed on time but apparently he will be compensated for the time he/she spends in the keyline before he finally receives the equipment after the start of the scheduled shift.

But, the Agency's policy on shift starts is not that simple. Section 6 of H.R.M. 610.1, the very same policy manual states that "an employee whose shift starts at 7:30 a.m., must be at the control center and have received his/her equipment no later than 7:30

a.m., to be considered on time for the start of his/her shift."

Thus it can be seen that even if an employee enters the keyline at "a reasonable time" to expect to get his/her equipment by shift start, he is really not on time if he doesn't receive his equipment by shift start and not only will he be considered late for work and not be paid for his keyline delay in receiving the equipment, as presumed by Section 3, but he will be, again presumably, docked the time he is late for shift start. The only logical conclusion to be arrived at from these somewhat conflicting provisions is that Section 3 and Section 6 of H.R.M. 610.1 are clearly contradictory and that the negative approach to the keyline at start of shift does not exist at shift end since the shift, by definition, ends after a wait in the keyline and the turn in of equipment at the control center for which the employee is paid since the shift for which he is paid ends theoretically after his wait in the keyline. Of course, there is no provision dealing with an employee who waits in the keyline to return keys and equipment but cannot reach the front of the line to turn in his keys and equipment by scheduled shift end. The assumption is, or must be, by the absence of appropriate language, that he will not be paid overtime for his excessive keyline wait.

The further provisions of H.R.M. 610.1 call upon supervisors to allow employees to leave early to start the walk to the control center. However, it does not provide any amount of "reasonable time" to accomplish the turn in of the equipment at shift end. In point of fact, an Agency witness testified that she lets her staff leave Unicorn at 3:50 p.m., to start their trek to the control center to enter the keyline to turn in equipment. If Unicorn is, as stated in other testimony more than three hundred yards to the control center, is ten (10) minutes a "reasonable time" to walk that distance, get into a keyline at probably the busiest time of the day at the control center and turn in equipment by 4 p.m.? This question raises the basic question of what is a "reasonable time" as it applies to entry into the keyline to be deemed at work on time or as it might apply to the returned equipment including

the travel time from the work site to the control center as suggested herein above.

When discussing the keyline wait at the control center we must recognize that OM 214.95 and H.R.M. 610.1 were issued in November 1995 and April 1996 respectively and since 1996 there have been changes at FCI Jesup. At some unspecified later date yet to be determined, a change was made in shift starting and stopping times for a few duty posts which were 24 hour 3 revolving 8 hour shift duty posts which presumably were made relatively self sufficient in that all or much of the equipment necessary stayed at that post and did not require picking up of the keys and/or equipment at the control center, (Hereinafter "equipment based 24 hour duty post"). It must be assumed that prior to this change and the unspecified a date, most if not all bargaining unit employees employees stopped at the control center for keys and equipment since that situation was reflected in the provisions of H.R.M. 610.1 as of, at latest, April 1996.

Whenever that change was implemented, H.R.M. 610.1 became, to some point, not applicable to many of the bargaining unit employees since the change to some equipment based 24 hour duty posts was obviously effected to eliminate many if not all custodial officers from entering the keyline and stopping at the control center daily. This had the effect apparently, of having such employees shift starts at their duty post and not when they received their equipment at control as previously required. It of course, also cut any compensation to the employees affected for entry keyline time, traveling to and from the duty post, to an from the control center and no keyline pay for returning equipment at shift end.

The time of the change to equipment based 24 hour duty posts, was not explicitly established by documentary evidence. However, it will be possible to establish by evidentiary and testimonial inference, a date when the change was made or must have been made. The non-existence of an official, specific and explicit documentation stating the effective date and other pertinent information regarding a change so

important that it drastically affected the existent Agency policy contained in H.R.M. 610.1 is incredible and extremely noteworthy as is the total lack of time records for the pre- and post-shift activities and even for that matter, the actual hours for principal activity work maintained by the Agency and especially in light of a possible claim established in the National Agreement as to compensation for pre- and post-shift work activities for the period after January 1, 1996.

There remains to the arbitrator the question of why the Agency will not or cannot deal with the keyline (and the control center to which it is inextricably connected) at the commencement of the shift. At first sight, compensation for keyline time at start of a shift is both compatible and reasonable in light of the compensation the Agency provides for keyline time at shift end. There seems to be however, a fear by the Agency of abuse of such treatment by employees and of an uncontrollable cost attached to such compensation treatment at the start of a shift, because of the perceived inability to control or limit the times of entry by employees into the keyline at shift start as the Agency believes it is able to do at shift end.

The usual or common methods by employers to effect some control of what may be called portal entry, are time clocks, time cards, electronic time data entry systems and other means constantly evolving. It might be noted at this juncture, that there is no evidence that the Agency employs any time record system at any phase of its portal to portal shift operation other than log books on post which were minimally referred to but not described in detail in testimony or other evidence.

The Agency's problems with the keyline exist obviously because of the existence of the control center. Conceivably, if the control center system was discontinued, there would be no keyline problems. But it is evident from the record in the case which reflects the unique security concerns and requirements for safety and the effective operation of the institution, that the control center is a necessary fact

of life at this time in FCI Jesup and at probably all or most of the Agency's institutions and will be, until an effective alternative is found and deployed. The record reflects however, that the control center is not currently being operated as efficiently as it could be operated.

[Missing text] at their duty posts after the scheduled shift start times when circumstances of the keyline length dictate. The Agency argues that it changed its shift end policy to direct that employees leave their duty posts to start traveling to the control center before the scheduled shift end time in order to turn in equipment virtually, exactly at shift end time.

The testimony of the Agency's witnesses is not consistent from department to department and even to Warden Vasquez, who testified that employees start their shift when they don their equipment.

According to the testimony of the facilities department manager, the facilities department starts its day shift, (assumedly its only shift) either at or in the keyline at 7:30 a.m., the shift's scheduled start or upon the receipt of keys and equipment from the control center at 7:30 a.m. It ends the work day at about 3:50 or 3:55 p.m., at which time its employees commence traveling for about five minutes to the control center to join the keyline to return keys and equipment.

The associate warden of FCI Jesup, who is responsible for Unicor, testified that Unicor requires its employees to be present at the work site at 7:35 a.m., to 7:40 a.m., for the shift scheduled to start at 7:30 a.m. at which time they should be in the keyline and to leave the work site at 3:50 to travel about 300 yards, based upon other testimony, to the control center to enter the keyline to return keys and equipment to the control center at exactly 4:00 p.m., the end of shift.

The same associate warden of FCI Jesup, is also responsible for the Education, Recreation, Medical and Safety departments and on the basis of her strong, broad based testimony, which is summarized herein, the arbitrator infers that her testimony as to Unicor,

applies as well to these other departments as to starting work, starting shift, ending work and ending shift for these departments. She testified early that there were no keylines at FCI Jesup but later testified that she has seen keylines but gave no evidence of their length.

A unit manager of case management counselors on behalf of the Agency, testified that she required her staff to be in the keyline at 7:30, the shift starting time, and at end of shift, to leave the work site between 3:45 p.m. and 3:50 p.m., and out of the institution by 4:00 p.m. She further testified that if they leave the job at 3:50 p.m., walk five minutes to the control center, a distance in excess of 400 yards, by testimony and measurement, they would arrive at control at 3:55 p.m., and may have to stand in the keyline for a time the length of which she did not refer to in her testimony.

Warden Vasquez, the extant warden at the time of the hearings, j provided no testimony as to the starting and stopping times of shifts nor as to the keyline but expressed surprise at the requirement of a post order requiring an inventory to be taken jointly by the relieving and relieved officer at the time of relief at shift start of the perimeter patrol. He was not aware that relief had to come in earlier than shift start to relieve the perimeter patrol. In these matters, he relies upon the expertise of his managers. The only testimony by Vasquez as to overtime consisted of his knowledge of the claims for overtime of medical department personnel for extended principal activity work, which he referred to the Internal Affairs Department to investigate for the possibility of fraud. He did however, testify that he does not feel that there is a problem with pre- and post-shift activities.

The most recent past warden, Robert McFadden, during whose time from April 2003 to September 2004 at FCI Jesup as warden, the subject grievance was filed, testified that he knew nothing about the portal to portal issues referred to in the Union's communication to him of May 18, 2004 and was unclear as to why the Union wanted to negotiate portal to portal issues. He did however testify that he

thinks that the establishment of some equipment based 24 hours posts was made before he arrived in April 2003.

He considered employees on time when they are on the keyline but as to those employees on equipment based 24 hour posts at the time they arrived on post. He testified that he followed former Warden Wooten's proposed plan on shift starting and stopping times which he believed was in response to OM 214-95. He further testified that the 15 minute overtime included in the 4 p.m., to 12:15 a.m., shift proposed in Wooten's plan was abandoned during his time as warden from 2003 to 2004. Finally, in response to an inquiry from the arbitrator, he testified that if an employee was in the keyline at starting time, regardless of how much earlier he entered the keyline, and impliedly how much later after scheduled shift start he remains, he starts his shift in the keyline.

John Oliver, a former captain at FCI Jesup from September 2002 to August 2004, testified on behalf of the Agency that the post order dated September 1998, Union Exh. 8, was changed by him while he was captain as to the housing units. Union EXH. 8 related to the F-1 housing unit midnight to 8 a.m., shift which impliedly provided for picking up keys and equipment at the control center and stopping at the lieutenant's office to be checked off, receive relevant information and checking ones own mailbox and then reporting to the duty post. Captain Oliver gave no date for his change of the post order, Union Exh. 8 but when referred to Agency Exh. 10, a post order dated September 23, 2003, he testified by implication that this order was the order that changed the system requiring custodial officers to stop at the lieutenant's office and by further but vague implication, the system of relief for custodial shift officers, to change the housing unit order of September 1998, which had started at the control center (and keyline) and, instituted the equipment based 24 hour duty post at housing units which impliedly eliminated the requirement of the stopping at the control center for keys and equipment and the stopping at the lieutenant's office before assuming the duty post.

However, he also implied the same thing as to Agency Exh. 11 issued July 1, 2004 and due apparently to objections to the admission of Agency exhibits 10 and 11 and the colloquy between the advocates relative to these exhibits, the explicit testimony as to which of these post orders, that of September 23, 2003 or that of July 1, 2004, if either, initiated the equipment based 24 hour duty post ostensibly negating the requirement for officers assigned to those posts to stop at the keyline and the lieutenant's office to check in and check mail so that their shift started at the post was never elicited from Oliver.

The pertinent language of both post orders are essentially the same insofar as the initial duties of the relieving officer are concerned. The arbitrator will return to this testimony later.

Captain Oliver further testified that custodial unit officers must be on post at scheduled shift start time and that non-custodial employees must be at the control center at shift start. He testified that at the time of the relief on a housing unit shift takes place, the officers exchange equipment and keys and conduct an inventory of the locked grill tool cage located in another location away from inmate's housing and the duty post.

As to perimeter patrol shifts, the relieving officer must come in early to conduct a joint inventory with the relieved officer and in some instances, wait until other patrol effects its relief if first in progress and that perimeter patrol officers should be compensated for coming in early.

With respect to the 4 p.m., -- midnight shift, he has no idea how much earlier a relieving officer must come in to relieve and still initiate the 4 p.m., count at exactly 4 p.m., as required.

Captain Bruno Ierulli, an Agency (and Union) witness, and the current head of the Custodial Department, testified as to the time from the keyline to the duty post, it was his post order of June 26, 2005 that terminated the requirement that custodial officers check in personally at the lieutenant's office prior to

taking up their post. This testimony contradicts former Captain Oliver's testimony implying that the stop at the lieutenant's office was terminated by his post orders of 2003 or 2004 and by implication that his, Ierulli's, 2005 post order effected the equipment based 24 hour post. He indicated that there are housing unit posts that are 16 hour duty posts and the officer manning the first 8 hour shift of that post must enter the keyline to pick up keys and equipment at the control center and the second officer, whose 8 hour shift will conclude the 16 hour coverage, must return the keys and equipment to the control center through the keyline at end of shift and 1 6 hour post.

The Union's proofs are directed in support, obviously of its contention and claims in the subject grievance that there is substantial keyline time at both the start and end of shifts which is uncompensated and beyond the de minimus limitation of ten (10) minutes and its denial that the Agency has complied with OM 214-95 and H.R.M. 610.1 by adjusting work times for late arrival and early release, to allow for part of or all of keyline time to be in effect, a part of the shift time.

The testimony of the Union's witnesses which notably included superior officers, is reasonably consistent as to keyline time and other pre-shift and post-shift work activities to and from the duty post and as to the period prior to the implementation of the equipment based 24 hour post the time from keyline to duty post, inclusive, for custodial officers, other than those on perimeter patrols, averaged out to twenty (20) minutes in and twenty (20) minutes out for a total of forty (40) minutes and there is no dispute that the shift started at the control center and ended at the control center.

During the same period, prior to the institution of the equipment based 24 hour duty post, the keyline to duty post and relief pre-shift activity time for custodial officers on perimeter patrol is asserted, in testimony, to have been about between fifteen (15) to forty-five (45) minutes in at shift start inclusive of inventorying the guns and ammunition at a special location and inspecting the vehicle before shift start,

for an average of about thirty (30) minutes without considering time for the exit from the shift, which is estimated at twenty (20) minutes. Except for estimated amounts of time, the Union witnesses were unanimous as to the extensive time for relief of the perimeter patrol. The Agency did not strongly dispute this conclusion.

There is testimony by one lieutenant that the time required to effect a proper take over including change of equipment and inventory of the non-perimeter patrol housing unit custodial shift upon relief, is between more than ten (10) minutes and as much as thirty (30) minutes which includes exchanging equipment and communications relating to the status of the duty post during the prior shift and the inventorying of tools located at a locker away from the post. Ostensibly, this, on average, twenty (20) minutes would be added to the pre- and post-shift work activities of all custodial officer post duty excluding perimeter patrols and this would apply not only to the pre-equipment based 24 hour post change period as well as the period which followed that change if such a distinction applies in this case, at all.

It must be noted here, if it has not yet been done, that there exists a 16 hour duty post with a keyline pick up of equipment at start of shift by the first officer and a keyline return of equipment by the second shift officer at end of 16 hour post. This keyline to post process was only affected as to each shift by one-half the total pre- and post-shift time by the placement of equipment at post change and required control center appearances since each shift officer would enter the keyline only once per shift; upon start or upon end of the 16 hour post assuming there was no additional equipment required to be brought to or taken from the post from and to the control center be either the relieving or relieved officer as for example, the pick up and return of afresh battery by -each officer at each shift.

The activity of both stopping at the lieutenant's office at pre-shift start for custodial officers for check in and for information purposes and the activity of travel from control center to duty post and return were

impliedly to be omitted from the pre-shift and post-shift activities by the Agency policy eliminating the stop at the control center by creation of the equipment based 24 hour post. The assumption presumably, is if an employee was not required to stop at the control center for keys and equipment, then his entire travel time to and from duty post, would not be compensable and that by implication, included stopping at the lieutenant's office. However, as can be seen from the testimony of the Agency witnesses, both the initiation of the equipment based 24 hour duty post and the termination of the requirement to stop at the lieutenant's office were effected by the past captain, Oliver, in either 2003 or 2004 or by the current, Captain Ierulli in 2005, by post orders dependent upon which testimony appears the most reliable.

In order to examine these activities and to determine whether they properly belong to the group of activities claimed by the Union to be compensable as work time in excess of 8 hours per day or 40 hours per week, we must review the continuing issue of whether keyline time is compensable work time indispensable to a principal activity. To do so, we must initially revisit H.R.M. 610.1 which unequivocally states that keyline time is not work time and thus not compensable.

This provision is clearly, from any point of view, an anomaly in the context of the section itself and of the Agency's purported implementation of H.R.M. 610.1 Subsection (3) of the section sets forth the desired shift time and management example and that subsection states that employees in the keyline at shift start are to be considered on time. This language can have no other meaning or construction other than an employee will be paid for their time in the keyline after scheduled shift start.

At the other end of the shift, the same employees are to be released from the work site early to get into the keyline before shift ends so as to return keys and equipment at scheduled shift end. There can be no doubt that subsection (3) provides that such waiting in the keyline is work time impliedly even if the

employee picks up equipment after shift start or starts actual work after shift start and thus, is compensable. As noted earlier this flies in the face of the subsection (6) which requires at the front end of a shift, the acquisition of the keys and equipment at the scheduled start of shift time but the return at scheduled shift end of keys and equipment even in the light of the contradiction of subsection (6) to (3), the end of shift process to return includes, by implication, keyline time within the scheduled shift period.

In light of all of the above, the seemingly absolute stricture that keyline waiting time is not work time is totally contradictory to the entire concept of H.R.M. 610.1 which attempts to alleviate keyline waiting time by including it actually within the 8 hour time frame of the scheduled shift, thus making it compensable (at straight time notably) as payment for the exact shift time spent in the keyline and consequently reversing itself and making keyline time work time.

The Master Agreement establishes that agreement provisions are subordinate to Agency policies and Agency policies are subordinate to statutes dealing with the same subject matter. It further permits or limits this arbitrator to extend the same considerations in his opinion and award and not to interfere with policies of the Agency unless they are in conflict with an applicable statute.

This arbitrator does not believe he is interfering with H.R.M. 610.1 when he states that it may be reasonably clear as to its purpose but it is, as suggested above, and herein at other locations, a series of contradictions, misleading directives and as such is virtually valueless and, notwithstanding the Master Agreement's hierarchy of authority, unreasonable and arguably non-enforceable as policy due to its contradictory provisions and its clear conflict with the FLSA.

Indeed, one arbitrator, in what may now be somewhat of a landmark decision in a case involving the same parties as are involved herein and involving virtually the same pre-shift and post-shift issues as contained in this case, arising out of a grievance and

arbitration at the FCI Petersburg, Virginia institution, found that the provision that waiting in a keyline is not work time and not compensable, to be violative of the mandates of the FLSA since she found as a matter of fact, that the keyline wait is integral and indispensable to an employee's principal work activity in the correctional institution and warrants the protection of the FLSA as it relates to overtime requirements: *In the Matter of the Arbitration Between the American Federation of Government Employees, Local 2052 and the Department of Justice Federal Bureau of Prisons Federal Correction Institution, Petersburg, Va., FMCS Case No. 01-04534 (Arb. Shaw March 19, 2004) (Petersburg)*. This finding was made in the Petersburg case but because of a stipulation that the institution only dealt with 15 minute overtime increments in compensation matters, her basic finding as to the compensability of keyline time often (10) minutes as a pre-shift activity prior to the issuance of an M.O.U., presumably adjusting shift starting and stopping times and, this arbitrator infers the commencement of a form of equipment based 24 hour duty post, did not impact the total minutes in her final award because the stipulation increased the basic non-entry keyline finding of twenty (20) minutes by ten (10) minutes equaling the amount of time she found as spent in the keyline at shift start.

In the within case, the arbitrator finds that keyline time is integral and indispensable to the principal activities at FCI Jesup and the non-payment of compensation for time in the keyline is a violation of the FLSA and is compensable.

Despite the foregoing discussion and finding relative to the keyline issue, it must be noted, and the arbitrator does so at this point, that the determinations of whether or not waiting time to receive equipment essential to the principal activity of an employee have been and remain cautionary and restrictive and based on case by case circumstances. We are clear that such a determination involving whether or not an activity of an employee is indispensable to the principal activity of that employee and thus compensable or

preliminary or postliminary and not compensable turns upon fact. *Amos v. United States*, 13 Cl. Ct. 442 (1987). This rule applies as well to the determinations of whether the keyline wait at FCI Jesup is integral and indispensable to the principal activity of an employee and, thus, compensable.

In the consolidated cases of *IBP Inc., v. Alvarez, etc., et al.* and *Tum et al. v. Barber Foods Inc., etc.*, 546 U.S. ____ (2005); 2005 WL 29783111 (U.S.), cases numbered 03-1238 and 04-66 respectively, the Supreme Court of the United States in the *Barber* case made certain determinations relative to waiting time to receive protective clothing which was required to be donned by production workers in a poultry processing plant prior to the commencement of their principal work activity, the Court stated, with respect to the issue:

"By contrast, petitioners supported by the United States as Amicus Curiae, maintain that the pre-donning waiting time is 'integral and indispensable' to the "principal activity" of donning and is therefore itself a "principal activity." However, unlike the donning of certain type of protective gear which is always essential for the work to do his job, *the waiting may or may not be necessary in particular situations or for every employee.* (Emphasis added). It is certainly not "integral and indispensable" in the same sense that the donning is. It does however, always qualify as a "preliminary" activity. We thus do not agree with petitioners that the pre-donning time at issue in this case is a "principal activity" under 4(a).⁸

(Footnote 8 "As explained below, our analysis would be different if Barber required its employees to arrive at a particular time in order to begin waiting.")

Further on in the opinion, the Court explained its footnote comment:

"The government also relies on a regulation promulgated by the Secretary of Labor as supporting the petitioner's view. That regulation, 29 C.F.R. # 790.7(h) (2005) states that when an employee is required by his employer to report at a particular hour at his workbench or other place where he performs his

principal activity, if the employee is there at that hour ready and willing to work but or some reason beyond his control there is no work for him to perform until some time has elapsed waiting for work would be an integral part of the employee's principal activities" *that regulation would be applicable if Barber required its workers to report to the changing area at a specific time only to find that no protective gear was available until after some time has elapsed but there is no such evidence in the record in this case"* (Emphasis supplied) 546 U.S. at ____ (2005)

The instant case is more than four square within the exception to the denial of waiting time as compensable in general, as an integral part of the employees principal activity and thus compensable. This case exceeds the concept of the regulation cited in the *Barber* case and of the rationale of the Supreme Court itself in that case when considering the regulation. In the instant case, the Agency expects its employees to arrive at a "reasonable time" prior to shift start and wait in the keyline so that they can receive their absolutely essential and indispensable body alarm, keys, radio and battery by the exact time their shift starts or be penalized. This is not an occasional situation guided by chance as described in the regulation and the facts of the *Barber* case nor is it a merely preliminary activity unconnected to the employers' principal work activity or the employer's scheduled work activity for that employee. It was and is a de facto specific time and virtually permanent and mandated requirement to be in the keyline before scheduled shift start and not merely an expectation by the Agency. Indeed, not one witness in the matter, testified that the keyline did not exist, was not virtually permanent or was so short as to be infinitesimal, but one witness testified that if the employees did not daily report early to the control center, and enter that keyline, the necessary operations of the institution would not be maintained at the appropriate level of order or efficiency.

The concession in H.R.M. 610.1 that by being in the keyline "a reasonable time" prior to shift start, an employee would be considered on time for the shift,

illustrates clearly that an employee must wait in the keyline for equipment or be penalized and as such a "reasonable time", although arbitrary and capricious in the sense used in H.R.M. 610.1, when I applied to this issue is by any construction as specific as the "specific time" example in *Barber* as the Agency can get in its clearly obvious attempt to avoid an actual specific time as referred to in the exception in *Barber* making keyline time compensable.

An extreme example is the extensive time necessary to effect the relief of the prior shift of the perimeter patrol. As to the other duty posts, the credible testimony is relatively overwhelming that non-custodial employees, as well as custodial employees must be at their duty post at scheduled shift start and arguably so at shift end.

The matter extends even beyond the status of the keyline at FCI Jesup currently or in the near past. It started before the National Grievance and the National Settlement. There is no more reasonable inference to be made from the magnitude of the cash settlement made by the Agency to settle the National Grievance than it had to have included within its ambit as a primary item, the keyline waiting time or some variation thereof.

Continuing the inference, the other two (2) emanations from the settlement agreement, aside from the cash element, were the Operations Memorandum (OM) 214-95 and the Human Resources Manual (H.R.M.) 610.1. Both of these documents are generally referred to as Agency policy statements. An examination of both of those documents readily discloses that, notwithstanding the formal verbiage, the fundamental purpose of both, is to attempt to deal with the apparently perpetual keyline dilemma of the Agency and the waiting time therein for its employees.

In conclusion and for all of the above reasons, the arbitrator finds, as a matter of fact and by way of repetition, that keyline waiting time is indispensable to the principal work activities of the employees of FCI Jesup and is thus compensable under the FLSA. The above finding affects all employees past and

present to various degrees during different periods of time prior to the time during the entire time covered by the award in this matter.

There are several other activities in the list set forth herein above which have a direct relationship to a finding, relative to the keyline time.

The first of these remaining activities is the picking up of batteries by employees but more particularly custodial employees, including but not limited to, officers who work shifts at the equipment based 24 hour duty post and custodial 16 hour duty posts. The arbitrator has reviewed a large number of arbitration decisions involving the parties hereto on virtually the same or similar issues presented in this case. For no outwardly explicit reason or reasons, most of those decisions exclude, and in at least one or more cases, pointedly exclude, batteries as equipment in the same sense as keys, radios, and body alarms, among other items. No reason has been given regarding this exclusion to the satisfaction of this arbitrator if any reason has been given at all. Indeed, there appears to be some secret or silent basis for this exclusion as if an explanation is not necessary or uncalled for. This arbitrator disagrees with these decisions on the basis of the evidence in this case.

Initially, by something less than the application of Aristotelian logic, it appears that without a charged battery, the other equipment consisting of radios and body alarms are inoperative and serve no purpose. The battery is the engine that makes essential equipment work. Without the essential equipment of operative radios and body alarms, the employees of FCI Jesup and other Agency institutions cannot perform their principal work activity effectively and in safety for both themselves and the inmates for whose safety they are responsible as one of their principal work activities.

There is one fact that came out of the testimony in this case which might shed some light on the Agency's treatment of batteries. It appears, that in the past at an Agency institution, described only as "Talladega", an inmate takeover of a unit resulted in the taking of one or more custodial officers as

hostages. During the period of this takeover, the radios of the hostage officer(s) were used to monitor the communications of the authorities and to aid in this use of the radios, the inmates recharged the batteries at battery charging facilities located in the unit itself. As a consequence, the continued and lengthy monitoring of communications apparently caused the Agency serious problems in overcoming the takeover. Shortly after this event, apparently all battery chargers at Agency institutions were removed from custodial unit duty posts and placed only in control centers. This incident might have caused repercussions in the Agency which brought about the battery's significance in its operational scheme to the low esteem it currently enjoys.

When confronted with the question of how to deal with the problem of the lack of an operational live battery at an officer's housing unit or perimeter patrol duty post, the answer from the Agency's witnesses uniformly is that a control officer will deliver one to the post. This arbitrator can't quite get around the problem of how an officer with an inoperative dead battery for its radio's operation, can communicate with the lieutenant's office or the control center to advise of his predicament. There was no testimony on this issue from the Agency's witnesses nor even a suggestion as to whether this problem exists to any extent from the Union's case.

Assuming *arguendo* that the officer with the dead battery can communicate with, or get word to, a source for charged batteries, the Agency's witnesses without exception testified that a compound officer or activities officer will deliver one to the officers' post as soon as possible but with the proviso that such delivery must await the availability of the compound officer in the light of the compound officer's other duties. When the testimony of all witnesses included a time for such delivery of a battery once the compound officer was available for the delivery, the earliest response time was at least about 15 minutes by an operations lieutenant; as much as 20 to 30 minutes or more to deliver a battery up to 1-1/2 hours by a custodial officer, who was a former compound

officer; to replacement at some time during the shift by a former captain in charge of the custodial department; and to not within 10 to 15 minutes normally by an operations lieutenant. Not one of the witnesses for either party testified that he/she could guarantee delivery of a battery in any reasonable period of time.

As might be expected, the availability or even, at some times, the existence of one or two compound officers to deliver batteries during shifts was challenged in testimony and argument. The Agency admitted that compound officers' posts were entirely vacated during some periods and reduced to one per shift during other periods. The most persuasive testimony on the subject was from the current captain of the custodial department who testified as an Agency witness, that because of understaffing at FCI Jesup, it was likely that there would be one compound officer on shift rather than two and further that some custodial staff currently get batteries at the control center at shift start because they don't want to get assaulted in the unit and doing it is not a bad idea.

The main response however given by the Agency in argument and testimony is that there is no Agency requirement that officers pick up batteries at the control center and thus any stop to pick up a battery at the control center is not compensable as a pre-shift work activity much like the extensive pre-shift perimeter patrol relief activities and thus not compensable nor, as would naturally follow, if it was a compensable work activity, would the travel time to the duty post be compensable.

At no point in its case or in the Union's case for that matter, did the Agency indicate through testimony document or argument that it required the pickup of batteries by shift employees to stop. As a matter of fact, the testimony of all superior officers at the hearing was that they knew that custodial officers picked up batteries at the control center as a common practice but while they didn't require that action, they did not order the officers not to do so. Indeed one of the superior officers, a GS-11 Seg. Lieutenant, testified that she expected her unit officers to pick up

batteries at the control center at shift start while, as stated herein, the current captain of the custodial department thought that it was a good idea in the interest of officer safety.

From all of the testimony and other evidence and notwithstanding the non-existence of concurring opinions in other arbitration cases with the same parties and issues, the arbitrator is forced to conclude that the pick up of a freshly charged battery at the start of a shift is a pre-shift activity that is indispensable to the performance of the principal work activity of an employee in the same category as a body alarm and radio and the pick up of a battery at the control center, as the common practice is currently, and the pre-requisite wait in the keyline is compensable as is the post requisite travel to the duty post.

There remains several questions relating to the battery issue. The first question has to do with the extent of the application of the finding on the battery pick up due to the initiation of the equipment based 24 hour duty post since, of course, the battery pick-up refers mainly to shift officers at those posts and to the second shift officers on the 16 hour post who, although he does not have to pick up all of the equipment including a battery, as does the first shift officer, he is included generally in the group that would pick up afresh battery for the second 8 hour shift at the post.

There is no evidence that the Agency kept records of who picked up only batteries since the 24 hour shift change and the only evidence presented as to this question was the testimony of two operations lieutenants, one who testified as a Union witness in its own case and the other who testified as a rebuttal witness for the Union that it was a common practice for years for an officer to pick up a spare battery to replace the one used on the prior shift because the ones on post run out early on the next shift. Other Union witnesses corroborated this testimony. As a consequence of the lack of specific evidence as to numbers or identity of those employees who picked up only batteries at the control center, the arbitrator

will accept the common practice testimony of the witnesses and particularly that of the two operations lieutenants who must be considered adverse, if not hostile, witnesses and apply the finding to all custodial department shift employees as described herein above.

Another most important reason supporting the battery pick up finding, is the undisputed evidence that the presence of a newly charged battery on a duty post at start of shift to avoid non-functioning communication and safety equipment is a benefit to the Agency which it accepts fully without objection and enjoys.

This leaves only one other activity put at issue by the Union and that is the stopping at the lieutenant's office to check in, check mail and exchange shift schedule information.

There is much evidence in the forms of exhibits and testimony on this issue. The main evidence in connection with this issue is from the Agency which purports to prove that this activity was terminated on or about one of three dates, September 23, 2003, July 1, 2004 or June 26, 2005 by two different captains in post orders placed in evidence (Agency Exh.'s 10, 11 12 and 14) and by their respective testimony. There basically is no other evidence of the date of the termination of this activity by the Union or the Agency. There are some vague references by a Union witness and by the past warden to the approximate time of the initiation of the equipment based 24 hour duty post by which the Agency sought to terminate a stop at the control center which might be connected to the lieutenant's office stop or not. The testimony of the two captains relative to the termination of the lieutenant's office stop also implies, vaguely, that the 24 hour post was created when the stop at the lieutenant's office was terminated. All three post orders contain the same language as to the action to be taken by a housing unit officer at shift start. All omit any requirement of stopping at the lieutenant's office personally but do contain language to the effect that they should notify the lieutenant's office of their presence to be checked off.

In light of this consistency of language and the lack of any other evidence on the subject, the arbitrator finds that the activity requirement of stopping at the lieutenant's office to check in, check mail and receive shift information prior to relieving the post, was terminated as of September 23, 2003, the date of the first of the similarly worded post orders referred to herein.

Further, in the same vein, the arbitrator in the totally inexplicable absence of any documentary or otherwise definitive evidence of a date upon which the equipment based 24 hour duty post was initiated, finds that the said 24 hour duty post was also initiated on September 23, 2003 by reason of the same post order.

This finding is based in part, upon the difference in language and format between the post orders of September, 1998 and of September 23, 2003. From this difference in language it can be inferred that in 1998 the equipment boldly listed before any relief action takes place, meant that the listed equipment must be in the officer's possession presumably obtained at the control center prior to his effectuating the relief of the prior shift officer and from the absence of such specific early listing of equipment in the September 2003 post order, that the equipment is obtained as part of the relieving action, i.e., by exchange from the relieved officer.

This finding is also based in part upon an acknowledgement of the change by Leonard Spell, President of the Union, in his testimony at the hearing of September 20, 2005 when he testified in response to a question as to the type of equipment that had to be picked up prior to going to the duty post, "Well, we are talking different times. At one time we had the keyline. We went through the keyline, picked up equipment ..." (Trans. P. 33, 63-5). The finding is also based upon the somewhat vague testimony of former Warden McFadden who was warden from April 2003 to September 2004 to the effect that he thought that the practice of putting the equipment on the post, "some of that was there when I started in spring -- or in Jesup". This testimony is vague as to the start of

the practice either "in spring -- or Jesup" but it is fairly definitive that it started sometime in 2003 at latest while McFadden was warden in 2003.

Finally, the finding is based again, in part, upon the inferences derived from the language and dates of OM 214-95, H.R.M. 610.1 and former Warden Wooten's plan of November 1995 which either explicitly provides and/or inferred that all equipment was obtained by all employees from the control center prior to taking post as of April 1996 and there are no other further references in the evidence in the case which relate to the start of shift or work or duty post for employees and more particularly, for custodial employees until the post order of September 23, 2003, which by its termination of the stop at the lieutenant's office must have, logically and necessarily terminated the stop at the control center.

The arbitrator finds it incredible that the Agency did not produce specific documentary evidence of so momentous a change in shift practice in the form of at least an explicit post order citing the change or a form of written notice to the Union or the affected employees, that the latter were no longer required to enter the keyline and pick up equipment at the control center, but, to go apparently, directly to their duty post or, as inane as it might sound, to the lieutenant's office and then the duty post if it occurred prior to September 23, 2003, the found date of the termination of the practice of stopping at the lieutenant's office. From this improbable and strangely unexplained absence, of documentary evidence and definitive testimony from the parties, the arbitrator was bound to cull from the meager non-specific evidence available, by inference, a date for the initiation of the equipment based 24 hour duty post to more fully establish the chronological sequence of events pertinent to this case and that date the arbitrator finds as set forth herein above, to be September 23, 2003.

In any event, the arbitrator in considering the stop at the lieutenant's office, notes that the most important aspects of that stop, is to do almost exclusively the Agency's administrative business. Thus from September 23, 2003, and since it was no

longer required by the Agency and has not been otherwise established to be indispensable to the principal activity of the employee, it will not be compensable after that date however inefficient the termination of that activity might be considered by the shift lieutenant and others according to their testimony.

At this juncture and after considering all of the above, the arbitrator feels that he must make certain basic findings and thus hereby makes the following general and specific findings of fact and/or law findings of fact and/or law with others to follow:

1. The Agency violated its own policy as reflected in OM 214-95 and H.R.M. 610.1 by its failure to take appropriate actions with respect to shift start and end times and other actions and/or inactions as set forth herein.

2. The Agency violated the Fair Labor Standards Act by not compensating bargaining unit employees at contractually appropriate overtime rates for pre-shift and post-shift work activities indispensable to their principal work activities as described herein during the period set forth herein and herein after.

3. The Agency's violations of the Fair Labor Standards Act as described herein were willful and retroactively and continually committed daily during a period of three (3) years prior to the date of the filing of the subject grievance on July 6, 2004 the time set forth in the Portal to Portal Act of 1947 for limitation of actions under the Fair Labor Standards Act for willful violations of the Act and thus the Agency is liable for retro-active compensation for the said three (3) year period of retro-activity and thereafter in the form of overtime pay to all of the bargaining unit employees, past and present who were employed and worked at FCI Jesup during the three (3) year period of retro-activity from July 6, 2001 to July 6, 2004 and thereafter to and through September 22, 2005, the date of the closing of the hearing in this case.

The finding of retroactivity for three (3) years is based upon another finding from the totality of

evidence in this case, that the Agency was on notice of pre-shift and post-shift work activity claims or portal to portal claims by the Union for an extended period of time, at least commencing with the filing of an earlier grievance on essentially the same subject in October of 2002, sometimes referred to as the Walter Spence grievance and perhaps commencing even earlier when it apparently eliminated the implementation of a 15 minute overtime provision relating to a 4:00 p.m., to 12:15 a.m., shift from its proposed plan to comply with OM 214-95, on yet another date as to which no evidence was presented, and thus acted in willful violation of the Fair Labor Standards Act of 1938 as amended and as provided in 29 U.S.C. 255 of the Portal to Portal Act of 1947 as amended which provided inter alia for a limitations of actions of a period of 3 years prior to the filing of a claim (grievance) in cases of willful violation of the Fair Labor Standards Act.

In addition to the above findings, the arbitrator must make findings relating to a description of the bargaining unit employees covered by this arbitration and any award made herein and the specific amount or amounts of retro-active pay to which those employees are entitled under the award.

With respect to the matter of the coverage of employees of any award made in this case, there is a profusion of possible findings based upon the record in this case.

Initially, the subject grievance alleged violations as to and requested relief for all members of the bargaining unit. As noted herein above, the Union in its opening statement, pre-hearing memorandum and post-hearing brief, specified the employees of eleven bargaining unit positions in department of FCI Jesup, are sought to be covered by the arbitration as:

- Custody Officers
- Facilities Foreman
- Food Service Foreman
- Recreation Specialists
- Unicorn Foreman

Warehouse Foreman
Education Teachers
Medical Staff
Unit Management Staff
Mechanical Services Foreman
ISM staff

There is no evidence in the record whether the departments named in the Union's list and the positions for that matter, include all departments at FCI Jesup or the positions listed include all bargaining unit employees in those departments.

As to the list, the arbitrator notes that if the departments and the positions therein do not include all bargaining unit employees at FCI Jesup but include less than all, then this action by the Union in lessening the coverage of the subject grievance constitutes an alteration to the subject grievance by one party which is prohibited in the absence of an agreement or consent by the other party, a provision which was raised by the Agency on another factual issue herein but was not raised as to this issue. Indeed, if the list includes all of the departments and generally all of the positions of those departments at FCI Jesup, we have no issue.

On the other hand, if the list includes less of either departments or unit employees at FCI Jesup, the issue raised is whether this is the type of unilateral alteration proscribed by the Master Agreement or an acknowledgement to the Agency which might presumably reduce any exposure the Agency may face from an award dealing with, perhaps, less employees.

There is another factor to this issue. As set forth above, the Union notified the Agency twice at the hearing, orally and in writing on the record, with specificity of the unit employees affected by the arbitration and no objection, refutation or opposition was raised by the Agency to what might be deemed the Union's unilateral amendment to the subject grievance.

In anyone of the above events, the arbitrator

finds that the Union's list reflects the extent of the grievance/arbitration coverage for purposes of this case. Additionally, since the Union refers to positions in certain department and not all bargaining unit employees of those departments, the arbitrator finds by inference, that the Union intended the coverage to extend to all of the unit employees of the listed departments since testimony was given by bargaining unit employees at the hearing who did not describe themselves in accordance with the list position titles.

In one case, witness Rosario stated that he worked in the Facilities Department as an electronic technician and did not indicate that he was a facilities foreman as described in the list. Additionally, Rickey Frank Pasley, described himself as working in Unicorn as well as a fabric supervisor.

It is the arbitrator's inference gleaned from all of these facts, that since these departments involving positions listed as foreman may include inmate labor, that they are foremen of a kind, i.e., a supervisor of inmate workers.

Consequently, the arbitrator finds that the Union list refers to all of the unit employees working in the departments named and not only to the positions listed.

Additionally, it may have been urged that the Union did not present testimony relative to each of the departments in which the positions referred to in the Union's list and consequently those departments or the bargaining unit members employed in those departments, should not be included in the coverage of an award in this matter.

It is clear to the arbitrator from the record in this case, that the bargaining unit employees or their positions, are divided into two (2) basic groups: The custodial employees of the Custodial Department and the noncustodial employees in all other departments. The above positions can then only relate to the non-custodial departments and their employees.

There has been testimony in this case, replete with references to transferal of employees from non-custodial departments to custodial functions for a

day on occasion and the entire record on this issue points to the fact that some custodial and non-custodial employees on any given date, may switch back and forth according to the needs of the Agency. The distinction then is not as between employees but as between custodial work and non-custodial work performed by any employee assigned to either type work.

The testimony generally produced facts about custodial work which were common only to custodial work and those workers and similarly produced facts about non-custodial work and workers which were common only to all non-custodial departments. Thus, the fact that there may have been no witnesses or testimony relative to one or more of the non-custodial departments on the Union's inclusive list and their employees, is not exclusionary of those departments and their employees from coverage in this award. The facts about the non-custodial departments derived through testimony relative to the issues in this case, appear to be and the arbitrator finds, are common to all non-custodial departments on the Union's list and thus the bargaining unit employees of these departments from which or about which no testimony was received, are not excluded from the determinations and relief provided in this award and the arbitrator so finds.

As an overall finding, the arbitrator finds that all of the unit employees of all of the listed non-custodial departments are included as affected employees and covered by this award as well, of course, as are all custodial employees.

The issues of the pre-shift and post-shift activities having been discussed at extraordinary length, it is clearly evident that an award of compensation for time spent at those indispensable activities by the affected employees will be made. Thus, the next matter to be dealt with in this case is the award and of necessity the amount of time worked at such activities for which compensation shall be awarded.

We must acknowledge from the prior discussion and probably restate that there is no documentary or

other specific timekeeping evidence of the actual times spent in the keyline, traveling to and from the duty post, stopping at the lieutenant's office, exchanging equipment at relief of the duty post, of early release if any, from non-custodial work at shift end to go to the control center and return equipment and other activities that are relevant to the determinations necessary for the award. As a consequence, we are forced by the lack of timekeeping records to use the testimonial evidence in the record from which, in some cases, inferences as to time may be made by the arbitrator.

As to the travel time from the control center to the duty post and return, we have evidence from Lieutenant Hearn of the distance from the control center to what appear to be the farthest duty posts, those distances range from 405 yards to 243 yards. Based upon the arbitrator's estimation of the time to walk one full pace, which is by testimony about one yard using the measuring words commonly used of one, one thousand, two, one thousand etc., signifying a one second period to arrive at a conservatively estimated one second per pace or yard, the time to walk 405 yards to F unit was at least about seven (7) minutes; to Unicor (329 yards) at least about six (6) minutes; to the Facilities Department (259 yards) at least about four (4) minutes and to the Education Department, (243 yards), at least about four (4) minutes and return to the control center at shift end. There has been testimony by some non-custodial employees that travel to their department might be as little as 1-1/2 to 3 minutes. From these figures, the arbitrator finds the average time from the Control Center to a duty post conservatively, to be three (3) minutes and return.

With respect to the time to effect a relief of a unit officer and turnover of shift including inventory keys and tools and equipment located in lockers away from inmates units and relay pertinent information to relieving officer of status of shift the testimony of Lieutenant Barnard, a GS 11 shift operations lieutenant, establishes a time for turnover of from 10 to 30 minutes. The average time from that testimony,

would then be 20 minutes. The arbitrator finds that the average on a conservative level is twelve (12) minutes. The perimeter patrol however has been testified to as being between fifteen and forty-five minutes since it involves inventorying of guns and ammunition by exact individual count by both relieving and relieved officers and inspection of vehicle in the rear of the institution at a gun barrel. On the testimony, the average appears to be thirty minutes. However, it is reasonable to assume, on the meager evidence available, that there is a rotation of officers as to duty assignments on a regular basis and it would be virtually impossible to determine individual officers on perimeter patrol and for how long over an extended period of time, as is the case here. Thus, the times for perimeter patrol officers to effect relief of a prior shift should, for practical purposes, be considered as identical to other custodial employees twelve minutes.

The establishment of the average actual time spent in the keyline is a bit more complicated. Some of the witnesses testified as to what appeared to be the total time to perform pre-shift activities without specifying what portion of that total time was spent only on the keyline prior to arriving at the control center desk or point of confronting the control center officer and turning in the chit, if necessary and, in any event, receiving the keys, equipment and other material if any.

Two witnesses however, Walker and Pasley, both non-custodial employees, testified that they had to arrive at the control center and apparently stay in the keyline from fifteen minutes to twenty minutes before start of shift and at end of shift at least the same amount of time or more. There were other witnesses, mostly custodial employees, who appeared to provide, in testimony, only what must be assumed to be total time from keyline to workplace, estimates of between twenty minutes to thirty minutes without breaking down those estimated times into categories of keyline time, travel time, etc.

Additionally there was testimony from many witnesses that perimeter patrol officers, in order to

effectuate the relief of a prior shift which included extensive time for inventorying guns, ammunition and other equipment, of from fifteen (15) minutes to forty-five (45) minutes, apparently without specifying if such time included was exclusive of the keyline time and as well, the occasional, potential waiting time required for the other patrol officers to be relieved. None of the testimony reflected how much time was spent at keyline or to other pre-shift activities. Also it was adduced in what might be termed anecdotal, testimony that employees whose shifts start after 4:00 p.m., are required to wait to be electronically admitted into the lobby by the control center office through an outside door which is locked at 4:00 p.m., and entry is controlled by the control center.

In order to determine the time of keyline wait for all affected employees, the arbitrator has reduced the testimony to averages.

In the case of the non-custodial employees' testimony of between 15 and 20 minutes, the arbitrator has reduced these figures by 3 minutes, the travel time to the duty post to allow for the possibility that the testimony was total time and not keyline time only. Thus, we have, in the case of non-custodial employees, the estimated keyline time of 12 to 17 minutes.

The arbitrator has made a similar adjustment in the apparently custodial employees testimonial average of 20 to 30 minutes by reducing each figure by the travel time of three (3) minutes and the relief exchange time of 12 minutes to produce an average of from 5 to 15 minutes keyline waiting time. The non-custodial 12 to 17 minute estimate averages 15 minutes while the custodial 5 to 15 minutes averages out to 10 minutes.

Finally, the average of the non-custodial 15 minutes and the custodial 10 minutes, conservatively averages out to 12 minutes which the arbitrator concludes and finds to be the keyline waiting time for all affected Bargaining Unit employees at starting of shift and the keyline waiting time at end of shift.

At this point, we must examine the time required for the stop at the lieutenant's office on the way to the duty post to check in and check and pick up mail from the employees' mailbox. From that description of the activity at the office, it is clear that there must be a somewhat minimal time to be applied to the activity.

The arbitrator finds that the activities required at the Lieutenant's office took no less than four minutes.

From the foregoing analysis of the activities and time of those activities, the arbitrator has arrived at the following conclusions and findings with respect to the pre-shift and post-shift activities of certain employees at certain times during the period July 6, 2001 through September 23, 2003 and thereafter to November 23, 2005.

With respect to custodial bargaining unit employees inclusive of those on perimeter patrol from the period July 6, 2001 through September 23, 2003, the times which they spent on pre-shift and post-shift activities which are integral and indispensable to the employees' primary activity are hereby found by the arbitrator to be:

keyline time (entry) 12 minutes travel to duty post 3 minutes stop at lieutenant's office to check in etc. 4 minutes exchange of any inventory of equipment at post 12 minutes travel to control (return) 3 minutes keyline time (exit) 12 minutes Total Time 46 minutes

As to custodial employees, all bargaining unit employees including perimeter patrol, during the period September 23, 2003 through November 23, 2005, the date of the closing of the hearing herein, the times which they spent on pre-shift and post-shift activities which are integral and indispensable to the employees primary activity are hereby found by the arbitrator to be:

keyline time (entry) (battery) 12 minutes travel to duty post 3 minutes exchange of equipment and inventory at post 12 minutes travel to control (return) 3 minutes keyline time (exit) (battery) 12 minutes Total Time 42 minutes

With respect to all non-custodial bargaining unit employees in all departments affected by the Union's

affected positions list during the period July 6, 2001 through November 22, 2005, the date of the closing of the hearing herein, the times which they spent on pre-shift and post-shift activities which are integral and indispensable to the employees' principal activity are hereby found by the arbitrator to be:

keyline time (entry) 12 minutes travel to duty post 3 minutes keyline time (exit) 12 minutes Total Time 27 minutes

Further, by way of explanation as to affected non-custodial employees, the arbitrator considered reducing the total time of post-shift activities by three (3) minutes to allow for the purported early release from work to travel to the control center but due to the conflicting and in some cases barely credible testimony, together with the repeated lack of documentary evidence in the form of a post-order or some equivalent official directive from FCI Jesup, authorizing and/or directing such early release, the arbitrator questioned the reasonableness of the considered reduction. H.R.M. 610.1 is a memorandum of policy meant to be implemented by each institution of the Bureau of Prisons. There is little or no evidence of its actual implementation at FCI Jesup except for the aforesaid testimony as to early release of five to ten minutes from the job site.

Indeed, the only plan or document implementing work schedules to meet the Agency's parameters is the one proposed by Warden Wooten in November of 1995 in response to OM 214-95 and prior to the issuance of H.R.M. 610.1 in 1996 and that plan does not appear to contain directives for early release from work or post or provisions implementing or even explaining, the conflicting shift start provision of H.R.M. 610.1 or any variation of those provisions, and in fact, no testimony at all relative to the keyline, control center or equipment acquisition, shift start provisions except for the inmates work call being changed from 7:30 a.m. to 7:40 a.m., which is not persuasive on the point.

In conclusion and notwithstanding the lack of documentary evidence but giving reluctant credence to the testimony, the arbitrator has allowed a

deduction of the three minutes attributable to travel time from the duty post to the control center but not from the control center to the duty post due to the overwhelmingly persuasive testimony that non-custodial employees are required, to be at their duty post at the scheduled shift start and not after a policy proposed equipment acquisition shift start at the control center which does not appear to have ever been formally adopted, announced and uniformly implemented or enforced by FCI Jesup except for the publication of the proposed policy's existence itself in H.R.M. 610.1 and the plan of Warden Wooten which do not provide the semblance of a specific, clear, uniform and required practice by the Agency of keyline control center start of shift or early release for equipment return at end of shift.

Award

A. The subject grievance is arbitrable.

B. The Agency violated its own policy as contained in OM 214-95 and H.R.M. 610.1 and the Fair Labor Standards Act as well as the Master Agreement, by not compensating affected bargaining unit employees at FCI Jesup for daily pre-shift and post-shift work activities which are integral and indispensable to their principal activity during periods between July 6, 2001 and November 22, 2005, the effective date of the closing of the hearing herein.

C. All past and present bargaining unit custodial employees or all such employees who worked in custodial positions, inclusive of those who worked perimeter patrol duties during the period from July of 2001 through September 23, 2003 shall be compensated by the Agency for 46 minutes of overtime work per shift per day, at the appropriate overtime rate in effect at the time with interest.

D. All past and present bargaining unit custodial employees or all such employees who worked in custodial [missing text] those who worked perimeter patrols duties during the period from September 23, 2003 through November 22, 2005 shall be compensated by the Agency for 42 minutes of overtime work per shift per day during said period at

the appropriate overtime rate in effect at the time with interest.

E. All affected past and present bargaining unit non-custodial employees who worked in non-custodial positions i.e., those employees who worked in non-custodial departments listed and set forth in the record by the Union as covered by the subject grievance and this arbitration and described in the opinion herein, during the period from July 6, 2001 through November 22, 2005 shall be compensated by the Agency for 27 minutes of overtime work per shift per day during said period at the appropriate overtime rate in effect at the time with interest.

F. Custodial employees who worked in custodial positions during the time period described in C above and who are entitled to the awarded compensation set forth therein may also be entitled to the compensation awarded custodial employees under D above if they worked during the time period set forth in D above.

G. All payments of compensation awarded herein above shall be made in the absence of an appeal of this award within 120 days of the date of this opinion and award or such extended time as may be agreed to by and between the parties.

H. The arbitrator retains jurisdiction with respect to all aspects of the award and the remedy awarded herein.