

109 LRP 33992

**U.S. Department of Justice, Federal
Bureau of Prisons, Metropolitan
Correctional Center, Chicago and
American Federation of Government
Employees, Local 3652, Council of Prison
Locals**

Federal Labor Relations Authority

63 FLRA No. 127

0-AR-3988

June 4, 2009

Judge / Administrative Officer

**Carol Waller Pope, Chairman and Thomas M.
Beck, Member**

Full Text

DECISION

Before the Authority: Carol Waller Pope,
Chairman and Thomas M. Beck, Member

I. Statement of the Case

This case is before the Authority on exceptions to an award of Arbitrator Amedeo Greco filed by the Agency under § 7122(a) of the Federal Service Labor-Management Relations Statute (the Statute) and part 2425 of the Authority's Regulations. The Union filed an opposition to the Agency's exceptions. In addition, the Union filed a supplemental submission.'

* The Union's supplemental submission addresses the applicability of a United States Supreme Court decision that was issued after the Agency filed its exceptions and the Union filed its opposition thereto. Based on Authority precedent and, pursuant to § 2429.26 of the Authority's Regulations, we will consider the submission. See, e.g., United States Customs Serv., 46 FLRA 1080 (1992) (union permitted to file a supplemental submission addressing the applicability of a court decision that was issued after the union filed its exceptions).

The Arbitrator sustained a grievance alleging

that the Agency violated the parties' agreement (CBA), the Fair Labor Standards Act (FLSA), 29 U.S.C. §§ 201 et seq., the Federal Employees Pay Act (FEPA), 5 U.S.C. § 5542, and an Agency Regulation by failing to pay bargaining unit employees overtime for compensable work performed before and after the end of their scheduled shifts.

For the reasons discussed below, we find that certain portions of the award are deficient as contrary to the FLSA and 5 C.F.R. § 551.412, and, therefore, set aside those portions. We further deny the Agency's exceptions as they concern other portions of the award.

II. Background and Arbitrator's Award

This dispute concerns the Agency's Metropolitan Correctional Facility (MCC), located in downtown Chicago, Illinois. About 205 staff members are employed at MCC, 158 of which are bargaining unit employees, 89 of whom work in the Corrections Department.

The MCC is a 26-story high-rise building that has a front desk in the main lobby. Visitors and employees must sign in at the lobby front desk and receive permission by guards before they can enter the rest of the facility. Employees must either: (1) walk through a metal detector and use one of two secured elevators; (2) go to unsecured elevators; or (3) depending on their duties, walk up a short flight of stairs to the locked second story control room that has a locked gate at the bottom of the stairs. Some employees pickup/drop off equipment at the Control Room before/after their shift.

The National Union filed a bargaining-unit wide grievance concerning the Agency's failure to compensate employees for pre- and post-shift activities. This grievance was resolved when the Agency entered into a national settlement with the National Union.

Subsequently, the local Union President sent a letter to the Warden concerning pre-and post-shift issues at MCC, asserting that the Agency never complied with the national grievance, and seeking to

informally resolve the matter. Later, the local Union President filed a formal grievance alleging that MCC violated Articles 3, Section a, 18, Section a, and 36 of the CBA, the FLSA, 29 U.S.C. § 201 et seq., and the FEPA, 5 U.S.C. § 5542.2 The parties were unable to resolve the grievance and the matter was submitted to arbitration.

2 The relevant portions of Article 18, Section a, and the referenced statutes are set forth in the Appendix to this decision. The text of Article 3, Section a, and Article 36 is not contained in the record.

The Arbitrator framed the issues as follows:

1. Was the grievance timely filed under Article 31, Section d. of the [CBA] and/or barred under the doctrine of laches, and has the Agency waived these defenses by not raising them until nearly four years after the grievance was filed?

2. If the grievance is timely, how far back should any possible back pay run?

3. Did the Union comply with the other steps of the . . . grievance procedure set forth in Article 31 of the [CBA] which require the Union to informally attempt to resolve the grievance . . . and ha[d] the Agency waived this defense ... ?

4. Did the Agency violate Article 3, Section a, and/or Article 18, Section a of the [CBA], and/or [Operations Memo], 5 U.S.C. § 5542, the [FEPA], or 29 U.S.C. § 201, the [FLSA], by not paying employees overtime for the compensable work they may have performed before and/or after their shifts and, if so, what is the appropriate remedy?

Award at 2.

The Arbitrator found the grievance arbitrable and turned to the merits.³ According to the Arbitrator, the key factual issues center on: (1) how long it takes unit employees to go from the front lobby to their designated posts at the start of their shifts; (2) how long it takes them to leave their posts at the end of their shifts and get to the lobby; (3) whether they are required to pick up equipment in the control room before and/or after their shifts; (4) when they are

required to be at their posts; and (5) whether they are penalized for being late. The Arbitrator stated that much of the testimony on these matters was in "sharp dispute" and centered on how long employees must wait for one of four elevators and how long it takes the elevators to arrive at their destinations. Id. at 3.

The Arbitrator stated that his findings were based on the "credited, composite testimony." Id. at 63. Based on the evidence, the Arbitrator concluded that "[a]ll current and former employees who have picked up pouches, keys, transfriskers, and/or other equipment (other than batteries alone) at the beginning of their shifts and/or who have returned such equipment to the control room at the end of their shifts, are entitled to compensation for doing so under . . . established law and arbitral authority." Id. at 64. The Arbitrator found that "picking up and dropping off equipment in the [C]ontrol [R]oom is a 'significant type of work' because it is an essential and integral part of an employee's job duties ... it involves a substantial amount of time, because it is officially ordered or approved, and because it clears the de minimis standard." Id. at 65. In support, the Arbitrator cited, among other cases, United States Dep 't of Justice, Federal Bureau of Prisons, Unites States Penitentiary,

?> The Agency does not challenge the Arbitrator's arbitrability determination. Therefore, such matters will not be discussed further in this decision.

Leavenworth, Kan., 59 FLRA 593 (2004) (BOP, Leavenworth, Kan.), reconsideration denied, 59 FLRA 803 (2004).

The Arbitrator addressed the Agency's reliance on *Amos v. United States*, 13 Cl. Ct. 442, 448 (1987) (*Amos*), to assert that the employees here do not deserve payment for traveling to and from their posts because traveling does not constitute an integral part of their job performance under the Portal-to-Portal Act (Act), 29 U.S.C. § 254(a)(1).⁴ The Arbitrator stated that in *Amos*, the court held that under the FLSA regulations employees must be compensated when their travel includes "travel from the place of

performance of one principal activity to the place or performance of another" Award at 69 (quoting Amos). Here the Arbitrator found that the employees, mentioned above, "in addition to spending ten minutes a day checking in and out of the lobby at the beginning and ending of their shifts, . . . spend an added 20 minutes [picking up equipment] at the beginning . . . and an added 20 minutes at the end of their shifts if they must return such equipment." Id. The Arbitrator also found that the record established that in addition to spending 10 minutes a day checking in and out of the lobby at the beginning and ending of their shifts ~ employees who pick up or drop off such equipment spend an added total of 35 minutes a day doing so. The Arbitrator found that because such work exceeds 10 minutes a day, it "exceeds the de minimis test and hence is compensable." Id.

The Arbitrator thus concluded that the Agency's refusal to compensate employees violated Article 3, Section a and Article 18, Section a of the CBA, which provides for an 8-hour day, and the FLSA and the FEPA, 5 U.S.C. § 5542 because "the former requires overtime in excess of 40 hours per work week, and because the latter requires payment for overtime when it has been authorized, approved or confirmed by an authority empowered to do so." Id. at 69-70.

In so concluding, the Arbitrator also rejected the Agency's claim that the travel by the subject employees is not considered official work under *Abrahams v. United States*, 1 Cl Ct. 305 (1982) (*Abrahams*), finding that this "case does not involve commuting." Id. at 75. The Arbitrator stated that this case "centers on what happens after employees have finished their commuting and then sign in at the [lobby] front desk[;] how long it takes them to [travel] to their assigned posts[;] and how long it takes them at the end of their shifts to leave their posts and [travel] to the lobby where they . . . sign out before . . . starting] their commut[e]." Id. (emphasis in Award). The Arbitrator stated that such questions require a focus on "how long the Agency . . . keeps employees within the MCC and whether it is properly

compensating them for all of the time they must wait for elevators when they are subjected to management's control." Id.

The Arbitrator further stated that even if compensation was not required under any Federal law, "payment is independently required under Article 18, Section [a]" 5 of the [CBA], which provides for an "8-hour work day[,] because employers cannot unreasonably require employees to be at their work sites outside of a contractually-provided work day."

4 The pertinent text of the Act is set forth in the Appendix to this decision.

5 In his award, the Arbitrator inadvertently refers to Article 18, Section a as Article 18, Section 1.

Id. at 76. The Arbitrator found that "separate contractual right exists independently of any statutory rights because 29 U.S.C. § 254 governing [portal-to-portal] pay provides, among other things, "[c]ompensability by contract or custom[.]" Id. at 78 (quoting 29 U.S.C. § 254(b)). The Arbitrator stated that "when employees routinely must wait a total of 30 minutes a day ... for an elevator, it is ... clear that the Agency has failed to fulfill its obligation under Article 18, Section a, to allow employees reasonable and timely access to and from their duty posts." Id. at 79 (emphasis added in Award).

Accordingly, the Arbitrator determined that under Article 18, Section a, the Agency "must compensate employees for [arriving] so early and for leaving work so late because the Agency itself has made such significant waiting an integral and essential part of their job by virtue of [its] official policy of pretending that there are no elevator delays and by refusing to properly rectify those delays over the four years the grievance was pending." Id. at 79-80. In so concluding, the Arbitrator found that employees "have no right to compensation" for: (1) the time it takes to enter the facility and sign in at the front lobby desk and travel to/from their duty posts in properly functioning elevators, or to sign out at the end of the shifts and leave the facility; and (2) the reasonable times it takes an employee to get an

elevator at the beginning and end of their shifts. The Arbitrator found that these matters should be accomplished within 10 minutes with properly functioning elevators. However, the Arbitrator concluded that the Agency "must pay 30 minutes of overtime a day in compensation to all current and former . . . unit employees, (other than those who were required to pick up equipment in the [C]ontrol [R]oom and who are discussed above), from February 2, 2001 to the present who have used the elevators to get to their posts on time and/or to leave their posts at the end of the day because they have been forced to report for work . . . earlier . . . and to remain in the locked facility at the end of their shifts . . . longer than they should." Mat 81-82.

With respect to the remedy, the Arbitrator determined, in pertinent part, that: (1) all affected employees are to be awarded back pay even if they did not personally testify, because the credited testimony established that all employees have been affected by the "Agency's unlawful practices"; (2) there is "no proof in th[e] record that any . . . unit employees from February 2, 2001, to the present have ever . . . stopped off to do personal errands while going to and from their work stations [, and] therefore,... no weight [was given] to the "Agency's bare claim that they may have done so" (footnote omitted); (3) the Agency had acted in a "willful manner"; (4) "liquidated damages" were appropriate and the record showed that 30-40 minutes of overtime must be paid rather than the one hour of liquidated damages requested by the Union; (5) the Agency "must bargain with the Union over how the terms of th[e] [a]ward are to be implemented"; and (6) a notice personally signed by the current Warden must be posted. Award at 83, 84, 85, 86, and 87. The Arbitrator also retained jurisdiction "indefinitely." Id. at 89.

Accordingly, the Arbitrator ordered the following:

2. Back pay shall begin to run 40 days prior to the time the grievance was filed . . . back to February 2, 2001.

4. The Agency has violated Article 3, Section a, and Article 18, Section a of the [CBA] and the [FLSA] and the [FEPA] by not compensating employees for picking up and/or dropping off equipment, other than only batteries in the [C]ontrol [R]oom.

5. The Agency has violated the [FLSA] and the [FEPA] by not compensating employees, including those who only picked up and/or dropped off batteries, for spending 30 minutes a day waiting for an elevator at the beginning and ending of their shifts.

6. The Agency has separately violated Article 3, Section a, and Article 18, Section a, of the agreement by not compensating the employees referenced in Paragraph 5 above.

A. [A] ward with interest 40 minutes of overtime, at the rates then in effect, for each day worked to all current and past employees who reported for duty and who picked up and returned such equipment as keys, pouches, or transfriskers to and from the [C]ontrol [R]oom from February 2, 2001,6 to the present, (excluding those employees who only picked up batteries).

B. [A]ward with interest 35 minutes of overtime, at the rates then in effect, for each day worked to all current and past employees who reported for duty and who picked up or returned such equipment as keys, pouches, or transfriskers to or from the [C]ontrol [R]oom from February 2, 2001, to the present (excluding those employees who only picked up batteries). (Emphasis in Award.)

C. [A] ward with interest 30 minutes of overtime, at the rates then in effect, for each day worked to all other current and past employees who reported for duty and who worked from February 2, 2001, to the present.

E. Immediately begin paying 40 minutes of overtime a day, at the rates in effect, to all employees who report to work and must pick up and drop off equipment in the [C]ontrol [R]oom. The Agency also will immediately begin paying 35 minutes of overtime a day, at the rates in effect, to all employees

who report to work and are required to only pick up or drop off such equipment. (Emphasis in Award.)

F. Immediately begin paying 30 minutes of overtime a day, at the rates in effect, to all other employees who report for work and who are not referenced in Paragraph E above.

6 In a subsequent letter to the parties, the Arbitrator informed them that in certain portions of the award he had inadvertently stated the date as January 28, 2001. The Arbitrator identified those portions and advised the parties to correct the date to read February 2, 2001.

G. Continue paying all of the overtime referenced in Paragraphs E and F above until the Agency expressly tells employees, in writing, they are not required to be in the front lobby more than five minutes before the start of their shifts and they are to leave their shifts so they can be in the front lobby within five minutes after the end of their shifts, as measured by the log-in book which they must sign upon entering and leaving the facility.

I. [P]ay overtime with interest, at the rates then in effect, to all current and past employees who were not paid overtime for staying over at the end of their shifts because they were relieved late from February 2, 2001, to the present.

J. Immediately begin paying overtime, at the rates in effect, to all employees who are required to be held over past their shifts.

Award at 90, 91, 92, 93.

III. Positions of the Parties

A. Agency's Exceptions

The Agency asserts that the award is contrary to the FLSA because it grants overtime pay for "preliminary and postliminary activity." Exceptions at 3. According to the Agency, the "primary basis for this award was [the Arbitrator's] finding that bargaining-unit employees had to wait approximately 30 minutes each day for elevators to take them to and from their posts and that they were entitled to compensation for those delays." Id. at 2. The Agency

contends that "[i]n effect, the [Arbitrator made the legal finding that waiting for elevators is work within the meaning of the FLSA." Id. Such finding, in the Agency's view, is contrary to 29 U.S.C. § 254(a) as well as 5 C.F.R. § 551.412(b).⁷ The Agency asserts that the award grants overtime compensation for time spent in preliminary and postliminary activities (waiting for elevators) independent of any time spent on obtaining or returning equipment.

Relying on Authority precedent, including United States Dep 't of Justice, Federal Bureau of Prisons, United States Penitentiary, Terre Haute, Indiana, 58 FLRA 327, 329 (2003) (BOP, Terre Haute, Ind.) and BOP, Leavenworth, Kan., 59 FLRA at 597-98, and the court's decision in Amos, the Agency also contends that the award of compensation to all unit employees is inconsistent with precedent which has defined the starting and ending point of an employee's work day as where the employee picks up equipment. The Agency thus asserts that absent evidence that unit employees perform "principal work activities" during the time spent waiting for elevators, the award of overtime pay for this period is inconsistent with the FLSA.

⁷ The pertinent text of 29 U.S.C. § 254(a) and 5 C.F.R. § 551.412 is set forth in the Appendix to this decision.

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Regarding the award for time spent other than waiting for elevators, the Agency contends that the award is contrary to the FLSA because it grants overtime pay for de minimis amounts of pre- and post-shift activity. Citing 5 C.F.R. § 551.412(a)(l), the Agency asserts that an award of 10 minutes or less is considered to be de minimis. According to the Agency, the Arbitrator "awarded [10] minutes of compensation to employees who picked up and returned equipment, while he added [5] minutes of compensation to those employees who picked up or returned equipment." Id. at 7-8. The Agency claims that since such grants of compensation are ten minutes or less per day, they are de minimis and inconsistent with the FLSA.

Additionally, citing *United States Department of the Air Force v. FLRA*, 952 F.2d 446 (D.C.Cir. 1991) (*Dep't of the Air Force v. FLRA*) and *United States Department of Veterans Affairs, Medical Ctr., Huntington, West Virginia*, 56 FLRA 990 (2000) (VA), the Agency contends that preliminary and postliminary activities may not be compensated in collective bargaining agreements because such payment is barred by 5 C.F.R. § 551.412(b). The Agency thus asserts that the Arbitrator's statement that there are "'the statutory apples and the separate contractual apple' for [unit] employees to choose from thus is mistaken as a matter of law." *Id.* at 6 n.3 (quoting Award at 80, emphasis in Award).

The Agency next asserts that the award is contrary to law because it affects the Agency's right to assign work. The Agency states that the Arbitrator ordered the Agency to grant prospective overtime pay to unit employees unless it changes its policies regarding shift arrival and departure and that such "amended policies must not require employees to be in the front lobby more than five minutes before the start of their shifts ... [and] must allow employees to leave their shifts so that they can be in the front lobby within five minutes after the end of their shifts." *Id.* at 8. The Agency contends that such order interferes with its right to assign work because it will prevent management from determining when work assignments will occur.

The Agency also asserts that the award "excessively interferes" with its right to determine its internal security. *Id.* at 9. According to the Agency, the determination of the location of employees and when they can begin and end their shifts affects its right to determine the internal security of the prison. Therefore, the Agency asserts that the award "excessively interferes with its right to determine . . . internal security ... by requiring [it] to place employees at certain locations at the start and finish of their shifts." *Id.* at 10.

B. Union's Opposition

The Union contends that the Agency is incorrect in asserting that the award violates the Act. The

Union argues that "[w]hether an activity is preliminary or postliminary to a principal activity is a question of fact[,] and the Arbitrator specifically held as a matter of fact (which has not been contested by the Agency . . .) that there is no evidence in the record to suggest that employees were free to conduct personal errands while waiting for the . . . elevators." *Opposition* at 5-6, 7 (emphasis in opposition). The Union contends that it is "not subject to factual dispute that the Arbitrator found that this is the task the [Agency] did impose upon its employee for its own purposes." *Id.* at 8. The Union asserts that, as found

by the Arbitrator, the FLSA provides for compensation for time spent on Agency mandated work (waiting for elevators/checking out equipment).

The Union also contends that the parties' CBA "independently authorizes payment for overtime[.]" *Id.* at 8. The Union asserts that the Arbitrator specifically interpreted Article 18, Section a and found that the Agency's actions concerning the movement and check-out practices violated the parties' CBA. *Id.* at 9. Citing *United Paperworkers International v. Misco*, 484 U.S. 29, 37-38 (1987), the Union contends that the Arbitrator's interpretation of Article 18 is not subject to reinterpretation by reviewing authority. The Union also contends that the Agency is incorrect in claiming that *Dep't of Air Force v. FLRA* prohibits the operation of 29 U.S.C. § 254(b) through the CBA. According to the Union, this case "clearly shows that [it] is a duty to bargain case, not an examination of an arbitrator's interpretation of an established CBA." *Id.* at 10 (emphasis in *Opposition*). The Union asserts, therefore, that the decision in *Dep't of Air Force v. FLRA* does not prohibit the Arbitrator's reliance on Article 18.

Lastly, the Union asserts, contrary to the Agency, that the 20 to 30 minutes of overtime per day ordered by the Arbitrator far exceeds the de minimis standard.

In its supplemental submission, the Union cites *IBP, Inc. v. Alvarez, et. al*, 546 U.S. 21 (2005) (*Alvarez*). The Union contends that *Alvarez*

addresses issues raised in this case as it concerns the "interplay between the [FLSA] and the [Act] vis-a-vis the compensability of transportation/travel time and the starting point for compensable time." Supplemental Submission at 2.

IV. Analysis and Conclusions

A. The award, in part, is contrary to the FLSA

The Authority reviews questions of law de novo. See NTEU, Chapter 24, 50 FLRA 330, 332 (1995) (citing *United States Customs Serv. v. FLRA*, 43 F.3d 682, 686-87 (D.C. Cir. 1994)). In applying a standard of de novo review, the Authority determines whether the arbitrator's legal conclusions are consistent with the applicable standard of law. See NFFE, Local 1437, 53 FLRA 1703, 1710 (1998). In making that determination, the Authority defers to the arbitrator's underlying factual findings. See id.

The Agency asserts that the award grants overtime compensation for time spent in preliminary and postliminary activities (waiting for elevators) independent of any time spent on obtaining or returning equipment. The Agency asserts that absent evidence that unit employees perform "principal work activities" during the time spent waiting for elevators, the award of "30 minutes of overtime pay" for each day worked "to all bargaining unit employees" for such waiting time is inconsistent with the FLSA, 29 U.S.C. § 254(a).

The Act, 29 U.S.C. § 254(a), which amended the FLSA, provides that no employer will be liable under the FLSA for failing to pay overtime to an employee for:

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(1) walking, riding, or traveling to and from the actual place of performance of the principal activity or activities which such employee is employed to perform, and

(2) activities which are preliminary to or postliminary to said principal activity or activities[.]

Specifically, by this amendment, Congress distinguished between "the principal activity or

activities [that an] employee is employed to perform," which are compensable, and "activities which are preliminary to or postliminary to said principal activity or activities," which are not compensable. 29 U.S.C. § 254(a)(1)-(2). See *AFGE, Local 1482*, 49 FLRA 644, 647 (1994); *GSA*, 37 FLRA 481, 484 (1990) (GSA). See also *Reich v. New York City Trans. Autk*, 45 F.3d 646, 649 (2nd Cir. 1995). In *Steiner v. Mitchell*, 350 U.S. 247 (1956) (Steiner), the Court clarified that a given activity constitutes a "principal activity," as opposed to a preliminary or postliminary task, if it is "an integral and indispensable part of the principal activities for which covered workmen are employed." Id. at 256. See also *GSA*, 37 FLRA at 484 (quoting 5 C.F.R. § 551.412(a)).

In determining whether given activities are an integral and indispensable part of employees' principal activities, "what is important is that such work is necessary to the business and is performed by the employees, primarily for the benefit of the employer, in the ordinary course of that business." *Dunlop v. City Electric Inc.*, 527 F.2d 394, 401 (5th Cir. 1976). Further, preliminary or postliminary activities that are integral and indispensable to an employee's principal activity or activities are themselves principal activities under the Act. *Alvarez*, 546 U.S. 21. Thus, as the Supreme Court held in *Alvarez*, "during a continuous workday, any walking time that occurs after the beginning of the employee's first principal activity and before the end of the employee's last principal activity ... is covered by the FLSA." Id. at 37.

Employees have the burden of establishing, under the FLSA and the Act, that they have performed work for which they have not been properly compensated. *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 686-87 (1946). Testimonial evidence may be sufficient evidence and it is not necessary that all similarly situated employees testify in order to be covered by any subsequent award.

The Authority has previously applied 29 U.S.C.

§ 254 as it concerns whether employees walking or traveling time constituted a compensable activity. In *BOP, Terre Haute, Ind.*, 58 FLRA at 329, the Authority found that where there was no evidence that employees therein had engaged in any principal activities during their travel from the penitentiary's security perimeter to the administrator's office, or from the administrator's office to the control center, such travel was non-compensable under 29 U.S.C. § 254. In so concluding, the Authority noted certain activities that courts have found non-compensable under § 254, such as travel from picking up identification tags (used to verify attendance and control access to the job site) to the job site, on a bus required by the employer for security reasons. See *id.* and the cases cited therein. The Authority stated that the court's decisions indicated that "unless employees are required to engage in principal activities during their travel, their time spent traveling to and from the actual place of performance of their

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principal activities is non-compensable, even if it is on the employer's premises, and even if it occurs after the employee checks in." *Id.* at 329.

The Authority has found such walking/traveling to be in certain instances compensable, however. For example, in *BOP, Leavenworth, Kan.*, 59 FLRA 593, the Authority found that picking up equipment at the penitentiary's control center and walking from there to duty stations as well as returning the equipment to the control center are compensable activities. See *id.* at 597. See also, *Amos*, 13 Cl. Ct. 442, (finding that compensating employees of a correctional facility for travel to duty stations because they were required to pick up work-related items was compensable, but noting that "[i]f they did not have to obtain these items in the control room, the time spent passing through the control room and walking to their duty station clearly would not be compensable." *Id.* at 449).

Turning to the instant case, the Arbitrator found that "[a]ll current and former employees who have picked up pouches, keys, transfriskers, and/or other

equipment (other than batteries alone) at the beginning of their shifts and/or who have returned such equipment to the [C]ontrol [R]oom at the end of their shifts," as well as employees who are required to either pick up or drop off such equipment in the Control Room, "are entitled to compensation^]" Award at 64. The Arbitrator's factual findings reveal that picking up and dropping off such equipment as well as picking up or dropping off the equipment is a "significant type of work" because it is an essential and integral part of an employee's ... duties" and is not *de minimis* because the time spent in such activity is more than 10 minutes. *Id.* at 65.

Therefore, to the extent that the award requires the Agency: (1) to compensate current and former unit employees for picking up equipment at the Control Center and walking, including waiting for elevators, from the center to their duty stations as well as returning the equipment to the Control Room; and (2) to compensate all employees who currently report to work and are required to either pick up or drop off such equipment in the Control Room, the Arbitrator's factual findings establish that the award is consistent with Authority precedent and court decisions that have found that picking up equipment at a penitentiary's control center and walking from there to duty stations as well as returning the equipment to the control center are compensable activities. Accordingly, the Agency has not demonstrated that this part of the award is inconsistent with 5 U.S.C. § 254(a) of the FLSA.⁸

⁸ It is noted that the Arbitrator found that the Agency's action in failing to compensate unit employees violated the FLSA and the FEPA. As to FEPA, 5 U.S.C. § 5542(a), the Federal Employees Pay Comparability Act of 1990 (FEPCA) amended Title 5, providing, as relevant here, that federal employees who are covered by the overtime pay provisions of the FLSA are not subject to the overtime pay rates and computations established in 5 U.S.C. § 5542(a), and the Office of Personnel Management (OPM) subsequently promulgated regulations implementing FEPCA. See *International*

Federation of Professional and Technical Engineers, Local 529, 57 FLRA 784, 785 (2002). See also Aaron v. United States, 56 Fed. Cl. 98, 101 (2003). OPM's regulations establish that federal employees who are covered by the overtime provisions of the FLSA are entitled to overtime pay only under that statute. See 5 C.F.R. §§ 532.503(a)(1), 550.101(c). See also United States Dep 't of the Navy, Naval Sea Systems Command, 57 FLRA 543, 546 n. 12 (2001). Accordingly, as the employees herein are covered by the overtime provisions of the FLSA, FEPA does not apply.

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The Arbitrator also found that all other current and past employees, who were not required to go to the Control Room to pick up and/or drop off equipment, are entitled to at least 30 minutes of overtime a day solely for the extra time it took the employee to take an elevator to and from his/her duty post. The Arbitrator found that these employees were "entitled to added compensation for the extra time it takes them to take an elevator to and from their duty posts because the totality of the record establishes that all employees ... on a daily basis must wait for elevators for a total of... 30 minutes going up and down the facility[.]" Award at 71. The Arbitrator stated that the Agency must compensate these employees for arriving so early and for leaving work so late because the "Agency itself has made such significant waiting an integral and essential part of their job by virtue of [its] official policy of pretending that there are no elevator delays and by refusing to properly rectify those delays over the four years the grievance was pending[.]" Id. at 79-80. However, the Arbitrator's factual findings with respect to these employees do not show that they were required to engage in any work during their travel that is an integral and an indispensable part of employees' job duties as correctional personnel.

The Union relies on the Arbitrator's factual findings that this case does not involve commuting but what happens after employees have finished their commuting, and thus argues that the FLSA provides

for compensation for time spent on Agency mandated work (waiting for elevators). However, as the Authority stated in BOP, Terre Haute, Ind., "unless employees are required to engage in principal activities during their travel, their time spent traveling to and from the actual place of performance of their principal activities is non-compensable, even if it is on the employer's premises, and even if it occurs after the employee checks in." Id. at 329. As the Arbitrator's factual findings do not show that these employees were engaged in any work during their travel that is an integral and indispensable part of their job duties as correctional personnel, such travel time is non-compensable under the 29 U.S.C. § 254(a).

Also, the Union's reliance on Alvarez, which concerned whether employees were entitled to compensation under the Act for time spent walking to their work areas after donning protective gear and for time spent waiting to don the gear, does not require a different outcome. In Alvarez, the Supreme Court held that since donning and doffing the protective gear was admittedly integral and indispensable to the employee's principal activity, such donning and doffing was itself a principal activity, and thus walking to and from changing and work areas, post-donning and pre-doffing, was part of the workday for which employees were entitled to compensation. The Court also held, however, that in the absence of any showing that the employees were required to report at a specific time and wait to don the gear, the time spent waiting to don gear was preliminary to the first principal activity of the workday and thus such time was not compensable except by agreement of the parties or the custom and practice in the particular industry. In this case, the Arbitrator's factual findings with respect to these employees do not show that while traveling to their posts of duty they were required to engage in any activity that is an integral part of their job duties as correctional personnel. As such, Alvarez provides no basis for finding that the travel involved with respect to these employees is compensable.

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Accordingly, based on the above, the Agency has demonstrated that this portion of the award is inconsistent with 29 U.S.C. § 254(a). See, e.g., BOP, Terre Haute, Ind, 58 FLRA at 329.

In sum, we find that the portions of the award that order compensation to employees that either pick up and return or pick up or return equipment to the Control Room are not deficient. We further find that, to the extent the award orders compensation of 30 minutes of overtime a day for time spent waiting for an elevator to all current and past employees who were not required to go to the Control Room, we find this portion of the award is inconsistent with 29 U.S.C. § 254(a).

B. The award, in part, is contrary to 5 C.F.R. § 551.412

The Agency claims that the Arbitrator awarded 10 minutes of compensation to employees who picked up and returned equipment and 5 minutes of compensation to those employees who only picked up or returned equipment. The Agency argues that such grants of compensation for "pre- and/or post-shift activity" are de minimis under 5 C.F.R. § 551.412(a)(1) because the time awarded is 10 minutes or less. Exceptions at 7.

Under 5 C.F.R. § 551.412(a)(1), if an agency reasonably determines that a preparatory or concluding activity is closely related to an employee's principal activities and is indispensable to the performance of the principal activities, and that the total time spent in that activity is more than 10 minutes per workday, the agency is authorized to credit all of the time spent in that activity, including the 10 minutes, as hours of work.

The Agency's exception is based on the premise that any time spent by these employees, waiting for the elevators, is not compensable. As noted, supra, this premise is not correct. In this case, the Arbitrator specifically awarded "40 minutes" of overtime for each workday to all employees who picked up and returned equipment to the Control Room and "35

minutes" of overtime for each workday to employees who picked up or returned equipment to the Control Room. Award at 91 and 92 (emphasis added). The award thus orders overtime that exceeds the de minimis test of 10 minutes per workday. Accordingly, the Agency has not demonstrated that this portion of the award is contrary to the requirement of 5 C.F.R. §551.412(a)(1).

The Agency further asserts that the award is contrary to 5 C.F.R. § 551.412(b) to the extent that the Arbitrator awarded compensation based on the parties' agreement. In the award, the Arbitrator stated that "even if. . . payment is not required under any federal law or regulation, payment is independently required under Article 18, Section [a] of the agreement" which provides for an 8-hour work day because employers cannot unreasonably require employees to be at their work sites outside of a contractually-provided work day." Award at 76. The Arbitrator found therefore, that the "Agency . . . has independently violated Article 18, Section a, even if it did not violate federal regulations which involved non-contractual rights." Award at 80. Relying on Dep't of Air Force, the Agency argues that compensation under a collective bargaining agreement is barred by 5 C.F.R. § 551.412(b), which provides:

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

In Dep't of Air Force, the court interpreted 5 U.S.C. § 551.412(b). The court found that § 4(b) of the Portal-to-Portal Act, which recognizes compensability by contract or custom for time that would otherwise be precluded by 29 U.S.C. § 254(a), does not override OPM regulations implementing 29 U.S.C. § 254(a) and prohibiting certain conduct from being treated as hours of work for purpose of compensation. Dep't of Air Force, 952 F.2d at 450-51.

The court noted that, while contrary collective bargaining provisions were recognized as exceptions to the requirements of the Portal-to-Portal Act, Part 551 of the OPM regulations acted to "rule out such bargaining" for federal employees. *Id.* at 451. The court further found that OPM "intended its regulations in Part 551 to be mandatory." *Dep't of the Air Force*, 952 F.2d at 451 (footnote omitted). Thus, based on the court's decision, "a contract provision that requires the Agency to compensate an employee in a manner contrary to Part 551 of OPM's regulations is contrary to a Government-wide rule or regulation, despite any exception created by § 4(b) of the Portal-to-Portal Act." See also *NTEU*, 59 FLRA 119, 122 (2003) (Member Pope dissenting), *sff'd*, *NTEU v. FLRA*, 418 F.3d 1068 (9th Cir. 2005).

In this case, the Arbitrator found that all current and past employees who were not required to go to the Control Room are entitled to at least 30 minutes of overtime a day for the extra time required to take an elevator to and from his/her duty post. The Arbitrator's factual findings concerning these employees do not show that, while traveling to their posts of duty, including waiting for elevators, they were required to engage in any activity that is an integral part of their job duties as correctional personnel. The Arbitrator's factual findings for these employees thus do not show that the activity of waiting for elevators is closely related to the performance of the principal activity and thus, under the OPM regulation, it is a preliminary/postliminary activity.

Under 5 C.F.R. § 551.412(b) preliminary or postliminary activities are excluded from hours of work and are not compensable. Since the Arbitrator's interpretation of Article 18, Section a would permit the subject employees to be compensated for "hours of work" that are excluded from "hours of work" under 5 C.F.R. § 551.412(b), the Arbitrator's award requiring these employees to be compensated under this provision for time spent waiting for an elevator is inconsistent with 5 C.F.R. § 551.412(b). See, e.g., *United States Dep't of Veterans Affairs, Medical Ctr.*,

Huntington, W. Va., 56 FLRA 990, 991 (2000).

Accordingly, we deny the Agency's exceptions to the extent that such exceptions claim that the award of compensation to employees who picked up and/or returned equipment to the Control Room is contrary to the *de minimis* standard under 5 C.F.R. § 551.412(a)(1). To the extent that the Arbitrator relied on Article 18, Section a to award 30 minutes of overtime per work day for time spent waiting for an elevator to all current and

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past employees who were not required to go to the Control Room, we find that this portion of the award is deficient because it is inconsistent with 5 C.F.R. § 551.412(b).9

C. Paragraph G of the award is not contrary to § 7106(a) of the Statute

When resolving an exception which contends that the award is contrary to a management right under § 7106 of the Statute, the Authority first considers whether the award affects the exercise of a management right. See *United States Dep 't of the Navy, Naval Undersea Warfare Ctr., Div. Newport, Newport, R.I.*, 63 FLRA 222, 225 (2009).

In Paragraph G (at 92) of his award, the Arbitrator directed the Agency to grant prospective overtime pay to employees described in Paragraphs E (that is, employees who must pick up and/or drop off equipment in the control room) and F (that is, employees who must wait for elevators even if they do not pick up/drop off equipment) "until the Agency expressly [changes its policy on arrival and departure times]." Specifically, the Arbitrator permitted the Agency to stop paying overtime to these employees when it stopped requiring them to be in the lobby more than five minutes before the start of their shifts and permitted them to leave their work duties at a time that would enable them to be in the lobby no more than five minutes after the end of their shifts. The Agency asserts that this part of the award affects its right to assign work because the five-minute requirement will prevent the Agency from

determining when work assignments will occur. The Agency also claims that the location of employees and when they can begin and end their shifts affect its right to determine its internal security under § 7106(a)(1).

The Authority has held that management's right to assign work under § 7106(a)(2)(B) of the Statute includes the right to determine when work assignments will be performed. See *Int'l Ass'n of Fire Fighters*, 59 FLRA 832, 833-34 (2004) (citing *United States Dep't of Justice, Fed. Bureau of Prisons, Mgmt. and Specialty Training Ctr., Aurora, Colo.*, 56 FLRA 943, 944 (2000)) (BOP). Because the determination of employees' daily work schedules -employees' daily starting and quitting times ~ constitutes a determination of the length of the workday and when during the day assigned work will be performed, it constitutes an exercise of management's right to assign work under § 7106(a)(2)(B). See BOP, 59 FLRA at 833.

The portion of the award in dispute here does not require the Agency to make any changes in employees' starting and quitting times. The award does not prohibit the Agency from ordering involuntary overtime. Under the award, the Agency has the option of either changing its policy (under which employees are considered late if they are not at their work stations at the scheduled start of their shift, regardless of the time spent picking up

9 Chairman Pope notes that, for the reasons in her dissent in *NTEU*, 59 FLRA 119, 124-25 (2005), she would prefer to find enforceable Article 18 of the parties' agreement. However, the majority's position in *NTEU* that such provisions are not enforceable in the Federal sector was upheld by the U.S. Court of Appeals for the Ninth Circuit in *NTEU v. FLRA*, 418 F.3d 1068 (9th Cir. 2005), as well as by the U.S. Court of Appeals for the District of Columbia Circuit in an earlier case reversing the Authority on this point, *United States Dep't of the Air Force v. FLRA*, 952 F.2d 446 (D.C. Cir. 1991). Accordingly, for the purposes of resolving this case without further delay, Chairman Pope agrees that, insofar as the award relies

on Article 18, it is inconsistent with 5 C.F.R. §551.412.(b).

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equipment, or employees are late leaving work because of having to drop off equipment) or continuing to pay overtime as described in the award. Thus, the award would not prevent the Agency from determining when the subject employees should report to or leave work. Rather, the award leaves it to the Agency to make such determination.

As to the Agency's contention that the award affects its right to determine its internal security, it is well established that the right to determine internal security practices under § 7106(a)(1) of the Statute includes the authority to determine the policies and practices that are part of an agency's plan to secure or safeguard its personnel, physical property, or operations against internal or external risks. See, e.g., *NTEU*, 53 FLRA 539, 581 (1997). Where the agency shows a link, or reasonable connection, between its objective of securing or safeguarding its personnel, property, or operations and the policy or practice designed to implement that objective, a proposal that "conflicts with" the policy or practice affects management's right under § 7106(a)(1). See, e.g., *NTEU*, 55 FLRA 1174, 1186 (1999).

In this case, relying on Authority precedent, the Agency asserts that the determination of the practices and policies which are necessary to the accomplishment of the security function of the agency, including the assignment of personnel, is directly related to the determination of an agency's internal security practices, and that the award by "requiring [the Agency] to place employees at certain locations at the start and finish of their shifts" affects its right to determine its internal security. Exceptions at 10. As found above, the portion of the award in dispute here does not require the Agency to make any changes in employees' starting and quitting times nor does the award require the Agency to assign employees to certain locations at the start and end of their shifts. Rather, the award gives the Agency the option of determining whether to continue to pay

overtime to the subject employees. As the award does not require the Agency to make any changes in employees' starting and quitting times and does not require the Agency to assign employees to certain locations at the start and end of their shifts, the Agency has failed to establish that this portion of the award affects its internal security under § 7106(a)(1).

Based on the above, we find that the Agency has failed to establish that the award affects a management right.

V. Decision

The award is deficient to the extent that it provides a remedy to employees for time spent waiting for an elevator. Accordingly, we set aside these portions of the remedy. The Agency's other exceptions are denied.

17 APPENDIX

1. Article 18, Section a provides as follows:

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

Award at 79.

2. Under section 7(a) of the FLSA, 29 U.S.C. § 207(a), employees are entitled to receive overtime compensation for all hours worked in excess of 40 hours in a workweek at a rate of one and one-half times their regular rate.

3. 5 U.S.C. § 5542, provides, in pertinent part, as follows: § 5542. Overtime rates; computation

(a) For full-time, part-time and intermittent tours of

duty, hours of work officially ordered or approved in excess

of 40 hours in an administrative workweek, or ... in excess of 8 hours in a day,

performed by an employee are overtime work and shall be paid for, except

as otherwise provided by this subchapter[.]

4. 29 U.S.C. § 254(a) and (b) provide as follows:

§ 254. Relief from liability and punishment under the Fair Labor Standards Act of 1938,... for failure to pay minimum wage or overtime compensation

(a) Activities not compensable

Except as provided in subsection (b) of this section, no employer shall be subject to any liability or punishment under the [FLSA] ... on account of the failure of such employer to pay an employee minimum wages, or to pay an employee overtime compensation, for or on account of any of the following: activities of such employee engaged in on or after May 14, 1947,

(1) walking, riding, or traveling to and from the actual place of performance of the principal activity or activities which such employee is employed to perform, and

(2) activities which are preliminary to or postliminary to said principal activity or activities,

which occur either prior to the time on any particular workday at which such employee commences, or subsequent to the time on any particular workday at

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which he ceases, such principal activity or activities. For purposes of this subsection, the use of an employer's vehicle for travel by an employee and activities performed by an employee which are incidental to the use of such vehicle for commuting shall not be considered part of the employee's principal activities if the use of such vehicle for travel is within the normal commuting area for the employer's business or establishment and the use of the employer's vehicle is subject to an agreement on the part of the employer and the employee or representative of such employee.

(b) Compensability by contract or custom

Notwithstanding the provisions of subsection (a) of this section which relieve an employer from

liability and punishment with respect to any activity, the employer shall not be so relieved if such activity is compensable by either:

(1) an express provision of a written or nonwritten contract in effect, at the time of such activity, between such employee, his agent, or collective-bargaining representative and his employer; or

(2) a custom or practice in effect, at the time of such activity, at the establishment or other place where such employee is employed, covering such activity, not inconsistent with a written or nonwritten contract, in effect at the time of such activity, between such employee, his agent, or collective-bargaining representative and his employer.

5. 5 C.F.R. § 551.412 provides, in relevant part, as follows: § 551.412 Preparatory or concluding activities.

(a)(1) If an agency reasonably determines that a preparatory or concluding activity is closely related to an employee's principal activities, and is indispensable to the performance of the principal activities, and that the total time spent in that activity is more than 10 minutes per workday, the agency shall credit all of the time spent in that activity, including the 10 minutes, as hours of work.

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