

IN THE MATTER OF ARBITRATION BETWEEN

**Counsel of Prisons Locals (AFL-CIO)
American Federation of Government
Employees Local 801, Waseca, Minnesota**

And

**Opinion and Award
FMCS Case No. 07-53583**

**United States Department of Justice,
Federal Bureau of Prisons, Federal
Correctional Institution, Waseca, Minnesota**

ARBITRATOR

Joseph L. Daly

APPEARANCES

On behalf of AFGE, Local 801
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On behalf of United States Department of Justice,
Federal Bureau of Prisons
William E. Branch, Labor Management Relations Specialist

JURISDICTION

In accordance with the Master Agreement between Federal Bureau of Prisons and Counsel of Prison Locals, American Federation of Government Employees; and under the jurisdiction of the United States Federal Mediation and Conciliation Service, Washington, D.C., the above grievance arbitration was submitted to Joseph L. Daly, Arbitrator, on August 3, August 4, and September 24, 2009, in Waseca, Minnesota. Post Hearing Briefs were filed by the parties on December 18, 2009, and received by the arbitrator on December 23, 2009. The decision was rendered by the arbitrator on February 3, 2010.

ISSUES AT IMPASSE

The Union states the ultimate issue on the merits as: whether the bargaining unit employees at Waseca Federal Correctional Institution were required and/or suffered and permitted to work in excess of the contractually mandated eight (8) hour work day in

performance of activities which are integral and indispensable to their principle work activities? If so, what is the amount of compensation due to these employees as a result of that work? [Post hearing brief of Union at 14].

The Agency states the issue as: did the Agency violate the Fair Labor Standards Act by requiring bargaining unit staff at Federal Correctional Institution Waseca to perform preliminary or postliminary work without compensation? If so, what shall be the remedy? [Post-hearing brief of Agency at 3].

Prior to dealing with the **merits** issue, the Agency also raised **two threshold/jurisdictional issues**. They are:

1. Was the grievance filed timely within 40 calendar days from the date of the alleged grievable occurrence as required by Article 31, Section d. of the Master Agreement? If not, the grievance should be dismissed, if so;
2. Is the grievance defective because the Union's pleading fails to meet the minimum standards of sufficiency in identifying the alleged grievants and the alleged grievable occurrences in the instant grievance? If so, the grievance should be found procedurally defective and denied. [Post-hearing brief of Agency at 3].

The Potentially Relevant Contractual Provisions include:

(1) Master Agreement Article 6 – Rights of the Employee

Section q. The Employer and its employees bear a mutual responsibility to review documents related to pay and allowances in order to detect any overpayments/underpayments as soon as possible.

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

(2) Master Agreement Article 18 – Hours of Work.

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

(3) Article 31 – Grievance Procedure

Section a. The purpose of this article is to provide employees with a fair and expeditious procedure covering all grievances properly grievable under 5 USC 7121.

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.

The Potentially Relevant Agency Policies include:

(1) Federal Bureau of Prisons Human Resource Management Manual Section 610.1 – Institutional Shift Starting and Stopping Times

1. PURPOSE AND SCOPE. To establish basic parameters for the shift starting and stopping times for the 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 to their assigned duty post and return (at the end of the shift). If an employee arrives at the key line in a reasonable time to get equipment by the beginning of the shift, this employee is not to be considered late.

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

The Potentially Relevant Statutory Provision includes:

1. 29 USC 207(a)(1) which in essence states the Fair Labor Standards Act requires an employer to compensate its employees at one and one-half times their regular rate of pay for all hours worked in excess of forty hours per work week.

Potentially Relevant Regulations include:

1. Office of Personnel Management (OPM) [The Federal Agency charged with administering the Fair Labor Standards Act in the Federal Sector provides at 5 C.F.R. §551.401(a): All time spent by an employee performing an activity for the benefit of an agency and under the control or the direction of the Agency is ‘hours of work.’ Such time includes:

- (1) time during which an employee is required to be on duty;
- (2) time during which an employee is suffered or permitted to work; and
- (3) waiting time or idle time which is under the control of an agency and which is for the benefit of an agency.

“Suffered or permitted to work” is defined as: any work performed by an employee for the benefit of an agency, whether requested or not, provided the employee’s supervisor knows or has reason to believe that the work is being performed and has an opportunity to prevent that work from being performed.” 5 C.F.R. §551.104

§551.402 – Agency Responsibility

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

2. Department of Labor Regulations §785.13 Duty of Management

In all such cases it is the duty of the management to exercise its control and see that the work is not performed if it does not want it to be performed. It cannot sit back and accept the benefits without compensating for them. The mere promulgation of a rule against such work is not enough. Management has the power to enforce the rule and must make every effort to do so. 29 C.F.R. §785.13

FINDINGS OF FACT

1. On August 10, 2002, as a result of a national grievance against the Federal Bureau of Prisons, the Union and the Agency entered into a settlement agreement which specifically addressed what is commonly known as the “portal-to-portal” issue, i.e., the performance of pre and post shift activities by employees and the necessity of compensation for such activities. The settlement agreement addressed only a handful of institutions. Therefore, the agreement specifically permitted employees from other institutions to pursue claims on portal-to-portal issues if the specific institution in question had not instituted the proper changes to eliminate the portal issues.

2. Former Warden at the United States Department of Justice Federal Bureau of Prisons, Federal Correctional Institution Waseca, Minnesota, Carol Holinka, testified that management officials had never actually implemented such a plan at the Waseca prison. The only plan implemented at Waseca was done in November of 1995, prior to the completion of the institution. The memorandum submitted by the Warden at that time states: “Due to unfinished construction and remodeling, our situation is unique. Currently, the only position at the institution, which would be affected by the new procedures, would be the cadre dorm officer. However, we are aware that additional changes will need to be made once buildings are completed, new work-sites are established, and new posts developed.”

3. The language of the national settlement agreement was eventually incorporated into section 6.1.10 of the Agency’s Human Resources Manual the purpose of which was 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.” Section 610.1 further states:

Therefore, employees who pick-up equipment at the control center, shall have their shift scheduled to include reasonable time to travel from the control center to their assigned duty post and return (at the end of the shift).

Section 610.1 further provides suggestions as to how the various institutions should implement the necessary changes to comply with the mandates of the section:

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.

3. The grievance, which led to the national settlement agreement, was based, at least in part, on federal laws setting out acceptable hours of work. Specifically, the Fair Labor Standards Act, 29 U.S.C. §§201 et. seq. was passed by Congress to ensure that all employees engaged in work covered by the FLSA were properly compensated. Subsequently, in the *Portal-to-Portal Act*, Congress amended the FLSA to distinguish between “principal” activities and “preliminary” or “postliminary” activities. 29 U.S.C. §254. The Courts, which have interpreted the FLSA in the *Portal-to-Portal Act* in the following years, have held that a “principal activity” is one which is “an integral and indispensable part of the principal activities for which covered workmen are employed.” *Stiner v. Mitchell*, 350 U.S. 247, 256 (1956). In determining which activities are integral and indispensable, “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 ordinary course of that business.” *Dunlop v. Electric, Inc.*, 527 F.2d 394, 401 (5th Cir. 1976).

4. Article 31, Section d. of the Master Agreement requires that grievances must be filed within forty calendar days of the date of the alleged grievable occurrence. The section goes on the state “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. of article 31 states the arbitrator will decide timeliness if raised as a threshold issue.

A formal grievance was filed by Union President, William Joenks, Jr., dated December 20, 2006, alleging in applicable part:

F.L.S.A. (Fair Labor Standards Act), 29 U.S.C., F.E.P.A. (Federal Employees Pay Act of 1945), as amended, 5 United States Code section 5542 and 29 U.S.C.

section 201 which defines the meaning of pre/post shift activity as work for which employee's are entitled to compensation, as well as any and all other pay acts; Program Statement 3000.02 and Operations Memorandum 214-95. The Master Agreement, including Article 18-Hours of work, Section a., Back Pay Act.

Specifically, Mr. Joenks alleged "formal grievance-portal to portal attachment #1". Attachment #1 reads in full:

Section #6. In What way were each of the above violated? Be specific.

Management officials of the Federal Correctional Institution (FCI), Waseca, MN violated the above cited pay acts by requiring bargaining unit employees (past, present and future) to perform work in excess of the established forty (40) hour work week. Bargaining unit employees depending on their work discipline for which each employee is employed were required to perform between 15 to 30 minutes of unpaid work for the following without being properly compensated for such work in accordance with the above cited pay acts:

1. Pick up keys and equipment form the Control Center, and exchange chits for such keys and equipment. This frequently required bargaining unit employees to stand in line for unreasonably long periods of time. It has been the agency's expectations of their employees that are required to pick up equipment, that you arrive early, giving yourself enough time to get to the control center to have all your keys and equipment. In the Agency's own policy statement they instruct employees to do the impossible considering the amount of employees in the key line and the doors that the employee must first get through to get to the control center which stay locked until opened by the control center, that sometimes takes several minutes. The policy state "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 am". Employees to accomplish this have been coming to work early to get into key line and to get through the doors controlled by the Agency so they may receive their keys/equipment as instructed by policy. The Agency contends that waiting in key line is not compensate able, however, the Union believes that waiting in key line is an integral part of the performance of duties and therefore the employees should be compensated for this time.
2. Report to the Lieutenant's office to 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, (annual and sick leave forms, performance evaluations, significant incident logs, etc.), on some shifts and post pick up mail bags and sort mail to be passed out immediately after count, and other duties as required.
3. Travel to their assigned duty post. Discuss all pertinent information passed on by the staff member they are relieving. Inventory all equipment prior to reliving

[sic] staff member. Test equipment for serviceability. Review log book entries. Review daily memorandum clip board. Discuss base count.

4. When employees relief arrives at their assigned duty post, the employee will pass on all pertinent information to the staff member they are being relieved by. Wait for relief to inventory all equipment prior to being relived [sic]. Wait for relief to test equipment for serviceability. Wait for relief to review daily memorandum clip board, and answer any questions. Discuss base count with the relief. Travel from their assigned duty post.

5. Return 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.

As well in those departments that require relief, the rosters do not overlap, thus causing the employees to work over their 8 hour schedule without compensation form the employer. For example when the morning watch officer comes on duty his starting time is 12:00am and the evening watch officer's quitting time is also 12:00am, this clearly does not allow the appropriate time to exchange equipment and information without both officers working off duty, without compensation.

Management officials of FCI Waseca have ignored and not complied with Operations Memorandum 214-95, dated November 1, 1995 (Attachment #2), which required all Bureau of Prisons (BOP) institutions to establish basic parameters for shift starting and stopping times for employees working in BOP institutions, and the procedures to initiate practices at all BOP institutions which incorporate these parameters. Institution Wardens were required to ensure that approved plan were incorporated into action, which met the specific 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 Waseca. Therefore, FCI Waseca is not in compliance with section 610.1 of program Statement 3000.02, Human Resource Management Manual.

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 the same portal to portal (pre-shift and post-shift) issues raised in this formal grievance, and covered the period May 17, 1989 thru January 1, 1996. In the settlement agreement, and the parties agreed that certain institutions may not have implemented changes to comply with section 610.1 of the Human Resource Manual, Institution Shift Starting and Stopping Times. The parties further acknowledged that if changes were not made to comply with Section 610.1 of the Human Resource Manual, negotiations would take place to negotiate any 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 changed as

noted above have not been made at FCI Waseca, and therefore bargaining unit employees are due payment.

Officials of the American Federation of Government Employees (AFGE) Local 801, 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 Waseca. 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's [sic] at FCI Waseca did not comply with this section, and never submitted any plan to the Regional Director as required. 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 BOP and the Union, bargaining unit employees are due payment for the same violations committed between January 1, 1996 and the present date. Further, the provisions of the Portal to Portal Agreement did not fully address all of the violations and issues raised in this grievance. All bargaining unit employees of FCI Waseca continue to perform work as cited in this grievance, without receiving compensation for such work. Therefore, the violations cited in this grievance have and do continue, making this a continuing violation.

In addition, management officials of FCI Waseca have not complied with section 7 of the settlement agreement reached between the BOP and the Union, which states that negotiations will take place to negotiate any payment due bargaining unit members for the period between 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 negotiations to negotiate payment due bargaining unit members have not taken place as of the present date.

In conclusion, local management at FCI Waseca realized their failure to follow Operations Memorandum 214-95, so they draft an institutional supplement called "Institutional Shift Starting and Stopping Times (Portal to Portal) and have issued it to the union to negotiate this supplement.

IF THERE IS ANY QUESTION ABOUT ANYTHING IN THIS GRIEVANCE, PLEASE CONTACT THE LOCAL PRESIDENT OR COUNCIL 33 ATTORNEY FOR CLARIFICATION [Joint exhibit #2].

5. In response to Union President William Joenks' formal grievance, then-Warden Carol Holinka stated:

This is in response to a formal grievance received on December 20, 2006, which alleged management officials of the Federal Correctional Institution, Waseca, Minnesota (FCI Waseca) have violated the Fair Labor Standards Act, 29 United States Code (USC), the Federal Employees Pay Act, as amended, 5 USC 5542, 29 USC 201, which defines the meaning of pre and post shift activity as work for which employees are entitled to compensation, as well as any and all other pay acts, Program Statement (PS) 3000.02, Operations Memorandum (OM) 214-95, and Article 18, section a. of the Master Agreement. Local 801 further alleges, management is requiring bargaining unit employees to perform work in excess of the established 40 hour work week.

Local 801 alleges 15 to 30 minutes of unpaid work was not properly compensated, depending upon the bargaining unit employee's work discipline for the following activities, which I have briefly described.

1. Pick up keys and equipment from the Control Center and exchange chits for keys and equipment.
2. Report to the Lieutenant's Office to 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 (annual and sick leave forms, performance evaluations, significant incident logs, etc.), on some shifts and posts pick up mail bags and sort mail to be passed out immediately after count, and other duties as required.
3. Travel to their assigned duty post. Discuss all pertinent information passed on by the staff member they are relieving. Inventory all equipment prior to reliving [sic] staff member. Test equipment for serviceability. Review log book entries. Review daily memorandum clip board. Discuss base count.
4. When employees relief arrives at their assigned duty post, the employee will pass on all pertinent information to the staff member they are being relieved by. Wait for relief to inventory all equipment prior to being relived [sic]. Wait for relief to test equipment for serviceability. Wait for relief to review daily memorandum clip board, and answer any questions. Discuss base count with the relief. Travel from their assigned duty post.
5. Return 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.

Block 5 of your grievance is lacking specificity regarding the various directives, acts, laws and memorandum you cite. The agency is not charged with the responsibility of going through the Federal Labor Standards Act, 29 USC, the Federal Employees Pay Act, Program Statement 3000.02, and the Back Pay Act to try to figure out what parts of these documents are applicable to your claim. It

is your responsibility, as the grieving party, to point out clearly and precisely what portions of these documents the Agency violated. Therefore your grievance is procedurally rejected.

In addition, your grievance is rejected for lack of specificity in block 6 of the grievance form. Although you claim that bargaining unit staff have not been compensated for work performed and outline five incidents, you have failed to provide any specifics regarding the date of each alleged incident and the name(s) of the employee(s) claiming compensation for that date and incident. You allege Management violated employee rights by stating “bargaining unit employees (past, present and future) to work in excess of the established forty (40) hour work week”. The [sic] is a broad and unspecific claim. You further state “Bargaining unit employees depending on their work discipline for which each employee is employed...” which is non specific, confusing, and fails to provide the Agency with enough information to research the alleged harm done to staff. It is your responsibility, as the grieving party, to point out clearly and precisely what is being claimed so that Management can properly research and resolve any specific claims of harm done to staff. Your overly board [sic] claim fails to give Management an opportunity to accomplish what a grievance process is designed to do.

Your grievance is also rejected for untimeliness. In block 7 of the grievance form, you state the date of violation as January 1, 1996 to present (This is an ongoing violation), however you filed it on December 20, 2006. The Master Agreement, Article 31, Section d., states, “Grievances must be filed within forty (40) calendar days of the date of the alleged grievable occurrence.” It is not prudent nor sound labor relations to make an alleged claim as you have done here, after ten years.

As to the merits of your claim, Local 801 states in support of its claim for compensation that rosters do not overlap in the departments requiring relief which allegedly does not allow appropriate time to exchange equipment and information without both officers working off duty.

Program Statement 3000.02, Chapter 6, section 610, Institution Shift Starting and Stopping Times, states each institution will have approved work schedules to begin and end at the point employees pick-up and drop-off equipment (keys, radios, body alarms, work detail pouches, etc.). Equipment exchange occurs in one of two locations, Control Center for posts without 24 hour issue equipment or at the location of the post when 24 hour issue equipment exists. For employees exchanging/receiving equipment at the control center, they are given reasonable travel time from the control center to their assigned posts, and return at the end of their shift. For employees exchanging equipment on post, they are to report to their post at the designated time.

Your grievance stipulates several tasks employees are required to accomplish, these tasks are accomplished on duty time.

FCI Waseca management have taken steps to comply with P.S. 3000.02, Section 610.1. The institution permanently located the equipment required for the 24 hour custodial posts at the work site. Several compressed work schedules were negotiated and approved.

Further, in December 2005, management and the union met to negotiate an institution supplement on Shift Starting and Stopping Times. After a couple of days Local 801 asked to remain in caucus until they could discuss the negotiation with the Council President and North Central Region Vice President which should take about two weeks. Eight months and several conversations later, management was still waiting for a final response from Local 801. In August 2006, management requested to reschedule the negotiations. To date, Local 801 has been an unwilling participant.

Local 801 states in support of its claim that management did not comply with OM 214-95 dated November 1, 1995.

In a memorandum dated December 18, 2006, Local 801 was advised the institution did review O.M. 214-95 with the AFGE Local #801 Union Officers. A plan was developed and submitted to the Regional Director on November 16, 1995.

Local 801 states in support of its claim that management has not complied with section 7 of the portal to portal Settlement Agreement as management had not negotiated any payment due bargaining unit employees for the period January 1, 1996 until the implementation of the pre and post procedures to comply with Section 610.1 of the Human Resources Manual.

In memorandum dated December 18, 2006, Local 801 was advised FCI Waseca bargaining unit members are not due payment under paragraph 7 of the 2000 Settlement Agreement between the Federal Bureau of Prisons and the Council of Prison Locals, AFGE. That provision specifically required only USP Marion, USP Leavenworth, FCI Milan, FCC Coleman, and Florence ADX to negotiate any payment due bargaining unit members for the period between 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, in the event that changes were not made to comply with section 610.1. Further more, FCI Waseca was not part of the May 1989 grievance which led to the Settlement Agreement, and was not fully activated until June 1996.

Therefore, your grievance is procedurally rejected, and also denied for lack of merit.

6. At the arbitration hearing, the Union presented a number of witnesses all of whom are currently employed as Correctional Officers at Waseca. The witnesses detailed their pre and post-shift duties, which they believed are integral and indispensable to the principal activities of their jobs. The testimony from all the witnesses both Union and Agency witnesses were in agreement that officers assigned to work a housing unit are expected to be at that post at the start of their shift time, i.e., either 12 a.m. for morning watch, 8 a.m. for day watch or 4 p.m. for evening watch. The Union presented testimony of seven witnesses, all of whom are currently employed at Waseca and all of whom have worked as Correctional Officers in the housing units at Waseca. The Agency presented the testimony of three lieutenants, a captain, a former Associate Warden and a former Warden. Of the witnesses presented by the Agency, one has worked as a Correctional Officer at Waseca and he worked for seven or eight months in 1998 prior to being promoted to management. Examples of testimony included Officer Rodney Hill, presently employed as a Correctional Officer at Waseca for approximately 15 years. He provided a summary of the pre-shift activities in which a Correctional Officer must engage prior to actually assuming his post and beginning work as the Housing Unit Officer. Officer Hill stated that prior to assuming duties at the housing unit an officer must:

Get to the control center and pick up a battery for the body alarm, enter the institution when Control would open the grill, report to the Lieutenants office to check our mailbox for any information that was put in there and, also, to let the Lieutenant know we were on site. I would go to the Unit Alpha [housing unit] if that's where I was assigned, meet with the unit officer. We would exchange keys and do an inventory of the items specific to the unit like flashlight and handcuffs. And the officer would pass on any pertinent information from the night before. Then we would get to the phone and call control unit and verify the number of inmates assigned to the unit, verify the unit base. And the Control Center would ask us to test our body alarm at that time. And once that was completed satisfactory then the off going officer would leave and I would assume the unit.

Officer Hill testified that the above process took, on a daily basis "safely, 15 minutes" that he would arrive at the institution 15-20 minutes early in order to complete all the activities.

Officer Michael Whaley, employed since 1999, testified the first thing he would do upon arriving at work was to pick up a battery at the Control Center. He would then go to the Lieutenant's office to check in and check his mail box to "see if I had any shift changes or – anything that may apply for the next day or the next week." Officer Whaley also testified that he

would then go to the housing unit, perform a check of all his equipment and receive any pertinent information from the outgoing officer.

Once you get to the housing unit you're gonna-they're gonna tell you your base count, you're gonna check all your equipment like keys, your flashlight, radio holder—everything that's accounted for. Then you're going to test your body alarm and make sure your count is correct with Control. Then they're gonna pass on any kind of pertinent information they may have that may be ongoing on the shift.

Officer Whaley testified that the process inside the housing unit alone, not counting the time it takes to obtain a battery, check with the Lieutenant, check the mailbox and walk to the unit, takes 5-7 minutes. Officer Whaley confirmed the testimony of other officers that the totality of activities required of officers prior to assuming their posts at the housing units takes approximately 15 minutes to perform. Other officers such as Wendy Buffington, Carl Underwood, Michelle Conley, Chris Campbell and William Joenks confirmed that every officer working a housing unit was arriving at the institution 15 minutes early in order to perform the pre-shift activities.

7. The witnesses for the Agency essentially testified that the officers did not need to obtain a fresh battery from the Control Center when they arrived at work. The Agency introduced testimony that battery chargers were installed in the housing units in July 2005. None of the officers who testified on behalf of the Union recalled this. All of the officers testified that the battery chargers were not installed in the housing units after the grievance of December 20, 2006 was filed.

Each of the officers testified as to the accountability of their equipment. Officer Whaley testified that both the outgoing officer and the incoming officer are required to be present to inventory the equipment to make sure it is all there and is in working order. Several of the officers testified that they could be disciplined if they did not perform a proper inventory of the equipment with the outgoing officer and a piece of equipment was later discovered to be missing or broken. Captain Swartz and Associate Warden Dubbs, both witnesses for the Agency, testified that if a piece of equipment was discovered to be missing or broken during an officer's shift, there would be an investigation and it might be possible that an officer could be disciplined. Lieutenant Kimball, another witness for the Agency, testified that if a piece of equipment turned up missing or broken during a shift, there "would be a problem" with

determining which officer would be held accountable if the inventory was not done properly and signed off by both officers.

A number of officers testified that they were specifically instructed by several lieutenants that they were required to personally check in with the lieutenants prior to proceeding to the housing units to which they were assigned. Officers Buffington, Underwood, Conley and Whaley each testified that at least three lieutenants specifically instructed them to personally check in when coming on a shift.

Several witnesses called by the agency denied there ever was a requirement that officers personally check in with lieutenants prior to going on shift. However the Agency issued a memorandum to all staff in 2007, which, among other things, instructed officers to go straight to their posts instead of personally checking in with lieutenants. See Union exhibit #10.

All the officers testified that if they don't check their mailboxes prior to going to the original assigned housing unit there is a possibility they may, in fact, report to the wrong post due to a sudden reassignment and delay the shift exchange.

8. The position of the Union is that the Federal Bureau of Prisons, Waseca, Minnesota, has failed to comply with the Master Agreement, its own Human Resources Manual and federal law. Further, the Union alleges that the Agency has committed these violations knowingly and willfully. As a result the Union is requesting that the arbitrator award all affected collective bargaining members the appropriate compensation for a period 3 years preceding the filing of the grievance, plus all interest allowed by law, attorneys' fees, expenses, and any further relief to which the arbitrator deems the Union to be entitled. Further it is the position of the Union that the violations covered by the grievants in this case are ongoing and continuous and have been for at least 3 years prior to the filing of a grievance. The grievance itself states that it addresses an ongoing violation. In other words, the alleged contract violations are continuous. The Union position is that the Agency was engaged in repeated violations through the date on which the grievance was filed in December of 2006. As a result, contends the Union, even if the violations were occurring for years prior to the actual grievance, as long as the last violation occurred within forty days of the filing of the grievance, it is timely.

It is also the position of the Union that the Agency has been more than sufficiently aware of the circumstances surrounding this portal-to-portal grievance. The Union position is that the Agency is attempting to avoid liability for its FLSA violation by attempting to impose a

contractual “specificity” burden on the Union that does not exist. The Union argues that the Master Agreement does not contain a “specificity” requirement. The Agency was sufficiently on notice, says the Union, to respond to the grievance and to defend itself. It was on notice from the national settlement agreement, prior management knowledge, and the grievance itself. In this specific case at Waseca, it was not possible to list each post and each employee or to list each specific date on which each violation occurred when the grievance was filed on December 20, 2006. But the grievance was sufficiently descriptive of the situation to give fair notice to the Agency that the Union was alleging a breach of contract and specific federal laws.

9. It is the position of the Agency with regard to the threshold issues: 1) the grievance was not filed in a timely manner within forty days from the dated of the alleged grievable occurrence and 2) the grievance was defective because it failed to meet the minimum standards of sufficiency in identifying the alleged grievants and the alleged grievable occurrences. Further the Agency argues that on the merits the general housing unit portal is at his post and not at Central Control. The Agency’s position is that there was no requirement for officers to pick up batteries or equipment at the Control Center; the battery chargers are, in fact, in the housing units; there was no requirement to report to a lieutenant’s office prior to the start of the shift; that prior to the installation of battery chargers in the housing unit, the compound officer would provide replacement batteries to the housing unit officers by delivering a replacement battery; and that during shift changes, the oncoming officer reports to the housing unit to take over the unit from the officer on duty. The officer on duty turns over the equipment and responsibilities to the oncoming officer and the outgoing officer’s job duties are over. This takes only a few moments and is incidental (*de minimus*); log books are maintained in each housing unit and are the official records to document events that occur in the unit; the travel time to the units are simply two and a half to three minutes. The Agency’s position is that it is clear from the evidence and testimony provided that the Agency has not required general housing unit officers at Federal Correctional Institution Waseca, Minnesota to perform any “preliminary” or “postliminary” duties [See, 29 U.S.C. §254] without compensation. There was no requirement for staff to pick up batteries at the Control Center. There was no requirement for housing unit officers to pick up and drop off equipment or paperwork at the control center. There was no requirement for housing unit officers to go to the lieutenant’s office to check in prior to the start of their shift. Consequently, the Agency has not violated the FLSA or the Master Agreement.

The Agency further contends that if the arbitrator finds that the Agency was in violation of the FLSA, regarding general housing unit officers, the dates of liability must be limited to December 20, 2004 until July 10, 2005 based upon the testimony of the Union's own witnesses.

DECISION AND RATIONALE

Threshold Issues

A. Was the grievance timely filed within forty (40) calendar days?

The burden is on the Agency to establish that the Union failed to file the grievance within a timely manner. It is well established in labor arbitration that the party who raises an affirmative defense of "arbitrability" has the burden of proof to establish that contention by a preponderance of the evidence. Elkouri and Elkouri, *How Arbitration Works 5th Edition* at 277, n. 302 (1997). "[A] general presumption exists that favors arbitration over dismissal of grievances on technical grounds." *Id.* at 38. The grievance itself [Joint exhibit #2] states "management officials of the Federal Correctional Institution (FCI) Waseca, MN violated the above cited pay acts by requiring bargaining unit employees (past, present and future) to perform in excess of the established forty (40) hour per week." The Union alleged violations covered by the grievance of December 20, 2006, were ongoing and continuous and have been so for at least three years prior to the filing of the grievance. The grievance itself states that it address an ongoing violation. The Union alleges that the Agency was engaging in repeated violations through the date on which the grievance was filed in December of 2006. Pursuant to the "doctrine of continuing violation", the Union can count the last time the Agency violated the Master Agreement in calculating the time it had to file the grievance. In a case where the "original violation occurred outside the statute of limitations [forty days], but is closely related to other violations that are not time-barred...recovery may be had for all violations, on the theory that they are part of one continuing violation." *Hendrix v. Yazoo City*, 911 F.2d 1102, 1103 (5th Cir. 1990). Arbitrator Tamoush in *Department of Justice and AFGE Local 3584*, 109 LRP 4789 (2008) stated, "[t]he grievance is timely, since the issue being raised, that overtime not being assigned or paid has been a continuing one." As a result, even if the violations were occurring for three years prior to the actual grievance, as long as the last violation occurred within forty days of filing of the

grievance, it is timely. Therefore the grievance was timely filed in accordance with Article 31-Grievance Procedures Section d. of the Master Agreement.

B. Did the grievance lack specificity?

The parties' Master Agreement contains no "specificity" requirement. Rather, Article 31, Section f. requires the Union to utilize the official grievance form when filing grievances. The grievance form states in Box 6 "Be specific." There is no guidance or instruction regarding what "specific" information must be provided, or in what detail, to satisfy the "Be specific" statement. President William Joenks in a two page, small type explanation described as best he could at the time of filing the grievance what he understood to be the violations. "It is not necessary for the grievance to include the entirety of the Union's case, but only that it suffices to notify the Agency of the allegations against them with enough specificity to enable the Agency to provide a reasonably informed response." *FCIL Reno and AFGE Local 171*, FMCS # 01-11034 at 6 (April 16, 2002); "A grievance that, on its face, provides sufficient information for the employer to respond is sufficient." See *USP Atwater*, FMCS # 05-57849 at 8. The agency was sufficiently on notice to respond to the grievance and to defend itself. This is not a grievance that suddenly surprised the Agency. The Agency was certainly on notice from the national settlement and prior management knowledge that the "portal-to-portal" issue was in contention and still needed to be resolved in various facilities around the country. The President of the Union filed a group grievance. It was not possible on December 20, 2006 for him at the time of filing the grievance to list each post and each employee or to list the specific dates on which each violation occurred for the 3 previous years. It is permissible for the Union to file group/class grievances. Consequently, the grievance is specific enough to give fair notice to the Agency of the facts and the alleged contractual and statutory violations. Therefore the grievance will not be dismissed for "lack of specificity".

Merits

C. Did the Agency violate the Master Agreement and the law?

The Union presented testimony of seven witnesses, all of whom are currently employed at Waseca and all of whom have worked as correctional officers in the housing units at Waseca. The Agency presented the testimony of three lieutenants, a captain, the former associate warden and the former warden. Of these witnesses one has worked as a correctional officer at Waseca.

Each of the Union witnesses testified that it took 15 minutes-sometimes a few minutes longer- to complete all of the “preliminary” activities required by the Agency before they arrived at their assigned post. A number of the officers further testified that at least three lieutenants required them to personally check in with the lieutenants prior to proceeding to the housing units to which they were assigned. The Agency witnesses deny this requirement. Yet the Agency issued a memorandum to all staff in 2007 which instructed officers to go straight to their posts instead of personally checking in with the lieutenants. [See Union exhibit #10]. Based on the testimony of the respective witnesses it is held that on average each housing unit officer was required to do 15 minutes of preliminary and essential activities prior to arriving at their assigned housing units.

The FLSA requires that an employer compensate its employees at one and one-half times the regular rate of pay for all hours worked in excess of forty per week. The Federal Agency must compensate its employees for all work that is “suffered or permitted” per the Office of Personnel Management. 5 C.F.R. §551.401(a). See also 29 U.S.C. §203(g). “Suffered or permitted” to work is defined as

Any work performed by an employee for the benefit of an agency, whether requested or not, provided the employee’s supervisor knows or has reason to believe that the work is being performed and has an opportunity to prevent that work from being performed. 5 C.F.R. §551.401(a).

An employer “suffers or permits” its employees to work when it has actual or constructive knowledge of the work performed. As a matter of fact in this case, it is held that the employer knew or had reason to believe that work was being performed before the officers arrived at the assigned housing unit to which they were posted. If the employer did not desire that the work be done, the employer had to make every effort to prevent its performance. See *Chaov Gothum Registry, Inc.*, 514 F. 3d 280 (2d Cir. 2008). The law does not allow employers to enjoy the fruits of an employee’s labor without paying overtime by placing the burden on the employees to claim it. An employer cannot claim as a defense to a claim for overtime pay that the employee never asked to be compensated for the work performed. Instead, it is the duty of management to exercise control to see that the work is not performed if the employer does not want to pay for it. 29 C.F.R. §785.11 (“Work not requested, but suffered or permitted is work time.”).

Employees are entitled to compensation from the moment they perform the first integral and indispensable activity until they perform the last activity that is integral and indispensable

within the performance of their jobs. In this case, the activities required at the Control Center, reporting to the lieutenant's office, checking mailboxes, checking batteries, and walking to assigned posts are all principal activities of the workday and cannot be excluded from FLSA coverage. The walking and the preliminary activities are compensable as long as they occur after the workday has begun and before it has ended. All of the above activities are "integral and indispensable" activities for the job of being a housing unit correctional officer at Waseca, Minnesota. They constitute work. In this case, it is held that the Agency knew or should have known that these activities were being performed. The activities were controlled and required by the employer. Such work is compensable. Numerous arbitrators have determined that the exact work at issue in this case is compensable at other Bureau institutions. See, e.g. AFGE Local 391 and FCI Jesup, FMCS # 94-07225 at 131-32 (July 14, 2006) ("The pickup of a freshly charged battery at the start of a shift is a pre-shift activity that is indispensable to the performance of the principal work activity...[and] is compensable as is the post-requisite travel to the duty post.")

With regard to "postliminary" duties, the Union did not carry its burden of proof by a preponderance of evidence to show that the Master Agreement was violated or that the Agency "suffered or permitted" the "postliminary" work to be performed. Essentially, all that was shown at the arbitration hearing was that once the oncoming employee reached the work station he simply received the equipment from the outgoing employee - which often took less than a minute or two. It is "de minimus". Therefore, the outgoing employee has not worked overtime nor has the employer "suffered or permitted" the outgoing employee to work. It is held that with respect to the outgoing employee the Union has not shown by a preponderance of evidence that any outgoing employee has been required to work "postliminary" overtime.

The Union has fulfilled its burden of proof and shown by a preponderance of the evidence that the Master Agreement, Agency policy and Federal law have been violated with respect to incoming employees. Based on the facts presented in this matter, as well as governing law and regulations, and numerous arbitration decisions addressing these exact issues, it awarded that the Agency pay 15 minutes per day to each affected employee for the three years proceeding the date of the grievance. It is further held that the award includes interest allowed by law and attorney's fees expended by the Union during this arbitration hearing. Because the parties have agreed to arbitration as the mechanism to resolve disputes the costs of the arbitration proceedings

will be born equally by the Union and by the Agency. The arbitrator will retain jurisdiction over this matter until such time as the Agency is in compliance with the arbitrator's award.

February 3, 2010
Date

Joseph L. Daly
Arbitrator