BEFORE
MARGO R. NEWMAN
ARBITRATOR

In the Matter of the Arbitration Between	)	
	)	
FEDERAL BUREAU OF PRISONS,	)	
FCI Otisville, New York	)	
Employer	)	Portal-to-Portal Grievance
	)	
and	)	
	)	FMCS Case #10-04502-8
AMERICAN FEDERATION OF	)	
GOVERNMENT EMPLOYEES, Local 3860	)	
Union	)	
	)	

DECISION AND AWARD OF ARBITRATOR

This matter was heard in Otisville, New York on January 10, 11, 12 and 24, 2012, before the undersigned arbitrator selected by the parties through the procedures of the Federal Mediation and Conciliation Service.

Representing the Federal Bureau of Prisons, FCI Otisville, NY, hereinafter called the Agency, Employer or BOP, was John LeMaster, Assistant General Counsel, U.S. Department of Justice, Bureau of Prisons. Also present for the Employer was Linda Whinnery, Assistant Human Resources Manager.

Representing the American Federation of Government Employees, Local 3860, hereinafter called the Union, were Molly Elkin and Reid Coploff of Woodley & McGillivary. Also present for the Union were Don Drewett, President, Anthony Guerrera, Treasurer, Ralph De Meo, Secretary, and Victor Gil, Steward.

At the hearing the parties were afforded the opportunity to examine and cross-examine witnesses, to present documentary and other evidence, and to argue their respective positions. A written transcript was taken. Post-hearing briefs were filed, the last of which was received by the arbitrator on June 22, 2012. The parties stipulated that the matter was properly before the arbitrator for resolution.

I. THE ISSUE

The parties stipulated to the following issue:

> Did the Bureau of Prisons, FCI Otisville, suffer or permit bargaining unit employees to perform work before and/or after their scheduled shifts without compensation in violation of the Fair Labor Standards Act and the parties' Master Agreement, and, if so, what is the appropriate remedy?

II. RELEVANT PROVISIONS

The following provisions of the Master Agreement between the Federal Bureau of Prison and Council of Prison Locals, AFGE (the Agreement), Fair Labor Standards Act[1] (FLSA), Portal-to-Portal Act[2] (Portal Act), Office of Personnel Management (OPM) Regulations,[3] Department of Labor (DOL) Regulations,[4] and DOL Wage and Hour Division (WHD) Advisory Memo No. 2006-2[5] were cited by the parties as having application to the issue in this case.

MASTER AGREEMENT

ARTICLE 3 - GOVERNING REGULATIONS

> Section b. In the administration of all matters covered by this Agreement, Agency officials, Union officials, and employees are governed by existing and/or future

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1 29 U.S.C. §201 *et seq.*

2 29 U.S.C. §254.

3 5 C.F.R. §551 *et seq.* - Pay Administration Under the FLSA.

4 29 C.F.R. §785 - Hours Worked, and §790 - Effect of Portal-to-Portal Act on FLSA.

5 The subject of this Advisory memo is the state of the law after the Supreme Court's decision in *IBP v. Alvarez*, 126 S.Ct. 514 (2005).

laws, rules, and government-wide regulations in existence at the time this Agreement goes into effect.

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.

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

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.

FAIR LABOR STANDARDS ACT

§207. Maximum hours

(a) (1) ..... no employer shall employ any of his employees[6] ... for a workweek longer than forty hours unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

§216. Penalties

(b) Damages; right of action; attorney's fees and costs' termination of right of action. Any employer who violates the provisions of section 6 or 7 of this Act [29 USCS §206 or 207] shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and an additional equal amount as liquidated damages. ..... The court in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action.....

PORTAL-TO-PORTAL ACT

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

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6 There is no dispute that the FLSA applies to federal employees. See, 29 U.S.C §203(e)(2).

(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 ..... 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 which he ceases, such principal activity or activities.....

§255. Statute of limitations

Any action commenced on or after the date of the enactment of this Act... to enforce any cause of action for unpaid .... overtime compensation, or liquidated damages, under the Fair Labor Standards Act of 1938 ....

(a) if the cause of action accrues on or after the date of the enactment of this Act [enacted May 14, 1947]--may be commenced within two years after the cause of action accrued, and every such action shall be forever barred unless commenced within two years after the cause of action accrued, except that a cause of action arising out of a willful violation may be commenced within three years after the cause of action accrued;

§260. Liquidated damages

In any action commenced ... to recover ... unpaid overtime compensation, or liquidated damages, under the FLSA ....., if the employer shows to the satisfaction of the court that the act or omission giving rise to such action was in good faith and that he had reasonable grounds for believing that his act or omission was not a violation of the FLSA ....., the court may, in its sound discretion, award no liquidated damages or award any amount thereof not to exceed the amount specified in section 16 of such Act...

OPM REGULATIONS

§551.401 Basic principles.

(a) All time spent by an employee performing an activity for the benefit of an agency and under the control or direction of the agency is "hours of work."[7] Such time includes:

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[7] There is no dispute that the FLSA provides overtime compensation at one and one-half times an employee's regular rate of pay for time worked by non-exempt employees over 8 hours per day and 40 hours per week. See, 5 CFR §551/401 (f) and (g); 5 CFR §551.501.

(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.

§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.

(b) An agency shall keep complete and accurate records of all hours worked by its employees.

§551.411 Workday.

(a) For the purposes of this part, workday means the period between the commencement of the principal activities that an employee is engaged to perform on a given day, and the cessation of the principal activities for that day. All time spent by an employee in the performance of such activities is hours of work. The workday is not limited to a calendar day or any other 24-hour period.

§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.

DOL REGULATIONS

§785.11 General.

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

§785.13 Duty of management.

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

§790.22 Discretion of court as to assessment of liquidated damages.

(a) Section 11 of the Portal Act provides that in any action brought under the FLSA to recover ..... unpaid overtime, ... the court may, subject to prescribed conditions, in its sound discretion award no liquidated damages or award any amount of such damages not to exceed the amount specified in section 16(b) of the FLSA.

(b) The conditions prescribed as prerequisites to such an exercise of discretion by the court are two: (1) The employers must show to the satisfaction of the court that the act or omission giving rise to such action was in good faith; and (2) he must show also, to the satisfaction of the court, that he had reasonable grounds for believing that his act or omission was not a violation of the FLSA. If these conditions are met by the employer against whom the suit is brought, the court is permitted, but not required, in its sound discretion to reduce or eliminate the liquidated damages which would otherwise be required in any judgment against the employer .....

§790.6 Periods within the "workday" unaffected.

(a) Section 4 of the Portal Act does not affect the computation of hours worked within the "workday" proper, roughly described as the period "from whistle to whistle," and its provisions have nothing to do with the compensability under the FLSA of any activities engaged in by an employee during that period. Under the provisions of section 4, one of the conditions that must be present before "preliminary" or "postliminary" activities are excluded from hours worked is that they 'occur either prior to the time on any particular workday at which the employee commences, or subsequent to the time on any particular workday at which he ceases' the principal activity or activities which he is employed to perform. Accordingly, to the extent that activities engaged in by an employee occur after the employee commences to perform the first principal activity on a particular workday and before he ceases the performance of the last principal activity on a particular workday, the provisions of that section have no application. Periods of time between the commencement of the employee's first principal activity and the completion of his last principal activity on any workday must be included in the computation of hours worked to the same extent as would be required if the Portal Act had not been enacted. The principles for determining hours worked within the "workday" proper will continue to be those established under the FLSA without reference to the Portal Act, which is concerned with this question only as it relates to time spent outside the "workday" in activities of the kind described in section 4.

§790.8 “Principal” activities.

(a) An employer’s liabilities and obligations under the FLSA with respect to the “principal” activities his employees are employed to perform are not changed in any way by section 4 of the Portal Act, and time devoted to such activities must be taken into account in computing hours worked to the same extent as it would if the Portal Act had not been enacted. But before it can be determined whether an activity is “preliminary or postliminary to (the) principal activity or activities” which the employee is employed to perform, it is generally necessary to determine what are such “principal” activities.

The use by Congress of the plural form “activities” in the statute makes it clear that in order for an activity to be a “principal” activity, it need not be predominant in some way over all other activities engaged in by the employee in performing his job; rather, an employee may, for purposes of the Portal-to-Portal Act be engaged in several “principal” activities during the workday..... The legislative history further indicates that Congress intended the words “principal activities” to be construed liberally in light of the foregoing principals to include any work of consequence performed for an employer, no matter when the work is performed. A majority member of the committee which introduced this language in to the bill explained to the Senate that it was considered “sufficiently broad to embrace within its terms such activities as are indispensable to the performance of productive work.”

DOL WHD ADVISORY MEMORANDUM NO. 2006-2

SUBJECT: IBP v. Alvarez, 126 S.Ct. 514 (2005)

The Supreme Court’s Decision

The Supreme Court’s unanimous decision in Alvarez holds that employees who work in meat and poultry processing plants must be paid for the time they spend walking between the place where they put on and take off protective equipment and the place where they process the meat or poultry. The Court determined that donning and doffing gear is a “principal activity” under the Portal to Portal Act ... and thus time spent in those activities, as well as any walking and waiting time that occurs after the employee engaged in his first principal activity and before he finishes his last principal activity, is part of a “continuous workday” and is compensable under the FLSA. The Court also held that waiting time before the first principal activity is not compensable, unless the employees are required to report to work at a specific time.

The Meaning of “Work”

..... The Court in Alvarez then emphasized that, other than its express exceptions for travel to and from an employee’s principal activity and for other preliminary or postliminary activities, the Portal-to-Portal Act does not change the conception of “work” or define the workday.

Therefore, the time, no matter how minimal, that an employee is required to spend putting on and taking off gear on the employer’s premises is compensable “work” under the FLSA.

> The Portal-to-Portal Act
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> ..... As stated by the Court,
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> [W]e hold that any activity that is 'integral and indispensable to a principal activity' is itself a 'principal activity' under section 4(a) of the Portal-to-Portal Act.
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> Donning and Doffing of "Nonunique" Gear in Processing Plants
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> ..... Accordingly, whether required gear is "unique" or "non-unique" is irrelevant to whether donning and doffing is a principal activity.
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> ..... However, donning and doffing of required gear is within the continuous workday only when the employer or the nature of the job mandates that it take place on the employer's premises. It is our longstanding position that if employees have the option and the ability to change into required gear at home, changing into that gear is not a principal activity, even when it takes place at the plant.
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> De Minimis Activities
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> ..... Alvarez thus clearly stands for the proposition that where the aggregate time spent donning, walking, waiting and doffing exceeds the de minimis standard, it is compensable. Any other conclusion would be inconsistent with the continuous workday rule.....

III. BACKGROUND

The issue raised in this "portal" case - whether certain activities engaged in by Correctional Officers (CO) are integral and indispensable to their principal activity thereby commencing and concluding their compensable continuous workday - has been the subject of numerous prior arbitration, Federal Labor Relations Authority (FLRA), and court decisions involving various Union locals and Agency locations,[8] and had its genesis in a Settlement Agreement resolving a 1995 Agency-wide grievance reached in August, 2000 which preserved the right of Bureau of Prison (BOP) employees to file claims for premium pay covering pre-shift and post-shift work after January 1, 1996.

At the time of the filing of the instant grievance on July 1, 2010, almost five years had passed since the Supreme Court handed down its decision in *IBP, Inc. v. Alvarez, et. al*., 546 U.S. 21 (2005) ("*Alvarez*"), specifically interpreted by the Secretary of Labor in the WHD Advisory Memo No. 2006-2, and over a dozen BOP portal cases had issued or been

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[8] The record contains over 75 cases relied upon by the parties in support of their respective positions.

reviewed. In fact, a prior portal grievance had been filed by the Union at the same facility - Otisville - protesting the unilateral implementation in 2005 of the Mission Critical Roster (MCR) doing away with overlapping shifts, and the portal issues arising therefrom, which resulted in an Opinion and Award by Arbitrator Roger Kaplan on June 30, 2008.[9]

An extensive and lengthy review of this precedent, which forms the back drop of the parties' positions in the instant case, establishes the following framework for consideration of the portal issue raised herein. The FLSA was enacted, and liberally interpreted, to assure that covered employees receive appropriate compensation for all work performed, including overtime for all time worked over 8 hours in a workday, and 40 hours in a workweek. As a result of the expansive interpretation given to the term "workweek" in the FLSA, Congress enacted the Portal Act, exempting from FLSA coverage walking on the employer's premises to and from the location of the employee's principal activities, and preliminary or postliminary activities to their principal activity. Consideration of whether certain activities are compensable under the FLSA is worksite specific, and depends on a determination of what are the employee's principal activities, and what actions are deemed to be integral and indispensable to such principal activities. An employee's first action deemed to be integral and indispensable to his/her primary activities starts the workday, which is continuous until the employee's last action deemed to be integral and indispensable to his/her primary activities. The entire continuous workday is compensable under the FLSA.

In the context of COs employed by the BOP in a correctional institution, there appears to be little dispute that their primary job duty is ensuring the safety and security of the institution, staff and inmates. Their position descriptions note that they are subject to daily stress and that exposure to potentially life threatening situations, such as physical attack, are inherent in the position, which requires the exercise of sound judgment in

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[9] See, FMCS Case No. 05-54793, which upheld the Agency's right to unilaterally implement the MCR and held that (1) employees who pick up equipment at the Control Center (CC) and are not relieving anyone were not entitled to overtime so long as their shift starts at the CC; (2) employees picking up equipment at the CC and relieving others were entitled to compensation for the travel time between the pick up and their post and from their post back to the CC to the return of equipment so long as such travel time exceeded 10 minutes; (3) that employees exchanging equipment on the post were not entitled to overtime compensation; (4) standing in line at security and flipping an accountability chit were not compensable; and (5) the record did not show any compensable concluding activities in excess of 10 minutes. The Union's appeal to this Award was ultimately dismissed as untimely, and did not address the merits. No monies were paid out to any CO as a result of this Award.

making instantaneous decisions affecting life, well-being and civil liberties, as well as constant alertness and vigilance in reporting observations regarding inmate behavior. All COs are governed by BOP Standards of Employee Conduct and General Post Orders (PO), as well as POs specific to the particular job assignment.

The portal litigation that has arisen in this sector involves consideration of whether certain activities COs engage in when they come to work are integral and indispensable to their primary activity and considered part of their continuous compensable workday, or whether they are preliminary or postliminary to their primary activity and excepted from compensation under the Portal Act. These activities fall under certain categories - donning and doffing equipment, what constitutes "equipment," travel time within the facility to/from the post, information and equipment exchange on post, waiting time at security screening and at the Control Center (CC). The precedent establishes that time spent participating in security screening, and waiting and travel time prior to obtaining and/or donning the first piece of integral and indispensable equipment is excluded as a preliminary activity under the Portal Act and is not compensable.[10]

The issues raised in this case include (1) whether donning a duty belt in the lobby after clearing security starts the continuous workday; (2) whether obtaining only a charged battery from the CC (and returning a spent battery to CC) when all other equipment is exchanged on post (both prior and subsequent to the placement of battery chargers on the units) starts the continuous workday; (3) whether entering the compound through the CC sally port[11] and walking to post is part of the continuous workday for COs working on 24 hour posts; (4) whether information and equipment exchange on post is compensable.

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[10] See, *Bonilla v. Baker Concrete Const., Inc.*, 487 F.3d 13440 (11th Cir. 2007); *Gorman v. Consolidated Edison Corp.*, 488 F.3d 586 (2nd Cir. 2007); *FCI Allenwood and AFGE Local 4047*, 65 FLRA 960 (2011); *USP Terre Haute and AFGE Local 720*, 58 FLRA 327 (2003); *MCC Chicago and AFGE Local 3652*, 63 FLRA 423 (2009); *Alvarez*, supra.

[11] A sally port is an entrance with a holding area between two doorways which are controlled by the CC. Authorization for passage must be confirmed prior to the inner door being unlocked.

IV. RELEVANT FACTS[12]

FCI Otisville is a medium security institution that housed 1237 male inmates as of December 30, 2011, many of whom belong to different gangs. It also contains a camp (J Unit) that is a stand alone building outside the perimeter of the facility that housed 121 inmates convicted of non-violent crimes punishable by less than ten year terms during the same period. The correctional staff include approximately 120 COs, 12 Lieutenants (Lt.) and one Captain. The Captain reports to the Associate Wardens, who are directly responsible to the Warden.

The correctional staff work straight 8 hour shifts with no duty free lunch or overlap. There are five shifts: Day Watch, 8 a.m. - 4 p.m. (D/W); Evening Watch, 4 p.m. - midnight (E/W), Morning Watch, midnight - 8 a.m. (M/W), AM shift, 6 a.m. - 2 p.m. (AM) and PM shift, 2 p.m. -10 p.m. (PM). COs bid on different job positions quarterly, and the Quarterly Roster shows the job assignment of each CO and Lt. for that quarter. The records reveal that between 25-30 COs work on D/W, approximately 20 COs work on E/W, and approximately 15 COs work on M/W. There are one Operations Lt. and one Activity Lt. on both the D/W and E/W, but only one Operations Lt. on the M/W.

The institution has a perimeter fence that surrounds the grounds of the compound, where the different buildings are separate (or attached) and accessed by an external pathway. These buildings include Administration, Gym, CMS,[13] Food Service, Lt.'s Office, Housing Units (G, F, E, D and Z) and a Hospital. Housing Units (HU) G, F and E each have two wings (A side and B side) which house 154 inmates. HU D also has two sides (D Dorm), each housing fewer inmates. There is a common locked CO security office for both sides of a HU, located on the A side. A side HU posts are staffed 24 hours/day; B side HU posts and D Dorm are staffed only 16 hours. Z Unit, also known as SHU, houses an average

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[12] The recitation of facts is a compilation of the stipulations of the parties, the testimony of all witnesses and the documentation introduced into evidence. Where there is little or no dispute of fact, the specific testimony will not be set forth in detail or attributed to the witness(es) by name. In order to minimize repetitive or duplicative testimony, both parties agreed to the procedure of introducing Offers of Proof, indicating the name of the witness(es) and what their relevant testimony would be; such "evidence" was accepted as if this testimony was presented at the hearing, and is being relied upon in that way.

[13] Unicor - a private enterprise where inmates work making solar panels - is located within this area.

of 65 inmates requiring closer supervision and restrictions, who are confined to their cells for 23 hours/day and fed through slots in the door. There is an additional secure entranceway from the compound into SHU, that is controlled by a sally port monitored by the CC. The SHU #1 post is staffed 24 hours/day; SHU #2 & 3 and the D Dorm posts are staffed 16 hours/day.

Employees as well as visitors and guests enter through the front lobby area adjacent to the parking lot, where they must leave certain prohibited items in lockers and pass through security (metal detector) screening. COs must remove their duty belts prior to passing through this screening.[14] These belts, which are required for all COs except the CC #1 and J Unit Control positions, contain key clips/chain (to hold their keys), a radio holder, key keeper, mask protector, gloves, brass chits (used to obtain equipment), and handcuff holders. Most, but not all, COs don their duty belts in the front lobby after clearing the security site and before entering the lobby (A-1) sally port. Inside the A-1 sally port is an accountability board indicating which employees are in the institution at any given time. When a CO is coming on shift, he turns his chit on the accountability board indicating his entrance into the facility. Similarly, when leaving, a CO will turn his chit face down indicating he is no longer present inside the institution. After exiting the A-1 sally port, there is a short walk outside before reaching the entrance to the CC lobby. Some COs wait until reaching this lobby before donning their duty belts.

The CC is the heart of the institution. It is the location where equipment, keys, crew kits and other paperwork are stored and exchanged, batteries are charged, all movement in sally port doors are controlled, counts are coordinated and maintained, and all movement within the institution is monitored. It is an extremely busy place during shift changes, especially when they occur during daily counts. COs not working 24 hour posts or scheduled for the PM shift, must pick up their keys and equipment (including charged batteries) from the CC prior to going to their posts. All COs must check the Daily Roster to make sure that their assignments have not been changed for the day. COs then enter the compound through the A-2 sally port, which is operated by the CC. In performing their job

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[14] The J Unit has a separate entrance, screening area and CC. J Unit and J Unit Control posts screen themselves in at the beginning of their shifts.

function, COs must maintain a state of alertness when walking through the compound and interact with inmates when necessary, which may include correcting inappropriate behavior, conducting shakedowns or searches.[15] Some COs stop in the Lt.'s office on the way to their posts to check their mailboxes, inform the Lt. that they are present, and, at least once a month, to check the Posted Picture File (PPF)[16] maintained in a book there. Those COs working 24 hour posts[17] and the PM shift, conduct a shift "relief" on post, which includes accounting for equipment in the cage, counting keys, exchanging and inspecting equipment maintained on the post as well as verbal information about occurrences during the previous shift that may not be recorded in the daily log book. Once relieved, the COs are expected to depart the institution the same way as they entered. If on a post where no relief occurs,[18] COs return all equipment and keys to the CC on their way out of the facility. All COs must respond to emergencies that occur while they are physically in the institution, regardless of whether they happen during their specified shift hours.[19]

Radios, with body alarms, are required equipment for all posts other than CC posts. It is the primary way that COs communicate with each other, and it is a CO's lifeline in cases of emergency. General POs require COs to ensure that a freshly charged battery is installed in the radio and the beginning of a tour of duty. It is undisputed that at this institution, it has been the general practice for at least 20 years for COs to pick up a freshly charged battery at the CC prior to heading to their post, and drop off dead batteries at the CC at the end of the

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[15] The Lts. testified that COs on the way to their HU posts need not interact with inmates, except to respond to emergencies, and should notice issues and report them when they come on shift. All other correctional staff disagreed, and stated that they are in uniform and must enforce the rules with respect to inmate conduct, which requires reacting to a potentially unsafe situation immediately, before it gets out of hand.

[16] The PPF contains information of particular interest about specific inmates bearing on issues affecting potential security concerns.

[17] For purposes of this case, these posts include all A side HUs, Compound #1 & #2, SHU #1, CC #1, J Unit & J Control. The Union is not seeking compensation for the SHU #4 or CC #2 positions.

[18] For purposes of this case, these posts would include B side HUs, D Dorm HU, and SHU #2 & #3.

[19] Captain Matthew Whinnery testified that he expects COs who respond to emergencies outside of their 8 hours shift to notify a Lt. in a written or verbal report, and, if the Lt. confirms their presence, they would be paid. All COs testified that the Agency will not approve overtime for amounts of time less than 15 minutes, and only the CO in charge at the emergency is responsible for submitting a written report. They stated they had not been compensated for overtime in these circumstances. Lt. Rementer recalled approving overtime for a period of 15 minutes or less only for issues relating to COs driving the bus and being late returning to the facility.

shift. Prior to March, 2011, there were no battery chargers on the HUs or SHU, and the only place batteries were charged was at the CC. In March, 2011, battery chargers were installed in the HUs security office and in SHU.[20] The testimony of all COs at the hearing was that the practice of picking up a freshly charged battery continued even after there were battery chargers on the HUs, since the batteries are old and do not maintain a charge, and could last less than 2 hours, or between 2 and 4 hours, requiring a newly charged battery during the shift.

There has been no written policy or verbal instruction issued to COs prohibiting them from picking up and dropping off batteries at the CC, nor instruction given to CC staff not to issue batteries to COs on 24 hour posts. The evidence suggests that Lts. have been present at the CC when HU COs pick up and drop off batteries, were well aware of the practice, and made no attempt to stop it. Testimony from command personnel explained that it is part of the job duty of a Compound CO to take batteries to the HUs when a CO requests one, but that this will occur when the Compound CO has time within his other responsibilities to do so.[21] The parties stipulated that since March, 2011 not all COs stop at the CC to pick up batteries on the way to their posts or return spent batteries to the CC once they have been relieved from duty on their posts.

The dispute between the parties is where the CO's workday begins. Briefly stated, the Union contends that the first integral and indispensable action of the CO is donning his duty belt in the front lobby, (or, at the very latest, in the CC lobby), and the last activity of his compensable workday occurs when he returns his spent battery to the CC. The Agency's position is that the CO's workday begins when he draws or exchanges his equipment - at the CC for employees not relieving anyone on post, and at the post where the exchange takes place on 24 hours posts or when relieving another CO.

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[20] CO Jeffrey Pepin testified that he worked the SHU #1 post after March, 2011, but that the battery chargers there did not work, and he informed his supervisors of that fact. Captain Whinnery, who initiated the action of placing battery chargers on the HUs and SHU, testified that he was never told that they were not functioning well, although he admitted that the institution has old batteries that do not maintain a charge.

[21] Compound COs also can take the PPF around to COs on post who have not signed it within the required period, also as time permits.

There is no dispute that the specific POs set forth shift hours beginning at the scheduled start time and ending 8 hours later at the scheduled end time, and that COs sign into their post log books at the times so indicated, regardless of when they actually arrive on post. Specific POs for 24 hour posts and others requiring relief all indicate that the actual counting of equipment and completion of the Accountability Equipment Form, basically the first duty listed to be performed, should not take place until after the other CO is relieved, when he is to proceed directly out of the institution.

All COs who testified made clear that part of the relief process, that had to be accomplished with both COs present, was to count and check all of the equipment and keys, since the incoming CO is responsible for all equipment once the outgoing CO has departed, and he must be sure that everything is in working order and accounted for due to both security and possible disciplinary reasons. They estimated that, depending on the post, the exchange of equipment and information takes between 5 and 15 minutes.[22] They also noted that not all pertinent information that needs to be passed on is included in the log book, since things that seem unusual or stand out with respect to inmate behavior patterns and groups should be brought to the attention of the next shift CO even if nothing concrete has occurred that would make it into the log book. Agency witnesses testified that the "relief" process on post takes no more than a few seconds, with there being no need for any verbal exchange as all important information should be recorded in the log book.[23]

All witnesses understood the difference between a "good relief" - someone who arrives at the post in time to allow for a proper exchange of information and equipment and sufficient time for the outgoing CO to be at the CC returning a spent battery by the designated end of shift time - and a "bad relief" - a "minute man" who arrives on post at exactly the designated start time or later, creating a delay in the outgoing CO exiting the

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[22] CO David Johnson estimated it took 3-5 minutes to make an exchange on a HU post and 5-7 minutes on SHU. CO Jeffrey Pepin testified that it took at least 15 minutes to do a proper relief for the CC #1 post, as there is much information and a lot of equipment to account for, and the change of shift times are busy at the CC with COs picking up and dropping off equipment.

[23] Lt. Rementer, who has acted as an Administrative Lt. in the Administration building since 2008, and has not reviewed exchanges on posts since then, testified that he believed the equipment exchange takes 10-20 seconds. The parties agreed that other Lts. would similarly testify. Douglas White, Captain at Otisville between 2003 and 2009, testified that the exchange takes only a few seconds. Both agreed that a verbal exchange of information was not necessary, as all pertinent information should be in the log book.

facility. All Union witnesses stated that they could not adequately perform their jobs and make a proper relief if they did not arrive on post until the shift start time designated in the specific POs. They concurred that there must be a period of time when both COs are present during which to make a proper relief.

The COs who testified made clear that their Lts. have seen them arrive early and go to their posts prior to the scheduled shift starting time, and that they often stop in the Lt.'s office to check in, or walk through the compound with a Lt. who has also arrived prior to the start of the shift. Lt. Rementer testified that the COs are not on duty when they arrive early, as he does, and Captain White stated that COs arriving early are on personal time until their shift begins. Some of the COs are part of a van pool, a government program designed to assist in commuting time, expenses and environmental impact, which causes them to arrive early and leave together immediately after shift ending time to meet the time schedule of the van pool.

The Union made a lengthy Information Request in conjunction with its filing of the grievance on July 1, 2010.[24] In response to its request for copies of all videotapes showing employees entering and exiting the institution, donning their duty belts, traveling to or from their posts, and arriving at, and departing from, their posts, the Union received videotapes of only the A-1 lobby outer door for the period between January and June, 2011.[25] Union Secretary and Senior Officer Specialist Ralph De Meo was given the task of reviewing the videos and obtaining pertinent information relating to the time staff members entered and left the facility. He testified as to his methodology for reviewing the tapes as well as his written results, which were detailed in a Union exhibit.[26] De Meo stated that from the vantage point of the A-1 lobby camera he could see the COs entering the A-1 sally port, most already having donned their duty belts, as well as the COs exiting into the lobby. From

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[24] Since the Agency is not raising any procedural defenses to arbitrability, there is no need to set forth in detail the informal resolution process engaged in by the parties leading up to the filing of this grievance.

[25] There was no video evidence provided to the Union concerning the J unit.

[26] DeMeo was given 6 days to view the videos and he chose the time period of Monday-Thursday of the 2nd week of each month (a total of 18 days), 1/2 hour before and after each shift. He worked from the Daily Roster and noted the time of arrival and departure of each staff member. From this information he arrived at averages for each post based on the available data. He discounted information about COs who did not have both an arrival and departure time within those parameters.

this review he concluded that COs in the following positions worked an average of the listed number of minutes in excess of 8 hours per shift:

Compound #1 & #2	-	13:06
CC #1	-	15:44
Unit D & HU A sides	-	18:30
Unit D Dorm & HU B sides	-	15:46
SHU #1	-	24:19

De Meo testified that this averaged out to 17:29 minutes of overtime work for the group of COs working these positions.

Eric Zwicker, Aaron Whitley and Jeff Pepin testified that when they worked the J Unit CC post, they arrived 15 minutes before their scheduled start time, screened themselves in and watched the screening process for the incoming J Unit CO, making the relief on post. Whitley and Pepin testified that they left the J Unit CC at 5 minutes after their scheduled end shift, amounting to an additional 20 minutes per day of overtime work. Zwicker, Whitley and Paul Ferguson's evidence was that they also worked an additional 20 minutes per day when they performed the J Unit CO position. Battery chargers are maintained at the J unit CC, and J Unit COs stop and pick up a fresh battery before going onto the unit, and return it at the end of their shift. Additionally, both Whitley and Ferguson testified that they had performed the SHU #2 and SHU #3 posts on the AM or PM shifts, and that they spent an additional 15 minutes over their 8 hour shifts between the time they put on their duty belts and when they dropped off their equipment at the CC.[27]

This grievance requests overtime compensation for COs working the following posts commencing July 1, 2008: [28] Compound # 1 & 2, HUs (A & B sides), CC #1, SHU #1, 2, & 3, J Unit and J Unit Control. A compilation of the testimony of COs De Meo, David Johnson, Zwicker, Peter Johnson III, Pepin and Whitley encompasses the work routine and

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[27] Ferguson also stated that he worked SHU #3 on the E/W and spent an additional 20 minutes over his 8 hour shift from the time he put on his duty belt until he dropped off his equipment at the CC.

[28] COs having worked within these classifications during the relevant time period who were interested in being grievants affected by the outcome of this case were asked to sign up with the Union. At the hearing the Union submitted to the arbitrator, in camera, a list of 232 named grievants in this case. That list will be furnished to the parties upon remand should the Agency be directed to compensate COs working in these classifications.

actual hours for the Compound #1 & 2 positions on all three shifts. These 24 hours posts carry keys to all areas within the institution except for the visiting room and commissary. Their equipment cage is located in the Lt.'s office and includes a video camera, flashlights, extension cord, and handheld metal detectors. These COs run and call all inmate moves in the institution and escort inmates to SHU. They conduct fence checks and trash calls, supervise inmate work details and pay them, bring equipment to the HUs and deliver mailbags. They respond to all emergencies in the institution. The named COs testified that they put on their duty belts in the A-1 lobby after security screening approximately 20-25 minutes prior to their shift starting time, they turn their chits in the A-1 sally port, pick up charged batteries and check the daily Roster at the CC prior to entering the compound. Their shift relief is either conducted in the Lt.'s office or by the side gate. They normally drop off spent batteries at the CC on their way out of the facility at around their shift end time.[29]

Pepin and Ralph Horn gave testimony about the CC #1 post on all three shifts. They each indicated that they arrived at the CC 15 minutes before their shift starting time and left 5 minutes after the ending time in order to accomplish the appropriate relief procedures[30] and perform other tasks associated with that position, which include maintaining all pass books and crew kits and updating the files for those kits, printing the daily rosters, ensuring that all call out sheets are delivered, maintaining key counts, monitoring video cameras at all entrances and exits as well as movement in and out of the institution, calling three daily counts, controlling all sally port doors (A-1 lobby inner and outer, A-2 inner and outer, J gates, rear gates, compound sally port, and the outer door of the SHU sally port), maintaining the security system, body alarms, radios and phones, charging batteries and distributing batteries and equipment to COs.

Testimony concerning the A side HUs came from David Johnson, Peter Johnson III, Jason Nery, Ferguson and Whitley. These are 24 hour posts where one CO is in charge of

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[29] The Union averaged out the testimony concerning the pre-shift overtime from these witnesses to be 22.5 minutes.

[30] The CC #1 debriefing both before and after their shift includes information on camp drivers' locations, airport trips and those to other institutions, checking receipts and discharges, accounting for, and inventorying all equipment including leg iron restraints, radios, transfriskers, and keys prior to sign off, and reviewing two log books. The CC #1 post overtime was testified to be 20 minutes per day.

154 inmates,[31] who must clear a count between 3:45 and 4 p.m. and who are locked in their cells between 9:45 p.m. and 6 a.m. Their command center is a locked office with a cage containing equipment on a shadow board including scrapers, extension cords, pipe wrenches, mirror, handcuffs, leg irons, 911 safety knife, flashlight and a transfrisker, as well as a radio and battery charger. A side HU COs inspect rooms, conduct searches of cells, common areas and inmates, assure that inmates are following rules and resolve issues that may arise. The B side HU CO post is staffed for 16 hours a day. The AM shift CO does not relieve anyone, so he picks up his radio, keys and detail pouches for both sides from the CC, and gets a verbal briefing from the A side M/W CO, who is responsible for manually opening inmate cell doors on both sides at 6 a.m.; the B side cells cannot be opened by the A side HU CO without the B side AM CO present. After the B side AM CO is relieved by the PM CO and does the exchange of information and equipment at the post, he drops off paperwork at the Lt.'s office and at the CC if requested, along with his spent battery. The B side PM CO is not relieved, and locks all inmates into their cells beginning at 9:30 p.m., secures the unit, locks the door and drops off the keys, equipment and spent battery to the CC on his way out of the facility. The AM side CO's testimony establishes that they work between 20 and 25 minutes per day over their 8 hour shifts;[32] B side testimony indicates a 20 minute period of working over the 8 hour shift.

With respect to the SHU posts, the unit consists of approximately 65 inmates who remain in their cells 23 hours/day; when they are out of their cells they are handcuffed and escorted. Certain shifts in SHU have additional COs assigned. [33] The SHU #1 controls all cell doors and ranges as well as the entrance and exit from the unit. The cage equipment in SHU includes 24 sets of handcuffs, 3 leg irons, plastic handcuffs, two batons, hand held metal detectors and three 911 safety knives. Testimony of Pepin and Zwicker indicates that the SHU #1 pre and post-shift relief functions take an additional 25 minutes over the scheduled 8 hour shift. SHU #2 works AM and PM shifts. Testimony from Zwicker, Whitley and Ferguson indicate an additional 15 minutes of pre-shift time worked in this

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[31] D unit has 90 inmates.

[32] The Union averaged out the testimony concerning the overtime from the A side COs to be 22.5 minutes.

[33] On the AM shift there is a Recreation Officer as well as SHU #2 & 3. During the week the D/W also has SHU #4 & 5 (not covered by this grievance); the PM SHU #2 and the E/W SHU #3 have a SHU Lt. present.

position. SHU #3 works AM and E/W shifts. Whitley's evidence was that he donned his duty belt 15 minutes prior to the shift start time when working SHU#3 AM shift. Ferguson indicated that there was a 20 minute pre-shift period commencing when he donned his duty belt in the A-1 lobby and ending after the relief on post.

On the basis of its theory of the case and the testimonial and video evidence, the Union seeks the following overtime compensation:[34]

Compound #1 & 2	-	18 minutes
CC #1	-	18 minutes
A side HUs	-	20.5 minutes
B side HUs	-	18 minutes
SHU #1	-	25 minutes
SHU #2	-	20 minutes
SHU # 3	-	17.5 minutes
J Unit Control	-	20 minutes
J Unit	-	20 minutes

Don Drewitt, Local Union President testified that, despite the fact that the institution is covered by the Agency's Program Statement P3000.03, Human Resources Manual, Chapter 6, Attendance and Leave, §610.1, Institution Shift Starting and Stopping Times, [35] the Warden never came to him or the prior Union President since July 1, 2008 to formulate a

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[34] The times listed are derived by adding the average number of minutes reflected in testimony with the average number of minutes reflected in the video and dividing by 2. There was no video evidence from J Unit, so the numbers reflect only the average number of minutes contained in the testimony.

[35] The pertinent provisions of §610.1 are set forth herein.

3. CRITERIA. Each institution shall have approved work schedules with shift starting and stopping times, for employees who work at the institution to begin and end at the point employees pick-up and drop-off equipment (keys, radios, body alarms, work detail pouches, etc.) at the control center. Therefore, employees who pick-up equipment at the control center, shall have their shifts scheduled to include reasonable time to travel from the control center to their assigned duty post and return (at the end of the shift). If an employees 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.....

6. SCHEDULING CONSIDERATIONS.

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

plan for overlapping work schedules. He noted that there was a portal-to-portal plan at Otisville involving overlapping shifts before the Agency went to its MCR. Janice Killian, former Otisville Warden between April, 2007 and October, 2010, testified that she never attempted to formulate a plan for overlapping shifts at Otisville, despite inheriting the first portal case and being involved with the instant grievance. She stated that the POs clearly state the starting and ending times for posts, which occur at the location where the exchange of equipment takes place. Warden Terry Billingsley, who has been at Otisville since April, 2011, admitted not being aware of the current portal grievance at Otisville, not having read any prior Agency portal cases, having read a part of the prior Kaplan portal award involving the institution, and never seeking an opinion from anyone in OPM, DOL or the Department of Justice (DOJ) as to whether they were complying with the FMLA with their current shift schedules. Billingsley did not attempt to implement overlapping shifts since his arrival.

Human Resources Manager Russell Reuthe has been at Otisville for five years and is responsible for FLSA compliance and pay issues. He did not recall seeing or reading the instant grievance or discussing any portal issues with the local Union. Captain Whinnery, like prior Captain White, testified that a CO is on personal time until he makes an equipment exchange on the post on 24 hours positions or at the CC, and they are expected to be on post at the designated start time. Captain Whinnery noted that the specific POs provide for between 7 and 10 minutes of travel time prior to the end of the shift for posts requiring COs to turn in equipment at the CC. He also stated that his command staff asked the Union if there were portal issues at labor-management meetings, but none were raised or brought to his attention.

V. UNION POSITION

The Union begins its argument by pointing out the the FLSA requires Federal sector Employers to pay overtime for time worked over 8 hours/day, which includes compensation for all work "suffered or permitted."[36] It notes that actual or constructive knowledge is

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[36] Defined by 5 C.F.R. §551.104 as any work performed by an employee for the benefit of the Agency, whether requested or not, if the supervisor knows or has reason to believe the work is being performed and has an opportunity to prevent it.

sufficient, [37] and that it has shown by representative testimony[38] that command personnel knew that COs were performing pre-shift work and were not being paid for it, accepted the benefit without objection, and failed to control employee work time or keep accurate records of all hours worked, as required by the FLSA. The Union insists that the Agency cannot sit by and accept the benefit without pay, even if the employee does not make a claim for the overtime. [39] It maintains that, based upon the history of portal disputes within the Agency, it knew, or should have known, that the duties of a CO cannot be performed during regular work hours without overlapping shifts due to the nature of the work itself.

The Union contends that COs are entitled to compensation from the moment they perform their first integral and indispensable activity until they perform their last integral and indispensable activity, all of which constitutes their continuous workday under the FLSA. It points out that the Supreme Court defines work broadly,[40] and that even activities excluded from FLRA coverage by the Portal Act are compensable if they take place after the employee performs other compensable activities.[41] The Union asserts that an activity is integral and indispensable to an employee's principal activities if it is made necessary by the nature of the work performed,[42] and constitutes work if it is undertaken primarily for the

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37 *Reich v. Dept. of Conservation & Natutal Resources*, 28 F.3d 1076 (11th Cir. 1994); *Cunningham v. Gibson Electric Co., Inc.*, 43 F. Supp. 2d 965 (N.D. IL, 1999); *Brennan v. General Motors Acceptance Corporation*, 482 F.2d 825 (5th Cir. 1973); *Kappler v. Republic Pictures Corp.*, 59 F. Supp. 112 (D. Iowa 1945); *Mumbower v. Callicott*, 526 F.2d 1183 (8th Cir. 1975); *Handler v. Thrasher*, 191 F.2d 120 (10th Cir. 1951).

38 The Union notes that representative testimony is accepted in FLSA litigation, citing *Hoffman-LaRoche, Inc. v. Sperling*, 493 U.S. 165 (1989); *Anderson v. Mount Clemens Pottery*, 328 U.S. 680 (1946); *Morgan v. Family Dollar Stores, Inc.* 551 F.3d 1233 (11th Cir. 2008), and that it is regularly used in BOP portal cases, See e.g. *USP Marion and AFGE Local 2343*, 61 FLRA 675 (2006); *AFGE Local 148 and USP Lewisburg*, FMCS No. 06-03725 (Fabian, 2008); *AFGE Local 420 and USP Hazelton*, FMCS No. 09-00421 (Vaughn, 2010). It asserts that its evidence covered each shift and post for which compensation is being sought.

39 See, e.g. *Cunningham*, supra; *Kappler v. Republic Pictures Corporation*, 59 F. Supp. 112 (S.D. Iowa, 1945). The Union notes that Article 6 relates to an employee's responsibility with respect to administrative errors concerning work time that is not in dispute.

40 See, e.g. *Tennessee Coal Iron & Railroad Co. v. Muscoda Local No. 123*, 321 U.S. 590 (1944); *Anderson v. Mt. Clemens Pottery*, 328 U.S. 680 (1946).

41 See, *Alvarez*, supra.

42 The Union cites *Mitchell v. King Packaging Co.*, 350 U.S. 260 (1956)

employer's benefit, the employer knew or should have reasonably known that the activity was performed, and the activity was controlled or required by the employer.[43]

The Union argues that the CO's continuous workday starts with the donning of equipment, including their duty belt, after passing through the metal detector in the lobby, and ends with the doffing of that equipment. It notes that, post-*Alvarez*, the DOL WHD Advisory Memo 2006-2 and court decisions have recognized that donning and doffing specialized safety equipment, including duty belts for police officers, is integral and indispensable to their primary job and starts the compensable workday, no matter how minimal the time expended on such activity.[44] The Union points out that the duty belt is required by the Employer and has key clips, radio holder, key keeper, CPR mask, gloves, brass chits and handcuff holder which are necessary to secure the required equipment to their person, and for a CO to be able to deal with incidents involving the safety and security of the institution, its personnel and the inmates. It points out that duty belts must be donned on the Employer's premises, due to the fact that the belt cannot pass through the security screening process instituted in the front lobby while it is on the CO's person, and must be placed in a bin to be screened separately. Since it was agreed that most COs don their duty belts in the front lobby, the Union contends that their compensable workday begins prior to their entering the A-1 sally port, or at the latest, when they reach the CC lobby by which time all COs have donned their duty belts.

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[43] See, *Adams v. U.S.*, 65 Fed Cl. 217 (Fed. Cl. 2005); *Bull v. U.S.*, 68 Fed. Cl. 212 (Fed. Cl. 2005); *Tennessee Coal*, supra; *Mt. Clemens Pottery*, supra.

[44] The Union cites *Maciel v. City of Los Angeles*, 569 F. Supp. 2d 1038 (C.D. Cal. 2008); *Nolan v. City of Los Angeles*, 2009 U.S. Dist. LEXIS 70764 (C.D. Cal. 2009); *Steiner v. Mitchell*, 350 U.S. 247 (1956); *Ballaris v. Wacker Siltronic Corp.*, 370 F.3d 901 (9th Cir. 2004); *Jordan v. I.B.P., Inc.*, 542 F. Supp. 2d 790 (M.D. Tenn. 2008); *Perez v. Mountaire Farms*, 650 F.3d 350 (4th Cir. 2011); *FCI Williamsburg and AFGE Local 525*, FMCS No. 08-56529 (Harris, 2012).

The Union alternatively argues that all COs compensable workdays begin when they pick up equipment at the CC,[45] including those who work on 24 hour posts and pick up only a freshly charged battery at the CC before making their relief on post.[46] The Union maintains that a charged battery is integral and indispensable to the job of a CO, since a working radio and body alarm are of utmost importance to the safety of a CO and communication between them, and notes that POs require COs to assure that a freshly charged battery is in the radio at the beginning of their tour. It relies on precedent within the BOP holding that a charged battery is an indispensable piece of equipment for a CO, and that its pick up at the CC starts the compensable workday, and its return ends the continuous workday. See, *FCC Oakdale and AFGE Locals 3957 and 1007*, FMCS No. 08-55478 (Moreland, 2011); *USP Allenwood and AFGE Local 307*, FMCS NO. 08-50318 (Katz, 2011); *AFGE Local 420 and USP Hazelton*, FMCS No. 09-00421 (Vaughn, 2010); *FCI Jesup and AFGE Local 3981*, FMCS No. 04-97225 (LaPenna, 2006), *aff'd* 63 FLRA 323 (2009); *FCI Allenwood and AFGE 4047*, FMCS No. 09-57336 (Scola, 2010), *aff'd* 65 FLRA 996; *FCI Sheridan and AFGE Local 3979*, FMCS No. 08-522128 (White, 2010); *FCI La Tuna and AFGE Local 83*, FMCS No. 06-0908-0521 (Curtis, 2009); *FTC Oklahoma City and AFGE Local 171*, FMCS No. 07-00183 (Shieber, 2009); *USP Atwater and AFGE Local 1242*, FMCS No. 05-57849 (Calhoun, 2008); *FCI Forth Worth and AFGE Local 1298*, FMCS No. 08-51179 (Gomez, 2009); *FMC Carswell and AFGE Local 1006*, FMCS No. 07-04342 (Nicholas, 2008), *aff'd* 65 FLRA 960 (2011).

The Union posits that the 20 year practice of COs picking up freshly charged batteries at the CC did not change with the introduction of battery chargers on the HUs and SHU in March, 2011. It notes that supervision are well aware that HU COs continue to pick up charged batteries (and return spent ones) at the CC even after this date, since the batteries

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45 See, e.g. *FCC Beaumont and AFGE, Council of Prison Locals*, C-33, FMCS No. 05-54516 (Marcus, 2006); *AFGE Local 801 and FCI Waseca*, FMCS No. 07-53583 (Daly, 2010); *AFGE Local 3955 and FCC Tuscon*, FMCS No. 08-56902 (Hammond, 2011), *aff'd*, 66 FLRA No. 61 (2011); *USP Pollock and AFGE Local 1034*, FMCS No. 06-56077 (Wetsch, 2008); *USP Leavenworth and AFGE Local 919*, FMCS No. 01-08257 (Gordon, 2003); *FCI Petersburg and AFGE Local 2052*, FMCS No. 01-04534 (Shaw, 2004). The Agency agrees that the workday begins after picking up equipment at the CC for COs who do not make their relief on posts and get all of their keys and equipment at the CC. According to the Union, this would also include SHU # 2 & 3, AM B side HU COs, and J Unit COs who pick up a key at the J Unit CC to let themselves into the unit.

46 The Union asserts that this applies to pick up of freshly charged batteries at the J Unit CC as well.

are old and do not hold a charge or get fully charged, necessitating multiple batteries on each shift, and that it is unreasonable to expect COs to wait for a time when Compound COs are free to bring them a requested battery considering the critical importance of having an operational radio and body alarm - their lifeline - at all times a CO is on duty.[47]

The Union contends that all COs must spend time off shift performing work that is integral and indispensable to their primary job, and reiterates that it is not seeking commuting time in this grievance. It maintains that COs must be alert and vigilant while walking to their post,[48] interact with inmates and correct their behavior,[49] conduct shakedowns, and must respond to emergencies as soon as they go through the A-1 sally port and could be fired for failing to respond, despite being told they cannot put in overtime amounting to less than 15 minutes. The Union points out that information and equipment exchange (relief) on the post is an integral and indispensable part of the CO job, and that it is absurd to think that the relief process takes only a few seconds, or can be accomplished with only one CO present, if for no other reason than accountability purposes. It asserts that for posts staffed for 24 or 16 hours that require continuous coverage and a shift relief process, it is impossible for COs to do their jobs without overlapping shifts, noting that while the Agency schedules 8 hour shifts, it suffers or permits COs to work *de facto* overlapping shifts where both COs are present and working but only one is being paid.[50] The Union contends that the Agency has actual or constructive knowledge that COs perform work before and/or after their shifts, not only because they can see who is in the facility by looking at the accountability board and watching the COs walking in the compound with their batteries or in the Lt.'s office on a regular basis, but also because they have set up a system making it is impossible for COs to routinely perform pre or post-shift work to meet

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47 See, e.g. *FCI Williamsburg* and *FCI Allenwood*, supra.

48 See, e.g. *FCI Greenville and and AFGE Local 1304*, FMCS No. 05-05187 (Briggs, 2009); *USP Hazelton*, supra; *FCI Williamsburg*, supra.

49 See, e.g. *USP Pollock and AFGE Local 1034*, FMCS No. 06-56077 (Wetch, 2008); *FCI Greenville*, supra.

50 The Union relies on *USP Allenwood*, supra; *FCC Oakdale*, supra, noting that the Agency recognizes in its POs that it can take 14 minutes to walk to and from a HU post from CC. It also contends that CC #1 and J Unit Control posts work *de facto* overlapping shifts doing shift changes and inmate counts and movements, and accounting for all equipment and engaging in a lengthy briefing with management's knowledge and assent.

expectations and assume their posts at the start of the shift without scheduling overlapping shifts.[51]

The Union argues that the POs do not support the Agency's defenses. It notes that it ignores the reality of the daily routine as well as common sense to say that relief tasks are to be done after the off-going CO is relieved and has left, since it is impossible to relieve someone who has already left. It posits that it is impossible to count inventory after the outgoing CO has left, due to the accountability of missing inventory issue that could arise as a result, and lead to security and disciplinary consequences. The Union points out that directing the CO to close out the log book 1/2 hour prior to the end of the shift would not permit him to include all activities and important information up to the shift's end, entries the Agency asserts are complete and sufficient to negate the necessity of a verbal exchange. It also points out that while the POs require COs to ensure there is a freshly charged battery installed in the radio/body alarm, it does not provide for any time for the CO to pick up such a battery from the CC.

The Union contends that the Agency did not establish that the time spent by COs engaging in these integral and indispensable functions is *de minimis*, an inquiry that requires a common sense approach, and a defense that does not apply to time that reoccurs daily, is repetitive and regular, and aggregates over an extended period of time, as in portal cases.[52] In any event the Union contends that the evidence supports a finding that all of the pre and post-shift work in issue is greater than 10 minutes/day, thereby exceeding the *de minimis* standard, and that it would not be practically difficult to determine the amount of time involved, as it has done in this case. The Union indicates that the reason the Agency did not compensate the COs for their pre and post-shift time is because it felt that it was not compensable work, and not because the employees did not ask for the overtime, and that its actions belie any claim to the contrary.

The Union argues that the cases relied upon by the Agency are inapposite. It notes that the denial of compensation for the meal period in *FCI Three Rivers and AFGE Local*

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[51] See, *Castilla v. Givens*, 704 F.2d 181 (5th Cir. 1983).

[52] See, *FCC Beaumont*, supra; *FTC Oklahoma City*, supra; *FCI La Tuna*, supra; *FCI Fort Worth*, supra; *FCI Williamsburg*, supra.

4044, 65 FLRA 264 (2010) was based upon a finding that management lacked knowledge of its ongoing FLSA violations, not upon witness credibility, and it has proven in this case that management knew, or should have known, about the pre-shift work being repeatedly performed by the COs in Otisville. The Union asserts that the basis for the holding in *USP Lewisburgh and AFGE Local 148*, FMCS No. 06-03725 (Fabian, 2008) was a finding that the witnesses were incredible, a contention not really made in this case where the Agency repeatedly acknowledged the honesty and integrity of the COs at this institution. The Union distinguishes the finding in *USP Terre Haute and AFGE Local 720*, 58 FLRA 327 (2003), that there was no showing that COs performed an integral and indispensable activity during their travel time between the security perimeter and the CC, from the situation of COs at Otisville donning duty belts after the security screening site. The FLRA notes in *Terre Haute*, that the Agency conceded that all time after the pick up of equipment at the CC was compensable. Finally, the Union asserts that the finding in *FDC Philadelphia and AFGE Local 1325*, FMCS NO. 06-01660 (Simon, 2009) is an anomaly based upon incorrect factual findings, pointing out that the practice existing in Otisville is uniform, and noting that intervening FLRA precedent in *FCI Jesup* is contrary to the holding in that case.

With respect to the appropriate remedy, the Union contends that it established the amount and extent of work performed as a matter of just and reasonable inference, and that, in the absence of the Agency maintaining the required time records, the arbitrator can rely upon the testimonial evidence presented.[53] The Union maintains that the testimony shows consistent work by COs in all disputed posts over 8 hours/day, and that this evidence was uncontradicted by the Agency. It notes that the video evidence supports the amount of uncompensated work testified to by the COs. The Union asserts that it has taken a reasonable approach by averaging out the testimonial evidence from each post, adding it to the average shown by the video, and dividing by two to arrive at the amount of overtime being worked by COs on each post. It points out that there was no video evidence produced

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[53] *USP Marion*, supra; *Mt. Clemens Pottery*, supra; *Marshall v. Partida*, 613 F.2d 1360 (5th Cir. 1980); *Brock v. Seto*, 790 F.2d 1446 (9th Cir. 1986); *Clark v. A&B Automotive & Towing*, 1996 U.S. App. LEXIS 15226 (9th Cir. 1996); *FCC Beaumont*, supra; *USP Leavenworth*, supra.

by the Employer to contradict the Union's evidence and no other document that exists to rebut the reasonable inference to be drawn from its evidence.[54]

The Union argues that liquidated damages are warranted under FLSA §216(b) as a make whole remedy, and have been held to be compensatory (for failure to pay wages on time), not punitive.[55] It asserts that liquidated damages are the norm, and that the employer bears a substantial burden to show that it acted in good faith and on a reasonable belief that it was not violating the FLSA (and it took affirmative steps to ascertain the Act's requirements) in order to defeat the award of liquidated damages.[56] In this case the Union asserts that the Agency did not show that it even attempted to discern its FLSA obligations since (1) it made no inquiries to OPM, DOL or DOJ regarding its pay practices, (2) those responsible for effectuating compliance never read any of the multitude of portal cases within the BOP or even the prior case involving Otisville, (3) they were not familiar with this grievance, and (4) made no schedule changes after the award in the prior case. The Union contends that the Agency did not exercise good faith in this case, and failed to comply with PS 3000.03 §610.1 in establishing work schedules permitting compliance with overlapping shifts and reasonable travel time, and did not engage in any negotiations with the Union in arriving at a workable schedule or ascertaining what it had to do to comply with the prior Otisville arbitration award.

Thus, the Union requests that the arbitrator find that the Agency violated the FLSA by failing to compensate COs for the time spent performing work that the Agency suffered or permitted before and/or after the employee's shift when assigned to the following posts: Compound #1 & 2, HUs, SHU #1, 2 & 3, J Unit Control and J Unit. It requests a finding that: (1) for all posts other than CC #1 and J Unit and J Unit Control, the compensable workday starts when the COs don their duty belt in the lobby after clearing the screening

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[54] The Union relies on *De Leon v. Trevino*, 163 F. Supp. 2d 682 (S.D. Texas, 2001); *USP Leavenworth*, supra; *FCI Jesup*, supra; *FCC Beaumont*, supra.

[55] See, e.g. *Marshall v. Brunner*, 668 F.2d 748 (3rd Cir. 1982); *Brooklyn Savings Bank v. O'Neil*, 324 U.S. 697 (1945); *Overnight Motor Transp. Co. v. Missell*, 316 U.S. 572 (1942).

[56] See, e.g. *Walton v. United Consumers Club, Inc.*, 786 F.2d 303 (7th Cir. 1986); *Kinney v. District of Columbia*, 994 F.2d 6 (D.C. Cir. 1993); *Martin v. National Association of Wholesaler-Distributors*, 940 F.2d 896 (3rd Cir. 1991).

site (or at the latest at the CC), or in the alternative, when they pick up a freshly charged battery at the CC, and ends when they return depleted batteries and/or other equipment to the CC; (2) the compensable workday for the CC #1 post begins and ends at the CC when they start and end their information and equipment exchange; (3) for J Unit, the workday begins when they screen themselves at the screening site and ends when they drop off a battery and key at the J Unit CC; and (4) for J Unit Control, the workday begins when they screen themselves at the screening site and ends when they complete the shift exchange process and depart their post. The Union asks for the following overtime compensation for each shift worked on the following posts: (1) Compound #1 & 2 - 18 minutes; (2) CC #1 - 18 minutes; (3) A side HU - 20.5 minutes; (4) B side HU - 18 minutes; (5) SHU #1 - 25 minutes; (6) SHU #2 - 20 minutes; (7) SHU #3 - 17.5 minutes; (8) J Unit Control - 20 minutes; and (9) J Unit - 20 minutes. It also asks for liquidated damages equal to the amount of backpay and an award of reasonable attorney's fees and costs.

VI. AGENCY POSITION

The Employer first states that the FLSA requires representative testimony in class action cases, and that the burden of proof is on the employee to prove a violation.[57] It asserts that one person cannot be an adequate representative for an entire post, and the amount and extent of work must be similar.[58] The Employer notes that it is clear that there are no uniform arrival, departure or exchange times in this case, undermining the representativeness of the testimony. It suggests that the credibility of witnesses is important, especially where there is the potential for financial gain,[59] as here, noting the fact that it did not receive any complaints from employees who knew how to file for overtime and failed to do so, and asserting that this also affects the believability and self-serving nature of the evidence. The Agency contends that the employees' and Union's vague and general allegations about time worked is insufficient to meet its burden of proof.

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[57] The Agency relies on *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011); *Proctor v. Allsups Convenience Stores*, 250 F.R.D. 278 (N.D. Texas 2008); *Dole v. De Sisto*, 929 F.2d 789 (1st Cir. 1991); *McLaughlin v. Ho Fat Seto*, 850 F.2d 586 (9th Cir. 1988).

[58] See, e.g. *FCI Three Rivers*, supra.

[59] See, e.g. *USP Lewisburg*, supra; *Hillen v. Dept of the Army*, 35 M.S.P.R. 453 (1987); *Negron v. Dept of Justice*, 95 M.S.P.R. 561 (2004).

The Agency argues that the pre and post-shift activities being relied upon by the Union in this case are not integral and indispensable to the primary activities of the COs at Otisville, as they do not meet the test of being necessary to the business, performed by employees primarily for the benefit of the Employer, and in the ordinary course of business.[60] The Agency maintains that the picking up and dropping off of batteries is not an integral and indispensable activity, as it is not required by the Employer or done at management's direction, there are battery charges on the units, and Compound COs deliver them to the unit while they are on duty as part of their normal responsibilities. The Agency notes that none of the POs that govern the job responsibilities of a CO require him to pick up a battery at the CC. It asserts that the question is not whether a battery is integral and indispensable, noting that a battery without a radio serves no function, but whether the act of picking one up is.[61]

The Agency next asserts that the act of stopping in the Lt.'s office is not an integral and indispensable activity. It avers that it is not required by the Employer and, on 24 hour posts, the CO can call in to the Lt. to report that he is present. When the shift starts at the CC, if a CO stops by the Lt.'s office, it is on compensable time. The Employer maintains that COs can check their mail while on duty or when relieved, and most employment-related information is sent by email. It contends that there is no benefit to the Employer when an employee elects to stop in the Lt.'s office to check his mailbox. Additionally, the Agency contends that reviewing the PPF in the Lt.'s office is not an integral and indispensable activity, since Compound COs also have the responsibility of taking it to posts to assure that COs timely view and sign it.

The Employer argues that donning a duty belt at the security screening site is also not an integral and indispensable activity. It asserts that a duty belt is not equipment, and is purchased by the CO and configured to meet his needs. The Employer only requires that it have a clip and chain before it issues keys to the CO. The Agency contends that putting on the belt is part of the security screening process which itself is not compensable under the

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60 See *MCC Chicago*, supra; *Dunlop v. City Electric Inc.*, 527 F.2d 394 (5th Cir. 1976); *Bonilla v. Baker Concrete Constr., Inc.*, 487 F.3d 1340 (11th Cir. 2007).

61 *Amos v. U.S.*, 13 Cl. Ct. 442 (1987); *USP Terre Haute*, supra; *FDC Philadelphia*, supra.

Portal Act and prior precedent.[62] It notes that the belt is not issued by the Agency, nor does it constitute protective equipment stored on employer property, as was the case is *Alvarez*, supra. The Employer also relies upon the previous finding in *Terre Haute*, supra, that turning a chit on the accountability board is not an integral and indispensable activity.

The Agency avers that COs traveling to their posts on the compound before their shift starting times are walking without performing a principal activity directed by the Employer, and are directly covered by the exceptions set forth in the Portal Act. It asserts that COs are not expected to perform work before or after their shifts, and that being alert and vigilant is insufficient to convert non-compensable travel time to work time.[63] The Employer avers that when emergencies occur, it is impossible for a Lt. to know who responded off shift without being so informed, and absent such written request for overtime, and proof that the time was more than *de minimis*, it is not obligated to compensate COs for such response.[64] The Employer argues that any of these pre or postliminary activities found to be an integral and indispensable activity, are still not compensable as they are, at best, *de minimis*, taking less than 10 minutes total to complete.[65]

The Employer next argues that management did not suffer or permit employees to work without compensation. It maintains that video evidence of staff entering and leaving the A-1 sally port early or late, being relied upon by the Union, is immaterial in determining if they are performing an integral and indispensable activity for the Agency, as opposed to being on their own personal time.[66] It points out that employee participation in van pools

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62 It relies on *Whalen v. U.S.*, 93 Fed. Cl. 579 (2010); *Gorman v. Consolidated Edison Corp.*, 488 F.3d 586 (2nd Cir. 2007); *Bonilla*, supra; *Mt. Clemens Pottery*, supra; *USP Terra Haute*, supra; *FCI Schuykill and AFGE Local 3020*, FMCS No. 05-04730 (Nagy, 2008); *Albrecht v. Wackenhut Corp.,* 379 Fed. Appx. 65 (2nd Cir. 2010), and argues that this also applies to the J Unit.

63 See, e.g. *Terre Haute*, supra; *Bobo v. U.S.*, 37 Fed. Cl. 690 (1997).

64 See, *USP Lewisburg*, supra.

65 It cites *Carlsen v. U.S.*, 72 Fed. Cl. 782 (2006); *Lindow v. U.S.*, 738 F.2d 1057 (9th Cir. 1984); *USP Leavenworth*, supra; *MCC Chicago*, supra.

66 The Agency argues that if the arbitrator were to determine that any one activity prior to reaching the post is an integral and indispensable part of the CO job, necessitating financial compensation, she must use the video evidence to determine the amount of time from the A-1 sally port, rather than the conclusionary self-serving testimony of the few COs who were presented at the hearing.

accounts for early arrival and departure times, rather than the necessity to commence work before the shift starting time. The Agency notes that the parties stipulated that not every CO dons his duty belt in the A-1 lobby or picks up a battery at the CC. It contends that the Agency never intended for staff to work over 8 hours/day, and POs, which must be adhered to by all COs, make clear the beginning and end time of each post by shift, which conforms to the entry made by COs in the logbooks, which are required to be accurate.

The Employer avers that it has been proactive since the first Otisville portal case, instructing management to identify and address portal issues, which has been done by placing battery chargers on the the HUs and changing POs to give COs a reasonable amount of time to get from the CC to their posts. It points out that no portal issues have been brought out by the Union when questioned in labor-management meetings or identified by staff at other times, and COs have never properly followed the procedure to request overtime for the hours claimed by this grievance. The Employer asserts that, under Article 6 of the collective bargaining agreement, pay issues are a mutual responsibility of the employee and the Employer, and alleges that overtime has not been denied when requested for work assigned and performed. It states that COs chose not to request overtime for time worked less than 15 minutes, despite never having been instructed not to. The Employer argues that it has the right to determine the methods and means of performing work, and the employees' failure to follow written instructions concerning the designated start and end times set forth in the specific POs, as well as the established procedure for claiming overtime compensation, cannot support a finding that it suffered and permitted additional work, or be the basis of financial gain for such employees.

In conclusion, the Agency distinguishes *Alvarez* on its facts, which dealt with protective clothing in a meat processing plant, and notes that *Williamsburg*, supra, is an interim decision that is not final and is without precedential value. It states that the evidence supports the finding that work time starts once the CO gets the keys and radio necessary to perform his job, which occurs on the post for 24 hour positions, and at the CC for AM shifts, where COs are given a reasonable amount of time to walk to the post, as required in the Human Resources Manual. The Employer requests that the grievance be denied in its entirety.

VII. DISCUSSION AND FINDINGS

As noted earlier, the determination I must make in this case is what the first and last integral and indispensable activity is for COs on posts where relief is made on the post.[67] While the Union urges me to conclude that donning the duty belt in the lobby begins the CO's work shift on all but the CC #1 and J Unit Control posts, and that the doffing of same ends the shift, and the Agency states that it occurs at the post upon exchange of the radio and keys (with any brief time spent performing the relief being *de minimis*), there are other activities that also come into play in making this determination - picking up and dropping off charged and spent batteries at the CC, and activities undertaken by the CO once he passes through the A-2 sally port onto the compound until he reaches his post (including travel time to the post, and stopping in the Lt.'s office to check mailboxes and the PPF), and performing the shift exchange of equipment and information. It goes without saying that once a CO engages in his first integral and indispensable activity, his continuous workday begins, and all activities engaged in thereafter (regardless of whether they would be considered integral and indispensable activities themselves) are compensable until the last integral and indispensable activity is completed. See, e.g. *Alvarez*, supra.

Many of these activities apply to all of the posts in issue in this case, and can be dealt with together. For example, all COs, with the exception of the Control posts (CC #1 and J Unit Control) are required to don their duty belts prior to the time they pick up equipment from the CC and/or enter the compound. The duty belt itself is not provided by the Agency, but it is required, and it must have a key chain, a metal radio holder, and a place to keep brass chits used to secure equipment. It also must provide a location for the CO to attach key clips, a CPR mask, gloves and handcuffs, so that he can carry all of the required equipment necessary to do his job while keeping his hands free. Since the duty belt contains metal, it must go through the security screening separately, and cannot be worn until after the CO clears security.[68] The parties agreed, and the video evidence reveals, that most, but

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[67] All of the positions sought by the Union - Compound #1 & 2, HUs, SHU #1, 2, & 3, CC #1, J Unit Control and J Unit - fall into that category, at the very least at one time on the shift (at the end of the B side AM and the beginning of the B side PM shifts).

[68] The belt could be worn with the CO's uniform when coming to work, but it must be removed for security screening, and then can be put back on along with other items that require separate screening.

not all, COs don their duty belts in the front lobby after being screened and prior to entering the A-1 sally port. The remaining COs don their duty belts by the time they arrive in the CC lobby or at that location, since keys cannot be issued to a CO by the CC until he can fasten them to the duty belt. Even if a CO picks up no equipment at the CC, he would not enter the compound through the A-2 sally port without wearing his duty belt on his uniform. It is a necessary part of his attire, and carrying it would hamper his ability to react to emergencies or situations that may arise with inmates while he is on the compound going to his post.

The court cases cited by the Union involve the donning and doffing of personal protective gear at the employer's premises in manufacturing or processing plants found to be integral and indispensable to the safe performance of the principal activities of the employee. See, e.g. *Alvarez*, supra; *Steiner*, supra; *Perez*, supra. Two cases rely upon the donning and doffing of personal protective equipment of a police officer kept at his assigned station (including kevlar vest and Sam Brown belt and contents) prior to commencing his shift, finding the gear to be integral and indispensable to his principal duties, and therefore the time taken to put it on to be compensable. See, *Maciel*, supra; *Nolan*, supra. In *Nolan*, the court stated that police uniforms convey and legitimize an officer's authority, increase his safety and help deter crime.

The precedent involving donning and doffing duty belts in a BOP portal case comes from *FCI Hazelton*, supra, and *FCI Williamsburg*, supra.[69] Both Arbitrators Vaughn and Harris conclude that the duty belt is required and necessary equipment for a CO to perform his principal duties, that it must be donned on the employer's premises due to the need for security screening, and that its use benefits the Agency. I am in agreement with that conclusion. In *FCI Hazelton*, supra, Arbitrator Vaughn found that a CO was not required to don his duty belt immediately after security screening, or prior to going to the CC or onto the compound passed the second sally port, which is the first place wearing the belt actually benefits the Agency. He opined that entering into the confined portion of the institution where it is possible for a CO to encounter inmates and perform his principal duty of protecting the safety and security of the institution, staff and inmates, is when the duty belt

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[69] It was noted by Arbitrator Katz in *Allenwood II*, supra, that the Union waived its argument that the compensable workday began with belt-donning after security screening.

is needed to convey and legitimize his authority and maintain the security of the items attached to the belt. *Id.* at pp. 78-79.

In *FCI Williamsburg*, supra, Arbitrator Harris found that the donning of a duty belt in the lobby after security screening starts the compensable workday for Compound #1 & 2 COs[70] based upon the existence of an admitted uniform practice for COs to put on their duty belts after clearing through the metal detector at tables provided by the Agency adjacent to the screening area. He noted that their hands must be free and prepared to receive equipment at the CC one minute later.

I believe that the analysis of Arbitrator Vaughn in *FCI Hazelton*, supra, with respect to the issue of donning and doffing CO duty belts, is more on point when considering the facts elicited with respect to the situation existing at Otisville. The parties stipulated that most, but not all, COs don their duty belts after clearing security in the front lobby, and the Union acknowledges that they can do so up until they get to the CC prior to receiving any equipment. Thus, unlike the situation in *FCI Williamsburg*, supra, there was no uniform practice shown in this case. At Otisville, absent some rule or procedure requiring a CO to don his duty belt in the front lobby after going through security, or a showing that the belt is required to be on the CO's person for some reason specifically related to his principal activities prior to reaching the CC and obtaining equipment, the fact that most, but not all, of the COs choose to don their duty belts after passing through the security screening, for ease of transport or their convenience, is insufficient to make the actual donning at that location an integral and indispensable part of their principal activities. Accordingly, I cannot accept the Union's position that a CO's compensable workday commences when he dons his duty belt in the front lobby.[71]

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[70] At that stage of the proceedings, only the Compound #1 & 2 and Control #1 posts were in issue. Arbitrator Harris found that the commencement of the work day for the Control #1 was when he entered the door to the CC. Earlier in the award he concluded that the picking up of batteries from the CC started the compensable workday for the Compound #1 & 2 posts, but he noted that subsequent to the institution of security screening, the additional minute it took to go from the lobby where the duty belt was donned, to the CC where the battery was picked up, was compensable.

[71] This finding is not based on the minimum amount of time it takes to actually don a duty belt, but, rather, on the fact that, while the belt itself is an integral and indispensable part of the necessary uniform of a CO, its donning in a location prior to reaching the CC is not required.

There are a plethora of BOP portal awards dealing with COs retrieving equipment from the CC.[72] Since the issue in this case focuses on whether drawing only a charged battery is sufficient "equipment" to fall within the parameters of the Criteria listed in the Human Resources Manual §610.1(3) - employees who pick up equipment at the CC shall have their shift starting and stopping time at the CC and their shifts scheduled to include reasonable time to travel from the CC to their assigned post and return at the end of the shift - the awards dealing with charged batteries are most relevant. The FLRA has upheld the finding that the pick up and drop off of batteries from the CC is an integral and indispensable activity to a CO's primary job duties, and thus begins and ends the continuous workday. See, *FMC Carswell*, supra; *FCI Jesup*, supra; *FCI Allenwood*, supra. Numerous arbitrators have also held that charged batteries are critical to the functioning of the radio and body alarm - the lifeline of the CO - without which he could not perform his principal activities safely and effectively. See, *FCI Hazelton*, supra; *FCI Williamsburg*, supra; *FCI Allenwood*, supra; *Allenwood II*, supra; *FCI Schuykill*, supra; *FCI Fort Worth*, supra; *FCI La Tuna*, supra; *FCC Oakdale*, supra; *USP Atwater*, supra.

I am in agreement that the situation in Otisville requires a similar finding. Prior to March, 2011, there were no battery chargers on the units. The evidence establishes without question that virtually all COs picked up a freshly charged battery from the CC prior to going to their HU posts to make the exchange of other equipment, and dropped off spent batteries at the end of the shift, and that such practice had been ongoing for at least 20 years to the knowledge of command staff, who often witnessed such exchanges. I find that management knew of this practice, condoned it, did nothing to end it, and benefitted from it. The fact that batteries could be brought to the units by Compound COs or other relief personnel, when they had time, did not substitute for the CO fulfilling his PO responsibility to ensure that his radio and body alarm had a freshly charged battery at the beginning of the shift by picking one up himself. COs could not be left to rely upon the fact that freshly charged batteries would be timely brought to them when requested, and understood that the

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[72] See, e.g. *USP Terre Haute*, supra; *USP Leavenworth*, supra; *MCC Chicago*, supra; *FCC Beaumont*, supra; *FTC Oklahoma City*, supra; *FCI Schylkill*, supra. The Agency admits that the start time for COs who pick up their keys and equipment at the CC is at that location at the time of pick up.

delay in furnishing them could put their safety and security in extreme jeopardy. See, *FMC Carswell*, supra.

The record also supports the finding that this practice changed very little after the Agency placed battery chargers on the HUs and in SHU. This is primarily due to the admitted fact that the batteries at Otisville are old, do not maintain a charge, and could last as little as 2 hours after being charged on the unit. Without a freshly charged battery from the CC, reliance on the battery charger in the units to provide sufficient coverage for an entire 8 hour shift was, at best, chancy, and, at worst, reckless. Thus, similar security concerns exist for HU COs after the battery chargers were installed in the units, and it was unreasonable for the Agency to expect them to feel comfortable waiting for a Compound CO to deliver a replacement battery when time permitted.[73] Apparently, many of these batteries do not give the CO much advance warning that they will lose their charge. The evidence also establishes that management knew that COs on 24 hour posts continued to pick up and drop off batteries at the CC after March, 2011, issued no directives for them not to do so or for CC COs not to hand them out, and continued to enjoy the benefit of the safety that came from these COs ensuring that they were in a position to comply with the PO requiring a freshly charged battery to be placed in the radio/body alarm at the start of the shift.

Thus, I find that for the Compound #1 & 2, HUs, SHU # 1, 2 & 3 posts, where shift relief occurs at the post, the first integral and indispensable activity engaged in by the CO is picking up a charged battery at the CC. I also find that the dropping off of a spent battery at the end of the shift concludes the compensable workday for the COs on these posts. That means that time spent traveling to and from these posts, as well as engaging in the shift relief process, is also compensable time. See, *Alvarez*, supra; *FCI Jesup*, supra; *FCI*

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[73] Both *FCI Fort Worth*, supra, and *FCI Williamsburg*, supra, deal with the situation where battery chargers were placed on the unit during the recovery period, a fact that did not change the finding of the arbitrators that employees were entitled to compensation for pre-shift overtime including the time spent picking up batteries at the CC.

Allenwood, supra.[74] The travel time involved in this case occurs after the first compensable activity, thus distinguishing the holding in *USP Terre Haute*, supra. Although the specific distances to each post were not set forth in the record, the evidence does include specific POs that set forth the amount of time designated by the Agency as appropriate travel time between the post and the CC for COs who must return their equipment to the CC at the end of their shifts. Thus, 7 minutes is alloted to get from SHU to the CC, 10 minutes is allotted to travel between D, E, F and G HUs and the CC, and 7 minutes is designated as the travel time from the rear gate, a location near where Compound COs make their on post exchanges (if not in the Lt.'s office). In calculating the appropriate compensation due to the grievants when working in these positions, it must be remembered that the designated travel time is meant to account only for one way travel from the post to the CC.

As to the CC #1 post, the evidence reveals that the COs in this position do not don duty belts or pick up batteries, but report directly to their post. When they arrive they must engage in extensive information and equipment exchange at the time of shift relief, including accounting for, and inventorying, all keys and equipment (while giving out/ receiving such equipment to/from COs entering and exiting the institution) which include leg iron restraints, radios, transfriskers, and batteries, reviewing two log books, and conducting a debriefing that includes the location of camp drivers, airport trips and trips to other institutions, receipt and discharge of inmates, and inmate counts, including appropriate paperwork on these matters. The record reveals that the shift relief process on the CC #1 post is more extensive than on any other post, and takes longer. Since the CC is the nerve

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[74] Even if a CO on a 24 hour post fails to pick up a charged battery at the CC, I am in accord with the cases that hold that passing through the sally port and entering the compound, while in uniform (but unarmed and vulnerable) places the CO in a dangerous work environment, where he is required to be constantly alert and vigilant in observing and responding to potentially unsafe situations, and exercise sound judgment in making instantaneous decisions affecting life, well-being and civil liberties, and that such activities are integral and indispensable to his primary function of ensuring the safety of the institution, staff and inmates. See, *FCI Greenville*, supra; *USP Pollock*, supra; *FCI Williamsburg*, supra. As a result, the difference in the commencement of the continual workday between those COs who pick up charged batteries and those who do not is negligible.

The situation in Otisville is distinguishable from that dealt with in *MCC Chicago*, supra, where the arbitrator denied compensation for travel time (including elevator waiting time) if no equipment was picked up at the CC, since the COs in that case were inside a 26 story building using an elevator to get to their respective units, and had no chance of meeting unattended inmates in transit. I do note that the arbitrator there awarded travel time, including elevator wait time, to employees picking up batteries at the CC.

center of the institution, and it is the responsibility of the COs at this post to know the whereabouts and control the movement of all persons within the institution, the passage of accurate information and equipment inventory is an integral and indispensable part of their primary activities,[75] and the arrival on post and commencement of the shift exchange process is the start of their compensable workday, which ends when they leave the CC to exit the facility after engaging in the same relief process with the oncoming CC #1.

The J Unit operates as a distinct entity, with a CC and housing unit.[76] The main difference is that the COs working in J Unit screen themselves through the security area prior to proceeding to the location of their post. The J Unit Control engages in an information and equipment exchange concerning all aspects of the camp with the outgoing J Unit Control, and gives a charged battery and the key to the J Unit CO to let himself into the unit at the commencement of his shift.[77] The J Unit CO also engages in a shift relief with the outgoing CO, exchanging pertinent information and equipment to perform his primary activities. I find that the first integral and indispensable activity engaged in by the J Unit CO is obtaining the charged battery and key to the unit from the J Unit CC. I do not find that the act of screening themselves in is an integral and indispensable activity under the circumstances, because, unlike the front lobby COs, that is not their primary job function, and it merely allows them access to their workplaces, as is the case in the main institution. There is no reason to deviate from the precedent that the screening process is not compensable. See, *FCI Allenwood*, supra; *USP Terre Haute*, supra.

Having found that there are pre-shift and/or post-shift activities that are integral and indispensable to the performance of the work of the COs in the disputed positions, that they

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75 The process of shift exchange has been repeatedly recognized as an integral and indispensable activity to the principal activity of a CO on any post, since the passage of information and equipment is critical to the ability to safely perform the job. See, *FCI Hazelton*, supra; *USP Marion*, supra; *FCC Beaumont*, supra. *Cf. USP Leavenworth*, supra.

76 The parties agreed not to go into any detail about the security procedures on this unit due to concerns about the dissemination of this information.

77 It is unclear how else the J Unit CO would acquire a charged battery to power his radio and body alarm at the start of, or during, the shift.

have engaged in on a daily basis throughout the period encompassed by this grievance, [78] and for which they have not received compensation, I next address whether the Agency has suffered or permitted such work requiring overtime compensation under the FLSA. I have found above that the integral and indispensable activities that start and end the compensable workday have been for the benefit of the Agency, regardless of whether they were requested or directed, as they deal directly with a CO's ability to ensure the safety and security of the institution, staff and inmates.

I also reaffirm my conclusion that supervisors and management knew, or had reason to believe, that such work was being performed, had the opportunity to prevent it, and failed to do so. Not only did command staff see HU COs picking up charged batteries at the CC prior to their shift starting time (and returning spent ones at the end of the day), as well as walking on the compound to their posts, and occasionally checking in at the Lt.'s office prior to their designated start times, but the accountability board in the A-1 sally port indicates who is in the institution at any given time and can easily be seen by supervisors wanting to access that information. Additionally, management at Otisville chose not to change its shift starting times to allow for overlapping shifts on 24 hour posts despite the provisions of Human Resource Manual §610.1, and knowing that it was operationally impossible for the COs to have freshly charged batteries in their radios at the start of the shift, and effectuate the change of shift, with straight 8 hour shifts, where only one CO was being compensated during the shift relief that both were required to participate in. See *FCC Oakdale*, supra; *FCI Hazelton*, supra; *FCI La Tuna*, supra. It is disingenuous for the Agency to argue that the shift exchange took a matter of seconds, as it did in this case, or that this work was voluntarily performed. As noted by Arbitrator Katz in *Allenwood II*, supra, at pp 82-83:

> With respect to the *de facto* overlap during the change-of-shift period, the supposedly "voluntary" actions of the CO's have been undertaken because they, unlike management, have recognized that adherence to the official start-times would make it impossible for the official end-times to be adhered to.....

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[78] The Union seeks compensation commencing on July 1, 2008, so there is no issue raised in this case concerning extending the 2 year statute of limitations. Arbitrator Kaplan's award was issued on June 30, 2008 and dealt with the period prior to that date.

> In that sense, the CO's "voluntary" use of these *de facto* overlapping schedules (based on early arrivals by the incoming CO's), actually constitutes a form of involuntary action - since it is necessary to ensure timely relief of the outgoing CO's. In either event, however, the practice benefits the institution. Yet management, while sitting back and enjoying the fruits of the CO's labor, maintains that it is not obliged to pay for it. This is contrary to several of the cited regulatory provisions.
>
> Management knew, as well it should have, that the CO's were following this early arrival practice. Without regard to whether management requested the CO's to do so, management took no steps to prevent that work from being performed. In that sense, it has "suffered or permitted" the work within the meaning of 5 CFR §551.104, since it knew it was being performed; it knew that work was of benefit to the Agency; it had an opportunity to prevent the work from being performed; but it declined to avail itself of the opportunity to do so. These actions are contrary to 29 CFR §785.13, indicating that management has the duty to "exercise .... control to 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 conclusion is inescapable that the Agency suffered or permitted the pre and/or post-shift work found to be integral and indispensable to the CO's primary activities herein during the entire time period encompassed by this grievance without compensating employees for such work in violation of the Master Agreement and FLSA. See, *FMC Carswell*, supra.[79]

With respect to the appropriate remedy, I conclude that the Union met its burden of establishing not only the violation, but a reasonable method for calculating the amount of overtime requiring compensation. As noted, the Agency failed to maintain time records and was unable to rebut the testimony of the COs with respect to the time it took them to pick up equipment and make a proper relief, or to contradict the information obtained from the videotape evidence establishing the time spent in the facility by COs at different posts. See, *FCC Beaumont*, supra; *USP Leavenworth*, supra. Under such circumstances, it is reasonable to use both types of evidence, along with the specific PO information concerning travel time allotted to different posts due to their distance from the CC, to calculate the amount of pre and/or post shift work performed by the COs covered by this grievance.

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[79] This finding is consistent with the holding in Arbitrator Kaplan's award that COs picking up equipment at the CC and relieving other employees were entitled to compensation for the travel time between the pick up and their posts and from their posts back to the CC to return the equipment, so long as such time exceeded 10 minutes. He did not deal with the issue presented in this case concerning whether such equipment included a charged battery. It also distinguishes this case from *FCI Three Rivers*, supra.

The video evidence provided by the Agency in response to the Union's information request covered only the camera in the lobby monitoring the A-1 sally port. In considering the amount of pre and post-shift activities engaged in by the COs in this case, the times recorded by the Union for COs entering that area must be adjusted to reflect the fact that a CO must go through the A-1 sally port and walk a short distance until he enters the CC, where he requests and receives his charged battery, which I have found to be his first integral and indispensable activity commencing his continuous workday. Having made that walk during the days of the hearing in this case, and having observed the workings of the CC, I believe that it is reasonable to conclude that it takes approximately 2 minutes to complete that distance and the retrieval of battery process.[80]

Based upon the representative testimony of its witnesses, and averaging out the time estimates they placed on the period between donning their duty belts in the front lobby and assuming their posts after having made the shift exchange, and taking into account the video evidence of the amount of time spent inside the institution, the Union seeks the following daily overtime compensation for the COs when working on these posts:

Compound #1 & 2	-	18 minutes
CC #1	-	18 minutes
A side HUs	-	20.5 minutes
B side HUs	-	18 minutes
SHU #1	-	25 minutes
SHU #2	-	20 minutes
SHU # 3	-	17.5 minutes
J unit Control	-	20 minutes
J unit	-	20 minutes

I think it appropriate to amend the amount of time so designated in the following ways. First, since the testimony involves the period between the donning of the duty belt and assuming the post, and the video evidence includes the time inside the institution starting and ending with the A-1 sally port, and I have held that it takes approximately 2 minutes to arrive at the CC and retrieve batteries, which I have found to be the first integral

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[80] It is interesting to note that this was the time period the Union contended was the difference between the donning of the duty belt in the front lobby and the retrieval of a battery from the CC in the *FCI Williamsburg* case; Arbitrator Harris apparently found it to be one minute.

and indispensable compensable activity, I shall deduct 2 minutes from each of those averages (with the exception of the J unit), and calculate a new average in the same manner used by the Union that I have found to be reasonable herein.[81] Second, I will take into account the travel times set forth in the specific POs noted above - 7 minutes for SHU, 10 minutes for the HUs, and 7 minutes for the Compound COs - to assure that the figure arrived at is consistent with the compensable round trip from the CC to the unit and return. Third, since there is no evidence establishing the need for post-shift overtime with the exception of the CC #1 and J Unit Control positions which do not involve any travel time, I conclude that the *de facto* overlapping shifts created by the pre-shift overtime procedure permitted most of the HU COs to travel to the CC, and turn in their batteries, by the end of their scheduled shifts, negating the need to double the travel time for each post.

Thus, I find the following to be the appropriate compensable overtime worked by COs in the following positions on a daily basis:

Compound #1 & 2	-	16 minutes
CC #1	-	17 minutes
A side HUs	-	19.5 minutes
B side HUs	-	16 minutes
SHU #1	-	23 minutes
SHU #2	-	13 minutes
SHU # 3	-	15.5 minutes[82]

With respect to the J Unit positions, there was no video evidence and no site visit, so I have no basis to determine the time it takes between the screening process and arrival at the J Unit CC and retrieval of equipment. In such case, since the testimony related to the time period commencing at the screening site, an activity I have found not to be compensable, I have taken the liberty of making a similar 2 minute deduction from the

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81 I have rounded any fraction of a minute to the nearest whole minute.

82 Since there were no video calculations applicable to the SHU #2 & 3 positions, I have deducted the 2 minutes from the average of the testimony presented with respect to each of these positions.

average time established by the testimony with respect to these posts.[83] Thus, I conclude that COs working on the J Unit Control and J Unit posts are entitled to 18 minutes per day of overtime compensation from July 1, 2008 to the present.

Like many other arbitrators, I reject the applicability of the *de minimis* defense in a case such as this, where the compensable time recurs daily, is repetitive and regular, and aggregates over an extended period of time. See, *FCC Beaumont*, supra; *FTC Oklahoma City*, supra; *FCI La Tuna*, supra; *FCI Fort Worth*, supra. Even were I to consider the Agency's *de minimis* argument, based upon the amount of additional compensable work I have found to have been performed by the COs on the posts in issue in this case, the time period far exceeds the 10 minute *de minimis* standard.

In determining the appropriateness of liquidated damages in an amount equal to the overtime compensation directed herein, I note that such remedy is found to be compensatory rather than punitive in FLSA cases, and is the norm rather than the exception. See, e.g. *Marshall v. Brunne*r, supra. On the facts of this case, I am unable to find that the Agency met its burden of establishing that it acted in food faith on a reasonable belief that it was not violating the FLSA. First, it refused to consider instituting overlapping shifts despite the plethora of precedent within the BOP indicating that 24 hour posts, by their nature, and the nature of the position, require some overlap to accomplish, at the very least, an adequate shift exchange. Its cavalier attitude that such shift exchange takes only seconds belies any contention that it was operating under a good faith belief that its actions were appropriate.

Additionally, despite the fact that the overwhelming applicable precedent at the time the grievance was filed in this case supports the existence of integral and indispensable activities prior to arriving on a post, Otisville management chose not to read or become aware of that precedent. In fact, its Labor Relations Manager who was in charge of assuring compliance with the FLSA was unfamiliar with either the past award or current grievance at the facility, and had made no effort to educate himself about the requirements in this area by

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[83] In consultation effectuating the remedy herein, the parties are free to adjust this figure by a different period of time if they can agree upon the time it takes to travel from the screening site in J Unit to its CC. Such figure should be deducted from the 20 minutes supported by the testimony.

reading other portal cases. The Warden did not request an opinion letter from the Agencies responsible for FLSA-related matters concerning Otisville's compliance with that statute. Neither did other management at the facility. The fact that some POs were changed to permit travel time at the end of the shift for COs who needed to return their equipment to the CC, does not establish that the Agency made any effort to understand and deal with the realities of exchanging shifts on 24 hour posts that must be continuously manned. For these reasons, I find that an award of liquidated damages in an amount equal to the overtime compensation directed herein is appropriate, as is an award of reasonable attorney's fees and costs associated with the collection of the overtime payments directed herein.

The parties are directed to meet and attempt to resolve the specific calculation of monies owing to each of the 232 grievants who constitute the group agreeing to be part of this case,[84] based upon the positions they held during the time period commencing July 1, 2008 to the present, and the days worked in each such position. This process shall commence immediately and be completed as soon as practically possible, with the ending date of the calculation to be the date when such agreement is reached.[85] The parties are to report to the arbitrator the status of such discussions after 90 days in order for her to determine if additional time spent at this task is necessary and would be fruitful. Once the parties reach an accord as to the overtime amounts owing to each grievant, payment of said sum and an equal amount in liquidated damages shall be made to them, or their heirs, by check within 30 days, or an alternative time period agreed to by the parties. Within 30 days of said agreement, the Union shall submit to the Agency its petition for attorney's fees and expenses, which, if deemed to be reasonable by the Agency, shall be paid within an agreed period of time.

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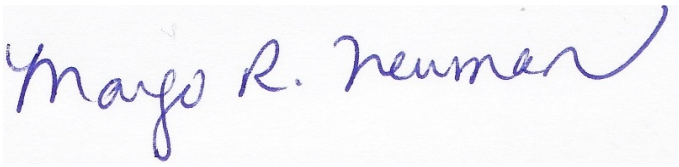
[84] In the event that the Agency has any question as to the accuracy of the list of grievants being proposed by the Union during these discussions, it may contact the arbitrator to request a copy of the list submitted in camera during the arbitration hearing.

[85] The Agency has argued that it would be more appropriate to rely only upon the video evidence to determine the monetary amounts owed to covered employees. Should the parties agree that the most feasible and practical way to proceed in calculating damages in this case is to take the average number of minutes calculated by De Meo from his video analysis - 17.5 minutes - and apply it to all posts covered by this award, I believe that it would also be reasonable for them to agree to compensate all affected employees 17.5 minutes of overtime for each day they worked during the recovery period. I find that no deduction would be appropriate when using the overall average, considering travel times designated by the Agency. Absent such agreement, the specified amounts of overtime contained in this award govern.

In the event that the parties are unable to conclude a settlement with respect to the overtime and liquidated damages amount owing to each grievant and/or the reasonable attorney's fees and costs, they are to contact the arbitrator for a discussion on the best manner in which to proceed to resolve the disputed amounts, and such process will be directed by the arbitrator. Accordingly, I retain jurisdiction to deal with issues respecting the implementation and interpretation of this award.

VII. AWARD

The grievance is sustained. The BOP, FCI Otisville, suffered or permitted bargaining unit employees to perform work before and/or after their scheduled shifts without compensation, from July 1, 2008 to the present, in violation of the FLSA and the parties' Master Agreement. The Agency shall compensate the grievants in the manner set forth more specifically herein.



Margo R. Newman, Arbitrator

Dated: November 4, 2012