

109 LRP 28960

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

Federal Labor Relations Authority

63 FLRA No. 107

0-AR-4124

May 18, 2009

Judge / Administrative Officer

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

Full Text

DECISION

DECISION

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

I. Statement of the Case

This matter is before the Authority on an exception to an award of Arbitrator Jerome J. La Penna filed by the Agency under § 7122(a) of the Federal Service Labor-Management Relations Statute (Statute) and part 2425 of the Authority's Regulations. The Union filed an opposition.

The Arbitrator found that the Agency violated the Fair Labor Standards Act (FLSA), 29 U.S.C. § 201 et seq., as amended by the Portal-to-Portal Act (Act), 29 U.S.C. § 254, by failing to compensate employees for pre-shift and post-shift work. Consequently, he ordered appropriate compensation under the FLSA and the Act.

For the reasons that follow, we grant the Agency's exception in part and deny the Agency's exception in part.

II. Background and Arbitrator's Award A. Background

This case is another in the series of cases involving disputes between Union locals and the Agency relating to premium pay for pre-shift and post-shift activities under the Act and the FLSA.¹ These disputes followed an Agency-wide grievance filed by the Union in 1995 and settled by the parties in August 2000 (Settlement Agreement). See United States Dep't of Justice, Fed. Bureau of Prisons, United States Penitentiary, Marion, Ill., 61 FLRA 765 (2006) (BOP, Marion). The Settlement Agreement also preserved the right of employees to file claims for premium pay covering pre-shift and post-shift work after January 1, 1996. The grievance in this case is such a claim.

The grievance alleged that the Agency violated the FLSA and Agency regulations by failing to compensate employees for pre-shift and post-shift work. The bargaining unit includes both custodial and non-custodial employees. In the normal course of their duties, both custodial and non-custodial employees report to the control center, a centralized location, in order to pick up equipment needed in their jobs ~ for example, body alarms, radios, keys, and batteries ~ and then walk to their post of duty. At the end of their shift, they walk back to the control center to return their equipment. The line of employees waiting to pick up or return equipment at the control center that results from this procedure is known as the "key line." Award at 101. Moreover, for a period of time covered by the grievance, custodial employees also stopped at the lieutenant's office, in the vicinity of the control center, to check their mailboxes, receive instructions, and review and sign various documents.

In its grievance, the Union contended that: (1) employees engaged in these various activities either before and/or after their scheduled work shifts; (2) the activities constituted compensable work; and (3) the employees were entitled to overtime pay. The Agency rejected the grievance and the matter was submitted to arbitration.

¹ See United States Dep't of Justice, Fed. Bureau of Prisons, United States Penitentiary, Marion, Ill., 61 FLRA 765 (2006); United States Dep't of Justice, Fed. Bureau of Prisons, United States Penitentiary, Leavenworth, Kan., 59 FLRA 593 (2004); AFGE, Local 3882, 59 FLRA 469 (2003); AFGE, Local 801, 58 FLRA 455 (2003); United States Dep't of Justice, Fed. Bureau of Prisons, United States Penitentiary, Terre Haute, Ind., 58 FLRA 327 (2003), recon. denied, 58 FLRA 587 (2003), on exceptions after remand, 60 FLRA 298 (2004).

B. Arbitrator's Award

The Arbitrator stated the issues as follows:²

Did the Agency violate the Fair Labor Standards Act[,] the Portal[-]to[-] Portal Act of 1947 and other statutes, the Master Agreement, its own policy set forth in HRM 610.1 and/or any other applicable legal or contractual obligation or anything else that would apply by not compensating bargaining unit members for the pre[-]shift and post[-]shift work activities performed during the period January 1, 1996 to the date of the filing of the grievance and thereafter? If so, what should be the remedy?

Award at 8-9.

The Arbitrator determined that the grievance is limited to pre-shift and post-shift activities. The Arbitrator listed the activities in dispute as follows:

1. Waiting in the key line at the control center to pick up keys and equipment and picking up the keys and equipment prior to shift start.
2. Reporting to the lieutenant's office to check in, check mail boxes, to pick up pertinent work information.
3. Traveling between control center and the duty post.
4. Waiting in keyline [sic] to turn in keys and equipment after completion of scheduled shift.
5. Picking up of spare charged battery at control center through keyline [sic] before start of shift by custodial officer and others and return.
6. Perimeter patrol at shift change, inventorying of equipment on site and the wait for completion of other patrol[']s relief.
7. Relief of prior housing unit shift officer[,] including inventorying tool room equipment and conferring with relieved officer as to past and current status of the post.

Id. at 98-99.

As to time spent in the key line, the Arbitrator noted that subsection 6 of HRM 610.1, an agency regulation, provides that employees must be at the control center and

2 The Arbitrator's statement of the issues included threshold questions of arbitrability. He found the grievance to be arbitrable and no exception has been filed to his findings in that regard. Consequently, these matters will not be further addressed herein.

have received their equipment to be on time for the start their shift. The Arbitrator found, however, that the control center caused delays for employees picking up equipment, since it was staffed by only one employee, making it impossible for all employees to obtain the requisite equipment by the time the shift begins. See id. at 106-07. He also noted that subsection 3 of HRM 610.1 attempts to deal with this delay because it provides that if employees enter the key line to get their equipment at a reasonable time before the beginning of the shift, those employees will not be found to be late.⁴ According to the Arbitrator, subsection 3, as worded, implies that waiting in the key line is compensable if an employee's shift starts while the employee is in line. Id. at 118.

The Arbitrator stated that, under the FLSA, whether pre-shift or post-shift activities are compensable turns on whether those activities "are integral and indispensable to an employee's principal work activity[.]" Id. at 121. Specifically, noting the "unique security concerns and requirements for safety" that are a necessary part of the operations of the Agency, id. at 106, the Arbitrator found that the body alarms, keys, radios, and batteries that employees wait in the key line to receive, or return, at the control center were "absolutely essential and indispensable" to their work, id. at 124. Moreover, the Arbitrator specifically found that time spent in the key line by an employee to obtain or return that equipment was not "merely preliminary [or postliminary] activity unconnected to the employer's principal work activity or the employer's scheduled work activity for that employee." Id. at 124.

Citing *IBP, Inc. v. Alvarez*, 546 U.S. 21 (2005) (*Alvarez*), the Arbitrator found that "keyline [sic] time is integral and indispensable to the principal activities" at the Agency. Id. at 121. In this regard, the Arbitrator referenced the Court's holding in *Alvarez* that waiting time is compensable if the employer requires employees to arrive at a particular time in order to begin waiting. The Arbitrator cited Agency policy requiring employees to arrive at a reasonable time prior to the beginning of the shift and wait in the key line so that they can receive their body alarm, keys, and radio by the time their shift starts and found waiting in the key line to be compensable. Based on his findings, the

3 Subsection 6 of HRM 610.1 provides, in relevant part, as follows:

6. SCHEDULING CONSIDERATIONS

a. An institution employee whose shift starts at 7:30 a.m. must be at the control center and have received his/her equipment no later than 7:30 a.m. to be considered "on time" for the start of his/her shift. ...

HRM 610.1, Subsection 6.

4 Subsection 3 of HRM 610.1 provides, in relevant part, as follows:

3. CRITERIA

If an employee arrives at the key line in a reasonable time to get equipment by the beginning of the shift, this employee is not to be considered late.

HRM 610.1, Subsection 3.

Arbitrator concluded that "key line waiting time is indispensable to the principal work activities of the employees of FCI[] Jesup and is thus compensable under the FLSA." Id. at 126.

The Arbitrator noted, in addition, that the creation of equipment-based 24-hour custodial duty posts during the period covered by the grievance did not affect the need to stop at the control center to obtain and return batteries, which were recharged at the control center. According to the Arbitrator, because the battery at the post from the prior shift usually went dead before the end of the subsequent shift, custodial employees made it a practice to pick up a fresh battery in order to ensure their personal safety and security prior to starting their shift. Specifically, the Arbitrator found that, "without a charged battery, the other equipment consisting of radios and body alarms are inoperative and serve no purpose." Id. at 127. He also found that, "[w]ithout the essential equipment of operative radios and body alarms, the employees of FCI, Jesup ... cannot perform their principal work activity effectively and in safety both for themselves and the inmates for whose safety they are responsible as one of their principal work activities." Id. at 127-28. Thus, the Arbitrator concluded that "the pick up of a freshly charged battery at the start of a shift is a pre-shift activity that is indispensable to the performance of the principal work activity of an employee [and] ... is compensable[.]" Id. at 131-32. The Arbitrator found that the Agency "accepted" this practice "fully without objection." Id. at 133.

As to whether time spent in the lieutenant's office was compensable, the Arbitrator found that "the most important aspects of that stop, is to do almost exclusively the Agency's administrative business." Id. at 137. The Arbitrator concluded that, prior to September 23, 2003, the time spent in the lieutenant's office was compensable. He also found that, after that date, the practice was discontinued and no premium pay was owed. Id.

Summarizing his findings of fact and law, the Arbitrator found that the Agency: (1) violated its own policy as reflected in HRM 610.1 by its "failure to take appropriate actions with respect to shift start and end times;" (2) violated the FLSA "by not compensating bargaining unit employees at contractually appropriate overtime rates for pre[-]shift and post[-]shift work activities indispensable to their principal work activities;" and (3) willfully violated the FLSA during a three year period prior to the filing of the grievance and thus is liable retroactively for that three year period, and thereafter, "in the form of overtime pay to all bargaining unit employees, past and present[,] who were employed and worked at [the Agency]." Id. at 138-39. As stated by the Arbitrator, the period of liability extended from July 2001 to and through the date of the closing of the hearing in the case. Id.

Finally, the Arbitrator considered "the amount of time worked at [indispensable] activities for which compensation shall be awarded." Id. at 145. As to custodial employees, including those who worked the perimeter patrol, during the period July 1, 2001 through September 23, 2003, the Arbitrator found that pre-shift and post-shift activities consumed 46 minutes of compensable overtime.⁵ After September 23, 2003,

Specifically, the Arbitrator found that key line time upon entrance amounted to 12 minutes; time when the stop at the lieutenant's office was eliminated, the Arbitrator found that pre-shift and post-shift activities took 42 minutes. With respect to non-custodial employees, the Arbitrator found that the amount of time needed for pre- and post-shift activities totaled 27 minutes.⁶

Consistent with his findings, the Arbitrator ordered all past and present bargaining unit employees covered by the award to be compensated with appropriate amounts of overtime for the pre-shift and post-shift activities worked during the period covered by the award.

III. Positions of the Parties

A. Agency's Exception

The Agency contends that the Arbitrator erred in finding that certain employee activities for which he awarded compensation were, as a matter of law, compensable.⁷ As to traveling from the control center to the post of duty, citing the Authority's decision in United States Dep 't of Justice, Fed. Bureau of Prisons, United States Penitentiary, Terre Haute, Ind. 58 FLRA 327, 329 (2003) (BOP, Terre Haute), the Agency contends that time spent traveling to and from the place in which the employee performs principal activities is not compensable under the FLSA because the employee does not perform principal activities during the travel. Also, relying on BOP, Terre Haute, the Agency maintains that "checking in or out" is not

compensable and, by analogy, stopping at the lieutenant's office is likewise not compensable. Exception at 4.

As to waiting in the key line to pick up and return equipment, citing Alvarez, the Agency maintains that waiting to undertake a principal activity is not integral or indispensable to that activity. Similarly, the Agency argues, waiting for equipment at the control center, even though the equipment is used in employees' work, is not compensable activity. The Agency also asserts that the "limited exception" articulated in Alvarez for situations where employees are to report at a particular hour and work is unavailable does not apply in the circumstances of this case. *Id.* at 7 (citing Alvarez, 546 U.S. at 40). traveling to duty post amounted to 3 minutes; 4 minutes were consumed by stopping at the lieutenant's office; 12 minutes were needed for relief at the post of duty; another 3 minutes to travel to the control center at the conclusion of a shift; and another 12 minutes were spent in the key line upon exit.

6 In particular, the Arbitrator found that time spent in the key line upon entrance amounted to 12 minutes; time needed to travel to the employee's duty post amounted to 3 minutes; and the amount of time required by the key line upon exit was 12 minutes.

The Agency does not challenge the Arbitrator's finding that employees' time spent in exchanging equipment, inventorying equipment, and sharing information during a change of shift at a custodial post of duty is compensable.

With respect to employees waiting in the key line to pick up and return batteries, the Agency notes that the Arbitrator found that employees were not required to pick up and return batteries and asserts that, in the absence of such a requirement, time spent in doing so is not compensable. The Agency claims that the Arbitrator's finding that these activities were indispensable work activities involved the Arbitrator second-guessing correctional management officials in a matter relating to internal security.

B. Union's Opposition

The Union notes that the Agency does not challenge the Arbitrator's findings of fact. In this regard, the Union contends that a determination of whether an activity is integral to an employee's principal activity, as opposed to being preliminary or postliminary, is a question of fact. Stated differently, citing *Dunlop v. City Electric Inc.*, 527 F.2d 394, 401 (5th Cir. 1976) (*Dunlop*), the Union asserts that the test for whether an activity is integrally related to employees' principal activities is "whether the activity is performed regularly by the employees within the course of the employer's business." Opposition at 10 (citing 29 C.F.R. § 790.8(c) and 5 C.F.R. § 551.412). 8

The Union claims that the Agency argues that the Arbitrator applied the wrong legal standard in order to avoid the Arbitrator's factual findings as to the relationship between the pre- and post-shift activities and the employees' principal work activities. The Union maintains, in this regard, that the Authority's decision in *BOP, Terre Haute* is distinguishable from the facts as found by the Arbitrator in this case. Specifically, according to the Union, the Arbitrator found that the Agency required custodial employees to stop at the lieutenant's office to conduct, almost exclusively, the Agency's business.

Moreover, the Union asserts that the Agency's reliance on Alvarez is mistaken. The Union maintains that the Arbitrator properly construed Alvarez in finding waiting time at the control center to pick up equipment and/or batteries is integral and indispensable to employees' principal activities. Specifically, the Union notes, the Arbitrator cited to the Court's statement that waiting time would be compensable if the employer required employees to arrive at a particular time in order to begin waiting. Opposition at 16. The Union points out, in this regard, that the Arbitrator found that Agency policy requires employees to arrive at a reasonable time prior to the start of their

! 29 C.F.R. § 790.8(c) provides as follows:

Among the activities included as an integral part of a principal activity are those closely related activities which are indispensable to its performance. If an employee in a chemical plant, for example, cannot perform his principal activities without putting on certain clothes, changing clothes on the employer's premises at the beginning and end of the workday would be an integral part of the employee's principal activity.

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

(a)(I) 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.

shift and wait in the key line to receive equipment that is essential to their principal activities.

IV. Analysis and Conclusions

The award is contrary to law.

The Agency contends that the award is contrary to the FLSA, as amended by the Act. When a party's exception involves an award's consistency with law, the Authority reviews any question of law raised by the exception and the award de novo. See NTEU, 50 FLRA 330, 332 (1995) (citing *United States Customs Serv. v. FLRA*, 43 F.3d 682, 686-87 (D.C. Cir. 1994)). In applying the standard of de novo review, the Authority determines whether an arbitrator's legal conclusions are consistent with the applicable standard of law. See, e.g., BOP, *Terre Haute*, 58 FLRA at 329. In making that determination, the Authority defers to the arbitrator's underlying factual findings. See *id.*

The Authority outlined the legal framework applicable in cases under the FLSA and the Act in BOP, *Marion*. As relevant herein, the Authority stated that framework as follows:

[In passing the Act, Congress distinguished] between "the principal activity or activities that an employee is hired to perform," which are compensable, and "activities which are preliminary to or postliminary to said principal activity or activities," which are not compensable. 29 U.S.C. § 254(a) (1)-(2). See AFGE, *Local 1482*, 49 FLRA 644, 646-47 (1994); *Gen. Servs. Admin.*, 37 FLRA 481, 484 (1990) (GSA). See also *Reich v. New York City Trans. Autk.*, 45 F.3d 646, 649 (2nd Cir. 1995) {Reich}. In *Steiner v. Mitchell*, 350 U.S. 247 (1956) (Steiner), the court clarified that a given activity constitutes a "principal activity," as opposed to a preliminary or postliminary task, if it is "an integral and indispensable part of the principal activities for which covered workmen are employed." *Id.* at 256. See also GSA, 37 FLRA at 484 (quoting 5 C.F.R. §551.412(a)).

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

BOP, *Marion*, 61 FLRA at 770-71.

The Authority has applied these legal principles to Agency prison employees in previous cases.

Specifically, the Authority has held that: (1) time spent traveling on prison property prior to an employee's principal activities is not compensable, BOP, *Terre Haute*, 58 FLRA at 329; (2) time spent stopping at the administrator's office to check in is not compensable, *id.*, at 330; and (3) time spent traveling after getting equipment at the control center is compensable. *United States Dep 't of Justice, Fed. Bureau of Prisons, United States Penitentiary, Leavenworth, Kan.*, 59 FLRA 597-98 (2004) (BOP, *Leavenworth*). While the Authority has not specifically addressed the compensability of waiting time, in Alvarez the Court held that waiting time prior to the employee's principal activities is not compensable, unless the employer requires employees "to arrive at a particular time in order to begin waiting." *Id.* at 40 n.8.

The Arbitrator concluded that the following activities are compensable: (1) travel to and from the control center to employees' posts of duty; (2) activities at the lieutenant's office; and (3) waiting in the key line to pick up equipment and batteries. The Agency contends that the Arbitrator's legal conclusions in this regard are deficient. The Agency does not dispute the legal standard applied by the Arbitrator or challenge his factual findings. The Agency's exception thus questions the Arbitrator's application of law to the facts as he found them.

Specifically, the Agency relies on BOP, *Terre Haute* for its argument that the award finding travel to and from employees' posts of duty is deficient. The Agency's reliance is misplaced. That case involved travel preceding the stop at the control center. None of the pre-shift activities involved in this case involved travel before the control center. In BOP, *Leavenworth*, the Authority held that travel after the commencement of an employee's principal activities at the control center is compensable. BOP, *Leavenworth*, 59 FLRA at 597-98. In this case, the Arbitrator found that the stop at the control center, including the stop to obtain batteries, involved activities integral and indispensable to employees' principal activities. As the Authority defers to the Arbitrator's factual findings, under BOP, *Leavenworth*, travel after these activities is compensable. See also Alvarez, 546 U.S. at 32-34. Moreover, since the Arbitrator found that returning equipment to the control center is an employee's last principal activity, consistent with Alvarez, 546 U.S. at 40, travel from the duty post to the control center at the end of the shift is also compensable.

The Agency also relies on BOP, Terre Haute in support of its claim that the Arbitrator's finding that time spent on activities at the lieutenant's office is contrary to law. In that case, the Authority found that "moving a marker on an 'accountability board' in the administrator's office to indicate that the employee is inside the institution," BOP, Terre Haute, 58 FLRA at 330, constitutes non-compensable "checking in" activities. The Authority also noted that there is "no basis for concluding[] that the employees perform any other activities at the administrator's office." *Id.* In this case, by contrast, the Arbitrator specifically found that employees do more than check in at the lieutenant's office. He found that they also check their mailboxes, receive instructions, and review and sign various documents, all of which the Arbitrator found to constitute activities that are indispensable to their principal activities. Award at 98, 137. As the

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Authority defers to the Arbitrator's factual findings, and the Agency does not dispute these findings, it has not established that the award of overtime compensation for the time spent at the lieutenant's office is contrary to law.

As to the key line, the Agency relies on the general principle, set out in *Alvarez*, that employees are not entitled to compensation while waiting to begin work. *Alvarez*, 546 U.S. at 41. The Arbitrator relied on the court's statement in *Alvarez* that waiting time is compensable if the employer requires employees to arrive at a particular time in order to begin waiting. See *id.*, at 40 n.8. The Arbitrator found that waiting in the key line in this case, for equipment and/or batteries, falls within the exception noted in *Alvarez* because the Agency's own regulation, subsection 3 of HRM 610.1, provides that employees who arrive at the control center at a reasonable time prior to the beginning of a shift to obtain equipment are not considered late if they do not receive the equipment until after the starting time of the shift.

Contrary to the Arbitrator's finding, nothing in the Agency's regulation or the record establishes that employees are required to arrive at a particular time prior to beginning a shift, as required by *Alvarez* for the time to be compensable. Providing for employees to report at a reasonable time before the beginning of a shift to obtain necessary equipment and batteries does not require employees to report at a particular time. To the contrary, the general rule that waiting time is not compensable assumes that employees may be required to report at a reasonable time prior to actually starting work, in order to complete non-compensable preliminary activities. As we defer to the Arbitrator's factual finding that employees report to the key line at a reasonable time prior to the distribution of equipment, and not at a particular time as required by *Alvarez* to make the time compensable, the portion of the award compensating employees for waiting in line is inconsistent with *Alvarez* and contrary to law. Consequently, the Arbitrator's award ordering overtime compensation for this time prior to the beginning of the shift is deficient.

V. Decision

The award is set aside insofar as it provides overtime compensation to the correctional officers for the time spent waiting in the key line prior to their shifts. The Agency's exception is denied in all other respects.