70 FLRA No. 85

UNITED STATES
DEPARTMENT OF JUSTICE
FEDERAL BUREAU OF PRISONS
FEDERAL CORRECTIONAL COMPLEX
TUCSON, ARIZONA
(Agency)

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
COUNCIL OF PRISON LOCALS
LOCAL 3955
(Union)

0-AR-5247

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DECISION

February 28, 2018

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Before the Authority: Colleen Duffy Kiko, Chairman, and Ernest DuBester and James T. Abbott, Members
(Member DuBester dissenting)

I. Statement of the Case

On November 7, 2016, Arbitrator Vern E. Hauck issued an award finding, in relevant part, that the Agency violated the Fair Labor Standards Act (FLSA)[1] by failing to compensate two types of employees (officers) – relief officers and non-relief officers – for activities that they performed before and after their assigned shifts. As a remedy, the Arbitrator directed the Agency to compensate the officers with overtime pay. There are two main questions before us.

The first question is whether the award is contrary to the FLSA and the Portal-to-Portal Act (the Act)[2] because it directs the Agency to compensate relief and non-relief officers, respectively, for the time that they spent traveling to and from their duty posts. There is no basis for finding that the relief officers' travel time was compensable under the FLSA, the Act, or pertinent precedent. And to the extent that the award grants compensation to non-relief officers who did not engage in a compensable activity before traveling, the award is contrary to the Act. Therefore, the answer to the first question is yes.

The second question is whether the awarded remedy is deficient. Because the Arbitrator aggregated the amount of the affected officers' pre- and post-shift time to determine the remedy, the answer is yes.

II. Background and Arbitrator's Award

The Agency is a correctional complex (the complex) that consists of three prison facilities (respectively, the institution, the penitentiary, and the camp). Officers work at various posts within these three facilities.

Generally, officers begin their workday by coming through the front entrance of the complex, removing any equipment that they brought from home, and passing through a security screening. After the security screening, the officers proceed to a control center. Then, to enter the secure confines of the complex, the officers pass through a "sally port" that is adjacent to the control center.[3] Once through the sally port, the officers travel to their designated posts.

The Union filed a grievance alleging that the Agency violated the parties' collective-bargaining agreement and the FLSA by failing to pay officers for work that they performed before and after their assigned shifts. The grievance was unresolved, and the parties submitted the matter to arbitration.

As relevant here, the stipulated issues before the Arbitrator were whether "the Agency violate[d] . . . the FLSA by suffering and permitting [officers] to work before or after their assigned shifts without proper compensation? [And,] [i]f so, what is the appropriate remedy?"[4]

Before the Arbitrator, the parties disputed, in relevant part, whether the officers were entitled to compensation for picking up and dropping off equipment at the control center and for traveling to and from their posts.

The Arbitrator distinguished the activities of relief officers and non-relief officers, stating that relief officers relieve other officers at their posts, while non-relief officers do not. The Arbitrator also noted the Agency's claim that relief officers obtain

[1] 29 U.S.C. §§ 201-219.
[2] *Id.* §§ 251-262.
[3] Award at 24.
[4] *Id.* at 2.

their equipment "at the[ir] posts,"[5] and found that at least some non-relief officers obtain their equipment at the control center.

Regarding the relief officers, the Arbitrator further found that their "primary activity of providing safety and security [for the complex] . . . occurs on the way to and from [their] post[s,] and includes" several activities, such as: "responding to body alarms, addressing inmate behavior, confiscating weapons and contraband, stopping fights, making sure that illegal activity is not occurring, and listening as well as responding to legitimate inmate questions."[6] The Arbitrator found that these activities were "integral and indispensable to the productive work . . . that the [relief] [o]fficers [were] employed to perform."[7] Thus, the Arbitrator concluded that the relief officers were entitled to compensation from the moment that they entered the sally port at the start of their shifts until the moment that they returned through the sally port at the end of their shifts.

With respect to non-relief officers, the Arbitrator determined that those officers' "first and last principal work activity" occurred at the control center.[8] As a result, the Arbitrator concluded that non-relief officers were entitled to compensation from the moment that they arrived at the control center at the start of their shifts to the moment that they cleared the control center at the end of their shifts.

As for the amount of time that the officers spent performing pre- and post-shift activities, the Arbitrator observed that certain posts, regardless of the facility, "require[d] additional . . . [travel] time due to the post[s'] distant location . . . from the [c]ontrol [c]enter."[9] According to the Arbitrator, the various locations of the posts "contribute[d] significantly to the varying amounts of . . . compensable overtime work performed by the . . . [o]fficers."[10] The Arbitrator concluded that, "in the aggregate," the amount of time that the officers spent on pre- and post-shift activities "exceed[ed] ten . . . minutes per day."[11]

Based on these findings, the Arbitrator concluded that the Agency violated the FLSA. As a remedy, the Arbitrator, in relevant part, awarded each officer at the penitentiary thirty minutes of overtime pay per shift and each officer at the institution and the camp twenty minutes of overtime pay per shift. The Arbitrator also directed the parties to "convene their [j]oint [l]abor-[m]anagement [c]ommittee" to determine the amounts of compensation to be paid to the "eligible" officers.[12]

On December 12, 2016, the Agency filed exceptions to the award, and on January 23, 2017, the Union filed an opposition to the Agency's exceptions.

III. Analysis and Conclusions

A. The award is contrary to the FLSA and the Act, in several respects.

The Agency argues that the award is contrary to the FLSA and the Act in several respects.[13] When an exception involves an award's consistency with law, the Authority reviews any question of law de novo.[14] In applying the standard of de novo review, the Authority determines whether the arbitrator's legal conclusions are consistent with the applicable standard of law but defers to the arbitrator's factual findings unless the excepting party establishes that they are nonfacts.[15]

Under the FLSA and its implementing regulations, employees are entitled to compensation for the time that they spend performing "principal activities," which are those activities that the employees are "employed to perform."[16] However, under the Act, employees are not entitled to compensation for the time that they spend "traveling to and from the actual place of performance of the[ir] principal activity or activities,"[17] even if the travel occurs "on the employer's premises."[18]

The Agency first argues that the Arbitrator erred by awarding compensation to the relief officers

[5] *Id.* at 21 (citations omitted).
[6] *Id.* at 27 (citations omitted).
[7] *Id.* at 27-28 (emphasis added).
[8] *Id.* at 25.
[9] *Id.* at 31; *see also id.* at 6-9 (noting testimony that certain officers, depending on their post's location, spent between five and twenty minutes on pre- and post-shift activities, including travel time).
[10] *Id.* at 30.
[11] *Id.* at 29 (citing *Gorman v. Consol. Edison Corp.*, 488 F.3d 586 (2d Cir. 2007)).
[12] *Id.* at 33.
[13] Exceptions Br. at 6-16.
[14] *U.S. DOJ, Fed. BOP, U.S. Penitentiary, Atwater, Cal.*, 68 FLRA 857, 858 (2015) (*Atwater*) (Member DuBester dissenting in part) (citation omitted), *recons. denied*, 69 FLRA 238 (2016) (*Atwater II*) (Member DuBester dissenting in part).
[15] *Atwater*, 68 FLRA at 858 (citation omitted).
[16] 5 C.F.R. § 550.112(a).
[17] 29 U.S.C. § 254(a)(1).
[18] *E.g., U.S. DOJ, Fed. BOP, Metro Corr. Ctr., Chi., Ill.*, 63 FLRA 423, 429 (2009) (citation omitted).

for the time that they spent traveling between the sally port and their posts.[19] In particular, the Agency contends that under the FLSA, the Act, and Authority and court precedent, such travel time is non-compensable.[20]

In contrast, the Union argues that the relief officers were entitled to compensation for their travel time.[21] The Union relies on[22] *U.S. DOJ, Federal BOP, U.S. Penitentiary, Coleman II, Florida* (*Coleman*), where the Authority denied exceptions to an award that granted employees compensation for the time that they spent traveling to their posts.[23]

Unlike the arbitrator in *Coleman*, the Arbitrator here did not find that the travel *itself* was a principal activity.[24] Therefore, *Coleman* does not support the Union's claim that the relief officers' travel was compensable.[25] Further, the Arbitrator did not find, and the Union does not contend, that the relief officers performed a compensable activity *before* traveling. Thus, there is no basis for finding the entirety of their travel time compensable as part of their "continuous workday."[26]

Accordingly, the compensability of the relief officers' travel time hinges on whether, and to what extent, those officers were required to engage in any principal activities *while* traveling. In this connection, the Authority has held that "the time that an employee spends traveling to his or her post is not compensable *unless* the employee is required to engage in a principal activity during that travel."[27]

In determining that the relief officers' travel time was compensable, the Arbitrator stated that the officers' "primary activity of providing safety and security [for the complex] . . . occurs on the way to and from [their] post[s]."[28] The Arbitrator then listed several activities that are "include[d]" in that "primary activity."[29] However, the Arbitrator did not find that these activities were principal activities[30] or that any relief officers actually engaged in those activities while traveling.[31] Moreover, the Authority has held that "the mere possibility that an employee *might* be called upon to perform work while traveling does not make all travel time compensable."[32] Thus, the mere fact that the relief officers *could have* been called upon to perform those activities as part of their "primary activity"[33] while traveling does not make their travel compensable.[34]

Additionally, even if the relief officers were required to perform, and had performed, the activities

[19] Exceptions Br. at 9-13.
[20] *Id.* at 10-11.
[21] Opp'n at 7.
[22] *Id.*
[23] 68 FLRA 52, 55-56 (2014) (then-Member Pizzella concurring, in part, and dissenting, in part) (citation omitted).
[24] *See id.* at 53, 55-56; *Atwater II*, 69 FLRA at 241 (noting that the "crux" of the Authority's decision in *Coleman* was the arbitrator's finding that the travel itself was a principal activity).
[25] *See Atwater II*, 69 FLRA at 241 (distinguishing *Coleman* "based on the arbitrator's finding in *Coleman* that [the] officers' travel was itself a principal activity").
[26] *See IBP, Inc. v. Alvarez*, 546 U.S. 21, 37 (2005) (*Alvarez*) ("[D]uring 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."); *Amos v. United States*, 13 Cl. Ct. 442, 449 (1987) (compensating employees of a correctional facility for their time spent traveling to their duty stations because, before their travel, they were required to pick up work-related items); *U.S. DOJ, Fed. BOP, U.S. Penitentiary, Leavenworth, Kan.*, 59 FLRA 593, 597-98 (2004) (*Leavenworth*) (noting that the time officers spent walking to their posts was compensable because it occurred after the officers were required to pick up equipment at a control center); *see also U.S. DOJ, Fed. BOP, Fed. Corr. Inst., Terminal Island, Cal.*, 63 FLRA 620, 623 (2009) (*Terminal Island*) (noting that the Authority has applied the continuous-workday doctrine to find that "time spent traveling after obtaining equipment at [a] control center is compensable" (citing *Leavenworth*, 59 FLRA at 597-98)).
[27] *Atwater II*, 69 FLRA at 239 (citation omitted) (emphasis added); *see Aiken v. City of Memphis, Tenn.*, 190 F.3d 753, 758 (6th Cir. 1999) (employees are entitled to payment for any work that the employer requires them to perform during travel); *Reich v. N.Y.C. Transit Auth.*, 45 F.3d 646, 651 (2d Cir. 1995) (*Reich*) (employers are not exempt "from payment for actual work required to be done during . . . travel"); *see also* 29 C.F.R. § 785.41 ("Any work which an employee is required to perform while traveling must, of course, be counted as hours worked.").
[28] Award at 27.
[29] *Id.*
[30] *Id.* (finding the listed activities to be "integral and indispensable"); *see, e.g., U.S. DOJ, Fed. BOP, Fed. Corr. Inst., Bastrop, Tex.*, 69 FLRA 176, 180 (2016) (noting that the terms "principal activity" and "integral and indispensable" activity apply to different classes of activities).
[31] *See Atwater II*, 69 FLRA at 241 (noting that the Authority in *Atwater* set aside an award that granted compensation for travel time, in part, because the arbitrator "made no explicit findings that the officers [had] addressed inmate misconduct").
[32] *Atwater*, 68 FLRA at 859 (citing *Reich*, 45 F.3d at 651-52; *Bobo v. United States*, 136 F.3d 1465, 1467-68 (Fed. Cir. 1998)).
[33] Award at 27.
[34] *See Atwater II*, 69 FLRA at 240.

that the Arbitrator listed, those officers would be entitled to compensation only for the portion of their time that they spent engaged in those activities[35] (and, if applicable, any subsequent travel).[36] In this regard, the Agency acknowledges that "when an employee *is* [required] . . . to respond to an emergency, pat down an inmate, etc., then the Agency would pay that employee from the time of [that] response forward, since there would be a principal activity once that involvement began."[37]

The Union also contends that the relief officers' travel time was compensable because those officers routinely engaged in "active observation and vigilance" while traveling to their posts.[38] But the Authority has found that a heightened state of vigilance is not a principal activity and does not render travel time compensable.[39] Thus, the Union's contention provides no basis for finding that the relief officers' travel was compensable.

Based on the foregoing, we conclude that the Arbitrator's finding – that the relief officers' travel time was compensable under the FLSA – is contrary to the FLSA and the Act. Accordingly, we set aside that portion of the award.

The Agency also argues that the award is contrary to the FLSA because it directs the Agency to compensate *non*-relief officers for their travel time, without regard to whether they picked up equipment at the control center first.[40] In this regard, the Agency asserts that, "[w]ith no finding . . . that *every* non-relie[f] officer is picking up equipment at the control center, this portion of [the] award is deficient and should be set aside."[41]

The Agency does not dispute that the non-relief officers who picked up equipment at the control center were entitled to compensation for their subsequent travel time. And the Authority has found similar travel time to be compensable as part of employees' continuous workday.[42] However, as the Agency correctly notes,[43] the Arbitrator did not find that *every* non-relief officer picked up equipment at the control center before traveling.[44] Therefore, the award potentially compensates the travel time of non-relief officers who did not engage in a compensable activity before traveling (and whose travel is not otherwise compensable). To the extent that the award directs the Agency to grant those officers overtime pay, it is contrary to the FLSA and the Act, and we set aside that portion of the award.

B. The awarded remedy is deficient.

The Agency argues that the award is contrary to the FLSA because the Arbitrator averaged the amount of the officers' pre- and post-shift time to determine the remedy.[45] Under 5 C.F.R. § 551.412, employees are not entitled to compensation for time spent in a pre-shift or post-shift activity unless, as relevant here, the time spent in that activity is "more than [ten] minutes per workday."[46]

The Arbitrator awarded each officer at the penitentiary thirty minutes, and each officer at the institution and the camp twenty minutes, of overtime pay per shift.[47] However, the Arbitrator based that remedy on an "aggregat[ion]" of the amount of time that *all* of the officers spent on "pre-shift and post-shift tasks."[48] The Authority has found that aggregating the amount of compensable time is

[35] *See id.* (observing that "paying employees for any principal activities that they perform during travel . . . would be consistent with the Act" (citation omitted)); *see also Smith v. Aztec Well Servicing Co.*, 462 F.3d 1274, 1290 (10th Cir. 2006) (noting that "the few instances where [employees] did transport . . . materials [while traveling to their posts] d[id] not transform *all* of their travel time into [compensable time]").

[36] *See Alvarez*, 546 U.S. at 37 (finding travel compensable under the continuous-workday doctrine).

[37] Exceptions Br. at 12.

[38] Opp'n at 6.

[39] *Atwater*, 68 FLRA at 860 (citing *Reich*, 45 F.3d at 651-52; *U.S. DOJ, Fed. BOP, Fed. Corr. Inst., Allenwood, Pa.*, 65 FLRA 996, 1000 (2011) (explaining that "be[ing] prepared to respond in the event of an emergency" was not sufficient to make an activity a principal activity); *U.S. DOJ, Fed. BOP, U.S. Penitentiary, Terre Haute, Ind.*, 58 FLRA 327, 330 (2003) (noting that the secure nature of an institution does not make travel within the institution, by itself, a principal activity)).

[40] Exceptions Br. at 13-14.

[41] *Id.* at 14 (emphasis added).

[42] *See, e.g.*, *Terminal Island*, 63 FLRA at 623 ("[T]ime spent traveling after obtaining equipment at the control center is compensable." (citing *Leavenworth*, 59 FLRA at 597-98)).

[43] Exceptions Br. at 14.

[44] *See* Award at 24 n.5 (noting that some officers brought their equipment from home); *id.* at 24 (stating that officers "may" obtain equipment at the control center).

[45] Exceptions Br. at 16.

[46] 5 C.F.R. § 551.412(a) (stating that "a preparatory or concluding activity" is compensable if the total time spent in that activity is more than ten minutes per workday); *see id.* § 550.112(b) (noting that a "pre[-]shift activity is a preparatory activity . . . and a post[-]shift activity is a concluding activity").

[47] Award at 33-34.

[48] *Id.* at 29 (citation omitted).

inconsistent with 5 C.F.R. § 551.412(a) because it potentially entitles individual employees to compensation for the performance of activities that lasted ten or fewer minutes per workday.[49] Accordingly, we find that the awarded remedy is inconsistent with that regulation.

In addition, as the Agency argues,[50] the Arbitrator erred by failing to account for the differences in travel times between the posts. In particular, the Arbitrator observed that the distances between post locations, regardless of facility, "contribute[d] significantly to the varying amounts of . . . compensable overtime work" performed by the officers.[51] Nonetheless, the Arbitrator found that each officer at the penitentiary was entitled to the same amount of compensable time and that each officer at the institution and the camp was entitled to the same amount of compensable time.[52] Because the awarded remedy does not account for the time differences between posts,[53] we are unable to determine whether the award requires the Agency to compensate officers for activities that they did not perform.

Where the Authority is able to modify an award to bring it into compliance with applicable law, it will do so.[54] Applying that principle, and consistent with the above,[55] we modify the remedy to exclude the payment of overtime compensation to the relief officers for the time that they spent traveling. Also, to the extent that the award directs the Agency to pay for the travel time of non-relief officers who did not pick up equipment at the control center, we modify the award to exclude that payment.

C. The Agency fails to support its remaining exception.

Under § 2425.6(e)(1) of the Authority's Regulations, "[a]n exception may be subject to . . . denial if . . . [t]he excepting party fails to . . . support" its argument.[56] In its exceptions form, the Agency argues that the award is contrary to an Agency-wide regulation,[57] but it does not identify an Agency-wide regulation or present any support for that argument. Accordingly, we deny this exception, as unsupported, under § 2425.6(e)(1).[58]

IV. Decision

We set aside the portion of the award granting compensation to relief officers for the time that they spent traveling to and from their posts. We also set aside the award to the extent that it provides compensation, for time spent traveling, to non-relief officers who were not required to pick up equipment at the control center.

[49] *AFGE, Local 331*, 67 FLRA 295, 296 (2014) (rejecting a party's claim regarding "aggregate" time being compensable).
[50] Exceptions Br. at 15-16.
[51] Award at 30.
[52] *Id.* at 33-34.
[53] *Id.* at 30.
[54] *E.g., Atwater*, 68 FLRA at 860 (citation omitted).
[55] *See supra* Section III.A.
[56] 5 C.F.R. § 2425.6(e)(1); *see AFGE, Local 2152*, 69 FLRA 149, 151 (2015) (*Local 2152*).
[57] Exceptions Form at 5.
[58] *See Local 2152*, 69 FLRA at 151.

Member DuBester, dissenting in part:

I agree with my colleagues that the Agency fails to support its exception that the award is contrary to an Agency-wide regulation. Accordingly, I too would deny the exception.

Contrary to the majority, I would uphold the Arbitrator's finding that the correctional officers (officers) interact with inmates while traveling to and from their posts. And I would uphold the Arbitrator's finding that this interaction is a "principal activity." It follows that officers' travel time is compensable.[1]

The Arbitrator made a careful, thorough review of the evidence in the case. As part of his review, he walked the prison grounds. He also interviewed more than a dozen witnesses.[2] And, analyzing the evidence, he found that the officers are employed to ensure the "safety and security" of the complex.[3] Further, crediting witness testimony, the Arbitrator found that officers interact with inmates while traveling to and from their posts by responding to body alarms, addressing inmate behavior, confiscating weapons and contraband, stopping fights, and listening and responding to inmate questions.[4] These activities are not, as the majority claims, "mere possibilit[ies]"[5] about which the Arbitrator made no findings. These are undisputed facts—to which we defer.[6]

In addition to thoroughly reviewing the evidence, the Arbitrator made a comprehensive analysis of the law. He carefully analyzed relevant U.S. Supreme Court decisions, Authority precedent, and other "rulings, arbitral opinion[s,] and various policies and laws cited by the parties in support of their opposing views."[7] I find no reason to fault the Arbitrator's legal analysis.

Accordingly, based on his thorough factual findings, and his comprehensive legal analysis, the Arbitrator correctly determined that the officers' time spent traveling is compensable.

Contrary to the majority,[8] the Arbitrator's application of the law to the case's facts, and his conclusion that officers' travel time is compensable, brings this case within the sphere of the Authority's *Coleman* precedent.[9] As relevant here, the Authority in *Coleman* upheld an arbitrator's award—similar to the award before us now—compensating officers for time spent traveling to their posts, because they interacted in various ways with inmates—compensable "principal activities."[10]

Similarly here, the Arbitrator found—in great detail and based on a thorough review of the evidence—that the officers interact with inmates while traveling.[11] But the majority summarily concludes that this case is unlike *Coleman* because the Arbitrator did not "find that the travel *itself* was a principal activity."[12] But neither *Coleman*, nor any of the other cases the majority cites, require *traveling* itself to be a principal activity to make that time compensable.[13] Rather, *Coleman* makes clear that travel time is compensable if, during that travel time, the employee engages in principal activities—such as interacting with inmates.[14]

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[1] *Compare* Award at 27 (finding officers interact with inmates while traveling), *with U.S. DOJ, Fed. BOP, U.S. Penitentiary, Coleman II, Fla.*, 68 FLRA 52, 55-56 (2014) (*Coleman*) (officers' time spent traveling is compensable if they interact with inmates).

[2] Award at 29-30.

[3] *Id.* at 21.

[4] *Id.* at 27.

[5] *Compare* Majority at 5 (concluding that "listed . . . activities" are "mere possibilit[ies]"), *with* Award at 27 (citing Hr'g Tr. at 116-121, 125, 161-62, 195-96, 211, 281-82, 324-25, 440, 446, 580) (crediting officers' testimonies that activities took place while traveling); *see also* Opp'n Br. Attach. Ex. 4.

[6] *See NTEU, Chapter 299*, 68 FLRA 835, 837 (2015) ("Authority defers to the arbitrator's underlying factual findings unless the appealing party establishes that those findings are deficient as nonfacts").

[7] Award at 22.

[8] Majority at 4-5.

[9] *Coleman*, 68 FLRA 52.

[10] *Id.* at 55; *see also* Opp'n Br. at 7 ("Arbitrator Hauck's decision is based upon the identical rationale [and] . . . [a] better defined evidentiary record and more detailed factual conclusions.").

[11] Award at 27.

[12] Majority at 5.

[13] *See Coleman*, 68 FLRA at 55.

[14] *Id.* ("*unless employees are required to engage in principal activities during their travel*, their time spent traveling to and from the actual place of performance of their principal activities is non-compensable, even if it is on the employer's premises, and even if it occurs after the employee checks in.") (citing *U.S. DOJ, Fed. BOP, U.S. Penitentiary, Terre Haute, Ind.*, 58 FLRA 327, 329 (2003)).

The majority further relies on inapplicable precedent to support its claim that, even if officers engage in principal activities while traveling, their compensation should be limited to the time they spend engaged in those activities. Majority at 6. The case the majority cites dealt with circumstances unlike those in this case. *See Reich v. N.Y.C.*

In sum, the majority unreasonably disregards the Arbitrator's thorough, uncontested factual findings that the officers interact with inmates while traveling. And, the majority fabricates a legal requirement—mischaracterizing *Coleman*—that "travel *itself*" must be a principal activity to be compensable.[15]

Accordingly, I dissent.

Transit Auth., 45 F.3d 646, 647-48 (2d Cir. 1995). The court rejected a request for overtime compensation by police dog handlers, for dog-care work during their commute. Reversing the district court, the court held that accepting the argument for compensation "would require the conclusion that handlers must be compensated around the clock, waking and sleeping, because certain [dog-care] obligations are always present." *Id.* at 651. One could reasonably, respectfully, disagree with the court's rationale. But in any event, the court's holding should be limited to the case's unique facts.

[15] Majority at 5.