63 FLRA No. 174

UNITED STATES DEPARTMENT OF JUSTICE
FEDERAL BUREAU OF PRISONS
FEDERAL CORRECTIONAL INSTITUTION
TERMINAL ISLAND, CALIFORNIA
(Agency)
and

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES
LOCAL 1680
COUNCIL OF PRISON LOCALS
(Union)

0-AR-4179

DECISION

August 12, 2009

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

Kenneth A. Perea, filed by the Agency under § 7122(a) of the Federal Service Labor-Management Relations Statute (the Statute) and part 2425 of the Authority's Regulations. The Union filed an opposition to the Agency's exception.

A grievance was filed alleging that the Agency violated the overtime compensation provisions of the Fair Labor Standards Act (FLSA), 29 U.S.C. § 201, *et seq.*, and the Federal Employees Pay Act, 5 U.S.C. § 5542, *et seq*. The Arbitrator determined that the employees at issue were entitled to overtime compensation under the FLSA and the Federal Employees Pay Act.

For the reasons set forth below, we grant the Agency's exception and find that the award is deficient. We remand the award to the parties for resubmission to the Arbitrator.

II. Background and Arbitrator's Award

A. Background

This dispute arises out of a grievance filed by the Union alleging that the Agency violated the overtime compensation provisions of the FLSA, and the Federal Employees Pay Act, by failing to compensate correctional officers for certain pre-shift and post-shift activities. [1] Award at 5-6.

After the grievance was filed, the parties held a telephone conference to attempt to informally resolve the grievance, as required by the collective bargaining agreement.

Id. at 6-7. A resolution was not reached and the Union submitted the matter to arbitration. *Id*. at 8.

At arbitration, the Arbitrator framed the issues as follows:

> 1. Is the grievance procedurally arbitrable?
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> 2. If so, did [the] Agency fail to lawfully compensate correctional officers working [at the] Federal Correctional Institution . . . for pre-shift and post-shift overtime and review of Agency contingency plans pursuant to the [FLSA] and/or Federal Employees Pay Act?
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> 3. If the answer to Issue No. 2 above is in the affirmative, what is the appropriate remedy?

Id. at 2.

As relevant here, the Arbitrator found that the Agency failed to compensate the correctional officers for pre-shift and post-shift overtime. [2] In this regard, the Arbitrator concluded that the correctional officers are required to "perform essential responsibilities of their positions on an overtime basis." *Id*. at 17. In so con-

1. This case is one in a series of disputes among various AFGE local unions and the Agency concerning overtime pay for pre-shift and post-shift activities under the FLSA (*e.g., 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, Council of Prison Locals 33*, 58 FLRA 455 (2003); *United States Dep't of Justice, Fed. Bureau of Prisons, United States Penitentiary, Terre Haute, Ind.,* 58 FLRA 327 (2003) (*BOP, Terre Haute), reconsideration denied,* 58 FLRA 587 (2003), *on exceptions after remand,* 60 FLRA 298 (2004).

cluding, the Arbitrator found that, prior to the commencement of the correctional officers' shifts, they must report to the front lobby and check in with the Operations Lieutenant, who advises them of their posts of duty. *Id*. at 3, 17. Following their report to the Operations Lieutenant, the correctional officers must pass through the control room "sally port," which is a secured hallway used to enter the Control Center. *Id*. Upon entering the Control Center, each correctional officer must slide a magnetic disc across a board displaying his/her name from the "out" position to the "in" position to reflect the correctional officer's presence at the facility. *Id*. at 3. The correctional officers then line up to obtain the equipment necessary to perform their assigned duties during their shifts. *Id*. at 3, 17. The process by which the equipment is provided to the correctional officers involves their receipt of "chits" marked with their names in exchange for the required equipment.[3] *Id*. at 4, 17-18. After receiving all of the necessary equipment, each correctional officer exits the Control Center through the sally port and proceeds to his/her assigned post. *Id*. at 4, 18.

The Arbitrator made several findings with regard to the pre-shift and post-shift activities performed by the correctional officers and the amount of time that the officers spend performing such activities. The Arbitrator found that it takes the correctional officers approximately 5 to 10 minutes from the time that they report to the Operations Lieutenant until they clear the Control Center's sally port and obtain all necessary equipment before departing to their posts. *Id*. at 4. The Arbitrator estimated that the length of time that it takes the correctional officers to reach their assigned duty posts from the Control Center varies between 3 and 15 minutes, depending on the location of the posts. *Id*. The Arbitrator determined that, when arriving at their duty posts, the correctional officers take anywhere from 5 to 20 minutes to exchange information and/or inventory equipment with the outgoing correctional officers, depending on the type of post to which the correctional officers are assigned.[4] *Id*. at 5. In this regard, the Arbitrator found that some posts are monitored 24 hours per day, others 16 hours per day, and still others only 8 hours per day. *Id.* at 5 n.1. The Arbitrator found that the 8-hour posts do not require any type of exchange at all and the 16-hour posts only require exchanges once every 24 hours. *Id.* In sum, the Arbitrator found that "the precise amount of time consumed in the performance of the foregoing duties varies among correctional officers since some posts are [monitored] for three shifts, others posts for two shifts[,] and the remaining for one shift, distances from [the] Control Center to posts vary[,] and at some posts equipment is exchanged between incoming and outgoing correctional officers while at other posts equipment must be withdrawn from [the] Control Center." *Id*. at 18.

B. Arbitrator's Award

Although the Arbitrator did not distinguish between the different types of officers, i.e., those who pick up their equipment at the control center from those who do not, those whose duty posts are near the control center from those whose posts are not, and those who spend a considerable amount of time exchanging equipment and information from outgoing officers at the duty posts from those who do not, he determined that, "based upon the totality of the evidence presented," all correctional officers spend approximately 30 minutes per day engaged in pre-shift and post-shift activities and that the time is not *de minimis*.[5] Award at 17-18. The Arbitrator concluded that the Agency failed to lawfully compensate the correctional officers "for pre-shift and post-shift overtime pursuant to the [FLSA] and Federal Employees Pay Act." *Id.* at 20.

Specifically, the Arbitrator awarded the correctional officers "one-half hour [back pay] at their respective overtime rates of pay plus interest thereon for all full shifts they completed commencing three years prior to initiation of the subject grievance . . . until the date of this Award." *Id.* at 19. Although the Arbitrator found that the Agency's violation of the FLSA was willful, he denied the Union's request for liquidated damages under the FLSA. *Id.* The Arbitrator also declined to

2. As a preliminary issue, the Arbitrator found that the grievance was arbitrable. Award at 17. No exception was raised concerning this finding. Therefore, we will not address it further.

3. The Arbitrator found that the equipment received at the Control Center may include items such as batteries, body-alarms, two-way radios, radio cases, key rings, handheld metal detectors, flashlights, handcuffs, leg irons, callouts and crew kits. Award at 4, 17.

4. The Arbitrator found that the exchange may include exchanging equipment which remains on post, exchanging chits for freshly drawn equipment, inventorying all keys and ammunition, reviewing the daily inspection report, staff information report, and post logbook, and exchanging any other pertinent information. *Id*. at 5.

5. The Arbitrator concluded that the post-shift activities performed by the officers essentially follow the pre-shift routine in reverse and constitute approximately the same amount of time that it took to complete the pre-shift activities. Award at 5.

compensate correctional officers for their time spent reviewing the Agency's contingency plans. *Id*. at 18. Lastly, the Arbitrator awarded the Union attorney fees. *Id.* at 19. The Arbitrator remanded the matter to the parties to determine the precise amount of compensation due to the correctional officers and attorney fees due to the Union. *Id.*

III. Positions of the Parties

A. Agency's Exception

The Agency argues that the award is contrary to the FLSA, 29 U.S.C. § 254(a), which lists the following activities as non-compensable:

> (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
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> (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.
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> 29 U.S.C. § 254(a); Exception at 3-4.

According to the Agency, the correctional officers' activities such as checking in and out, waiting in line, and travel time, are not compensable under the FLSA because these pre-shift and post-shift activities constitute preliminary or postliminary activities, not "preparatory or concluding" activities under 5 C.F.R. § 551.412(b). [6] Exception at 4. The Agency argues that such activities are not closely related to the performance of the principal activity and thus, are not compensable. *Id.* at 4 (citing 5 C.F.R. § 551.412(b)).

In addition, the Agency contends that the legislative history of 29 U.S.C. § 254 and Authority precedent preclude the correctional officers from receiving compensation for traveling to and from the place at which they perform their duties. *Id.* (citing *United States Dep't of Justice, Fed. Bureau of Prisons, United States Penitentiary, Terre Haute, Ind.,* 58 FLRA 327, 329 (2003) (*BOP, Terre Haute*) for the principle that the time spent traveling between different places within an institution is not compensable time on duty). *Id.* The Agency also contends that Authority precedent precludes the correctional officers from receiving compensation for waiting in line for equipment. *Id.* at 5-6 (citing *Amos v. United States,* 13 Cl. Ct. 442 (1987) (*Amos*) and *IBP, Inc. v. Alvarez,* 546 U.S. 21 (2005) (*Alvarez*) for the principal that entering a facility and waiting in line for equipment is not compensable under the FLSA). *Id*. at 6.

The Agency also argues that the award overcompensates the correctional officers for engaging in the above activities. According to the Agency, the Arbitrator awarded 30 minutes of compensation time to all of the correctional officers even though not all of the correctional officers spend time obtaining equipment at the Control Center and/or exchanging equipment at duty posts. *Id.* at 3, n.2. The Agency claims that the award will require it to pay correctional officers "for Control Center equipment exchanges that they do not perform and . . . for post equipment exchanges that do not occur during their shifts." *Id.* Based on the foregoing, the Agency asks that the Authority set aside the award. *Id.* at 7.

B. Union's Opposition

The Union claims that the award is not contrary to law and that "[the] Agency confuses the applicable standard of law with respect to the compensability of activities that are integral and indispensable to a principal activity." Opposition at 3 (citing

5 C.F.R. § 551.412(a)(1)). [7] In this respect, the Union argues that the correctional officers should be compensated for the time they spend "obtaining equipment and/or chits at the control center, walking to their post, exchanging report and inventorying equipment with the outgoing officer, walking back to the control center at the conclusion of their shift, and returning chits and/or equipment to the control center" because such activities are integral to and an indispensable part of the principal activity. *Id.* at 4-5 (citing *Amos,* 13 Cl. Ct. at 449; *Alvarez,* 546 U.S. at 36).

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6. 5 C.F.R. § 551.412(b), which implements the FLSA, states in pertinent part:

> 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.

Exception at 4.

The Union also contends that the award does not overcompensate the correctional officers. *Id.* at 6. Specifically, the Union claims that "the Arbitrator did not include non-compensable activities in his average of 30 minutes." *Id.* According to the Union, the award was not intended to compensate the correctional officers for the non-compensable activities addressed at arbitration because such activities constitute such a trivial amount of time for which to be compensated. *Id.* at 7. The Union also argues that the mere fact that the correctional officers were awarded compensation for both obtaining equipment at the Control Center, as well as exchanging equipment at the post, does not necessarily mean that they were overcompensated for their pre-shift and post-shift activities. *Id.* at 8. In this regard, the Union claims that these are two separate activities, and as such, the Arbitrator correctly included both activities into the 30-minute average of daily pre-shift and post-shift activity for which officers are to be compensated under the award. *Id.* The Union requests that the Authority "affirm the Arbitrator's [a]ward." *Id.* at 9.

IV. Discussion

The award is contrary to law.

When an 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, Chapter 24*, 50 FLRA 330, 332 (1995) (citing *United States Customs Serv. v. FLRA*, 43 F.3d 682, 686-87 (D.C. Cir. 1994)). In applying the standard of *de novo* review, the Authority assesses whether an arbitrator's legal conclusions are consistent with the applicable standard of law. *See United States Dep't of Def., Dep'ts of the Army and the Air Force, Ala. Nat'l Guard, Northport, Ala.*, 55 FLRA 37, 40 (1998). In making that assessment, the Authority defers to the arbitrator's underlying factual findings. *See id.*

Congress passed the FLSA to "guarantee[] compensation for all work or employment engaged in by employees covered by the [FLSA]." *Tenn. Coal, Iron & R. Co. v. Muscoda Local No. 123*, 321 U.S. 590, 602 (1944). Congress subsequently amended the FLSA with the Portal-to-Portal Act (the Act), distinguishing 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)(2). *See AFGE, Local 1482*, 49 FLRA 644, 646-47 (1994); *Gen. Serv. Admin.*, 37 FLRA 481, 484 (1990) (*GSA*); *see also Reich v. New York City Transit Auth.*, 45 F.3d 646, 649 (2nd Cir. 1995) (*Reich*). 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[.]" *Steiner v. Mitchell,* 350 U.S. 247, 256 (1956) (*Steiner*); s*ee also GSA*, 37 FLRA at 484 ("[p]reparatory and concluding activities of more than 10 minutes per workday are compensable as hours of work when they are 'closely related to an employee's principal activities, and [are] indispensable to the performance of the principal activities[.]'") (quoting 5 C.F.R. § 551.412(a)).

In determining whether given activities are an integral and indispensable part of employees' principal activities, "what is important is that such work is necessary to the business and is performed by the employees, primarily for the benefit of the employer, in the ordinary course of that business." *Dunlop v. City Elec. Inc.*, 527 F.2d 394, 401 (5th Cir. 1976) (*Dunlop*). Pre-shift and post-shift 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. As a general matter, employees are entitled to be paid for time before and after their ordinary work shift if they are engaged in activities that are "closely related to [their] principal activities, and [are] indispensable to the performance of the principal activities[.]" 5 C.F.R. § 551.412(a)(1). Therefore, "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." *Alvarez,* 546 U.S. at 37.

The Authority has applied these legal principles to Agency prison employees in previous cases. Specifically, the Authority has held that time spent traveling after obtaining equipment at the control center is compensable. *United States Dep't of Justice, Fed. Bureau of Prisons, United States Penitentiary, Leavenworth, Kan.*, 59 FLRA 593, 597-98 (2004) (*BOP, Leavenworth*).

7. 5 C.F.R. § 551.412(a)(1), "Preparatory or concluding activities," which implements the FLSA, states in pertinent part:

> 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.

Award at 3.

The Agency claims that the award is contrary to law because the Arbitrator erroneously awarded the same amount of overtime compensation to all of the correctional officers even though not all of the correctional officers spend time performing compensable pre-shift and post-shift activities under the FLSA. Exception at 3 n.2. Specifically, the Arbitrator found that, "[b]ased upon the totality of the evidence . . . [the] average amount of time expended per day per correctional officer is equal to 30 minutes in excess of their regular eight-hour shift." Award at 18. As such, the Arbitrator awarded "each correctional officer" 30 minutes of overtime compensation. Award at 20. For the following reasons, we find that the award is contrary to law.

In awarding each correctional officer the same amount of overtime compensation, the Arbitrator erred in failing to differentiate among correctional officers who perform pre-shift and post-shift duties warranting compensation and those who do not. In this respect, the Arbitrator found that the correctional officers' pre-shift and post-shift activities vary depending on the type of post to which they are assigned. Some correctional officers must stop at the Control Center to pick up equipment before proceeding to their duty posts and some do not. Other correctional officers spend time exchanging equipment and information at their duty posts with the outgoing officer, while others do not. Under the FLSA and Authority precedent, only the officers picking up their equipment at the Control Center are entitled to compensation for their travel time to and from their duty stations because obtaining such equipment is "indispensable to the performance of [the correctional officers'] principal activities," 5 C.F.R. § 551.412(a)(1), and "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." *Alvarez,* 546 U.S. at 37; *see also BOP, Terre Haute,* 58 FLRA at 330 (prison employees must be compensated from the time that they pick up the equipment necessary for them to perform their job duties, including time traveling to and from the employee's duty station from the point where equipment is picked up); *see also BOP, Leavenworth*, 59 FLRA at 597-98 (travel after the commencement of an employee's principal activity at the control center is compensable); *see also GSA,* 37 FLRA at 484-87.

Correctional officers who merely check in upon their arrival at the facility and then travel directly to their duty posts without stopping to pick up equipment at the Control Center, are not entitled to compensation for this travel time under the FLSA, as they are not engaged in activities "indispensable to the performance of the principal activities" until they arrive at their posts. 5 C.F.R. § 551.412(a)(1); *see BOP, Terre Haute,* 58 FLRA at 330 (citing *Amos,* 13 Cl. Ct. at 449-50 (employees who do not obtain equipment necessary to perform their duties prior to walking to their duty stations do not receive compensation for time spent passing through the control room and travel to their duty stations); *see also Alvarez,* 546 U.S. at 37 (walking time that takes place prior to an employee's first principal activity or after an employee's last principal activity is non-compensable)). However, any pre-shift and post-shift time spent by these correctional officers exchanging equipment and information with outgoing officers at their duty posts that is more than *de minimis*, is compensable since such activity is "indispensable" to the performance of their principal activities. *See BOP, Terre Haute,* 58 FLRA at 330 (prison employees must be compensated from the time that they pick up the equipment necessary for them to perform their job duties). As such, the award is contrary to law because, in awarding overtime compensation, the Arbitrator did not distinguish between the correctional officers picking up their equipment at the Control Center from those who do not, nor between officers who exchange equipment and information at their duty posts from those who do not.

Moreover, although the Arbitrator found that the time spent by the correctional officers performing pre-shift and post-shift activities could greatly vary, he awarded "each correctional officer" 30 minutes of overtime compensation without taking this variance into consideration. Award at 20. Specifically, the Arbitrator estimated that the length of time that it takes the correctional officers to reach their assigned duty posts from the Control Center could range from 3 to 15 minutes, and determined that, when arriving at their duty posts, the correctional officers could take anywhere from 5 to 20 minutes to exchange information and/or inventory equipment with the outgoing correctional officers. [8]

As discussed above, the Authority has held that correctional officers picking up their equipment at a control center are entitled to compensation for their travel time to and from their duty stations if the time spent traveling is more than *de minimis* because obtaining such equipment is indispensable to the performance of their principal activities.

8. The Arbitrator also found that the officers spent 5-10 minutes checking in and out and waiting in line at the Control Center, however, these activities are not compensable activities under the FLSA or Authority precedent, see *BOP, Terre Haute*, 58 FLRA at 330.

BOP, Leavenworth, 59 FLRA at 594. In addition, correctional officers who bypass the Control Center are entitled to compensation for any pre-shift and post-shift time that is more than *de minimis* that is spent exchanging equipment and information at their duty posts with outgoing correctional officers. 5 C.F.R. § 551.412(a)(1), provides for the compensation of "a preparatory or concluding activity" where, among other things, the total time spent in that activity is more than 10 minutes per workday. *See* 5 C.F.R. § 551.412(a)(1). As such, time spent in such activities totaling fewer than 10 minutes per workday is *de minimis* under 5 C.F.R. § 551.412 (a)(1) and not compensable. *See BOP, Leavenworth,* 59 FLRA at 598 (award contrary to 5 C.F.R. § 551.412(a)(1) where total time awarded to employees by arbitrator did not exceed 10 minutes per workday). Because the award could potentially compensate correctional officers whose compensable pre-shift and post-shift duties do not exceed 10 minutes per workday, the award is contrary to 5 C.F.R. § 551.412(a)(1).

In sum, as the award distinguishes neither the correctional officers who pick up the equipment necessary for their work at the Control Center from those who do not, nor the correctional officers who spend time exchanging information and equipment at their duty posts from those who do not, we are unable to determine whether the award requires the Agency to compensate the correctional officers for activities that are either not performed, or not compensable. Moreover, as the award does not account for the varying amount of time that the correctional officers who *do* perform compensable pre-shift and post-shift activities are engaged in such activities, we are unable to determine whether those correctional officers are compensated in accordance with the FLSA.

Accordingly, the award is deficient. As the record does not provide sufficient information for the Authority to determine which correctional officers perform compensable activity and the amount of time that the correctional officers are engaged in such activity, we remand the award to the parties for resubmission to the Arbitrator for clarification consistent with this decision. *See BOP, Terre Haute,* 58 FLRA at 330 (award remanded to the parties for resubmission to the arbitrator for clarification where it was not clear as to which activities were included in the compensation awarded).

V. Decision

The Agency's exception is granted. The award is set aside insofar as it provides overtime compensation to the correctional officers who are not required to pick up equipment at the Control Center and/or those who are not required to exchange equipment and/or information at their duty posts. The award is remanded to the parties for resubmission to the Arbitrator, absent settlement, for a determination consistent with this decision.