68 FLRA No. 138

UNITED STATES
DEPARTMENT OF JUSTICE
FEDERAL BUREAU OF PRISONS
U.S. PENITENTIARY
ATWATER, CALIFORNIA
(Agency)

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
COUNCIL OF PRISON LOCALS
LOCAL 1242
(Union)

0-AR-5081

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DECISION

August 27, 2015

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Before the Authority: Carol Waller Pope, Chairman, and Ernest DuBester and Patrick Pizzella, Members
(Member DuBester dissenting in part)

I. Statement of the Case

The Union filed a grievance alleging, in relevant part, that the Agency violated the Fair Labor Standards Act (FLSA)[1] by failing to pay employees who work in a maximum-security prison for the time that they spent performing certain activities before and after their scheduled shifts. Arbitrator Ronald Hoh found, in pertinent part, that the Agency violated the FLSA, and he awarded varying amounts of overtime pay. There are three questions before us.

The first question is whether the award is contrary to law, in part, because the Arbitrator directed the Agency to pay employees for the time that they spent checking in with a supervisor (the lieutenant). Because employees may be compensated for their check-in time where, as here, they perform certain additional duties during the check-in, the answer is no.

The second question is whether the award is contrary to law, in part, because the Arbitrator directed the Agency to pay employees for the time that they spent traveling through the secure main corridor of the prison (the main corridor). Because the Arbitrator's legal conclusion – that employees' vigilance in the main corridor made their travel time compensable – is inconsistent with relevant precedent, the answer is yes.

The third question is whether the award is contrary to law, in part, because the Arbitrator directed the Agency to pay certain employees for preparatory activities that they performed for only ten minutes per workday. Because the time that an employee spends performing a preparatory activity must *exceed* ten minutes per workday in order to be compensable, the answer is yes.

II. Background and Arbitrator's Award

The Union filed a grievance alleging that the Agency improperly failed to pay employees for compensable work that they performed before and after their scheduled shifts. The grievance went to arbitration.

At arbitration, the parties stipulated to the following issues, as pertinent here: "Did the [Agency] suffer or permit bargaining[-]unit employees to perform work before and after their scheduled shifts without compensation[,] in violation of the [FLSA] . . . ? . . . If so, what shall be the remedy?"[2]

In his award, the Arbitrator discussed two groups of employees: (1) those whose workday begins at their respective duty posts within the prison (the officers); and (2) those whose workday begins at the prison's control center.

Regarding the officers, the Arbitrator found that the Agency owed the officers overtime pay for the time that they spent performing certain activities before their shifts. According to the Arbitrator, any preparatory activity that is indispensable and closely related to an employee's principal activities is itself a principal activity, and is compensable under the FLSA.[3] Specifically, the Arbitrator found that: (1) the Agency required most of the officers to report to the lieutenant's office before their shifts started; (2) the check-in was an "integral and indispensable part of the [officers'] principal activities";[4] and (3) the officers were entitled to compensation for this time because, while in the office, in addition to checking in, they received post assignments, exchanged pertinent information, dropped off and signed incident reports, and reviewed other documents.

[1] 29 U.S.C. §§ 201-219.

[2] Award at 2.

[3] *Id.* at 45-46 (citing *IBP, Inc. v. Alvarez*, 546 U.S. 21, 37 (2005); *Steiner v. Mitchell*, 350 U.S. 247, 252-53 (1955)).

[4] *Id.* at 66.

For those officers who did not check in with the lieutenant, the Arbitrator found that they were entitled to compensation for the time that they spent traveling between the entrance to the main corridor and their posts. In this regard, the Arbitrator found that "maintaining vigilance and monitoring inmate activity while traveling" within the main corridor constituted "work," even if no inmates were present, because "once an [officer] enters[,] . . . he/she must be prepared to respond to emergencies, inmate assaults, and similar inmate conduct, in his/her overall function of maintaining the safety and security of the [p]rison."[5] However, the Arbitrator also found that the main corridor is staffed twenty-four hours per day by officers who "patrol and monitor for anything that happens" there.[6]

Regarding the employees whose workday begins at the control center, as relevant here, the Arbitrator found that employees assigned to the work-corridor post and two shifts in the recreation department reported to the control center ten minutes before the scheduled start of their shifts to pick up equipment. The Arbitrator stated that these employees were entitled to compensation once they reported to the control center even if they were not "required" to arrive early for their shifts.[7]

As a remedy, the Arbitrator directed the Agency to compensate employees for varying amounts of overtime based on the particular posts at issue. Except for the work-corridor post and the two shifts in the recreation department, the Arbitrator awarded more than ten minutes of overtime pay for each post.

The Agency filed exceptions to the award, and the Union filed an opposition to the Agency's exceptions.

III. Analysis and Conclusions

The Agency argues that the award is contrary to law because it directs the Agency to compensate employees for: (1) checking in with the lieutenant; (2) traveling in the main corridor to their posts; and (3) performing preparatory activities that do not exceed ten minutes per workday.[8] When an exception involves an award's consistency with law, the Authority reviews any question of law de novo.[9] In conducting de novo review, the Authority assesses whether the arbitrator's legal conclusions are consistent with the applicable standard of law.[10] Under this standard, the Authority defers to the arbitrator's underlying factual findings unless the excepting party establishes that they are nonfacts.[11]

The Agency's exceptions rely on the FLSA, as amended by the Portal-to-Portal Act (the Act),[12] as well as the FLSA's implementing regulations.[13] Under these statutes and regulations, employees are entitled to compensation for the time that they spend engaged in those "principal activities" that they are "employed to perform."[14] In contrast, pre-shift "preparatory" activities and post-shift "concluding" activities are activities that are "closely related . . . and indispensable to the performance of the principal activities."[15]

In his award, the Arbitrator stated, as relevant here, that any preparatory activity that is indispensable and closely related to an employee's principal activities is itself a principal activity, and is compensable under the FLSA.[16] However, Office of Personnel Management (OPM) regulations that implement the FLSA in the federal sector[17] distinguish principal activities from preparatory activities for federal employees.[18] In this regard, the regulations state, as pertinent here, that "a preparatory activity that an employee performs prior to the commencement of his or her principal activities . . . [is] not [a] principal activity."[19] Although the Authority has previously made statements similar to the Arbitrator's,[20] the Authority has since clarified that it follows the OPM regulations.[21] Accordingly, in order to resolve the Agency's exceptions, we reiterate here that, in the federal sector, a pre-shift activity that is "closely related" and "indispensable" to a principal activity is a preparatory activity – *not* a principal activity.[22] However,

[5] *Id.* at 67 (internal quotation marks omitted).
[6] *Id.* at 14.
[7] *Id.* at 66 (internal quotation marks omitted).
[8] Exceptions at 6.
[9] *See NTEU, Chapter 24*, 50 FLRA 330, 332 (1995) (citing *U.S. Customs Serv. v. FLRA*, 43 F.3d 682, 686-87 (D.C. Cir. 1994)).
[10] *USDA, Forest Serv.*, 67 FLRA 558, 560 (2014) (*USDA*).
[11] *Id.* (citation omitted).
[12] 29 U.S.C. §§ 251-262.
[13] Exceptions at 7-9, 14-15.
[14] 29 U.S.C. § 254(a); 5 C.F.R. § 550.112(a).
[15] 5 C.F.R. § 550.112(b)(1)(i).
[16] Award at 45-46 (citing 29 C.F.R. § 785.38; *Alvarez*, 546 U.S. at 37; *Steiner*, 350 U.S. at 252-53).
[17] *See, e.g., Naval Station Mare Island*, 28 FLRA 1057, 1059 (1987) (explaining that OPM is authorized under 29 U.S.C. § 204(f) to administer the FLSA for federal employees).
[18] 5 C.F.R. § 550.112(b); *see also U.S. DOJ, Fed. BOP, Fed. Prisons Camp, Bryan, Tex.*, 67 FLRA 236, 238 (2014) (*Bryan*).
[19] 5 C.F.R. § 550.112(b).
[20] *E.g., U.S. DOJ, Fed. BOP, Fed. Corr. Inst., Allenwood, Pa.*, 65 FLRA 996, 999 (2011) (*Allenwood*) (Member DuBester dissenting); *U.S. DOJ, Fed. BOP, Fed. Corr. Inst., Jesup, Ga.*, 63 FLRA 323, 327-28 (2008) (*Jesup*).
[21] *Bryan*, 67 FLRA at 238 (clarifying that, in the federal sector, preparatory activities are "closely related . . . and . . . indispensable to the performance of principal activities," but are not themselves principal activities) (quoting 5 C.F.R. § 551.412(a)(1)) (internal quotation marks omitted)).
[22] *Id.*

preparatory activities *are* compensable if an employee performs them for more than ten minutes per workday.[23]

A. The award of overtime pay to the officers for the time that they spent checking in with the lieutenant is not contrary to the FLSA or the Act.

The Agency argues that the Arbitrator's conclusion that the officers were entitled to compensation for the time that they spent checking in with the lieutenant is contrary to law because checking in is an activity that is not ordinarily compensable under the FLSA.[24]

Under the Act, checking in is not ordinarily regarded as a compensable preparatory activity.[25] However, the Authority has found that employees who perform certain additional activities when checking in may be compensated for the check-in if the employees spend more than ten minutes performing those activities.[26] In this regard, in *U.S. DOJ, Federal BOP, Federal Correctional Institution, Jesup, Georgia*, the Authority held that compensating prison employees for the time that they spent checking in was lawful because the arbitrator found that employees not only "check[ed] in at the lieutenant's office," but also "check[ed] their mailboxes, receiv[ed] instructions, and review[ed] and sign[ed] various documents."[27] Similarly, here, the Arbitrator found that officers did more than check in at the lieutenant's office – the officers also received post assignments, exchanged pertinent information, dropped off and signed incident reports, and reviewed other documents.[28] As the Agency does not allege that the Arbitrator's factual findings are nonfacts, we defer to those findings.[29] And those findings support the Arbitrator's conclusion that the time that the officers spent checking in at the lieutenant's office is compensable.[30]

B. The award of overtime pay to the officers for the time that they spent traveling in the main corridor is contrary to the FLSA and the Act.

The Agency argues that the Arbitrator incorrectly concluded that the officers' vigilance and the possibility of encountering inmates while traveling through the main corridor made that travel time compensable.[31] In this regard, the Agency argues that the award conflicts with the Authority's decisions in *U.S. DOJ, Federal BOP, Federal Correctional Institution, Allenwood, Pennsylvania* (*Allenwood*)[32] and *U.S. DOJ, Federal BOP, U.S. Penitentiary, Terre Haute, Indiana* (*Terre Haute*).[33] In response, the Union contends that, under the Authority's decision in *U.S. DOJ, Fed. BOP, U.S. Penitentiary, Coleman II, Florida* (*Coleman*),[34] "maintaining vigilance in secure areas of the prison" makes the officers' travel time compensable.[35]

Generally, under the Act, 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.[36] In both *Allenwood* and *Terre Haute*, arbitrators found that certain prison employees were entitled to compensation for their travel time in a secured area on the way to their duty posts.[37] In both cases, the Authority found the awards contrary to law because the arbitrators had made no findings that the employees performed principal activities during their travel.[38] In particular, the Authority rejected the idea that the dangerous nature of the prisons meant that the employees' vigilance amounted to a principal activity that made the travel compensable.[39] Similarly, federal-court decisions addressing the compensability of travel time have clarified that, while work that occurs during travel may be compensable, the mere possibility that an employee *might* be called upon to perform work while traveling does not make all travel time compensable.[40]

[23] 5 C.F.R. § 551.412(a)(1).
[24] Exceptions at 8 (citing 29 U.S.C. § 254(a); 29 C.F.R. § 790.8(c)).
[25] *U.S. DOJ, Fed. BOP, U.S. Penitentiary, Terre Haute, Ind.*, 58 FLRA 327, 330 (2003) (*Terre Haute*) (explaining that the legislative history of 29 U.S.C. § 254 specifically includes checking in as a non-compensable activity) (citing *Vega v. Gasper*, 36 F.3d 417, 425 (5th Cir. 1994) (citing S.Rep. No. 48, 80th Cong., 1st Sess. p. 47 (1947))).
[26] *Jesup*, 63 FLRA at 327-28.
[27] *Id.*
[28] Award at 57-58.
[29] *USDA*, 67 FLRA at 560.
[30] *Jesup*, 63 FLRA at 328.
[31] Exceptions at 9.
[32] 65 FLRA 996.
[33] 58 FLRA 327.
[34] 68 FLRA 52 (2014) (Member Pizzella concurring in part, dissenting in part).
[35] Opp'n at 14-15.
[36] 29 U.S.C. § 254(a); *see also U.S. DOJ, Fed. BOP, Metro Corr. Ctr., Chi., Ill.*, 63 FLRA 423, 428 (2009) (citing *Terre Haute*, 58 FLRA at 329-30)).
[37] *Allenwood*, 65 FLRA at 996-97; *Terre Haute*, 58 FLRA at 328.
[38] *Allenwood*, 65 FLRA at 1000; *Terre Haute*, 58 FLRA at 329.
[39] *Allenwood*, 65 FLRA at 1000; *Terre Haute*, 58 FLRA at 329-30.
[40] *Reich v. N.Y.C. Transit Auth.*, 45 F.3d 646, 651-52 (2d Cir. 1995); *see also Bobo v. United States*, 136 F.3d 1465, 1467-68 (Fed. Cir. 1998).

In this case, while the Arbitrator found that "violent circumstances and inmate misconduct have occurred"[41] and that officers "may encounter inmates" when passing through the main corridor,[42] he did not find that officers en route to their posts have had to address such circumstances or misconduct. Additionally, although the Arbitrator here found the officers' "vigilance" while traveling to be "integral and indispensable" to officers' principal activities,[43] he did not find the travel to be a principal activity itself. We note, in this regard, that the Arbitrator determined that the main corridor is continuously staffed by officers who "patrol and monitor for anything that happens" in the main corridor.[44] Thus, it is the primary duty of *those* officers – not the officers en route to their posts – to respond to any violent circumstances or inmate misconduct.[45]

The Arbitrator's findings distinguish this case from *Coleman*. In *Coleman*, an arbitrator found that once certain prison employees entered a particular secure area, they began performing their principal duties because they were in the presence of inmates, they *were* called upon to restrain inmates, and incidents involving the inmates "[did] occur" inside the area.[46] More specifically, in *Coleman*, unlike here, the arbitrator found that that "[o]n one occasion[,] [an officer] personally assisted staff in restraining inmates who'd been fighting while he was walking in the corridor."[47] Thus, we interpret the holding in *Coleman* to be limited to the circumstances in which an arbitrator expressly found that employees performed a principal activity, not merely an integral and indispensable activity, when they actually engaged with inmates.[48] Those circumstances are not present here, as the Arbitrator found only that the officers' "vigilance" while traveling was "integral and indispensable."[49]

[41] Award at 12.
[42] *Id.* at 66.
[43] *Id.* at 67.
[44] *Id.* at 14.
[45] *See id.*
[46] *Coleman*, 68 FLRA at 53, 55-56.
[47] *Id.* at 53 (quoting award).
[48] *Id.* at 55.
[49] Award at 67 (internal quotation mark omitted).

Member Pizzella notes that, as he did in *Coleman*, "'the dangerous nature of the correctional environment' does not transform non-compensable activities into integral and indispensable activities." *Coleman*, 68 FLRA at 59 (Concurring and Dissenting Opinion of Member Pizzella) (quoting *U.S. DOJ, Fed. BOP, Fed. Prisons Camp, Bryan, Tex.*, 67 FLRA 236, 238 (2014) (quoting *U.S. DOJ, Fed. BOP, Fed. Corr. Inst., Allenwood, Pa.*, 65 FLRA 996, 999 (2011) (Member DuBester dissenting in part))). In other words, vigilance and heightened awareness does not make an activity compensable.

Additionally, in this case, the Agency concedes that "if an employee is (as opposed to might be) called upon to respond to an emergency, . . . 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."[50] This approach is consistent with *Reich v. N.Y.C. Transit Authority* (*Reich*),[51] in which the U.S. Court of Appeals for the Second Circuit interpreted the Act to require payment for any principal activities that employees performed during travel, but found that it would "go too far" to extend that holding to render all travel time compensable.[52] Thus, consistent with *Reich*, as well as the Authority's decisions in *Allenwood* and *Terre Haute*, we find that the mere possibility that the officers *could* be called upon to perform a principal duty while traveling is not sufficient, by itself, to make the travel here compensable under the Act.[53]

Accordingly, we find that the Arbitrator's conclusion – that the officers' travel in the main corridor to reach their duty posts is compensable – is contrary to law.

Where the Authority is able to modify an award to bring it into compliance with applicable law, it will do so.[54] Applying this principle, we modify the award to exclude the payment of overtime compensation to the officers for the time that they spent traveling in the main corridor to reach their duty posts.

C. The award is contrary to law, in part, because it compensates employees for preparatory activities that they performed for only ten minutes per workday.

As discussed above, the Arbitrator found that employees assigned to the work-corridor and recreation-department posts reported to the control center ten minutes before their shifts began in order to pick up equipment,[55] and he directed the Agency to pay those employees for that time.[56] The Agency argues that this direction conflicts with regulations implementing the

[50] Exceptions at 11 (emphasis omitted).
[51] 45 F.3d 646.
[52] *Id.* at 651-52.
[53] *See id.*; *Allenwood*, 65 FLRA at 1000 (explaining that "be[ing] prepared to respond in the event of an emergency" was not sufficient to make an activity a principal activity); *Terre Haute*, 58 FLRA at 330 (noting that the secure nature of an institution does not make travel within the institution, by itself, a principal activity).
[54] *U.S. DOJ, Fed. BOP, Fed. Corr. Complex, Yazoo City, Miss.*, 68 FLRA 269, 270-71 (2015) (*Yazoo*) (citing *Coleman*, 68 FLRA at 57).
[55] Award at 28, 36-37.
[56] *Id.* at 68.

FLSA in the federal sector.[57] Under those regulations, if a pre-shift or post-shift activity "is closely related . . . and is indispensable to the performance of the principal activities, and . . . the total time spent in that activity is *more than ten minutes* per workday," then the time spent performing that "preparatory" or "concluding" activity is compensable under the FLSA (the ten-minute rule).[58]

According to the Union, the ten-minute rule does not apply because the Arbitrator found that employees who reported early were performing principal activities during those ten minutes.[59] To the extent that the Union argues that the Arbitrator implicitly found any activity to be a principal activity because the activity was "indispensable"[60] to a principal activity, that argument is misplaced. As discussed above, in the federal sector, a pre-shift or post-shift activity that is "closely related" and "indispensable" to a principal activity is a preparatory or concluding activity – *not* a principal activity.[61] Moreover, in his award, the Arbitrator made no findings that *any* particular activity was a principal activity.[62] And the Arbitrator did not find that the employees were required to report ten minutes early or that reporting ten minutes early was a principal activity that the employees were "employed to perform."[63] Accordingly, the award does not support the Union's argument that, when certain employees arrived at their posts ten minutes early, they were performing a principal activity.

Because the Arbitrator directed the Agency to pay employees for the time that they spent performing preparatory activities that did not exceed ten minutes per workday, we find that the award is contrary to law, in part.[64] As discussed above, where the Authority is able to modify an award to bring it into compliance with applicable law, it will do so.[65] Accordingly, we modify the award to exclude those portions of the award that direct the Agency to compensate employees for the time that they spent performing preparatory activities where the performance of those activities did not exceed ten minutes per workday.

IV. Decision

We deny the Agency's exceptions in part, and grant the Agency's exceptions in part. We modify the award to set aside those portions of the award that direct the Agency to pay employees for the time that they spent: (1) traveling in the main corridor to their duty posts; and (2) reporting early to the control center where performing that duty did not exceed ten minutes per workday.

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[57] Exceptions at 14.
[58] 5 C.F.R. § 551.412(a)(1) (emphasis added).
[59] Opp'n at 31.
[60] Award at 63.
[61] *Bryan*, 67 FLRA at 238.
[62] Award at 67-68.
[63] 5 C.F.R. § 550.112(a).
[64] *See, e.g.*, *Yazoo*, 68 FLRA at 270 (finding that employees who reported to work less than ten minutes before their shifts to pick up equipment were not entitled to compensation because the arbitrator made no finding that arriving early was a principal activity); *Jesup*, 63 FLRA at 328 (explaining that employees who are not required by the agency to arrive at a particular time prior to beginning their shifts are not entitled to be compensated for the time that they report early for their shifts).
[65] *E.g.*, *Yazoo*, 68 FLRA at 270-71; *Coleman*, 68 FLRA at 57.

Member DuBester, dissenting in part:

I agree with the Authority's decision that the award of overtime pay to the officers for the time they spend checking in with the lieutenant is not contrary to the Fair Labor Standards Act or the Portal-to-Portal Act. I also agree that the award is contrary to law, in part, because it compensates employees for preparatory activities that they performed for only ten minutes per workday. However, I disagree with the majority's decision that the award of overtime pay to the officers for the time they spend traveling in the prison's main corridor is not compensable.

The Arbitrator's key finding on this issue is that "[o]nce employees . . . pass through a secured door into the [m]ain [c]orridor . . . this is the first time officers come upon inmates – normally those involved in [m]ain [c]orridor cleaning and related functions, or in movement of inmates to other non-custodial [p]rison areas. However, violent circumstances and inmate misconduct have occurred in the [m]ain [c]orridor during such times."[1] The Arbitrator also finds that officers "passing through the [m]ain [corridor . . . in many circumstances . . . may encounter inmates."[2] Indeed, the main corridor is apparently sufficiently prone to violence that the prison has "Main[-]Corridor officers" who "patrol and monitor for anything that happens in the [m]ain [c]orridor . . . . That position is staffed for all three shifts."[3]

These arbitral findings, to which we defer, bring this case within the sphere of Authority precedent such as *U.S. DOJ, Fed. BOP, U.S. Penitentiary, Coleman II, Florida* (*Coleman*).[4] As the majority recognizes, "[i]n *Coleman*, an arbitrator found that once certain prison employees entered a particular secure area, they began performing their principal duties because they were in the presence of inmates, they were called upon to restrain inmates, and incidents involving inmates '[did] occur' inside the area."[5] In this case, as in *Coleman*, the Arbitrator finds that inmates are present in the main corridor, and that violence and misconduct have occurred there. That, combined with the Arbitrator's finding that the prison staffs a "Main[-]Corridor officer" position to patrol the main corridor around the clock to handle "anything that happens,"[6] such as inmate violence or misconduct, is tantamount to a finding that officers passing through the main corridor "have been called upon to . . . restrain . . . inmates."[7] The officers are therefore performing a principal activity and are entitled to compensation.

I find the majority's reasons for distinguishing *Coleman* unpersuasive. It is virtually inconceivable that an officer would ignore inmate violence that occurred while the officer was passing through the main corridor and was in a position to intervene. Moreover, that the main corridor is "continuously staffed"[8] with Main Corridor officers simply confirms the reality of inmate violence and misconduct in the main corridor. And the majority does not suggest that an officer passing through the main corridor would ignore inmate violence and step aside to wait for Main[-]Corridor officers to arrive on the scene if the officer was in a position to take action and safeguard personnel or property. In these circumstances, the majority's reliance on an arbitral finding of "one occasion"[9] when an officer dealt with inmate violence, to distinguish *Coleman*, is overly legalistic – and unreal. Therefore, applying *Coleman*, I dissent on this issue.

[1] Award at 11-12
[2] *Id.* at 66; *see also id.* at 67 (finding that officers in the main corridor "may encounter an inmate or inmates").
[3] *Id.* at 14.
[4] 68 FLRA 52 (2014) (Member Pizzella concurring in part, dissenting in part).
[5] Majority at 6 (citing *Coleman*, 68 FLRA at 55-56).
[6] Award at 14.
[7] *Coleman*, 68 FLRA at 55-56.
[8] Majority at 6.
[9] *Id.*