Arbitration Award

In re
Department of Justice, Federal Bureau of Prisons
Federal Medical Center, Carswell, Texas
and
American Federation of Government Employees, Local 1006

FMCS Case No. 07/04342
126 Lab. Arb. (BNA) 705
March 3, 2009

Samuel J. Nicholas Jr., Arbitrator, selected by parties through procedures of the Federal Mediation and Conciliation Service

I.

The parties hereto, AFGE Council of Prison and Local 1006 ("Union") and U.S. Department of Justice Federal Bureau of Prisons Federal Medical Center Carswell, Texas ("FMC") bring on to arbitration a certain grievance filed by Union on or about May 15, 2007 alleging Agency to be in violation of the Fair Labor Standards Act ("FLSA") and certain provisions of their Master Agreement ("Agreement"). The grievance, in pertinent part reads as follows:

A continuing violation of the Master Agreement between the Federal Bureau of Prisons and the Council of Prison Locals, including but not limited to the following Articles: Article 3, Section b., governing Regulations. This is a continuing violation of the overtime laws under Section 7 of the Fair labor Standards Act, 29 U.S.C. §207(a), as well as the Office of Personnel Management regulations implementing the FLSA in the federal sector set forth at 5 C.F.R. Part 551, and under Title 5 of the U.S. Code.

From April 27, 2004, as well as before, and continuing and ongoing to the present the Agency is requiring bargaining unit employees currently classified as FLSA non-exempt, to perform work prior to and after their shifts. The Agency requires certain unit employees to perform work prior to the start of their shifts, such as obtaining equipment, exchanging information, etc. The employees have been performing work for the benefit of the agency during this pre and post-shift time yet it has not paid them for this work time. As a result, management has violated the rights of these employees set forth under the articles and laws referenced in paragraph 5 above.

On June 14, 2007 Agency filed its written response to the subject grievance, thereby acknowledging receipt of the grievance and the allegations contained therein. It denied the grievance, largely on procedural grounds, claiming that the matter was not timely

filed and, therefore, not an arbitral matter as provided by the Agreement.

While the matter was duly considered by the parties via their contractually provided grievance procedure (Art. 31 of the Agreement), no settlement was reached; thus, Union moved the matter to arbitration.

II.

Upon being named by the parties as sole and impartial Arbitrator, the parties agreed that the case would be bifurcated, i.e. procedural arbitrability issues would be first considered, and the substantive aspects of the grievance may be taken up subsequent thereto. Accordingly, the Arbitrator conferred with the parties and he advised that upon receipt of the parties' arbitral positions as set forth in pre-hearing Briefs, a determination would be made relative to the question of the timeliness of the grievance. To this end, the Arbitrator received the parties' written positions and supporting authority as directed. Shortly thereafter, the Arbitrator found and so ruled that the matter was arbitrable and that a hearing on the merits would go forward and same was held on June 25 and 26, 2008.

III.

The following contractual provisions are deemed relevant:

> Article 3, Section a., "Both parties mutually agree that this Agreement takes precedence over any Bureau policy, procedure, and/or regulation which is not derived from higher government-wide laws, rule, and regulations."
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> Article 5, Section a., "… nothing in this section shall affect the authority of any Management official of the Agency … to determine internal security practices … to assign … to assign works … and to determine the personnel by which Agency operations shall be conducted …"
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> Article 6, Section q., "The Employer and its employees bear a mutual responsibility to review documents related to pay and allowances in order to detect any overpayments/underpayments as soon as possible … 2 … should an employee realize that he/she has received an overpayment/underpayment, the employee will notify their first line supervisor in writing."
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> Article 31, Section d., states, in relevant part, "Grievances must be filed within forty (40) calendar days of the date of the alleged grievable occurrence."
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> Article 32, Section a., states, in relevant part, "… However, the issues, the alleged violations, and the remedy requested in written grievance may be modified only by mutual agreement." (The agency has not agreed to modify the written grievance.)

Article 32, Section h., states "… The arbitrator shall have no power to add to, subtract from, disregard, alter, or modify any of the terms of: 1. this Agreement; or 2. published Federal Bureau of Prisons policies and regulations."

IV.

The parties bring on to arbitration a certain grievance that concerns the subject matter of work time which, indeed, has a long standing history. Thus, the facts pertaining to this matter are not in great dispute, and upon hearing the parties' versions of the background and setting for the grievance, the basic facts have been reconciled per the following summary:

In May 1995, Union filed a national grievance claiming that the Portal-to-Portal Act was being violated at all federal correctional institutions throughout the country. In August, 2000 the parties reached a settlement, obliging Agency to pay some 100 million dollars to bargaining unit employees at all institutions, including Carswell. Subsequent to the filing of the instant grievance, Agency issued a policy to establish proper shift starting and stopping times.

FMC Carswell is one of over 100 federal prisons located throughout the United States. Each facility is charged with a given mission and is directed by a Warden and staff. The facility consists of various departments. Employees are assigned different shifts depending on the mission of their particular department. The largest department is Correctional Services, which functions on 7 day, 24 hour posts, also known as relief posts. Also, it has 5 day, 8 hour posts, known as non-relief posts. The work schedule of any employee within Correctional Services is listed on the "Daily Roster". Inmates are housed in separate units within the "High Rise" building which is divided into two sides, "Northside" and "Southside". Housing unit ports are keyed to 24 hour schedules with no overlapping shifts.

At the center of the complex is a 5 floor hospital, which includes a special housing unit, resident drug assistance program, mental health units, medical surge units, chronic care unit ("CC5") and the administrative unit.

As stated supra, on May 15, 2007, Local 1006 filed a formal grievance claiming Portal-to-Portal violations with same occurring since April 27, 2004. On June 14, 2007, Agency, via its South Central Regional Office, rejected the grievance for various reasons. Union subsequently invoked arbitration and the matter is now properly before the Arbitrator.

V.

The Positions of the parties have been duly noted and they are outlined as follows:

Union

1. Supervision and custody of inmates is a paramount importance at FMC Carswell.

2. Correctional officers and staff are on-duty from the moment they set foot on institution grounds.

3. Batteries and their significance are vitally important to employees at FMC Carswell, and are duly recognized as such.

4. Correctional officers and other staff at FMC Carswell pick up charged battery at the control center prior to proceeding to their assigned work posts.

5. Correctional officers and other staff are required to work prior to their assigned duty time in order to accomplish their duties as provided in the post orders.

a. Correctional officers' shifts are not overlapping;

b. Post orders require Correctional Officers to be on post at the beginning of their shifts and to stay on post until the end of their shift;

c. Correctional officers at FMC Carswell are required to report to work early in order to comply with post orders covering:

1. The Administrative Unit;
2. The High Rise;
3. The Special Housing Unit;
4. Chronic Care 5;
5. The Control Center.

d. Licensed Vocational Nurses in the Mental Health Units.

e. Off-Going Correctional Officers are required to work after their shift ends when they are relieved at the end of their shifts.

6. A preponderance of the evidence runs in Union's favor, denoting that Union has met its burden of proof.

Agency

1. Following the parties' May, 1995 settlement the parties continued to consider certain portal to portal concerns, subsequently, Agency issued a policy for the establishment of proper shifts starting and stopping times. To this date, Agency has adhered thereto.

2. Agency steadfastly maintains that Union's allegations are false and are unproven in support of the action taken following the 1995 settlement, Agency has issued policy statements and memorandums from wardens at Carswell and, all of which were made consistent with the settlement in the following decisions decided by the federal courts.

3. The decisions rendered in the following cases may not be deemed precedent, for they are easily distinguished from the subject grievance:

Carlsen v. United States, 521 F.3d 1371 (2008)

Amos v. United States, 13 Cl.Ct. 442 (1987)

AFGE Local 801 Council of Prison Locals & USDOJ Federal Bureau of Prisons Federal Correctional Institution Waseca, Minnesota, 58 F.L.R.A. 455 (2003)

U S Department of the Air Force v. Federal Labor Relations Authority, 952 F.2d 446 (1991)

Gorman v. Consolidated Edison Corporation, 488 F.3d 586 (2007)

Bonilla v. Baker Concrete Construction, Inc., 487 F.3d 1340 (2007)

Aiken v. City of Memphis, Tenn., 190 F.3d 753 (1999)

Vega v. Gasper, 36 F.3d 417 (1994)

Dolan v. Project Construction Corp., 558 F.Supp. 1308 (1983)

Smith v. Aztec Well Servicing Co., 321 F.Supp.2d 1234 (2004)

Lindow v. United States, 738 F.2d 1057 (1984)

Bobo v. United States, 136 F.3d 1465 (1998)

AFGE Local 1482 and US Department of the Navy Marine Corps Logistics Base Barstow, California, 49 F.L.R.A. 644 (1994)

5. Union is with the burden to prove the merits of the subject grievance. This it has failed to do.

6. Per the Warden's directions issued in 2006, 2007 and 2008 specific information was given to employees on work honors, covering pre and post shift activities.

7. Most, if not all, of Union's testimony relative to an employer having to wait, e.g. 2-5 minutes must be seen under the *de minimis* standard and not compensable.

VI.

While the parties have presented their respective version of the focal question that serves to properly frame the grievance, it must be said that other than semantics they are

essentially the same. However, the Arbitrator will address both questions and they are restated thusly:

Union

"Did the Agency suffer or permit bargaining unit employees to perform compensable work within the meaning of the FLSA prior to the beginning of their scheduled shift times and after the completion of their scheduled shift times?"

Agency

"Did the Agency fail to pay pre-shift and post-shift overtime in accordance with Fair Labor Standards Act (FLSA)? If so, what is an appropriate remedy?

In addition to Union stated positions supra, it strongly contends that the evidence offered by both parties reflects that Agency has violated the Master Agreement in Agency's own regulations. In support thereof it maintains the following:

A. FLSA overtime claims are appropriately pursued in the federal sector through the grievance procedure;

B. The FLSA requires employers in the federal sector to pay overtime for time worked over eight hours in a day;

C. A federal agency must pay for all hours that it "Suffers or Permits" Its employees to work:

1. An employee cannot volunteer his or her time under the FLSA; and

2. It is an employer's responsibility to ensure that work is not performed by an employee if it does not want to compensate the employee.

D. Activities that are integral and indispensable to an employee's principal activity and occur during the "Continuous Work Day" are compensable;

E. Arbitrators have held that picking up equipment at a prison begins the "Continuous Workday"; and,

F. The Agency and prison have each recognized that an employee is to be paid as soon as a piece of equipment is picked up: Accordingly,

1. Employees at FMC Carswell are entitled to compensation under the FLSA from the moment they pick up a charged battery at the Control Center:

a. Position descriptions and post orders require correctional officers to maintain the safety and security of the institution.

b. Radios and fully charged batteries are sufficiently related to a correctional officer's job responsibility of maintaining the safety and security of the institution.

2. Correctional Officers at FMC Carswell are entitled to overtime compensation as a result of reporting to work early in order to comply with the post orders.

While it is true that the instant grievance is the first of its type at FMC Carswell, the parties realize full well that portal-to-portal cases are not matters of first impression. To be sure, the decision rendered by Arbitrators JJ Lapenna, Bernard Marcus and Sue O. Shaw clearly show that the AFGE and Bureau of Prisons have taken up arbitration issues/questions that are directly on point with the case at hand and indeed the issues stated supra. However, upon recognizing that the decisions rendered by the noted Arbitrators come from different institutions notwithstanding that local bargaining units must comply with governing provisions of the Master Agreement and applicable federal law, including BOP regulations and FLRA rulings and federal court decisions, I cannot find that the instant grievance is made res judicata.

Following admission of Joint Exhibits (1-25) at the hearing on June 25, 2008, a recess was taken and time was allotted for the Arbitrator to tour certain locations within the Carswell facility, including the entry area and where an employee receives his equipment as needed for his shift. Accordingly, the Arbitrator noted the logistics and the practical aspects of entering and exiting this area and the general distance from said area to shift stations.

When note and attention is given to the wording set forth in Article 3b of the Agreement "The administration of all matters covered by this agreement, Agency officials, Union officials and employees are governed by existing and/or future laws, rules and government wide regulations in existence at the time this agreement goes into effect", the parties should realize that the Arbitrator is obliged to address a grievance, such as we have here, as pertaining to rights and privileges set forth in the FLSA. Therefore, it is hereby held that the Arbitrator is with the jurisdiction granted him to address the substantive merits of the instant grievance.

As to the implementation of the FLSA in the federal sector, the parties are aware that the Office of Personnel Management (OPM) is charged with administering the FLSA in the federal sector, 29 U.S.C. §204(f). OPM's regulations relative to the FLSA do require overtime compensation to be paid and to be recognized as part of compensable hours. In this connection, and quite worthy of note, following the 1995 settlement Warden Van Buren, on March 14, 2006, issued a memorandum concerning the subject "portal-to-portal issues/assigned work hours". In pertinent part, the Warden said:

As a reminder, staff who are required to pick up keys and/or equipment at the control center are considered "on time" if they are picking up their equipment from the control center at the start of their shift (e.g. 7:30 a.m. for a 7:30 a.m. - 4:00 p.m. shift). Staff

issued 24-hour keys who are not required to retrieve equipment from the control center are considered "on time" if they are at their assigned work areas at the start of their shift.

Employees who are require to drop off keys and/or equipment at the control center at the end of their shift are allotted reasonable travel time prior to the end of their shift to travel from their duty post to the control center. An employee whose shift ends at 4:00 p.m. should be at the Control Center dropping off his/her keys and/or equipment at the control center no later than 4:00 p.m.

Additionally, in the two succeeding years, on January 25, 2007 and March 3, 2008, the same memorandum was updated and submitted to employees at Carswell, with Warden Van Buren issuing the January 25, 2007 memo and Warden Chapman executing the memorandum of March 3, 2008. Presumably, the Wardens and BOP upper management knew that it must pay for all hours that it "suffers or permits" employees, such as Grievants, to work. As cited by Union in its Brief, the Office of Personnel Management has defined the phrase, "suffered or permitted work" as being:

> [A]ny work performed by an employee for the benefit of an agency whether requested or not, provided the employee's supervisor knows or has reason to believe that the work is being performed and has an opportunity to prevent that work from being performed.

5 C.F.R. §551.104. OPM defines compensable hours of work as:

> (1) Time during which an employee is required to be on duty;
>
> (2) Time during which an employee is suffered or permitted to work; and
>
> (3) Waiting time or idle time which is under the control of an agency and which is for the benefit of an agency. 5 C.F.R. §551.104(a)

Agency is correct and on point with the FLSA when it contends that an employee cannot volunteer his or her time as so provided for in the statute. However, it is Agency's responsibility to make certain work is not performed by an employee, assuming that said employee is not to be compensated.

From the authority shown and cited, the law clearly provides an employer has actual or even constructive knowledge that work is being performed, employees must be duly compensated. Brennan v. Gen'l Motors Acceptance Corp., 482 F.2d 825, 827-28 (5th Cir. 1973). Also see Moon v. Kwon, 248 F.Supp.2d 201 (S.D.N.Y. 2002) The case law shows that actual or constructed knowledge of management is imputed to the employer. See e.g., Reich v. Dept. of Conservation & Nat'l Res., 28 F.3d 1076, 1082 (11th Cir. 1994); Cunningham v. Gibson Elec. Co., 43 F.Supp.2d 965, 975 (E.D. Ill. 1999).

The Arbitrator has noted certain provisions of the Portal-to-Portal Act, 29 U.S.C. §251 et seq., and it is clear that the statute makes for a limited exception to the requirement that

the employer compensate employees for all hours worked. See Section 4(a), 29 U.S.C. §254(a). The exclusion addresses the responsibility of the employer in compensating one for his travel and other preliminary and post preliminary activities. [1]

Having previously noted that the instant case does not come on as a genuine matter of first impression, the Arbitrator has noted the decision rendered by Arbitrator LaPenna dated July 14, 2006 covering a similar dispute between BOP and AFGE Local 3981, as related to Agency's Jesup, Georgia facility. In addressing the merits of the grievance before him, the Arbitrator said:

> [T]he 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 … [and] is compensable as is the post requisite travel to the duty post."

Also, of interest and major significance is the decision rendered by my long time friend, Arbitrator Bernard Marcus, in FCC Beaumont and AFGE, Council of Prison Locals, C-33, FMCS No. 05-54516 at 22 (Dec. 27, 2006) In upholding the grievance, the Arbitrator found:

> [T]ime spent at the control center receiving equipment necessary for the employee to perform his duties when he reaches his post is compensable from the moment the employee requests the equipment. As stated, included in such equipment are: radio, batteries, security equipment, weapons, ammunition, handcuffs, pacification equipment, flashlights, stamp pad and stamp, written orders in the officers mail box, detail pouches, etc.

While Agency has argued strenuously that the pick up of batteries is not necessary, for phones have exchanged batteries in place, it must be noted that upon this Arbitrator's inspection, I am in agreement with what has been previously said, that without the "essential equipment of operative radios and body alarms, the employees of FCI Jesup and other Agency institutions cannot perform their principal work activity effectively and in safety for both themselves and the inmates for whose safety they are responsible as one of their principal work activities." Clearly, Arbitrators La Penna and Marcus found that picking up and returning batteries started and ended one's compensable work day and, moreover, that safety concerns outweigh Agency's argument that it is unnecessary to pick up a battery at the start of the workday since batteries can be delivered upon request. Also, in those cases, as is the matter before this Arbitrator, management knew that correctional officers were picking up batteries at the control center and it never directed them to refrain from doing so.

Ironically enough, with the parties having acknowledged that radios and fully charged batteries constitute equipment that is sufficiently related to an officer's job and his responsibility for maintaining a safe and secure penal complex, how can it be validly maintained that picking up and delivering batteries does not constitute work and compensable time? And the record clearly shows that upon an officer requesting a fully charged battery, he has not been denied same. Also, the record reflects that correctional

officers make it a manner of daily practice to drop off depleted or discharged batteries after their scheduled shift so that said batteries can be recharged.

Finally, the Arbitrator finds that given the long-standing history of disputes related to "compensable time", including the aforenoted 1995 settlement, federal court decisions, arbitration decisions and Agency's own regulations, as highlighted by the aforenoted memorandums, together with the clear and undisputed facts revealed by witness testimony, it must be said that Union has met its burden for showing that a preponderance of the evidence runs in its favor. Accordingly, it is ruled that the instant grievance is of merit.

To this end, the following Award it rendered.

Award

The grievance is upheld, for the parties offered issue statements supra must be and are answered in the affirmative.

Within 60 days the parties are directed to file a stipulation on the number of hours to be compensated and the monetary rate for quantifying the Award relative to the total sum due. Should the parties fail to do so, the Arbitrator will make the calculations upon receiving advice of the parties.

As stated in the Opinion, a hearing was held on June 25 and 26, 2008, wherein the parties presented testimony and evidence regarding the pre-shift and post-shift activities of bargaining unit employees assigned to 9 separate posts/departments: (1) the Administrative Unit #1, (2) the High Rise Units (4 separate posts—1 North, 1 South, 2 North and 2 South), (3) the Special Housing Unit #1, (4) Chronic Care 5, (5) Control Center #1, and (6) the Mental Health Units (for Licensed Vocational Nurses) with the parties having advised the Arbitrator that they cannot agree on the number of hours the subject employees/grievants are subject to compensation, I find that the employees working in the posts/departments are entitled to recover damages equivalent to 22 minutes of unpaid work time per shift at these posts.

Based on the submissions of the parties, and the hearing in this matter, the Agency has failed to prove that it acted in good faith in violating the Fair Labor Standards Act (FLSA) and, accordingly, an award of liquidated damages equal to the backpay damages is appropriate.

Further, it is found that the Agency willfully violated the FLSA and, accordingly, damages should be calculated going back 3 years from the date the grievance was filed.

Accordingly, I find that Agency is liable for a total of $482,429.52 backpay for correctional officers who occupied these posts during the time period from 3 years prior to the date the grievance was filed up to December 21, 2008 (May 14, 2004 to December 21, 2008), and an equal amount as liquidated damages, and $15,997.56 in backpay for

vocational nurses and an equal amount as liquidated damages for the same time period. The total damages for the individuals who worked in the posts/departments set forth supra during the time period of May 14, 2004 - December 21, 2008 are $996,774.15.

This amount is exclusive of any attorneys' fees and costs to which the union may be entitled under the FLSA.

Note:

1. In Steiner v. Mitchell, 350 U.S. 247, 256 (1956) the U.S. Supreme Court held that notwithstanding the exception noted in the Portal-to Portal statute the employer must compensate his employees for pre and post ship activities if, indeed, they are deemed integral and indispensable to principle work activities.