

In the Matter of Arbitration  
Between  
The U.S. Department of Justice, Federal Bureau of Prisons  
U.S. Penitentiary Lewisburg, Pennsylvania

v.

American Federation of Government Employees, Local 148

(Lunch Periods, Laundry Department and UNICOR)

FMCS Case #06-03725

Date of Grievance	-	03/14/2006
Date of Hearing	-	08/22/2007 and 08/23/2007
Date of Post-hearing briefs	-	11/02/2007
Date of Reply to Post-hearing briefs	-	11/21/2007
Date of Reply to the Reply Briefs	-	01/25/2008
Date of Decision	-	02/15/2008

Appearances:

Agency:

Ms. Letitia Byers-Pinkney, Esquire

AFGE 148:

Bryan G. Polisuk, Esquire

Bernard S. Fabian, Arbitrator  
1 Elizabeth Street  
Dravosburg, PA 15034  
February 15, 2008

## BACKGROUND

The United States Penitentiary (USP) Lewisburg, is a federal prison located in Lewisburg, Pennsylvania. Eligible employees working at the facility are properly certified and represented by the American Federation of Government Employees (AFGE) Local 148. The employees are part of and subject to the Master Agreement between the Federal Bureau of Prisons and the Council of Prison Locals, which is controlling in this subject matter.

On 03/14/2006, a grievance was filed on behalf of the applicable Local 148 represented employees. Specifically, those employees who work as supervising inmates or foreman in UNICOR and in the laundry department, protesting that they have not been allowed their 30-minute unpaid lunch period from 03/06/2003 through 03/14/2006. The grievance was filed with the Northeast Regional Director. The Director responded to the grievance on 04/21/2006 and denied the grievance and alleged certain procedural defenses. On 05/18/2006, the Union via their representatives invoked arbitration. Subsequently, the below-named arbitrator was selected through the Federal Mediation and Conciliation Service to hear and decide the issue.

Upon his selection, the Arbitrator promptly contacted both Parties and a mutually agreeable time, date and place was selected to hear the subject case. The case was heard and a transcript was taken on 08/22/2007 and 08/23/2007, in Lewisburg, Pennsylvania at the Institution. Both Parties were ably represented and had the opportunity to present witnesses, cross-examination and to present

exhibits. At the close of the hearing, both Parties elected to file Post-Hearing Briefs and subsequently rebuttal briefs to the post-hearing briefs. The Post-Hearing Briefs were dated 11/02/2007 and the Rebuttal Briefs were dated 11/21/2007. Both were received by the Arbitrator in a timely manner from the Parties.

Subsequently, on 11/28/2007, the Union filed a motion to submit a Response to the Agency's Reply Brief. The Agency objected and both Parties briefed their position on this Motion to the Arbitrator. On 12/21/2007, the Arbitrator granted the motion of the Union to respond to the Agency's Reply Briefs and requested that the final briefs in this matter be exchanged by 01/15/2008.

This deadline was extended by mutual agreement of the Parties. The Reply Briefs to the Reply Briefs, were then received by the Arbitrator, dated 01/25/2008. With the receipt of the hearing transcripts and the 3 briefs from each of the Parties, the record of the subject case is deemed to be closed and the issue is ripe for the decision. At the hearing, the Agency stated that their previously procedural issues were waived and withdrawn and the case was to be decided solely on its merits.

### SPECIFIC BACKGROUND

USP Lewisburg is a high-security level penitentiary located at Lewisburg, Pennsylvania, housing over 1500 inmates with approximately 500 total government employees. This grievance concerns the UNICOR and laundry employees represented by AFGE Local 148. These non-supervisory employees are properly represented by AFGE Local 148 (hereinafter referred to as the Union). USP Lewisburg is part of the Federal Bureau of Prisons, U.S. Department of Justice (hereinafter referred to as the Agency). UNICOR at USP Lewisburg is a federal manufacturing facility and is staffed by inmates of the institution, and supervised by employees of USP Lewisburg, represented by AFGE 148. (UNICOR Foreman).

UNICOR manufactures at the facility, steel lockers, cabinets and similar steel furniture used throughout the federal government. Included in its operating functions are shearing and cutting/bending of steel, welding, grinding and finishing by powder coat painting. Finished product and raw materials are warehoused, stored, and packed and shipped to and from other locations and suppliers via commercial shippers.

All manufacturing employees are inmates of the institution and are supervised by the UNICOR foreman. These UNICOR foreman are at the first supervisory level in terms of a manufacturing environment and again are properly represented by the Union. There are supervisory employees also in UNICOR who are responsible for the supervision of the "UNICOR foreman" and are excluded

from the Bargaining Unit and are therefore not the subject of this grievance. The "UNICOR foreman" are first correctional officers and have received correctional officer training and have worked as correctional officers in this institution or at another institution prior to bidding on and being selected as "UNICOR foreman."

All of the UNICOR foreman, supervisory or technical positions have a formal job description of 3-5 pages each as well as an evaluation process connected with them. Listed among the major duties of each of these positions, is that the incumbent is first a law enforcement officer and occupies a correctional officer position in a correctional institution and that this is the primary duty before other duties required of the individual within the specific job description.

Inmates that work for UNICOR report to the UNICOR facility in the morning and change from their normal prison wear in a changing room. They change from the issued prison clothing into issued work clothing, which they wear while working in UNICOR. The employees enter the changing room, then remove their normal institutional prison garb, proceed through a metal detector and then put on their work clothes. They, then go to their appropriate work assignments in the approximately 10-15 various departments of the UNICOR manufacturing process.

These inmates eat at the "main line chow hall" at approximately 11 a.m. of each work day. This is not a set time but is an approximate time. The supervisor of the chow hall or the lieutenant in charge thereof, does not want all inmates of

the institution in the chow hall facility at the same time. Therefore, they stage or have inmates eat at different times during the meal period.

The exact time of each prisoner eating is dependent upon many facts, including what meal specifically is being served that day. For example, if it is a meal that all inmates enjoy eating and therefore want to eat, it takes longer. The time period involved is also dependent on what specifically is being served or the type of food being served. Some foods served, take longer for inmates to eat than other types of food that are being served. For example, a fried chicken dinner takes longer for the inmates normally to consume than a meal composed of hamburgers. There are also certain other variables such as the speed of the chow hall line.

As a result, the UNICOR inmates are not sent to the chow hall main line until the lieutenant or supervisor calls for them. Moreover, for several years, the UNICOR inmates have been divided into 2 separate groups and each group is sent independently. This is because of the large number of inmates who are working in the UNICOR facility and also that the chow hall supervisor does not want all of these inmates present at the same time because of control issues.

Therefore, some time before 11 a.m., usually 15 to 20 minutes prior to 11 a.m., the work in UNICOR must cease and tools secured. The tools utilized by the inmates working in UNICOR are the same as tools in any similar manufacturing facility. The work involves taking raw plate steel and cutting, bending, shaping and welding the plate into steel lockers or other fixtures. Therefore, such tools

would include saws, bending shears, press brakes, welding torches, cutting hand shears and various hand tools including hammers, pliers, etc. These tools can obviously be used by the inmates in the institution for other jobs that would not be desirable by the prison staff.

Therefore, the tools are controlled and are categorized as either Class A tools or Class B tools. Class A tools include a variety of tools that would include saws, sharp bladed instruments, etc. Class B tools generally include pliers, hammers, and similar tools. Class A tools are required to be kept under the constant supervision of the UNICOR foreman or correctional officer. That UNICOR foreman specifically then would go to the secure "tool crib" accessible only to him, draw the tools out and assign them to the specific inmates. The Category B tools are kept in a category B "tool crib" which includes a shadow board which outlines the shape of the specific tool that is to be hung in that location. These Category B tools are accessible by the inmates through an inmate tool crib worker or through the UNICOR foreman. Either the inmate tool room worker or the UNICOR foreman would issue the applicable Category B tools to the inmate, receive the inmates chit, hang it on the shadow board for the tool that was issued and the inmate thereafter uses the appropriate tool. The Category A tools are only accessible and can be issued by the foreman.

Therefore, prior to inmates leaving the building at the end of the work shift or for chow during the noon hour, the tools must be collected. In the case of the Category B tools, the inmate tool room attendant or the UNICOR foreman may

return the tools to the Category B tool crib, remove the inmate chit and hang the appropriate tool in its place on the shadow board. For category A tools used in the operation, the UNICOR foreman himself must take a tool cart and personally secure the Category A tools from the inmates and return them to the secure Category A tool room to which the UNICOR foreman has the only key.

Subsequently, at approximately 10:40 or 10:45 a.m. the work must cease in UNICOR. The tools in the departments must be returned to the proper location. The paint shop paints the product by powder coating. The powder coating is applied to the finished steel product, which then goes through a heated oven to bake the powder coat paint onto the steel. Therefore, the oven temperatures need to be reduced, as well as product on the line moving through the oven needs to be interrupted to prevent scorching or burning of the painted product in the oven while the inmates are at lunch.

The inmates then need to be counted by the foreman at the work shop location and taken down the steps. The UNICOR building itself is comprised of 3 floor with shops on all 3 floors. So, dependent on the individual shop in which the inmate is working, he may have to descend from the third floor or the second floor, and in some cases, he may be working on the first floor. Then, the inmate would be taken into the changing room where he would remove his UNICOR work clothes; go through the metal detector to the other side of the room and put on his normal prison clothing. The inmates would then be recounted and released to the chow line when they are called by the lieutenant or the chow hall supervisor.

Within the last several years, starting in approximately 2005, when all inmates are out of the UNICOR building, the doors to the UNICOR building are closed and locked for ½ hour. This is the ½ hour time that is allocated by the Agency to the UNICOR foreman's unpaid lunch period.

If the inmates finish early from lunch or do not eat lunch, he can leave the chow hall and return to the "slot." The slot is an area which is between the buildings in the institution and at the entrance to the UNICOR building. The inmates then congregate there under the supervision of correctional officers/UNICOR foreman who are specifically assigned to this monitoring task on a rotating basis. The inmates will congregate there until the UNICOR doors are open and the inmate then goes through the metal detector again, changes into his work clothes and returns to his work area. The metal detector is manned by the UNICOR foreman on a schedule rotating basis. Upon arrival back then at the work site, the tools need to be secured from the proper tool room, either Category A or Category B, the ovens need to be reheated and the work for the balance of the afternoon commences.

So, therefore, in addition to the primary responsibility of monitoring and controlling the inmates, the UNICOR foreman are also responsible for the production schedules, the products being produced, the distribution of tools, the securing of the tools after they have been used and the heating of the ovens. The foremen also have additional assignments that they receive on a rotating basis such as manning the metal detector. This schedule includes manning it at 7:10 a.m.

when the inmates report to work, 10:40 a.m. when they are getting ready to go to chow, 11:10 a.m. when the UNICOR inmates will start returning from chow and at 3:05 p.m. when the inmates will be leaving the UNICOR building. These additional duties last until all of the inmates have left the building.

Prior to July 2005, the UNICOR door was not locked for the ½ hour lunch break and the inmates could return early if they so desired. Obviously, when they did return, the care, custody, control and monitoring became the primary responsibility of the UNICOR foreman within the facility.

There is also an officer's mess that is located behind the main line chow hall for utilization of employees at USP Lewisburg and the UNICOR foreman and others are eligible to go there and eat their meals if they so desire during the ½ hour paid lunch period. The testimony was that some employees availed themselves of this while others bring their lunch to work, while others do not eat lunch at all.

#### Laundry and Clothing Issue Department

Prior to January 2006, laundry and clothing issue foremen, again who are represented by AFGE 148, had a ½ hour unpaid lunch period.

However, in July 2006, the employees again requested, as they previously had, that they be scheduled to work an 8-hour shift that included a 20-minute paid lunch period. Effective in July 2006, the schedule was changed to give them the 8-hour scheduled work day that included the 20-minute paid lunch period to "eat on the fly" or "lunch on the job." Prior to January 2006, they had the 30-minute

unpaid lunch period. The testimony at the hearing was that the laundry and clothing issue area does not close for any fixed period of time, either before January of 2006 or since January of 2006. Therefore, there are situations in which the inmates working in the laundry facility could leave for chow and return early to the laundry area which would require the foreman to monitor them. Also, there was testimony that during the 30-minute unpaid lunch period before January 2006, there were numerous telephone calls from other correctional officers or supervisory personnel to the laundry and clothing issue department. Also, there was testimony that other inmates could enter the laundry and clothing issue area to pick up clothing that they had left to be cleaned several days prior but on this day had left the chow hall early in an attempt to retrieve their clothing during the remaining time available to lunch. There were also cases when the supervisors would see inmates going to the chow hall or going through the chow line that were dressed in what the supervisors considered to be inappropriate or ill-fitting clothing and the supervisors would pull those inmates from the chow hall line and direct them to go to clothing issue and obtain clothing.

The testimony of the employees that worked in the area, was that these instances did not occur infrequently and that they did occur frequently enough that they interrupted the 30-minute unpaid lunch period. The testimony of the exempt supervisor for the Laundry Department was that although phone calls did occur, he attempted to answer them himself 99% of the time and instructed the laundry foremen to not answer the phone calls during the 30-minute unpaid lunch period.

period. The supervisor also testified that he had told people that came to pick up laundry during the lunch period, to come back in the morning to pick up their laundry or later in the day. However, there was no testimony that the supervisor in the clothing issue department refused the orders of his superiors when they called on the telephone or sent inmates down to have their clothing changed or corrected. The supervisor generally was in the area with the laundry foreman and from testimony admitted that there was times when he could not answer the phone or that higher levels of management in the institution had made special requests or had sent inmates down for special fittings, etc.

The Union presented what they believed was a representative sampling of the UNICOR and laundry employees who alleged that they were deprived of their 30-minute unpaid lunch period at this hearing. The Union stated that this sampling was provided in the interest of efficiency and of having a timely hearing without much repetitive testimony. They stated that there was no need to put all of the alleged grievants into testimony of the subject case. I concur with this premise of the Union. I believe that the UNICOR foremen and laundry foremen who testified at the subject hearing provided a representative sampling of the testimony of what other employees in those positions or similar positions would have testified.

Furthermore, all of the job descriptions for UNICOR and the laundry and clothing issue department were presented as exhibits at the hearing and the reading of those job descriptions as compared to those of the employees who testified,

yields the fact that they are all similar in make up and contain similar factual situations and wording.

The Arbitration hearing was bifurcated. A bifurcated hearing separates the alleged violation of a Collective Bargaining Agreement and/or applicable statutes from any question of liability should there have been found to be a violation of the Collective Bargaining Agreement or applicable standards. If there is found to be a violation, then another hearing can be held to argue what liability and damages have been incurred. The remedy then is deferred until the grievance is resolved in the Union's favor. If the grievance is not granted and the Agency's position is sustained, of course, therefore there would be no reason to have another hearing to determine any liability because no liability would in fact exist.

APPLICABLE SECTIONS OF THE  
COLLECTIVE BARGAINING AGREEMENT

The following are the applicable sections of the Master Collective Bargaining Agreement in effect between the Parties for the period of time involved in the grievance.

ARTICLE 3 – GOVERNING REGULATIONS.

Section b. In the administration of all matters covered by the Agreement, Agency officials, Union officials and employees are governed by existing and/or future laws, rules and government-side regulations in existence at the time this Agreement goes into effect.

## ARTICLE 18 – HOURS OF WORK

Section a. The basic workweek will consist of five (5) consecutive work days. The standard workday will consist of eight (8) hours with an additional thirty (30) minute no-paid, duty-free lunch break. However, there are shifts and posts for which the normal workday is eight (8) consecutive hours without a non-paid, duty-free lunch break.

Employees on shifts which have a non-paid, duty-free lunch break will ordinarily be scheduled to take their break no earlier than three (3) hours and no later than five (5) hours after the start of the shift. It is the responsibility of the Employer to schedule the employee's break, taking into consideration any request of the employee. The Employer will notify the affected employee of the specific anticipated time that the employee will be relieved for his/her lunch break. Any employee entitled to a non-paid, duty-free lunch break who is either required to perform work or is not relieved during this period will be compensated in accordance with applicable laws, rules or regulations. The Employer will take the affected employee's preferences into consideration in determining the manner of compensation (i.e. overtime versus compensatory time or early departure), except in cases where the compensation is at the election of the employee. Management will not, without good reason, fail to relieve employees for a duty-free lunch break.

There will be no restraint exercised against any employee who desires to depart the institution/facility while the employee is on a non-paid, duty-free lunch break. For the purposes of accountability, the employee leaving the institution/facility will leave word with his/her supervisor.

## ARTICLE 32 – ARBITRATION

Section a. In order to invoke arbitration, the party seeking to have an issue submitted to arbitration must notify the other party in writing of this intent prior to expiration of any applicable time limit. The notification must include a statement of the issues involved, the alleged violations and the requested remedy. If the parties fail to agree on joint submission of the issue for arbitration, each party shall submit a separate submission and the arbitrator shall determine the issue or issues to be heard. However, the issues the alleged violations, and the remedy requested in the written grievance may be modified only by mutual agreement.

### ISSUE

The Parties did not provide the Arbitrator with an agreed-to issue for the subject grievance, and therefore the framing of the issue remains in the purview of the Arbitrator. The issue is framed thusly: Did the Agency violate the rights of the employees of Lewisburg Federal Penitentiary who work in the laundry and UNICOR departments by denying them a 30-minute, unpaid lunch period free from work pursuant to the Collective Bargaining Agreement and the applicable statutes from the period of March 1, 2003, through March 14, 2006?

### POSITION OF THE PARTIES FOR THE POST-HEARING BRIEFS

#### Agency:

1. Emergencies or isolated incidents may have interrupted the staff's 30-minute lunch period.
2. The Agency did not require staff to perform the duties that the Union alleged were performed via testimony at the hearing.
3. The Agency could not compensate employees if it did not know the employees performed duties during their lunch period.
4. The Agency created work schedules to relieve staff during the 30-minute unpaid lunch period.
5. The Master Agreement provides that existing laws govern: The Fair Labor Standard Act (FLSA) govern. Therefore, "suffer or permit to work" is the standard in arbitration.

6. Laundry and UNICOR staff did not work during the meal periods consistent with the suffered or permitted standard and the Union must prove that such work occurred.
7. The four (4) Union witnesses do not represent the entire unit staff; their activity did not benefit the Agency and were not known to the Agency.
8. The Union failed to demonstrate that work was compensable. Any such work was "de minimus."

Union:

1. The Master Agreement provides for a 30-minute unpaid lunch if working an 8.5 hour schedule shift.
2. UNICOR employees do not receive a 30-minute lunch break because of their assigned duties.
3. Laundry employees did not receive a 30-minute unpaid lunch period during the time that they were scheduled on a 8.5 hour work day.
4. The Federal Labor Standards Act (FLSA) claims are pursued properly through the Grievance Procedure.
5. The Agency must pay for all hours that it "suffers or permits" employees to work.

6. The Federal Labor Relations Authority (FLRA) states that courts have interpreted work under the FLSA (Fair Labor Standards Act) broadly.
7. The employer is liable when it has actual or constructive knowledge of overtime worked.
8. Arbitrators have awarded damages in similar arbitration awards.
9. UNICOR employees are entitled to overtime for the entire life of the grievance. The laundry department employees are entitled to overtime before they began to work the 8-hour shifts.

Subsequent to the Post-Hearing Briefs, the Parties agreed and elected to file Reply Briefs to the others Post-Hearing Briefs.

The Agency's Reply Brief to the Union's Post-Hearing Brief

1. The employee must perform substantial work during a meal break to warrant overtime compensation.
2. Employees must prove that they performed such substantial work during their meal break.
3. The Union failed to evince that the employees complained of work during their 30-minute scheduled lunch period.
4. The Union did not provide evidence that the supervisors were aware of the employees doing the work during their 30-minute unpaid lunch period.

Union Reply to the Agency's Post-Hearing Brief.

1. The work performed was undertaken for the benefit of the employer.
2. The Agency knew or should have known that the employees were working during their 30-minute unpaid lunch period.
3. The work performed was controlled/required by the employer.
4. The work is compensable.

Subsequently, the Union filed a motion requesting that they be given the ability to file a second Reply Brief to the Agency's Post-Hearing Reply Brief, inasmuch as they contended that some issues that were raised in defense by the Agency, were raised for the first time during the processing of this grievance. The Agency objected and requested that the motion not be granted. Both Parties filed briefs with regard to the motion. The agency requested that the motion be denied; the Union requested that the motion be granted. The Arbitrator read both of the briefs concerning the motion and decided that in the interest of a full and fair hearing and complete transcript, that the motion requested by the Union should be granted and that they be given the opportunity to reply to the Agency's Reply to the Post-Hearing Briefs. The Agency was similarly provided that same opportunity.

Subsequently, therefore, after the motion was granted, both Parties filed a Reply Brief to the opposing Party's Reply Brief.

The Agency's Reply Brief to the Union's Reply Brief

1. The Agency denies it argues for the first time in its reply brief, the "predominantly for the employer's benefit" test that was established by certain court decisions and their interpretation of the Fair Labor Standard's Act.

The Union's Reply Brief to the Agency's Reply Brief

1. The Federal Labor Relation's Authority (FLRA) has not adopted the "predominantly for the benefit of the employer" test as alleged by the Agency.
2. The FLRA has adopted the "suffered or permitted standard" which is defined in the Fair Labor Standard's Act (FLSA).

DISCUSSION AND OPINION

The Master Labor Agreement between the Parties defines that the Agency is subject to the Fair Labor Standard's Act (FLSA) and such act defines wages, entitlements and administrative procedures. The Office of Personnel Management (OPM) is responsible for administration of the FLSA generally in the federal government and for this agency in particular. Union Exhibit #5 is the copy of the Office of Personnel Management (OPM) regulations that was presented in the hearing. It is the primary controlling document in this grievance and the applicable provisions pertinent to this grievance are quoted.

## Office of Personnel Management

### **Subpart A – General Provisions**

§551.102 Authority and administration.

- (a) Office of Personnel Management Section 3(e)(2) of the Act authorizes the application of the provisions of the Act to any person employed by the Government of the United States, as specified in that section.

§551.104 Suffered or Permitted work means any 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 the work from being performed.

### **Subpart D – Hours of Work**

#### **General Provisions**

§551.401 Basic Principles

- (a) All time spent by an employee performing an activity for the benefit of an agency and under the control or direction of the agency is "hours of work." Such time includes:
- (1) Time during which an employee is required to be on duty;
  - (2) Time during which an employee is suffered or permitted to work.

§551.402 Agency Responsibility.

- (a) An agency is responsible for exercising appropriate controls to assure that only that work for which it intends to make payment is performed.
- (b) An agency shall keep complete and accurate records of all hours worked by its employees.

### **Subpart C – Application of Principles**

Employees "Suffered or Permitted" to Work.

§785.11 General.

Work not requested but suffered or permitted is work time. For example, an employee may voluntarily continue to work at the end of the shift. He may be a pieceworker, he may desire to finish an assigned task or he may wish to pare time reports or other records. The reason is immaterial. The employer knows or has reason to believe that he is continuing to work and the time is working time.

§785.13 Duty of management.

In all such cases, it is the duty of the management to exercise its control and see that the work is not performed if it does not want it to be performed. It cannot sit back and accept the benefits without compensating for them. The mere promulgation of a rule against such work is not enough. Management has the power to enforce the rule and must make every effort to do so.

Additionally, the Arbitrator after reviewing the Reply Brief to the opposing parties Reply Brief, makes a finding that the Federal Labor Relations Authority has in fact adopted the "Suffered or Permitted Standard" and not the "Predominantly for the Benefit of the Employer" test. Therefore, that argument of predominantly for the benefit of the employer is not considered germane to the instant grievance.

Laundry: It is my opinion with regard to the Laundry Department, that the following are facts I have deduced as a result of the testimony at the hearing and the briefs filed in support of the hearing. Prior to late January 2006, the employees did work an 8½ hour shift with one-half hour paid lunch. Subsequently to January 2006, the employees have worked an 8-hour scheduled shift with a 20-minute paid lunch period. The testimony that I have found to be factual during the time they worked 8½ hours, is as follows:

1. Other correctional officers and supervisors visited the Laundry to pick up clothing that had been processed by laundry staff and that these visits did occur during the normally scheduled 30-minute unpaid lunch period for the laundry foreman.

2. Inmates would attempt to stop by the laundry department to pick up their laundry after going to the chow hall and that they were sometimes able to secure such laundry. In any event, it did have the effect of interrupting laundry foremen during their 30-minute unpaid lunch period.
3. The supervisors in the main line chow hall would from time to time, send inmates with ill-fitting clothing from the chow line down to clothing issue to get clothing that fit them better and therefore improve their appearances. Again, these interruptions had the effect of interrupting the employees 30-minute unpaid lunch period.
4. Supervisors, including high-ranking officers, would send new inmates from time to time to the clothing issue center during the period of time that the employees were on their 30-minute unpaid lunch period.
5. Other supervisors, correctional officers or other employees of the institution would from time to time call the laundry for any of the above issues previously quoted or to see if the clothing that they were having laundered was ready to be picked up.

The Supervisor of the Laundry Department testified that he attempted to insure that the Foreman of the laundry have a 30-minute uninterrupted lunch period by attempting to field all the telephone calls and that he believed that he was successful 99% of the time. Obviously, therefore, the telephone calls occurred relatively frequently and there is no question that the supervisor was

aware of them. He also testified that he told his foreman to ignore the calls. This leads the Arbitrator to believe that the telephone calls were an ongoing problem. Other supervisors and senior management of the prison would also call to request clothing issue to inmates, and the foreman would comply with the request. In fact, they basically had no option if a superior officer or supervisor requested that they fit an inmate ill-fitting clothes or that they fit clothing for an inmate that had just arrived or transferred in. They could not realistically refuse such a request by superiors because of their lunch break.

Obviously, there was no operational requirements that necessitated that an 8½ shift be required of the laundry foreman inasmuch as when the new manager assumed duties and the employees again requested that they be permitted to go to an 8-hour schedule which includes the paid lunch, the request was granted. This simple change of scheduling eliminated the problem of the unpaid lunch. However, it did not eliminate the problem prior to January 2006 when the employees were supposed to be working the 8½ hour shift with a 30-minute unpaid lunch period, but in fact had their lunch period interrupted routinely.

UNICOR: There were memos offered as exhibits at the hearing signed by a factory manager stating that when the inmates were returned from the chow line, it was expected that they would commence working again. This memo was posted on all the applicable bulletin boards to be reviewed by the UNICOR foremen and all of them were aware of it. However, to have this directive occur, the various UNICOR foremen, dependent upon their area of responsibility, would have duties

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prior to the inmates return. The paint foreman would need to turn up the thermostat to start the reheating process for the ovens and the paint department so that the powder coat painting line could then recommence to operate. In the case of the other departments, the UNICOR foremen would be required to draw the appropriate tools from the Category A tool room and supervise the drawing of tools from the Category B tool line so that the tools were issued to the proper inmates in proper amounts and control of those tools could be maintained. Obviously, this UNICOR foreman could not perform such tasks instantaneously at 11:30 when the doors to UNICOR were opened.

Moreover, one will remember that the UNICOR foreman had other duties, from time to time, that were scheduled during this period of time. They were scheduled periodically to work on the metal detector machine in the changing room. They were scheduled to work as monitors and correctional officers in the slot where UNICOR employees were congregating after lunch but before the doors were opened. Additionally, prior to the time when the UNICOR doors were closed for the 30-minutes, the foreman would be in the UNICOR building and inmates who finished lunch early would wander back into the UNICOR building. Obviously, whenever an inmate returned to the UNICOR building during that period of time before the door was locked, the lunch period for the UNICOR foreman/correctional officer was over as his primarily responsibility for care, custody and control of the inmate occurred. Therefore, prior to the locking of the door for 30 minutes, there is no question that routinely the 30-minute unpaid lunch

period for the UNICOR foreman was violated when the inmates came back from lunch early.

After the doors were closed for lunch, there are duties that required the UNICOR foreman to start work before the end of the 30-minute unpaid lunch period. This is on a routinely, reoccurring daily basis. And, for whatever period of time these duties required, there would be that much period of time that the employees did not get their 30-minute unpaid lunch period. For example, if one would argue that such duties took only 10 minutes, therefore, the UNICOR foremen were only receiving a 20-minute unpaid lunch period.

However, we also know that there was other frequent scheduled interruptions to the 30-minute unpaid lunch period. Whenever the foreman was individually scheduled to work the metal detector or to perform monitoring correctional officer duties in the slot prior to the door being opened, he obviously did not receive his 30-minute scheduled unpaid lunch period. The Agency replied that they had advised the employee to work out with his supervisor so that he could get the 30-minute unpaid lunch period for which he was entitled. However, by practice, the testimony was that such did not occur. I find the testimony credible. Moreover, I do not believe that it is the responsibility of the employee to work out with other employees or his supervisors so that he can receive his 30-minute unpaid lunch period.

The applicable standards and the Collective Bargaining Agreement all state that the control of the work force and the scheduling is the responsibility of

Management. Management cannot abdicate this responsibility and claim that the employees were responsible for making arrangements for themselves to receive a 30-minute unpaid lunch period when they were on metal detector or slot monitor duties.

If we believe the assertions that the Union witnesses testified to at the hearing, which were supported by exhibits presented at the hearing, which I have found to be factual, then we must look at the Agency's stated defenses to such violations. Were they infrequent? Were they comprehended by the various controlling acts and regulations and were defensible as the Agency asserts? In order to properly decide these questions, I must review the position of the Agency in defending this grievance, to see if the individual assertions made by them are in fact defenses that would render the grievance moot. I therefore, revisit the arguments asserted in the Agency's post-hearing brief.

- "1. Emergencies or isolated incidences may have interrupted the staff's 30-minute lunch period."

This assertion in and of itself is not a defense to the grievance. But, I see it as a statement of fact, agreeing that on certain occasions as a minimum, there have been times when isolated incidences or emergencies may have interrupted the 30-minute duty free lunch period. It is not, however, a defense that I find valid.

- "2. The Agency did not require staff to perform the duties, the Union offered by its testimony."

This is a reoccurring theme and one that I do not find to be valid. In all of the job descriptions presented to me, one of the primary responsibilities of the laundry foremen and UNICOR foremen were that they were first correctional officers. They worked and performed the duties of correctional officers and received the proper training and certification of correctional officers prior to becoming either UNICOR foremen or laundry foremen. Moreover, the job descriptions themselves state that it is one of the primary responsibilities of these positions to be responsible for the control of inmates under their supervision at all times. The Agency does in fact require the staff to perform the duties required in this job description at least insofar as the custody of the inmate is concerned, whenever the inmate is in the presence of the correctional officer/foreman.

"3. The Agency could not compensate employees if it did not know the employees performed duties during the duty-free lunch period."

I find that this is not a proper defense. The Agency knew or should have known that if inmates were in fact returning to the area early during the employees 30-minute unpaid lunch period or that telephone calls or other supervisors were impinging upon the 30-minute lunch period, that this was a violation of the FLSA and that the employees should have been compensated.

"4. The Agency insured that employees did not perform work during the duty-free lunch periods when it created schedules to relieve the staff during the lunch."

I do not find this statement to be a defense, especially given the fact that it was usually the employees who were required to try and find the 30 minutes

available for their lunch. The UNICOR door being closed for only 30 minutes did not permit time for the foreman's lunch and other required duties.

"5. The Master Agreement provides that existing laws govern the Fair Labor Standards Act and therefore, the "suffer or permit to work" is the standard in arbitration."

I agree. This, however, is not a defense to what happened, it is a simple statement of fact that I have agreed to prior in this decision. Moreover, this is also in opposition to what the Agency has argued in their "predominantly for the employer's benefit" test.

"6. Laundry and UNICOR staff did not work during their meal periods consistent with the "suffered or permitted standard" and the Union must prove that such work occurred."

In fact, I do believe that the laundry and UNICOR staff did perform some work during their 30-minute unpaid lunch period. Additionally, as previously stated, the Agency knew or should have known that this work was occurring. Obviously from the testimony of the laundry supervisor, he knew that some work was occurring during this period of time. Also, it can be directly inferred from the exhibits presented, namely the memo posted in the UNICOR building, that at 11:30, all inmates are expected to be at work, that there must be some preparatory time before the employee can be at work and this, therefore, would argue against this defense.

"7. The Union witnesses did not represent the entire unit staff. Their activity did not benefit the Agency and were not known to the Agency."

I have previously found that the four witnesses, in my opinion, were representative of what the other members of the staff would have testified to, if in fact they had been permitted to so testify. However, in the interest of timeliness and efficiency of the hearing, the Union elected to not bring on a barrage of witnesses all stating the same thing. I agree with this decision by the Union. Moreover, it is obvious from the reading of the job descriptions, that all the job descriptions are similar in that they all contain the comments about the care, custody and control of the inmates of the institution when they are in the presence of the UNICOR foremen or laundry foremen. In fact, this activity did benefit the Agency and should have been known by the Agency.

- “8. The Union failed to demonstrate that the work was compensable and any such work was “de minimus.”

The Union has made an argument in one of their briefs that the “de minimus” standard is not a standard that would be acceptable as a defense to a violation of the Fair Labor Standards Act in this situation. I agree with this contention of the Union. In fact, a fair reading of the various acts and decisions rendered by courts in support thereof, reveals in my opinion that “de minimus” is not a factor to be considered with regard to a violation of the Fair Labor Standards Act. Moreover, it appears that these duties that the employees were required to perform during their unpaid lunch period, far exceeded what would be reasonably construed to be a “de minimus” standard. Five or ten minutes everyday out of a 30-minute paid lunch period in dealing with getting tools ready for the work to

again commence, in trying to get the ovens back up to proper operating temperature and answering phone calls from concerned senior officers of the institution regarding inmates clothing or their own clothing, seemed to have occurred on a regular, consistent basis which would, in my opinion, eliminate “de minimus” concept completely.

In the Reply Brief to the Union’s Post-Hearing Brief, the Agency argued four principle arguments that we must again look at to see if they are a defense to the violations which we have already deemed to have occurred.

- “1. That the employee must perform substantial work during the meal break to warrant compensation.”

I do not know what the word substantial means or is defined as in regards to this but if one can see that 5 or 10 minutes of a 30-minute unpaid lunch period of time is consistently on a daily basis required for the performance of duties, I think that this rises to at least a reasonable argument of what substantial means.

- “2. The employee must prove that they performed substantial work during their meal period.”

This is inconsistent with my reading of the applicable acts and decisions regarding this matter. My recollection is that in most of the decisions cited as well as in the various acts themselves, that it is management’s responsibility to schedule the workforce and Management’s responsibility to know if work is being performed or not being performed and Management’s responsibility to know if the

employees are working during the period of time that they are being paid and that they are not working, performing work in excess of the time that they are being paid.

“3. That the Union failed to evince that the employees complained of working during their lunch.”

In fact, we have testimony from both Union and Agency witnesses that on occasion there was discussion between employees represented by AFGE and their superiors about work being performed during lunch. For certain, in the laundry department, there were such discussions inasmuch as the schedule was finally changed at the request of the employees.

“4. The Union did not provide evidence that the supervisors were aware of the work.”

In my opinion, this is a reiteration of the same argument that was contained in several of the arguments in the post-hearing brief as well as #2 above.

The Agency in one of its assertions of the Post-Hearing Brief, relied on the decision that was rendered in Bull v. the United States, 68FED.C1.212,220(2005). They stated that there are prongs that the Union must demonstrate so that they can be upheld that a violation of the FLSA had occurred. This is the same argument that I have enumerated above, but I think needs to be specifically addressed inasmuch as the Agency has made such a detailed argument concerning this decision. The Agency argues that the FLSA burdens the Union with evincing “each activity for which overtime compensation is sought, constitutes work and

the hours of work performed are actually, rather than theoretically, compensable and reasonable in relation to the principle activity.” These cited decision include the Mt. Clemens Pottery decision which is a decision that is obviously not between a federal government agency and the FLSA. Therefore, it may or may not have applicability. However, we know that the Agency is required to comply with the FLSA pursuant to the rules and regulations developed and set down by the Office of Personnel Management. The Mt. Clemens Pottery Company is not subject to the OPM rules and Rules and Regulations. With regard to Bull v. the United States, 68FED.C1.212.220(2005) which has established prongs, the Agency states that the Union must show:

1. “That the activity was undertaken for the benefit of the employer.
2. Known or reasonably should have known to the employer to be performed .
3. Controlled or required by the employer.”

Again, the Agency knew or should have known such activity, the work, was taking place. Moreover, in answer to the argument that is contained further on in the Bull Case, “de minimus” is not an argument that can be raised in this case as argued and decided previously. In any event, the work that I have found to have been performed in my opinion, would exceed a “de minimus” argument, if such argument was available.

Furthermore, we have arguments contained throughout the various briefs submitted that it was the employee’s responsibility to notify the agency that they

were working during the time in question; that it was the Union's requirement that they were to prove that work actually did occur and similar type arguments. But, we have testimony on the record in the transcript, that at least periodically these effected employees did have conversations with their immediate supervisors, if not other higher level supervisors, concerning the fact that they believed that they were being required to work at least part of the time during their unpaid lunch break. I do not know that there could be substantially more that these employees could do other than verbally complain to their supervisors or to complain to other supervisors. In the case of the laundry employees, they wrote a memo to higher level management securing their approval to rearrange their schedules from an 8½ hour day to an 8-hour day or to file a grievance. It appears that every reasonable effort was made to notify Management that these employees were in fact working during their lunch period. This, however, is not even required of these employees if my fair reading of the acts and procedures offered to me as exhibits is in fact correct, which I believe it to be correct.

I have also reviewed the two arbitration decisions provided to me as attachments to the Post-Hearing Brief by the Union for the United States Penitentiary at Polluck, Louisiana and for the United States Penitentiary at Allenwood, Pennsylvania Correctional Institute and have read with great interest the decisions of the Arbitrators in those two cases. In my opinion, this decision is consistent with the findings of fact and opinion in those cases. We do not, however, have the procedural defense arguments presented in these other cases in

this grievance. Those procedural defenses were waived at the hearing and this case was to be decided solely on its merits.

In summary, I believe that the Agency violated the employees rights to a 30-minute unpaid lunch period under the terms of the Master Collective Bargaining Agreement, the Fair Labor Standards Act and the Office of Personnel Management Policies and Procedures, and the Federal Labor Relations Act (FLRA) in the subject case.

#### AWARD

The grievance is granted. For the first part of the bifurcated hearing, this Arbitrator has found that the Agency did violate the 30-minute unpaid lunch period as defined in the various controlling acts and regulations. The Parties should promptly reconvene to discuss the question of liability. If a second hearing is needed to define liability, either Party can contact the Arbitrator. The Arbitrator will then promptly contact all Parties and arrange such hearing.

Respectfully Submitted,



Bernard S. Fabian, Arbitrator  
1 Elizabeth Street  
Dravosburg, PA 15034  
February 15, 2008

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