FEDERAL LABOR RELATIONS AUTHORITY OALJ 13-05
Office of Administrative Law Judges
WASHINGTON, D.C.

DEPARTMENT OF JUSTICE FEDERAL BUREAU OF PRISONS U.S. PENITENTIARY ADMINISTRATIVE MAXIMUM FLORENCE, COLORADO RESPONDENT AND AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 1112 CHARGING PARTY	Case No. DE-CA-11-0147

Timothy Sullivan, Esq.
For the General Counsel

Scot L. Gulick, Esq.
For the Respondent

Robert Snelson
For the Charging Party

Before: CHARLES R. CENTER
Chief Administrative Law Judge

DECISION

STATEMENT OF THE CASE

This case arose under the Federal Service Labor-Management Relations Statute (the Statute), 5 U.S.C. §§ 7101-7135 and the revised Rules and Regulations of the Federal Labor Relations Authority (the Authority), Part 2423.

A Complaint and Notice of Hearing was issued on November 30, 2011, based on an unfair labor practice (ULP) charge filed on January 20, 2011, and an amended charge filed on July 28, 2011, against the Department of Justice, Federal Bureau of Prisons,

U.S. Penitentiary, Administrative Maximum, Florence, Colorado (the Agency/ Respondent) by the American Federation of Government Employees, Local 1112 (the Union/Charging Party).[1] The complaint alleges that the Respondent failed to comply with an arbitration award and thereby violated § 7116(a)(1) and (8) of the Statute. The Respondent filed its Answer to the complaint on December 27, 2011, denying any violation of the Statute.

A hearing was held in this matter on February 9, 2012, in Denver, Colorado. All parties were represented and afforded the opportunity to be heard, to introduce evidence, and to examine witnesses. The General Counsel and Respondent filed post-hearing briefs, which I have fully considered.

Based on the entire record, including my observation of the witnesses and their demeanor, I make the following findings of fact, conclusions of law, and recommendations.

FINDINGS OF FACT

The Respondent is an agency under § 7103(a)(3) of the Statute. (G.C. Ex. 1(c)(d)). The Bureau of Prisons (BOP) is a primary national subdivision of the agency, as defined in 5 C.F.R. § 2421.5. (G.C. Ex. 1(c)(d)). The U.S. Penitentiary, Administrative Maximum, Florence, Colorado (the ADX) is an activity, as defined in 5 C.F.R. § 2421.4, and/or a component of the BOP. (G.C. Ex. 1(c)(d)). The American Federation of Government Employees, Council of Prison Locals (the Council) is a labor organization under § 7103(a)(4) of the Statute and is the exclusive representative of a unit of employees appropriate for collective bargaining at the BOP. (G.C. Ex.1(c)(d)). The American Federation of Government Employees, Local 1112 (Local 1112), is an agent of the Union for the purpose of representing employees at the ADX. (*Id.*). The BOP and the Council are parties to a collective bargaining agreement (CBA) covering employees in the bargaining unit represented by Local 1112. (*Id.*).

The Union filed a grievance alleging that the Agency violated the Fair Labor Standards Act (FLSA) and the CBA by: (1) failing to keep complete and accurate records of the hours correctional officers (officers/COs) worked; and (2) failing to pay COs for off-the-clock work. (G.C. Ex. 2 at 2-3). The grievance was unresolved and proceeded to arbitration.

Hearings were held on March 24 and August 25, 2009, before Arbitrator David W. Stiteler (the Arbitrator). (G.C. Ex. 2 at 2, 30). The Arbitrator issued an award (the award) on or about December 18, 2009. (*Id.* at 1, 30).

With regard to the Agency's timekeeping records, the Arbitrator found that: (1) the Agency did not use time clocks or sign-in sheets; (2) the Agency prevented COs from indicating on their log books that they had started work early and thus "created a fiction

[1] The initial charge was filed by the American Federation of Government Employees, Local 1302 (Local 1302). (G.C. Ex. 1(a)). Subsequently, Local 1302 merged into Local 1112. (Tr. at 22).

about an officer's work time"; (3) other than "occasionally telling officers not to sign in early," supervising lieutenants did not "enforce[] the notice in the post orders not to work outside shift hours"; and (4) the Agency's timekeeper relied on information from the administrative lieutenant that was "neither complete nor accurate[.] " (*Id.* at 6, 25, 22).

The Arbitrator determined that these flaws resulted in the Agency having time records that were "inadequate to the extent that they [did] not document a CO's arrival time at and departure time from the post for the shift exchange activities . . . ." (*Id.* at 22). The Agency had "no provision to account for the time spent by COs in shift exchange activities[]" and "no process to record precisely when each officer beg[an] and end[ed] work[.]" (*Id.* at 27, 28). Accordingly, the Arbitrator determined that the Agency "violated the FLSA by not keeping complete and accurate time records for COs," and stated that the Agency's "current system violates its obligations under the FLSA." (*Id.* at 19, 29).

The Arbitrator determined that the Agency violated the FLSA and directed the Agency to "modify its timekeeping process to satisfy its FLSA obligations." (*Id.* at 30). While doing so, the Arbitrator declined to adopt the Union's request that the Agency be directed to adopt a "particular timekeeping system[.]" (*Id.* at 29).

Next, the Arbitrator addressed the Union's claim that COs were working off the clock, specifically when participating in a process called a "shift exchange[.]" (*Id.* at 5). During a shift exchange, a CO arriving at his or her post "takes inventory of the equipment assigned to the post." (*Id.*). Also during this process, the CO leaving the post "hands over keys and other equipment[]" to the incoming CO and tells the incoming CO about any "critical information." (*Id.*). The Arbitrator found that a shift exchange "entails the incoming CO arriving" at his or her post early so that the CO being relieved can "leave on time[,]" i.e., at the end of his or her regular shift. (*Id.* at 24). For posts that are within the ADX walls, the Arbitrator stated, the "length of time it takes to complete the shift exchange varies from five to [fifteen] minutes depending on how much equipment has to be inventoried and whether there is much information to pass on." (*Id.* at 5). For posts that are at perimeter towers outside the ADX fences, the Arbitrator stated that the shift exchange process sometimes takes "longer" since "towers are armed posts" and "each round of ammunition has to be accounted for." (*Id.* at 6).

As relevant here, shift exchanges occur at two types of posts: those that are covered for two, 8-hour shifts each day (16-hour posts) and those that are continuously covered, 24-hours a day (24-hour posts). (Tr. at 20, 55-61, 75). On a 16-hour post, there is one shift exchange a day, which occurs when the CO working on the second shift relieves the CO working on the first shift. (*Id.* at 20, 55-57, 75). On a 24-hour post, there is always a CO on duty and, therefore, there is a shift exchange every eight hours when a new CO begins his or her shift.[2] (*Id.* at 20, 58, 75).

[2] The parties stipulated that the Union did not present evidence regarding sixteen-hour posts to the Arbitrator. (Tr. at 92).

The Arbitrator found that the Agency knew that COs were performing off-the-clock work during shift exchanges. (G.C. Ex. 2 at 24-25). Additionally, the Arbitrator found that the off-the-clock work occurring during shift exchanges involved "pre- and post-shift activities" that were integral and indispensable to a CO's principal activities. (*Id.* at 25-26). Further, the Arbitrator stated that the activities were "done for the Agency's benefit[]" and were "not merely preliminary or postliminary tasks." (*Id.* at 26). Based on these considerations, the Arbitrator determined that the "shift exchange activities [we]re compensable," and that COs were "performing compensable work at their posts before, and in some cases after, the start [or end] of their shifts[,]" and therefore, the Agency violated the FLSA and the CBA by "failing to pay overtime as required." (*Id.* at 26, 27, 19; Tr. at 61).

With regard to a remedy, the Arbitrator stated that it was "not possible to determine the precise amount of time spent outside the assigned shifts in compensable activities[,]" because the Agency's timekeeping system had "no provision to account for the time spent by COs in shift exchange activities[.]" (*Id.* at 27). In such situations, the Arbitrator stated, employees are "not required to establish the exact amount of time worked." (*Id.* at 28). Instead, the Arbitrator stated that employees are only required to "provide sufficient evidence about the amount of work to allow a reasonable inference to be made about the time involved." (*Id.*; footnote omitted). Once employees have done that, the Arbitrator stated, the "burden is on the employer to produce evidence sufficient to rebut the employees' claim." (*Id.*). Applying these principles, the Arbitrator found that: (1) the Agency had "no process to record precisely when each officer beg[an] and end[ed] work[];" (2) the Union had "established that COs [we]re performing compensable work outside their shift times[;]" and (3) the Agency "did not adequately rebut the Union's claim." (*Id.*).

The Arbitrator then considered how much backpay each CO should receive. In this regard, the Arbitrator noted that the Union had asked for "10 minutes [of] overtime per shift for all ADX employees for each shift worked; [and] liquidated damages . . . ." (*Id.*). The Arbitrator explained that the Union's requested remedy was "based on an estimate of the average time involved per shift per CO." (*Id.*). The Arbitrator determined that "the Union's proposed remedy of 10 minutes [of] overtime per shift [was] appropriate under the circumstances." (*Id.*). The Arbitrator modified the Union's proposed remedy, however, so that it applied only to "affected COs" and not "all ADX employees." (*Id.*).

Having found that the Agency "fail[ed] to pay COs for compensable pre- and post-shift work related to shift exchange activities," the Arbitrator determined that the Agency violated the FLSA and the CBA. (*Id.* at 30). The Arbitrator concluded by stating that "[a]ll affected COs [were] entitled to back pay for the time spent in such shift exchange activities." (*Id.*).

The Arbitrator issued the award and the Agency filed a timely exception. *See U.S. Dep't of Justice, FBOP, USP Admin. Maximum (ADX), Florence, Colo.*, 64 FLRA 1168, 1170 (2010) (*DOJ I*), *recons. denied*, 65 FLRA 76 (2010) (*DOJ II*). In its exception, the Authority noted the Agency's argument that, "[b]ecause the Arbitrator awarded only ten minutes of compensation, . . . the award is *de minimis* and, therefore, contrary to

§ 551.412(a)(1)."[3] *DOJ I*, 64 FLRA at 1169. The Authority found that the Agency could have raised this argument at arbitration, but failed to do so. *Id.* at 1170 (citing 5 C.F.R. § 2429.5).[4] Accordingly, on July 30, 2010, the Authority issued an order dismissing the Agency's exception. The Agency then filed a motion for reconsideration and on September 22, 2010, the Authority issued an order denying the Agency's motion. *DOJ II*, 65 FLRA at 76, 78.

Subsequently, the parties spent months arguing about how the award should be implemented. During this time, the parties regularly asked the Arbitrator for guidance and clarification. This began on October 15, 2010, when the Union sent an e-mail to the Arbitrator (carbon copied to the Agency) asserting that the Agency wanted to know what it "need[s] to do to comply with the FLSA standards for record keeping." (G.C. Ex. 3 at 2). In addition, the Union asserted that the Agency wanted to know which COs were "'affected.'" (*Id.*).

On October 22, 2010, the Arbitrator responded by e-mail to the parties. With regard to record keeping, the Arbitrator stated that that the award "does not require the Agency to adopt any specific method of record-keeping," and that the Arbitrator could not "offer any particular guidance to the Agency on how to comply with FLSA rules." (*Id.* at 1). The Arbitrator added that the award "stated that the Agency's records did not satisfy FLSA requirements because they did not accurately document a CO's arrival and departure time at the post." (*Id.*). With regard to "affected" COs, the Arbitrator stated that the award "covers COs at the ADX[.]" (*Id.*).

In response, the Agency sent a letter to the Arbitrator (carbon copied to the Union) on October 27, 2010. (G.C. Ex. 4 at 1-2). With regard to record keeping, the Agency asked how it was "supposed to modify its timekeeping process to satisfy its FLSA obligations." (*Id.* at 1). In this connection, the Agency asserted that it believed it was complying with the requirement in 5 C.F.R. § 551.402,[5] that an agency keep "complete and accurate records of all hours worked by its employees." (G.C. Ex. 4 at 1-2). With regard to "affected" COs, the Agency asked "who [were] the affected " COs. (*Id.* at 1). The Agency asserted that it believed that affected COs would be "entitled to 10 minutes of overtime" plus liquidated damages. (*Id.*).

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[3] 5 C.F.R. § 551.412(a)(1) states in pertinent part:

> If an agency reasonably determines that a preparatory or concluding activity is closely related to an employee's principal activities, and is indispensable to the performance of the principal activities, and that the total time spent in that activity is more than 10 minutes per workday, the agency shall credit all of the time spent in that activity, including the 10 minutes, as hours of work.

[4] 5 C.F.R. § 2429.5 states in pertinent part, that the Authority "will not consider . . . arguments . . . that could have been, but were not, presented in the proceedings before the . . . arbitrator."

[5] 5 C.F.R. § 551.402 states in pertinent part, that an agency "shall keep complete and accurate records of all hours worked by its employees."

The next day, the Arbitrator responded with an e-mail to the parties. With regard to record keeping, the Arbitrator stated it was the "Agency's responsibility to have a timekeeping method that accurately reflects when COs start and end their shifts." (*Id.* at 2). With regard to which COs were "affected," the Arbitrator stated that he did "not recall any evidence about COs who work in . . . positions where there is no shift exchange practice." (*Id.* at 1). The Arbitrator added that if there "are such CO positions, they were not 'affected' under the terms of the award . . . ."[6] (*Id.*).

On January 5, 2011, the Arbitrator e-mailed the parties stating that there continued to be "several areas of dispute[]" regarding the implementation of the award. (G.C. Ex. 6 at 1). The Arbitrator stated that he had "award[ed] a specific amount of back pay for the overtime . . ." and had directed the Agency to "modify its timekeeping process so that it was keeping complete and accurate records of time worked by COs." (*Id.*). The Arbitrator stated "[i]f the Union believes that the Agency has failed to comply with [the] directive to change its timekeeping process to [e]nsure that it accurately reflects time worked, it will have to pursue enforcement . . . in the appropriate forum.[7] (*Id.* at 2).

On January 20, 2011, the Union filed its initial unfair labor practice charge. (G.C. Ex. 1(a)). In that charge, the Union asserted that the Agency had "failed to . . . comply with the arbitration award" because it had "not modified its timekeeping process . . . ." (*Id.*).

Around this time, the Union began to assert that the Agency was also not paying all affected COs the correct amount of backpay. (Tr. at 34-36). On January 24, 2011, the Union e-mailed the Arbitrator (and carbon copied the Agency) alleging that the Agency "failed to follow [the Arbitrator's] instructions as to how much to pay each affected [CO]". (G.C. Ex. 7 at 2). Specifically, the Union asserted that, for "approximately one-third of the posts" covered by the award, the Agency had paid COs the equivalent of "ten minutes per shift with no penalty," i.e., no liquidated damages. (*Id.*).

On March 9, 2011, the Union e-mailed the Arbitrator (and carbon copied the Agency) again alleging that the Agency had not complied with the award. (R. Ex. 1 at 2). Specifically, the Union asserted that the Agency "refused to implement a system for keeping complete and accurate records of all hours worked[]" and "refuse[d] to pay the full monetary award to . . . 'affected'" COs. (*Id.*). On March 12, 2011, the Arbitrator responded, again stating that if the Union "believe[d] that the Agency ha[d] not complied with the award[,]" the Union was "free to pursue compliance-related disputes in another forum." (*Id.* at 1-2).

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[6] On December 15, 2010, the Agency sent a memorandum to the Union answering a number of questions about the technical aspects of the award's implementation. (R. Ex. 3). These technical aspects of implementation are not relevant to the matter here.

[7] In a letter to the Arbitrator (carbon copied to the Union), dated January 12, 2011, the Agency asserted that: (1) the parties would meet to review a sample of the "calculations used to pay affected" COs; (2) the Agency had provided the Union a "complete list of posts utilized for calculating compensation per the award;" and (3) the Agency was compiling data as directed by the Arbitrator. (R. Ex. 2).

In an apparent attempt to explain why some COs were receiving less backpay than others, the Agency sent a memorandum to the Union on April 12, 2011. (G.C. Ex. 8). There, the Agency asserted that a CO assigned to a "post with only one relief activity during the shift," i.e., a sixteen-hour post, was "only . . . entitled to compensation for this one activity as compared to those posts which have two relief activities." (*Id.*). On July 28, 2011, the Union filed an amended charge which additionally alleged that the Agency had "failed to pay the full ten (10) minutes . . . to affected Correctional Officers," and that the Agency instead "only paid five minutes to affected [COs]." (G.C. Ex. 1(b)).

Pursuing the matter further, the Union e-mailed the Arbitrator (and carbon copied the Agency) on September 29, 2011. (R. Ex. 1 at 3). In the e-mail, the Union asserted that the Agency believed it was "only required to pay [for] . . . five minutes" of backpay per shift to "officers working posts where there was only a relief on one side or the other [side,]" i.e., officers working on 16-hour posts. (*Id.*). The Agency asked the Arbitrator if he had "authorize[d] the [A]gency to only pay five (5) minutes plus liquidated damages to any of the affected [COs] instead of the ten (10) minutes plus liquidated damages[.]" *Id.* That day, the Arbitrator responded with an e-mail to the parties stating that he "did not authorize the Agency's actions[.]" (G.C. Ex. 9).

On November 30, 2011, the Regional Director for the Denver Regional Office issued a Complaint and Notice of Hearing alleging that the Respondent had violated the Statute by failing to comply with the arbitration award. (G.C. Ex. 1(c) at 4). In the complaint the General Counsel alleged that: (1) the award directed the Agency to modify its timekeeping process; (2) the award directed the Agency to pay all affected COs ten minutes of overtime per shift, plus liquidated damages; (3) the award became final and binding on September 22, 2010, when the Authority issued *DOJ II*, 65 FLRA 76; (4) since September 22, 2010, the Agency had not modified its timekeeping process; and (5) since September 22, 2010, the Agency had not paid ten minutes of overtime per shift, plus liquidated damages, to COs who had worked at 16-hour posts.

In its answer the Agency admitted that it "has not modified its timekeeping process." (G.C. Ex. 1(d) at 3). Additionally, the Agency admitted that it "has not paid [COs] on 16-hour [posts] . . . ten minutes of backpay" per shift plus liquidated damages. (*Id.*). Nevertheless, the Agency asserted that the award was ambiguous and that the Agency did not violate the Statute.

Robert Snelson, a Senior Officer Specialist at the ADX, testified for the Union. (Tr. at 14-15). With regard to the Agency's timekeeping system, Snelson testified that that "[t]here's no system in place to determine what time I come on duty and what time I leave," and that "nothing has been changed." (*Id.* at 63-64).

Louis Milusnic, an Associate Warden at the ADX, testified for the Agency. When asked what the Agency had done to "try and follow the [A]rbitrator's decision as regards . . . the timekeeping process[,]" (Tr. at 79), Milusnic testified that the Agency had: (1) "approached the Union with an attempt to implement a new [timekeeping] process there

with the [Homeland Security Presidential Directive 12 (HSPD 12)]" (*id.)*; (2) "given direction to our lieutenants in an attempt to ensure that staff are coming into work on time and leaving work on time," (*id.*); (3) implemented a "work group" so that the Union and the Agency could "look at ways to solve this issue . . . informing staff of their responsibilities, informing the supervisors of their responsibilities" and creating "more awareness to the whole situation" so as to "prevent future situations where staff are coming in early or leaving late and not being compensated,"(*id.* at 79-80); and (4) implemented training on such matters for new and current staff.

With regard to HSPD 12, Milusnic also testified that the directive provided the Agency an "option at some point in time to install and implement a timekeeping clock procedure[.]" (*Id.* at 78). Further, Milusnic testified that the Agency had "communicated with the Union that [the Agency] wanted to move forward with . . . [a] pilot" program. (*Id.*) Additionally, Milusnic testified that the program was "ultimately not allowed . . . based on some objections by the [n]ational Union." (*Id.* at 78-79).

Tammy Childs, Human Resource Manager at the ADX, also testified for the Agency with regard to its timekeeping process. (Tr. at 86). In her testimony, Childs indicated that: (1) a CO working "beyond his 8-hour day . . . could request overtime," (*id.* at 88); and (2) the human resources office "goes out every 2 months" and looks at "every single [time and attendance] on the complex to ensure compliance with all of the pay and leave regulations[.]" (*Id.* at 88-89).

On rebuttal, Snelson testified that: (1) the Agency had not informed the Union that there would be any changes to the Agency's time and accounting system; (2) the Agency had informed the Union that the Agency was considering implementing a new time and attendance record keeping system involving HSPD 12 identification cards; (3) the Agency had not given the Union any documentation about such a system; (4) the Agency had "never . . . negotiated anything" in that regard; and (5) he was unaware of the national Union preventing the Agency from implementing such a system. (Tr. at 96, 98, 99).

With regard to shift exchanges and backpay, Snelson testified that the Union discovered in late January that the Agency was paying COs on sixteen-hour posts only five minutes' of overtime per shift, even though the Agency was paying COs on twenty-four-hour posts ten minutes' of overtime per shift. (Tr. at 34-36). Snelson believed that the award required the Agency to give "[e]ach affected correctional officer," including COs on sixteen-hour posts, "[ten] minutes of overtime" plus liquidated damages. (*Id.* at 20-21). With regard to how long a shift exchange can take, Snelson testified that the Union wasn't "saying that everybody only spends [ten] minutes performing this activity," (*id.* at 49), even though the Union's attorney proposed a remedy of ten minutes of backpay plus liquidated damages. In practice, Snelson testified, there's "no exact 10 minute exchange really going on. It's many times 15, 20, 30 minutes." (*Id.* at 49).

Milusnic testified that a CO on a 16-hour post participates in one shift exchange a day and that a CO on a 24 hour post participates in two shift exchanges a day. (*Id.* at 75). When asked how the Agency decided to pay out backpay, Milusnic stated that the Agency "looked at the number of shift exchange activities that the officers were involved in and if they were involved in two shift exchanges[,]" i.e., if they were assigned to twenty-four-hour posts, then they were "compensated accordingly for those two activities" and received ten minutes of overtime per shift, plus liquidated damages. (*Id.* at 76). When asked why the Agency decided to give COs assigned to 16-hour posts for only five minutes of overtime per shift, plus liquidated damages, Milusnic stated that those COs were "involved in one exchange activity, precisely half of what the 24-hour-a-day posts were involved in." (*Id.* at 76-77). Milusnic testified that he believed that these actions were consistent with the award as, according to Milusnic, the award stated that "all affected COs are entitled to back pay for the time spent in such shift exchange activities[.]" (*Id.* at 78).

POSITIONS OF THE PARTIES

General Counsel

The General Counsel argues that the Agency violated § 7116(a)(1) and (8) of the Statute by failing to comply with the final and binding award, both by failing to modify the Agency's timekeeping process and by failing to provide COs on sixteen-hour posts ten minutes of overtime per shift.

With regard to the Agency's timekeeping process, the General Counsel asserts that: (1) the award directed the Agency to modify its timekeeping process; (2) the Agency did not modify its timekeeping process; and (3) the award is not ambiguous with regard to the Agency's obligation to modify its timekeeping process. (G.C. Br. at 19). The General Counsel contends that the Agency's arguments constitute collateral attacks on the award. (citing *U.S. Dep't of Homeland Sec., U.S. Customs & Border Prot., Swanton, Vt.*, 65 FLRA 1023, 1029 (2011)). Additionally, the General Counsel asserts that the Agency's claim- - that it tried to comply with the award - - does not mean that the Agency met its obligations under the Statute. (*Id.* at 20) (citing *U.S. Dep't of Transp., FAA, Nw. Mountain Region, Renton, Wash.*, 55 FLRA 293, 297 (1999) (*Chair Segal concurring*) (*FAA*)).

With regard to backpay, the General Counsel asserts that: (1) the award directed the Agency to pay all affected COs ten minutes of overtime plus liquidated damages; (2) the award is not ambiguous in this regard; and (3) even if the award was ambiguous, the Agency's interpretation of the award is not consistent with a reasonable construction of the award. Further, the General Counsel asserts that there is no basis for the Agency's assumption that COs on sixteen-hour posts necessarily spent less time working off the clock than COs on twenty-four-hour posts. In addition, the General Counsel argues that: (1) the Agency's interpretation of the award is "tantamount to adding a condition precedent" to the award; (2) the Agency acted with a "lack of candor" by not immediately making known to the Arbitrator or the Union how the Agency would calculate backpay; (3) if the Agency felt that the award was ambiguous, it should have asked the Arbitrator for clarification; and (4) the amount of money the Agency actually paid COs was based on a "pre-determined dollar limit, . . . rather than the intent of the Award." (G.C. Br. at 16, 17, 18).

Respondent

The Respondent argues that the award is ambiguous and that the Agency did not violate the Statute. With regard to the Agency's timekeeping process, the Respondent asserts that "[m]erely ordering the Agency to follow the law without any further guidance . . . makes [the] Award ambiguous." (R. Br. at 6, citing *U.S. Dep't of Justice, Fed. BOP, FCI, Marianna, Fla.*, 59 FLRA 3, 4 (2003) (then-Member Pope dissenting) (*FCI, Marianna*), for the proposition that an award is ambiguous when it does "not define the meaning of the terms 'good cause' and 'administrative convenience,'" and when it does not "provide specific instructions on what actions" an agency is "required to take to comply" with an award).

Further, the Respondent argues that by creating a portal-to-portal work group; "notifying [l]ieutenants that they must ensure that [COs] come to work on time and leave work on time"; training new and current employees "regarding [p]ortal-to-[p]oral issues;" "reviewing the [l]og [b]ooks at the various [CO] posts"; and making "preparations to pay those employees who either logged in early or logged out later than their shift" demonstrate that the Respondent has addressed the [p]ortal-to[-p]ortal issues identified in the award. (R. Br. at 3-4).

With regard to backpay, the Respondent argues that the award "ordering the [Agency] to pay [COs] for compensable pre-and post-shift work and ordering that all affected [COs] are entitled to back pay for the time spent in shift activities is ambiguous."[8] (*Id.* at 7). In this regard, the Agency asserts that the award: (1) "does not differentiate between 16 and 24 hour posts; (2) provided that affected [COs] were only entitled to pay for the time spent in shift exchange activities; and (3) provided for both pre- and post-shift activities, under these circumstances, the Agency states that "the Arbitrator's [award] was ambiguous regarding the 16- hour posts." (*Id.* at 8).

Additionally, the Respondent argues that the parties stipulated that there was no evidence presented at arbitration regarding sixteen-hour posts. (*Id.* at 7). Therefore, the Respondent contends that it "could . . . be argued that . . . the [COs] on [sixteen-hour] posts were not 'affected' and are not entitled to any back pay." (*Id.*).

In the alternative, the Respondent contends that "paying the [COs] on the [sixteen-hour] posts" half as much backpay as COs on twenty-four-hour posts is consistent with a reasonable construction of the award, since COs on sixteen-hour posts performed one shift exchange a day, and COs on twenty-four-hour posts performed two shift exchanges a day. (*Id.* at 8).

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[8] The Respondent refers to the part of the award that states:

> 2. The Agency violated the FLSA and [the CBA] by failing to pay COs for compensable pre- and post-shift work related to shift exchange activities that is integral and indispensable to their principal activities.
>
> 3. All affected COs are entitled to back pay for the time spent in such exchange activities.

(G.C. Ex. 2 at 30).

CONCLUSIONS OF LAW

An agency "shall take the actions required by" an award that has become final and binding. 5 U.S.C. § 7122(b). An arbitration award becomes final and binding when: (1) the period for filing exceptions expires; (2) the Authority issues a decision resolving exceptions; or (3) exceptions are withdrawn. *See, e.g.*, *U.S. Dep't of the Treasury, U.S. Customs Serv., Nogales, Ariz.*, 48 FLRA 938, 940 (1993) (*Customs*); *see also, e.g.*, *FAA*, 55 FLRA at 296 (an award becomes final and binding when there are no timely exceptions or when timely exceptions are denied by the Authority).

Failing to comply with a final and binding arbitration award constitutes a violation of § 7116(a)(1) and (8) of the Statute. *See U.S. Dep't of the Treasury, IRS, Austin Compliance Ctr., Austin, Tex.*, 44 FLRA 1306, 1315 (1992) (*IRS*), *recons. denied* 45 FLRA 525 (1992). Whether an agency has adequately complied with an arbitration award depends, in part, on the clarity of the award. *IRS*, 44 FLRA at 1315. If the award at issue is unambiguous, then the agency's failure to comply with the award constitutes a violation of § 7116(a)(1) and (8) of the Statute. *See, e.g.*, *U.S. Dep't of the Air Force, 6th Air Mobility Wing, MacDill AFB, MacDill AFB, Fla.*, 59 FLRA 38, 39 (2003) (Member Armendariz concurring); *see also, e.g.*, *IRS*, 44 FLRA at 1315 (an agency that "disregards portions of an unambiguous arbitration award, . . . fails to comply with the award . . . ."). If the award at issue is ambiguous, then compliance is determined by assessing whether the agency's action is consistent with a reasonable construction of the entire award. *See FCI, Marianna*, 59 FLRA at 4 (citations omitted). Additionally, while issues pertaining to an agency's compliance are considered during a ULP proceeding to enforce an arbitration award, issues that go to the merits of the award are not. *See, e.g.*, *FAA*, 55 FLRA at 296. A party may not use such a proceeding to collaterally attack the underlying award. *See, e.g.*, *U.S. Dep't of Veterans Affairs Med. Ctr., Allen Park, Mich.*, 49 FLRA 405, 426 (1994).

I first consider whether the award became final and binding. As relevant here, an award becomes final and binding when the Authority resolves exceptions to the award. *See Customs*, 48 FLRA at 940. Here, the Agency filed one timely exception to the award, and the Authority resolved that exception by dismissing it under § 2429.5 of the Authority's Regulations. *See DOJ I*, 64 FLRA at 1168-70; *see also* G.C. Ex. 1(c) at 3 & Ex. 1(d) at 2. Because the Authority resolved the Agency's exception in *DOJ I*, I find that the award became final and binding on July 30, 2010, when *DOJ I* issued.[9]

Having established that the award became final and binding on July 30, 2010, I consider whether the Agency complied with the award. I address the two disputed aspects of the award, the one pertaining to the Agency's timekeeping process and the one pertaining to the Agency's payment of backpay, in turn.

[9] The General Counsel's assertion - - that the award did not become final and binding until September 22, 2010, when the Authority denied the Agency's motion for reconsideration of *DOJ I,* is incorrect. Contrary to the General Counsel's assertion, the award became final and binding when the Authority resolved the Agency's exceptions, *see Customs*, 48 FLRA at 940, and the Agency's motion for reconsideration did not affect the finality of the award, *see* 5 C.F.R. § 2429.17 (a motion for reconsideration "shall not operate to stay the effectiveness of the action of the Authority, unless so ordered by the Authority.").

The Agency's Timekeeping Process

The Agency asserts that "[m]erely ordering the Agency to follow the law without any further guidance . . . makes [the a]ward ambiguous." (R. Br. at 6, citing *FCI, Marianna*, 59 FLRA at 4). I assume that the award is ambiguous and thus consider whether the Agency's actions are consistent with a reasonable construction of the award. *See FCI, Marianna* 59 FLRA at 4-5.

The Arbitrator found that the Agency's "current system" used timekeeping methods that did not accurately record how much time COs worked, *see* GC Ex. 2 at 6, 22, 24-25; and that the Agency thus violated the FLSA. (G.C. Ex. 2 at 29). Accordingly, the Arbitrator directed the Agency to "modify its timekeeping process to satisfy its FLSA obligations." (*Id.* at 30). I find that the Agency's action of having "not modified its timekeeping process" is not consistent with the Arbitrator's direction that the Agency "modify its timekeeping process[.]" (G.C. Ex. 1(d) at 30 & Ex. 2 at 30). Additionally, I find that the Agency's refusal to modify its timekeeping process has resulted in the Agency continuing to fail to satisfy its FLSA obligations which is not consistent with the Arbitrator's direction that the Agency "satisfy its FLSA obligations." (G.C. Ex. 2 at 30).

While the Agency admits that it has not modified its timekeeping process, the Agency asserts that it has "addressed the [p]ortal-to[-p]ortal issues identified in the" award, (R. Br. at 6). To support this claim, the Agency relies on testimony from Milusnic and Childs. Milusnic testified that to comply with the award, the Agency had: (1) approached the Union with an attempt to implement a new timekeeping process with the HSPD 12; (2) given direction to lieutenants in an attempt to ensure that staff are coming into work on time and leaving work on time; (3) implemented a work group so that the Union and the Agency could look at ways to solve this issue and inform staff of their responsibilities, informing the supervisors of their responsibilities, and creating more awareness to the whole situation so as to prevent future situations where staff are coming in early or leaving late and not being compensated; and (4) implemented training on such matters for new and current staff. Childs testified that a CO can request overtime, and that the human resources office audits time and attendance forms every two months.

I find that Milusnic's testimony is vague and self-serving, thus, I give it little weight. Further, Milusnic's testimony does not demonstrate that the Agency complied with a reasonable construction of the award. The award directed the Agency to modify its timekeeping process to satisfy its FLSA obligations and Milusnic's testimony does not demonstrate that the Agency modified its timekeeping process, or that the Agency is satisfying its FLSA obligations. For example, Milusnic's testimony does not demonstrate that the Agency records precisely when each officer begins and ends work or that the Agency is keeping complete and accurate records of the time worked by COs. Likewise, Childs' testimony that a CO can request overtime and that the Agency audits time and attendance forms every two months, does not demonstrate that the Agency has modified its timekeeping process or that the Agency is satisfying its FLSA obligations. In this regard, I find that Snelson's statement that "nothing has been changed" more accurately describes the Agency's actions. (Tr. at 63).

I find that the Agency's actions are not consistent with a reasonable construction of the award as it pertains to the Agency's timekeeping process. Thus, I find that the Agency has not complied with the award in this regard.

Backpay

The Agency asserts that "ordering the [Agency] to pay [COs] for compensable pre- and post-shift work and ordering that all affected [COs] are entitled to back pay for the time spent in shift activities is ambiguous." (R. Br. at 7). In this regard, the Agency asserts that the award: (1) does not differentiate between 16 and 24 hour posts; (2) provided that affected [COs] were only entitled to pay for the time spent in shift exchange activities; and (3) provided for both pre- and post-shift activities. Under these circumstances the Agency states that the Arbitrator's award was ambiguous regarding the 16-hour posts. (*Id.* at 2, 8).

Even assuming that this aspect of the award is ambiguous, the Agency does not demonstrate that its actions are consistent with a reasonable construction of the award. Read as a whole, the award clearly indicates that all affected COs, including COs on sixteen-hour posts, are to be paid ten minutes of overtime per shift, plus liquidated damages. A number of the Arbitrator's findings support this conclusion. First, the Arbitrator did not distinguish between different types of affected COs. Instead, the Arbitrator granted relief to "[a]ll affected COs," who participated in at least one shift exchange per shift that worked either 16 or 24-hour shifts. (G.C. Ex. 5 at 1; Tr. at 20, 55-61, 75).[10] Second, the Arbitrator adopted one measure of backpay, that being ten minutes of overtime per shift to all affected COs. The Arbitrator did not cite any other measure of backpay that COs were to receive and certainly did not state that COs were to receive only five minutes of overtime per shift. Third, the Arbitrator's "ten minutes" remedy was based on an "*estimate* of the *average time* involved per shift per CO." (G.C. Ex. 2 at 28) (emphasis added). As an estimate of the average amount of time worked, the remedy was to apply without regard to how much overtime a CO actually worked, or how many shift exchanges a day the CO actually performed. As such, the Arbitrator's statement, that "[a]ll affected COs are entitled to back pay for the time spent in such shift exchange activities," cannot be read as permitting the Agency to modify the remedy the Arbitrator imposed to reflect how much overtime a CO actually worked in a shift exchange or how many shift exchanges a day a CO actually performed. (*Id.* at 30). Having gained the benefit of an award that was averaged in its favor, the Respondent cannot ignore the amount of overtime awarded on the basis of an assumption that it did not prove, *i.e.*, that single shift exchanges took no more than five

[10] With regard to the Agency's claim, that it "could . . . be argued that . . . the [COs] on 16-hour posts were not 'affected,'" the Arbitrator clarified that such COs were "affected," and the Agency did not file exceptions to the clarification. (G.C. Ex. 5 at 1, Ex. 1(c) at 3-4 & Ex. 1(d) at 2). Thus, to the extent the clarification actually modified the award, the modification became binding on the Agency, *see, e.g.*, *U.S. Dep't of Labor, Wash., D.C.*, 59 FLRA 131, 132 (2003) (*DOL*), and cannot be collaterally attacked.

minutes, especially when it was the Respondent who was responsible for the failure to properly document the actual time required. Fourth, the Arbitrator clarified that the award precluded the Agency from paying some COs five minutes of overtime per shift, plus liquidated damages.[11] (R. Ex. 1 at 3; G.C. Ex. 9).

With regard to the witness' belief as to how much backpay the Arbitrator was ordering the Agency to pay, I find that Snelson's testimony is consistent with other evidence in the record, and that Milusnic's is not. (Tr. at 20-22, 49, 75-77). I also note that it is difficult to put much stock in the Agency's argument that some COs are not entitled to ten minutes of overtime when the Agency previously manifested a belief that all affected COs were entitled to ten minutes of overtime, *see DOJ I*, 64 FLRA at 1169. The Arbitrator awarded each affected CO ten minutes of overtime per shift and the award provides no basis for halving that estimated average any more than it provides for doubling it when the CO experienced a shift exchange at both ends of a shift. The estimated average contemplated that some single shift exchanges took longer than ten minutes and some duel exchanges that may have taken less than ten minutes. The award was not ambiguous, it was an estimated average and there is no basis for the Respondent to assume that the estimated average could be reduced by half simply because a CO participated in a single shift exchange. Single shift exchanges may have taken five minutes or ten minutes, or they may have taken thirty minutes, and the Respondent cannot assume, nor did they prove before the Arbitrator that single shift exchanges never exceeded five minutes. Therefore, the Respondent's attempt to halve the estimated average determined by the Arbitrator is not consistent with a reasonable construction of the award.

I find that the award required the Agency to pay all COs, whether on 16-hour posts or 24-hour posts, ten minutes of overtime per shift, plus liquidated damages. Therefore, I find that the Agency's action in deciding to pay COs on sixteen-hour posts only five minutes of overtime, plus liquidated damages is inconsistent with a reasonable construction of the award. Accordingly, I find that the Agency failed to comply with this aspect of the award.

CONCLUSION

For the reasons stated above, I find that the Agency failed to comply with the award and therefore violated § 7116(a)(1) and (8) of the Statute. I recommend that the Authority adopt the following Order:

ORDER

Pursuant to § 2423.41(c) of the Authority's Rules and Regulations and § 7118 of the Federal Service Labor-Management Relations Statute (the Statute), it is hereby ordered that the Department of Justice, Federal Bureau of Prisons, U.S. Penitentiary, Administrative Maximum, Florence, Colorado, shall:

[11] The Agency did not file exceptions to this clarification. Again, I note that to the extent the clarification actually modified the award, the modification became binding on the Agency. *DOL*, 59 FLRA at 132, and cannot be collaterally attacked.

1. Cease and desist from:

(a) Failing and refusing to fully comply with the Arbitrator's award issued on or about December 18, 2009, which became final and binding on July 30, 2010.

(b) In any like or related manner interfering with, restraining, or coercing bargaining unit employees in the exercise of their rights assured by the Statute.

2. Take the following affirmative action in order to effectuate the purposes and policies of the Statute:

(a) Make whole all affected correctional officers, including those officers who worked at 16-hour posts, for the time period covered by the award, by paying him/her ten minutes of overtime per shift, plus an equal amount of liquidated damages with interest; and modify the timekeeping process so that the Agency satisfies its obligations under the FLSA.

(b) Post at its facilities where bargaining unit employees represented by the Union are located, copies of the attached Notice on forms to be furnished by the Federal Labor Relations Authority. Upon receipt of such forms, they shall be signed by the Warden at the ADX Florence, Colorado facility, and shall be posted throughout the ADX and maintained for 60 consecutive days thereafter, in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. Reasonable steps shall be taken to ensure that such Notices are not altered, defaced, or covered by any other material.

(c) Disseminate a copy of the Notice through the Respondent's e-mail system to all bargaining unit employees.

(d) Pursuant to § 2423.41(e) of the Authority's Regulations, notify the Regional Director, Denver Region, Federal Labor Relations Authority, in writing, within 30 days from the date of this Order, as to what steps have been taken to comply.

Issued, Washington, D.C., January 16, 2013.

CHARLES R. CENTER
Chief Administrative Law Judge

NOTICE TO ALL EMPLOYEES

POSTED BY ORDER OF THE

FEDERAL LABOR RELATIONS AUTHORITY

The Federal Labor Relations Authority has found that the Department of Justice, Federal Bureau of Prisons, U.S. Penitentiary, Administrative Maximum, Florence, Colorado, violated the Federal Service Labor-Management Relations Statute (the Statute), and has ordered us to post and abide by this Notice.

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE RECOGNIZE that the Statute requires an agency to take the actions required by an arbitrator's final award.

WE WILL NOT fail or refuse to fully comply with the Arbitrator's award issued on or about December 18, 2009, which became final and binding on July 30, 2010.

WE WILL NOT, in any like or related manner, interfere with, restrain, or coerce bargaining unit employees in the exercise of their rights assured by the Statute.

WE WILL, make whole all affected correctional officers, including those officers who worked at sixteen-hour posts, for the time period covered by the award, by paying him/her ten minutes of overtime per shift, plus an equal amount of liquidated damages, with interest; and by modifying our timekeeping process so that we satisfy our obligations under the FLSA.

_____
(Agency/Activity)

Dated:_____ By:_____
(Signature) (Title)

This Notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material.

If employees have any questions concerning this Notice or compliance with any of its provisions, they may communicate directly with the Regional Director, Denver Regional Office, Federal Labor Relations Authority, whose address is: 1391 Speer Boulevard, Suite 300, Denver, CO 80204, and whose phone number is: (303) 844-5224.