BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

LOCAL 33, AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES

and

FEDERAL BUREAU OF PRISONS

FMCS Case No. 06-01919-A
(Back Pay)

Appearances:

Eichenbaum, Liles & Heister, P.A., by Mitchell L. Berry, Esq., appearing on behalf of the Union.

Michael A. Markiewicz, Esq., Agency Representative, appearing on behalf of the Agency.

ARBITRATION AWARD

The Agency and Union above are parties to a collective bargaining agreement which provides for final and binding arbitration of certain disputes. The parties selected Christopher Honeyman as Arbitrator to resolve the Union's grievance concerning overtime pay and per diem reimbursement for employees assigned to assist the Federal Correctional Center at Beaumont, Texas, and certain other facilities, following Hurricanes Rita and Katrina in 2005. A hearing was held in Beaumont, Texas on May 14, 2008, at which time the parties were given full opportunity to present their evidence and arguments. No transcript was made, both parties filed briefs, and the record was closed on July 14, 2008.

Stipulated Issues

1. Did the Agency fail to pay employees who were on temporary duty status during Hurricanes Rita and Katrina in accordance with applicable laws, rules, and regulations?

2. Did the Agency fail to properly pay per diem rates to such employees?

3. If either of the above questions is answered in the affirmative, what is the appropriate remedy?

Relevant Contractual Provisions

ARTICLE 3 – GOVERNING REGULATIONS

Section a. Both parties mutually agree that this Agreement takes precedence over any Bureau policy, procedure, and/or regulation which is not derived from higher government-wide laws, rules, and regulations.

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

ARTICLE 18 – HOURS OF WORK

Section c. Every reasonable effort will be made by the Agency:

1. To ensure that all administratively controllable travel is performed in a paid duty status;

2. Should an employee be required to travel outside of his/her regularly scheduled workday and/or work week, such employees will be compensated to the extent allowable by applicable laws, rules, and regulations;....

The parties stipulated that the relevant laws, rules and regulations are CFR 551.431 and 551.432, and certain sections of the federal travel regulations:

§ 551.431 Time spent on standby duty or in an on-call status.

(a) (1) An employee is on duty, and time spent on standby duty is hours of work if, for work-related reasons, the employee is restricted by official order to a designated post of duty and is assigned to be in a state of readiness to perform work with limitations on the employee's activities so substantial that the employee cannot use the time effectively for his or her own purposes. A finding that an employee's activities are substantially limited may not be based on the fact that an employee is subject to restrictions necessary to ensure that the employee will be able to perform his or her duties and responsibilities, such as restrictions on alcohol consumption or use of certain medications.

(2) An employee is not considered restricted for "work-related reasons" if, for example, the employee remains at the post of duty voluntarily, or if the restriction is a natural result of geographic isolation or the fact that the employee resides on the agency's premises. For example, in the case of an employee assigned to work in a remote wildland area or on a ship, the fact that the employee has limited mobility when relieved from duty would not be a basis for finding that the employee is restricted for work-related reasons.

(b) An employee will be considered off duty and time spent in an on-call status shall not be considered hours of work if:

(1) The employee is allowed to leave a telephone number or to carry an electronic device for the purpose of being contacted, even though the employee is required to remain within a reasonable call-back radius; or

(2) The employee is allowed to make arrangements such that any work which may arise during the on-call period will be performed by another person.

[45 FR 85664, Dec. 30, 1980, as amended at 64 FR 69180, Dec. 10, 1999]

§ 551.432 Sleep time.

(a) Except as provided in paragraph (b) of this section, bona fide sleep time that fulfills the following conditions shall not be considered hours of work if:

(1) The work shift is 24 hours or more;

(2) During such time there are adequate facilities such that an employee may usually enjoy an uninterrupted period of sleep; and

(3) There are at least 5 hours available for such time during the sleep period.

(b) For employees engaged in law enforcement or fire protection activities who receive annual premium pay under 5 U.S.C. 5545(c)(1) or (2), the requirements of paragraph (a) of this section apply, except that on-duty sleep time may be excluded from hours of work only if the work shift is more than 24 hours.

(c) The total amount of bona fide sleep and meal time that may be excluded from hours of work may not exceed 8 hours in a 24-hour period.

(d) If sleep time is interrupted by a call to duty, the time spent on duty is considered hours of work.

(e) On-duty sleep and meal time during regularly scheduled hours for which standby duty premium pay under 5 U.S.C. 5545(c)(1) is payable may not be excluded from hours of work.

(f) For firefighters compensated under 5 U.S.C. 5545b, on-duty sleep and meal time may not be excluded from hours of work.

[45 FR 85664, Dec. 30, 1980, as amended at 57 FR 59279, Dec. 15, 1992; 64 FR 69180, Dec. 10, 1999]

Federal Travel Regulations: Chapter 301 – Travel Allowances

301-11.17: If my agency authorizes per diem reimbursement, will it reduce my M&IE allowance for a meal(s) provided by a common carrier or for a complimentary meal(s) provided by a hotel/motel?

> Answer: No. A meal provided by a common carrier or a complimentary meal provided by a hotel/motel does not affect your per diem.

301-11.18: What M&IE rate will I receive if a meal(s) is furnished at nominal or no cost by the Government or is included in the registration fee?

> Answer: Your M&IE rate must be adjusted for a meal(s) furnished to you (and except as provided in 301-11.17), with or without cost, by deducting the appropriate amount shown in the chart in this section for CONUS travel,... If you pay for a meal that has been previously deducted, your agency will reimburse you up to the deduction amount. The total amount of deductions made will not cause you to receive less than the amount allowed for incidental expenses.

Relevant Facts

When a hurricane or other natural disaster threatens a correctional facility, standing practice is to bring in extra personnel from other facilities. In anticipation of both Hurricane Katrina and Hurricane Rita in 2005, a number of employees were moved from other facilities. For Hurricane Katrina, the employees brought in were bus crews trained to move prisoners safely; they were assigned primarily to helping to evacuate State of Louisiana inmates from various locations. For Hurricane Rita, in addition to bus crews, a number of SORT teams (specially-trained volunteer teams used in emergencies of all kinds) were brought in to Beaumont, Texas. That facility, a large complex with a maximum security prison, a high-medium security prison, a low-medium security prison, and a "camp", i.e. a minimum security facility, all on the same grounds, was particularly hard hit. In all, it appears that some 230 employees (not all in classifications/pay grades covered by the collective bargaining agreement) were put on temporary duty on the first occasion and about 70 on the second.

In the main, such disagreement as there is over the facts is a matter of emphasis or degree rather than outright contradiction. For Hurricane Katrina, the Union's primary witness was correctional officer William Baney, whose normal assignment is to supervise the tool room at the correctional facility in Forest City, Arkansas. Baney has previously been on bus crews for transporting prisoners to or from Forest City; for Hurricane Katrina, he served with a total of approximately 10 employees assigned to three buses, but his bus was sent two weeks after the other two buses. Baney testified that the first assignment was to work out of Elaine Hunt State Correctional Facility in Baton Rouge, Louisiana, going to New Orleans to pull inmates out of facilities there, and also transporting prisoners from Elaine Hunt to other prisons. For approximately 8 days, he testified, his crew was required to stay in the visiting room at Elaine Hunt, sleeping on the floor on an inmate mattress, and was required to be

on ready status 24 hours per day. Baney testified that 40 to 50 people were operating out of the same room, including an emergency response team which was continuously on ready status and being sent out at all hours to put down fights, which involved using the room for staging a considerable quantity of gear. Baney stated that the pattern of his own crew's work was that they would make two to three runs a day, totaling about eight hours driving, but did not know how long a run would last, or how long a break there would be between runs; sometimes the breaks were as long as six or seven hours, and then they would be suddenly dispatched again. As a result of lights, television and radios being on most of the time, as well as people coming and going, he stated, he got two to three hours of uninterrupted sleep a night. As to food, he testified that food was not provided by the Bureau of Prisons, and that two to three bus crews at a time would go out to a convenience store to try to find sandwiches, etc. With a total of 50 to 60 visiting employees working out of the prison, one shower area was available for both men and women, so that everyone had to stand in line for a shower.

After about eight days, all the bus crews moved to Oakdale, a federal prison, where the crews were provided with military cots in the training center, but were still on call at all times and still had to run out and back to get food. Baney testified that about 20 people worked from one room at this location, spending eight to 10 hours a day on sporadic runs, for about five days. At the end of the deployment, following a 14 hour workday his crew returned to Oakdale and was told to grab their bags because they were being sent home to Forest City immediately. They did not have time to sleep.

A few weeks later, Baney's crew was dispatched again because of Hurricane Rita. This time, they were mobilized as soon as the Agency realized how big the hurricane was going to be. First, they were told to go to Lake Charles, Louisiana to evacuate the county jail there, but during the trip they were redirected to Bastrop, Texas, west of Houston, and told to "stage up" to be ready when the hurricane hit. Baney estimated that they were based at Bastrop for two weeks, in a state of readiness, with a total of six bus crews, i.e. about 20 people. They were provided with military cots to sleep on, and had four showers for the men and four for the women. When the hurricane hit Beaumont, they began doing 12-hour runs to Beaumont and back, bringing food in, and on the return trip, evacuating prisoners who were scheduled to be released. This pattern lasted for a week, after which his crew was moved to Beaumont. At Beaumont, they found the training center full up, and had to sleep on a bus for the first several days. They took military cots, stretched them out over the top of three seats with an inmate mattress on top, and ran the engines 24 hours a day in order to get some cool air. Baney testified that all the bus crews were sleeping like that, but were not sleeping much because of staff coming in and out and cars coming down the road with headlights on. Work started at 4 a.m., evacuating the "medium" prison which was significantly damaged by the hurricane, and taking prisoners to Beaumont Airport, for about three trips a day or 16 working hours. Baney testified that they scrounged for food wherever they could, because there was some food being prepared at the "medium" prison but there was none left by the time the bus crews got back. He estimated that during this period the crews were getting perhaps four hours a night of uninterrupted sleep. Baney stated that during the two hurricanes, he was paid for 16 hours a day, but was never paid for 24 hours a day.

Mark Sheldon, a lieutenant (i.e., a supervisor) at Forest City called as a witness by the Union, testified in generally similar terms to Baney. He was in charge of a different bus during Katrina, a bus which was actually relieved by Baney's crew. Sheldon testified that at that time, following the first two days at which they stayed at the Elaine Hunt facility on ready status at all times, there was supposed to be a 12 hour working schedule, after which they would be relieved by another crew. Sheldon stated, however, that in practice it did not work that way. He slept on a bus the first night, and then in the visitation room, along with another 35 or so people. Everyone was in one large room; they were given mattresses and sheets and told to sleep where they could. After three days, military cots were brought in. Sheldon testified that the non-working time available varied, but that it was not uncommon to work 16 hours or more, and to get a shower when he could. His crew returned to Forest City after approximately 6 days.

For Hurricane Rita, his experience was similar to and at the same time as Baney's, except that Sheldon noted that until the hurricane actually hit, the crews were free to go to downtown Bastrop if they were not working. Sheldon noted that before these two events, when his crew was dispatched in such a way that they had to stay overnight somewhere, they were always put up in hotels. He testified that while at Beaumont, the crews were on 16-hour shifts and had to sleep on the buses for the first three or four days, stating that from his point of view, his crew was either working or waiting to work the entire time they were dispatched during the hurricanes. He conceded that like others, he had volunteered to be part of a bus crew, which is a selective process and requires special training, and also that the hurricanes presented different situations from the normal, because in the towns where they were working, everything was shut down, because there was no electricity. Sheldon stated that his responsibilities included timekeeping, and he put in the employees for the hours they were specifically assigned to work; but once they were relieved, they were "off the clock" even if they were still at the facility.

The experiences of the SORT (Special Operational Response Team) teams, which did not have transportation once they arrived at Beaumont, were related to the experience of the bus crews, but not identical. Gregory Watts, squad leader of a SORT team based at Fort Worth, Texas, testified that his team of eight employees was assigned to Beaumont for Hurricane Rita, arriving at Beaumont a day or two after the hurricane hit, and staying about 12 days. His team was assigned for all but the last day to the maximum-security penitentiary, working a double shift from midnight till 4 p.m.. Watts testified that their off hours were supposedly 4 p.m. till midnight, but since the facility was so large.[1] The team had to travel to the training center together, which meant waiting for the last member to be free, typically a 30 to 45 minute delay. Similarly, they had to be ready to leave the training center on the grounds at 11:30 p.m., reducing their maximum time at the training center to about seven hours.

[1] By observation, it is approximately 2 miles from the gate of the Center to the administration building, with the secured correctional buildings at a considerable distance all around a large campus.

During that period, Watts testified, they slept on the floor for the entire 12 days, using sleeping bags. Watts estimated that 40 to 50 people used a single room, with 75 to 100 people staying at the training facility altogether, and coming and going at all hours depending on their shifts. The crowding meant lines for the showers, lights were on continuously, and with the kitchen active and open to the sleeping room, Watts estimated that he got perhaps three to four hours a night of uninterrupted sleep.

With respect to food, Watts testified that they were unable to get "three square meals" a day, because the Red Cross brought food but this was mainly gone by the time his shift got out. The employees did not get relieved for meals, so their time off also had to be used to scrounge food for the team for meals during the shift. Watts also testified that while they were told they were off-duty during the time they were not specifically assigned to a shift, some of that time he regarded as standby time, because they were required to store their tactical gear in an armory, and later retrieve it. They were also required to stay at the training center, he said, and not go elsewhere, though they sometimes did borrow a car to try to find food at a store that was open. Watts testified that these conditions appeared to be the same for other SORT teams as well. He stated that they were paid for 16 hours for some days, and 12 for others, but he regarded the entire time as agency time, partly because he had worked a double shift at his own facility before, but never worked double shifts back to back previously over multiple days.

On cross-examination, Watts conceded that SORT teams know that conditions they work in will often be unpleasant, because their purpose is to respond to emergencies, and that the Beaumont situation was clearly an emergency, including power lines down on the roads, houses destroyed, difficulty traveling, and law enforcement restricting travel. Watts also testified that at a meeting with other team leaders, a regional office manager who spoke, whom he was not able to identify for certain by name, told those present that they were on standby throughout their presence at Beaumont. He also added that the Red Cross was supplying food when his crew first arrived at the facility, with fruit and cereal generally available but the cooked food "always picked over" by the time his crew got back to the training center.

Isaac Ortiz, President of Local 1010 and permanently assigned to Beaumont, also testified as to the SORT teams' experience there. He testified consistently with Watts in general terms, and also stated that when the "medium" was evacuated because of damage, temporary duty staff were assigned to one of its housing units, which was cleaned up by a contractor. Ortiz described sleeping conditions in the cells as poor, because there was not enough power to run the air conditioning properly and the temperature often reached 100° during that time. FEMA brought in trailers, but these were assigned almost entirely to families of regular Beaumont staff whose houses were damaged or destroyed.

The primary management witnesses were Bureau Regional Director Geraldo Maldonado, who arrived in Beaumont on the Sunday of Hurricane Rita (which hit on a Saturday) and stayed several days, and Employee Services Administrator Linda Rivera, who arrived the following Thursday and stayed for more than a week. Maldonado testified that there was severe damage to the infrastructure of the area and at night, a visitor would not have known there was a city there, because there were no lights. He testified that the employees were

assigned to the grounds because there was no hotel space functioning locally, and that he and other managers were unable to find any as far away as Houston, because all of the working hotel rooms had been taken by first responders. Contrary to a Union witness, Maldonado testified that there was no shortage of water because they had water shipped in right away, and he testified that after a day or two, the commissary was functioning and providing hot meals, in addition to assistance from the relief organizations.

Maldonado testified that many supervisors and managers do not know what the vague term "standby" actually means in terms of pay status, but that any employee of the system can be called in at any time; they are required to have working telephones, but are not paid for this. He noted that the SORT teams were present to support local staff, many of whose houses were damaged or destroyed, and that the SORT teams are heavily trained, are equipped for emergencies, are exclusively composed of volunteers, and know that the work can be under adverse conditions. On cross-examination, Maldonado stated that he himself, sleeping in a car for the first few nights until a trailer was available, got four to five hours of sleep a night. He testified that in his view the training center was adequate for decompressing when not on duty, compared to what else was available in the community, and stated that he would dispute employees' claim to be either working or sleeping the entire time "after the first few days." He also stated that he did not believe it was possible that any employees were working 16 hours on, eight hours off.[2]

Rivera testified that when she arrived at Beaumont, she was assigned to a trailer for sleeping, and used the training center for the restroom and showers, so was able to observe the employees there. She stated that whenever she went into the building, there were employees present, but by the time she got there, most employees were sleeping in trailers. Some employees, she stated, were still sleeping in the weight room area. She did not recall seeing employees sleeping in the training area because the doors were closed. With respect to food, Rivera testified that by the time she arrived, there was plenty of food at the penitentiary, with food service open, and basics such as peanut butter and jelly and fruit at the training center. She stated that early on, there were military "MREs" there, but not by the time she arrived. Rivera testified that she saw food service of the institutions functioning by 6 a.m., with sandwiches available at the training center all the time she was around, but conceded that she could not testify as to conditions before she arrived there She characterized employees as having "down time" at the training center, but conceded that there were crisis support teams on duty around the clock. She stated that under the regulations, employees are entitled to pay for the full 24 hours only if they are actually working. But she noted that she was not involved in tracking people's time or deciding how much per diem they should get.

[2] It is a matter of record that months before the hearing, the Union formally requested the duty rosters showing who worked when, but did not receive them.

The Union's Position

The Union defines two general groups of employees at issue: (1) those who were sent to Beaumont from other Bureau institutions during and following Hurricane Rita, and (2) those who were members of bus crews sent from various institutions to Louisiana and Texas to transport inmates (including state and local government inmates) during both Hurricanes Rita and Katrina. The Union cites 5 CFR 551.431 and 5 CFR 551.432 as the regulations setting forth the requirements the employees must meet in order for the Union to prevail on the first issue.

The Union argues with respect to "group 1" that the testimony demonstrated that these employees did not have eight hours of time actually available to them for sleeping and eating during their 24 hour shifts. The Union notes that under Abreau v. United States, 22 Cl. Ct. 230, 239 (US Claims Court 1991), the employees must "put on prima facie evidence that there were not in fact eight hours actually available for sleeping and eating." The Union points to CFR 551.432's requirements that sleep periods cannot be deducted from pay if (1) during the sleep period there were not adequate facilities such that employees could usually enjoy a period of uninterrupted sleep, and (2) there were not at least 5 hours available for uninterrupted sleep.

The Union points to testimony by Watts, in particular, as demonstrating that the maximum the employees could possibly have had was seven to 7 ½ hours, after waiting for the last of the team before using scarce transportation, and that with dismal sleeping conditions including up to a hundred people coming and going throughout the day and night, and having to line up for showers as well as scavenge food because any food delivered earlier during the day to the training center was largely gone by the time Watts's team returned, there was simply no opportunity for them to get the required five hours of uninterrupted sleep. The Union argues that the teams which were housed at the medium security prison had it even worse, because witnesses compared it to "sleeping in an oven," and with no power or fresh water to flush the toilets, conditions were unacceptable even for inmates, which was why they were evacuated. The Union contends that for all of these employees, there is substantial proof to overcome the presumption of the "two-thirds rule", under which agencies frequently calculate the amount of actual work hours by presuming that eight hours of a 24 hour shift are for sleeping and eating, without making any effort to connect the eight hour period with particular duty hours. The Abreau case, the Union argues, allows such a presumption, provided that an employee can overcome it by the prima facie evidence requirement quoted above. The Union argues that the Agency has offered no real evidence to counter the employee testimony, noting that even Regional Director Maldonado conceded that he was unable to get 5 hours uninterrupted sleep during this period. The Union claims backpay under the Back Pay Act, 5 USC 5596.

With respect to "group 2", the bus crew employees, the Union argues that conditions were similar to those at the training center in Beaumont. For this group, the Union points to testimony by Baney and Lt. Sheldon as being consistent, such that during and after Hurricane Katrina, employees were required to be in readiness at all times, were expected to make quick trips to a convenience store to buy something to eat, with immediate return to the facility where they were housed, and were expected to be ready to go at a moment's

notice, with sporadic trips throughout the day and night for many days in succession. For Hurricane Rita, the Union notes that there were approximately 4 days during which the crews were sent to Bastrop, Texas to "stage" in advance of the hurricane, sleeping on military cots in the training center there and waiting until called, but that after they went to Beaumont, they slept on their buses for three nights, eating inmate food at the medium security facility and inmate rations while they were on trips. Like group 1, these employees were presumed to have eight hours off in a 24-hour shift, but the Union argues that the reality was that they did not have sufficient time for eating and sleeping. The Union notes that Sheldon, who is not in the bargaining unit, testified that all of his time during the hurricanes, 24 hours a day, was "agency time." The Union argues that all of the testimony shows that the bus crews were restricted by order to a designated post of duty, assigned to be in a state of readiness, and with substantial limitations on their activities such that they could not use their time for their own purposes. They thus meet the requirements of regulation 551.431 for all their time spent on standby duty to be deemed hours of work, for which they are entitled to be compensated.

The Union notes that employees in both groups were not paid a full per diem, but rather, $3.00 per day, the allowed amount for "incidentals" under the applicable rules. The Agency excused itself from paying the full $31.00 by deducting the cost of meals, which it viewed as "provided by the Institution free of charge." The Union argues that the Agency did not, in fact, provide meals, because in some cases a relief organization, the Red Cross, provided meals, and in other cases employees had to scavenge for leftovers or purchase their own food. In still other cases, permanent Beaumont employees brought some food from home to cook and share with the temporary duty employees. The Union argues that the Agency's general assumption that all meals provided to temporary duty employees were provided by the Agency is not supported by the facts, and that the employees should receive their full per diem.

The Union argues that under previous decisions under the Back Pay Act, the Union stands in the shoes of an employee who is entitled to attorney's fees if he has obtained "all or a significant part of the relief sought by him", and that prevailing on a significant portion of the claims made is enough to meet this standard. The Union argues that the threshold requirement under the FLRA is that the grievant be affected by an "unjustified or unwarranted personnel action which resulted in the withdrawal a reduction of the grievant's pay, allowances or differentials" (citing GSA v. AFGE Council 236, 61 FLRA 68, 69) and that the evidence establishes that the employees at issue meet this standard. The Union argues that the "warranted in the interest of justice" requirement and the requirement that the fees awarded must be "reasonable" (Allen v. U.S. Postal Service, 2 MSPB 582, 586) are also met, arguing that the Union attorneys, who work out of Little Rock, Arkansas, represent the Union nationally and the employees involved in this matter are from multiple locations, such that the "Laffey Matrix" of allowable attorney fees maintained by the office of the United States Attorney for the District Of Columbia is the appropriate measure. The Union identifies an hourly rate of $315.00 as appropriate for both Mr. Berry and the previous attorney Ms. Martha McAlister under the Laffey Matrix, and calculates a total of 47.7 hours invested, plus expenses of $9.42, for a total of $16,956.42 requested as a part of the Award.

The Union, assuming it will prevail, requests that the Arbitrator maintain jurisdiction over this matter to facilitate the carrying out of the Award.

The Agency's Position

The Agency begins by noting that both bus crews and SORT teams are composed entirely of volunteers who are aware that they may have to work in arduous situations. The Agency argues that the Union has the burden to prove that standby pay is appropriate, and contends that 5 CFR 551.432 does not apply because the evidence clearly confirmed that employees were put on shifts of less than 24 hours; the Agency contends that this section applies to "those situations where the shift lasts a number of days, such as firefighters who are assigned to the firehouse for a number of days." The Agency argues that the only relevant section is 5 CFR 551.431.

With respect to that section, the Agency argues that the employees were not officially ordered to a designated post of duty; the fact that they stayed on the prison property at Beaumont, Texas is not enough, because the specific location where the employees stayed was not a post of duty. The Agency cites several cases to this general effect. The agency further argues that the facts fail to meet a second principle of the regulation, that employees be "assigned to be in a state of readiness to perform work with limitations on the employee's activities so substantial that the employee cannot use the time effectively for their own purposes." For all of the employees involved in this matter, the Agency argues that the employees were not assigned to a state of readiness and their activities were not substantially limited by the Agency. Instead, the Agency argues, the reason for their movements being limited was simply that the entire local community was devastated by a hurricane, and that the Agency did not place any restrictions on the employees during their off-duty time. The Agency argues that it is clear that the employees had a place to sleep, eat, and enjoy other activities such as watching DVD movies, card playing, etc., even if these were somewhat limited. The Agency points to 5 CFR 551.431 (a) (2) as explicitly stating that an employee who has limited mobility for geographic reasons when relieved from duty does not have a basis for claiming that he or she is restricted for work-related reasons. The Agency argues that there was no evidence given that showed that employees were called back after their regular duty hours with a high degree of frequency in order to perform essential work, that the return to work was immediate, or that there was no one else available to perform the work, all elements in demonstrating that employees were required to remain in a state of readiness of all times. The Agency characterizes what employees were told as being that they may have to respond to an emergency at any time, which is a vague statement that does not qualify them for pay. Accordingly, the Agency contends that the employees had specific periods of time when they were off-duty, as opposed to being ordered to remain in uniform, awake, and ready to respond. The fact that some witnesses used the term "standby" does not mean that the employees' working conditions met the more rigorous definition of "standby" which actually qualifies for pay.

The Agency contends that each employee witness was qualified only to testify as to experience that was personal or personally observed, arguing that Watts, Baney and Sheldon could not (respectively) testify adequately as to the experiences of SORT teams who were not

on the same schedule as Watts, or bus crews that were not on the same runs as Baney and Sheldon. The Agency argues, however, that a SORT team based at USP Leavenworth, which had filed a similar grievance separately arguing that they were entitled to standby pay for their Hurricane Rita-related work at Beaumont and had lost at arbitration, had experiences similar to the other SORT teams, which are part of the present grievance.

With respect to per diem, the Agency argues that the Union failed to provide any evidence which shows the Agency was in violation for deducting certain amounts. The Agency notes that every witness testified that there was food available, "which had been provided by the agency." The Agency draws a distinction between food that is available and food that certain witnesses do not personally like, and argues that the evidence shows that the Agency properly followed the applicable federal regulation.

In summary, the Agency argues that its did not restrict by any official order the SORT team or bus crew employees to a designated post of duty, but instead, provided a location where the grievants could spend their off-duty time as they chose.

The Agency does not argue against the Union's request for attorney's fees in the event that it prevails.

Discussion

The Agency argues its case on the standby pay issue in unified terms, seeing all the employees affected as similarly situated under the regulations. The Union argues for separate consideration of two groups. I agree with the Union that the bus crews and the SORT teams differ in their relationship to the regulations on at least one key parameter. The evidence as presented, however, leads me to make a further distinction. I do not find that the situation presented at Beaumont following Hurricane Rita was the same over the entire period of time the crews were working. Instead, all of the testimony is consistent with a general conclusion that is also a matter of common sense, i.e. that conditions immediately following a natural disaster may be very bad indeed, but the efforts of many people begin to remedy them over time. As a result, the first few days after Hurricane Rita appear, on this record, to have presented a significantly higher level of stress, chaos, and dysfunction than the last few days before the TDY employees were sent home.

This matters, because it is clear under the Little Creek case[3] cited by the Agency that the mere fact that the SORT teams were effectively restricted to the FCC property at Beaumont continuously for a number of days is not enough to render this time as continuous duty. The concept of a geographic restriction rather than an Agency-mandated one is clearly broad enough to encompass a temporary geographic restriction caused by widespread damage everywhere else in the area. At the same time, the same case and also the case of the Leavenworth-based SORT teams stand for the general proposition that all time spent at a restricted location does not necessarily constitute payable standby time, even if employees

[3] Naval Amphibious Base, Little Creek, Virginia, 15 FLRA 445 (1984).

may be required to work additional hours beyond those initially scheduled, unless they are required to be in a continuous state of readiness.

I do not agree with the Agency, however, that 5 CFR 551.432 is irrelevant. First, while the regulation is clumsily written, the Agency is clearly wrong in arguing that it applies only to shifts of more than 24 hours. On its face, it makes a distinction between "employees engaged in law enforcement or fire protection activities who receive annual premium pay...." and other employees, by specifying that for such law enforcement or fire protection employees, on-duty sleep time may be excluded from hours of work "only if the work shift is more than 24 hours." This is clearly an exception to subparagraph (1) of section (a), which otherwise includes the concept that bona fide sleep time.... shall not be considered hours of work if "the work shift is 24 hours or more".

In this instance, the Agency clearly believes that its specified 12 or 16 hour shifts[4] constituted discrete events, not one continuous shift with sleep time in between work periods. For the 12 hour shifts, this is supported by the arbitrator's ruling in the Leavenworth-based SORT teams case; the award in that case clearly notes that those teams were on 12 hour shifts.

But the testimony given in this matter by the Union witnesses focused on the 16 hour shifts, and I find these to be another matter entirely. It is well-known that employees who are more regularly scheduled for 24-hour or longer shifts, the obvious example being firefighters, get substantial continuous periods of sleep within these shifts, probably more often than not. Indeed, they could hardly function otherwise over an extended period, and the obvious reason 551.432 exists at all is that the Government recognizes the unusual hardship involved when such an employee cannot get at least five hours of uninterrupted sleep. When the expectation is that SORT employees will be on active duty 16 hours a day for a number of continuous days, will be present throughout the other hours at the Agency's facility rather than a hotel or some other separate location, and will be subject to being called back to work in an emergency, this is the functional equivalent of the normal work schedule of the kinds of firefighters and other employees for whom 551.432 was plainly designed. Defining the work shift as separate 16-hour days with supposedly entirely free time off in between, rather than as one continuous long shift or as 24-hour shifts which include eight hours of presumed sleep time, appears to be an arbitrary distinction without a practical difference. Accordingly, I find that for those SORT teams that were on 16 hour shifts, 5 CFR 551.432 applies.[5]

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[4] According to the Union witnesses, both were used, although Maldonado did not believe there were any 16 hour shifts.

[5] The Agency, under Article 18, Section c, has undertaken to make "every reasonable effort" to "ensure that all administratively controllable travel is performed in a paid duty status" and that "Should an employee be required to travel outside of his/her regularly scheduled workday and/or work week, such employees will be compensated to the extent allowable by applicable laws, rules, and regulations;....". The use of the term "allowable" in this context strongly implies that the Agency is not permitted to erect artificial barriers to such compensation. The parties did not specifically argue whether or not "travel"

That does not automatically mean that all such employees are entitled to be considered in work status for 24 hours of every day that they were present at Beaumont, however, because 551.432 imposes other relevant requirements. In particular, the requirements that "(2) During such time there are adequate facilities such that an employee may usually enjoy an uninterrupted period of sleep; and (3) There are at least 5 hours available for such time during the sleep period" imply that a factual screen is necessary as to whether, and more important, when, employees in this category can reasonably be judged as having been allowed at least five hours' uninterrupted sleep in a 24-hour period. This compels attention to a number of indications, noted above, that the situation at Beaumont was not the same throughout the entire time the TDY employees were present.

In ascertaining how much sleep employees responding to a crisis get, it is absurd to expect precision in the evidence. A crisis is, after all, a crisis, and people have more important things to do in the Agency's service than to keep exact records of how they are spending each hour. For that matter, the Union can hardly be held at fault for presenting testimony by a few employees as representative of many, when the passage of nearly 3 years makes more cumulative testimony even less likely to be helpful than it usually is, and when the Agency was not even able to supply the Union with the accurate record of who had worked how many hours on each date, which the Union had asked for long before the hearing. (In the form of pay records, this is a type of record routinely kept by employers of all kinds for years, and the failure to turn it over was unexplained.) Furthermore, one Union witness, Ortiz, is a regular Beaumont employee and a Union officer, who is presumably in a position to observe on a somewhat broader basis, and his testimony agreed with the others. For that matter, Maldonado's testimony also supports the employees' claims, up to a point: he stated that he would dispute employees' claim to be either working or sleeping the entire time "after the first few days." (Emphasis added.)

To the extent that the Union witnesses generalized their experience as being similar throughout their stay at Beaumont, however, when the last witness actually to arrive at Beaumont after Hurricane Rita, Linda Rivera, characterized sleeping as well as food conditions as having improved by then, I find Rivera probably more reliable. Her testimony also agrees with Maldonado's as quoted above. With no criticism intended of the employee witnesses, it is natural to anyone presented with the situation as it existed when they arrived to find such a level of disruption and dysfunction making more of an enduring impression than the slow improvement which logically occurred thereafter as a result of everyone's efforts.

Accordingly, I believe it is a fair inference from all of the evidence taken together that for a period of time following the SORT teams' arrival, they were presented with so much noise and such inadequate living conditions, including time required to line up for showers and find adequate food, that their testimony should be accepted as to having gotten less than five continuous hours of sleep a night. For the same reasons, I believe it is a fair inference that that degree of bad conditions did not continue indefinitely. As the best available marker of

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within this clause's meaning includes TDY time at a location to which the employee has traveled, so I do not rely on this clause. But it is certainly consistent with the conclusion reached.

when the situation improved enough that it should be assumed that employees were able to get more regular sleep, if only as a matter of their exhaustion, I will date the expiration of the "continuous duty" assumption (with an exception discussed below concerning the bus crews) as of Rivera's arrival, which was sometime during the Thursday after the hurricane. There is no basis in the record on which to make any distinction between different shifts during that Thursday, as the record does not show at what time during the day Rivera arrived. Accordingly, I find that the best judgment that the paucity of records and the passage of time will allow is that SORT team members are entitled to pay for 24 hours for each day for which they were scheduled for what the Agency characterized as a "16 hour shift" between the onset of the hurricane and the end of such a shift which began at any time on the following Thursday. SORT team members who were on 12 hour shifts may also have gotten less sleep during those days than 12 hours off might imply; but it is not evident that there is any basis under which 551.432 covers them, and they are also factually on the same footing as the Leavenworth-based employees whose grievance was denied by a previous arbitrator. Accordingly, SORT team employees are not covered by this finding to the extent that they were on 12-hour shifts.

The bus crews are in a somewhat different situation depending on their location. The testimony concerning both Hurricane Rita and Hurricane Katrina was that unlike the SORT teams, at least the bus crews assigned to facilities other than Beaumont were, in fact, ordered to be in a state of continuous readiness. When assigned at Beaumont, the testimony indicates, they were given specified shifts, but the testimony indicates these may have been 16 hour shifts, and furthermore, that their actual work hours did not necessarily correspond to the specifications they were given. While they were "staging" at Bastrop, on the other hand, they were required to be in readiness but appeared not to have been actually working all that many hours. Consequently, their eligibility to be considered in continuous-duty status for an entire 24-hour period varies. Based on all the testimony taken together, I find that for the first few days they were stationed at Beaumont, sleeping on buses, and given what appear to have been 16-hour specified shifts with possibly longer hours in practice, the bus crews are entitled to the benefit of regulation 551.432 on the same basis as the SORT teams, though the actual dates are different. Accordingly, I conclude that any bus crew which was given a 16 hour shift at Beaumont is entitled to the same presumption of less than five hours' sleep during the first four days after they arrived at Beaumont, but not thereafter.

The testimony, however, also establishes that the bus crews, unlike the SORT teams, were at other times and other locations "....restricted by official order to a designated post of duty and ... assigned to be in a state of readiness to perform work with limitations on the employee's activities so substantial that the employee cannot use the time effectively for his or her own purposes." The fact that the crews were told to go and get food from a local convenience store speaks to the Agency's inability to supply them, not to the concept of using time for their own purposes. And all of the testimony in the record with respect to the bus crews' work away from Beaumont is consistent, to the effect that they were told to be continuously available on the premises, for assignments of unpredictable length, at unpredictable intervals. This squarely fits the definition of on-call or standby work in its strictest definition, in 551.431, and there is no evidence that any of the exceptions in that regulation apply. Accordingly, I conclude that while assigned at Elaine Hunt State Correctional Facility, Oakdale and similar affected facilities, bus crews responding to

Hurricane Katrina meet the 551.431 definition of "time spent on standby duty or in an on-call status". The crews are therefore payable 24 hours a day continuously for that reason during those days. This finding does not apply to the days they spent working out of Bastrop, Texas, because the testimony as to their time there speaks in terms of them having significant time off while "staging" in advance of the hurricane, and in terms of their working relatively fixed 12-hour shifts the first few days thereafter, until they moved to Beaumont.

The remaining issue is the per diem payment. And once again, the relevant facts are not the same across all of the employees involved in this matter, or across all of the dates. I conclude that the evidence with respect to the bus crews' experience at Elaine Hunt State Correctional Facility, Oakdale and similar facilities consistently demonstrates that the Agency cannot be credited with providing the crews with meals during those days. The full per diem is accordingly owed.

At Beaumont, the picture is mixed, particularly because of Rivera's testimony that the commissary was functioning properly by the time she arrived. Once again, I believe it is a fair inference that without any criticism of the employees intended, they were more struck by the low quality, quantity and availability of food when they arrived than by its probably gradual improvement later. There is, however, a very specific pair of regulations involved. Federal Travel Regulation 301-11.18 specifies that the per diem "must" be adjusted for a meal or meals furnished to the employee, except as provided in 301-11.17. The latter section, however, is specific in its reference to meals provided by a common carrier or complimentary meals provided by a hotel/motel. The use of the term "must" in conjunction with an express exception for two specific sources of free meals, I conclude, implies that other sources of free meals such as the Red Cross are to be treated as if the Agency itself had provided them. Accordingly, the rules, especially in conjunction with the testimony of all witnesses to the effect that these volunteer employees anticipate that working conditions will at times be adverse, are quite restrictive. Since all of the testimony was that at least some food was available to employees throughout, the only remedy employees assigned to Beaumont are entitled to is the one implied by the additional clause "If you pay for a meal that has been previously deducted, your agency will reimburse you up to the deduction amount." This provides the right to repayment for any meals which Beaumont-assigned TDY employees actually purchased as a result of finding insufficient food available on-site. There was testimony that such purchases were made from a local Wal-Mart that was open, and the employees who made such food purchases are entitled to reimbursement.

The Agency did not argue against the Union's request for attorneys' fees or the Union's calculation of the amount, which was presented in an itemized list. I find that the Union has prevailed on the merits of this matter to a substantial degree, that the legal reasons supplied in support of the request for attorneys' fees appear sufficient on their face, and that both the actual amounts and the methods of calculation appear reasonable under the circumstances. Attorneys' fees are accordingly included as an element of the Award, in the amount requested.

For the foregoing reasons, and based on the record as a whole, it is my decision and

AWARD

1. That the Agency failed to pay certain employees at certain times, while on temporary duty during and after Hurricanes Rita and Katrina, in accordance with applicable laws, rules and regulations.

2. That the Agency failed to properly pay per diem rates for certain such employees for certain dates.

3. That as remedy, the Agency shall, forthwith upon receipt of a copy of this Award, repay affected employees as follows:

a) SORT team employees assigned to FCC Beaumont, Texas on temporary duty after Hurricane Rita shall be compensated for shifts characterized as 16 hours, from Saturday, September 24, 2005 through the close of any such shift which began on Thursday, September 29, 2005, for 24 hours per day during said days. Bus crew employees so assigned shall be compensated for 24 hours per day for the first four days after their arrival at Beaumont.

b) Bus crew employees assigned as temporary duty after Hurricane Rita and/or Hurricane Katrina to work out of Elaine Hunt State Correctional Facility, Oakdale FCC, or other locations similarly affected, shall be compensated for 24 hours per day while assigned to work out of such facilities, and shall be paid their full per diem for such periods.

c) SORT team and bus crew employees assigned to Beaumont, Texas following Hurricane Rita shall be reimbursed for any food purchased externally while on temporary duty during and after the hurricane.

4. The Agency shall promptly defray the Union's attorneys' fees incurred for this matter, by payment of the sum of $16,956.42 to the firm of Eichenbaum, Liles & Heister, Little Rock, Ark.

5. The undersigned will retain jurisdiction for 120 days from the date below, in the event of a dispute concerning the remedy. Said period may be extended for good cause shown on request of either party.

Dated at Washington, DC this 6th day of September, 2008

By_____
Christopher Honeyman, Arbitrator