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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
CENTRAL DIVISION AT LEXINGTON
CIVIL ACTION NO. 5:06-CV-00299-JBC

JUSTIN CRAWFORD, et al.,

PLAINTIFFS

v.

LEXINGTON-FAYETTE URBAN
COUNTY GOVERNMENT

DEFENDANT

**PLAINTIFFS' MEMORANDUM IN SUPPORT OF
MOTION FOR PARTIAL SUMMARY JUDGMENT
WITH REGARD TO COMPENSABILITY OF MEAL PERIODS**

CERTIFICATE OF SERVICE

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Come the Plaintiffs, by counsel, and for their Memorandum in support of their Motion for Partial Summary Judgment with regard to the compensability of the twenty-minute “meal breaks” provided by the Defendant, the Lexington-Fayette Urban County Government (“LFUCG”), to Division of Community Corrections (“DCC”) Plaintiffs who are or who have been employed in the Custody, Intake, and/or Master Control areas, state as follows:

INTRODUCTION

The Plaintiffs have alleged that the LFUCG has violated the Fair Labor Standards Act (“FLSA”), 29 U.S.C. § 201, *et seq.*, by depriving DCC Employees of bona fide meal periods. More specifically, the Plaintiffs now or formerly assigned to Custody, Intake, and Master Control allege that they are required to remain on duty throughout their twenty-minute unpaid “meal breaks.”

On January 26, 2007, the Court conditionally certified this collective action under 29 U.S.C. § 216(b). (Order, Docket Entry No. 97). During discovery subsequent to that conditional certification, the LFUCG represented that only the following four (4) Bureaus or areas within the DCC receive unpaid “meal breaks”: Custody, Intake, Training, Master Control/Lobby.¹ (LFUCG’s Response No. 6 to the Plaintiffs’ First Set of Interrogatories). The Plaintiffs who are assigned (or who, from September 6, 2003, to the present, have been assigned) to Custody, Intake, and/or Master Control/Lobby now ask the Court for the entry of Partial Summary Judgment in their favor on their claim that the LFUCG has deprived them of bona fide meal periods, and that they are entitled to

¹ As explained in the Memorandum filed in support of the Plaintiffs’ Motion for Certification of Subclasses, the three (3) Plaintiffs - Eric Legear, Frank Adams, and Dustin Wynn - who are now or who were previously assigned to the Training area do not wish to pursue a claim pertaining to their meal breaks as to the time periods during which they worked in the Training Bureau.

compensation, including overtime compensation, for that time.²

FACTUAL BACKGROUND

A. General Background

1. The DCC's mission and structure

The LFUCG operates a detention center facility (“the facility”) which houses hundreds of inmates, all of whom are suspected or convicted of committing crimes. The DCC’s Assistant Director of Operations, James Kammer (“Kammer”), identifies the mission of the DCC as follows: “to house those incarcerated or held pursuant to the order of the Court, provide them a safe and secure location, provide [for] the safety and security of the public inside, the staff, while providing a constitutional level of care to those housed within.” (Transcript of January 3, 2007, hearing (“1/3/07 Tr.”), p. 28).³

DCC Employees hold military-like ranks. In ascending order, those ranks are: Officer, the honorary rank of Corporal⁴, Sergeant, Lieutenant, Captain, and Major. Employees are considered

² As explained in the Plaintiffs’ Memorandum in support of their Motion for Certification of Subclasses, the issue of whether Custody, Intake, and/or Master Control/Lobby Employees who are ranked as Lieutenants or Captains may assert an overtime claim under the FLSA requires a preliminary determination of whether the LFUCG has properly classified those Employees as “exempt” from wage and hours laws. For the reasons set out in the Plaintiffs’ contemporaneously filed Motion for Partial Summary Judgment with regard to those classifications, the Plaintiffs believe that these Employees are entitled to assert FLSA claims.

³ Assistant Director Kammer reports directly to the DCC’s Director, Ron Bishop, and occupies the “number two position” within the DCC. (1/3/07 Tr., p. 23). He supervises Custody, Intake, Master Control, and other areas. (*Id.*, p. 24). A copy of the organizational structure of the DCC is attached hereto as Exhibit A. Assistant Director Kammer is also the LFUCG’s designated witness under Fed. R. Civ. P. 30(b)(6) as to a variety of issues in this lawsuit, including the twenty-minute “meal breaks”.

⁴ The ranks of Corporal and Officer are indistinguishable with regard to job duties as well as pay level. (1/3/07 Tr., p. 50 (Kammer testimony)). The DCC’s current Director, Ron

“commanders” upon reaching the non-exempt rank of Sergeant. (July 24, 2007, deposition of James Kammer (“Kammer depo.”), p. 175).⁵ Assistant Director Kammer characterizes the rank of Major as the DCC’s “first line of administration”. (1/3/07 Tr., pp. 37, 50).

The DCC is comprised of several Bureaus or areas. Unlike other areas of the DCC, Custody, Intake, and Master Control employ twenty-minute unpaid “meal breaks” rather than paid “lunch-on-the-run” meal breaks. Not coincidentally, these three areas are the only areas of the DCC which operate 24-hours a day, with Employees assigned to shifts which overlap by twenty (20) minutes.⁶

The DCC’s Operational Order for Custody Employees’ work hours states:

[t]he duty tour (work period) for Custody staff is designated as eight (8) hours and twenty (20) minutes. Each duty tour shift shall commence at five (5) minutes before the hour and continue until fifteen (15) minutes past the hour, i.e., 0755 hours to 1615 hours, 1555 hours to 0015 hours, 2355 hours to 0815 hour. This schedule permits **away from duty station meal breaks of twenty (20) minutes**.

(DCC Operational Order No. 3.1-2b (attached hereto as Exhibit B)) (emphasis added). Intake and Master Control Employees operate on the same overlapping shift schedule, with workdays lasting

Bishop (“Director Bishop”), testified that the rank of Corporal is being “phas[ed] out” and the rank of Corporal ceased to officially exist in late 2006. (November 30, 2007, deposition of Ronald L. Bishop (“Bishop depo.”), p. 17).

⁵ Depositions cited in this Memorandum have been filed in the record.

⁶ The unpaid twenty-minute meal breaks provided to Custody, Intake, and Master Control Employees are not only unique within the DCC, but also within the entire LFUCG. Employees of the LFUCG’s Human Resources division cannot identify any other LFUCG Employees who receive a twenty-minute unpaid meal break. (See November 8, 2007, deposition of Leslie Jarvis, pp. 76-79; December 3, 2007, deposition of Tracey Stephenson, pp. 25-26). Walter Skiba, who served as the Director of Human Resources until 2004, testified that his Division was never asked to review the DCC’s meal break policy; instead, the policy was created by the DCC itself. (February 11, 2008, deposition of Walter Skiba, p. 59). The current Director of Human Resources, Michael Allen, has no understanding at all of the DCC’s break policy, and has never been asked to review its compliance with wage and hour laws. (February 21, 2008, deposition of Michael Allen, pp. 40-41).

eight (8) hours and twenty (20) minutes and with unpaid twenty-minute “meal breaks”. (1/3/07 Tr., pp. 39, 43 (Kammer testimony)). During each shift, Employees assigned to Custody, Intake, and Master Control supposedly receive two (2) compensated ten-minute “rest periods” or breaks, in addition to one twenty-minute “meal break.” (*Id.*, p. 74-75 (Kammer testimony)). Thus, of the eight (8) hour and twenty (20) minute shift, twenty (20) minutes are unpaid.

The Site Map attached hereto as Exhibit C depicts the physical structure of the DCC. The lower-level innermost “ring” includes the Intake area, as well as a Shift Command area in which Custody “commanders” have their work stations. Inner and outer rings include inmate housing units, which are operated by Custody Employees. Housing units on the outermost ring are alphabetically labeled from AA through LL. (1/3/07 Tr., p. 30 (Kammer testimony)). Also on the outermost ring is the Officers’ Dining Room (“ODR”), where DCC Employees are supposedly able to eat during their twenty-minute meal “breaks.” A hallway “goes all the way around the circle”, connecting the outer rings to the inner hallway, and is estimated by Assistant Director Kammer to have a length of approximately one-quarter mile. (*Id.*, p. 31). Inside the hallway are eight “inner ring units”, labeled from A through H. (*Id.*). In order to exit any of the housing units, an Employee must open two doors (one with his or her “fob” and the other by contacting Master Control), which are separated by a vestibule. (February 4, 2008, deposition of Charlesetta Johnson (“Johnson depo.”), p. 16).⁷

2. *The unpaid twenty-minute “meal breaks”*

The meal and rest breaks supposedly provided to Custody, Intake, and Master Control

⁷ The two doors separating the housing unit from the hallways cannot be opened at the same time. The opening of the outer door is controlled by Master Control. Requests to Master Control for doors to be opened are placed on a priority list. (February 11, 2008, deposition of Sarah Balltrip (“Balltrip depo.”), p. 114). A Custody Officer attempting to exit a housing unit must press a button and wait for Master Control to open the outer door. (*Id.*).

Employees do not occur on a regular, scheduled basis. (1/3/07 Tr., p. 210 (Kammer testimony)). Although the first ten-minute break is intended to be given to an Employee during the first four (4) hours of the shift, the second during the last four (4) hours, and the meal break toward the middle, Assistant Director Kammer conceded that this is only a “general philosophy”. (*Id.*, p. 75). For example, Custody Officers’ breaks occur only “[w]hen they ask the rover to come relieve them or when the time permits if it’s the rover themselves, they take it as time permits . . . Commander is the same way. As time permits, commanders take their break.” (*Id.* at p. 210).⁸

Assistant Director Kammer testified that Employees may “theoretically” take their breaks anywhere within the facility, but that there are three (3) “designated” break areas. (1/3/07 Tr., p. 52). First, breaks may be attempted in the ODR, which is operated by an independent contractor but at least partially staffed by trustees, who are “basically inmate workers”. (*Id.*, pp. 51-52). The ODR is not open 24-hours. (*Id.*, p. 159). Second, breaks may be attempted in the smoke room, which is located near the Intake area. Third, Employees may spend their breaks at the Shift Command office, which is where commanders have their work stations. (*Id.*, p. 52).

Employees who are on “break” are not free to use the time as their own. They are not permitted to leave the facility’s grounds without obtaining prior approval from their commanders. (Kammer depo., p. 125).⁹ They are not permitted to change out of uniform during their breaks. (*Id.*). They are not permitted to take their breaks by exiting either the “back” sallyport doors or the “back

⁸ Assistant Director Kammer “expect[s] the officers themselves to work on getting their breaks and coordinate their breaks with the rovers.” (1/3/07 Tr., p. 77).

⁹ At least one Custody Officer who is not a Plaintiff in this action testified that he does not believe that he is permitted to leave the facility itself during breaks. (February 12, 2008, deposition of Roy Compston (“Compston depo.”), p. 45).

dock” doors located on the facility’s lower level. (*Id.*, p. 207).¹⁰ If they choose to go outside, they must exit through the upper level front doors, near the Master Control area, and they must remain on the facility grounds. (*Id.*, p. 194). (See also Johnson depo., p. 21 (“[e]verybody should enter and exit through the front of the facility”). An Employee who is working in the downstairs areas of Intake or Custody and who wishes to take a break outdoors will lose as much as six (6) minutes of his or her twenty-minute meal break simply traveling to and from the front doors. (Johnson depo., p. 65-66 (it may take an Officer working in housing unit AA as much as three (3) minutes to travel from the unit to the front doors).

None of the witnesses for the LFUCG even attempted to claim that the twenty-minute meal breaks are intended to provide DCC Employees with time in which to comfortably and adequately enjoy their meals. Assistant Director Kammer admitted that twenty minutes may not be sufficient “to sit down and have an extended period at meal time”. (1/3/07 Tr., p. 158). He defends the brevity of the meal break by claiming that Employees are at least “getting your 20 minutes away - there’s the opportunity to get your 20 minutes away from your work post”. (*Id.*). The unpaid twenty-minute time periods exist for reasons which are totally unrelated to the Employees’ need for sufficient time in which to eat a meal. Assistant Director Kammer testified that Custody, Intake, and Master Control Employees receive unpaid meal periods because the DCC must offset the “turnover period” between the shifts operating these three 24-hour areas. (Kammer depo., p. 171). Major James Capillo, who is not a Plaintiff but who purportedly constitutes the DCC’s “first line of

¹⁰ The sallyport is the entry into the Intake area used by police officers delivering new inmates to the facility. (Johnson depo., p. 21). The back dock doors are used by maintenance workers and for supply deliveries. (*Id.*, p. 22). Lieutenant Johnson, who works in Master Control and therefore controls the opening and closing of the back dock doors, confirmed that Employees are not permitted to exit through those doors. (*Id.*).

administration”, offered an even more astonishing explanation. He testified that the twenty-minute unpaid meal break policy was created after a DCC Corporal complained to the Kentucky Department of Labor that he did not receive rest breaks, prompting the LFUCG to respond: “Okay. Fine. You want the two 10 minute breaks? You can have the two 10 minute breaks. You owe us another 20 minutes worth of time.” (February 4, 2008, deposition of James Capillo (“Capillo depo.”), p. 71).¹¹

Former DCC Director Glenn Brown testified that Employees in Custody, Intake, and Master Control worked on a “lunch on the run” status during his tenure:

A. Lunch on the run means basically you have a period of time of 20 minutes, and during that period of time of 20 minutes actually you have the opportunity to eat your meal or go get your meal if there is sufficient staff to give you a break. And while you’re doing that, technically you’re still working but you have that 20-minute break while working. So that’s the terminology that I would presume would be why it was called lunch on the run.

...

Q. But what you’re telling me, that it was even all the way up until you retired January 1 of 2004 you had a lunch-on-the-run policy which means that an employee at the detention center is effectively on duty even during their breaks?

A. That’s correct.

(October 23, 2007, deposition of Glenn Brown (“Brown depo.”), p. 10-11).¹² As explained below, the DCC continues to apply its “lunch-on-the-run” policy to Employees who work in areas other than

¹¹ Major Capillo is an attorney. (Capillo depo., p. 5). Given his level of education, his “administrative” position with the DCC, as well as his status as an officer of the Court, his understanding of the LFUCG’s “meal break” policies and the accuracy of his descriptions of those policies should be given particular weight.

¹² Brown was the Director of the DCC from September 2001 until January 1, 2004 (Brown depo., pp. 4, 37), for at least four (4) months of the time period included in the Plaintiffs’ claims for compensation. Brown’s testimony confirms the LFUCG’s actual knowledge that, during his tenure, it was obtaining twenty (20) minutes of unpaid work from its Employees.

Custody, Intake, and Master Control.¹³

B. The LFUCG's "Meal Break" Policies and Practices for Custody Employees

The Custody Bureau is assigned the duty of "working" the inmate housing units. (1/3/07 Tr., p. 37 (Kammer testimony)). Employees assigned to Custody include "basic line" Officers and Corporals, Sergeants, Lieutenants, and Captains. (*Id.*). Assistant Director Kammer testified that the "practice and intent" of the DCC's administration is to assign a Custody Officer to a particular housing unit for a five-day period (in other words, for the duration of the Officer's regular "workweek"), although assignments may rotate more frequently. (1/3/07 Tr., p. 73). The housing units are operated pursuant to the DCC's "direct supervision" philosophy, which means that "there's officers in with the inmates in the living unit". (Kammer depo., p. 14). Because Custody Officers obviously cannot leave inmates unattended, Custody Employees rotate the position of "rover". (1/3/07 Tr., p. 72 (Kammer testimony)). Rovers serve as "relieving officers", replacing the Custody Officers in the housing units during the Officers' purported meal and rest breaks. (*Id.*). When they are not inside housing units, rovers are required to deliver cleaning or other supplies to the housing units (*id.*, p. 75) and to respond to "tones" indicating emergencies.¹⁴

¹³ Former Director Brown's recollection was confirmed by Plaintiff Barry Lindsay, who began working at the DCC in 1985. Lindsay testified that, at the old jail building, shifts were "just strictly eight hours." (February 19, 2008, deposition of Barry Lindsey, p. 139). Employees ate "lunch on the run" and received no breaks. (*Id.*, pp. 142). "So they had people - some of the officers got to complaining, and so they come up with the fact of two tens and a 20-minute break, and that's what they came up with, but it changed the time. We had to report at 0755, but we had to work until 4:15 because of those - the breaks." (*Id.*, p. 142-43).

¹⁴ As explained below, a rover and a relieved Custody Officer exchange duties during an Officers' "meal break" time. The rover becomes responsible for overseeing the Officer's assigned housing unit while the Officer leaves that particular "work station", while the Officer becomes responsible for responding to "tones" and, in some instances, for obtaining any supplies needed by his or her housing unit.

1. *Custody Officers are required to spend a portion of their “meal breaks” traveling to, signing, and returning from “break sheets”*

While the Employees are “theoretically” allowed to take their “breaks” anywhere in the facility, the LFUCG admits that, during those twenty-minute time periods, Custody Officers must travel to and sign one of three “break sheets” (posted at the ODR, Shift Command, and the smoke room). (*Id.*, p. 52 (Kammer testimony)).¹⁵ Unfortunately for these Employees, however, the LFUCG’s policy also dictates that the ten- and twenty-minute periods allotted for their breaks begin when they are relieved from their work stations inside the housing units, not when they reach and sign a break sheet. (*Id.*, p. 121). Likewise, their breaks are deemed to end only when the Officer returns to the unit (*id.*), not when he or she leaves the break sheet to begin traveling back to the unit work station. (Kammer depo., pp. 164, 239 (if an Officer left for a twenty-minute “meal break” at 12:00, and needed three (3) minutes to reach a break sheet, then he or she must nevertheless return to his or her post no later than 12:20)).

Given the extraordinarily brief amount of time allotted to a Custody Officer in which to take a meal break, the time lost in the task of traveling to and from and signing the break sheet is not insignificant. Assistant Director Kammer testified that walking from some units to the nearest break sheet may take as much as two (2) minutes. (*Id.*, p. 162). If this is true, then an additional two (2) minutes obviously will be required to return from the break sheet to the unit. Thus, according to Assistant Director Kammer, a Custody Officer may spend as much as four (4) minutes of a twenty-

¹⁵ Presumably, Assistant Director Kammer’s testimony that DCC Employees may “theoretically” spend their “break time” anywhere in the facility (1/3/07 Tr., p. 52) did not pertain to Custody Officers, since he admits that those Employees must spend at least a portion of their break time traveling to and from one of the three areas in which “break sheets” are posted.

minute meal break complying with the DCC's "break sheet" policy.¹⁶ The LFUCG does not, and cannot, claim that Custody Officers are able to eat a meal during that travel time. Unsurprisingly, a Custody Corporal who is not a Plaintiff testified that she would prefer to stay in her unit during her breaks largely because "leaving the unit to go sign a break sheet is almost an inconvenience to me." (November 28, 2007, deposition of Tonya Roberts ("Roberts depo."), p. 61).

Although Assistant Director Kammer defends the break sheet requirement as providing a "tool" through which the DCC may confirm whether Custody Officers have received their breaks (Kammer depo., p. 173), he concedes that this information may just as easily be obtained from Activity Reports, which are documents that must be completed by each housing unit Officer throughout his or her shift. (1/3/07 Tr., pp. 136, 189)). Captain Darin Kelly, who is not a Plaintiff, admitted that he is not "real sure" why Custody Officers must sign the break sheet, since their Activity Reports already reflect the times at which their breaks began and ended. (July 25, 2007, deposition of Darin Kelly ("D. Kelly depo."), p. 23). Major Korb, who is not a Plaintiff, agreed that the administration can determine whether an Employee received a break simply by reviewing his or her Activity Report. (November 26, 2007, deposition of Michael Korb ("Korb depo."), p. 57). Two

¹⁶ In light of Fed. R. Civ. P. 56, the Plaintiffs accept, for purposes of this Motion only, the estimation provided in Assistant Director Kammer's deposition of the amount of time needed to travel to and from and to sign the break sheets. In the event partial summary judgment is not granted, however, the Plaintiffs will show at trial that his estimation is far too conservative. Notably, Assistant Director Kammer's testimony before the Court at the conditional certification hearing estimated the one-way "travel time" from a housing unit to the ODR as requiring as much as three (3) minutes, which would result in the loss of as much as six (6) minutes from an Officer's meal period. (1/3/07 Tr., p. 185-86). Under that estimation, a Custody Officer would have only fourteen (14) remaining minutes in which he or she might attempt to eat a meal. Major Capillo, who is not a Plaintiff, testified that it might take an Officer as much as five (5) minutes to travel from a housing unit to Shift Command (Capillo depo., p. 41), another location at which the break sheet is posted. A Corporal who is not a Plaintiff testified that it takes him three (3) minutes to travel from housing unit AA to a break sheet. (Compston depo., p. 18).

other Employees who are not Plaintiffs in this action, Major Capillo and Lieutenant Stephanie Morgerson, both testified that they monitor Custody Officers' breaks by reviewing Activity Reports. (Capillo depo., p. 42; November 29, 2007, deposition of Stephanie Morgerson ("Morgerson depo."), p. 77). The only apparent purpose of the "break sheets" is their function of ensuring that Officers do not spend their meal breaks inside the units; as explained below, the LFUCG relies on Custody Employees who are taking their "breaks" to serve as its "response team" in lieu of the rovers who assume the Employees' regularly-assigned work stations. The break sheet requirement thus exists only for the LFUCG's benefit, not for the benefit of the Officers or even the convenience of their "commanders".

Assistant Director Kammer's justification for the break sheet policy is further defeated by the reality that a Custody Officer must record both the time at which the "break" began (the time he or she left the housing unit), and the time at which the break will end (twenty minutes later). Even Assistant Director Kammer admits that this rule requires the Custody Officer to "make somewhat of an assumption":

They know what time they've started their break, because that's pretty clear the time that they were relieved and left the unit. They have a starting time. So they know by the time they get to the break sheet what time they started their break.

Again, if they go into the break room or the ODR and then are working on that break, and they know if they have taken 15 minutes of the break and then leave, and they assume that **it took three minutes to get to the break room, it takes three minutes to get back to the unit.** And they can assume it's going to take them three minutes, yeah, and they can clock that time back in as three minutes

(1/3/07 Tr., p. 185) (emphasis added). The Officer must therefore sign the break sheet by identifying the starting and ending times for a meal break (which, excluding the time required to travel to and from the break sheet, may now consist of only sixteen (16) minutes) without knowledge of whether

a signal, a code, an assignment from a commander by radio or in person, or other interruptions may delay his or her return to the housing unit. (*Id.*, p. 186). As explained below, Assistant Director Kammer brushes aside the Plaintiffs' allegation that Custody Officers must perform work-related errands and respond to codes and signals during their meal breaks by claiming that they are free to take the remainder of their break time once those errands are completed. If that explanation is true, then the LFUCG's policy of requiring an Officer to record the time at which he or she left the unit and the expected time of return to the unit as his or her "break time" is particularly unjustifiable.

Signing a break sheet is not optional. According to Assistant Director Kammer, that duty is performed pursuant to a DCC "directive". (1/3/07 Tr., p. 122). Coaching and Counseling ("C&C") forms may be (and have been) issued to Custody Officers who fail to follow that directive. (*Id.*, p. 191; Exhibit D).¹⁷ DCC Director Bishop testified that Custody Officers are not permitted to "sign out" for all three of their breaks at one time, nor may they ask another Employee to sign on their behalf. Instead, they must physically and personally travel to and sign a break sheet during each break. (Bishop depo., p. 29-30).

According to Major Hill, who is not a Plaintiff, a Custody Officer must travel to and sign a break sheet even if he or she does not wish to spend the break at or near a break sheet location:

Q. Now if I wanted to - I've just left Unit C and I want to take my break somewhere different than any of those places. I just want to hang out in the hall, talk to my buddy? Am I still required to walk to a break sheet and sign out?

¹⁷ The LFUCG insists that the issuance of a C&C is not a disciplinary action. However, the LFUCG cannot dispute the testimony of Major Noland Hill, its purported "first line of administration", that Majors review C&Cs in an Employee's file in order to determine whether that Employee's behavior indicates some sort of recurring problem or deficient pattern. (February 6, 2008, deposition of Noland Hill ("Hill depo."), p. 103-104). At the least, C&Cs are the first step in a progressive disciplinary process.

A. You would need to sign out on the break sheet if you're on break. Maybe I misunderstood the relevance of where you said you were taking it.

Q. No, sir, I don't think you did. So no matter where I choose to take my break, your officers . . . are required to go to one of those three break sheets and sign out?

A. They would need to sign out, yes.

Q. Now, do they sign the time that they left their unit or the time that they got to the break sheet?

A. They would sign the time they went on break when they were once relieved and away from their work station, you're essentially on break.

Q. So there would be a period of time when I left my Unit C that I'd be on break prior to getting to the break sheet to sign it?

A. If you're away from your work station, you're relieved, you're on break.

(Hill depo., p. 55-56).

Increasing the amount of break time lost by Custody Officers in performing their required duty of traveling to and signing the break sheets is their inability to exit a housing unit without first waiting for Master Control and the security system to permit certain doors to be opened. As explained above, each unit is separated from the hallway by an inner unit door, a vestibule, and an outer unit door. Non-Plaintiff Major Capillo testified that an Officer must use his or her "fob" to open the inner door, a task which is not instantaneous because "[s]ometimes the computer takes more time than others". (Capillo depo., p. 49). The outer unit door may only be opened by Master Control. (*Id.*). Major Capillo described the steps which must be taken by a Custody Officer who happens to be assigned to Unit AA and who wishes to eat in the ODR:

. . . you have to fab [sic] through the interior door, go through the vestibule, wait for master control to open the outer door, you then walk to the end of the corridor, you have to fab [sic] open two - fab [sic] open a door, walk through it, fab [sic] it closed, fab [sic] open another door, fab [sic] it closed, and then you can go directly to the

door to the vestibule or to the hallway, fab [sic] that open, and then press the button and go into the ODR

(*Id.*, p. 49).

2. *Custody Employees are required to respond to tones while on “break”*

Within the DCC, codes or signals (sometimes referred to herein as “tones”) may sound at any time during a shift. A “Signal 7” signifies some type of emergency or that a staff member or inmate needs assistance. (1/3/07 Tr., p. 114 (Kammer testimony)). These are not rare events. Robert Walker, who is not a Plaintiff and who testified for the LFUCG at the conditional certification hearing, stated that tones are “very regular” occurrences at the facility. (1/4/07 Tr., p. 120). Nicholas Elko, a witness called by the LFUCG at the conditional certification hearing who later joined the lawsuit as a Plaintiff, testified that tones are not limited to any particular shift. (1/4/07 Tr., p. 188). A Signal 7 may indicate problems that range from extremely serious to mild. While a Signal 7 sometimes indicates that inmates are fighting, or than an inmate has attacked an Employee, it may also mean “the atmosphere in the [housing] unit has gotten tense; for example, an officer notices that the inmates are anxious about getting fed and are starting to bang and beat on the windows” (Capillo depo., p. 59).

Other types of tones also sound within the facility. A Code 100 and a Code 101 both signify medical emergencies. While Assistant Director Kammer testified that non-commanders need not respond to those codes (1/3/07 Tr., p. 116-117), he has apparently failed to communicate that exception to the DCC Employees. Major Capillo, who describes himself as the “liaison between the assistant director and the director and the boots on the floor”, testified that even Officers must respond to a Code 101, and “probably should respond to a code 100, in case it gets upgraded to a

101.” (Capillo depo., p. 43, 48). Director Bishop also testified that “it’s pretty much mandatory” that “available officers” respond to codes which indicate medical emergencies. (Bishop depo., p. 22). Director Bishop’s understanding is shared by lower-ranked Employees. Custody Corporal Roy Compston, who is not a Plaintiff, testified that he believes he is “[p]robably” required to respond to a Code 100 or a Code 101 during his twenty-minute break. (Compston depo., p. 14). A Code 9 indicates smoke or fire. (February 14, 2008, deposition of John Taylor (“Taylor depo.”), p. 24). When he worked as a Sergeant in the Custody area, John Taylor, who is not a Plaintiff, responded to Code 9s as well as to Code 100s and Code 101s. (*Id.* at pp. 24-26).

As a matter of undisputed fact, and according to Assistant Director Kammer, Custody Employees of all ranks must respond to codes and signals that sound during their ten- or twenty-minute “breaks.” (Kammer depo., p. 127). This rule has been confirmed by numerous witnesses who are not Plaintiffs in this action. For example, Major Michael Korb, who purportedly constitutes the DCC’s “administration”, testified that DCC policy requires “any available officer” to respond to tones and signals. The term “available officer” includes any Employee who is not physically inside a housing unit, even if he or she is purportedly taking a meal break. (Korb depo., p. 47). Major Korb further testified that he would look “unfavorably” on any Employee who failed to respond to a Signal 7 while taking a meal break. (*Id.*, p. 83). (*See also* October 24, 2007, deposition of John Dulin (“Dulin depo.”), p. 12 (Sergeant Dulin, who is not a Plaintiff, testified that he is required to respond to tones regardless of where they occur within the facility, and that the same is true of lower-ranked Custody Employees); November 27, 2007, deposition of Mark Kelly (“M. Kelly depo.”), p. 27-28 (Captain Mark Kelly, who is not a Plaintiff, testified that “anybody that’s available”, including himself, must respond to a Signal 7 during their meal break because “[i]t’s

always been that way”)).

Obviously, tones do not sound according to any timetable, nor is there any standard amount of time required to respond to and resolve incidents which may result in tones. A spreadsheet prepared by a DCC Employee setting forth the frequency of tones from September 2003 until February 13, 2008, shows numerous days on which four (4) or more tones sounded, sometimes during a single shift. (A copy of the spreadsheet is attached as Exhibit E). For example, during the first week of January 2008, fifteen (15) signals or codes sounded. Six (6) of those signals or codes occurred within a single day. The sounding of a Signal 7 does not indicate the nature of the problem. Therefore, an Employee hearing the tone cannot determine the severity of the incident, the number of inmates involved, or the number of needed responders. (Hill depo., p. 17).

The rule that Employees who are purportedly on “break” respond to tones arises from the DCC’s critical security need to ensure that a sufficient workforce remains outside the locked-down housing units to respond to the altercations, medical problems, and other “emergencies” that are inherent and inevitable in the operation of a jail. Captain Jeffrey Carter, who worked in the Training Bureau and who is not a Plaintiff, testified that the DCC Employees who are taking their alleged meal breaks actually constitute “**our response team**. I guess unnamed response team because they have to - **we have to have someone there.**” (February 13, 2008, deposition of Jeffrey Carter (“Carter depo.”), p. 44) (emphasis added).

The Director of the DCC, Ron Bishop, admitted that the safe and effective operation of the DCC depends on the constant readiness of Employees taking their “breaks” to respond to tones:

Q. What about the Fayette County Detention Center, with the policies and procedures in place, can you safely and effectively operate it if those people who are available to respond to tones by being on breaks do not respond to tones?

A. Not as effectively, and that's why we make it available for them to have a meal and to remain on the premises, so that they are available should they be needed.

(Bishop depo., p. 59) (emphasis added).

Director Bishop's predecessors agreed. Former DCC acting Director Tony Dehner ("Dehner") explained why DCC Employees must remain "at the ready" to respond to tones during their meal breaks:

A. Well, you're charged, first of all, with any inmate in that facility you're charged with their care and their custody, i.e., the care being you're responsible for their wellbeing anytime you're in that facility. If another officer is in trouble in the facility you certainly are responsible to help that person in any way, shape, or form and do it immediately.

(October 19, 2007, deposition of Tony Dehner ("Dehner depo."), p. 17) (emphasis added). Because DCC Employees are responsible for the safety of inmates and other Employees for the entire time they are inside the facility, Dehner believes their service to the LFUCG begins "as soon as [they] walk through the front door" and ends only when they leave the facility. (*Id.*, p. 9). According to Dehner, an Employee cannot be considered "off duty" during any time period when he or she is required to respond to tones. (*Id.*, p. 16).

Similarly, former Director Glenn Brown testified that, during his tenure, all Employees attempting to take their breaks were expected to respond to tones, "just like other staff that were not on break because you don't know the severity of what's happening." (Brown depo., p. 15).

Non-Plaintiff Employees of the DCC confirm Director Bishop's testimony that the LFUCG's policy requiring them to respond to tones during their breaks is imperative to the facility's safe and effective operation. For example, Major Capillo testified that, because of safety implications, he would not want to work in the facility if the LFUCG did not require "on break" Employees to

respond to tones. (Capillo depo., p. 46-47). Captain Jeffrey Carter, who has over twelve (12) years of experience at the DCC and has served in the Training Bureau and also as the facility's "safety officer", agreed:

Q. Could the jail operate with an operational order that said if you are on your 10 minute break or your 20 minute break - I'm talking about the custody units in the custody area. **Could the jail operate with an order that said if you are on your 10 minute break or your 20 minute break, you don't have to respond to tones?**

A. **This will be based on my opinion and truth. I feel no.**

Q. Can you explain why?

A. **The staffing. We don't have the staff**

. . .

Q. **With respect to the safe operation of the jail, though, assuming that the expense is not an issue, could the jail operate in a safe manner if officers that were on their breaks were not required to respond to any emergency situation?**

A. **No, sir.**

Q. Why not?

A. **Because those are the only staff that can respond**

(Carter depo., pp. 18-19) (emphasis added). Non-Plaintiff (and purported member of administration)

Major Hill testified similarly:

Q. What if the rule was that anyone on break, be it a commander or a unit officer on a custody shift, was not required to respond to Code 100s or Signal 7s, would that create a problem at the facility?

. . .

A. Well, yes.

Q. Why?

A. Who's going to basic - **no one would be there to show up to support or to basically manage or control whatever the disturbance or emergency was.**

Q. Well, I mean, you could wait until they got off break before they would respond, right?

A. No, sir.

Q. Why?

A. Obviously, **someone's life could be in danger, could be potential loss of life.** If it was an inmate altercation or fight, someone could be hurt, including staff. I would not - **that wouldn't be acceptable.**

(Hill depo., p. 67-68) (emphasis added).

3. *Custody Employees are required to carry and respond to radios, and to respond to telephone calls and other interruptions, during their twenty-minute "meal breaks"*

As a matter of undisputed fact, and pursuant to the LFUCG's admitted policies and practices, the twenty-minute meal periods purportedly provided to Custody Employees are disrupted not only by tones, but also by radio calls, telephone calls, and other interruptions.

The LFUCG's policy is that Custody Officers (including rovers) must carry radios and respond to calls while taking their "breaks". (1/3/07 Tr., p. 192 (Kammer testimony); *see also* Compston depo., p. 20-21 (testifying that he carries and responds to his radio during his break because he believes that he is required to do so)). In the event a Custody Officer fails to answer the radio while on break, a "supervisor" contacts that Officer on the overhead page system "[s]o one way or another", they are reached. (February 15, 2008, deposition of Jason Southworth ("Southworth depo."), p. 22).

Custody "commanders" (Sergeants, Lieutenants, and Captains) must also carry and answer radios during their alleged break time. (Kammer depo., p. 194, 241). Non-Plaintiff witnesses have

confirmed that rule. (See Capillo depo., p. 51 (testifying that he expects “every officer to respond on the radio if they are trying to be communicated with” unless that individual does not have a radio); July 27, 2007, deposition of Captain Dwight Hall (“Hall depo.”), p. 69 (a Custody officer must carry a radio during his or her break, and must respond to it); Morgerson depo., p. 16 (Lieutenant Morgerson, who is not a Plaintiff, testified that she must respond to her radio while she takes her twenty-minute meal break). Captain Mark Kelly admitted that he carries his radio throughout his shift, that he must respond to radio requests regardless of whether he is on break, and that the same is true for all of the other commanders on his shift. (Mark Kelly depo., p. 49). He stated that he receives phone calls and radio calls during his meal “[q]uite often” (*Id.*, p. 66). Indeed, Captain Kelly was unable to recall a single twenty-minute meal period during which he has not been interrupted by his radio, a page, or a question. (*Id.*, p. 66). Those interruptions range from thirty seconds to “[a] couple of minutes”. (*Id.*, p. 68).

Commanders who attempt to eat in their offices remain responsible during their “meal breaks” for answering telephone calls and responding to other interruptions. Major Hill, who is not a Plaintiff, testified that he occasionally eats in his office and that he “absolutely” answers the telephone during that time “[bec]ause I’m at my desk.” (Hill depo., p. 71-72). He testified that this was true even when held lower ranks:

Q. Did you ever eat at your desk when you were a sergeant, lieutenant or captain?

A. I did.

Q. Were you on break?

A. Probably.

Q. If the phone rang, would you answer it?

A. I would.

Q. If an officer walked in and asked you a question, would you answer it?

A. I would.

Q. Would you do paperwork sometimes when you were eating?

A. If it was necessary.

Q. Were you on break?

A. Maybe.

(Hill depo., p. 71-72).¹⁸

Custody Sergeant Jason Southworth, who is not a Plaintiff, testified that he eats at his desk while answering the telephone and questions from Employees. (Southworth depo., p. 28-29). He also answers questions from Employees who enter Shift Command while he is eating. (*Id.*). Thus, Sergeant Southworth's experience differs from the experiences of the Plaintiffs only insofar as he happens not to be "bothered" by the interruptions that occur during his twenty-minute meal breaks. (*Id.*, p. 29). Non-Plaintiff Lieutenant Morgerson's meal breaks are also spent taking telephone calls, and she considers a meal break during which she is interrupted twice as reflecting "just normal jail activity", not a particularly busy shift. (Morgerson depo., p. 80-81). Sergeant John Dulin, who is not a Plaintiff, testified that his meal breaks are subject to a variety of interruptions, all of which may require his immediate response:

Q. Have you ever performed jail duties during either your 10-minute break or your

¹⁸ In continuing to work at their desks during their meal breaks, DCC commanders follow the lead of DCC Director Bishop. Director Bishop testified that he eats in his office most of the time. (Bishop depo., p. 25). On those occasions, he does answer the telephone, and has sometimes performed "paperwork with one hand" with a sandwich in the other. (*Id.*). He admitted that he does not consider himself to be taking a "break" during those time periods. (*Id.*).

20-minute meal break? When I say “jail duties”, I mean things for, say, the housing units.

A. If I understand the question correctly, I’ve answered the radio during my break. I’ve had to stop my break, do something and then return to my break. If that’s what you’re asking me, yes.

Q. What are some of the instances where you would be interrupted, let’s say on your 20-minute meal breaks.

A. Obviously, like you said, emergency tones would be one. Phone calls sometimes would be another. Just, you know, in general, work things that happen.

....

Q. And are you expected to perform those duties during your lunch break if you’re asked to do them?

A. If it’s an emergency, yes. I mean if it’s an emergency tone **or if it’s not even so much an emergency tone but if there’s some pressing issue in a housing unit that I’m responsible for that housing unit that day, then yes, I’m expected to go take care of it.**

Q. And do you believe you’d be free to say, “I’m not going to respond because I’m on my 20-minute lunch break”?

A. Not for some instances, no sir.

(Dulin depo., pp. 14-15 (emphasis added)). As a result, Sergeant Dulin takes his break in “different time groups, you know . . . Five minutes here, 10 minutes here . . .” (*Id.*, p. 16). Sergeant Dulin testified that he may receive as many as fifteen (15) calls during any given hour. (*Id.*, p. 11-12).

Also undisputed is the LFUCG’s requirement that Custody Employees may be required to run jail-related errands in connection with their meal breaks. Assistant Director Kammer does not deny that these Employees are required to deliver razors, for example, during the time they are outside the units for the alleged purpose of taking a meal break. (Kammer depo., p. 113). The Director of the DCC, Ron Bishop, also testified that he is personally aware that Custody Officers

obtain coffee for trustees and transport razors during their break time. (Bishop depo., p. 34). Director Bishop acknowledged that a Custody Officer who is asked to perform an errand while walking toward the ODR has not been completely relieved of his or her duties “perhaps in the truest sense of the word”. (*Id.*, p. 36). Former Director Brown also acknowledged that, during his tenure, he observed Employees who were on “break” transporting mail, razors, cleaning supplies, jumpsuits, hygiene packs, laundry, trash, clippers, and other items. (Brown depo., p. 31). Captain Hall and Captain Kelly, neither of whom are Plaintiffs, admitted that “occasionally it does happen” that Custody Employees perform jail duties during breaks. (Hall depo., p. 100; M. Kelly depo., p. 45).

These admissions from the LFUCG’s administrators and “commanders” are repeated by Custody Officers and Corporals who have not joined this lawsuit as Plaintiffs. Corporal Tonya Roberts, who has worked various shifts in Custody, testified that “it is hard to take a break, you know, 10 minutes and then 20 and then 10, you know, and you are required to kind of eat on the run and if something happens you’re required to respond . . .” (Roberts depo., p. 12). She also testified that she has been asked to deliver items and perform other duties during her meal breaks. (*Id.*, p. 54). Roberts further explained that she chose not to join this action because the LFUCG’s requirement of eating “on the run” is “**something that everybody’s made aware of in training**. When you first get your job there everybody’s made aware of that.” (*Id.*, p. 12 (emphasis added)). Custody Corporal Roy Compston testified that “[s]ometimes if you’re out on a 20 minute break you might run back and get an inmate a jumpsuit or shower shoes, you know, something that the rover didn’t get”. (Compston depo., p. 13). He must obtain those items in order to operate his housing unit in an efficient manner, and because the rovers are often so busy giving breaks that “sometimes they’ll get your stuff you need and sometimes they won’t”. (*Id.*, pp. 14-15).

Assistant Director Kammer defends the LFUCG's practice of requiring Custody Employees to perform these errands during their breaks by insisting they are permitted to suspend their break time while they perform those tasks. Indeed, Assistant Director Kammer claims that, if any Employees are performing errands during their meal breaks, "then that's a problem they have with not communicating with their commanders." (Kammer depo., p. 112). The Assistant Director's justification for this practice, however, is irreconcilable with his testimony that a Custody Officer's break begins when he or she is relieved from the housing unit, and ends when he or she returns to the unit. (1/3/07 Tr., p. 121 (Kammer testimony)). As a matter of undisputed fact, these Employees are required to record the times of departure from the unit and return to the unit as their "break time". (Hill depo., pp. 55-56 (a Custody Officer must indicate on the break sheet that they began their break "when they were once relieved and away from their work station" because that is when "you're essentially on break"))).

C. The LFUCG's "Meal Break" Policies and Practices for Intake Employees

"The intake area is the primary place where the processing [of] new arrestees into the facility" takes place. (1/3/07 Tr., p. 38 (Kammer testimony)). The area includes various "stations", such as a triage desk and a property room. Some Intake Employees work in "rover-like" positions, and are assigned by the commander to work a variety of stations "based on the need of what's going on in the intake area at the time". (Kammer depo., pp. 249-250). Although a "rover" may not necessarily "relieve" an Intake Employee for a twenty-minute meal break, Assistant Director Kammer confirmed that certain positions in the area, such as the triage station, must be staffed at all times. (*Id.*, p. 250). Major Capillo, who is not a Plaintiff, characterized the Intake area as particularly volatile:

. . . That is where we have the highest officer-to-inmate ratio because, basically, anyone who walks in the back door we have to deal with and we don't know anything about them. There are people who are going to be there for eight hours. There are people who are going to be there for two hours. There are going to be people in there who are coming down from drugs. There are people who are going to be coming up from drugs. There are going to be people coming in who have got medical conditions, who have got mental health conditions, all of those things. So we have the highest - that's the most volatile group and the highest numbers of officers for the group.

(Capillo depo., p. 53).

1. *Intake Employees are required to respond to tones, signals, and "combatives" during their twenty-minute meal break*

As a matter of undisputed fact, Intake Employees must respond to tones indicating security problems during their meal periods. (Kammer depo., p. 126). (*See also* Hill depo., p. 17 (Intake Employees attempting to take meal breaks away from their work stations must respond to incidents that occur in the Intake area); Taylor depo., p. 25 (as an Intake Sergeant, he must respond to signals or codes in the Intake area even if he is attempting to take a meal break)).

2. *Intake Employees are required to respond to radio calls, telephone calls, and other interruptions during meal breaks*

Assistant Director Kammer has admitted that Intake Employees, like Custody Employees, are required to carry - and answer - their radios even while attempting to take a meal break. (Kammer depo., p. 126). Such work-related interruptions are common. Tonya Roberts, who is not a Plaintiff and who worked in Intake for over a year, testified that "[i]n intake if something was to happen that they needed my assistance with I would have to go right then"; she was not troubled by those interruptions, however, because she received a total of forty (40) minutes of so-called break time that was, in her words, "broken up". (Roberts depo., pp. 59-60). John Taylor, who is not a Plaintiff and who works as an Intake Sergeant, testified that he usually eats his meal inside the Intake

area, sometimes at his desk. (Taylor depo., p. 36). While doing so, he answers his telephone, responds to questions from co-workers, completes paperwork, and types on his computer. (*Id.*, p. 37). He admitted that it is the “exception to the rule” for an Intake Employee to eat in the ODR. (*Id.*, p. 47). The telephone “rings pretty constant” in the Intake area, and an Intake Employee taking a meal break in that area might answer two or three calls during a single twenty-minute “break”. (*Id.*, p. 69). Although Sergeant Taylor claimed that it is “permissible” for an Intake Employee who is interrupted in that manner during a meal break to ask “for five additional minutes”, he clarified that such a request could not be granted “[i]f we had a high volume of arrests coming in” or “something was taking place in intake that would prohibit that”. (*Id.*, p. 70).

D. The LFUCG’s “Meal Break” Policies and Practices for Master Control Employees

The Master Control/Lobby area differs from the Custody and Intake areas insofar as it is located on the “upper level” of the DCC facility. (1/3/07 Tr., p. 42 (Kammer testimony)). (*See also* Site Map, Exhibit C). Using computers and monitors, Master Control observes the entire facility and is “basically the security and operations center”. (*Id.*). This area is also responsible for the Lobby, which is staffed by two (2) Employees. (Johnson depo., p. 11). Master Control is a glassed-in area, and includes three (3) computer stations. (*Id.*). At least two (2) of those stations must be “manned” at all times. (*Id.*). When a Master Control Employee manning one of those stations attempts to take a break, therefore, an Employee working in the Lobby area must relieve him or her. (*Id.*, p. 28). If a tone sounds for a Custody housing unit, Master Control Employees remotely operate the unit until the housing officer is confirmed to have regained control. (*Id.*, p. 42-43). Master Control also supervises the public’s visitation with inmates. (*Id.*, p. 44). Lieutenant Johnson characterizes Master Control as a “very hectic” job, requiring considerable “multi-tasking”. (1/4/07 Tr., p. 17; Johnson

depo., p. 60). She testified that, in Master Control, “you never know when something is going to jump off”. (*Id.*, p. 75).

The LFUCG’s policy with regard to “meal breaks” in Master Control is consistent with its policy for Custody and Intake: Employees continue to perform work duties and remain in a constant state of vigilance throughout some or all of their twenty-minute “breaks.” Non-Plaintiff and Master Control Lieutenant Johnson testified that she typically takes her “breaks” in the Master Control area itself. (Johnson depo., p. 32). She does this so that she will be “comfortable” and because “I usually have my busy work that I do.” (*Id.*, p. 67). She testified:

Q. . . . And during your meal breaks, do you continue to monitor master control and see what’s going on, answer the phones, things of that nature?

A. Yes, sir.

Q. Okay. Does anything really change during your 20 minute meal period, change from what your regular duties are, other than you are eating while you are doing them?

A. Nothing really changes.

Q. Okay. You are just eating while you’re working?

A. Just - there is just - is a confined area. Master control is just a confined area.

Q. . . . What do your officers do for their 10 minute and 20 minute breaks? Essentially the same thing that you do?

A. Basically, the same thing.

(Johnson depo., p. 34 (emphasis added)).

Lieutenant Johnson also explained that Master Control Employees who are attempting to take a “break” may be needed to handle tones:

Q. . . . Has that ever happened over there, where somebody is eating their meal

during their 20 minute meal period in master control and something happens, like a tone? Have you ever seen that happen?

A. What did those officers do?

A. They could get on station three.

Q. And what does that mean?

A. There's another - we have three stations in master control, and if they felt that they wanted to assist in that, they could. We would not - I would not stop them from doing that.

Q. Okay. Have you ever been in a situation where something in master control happened and someone was eating their meal in master control and you told them to go do something, like answer that phone or look at that video, and let so-and-so out of AA?

A. Yes, I have.

(*Id.*, p. 39 (emphasis added)). When asked about her own practices, Lieutenant Johnson admitted that, if a tone occurs while she is eating, she “would get up to see exactly what it is and what’s showing - what they have got showing on the monitor. If it is something that’s bad enough, I will get on another station to start assisting with opening doors.” (*Id.*, p. 61). In light of the manner in which she and the Employees whom she allegedly supervises spend their meal breaks, it is unsurprising that Lieutenant Johnson believes that the term “lunch on the run” applies to Master Control, since “you get your lunch when you can. You just eat and keep on going.” (*Id.*, p. 61).

Lieutenant Johnson did testify that Master Control Employees are free to eat their meals in the ODR, where they would obviously be unable to assist Master Control in responding to tones during their break time. Even assuming that Master Control Employees are able to leave their work stations during their twenty-minute meal breaks, however, their trip to and from the ODR would consume at least six (6) minutes of their break time. (Johnson depo., p. 65-66). In light of that

distance, it is unsurprising that Employees like Lieutenant Johnson find it more “comfortable” to eat at their work stations instead of attempting to eat a meal in fourteen (14) minutes.¹⁹

E. The LFUCG’s Meal Break Policies in Other Areas of the DCC

Significantly, the meal periods provided to Employees who are not assigned to Custody, Intake, Master Control, or Training operate very differently. Employees working in the Classifications and Programs Bureau, which assigns new inmates to housing units and operates on an eight-hour shift, eat meals that are subject to only infrequent interruptions. (1/4/07 Tr., p. 201 (testimony of Lisa Farmer). Corporal Lisa Farmer, who is not a Plaintiff and who works in Classification, testified that she is free from her work responsibilities during her meal time. (*Id.*, p. 201). She is not required to respond to tones, whether during her meal break or otherwise. (*Id.*, p. 202). Similarly, Employees in the Auxiliary Bureau, which is responsible for transporting inmates to and supervising inmates between court appearances, are not required to respond to tones at the facility or to perform work duties during their “breaks.” (1/4/07 Tr., p. 41 (testimony of Jason Southworth)). Sergeant Jason Southworth, who is not a Plaintiff, testified that Auxiliary Employees may take their meal breaks at any time they wish, and that they sometimes take more than the three allotted breaks during a particular shift. (*Id.*, p. 42). “If we have down time and there is not a court going on, we usually tell our officers go ahead and take a break. Go outside and smoke a cigarette

¹⁹ She further claimed that a Master Control Employee who is eating in the ODR has the “discretion” - but not the obligation - to respond to a tone sounding in the Custody area. Lieutenant Johnson’s view of the policy, however, was directly contradicted by Major Capillo, an alleged “administrator” who outranks Lieutenant Johnson. Major Capillo made clear that “if an officer is downstairs and on break, I would expect that they would go ahead and respond”. (Capillo depo., p. 57). Major Capillo could not recall a single occasion when he had observed a tone sound and an “available” officer fail to respond. (*Id.* at p. 58).

or do what you need to do, and they're free until court is resumed when we are downtown." (*Id.*, p. 43). They are sometimes permitted to take up to forty-five (45) minutes to an hour for their meals, and the administration keeps no record of the length of their "breaks". (*Id.*; Southworth depo. p. 10). Southworth also has experience in the Custody Bureau, and he explained the difference between the Custody Employees' meal breaks and the meal breaks enjoyed by Auxiliary Employees as follows:

Q. Well, for one thing, we [in Auxiliary] got to go outside the facility - well, we have plenty of time to go down and across the street and get food and take it back. Sometimes I'll be eating in the courthouse in Auxiliary Services; sometimes I'll be eating in the officers dining room. With custody, don't have time to take 20 minutes to go out, especially on third shift, to get something to eat, so I have to eat in the officers dining room. **In custody, I take a straight 20-minute lunch, where in Auxiliary Services I may have had an hour, depending on courts, where I could sit there and eat a nice lunch and take my time before I had to show up to another court. That's about the differences I see.**

Q. Are you telling me that when you worked in Auxiliary Services you actually had more time to eat than you do in custody?

A. Some occasions, depending on our case load for courts and everything. We may have a slow day, which I was able - myself and my officers were able to - my officers and I were able to take a longer break.

(*Id.*, p. 33-34 (emphasis added)). Similarly, Employees in the Community Alternatives Program ("CAP") are not required to respond to tones or to sign break sheets during their meal breaks. (1/3/07 Tr., p. 223 (testimony of Sandra Beasley)).

Astonishingly, the meal periods described by the above-quoted Employees are paid. These areas are classified by the LFUCG as operating on a "lunch on the run" status, which means that they remain "on the clock while they're doing lunch." (1/3/07 Tr., p. 65, 68 (Kammer testimony)). Meanwhile, Employees who are required to spend their "break" time responding to tones, acting as the facility's "response team", signing "break sheets" verifying the length of their breaks, and

remaining at all times within the facility (or, if they wish to sacrifice up to six (6) minutes of break time, on the facility's grounds), are not paid for their twenty-minute "meal breaks." This inconsistency alone suggests that the unpaid meal breaks allotted to Custody, Intake, and Master Control Employees are not bona fide.

ARGUMENT

A. Standard for Summary Judgment

The issue presented by the Plaintiffs' Motion is whether the twenty-minute "breaks" allotted to the Plaintiffs who are (or who have been) employed in the Custody, Intake, and Master Control areas are compensable work time or bona fide, non-compensable "meal breaks." If the meal periods are not bona fide, then the Plaintiffs are entitled to compensation (including overtime compensation) for them.

Having chosen careers in the inherently dangerous field of community corrections, the Plaintiffs do not challenge the LFUCG's need for Employees to remain constantly vigilant of and responsive to security and safety problems, even during their "breaks." The question presented by this lawsuit, therefore, is not whether the LFUCG may properly impose restrictions and obligations upon the Employees' meal breaks. The question is whether those restrictions and obligations permit the LFUCG to withhold compensation for those twenty-minute time periods.

Under Fed. R. Civ. P. 56(c), summary judgment is proper if the record reflects no genuine issue of material fact, and that the moving party is entitled to judgment as a matter of law. *Id.* Although the burden of establishing a lack of a genuine issue of material fact is upon the movant, the non-movant must respond to such a showing by pointing to evidence in the record upon which a reasonable jury might find in its favor. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

The genuine issue must be “material”; in other words, it must involve facts that might affect the outcome of the suit under the governing law. *Id.*

B. Department of Labor Regulations

Although not imposing a standard from which this Court has no discretion to deviate, the Department of Labor (“DOL”) has promulgated a regulation defining bona fide meal periods for which no compensation is owed:

Bona fide meal periods are not worktime. Bona fide meal periods do not include coffee breaks or time for snacks. These are rest periods. **The employee must be completely relieved from duty for the purposes of eating regular meals. Ordinarily 30 minutes or more is long enough for a bona fide meal period. A shorter period may be long enough under special conditions. The employee is not relieved if he is required to perform any duties, whether active or inactive, while eating.** For example, an office employee who is required to eat at his desk or a factory worker who is required to be at his machine is working while eating

29 C.F.R. § 785.19(a) (citations omitted) (emphasis added). The regulation further provides that an employee need not be permitted to leave the premises in order for a meal period to qualify as bona fide, so long as “he is otherwise **completely freed** from duties during the meal period.” *Id.* (emphasis added).

The DOL has also defined “rest periods” as to which an employer may not properly withhold compensation:

Rest periods of short duration, **running from 5 minutes to about 20 minutes**, are common in industry. They promote the efficiency of the employee and are customarily paid for as working time. **They must be counted as hours worked.** Compensable time of rest periods may not be offset against other working time such as compensable waiting time or on-call time.

29 C.F.R. § 785.18 (emphasis added).

These administrative interpretations of the FLSA are “entitled to respect” by the Court. *Hill*

v. United States, 751 F.2d 810, 813 (6th Cir. 1984) (citing *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)). The regulations “constitute a body of experience and informed judgment to which courts and litigants may resort for guidance.” *Skidmore*, 323 U.S. at 140.

C. The Plaintiffs Assigned to Custody, Intake, and Master Control Remain on Duty Throughout Their Meal Breaks, Which Are Spent for the Predominant Benefit of the LFUCG, and So Are Entitled to Compensation for Those Twenty-Minute Time Periods

1. *The “predominant benefit” standard*

The United States Court of Appeals for the Sixth Circuit interprets the FLSA and its regulations as defining a bona fide meal period as one during which “the employee can pursue his or her mealtime adequately and comfortably, is not engaged in the performance of any substantial duties, **and** does not spend time predominantly for the employer’s benefit”. *Hill*, 751 F.2d at 814-15 (emphasis added).

Applying that standard, the *Hill* Court held that a mail carrier was not entitled to compensation for his thirty-minute meal period based on the fact that, during that time, he remained accountable for mail items which he carried with him. The mail carrier was “not required to exercise constant vigilance”, but was instead able to “eat comfortably without having to check his pockets regularly or be otherwise distracted from his meal.” *Id.* at 815. He was not required to accept mail from or sell stamps to customers who happened to interrupt him while he ate, and there was no affirmative evidence that any such interruptions had ever occurred. While those facts obviously required a finding that the mail carrier’s meal period was non-compensable, the *Hill* Court specifically noted the Supreme Court’s holding that even “inactive duty may be compensable.” *Id.* at 813 (citing *Skidmore*, 323 U.S. at 140).

The *Hill* Court also cited (and distinguished) an earlier Sixth Circuit case, *F.W. Stock & Sons*

v. Thompson, 194 F.2d 493 (6th Cir. 1952). There, meal periods were found to be compensable where mill workers “were required by the nature of their work and their employer to pay ‘constant attention’ to their machinery and because ‘their lunch periods were often interrupted by emergencies requiring immediate attention.’” *Id.* at 496. The *Thompson* Court adopted the “predominant benefit” standard for determining the compensability of a meal period, holding:

As pointed out by the District Judge in his opinion, the duties of the millers and oilers and the flour and feed packers were all related to the operation of the mill machinery, which was not stopped at any time during a twenty-four-hour period except as the result of a serious break-down. Frequent chokeups in the operation of the machinery required constant attention; **and all these employees were required to stand by on the alert. Their lunch periods were often interrupted by emergencies requiring immediate attention.** Upon the whole record, we think it has been shown that all these employees were honestly of the opinion that their superior did not desire them to leave the premises during lunch periods, but expected them to eat lunches in the immediate vicinity of their work and to resume work as soon as they had finished eating. At least they pursued this course. Many testified that they were ordered by their superiors to remain on the company premises during their entire shifts.

So it seems to have been proven adequately that the employees did not have a free lunch period during which they could serve their own interest and do as they pleased, but that their duties and responsibilities to their employer were continued during the lunch periods. As the District Judge well said during a colloquy with counsel: “A man who has to oil machinery with a sandwich in his hand is not having a free lunch period.” He made the further appropriate comment that a man who has to have his eyes glued upon the watching of grain coming down from floors above and be careful that there is no stoppage during the entire eight hours of his shift, including his lunch period, does not have a free lunch period.

Thompson, 194 F.2d at 496 (emphasis added).²⁰

²⁰ Significantly, *Thompson* recognizes that the employees’ perception of the employer’s policy may be as important as the policy itself. The *Thompson* Court noted that the employees “were honestly of the opinion” that they were required to spend their meal periods on the premises and in the immediate vicinity of their work. *Id.* at p. 496. “At least they pursued this course.” *Id.*

Similarly, in this case, the Employees’ perceptions of the LFUCG’s meal break policy must be noted. For example, Intake Lieutenant Letrease Cunningham (who is a Plaintiff in this

The Sixth Circuit continues to adhere to the “predominant benefit” standard for determining whether meal periods are bona fide and, therefore, properly non-compensable. That standard was applied by a District Court within this Circuit in *Rushing v. Shelby County Government*, 8 F.Supp.2d 737 (W.D. Tenn. 1997), a case remarkably similar to this one. In *Rushing*, a group of sergeants, lieutenants, and captains in a county correctional center were provided with purported twenty-minute meal periods. Like the LFUCG, the county did not provide those meals according to any regular schedule, and required the employees to both remain in the facility and to respond to radios and emergency “codes” during their meal breaks. The Court found that the “restrictions on plaintiffs’ freedom during meals inured to the benefit of the defendants and resulted in plaintiffs performing substantial duties for the defendants during meals.” *Id.* at 746.

It is important to note that, in this case, the Plaintiffs do not propose that the hypothetical possibility of infrequent interruptions renders their meal periods compensable. Instead, Courts applying the predominant benefit standard distinguish between bona fide meal periods, which may be subject to the possibility of a stray radio call, and meal periods which are so restricted that the employer obtains - for free - services that, but for availability of the on-break employees, it would

case), testified that she eats her meal in the Intake area after picking up food in the ODR, and that she is not able to inform telephone callers that she is on break so they should call back at another time. (August 14, 2007, deposition of Letrease Cunningham (“Cunningham depo.”), p. 37). Intake Captain Suzanne Whittlesey feels “compelled” to answer the telephone during her meal breaks. (August 25, 2007, deposition of Suzanne Whittlesey (“Whittlesey depo.”), p. 62). Custody Lieutenant Antonio Deleon testified that he believes that he must answer his radio during his meal breaks; if he does not, he will be paged through the overhead system and his “supervisor” will “be over there saying, why isn’t he responding to that?” (August 16, 2007, deposition of Antonio Deleon, p. 97). While the Plaintiffs obviously do not rely upon their own testimony to establish the absence of a disputed issue of material fact, this testimony is referenced as an example of the Employees’ perceptions of the restrictions imposed upon their meal time. *Thompson* makes clear that, in addition to the employer’s stated policies, such perceptions may be considered in determining the compensability of a meal period.

have to obtain from other paid workers.

In *Glenn L. Martin Nebraska Co. v. Culkin*, 197 F.2d 981 (8th Cir. 1952), for example, security guards and firemen employed by an airplane plant received thirty (30) minutes for their meals. The guards had “the general duty of maintaining order and exercising constant vigilance for the security of the plant.” *Id.* at 983. There, as here, the guards worked three overlapping shifts and were relieved from their posts by rovers in order to take their “breaks.” The employer did not compensate the guards for the “overlap time”, but argued that the time was offset by the guards’ paid meal breaks. Firemen working for the plant were subject to the same rules. The employer argued that, although interruptions to the guards’ and firemen’s meal breaks were possible, they only rarely occurred. Because the regular job duties assigned to the guards and firemen were similar to the duties they continued to bear during their meal breaks, however, the infrequency of actual interruptions was not determinative of the compensability of their meal breaks:

[T]he question was not so much whether the guards and firemen were actually regularly called upon to put down overt acts of violence, sabotage, disturbances, or to put out fires during the 30-minute period, as it was whether they were performing their regular duties during that period and were then substantially performing the duties assigned to them by their employer and were not free to follow pursuits of a purely private nature. *Armour & Co. v. Wantock*, 323 U.S. 126, 65 S.Ct. 165, 89 L.Ed. 118; *Skidmore v. Swift & Co.*, 323 U.S. 134, 65 S.Ct. 161, 89 L.Ed. 124. As the Supreme Court said in *Skidmore v. Swift & Co.*:

“For the reasons set forth in the *Armour* case, 323 U.S. 126, 65 S.Ct. 165 (89 L.Ed. 118) decided herewith we hold that no principle of law found either in the statute or in Court decisions precludes waiting time from also being working time. Facts may show that the employee was engaged to wait, or they may show that he waited to be engaged. His compensation may cover both waiting and task, or only performance of the task itself.”

Although the guards were constantly obliged to prevent disturbances by their presence and vigilance, and the firemen were likewise obligated to be constantly

vigilant to prevent fires, yet **both the guards and the firemen served to a considerable extent in a stand-by capacity. In the latter respect both were engaged in their regular duties during the 30-minute period as effectively as if they were putting down disturbances or putting out fires.** And if, as the trial court found, these plaintiffs were engaged in the principal activity of their regular work during the 30-minute period, they were entitled to recover compensation therefor

Id. at 984-85 (emphasis added).

The principles established by the Supreme Court in *Armour* and *Skidmore*, and applied in *Culkin*, were more recently considered in *Reich v. Southern New England Telecommunications Corp.*, 121 F.3d 58 (2nd Cir. 1997), where the Secretary of Labor challenged an employer's failure to compensate workers for 30-minute lunch breaks. The workers performed tasks such as installing and replacing telephone poles, cables, and telephones. They spent their workdays at various sites. Although they received a full thirty minutes in which to eat their meals, they were required to remain at the work site during that time in order to secure the area and prevent possible harm to the public. Despite the security and safety provided by the workers during their meal times, the employer argued that the meal times were predominantly for the workers' benefit "because during their lunch break the workers' safety and security roles are wholly passive, leaving them free to eat their meal." *Id.* at 65. The Court rejected the employer's interpretation of the "predominant benefit" test:

This argument, whatever its superficial appeal, misses the point. During their lunch break, the workers are restricted to the site for the purpose of performing valuable security service for the company. **The importance, indeed indispensability, of these services is evidenced by the mandatory nature of the restrictions that surround the workers' lunch break.** To be sure, the workers perform different services during meal breaks than throughout the rest of the day, but the workers' on-site presence is solely for the benefit of the employer and, **in their absence, the company would have to pay others to perform those same services. By not compensating these workers, [the employer] is effectively receiving free labor.**

Id. at 65 (emphasis added). *See also Loveday v. Camel Manufacturing Co.*, 326 F.Supp. 1388 (D.C.

Tenn. 1970) (night watchman remained on duty, and spent his time predominantly for the benefit of his employer, even during his thirty minute meal period).

Again, the purpose of a bona fide meal period is to relieve the employee from duty “for the purpose of eating regular meals” for a sufficient amount of time to permit the employee to “pursue his or her meal time adequately and comfortably”. See 29 C.F.R. § 785.19(a); *Hill*, 751 F.2d at 814-15. For the reasons set forth below, and as a matter of undisputed fact and law, the “meal periods” provided to Custody, Intake, and Master Control Employees fall far short of those standards.

2. *The meal breaks provided to Custody Plaintiffs are not bona fide, and are spent to the predominant benefit of the LFUCG*

Applying the Sixth Circuit’s seminal meal break cases, the twenty-minute “breaks” allotted to Custody Plaintiffs are far more analogous to *Thompson* than to *Hill*. During their meal breaks, these Plaintiffs remain responsible for much more than the mail passively carried by the plaintiff in *Hill*. According to Major Hill, a Custody Employee’s failure to carry out the duty of responding to tones during meal breaks could result in “a potential loss of life”. Indeed, the ongoing responsibility to respond to and resolve emergencies is so imperative that Major Capillo admitted that he would not even be willing to work in a facility in which on-break Employees were not required to respond to tones. Because of that responsibility, former acting Director Tony Dehner believes that these Plaintiffs are “on duty” from their arrival at the facility until their departure. Like the *Thompson* mill workers, Custody Employees must keep their “eyes glued upon the watching” - not of grain, but of the ever-changing status in the security and safety of the DCC and its occupants. Like those mill workers, these Employees perform duties within DCC areas that operate around-the-clock. They cannot leave the facility for their meals. There can be no “stoppage” in the security they provide to

the LFUCG, and so “all these employees [are] required to stand by on the alert” and to address problems requiring their “immediate attention”. *Thompson*, 194 F.2d at 496.

As a matter of undisputed fact, Plaintiffs assigned to the Custody area, regardless of rank, must respond to tones if they are “available” - a term which the LFUCG defines as including Plaintiffs who are attempting to take their twenty-minute “breaks”. The LFUCG is benefitted in exactly the same manner as the detention facility in *Rushing*: by requiring Custody Employees to respond to tones and to telephone, radio, and overhead calls during their meal breaks, the LFUCG is assured of the constant availability of on-site, trained Employees to address the potentially life-threatening incidents which are unavoidable in a facility housing hundreds of inmates. In Captain Carter’s words, the LFUCG’s meal break policies provide it with a twenty-four hour “response team.” (Carter depo., p. 44).

The requirement that these Plaintiffs respond to tones during their meal breaks makes their duties during their “break” time indistinguishable from their duties during their paid time. At either time, the Plaintiffs are required to “stand by” and remain on guard. At either time, they are charged with carrying out the DCC’s stated mission - providing for the safety and security of inmates and staff. The Custody Plaintiffs perform the “duties assigned to them by their employer” during their meal periods. *Culkin*, 197 F.2d at 984-85. They maintain the type of “constant vigilance” exercised by the *Culkin* plaintiffs during their regular work time and their “break” time. Like the *Reich* employer, the LFUCG “would have to pay others to perform those same services” if these Employees were no longer required to respond to tones, and “[b]y not compensating these workers, [the LFUCG] is effectively receiving free labor.” *Reich*, 121 F.3d at 65. This reality has been specifically acknowledged by Director Bishop, who admitted that the DCC could not operate as

safely or effectively with a policy that permitted Employees to ignore tones during their meal breaks. Major Hill admitted that, in the absence of the existing rule, “no one would be there to show up to support or to basically manage or control whatever the disturbance or emergency was.” (Hill depo., p. 67). Captain Carter similarly testified that the jail simply could not operate unless Employees were required to respond because “[w]e don’t have the staff” and “those are the only staff that can respond.” (Carter depo., p. 18-19).

Because Custody Plaintiffs must remain poised to respond to inmate and staff problems throughout their shifts, their “meal breaks” benefit the LFUCG in a manner which is not only “predominant”, but is also indispensable to the facility’s safety and security. In addition to their obligation to respond to tones, however, no disputed issue of fact exists as to the requirement that Custody Officers perform additional duties during their meal breaks. They must carry and respond to radios. Commanders must answer inquiries from other Employees and telephone calls. Custody Officers perform work errands during the very time period identified by Assistant Director Kammer as constituting their “breaks” (the time after they are relieved from their posts and the time at which they return). In light of these additional restrictions, the compensability of the Custody Plaintiffs’ meal breaks is even more obvious than in *Reich* and *Culkin*, where the on-break Plaintiffs remained only “passively” on-duty.

Moreover, these Employees are not permitted to leave the facility during their meal periods, except to walk on the facility’s grounds - an option which would require them to sacrifice at least six (6) minutes of their already-scarce break time. This undisputed fact alone violates § 785.19(a), which states that an employee who is not permitted to leave the premises during a meal break must be “otherwise completely freed from duties” in order for that meal break to qualify as bona fide and

non-compensable. Director Bishop testified that the requirement that the Employees remain on the premises exists specifically “so that they are available should they be needed.” (Bishop depo., p. 59). “The importance, indeed indispensability” of the services provided to the LFUCG by the Custody Plaintiffs during their “meal breaks” is “evidenced by the mandatory nature of the restrictions that surround the workers’ lunch break.” *Reich*, 121 F.3d at 65. Inexplicably, none of these restrictions are imposed upon DCC Employees who enjoy so-called “lunch-on-the-run” status and receive payment for their meal time. These twenty-minute “meal breaks” allotted to the Custody Plaintiffs constitute work time, and must be compensated.

3. *The meal breaks provided to Intake Plaintiffs are not bona fide, and are spent for the predominant benefit of the LFUCG*

The twenty-minute meal breaks purportedly provided to Plaintiffs who are or who have been assigned to the Intake area are subject to substantially the same restrictions which are imposed upon the breaks provided to Custody Employees. Unlike the DCC Employees who are paid for their “lunch-on-the-run” meal time, Intake Employees who attempt to take their meal breaks outside of their work area must return to that area to respond to codes, signals, pages, combative arrivals, or other problems. This restriction benefits the LFUCG in the same manner and to the same degree as the LFUCG policy that Custody Employees maintain constant readiness to respond to inmate or staff incidents during their breaks. If anything, the exceptionally volatile job of admitting new inmates into the jail (Capillo depo., p. 53) makes altercations in the Intake area particularly unavoidable and dangerous.

The requirement that these Employees return to the Intake area to address such problems assumes, of course, that they are able to leave the area at all. John Taylor testified that it is the

“exception to the rule” for an Intake Employee to eat in the ODR. (Taylor depo., p. 47). He admitted that the telephone rings constantly in that area, and that he answers such interruptions while eating at his desk. (*Id.*, p. 69). Like Custody, the Intake area demands the continuation of work duties throughout an Employee’s meal period. The LFUCG receives a benefit from on-break Intake Employees for which it would have to pay if it permitted them to ignore tones, altercations, and telephone calls during their meal periods. Like the Custody Employees, therefore, Intake Employees are entitled to payment for their meal “breaks.”

4. *The meal breaks provided to Master Control Plaintiffs are not bona fide, and are spent for the predominant benefit of the LFUCG*

Although Master Control is located on the upper level of the facility, its physical distance from inmate-populated areas does not permit Master Control Employees to take twenty-minute meal breaks during which they are freed from their work obligations. Lieutenant Johnson testified that “[n]othing really changes” in terms of her duties or tasks during her meal period, except that she performs those duties while simultaneously eating. (Johnson depo., p. 34). She admitted that others working in Master Control with her do “[b]asically the same thing” during their own breaks. (*Id.*). She also admitted that she has individually directed other Master Control Employees to answer the telephone, review videotape, or remotely open secure doors during those Employees’ meal breaks. (*Id.*, p. 39). Master Control Employees must perform work duties when a tone sounds anywhere within the facility. An extra computer station exists for the purpose of permitting an additional Employee to open and close doors during such an event. Lieutenant Johnson testified that she “would not stop” a Master Control Employee on “break” from assuming that third station to assist with a code or a signal, and that she has directed on-break Employees to perform such duties. Even

if a Master Control Employee is theoretically entitled to leave the Master Control area during his or her meal break, Lieutenant Johnson admitted that the Employee must spend as much as six (6) minutes of his or her brief twenty-minute break simply traveling to and from a downstairs break location. (Johnson depo., p. 65-66 (testifying that two to three minutes are required to travel from the upstairs Master Control area to the downstairs Shift Command)).

Further, and despite Lieutenant Johnson's attempt to characterize a Master Control Employee's obligation to respond to tones while in the ODR as discretionary, the LFUCG's "first line of administration" has testified that the obligation is mandatory. (Capillo depo., p. 57 ("if an officer is downstairs and on break, I would expect that they would go ahead and respond"). These Employees cannot "serve their own interests and do as they please" during their meal breaks. *Thompson*, 194 F.2d at 496. Even during meal breaks, therefore, Master Control Employees continue to provide the same constant vigilance expected from them during non-break time, and the LFUCG must compensate them for that service just as it compensates the Employees who enjoy "lunch-on-the-run" status.

D. The Twenty-Minute "Meal Breaks" Are Too Short to Qualify as Bona Fide Compensable Meal Periods

1. *Plaintiffs assigned to Custody, Master Control, and Intake do not have sufficient time in which to adequately and comfortably eat a meal*

Regardless of whether the LFUCG's admitted policy of requiring Employees who are assigned to Custody, Intake, and Master Control to respond to tones, to carry and respond to radios, to answer telephones, and to perform other work duties renders those Employees' meal breaks compensable, these Plaintiffs are entitled to compensation for an independent but equally compelling reason: the extremely abbreviated amount of time provided to these Employees for their "meal

breaks” will not allow those breaks to qualify as bona fide.

As noted above, the DOL’s regulations which serve as guidelines for this Court’s analysis state that a bona fide meal period (which may be treated as noncompensable by the employer) is “[o]rdinarily 30 minutes or more” 29 C.F.R. § 785.19(a). While a “shorter period may be long enough under special conditions”, the DOL classifies periods of five (5) to twenty (20) minutes as mere “rest periods”, which “must be counted as hours worked”. 29 C.F.R. § 785.18. As a matter of undisputed fact, Plaintiffs who are or who have been assigned to the Custody, Intake, and Master Control areas receive only twenty (20) minutes for their “meal breaks.” Even the Assistant Director, however, admits that this may not be a sufficient amount of time in which to eat a meal. (1/3/07 Tr., p. 158).²¹ The unpaid twenty-minute meal break exists not for the purpose of providing DCC Employees with time in which “the employee can pursue his or her mealtime adequately and comfortably”, *Hill*, 751 F.2d at 814, but simply to allow the DCC to operate 24-hour areas on shifts which overlap by twenty (20) minutes, and, even more importantly, to provide the DCC with an “unnamed response team” of trained Employees who can respond to security or medical incidents. (Carter depo., p. 44; Bishop depo., p. 59, Kammer depo., p. 171-72).

²¹ While acknowledging that some Plaintiffs simply cannot eat during their allotted break time, Assistant Director Kammer insisted: “But you’re getting your 20 minutes away - there’s the opportunity to get your 20 minutes away from your work post.” (1/3/07 Tr., p. 158). His view of a bona fide non-compensable meal break is echoed by the written Operational Order as to meal breaks in the Custody Bureau, which promises nothing more than twenty minutes “away from duty station”. (Exhibit B). Of course, *Hill* and § 785.19 require far more than the “opportunity to get your 20 minutes away from your work post” or from a “duty station.” Such an “opportunity”, assuming it materializes and is not repeatedly interrupted, is nothing more than a rest break during which an Employee must be compensated. To qualify as a bona fide meal break, the time away must be sufficient to permit the Employee to “adequately and comfortably” pursue his or her mealtime rather than performing substantial duties, and may not be time spent predominantly for the LFUCG’s benefit. *Hill*, 751 F.2d at 814-15.

In light of the LFUCG's admitted policy of requiring Custody, Intake, and Master Control Employees to respond to tones and other incidents while physically inside the facility, the Employees cannot be assured of an interruption-free meal break unless they attempt to eat outdoors.²² Such an attempt would require Intake and Custody Employees to devote no less than six (6) of their twenty "break" minutes to traveling to and from the only door through which they are permitted to exit the facility. (Johnson depo., p. 65-66). The same amount of time must be sacrificed by a Master Control Employee who chooses to spend his or her mealtime in the ODR and, therefore, away from his or her work station.²³ (*Id.*). In order to minimize the risk of interruptions, therefore, Custody, Master Control, and Intake Employees must reduce their meal breaks to as little as fourteen (14) minutes. Neither the regulations, nor any caselaw of which the Plaintiffs are aware, permit an employer to characterize such a brief amount of time as anything other than a compensable "rest period."

2. *The "break sheet" requirement deprives Custody Officers of a bona fide meal break*

The brevity of the meal period, and therefore the lack of its bona fide status, is particularly obvious as to Plaintiffs who work (or who have worked) as Custody Officers. Through its representative, Assistant Director Kammer, the LFUCG admits that Custody Officers must devote a portion of their twenty-minute meal "breaks" to the performance of an indisputably mandatory work duty: traveling to and from and signing the mandatory "break sheets". The DCC's Director confirmed that the break sheet must be signed by Custody Officers during each and every break, and

²² Even this decision, of course, would not relieve them of their duty to respond to radio communications, and would also require them to ignore the Director's statement that the DCC cannot operate as safely or effectively without their responsiveness during their "break" time.

²³ A Master Control Employee's effort to take an uninterrupted meal break in the ODR would require him or her to ignore Major Capillo's directive that "all available" Employees respond to codes or signals they may hear while in that location.

corrective action can - and has - been taken against Employees who fail to do so.

As a matter of undisputed fact, the twenty minutes allotted to the Custody Officers for their meal breaks begins to run when they are relieved from their units by another Employee, and it ends when they return to those units. (1/3/07 Tr., p. 121 (Kammer testimony)). The amount of time required in order for them to travel to the break sheet, and then from the break sheet to the place at which they wish to spend their remaining break time or back to their units, counts against their total break time. Even according to the more conservative of Assistant Director Kammer's two estimations, this mandatory task can require as much as four (4) minutes - leaving a Custody Officer with a "meal break" of only sixteen (16) minutes. This amount of time is nothing more than a rest period, and so must be counted as hours worked.

While § 785.19 recognizes that a bona fide meal period may be less than thirty (30) minutes under "special conditions", no justification may be offered in this case. The break sheet is not necessary in order for the LFUCG to confirm whether individual Employees have received their breaks. Two Majors, a Captain, and a Lieutenant, none of whom are Plaintiffs, have testified that such a confirmation may just as easily be obtained from the Custody Officers' Activity Reports. (D. Kelly depo., p. 23; Korb depo., p. 57; Capillo depo., p. 42; Morgerson depo., p. 77). Even Assistant Director Kammer admits that the Activity Reports provide evidence of the time at which an Officer began and ended a break. (1/3/07 Tr., p. 189). Of course, the break sheets do serve one important purpose: they guarantee that the Custody Officers assigned to secure housing units must leave those units when they are "relieved" by rovers, ensuring the availability of a trained "unnamed response

team” outside the units even when rovers are inside the units.²⁴

The time spent by Custody Officers traveling to the break sheet, signing the break sheet, and then traveling to their chosen break location or back to a housing unit cannot be characterized by the LFUCG as time during which the Plaintiffs are taking a bona fide meal break. An Employee is obviously not able to adequately and comfortably eat a meal while making a required walk from one point to another, nor are they able to “serve their own interest and do as they please[]” during that time. *Thompson*, 194 F.2d at 496.

Any doubt as to the compensability of required travel from one point within the workplace to another has been removed by the United States Supreme Court’s holding in *IBP, Inc. v. Alvarez*, 546 U.S. 21 (2005). There, production workers in a meat processing plant were required to don protective gear and gather needed tools in a company locker room prior to the starting time of their shift. The workers’ pay was based on the time spent actually cutting meat, so that “[p]ay begins with the first piece of meat and ends with the last piece of meat”. *Id.* at 31. The workers filed a class action to recover compensation for “preproduction and postproduction work”, including time spent walking between the locker room and the production floor before and after their assigned shifts. The employer argued that the walking time was “excluded from FLSA coverage” under the Portal-to-Portal Act. As part of its determination of whether that time was compensable, the Supreme Court provided a concise and helpful summary of its consistent definition of the term “work” since the enactment of the FLSA:

²⁴ The Court will note from the Site Map attached as Exhibit C that all of the break sheets are posted in a central area, which requires the LFUCG’s “response team” to congregate in a place where they will be readily available to any housing unit with an emergency. Clearly, the DCC had a work-related purpose in mind when it required the redundant break sheets to be signed in these locations.

Our early cases defined [work] broadly. In *Tennessee Coal, Iron & R. Co. v. Muscoda Local No., 123*, 321 U.S. 590, 64 S.Ct. 698, 8 L.Ed. 949 (1944), we held that time spent traveling from iron ore mine portals to underground working areas was compensable; relying on the remedial purposes of the statute and Webster’s Dictionary, we described “work or employment” as “physical or mental exertion (whether burdensome or not) controlled or required by the employer and pursued necessarily and primarily for the benefit of the employer and his business.” The same year in *Armour & Co. v. Wantock*, 323 U.S. 126, 65 S.Ct. 165, 89 L.Ed. 118 (1944), we clarified that “exertion” was not in fact necessary for an activity to constitute “work” under the FLSA. We pointed out that “an employer, if he chooses, may hire a man to do nothing, or to do nothing but wait for something to happen.” Two years later, in *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 66 S.Ct. 1187, 90 L.Ed. 1515 (1946), we defined “the statutory workweek” to “include all time during which an employee is necessarily required to be on the employer’s premises, on duty or at a prescribed workplace.” Accordingly, we held that the time necessarily spent by employees walking from time clocks near the factory entrance gate to their workstations must be treated as part of the workweek.

Alvarez, 546 U.S. at 25-26. The *Alvarez* Court then explained how, in response to the *Anderson* holding that the term “workweek” included the time spent walking from time clocks to workstations, Congress passed the Portal-to-Portal Act (“the Act”), which excluded from the FLSA the activities of walking, riding, or traveling to and from the actual place of performance of the employee’s principal activities. Importantly, however, the Act’s exclusion applies only to walking time that is preliminary or postliminary to the Employee’s principal activity; “the Portal-to-Portal Act does not purport to change this Court’s earlier descriptions of the terms ‘work’ and ‘workweek’, or to define the term ‘workday.’” *Id.* at 29. The Act’s inapplicability to the compensability of walking or traveling time during the workday was further acknowledged by the DOL, which promulgated a regulation shortly after the statute’s enactment. That regulation expressly states that the Act has no impact on the number of hours worked “within” a workday.²⁵ *Alvarez*, 546 U.S. at 28.

²⁵ The regulation states: “[T]o the extent that activities engaged in by an employee occur after the employee commences to perform the first principal activity on a particular workday, the provisions of [the Portal-to-Portal Act] have no application. 29 C.F.R. § 790.6(a). The DOL

In rejecting the employer's reliance on the Portal-to-Portal Act, the *Alvarez* Court considered Congress' intent in repudiating its pre-Act *Anderson* holding, and concluded:

. . . There is a critical difference between the walking at issue in *Anderson* and the walking at issue in this case. **In *Anderson*, the walking preceded the employees' principal activity; it occurred before the workday began. The relevant walking in this case occurs after the workday begins and before it ends**

Id. at 35 (emphasis added). Based upon the foregoing, and the relevant DOL regulations, the Supreme Court held:

. . . during a continuous workday, **any walking time that occurs after the beginning of the employee's first principal activity and before the end of the employee's last principal activity is excluded from the scope of that provision [of the Portal-to-Portal Act], and as a result is covered by the FLSA.**

Id. at 37 (emphasis added).²⁶

The rationale of *Alvarez* applies to tasks that must be performed before and after an Employee's meal break as well to tasks that must be performed before and after a shift. *See Garcia v. Tyson Foods, Inc.*, 474 F.Supp.2d 1240, 1247 n. 3 (D. Kan. 2007) (*Alvarez* overrules earlier caselaw holding that a task that takes "all of a few seconds and requires little or no concentration" is "properly considered not work at all"). Regardless of where or how Custody Officers wish to spend their (already brief) meal breaks, they must first travel from their housing units to a break sheet, and then either from the break sheet to the place where they wish to spend their break or back to their units. This work activity is akin to the time they must spend traveling from their pre-shift

further defines the term "workday" as including a rest or lunch period. § 790.6(b).

²⁶ Assistant Director Kammer, who is the LFUCG's designated Rule 30(b)(6) witness regarding meal breaks, testified that the walking time to and from the "break sheets" during the Employees' meal breaks is supposed to occur in the middle of the Employees' shifts, and so obviously after the beginning of the Employees' first principal activities and before the end of their last principal activities.

briefings to their units (or, using the language of *Alvarez*, 546 U.S. at 35, “walking between two different positions on an assembly line”), which even the LFUCG acknowledges as compensable.

In *Summers v. Howard University*, 127 F.Supp.2d 27 (D.C.C. 2000), the Court found that disputed issues of material fact prevented the entry of summary judgment to either party on FLSA claims by university security officers for overtime compensation for their “meal breaks”. Officers were, at least theoretically, permitted to leave campus during their breaks. However, and applying the predominant benefit test, the Court recognized that security officers wishing to take their breaks away from the university had to use their own break time to travel to their break destination and to check-in their weapons. The Court found that fact to “militate in favor of a finding of compensable work”. *Id.* at 35. Because the record did not show whether the plaintiffs actually exercised the option to leave campus for their breaks, the Court could not ascertain as a matter of undisputed fact “the degree to which plaintiffs’ presence on campus during their meal breaks inures to the defendant’s benefit.” *Id.* at 34. Here, however, there is no dispute about whether the Custody Officers must actually devote their own break time to traveling to and from and signing the break sheet. They must perform this duty no matter where they wish to spend their breaks. The Custody Officers’ travel time to and from the break sheet, and time spent signing the break sheet, is not optional. C&Cs have been issued to Officers who fail to comply with the break sheet “directive”. (Exhibit D). More importantly, there is no dispute that the Custody Officers’ presence within the facility during their breaks is required for the LFUCG’s predominant benefit; the DCC’s Director has admitted that their presence and availability is not only necessary for the safe and effective operation of the facility, but is also the reason underlying the LFUCG’s policy that these Employees may not leave the facility or its grounds during their break time. The time sacrificed by these

Plaintiffs traveling to and from the mandatory break sheets renders their meal breaks compensable.

CONCLUSION

The LFUCG's disregard for the bona fide status of the meal breaks provided to the Plaintiffs who are or who have been assigned to Custody, Intake, and Master Control is evidenced by its Assistant Director's admission that the breaks are unpaid in order to offset the twenty-minute "turnover" time between overlapping shifts. In other words, the LFUCG wants a twenty-minute overlap between the Custody, Intake, and Master Control shifts, but it does not wish to pay that time, so it labels a twenty-minute period during each shift as a "meal break" even though that time is insufficient for a meal and, as discussed above, the Employees must perform work. The LFUCG has apparently based its compliance with the FLSA on the assumption that meal breaks may be unpaid so long as an Employee is permitted to step away from his or her ordinarily assigned "work station." In reality, however, an on-break DCC Employee simply exchanges one work station for another. Custody Officers leave their housing units for "breaks" only to assume responsibility for tones that might occur anywhere within the facility and to answer radio calls. Custody commanders eat at their desks; even if they eat elsewhere, they must respond their radios, tones, and other interruptions. Intake Employees leave their work stations at their peril, since they may be recalled at any time to handle problems in that area; if they remain in the Intake area, they must answer the telephone and perform other duties. Master Control Employees cannot leave their work areas for the ODR without shortening their meal periods by six (6) minutes. If they do not go to the ODR, their duties while "on break" do not differ from their duties while they are not on break.

All of these restrictions are imposed upon Employees who, during "breaks", are not permitted to leave the facility's grounds and must remain in the same state of constant vigilance which they

are required to exercise during their workdays. Custody Officers are even more restricted: the LFUCG requires them to spend their breaks walking to and from and signing a document which has no apparent purpose other than guaranteeing that they leave their units during their breaks, so that the LFUCG is never without the “response team” needed to maintain the facility’s safety and security. Remarkably, none of these restrictions are placed upon DCC Employees in other areas, whose shifts last for eight (8) hours, who are paid for eight (8) hours, and who receive a bona fide meal break.

There are no genuine issues of material fact with regard to the above-described policies, since they have all been admitted by the DCC’s administrators and by Employees who are not participants in this lawsuit. There is no genuine issue of material fact with regard to the critically important benefit derived by the LFUCG from “on break” Employees, since even the current Director admits that the facility could not operate as safely without the current restrictions on the unpaid meal breaks. Based upon the reasons set forth above, therefore, the Plaintiffs respectfully request that the Court enter partial summary judgment holding that the twenty-minute “meal breaks” in the Custody, Intake, and Master Control areas are compensable.

Respectfully submitted,

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