JAMS ARBITRATION

ADAM HILL, *et al*,	)	
Claimants,	)	
v.	)	**JAMS Ref. No. 1410006042**
	)	
WACKENHUT SERVICES INTERNATIONAL,	)	
WACKENHUT SERVICES, INC., and	)	
WACKENHUT SERVICES, LLC,	)	
Respondents.	)	
	)	

INTERIM AWARD

Introduction

On December 6, 2011, certain of the Claimants herein filed, in the U. S. District Court for the District of Columbia, a twelve-count complaint against Respondents as well as Halliburton Corporation and Kellogg-Brown & Root, LLC ("KBR") (in several corporate forms) alleging that all defendants had deprived them of compensation to which they were entitled for their work as firefighters in Iraq and Afghanistan. On June 7, 2012, that Court granted Respondents' motion to compel arbitration. On September 20, 2012, Claimants submitted to the JAMS office in Washington, DC a ten-count "Class Action Complaint for Breach of Employment Agreement, Fraud and Related Claims" against Respondents. Thus began an intense arbitration battle that has raged on for nearly two years. The extensive arbitration proceedings are summarized in Part One hereof.

In Order No. 13, I decided, with the parties' consent, to divide the case into two parts, *i.e.,* (a) the individual claims of Claimants whose employment with Wackenhut[1] was governed entirely by employment agreements entered into prior to February 1, 2009, and (b) the purported class action claims of Claimants hired by Wackenhut (whether initially or following an earlier

[1] In this award, the term "Wackenhut" means all the Respondents herein.

period of employment) after that date.[2] For ease of reference, the first part just identified will be called "Part A" and the second part, "Part B." As a result of damages calculation difficulties identified during opening statements at the Part A hearing, I decided,[3] again with consent of the parties, that potentially wasteful expenditures of time and money could be avoided if, after the parties presented their evidence on both liability and damages, I first determined the liability issues and then afforded the parties an opportunity to brief (and possibly stipulate to) whatever damage determinations were required in light of the liability rulings.

Accordingly, this Interim Award disposes of all Part A liability issues. Order 16 entered today prescribes procedures for determination of Part A damages issues. Once those determinations are made, I will issue a Partial Final Award that will include this Interim Award and those damages determinations and will also issue an order prescribing initial proceedings for Part B of this arbitration.

Part One:
PRIOR PROCEEDINGS

The Part A Partial Final Award identified above will include a complete account of all significant prior proceedings. For purposes of this interim award, it is sufficient to note that Counts VIII, IX and X of Claimants' arbitration complaint were dismissed in Order No. 3, Count XI was dismissed in Order No. 6, Count II was dismissed in Orders No. 3 and 9,[4] and that Claimants have withdrawn Count VI. Left for determination in this award are Counts I, III, IV, V and VII.

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[2] Wackenhut contends that, whatever viability there may be (Wackenhut asserts there is none) in compensation claims of firefighters whose employment agreements incorporated the initial version of the "Compensation Data Sheet," the incorporation of a revised compensation sheet in agreements executed after February 1, 2009 absolutely precludes recovery for work performed after a firefighter executed such an agreement.

[3] Tr. 48-53.

[4] By way, I assume, of a request for reconsideration, Claimants have sought yet again to persuade me that Wackenhut is required to pay its firefighters overtime in accordance with Iraqi Labor Law. They have failed. In addition to the many other problems with their purported proof, Claimants have failed to provide any authority or justification for why this American employer should pay its American employees serving as wartime firefighters at American military bases in the same manner as a an Iraqi rug maker in Mosul is required by Iraq law to pay his Iraqi employees.

Part Two:

THE "FAILURE TO FILE A GRIEVANCE" DEFENSE

Wackenhut devotes three pages of its April 16, 2014 post-hearing brief to arguing that "Claimants' Failure to Follow Wackenhut's Mandatory Grievance Procedure Bars their Claims for Compensation after April 2007." It asserts that, by failing to file grievances with Wackenhut, Claimants failed to satisfy a contractual prerequisite for arbitration and are thus precluded from arbitrating their claims.

To the best of my recollection, the only time prior to April 16, 2014 at which Wackenhut made such a contention in this arbitration was April 4, 2013 when Wackenhut included, as the fourteenth and final boilerplate affirmative defense in its Amended Answer, the one sentence statement that "Claimants have failed to exhaust their pre-arbitration remedies as described in the Wackenhut Dispute Resolution Program." The contention was not included in Wackenhut's motion for partial dismissal, nor in Wackenhut's Pre-Trial Brief, nor in Wackenhut's opening statement at the commencement of the ten-day evidentiary hearing. It is way, way too late for Wackenhut to contend that the last twenty-one months of extraordinarily time-consuming and expensive arbitration proceedings should never have happened. I hold that this defense, whatever its merits might or might not be, has been waived.

Part Three:

THE MISREPRESENTATION CLAIMS

A. COUNT III

Count III purports to allege a claim for fraud in the inducement. It asserts, in broad and un-detailed fashion, that Wackenhut told Claimants that the contracts being offered to them "would provide that [Claimants] would be fully compensated for their services," that these representations were false, that they were made either negligently or with intent to deceive, that Claimants relied on the representations in entering into their employment agreements, and that Claimants suffered damages by entering into the agreements. While not spelled out in the

arbitration complaint, it has become clear that the alleged misrepresentations which form the basis of this Count are of two types, each of which is considered below.

1. 12 Hours On / 12 Hours Off

Claimants contend that, during their induction training in Houston, Wackenhut officials told them that they would provide firefighting services on a "shift work basis" and that they would work for 12 hours and then be off for 12 hours on each of five or six days per week. The evidence overwhelmingly shows that such representations were indeed made to prospective employees for some period of time but that Wackenhut abandoned the 12/12 schedule fairly early on and instead required virtually all firefighters to work for 16 hours per day, followed by an 8 hour "on call" interval, for nearly every day they were at their bases except when they were sick or on leave or, in some instances, on dispatch duty.

Wackenhut has raised a host of arguments about why, even if this were true (which it does not seriously dispute), Claimants have not proven a claim or misrepresentations. Thus, they argue, *inter alia,* that such claims must be denied because, *inter alia,* (a) the contract had an integration clause, (b) Claimants repeatedly "re-upped" with Wackenhut even after they well knew they would not be "off" for 12 hours each day, and (c) Claimants have not proven fraudulent intent. However, I do not find it necessary to consider all these arguments, since I agree with Wackenhut that this claim fails because Claimants have not proven any damages.

Claimants' complaint seeks only economic damages, specifically compensation they say they should have received for their work but did not. They have not sought recovery for non-economic damages, *e.g.,* pain and suffering, mental anguish or physical injuries resulting from working, under inherently stressful, war-time conditions for much longer periods of time than they were told they would be working. They have not even alleged, and certainly have not proven, the kind of economic damages that are sometimes asserted by those who claim they were fraudulently induced to enter into an employment agreement, *e.g.*, giving up (or losing an opportunity to take) a higher paying job than the one they were induced to take, moving or other expenses incidental to taking the subject job, travel or lodging expenses, etc. The only damages sought by Claimants are wages they allegedly earned, but did not receive, while working for Wackenhut.

As regards the misrepresentation about having to work only 12 hours per day rather than 16, it is undeniable that the actual work hours they experienced when they got to Iraq caused them to earn more money than they would have earned had the 12 hour representation been true. Working 16 hours/day at any given hourly rate will inevitably produce more income than working 12 hours/day at the same hourly rate. Claimants have other claims about pay they assert they should have received for being on call for 8 hours/day, for serving as acting officers, and for increasing (via uplifts and overtime) the rate by which they were paid for hours worked beyond 40/week, and those claims are considered below. However, it is simply incontrovertible that working more hours per week than they were told they would be working did not, and could not, have caused them to receive less income than they would have received had they worked the smaller number of hours that were promised.

2. Overtime Paid as if Working in a US Firehouse

Claimants contend that Wackenhut represented to them that "their pay would run just like a firehouse in the United States"[5] and that U.S. firefighters are generally paid an overtime rate of time and a half for all hours worked in excess of 40 hours per week. I find that there is no credible evidence, let alone a preponderance of the evidence, to establish that Wackenhut told prospective firefighters that they would receive overtime pay for all hours worked above 40/week, just as if they were working in a US firehouse. However, Claimants seem to be contending that they "understood" or "were led to believe" that pay practices in the Wackenhut firehouses in Iraq would be the same as pay practices in US firehouses,[6] which typically include a 1.5 hourly rate for work beyond 40 hours per week.

To the extent that Claimants are arguing that it was reasonable for them to understand, from what was said in Houston, that they would get paid overtime just as if they were in a U.S. firehouse, I reject that argument. The pay arrangements for firefighters in Iraq that were

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[5] Tr. 14-15.

[6] "We have cited to Mr. Bond, who testified extensively about his being in the U.S. fire stations, his understanding of pay and how they [Wackenhut] led him to believe during [his] recruiting in Houston ... that he specifically would work a 24-hour shift, which had a specific meaning to the firefighters in the U.S., which [Wackenhut] well knew..." (Tr. 2784-85). "White testified he was led to believe they would be working like a fire station atmosphere in the U.S. that he was used to and informed of the shift work and that they would be paid for 24 hours a day." (Tr. 2785-86).

explained to them were significantly different from those of domestic U.S. firefighters. While the latter are paid straight time for their first 40 hours of weekly work and then 150% of that rate for hours in excess of 40, those in Iraq had the reverse compensation scheme, *i.e.*, they were paid 155%, and later 175%, of straight time for their first 40 hours per week and then straight time thereafter. Although those two arrangements are not exactly alike, they are closer to parity than paying Wackenhut firefighters 155% (or 175%) for their first 40 hours and then 150% for hours thereafter.

Claimants seem to say that they were promised both (a) the very un-U.S. like multipliers on the first 40 hours and then (b) the typical U.S. 1.5 multiplier for hours beyond 40. That might indeed have been a very sweet deal, much like having your cake and eating it, too, but, it would not have been reasonable for Claimants to believe (if they really did) that that was what Wackenhut was offering them.

3. Conclusion

For reasons stated above, I conclude that Claimants have not proven their claims under Count III of the complaint.

B. COUNT IV

Count IV, entitled Intentional and Negligent Misrepresentation after Contract, appears to allege that Wackenhut represented to firefighters in Iraq that it was maintaining proper records concerning their pay and that it misled firefighters concerning its legal obligation as regards their pay. There was virtually no evidence introduced during the hearing to support those allegations, nor did Claimants discuss them in their post-hearing briefs or in closing argument. Thus, I conclude that, if this count has not been abandoned, it fails for lack of proof.

Part Four:

BREACH OF CONTRACT, QUANTUM *MERUIT*, UNJUST ENRICHMENT

Count I of the Complaint, in rather vague language, asserts that Wackenhut failed to pay Claimants certain compensation to which they were entitled under three alternative legal theories, namely, breach of express contract, breach of implied contract (often called *quantum meruit),* and unjust enrichment. Post-complaint proceedings have revealed that the four categories of compensation Claimants seek under these alternative theories are (1) Acting Officer Compensation, (2) On-Call Compensation, (3) Uplifts on hours worked in excess of 40 per week, and (4) Overtime (pay at 1.5 times the straight hourly rate) for work hours that exceed 40 per week. Those four claims will be discussed *seriatim* in relation to each of these three legal theories.

A. EXPRESS CONTRACT

American jurisprudence encourages parties to make their own "private law" by entering into binding contracts. With few exceptions (e.g., unconscionability, violation of statutes or public policy, or duress), courts and arbitrators enforce such agreements as written without regard to whether they consider the provisions sensible or wise. Not infrequently, however, courts and arbitrators are required to determine what those provisions really mean. That process generally begins by examining the plain words of the contract to see if, when read as a whole and in light of its evident purpose, the contract is unambiguous. If so, the inquiry ends there, unless one of the aforementioned exceptions applies. If there is ambiguity, tribunals try to divine the most reasonable interpretation of the contract utilizing "rules of construction" developed over centuries by the common law. With this background in mind, I turn to consider the parties' arguments about how their contract should be interpreted.

1. Acting Officer Compensation.

The facts needed for determination of this claim are not extensive and are well established by the preponderance of the evidence.

Under the subject contracts, Wackenhut employed people in five different job classifications, with different hourly wage rates for each, namely, (1) firefighter, (2) lieutenant, (3) captain, (4) assistant chief / training officer, and (5) fire chief. Applicable military regulations and provisions of the KBR – Wackenhut contract defined the level of experience and education normally required of those employed in each category. At each installation for which it provided 24/7 fire protection, Wackenhut was legally obligated to have in place a certain number of employees of various categories, such numbers determined by relevant factors, including, *inter alia,* the number and type of fire apparatus present at each location.

Throughout most of the time relevant to this case, difficulties in recruiting qualified candidates prevented Wackenhut from staffing many of its sites with all of the officers (categories 2-5 above) prescribed for such locations. Accordingly, Wackenhut frequently assigned firefighters to work, sometimes for months or years, as "acting lieutenants" and perform the functions required of that office. For similar reasons, Wackenhut sometimes assigned officers of one job classification to serve in a higher classification and perform the functions of that higher position.

In general, employees who were assigned to these "acting" positions were not paid at the hourly rate specified for those positions but rather at the hourly rate of the position for which they had been hired. Claimants contend that the plain language of the Wackenhut employment agreement requires that those serving in such acting positions be paid at the hourly rate specified in the applicable compensation sheet for the positions in which they so served. I agree.

The parties agree that CX 8 is an accurate exemplar of the employment agreements executed by Wackenhut and its firefighters prior to February 1, 2009. The second sentence of the agreement states that "[t]his Employment Agreement includes the Compensation Data Sheet that is attached."[7]

That sentence also states, *inter alia*, "[t]his Agreement and the attached Data Sheet show [among other things] "[t]he position for which you are initially assigned/hired." That statement

[7] Prior to February 1, 2009, Wackenhut had only one form of a Compensation Data Sheet, the contents of which were well known to Wackenhut and all the firefighters. It is not clear whether, when their employment agreements were executed, Wackenhut attached a copy of that Compensation Data Sheet to the executed copy of every Claimant's agreement. However, such ministerial failures by Wackenhut, if any occurred, would have no legal effect. There is no dispute about what document is referenced in the second sentence of the agreement and thereby incorporated into the contract.

is not accurate. There is nothing in either the Agreement or the Data Sheet that shows the position for which the employee was initially assigned or hired. That information is contained in a separate form document utilized by Wackenhut, namely, the offer of employment letter. The Compensation Data Sheet, on the other hand, shows all five job classifications utilized by Wackenhut in Iraq and the specified pay rate for each.

Section 1 of the General Terms and Conditions ("GTC") part of the Employment Agreement states "[y]ou agree to perform services of the job classifications shown on the Data Sheet, and other services within your capability as requested by Employer." (Emphasis added). The use of the plural word classifications is significant here. It recognizes that the employee may be "requested" to perform services of more than one classification level shown on the Data Sheet.

Thus, the statement in GTC Section 4 that "[y]our compensation is identified on the attached Data Sheet" is correct in the sense that all employee compensation is identified on that Data Sheet and the compensation due any particular employee at any particular time can be readily determined once the applicable job classification is known.

Most relevant to the Acting Officer Claim is Section 23 of the Specific Terms and Conditions ("STC") part of the Employment Agreement, which states in pertinent part:

> You represent that ... you will accept work assignments at any location within the Area of Operations as may be assigned by Employer, at the hours and on such shifts as designated by Employer. In the event that Employer requires you to render services in a job classification other than that for which you were assigned/hired, you agree to perform such work in such classification to the best of your ability at the rate specified in this Agreement. (Emphasis added).

The claim at issue is precisely for the situation in which Wackenhut requires an employee "to render services in a job classification other than that for which [the employee was] assigned/hired." And Section 23 tells the reader the rate at which the employee will be paid in that situation, namely, "the rate specified in this Agreement." Rate specification, as we have seen, is provided by the Data Sheet which forms a part of the Agreement. However, since the Data Sheet for every contract specifies not a single rate but rather five different rates, each for a different job classification, the question becomes what is meant by "the rate specified in this Agreement." (Emphasis added.)

Had the drafters of this Agreement meant to say that, no matter what job the Employer may require an employee to perform, that employee will be paid at the rate specified for the job for which he or she was hired, it would have been very easy to convey that meaning by saying,

> In the event that the Employer requires you to render services in a job classification other than that for which you were assigned/hired, you agree to perform such work in such classification to the best of your ability at the rate specified in this Agreement for the job classification for which you were hired/assigned.

However, that simple and obvious formulation does not appear in Section 23. Rather, immediately after employing the word "classification" to refer (twice in the same sentence) to the classification of the job whose services the Employer is requiring the employee to render, the Section speaks of "the rate specified in this Agreement." I hold that the most reasonable construction of Section 23 is that "the rate specified in this Agreement" means the rate specified for the classification of the job the employee is being required to perform. I further hold that, to the extent this section may be ambiguous on this point, that ambiguity must be construed against the drafting party, Wackenhut.

The common sense consequence of this interpretation is that when Wackenhut requires an employee at one classification level to step up and take on the presumably more demanding duties of a higher classification position, so that Wackenhut can satisfy the manning requirements that allowed it to continue being paid for providing 24/7 fire coverage at the multiple bases, it was obligated to pay that employee the compensation associated by Wackenhut, in the Data Sheet with the performance of such duties.

Wackenhut contends that STC Section 2 of the Employment Agreement dictates a contrary result because it contains the following language:

> You will receive compensation on the attached Compensation Data Sheet based upon your individual job classification. In-Country Project Manger and the Project General Manager must approve any job classification or rate adjustment(s) in writing, and any changes in job classification or salary are only effective on the date indicated on the formal Personnel Action Notice.

However, it is clear that the situation addressed in Section 2 is entirely different from the situation addressed in Section 23. Section 2 contains no mention of the Employer requiring an employee to render services in a job classification other than the one for which the employee was hired. Rather, Section 2 is plainly speaking to the situation that obtains when an Employee seeks promotion to a higher job classification. Such a request would require a formal Personnel Action

Notice, something that is not mentioned at all in Section 23. Nor did Wackenhut produce evidence that formal Personnel Action Notices were used when Wackenhut required an employee to serve as an "acting" officer and perform the services of a higher job classification.

Section 2 thus applies when an employee is seeking a "change in his job classification" that moves him up to another classification level where he will stay until he is terminated, or demoted, or perhaps promoted further. Section 23 says nothing about changing an employee's job classification but rather paying him for a higher level job the Employer has asked him to fulfill, presumably until an employee who holds that higher classification can be found to perform it.

To put it another way, if Wackenhut, pursuant to Section 23, requires an employee hired as a firefighter to perform the services of a lieutenant on an acting basis until an employee who was hired as a lieutenant can take over, that firefighter would be paid at the lieutenant rate only while serving as an acting lieutenant. But his job classification has not changed and when the "real" lieutenant comes along, he will return to his duties and his pay as a firefighter. Conversely, if a firefighter seeks and receives promotion pursuant to Section 2, then his job classification is changed to lieutenant and he will continue to be paid at that level until some subsequent personnel action again changes his job classification, either up or down.[8]

Accordingly, I hold that, under the most reasonable interpretation of the plain language of the Employment Agreement, Wackenhut is contractually obligated to pay "acting officers" the compensation specified for such an officer in the Compensation Data Sheet during the period of time when the employee was functioning in that position pursuant to Wackenhut's "request" (GTC § 1) or "requirement" (STC § 23).

2. <u>On Call Compensation</u>

Because Wackenhut was unable to staff two shifts of firefighters who would alternate for 12 hour periods, all firefighters who were in service at their assigned sites were, for six or seven days a week, on active duty from 7:00 am – 11:00 pm and then "on-call" from 11:00 pm – 7:00

[8] Because I find that STC Section 2 does not apply at all to one required by Wackenhut to serve as an acting officer under STC Section 23, I need not considered whether it would be unconscionable for Wackenhut to grant a firefighter's application for promotion to lieutenant, have him perform the duties of that office for an extended period of time and then refuse to pay him at the lieutenant rate on grounds that the In-Country Project Manager and the Project General Manager somehow never got around to signing off on the formal Personnel Action Notice.

am. Claimants contend they should be paid for all eight on-call hours regardless of whether they were required to respond to fires or perform other duties during those hours. Wackenhut contends they should only be paid for on-call time spent in responding to fires or performing other duties.

Since the Employment Agreement was plainly drafted on the assumption, which turned out to be incorrect, that firefighters would be working in shifts,[9] it does not explicitly prescribe how on-call time will be paid. However, that does not mean that the Agreement does not apply to the 1/3 of every day when employees were on-call. GTC § 4 explains that, every two weeks, employees will be paid for the amount they have "earned," subject to deductions for taxes, employee benefits (*e.g.*, health insurance), and advances. Wackenhut's payments to employees for services rendered during the on-call period were included in their regular bi-weekly paychecks. Plainly the Agreement required Wackenhut to pay firefighters for whatever pay they had earned during on-call periods. The critical question is what pay did they earn during those periods? That question in turn depends, as Wackenhut counsel recognized in closing argument (Tr. 2752), on what is the meaning of "work" for which compensation is owed under this contract.[10]

While the Employment Agreement uses the term "work" numerous times, it does not define it. It is a well recognized rule of construction that, when application of a contract depends on the meaning of a term that is not specially defined in the contract, the term will be given its ordinary and common meaning or, when appropriate, the meaning ascribed to the term by the usage and practice of the particular trade or industry which is the subject of the contract.

In this case, ascertaining the ordinary and common meaning of the term "work" is not much help in trying to decide whether what the firefighters did during their on-call house constituted work. Most dictionaries provide numerous different definitions of "work." The two most closely related to the matter I am investigating are "the labor, task or duty that is one's accustomed means of livelihood" and "a specific task, duty, function or assignment, often being

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[9] *See, e.g.*, reference to "shifts" in STC §§ 17(k) and 23.

[10] Wackenhut counsel asserted in closing argument that "most assuredly – most assuredly, sir, sleeping is not work." However, that is not true, at least as FLSA regulations use the term, since they note that "under certain conditions an employee is considered to be working even though some of the time he is sleeping or in certain other activities" and then proceed to describe those conditions. 29 CFR §§ 785.20 – 785.22.

a part or phase of some larger activity."[11] While being on-call from 11:00 pm – 7:00 am every day was certainly a duty or assignment that firefighters fulfilled as part of the larger activity of proving firefighting protection 24/7 at military installations in Iraq, the definition does not really tell us whether this kind of duty or assignment has generally been regarded in the firefighting industry as compensable in the same way that work during the balance of the day is compensable. For that sort of understanding, one must look at usage and practice within that particular industry.

In my view, it is quite significant that, when the issue of on-call compensation arose in the implementation of this very contract, Tony Collins, Wackenhut's Deputy Program Manager for Iraq, chose to look to regulations issued under the federal Fair Labor Standards Act ("FLSA") for guidance.[12] Both sides have cited extensively to FLSA regulations and cases as furnishing instructive assistance. Because those regulations are applicable to the vast body of American employees, including firefighters who are specially addressed in a part of the regulations, the regulations provide a useful guide to how the term work is generally used in the firefighting industry.

Title 29 of the Code of Federal Regulations collects regulations issued by the Department of Labor to implement several federal statutes relating to the obligations of employers, including the Fair Labor Standards Act. 29 CFR § 785 concerns "Hours Worked" in all industries. With respect to on-call time, 29 CFR § 785.17 sets forth this general perspective:

> An employee who is required to remain on call on the employer's premises or so close thereto that he cannot use the time effectively for his own purposes is working while "on call." An employee who is not required to remain on the employer's premises but is merely required to leave word at his home or with company officials where he may be reached is not working while on call.

29 CFR § 553.221 provides a more-focused analysis on on-call arrangements when the employee is a firefighter or law enforcement employee:

> Time spent away from the employer's premises under conditions that are so circumscribed that they restrict the employee from effectively using the time for personal pursuits also constitutes compensable hours of work.
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> x x x

[11] Merriam-Webster's Collegiate Dictionary, 10th ed. 2002. The date of this dictionary means that the foregoing definitions were in use at about the time the Employment Agreement was drafted.

[12] I have earlier held that the obligations of the FLSA are not legally binding on Wackenhut because of its explicit coverage provisions. However, the act and its implementing regulations can and do provide useful information about usage and practice in the firefighting industry, as Mr. Collins correctly recognized.

> Time spent at home on call may or may not be compensable depending on whether the restrictions placed on the employee preclude using the time for personal pursuits. Where, for example, a firefighter has returned home after the shift, with the understanding that he or she is expected to return to work in the event of an emergency in the night, such time spent at home is normally not compensable. On the other hand, where the conditions placed on the employee's activities are so restrictive that the employee cannot use the time effectively for personal pursuits, such time spent on call is compensable. (29 CFR § 553.222 (c) and (d)).

The parties have cited only two cases that considered whether a firefighter's on-call time was compensable. Wackenhut cites *Clay v. City of Winona,* 753 F. Supp. 624 (N.D. Miss. 1990), in which the Court granted the employer's motion for summary judgment on grounds that no reasonable jury could find, on the facts in that case, that the firefighters' on-call time was compensable. There, firefighters were on duty for 24 hours and then off-duty for 72 hours. During the first 24 off-duty hours, they were required to carry a pager and remain within city limits (an area approximately 10 miles in diameter). They were paid for any call-out work that occurred during their on-call period but not the rest of it. Each firefighter generally had less than 3 call-outs per month. During the on-call time, some of the firefighters held second jobs and others performed work around the home or engaged in other activities of their own individual choosing. The firefighters were allowed to trade their on-call assignments among themselves without need for employer consent.

Claimants have cited *Renfro v. City of Emporia,* 948 F.2d 1529 (10th Cir. 1991). There the Court of Appeals affirmed a grant of summary judgment in favor of the firefighter plaintiffs based on the following facts which had been properly determined by the District Court: The firefighters worked six 24-hour shifts every 19 days. In the 24 hours following each shift, they had to carry pagers and return to work within twenty minutes. Call-backs (for which they were paid) averaged 3-5 per day. Although 11 of the 33 firefighters had secondary employment, it was difficult to get such employment and also difficult to trade their on-call assignments. The conditions of their on-call assignment restricted their personal pursuits. The need to return to the station within twenty minutes effectively precluded them from engaging in group activities or activities that required the expenditure of money.

The Court noted that the U.S. Supreme Court has stated that "an employer ...may hire a man to do nothing, or to do nothing but wait for something to happen...Readiness to serve may be hired, quite as much as service itself, and time spent lying in wait for threats to the employer's

property may be treated by the parties as a benefit to the employer."[13] *Armour & Co. v. Wantock,* 323 U.S. 126, 133 (1944).

In *Renfro,* the Court of Appeals also noted that the employer "is the primary beneficiary of the on call program," and that "[f]irefighters must be alert and ready to protect the community, and the time firefighters spend lying in wait for emergencies could be considered a benefit to the employer and thus compensable under FLSA." 948 F.2d 1529 at 1536, 1538.

As the Supreme Court observed in *Skidmore v. Swift & Co.,* 324 U.S. 134, 136-137, "we have not attempted to, and we cannot, lay down a legal formula to resolve cases so varied in their facts. Whether ... such time falls within or without the Act is a question of fact to be resolved by appropriate findings of the trial court." *Accord, Boehm v. Kansas City Power & Light Company,* 868 F.2d 1182, 1185 (10th Cir. 1989) (the test to determine whether on-call time is compensable "requires consideration of the agreement between the parties, the nature and extent of the restrictions, the relationship between the services rendered and the on-call time and all surrounding circumstances.")

With the forgoing guidance in mind, I note that the purposes of the Wackenhut Employment Agreement was to establish the terms on which it would buy the labor it needed in order to fulfill its obligation of providing uninterrupted fire protection on divers military bases in war-torn Iraq. Because Wackenhut was not able to recruit enough firefighters to staff these bases with alternating shifts, the on-call arrangement was absolutely essential to the fulfillment of its mission. Wackenhut did not include in its Employment Agreement any special definitions of "hours worked" and "amount earned" so those terms must be applied as they customarily are in the firefighting industry. In that industry, on-call time is compensable if the restrictions on the employee prevent him or her from effectively utilizing the time for personal pursuits.

Carrying a pager or radio is not, by itself, determinative of whether on-call time is compensable. Both the *Clay* and *Renfro* firefighters had to carry one, as did the firefighters in this case. However, other restrictions placed on the Wackenhut firefighters while on-call made it more difficult for them to use the time effectively for personal pursuits than even the firefighters in the *Renfro.* Thus, unlike the firefighters in all the cited cases, the Wackenhut firefighters were "tied to their apparatus" and could only go places if all the other members of their crew agreed to do so. According to Mr. Collins, two experienced Fire Chiefs involved in carrying out the

[13] *Accord,* John Milton, *On His Blindness:* "They also serve who only stand and wait."

Wackenhut contract believed that this factor traditionally tipped the scales in favor of compensation:

> I have today discussed this situation as well with Chief Gary Ellis at F1/F2 because he placed some firefighters on stand-by and required that they remain in an area removed from their quarters. He stated that he feels the compelling issue is not whether a member was assigned to an alternate stand-by location, but whether he or she was assigned to a vehicle to respond. This opinion is in ways shared by our Chief of Operations. Both approach this with significant emotion, apparently based on the traditional way in which firefighters are compensated... It is compensation for availability and knowledge rather than action. (CX at W 00316) (Emphasis added).

In this case, not only were the Wackenhut firefighters tied to an apparatus, but the employer also had them on a very short tether. In *Renfro*, on-call firefighters were required to report to the fire station within twenty minutes of receiving a call; Wackenhut firefighters had to report in less than half that time.

Finally, although the frequency of call-outs for the Wackenhut firefighters was apparently less than for the *Renfro* firefighters, the cumulative impact of the call-out arrangement was dramatically greater for Wackenhut firefighters than for those in *Clay* or *Renfro* or any of the relevant FLSA regulations. While the *Clay* firefighters had 48 hours after their on-call time to rest and do whatever they wanted and the *Renfro* firefighters had 24 hours to do the same,[14] the Wackenhut firefighters had virtually none. For them, the daily pattern of 16 hours on duty and 8 hours on-call was relentlessly repeated day after day and without interruption, generally for months, until they finally took R & R leave.

In consideration of all the matters discussed above, I find that the most reasonable reading of the term "all hours worked" in STC § 2 of the Wackenhut Employment Agreement is that it included not only the 16 hours of active duty from 7:00 am – 11:00 pm but also the highly restrictive on-call period from 11:00 pm to 7:00 am and the most reasonable reading of the term "amount earned" in GTC § 4 includes such work. Thus, Wackenhut will be required to pay Claimants, at straight time rates, for all of their on-call hours less any payments they have already received for work performed during those periods.

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[14] In *Clay*, on-call time was restricted to the first 24 hours of their 72 hours off-duty before beginning another 24 hour work shift. In *Renfro*, since the firefighters were on duty for 24 hours six times in every 19 days, those duty days must have been separated by two off-duty days, of which the first was on-call and the second was their own.

3. Up-Lifts for Hours in Excess of 40/Week.

Claimants contend that they should receive the contractual up-lifts for Foreign Service Bonus, Work Area Differential and Hazard Pay, not only on the first 40 hours worked per week (which they did) but also on all hours worked thereafter. It is clear that, under an express contract theory, this claim must be denied because STC § 2 expressly and clearly states that these up-lifts "apply only to the first 40 hours worked each week."

4. Overtime for Hours in Excess of 40/Week

Claimants also contend that they should receive overtime pay, at the rate of 150% of their straight time rate, for all hours worked in excess of 40/week. Again, such a claim cannot be granted on an express contract basis since STC§ 2 expressly and clearly states "[a]ll hours worked over 40 hours per week will be paid at the straight time rate."

B. *QUANTUM MERUIT*

Clearly Claimants do not have a *quantum meruit* claim for Acting Officer service and On-Call service, since I have already upheld those claims as a matter of express contract. As for a *quantum meruit* claim requiring Wackenhut to pay Up Lifts and Overtime for all hours in excess of 40, I find no merit in such a claim. Claimants argue that the parties never contemplated that employees would work more than 84 hours per week, and thus, at a minimum, the Employment Agreement could not possibly regulate the obligation of the parties once that Rubicon had been crossed. While the parties probably did not (in the early years) expect that employees would work more than 84 hours, it soon became clear that they would and did. And both parties treated the Employment Agreement as governing such work, not only as to wage rates but also the other contractual benefits the Claimants accepted, including insurance coverage, accrual of vacation pay, interim leave and sick leave. There is no ground for trying to imply a contract for the post-84 hour portion of every week, even if that could somehow be accomplished, which is a bit doubtful. (Under the Claimants' proposal, every week would go

back and forth between the express contract governing the first 84 hours and the implied contract governing the second 84 hours.)

C. UNJUST ENRICHMENT

Whatever might have been the merits of an unjust enrichment claim had Claimants not prevailed on their Acting Officer and On-Call claims as a matter of express contract, suffice it to say that I see nothing unjust about leaving their compensation at straight time plus Up-lifts for the first 40 hours, straight time for all additional compensable hours (both active duty and on-call) for the balance of the week, and compensation at the rate specified in the Compensation Data Sheet for any officer position employees were required to fill on an acting basis.

Part Five:
COVENANT OF GOOD FAITH AND FAIR DEALING

Although their titles are slightly different,[15] the allegations in Counts I and V are virtually identical. Since those allegations have been addressed and ruled on in Part IV of this Award, Count V of the Complaint will be denied as duplicative

Part Six:
PROMISSORY ESTOPPEL / DETRIMENTAL RELIANCE

Count VII of the Complaint purports to state claims for promissory estoppel and detrimental reliance. Paragraph 122 alleges that Wackenhut "required [Claimants] to submit to the orders of Defendant KBR on site in Iraq and Afghanistan which resulted in [Claimants] performing work for which they were not compensated." Since no evidence to support that allegation was introduced at the hearing, that claim must be denied.

The balance of the Count seems to refer to a claim addressed by Claimants' counsel in closing argument, namely, that the KBR-WSSI contract required Wackenhut to pay its

[15] Count I is titled "Breach of Contract, Express and Implied, unjust enrichment" whereas Count V is titled "Breach of Contract, Express and Implied, covenant of good faith and fair dealing."

firefighters just the same as KBR paid its firefighters for similar work, that Wackenhut did not do so, and that Claimants are third-party beneficiaries of that part of the KBR-WSSI contract and thus entitled to recover from Wackenhut any amounts it was required by that contract to pay them but failed to do so. At closing argument, I asked the parties to submit to me citations to any parts of the record herein which supported or refuted that claim, and both parties did so.

Virtually all of Claimants' submission seeks to establish that KBR paid its firefighters for on-call time and that Wackenhut is thus required to do so. For reasons pointed out in Wackenhut's submission, Claimants have plainly not proven that claim by a preponderance of the record. However, since I have ruled above that the Wackenhut Employment Agreement with its firefighters required Wackenhut to pay for on-call time, the sufficiency *vel non* of Claimants' recent submission seeking that same relief is moot.

Claimants' submission also cites testimony of David Bond apparently to support the contention that KBR paid Up-Lifts and Overtime at 150% of straight time for hours over 40 per week and thus Wackenhut should also. However, the evidence is confusing[16] and inconclusive[17] and I find it does not prove that the KBR-WSSI agreement required Wackenhut to pay Up-Lifts and Overtime on hours in excess of 40.

Thus, the claims alleged in Count VII are denied.

Part Seven:
THE STATUTE OF LIMITATIONS

In Order No. 14, I determined that, after a proper application of the tolling effect of the *Grabowski/Mahnke* arbitration, and assuming a two-year statute of limitations governs the claims herein, Claimants are barred from seeking recovery for any unpaid wages that allegedly became due to them prior to April 3, 2006 unless they can establish additional grounds for tolling the statute. During the course of this case, Claimants have advanced numerous shifting (and

[16] Thus, in answer to the question "And how were you paid [when working for KBR or Sallport]?", Mr. Bond testified "same way we were back home, you know, everything over 40 hours plus uplift, time and a half." But the uplifts in this contract (for Foreign Service, Hazard and Work Area Differential) were certainly not paid to Mr. Bond "back home."

[17] It is unclear if Mr. Bond is testifying about what he was paid by KBR or Sallyport and whether this was at a time when the Wackenhut-KBR contract allegedly required Wackenhut to pay its firefighters in the same way as KBR paid its firefighters.

sometimes inconsistent) arguments for permitting claims that seek earlier compensation. However, in their post-hearing brief, they seem to have settled on three arguments, each of which is considered below.

A. The District of Columbia Statute of Limitations Should Control

Putting the most generous possible construction on the argument, Claimants contend that, (a) in the District of Columbia, statutes of limitations are considered procedural, (b) the law of the forum is usually applied to procedural matters, and (c) because it is venued in the District of Columbia, this arbitration tribunal is effectively a District of Columbia forum and should thus apply the District of Columbia statutes of limitations to the claims herein. Whatever may be the strength or weakness of this argument in other contexts, it is not meritorious here.

First, it is clear that, under District of Columbia law, where parties to a contract provide that it will be governed by the law of a particular state that has some reasonable relationship to the contract, then unless that state's law is against public policy or otherwise invalid, a District of Columbia forum will apply the law of the designated state, including its statutes of limitations if that state regards the statute of limitations as substantive. *Aneke v. American Express Travel Related Services, Inc.,* 841 F. Supp. 2d 368, 375 (D.D.C. 2912), *appeal dismissed* 2012 WL 5899825 (D.C. Cir. 2012); *Sarfati v. Antigua & Barbuda,* 923 F. Supp. 2d 72 (D.D.C. 2013); *Ekstrom v. Value Haelth, Inc.,* 68 F. 3d 1391 (D.C. Cir. 1995).

Second, it is also clear that Florida has a significant relationship to this contract and that Florida considers statutes of limitations to be substantive.

> Florida courts consider the statute of limitations to be substantive, and therefore the statute of limitations of the parties' chosen forum will apply where there exists a contractual choice of law provision. *Gaisser v. Portfolio Recovery Associates, LLC,* 571 F. Supp.2d 1273, 1276 (S.D. Fla. 2008). *Accord, W Group Nurseries, Inc. v. Ergas,* 211 F. Supp. 2d 1362 (S.D. Fla. 2002).

Accordingly, I find that the statutes of limitations of Florida, not the District of Columbia, control here.

B. Florida's 3, 4 or 5 Year Statutes of Limitations Should Apply Here

Claimants assert that, because I earlier dismissed claims based on certain Florida statutes establishing particular obligations with respect to wages, the claims herein should not be subject to Florida Stat. § 95.11(4)(c), which imposes a two-year statute of limitations on actions "to recover wages or overtime or damages or penalties concerning payment of wages or overtime." Instead, they argue, the applicable limitation period is either (a) the three year federal statute of limitations for willful violations of the FLSA, or (b) the four year Florida statute of limitations for failure to pay salary or for fraud, *quantum meruit* or unjust enrichment, or (c) the five year Florida statute of limitations for breaches of contract in general. Claimants' Feb. 21, 2014 Post-Hearing Brief re SOL at 10-13. But (a) the Claimants were not salaried workers, (b) I have denied the fraud, *quantum meruit* and unjust enrichment claims, and (c) I have ruled that Wackenhut's wage payments to these Claimants were not subject to the FLSA, even though the FLSA may provide some insight into the way some of the contract's terms are understood in the firefighting trade.

The only claims on which Claimants prevailed were their express contract claims for payment of On-Call and Acting Officer wages, and those claims are certainly subject to Section 95.11(4)(c). Florida cases make very clear that all suits for wages or overtime, however accruing, are governed by Section 95.11(4)(c). *Broward Builders Exch., Inc. v. Goehring*, 231 So. 2d 513 (Fla. 1970); *Ultimate Makeover Salon & Spa, Inc. v. DiFrancesco,* 41 So. 3d 335 (Fla. Dist. Ct. App. 2010); *Joseph v. Okeelanta Corp.,* 656 So. 2d 1316 (Fla. Dist. Ct. App. 1995); *Blackburn v. Bartsocas,* 978 So. 2d 820 (Fla. Dist. Ct. App. 2008).[18]

C. Wackenhut is Estopped from Invoking the Statute of Limitations

Claimants contends that Wackenhut is equitably estopped from asserting a statute of limitations defense in this matter because (1) senior Wackenhut officials (including Tony Collins and Chief Tye) repeatedly threatened to discharge any firefighters who complained about their pay, and (2) Mr. Collins told many firefighters, in exit interviews and otherwise, that Wackenhut was negotiating (or hoped to negotiate) with KBR for changes in the KBR-WSSI contract that

[18] The cases cited by Claimants for the opposite conclusion are inapposite and, in some cases, misdescribed in their brief.

would allow Wackenhut to pay them for their on-call time.[19] The preponderance evidence shows that both assertions are factually accurate. The pertinent question is whether, legally, they estopp Wackenhut from invoking the statute of limitations.

In support of their estoppel argument, Claimants cite cases from multiple jurisdictions and quote the five requirements for equitable tolling under Kansas law. However, since I have held that the applicable statutes of limitation are those of Florida, it is Florida law that controls their application. Neither of the two Florida cases cited by Claimants enumerates the general Florida requirements for equitable estoppel of a statute of limitations defense. Those requirements are as follows:

> (1) conduct amounting to a false representation or concealment of material facts; (2) the intention, or at least the expectation that the conduct will be acted upon by, or influence, the other party; (3) Knowledge, active or constructive of the real facts; (4) plaintiff's lack of knowledge and of the means of ascertaining the truth; (5) plaintiff's good faith reliance upon defendant's statements; (6) action or inaction based thereon of such a character as to change the position or status of the plaintiff, to her injury.
> *Lopez v. Geico Casualty Co.,* 2013 WL 4854492 at *4 (S.D. Fla. 2013). *Accord, Ryan v. Lobo de Gonzales,* 841 So.2d 510, 519 (Fla. Dist. Ct. App. 20003); *Fox v. City of Pompano Beach,* 984 So. 2d 664, 668 (Fla. Dist. Ct. App. 2008)

Those elements must be proven by clear and convincing evidence. *Walburn v. City of Naples,* 2005 WL 2322002 at *8 (M.D. Fla. 20005). But there is no clear and convincing evidence in this record that either of the statements relied upon by Claimants was untrue. Indeed, the record seems to support the opposite conclusion.

Wackenhut apparently did discharge some of the firefighters that it considered troublesome, as it was entitled to do with at-will employees. Whether the inquiry about "beef or chicken" rises to the level of an intimidating threat is debatable. Many employers have undoubtedly told their at-will employees "if you don't like it here, you can find another job"[20] and even "if you don't stop complaining about X, I'm going to let you go." Claimants have cited no case holding that this sort of statement is sufficient to equitably estopp the assertion of a statute of limitations defense. Indeed, if it were, employees could presumably work for 40 years

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[19] Presumably such negotiations sought a prospective change in payment arrangements, although it would have been reasonable for firefighters to assume that it might also have led to some retroactive "back pay," as many knew had occurred at Anaconda.

[20] Claimants' counsel asserted that the "threats" here consisted of a "constant drumbeat" of statements to the effect of "[i]f at any time you do not agree with the work or schedule here, you can seek other employment." (Tr. 2694-2695).

for an employer who regularly said "stop complaining or you're out of here" and then bring an action for four decades of supposedly earned but unpaid wages.

As to the second statement on which Claimants rely, Wackenhut apparently did have some negotiations with KBR about changes in their contract. While those negotiations probably encompassed a number of areas, getting more money from KBR so that Wackenhut could pay its firefighters more money for on-call time may well have been part of the discussion. CX 30 shows that Collins was well aware that complaints about lack of on-call pay were widespread and that ensuring "a perception [among its firefighters] of fair compensation" was a "critical path item" for Wackenhut's success on this project. Moreover, he did recommend, and Wackenhut did implement, some increases in on-call compensation, though not as much as Claimants wanted (and have secured in this Award).

The two Florida cases cited by Claimants involve outrageous situations that are a far cry from the instant case. In G*lantiz v. State Auto Mut. Ins. Co.,* 573 So. 2d 1049 (Fla. Dist. Ct. App. 1991), policyholders brought against their insurer for uninsured motorist benefits. Seven months before the expiration of the statute of limitations, plaintiffs demanded that the insurer arbitrate pursuant to the arbitration clause in its policy. Insurer agreed and the parties began the arbitration. However, just after the statute of limitations expired, the insurer notified plaintiffs that the statute had run, denied their claim and refused to proceed further. The Court held that the insurer was equitably estopped from asserting the statute of limitations, stating that "we find it difficult to envision a more unfair position for a party to assume...That would seem to be 'gotcha' practice at its best." *Id. at *5-*6.*

In *Salcedo v. Association Cubana, Inc.,* 368 So. 2d 1337 (Fla. Dist. Ct. App. 1979), plaintiff brought an action against a medical clinic, asserting that, while pregnant, she was negligently exposed to x-rays by clinic employees and was forced to undergo a therapeutic abortion. She filed her action three months before the expiration of the four-year statute of limitations for general negligence actions. Defendant moved to dismiss, arguing that the claim was actually a medical malpractice claim which could not be filed until the parties had engaged in mandatory mediation. The trial court dismissed the case and the parties proceeded to mediation, during which time the above statute of limitations ran. When the mediation failed to produce a settlement, plaintiff promptly refiled her suit within the allowable 60 days following the termination of mediation, at which point, the appellate court said, "defendant promptly

pounced," asserting, contrary to its earlier motion, that the case was in reality not a malpractice claim but a general negligence claim for which mediation was not required, but that the statute of limitations for such a claim had now expired. A new trial judge agreed with this position and dismissed the suit.

The Court of Appeals was plainly incensed.

> It is apparent to us that an application of the most elementary principles of equity and "good conscience" ... require that the judgment below be set aside... The universal rule which forbids the successful assertion of inconsistent positions in litigation precludes the acceptance of such a result.
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> x x x
>
> In earlier times, the rule we apply in this case was said to reflect the feeling that a party may not "mend his hold," or "blow hot and cold at the same time" or "have his cake and eat it too. Today, we might say that the court will not allow the practice of the "Catch-22" or "gotcha" school of litigation to succeed. 368 So. 2d 1337 at 1338-1339.

Neither of these two cases bears any resemblance to the instant matter, and Claimants have cited no case that indicates that Florida courts would estopp Wackenhut from asserting the statute of limitations defense on the facts here.

Accordingly, Claimant's equitable estoppel argument is denied. The cutoff dates for recovery of wages here remains April 3, 2006.

Part Eight:
DISPOSITION OF CLAIMS

I. **Count I of the Complaint is denied in all respects except that Claimants' Acting Officer and On-Call Claims are granted pursuant to the parties' express contract. Claimants shall recover from Wackenhut (a) the difference between their initial hourly rate and that of any officer position in which they were acting at Wackenhut's direction, and (b) straight hourly time for all hours spent on-call less any amounts already paid for services performed during those periods.**

II. **Count II of the Complaint is denied per Orders Nos. 3 and 9.**

III. **Count III of the Complaint is denied for reasons stated *supra*.**

IV. **Count IV of the Complaint is denied for reasons stated *supra*.**

V. **Count V of the Complaint is denied for reasons stated *supra*.**

VI. **Count VI of the Complaint is withdrawn and dismissed with prejudice.**

VII. **Count VII of the Complaint is denied for reasons stated *supra*.**

VIII. **Count VIII of the Complaint is denied for reasons stated in Order No. 3.**

IX. **Count IX of the Complaint is denied for reasons stated in Order No. 3.**

X. **Count X of the Complaint is denied for reasons stated in Order No. 3.**

XI. **Count XI of the Complaint is denied for reasons stated in Order No. 6.**

XII. **With the exception of the determination of damages, arbitration costs and attorneys' fees, any claim asserted in this arbitration and not expressly granted or denied above is hereby denied.**

Curtis E. von Kann

June 27, 2014 **Arbitrator Curtis E. von Kann**