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DECISION

THE COMPTROLLER GENERAL OF THE UNITED STATES
WASHINGTON, D.C. 20548

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FILE: B-195418 DATE: November 25, 1980

MATTER OF: Panama Canal Commission - [Applicability of Senior Executive Service Provisions To Panama Canal Commission Employees]

DIGEST: Panama Canal Act of 1979 expressly excepts the appointment and compensation of all Panama Canal Commission positions from the provisions of the civil service laws and regulations. Additionally, provisions of the Panama Canal Treaty of 1979 would be in conflict with the implementation of the Senior Executive Service. The Treaty must be given priority over a subsequently enacted statute applicable to Federal agencies generally. Hence, the provisions of the Civil Service Reform Act of 1978 establishing a Senior Executive Service do not apply to the employees of the Panama Canal Commission.

By letter dated July 23, 1980, the Administrator of the Panama Canal Commission has requested our decision whether the employees of the Commission are subject to the provisions of Title IV of the Civil Service Reform Act of 1978, 1/ establishing a Government-wide Senior Executive Service (SES), designed to insure the high quality of Government executives.

The Panama Canal Commission was established effective October 1, 1979, by the Panama Canal Act of 1979, 2/ as successor to the Panama Canal Company. The establishment of the Commission was required by the

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1/ Pub. L. 95-454, October 13, 1978, 92 Stat. 1111, 1154 (codified at 5 U.S.C. § 3131 et seq.).

2/ Pub. L. 96-70, § 1101, 93 Stat. 452, 456, September 27, 1979.

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Panama Canal Treaty of 1977, and the purpose of the 1979 Act is to provide legislation implementing the Treaty between the United States and the Republic of Panama.

The Panama Canal Company as a Government Corporation was excluded from the Senior Executive Service. The Panama Canal Commission, however, is an agency for the purpose of the SES under the definition in 5 U.S.C. § 3132(a)(1). Nevertheless, the Commission believes that its positions are not subject to the provisions of Title IV of the Civil Service Reform Act (CSRA) governing the Senior Executive Service. The Commission relies on sections 1202 and 1212 of the Panama Canal Act of 1979. Under section 1202(a) of that law, positions in the Commission have been statutorily excepted from the competitive service and have been placed outside the appointment, classification, and pay provisions of title 5, United States Code. Moreover, section 1212 of the Act provides that the Commission shall operate under a separate Panama Canal Employment System, established by the President. That system is required to conform to the Panama Canal Treaty and to conform, to the extent practicable and consistent with the Panama Canal Act, to the policies, principles, and standards applicable to the competitive service.

The Commission points out that several provisions of the Panama Canal Act and the Panama Canal Treaty would be inconsistent with statutory requirements of the SES, if the SES were to be interpreted as applying to the Commission and that sections 1202 and 1212 of the Act appear to be intended to permit the establishment of an employment system that conforms to the treaty but to which provisions of law relating to appointments in Federal agencies in the United States do not apply of their own force.

An opinion on this question was also sought by the Commission from the Office of Personnel Management (OPM), the agency responsible for administering the SES program. In an opinion dated July 25, 1980, the General Counsel of OPM concluded that the SES is not

applicable to the Panama Canal Commission. OPM reasoned that, while the Commission was created as an Executive agency (§1101 of the Act), it is clear from sections 1202 and 1212 of the Panama Canal Act that its employees would be excluded from the civil service generally and subject to its own personnel system. Further, OPM found it significant that the Act does not make provision for placing Commission positions in the SES. If Congress had intended to include Commission employees under SES it would have expressly provided for it particularly since Congress was very mindful of the CSRA which became effective 9 months prior to the Panama Canal Act. OPM developed this point further as follows:

> "In fact, a careful reading of P.L. 96-70 discloses that when Congress wanted certain civil service laws to apply to Commission employees, it knew how to make specific provisions for it. For example, section 1209 extends coverage to certain Commission employees for work injuries (5 U.S.C. Chapter 81), retirement, (5 U.S.C. Chapter 83), life insurance, (5 U.S.C. Chapter 87) and health insurance (5 U.S.C. Chapter 89), and denies it to others, e.g., non-citizens, those appointed after October 1, 1979 etc. In addition, section 1241 makes the early retirement provisions of 5 U.S.C. § 8336 applicable in certain instances. Also, section 1271 confers the Labor Management Relations coverage of 5 U.S.C. Chapter 71 on Commission employees. It is especially noteworthy too, under section 1224, that Commission employees were made subject to veterans' preference, to the title 5 removal or suspension provisions applying to the competitive service and to certain wage grade provisions in 5 U.S.C. § 5544(a).
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> "On the other hand, it is also apparent in section 1112(a), (Code of Conduct for Commission Personnel), for example, that

> Congress was not subjecting the Commission to the Code of Conduct requirements in 5 C.F.R. Part 735, the civil service regulations applicable to Executive agencies generally, but instead was directing the Commission to establish a system that was substantially equivalent to Part 735.
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> "Moreover, with the language in section 1212(a), that the Panama Canal Employment System shall '(3) conform to the extent practicable and consistent with the provisions of this Act, to the policies, principles, and standards applicable to the competitive service', (emphasis added), there can be no doubt that Congress was pre-supposing that title 5 provisions would not apply to Commission employees unless it was so provided in the Act or, in the Commission's discretion, it was practicable to do so. Thus, in view of the specific authorities Congress accorded the Commission, we find the absence of express language in the law on SES applicability particularly persuasive that Congress did not intend SES to apply."

In reconciling the CSRA with the Panama Canal Act, OPM noted that the SES was never intended to embrace positions created by a later law for the purpose of operating a new agency under its own statutory authority. Under general rules of statutory construction, the Panama Canal Act, the later law, would take precedence over the earlier law, CSRA. OPM also pointed out that since the Act is the more specific statute, applying only to Panama Canal Commission employees whereas the CSRA applies to employees in the Executive branch generally, the two statutes can easily coexist by considering the conflicting provisions of the Act as specific exceptions to the SES reach of CSRA.

Finally, OPM noted the various provisions of the Panama Canal Treaty, particularly those provisions designed to foster participation of Panamanian nationals at high management levels and growing participation at all other levels, along with employment procedures which would give Panamanian nationals employment preference, which conflict with the CSRA. The OPM opinion recognized that a treaty can not be deemed to have been abridged or modified by a later statute, such as CSRA, unless such purpose on the part of Congress has been clearly expressed. Cook v. United States, 288 U.S. 102, 120 (1932). Thus, OPM concluded that, without express language to the contrary, the CSRA cannot be found to impliedly repeal the Panama Canal Treaty. Since the Treaty and SES are basically incompatible, the Treaty and its implementing statute cannot be disturbed by a CSRA provision with which it happens to conflict.

We are in agreement with the conclusions reached by both the Panama Canal Commission and the Office of Personnel Management. We believe that the statutory independence of the Panama Canal Commission mandates the conclusion that the Congress did not intend the Senior Executive Service provisions to apply to the Commission. We have previously reached the same conclusion with respect to the Federal Reserve Board, 58 Comp. Gen. 687, B-195418, July 30, 1979. The Federal Reserve Act exempted the Board's employees from the appointment and pay provisions of the civil service laws and regulations. In the absence of a definite indication that Congress intended otherwise, we held that the specific provisions of the Federal Reserve Act prevailed over the more general SES provisions of the Civil Service Reform Act. The same reasoning is equally applicable to the Panama Canal Commission.

As to the Panama Canal Commission, therefore, we hold that its employees are not covered by the Senior Executive Service.

Milton J. Socolar

For the Comptroller General
of the United States