Volpe PLM# 30766

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

FILE: B-214765 **DATE:** March 25, 1985

MATTER OF: Crews of Vessels - Pay Limitation on Premium Pay

DIGEST:

Civilian marine employees whose pay is set administratively under 5 U.S.C. § 5348(a) (1982) are not subject to pay caps on their premium pay increases. The pay cap language does not apply to premium pay. In addition, the Court of Claims overturned one agency's attempt to limit such increases in fiscal years 1979 and 1980, and there is no evidence of subsequent legislative intent to overrule that decision. See National Maritime Union v. United States, 682 F.2d 944 (Ct. Cl. 1982).

ISSUE

The issue in this decision is whether the premium pay received by civilian marine employees (crews of vessels) is subject to certain pay limitations imposed by statute. We hold that the premium pay of these employees whose pay is set under 5 U.S.C. § 5348(a) (1982) is not subject to the pay caps imposed by statutes in recent fiscal years, for the reasons stated below.

BACKGROUND

This decision is in response to a request from Robert P. Gajdys, Chief, Personnel Division, National Oceanic and Atmospheric Administration (NOAA), concerning the overtime and premium pay received by NOAA wage marine employees. This decision is subject to our labor-management procedures contained in 4 C.F.R. Part 22 (1984), and in that regard we received comments on this question from two other federal agencies and five labor unions. Those comments are summarized below.

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NOAA Question

The request from NOAA states that NOAA ships which are engaged in nautical surveys and oceanographic and biological research are manned by civilian employees whose rates of pay are fixed administratively pursuant to 5 U.S.C. § 5348(a) (1982). That statute provides that the pay of crews of vessels shall be fixed and adjusted consistent with the public interest and in accordance with the prevailing rates and practices of the maritime industry.

The request states further that in fiscal years 1979 and 1980, NOAA capped the basic pay of its wage marine employees based on the determination that it would be inconsistent with the public interest to increase pay rates above the statutory pay caps imposed on most other federal employees. Although NOAA also capped overtime and premium pay in those years, that was held to be an abuse of discretion and was reversed in National Maritime Union v. United States, 682 F.2d 944 (Ct. Cl. 1982).

Since 1981, NOAA has applied the pay caps enacted by the Congress to the basic pay of its wage marine employees, but not to the overtime and premium pay of those employees. However, NOAA is aware of an opinion by the Office of General Counsel, Office of Personnel Management (OPM), to the effect that any premium pay received by wage marine employees that is calculated from basic pay is subject to the pay cap.

The request from NOAA states that NOAA and the Office of General Counsel, Department of Commerce, agree with OPM's opinion, but NOAA points out that the Military Sealift Command (MSC), Department of the Navy, does not agree with the OPM opinion and does not apply the pay cap to the overtime and premium pay of MSC's wage marine employees. Since NOAA is reluctant to impose a pay cap unilaterally in view of prior court decisions overturning NOAA pay practices[1/], the agency asks our opinion whether the pay caps for fiscal years 1981 through 1983 apply to the overtime and premium pay received by wage marine employees and, if so, what action should be taken to reduce those overtime and premium pay rates.

1/ National Maritime Union v. United States, cited above, and Blaha v. United States, 511 F.2d 1165 (Ct. Cl. 1975).

OPM Opinion

The OPM opinion referred to by NOAA was contained in a letter dated December 2, 1983, to the Department of the Interior, concerning the application of the fiscal year 1983 pay cap to the pay of wage marine employees. The OPM opinion cited Public Laws 97-276, section 109, and 97-377, section 107,[2] which, in subsection (a) of the cited sections of each law, limited pay increases to prevailing rate employees and crews of vessels paid under 5 U.S.C. § 5348 to the pay increase granted General Schedule employees (4 percent). See also Federal Personnel Manual (FPM) Bulletin 532-47, November 18, 1982. The OPM letter next cites subsection (e) of the cited sections of both Public Laws which provides:

> "(e) For the purpose of administering any provision of law, rule, or regulation which provides premium pay, retirement, life insurance, or any other employee benefit, which requires any deduction or contribution, or which imposes any requirement or limitation, on the basis of a rate of salary or basic pay, the rate of salary or basic pay payable after the application of this section shall be treated as the rate of salary or basic pay."

The OPM opinion, citing FPM Bulletin 532-47, states that where an agency administratively, by rule or regulation, adopts a pay practice under which premium pay is calculated from basic pay, the premium pay would be subject to the same 4 percent pay limitation. Since the pay of crews of vessels is set administratively by the employing agency[3] and since the agency would adopt a pay practice through a rule or regulation, the OPM opinion concludes that the pay cap applies to any premium pay calculated from the basic pay of wage marine employees.

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[2] Public Law 97-276, § 109, 96 Stat. 1186, 1191-92, October 2, 1982; Public Law 97-377, § 107, 96 Stat. 1830, 1909-10, December 21, 1982.

[3] International Organization of Masters, Mates and Pilots v. Brown, 698 F.2d 536 (D.C. Cir. 1983).

The OPM opinion takes notice of the decision in National Maritime Union, cited above, where the court overturned NOAA's action in fiscal years 1979 and 1980 to limit increases in premium pay for wage marine employees to that amount provided to other prevailing wage employees. The OPM opinion distinguishes the court's decision in that case since the limitation did not depend on statutory pay caps but rather was an administrative decision by NOAA which was in conflict with the pay practices of MSC.

Interior Views

In response to our request for comments, Morris A. Simms, Director of Personnel, Department of the Interior, took notice of the OPM opinion, referred to above, and agrees that overtime and premium pay for fiscal years 1981 through 1983 should be capped. The letter also points out Interior's past practice to cap premium pay of the "relatively small number of vessel employees" employed by Interior.

DOD Views

We also received comments from the Deputy Assistant Secretary of Defense (Civilian Personnel Policy and Requirements) which state that the ruling in the National Maritime Union decision governs this question and that new legislation enacted subsequent to that considered by the court has not materially altered the court's decision.

The letter states that DOD concluded in 1979 that the then-applicable pay cap[4]/ applied only to basic pay. See also the Presidential Memorandum dated January 4, 1979, concerning the application of a 5.5 percent limitation on federal pay which is set administratively. Since then, DOD has capped only basic pay and not overtime and premium pay for fiscal years 1980 through 1983.

The letter from DOD states further that OPM's opinion conflicts with the decision in National Maritime Union where the court overturned NOAA's decision to cap premium and overtime pay rates in fiscal years 1979 and 1980. In addition, DOD points out that the language of the pay caps in

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4/ Public Law 95-429, § 614(a), 92 Stat. 1001, 1018-19, October 10, 1978.

Public Laws 97-276 and 97-377 (fiscal year 1983) can be traced back to Public Law 95-429 (fiscal year 1979) when DOD adopted its policy which was later reviewed by the court in the National Maritime Union case. The letter from DOD concludes that MSC's interpretation of premium pay for mariners is legal, reasonable, and in accord with the public interest.

Union Comments

In accordance with our labor-management procedures contained in 4 C.F.R. Part 22 (1984), we requested and received comments from five unions representing wage marine employees.

The International Organization of Masters, Mates and Pilots argues that capping premium pay would depart from the intent of the law as well as from the court's ruling in the National Maritime Union case. We received similar comments from the Marine Staff Officers and the Seafarers International Union.

The Radio Officers Union, D-3, argues that there has been no change in the language of the pay caps since fiscal year 1979 which would support a theory that the Congress intended to overrule the court's decision in the National Maritime Union case. Furthermore, the union contends that premium pay in the maritime industry is not subject to a simple calculation method as described in the pay legislation, citing Appendix One of the decision in Blaha.[5/]

Finally, District No. 1, Pacific Coast District, Marine Engineers' Beneficial Association, points out that the "vast majority of Federal sector mariners" are employed by MSC. The union argues that application of the pay cap legislation is arbitrary and that there is no definitive interpretation of subsection (e) (quoted earlier) as it relates to premium pay. Finally, the union argues that premium pay for civilian mariners is not "calculated from base pay" but rather is based on prevailing premium rates paid in the maritime industry as required by 5 U.S.C. § 5348.

5/ Blaha, cited above in Footnote 1.

Against this background we turn to OPM's opinion "that any premium pay received by these employees [the mariners] that is calculated from basic pay is subject to the pay cap." The OPM opinion recognizes the argument that the National Maritime Union case "could be pertinent," but responds:

> "* * * as we have indicated above, however, in fiscal year 1983, both basic pay and premium pay calculated [from] basic pay is specifically limited by statute. The holding in National Maritime Union of America, supra, therefore would not be controlling. * * *"

We have two fundamental problems with the OPM analysis. First, we find no change in the pay cap language subsequent to National Maritime Union that would affect the holding of the case with respect to premium pay. It is true that the statutory pay cap language for fiscal year 1981 and thereafter expressly covers the basic pay of federal mariners fixed pursuant to 5 U.S.C. § 5348(a). However, the court in National Maritime Union affirmed the Government's action in capping 1979 and 1980 basic pay for the mariners through administrative action, yet concluded at the same time that premium pay for the mariners was not capped. Thus, we see no reason why the fact that basic pay for the mariners is now capped by statute rather than by administrative action would be material to the holding in National Maritime Union as it applies to premium pay. If anything, Congress' action in expressly covering the mariners' basic pay in the pay cap language but including no comparable language on premium pay tends to reinforce the conclusion that premium pay is not capped.

The only other pay cap language referred to by OPM is subsection (e), quoted in full previously, which states in relevant part:

> "(e) For the purpose of administering any provison of law, rule, or regulation which provides premium pay * * * on the basis of a rate of salary for basic pay, the rate of salary or basic pay payable after the application of this section shall be treated as the rate of salary or basic pay."

the National Maritime Union case remains fully controlling with regard to the premium pay of mariners fixed under 5 U.S.C. § 5348.

Finally, we note that while the Government in National Maritime Union treated "premium pay" and "overtime pay" as two different categories of pay calculated through different means, the submission to us in the present case characterizes "overtime pay" as one form of "premium pay." The OPM opinion refers only to "premium pay" without elaboration on whether it uses this term to include or exclude "overtime pay." We recognize that there may be categories of "overtime pay" for mariners, perhaps occasionally referred to as "premium pay," in which the rate is established as a percentage of basic pay. We also recognize that the court in National Maritime Union may have left the door open for the Government to exercise its discretion to cap such overtime pay administratively if done prospectively and uniformly by all agencies. However, this is not the case now. Therefore, we find no basis to conclude that any "overtime" rates or "premium" pay rates for federal mariners are currently subject to the pay cap.

Accordingly, we hold that the overtime and premium pay increases granted to civilian marine employees under 5 U.S.C. § 5348(a) are not subject to the pay cap limitations.

Harry R. Van Cleve
for Comptroller General
of the United States