



Comptroller General
of the United States
Washington, D.C. 20548

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Decision

Matter of: Customs Inspectors Overtime
File: B-244300
Date: April 3, 1992

DIGEST

Payment of overtime compensation to Customs inspectors under 19 U.S.C. § 267 is not warranted after suspected "internal" drug carriers have been subject to a strip search and an x-ray search that reveal reasonable suspicion that the individual is concealing drugs. The time spent monitoring the suspect at a hospital or other facility after a reasonable suspicion has been established is not part of the inspectional process for which overtime compensation is authorized under 19 U.S.C. § 267.

DECISION

The Commissioner of Customs has requested a decision whether the time spent by Customs inspectors monitoring persons who are suspected of concealing drugs inside their bodies involves inspectional duties for which overtime is compensable under 19 U.S.C. § 267 (1988), or whether such monitoring constitutes enforcement duties for which overtime is compensated under the Federal Employees Pay Act of 1945 (FEPA), 5 U.S.C. §§ 5542, 5546 (1988). The National Treasury Employees Union (NTEU) has filed comments on the Commissioner's request and supports the Commissioner's determination that the monitoring is compensable under 19 U.S.C. § 267.

BACKGROUND

The Commissioner states that the question of which overtime law is applicable arises from the following circumstances. If a Customs inspector suspects that an individual entering the United States may be carrying illegal drugs within his or her body, the individual may be subjected to strip and x-ray searches. If, based on these searches, the Customs inspector continues to have reasonable suspicion that the individual is concealing drugs, the inspector will accompany the suspect to a hospital or facility for monitoring until the suspect has a bowel movement. This inspector will monitor the suspect until the end of the inspectors' tour of

duty, whereupon another inspector takes over monitoring the suspect. The Commissioner states that the monitoring may continue for several days.

The issue presented by the Customs Service is whether the inspectors who monitor the suspected "internal" drug carrier are performing "inspectional services" that qualify for overtime compensation under 19 U.S.C. § 267. Pending our decision, the Customs Service has determined that a sufficient nexus exists between the monitoring and the initial inspection of the individual upon entry to support treating it as inspectional duty until the individual is released from Customs custody. The Customs Service views the monitoring as part and parcel of the inspection duties described in 19 U.S.C. § 267, and states that the inspection stops only upon actual discovery of the contraband, i.e., the passage of the contraband from the suspect.

The NTEU likewise argues that the monitoring of suspected internal drug carriers is a continuation of the inspection process that warrants payment under 19 U.S.C. § 267 for overtime work performed. The union also contends that we should defer to the Customs Service's determination in view of the agency's responsibility for administering the customs laws.

In addition, NTEU cites several statutes that give Customs inspectors the authority to inspect, search, detain, and examine persons, cargo and vehicles that enter the country. See, e.g., 19 U.S.C. §§ 482, 1582, which are referenced in the Supreme Court's decision in United States v. Montoya De Hernandez, 473 U.S. 531 (1985), a case dealing with the reasonableness under the Fourth Amendment of a search and seizure of evidence from a suspected internal drug carrier. The union concludes from this decision that the Supreme Court views the detention and monitoring of suspected internal drug carriers as part of the inspection and examination functions of Customs inspectors as defined by statute. Thus, the union states that the activities at issue here are compensable under 19 U.S.C. § 267.

OPINION

The statute in question, 19 U.S.C. § 267 (1988), provides in part as follows:

"The Secretary of the Treasury shall fix a reasonable rate of extra compensation for overtime services of customs officers and employees who may be required to remain on duty between the hours of

five o'clock post meridian and eight o'clock ante-meridian, or on Sundays or holidays, to perform services in connection with the lading or unlading of cargo, or the lading of cargo or merchandise for transportation in bond or for exportation in bond or for exportation with benefit of drawback, or in connection with the receiving or delivery of cargo on or from the wharf, or in connection with the unlading, receiving, or examination of passengers' baggage"

We note that neither the statute, 19 U.S.C. § 267, nor the regulations, 19 C.F.R. § 24.16, define inspectional duties nor do they draw a clear line as to what duties are compensable thereunder. Thus, our analysis must be whether the duties performed are part of the inspectional process.

The many references to the lading and unlading of merchandise, persons and baggage require a strict interpretation of the statute with the result that Customs employees are not entitled to overtime under 19 U.S.C. § 267 unless the duties and services they perform are directly related to the customs inspection required by law. Zolczer, Smith, and O'Scier, B-197489, Jun. 12, 1980. We have consistently viewed the covered duties as involving inspection, examination, and the making of determinations as part of that inspectional process. Customs Service Data Transcribers, B-231380, Feb. 8, 1989.¹

In our decisions we have denied overtime under 19 U.S.C. § 267 for Customs employees who guarded a ship in transit or who assisted in predeparture inspections of airline passengers as a deterrent to skyjacking. 50 Comp. Gen. 703, supra; 2 Comp. Gen. 512 (1923). Similarly, we denied overtime under this statute to Customs employees who entered data from a package into a computer, a support activity to the Customs inspectional process. Customs Service Data Transcribers, supra.

In the present case, the Commissioner of Customs argues that the monitoring of the suspect is sufficiently related to the initial inspection and is a continuation of the examination process that terminates only with the discovery of the contraband, which the Commissioner identifies as the time the contraband is excreted from the suspect. While we recognize that the Secretary of the Treasury has broad discretion to define what inspectional duties are under 19 U.S.C. § 267, we cannot agree in this case that

¹ See 50 Comp. Gen. 703 (1971); Kenneth J. Corpman, B-214845, Apr. 12, 1985; Murphy and Doud, B-194568, Feb. 15, 1980.

monitoring of the suspect, once a reasonable suspicion of drugs has been established, is a continuation of the inspectional process.

It is our view that once the strip search and x-ray search have been performed and a decision has been made, based on the search results, that there is reasonable suspicion that an individual is carrying drugs internally, the inspectional process has been concluded. Whatever duties the Customs employee performs subsequently in monitoring the suspect at the hospital or other facility is not compensable under 19 U.S.C. § 267 but would be compensable for overtime under FEPA, 5 U.S.C. §§ 5542, 5546.

Our opinion is not inconsistent with the decision cited by NTEU, United States v. Montoya De Hernandez, supra. This is a criminal law case dealing with the propriety of a search and seizure. Although the Court referenced several statutes that describe the authority of Customs inspectors to search and seize suspected contraband or merchandise, the Court did not rule on the issue of inspectors' entitlement to overtime compensation under 19 U.S.C. § 267.

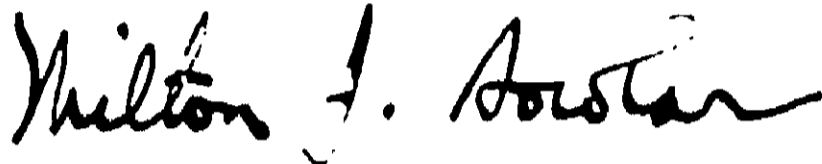
We are aware of a recent decision by the U.S. Court of Appeals for the Federal Circuit, National Treasury Employees Union v. United States, 950 F.2d 1562 (Fed. Cir. 1991), where the court overturned a Claims Court decision denying Customs inspectors overtime compensation under 19 U.S.C. § 267 for their duties in processing Cuban refugees during the Mariel boatlift. The Federal Circuit found that inspectional services were being performed by the Customs employees who were boarding vessels, examining manifests and baggage, completing customs forms, and otherwise assisting the Immigration and Naturalization Service in detaining undocumented aliens. The court denied the government's contention that there is a law enforcement exception to entitlement to overtime under 19 U.S.C. § 267, and the language of the majority opinion in this case suggests there is no distinction between inspectional and other duties performed by Customs inspectors for purposes of overtime compensation.

If the court's decision is intended to hold that whenever a Customs inspector is at work, overtime is compensated under 19 U.S.C. § 267, such a holding would be a radical departure from the usual meaning given to duties compensable under this special Customs overtime statute. To the extent that this could be read from the court's opinion, we think it is dictum which we are not bound to follow.²

² We note also that the Department of Justice has requested en banc review of the Federal Circuit's decision.

In the present case there is no dispute that the Customs employees are engaged in inspectional services when they encounter an arriving passenger they suspect may be concealing drugs. However, while the actual proof that a suspect is carrying drugs internally can only be known to a certainty upon the actual production of the evidence, the process of monitoring a suspect at a hospital or other facility only begins after an initial strip search has been conducted of the suspected internal drug carrier and a subsequent x-ray search is conducted.

Accordingly, we hold that the entitlement of Customs inspectors to overtime compensation for activities conducted after reasonable suspicion of drug smuggling has been established by x-ray examination must be determined under FEPA. However, in view of the complexity of this issue, we raise no objection to the past overtime payments made by the Customs Service under 19 U.S.C. § 267.



Acting Comptroller General
of the United States