

DECISION



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

265-12

FILE: B-205126

DATE: November 29, 1983

MATTER OF: Panama Canal Commission - Applicability of
Fair Labor Standards Act to Firefighters
Previously Employed as Police Officers

DIGEST:

Panama Canal Commission requests a decision as to whether firefighters who were employed prior to October 1, 1979, as police officers are entitled to overtime pay under the Fair Labor Standards Act (FLSA). These employees are now being paid at the same basic pay rate they received as police officers, plus 25 percent premium pay for standby duty under Title 5. We hold that these employees may not be paid under the FLSA. The "grandfather" clause of the Panama Canal Treaty of 1977, and the Panama Canal Act of 1979 does not cover these employees since their pay has not been reduced. Thus, their current terms and conditions of employment are no less favorable than they were prior to the passage of the Treaty and the Act.

Mr. Fernando Manfredo, Jr., Acting Administrator, Panama Canal Commission, has requested our decision as to whether 11 Commission employees are entitled to overtime payments in accordance with the provisions of the Fair Labor Standards Act (FLSA). The employees formerly served the Panama Canal Zone Government and later the Panama Canal Commission as police officers, and were placed in firefighter positions as a result of a reduction in force (RIF). For the reasons discussed below, we hold that these employees are not entitled to be paid overtime in accordance with the FLSA.

BACKGROUND

Prior to October 1, 1979, the employees of the Panama Canal Company and the Canal Zone Government were eligible to be paid overtime pursuant to either Title 5 of the United States Code or the FLSA, 29 U.S.C. §§ 201-219 (1976), whichever provided a greater payment. Under Title 5, the firefighters, who work three 24-hour shifts each week, were entitled to receive basic compensation for 40 hours of duty

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and annual premium compensation at the rate of 25 percent for the excess hours. 5 U.S.C. § 5545(c)(1). Under the FLSA, they were entitled to receive basic compensation for 54 hours of work and overtime pay at one and a half times the regular rate for the excess hours. Since the fire-fighters were entitled to greater pay under the FLSA, they were paid under that statute.

Effective October 1, 1979, many of the employees of the Panama Canal Company and the Canal Zone Government were transferred to the Panama Canal Commission. The Panama Canal Act of 1979 amended the FLSA, 29 U.S.C. § 213(f) (Supp. IV 1980), by deleting a reference to the Canal Zone as a territory or possession in which the FLSA applied. Pub. L. No. 96-70, § 1225(a), 93 Stat. 468. Since Congress specifically deleted the Canal Zone from FLSA coverage, we have held that the Commission was no longer covered by the FLSA. B-205126, June 17, 1982.

We also note that the Panama Canal Act of 1979 contains a "grandfather" clause which preserves rights of employees who transferred from the Panama Canal Company or Canal Zone Government to the Commission. Specifically, Section 1231(a) of the Panama Canal Act of 1979 provides with regard to employees transferred on that date from the Panama Canal Company or the Canal Zone Government to the Panama Canal Commission that "* * * the terms and conditions of employment set forth in paragraph (2) of this subsection shall be generally no less favorable, on or after the date of transfer [October 1, 1979] * * * than the terms and conditions of employment with the Panama Canal Company and Canal Zone Government on September 30, 1979 * * *." Panama Canal Act of 1979, § 1231, 93 Stat. 468, 22 U.S.C. § 3671(a)(1) (Supp. IV 1980). The "terms and conditions of employment" to which this section applies are listed in paragraph (2), specifically including "premium pay." Pub. L. No. 96-70, § 1231(a)(2)(C), 93 Stat. 468. Section 1231 was enacted to implement Article 10, paragraph 2(b), of the Panama Canal Treaty of 1977 (TIAS No. 10030).

Based on this background, the Commission previously submitted two cases to our Office in which it questioned whether certain groups of employees who were under the grandfather clause could be paid under the provisions of

the FLSA. In the first case, B-205126, June 17, 1982, we held that admeasurers could not be paid under the FLSA since they were entitled to overtime under Title 5 and the limitation on earnings in 5 U.S.C. § 5542(a)(2) applied. In the second case, B-205126, February 28, 1983, we were informed that if the FLSA provisions were not applied to firefighters covered by the grandfather clause, they would suffer a significant, protracted reduction in pay which would operate as a virtual nullification of the grandfather clause for them. Therefore, we held that these firefighters could continue to receive overtime pay in accordance with the FLSA.

FACTS

The employees who are the subject of this decision served prior to October 1, 1979, as police officers employed by the Canal Zone Government. The police officers were subject to the FLSA prior to October 1, 1979, but they generally worked a 5-day week of 8-hour shifts, plus occasional overtime. On October 1, 1979, they were transferred to the Panama Canal Commission and continued to serve as police officers during the transition period established by Article XI of the Panama Canal Treaty of 1977, TIAS 10030. In accordance with the Treaty, the transition period ended on March 31, 1982, and thereafter the Commission ceased to have authority for maintaining a police force.

A reduction in force occurred and 11 of the police officers were placed in firefighting positions. These employees now work the same three 24-hour shifts a week as do all firefighters. However, their basic hourly rate of pay is higher than the other firefighters because, when the police force was disbanded, they were granted grade retention in accordance with 5 C.F.R. Part 536. The Administrator states that when these employees were placed in firefighter positions their basic rate of pay was set at \$10.07 per hour. If they had transferred to the same positions without grade and pay retention, their basic rate would have been \$6.01 per hour. After the 2-year period of grade retention expires, these employees will be entitled to pay retention in accordance with 5 C.F.R. Part 536.

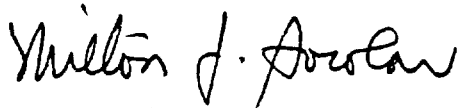
A comparison of the pay of these 11 employees reveals that they are earning more money as firefighters than when

they were police officers. They are earning approximately the same basic rate of pay as before, but now they receive 25 percent annual premium compensation under 5 U.S.C. § 5545 for their standby duty. When they were police officers, the employees received no premium compensation for standby duty and they received little overtime pay.

ANALYSIS

Based on the facts as presented, we see no reason why the "grandfather" clause should be invoked for these 11 employees. In this case, the employees are not seeking the preservation of a benefit they previously enjoyed. In fact, their pay has not been reduced but has actually increased since the Panama Canal Act of 1979. If these 11 employees were paid overtime under FLSA at their current basic rate of pay, they would be paid at a rate higher than other firefighters receive now, and higher than they received prior to the Act of 1979. Clearly the grandfather clause was not intended to cover this type of situation since that clause only guarantees that the terms and conditions of employment will be generally no less favorable than prior terms and conditions.

Accordingly, we agree with the Commission's view that extension of the FLSA provisions to the 11 employees is not permissible.

for 
Comptroller General
of the United States