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DECISION



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

FILE: B-205126

DATE: February 28, 1983

MATTER OF: Panama Canal Commission - Applicability of
Fair Labor Standards Act to Firefighters

DIGEST:

Panama Canal Commission requests a decision as to whether firefighters employed prior to October 1, 1979, are entitled to overtime pay under the Fair Labor Standards Act (FLSA). The Panama Canal Treaty and section 1231 of the Panama Canal Act state that prior employees transferred to the Commission shall have terms and conditions of employment which are generally no less favorable than prior terms and conditions. We hold that this clause requires continuation of FLSA overtime pay to Commission firefighters employed prior to October 1, 1979, since otherwise they would suffer a significant, protracted reduction in pay which would operate as a virtual nullification of the "grandfather" clause for them.

Mr. D. P. McAuliffe, Administrator, Panama Canal Commission has requested an interpretation of our decision B-205126, June 17, 1982, in which we held that the overtime pay limitation in 5 U.S.C. § 5542(a)(2) applied to employees of the Commission since they were no longer covered by the Fair Labor Standards Act (FLSA). He points out that our decision primarily involved certain admeasurers employed by the Commission and he requests that we clarify whether the decision applies to FLSA pay for firefighters employed prior to October 1, 1979, in view of the "grandfather" clause in section 1231 of the Panama Canal Act of 1979.

For the reasons that follow, we hold that firefighters employed in the Canal Zone prior to October 1, 1979, continue to be entitled to FLSA overtime pay by virtue of section 1231.

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DISCUSSION

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 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 firefighters 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 stated in our earlier decision that employees of the Commission were no longer covered by the FLSA.

The Administrator argues that the "grandfather" clause in section 1231(a) of the Panama Canal Act should be applied to firefighters employed prior to October 1, 1979, in order that they may continue to receive FLSA overtime pay. Section 1231(a) provides with regard to employees transferred on that date from the 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).

The Administrator points out that, if they are not paid under the FLSA, the potential loss of income for the firefighters, who are predominantly of Panamanian citizenship, would be approximately \$100 per pay period. As a result, employee morale would be adversely affected and this may affect Canal operational efficiency and safety. Finally, the Administrator states that the firefighters are rendering an essential service to the Commission, and that the higher payments to the firefighters will not prejudice the Commission's financial position because the Commission has since October 1979 covered all expenses by revenues as required by law.

We believe that the Administrator has made a sufficient showing to differentiate the firefighters employed by the Commission from the admeasurers and other employees of the Commission discussed in our prior decision. The firefighters have an irregular workweek involving 72 hours of work, as contrasted to the normal 40 hours, and 24-hour shifts, as contrasted to the normal 8 hours. These differences in working hours give rise to a significant, protracted difference in pay under FLSA for firefighters. Although the "generally no less favorable" language of the grandfather clause in section 1231(a) of the Panama Canal Act does not require application of FLSA overtime in every instance, we believe its non-application to firefighters here would significantly impair the terms and conditions of their employment in contravention of the Panama Canal Treaty and the Panama Canal Act. It is our view that the grandfather clause in section 1231(a) was enacted to prevent just such severe adverse impact upon the pay of those employees who were working prior to October 1, 1979. A failure to continue FLSA overtime pay for those firefighters employed prior to October 1, 1979, would operate as a virtual nullification of the grandfather clause as to them.

Since section 1225(a) of the Panama Canal Act deleted the Panama Canal Zone as an area covered by the Fair Labor

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Standards Act, it is clear that firefighters newly hired by the Panama Canal Commission on or after October 1, 1979, are not entitled to overtime pay under FLSA. This decision allows such pay only for those firefighters previously employed who were transferred to the Commission, as specified in section 1231(a).

Accordingly, those firefighters who were transferred to the Panama Canal Commission on October 1, 1979, are entitled to continue to be paid for overtime work under the Fair Labor Standards Act provisions as applied prior to October 1, 1979.

for Milton J. Fowler
Comptroller General
of the United States