

**105 FMSR 215**

**105 LRP 26587**

**Fred J. Fagergren v. Department of the Interior**

98 MSPR 649

**U.S. Merit Systems Protection Board**

DE-0831-03-0469-I-1

**June 14, 2005**

**Related Index Numbers**

**91.047 Law Enforcement Officer Retirement Credit**

**1022.047 Law Enforcement Officers**

**Judge / Administrative Officer**

**Neil A. G. McPhie, Chairman**

**Judge / Administrative Officer**

**Barbara J. Sapin, Member**

**Ruling**

The MSPB sustained the agency's determination that a park ranger was not entitled to law enforcement officer retirement credit.

**Meaning**

According to the U.S. Court of Appeals, Federal Circuit, the most important factors for determining whether a federal officer is eligible for LEO early retirement credit are:

1. Whether the officer frequently pursues and detains criminals, or merely guards life and property..
2. Whether there is an early mandatory retirement age.
3. Whether there is a youthful maximum entry age for the position.
4. Whether the job is physically demanding so as to require a youthful workforce.
5. Whether the officer is exposed to hazard or danger.

**Case Summary**

A park manager with the National Park Service applied for law enforcement officer retirement credit based on his service as a park ranger and manager.

The agency denied his entitlement claim to LEO retirement credit because the descriptions and duties of his positions did not support a finding that he was involved in law enforcement. The AJ reversed that decision, finding the ranger and manager jobs included law enforcement duties that could qualify him for LEO retirement credit. The MSPB reversed the AJ, deciding that although the appellant came in contact with criminal suspects and interrogated witnesses and suspects, it was only a few times in the course of several years. Most of the appellant's duties involved maintaining order, protecting life and property, and guarding against or inspecting for violations of law. These types of law enforcement duties do not qualify an employee for special LEO retirement credit. The MSPB upheld the agency decision to deny the appellant LEO retirement credit.

Although the appellant established that he worked long periods without breaks, he was on call 24 hours a day, and he was authorized to carry and routinely carried a firearm, the court found these factors are less important because they do not always distinguish LEO work from non-LEO work.

**Full Text**

**APPEARANCES:**

Lawrence Berger, Esquire, Garden City, New York, for the appellant.

Elaine England, Esquire, Salt Lake City, Utah, for the agency.

**Opinion and Order**

This case is before the Board upon the agency's petition for review of a May 21, 2004 initial decision reversing the agency's determination that the appellant is not entitled to law enforcement officer (LEO) service credit. For the reasons stated below, the Board GRANTS the petition for review, REVERSES the initial decision, and SUSTAINS the agency's determination that the appellant is not entitled to LEO service credit.

**Background**

The appellant was a GS-0025-14 Park Manager (Superintendent) with the National Park Service (NPS). Initial Appeal File (IAF), Tab 10, Subtab 2A-2. From April 29, 1973, to October 25, 1975, he was employed by the agency as a GS-0025-7/9 Park Ranger (Archeologist) at Effigy Mounds National Monument (Effigy Mounds), Iowa. On October 26, 1975, the agency promoted the appellant to the GS-0025-11 position of Park Manager (Superintendent) at the Mound City Group National Monument (Mound City), Chillicothe, Ohio. He remained in that Park Manager (Superintendent) position until March 7, 1981, when the agency promoted and reassigned him to the GS-0025-12 position of Park Manager (Superintendent) at Big Cypress National Preserve, Naples, Florida. *Id.*

The appellant, who is covered by the Civil Service Retirement System (CSRS), retired on April 2, 2002. *Id.* He requested primary LEO retirement coverage for the Effigy Mounds and Mound City positions and secondary LEO coverage for his remaining federal service, both of which the agency denied on the grounds that the position descriptions and his duties did not support a finding that the appellant was entitled to LEO coverage. IAF, Tab 10, Subtab 2A-1 at 1-4.

After a hearing, the administrative judge found that the appellant was entitled to primary LEO retirement service credit because he had shown that the reason for the existence of the qualifying positions was to perform primary law enforcement duties at Effigy Mounds and Mound City. Initial Decision (ID) at 11-21. The administrative judge further found that the appellant was entitled to secondary LEO retirement credit for his service after March 8, 1981. *Id.* at 22.

The agency alleges on petition for review that the administrative judge committed various errors in the ID. Petition for Review File (PFRF), Tab 1. The appellant has responded in opposition to the petition for review. PFRF, Tab 3.

### **Analysis**

Police officers seeking LEO retirement coverage bear the burden of proving entitlement thereto by a preponderance of the evidence. 5 C.F.R. § 1201.56(a)(2). Under 5 U.S.C. § 8331(20), an LEO is defined as an employee the duties of whose position are primarily the investigation, apprehension, or detention of individuals suspected or convicted of offenses against the criminal laws of the United States 5 U.S.C. § 8331(20). Employees occupying LEO positions are eligible to retire upon attaining age 50 with 20 years of LEO service, whereas the majority of other civil service employees are not eligible to retire until they reach age 60 with 20 years of service or age 55 with 30 years of service. *Bingaman v. Department of the Treasury*, 127 F.3d 1431, 1433 (Fed. Cir. 1997). This preference arises from a legislative intent that LEO employees be young men and women capable of meeting the vigorous demands of occupations which are far more taxing physically than most in federal service. *Watson v. Department of the Navy*, 262 F.3d 1292, 1299 (Fed. Cir. 2001) (citing S. Rep. No. 93-948, at 2 (1974), reprinted in 1974 U.S.C.C.A.N. 3698, 3699), *cert. denied*, 122 S. Ct. 817 (2002). Eligibility for LEO retirement coverage is strictly construed because the program is more costly to the government than more traditional retirement plans and often results in the retirement of important people at a time when they would otherwise have continued to work for a number of years. *Id.* at 1298 (citations omitted).

With respect to the requirements of 5 U.S.C. § 8331(20), the Office of Personnel Management (OPM) has created a three-prong test to determine which duties are considered primary duties of a particular position: (1) Whether the duties are paramount in influence or weight, that is, whether they constitute the basic reasons for the existence of the position; (2) whether the duties occupy a substantial portion of the individual's working time over a typical work cycle; and (3) whether the duties are assigned on a regular and recurring basis. 5 C.F.R. § 831.902. All three criteria must be met to demonstrate LEO eligibility. *Watson*, 262 F.3d at

1299. OPM's interpretation of statutes, which Congress charges it to administer, is normally entitled to great deference. *Newman v. Love*, 962 F.2d 1008, 1012 (Fed. Cir. 1992).

In general, if an employee spends at least fifty percent of his time performing certain duties, those duties are his primary duties. 5 C.F.R. § 831.902. The OPM regulations expressly state that duties of an emergency, incidental, or temporary nature are not primary, even if they meet the substantial portion of the time prong of OPM's test. *Id.* Furthermore, the regulations provide that maintaining law and order, protecting life and property, guarding against or inspecting for violations of law, or investigating persons other than persons who are suspected or convicted of offenses against the criminal laws of the United States are not LEO primary duties. *Id.*

The Board has developed a position-oriented approach for determining LEO eligibility, which focuses upon the reason for the existence of the position in question, for the first prong of OPM's test. Under the position-oriented approach, the Board considers the reason for the position's existence, assessing both the official position documentation and the employee's actual day-to-day duties. *Watson*, 262 F.3d at 1300. The United States Court of Appeals for the Federal Circuit (Federal Circuit) has expressed approval for this approach as consistent with the applicable statutes and regulations. *Id.* at 1296. As explained below, the appellant failed to show that his positions met any of the three prongs of OPM's test for an LEO position.

The Board has also applied the six-factored Bingaman approach for evaluating the second and third prongs of OPM's test that the LEO duties occupied a substantial portion of the employee's working time and that the duties were assigned on a regular and recurring basis. *Watson*, 262 F.3d at 1299. Under this approach, the Board considers whether the employee commonly: (1) Has frequent direct contact with criminal suspects; (2) is authorized to carry a firearm; (3) interrogates witnesses and suspects; (4) works for long periods without a break; (5) is on call

24 hours a day; and (6) is required to maintain a level of physical fitness. *Bingaman*, 127 F.3d at 1436. No single *Bingaman* factor is considered determinative. *Id.*

Moreover, satisfaction of the Bingaman factors alone is insufficient to establish entitlement to LEO coverage because they do not address the reason for the existence of the position, as required by 5 C.F.R. § 831.902. *Watson*, 262 F.3d at 1301. The Federal Circuit has held that, overall, the most probative factors for determining whether a federal officer is eligible for LEO early retirement credit are the following: (1) Whether the officer is merely guarding life and property, or whether he is instead more frequently pursuing or detaining criminals; (2) whether there is an early mandatory retirement age; (3) whether there is a youthful maximum entry age for the position; (4) whether the job is physically demanding so as to require a youthful workforce; and (5) whether the officer is exposed to hazard or danger. *Id.* at 1303.

On petition for review, the agency contends that the appellant's actual duties did not support a primary law enforcement finding because his duties are best described as maintaining order, protecting life and property, and guarding against or inspecting for violations of law. PFRF, Tab 1 at 10, 19. The agency also argues that the appellant failed to show that his positions had a maximum entry age, or early mandatory retirement age, or exposed him to hazard or danger. *Id.* at 15.

The administrative judge rejected these arguments below and found that, while some of the appellant's duties necessarily involved maintaining law and order and protecting life and property with the NPS, these were not the appellant's primary duties. *Id.* at 16. In support of her decision, the administrative judge described the appellant's duties at length, including his apprehension of criminal suspects and his investigation of criminal violations. *Id.* at 4-9. However, the administrative judge also found that the appellant spent a substantial portion of his working hours patrolling for ginseng poachers,

wildlife poachers, and tree poachers, and assuring that cultural artifacts and burial mounds were protected. *Id.* at 17.

Despite the administrative judge's findings, the record shows that the appellant did not satisfy the requirements for LEO service credit. The record shows that, while serving in the Effigy Mounds and Mound City positions, the appellant came in contact with criminal suspects or interrogated witnesses and suspects only a few times over several years. In addition, the evidence shows that most of his duty performance involved maintaining order, protecting life and property, and guarding against or inspecting for violations of law. These are the type of law enforcement duties that do not qualify an employee for special LEO service credit. *Watson*, 262 F.3d at 1301.

Furthermore, the appellant acknowledged that neither the Effigy Mounds nor Mound City position required that he maintain a level of physical fitness, and he failed to show that either position had age limitations or was particularly hazardous. IAF, Vol. VII, Hearing Transcript at 25-28. Finally, although the appellant established that he worked long periods without breaks, he was on call 24 hours a day, and he was authorized to carry and routinely carried a firearm, the court has found that these factors are less probative because they do not always distinguish LEO work from non-LEO work. *Watson*, 262 F.3d at 1302. Therefore, the appellant has failed to satisfy the criteria of OPM's test as set forth in 5 C.F.R. § 831.902.

Accordingly, we reverse the initial decision and sustain the agency's decision that the appellant is not entitled to primary LEO service credit for the periods of time that he occupied the Effigy Mounds and Mound City positions and so he is not entitled to secondary LEO service credit for his subsequent assignments.

### **Order**

This is the final decision of the Merit Systems Protection Board in this appeal. Title 5 of the Code of

Federal Regulations, section 1201.113(c) (5 C.F.R. § 1201.113(c)).

#### **Statutes Cited**

5 USC 8331

#### **Regulations Cited**

5 CFR 1201.56

5 CFR 831.902

#### **Cases Cited**

127 F.3d 1431

262 F.3d 1292

962 F.2d 1008