

100 FMSR 5441

**George W. Ayres v. Department of
Defense**

U.S. Merit Systems Protection Board

NY-0831-94-0355-B-1(09/21/00); 86 MSPR
593

September 21, 2000

Judge / Administrative Officer

**Before: Slavet, Acting Chairman; Marshall,
Member**

Related Index Numbers

91.009 Retirement, Service Credit

**1002.045 Appellate Jurisdiction of Merit Systems
Protection Board, Retirement Benefits**

**1022.047 Special Employment Categories, Law
Enforcement Officers**

Case Summary

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whether an appellant is entitled to LEO retirement coverage. In this case, OPM's classification standards and guidance showed that this position was not one whose duties were primarily the investigation, apprehension, or detention of criminals or suspected criminals, and none of the duties showed the position was created for this basic reason. Accordingly, the Board concluded the appellant was not entitled to LEO service credit for any time he occupied this position.

Full Text

APPEARANCES:

George W. Ayres, Carthage, New York, pro se.

Carl J. Disalvatore, Esquire, Fort Drum, New York, for the agency.

Opinion and Order

¶1 The agency has filed a timely petition for review of a remand initial decision that found that the appellant is entitled to law enforcement officer (LEO) retirement credit pursuant to 5 U.S.C. § 8412(d) for his service as a Supervisory Police Officer. For the reasons discussed below, we GRANT the petition for review under 5 C.F.R. § 1201.115, REVERSE the remand initial decision, and AFFIRM the agency's action denying the appellant LEO retirement credit.

Background

¶2 The appellant, a GS-7 Supervisory Police Officer (GS-083 series) with the Provost Marshal's Office, Department of the Army, Fort Drum, New York (Fort Drum), appealed the agency-initiated final decision denying him LEO coverage for purposes of retirement under the Federal Employees' Retirement System. Appeal File (AF), Tab 1. A consolidated hearing was held on the merits of this appeal as well as 16 other similar appeals. Remand Initial Decision (RID) at 2 n.1.

¶3 By initial decision dated December 12, 1996, the administrative judge (AJ) dismissed a consolidated appeal, consisting of the appellant's appeal and six other appeals, for lack of Board jurisdiction because the appellants had failed to make

formal, written requests to their agency head for a determination as to their entitlement to LEO coverage under 5 C.F.R. § 842.804(c). Third Refiled Appeal File, Tab 3 (*Margrey v. Department of Defense*, Initial Decision, Dec. 12, 1996). On petition for review, the Board found that it has jurisdiction over these appeals and remanded the cases for further adjudication. *Margrey v. Department of Defense* [99 FMSR 5049] (Vice Chair Slavet, concurring in part and dissenting in part).

¶4 On remand, the AJ, issued separate initial decisions and found that the appellant had shown that his service under position description (PD) No. 2637 as a Supervisory Game Warden, but not his service under PD No. 4096 as the Special Reaction Team (SRT) Coordinator, is entitled to LEO coverage because the totality of the evidence showed that the former, but not the latter position, is a rigorous position, the primary duties of which are the investigation, apprehension, or detention of individuals suspected or convicted of offenses against the criminal laws of the United States. RID at 8-12, 14-26. He further found that the appellant had not shown that either position was a qualifying secondary position for purposes of entitlement to LEO retirement credit. RID at 12-14, 27. Because he found that the appellant had shown that his service as a Supervisory Game Warden is primary LEO service, he reversed the agency's action and ordered the agency to grant the appellant LEO retirement credit for this service. RID at 26.

¶5 The agency has timely filed a petition for review, Petition for Review File (PFRF), Tab 1, to which the appellant has timely responded in opposition, *id.*, Tab 2. In his response, the appellant does not contest either of the AJ's findings with regard to his SRT Coordinator position nor the AJ's finding that his Supervisory Game Warden position is not a qualifying secondary position for purposes of entitlement to LEO retirement credit. *Id.*, Tab 2.

Analysis

¶6 Under the Board's recently adopted "position-oriented" approach to the adjudication of

claims for LEO retirement credit, if a position was not created for the purpose of investigation, apprehension, or detention, then the incumbents of that position would not be entitled to LEO credit. *Watson v. Department of the Navy*, MSPB Docket No. DC-0842-99-0483-1-1, slip op. ¶ 5 (July 17, 2000) [99 FMSR 5049]. The Board will consider evidence of what duties the incumbents performed from day-to-day in that position, along with all of the other evidence of record, to ascertain whether an appellant is entitled to LEO retirement coverage. *Id.*

¶7 It is undisputed that effective August 28, 1994, the appellant was reassigned from the position of SRT Coordinator to the position of Supervisory Police Officer under PD No. 2637. First Remand Appeal File (FRAF), Tab 3, Subtab 2H. It is also undisputed that this Supervisory Police Officer position was classified in the GS-083 occupational series using standards promulgated by the Office of Personnel Management (OPM). *Id.*, Subtabs 2G, 2H. As we found in *Watson*, slip op. ¶ 15, OPM's classification materials support a finding that GS-083 Police Officer positions do not meet either the statutory or regulatory definition of a "law enforcement officer." Thus, the agency's denial of LEO status to the appellant is consistent with OPM's classification guidance. *Id.*

¶8 PD No. 2637 covers the GS-083 Supervisory Police Officer position under which the appellant worked. FRAF, Tab 3, Subtab 2H. Under PD No. 2637, the appellant is to perform the following duties 30% of the time:

Supervises the section's five civilian employees. Schedules and assigns work; establishes shift priorities. Plans work assignments to the extent practicable based on knowledge of goals and objectives established for the Provost Marshal Office (PMO) organization; adjusts work assignments to meet deadlines and to work on special programs/projects and other emergency requirements. Develops employee performance standards and appraises employees on their performance of duties. Orients new employees to PMO and section policies

and procedures. Conducts training sessions for employees; familiarizes employees with ranges/impact area; conducts on-the-job training for new employees; and determines the need for more formalized training in order to develop the skills and knowledges necessary to ensure employee technical competence. Counsels subordinates, as required, for performance and/or disciplinary problems. Informally listens to and resolves employee complaints. Initiates and follows up on such section personnel actions as recruitments, promotions, details, temporary promotions, etc. Selects new employees, recommends incentive and performance awards, maintains and signs time and attendance reports, and approves leave requests. Refers all personnel administration and management problems which cannot be satisfactorily resolved to supervisor for resolution and decision. Prepares justifications for new equipment, coordinates with appropriate personnel, and trains employees on new equipment.

Id., Subtab 2G. The appellant is to spend another 60% of his time performing the following duties:

Game Warden. Performs a variety of duties related to enforcement of federal, state, and military regulations that concern fish and game control, natural resources, and environmental standards. Frequently, these duties are performed in remote areas of the post that are inaccessible to routine police patrols. Examples of such duties include:

a. Monitors and controls, through a variety of means, the fish and wildlife populations on the installation. Controls domestic animal population in family housing areas. As necessary, traps animals for purposes of detecting rabies, etc. Takes appropriate action to protect humans confronted by rabid or vicious animals.

b. Provides information aid and assistance to personnel using installation recreation facilities and hunting/fishing areas. Checks permits and catch of hunters and fishermen on a routine basis. Also checks wood cutting and snowmobile permits.

c. Arrests and apprehends persons violating civil

or military law, referring cases to appropriate agencies for further investigation and action. Completes required forms and reports.

d. Patrols assigned area of the Fort Drum installation, using a variety of ground mobile equipment or on foot, to detect illegal activity, to detect damage to the installation from natural disaster or vandalism, to locate downed aircraft, etc. Performs search and rescue procedures for lost and injured personnel. Operates motor vehicles to include jeeps, trucks, boats, and track vehicles, as well as emergency rescue equipment such as all-terrain vehicles and snowmobiles.

e. Teaches boating and hunting safety classes held on the installation.

Id. The appellant is to spend the remaining 10% of his time performing the following duties:

Police Patrol. Performs vehicle/foot patrol duties as required. Enforces New York State Vehicle Traffic Law, New York State Penal Law, Uniform Code of Military Justice, and commonly accepted military installation rules and regulations. Resolves those incidents/situations that are clear-cut violations of law, rule, or regulation. Recognizes those situations which are more serious or complex and calls for assistance. Maintains control and order at the scene of an accident; establishes the identity of persons involved and injured parties; determines the nature of the incident, administers first aid; takes statements of victims, witnesses and suspects. Arrests violators caught in the act and who readily admit guilt. Issues citations for observed violations of law, rule, regulation, etc. Prepares written reports that describe incidents and may be used in future legal actions.

Performs other duties as assigned.

NOTE: Advancing the EEO Program is an integral part of this supervisory position.

Id.

¶9 We find that while incumbents in this GS-083 Supervisory Police Officer position were expected to investigate, apprehend, or detain criminals or suspected criminals as the need arose, the position

was created for the primary purpose of maintaining law and order and protecting persons and property by means of community policing, traffic control, and checking for recreational permit and license violations. The PD is therefore consistent with OPM's classification guidance.

¶10 Concerning the duties of a GS-083 Supervisory Police Officer at Fort Drum, the appellant testified without rebuttal that 80% of his work time is spent conducting patrols and checking on subordinates. August 10, 1995 Hearing Tape (HT) 1. He further testified that he often had to check recreational permits and licenses and the catch of hunters and fishermen in isolated areas, that these activities often involved individuals who are armed and unknown to him, and that he had problems with poachers and "scrappers."1 August 10, 1995 HT 2. It is undisputed, however, that other employees at the base, i.e., the Criminal Investigation Division (CID) and Military Police Investigations (MPI), have been given primary jurisdiction and are charged with the responsibility to investigate crimes. August 22, 1995 HT 8 (testimony of LTC Ellis, Provost Marshal).2

¶11 In an attempt to prove his entitlement to LEO coverage, the appellant testified concerning examples of incidents in which he was involved. The appellant testified that, in one instance involving two individuals on a snowmobile who were later determined to be trespassing, he had to physically subdue the suspects to effect their arrest. August 10, 1995 HT 2. However, the appellant testified that he made just one arrest in the past year during a traffic stop and that he has never had to pull out his gun in an incident involving a human while serving in his current position. *Id.*

¶12 The record evidence shows that between January 1, 1994, and August 9, 1995, the appellant and his fellow officers in the Game Warden Section issued 295 "1805s" to civilians and 309 "1408s" to military personnel for such offenses as no valid post permit, trespassing, no valid access pass, trapping out of season, fishing without a license, operating untagged traps, trapping without a license,

unauthorized disposition of game, failure to wear blaze orange, camping in undesignated area, and numerous traffic violations. FRAF, Tab 6, Subtabs 3F, 3G. The 1805s and 1408s are tickets issued by Police Officers at the installation to civilians and military personnel respectively, for offenses occurring at the installation. *Id.* Here, the record shows that the large majority of tickets were issued for minor offenses such as traffic violations and recreational permit and license violations. *Id.*

¶13 OPM's classification standards and guidance show that the GS-083 Supervisory Police Officer position is not one whose duties are primarily the investigation, apprehension, or detention of criminals or suspected criminals. The PD for the GS-083 Supervisory Police Officer position, which follows OPM's classification standards and guidance, is in accord. Weighed together with the evidence showing that the GS-083 Supervisory Police Officer position at Fort Drum was not created as an LEO position is testimony and record evidence that persons encumbering that position at Fort Drum were on the lookout for potential violations of law, conducted generalized patrols, checked recreational permits and licenses and the catch of hunters and fishermen for recreational permit and license violations, and enforced traffic laws. None of these duties individually or collectively show that the GS-083 Supervisory Police Officer position was created for the basic reason of investigating, apprehending, or detaining known criminals or suspects. While an incumbent's actual duties are relevant under subsections (b) & (c) of OPM's regulation defining "primary duties" for purposes of 5 U.S.C. § 8401(17), *see* 5 C.F.R. § 842.802, the evidence of the actual duties performed in this case does not persuade us that---contrary to the official documentation of the position---"the basic reasons for the existence of the position" was actually investigation, apprehension, or detention. *See Watson*, slip op. ¶ 27.

¶14 We therefore sustain the agency's decision that the appellant is not entitled to LEO service credit for any period of time that he occupied the GS-083

Supervisory Police Officer position at Fort Drum.

<http://www.mspb.gov>.

Order

¶15 For the reasons stated above, we find that the appellant is not entitled to LEO service credit because the GS-083 Supervisory Police Officer position he occupied at Fort Drum was not created primarily to perform LEO duties as defined by statute. The initial decision is REVERSED.

¶16 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)).

Notice to the Appellant Regarding Your Further Review Rights

You have the right to request the United States Court of Appeals for the Federal Circuit to review this final decision. You must submit your request to the court at the following address:

United States Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, DC 20439

The court must receive your request for review no later than 60 calendar days after your receipt of this order. If you have a representative in this case, and your representative receives this order before you do, then you must file with the court no later than 60 calendar days after receipt by your representative. If you choose to file, be very careful to file on time. The court has held that normally it does not have the authority to waive this statutory deadline and that filings that do not comply with the deadline must be dismissed. *See Pinat v. Office of Personnel Management*, 931 F.2d 1544 (Fed. Cir. 1991) [91 FMSR 7013].

If you need further information about your right to appeal this decision to court, you should refer to the federal law that gives you this right. It is found in Title 5 of the United States Code, section 7703 (5 U.S.C. § 7703). You may read this law as well as review other related material at our web site,

1 The appellant testified that "scrappers" are individuals who trespass into the area of the installation used for target practice in order to steal aluminum and other metals. August 10, 1995 HT 1 (testimony of the appellant).

2 MPI investigates all larcenies under \$2,500.00, and all felonies under \$1,000.00; CID has jurisdictional purview over all larcenies and felonies above those amounts and all other criminal matters regardless of the amount involved. August 22, 1995 HT 8 (testimony of LTC Ellis, Provost Marshal).