

LEXSEE

WESLIE FITZGERALD, PATRICK W. LLOYD, ANDRE R. BROWN, JAMES
MCGRAIL, TODD M. TURNER, TIMOTHY F. MICKENS, Appellants, v.
DEPARTMENT OF DEFENSE, Agency.

DOCKET NUMBERS PH-0842-94-0200-B-1, PH-0842-94-0195-B-1, PH-0842-94-0194-
B-1, PH-0842-94-0186-B-1, PH-0842-94-0176-B-1, PH-0842-94-0189-B-1

MERIT SYSTEMS PROTECTION BOARD

80 M.S.P.R. 1; 1998 MSPB LEXIS 1116

September 8, 1998

[*1]

Leslie Deak, Esquire, National Federation of Federal Employees, Washington, D.C., for the appellants.
Lenore K. Strakowsky, Esquire, Lakehurst, New Jersey, for the agency.

OPINION:

As Corrected.

BEFORE

Ben L. Erdreich, Chairman

Beth S. Slavet, Vice Chair

Susanne T. Marshall, Member

Vice Chair Slavet issues a decision concurring in part and dissenting in part.

OPINION AND ORDER

The appellants Lloyd, Mickens, and Turner petition for review of a remand initial decision that dismissed for lack of jurisdiction their appeals from the agency's decision denying them law enforcement officer (LEO) retirement coverage, while the agency petitions for review of the same initial decision that found jurisdiction over the appeals of the appellants Fitzgerald, Brown, and McGrail and granted them LEO retirement coverage. For the following reasons, we GRANT the petition for review of the appellants Lloyd, Mickens, and Turner, DENY the agency's petition for review for failure to meet the criteria for review set forth at 5 C.F.R. § 1201.115, and REOPEN on our own motion the appeals of Fitzgerald, Brown and McGrail. 5 C.F.R. § 1201.118. We find the Board has jurisdiction over all of these appeals, and after consideration [*2] of the merits AFFIRM the agency's decision denying all of the appellants LEO coverage.

BACKGROUND

The appellants are or were employed at the Naval Air Warfare Center in Lakehurst, New Jersey as either a supervisory Police Officer, a Lead Police Officer, or a Police Officer. They filed appeals, which were consolidated by the Board, seeking review of a determination by the Assistant Secretary of Defense for Personnel and Readiness (ASDPR) that their positions did not qualify for LEO retirement coverage under the Federal Employees' Retirement System (FERS). See 5 U.S.C. §§ 8401(17), 8412(d), 8422(a)(2)(B).

The decision of the ASDPR was made in response to an October 13, 1992 memorandum from a Deputy Assistant Secretary of the Navy transmitting to the ASDPR a list of LEO positions, including the appellants', for approval or disapproval of coverage in the rigorous or secondary category under the special retirement provisions of FERS. Initial Agency Response, Tab 4c. The memorandum to the ASDPR was prompted by the Navy's internal Office of Civilian Personnel Management guidance that no Navy police officer positions had been approved for LEO [*3] special retire-

ment coverage under FERS, and any activities wishing to have positions reviewed by the ASDPR for such coverage were required to submit requests by a specified deadline date. *See id.*, Tab 4d.

In his May 30, 1995 initial decision, the administrative judge (AJ) found that the appellants were LEOs as defined in 5 U.S.C. § 8401(17), and that they were entitled to retirement coverage as such. The agency filed a petition for review of that determination. Because it was unclear whether the Board had jurisdiction over the appeals, we vacated the initial decision and remanded the appeals for further adjudication. *See Fitzgerald v. Department of the Navy*, 70 M.S.P.R. 152 (1996).ⁿ¹ On remand, the AJ dismissed the appeals of the appellants Lloyd, Mickens, and Turner for lack of jurisdiction, but found jurisdiction over the appeals of the appellants Fitzgerald, Brown, and McGrail, and reinstated the May 30, 1995 initial decision's finding that those appellants were entitled to LEO retirement coverage. Both parties have filed timely petitions for review of this remand initial decision.

ⁿ¹ Under the law of the case doctrine a tribunal will generally not reconsider issues that have already been decided in an appeal. *O'Connell v. Department of the Navy*, 73 M.S.P.R. 235, 240 (1997). Because the Board in *Fitzgerald v. Department of the Navy*, 70 M.S.P.R. 152 (1996) (*Fitzgerald I*), did not decide the merits of the appellants' entitlement to LEO coverage, the law of the case doctrine does not apply. In *Fitzgerald I* the Board denied the agency's petition for review "for the reasons discussed below . . ." *Id.* at 154. The "reasons discussed below" related exclusively to whether the Board had jurisdiction over the appeal. Thus, the Board exercised its discretion to defer a decision on the merits pending a decision on jurisdiction.

[*4]

In a June 16, 1997 Federal Register notice, we afforded interested parties an opportunity to file amicus briefs on the following issues in these appeals: (1) Whether 5 C.F.R. § 842.804(c), which creates a rebuttable presumption that an agency head's denial of LEO retirement coverage is correct where a formal, written request is not filed within six months after entering a position or after any significant change in the position, is invalid, unreasonable, or violates due process; and (2) whether the Board has jurisdiction over an appeal from a final agency decision denying an employee LEO retirement coverage where the employee made no request for such coverage in accordance with 5 C.F.R. § 842.807(a). *See 62 Fed. Reg. 32,663 (1997)*. We have reviewed and considered briefs submitted by the National Treasury Employees Union (NTEU), the American Federation of Government Employees (AFGE) Local 2145, the National Association of Government Employees (NAGE) Local R4-19, the Federal Law Enforcement Officers Association (FLEOA), the Office of Personnel Management (OPM), and the appellants in these appeals.ⁿ²

ⁿ² We have also considered a brief filed on behalf of the appellants in the pending case of *Streeter v. Department of Defense*, MSPB Docket No. NY-0842-97-0176-I-1. A Board decision in that case will be issued separately.

[*5]

ANALYSIS

Congress created FERS when it enacted the Federal Employees' Retirement System Act of 1986 (FERSA), Pub. L. No. 99-335, 5 U.S.C. §§ 8401-8479, reprinted in 1986 U.S.C.C.A.N. (100 Stat.) 514. FERSA, codified at chapter 84 of Title 5 of the U.S. Code, took effect on June 6, 1986. *See* Pub. L. No. 99-335 § 702. The statute, at section 8461(e)(1), allows that an administrative action or order affecting the rights or interest of an individual under the provisions of 5 U.S.C. chapter 84 administered by OPM may be appealed to the Board. The statute, at section 8461(g), gives OPM the authority to prescribe regulations to carry out the provisions of chapter 84.

OPM has the authority to issue regulations which the Board will enforce.

The Board has a history of giving effect to regulations issued by OPM in other situations in which the Board has jurisdiction by statute, but OPM is given the responsibility for prescribing regulations to implement that statute. For example, 5 U.S.C. § 5335(c) specifies that an agency's reconsideration decision to deny a within [*6] grade increase may be appealed to the Board. By regulation, OPM requires that the request for a reconsideration decision must be in writing, 5 C.F.R. 531.410(a)(1). The Board has long held that it will enforce OPM's regulation that calls for a request to be in writing even though the Board's jurisdiction to hear the appeal flows from a statute that says nothing about the written form of the request. *See, e.g., Plata v. Dept. of Defense*, 6 M.S.P.R. 173, 174 (1981).

Similarly, the Board has consistently enforced the regulatory requirements promulgated by OPM at 5 C.F.R. Part 831. Section 831.109(e) requires an applicant for retirement, prior to filing a retirement appeal with the Board, to file a written request for reconsideration with OPM within 30 calendar days from the date of the original decision, even though the statute that gives the Board jurisdiction over such matters says nothing about a requirement for a time limit or a written request. *See, e.g., Preece v. Dept. of Army*, 50 M.S.P.R. 222, 226 (1991). Our superior court has upheld our enforcement of OPM's regulations as they relate to the matter of the regulatory [*7] requirement of a request for reconsideration. *See, e.g., Toquero v. Merit Systems Protection Board*, 982 F.2d 520, 522 (Fed. Cir. 1993). Rulings such as these are particularly significant because they interpret the very statutory provisions at issue in the cases at bar, and they effectively allow OPM to restrict our oversight to only "final decisions" of OPM on retirement matters even though the statute speaks to our jurisdiction over the broader "administrative action or order affecting the rights or interests of an individual." 5 U.S.C. § 8347(d)(1) and 5 U.S.C. § 8461(e)(1).

The reality of our oversight responsibility in the area of retirement is that OPM is given the responsibility under statute for the implementation by regulation of the various retirement programs, and the Board is given the responsibility for ensuring that OPM's regulations are reasonable, consistent with statute, and applied fairly. Contrary to the argument in the separate opinion, OPM's regulations are applicable to these proceedings. n3

n3 There was no disagreement as to this point of law when a unanimous Board remanded the instant appeal in *Fitzgerald I* specifically for the purpose of adjudicating whether the appellants had complied with OPM's regulations.

[*8]

Section 842.804(c) is not invalid, unreasonable, or violative of due process.

5 C.F.R. § 842.804(c), in its entirety, provides:

If an employee is in a position not subject to the one-half percent higher withholding rate of 5 U.S.C. § 8422(a)(2)(B), and the employee does not, within 6 months after entering the position or after any significant change in the position, formally and in writing seek a determination from the employing agency that his position is properly covered by the higher withholding rate, the agency head's determination that the service was not so covered at the time of the service is presumed to be correct. This presumption may be rebutted by a preponderance of the evidence that the employee was unaware of his or her status or was prevented by cause beyond his or her control from requesting that the official status be changed at the time the service was performed.

The Board has interpreted this provision as a restriction on its jurisdiction over FERS LEO matters. *See, e.g., De-Vitto v. Department of Transportation*, 64 M.S.P.R. 354, 357-58 (1994). That is, if a request for LEO coverage [*9] is not made within the time limit set forth in the regulation, and neither of the circumstances specified in the regulation is present, the Board has held that an appeal of the agency's denial of LEO coverage is not subject to challenge, and must be dismissed for lack of jurisdiction. *Id.*

The appellants asserted below that 5 C.F.R. § 842.804(c) was "illegal as contrary to the promulgating statute, codified at 5 U.S.C. [§ 8412(d)]." Remand Appeal File (RAF), Tab 12. Under 5 U.S.C. § 8412(d), an employee who is separated from the service, except by removal for cause on charges of misconduct or delinquency, after completing 25 years of service as an LEO, member of the Capitol Police, or firefighter, or any combination of such service totaling at least 25 years, or after becoming 50 years of age and completing 20 years of service as an LEO, member of the Capitol Police, or firefighter, or any combination of such service totaling at least 20 years, is entitled to an annuity. The appellants asserted that 5 U.S.C. § 8412(d) sets forth a legal entitlement to an annuity for individuals [*10] who perform the duties of an LEO, while the regulation mandates a denial of such an annuity based solely on the timing of the application, not the merits of the claim. The appellants claimed that OPM was taking their property (retirement benefits to which they are entitled by statute) without providing them with an opportunity to present evidence to support their claim of entitlement. The appellants also claimed that the statute included no time limit on filing requests for LEO coverage, and that OPM's interpretation of the statute, as set forth in 5 C.F.R. § 842.804(c), was entitled to no deference because OPM had offered no explanation for it.

The agency opposed the appellants' argument, contending that section 842.804(c) was not contrary to or inconsistent with any statutes implementing FERS. RAF, Tab 21. It asserted that implicit in the timeliness requirement of the regulation was the need to ensure that persons seeking LEO coverage met the definition of LEO, including the requirement that they be young and physically vigorous individuals. See 5 U.S.C. § 8401(17)(A)(ii) (the term "law enforcement officer" means an employee, the duties [*11] of whose position, among other things, are sufficiently rigorous that employment opportunities should be limited to young and physically vigorous individuals, as determined by the Director of OPM considering the recommendations of the employing agency). The agency claimed that it would be difficult to make this determination, based on the evidence required at 5 C.F.R. § 842.804, if employees were able to wait twenty years before alleging eligibility to retire under the special retirement provisions for LEOs. Citing *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), the agency claimed that section 842.804(c) filled gaps not specifically covered by statute, and was based on a permissible construction of the statute which, at 5 U.S.C. § 8461(g), permitted OPM to prescribe regulations to carry out the FERS provisions. The agency asserted that the regulation was entitled to deference because it was implemented as an interim regulation shortly after the 1987 effective date of FERS and has been consistently applied by OPM since that time. Finally, the agency asserted [*12] that the regulation was not a taking of property because the appellants had no property interest in an expectancy of an annuity.

In his initial decision, the AJ found that the appellants did not show that OPM's interpretation of the statute was unreasonable or otherwise improper. He found that:

A timeliness requirement for filing a request for a determination appears reasonable, especially since these appellants, or any other similarly situated federally employed police officer, might ignore notice of his or her exclusion from the LEO retirement plan, then when they were about to retire at the end of 20 or 25 years of service, appeal his or her lack of inclusion.

Remand Initial Decision at 11. The AJ found that any such appeal would require the employee to meet an almost impossible burden of proving that he or she was performing law enforcement duties over his or her entire career. *Id.*

Section 842.804(c) is a reasonable interpretation of statute.

The starting point of every case involving statutory construction must be the language of the statute itself. *Todd v. Department of Defense*, 63 M.S.P.R. 4, 7 (1994), *aff'd*, 55 F.3d 1574 (Fed. Cir. 1995). [*13] Where that language is clear, it must control absent a clearly expressed legislative intention to the contrary. *Id.* Where a statute is ambiguous, however, the interpretation of an agency charged with administration of the statute is entitled to deference. *DeJesus v. Office of Personnel Management*, 63 M.S.P.R. 586, 592 (1994), *aff'd*, 62 F.3d 1431 (Fed. Cir. 1995) (Table). As the Supreme Court held in *Chevron*, 467 U.S. at 843, where a statute is silent or ambiguous with respect to a specific issue, the question for a reviewing court is whether the agency's answer is based on a permissible construction of the statute. See also *Bain v. Office of Personnel Management*, 978 F.2d 1227, 1231 (Fed. Cir. 1992) (an agency's interpretation of a statute need not be the only reasonable one in order for it to survive a challenge).

We agree with the assertion of the appellants on review and NTEU in its amicus brief that the FERS statute does not include a deadline for requesting a determination as to LEO status. Nevertheless, we do not read into the absence [*14] of such a deadline a congressional intent to allow such requests to be filed at any time. Nor do we find anything in the legislative history cited by legal counsel for the parties or amici that suggests Congress intended that there be no regulatory time limit for making requests for LEO retirement coverage or that there be a regulatory time limit different from that set forth in section 842.804(c). Although the appellants assert that under 5 U.S.C. § 8461(c), OPM shall adjudicate "all claims" under the provisions of chapter 84 administered by OPM, not just claims found to be timely by OPM, this provision does not necessarily prevent OPM from establishing regulatory time limits for filing such claims. "Adjudication" of a claim may include, for example, a finding by OPM or the Board that the claim was untimely filed under a regulatory time limit. In short, we find that the statute is silent with respect to the establishment of a regulatory time limit for requesting a determination on LEO retirement coverage.

When the legislative delegation to an agency on a particular question is implicit, a court may not substitute its own construction of a statutory [*15] provision for a reasonable interpretation made by the administrator of an agency. *Chevron*, 467 U.S. at 844. Here, Congress authorized OPM to prescribe regulations to carry out the provisions of 5

U.S.C. chapter 84 administered by OPM. 5 *U.S.C. § 8461(g)*. Pursuant to this statutory authority, OPM promulgated 5 *C.F.R. § 842.804(c)*. See 57 *Fed. Reg. 32,685, 32,689 (1992)*; 52 *Fed. Reg. 2068, 2069 (1987)*. We may not, therefore, substitute our own construction of the statute for a reasonable interpretation by OPM.

As OPM points out, the statute defines "law enforcement officer" as an employee, the duties of whose position, among other things, "are sufficiently rigorous that employment opportunities should be limited to young and physically vigorous individuals . . ." 5 *U.S.C. § 8401(17)*. Having a determination, by the head of an agency, on LEO coverage made early in an employee's career or soon after a change in duties helps effectuate this congressional requirement by ensuring [*16] that LEO positions are encumbered by individuals who meet this statutory requirement. If, for example, an agency identifies a position as non-LEO, a request for LEO coverage is made by the employee within six months after entering the position, and the head of the agency determines that the position *is* an LEO position, the agency could ensure that the position is thereafter occupied by a individual who is young and physically vigorous. In addition, we agree with OPM that there are fiscal reasons consistent with Congress' purpose of creating FERS that make a regulatory time limit for requesting LEO coverage a reasonable interpretation of the statute. Because of their earlier retirement eligibility and more generous annuity computation formula, the "normal-cost percentage" that agencies are required to pay into the Retirement Fund for FERS LEO employees is currently 25.6 percent of basic pay, more than twice the "normal-cost percentage" that agencies are required to contribute for employees generally. See 5 *C.F.R. part 841, subpart D, appendix A*. OPM posits that if an employee is permitted to wait until near the end of his or her career to make a claim of entitlement to [*17] FERS LEO service credit for up to twenty-five years of service, an agency could be forced to pay into the Retirement Fund, out of tightly-budgeted salaries and expense appropriations, a lump-sum amount greater than what it paid into the Retirement Fund over the course of the employee's career. OPM also contends that the Retirement Fund would have lost all of the interest income that the belatedly-made retirement contributions would have earned, a loss that could never be recovered, creating an unfunded liability for FERS annuities in the Retirement Fund, and violating the principle underlying the FERS funding statutes that FERS annuities be fully funded. n4 In further support of early FERS LEO coverage determinations, OPM correctly asserts that, with the passage of time, the question of whether duties presently being performed by an individual were the same at a particular date in the past would become increasingly difficult to discern. Given these policy concerns, we find that section 842.804(c), which does include circumstances under which the six-month time limit may be waived, is a reasonable implementation of the FERS statute.

n4 The legislative history of the FERS Act shows that Congress was concerned that the new retirement system be fully funded. See S. Rep. No. 166, 99th Cong., 2d Sess. 26, 29 (1986), *reprinted in* 1986 *U.S.C.C.A.N.* at 1405, 1431, 1434.

[*18]

Moreover, Federal courts have upheld regulatory time limits where the statutes in question did not set forth time limits but did authorize the agencies to issue regulations to carry out their responsibilities under the statutes. For example, in *Roman-Martinez v. Runyon*, 100 *F.3d 213, 216-18 (1st Cir. 1996)*, the court upheld a similar exercise of regulatory authority by the Equal Employment Opportunity Commission (EEOC) that requires Federal employees to contact EEO counselors within a specific time limit. The court noted that:

Section 717 of Title VII does not set out the procedures, nor does it prescribe a limitations period, for the filing of grievances by a federal employee affected by an alleged unlawful practice. But it grants to the EEOC authority to "issue such rules, regulations, orders and instructions as it deems necessary and appropriate to carry out its responsibilities under this section." 42 *U.S.C. § 2000e-16(b)* (1994).

Id. at 216. Based on the plaintiffs' failure to meet the time limit, the court affirmed the dismissal of the plaintiffs' case. *Id. at 217-18*. [*19] In *Hamilton v. Merit Systems Protection Board*, 75 *F.3d 639, 642-43 (Fed. Cir. 1996)*, the court held that the Board's time limit for mixed-case appeals (5 *C.F.R. § § 1201.154, 1201.22(c)*) was issued pursuant to 5 *U.S.C. § 7701(j)* (1988), which provides that the Board "may prescribe regulations to carry out the purpose of this section." Citing *Phillips v. United States Postal Service*, 695 *F.2d 1389, 1390-91 (Fed. Cir. 1982)*, the court noted that the Board has discretion to "require that appeals be processed in accordance with regulations prescribed by the Board." *Id. at 643*. In *Azarkhish v. Office of Personnel Management*, 915 *F.2d 675, 677 n.1 (Fed. Cir. 1990)*, the court applied 5 *C.F.R. § 831.809(e)(2)*, which provides for an extension of the regulatory 30-day time limit for filing a request for reconsideration with OPM when the individual shows that he or she was not notified of the time limit and was not otherwise aware of it, or that he or she was prevented by circumstances beyond his or her control from making the request

within the time limit. [*20] The court noted that it could not "say the latter regulation violates the statute it implements." OPM's authority for issuing 5 C.F.R. § 831.809(e)(2) was derived from 5 U.S.C. § 8347, which provides in part that OPM shall, except as otherwise provided, prescribe such regulations as are necessary and proper to carry out subchapter III of chapter 83 (Civil Service Retirement).

Our finding that section 842.804(c) is valid is consistent with the decision in *Bingaman v. Department of the Treasury*, 127 F.3d 1431, 1441 (Fed. Cir. 1997), where the court not only applied section 842.804(c), but explained the rational interplay between sections 842.804(c) and 842.807(a):

The effect of these two regulatory provisions is that if the employee does not request LEO credit within the six-month period specified in section 842.804(c), or show good cause for the failure to do so, the agency's determination will be deemed conclusive and the MSPB will not review the merits of that determination.

The arguments of the appellants and NTEU regarding validity are without merit.

Although the appellants claim that the Board and the [*21] courts have struck down OPM regulations that attempt to narrow the scope of the Board's jurisdiction or dictate how the Board will dispose of cases within its jurisdiction, the cases cited by the appellants are distinguishable from this appeal. In those cases, the regulations conflicted with express statutory provisions. See, e.g., *Horner v. Hollander*, 895 F.2d 759, 761 (Fed. Cir. 1990); *DoPadre v. Office of Personnel Management*, 69 M.S.P.R. 346, 351-53 (1996). Here, by contrast, the statute is silent on the issue of time limits for requesting LEO coverage.

The appellants contend that section 842.804(c) is an unreasonable construction of the statute and an abuse of OPM's discretion because OPM offered no reason why employees covered by the Civil Service Retirement System (CSRS) are permitted to raise the LEO issue at any time during their tenure. n5 OPM's promulgation of a different regulatory scheme for CSRS does not bear on the issue of whether its interpretation of FERS is unreasonable. The mere failure to offer a reason as to differences between regulatory schemes that interpret different statutes does not mean [*22] that section 842.804(c) is an unreasonable interpretation of FERS. In any event, OPM contends that the unique FERS definition of an LEO position as limited to young and physically vigorous individuals, the FERS statutory scheme of having agency contributions, employee deductions, and interest earnings pay the additional cost for FERS LEO annuities, as well as different historical circumstances, justify the different regulatory time limits between FERS and CSRS. We accept as reasonable OPM's proffered explanation for the different regulatory time limits of FERS and CSRS.

n5 Although there is presently no regulatory time period during which employees under CSRS must file requests for LEO coverage, see 5 C.F.R. § 831.906, they are generally limited to receiving credit for only one year before the date the request was received, see 5 C.F.R. § 831.906(e) and (f).

The appellants also assert that section 842.804(c) is unreasonable because it imposes unfair procedural burdens on employees. As the appellants assert, section 842.804(c) does not "protect" employees' rights because agencies are not required to provide their new employees with such information as the fact that there [*23] is a special retirement package for LEO employees, that he or she has not been placed in that system, and that he or she must appeal this determination in writing to the head of the agency within a short period of time. There is, however, no statutory notice requirement in this regard. See *Bingaman*, 127 F.3d at 1442 (agencies have no affirmative duty to advise employees on how to go about requesting LEO credit); *Caponio v. Department of the Treasury*, 73 M.S.P.R. 671, 678 (1997). Thus, the lack of a regulatory notice requirement in section 842.804(c) does not make that section an unreasonable interpretation of the FERS statute, which itself includes no notice requirement.

NTEU asserts that, when Congress enacted FERS, OPM's regulations provided no time limitation on the right to request a status determination under CSRS. Congress, therefore, can be presumed to have known of the interpretation given to CSRS and further presumed to have intended to embody that construction in the new FERS statute. When Congress adopts a new law incorporating a section of a prior law without change, Congress is presumed to have been aware [*24] of the administrative or judicial interpretation of the incorporated sections and to have adopted that interpretation. See *Haywood v. Office of Personnel Management*, 65 M.S.P.R. 603, 609-10 (1994). Here, however, NTEU

has identified no applicable provisions of CSRS that were incorporated into FERS without change. In any event, although NTEU asserts that there was no regulatory time limit for making a request for LEO coverage under CSRS when Congress enacted FERS in 1986, the regulations in effect at that time did not recognize a right to make such requests. Rather, 5 C.F.R. § 831.902 (1986-87) provided that:

after concurrence of OPM with respect to positions not approved by OPM prior to the effective date of Pub. L. 93-350 (July 12, 1974), the appropriate administrative authority of an agency shall determine the applicability of the definitions in section 8331(20)-(21) of title 5, United States Code, and of the special provisions mentioned in § 831.901 to employees in positions, including supervisory or administrative positions, in that agency.

NTEU also claims that section 842.804(c) violates the constitutional guarantees of due process because [*25] it deprives employees of "an immediate entitlement to service credit, established by reference to the statute." This argument fails because the appellants, who did not yet meet the eligibility requirements for entitlement to a special retirement annuity, had no protected property interest at stake to trigger the due process clause. See *American Postal Workers Union v. U.S. Postal Service*, 707 F.2d 548, 553-54 (D.C. Cir. 1983) (a retiree who meets the statutory eligibility requirements for retirement acquires an interest protected by the due process clause in benefits at the level provided by the law in effect at the time he or she becomes eligible; a reasonable expectation of later becoming eligible for such benefits does not constitute a property interest, however); see also *Rafferty v. United States*, 210 F.2d 934, 936 (3d Cir. 1954) (even where there has been compulsory contribution to a retirement or pension fund the employee has no vested right in it until the particular event happens upon which the money or part of it is to be paid). We reject NTEU's assertion that the appellants are not "applicants" for benefits [*26] because they are not claiming an entitlement to any particular level of benefits, but are instead claiming an immediate entitlement to service credit, established by reference to statute. The statute does not speak in terms of entitlement to "service credit." Rather, it provides that LEOs who meet certain statutory conditions are "entitled to an annuity." 5 U.S.C. § 8412(d). In this regard, the appellants are really less than applicants. In any event, whether the appellants are classified as "applicants" or not, they do not meet the statutory eligibility requirements for entitlement to an LEO annuity, and therefore have acquired no interest protected by the due process clause. The Supreme Court has stated that it has "never held that applicants for benefits, as distinct from those already receiving them, have a legitimate claim of entitlement protected by the Due Process Clause of the Fifth or Fourteenth Amendment." *Lyng v. Payne*, 476 U.S. 926, 942 (1986). As previously explained, section 842.804(c) is not an arbitrary or capricious interpretation of the FERS statute.

We recognize that section 842.804(c) is [*27] not a typical regulatory time limit because it purports to create a presumption on the merits as to the correctness of an agency head's determination that service is not covered, rather than simply barring the request itself based on its untimeliness. This unique aspect of section 842.804(c), however, does not make much of a difference in our adjudication of these types of cases. We view the regulation as essentially setting forth a time limit for requesting LEO coverage that includes specific criteria under which the time limit will be waived. An appellant's successful rebuttal of the presumption of correctness of an agency's determination will allow the appeal to be heard on its merits by the Board, just as a finding of good cause for an untimely-filed adverse action appeal will allow the appeal to be heard on its merits.

Accordingly, we find that the appellants and amici have not shown that section 842.804(c) is invalid, unreasonable, or violative of due process, and we turn to examine whether the Board has jurisdiction over the appeals of these six appellants who did not submit formal, written requests for LEO retirement coverage.

The absence of formal, written requests [*28] by the appellants for LEO retirement coverage does not deprive the Board of jurisdiction over these appeals.

The Board's jurisdiction is not plenary; it is limited to those matters over which it has been given jurisdiction by law, rule, or regulation. *Maddox v. Merit Systems Protection Board*, 759 F.2d 9, 10 (Fed. Cir. 1985). Under 5 C.F.R. § 842.807(a), "the final decision of an agency denying an individual's request for approval of a position as a rigorous . . . position made under § 842.804(c) may be appealed to the . . . Board under procedures prescribed by the Board." OPM's notice promulgating section 842.807(a) similarly specifies that any final agency decision "denying an individual's request for position approval" may be appealed to the Board, and that OPM was amending section 842.807 (1992) ("The final decision of an agency head under § 842.803 may be appealed to the . . . Board under procedures prescribed by the

Board.") to "clarify that only agency denial decisions made in response to individual requests under § 842.804(c) are subject to appeal . . ." 57 Fed. Reg. 32,685, 32,689 (1992). n6

n6 In its Federal Register notice, OPM provided no reason for adding a request requirement to its prior regulation which, as noted, simply provided that "the final decision of an agency head under § 842.803 may be appealed to the . . . Board under procedures prescribed by the Board."

[*29]

The Board has applied the request requirement in prior cases involving 5 C.F.R. § 842.807(a) or its CSRS counterpart. See *Scott v. Department of the Treasury*, 71 M.S.P.R. 42, 45-46 (1996) (finding that a document, filed by the appellant with his employing agency and erroneously treated by the administrative judge as a mere grievance, was a "qualifying request for a decision" seeking treatment as an LEO within the meaning of CSRS and FERS). Indeed, such a request for coverage was found to be a jurisdictional requirement in our prior decision in these appeals. There we found that "the Board's jurisdiction is limited to agency decisions made in response to employees' formal, written requests for LEO retirement coverage," that the record showed the existence of a final agency decision determining that the appellants were not entitled to LEO retirement coverage but did not indicate when, or if, the appellants submitted formal, written requests for such coverage, and that remand therefore was necessary "for resolution of this issue." *Fitzgerald*, 70 M.S.P.R. at 155. n7 On remand, the appellants admitted that they did not [*30] make formal, written requests. They asserted that the agency on its own initiative issued a decision that denied them LEO coverage and provided them with notice of Board appeal rights which they promptly followed in filing their appeals. RAF, Tab 6 at 2, 4.

n7 In *Fitzgerald*, the Board cited *DeVitto v. Department of Transportation*, 64 M.S.P.R. 354 (1994), for the principle that the Board's jurisdiction under sections 842.807(a) and 842.804(c) "is limited to agency decisions made in response to employees' formal, written requests for LEO retirement coverage, and agency decisions cannot be challenged unless the requests were made within the six-month filing period, or unless preponderant evidence establishes good cause for the failure to make them in a timely manner." Without further explanation, the AJ and the parties interpreted this statement and the applicable regulations to mean that, even in the absence of a formal, written request for coverage, the agency decision could still be "challenged" if there was good cause for a failure to make a request at all.

In its petition for review of the remand initial decision, the agency asserts that [*31] the Board lacks jurisdiction over these appeals because the appellants never made formal, written requests for an LEO retirement coverage determination. Agency's Petition for Review at 9-10. In its amicus brief, OPM asserts that the appellants' failure to submit formal, written requests to the agency, in contravention of OPM regulations, means that proper applications for LEO coverage were never filed with the agency, that the agency did not have the authority to prescribe different procedures for FERS LEO claims than those established at 5 C.F.R. § 842.804(c), and that the agency, therefore, had no authority to issue a decision on a FERS LEO claim that is appealable to the Board. Thus, OPM argues that it has delegated its authority to employing agencies to make LEO determinations and that such determinations must be made in accordance with the regulations delegating that authority. Based on this reasoning, OPM asserts that an agency's FERS LEO coverage determination, unless it is made in response to a formal, written request, is not an "action or order" giving rise to a Board appeal under 5 U.S.C. § 8461(e)(1). By contrast, NTEU, AFGE, NAGE, [*32] and FLEOA all argue that the lack of a request does not deprive the Board of jurisdiction in these appeals.

We have determined that the regulations in question may be read in such a way as to eliminate any requirement that a formal request be made before appealing to the Board. Under 5 C.F.R. § 842.807(a), final agency decisions denying requests for LEO coverage "made under § 842.804(c)" may be appealed to the Board. Section 842.804(c), however, by its very terms provides for rebuttal of the presumption of correctness of the agency head's determination where an employee is "unaware of his or her status or was prevented by cause beyond his or her control from requesting that the official status be changed at the time the service was performed." We conclude, therefore, that sections 842.804(c) and 842.807(a), when read together, contemplate that the Board will review the merits of an agency's LEO coverage determination, even though no request has been made by the employee, where the employee was unaware of his status or unable to make such a request because of circumstances beyond his control.

This reading finds support in *Bingaman*, 127 F.3d at 1442, [*33] where the court held that "the six-month rule of section 842.804(c) does not apply if an employee proves that he was unaware of his status or that some cause beyond

his control prevented him from making a request." Although the court agreed with the Board that the Adair petitioners did not make formal, written requests for LEO coverage, the court went on to note that the petitioners did not contend that the six-month rule was inapplicable "for either of those reasons," thereby suggesting that Board review would not be denied, despite the absence of formal, written requests, if the petitioners could prove that they were unaware of their status or that cause beyond their control prevented them from making a request.

Contrary to OPM's argument, section 842.804(c) does not provide that employing agencies may only issue final, Board-appealable LEO determinations when employees have made formal, written requests for such determinations. Indeed, we find nothing in 5 C.F.R. part 842, subpart H that restricts agencies from issuing LEO retirement determinations in the absence of formal, written requests from employees. The regulation merely provides that, if an employee is in a position [*34] not subject to the one-half percent higher withholding rate of 5 U.S.C. § 8422(a)(2)(B), and the employee does not, within six months after entering the position or after any significant change in the position, formally and in writing seek a determination from the employing agency that his position is properly covered by the higher withholding rate, the agency head's determination that the service was not so covered at the time of the service is presumed to be correct. Section 842.804(c) provides an agency with the benefit of a rebuttable presumption if these conditions are met, regardless of whether its decision is made in response to a formal, written request or not. Therefore, it would be incorrect to say that the agency exceeded its authority under the delegation by OPM and that its decision is therefore not subject to review by the Board.

OPM asserts that a formal, written request requirement is reasonable because it would help create a written record for the Board of the nature of the evidence and arguments that the individual presented to the agency, "avoid any miscommunication that might otherwise occur between the employee and the agency [*35] concerning exactly what arguments the employee has raised in support of his claim of eligibility for FERS LEO coverage," and better enable OPM to fulfill its oversight function under 5 C.F.R. § 842.808 by allowing it to ascertain the issues that were considered in any FERS LEO coverage claim.

Although we agree that a formal, written request requirement *could* be part of a process designed to help create a written record of the issues involved in a given FERS LEO coverage determination, OPM's regulations do not provide that employees may submit, along with their written requests, argument and/or evidence regarding why they believe their positions are covered. 5 C.F.R. § 842.804(c). Agencies are not required to inform their employees of their right to make such a request, *see Bingaman, 127 F.3d at 1442*, let alone required to inform their employees that they may submit argument and evidence that will be part of a written record. Thus, any request requirement does not automatically assist in the creation of a written record for OPM and Board review. Moreover, statute and precedent require de novo proceedings before the Board on the substance of the [*36] employee's claim. *See Elias v. Department of Defense, 114 F.3d 1164, 1167 (Fed. Cir. 1997)* (interpreting the CSRS LEO regulations as providing for de novo Board review of agency LEO coverage determinations).

We further find that mandating that an employee request an agency determination as to his or her LEO retirement status after a final agency decision has already been made contradicts any notion of judicial and administrative efficiency. The head of the agency has already considered and decided the issue and served notice on the affected employees, and we perceive no reason for the agency to have to repeat its procedures. Requiring that an employee make a formal, written request after the agency has issued a final determination on LEO coverage would obligate the employee and the agency to needlessly expend resources for no practical purpose. These appellants have no reason to believe that the agency would issue a different decision based on a formal, written request. The record shows that the ASDPR specifically instructed the Department of the Navy in August 1993, to "[p]lease ensure that the employees in the positions not recommended for coverage [*37] are notified of their rights to appeal this determination to the . . . Board . . ." Petition for Review File, Tab 15, Exhibit 1.

OPM contends that, because the agency stands in OPM's place under the delegation of authority, "it is as if OPM had not received a request for reconsideration in a FERS retirement matter, and had not issued a reconsideration decision. In such circumstances, there is no right of appeal to the Board." OPM cites *Slater v. Office of Personnel Management, 21 M.S.P.R. 405, 407 (1984)*, in support of this argument. We agree with OPM that the agency stands in OPM's place under the delegation of authority. Nevertheless, because the agency has issued a final LEO coverage determination, and there is no indication that it will issue another final decision, it is as if OPM had issued such a final determination or had issued an initial determination and refused to issue a reconsideration decision. *See McNeese v. Office of Personnel Management, 61 M.S.P.R. 70, 73-74* (where OPM has not issued a reconsideration decision and does not intend to do so, its initial decision serves as a final decision over which [*38] the Board can exercise jurisdiction), *aff'd, 40 F.3d 1250 (Fed. Cir. 1994)* (Table). Although OPM may have decided that it will only rule on retirement issues in

response to written requests, we have found nothing in 5 C.F.R. part 842, subpart H that prevents agencies from issuing final LEO coverage determinations in the absence of formal, written requests. n8 *Slater*, which stands for the proposition that the Board has jurisdiction to review OPM's denial of an individual's application for a survivor annuity only if the decision is sustained by OPM on reconsideration, is inapposite here. Cf. 5 C.F.R. § 831.109(c) (a decision initially rendered at the highest level of review available within OPM will not be subject to reconsideration, but will give an appeal right directly to the Board).

n8 Although, under 5 U.S.C. § 8461(c), OPM (or its designee) shall adjudicate all "claims" under the provisions of chapter 84 administered by OPM, we do not read this provision as prohibiting OPM or its designee from making a decision on retirement coverage in the absence of a claim. Rather, we view this provision as merely requiring that OPM or its designee adjudicate all claims that are made.

[*39]

The agency's petition for review is denied.

The agency asserts on review that the AJ erred in finding that the Board had jurisdiction over the appeals of the appellants Fitzgerald, Brown, and McGrail. We discern no error, however, in the AJ's determination that 5 C.F.R. § 842.804(c) does not apply to these appellants. The regulation applies to employees "in a position not subject to the one-half percent higher withholding rate of 5 U.S.C. § 8422(a)(2)(B)." 5 C.F.R. § 842.804(c). As the AJ found, because these appellants were originally placed in the LEO retirement plan upon appointment to their positions, and remained in that plan for much longer than six months, the regulatory provision that they make a formal, written request within six months after entering their positions does not apply. It would make no sense for these appellants to have been required to make such a request within six months of their appointments when they were already deemed by the agency to be LEOs. Further, the AJ correctly found that the agency did not show that there were any significant changes in their positions; the Standard Form (SF) 50s issued to inform [*40] these appellants that they had received within-grade increases or performance awards was not a significant change in their positions. Thus, the appellants could not have filed a request for coverage within six months "after any significant change in the position," as set forth in the regulation. As previously found, the lack of a formal, written request for coverage from these appellants does not deprive the Board of jurisdiction over their appeals.

The petition for review of the appellants Lloyd, Mickens, and Turner is granted.

Under section 842.804(c), the presumption of correctness of an agency head's determination that service is not covered by the higher, LEO withholding rate "may be rebutted by a preponderance of the evidence that the employee was unaware of his or her status or was prevented by cause beyond his or her control from requesting that the official status be changed at the time the service was performed." The appellants Lloyd, Mickens, and Turner do not contend that they were prevented by cause beyond their control from requesting determinations as to their LEO status. Rather, they maintain that they were unaware of their non-LEO status until they received [*41] the agency's notice informing them that they were not covered and that they could appeal this determination to the Board.

The AJ found that the appellants were "aware, or should have been aware" of their status based on their statements that they received SF 50s at the time of their appointments indicating in block 30 that they were in the "FERS and FICA" retirement plan. The AJ found that the bottom of these documents instructed the appellants to "turn over for important information," and that the back of the documents explained that "FERS" meant Federal Employees' Retirement System, and that "FERS-Spec" meant Federal Employees' Retirement System for law enforcement and firefighter personnel. The AJ found that:

The fact that they denied looking at the back of the form does not relieve them from their responsibility to review the information that the agency supplied to them at the time they were hired. I conclude, therefore, that the agency notified these appellants in writing at the time of their appointments that they were not in the LEO retirement plan, that the appellants did not submit a formal, written request seeking a determination that their positions were properly [*42] covered by the higher withholding rate, and that they have failed to show by preponderant evidence that they were unaware of their status at the time of their appointments.

The test in these cases, however, is not whether the appellants should have been aware that there were two types of retirements benefits (for non-LEOs and for LEOs) and that they were not considered to be LEOs. Nor is the test whether the agency notified, or attempted to notify, the appellants of their status. Instead, section 842.804(c) provides for the successful rebuttal of the presumption of correctness of the agency head's determination when the appellants prove by preponderant evidence that they were "unaware" of their status.

Here, the appellants testified without contradiction that they were unaware of their non-LEO status until they received the agency's decision on their coverage in December 1993, and that they did not understand what the abbreviations on their SF-50s stood for, nor did they read the back of their SF-50s. See Jurisdictional Hearing Transcript (JHT) at 36-37, 43-44, 56-58, 101-05; RAF, Tab 20 at 5-8, 10 (deposition of appellant Mickens). This testimony is consistent with the [*43] affidavits the appellants submitted on this issue. See RAF, Tab 6. Based on the fact that they occupied Police Officer positions, the appellants testified that they had no reason to believe that they were not also LEOs entitled to LEO-based special retirement benefits. See RAF, Tab 20 at 6-7, Tab 18 at 16-17; JHT at 101.

The appellants' testimony and affidavits are based on their personal knowledge. Moreover, their character has not been called into question, and they made no prior inconsistent statements. See *Hillen v. Department of the Army*, 35 M.S.P.R. 453, 458 (1987). Although the appellants' testimony could be characterized as self-serving, an appellant's testimony should not necessarily be discredited as self-serving because most testimony that he is likely to give, other than admissions, can be characterized as self-serving. See *Nicoletti v. Department of Justice*, 60 M.S.P.R. 244, 249 (1993). While the appellants' receipt of the SF-50s is evidence relevant to the issue of awareness of status, the SF-50s alone do not rebut the appellants' sworn statements and testimony on this issue. The agency presented [*44] no witnesses at the jurisdictional hearing, let alone other evidence demonstrating that the appellants were aware of their non-LEO status before December 1993. Moreover, we do not find it inherently improbable that the appellants would fail to read the back of documents such as SF-50s. Indeed, the AJ did not specifically find this testimony incredible.

Accordingly, we find that the appellants have shown by preponderant evidence that they were unaware of their non-LEO status until December 1993. See *Caponio*, 73 M.S.P.R. at 678-79 (the appellant's specific testimony that he was unaware of his LEO status was not rebutted by the general testimony of an agency witness that all new employees received information on their status, and constituted preponderant evidence of his unawareness); cf. *Owens v. Office of Personnel Management*, 76 M.S.P.R. 543, 550-51 (1997) (although the appellant did not submit evidence corroborating his claim that he was told his annuity would be reduced by approximately \$ 100.00 per month, his testimony under oath was based on personal knowledge of the events at issue, was consistent, and was not inherently [*45] improbable). Such unawareness rebuts the presumption of correctness attached to the agency head's determination that the appellants were not entitled to LEO coverage. We therefore may consider the merits of all six of the appellants' claims for LEO retirement coverage.

The appellants are not entitled to LEO retirement coverage.

In order to qualify for LEO retirement coverage pursuant to 5 U.S.C. § 8412(d)(2), the appellants must show that they meet the definition of a law enforcement officer as set forth at 5 U.S.C. § 8401(17). For purposes of this appeal, the term "law enforcement officer" means an employee, the duties of whose position: (1) Are primarily the investigation, apprehension, or detention of individuals suspected or convicted of offenses against the criminal laws of the United States; and (2) are sufficiently rigorous that employment opportunities should be limited to young and physically vigorous individuals. In determining whether the appellants meet the requirements of establishing their entitlement to LEO retirement coverage, the Board must examine all relevant evidence, including the [*46] position description. *Ferrier v. Office of Personnel Management*, 60 M.S.P.R. 342, 345 (1994). The appellants, as applicants for LEO retirement coverage, bear the burden of proving their entitlement to it by preponderant evidence. See 5 C.F.R. § 1201.56(a)(2).

The parties stipulated that the appellants investigate, arrest, and apprehend individuals suspected or convicted of offenses against the criminal laws of the United States, including the traffic laws of the State of New Jersey, which have been expressly adopted and made applicable to the Naval Air Engineering Station, Lakehurst, New Jersey. *Fitzgerald v. Department of the Navy*, MSPB Docket No. PH-0842-94-0200-I-3 (Initial Appeal File (IAF)-3), Tab 9. At issue, then, is whether those duties are the appellants' "primary" duties, and whether the duties of the position are sufficiently rigorous that employment opportunities should be limited to young and physically vigorous individuals.

Primary duties are those that: (a) Are paramount in influence or weight; that is, constitute the basic reasons for the existence of the position; (b) occupy a substantial portion of the individual's working [*47] time over a typical work cycle; and (c) are assigned on a regular and recurring basis. 5 C.F.R. § 842.802. In general, if an employee spends an

average of at least fifty percent of his or her time performing a duty or group of duties, they are his or her primary duties. *Id.*

We find that the investigation, arrest, and apprehension duties stipulated to by the parties do not constitute the basic reason for the existence of the Police Officer positions, i.e., they are not paramount in influence or weight, and thus are not "primary" duties. The position description for the GS-083-05 Police Officer position, which essentially describes the duties of all of the appellants, provides that the purpose of the position is to serve as a Police Officer for an assigned shift or tour of duty and to perform a variety of police tasks. *Lloyd v. Department of the Navy*, MSPB Docket No. PH-0842-94-0195-I-1 (IAF-1), Tab 3, Subtab 4C; Merits Hearing Transcript (MHT) at 42-43 (testimony of Patrick Lloyd that this was his official position description), 173 (testimony of Patrick Breaux, Security Director, that the supervisory and lead police officers perform the same duties as the police officers, [*48] but also have administrative and supervisory duties). "Police Officers maintain law enforcement of the entire [Naval Air Engineering] Center, involving the protection of life and property, maintaining law and order, traffic safety and control, enforcing all applicable Federal and state statutes, Navy regulations and command orders and regulations." IAF-1, Tab 3, Subtab 4C. Duties performed include:

1. Performs duties of prevention and detection of crimes by conducting routine patrols of assigned area or post in a radio equipped police vehicle or on foot and submit reports for appropriate action as required. Enforces NAEC base regulations, performs traffic control duties and in accordance with N.J. Title 39 motor vehicle code and personnel or visitor behavior, pet ownership, hunting, fishing and housing regulations, etc. Recognizes the characteristics of alcohol intoxication and drug abuse, identifies and field test suspected drug material, and blood and alcohol testing with the breathalyzer. Provides armed escort for money deposits or services, VIP's, ammunition and explosives or other valuable cargo. May be required to assist NAEC's Investigation Branch, NIS, FBI, local [*49] law enforcement agencies and other related duties. * * * 60%
2. Responds to and assumes control of crimes/crime scenes or provide medical, fire or other emergency assistance as directed by authorized authority. Must preserve and process physical evidence, interview witnesses, victims and suspects and write a comprehensive report. * * * 25%
3. Apprehend/detain without a warrant, any person committing any such offense or [sic] reasonable grounds to believe that person/s have committed a felony in the presence of a member of the police force. * * * 10%
4. Apprehend/detain under a warrant an[y] person accused of having committed an offense against the laws of the United States or against any rule or regulation prescribed under pertinent laws. * * * 5%
5. Performs other related miscellaneous duties as assigned.

Id.

A Request for Personnel Action form signed by Breaux shows that the position description for all of the Police Officer positions was amended to indicate that, as of April 23, 1992:

[P]olice officers are to directly engage in investigations, apprehensions, and detentions of persons suspected or convicted of offenses against the criminal laws of the United [*50] States. Police Officers will take part in all facets of the on going investigation. Investigations will involve searching crime scenes for clues and evidence, interviewing witnesses, following leads, analyzing and evaluating evidence, locating suspects and making apprehensions. Inquiries into criminal cases will require the police officer to conduct extensive research, interviewing, planning, observing, conducting stakeouts, and executing investigative techniques. Police officers will be required to perform duties in a semi-covert capacity in order to detect and prevent criminal activity.

E.g., IAF-3, Tab 6, Subtab H. This amendment appears to be the result of an April 23, 1992 "process improvement" recommendation assigning the investigation of petty theft and misdemeanor cases to the patrol division to allow the detectives on the base to pursue more critical tasks. IAF-3, Tab 5, Subtab 2; MHT at 30-31, 179. Thus, we find that these investigative duties do not appear to be the basic reason for the existence of the appellants' positions, but instead appear to be supplemental duties designed to reduce the workload of the detectives on the base.

Moreover, the appellants [*51] spend most of their time patrolling. *See, e.g.*, MHT at 32 (testimony of Patrick Lloyd that he spends at least seven hours of his eight and one-half hour day patrolling); 175 (testimony of Breaux that police officers are expected to patrol between 70 and 80 percent of the time). As set forth in the Navy Law Enforcement Manual, patrol operations provide a multitude of both crime and non-crime related services, such as crime prevention and deterrence, apprehension of criminals, provision of non-crime related services, provision of a sense of base security and satisfaction, and traffic enforcement and control. IAF-3, Tab 6, Subtab Y at 11-2. Breaux similarly testified that the mission of the police officers was to provide for the safety and security of the installation by detecting and preventing crime. MHT at 166-67. James McGrail testified that his job was to detect *and* deter crime. MHT at 105 ("We deter crime just by being in the area, people see the police presence. My job is to protect life and property through law enforcement."). OPM's Position-Classification Standards for GS-083 police positions provides that most police officers are engaged in patrol duties and/or [*52] traffic control, and in performing patrol duties "serve as a deterrent to crime and other violations of laws, rules, and regulations. Crime prevention is enhanced by the presence of uniformed officers in an area and by their being continually alert in observing, inspecting, and investigating circumstances or individuals which appear unusual and suspicious." IAF-3, Tab 6, Subtab C at 6. In sum, the Police Officer positions exist for a multitude of reasons, including deterring crime, providing escorts, assisting in non-criminal emergency situations, and providing traffic control at the front gate, *see* MHT at 145-46, and not "primarily" for conducting investigations. We therefore find that the appellants' investigation and apprehension duties are not "paramount in influence or weight," and do not constitute the basic reason for the existence of the Police Officer positions. 5 C.F.R. § 842.802 (definition of "primary duties").

We also find that the appellants have not shown that their duties investigating, arresting, and apprehending criminal suspects occupy a "substantial portion of their working time over a typical work cycle." *Id.* While patrolling, the appellants may [*53] stop individuals for traffic-related reasons or stop individuals in restricted areas of the base, question the individuals, and take appropriate action. *See* MHT at 11, 15-17, 82, 132-33, 144. These types of stops constitute investigations of individuals suspected of wrongdoing. *See Ferrier, 60 M.S.P.R. at 347* (stopping individuals possibly involved in wrongdoing, questioning them to determine if they had violated any law or regulation, and taking appropriate action depending upon the observations, the individual's responses, and other information, constituted investigations; even a traffic stop constituted such an investigation because the driver is questioned about his or her license, vehicle registration, and similar facts). The appellants also, for example, check buildings to ascertain whether they are secure, and investigate unsecured buildings for evidence of trespassers or burglary. *See* MHT at 54-56, 69. One appellant was once involved in a "stake out" with an agency detective of a building that was to be burglarized. MHT at 153. The appellants have not shown, however, that these types of activities, which involve investigating [*54] suspected criminal conduct, constitute their primary duties, as required by statute. Rather, their general patrolling duties would more appropriately constitute "protecting life and property, guarding against or inspecting for violations of law, or investigating persons other than those suspected of offenses against the criminal laws of the United States," all of which are duties that do not qualify under OPM's regulation as LEO duties. 5 C.F.R. § 842.802. Although the Navy Law Enforcement Manual indicates that there are "suspect oriented patrols," which focus on specific individuals or classes of suspects and may include the provision of photographs and background information concerning known suspects, *see* IAF-3, Tab 6, Subtab Y at 11-4, there is no indication in the record that this is the type of patrolling the appellants usually do.

As we have found in the CSRS context, *see Hobbs v. Office of Personnel Management, 58 M.S.P.R. 628, 633 (1993)*, the term "investigation" under 5 U.S.C. § 8401(17) of FERS should be construed as "criminal investigation." Criminal investigations involve unusual physical hazards [*55] for the investigator, deriving from frequent contacts with criminals and suspected criminals and their desire to avoid criminal prosecution. *Id.* Our determination that these appellants are not entitled to LEO coverage finds support in *Bingaman*, where the court approved of certain factors found by the Board to denote an LEO within the contemplation of the statute. An LEO commonly: (1) Has frequent direct contact with criminal suspects; (2) is authorized to carry a firearm; (3) interrogates witnesses and suspects, giving *Miranda* warnings when appropriate; (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 1434.*

The parties stipulated that the appellants are required to carry weapons and to be certified on those weapons, IAF-3, Tab 9, and the appellants give *Miranda* warnings, *see* MHT at 20, 97, and interrogate witnesses and suspects. Nevertheless, we find that the appellants have not shown by a preponderance of the evidence that they have frequent contact with criminal suspects. The appellants spend most of their time patrolling, [*56] and their duties not only involve investigations that may bring them into contact with criminal suspects, but also involve providing armed escort for money deposits, VIP's, ammunition, explosives, or other valuable cargo, responding to emergencies, and such activities as taking information from complainants, writing reports, responding to accidents on the base, and helping individuals who have been locked out of their cars. *See* IAF-3, Tab 5, Subtab 15 at 16, 24, 26, 34; MHT at 44-46. One appellant testified that he did not know how often he came in contact with criminals. MHT at 61. Breaux testified that between 15 and 30 individuals were arrested during 1994. MIIT at 172. The appellants investigate a substantial number of potential crimes, such as larceny and destruction of government property, that do not typically result in contact with criminal suspects. *See* IAF-3, Tab 6, Subtab M at 1 (Security Department Incident/Complaint Reports for 1993); MHT at 154 (most of one of the appellant's incident/complaint reports involved larcenies of personal property and damage to government property). Although the appellants took courses in such topics as search and seizure, crimes [*57] in progress, crowd control, terrorism, and rape, one appellant admitted that those were "not an everyday situation here, but you are liable to come across any one of these topics as a crime somewhere during the course of your career." MHT at 24. While the appellants' duties at times and as needed do include investigation, apprehension, and detention of individuals suspected or convicted of offenses against the criminal laws of the United States, we find that the appellants have not shown by preponderant evidence that these are the primary duties of their positions, as required by 5 U.S.C. § 8401(17)(A)(i)(I). *See Bingaman, 127 F.3d at 1434.*

We also find for the reasons discussed below that the appellants have not shown that the duties of their positions are "sufficiently rigorous that employment opportunities should be limited to young and physically vigorous individuals." *See Id.* The appellants do not typically work for long periods without a break. Although the appellants "occasionally" work overtime, MHT at 24, 132, they can refuse to work overtime, *see* IAF-3, Tab 5, Subtab 15 at 9 (Desk Journal for [*58] April 17, 1994, showing that seven officers either refused overtime or were unavailable to be contacted before an officer agreed to work overtime); MHT at 178. There is also no indication that the appellants are on call 24 hours a day. Rather, they work eight and one-half hour shifts. *See* IAF-1, Tab 3, Subtab 4C; MHT at 9, 14, 82, 129. Finally, although the appellants must undergo an annual physical examination, *see* IAF-3, Tab 9, they are not required to maintain a particular level of physical fitness by, for example, passing a physical fitness stress test, *see* MHT at 33-34, 77-78; *cf. Ferrier v. Office of Personnel Management, 66 M.S.P.R. 241, 245 (1995)* (the appellant had to pass a five-event Physical Fitness Battery). In sum, although the appellants carry weapons and interrogate suspects and witnesses, they do not have frequent contact with criminal suspects, do not work long periods without a break, are not on call 24 hours a day, and are not required to maintain a particular level of physical fitness.

Although the Police Officer positions involve occasional physical challenges, such as breaking up domestic violence fights, *see* [*59] MHT at 131-32, 136 (one appellant was involved in ten domestic violence incidents in one year), and foot chases, *see* MHT at 142 (foot chases are "not every day" but "do[] occur"), our conclusions regarding the above factors suggest that the appellants have not shown that the duties of their positions are sufficiently rigorous that employment opportunities should be limited to young and physically vigorous individuals. 5 U.S.C. § 8401(17)(A)(ii). We disagree with the AJ that there is an irrebuttable presumption that the duties of the appellants' positions are rigorous because they must wear bullet-proof vests while on duty. That the agency, in an abundance of caution, seeks to protect its employees from the possibility of severe physical injury or death does not mean that the actual duties of the Police Officer positions are sufficiently rigorous to meet the requirements of the statute.

There are a number of factors that distinguish this appeal from *Ferrier, 60 M.S.P.R. at 349*, where we ordered the U.S. Fish and Wildlife Service to award LEO credit under the CSRS for an employee's service as a Police Officer. [*60] The agency in *Ferrier* had four Police Officers patrolling the entire refuge, *see Ferrier, 60 M.S.P.R. at 345*, whereas approximately 37 individuals in the police division patrol the agency's grounds, *see* MHT at 166. In addition, there is no indication that there were other employees in *Ferrier* doing investigative work, while in this appeal there are detectives and officers of the Naval Investigative Service who are the primary criminal investigators for the agency. MHT at 174, 176. The number of officers patrolling an area and performing investigations affects the nature of the duties performed and the frequency of an officer's interaction with criminals.

In addition, the refuge in *Ferrier* was located immediately adjacent to a large urban area, and the duties of the Police Officers were fully commensurate with city police officers. *Ferrier, 60 M.S.P.R. at 345*. By contrast, there is no indication in the record that the naval base is located adjacent to a large urban area, and the duties of the Police Officers

here are not "fully commensurate" with city police officers. MHT at 36-37 (arrest authority [*61] comes from the commanding officer), 180-81 (the appellants did not have the authority to arrest personnel out in the community). The Police Officers in *Ferrier* had full law enforcement authority in the communities in which the refuge was located, see *Ferrier*, 60 M.S.P.R. at 347 n.4, while the appellants herein have no authority to arrest civilians who are located off base, other than under citizen arrest principles, see MHT at 36-37, 113-14. In fact, the appellants must contact the local police department to effect arrests of civilians living in government-owned housing adjacent to the base. See MHT at 12-13, 37.

We also note a difference in the apparent nature of the areas patrolled. In *Ferrier*, the Police Officers patrolled a wildlife refuge. Here, the appellants patrol a naval base where access is restricted. See MHT at 159 (persons entering the base were generally required to stop and get a pass), 168 (the agency conducted periodic unannounced searches and drug-dog searches at the gate), 180 (vehicles entering the base were required to have a decal or day pass). Most of the individuals on the base were civilian employees [*62] and military personnel, not members of the general public. MHT at 160. Finally, *Ferrier* had to pass an annual five-event Physical Fitness Battery in addition to an annual physical examination, while these appellants must only pass an annual physical examination. Balancing all of the pertinent factors under statute, regulation, and case law, we conclude that the appellants have not met their burden of showing that they have met the requirements which would entitle them to LEO coverage.

ORDER

Accordingly, we REVERSE the initial decision's findings that the Board lacks jurisdiction over the appeals of the appellants Lloyd, Mickens, and Turner, and that the appellants Fitzgerald, Brown, and McGrail are entitled to LEO coverage on the merits. Instead, we find that the Board has jurisdiction over all of these appeals, but that the appellants are not entitled to LEO coverage on the merits. The agency's decision denying such coverage is, therefore, AFFIRMED.

This is the final order of the Merit Systems Protection Board in these appeals. 5 C.F.R. § 1201.113(c).

NOTICE TO THE APPELLANTS REGARDING FURTHER REVIEW RIGHTS

You have the right to request the United States Court [*63] of Appeals for the Federal Circuit to review the Board's final decision in your appeals if the court has jurisdiction. See 5 U.S.C. § 7703(a)(1). You must submit your requests 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 requests for review no later than 30 calendar days after receipt of this order by your representative, if you have one, or receipt by you personally, whichever receipt occurs first. See 5 U.S.C. § 7703(b)(1).

CONCURBY: SLAVET (In Part)

CONCUR:

CONCURRING AND DISSENTING OPINION OF VICE CHAIR BETH S. SLAVET

in

Weslie Fitzgerald, et al. v. Department of Defense

Docket Nos. PH-0842-94-0200-B-1, et al.

I. Introduction

In 1992, the Office of Personnel Management (OPM) issued regulations that OPM asserts prevent the Board from reviewing the agency's sua sponte determination, made in a December 2, 1993 letter, that the appellants are not entitled to law enforcement officer (LEO) credit under the Federal Employees' Retirement System (FERS). OPM argues that the Board lacks [*64] jurisdiction to review the agency's decision because the appellants did not make formal, written requests for LEO credit as required under the 1992 regulations. The majority finds that the 1992 regulations are a valid "restriction" on the Board's statutory authority to review decisions affecting rights or benefits under FERS. Majority op.

at 6. Nonetheless, contrary to OPM's interpretation of the regulations, the majority also concludes that the Board has jurisdiction over these appeals, *id.* at 4, 20, even though the appellants did not make formal, written requests for LEO credit pursuant to the regulations, because "mandating that an employee request an agency determination as to his or her LEO retirement status after a final agency decision has already been made contradicts any notion of judicial and administrative efficiency," *id.* at 21.

I agree with my colleagues that the statute gives us the authority to review the merits of the agency's decision. However, I would find that the regulations upon which OPM relies and upon which the majority opines extensively do not restrict the Board's statutory authority to review the *sua sponte* decision made by the agency here. [*65] Thus, to the extent that the majority finds that the regulations are a jurisdictional restriction on the Board's statutory grant of review authority, I dissent. Having agreed with the majority that we can review the merits of the agency's decision, I concur in the majority's finding that the appellants are not entitled to LEO status based on the duties of their current positions. *See infra* at 27-29.

II. Factual background

There are two groups of appellants, and it is helpful to establish how the two groups are the same and how they differ.

The record evidence shows and the administrative judge found that Messrs. Fitzgerald, Brown, and McGrail (the Fitzgerald appellants) were considered by the agency to be eligible for LEO credit from the time of their appointments until August 1992. *See* Remand Initial Decision (RID) at 6-8. [Mr. Fitzgerald and Mr. Brown were in LEO positions at the time the FERS statute took effect, while Mr. McGrail was appointed to his police officer position in September 1987, after the statute became effective. *See id.* at 7-8.] Neither the majority nor I find error in the administrative judge's finding on this point. *See* Majority op. [*66] at 22-23.

In contrast to the Fitzgerald appellants, the record evidence shows and the administrative judge found that at no time did the agency consider Messrs. Lloyd, Mickens, and Turner (the Lloyd appellants) to be entitled to LEO credit. *See* RID at 11. Again, neither the majority nor I find error in this finding. *See* Majority op. at 23-24.

Thus, the Fitzgerald appellants were given LEO status when they were appointed, while the Lloyd appellants were not. That is the material difference between the two groups of appellants.

However, the two groups are alike in an important respect, namely, that in a letter dated December 2, 1993, the agency on its own initiative informed both groups, *i.e.*, all of the appellants, of its decision that they were not entitled to LEO credit. *See* Initial Appeal File (IAF), MSPB Docket No. PH-0842-94-0200-I-3, Tab 3, Subtab 4a. It was that agency action which resulted in the filing of the instant appeals, and which has led to the question of whether the Board has the authority to review an agency's *sua sponte* decision denying LEO credit.

In the appellants' initial appeal from its decision, the agency did not contend that the Board [*67] lacked the authority to review the decision made in the December 1993 letter, nor did it assert that the appellants needed to make formal, written requests before they could receive a decision on their LEO status. *See id.*, Tab 6. Accordingly, in his May 30, 1995 initial decision, the administrative judge found, without challenge from the agency, that the Board had jurisdiction over these appeals under the statute at 5 U.S.C. § 8461(e)(1). *See Fitzgerald v. Department of the Navy*, MSPB Docket No. PH-0842-94-0200-I-3, initial decision at 2 (May 30, 1995) ("May 1995 ID"). The jurisdictional issue was raised for the first time *sua sponte* by the Board in its remand opinion in *Fitzgerald v. Navy*, 70 M.S.P.R. 152, 154-55 (1996) (*Fitzgerald I*). In that unanimous opinion, the Board found that its jurisdiction over agency determinations on LEO credit under FERS is conferred by OPM's regulations at 5 C.F.R. §§ 842.804(c) and 842.807(a), and that its jurisdiction is "limited" under those regulations "to agency decisions made in response to employees' formal, written requests for LEO retirement coverage." 70 M.S.P.R. at 155. [*68] After the Board issued its remand opinion, the agency argued that the Board lacked jurisdiction over these appeals because the appellants had not made formal, written requests for LEO coverage as required by OPM's regulations. n1 *See* Remand Appeal File, MSPB Docket No. PH-0842-94-0200-B-1, Tab 9. It is apparent from our separate opinions here that the Board now, while disagreeing in our analyses, agrees as a whole that this conclusion in *Fitzgerald I* was erroneous.

n1 In his May 30, 1995 initial decision, the administrative judge found that the appellants were entitled to LEO credit. *May 1995 ID* at 12. The agency petitioned for review of the initial decision. Petition for Review File, MSPB Docket No. PH-0842-94-0200-I-3, Tab 1. In its remand opinion, the Board denied the agency's pe-

tion as not meeting the criteria for review; vacated the May 30, 1995, initial decision; and remanded the case for a jurisdictional determination, stating that if the administrative judge found that the Board has jurisdiction over these appeals, "he shall also consider and resolve the contentions made by the agency on review regarding the appropriate relief to be afforded the appellants." *Fitzgerald I*, 70 M.S.P.R. at 154 and 157.

Because the remand opinion denied the agency's petition for review and instructed the administrative judge to determine the relief to be granted to the appellants if he were to find that the Board has jurisdiction over these appeals, it may be read as indicating that the Board found no error in the administrative judge's finding that the appellants were entitled to LEO credit based on their current positions. However, despite the implication in the remand opinion that the Board finally resolved the merits of the appellants' entitlement to LEO credit, I do not disagree with the conclusion of the majority that the Board's vacation of the May 30, 1995 initial decision meant that the entire initial decision was vacated, including the administrative judge's findings on the merits of the appellants' entitlement to LEO status. See Majority op. at 3 n.1.

[*69]

III. Governing legal principles

The analysis of whether the Board has the authority to review the agency's December 2, 1993 action should be guided by five fundamental legal principles. First, as acknowledged by the Supreme Court, "[t]he starting point in every case involving construction of a statute is the language itself." *Landreth Timber Co. v. Landreth*, 471 U.S. 681, 685, 195 S. Ct. 2297, 2301 (1985) (citation omitted). The Federal Circuit too has stated: "The plain language of a statute is the starting point for determining its meaning." *Norfolk & Western Ry. Co. v. United States*, 62 F.3d 1395, 1397 (Fed. Cir. 1995), citing *Watt v. Alaska*, 451 U.S. 259, 265, 101 S. Ct. 1673, 1677 (1981), and *Consumer Product Safety Commission v. GTE Sylvania, Inc.*, 447 U.S. 102, 108, 100 S. Ct. 2051, 2056 (1980).

Second, it is a basic rule of statutory construction that the whole of the statute should be considered in ascertaining its meaning. See *Sterling Federal Systems, Inc. v. Goldin*, 16 F.3d 1177, 1185 (Fed. Cir. 1994), [*70] referring to 2A Sutherland Statutory Construction § 46.05 (5th ed. 1992). It is well settled that the provisions of a unified statutory scheme should be read in harmony, leaving no provision inoperative or superfluous or redundant or contradictory. See *Holley v. United States*, 124 F.3d 1462, 1468 (Fed. Cir. 1997). Our reviewing court, the U.S. Court of Appeals for the Federal Circuit, has applied this rule of construction to federal personnel regulations. See *Phipps v. Department of Health & Human Services*, 767 F.2d 895, 897 (Fed. Cir. 1985).

Third, as stated by the Supreme Court, "[i]f the statute is clear and unambiguous, 'that is the end of the matter, for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.'" *K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291, 108 S. Ct. 1811, 1817 (1988) (citations omitted). As expressed by the Federal Circuit, a "regulation cannot override a clearly stated statutory requirement." *Barseback Kraft AB v. United States*, 121 F.3d 1475, 1480 (Fed. Cir. 1997), [*71] quoting *Aerolineas Argentinas v. United States*, 77 F.3d 1564, 1575 (Fed. Cir. 1996) (citing *Brush v. Office of Personnel Management*, 982 F.2d 1554, 1560 (Fed. Cir. 1992)); see also *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 841-42, 104 S. Ct. 2778, 2781-82 (1984).

Fourth, as the Court has also instructed, "we are bound by the language of the statute as it is written," and if the plain language might not accord with what one party may think is "good policy," "we are not at liberty 'to rewrite [the] statute because [we] might deem its effects susceptible of improvement.'" *Commissioner v. Lundy*, 516 U.S. 235, 252-53, 116 S. Ct. 647, 656-57 (1996) (citations omitted).

Fifth, regulations "must be read as a whole, and cannot be read selectively." *Benitez-Pons v. Commonwealth of Puerto Rico*, 136 F.3d 54, 63 (1st Cir. 1998); see also *United States v. American College of Physicians*, 475 U.S. 834, 842, 106 S. Ct. 1591, 1596 (1986) [*72] (when "[r]ead as a whole," the regulations did not support the government's arguments); *Acting Special Counsel v. Sullivan*, 6 M.S.P.R. 526, 550 (1981) ("the regulation must be read as a whole").

Having applied these five principles to the appeals before us, I conclude that Congress gave the Board the authority to review the determination made by the agency in its December 2, 1993 letter under procedures prescribed by the Board; Congress did not give OPM authority to limit that review, add additional jurisdictional requirements to the statute, or prescribe Board procedures for hearing appeals from agency decisions denying LEO coverage.

IV. The statutory scheme

Congress created FERS when it enacted the Federal Employees' Retirement System Act of 1986 (FERSA), Pub. L. No. 99-335, 5 U.S.C. § 8401-8479, reprinted in 1986 U.S.C.C.A.N. (100 Stat.) 514. FERSA took effect on June 6, 1986. See Pub. L. No. 99-335 § 702. Three statutory provisions prescribe what authority the Board and OPM may exercise with regard to FERS: 5 U.S.C. § 8461(c), 8461(e), and 8461(g).

Section [*73] 8461(c) provides, in its entirety: "[OPM] shall adjudicate all claims under the provisions of [chapter 84] administered by [OPM]."

Section 8461(g) provides, in its entirety: "[OPM] may prescribe regulations to carry out the provisions of [chapter 84] administered by [OPM]."

Section 8461(e)(1) specifies the authority that Congress gave to the Board in the FERS system. Section 8461(e)(1) states, in its entirety:

Subject to paragraph (2), an administrative action or order affecting the rights or interests of an individual or of the United States under the provisions of [chapter 84] administered by [OPM] may be appealed to the Merit Systems Protection Board under procedures prescribed by the Board.

The majority and I start at the same place and end at the same place, that is, we both find, at the beginning of our respective analyses, that the Board's jurisdiction derives from 5 U.S.C. § 8461(e)(1), and we find, at the conclusion of our analyses, that the Board has jurisdiction to review the merits of the agency's decision to disapprove LEO coverage for both the Fitzgerald appellants and the Lloyd appellants. It is in the middle of our analyses [*74] that our paths diverge.

Using the legal principles set forth above and as explained more fully below, I find, first, that section 8461(e)(1) is unambiguous with respect to the Board's jurisdiction. Second, I find that Congress did not give OPM the authority to prescribe regulations that limit the Board's jurisdiction under section 8461(e)(1).ⁿ² Accordingly, I conclude that the Board has the authority under 5 U.S.C. § 8461(e)(1) to review the sua sponte agency decisions issued to the Fitzgerald and Lloyd appellants.

ⁿ² I also find that the OPM regulation at issue here does not apply by its own terms to the Fitzgerald appellants.

The majority takes a more circuitous route to reach the same result. Even though the majority's analysis does not affect the jurisdictional outcome in this case, I disagree with it because it is legally flawed and contrary to the FERS statutory scheme. Accordingly, while I concur in the ultimate finding that the Board has the authority to review the merits of the agency's sua sponte decisions, I do not concur in the majority's seeming conclusion that the OPM regulations add jurisdictional requirements to 5 U.S.C. § 8461 [*75] (e)(1).

V. The majority's reasoning

As I read its decision, the majority reasons as follows:

. "The statute, at section 8461(e)(1), allows that an administrative action or order affecting the rights or interest of an individual under the provisions of 5 U.S.C. chapter 84 administered by OPM may be appealed to the Board," majority op. at 4;

. the FERS statute is "silent with respect to the establishment of a regulatory time limit for requesting a determination on LEO retirement coverage," *id.* at 8-9; see also *id.* at 13;

. in 5 U.S.C. § 8461(g), "Congress authorized OPM to prescribe regulations to carry out the provisions of 5 U.S.C. chapter 84 administered by OPM," *id.* at 9;

. the statute at section 8461(c) giving OPM the authority to adjudicate "all claims" under FERS "does not necessarily prevent OPM from establishing regulatory time limits for filing such claims," *id.*;

- . OPM promulgated 5 C.F.R. § 842.804(c) pursuant to the statutory authority in 5 U.S.C. § 8461(g), *id.*;
- . the majority will not substitute [*76] its "own construction of the statute for a reasonable interpretation by OPM," *id.*;
- . the Board "has a history of giving effect to regulations issued by OPM in other situations where the Board has jurisdiction by statute, but OPM is given the responsibility for prescribing regulations to implement that statute," *id.* at 4;
- . the regulation at 5 C.F.R. § 842.804(c) "is not an arbitrary or capricious interpretation of the FERS statute," and is valid, reasonable, and not violative of due process, *see id.* at 16;
- . in *DeVitto v. Department of Transportation*, 64 M.S.P.R. 354 (1994), the Board applied section 842.804(c) as a "restriction on its jurisdiction over FERS LEO matters," *id.* at 6;
- . based on its finding that the regulation is not "invalid, unreasonable, or violative of due process," *id.* at 16, and in light of *DeVitto*, the majority examines "whether the Board has jurisdiction over the appeals of these six appellants who did not submit formal, written requests for LEO retirement coverage," as required by section 842.804(c), *id.*;
- . the majority finds that the regulation does not apply to the Fitzgerald appellants because [*77] "[i]t would make no sense for these appellants to have been required to make such a request . . . when they were already deemed by the agency to be LEOs," *id.* at 23, thus "the lack of a formal, written request for coverage from these appellants does not deprive the Board of jurisdiction over their appeals," *id.*;
- . the Lloyd appellants "have shown by preponderant evidence that they were unaware of their non-LEO status until December 1993," *id.* at 25, and "mandating that an employee request an agency determination as to his or her LEO retirement status after a final agency decision has already been made contradicts any notion of judicial or administrative efficiency," *id.* at 21; therefore,
- . the regulation's requirement of formal, written requests for LEO coverage does not preclude the Board from considering the merits of the Lloyd appellants' claims for LEO coverage, *id.* at 26.

I do not disagree with the majority's observation that the FERS statute is silent with respect to the time limits for making a request for LEO credit. In addition, for purposes of deciding this case, I do not disagree with the majority's findings that OPM has the authority under 5 U.S.C. §§ 8461 [*78] (c) and (g) to prescribe time limits for making claims for LEO credit, and that OPM's regulation at 5 C.F.R. § 842.804(c) is a reasonable regulation limiting when an employee can make a claim for LEO credit. Moreover, I agree that where OPM or any agency prescribes regulations governing the proceedings before it, the Board generally gives effect to those regulations if the agency relies on them in issuing its decision and if those regulations are a reasonable interpretation of the statute and do not violate due process.

However, despite my agreement in whole or for the sake of argument with these points, the governing statutory language does not support the finding implicit in the majority's reasoning that a timeliness regulation which is drafted to govern requests for LEO credit may operate to limit the Board's otherwise unlimited jurisdictional authority under 5 U.S.C. § 8461(e)(1) to review all decisions affecting a right or interest under FERS.

VI. Section 8461(e)(1) gives the Board, and only the Board, the authority to prescribe procedures governing appeals of administrative actions that affect rights or interests under FERS.

As explained [*79] below, section 8461(e)(1) is unambiguous with respect to the Board's jurisdiction, and even if it were ambiguous or silent on a matter relating to the Board's jurisdiction, OPM has no authority to fill in any gaps in a statutory provision that pertains solely to the Board's review authority. The majority is mistaken in finding that because OPM has the authority under 5 U.S.C. §§ 8461(c) and (g) to prescribe regulations on when and how LEO claims should be made, it also has the authority to place limits on Congress' grant of authority to the Board in 5 U.S.C. § 8461(e)(1) to review all administrative actions or orders affecting rights or interests under FERS.

In *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 841-42, 104 S. Ct. 2778, 2781-82 (1984), the Supreme Court held that where Congress has, in a statute, "explicitly left a gap for an agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation." *Id.* at 843-44, 104 S. Ct. at 2782. [*80] According to the Court, "[s]uch legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute." Where the legislative delegation to the agency is "implicit rather than explicit . . . a court may not substitute its own construction of the statutory provision for the reasonable interpretation made by the administrator of the agency." *Id.* at 844, 104 S. Ct. at 2782.

Section 8461(e)(1) clearly and unambiguously gives the Board jurisdiction to review any administrative action or order affecting a right or interest under FERS. Thus, there is no jurisdictional "gap" to be filled. See 467 U.S. at 843-44, 104 S. Ct. at 2782; see also *Conner v. Office of Personnel Management*, 104 F.3d 1344, 1346-47 (Fed. Cir. 1997) (where the statute "is not ambiguous and should be read according to its clear language," there is no need to consider an OPM regulation that attempted to reconcile an alleged gap or "overlap" in two statutory provisions), citing *Chevron*, 467 U.S. at 842-43, 104 S. Ct. at 2781-82. [*81] Moreover, to the extent it may be appropriate for the responsible administrative agency to fill in a gap left by Congress and specify a deadline for filing a Board appeal from a final action or order affecting a right or interest under FERS, that is the role of the Board pursuant to 5 U.S.C. § 8461(e)(1). The Board has filled that gap by prescribing a filing deadline for Board appeals in its regulations at 5 C.F.R. § 1201.22(b). The appellants here have filed their appeals within the deadline set by the Board. See IAF, MSPB Docket No. PH-0842-94-0200-I-1, Tab 1. Congress delegated no authority to OPM to implement any aspect of section 8461(e)(1). Well-settled case law supports my conclusion that 5 U.S.C. § 8461(e)(1) gives the Board exclusive authority to prescribe procedures for implementing that section of FERSA.

n3 The majority does not find that 5 U.S.C. § 8461(e)(1) is silent or ambiguous regarding the Board's jurisdiction to review agency decisions affecting rights or interests under FERS. Thus, because neither the majority nor I have found a jurisdictional gap in section 8461(e)(1), that should be "the end of the matter," according to the Supreme Court. *K Mart Corp.*, 486 U.S. at 291, 108 S. Ct. at 1817.

[*82]

In *Cheeseman v. Office of Personnel Management*, 791 F.2d 138 (Fed. Cir. 1986), the court considered 5 U.S.C. § 8347(d)(1), which, as explained below, is the CSRS counterpart to 5 U.S.C. § 8461(e)(1) and which, like section 8461(e)(1), provides that retirement matters "may be appealed to [the Board] under procedures prescribed by the Board." The court concluded that the Board is empowered under that provision to "prescribe its own procedures." *Id.* at 140; see *Lindahl v. Office of Personnel Management*, 776 F.2d 276, 278 (Fed. Cir. 1985). The court did not indicate that any other administrative agency has authority under the statute to prescribe procedures for Board appeals. See *Cheeseman*, 791 F.2d at 140; *Lindahl*, 776 F.2d at 278. See generally *Torres v. Office of Personnel Management*, 124 F.3d 1287, 1290 (Fed. Cir. 1997) ("Where Congress has clearly and plainly delegated only and very specific limited tasks to OPM, [the court] [*83] will not infer others.").

FERSA provides that OPM "may prescribe regulations to carry out the provisions of [chapter 84] administered by [OPM]." 5 U.S.C. § 8461(g). Board appeals are not "administered by" OPM, however, but instead are, as the statute provides, governed by "procedures prescribed by the Board." 5 U.S.C. § 8461(e)(1). The statute thus establishes a distinct division of responsibility between the Board and OPM for promulgating procedures and regulations to effectuate the provisions of FERSA. This division of responsibility has been recognized in other cases.

In *Bommer v. Department of the Navy*, 34 M.S.P.R. 543 (1987), the Board found that in enacting the Civil Service Reform Act of 1978, Congress "repeatedly expressed its intention that the Board would be an independent adjudicatory body, and it emphasized the need for separating the adjudicative responsibilities of the Board from the responsibilities of OPM." *Id.* at 547-48 n.7. Because our authority to review the instant appeals was created by Congress, OPM has no authority to regulate [*84] the manner in which we adjudicate these cases, including the placement of limitations on our statutory grant of jurisdiction. See *id.*; see also *DoPadre v. Office of Personnel Management*, 69 M.S.P.R. 346, 351-52 and 353 n.3 (1996) (the Board found that, under the CSRS counterpart to 5 U.S.C. § 8461(e)(1), OPM had no authority to issue regulations that limited the appellants' right to a full range of appellate procedures in the face of a clear statutory mandate that any administrative action or order affecting rights or interests under CSRS "may be appealed to the Board under procedures prescribed by the Board").

The majority, citing regulations promulgated by the Equal Employment Opportunity Commission (EEOC) and OPM, finds that OPM's promulgation of the 1992 regulations is acceptable because where a statute does not set time

limits, an agency can issue regulations to set time limits. See Majority op. at 11. However, the EEOC and OPM regulations cited by the majority govern matters within the specific statutory purview of EEOC and OPM. In contrast, the regulations at 5 C.F.R. § § 842.804(c) and 842.807(a) were [*85] prescribed by OPM in an attempt to govern matters entrusted by statute exclusively to the Board. n4

n4 The majority states that "the Board has a history of giving effect to regulations issued by OPM in other situations in which the Board has jurisdiction by statute." Majority op. at 4. In support of this assertion, the majority cites three cases: *Plata v. Department of Defense*, 6 M.S.P.R. 173 (1981); *Preece v. Department of the Army*, 50 M.S.P.R. 222 (1991); and *Toquero v. Merit Systems Protection Board*, 982 F.2d 520 (Fed. Cir. 1993). Those cases do not support the majority's statement.

In *Plata*, the Board found that there was no final agency decision that could be appealed since the appellant did not request reconsideration of the agency's denial of his within-grade increase as required by the statute at 5 U.S.C. § 5335(c). See M.S.P.R. at 174. Thus, the Board lacked jurisdiction because the terms of the statute were not met. In *Preece*, the Board found that it lacked jurisdiction to review OPM's initial decision on the appellant's request for an annuity because OPM had not issued a final decision as required by the statute at 5 U.S.C. § 8347(d). See 50 M.S.P.R. at 226. Similarly, in *Toquero*, the court found that OPM had not issued a final decision on the appellant's application for an annuity, and it concluded that the Board did not err in dismissing the appeal without prejudice to refile once OPM issued a final decision. See 982 F.2d at 522.

Thus, the Board lacked jurisdiction in *Plata*, *Preece*, and *Toquero*, because the agencies in all three cases had not issued decisions appealable to the Board when the appellants filed their Board appeals. In contrast, as the majority itself recognizes, the appellants here received a final agency decision. Therefore, the cases on which the majority relies in an effort to justify invoking the regulation sua sponte are inapplicable to the issue presented here.

[*86]

Thus, under *Chevron*, OPM's regulations cannot govern the Board's jurisdiction over these appeals since OPM does not "administer" section 8461(e)(1) and has no authority to promulgate regulations implementing section 8461(e)(1). See 467 U.S. at 842-43, 104 S. Ct. at 2781-82.

VII. The agency's sua sponte decision denying the appellants LEO coverage is an "administrative action or order affecting a right or interest" under FERS that is appealable to the Board.

Although the appellants filed timely appeals to the Board under procedures prescribed by the Board for filing such appeals, we must still determine whether the agency's December 2, 1993 decision is an "administrative action or order" affecting a "right or interest" under FERS within the Board's jurisdiction under 5 U.S.C. § 8461(e)(1). See *Maddox v. Merit Systems Protection Board*, 759 F.2d 9, 10 (Fed. Cir. 1985). In its December 2, 1993 letter, the agency denied LEO coverage to the appellants. The letter clearly affected a right or interest under FERS because, without LEO status, the appellants are not [*87] entitled to the statutory benefits that such status confers. See *Bingaman v. Department of the Treasury*, 127 F.3d 1431, 1433 (Fed. Cir. 1997) (citing 5 U.S.C. § § 8412(d)(2); 8412(a), (b); 8415(d); and 8422(a)(2) to describe the nature of those benefits). Accordingly, the agency's action denying LEO status to the appellants based on the nature of their positions is appealable to the Board. See 5 U.S.C. § 8461(e)(1) (an "administrative action or order" affecting a "right or interest" under FERS "may be appealed to [the Board]"); see also *Commissioner v. Lundy*, 516 U.S. at 252-53, 116 S. Ct. at 656-57 (where the language of a statute is clear and unambiguous, a tribunal is "bound by the language of the statute as it is written"); *King v. Briggs*, 83 F.3d 1384, 1388-89 (Fed. Cir. 1996) (same).

Having found that the Board has the authority under 5 U.S.C. § 8461(e) to review administrative actions or orders affecting rights and benefits under FERS, and that the agency's [*88] December 2, 1993 letter was such an action, I find that the Board has jurisdiction under 5 U.S.C. § 8461(e) to review the agency's final decision on the appellants' entitlement to LEO credit. Nonetheless, I write further to hopefully demonstrate the extent to which the attempts by both the majority and OPM to impose restrictions on our statutory authority to review final actions or orders affecting LEO rights or interests under FERS are based on mistaken factual premises, inapposite case law, and inapplicable regulatory and statutory provisions.

VIII. The arguments made by OPM and the majority for applying the regulations to these appeals as restrictions on the Board's jurisdiction rest on mistaken factual premises, inapposite case law, and inapplicable regulatory and statutory provisions.

A. Inasmuch as OPM's regulations interpreting 5 U.S.C. § 8347(d)(1), which gave the Board the authority to review final decisions under the predecessor retirement system to FERS, did not attempt to limit the Board's review authority by requiring formal, written requests from employees and inasmuch as Congress iterated [*89] language identical in all relevant respects to that statutory provision when it enacted section 8461(e)(1), Congress can be presumed to have been aware of and to have adopted OPM's interpretation of section 8347(4)(1) when it enacted section 8461(e)(1).

5 U.S.C. § 8347(d)(1), the provision giving the Board authority to review administrative actions and orders under the Civil Service Retirement System (CSRS), was enacted in its present form in 1980, *see* Pub. L. 96-500 § 1(a), and reads, in its entirety, as follows:

Subject to paragraph (2) of this subsection, an administrative action or order affecting the rights or interests of an individual or of the United States under the provisions of [chapter 83] may be appealed to the Merit Systems Protection Board under procedures prescribed by the Board.

5 U.S.C. § 8461(e)(1), the provision giving the Board authority to review administrative actions and orders under FERS, was enacted in 1986, and reads, in its entirety, as follows:

Subject to paragraph (2), an administrative action or order affecting the rights or interests of an individual or of the [*90] United States under the provisions of [chapter 84] administered by [OPM] may be appealed to the Merit Systems Protection Board under procedures prescribed by the Board.

The two statutory provisions governing retirement appeals to the Board are identical in all relevant respects, *i.e.*, they both state that "an administrative action or order affecting the rights or interests of an individual or of the United States . . . may be appealed to [the Board]." Thus, the majority is mistaken in asserting that there are "no applicable provisions of CSRS that were incorporated into FERS without change." Majority *op.* at 14. In fact, the very section of FERS that is at the heart of the jurisdictional question presented here -- section 8461(e)(1) -- was incorporated from the CSRS without relevant changes.

In *Haywood v. Office of Personnel Management*, 65 M.S.P.R. 603, 609-10 (1994), cited with approval by the majority, *see* Majority *op.* at 13, the Board restated the rule of statutory construction that when Congress adopts a new law incorporating a section of a prior law without change, Congress is presumed to have been aware of the administrative or judicial [*91] interpretation of the incorporated section and to have adopted that interpretation. Because OPM's CSRS regulations did not attempt to limit the Board's review authority by requiring formal, written requests from employees and because Congress iterated the same language in 5 U.S.C. § 8461(e)(1) as it had used in section 8347(d)(1) of the CSRS statute, Congress can be presumed both to have been aware of the CSRS regulations and to have approved of OPM's interpretation of section 8347(d)(1). *See Lorillard v. Pons*, 434 U.S. 575, 581, 98 S. Ct. 866, 870 (1978) (where "Congress adopts a new law incorporating sections of a prior law, Congress normally can be presumed to have had knowledge of the interpretation given to the incorporated law, at least insofar as it affects the new statute"); *see also Albemarle Paper Co. v. Moody*, 422 U.S. 405, 414, n.8, 95 S. Ct. 2362, 2370 n.8 (1975); *Anthony v. Office of Personnel Management*, 58 F.3d 620, 625-26 (Fed. Cir. 1995); *Public Citizen, Inc. v. Federal Aviation Administration*, 988 F.2d 186, 194 (D.C. Cir. 1993); [*92] *Friedrich v. U.S. Computer Services*, 974 F.2d 409, 414 n.8 (3d Cir. 1992); *United States v. Red Fox*, 845 F.2d 152, 155 (7th Cir. 1988). If Congress had intended restrictions on our review of FERS cases when it enacted FERSA, it could have expressed such an intent. *See D'Elia v. Department of the Treasury*, 60 M.S.P.R. 226, 232 (1993), *overruled on other grounds*, *Thomas v. Department of the Treasury*, 77 M.S.P.R. 224 (1998). Its failure to do so indicates that the Board's review authority under FERS should be the same as our review authority under the CSRS, that is, an individual may appeal any administrative action or order affecting a right or interest under FERS. *See id.*

B. OPM's "policy" concern cannot deprive the Board of its jurisdiction over these appeals.

OPM argues that its interpretation of the 1992 regulations effectuates congressional intent in having determinations on LEO eligibility made close in time to appointment to a position so there can be certainty of funding, that is, the sooner a decision is made on whether a position is [*93] LEO eligible, the sooner the agency and the trust fund can plan for the increased withholding for that position and the possibility that the incumbent will apply for early retirement. See Petition for Review File (PFRF), Tab 14. The majority opinion cites that argument with approval. See Majority op. at 10-11.

I would point out, first, that OPM overreaches by describing this argument as based on express statutory language, see *id.* at 4; there is no such language in the statute. Second, as the Federal Circuit has instructed, "because the meaning of the statute is clear and Congress has spoken, we do not [need to] reach OPM's argument regarding the asserted reasonableness" of its regulation. *Torres*, 124 F.3d at 1290. Rather, the Board and OPM are bound by the Supreme Court's instruction that if the plain language of a statute is not in accord with what a party may think is "good policy," that party is "not at liberty 'to rewrite [the] statute because [it] might deem its effects susceptible of improvement.'" *Commissioner v. Lundy*, 516 U.S. at 252-53, 116 S. Ct. at 656-57 (citation omitted). [*94] Thus, whether or not it might be "good policy" n5 to limit the Board's jurisdiction to appeals in which employees made time-limited formal, written requests, Congress did not do so in 5 U.S.C. § 8461(e)(1) or elsewhere in the statute. OPM's post hoc justification for attempting to limit the Board's jurisdiction by means of the 1992 regulations is undercut by simply looking at the history of those regulations.

n5 I note that OPM's CSRS regulations either did not have a time limit for requesting LEO credit or disposed of any funding concern by limiting the period of time for which LEO credit could be granted; they did not attempt to limit the Board's jurisdiction to hear LEO appeals. Compare 5 C.F.R. § 831.908(e) (1988 ed.) and *id.* § 831.906 (1998 ed.) with *id.* § 842.804(c) (1987 and 1998 eds.).

1. The history of OPM's regulations shows that the 1992 regulations are entitled to little, if any, deference.

OPM has promulgated two sets of FERS regulations governing claims for LEO credit: the 1987 interim regulations, which were issued contemporaneously with the statute, and a revised set of 1992 regulations. While the [*95] interim regulations were consistent with the statute on the matter of the Board's jurisdiction, the later regulations are not. Because the 1992 regulations were not issued contemporaneous with the enactment of FERSA and because they conflict with OPM's contemporaneous interpretation of the statute as expressed in the 1987 interim regulations, the 1992 regulations are a wholly unpersuasive attempt on OPM's part to limit the Board's statutory jurisdiction. The majority errs in deferring to these revised regulations. See Majority op. at 8.

2. The 1987 interim regulations were consistent with the statute in that they did not attempt to preclude the Board from reviewing the merits of the agency's sua sponte decisions denying the appellants LEO credit.

Effective January 1, 1987 (contemporaneous with FERSA's effective date), OPM promulgated interim regulations pertaining to LEO credit under FERS. See 52 Fed. Reg. 2068 (Jan. 16, 1987). The interim regulation at 5 C.F.R. § 842.803 delegated the determination of LEO status from OPM to the head of the employing agency. The interim regulation at section 842.804(c) stated that if an employee was [*96] not subject to the higher withholding rate governing LEO positions, and he

does not within 6 months after entering the position or after any significant change in the position, formally and in writing seek a determination from the employing agency that his position is properly covered by the higher withholding rate, [the agency's determination that the service is not LEO covered] is presumed to be correct.

5 C.F.R. § 842.804(c) (1987). According to the interim regulations, the presumption could be rebutted if the employee showed that he was unaware of his status or was prevented by cause beyond his control from requesting that the status of his position be changed at the time the service was performed. *See id.*

The interim regulation at section 842.807 also specifically provided that the "final decision of an agency head under § 842.803 may be appealed to the Board under procedures prescribed by the Board." A comment from OPM accompanying the interim regulations stated that "agency decisions on coverage under the new definitions [for LEO employees] are appealable to the [Board]." *52 Fed. Reg. 2068* (Jan. 16, 1987). The comment did not indicate [*97] that appeals would be limited to agency decisions only made pursuant to an employee's formal, written request under 842.804(c), nor did the interim regulation at section 842.807 refer to section 842.804(c). Rather, it referred to section 842.803, which was OPM's delegation to agency heads to make LEO determinations.

In its 1987 interim regulations, OPM made no attempt to place a jurisdictional bar in the way of the Board's review of sua sponte agency decisions like the one at issue here; section 842.807 simply provided that the "final decision of an agency head under § 842.803 may be appealed to the Board under procedures prescribed by the Board." The 1987 regulations were therefore consistent with *5 U.S.C. § 8461(c)(1)*. Had OPM not revised the regulations in 1992, our jurisdiction over these appeals would not be at issue.

3. OPM's 1992 regulations are not entitled to deference.

In 1992, OPM revised section 842.807 "to clarify that . . . only agency denial decisions made in response to individual requests under 842.804(c) are subject to appeal." *57 Fed. Reg. 32,689* (July 23, 1992) (emphasis added). As revised, [*98] section 842.807(a) provides that the "final decision of an agency denying an individual's request . . . made under § 842.804(c) may be appealed to the [Board] under procedures prescribed by the Board." [Emphasis added.] Sections 842.804(c) and 842.807(a) of the 1992 regulations are quoted below in their entirety.

Section 842.804(c) states as follows.

If an employee is in a position not subject to the one-half percent higher withholding rate of *5 U.S.C. § 8422(a)(2)(B)*, and the employee does not, within 6 months after entering the position or after any significant change in the position, formally and in writing seek a determination from the employing agency that his position is properly covered by the higher withholding rate, the agency head's determination that the service was not so covered at the time of the service is presumed to be correct. This presumption may be rebutted by a preponderance of the evidence that the employee was unaware of his or her status or was prevented by cause beyond his or her control from requesting that the official status be changed at the time the service was performed.

Section 842.807(a) provides [*99] as follows.

The final decision of an agency denying an individual's request for approval of a position as a rigorous, secondary, or air traffic controller position made under § 842.804(c) may be appealed to the Merit Systems Protection Board under procedures prescribed by the Board.

Applying the legal principle that regulations "must be read as whole, and cannot be read selectively," *Benitez-Pons, 136 F.3d at 63*, sections 842.804(c) and 842.807(a) of the 1992 regulations must be read together. Reading the sections together is also necessary because the revised 1992 version of section 842.807(a) expressly refers to section 842.804(c). OPM correctly asserts that when the two sections are read together, they would, if given effect, preclude the Board from reviewing the agency's December 2, 1993 decision since none of the appellants ever made a formal, written request for LEO coverage under section 842.804(c), which is a stated "prerequisite" for Board "jurisdiction" under section 842.807(a). n6 *See* PFRF, Tab 14 at 5.

n6 The majority relies on *DeVitto v. Department of Transportation, 64 M.S.P.R. 354 (1994)*, to find that the regulations are a "restriction on [the Board's] jurisdiction over FERS LEO matters." Majority op. at 6. Yet, the

majority finds that the Board has jurisdiction over these appeals even though the appellants never filed formal, written requests under section 842.804(c) because "mandating that an employee request an agency determination as to his or her LEO retirement status after a final agency decision has already been made contradicts any notion of judicial and administrative efficiency." *Id.* at 21. The majority contradicts itself by, on the one hand, finding that the regulations are valid jurisdictional restrictions that would bar the Board, per *DeVitto*, from hearing these appeals, while concluding, on the other hand, that even though the appellants did not comply with the regulations, the Board has jurisdiction.

Like the appellants here, the appellant in *DeVitto* received a final agency decision on his entitlement to LEO credit under FERS. See 64 *M.S.P.R.* at 357. The Board in *DeVitto* found that the appeal might not be within its jurisdiction because the appellant had not made a formal, written request under 5 C.F.R. § 842.804(c). *Id.* at 355 and 357. The Board remanded the case to allow Mr. DeVitto to show that he made such a request. See *id.* at 358.

Applying the majority's rationale here to *DeVitto* means that remand in *DeVitto* was error since the Board had jurisdiction based on DeVitto's receipt of a final agency decision on his LEO status. By not requiring the appellants here to have made timely formal, written requests for LEO credit, the majority overrules, or at least modifies, the holding in *DeVitto* that "only agency denial decisions made in response to requests under 5 C.F.R. § 842.804(c) are appealable to the Board." 64 *M.S.P.R.* at 357 (emphasis added).

Like the majority, I would decline to follow *DeVitto*. However, I would overrule it explicitly on the ground that the OPM regulations cannot act as a restriction on the Board's statutory jurisdiction.

[*100]

However, OPM's regulations are entitled to no deference insofar as they attempt to limit the Board's statutory review authority. A contemporaneous construction of a statute by an agency carries "persuasive weight." *Watt*, 451 *U.S.* at 272-73, 101 *S. Ct.* at 1681. In contrast, where an agency's contemporaneous interpretation of a statute remains unaltered for several years and is later amended by the agency in a way that conflicts with its earlier interpretation, the later interpretation "is entitled to considerably less deference" and may, under the circumstances, be "wholly unpersuasive." *Id.* at 273, 101 *S. Ct.* at 1681. The 1987 interim regulations, which did not attempt to bar Board review of an administrative action affecting a right or interest under FERS, were promulgated contemporaneously with the enactment of FERSA and were therefore entitled to persuasive weight. In contrast, the 1992 regulations, which do attempt to preclude our review of the agency's December 1993 decision, are not contemporaneous with the statute and conflict with the 1987 interim regulations. Accordingly, they [*101] merit significantly less deference than the 1987 regulations. I would therefore, under the circumstances, find OPM's interpretation of FERSA, as set forth in the 1992 regulations, "wholly unpersuasive." n7 See *id.* (agency's later-adduced interpretation of mining law, which was set forth ten years after the enactment of the statute and which was in conflict with its contemporaneous interpretation of the statute, was "wholly unpersuasive").

n7 The majority does not acknowledge that OPM changed the 1987 regulations in 1992 in a significant and material way. Instead, the majority appears to accept OPM's argument that sections 842.804(c) and 842.807(a) of the 1992 regulations are the same as the 1987 interim regulations, and that the 1992 regulations were promulgated contemporaneous with the 1987 enactment of FERSA. See Majority op. at 8.

C. The majority erroneously relies on *Bingaman* to resolve the questions presented here.

I also find that the majority's reliance on *Bingaman v. Department of the Treasury*, 127 *F.3d* 1431 (*Fed. Cir.* 1997), for its decision to apply the regulations sua sponte as a jurisdictional preclusion requirement [*102] is an erroneous interpretation of *Bingaman*, or, at least, an overstatement of *Bingaman*.

The majority concludes that its decision is "consistent with" the Federal Circuit's decision in *Bingaman*, and that *Bingaman* "support[s]" its finding that 5 C.F.R. §§ 842.804(c) and 842.807(a) apply to these appeals as valid restrictions on the Board's jurisdiction. See Majority op. at 12 and 19. The majority bases its conclusion on the court's findings regarding a subset of petitioners in *Bingaman*, the "Adair petitioners." See *id.* at 18. The circumstances of the Adair petitioners, however, are clearly and materially distinguishable from the situation here. In the instant appeal, the appellants received a sua sponte final agency decision on their entitlement to LEO credit, which is appealable to the Board under the plain language of 5 *U.S.C.* § 8461(e); the Adair petitioners did not receive such a decision. Not only had the Adair petitioners never received a sua sponte agency decision on their entitlement to LEO coverage, they had

also never filed formal, written requests for LEO credit with their employing agency. *See 127 F.3d at 1441.* [*103] Lacking either a decision from the agency on their entitlement to LEO credit or a formal, written request from them to the agency, the Adair petitioners argued before the court that (1) a December 6, 1990 memorandum from another employee referencing an August 15, 1989 letter from 40 other individuals was a formal, written request as to them, and (2) the agency was generally aware that employees in their positions wanted LEO coverage. *See id.* The court rejected both arguments, finding that the filing of a formal, written request could not be satisfied "by proxy or by reliance on the agency's alleged awareness that all members of a particular group of employees would like to be accorded LEO credit." *Id.*

Since the Adair petitioners had never received a sua sponte administrative action or order affecting their rights or interests under FERS, it was not necessary for the court to resolve whether the statute at 5 U.S.C. § 8461(e)(1) provided the Board with jurisdiction over sua sponte administrative actions or orders affecting their rights or interests under FERS, nor was it necessary for the court to resolve whether the 1992 OPM regulations [*104] were consistent with the statute. Accordingly, I disagree with the majority's conclusion that the court's resolution of the Adair petitioners' appeals supports a finding that the 1992 regulations apply to the circumstances here so as to act as a limitation on the Board's statutory review authority. n8

n8 In further contrast to the Adair petitioners, the 1992 regulations do not, by their own terms, apply to the Fitzgerald appellants because the regulation at 5 C.F.R. § 842.804(c) only purports to cover individuals who either initially were not appointed to LEO-covered positions or who had significant changes to their positions after appointment so as to give rise to a need to make formal, written requests for LEO credit. Thus, I agree with the majority that this regulation is inapplicable to the Fitzgerald appellants. *See Majority op.* at 22-23.

D. The Board will not raise nonjurisdictional matters that could have been raised by the agency, but were not.

I also conclude that the majority's view that the regulations act as a restriction on our statutory grant of jurisdiction (majority op. at 5) and are "applicable to these proceedings" even though the agency did not invoke [*105] them (*id.* at 5) runs counter to our case law in analogous situations.

The Board may raise jurisdictional matters sua sponte at any time. *See Ellis v. U.S. Postal Service, 77 M.S.P.R. 675, 677 (1998).* As I have explained above and as the majority agrees, the Board has jurisdiction over these appeals under 5 U.S.C. § 8461(e)(1). That, then, is the end of the jurisdictional inquiry. The Board should not be raising the regulations on its own initiative since the regulations are not jurisdictional. Rather, the regulations are merely timeliness requirements that can be waived by the agency if not invoked.

The 1992 regulations at section 842.804(c) state that the agency head's decision on LEO status is presumed to be correct if the employee "does not, within 6 months after entering the position or after any significant change in the position, formally and in writing seek a determination from the employing agency that his position is properly covered by the higher withholding rate," and the employee does not show that he or she was "unaware of his or her status or was prevented by cause beyond his or her control from [*106] requesting that the official status be changed at the time the service was performed." Case law in analogous situations shows that the Board will not raise and adjudicate issues of the type implicated by the OPM timeliness regulation if those issues could have been raised by the agency, but were not. *See, e.g., Holderness v. Defense Commissary Agency, 75 M.S.P.R. 401, 404 (1997)* ("the Board is required to review the agency's decision on an adverse action solely on the grounds invoked by the agency and may not substitute what it considers to be a more adequate or proper basis" (citation omitted)); *Koerner v. Office of Personnel Management, 51 M.S.P.R. 365, 367 (1991)* (where OPM rescinded its reconsideration decision and accepted the appellant's application to make a deposit as timely filed, the Board did not sua sponte raise the issue of the timeliness of the application to make a deposit); *Morton v. Department of the Treasury, 44 M.S.P.R. 416, 418 (1990)* (although the appellant's complaint of discrimination was filed with the agency after the expiration of the deadline set forth in 29 C.F.R. [*107] § 1613.214(a)(1)(i), the agency's acceptance of the complaint as timely filed was a decision within its authority under 29 C.F.R. § 1613.214(a)(4), and the Board did not revisit the agency's decision to accept the complaint as timely). Further, to the extent OPM contends that the agency here should have invoked 5 C.F.R. § 842.804(c), the Board has no jurisdiction to intercede on OPM's behalf in any dispute between OPM and the agency over the agency's decision not to invoke the regulations when it issued its December 2, 1993 decision on the appellants' entitlement to LEO coverage. *See Maddox, 759 F.2d at 10* (the Board's jurisdiction is not plenary; it is limited to those matters over which it has been given jurisdiction by law, rule or regulation).

E. The majority incorrectly finds that the statutory definition of "law enforcement officer" is a jurisdictional provision that allows the Board to invoke the regulations sua sponte.

The majority relies on 5 U.S.C. § 8401(17)(A) to support its finding that OPM's regulations are a valid jurisdictional regulation and can be raised sua sponte by the Board. See Majority [*108] op. at 10. In doing so, the majority confuses the jurisdictional issue with the merits issues.

Section 8401(17)(A) of title 5 defines "law enforcement officer." As the majority itself recognizes, that definition goes to the merits of these appeals, *i.e.*, whether the appellants are entitled to LEO status. See *id.* at 26-27. Thus, even though the majority relies on 5 U.S.C. § 8401(17)(A) to find that OPM's regulations restrict the Board's jurisdiction, section 8401(17)(A) is not a jurisdictional provision at all, but is a provision which is implicated only after the Board establishes its jurisdiction. n9

n9 On this point, the Federal Circuit, in a case involving an alleged untimely request for LEO credit under the CSRS, stated that "pension rights are established by statute, and are a matter of entitlement, not agency discretion"; such rights "cannot be disposed of on the ground that it is too burdensome to check the records of an employee's service." *Elias v. Department of Defense*, 114 F.3d 1164, 1168 (Fed. Cir. 1997). The court found that the Board had jurisdiction to review the agency's decision to deny the employee's request for LEO credit despite the fact that he had retired from his position as a Criminal Investigator in 1981 and did not make his request for LEO coverage until 1992. See *id.* at 1165, 1167-68. As the court recognized, the question of whether the Board has jurisdiction over an appeal is separate from the question of whether the employee is entitled to LEO status.

[*109]

IX. Summary and jurisdictional conclusion

Under 5 U.S.C. § 8461(c), OPM has the authority to adjudicate "claims," including claims for LEO status. Section 8461(g) gives OPM the authority to "prescribe regulations to carry out the provisions of [chapter 84] administered by [OPM]." Under the statutory grant of authority in sections 8461(c) and (g), OPM promulgated the 1992 regulations at 5 C.F.R. § § 842.804(c) and 842.807(a).

The agency here made a sua sponte determination that the appellants were not entitled to LEO coverage. The agency did not invoke or enforce the regulations at sections 842.804(c) and 842.807(c), that is, it neither required a formal, written request nor denied LEO coverage based on the timeliness of any such request under the OPM regulations. Rather, the agency in effect waived the regulations and issued a decision that the appellants were not entitled to LEO coverage based on the duties of their positions. Under "procedures prescribed by the Board," the appellants filed timely appeals from that decision. See 5 C.F.R. § 1201.22(b). The Board has jurisdiction under 5 U.S.C. § 8461 [*110] (e)(1) to review the agency's decision. Since the appeals were timely filed under Board procedures and since the statute gives us jurisdiction over the appeals, the only thing the Board should now be doing is reviewing the agency's decision that the appellants are not entitled to LEO credit based on the nature of their duties.

X. Conclusion on the merits

The FERS statute at 5 U.S.C. § 8401(17)(A) defines "law enforcement officer" as an employee, the duties of whose position are (i) "primarily the investigation, apprehension, or detention of individuals suspected or convicted of offenses against the criminal laws of the United States," and (ii) "are sufficiently rigorous that employment opportunities should be limited to young and physically vigorous individuals." Having reviewed the record evidence and the arguments of the parties, I concur in the majority's finding that the appellants have not shown by preponderant evidence that they meet either part of this definition. See Majority op. at 30 and 32. Thus, I agree with the majority that the appellants are not entitled to the LEO credit they seek. See *id.* at 35. However, I disagree [*111] with the majority's consideration of two factors in deciding whether the appellants meet the definition of law enforcement officer.

In attempting to distinguish this case from *Ferrier v. Office of Personnel Management*, 60 M.S.P.R. 342 (1994), a CSRS case on which neither the administrative judge nor the parties relied, the majority notes that in *Ferrier* four officers patrolled the refuge, whereas in this case about forty officers patrol the naval base. See Majority op. at 34. There is nothing in the statute, the court's decision in *Bingaman*, or the Board's case law that makes the size of the police pres-

ence a factor in determining whether a position is LEO covered. The majority provides no support for injecting this factor into the analysis of a claim for LEO credit, and I fail to see its relevance here.

In its attempt to distinguish *Ferrier*, the majority also notes that the refuge where Mr. Ferrier worked was "located immediately adjacent to a large urban area" and his duties were therefore "fully commensurate with city police officers," whereas the appellants here did not show they work near a large urban area. *Id.* As with size [*112] of the police force, there is nothing in the statute, the court's decision in *Bingaman*, or the Board's case law that makes proximity to urban areas a factor in determining whether a position is LEO covered. Moreover, the parties did not put the location of the base at issue, which may very well account for the lack of any evidence showing the population density of the area surrounding the base. If the appellants here had met the statutory definition of law enforcement officer, I would discern no basis in statute or case law for denying them LEO credit because they performed LEO duties in a rural setting, as the majority suggests.

Although I do not agree with the majority's importation of small force/large force and urban/rural dichotomies into the analysis of whether these appellants are entitled to LEO credit, my review of the record evidence, the statute, and the factors set forth in *Bingaman* and other cases all lead me to conclude that the appellants do not meet the statutory definition of law enforcement officer. Thus, I concur in the majority's decision to sustain the agency's denial of [*113] LEO status to the appellants.

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