

99 FMSR 5053

*John J. Mahoney, Ernie F. Lafferty, Ronald C. Hardy, Roy L. Thompson v. Department of Veterans Affairs***U.S. Merit Systems Protection Board**

CH-0842-97-0184-I-1(02/16/99); CH-0842-97-0187-I-1(02/16/99); CH-0842-97-0192-I-1(02/16/99); CH-0842-97-0229-I-1(02/16/99); 81 MSPR 65

February 16, 1999

**Related Index Numbers**

91.001 Retirement, Applications  
1000.126 Authority of Merit Systems Protection Board, Remands  
1002.045 Appellate Jurisdiction of Merit Systems Protection Board, Retirement Benefits  
1022.047 Special Employment Categories, Law Enforcement Officers  
1027.012 Timeliness, Delay in Filing  
1027.036 Timeliness, Waiver of Time Limits

**Case Summary**

Although two of the appellants had not established good cause for their untimely requests for LEO coverage, remand was warranted on the issues of whether the other two appellants were unaware of their LEO status within the six-month period or prevented by cause beyond their control from timely requesting a change in their status.

Although two of the appellants had not established good cause for their untimely requests for LEO coverage, remand was warranted on the issues of whether the other two appellants were unaware of their LEO status or prevented from making a timely request. The appellants, Police Officers, had requested coverage in the Law Enforcement Officer Retirement system. The agency denied the requests as untimely filed, and the appellants appealed. After the AJ dismissed the appeals for lack of jurisdiction, the appellants petitioned for review, asserting that they established good cause for their belated request for LEO coverage because they were unaware that they could request LEO coverage and then made their requests promptly after discovering that such requests could, in fact, be made. The Board observed that it was undisputed that the appellants requested determinations of their status after the requisite six-month periods. The Board found that two of the appellants, who were actually aware of their status when they began their service with the agency, had not established good cause for the untimely requests. The Board concluded that the agency had correctly held that these appellants' requests were untimely. As for the other two appellants, the Board found that remand was warranted on the issues of whether they were unaware of their LEO status within the six-month period, or prevented by cause beyond their control from timely requesting a change in their status.

**Judge / Administrative Officer**

Before: Erdreich, Chairman; Slavet, Vice Chair; Marshall, Member

**Full Text****APPEARANCES:**

M. Jefferson Euchler, Esquire, Neil Bonney &amp; Associates, P.C., Virginia Beach, Virginia, for the appellants.

James W. Blust Lexington, Kentucky, for the agency.

**Opinion and Order**

The appellants petition for review of the initial decision, issued October 10, 1997, that dismissed their appeals for lack of jurisdiction. For the reasons set forth below, the Board GRANTS the appellants' petition, VACATES the initial decision as it pertains to all four appellants, SUSTAINS the agency's decisions with respect to appellants Mahoney and Thompson, and REMANDS the appeals of appellants Lafferty and Hardy for further adjudication.

**Background**

The appellants are all Police Officers at the agency's Medical Center in Lexington, Kentucky, who requested coverage in the Law Enforcement Officer (LEO) Retirement system. They all made written requests for coverage, and the director of the Lexington Medical Center, who had been delegated to decide the appellants' requests, denied them as untimely filed. She found that requests for LEO credit must be made within six months after entering into the position in question, or within six months after any significant change in the position, that the appellants had all occupied their current police officer positions for more than six months, that there had been no significant change in their duties in the six-month period preceding their formal transfer applications, that they should have known that they did not have LEO status, and that they were not prevented by circumstances beyond their control from timely requesting determinations that their official status be reviewed and changed. Mahoney Appeal File, Tab 8, subtab 4h; Lafferty Appeal File, Tab 4, subtab 4g; Hardy Appeal File, Tab 4, subtab 4j, Thompson Appeal File, Tab 4, subtab 4i.

The appellants appealed these determinations to the Board's Central Regional Office. The administrative judge informed them that a question existed regarding the Board's jurisdiction over their appeals. She explained that, under 5 C.F.R. § 842.804(c), they were required to have applied for LEO coverage within six months after they entered into their positions, or within six months after any significant change in their positions, and that the Board does not have jurisdiction to review the merits of an LEO credit request when the application is made beyond that six-month period. She, therefore, ordered them to submit evidence and argument showing that they were unaware that they were not included in the LEO retirement system, that they were prevented by circumstances beyond their control from requesting that their status be changed, or that they applied for the change within six months of a significant change in their positions. Mahoney Appeal File, Tab 3; Lafferty Appeal File, Tab 5; Hardy Appeal File, Tab 5; Thompson Appeal File, Tab 5.

Upon considering the appellants' claims that they filed their formal transfer requests within six months after learning that they may have been entitled to LEO status, and their requests for hearings on these matters, the administrative judge consolidated the appeals, found that the appellants presented non-frivolous allegations of jurisdiction, and scheduled the matters for a hearing. Mahoney Appeal File, Tabs 12, 13.

Prior to the hearing, however, the appellants and the agency agreed to several stipulations and the appellants withdrew their hearing requests. The stipulations were that the agency did not inform the appellants of the LEO request procedures during the first six months of their employment with the medical center, that the appellants knew they were covered by FERS at the time they were employed, that they were unaware that they could request LEO coverage or of the procedures for doing so during the time at issue, and that the appellants requested LEO coverage within six months after learning of the LEO coverage procedures from an agency official. Mahoney Appeal File, Tab 25.

The administrative judge then dismissed the appeals for lack of jurisdiction, finding that appellants Mahoney and Thompson, who had prior service under the LEO retirement system, were aware that their Police Officer positions were not included in the LEO retirement system when they were hired, and that they discussed this status with agency officials who informed them that they would be in FERS rather than the LEO system. She further found that the agency had no obligation to notify them about their right to appeal their non-LEO status, and no duty to inform them of the time limit for such an appeal. With respect to appellants Lafferty and Hardy, she found that, although they lacked experience regarding the LEO retirement system, the information on their forms SF-50 should have put them on notice that there was another retirement system for LEOs, and that there were no circumstances beyond their control preventing them from timely applying for transfer to the LEO system.

In their petition for review, the appellants assert that they established good cause for their belated request for LEO coverage because they were unaware that they could request LEO coverage and then made their requests promptly after discovering that such requests could, in fact, be made.

## Analysis

If an employee is in a position that is not subject to the higher withholding rate applicable to LEOs, he must generally seek, formally and in writing, a determination from the employing agency that his position is properly covered by the higher withholding rate. 5 C.F.R. § 842.804.(c). If the employee does not seek such a determination within six months after entering the position, or after any significant change in the position, the agency head's determination that the service was not so covered at the time of the service is presumed to be correct. The employee may rebut this presumption by presenting preponderant evidence that he was unaware of his status or was prevented by cause beyond his control from requesting that the official status be changed at the time the service was performed. 5 C.F.R. § 842.804 (c); *Streeter v. Department of Defense*, MSPB Docket No. NY-0842-97-0176-1-1, ¶ 8 (Dec. 31, 1998) [98 FMSR 5457].

In *Fitzgerald v. Department of Defense* [98 FMSR 5316], the Board clarified that, when an appellant claims that he was unaware of his LEO status, the test is not whether the appellant should have been aware of the existence of LEO coverage or whether the agency notified or attempted to notify the appellant of his retirement status. Rather, the only question under 5 C.F.R. § 842.804(c) is whether the appellant has proven by preponderant evidence that he was actually unaware of that status. See *Streeter*, ¶ 9.

It is undisputed in the present cases that the appellants requested determinations of their status after the requisite six-month periods. The appellants however, argued that they diligently initiated their requests for agency determinations after learning about their rights to request LEO coverage and the procedure for making these requests. They argue that their lack of awareness constituted good cause for their untimely requests.

Appellants Mahoney and Thompson, however, have admitted that they knew about the LEO retirement system based upon prior LEO service in other positions, and that they were aware at the time they began the service at issue here that their positions did not have LEO status. Initial Decision at 5-6, 7-8, 9-10; Mahoney Appeal File, Tab 5; Thompson Appeal File, Tab 8. Thus, these appellants were actually aware of their status when they began their service with the agency, and the Board may only decide the merits of their claims if they can establish that good cause exists for their delay in timely requesting a change in status. They argue that good cause exists because the agency never informed them that they could make such a request, or the procedures for doing so, and that they, in fact, made their requests promptly after learning that such requests were possible. The Board has held, however, that an agency is not obligated to inform employees about the right to request a change in status or the procedures for making such a request, and the lack of notice does not excuse the failure to make a timely request. See *Fitzgerald [supra]*. Thus, appellants Mahoney and Thompson have not established good cause for their untimely requests.

Although the administrative judge dismissed these appeals for lack of jurisdiction because the appellants had actual notice of their status and did not establish good cause for their untimely requests to change that status, the Board has recently held that it has jurisdiction over final agency decisions denying requests for LEO service credit, such as the agency decisions for these appellants. See *Streeter*, ¶ 5; see also *Hamilton v. Department of Defense*, MSPB Docket No. DC-0842-97-0096-I-1, ¶ 4 (Feb. 3, 1999) [99 FMSR 5031]. Because we find, particularly in light of the appellants' admissions, that the agency correctly held that appellants Mahoney and Thompson untimely sought to change their retirement status, we affirm that decision. Under the circumstances, the administrative judge's action in dismissing these appeals instead did not denigrate these appellants' substantive rights. See *Panter v. Department of the Air Force* [84 FMSR 5672].

With respect to appellants Lafferty and Hardy, the administrative judge found that they should have known of the LEO retirement system based upon the information contained on their forms SF-50, and that the agency's failure to inform them about the opportunity and procedure for requesting a change in retirement systems did not constitute circumstances beyond their control justifying their untimely requests. Initial Decision at 10. As discussed above, however, the proper inquiry is whether the appellants proved by preponderant evidence that they were actually unaware of their status, and not whether they should have been aware of the existence of LEO coverage or whether the agency notified or attempted to notify them about their retirement status. Remand for further adjudication is, therefore, warranted on the issues of whether these two appellants were unaware of their LEO status within the six-month period, or prevented by cause beyond their control from timely requesting a change in their status and, if so, on the merits of their entitlement to the LEO status they seek. See *Streeter*, ¶ 10.

In reaching this conclusion, we note that the appellants withdrew their hearing request upon entering into several stipulations with the agency. Mahoney Appeal File, Tab 25. We find, however, that, in light of our clarification of the law in *Fitzgerald* after the parties entered into the stipulations at issue, the appellants should have the opportunity to reconsider their request to waive the hearing. See *Mims v. Department of Defense* [96 FMSR 5242].

#### **Order**

Accordingly, we REMAND the appeals of appellants Lafferty and Hardy to the Central Regional Office for further adjudication consistent with this Opinion and Order.

This is the Board's final order in the Mahoney and Thompson appeals. 5 C.F.R. § 1201.11-3(c).

#### **Notice To Appellants Mahoney And Thompson Regarding Further Review Rights**

You have the right to request the United States Court of Appeals for the Federal Circuit to review the Board's final decision in your appeal if the court has jurisdiction. See 5 U.S.C. § 7703(a)(1). You must submit your request to the court at the following address:

**United States Court of Appeals**

**for the Federal Circuit**

**717 Madison Place, N.W.**

Washington, DC 20439

The court must receive your request for review no later than 60 calendar days after 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).

**Cases Cited**

MSPB NY-0842-97-0176-I-1(12/31/98)  
80 MSPR 481  
MSPB PH-0842-94-0176-B-1(09/08/98)  
80 MSPR 1  
MSPB DC-0842-97-0095-I-1(02/03/99)  
80 MSPR 636  
MSPB BN07528310051(07/20/84)  
22 MSPR 281  
MSPB SF-0351-95-0769-I-1(07/09/96)  
71 MSPR 74  
98 FMSR 5457  
98 FMSR 5316  
99 FMSR 5031  
84 FMSR 5672  
96 FMSR 5242

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# rules and regulations

This section of the FEDERAL REGISTER contains regulatory documents having general applicability and legal effect most of which are keyed to and codified in the Code of Federal Regulations, which is published under 50 titles pursuant to 44 U.S.C. 1510. The Code of Federal Regulations is sold by the Superintendent of Documents. Prices of new books are listed in the first FEDERAL REGISTER issue of each month.

## Title 5—Administrative Personnel CHAPTER I—CIVIL SERVICE COMMISSION PART 213—EXCEPTED SERVICE

### Department of the Treasury

Section 213.3305 is amended to show that one additional position of Special Assistant to the Assistant Secretary (Legislative Affairs) is excepted under Schedule C.

Effective on publication in the Federal Register, § 213.3305(a) (51) is amended as set out below.

#### § 213.3305: Department of the Treasury.

- (a) *Office of the Secretary.* \* \* \*  
(51) Two Special Assistants to the Assistant Secretary (Legislative Affairs).

(5 U.S.C. secs. 3301, 3302; E.O. 10577, 3 CFR 1954-58 comp. p. 218)

### UNITED STATES CIVIL SERVICE COMMISSION,

[SEAL] JAMES C. SPRY,  
Executive Assistant  
to the Commissioners.

[FR Doc. 74-27518 Filed 11-21-74; 8:45 am]

## PART 511—CLASSIFICATION UNDER THE GENERAL SCHEDULE

### Implementation of Effective Date of Classification Decisions; Suspension

Part 511 of Title 5 of the Code of Federal Regulations is amended by clarifying the authority of Commission personnel who are authorized to make such decisions, to suspend for cause, the implementation of the effective date of either a classification decision (§ 511.701 (b)), or a classification appeal decision (§ 511.702). This change clearly specifies the discretionary authority of: (1) The regional director or his designee to suspend the implementation of the effective date of his own or an agency's decisions; (2) the Director, Bureau of Personnel Management Evaluation or his designee to suspend the implementation of the effective date of his own decision or that of a regional director or an agency and (3) the Commissioners to suspend the implementation of the effective date of any classification decision or classification appeal decision.

Sections 511.701(b) and 511.702 are amended as set out below.

#### § 511.701 Effective dates generally.

(b) *Commission's classification decision.* The effective date of a classification

decision made by means of a certificate issued by the Commission is not earlier than the date of receipt of the certificate in the agency and not later than the beginning of the fourth pay period following the receipt of the certificate in the agency, unless a subsequent date is specifically stated in the certificate. Except as otherwise provided by this paragraph, the filing of an appeal from such a decision does not delay its effective date. The implementation of the classification decision may be suspended when for good cause shown it is determined before its effective date that a review of the classification decision is warranted. The determination to suspend implementation may be made by (1) a regional director or his designee when the decision is made by the regional office or by an agency under the classification jurisdiction of the regional office, (2) the Director, Bureau of Personnel Management Evaluation, or his designee when the decision is made within the bureau, by a region or by an agency, and (3) the Commissioners with respect to any classification decision. Suspending the implementation does not change the effective date of the classification decision being reviewed except when that decision requires that the grade of the position be reduced or results in the reduction in the pay of the incumbent of the position. When the original decision requires that the grade of the position be reduced or results in the reduction in the pay of the incumbent of the position, the reviewing authority shall issue a new certificate and the effective date of the new certificate shall be not earlier than the date the agency receives the certificate and not later than the beginning of the fourth pay period after the date the agency receives the certificate unless a subsequent date is specifically stated in the certificate.

#### § 511.702 Agency's or Commission's classification decision on appeal.

Subject to § 511.703, the effective date of a change in the classification of a position resulting from an appeal to either an agency or the Commission is not earlier than the date of decision on the appeal and not later than the beginning of the fourth pay period following the date of the decision, except that a subsequent date may be specifically provided in a decision by the Commission. The implementation of the appeal decision may be suspended by the Commission when for good cause shown the Commission determines before its effective date that a review of the appeal

decision is warranted. The determination to suspend implementation may be made by (a) the regional director or his designee when the decision is made by the regional office or by an agency under the classification jurisdiction of the regional office, (b) the Director, Bureau of Personnel Management Evaluation, or his designee when the decision is made within the Bureau, by a region or by an agency, and (c) the Commissioners with respect to any appeal decision. Suspending the implementation does not change the effective date of the appeal decision being reviewed except when that decision requires that the grade of the position be reduced or results in the reduction in the pay of the incumbent of the position. When the original appeal decision requires that the grade of the position be reduced or results in the reduction in the pay of the incumbent of the position, the reviewing authority shall issue a new appeal decision and the effective date of the new decision shall be not earlier than the date of the new appeal decision and not later than the beginning of the fourth pay period following the date of decision unless a subsequent date is specifically stated in the new decision.

(5 U.S.C. 5116, 5338, 5351)

Effective date: November 22, 1974.

### UNITED STATES CIVIL SERVICE COMMISSION,

[SEAL] JAMES C. SPRY,  
Executive Assistant  
to the Commissioners.

[FR Doc. 74-27313 Filed 11-21-74; 8:45 am]

## PART 831—RETIREMENT

### Special Provisions Applicable to Law Enforcement Officers and Firefighters

Pub. L. 93-350, enacted July 12, 1974, amends title 5, United States Code, to, among other things, liberalize annuity computations applicable to law enforcement officers and firefighters, and to increase withholding and contribution rates for these employees and their agencies. To implement the changes made by Pub. L. 93-350 and pursuant to section 553(b) (A) and 8347 (a) and (b) of title 5, United States Code, authorizing the Civil Service Commission to prescribe rules and regulations, require certifications in support of applications, and adjudicate claims, Part 831 is amended effective immediately to change the

analysis and to add a new Subpart I, as follows:

**Subpart I—Law Enforcement Officers and Firefighters**

Sec.	
831.901	Special provisions applicable
831.902	Determination of applicability
831.903	Law enforcement officer
831.904	Firefighter
831.905	Creditability-of-service determinations

**Authority:** Sec. 563(b) (A), 8347 (a) and (b), title 5, U.S.C.

**Subpart I—Law Enforcement Officers and Firefighters**

**§ 831.901 Special provisions applicable.**

"Law enforcement officer" and "firefighter," as defined in section 8331(20)-(21) of title 5, United States Code, are subject to the following special provisions of subchapter III of chapter 83 of title 5, United States Code:

(a) Section 8331(3) (C) and (D), pertaining to basic pay;

(b) Section 8334(a) (1) and (c), pertaining to deductions, contributions, and deposits;

(c) Section 8335(g), pertaining to mandatory separation;

(d) Section 8336(c), pertaining to immediate retirement; and

(e) Section 8339(d), pertaining to computation of annuity.

**§ 831.902 Determination of applicability.**

Subject to §§ 831.903-831.904, and after concurrence of the Commission with respect to positions not approved by the Commission 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.

**§ 831.903 Law enforcement officer.**

(a) "Law enforcement officer" includes an employee whose primary duties, as set forth in the official position description, require the investigation, apprehension, or detention of persons suspected or convicted of offenses against the criminal laws of the United States. Law enforcement officer does not include an employee in a position the primary and regular duties of which involve maintaining law and order, protecting life and property, guarding against or inspecting for violations of law, or investigating persons other than persons who are suspected of violating the criminal laws of the United States, or whose duties only occasionally or incidentally require the investigation, apprehension, or detention of persons suspected or convicted of violating the criminal laws of the United States.

(b) If the Commission concurs with the appropriate administrative authority of an agency that the detention duties of a position in a penal or related insti-

tution as defined in section 8331(20) (A)-(D) of title 5, United States Code, require frequent direct contact with prisoners, an employee in such position shall be included within the meaning of the term "law enforcement officer". Concurrence of the Commission obtained prior to July 12, 1974, remains in effect.

(c) "Law enforcement officer" also includes an employee who is transferred to a position the primary duties of which are not the investigation, apprehension, or detention of persons suspected or convicted of offenses against the criminal laws of the United States, or from such a position to another such position, if—

(1) Service in the position transferred to follow service in a law enforcement position without—

(i) A break in service of more than three days; or

(ii) Intervening employment that was not as a law enforcement officer;

(2) The duties of the position transferred to are in the law enforcement line of work in an organization with responsibility for the investigation, apprehension, or detention of persons suspected or convicted of offenses against the criminal laws of the United States; and

(3) The position transferred to is—

(i) Supervisory—one which requires a duty of supervising subordinate employees who are directly engaged in the investigation, apprehension, or detention of persons suspected or convicted of offenses against the criminal laws of the United States; or

(ii) Administrative—one which includes an executive or managerial position and may include a clerical, technical, semiprofessional, or professional position of a type also found in organizations with no law enforcement responsibilities: *Provided*, That experience as a law enforcement officer is a basic qualification for the administrative position.

**§ 831.904 Firefighter.**

(a) "Firefighter" includes an employee whose primary duties, as set forth in the official position description, require the performance of work directly connected with the control and extinguishment of fires, or the maintenance and use of firefighting apparatus and equipment.

(b) "Firefighter" also includes an employee who is transferred to a position the primary duties of which are not the control and extinguishment of fires or the maintenance and use of firefighting apparatus and equipment, or from such a position to another such position, if—

(1) Service in the position transferred to follows service in a firefighter position without—

(i) A break in service of more than three days; or

(ii) Intervening employment that was not as a firefighter;

(2) The duties of the position transferred to are in the firefighting line of work in an organization with firefighting responsibilities; and

(3) The position transferred to is—

(i) Supervisory—one which requires a duty of supervising subordinate employees who are directly engaged in firefighting and/or in the maintenance and use of firefighting apparatus and equipment; or

(ii) Administrative—one which includes an executive or managerial position and may include a clerical, technical, semiprofessional, or professional position of a type also found in organizations with no firefighting responsibilities: *Provided*, That experience as a firefighter is a basic qualification for the administrative position.

**§ 831.905 Creditability-of-service determinations.**

(a) The Commission shall determine whether service prior to July 12, 1974, was as a law enforcement officer or firefighter.

(b) Service on and after July 12, 1974, shall be deemed to have been performed as a law enforcement officer or firefighter if—

(1) (i) The position in which the service was performed was approved by the Commission under paragraph (a) of this section as being subject to section 8336 (c) of title 5, United States Code; or

(ii) The appropriate administrative authority of the employee's agency determined, with the concurrence of the Commission, that the definitions in section 8331(20)-(21) of title 5, United States Code, applied to the employee; and

(2) Retirement deductions and contributions were made at the rate specified in section 8334(a) (1) of title 5, United States Code.

(c) In the event an employee is separated mandatorily under section 8336 (c) of title 5, United States Code, or is separated for optional retirement under section 8336 (c) of title 5, United States Code, and the Commission finds that all or part of the minimum service required for entitlement to immediate annuity was in a position in which the employee was not a law enforcement officer or firefighter, such separation shall be considered erroneous. For service held by the Commission to have been in a position in which the employee was not a law enforcement officer or firefighter, the employee may, upon proper application, be paid a refund, without interest, of—

(1) The excess of his retirement withholdings during such service at the rate specified in section 8334(a) (1) of title 5, United States Code, for law enforcement officers and firefighters over the rate specified for employees generally; and

(2) Withholdings during such service attributable to premium pay.

(5 U.S.C. 8347)

UNITED STATES CIVIL SERVICE COMMISSION,

[SEAL] JAMES C. SPRY,  
Executive Assistant  
to the Commissioners.

[FR Doc. 74-27318 Filed 11-31-74; 8:45 am]