

98 FMSR 5457

**Ralph W. Streeter, et al. v. Department of Defense**

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

NY-0842-97-0176-I-1(12/31/98); 80 MSPR 481

**December 31, 1998**

**Judge / Administrative Officer**

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

**Related Index Numbers**

**91.009 Retirement, Service Credit**

**91.021 Retirement, Effect of Government Regulations**

**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**

**1027.021 Timeliness, Effect of Federal Laws**

**Case Summary**

The appellants' assertions, if proven, would establish that they were unaware of their law enforcement officer status during the six-month period referenced in the regulation and that they acted diligently upon discovering their right to seek an agency decision on the matter.

The appellants' assertions, if proven, would establish that they were unaware of their law enforcement officer status during the six-month period referenced in the regulation and that they acted diligently upon discovering their right to seek an agency decision on the matter. The appellants, who held Police Officer or Supervisory Police Officer positions, formally requested LEO status and retirement coverage. After the agency denied their requests, they filed a timely Board appeal and requested a hearing. Without holding a hearing, the AJ found that the appellants had not made a

nonfrivolous allegation that the Board had jurisdiction over the appeals. The appellants petitioned for review, claiming that they did not file requests within six months after entering their positions because they were unaware of their LEO status until July 1995. In the alternative, they contended that the agency official who made the LEO determinations did not have authority under 5 CFR 842.802 to make such judgment, and that the Board should remand the appeals to the agency for new decisions by an appropriate agency official.

The Board first found that the definition of "agency head" was immaterial to the appeal at hand, since it is the decision of the "agency," not necessarily the decision of the "agency head," that is appealable to the Board. Next, the Board found that the appellants' assertions, if proven, would establish that they were unaware of their LEO status during the six-month period referenced in the regulation and that they acted diligently upon discovering their right to seek an agency decision on the matter. The Board directed that, on remand, the AJ must determine whether the appellants have rebutted the presumption of correctness of the agency's determinations and, if so, he must adjudicate the merits of the appeals. Although agreeing that these appeals should be remanded for further adjudication, the Vice Chair wrote separately to explain the nature of the proceeding on remand.

**Full Text**

APPEARANCES:

Fredric H. Pearson, Esquire, Pearson and Shapiro, Union, New Jersey, for the appellants.

Peter C. Giella, Esquire, Bayonne, New Jersey, for the agency.

**Opinion and Order**

Vice Chair Slavet issues a concurring opinion.

This case is before the Board on the appellants' petition for review of an initial decision that dismissed for lack of jurisdiction their appeals from the agency's decisions denying them law enforcement

officer (LEO) retirement credit. For the reasons discussed below, we GRANT the petition for review under 5 C.F.R. § 1201.115, VACATE the initial decision, and REMAND the appeals to the New York Field Office for adjudication consistent with this Opinion and Order.

### **Background**

The appellants, who hold Police Officer or Supervisory Police Officer positions at the agency's Military Traffic Command, Military Ocean Terminal, Bayonne, New Jersey, formally requested LEO status and retirement coverage. After the agency denied their requests, they filed a timely Board appeal and requested a hearing. Initial Appeal File (IAF), Tabs 1 & 5. In his show cause order, the administrative judge (AJ) informed the appellants of their burden of proving jurisdiction over an LEO appeal, indicated that it appeared that the Board might lack jurisdiction over the instant appeals, and ordered the parties to file evidence and argument on the issue. *Id.*, Tab 7. Both parties responded.

The AJ issued an initial decision, without affording the appellants a hearing, finding that they had not made a nonfrivolous allegation that the Board had jurisdiction over the appeals because their requests were filed with the agency more than six months after each appellant assumed his or her position and they had not shown that they were either unaware of their LEO status or prevented by circumstances beyond their control from requesting a change in retirement status. *Id.*, Tab 19.

In their timely petition for review, the appellants argue that the Board should afford them a hearing and a decision on the merits of their appeals. Specifically, they claim that they did not file requests within six months after entering their positions because they were unaware of their LEO status until July 1995. They contend that they subsequently showed due diligence in requesting that the agency review their status and "now have an unfettered right to a hearing before MSPB to challenge the final agency decision denying them LEO status." Petition for Review (PFR) File, Tab 1 at 5. In the alternative, they contend that

the agency official who made the LEO determinations did not have authority under 5 C.F.R. § 842.802 to make such a judgment, and that the Board should remand the appeals to the agency for new decisions by an appropriate agency official. *Id.* The agency has responded in opposition to the appellants' petition. *Id.*, Tab 3.

### **Analysis**

The Board's jurisdiction in these appeals arises from 5 U.S.C. § 8461(e)(1) which 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 the Office of Personnel Management (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.

**Remand is not necessary in order for the administrative judge to address whether the agency's denials of the appellants' requests for LEO coverage were final decisions made by a designated representative of the head of the agency as defined under 5 C.F.R. § 842.802**

The controlling regulations at 5 C.F.R. § 842.803 and § 842.804 state that it is the "agency head" that is to make the determination as to LEO coverage. The term "agency head" is defined in detail at 5 C.F.R. § 842.802 and includes designated representatives of the agency head so long as those representatives are at certain levels of the agency's organization and meet other requirements of the regulations. The appellants challenge whether the agency official who denied their requests for LEO coverage (John C. Moseley, Chief, Field Advisory Services Division) meets the definition of "agency head" at 5 C.F.R. § 842.802. Apparently, their theory is that, if the official who denied their LEO coverage claim does not meet the regulatory definition of "agency head," then their appeals would not be untimely because the agency has not yet made final decisions which would be appealable to the Board.

The regulation regarding Board jurisdiction over

agencies' determinations concerning LEO retirement coverage under FERS provides that

that [t]he 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 5 C.F.R. § 842.804(c) may be appealed to the Merit Systems Protection Board under procedures prescribed by the Board.

5 C.F.R. § 842.807(a). This regulation specifically states that it is the decision of the "agency," not necessarily the decision of the "agency head," that is appealable to the Board. Although somewhat confusing on its face when read in context with § 842.803, OPM's supplemental information published when these regulations were modified makes it clear that "any affirmative determination [as to LEO coverage] must be made by the agency head in accordance with § 842.803. However, a denial of an individual request for position approval may be made by the agency head's designated representative.. ." 57 Fed. Reg. 32685, 32688 (July 23, 1992). Since it is the "final decision of the agency" *denying* coverage that is the action on appeal here, and since the denial of a request for LEO coverage does not have to be made by the "agency head," then the 5 C.F.R. § 842.802 definition 2 of "agency head" is immaterial to the appeal at hand.<sup>2</sup>

**The administrative judge must determine whether the appellants have rebutted the presumption of correctness of the agency's determinations; if so, he should adjudicate the merits of the appellants' appeals**

If, within six months after entering the position or after any significant change in the position, an individual has not sought a determination from the agency requesting LEO retirement status, the agency's determination that the position is not covered is presumed to be correct. 5 C.F.R. § 842.804(c). It is undisputed that none of these appellants requested a determination of LEO status within the six-month period; however, the appellants argued below that they were unaware of the existence of LEO coverage until July 1995, and then diligently initiated their

request for an agency determination in September 1995. Thus, they asserted, their lack of awareness constituted good cause for their untimely request. The AJ found that the agency had no obligation to inform the appellants of their right to challenge their LEO retirement status, and, since they were not previously subject to the higher withholding rate, they *knew or should have known* that they were not receiving LEO coverage before July 1995, and were therefore not "unaware." He therefore concluded that the Board could not review the merits of the appeals. IAF, Tab 16.

In *Fitzgerald v. Department of Defense*, MSPB Docket No. PH-0842-94-0200-B-1, slip op. at 24 (Sept. 8, 1998), we clarified that, when an appellant claims that he or she was unaware of his or her 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 or her 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 or she was actually unaware of that status. *Id.* Here, the appellants have alleged that they were unaware of their LEO status until July, 1995. In addition, they also state, and the record reflects, that shortly thereafter they initiated a series of requests for determinations of their status. IAF, Tab 12, Exhs. 2, 3, 5A & 9. We find that these assertions, if proven, would establish that the appellants were unaware of their LEO status during the six-month period referenced in the regulation and that they acted diligently upon discovering their right to seek an agency decision on the matter.

On remand, the AJ must determine whether the appellants have rebutted the presumption of correctness of the agency's determinations denying LEO retirement coverage to these appellants. If the AJ determines that the appellants have proven by preponderant evidence that 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, he should further

adjudicate the merits of their appeals.

**Order**

Accordingly, we REMAND these appeals to the New York Field Office for further adjudication.

1 This appeal was consolidated below with the appeals of 22 other employees who raised the same issues in their appeals. A list of the appellants and docket numbers included in the consolidation is attached to this Opinion and Order as appendix A. All references to the Initial Appeal File (IAF) in this opinion are to the file in *Streeter v. Department of Defense*, MSPB Docket No. NY-0842-97-0176-I-1.

2 *Fitzgerald v. Department of the Navy* [96 FMSR 5123] is hereby overruled to the extent that it is inconsistent with this holding.

**Concurring Opinion**

BETH S. SLAVET, Vice Chair

I agree with the majority that the Board has jurisdiction to review the agency's October 1996 decision denying the appellants' request for law enforcement officer (LEO) retirement coverage under the Federal Employees' Retirement System (FERS). See Majority Opinion, ¶ 5; see also *Fitzgerald v. Department of Defense*, MSPB Docket No. PH-0842-94-0200-B-1, slip op. at 4 (Sept. 8, 1998). I also agree that a decision denying a request for FERS LEO coverage does not have to be issued by an "agency head," as that term is defined in 5 C.F.R. § 842.802, in order to be appealable. In addition, although I agree that these appeals should be remanded for further adjudication, I write separately to explain the nature of the proceeding on remand.

The appellants requested a hearing in their joint petition for appeal. Initial Appeal File, Tab 5 at 6. Since these appeals were timely filed and are within the Board's jurisdiction, see Majority Opinion, ¶¶ 2, 5, the administrative judge must hold the requested hearing on the merits. See 5 U.S.C. § 7701(a)(1). The appellants bear the burden of proving entitlement to the retirement benefits they seek by a preponderance of the evidence. See 5 C.F.R. § 1201.56(a)(2).

Accordingly, they must show sufficient reason for missing the 6-month deadline for seeking LEO coverage, either because they were unaware of their status or because they were prevented by circumstances beyond their control from making timely requests. See 5 C.F.R. § 842.804(c). The administrative judge may rule in the appellant's favor on the timeliness issue if he credits their testimony that they were unaware of their status, but he is not bound to credit their testimony; the agency is entitled to cross-examine the appellants at the hearing, and it is also entitled to challenge their testimony with any suitable evidence either already in its possession or that it obtains during discovery (if it chooses to conduct discovery prior to the hearing).

Finally, as stated by the majority, if the administrative judge is persuaded that the appellants have shown sufficient reason for not meeting the deadline in 5 C.F.R. § 842.804(c), he should adjudicate the question of entitlement to LEO coverage, *i.e.*, the question of whether the appellants actually fall with the statutory definition of law enforcement officer. 5 U.S.C. § 8401(17). However, I believe that the administrative judge also has the discretion to hear evidence on both the timeliness and entitlement questions in the first instance, so as to avoid bifurcated proceedings and to ensure a complete record whatever his decision on timeliness turns out to be.

**Appendix A**

- Nicholas F. Affuso NY-0842-97-0214-I-1 Anthony D.
- Anderson NY-0842-97-0215-I-1 William E. Brown,
- Jr. NY-0842-97-0216-I-1 Joseph A.
- Cascino NY-0842-97-0217-I-1 Julio A.
- Concepcion NY-0842-97-0218-I-1 Danny
- Diaz NY-0842-97-0219-I-1 Allison L.
- Doyle NY-0842-97-0207-I-1 Philip H.
- Francis NY-0842-97-0209-I-1 Miguel A.
- Garcia NY-0842-97-0210-I-1 Robert W.
- Keane NY-0842-97-0212-I-1 Pedro A.
- Martinez NY-0842-97-0197-I-1 Frances
- Mattson NY-0842-97-0205-I-1 Joseph A.
- Morabito NY-0842-97-0206-I-1 Joseph D.

NocerinoNY-0842-97-0195-I-1Jesus	M.
OteroNY-0842-97-0196-I-1John	
RobertsNY-0842-97-0186-I-1Sixto	R.
SolerNY-0842-97-0189-I-1Sandra	M.
StaudtNY-0842-97-0193-I-1Ralph	W.
StreeterNY-0842-97-0176-I-1German	D.
TorresNY-0842-97-0178-I-1William	J.
WroblewskiNY-0842-97-0182-I-1Frank	
ZuccaroNY-0842-97-0184-I-1Jerome	W.
MyersNY-0842-97-0194-I-1	