

94 M.S.P.R. 174
(Cite as: 94 M.S.P.R. 174)

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Merit Systems Protection Board.

Jack H. DODD, Appellant,
v.
DEPARTMENT OF the INTERIOR, Agency.

DA-0831-00-0653-I-1.

Sept. 9, 2003.

Agency petitioned for review of initial decision that granted in part employee's request for firefighter service retirement credit. The Merit Systems Protection Board held that employee was not entitled to firefighter service credit for periods during which he occupied positions of Livestock Handler (Horseman) and Maintenance Worker at federal wildlife refuge.

Petition granted; reversed.

West Headnotes

[1] Merit Systems Protection 433
[450k433 Most Cited Cases](#)

An agency may change its representative if it does so in writing, it is approved by an official authorized to designate representatives, and notice of the change is filed and served upon the other parties. [5 C.F.R. § 1201.31](#).

[2] Merit Systems Protection 433
[450k433 Most Cited Cases](#)

Agency's petition for review was properly before the Board, even though it was signed by individual who was not agency's designated representative, where agency filed a proper designation reflecting the change of its representative shortly after filing the petition.

[3] Merit Systems Protection 431
[450k431 Most Cited Cases](#)

A case is considered "moot" when the issues presented are no longer live or the parties lack a legally cognizable interest in the outcome of the case.

[4] Merit Systems Protection 431
[450k431 Most Cited Cases](#)

Agency's petition for review of initial decision which

awarded employee less than 20 years of firefighter service credit was not moot, even though award was not sufficient for an enhanced firefighter annuity, where employee had not withdrawn his claim of entitlement to the credit; moreover, issue of employee's entitlement to an attorney fee award remained.

[5] Merit Systems Protection 317
[450k317 Most Cited Cases](#)

Eligibility for firefighter service credit is strictly construed, because the program is more costly to the government than more traditional retirement plans and often results in the retirement of important people at a time when they would otherwise have continued to work for a number of years. [5 U.S.C.A. § 8336](#).

[6] Merit Systems Protection 317
[450k317 Most Cited Cases](#)

Three-prong test to assist in determining which duties are considered the "primary duties" of a particular position, for purposes of firefighter service credit, asks: (1) whether the duties are paramount in influence or weight, that is, whether they constitute the basic reasons for existence of the position; (2) whether the duties occupy a substantial portion of the individual's working time over a typical work cycle; and (3) whether the duties are assigned on a regular and recurring basis. [5 C.F.R. § 831.902](#).

[7] Merit Systems Protection 317
[450k317 Most Cited Cases](#)

An employee is not entitled to firefighter service credit merely because he performed some fire control duties, among his other position duties; rather, the primary duties of his position must be directly connected with the control and extinguishment of fires. [5 U.S.C.A. § 8336](#); [5 C.F.R. § 831.902](#).

[8] Merit Systems Protection 317
[450k317 Most Cited Cases](#)

"Position-oriented approach" is applicable in determining eligibility for firefighter service credit; under that approach, the Board considers the reason for the position's existence by assessing both the official position documentation and the employee's actual day to day duties. [5 U.S.C.A. § 8336](#); [5 C.F.R. § 831.902](#).

[9] Merit Systems Protection 317
[450k317 Most Cited Cases](#)

Factors to consider in determining whether employee is entitled to firefighter retirement credit include: (1) there is an early mandatory retirement age, (2) there is a youthful maximum entry age for the position, (3) the job is physically demanding so as to require a youthful workforce, and (4) the employee is exposed to hazard or danger. [5 U.S.C.A. § 8336](#).

[10] Merit Systems Protection  **317**
[450k317 Most Cited Cases](#)

Employee was not entitled to firefighter service credit for period during which he occupied position of Livestock Handler (Horseman) at federal wildlife refuge; position description and employee's actual duties supported conclusion that primary duty of position was to manage the wildlife resources and livestock at the, and firefighting was a duty performed only on an incidental or emergency basis. [5 U.S.C.A. § 8336](#); [5 C.F.R. § 831.902](#).

[11] Merit Systems Protection  **317**
[450k317 Most Cited Cases](#)

Employee was not entitled to firefighter service credit for period during which he occupied position of Maintenance Worker at federal wildlife refuge; preponderance of the evidence, as reflected in the performance plan and employee's own estimates regarding his actual duties, revealed that the reason for the existence of the was to perform maintenance duties, rather than firefighting duties. [5 U.S.C.A. § 8336](#); [5 C.F.R. § 831.902](#).

*[176 W. Craig James](#), Boise, ID, for appellant.

[Martin R. Steinmetz](#), Tulsa, OK, for agency.

Before Susanne T. Marshall, Chairman, and Neil A.G. McPhie, Member.

OPINION AND ORDER

¶ 1 The agency has filed a petition for review of the initial decision that granted in part the appellant's request for firefighter service retirement credit. For the reasons set forth below, the Board GRANTS the petition, REVERSES the initial decision with respect to the finding that the appellant was entitled to firefighter service credit from October 1979, to January 1991, and AFFIRMS the initial decision with respect to the finding that the appellant was not entitled to firefighter service credit from January 1991, to December 2000. [\[FN1\]](#)

[FN1](#). This date is used herein as the end of the period for which the appellant sought firefighter service credit, because he was still employed in one of the positions at issue at the time of the hearing in December 2000. It is unclear whether his employment in that position continued thereafter.

BACKGROUND

¶ 2 The appellant requested enhanced retirement annuity credit for performing firefighting duties while employed at a federal wildlife refuge. Initial Appeal File (IAF), Tab 4, Subtabs 2F, 2M. Specifically, the appellant claimed primary [\[FN2\]](#) firefighter service credit for his positions *177 as a WG- 08 Livestock Handler (Horseman) and a WG-08 Maintenance Worker, and secondary firefighter service credit for his position as a WG-09 Maintenance Mechanic. *Id.* Because the agency denied his request for firefighter service credit, the appellant filed a petition for appeal. IAF, Tab 1.

[FN2](#). Primary positions are those whose duties are primarily to perform work "directly connected" with controlling or extinguishing fires, or maintaining and using firefighting equipment, are classified as primary positions. Secondary positions are (1) clearly in the firefighting field, (2) in an organization with a firefighting mission, and (3) either supervisory positions with the main duty of being a first-level supervisor of firefighters in primary positions, or administrative positions for which experience in a primary firefighting position, or equivalent experience outside the Federal government, is a prerequisite. [5 C.F.R. § 831.902](#).

¶ 3 After holding the hearing requested by the appellant, the administrative judge found he was entitled to primary firefighter service credit for his employment as a Livestock Handler (Horseman), and for a portion of his tenure as a Maintenance Worker. IAF, Tab 12; Initial Decision (ID) at 13, 16-17. The administrative judge found that the appellant was not entitled to secondary firefighter service credit for his employment as a Maintenance Mechanic, however. ID at 19.

¶ 4 The agency has timely filed a petition for review alleging that the administrative judge improperly awarded firefighter service credit to the appellant because she incorrectly interpreted the regulations

governing firefighter service credit, ignored precedent, and made erroneous factual findings regarding the amount of time the appellant actually spent performing firefighting duties. Petition for Review File (PFRF), Tab 6. The appellant has filed a Motion to Dismiss or Remand in opposition to the petition for review. PFRF, Tab 1.

ANALYSIS

The petition for review is properly before the Board.

[1][2] ¶ 5 In his Motion to Dismiss or Remand, the appellant argued that the petition for review was signed by an individual other than the designated agency representative, and was therefore improperly filed. PFRF, Tab 1. An agency may change its representative if it does so in writing, it is approved by an official authorized to designate representatives, and notice of the change is filed and served upon the other parties. 5 C.F.R. § 1201.31(a); Hammond v. Department of the Navy, 37 M.S.P.R. 531, 536-37 (1988), *vacated in part on other grounds*, 50 M.S.P.R. 174, 180 (1991). Here, the agency filed a proper designation reflecting the change of its representative shortly after filing the petition for review, which rectified the problem. PFRF, Tab 3.

[3] ¶ 6 The appellant also argued that the matter was moot and the petition merely sought an advisory opinion because an employee is not entitled to an enhanced firefighter annuity unless he has 20 years of service credit, and the administrative judge only awarded him service credit for approximately 11 years and 2 months. PFRF, Tab 1; *see* *1785 U.S.C. § 8336(c)(1). A case is considered moot when the issues presented are no longer live or the parties lack a legally cognizable interest in the outcome of the case. Currier v. U.S. Postal Service, 72 M.S.P.R. 191, 195 (1996), *distinguished on other grounds in* Shelton v. U.S. Soldiers' & Airmen's Home, 82 M.S.P.R. 695 (1999).

[4] ¶ 7 Here, although the agency filed the petition for review, it is still possible that the appellant may be affected by a ruling on whether the service at issue is firefighter service. The appellant has not withdrawn his claim of entitlement to firefighter service credit to which the administrative judge found he was entitled. Additionally, a case is not made moot by the possibility that the appellant's annuity will not actually be increased or decreased as a result of the Board's decision. *See* Sandifer v. Department of the Navy, 90 M.S.P.R. 91, ¶¶ 1-3 (2001) (the Board granted the agency's petition for review of the initial decision that, at a maximum, awarded the appellant approximately 14 years of law enforcement officer (LEO) service credit), *aff'd*, 34 Fed.Appx. 750 (Fed.Cir.2002); *see also* Newman v. Love, 962 F.2d 1008, 1009 (Fed.Cir.1992)

(the court considered the Office of Personnel Management's (OPM's) appeal of the Board's decision to award federal retirees' former wives future survivor annuity benefits). While the issue of mootness has not been expressly addressed in similar cases, the Board has granted an agency's petition for review of an initial decision that awarded an appellant less than 20 years of service credit. Sandifer, 90 M.S.P.R. 91, ¶¶ 1-3.

¶ 8 Further, the appellant requested that the Board remand his appeal for adjudication of an attorney fees claim, which he alleged he would have made if the petition for review had not been filed. PFRF, Tab 1. In order to establish entitlement to an attorney fee award, the appellant must show: (1) he was the prevailing party; (2) he incurred reasonable attorney fees; and (3) an award is warranted in the interest of justice. 5 U.S.C. § 7701(g)(1); Yorkshire v. Merit Systems Protection Board, 746 F.2d 1454, 1456 (Fed.Cir.1984). As set forth below, the appellant is not entitled to the firefighter retirement credit he sought in his appeal. Therefore, the appellant is not a prevailing party, and is not entitled to attorney fees. *See* 5 U.S.C. § 7701(g)(1); Yorkshire, 746 F.2d at 1456. The agency's petition for review is properly before the Board, and the appellant's Motion to Dismiss or Remand is DENIED.

The primary reasons for the existence of the appellant's Livestock Handler and Maintenance Worker positions were not firefighting.

[5] ¶ 9 Federal employees occupying firefighter positions are eligible to retire upon attaining age 50 with 20 years of firefighter service, whereas the majority of other civil service employees are not eligible to retire until they reach age 55 with 30 years of service or age 60 with *179 20 years of service. 5 U.S.C. § 8336(a), (b), (c)(1). Congress established this preference to reward employees who perform particularly hazardous duties in the public interest, and to "facilitate the maintenance of relatively younger and more vigorous firefighting forces throughout the Federal establishment." Felzien v. Office of Personnel Management, 930 F.2d 898, 901 (Fed.Cir.1991) (quoting H.R.Rep. No. 840, 92d Cong., 2d Sess. 2, *reprinted in* 1972 U.S.Code Cong. & Admin. News 2941, 2944). Eligibility for firefighter service credit is strictly construed, because the program is "more costly to the government than more traditional retirement plans and often results in the retirement of important people at a time when they would otherwise have continued to work for a number of years." Watson v. Department of the Navy, 262 F.3d 1292, 1298 (Fed.Cir.2001) (quoting Morgan v. Office of Personnel Management, 773 F.2d 282, 286-87 (Fed.Cir.1985), and construing the preference in the context of LEO service credit). Additionally, employees bear the burden of

proving entitlement to firefighter service credit by a preponderance of the evidence. [5 C.F.R. § 1201.56\(a\)\(2\)](#).

[\[6\]](#) ¶ 10 For the purpose of the service credit, a firefighter is defined as an employee whose position duties are "primarily to perform work directly connected with the control and extinguishment of fires or the maintenance and use of firefighting apparatus and equipment, including an employee engaged in this activity who is transferred to a supervisory or administrative position." [5 U.S.C. § 8331\(21\)](#); see [5 C.F.R. § 831.902](#). OPM created the following three-prong test to assist in determining which duties are considered the "primary duties" of a particular position: (1) whether the duties are paramount in influence or weight, that is, whether they constitute the basic reasons for existence of the position; (2) whether the duties occupy a substantial portion of the individual's working time over a typical work cycle; and (3) whether the duties are assigned on a regular and recurring basis. [\[FN3\]](#) [5 C.F.R. § 831.902](#). All three criteria must be met to demonstrate service credit eligibility. [Watson, 262 F.3d at 1299](#).

[FN3](#). OPM's interpretation of statutes which Congress charges it to administer is normally entitled to great deference. [Newman v. Love, 962 F.2d at 1012](#).

[\[7\]](#) ¶ 11 If an employee spends an average of at least 50 percent of his time performing a duty or group of duties, those are generally considered his primary duties. [5 C.F.R. § 831.902](#). Duties of an emergency, incidental or temporary nature, however, are not "primary," even if they meet the substantial portion of the time element of OPM's test. *Id.* An employee is not entitled to firefighter service credit merely because he performed some fire control duties, among his other position duties. *[180 Spelman v. Office of Personnel Management, 9 MSPB 341, 10 M.S.P.R. 69, 71 \(1982\)](#). Rather, the primary duties of his position must be directly connected with the control and extinguishment of fires. [Corpe v. Office of Personnel Management, 3 MSPB 504, 3 M.S.P.R. 430, 431 \(1980\)](#) (an employee was not entitled to firefighter credit where he had consultative responsibilities regarding "slash and burn" agriculture, and was required to have an intimate knowledge of fire behavior, where the primary duties of his position were not directly connected with controlling and extinguishing fires). Furthermore, "[a]n employee whose primary duties are the performance of routine fire prevention inspection" is not considered a firefighter for service credit purposes. [5 C.F.R. § 831.902](#).

[\[8\]](#) ¶ 12 The Board has developed a "position-oriented" approach for determining LEO credit eligibility that focuses upon the reason for the existence of the position in question, which is the first prong of OPM's test. The Federal Circuit expressed approval for this approach, finding that it was consistent with the applicable statutes and regulations. [Watson, 262 F.3d at 1296](#). Under the position-oriented approach, the Board considers the reason for the position's existence by assessing both the official position documentation and the employee's actual day to day duties. *Id.* at 1300. Because the legislative intent behind the retirement preference and OPM's test articulated in [5 C.F.R. § 831.902](#) are the same for those requesting LEO or firefighter retirement credit, the position-oriented approach is equally applicable to employees seeking firefighter retirement credit. In fact, the Federal Circuit used this approach in deciding firefighter retirement credit cases prior to its decision in [Watson](#). See, e.g., [Perske v. Office of Personnel Management, 25 F.3d 1014, 1018 \(Fed.Cir.1994\)](#) ("We have held that entitlement to credit for service as a firefighter must be determined on the basis of actual duties performed, as well as by the grade level or by the official description.").

[\[9\]](#) ¶ 13 In [Watson](#), the Federal Circuit articulated certain "most probative factors" for determining whether a federal officer is eligible for LEO retirement credit. Several of those factors are instructive in the firefighter context as well, such as whether (1) there is an early mandatory retirement age, (2) there is a youthful maximum entry age for the position, (3) the job is physically demanding so as to require a youthful workforce, and (4) the employee is exposed to hazard or danger. [Watson, 262 F.3d at 1303](#).

¶ 14 There is no evidence that any of the positions for which the appellant seeks firefighter service credit had an early mandatory retirement age or youthful maximum entry age. The appellant testified that he was required to pass a step test in order to perform firefighting duties, but nothing in the record reflects that the positions in question were so physically demanding that a youthful workforce *[181](#) was required. IAF, Tab 12, Tape 2, Side A. Finally, while it is clear that the appellant was exposed to hazard or danger when fighting fires, on balance this does not outweigh the absence of the other most probative factors.

¶ 15 Notwithstanding the appellant's failure to satisfy the majority of the most probative factors pursuant to [Watson](#), the Board must also consider both the official position documentation and the appellant's actual duties for each of the positions at issue to determine the reason for the existence of those positions. [Watson, 262 F.3d](#)

at 1300; Perske, 25 F.3d at 1018. An examination of the relevant evidence reveals that the reasons for the existence of the appellant's positions were not firefighting. Until 1991, when full time firefighters were hired, all employees at the wildlife refuge who were physically able to do so fought wildfires when they occurred. IAF, Tab 4, Subtab 2F; Tab 12, Tape 3, Sides A, B, Testimony of Keeseey Kimball. The appellant was no exception. Further, firefighting was a priority at the refuge when a fire occurred. IAF, Tab 12, Tape 3, Side B, Testimony of Keeseey Kimball. However, as set forth below for each relevant position, the appellant only performed firefighting duties on an emergency and incidental basis, in addition to his other position duties. This is insufficient to qualify for firefighter service credit. 5 C.F.R. § 831.902; Spelman, 9 MSPB 341, 10 M.S.P.R. at 71.

Livestock Handler (Horseman)

[10] ¶ 16 The appellant was a Livestock Handler (Horseman) from 1979 to 1988. IAF, Tab 11, Subtab 35. When the appellant began working in this position, the position description listed his major duties and responsibilities as managing wildlife resources in ways such as taking censuses of the wildlife populations, rounding up, herding, corralling, branding, dehorning, castrating, roping and vaccinating animals, as well as caring for and feeding the horses at the refuge. IAF, Tab 11, Subtab 1. The position description also listed certain maintenance duties, such as dam inspection, maintenance of lake level records, fence and gate maintenance, firefighting, maintenance of salt boxes, and prescribed burning. [FN4] *Id.* With respect to firefighting, the position description stated:

[FN4]. Prescribed burning is the term used for annual intentionally set localized fires that control vegetation at the refuge. IAF, Tab 11, Subtab 30.

As knowledge of the geographic features of the refuge increase, the incumbent serves as an important member of the fire-fighting team. Will be detailed to scout fires in remote areas, thereby directing suppression forces into area for most efficient use of time, manpower, and equipment. As a member of the fire-fighting team uses hand tools and motorized pumps to contain a wildfire. Must understand *182 fire conditions and behavior. Must be adept at recognizing conditions for and setting back-fires.

Id.

¶ 17 Later editions of the position description added the duties of record keeping for the longhorn population, carpentry, painting, motor vehicle

maintenance and janitorial duties, and removed the detailed language regarding firefighting set forth above. IAF, Tab 11, Subtabs 2, 3. Instead, the later position descriptions stated that the "incumbent may be called upon to perform tasks involving fire suppression, wildlife inventories, search and rescue, and other miscellaneous duties not requiring any major skill, training or experience." *Id.* Thus, according to the position descriptions, the reason for the existence of the Livestock Handler position was to manage the wildlife resources and livestock at the refuge. Firefighting was a duty performed only on an incidental or emergency basis.

¶ 18 The preponderance of the evidence concerning the appellant's actual duties as a Livestock Handler does not vary from the duties listed in the position descriptions. The appellant testified that as a Livestock Handler he participated in livestock roundups, castrated animals, sold calves, took care of horses, worked on fences, and participated in prescribed burns and fighting wildfires. IAF, Tab 12, Tape 3, Side A. Performance evaluations reveal that firefighting was a non-critical element of the position, along with maintenance section duties and vehicle operation. IAF, Tab 11, Subtabs 4, 5. On the other hand, the critical elements of the appellant's position were longhorn management, buffalo management, horse management, other biological section programs, record keeping, and facilities and equipment maintenance. *Id.*

¶ 19 It is not disputed that the appellant performed certain firefighting duties while in the Livestock Handler position. *See, e.g.*, PFRF, Tab 4. However, the record reflects that these duties were infrequent. While the evidence is somewhat inconsistent, it indicates that at most, the appellant assisted in fighting one wildfire in 1979, thirteen in 1980, two in 1981, six in 1983, nine in 1984, five in 1985, ten in 1986, three small fires in 1987, and eighteen wildfires in 1988. IAF, Tab 4, Subtab 2I; Tab 11, Subtab 33; Tab 12, Tape 2, Side A, Testimony of the Appellant. The vast majority of these fires lasted 1 or 2 days each. IAF, Tab 11, Subtab 33; Tab 12, Tape 1, Side B, Testimony of Paul Swanson; Tab 12, Tape 2, Side B, Testimony of the Appellant.

¶ 20 The appellant also participated in five prescribed burns in 1980, one in 1981, two in 1983, one in 1984, one in 1986, one in 1987, and five in 1988. IAF, Tab 4, Subtab 2I. The appellant testified that during the earlier years of his employment at the refuge, prescribed burns *183 were performed in 1 day, but that in later years they usually lasted approximately 2 days. IAF, Tab 12, Tape 2, Side B; Tape 3, Side A.

¶ 21 Additionally, the appellant served as the fire marshal for the refuge from 1984 through 1988, and fire

marshal duties were a critical job element of his Livestock Handler position from at least October 1987, to September 1988. IAF, Tab 11, Subtab 5; Tab 12, Tape 2, Side A, Testimony of the Appellant. Because the statutory definition of a firefighter includes those who maintain and use firefighting apparatus and equipment, the time the appellant spent performing fire marshal duties may be properly considered by the Board. [5 U.S.C. § 8331\(21\)](#); [Felzien, 930 F.2d at 902](#). Both the appellant and another employee who had acted as a fire marshal testified that each Friday the fire marshal inspected and performed maintenance on seven vehicles and other equipment used for firefighting. IAF, Tab 12, Tape 1, Side B, Testimony of Paul Swanson; Tab 12, Tape 2, Side A, Testimony of the Appellant. These duties usually required between one-half and one full day of work. *Id.*

¶ 22 The majority of the appellant's actual duties as a Livestock Handler were not related to firefighting. Other than his fire marshal duties, which did not occupy a great deal of time, the appellant only performed duties related to firefighting on the infrequent occasions when a wildfire or prescribed burn actually occurred. The remainder of the appellant's time was occupied by the critical duties of his position--those related to maintenance of the livestock and wildlife at the refuge. Moreover, the record reveals that until full time firefighters were hired in 1991, when a fire occurred at the refuge, all of the employees who were physically qualified assisted in fighting the fire, regardless of their actual positions. IAF, Tab 4, Subtab 2F; Tab 12, Tape 3, Sides A, B, Testimony of Keesey Kimball.

¶ 23 The position descriptions and evidence of the actual duties performed by the appellant as a Livestock Handler indicate that the reason for the existence of the position was the maintenance of wildlife resources and livestock at the refuge. Accordingly, the appellant is not entitled to firefighter service credit for his employment from 1979 to 1988.

Maintenance Worker

[11] ¶ 24 The record does not contain a position description for a Maintenance Worker, the position the appellant occupied from 1988 to 1992. IAF, Tab 11, Subtab 35. However, a performance plan for that position indicated that the appellant performed the critical job elements of plumbing, carpentry, welding, operating and servicing vehicles, assisting with the refuge animals, and performing fire marshal duties. IAF, Tab 11, Subtab 6. The appellant's non-critical duties *184 included serving as a refuge firefighter, supervising youth program employees, and performing janitorial duties. *Id.*

¶ 25 In his application for the position of Maintenance Mechanic, the appellant estimated that as a Maintenance Worker, he spent approximately 20 percent of his time painting, 20 percent plumbing, 25 percent repairing facilities and structures, 15 percent performing electrical maintenance, and the remainder of his time welding, performing janitorial tasks, operating engineering equipment and motor vehicles. IAF, Tab 11, Subtab 35. He listed fire suppression among other general activities, such as janitorial tasks, which consumed approximately 5 percent of his time combined. *Id.* He also mentioned fire marshal duties in his application, but did not provide an estimate of the time he spent performing those duties. *Id.*

¶ 26 At the hearing, the appellant testified that he continued to perform fire marshal duties from 1988 through 1991. IAF, Tab 12, Tape 2, Side A. These duties were a critical element of the appellant's Maintenance Worker position. IAF, Tab 11, Subtabs 6, 7, 8, 9, 10. However, a performance appraisal for the period from July 1989, to June 1990, indicated that the appellant only performed fire marshal duties for 1 week, and did not fight any fires during that time period. IAF, Tab 11, Subtab 9. Another performance appraisal showed that from July 1990, to June 1991, the appellant fought two wildfires and participated in one prescribed burn, but did not perform any fire marshal duties. IAF, Tab 11, Subtab 10.

¶ 27 Other evidence reveals that at most, the appellant assisted in fighting six wildfires in 1989, eight in 1990, three in 1991, and two in 1992. IAF, Tab 4, Subtab 2I; Tab 11, Subtab 33; Tab 12, Tape 2, Side A, Testimony of the Appellant. Again, the majority of these fires lasted 1 or 2 days each. IAF, Tab 11, Subtab 33; Tab 12, Tape 1, Side B, Testimony of Paul Swanson; Tab 12, Tape 2, Side B, Testimony of the Appellant. As for prescribed burns, the appellant participated in two in 1989, two in 1991, and three in 1992, which also lasted between 1 and 2 days each. IAF, Tab 4, Subtab 2I; Tab 12, Tape 2, Side B, Testimony of the Appellant; Tab 12, Tape 3, Side A, Testimony of the Appellant.

¶ 28 The preponderance of the evidence, as reflected in the performance plan and the appellant's own estimates regarding his actual duties, reveals that the reason for the existence of the Maintenance Worker position was to perform maintenance duties, rather than firefighting duties. Therefore, the appellant is not entitled to firefighter retirement credit for his employment from 1988 to 1992.

¶ 29 The appellant has not challenged the administrative judge's findings that firefighting was not the primary reason for the existence of his Maintenance Mechanic position, or that he is not entitled to *185

firefighter retirement credit for that position. Further, a review of the record reveals that the administrative judge correctly decided that issue.

¶ 30 The preponderance of the evidence does not support a finding that firefighting was the reason for the existence of any of the appellant's positions. The appellant's failure to meet the requirements of the first prong of OPM's test under [5 C.F.R. § 831.902](#) alone is sufficient reason to deny the appellant firefighter service credit. However, as set forth below, the appellant failed to satisfy the other two prongs of the test as well.

The appellant did not fight fires during a substantial portion of his working time.

¶ 31 The appellant and a co-worker both testified that during the early years of the appellant's employment at the refuge, he spent 50 percent of his time performing firefighting duties. Tab 12, Tape 3, Side A, Testimony of the Appellant, Testimony of Keesey Kimball. This calculation included performing fire marshal duties, taking classes, fighting wildfires, conducting prescribed burns, and preparation for prescribed burns, such as cutting trees or mowing. *Id.* This testimony, however, was contradicted by the majority of the record evidence.

¶ 32 One of the appellant's supervisors, who also served as the Fire Management Officer for the refuge, estimated that between January 1990, and September 1995, firefighting comprised less than 10 percent of the appellant's actual work time, and was only performed as necessary when fires occurred. IAF, Tab 11, Exhibit 38. This testimony comports with the preponderance of the evidence in this matter. According to a list compiled by the appellant, from 1979 to 2000, he participated in sixty-one wildfires and thirty-eight prescribed burns. IAF, Tab 4, Subtab 2I. Thus, on average, the appellant was involved in approximately three wildfires and two prescribed burns each year.

¶ 33 As a further illustration of the time the appellant actually spent performing firefighting-related duties, it is instructive to examine 1988, the year in which the most wildfires and prescribed burns occurred at the refuge while the appellant was employed there. The appellant spent a maximum of 36 days that year fighting wildfires. IAF, Tab 11, Subtab 33; Tab 12, Tape 2, Sides A, B, Testimony of the Appellant. The appellant participated in five prescribed burns in 1988, and he testified that generally, prescribed burns lasted between 1 and 2 days each. IAF, Tab 4, Subtab 2I; Tab 12, Tape 2, Side B; Tape 3, Side A, Testimony of the Appellant. Assuming the prescribed burns lasted 2 days each, the appellant spent no more than 10 days

working on prescribed burns during 1988. Therefore, in the year *186 when the most fires occurred at the refuge, the appellant spent a maximum of 46 days on duties related to actual fires.

¶ 34 During 1988, the appellant testified that he also performed fire marshal duties. However, those duties occupied at most, one-half to one full day each week. IAF, Tab 12, Tape 1, Side B, Testimony of Paul Swanson; Tape 2, Side A, Testimony of the Appellant. Even assuming that the appellant spent an entire day each week for 52 weeks in 1988 performing fire marshal duties, [FN5](#) added to the totals for wildfires and prescribed burns, the appellant only spent 98 working days performing fire-related activities that year. This did not constitute a substantial portion of the appellant's working time.

[FN5.](#) This assumption errs on the side of generosity, as there is no specific evidence for the number of days the appellant spent performing fire marshal duties in 1988. It should be noted that during some years when the appellant served as fire marshal, he performed few or no fire marshal duties. IAF, Tab 11, Subtabs 9, 10.

¶ 35 The time the appellant spent taking classes related to firefighting should not be counted when calculating firefighter retirement credit, as the time was not spent directly in controlling and extinguishing fires, or in maintaining and using firefighting apparatus and equipment. [5 U.S.C. § 8331\(21\)](#). In any event, the appellant only took eighteen classes related to firefighting from 1980 to 1997. IAF, Tab 4, Subtab 2I. Some of the courses lasted 1 day, while others were 2 or 3 day courses. IAF, Tab 12, Tape 3, Side A, Testimony of Appellant. Even if these courses were counted, the appellant would not be entitled to firefighter service credit.

The appellant's firefighting duties did not occur on a regular and recurring basis.

¶ 36 As demonstrated by the number of fires with which the appellant was involved at the refuge, firefighting duties were not assigned to him on a regular and recurring basis. Instead, he only participated in firefighting when wildfires or prescribed burns took place. As set forth above, neither event occurred with enough frequency to deem the duties regular.

¶ 37 While the appellant's fire marshal duties were supposed to be performed once each week, the record reflects that, at least in certain years, those duties were

performed rarely, if at all. IAF, Tab 11, Subtabs 9, 10. Moreover, the maintenance duties the appellant performed as a fire marshal alone do not qualify as firefighting. The appellant's maintenance of firefighting equipment would have to have been coupled with regular and recurring use of that equipment to meet the statutory definition of firefighting. [5 U.S.C. § 8331\(21\)](#). The evidence does not show that the appellant used firefighting equipment on a regular and recurring basis.

*187 ¶ 38 The preponderance of the evidence does not support a finding that the appellant is entitled to firefighter service credit for any of the positions at issue. Accordingly, the initial decision is REVERSED with respect to the finding that the appellant was entitled to firefighter service credit from 1979 to 1991, and AFFIRMED with respect to the finding that the appellant was not entitled to firefighter service credit from 1991 to 2000.

ORDER

¶ 39 This is the final decision of the Merit Systems Protection Board in this appeal. [Title 5 of the Code of Federal Regulations, section 1201.113\(c\)](#) ([5 C.F.R. § 1201.113\(c\)](#)).

NOTICE TO THE APPELLANT REGARDING YOUR FURTHER REVIEW RIGHTS

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

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

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

If you need further information about your right to appeal this decision to court, you should refer to the federal law that gives you this right. It is found in [Title](#)

[5 of the United States Code, section 7703](#) ([5 U.S.C. § 7703](#)). You may read this law as well as review other related material at our web site, <http://www.mspb.gov>.

FOR THE BOARD:

Bentley M. Roberts, Jr.

Washington, D.C.

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