

102 FMSR 5109

John Street, Clinton D. Satterfield, Bob G. Roberts, and John J. Wilson v.

Department of the Navy

U.S. Merit Systems Protection Board

DC-0842-00-0084-I-1(01/10/02);

DC-0842-00-0185-I-1(01/10/02);

DC-0842-00-0186-I-1(01/10/02);

DC-0842-00-0210-I-1(01/10/02); 90 MSPR
652

January 10, 2002

Judge / Administrative Officer

Before: Slavet, Chairman; Sapin, Vice Chairman; Marshall, Member

Related Index Numbers

91.001 Retirement, Applications

91.009 Retirement, Service Credit

1002.045 Appellate Jurisdiction of Merit Systems Protection Board, Retirement Benefits

1022.047 Special Employment Categories, Law Enforcement Officers

Case Summary

A BOARD MAJORITY SUSTAINED THE AGENCY'S DENIAL OF THE APPELLANTS' REQUESTS FOR LEO SERVICE CREDIT. PRONG (I) OF THE LEO ANALYSIS IS NOT DEPENDENT ON THE PERCENTAGE OF TIME THAT AN INCUMBENT MAY, FOR WHATEVER REASON, SPEND ON LEO DUTIES. RATHER, THE QUESTION TO BE ASKED AND ANSWERED IN PRONG (I) IS WHETHER THE POSITION EXISTS OR IS DESIGNATED AS AN LEO POSITION.

A Board majority sustained the agency's denial of the appellants' requests for law enforcement officer service credit. The appellants, GS-05 police officers at the agency's Norfolk, Va., Naval Shipyard, requested LEO retirement credit for some or all of the time they served in the GS-083-05 police officer positions. The agency denied the requests, and the appellants appealed. Relying in part on the Board's decision in *Alford v. Navy* [99 FMSR 5147], the AJ

found the appellants were entitled to LEO service credit. The agency petitioned for review, arguing that the appellants were not entitled to LEO service credit because the primary duties of their positions were not LEO duties. A Board majority found that prong (i) of the LEO analysis is not dependent on the percentage of time that an incumbent may, for whatever reason, spend on LEO duties. Rather, the Board said, the question to be asked and answered in prong (i) is whether the position exists or is designated as an LEO position. The Board found the evidence clearly showed the appellants failed to rebut the presumption that their GS-083 positions were not LEO positions. The evidence showed that no maximum age was required for entry into the GS-083 police officer positions, the Board said. Furthermore, the evidence established that the appellants' positions were not LEO positions because the duties of the positions that were paramount in influence or weight were not LEO duties. Rather, the positions existed primarily to maintain law and order, inspect for violations of law, and protect life and property, the Board said. Thus, the appellants were not entitled to LEO service credit for work performed in those positions, irrespective of the fact that some of the duties they may have carried out some of the time may have been LEO-related. The Chairman issued a dissenting opinion.

Full Text

M. Jefferson Euchler, Esquire, Virginia Beach, Virginia, for appellant Street.

Neil C. Bonney, Esquire, Virginia Beach, Virginia, for appellants Satterfield, Roberts and Wilson.

Alex H. Adkins, Portsmouth, Virginia, for the agency.

Opinion and Order

¶1 The agency has filed a petition for review of the initial decision that granted the appellants' requests for law enforcement officer (LEO) service credit. For the reasons set forth below, the Board GRANTS the petition, REVERSES the initial decision, and SUSTAINS the agency's denial of the

appellants' requests for LEO service credit.

Background

¶2 The appellants are or were grade level GS-05 Police Officers at the agency's Norfolk, Virginia, Naval Shipyard. Initial Appeal File (IAF), MSPB Docket No. DC-0842-00-0210-I-1, Tab 10. The Police Officer positions are classified in the 083 series, and the appellants are covered under the Federal Employees' Retirement System (FERS). *Id.* The appellants requested LEO retirement credit for some or all of the time they served in the GS-083-05 Police Officer positions. *Id.*, Tab 10, Subtab 2b. The agency denied the requests, and the appellants filed appeals with the Board. *Id.*, Tab 1.

¶3 The administrative judge held a consolidated hearing and based his initial decision on a common evidentiary record. Initial Decision (ID) at 2. Relying in part on the Board's decision in *Alford v. Department of the Navy*, [99 FMSR 5147], the administrative judge found that the appellants are entitled to LEO service credit. On petition for review, the agency argues that the appellants are not entitled to LEO service credit because the primary duties of their positions are not LEO duties. Petition for Review File (PFRF), Tab 1.

Analysis

The regulations

¶4 In relevant part, the FERS statute at 5 U.S.C. § 8401(17)(A) defines a "law enforcement officer" as 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. Employees who occupy LEO positions are eligible to retire upon attaining age 50 and completing 20 years of LEO service, whereas most other civil service employees are eligible to retire at age 60 with 20 years of service or at age 55 with 30 years of service. *Bingaman v. Department of the Treasury*, 127 F.3d 1431, 1433

(Fed. Cir. 1997) [97 FMSR 7027].

¶5 Regulations promulgated by the Office of Personnel Management (OPM) and codified at 5 C.F.R. § 842.802 set forth a 3-prong test for determining whether a position is a LEO position. Under the regulatory test, an appellant must establish that the "primary duties" of his position are LEO duties, as defined by 5 U.S.C. § 8401(17)(A). According to 5 C.F.R. § 842.802, "primary duties" are duties 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 time over a typical work cycle; and (c) Are assigned on a regular and recurring basis." Duties that are of an emergency, incidental or temporary nature cannot be considered "primary" even if they meet the substantial portion of time criterion, i.e., the second prong. 5 C.F.R. § 842.802. The regulations further provide that LEO primary duties do not include "maintaining order, protecting life and property, guarding against or inspecting for violations of law, or investigating persons other than those who are suspected or convicted of offenses against the criminal laws of the United States." *Id.*

The case law

¶6 The Board stated in *Watson v. Department of the Navy*, [100 FMSR 5373], which was affirmed by the U.S. Court of Appeals for the Federal Circuit in *Watson v. Department of the Navy*, 262 F.3d 1292 (Fed. Cir. 2001) [101 FMSR 7047], that decisions like *Alford* placed too much emphasis on the day-to-day activities of an individual during a limited period of time. [*Watson, supra*] ¶ 5. Accordingly, both the Court and the Board in *Watson* held that the "incumbent-oriented" approach used in *Alford* did not adequately take into account the first prong of the definition of "primary duties" in 5 C.F.R. § 842.802, and that the inquiry should therefore focus on the duties inherent in the position and the basic reasons for its existence. 262 F.3d at 1299; [*Watson, supra*] ¶¶ 5-6.

¶7 Following the *Alford* rationale, the dissent

would find that an appellant can be entitled to LEO service credit if he performs LEO duties less time than 50 percent of the time, even down to as low as 30 percent of the time. In support of this proposition, the dissent quotes the Court's statement that the "position-oriented" approach "affirmatively involves consideration of prong (i) of sections 831.902 and 842.802 so as to ensure that in addition to consisting of duties that occupy a substantial portion, if not 50 percent or more, of the officers' working time and that occurred on a regular and recurring basis, the position exists currently as an LEO position." *Watson*, 262 F.3d at 1299. We do not agree with the dissent's interpretation of that part of *Watson*.*

¶8 Where the quoted language appears, the Court was explaining why the position-oriented approach comported with both statute and regulation. The Court observed that the definition of a primary LEO position in sections 831.902 and 842.802 consisted of the 3 criteria set forth above, namely, that primary duties are ones that "(i) are paramount in influence or weight; that is, constitute the basic reasons for the existence of the position; (ii) occupy a substantial portion of the individual's working time over a typical work cycle; and (iii) are assigned on a regular and recurring basis." The Court found that "[t]he inclusion of the conjunctive 'and' in section 831.902 and 842.802 clearly indicates that *all* three criteria must be demonstrated in order for a position to be LEO-eligible." *Id.* (emphasis added).

¶9 The Court went on to say that a position-oriented approach was consistent with the regulations because the factors set forth in *Bingaman v. Department of the Treasury*, 127 F.3d 1431 (Fed. Cir. 1997), for determining LEO eligibility "only considered prongs (ii) and (iii) to determine whether the officers' duties occupied a 'substantial portion' of their working time (prong (ii)), and were assigned on a 'regular and recurring basis (prong (iii)).'" *Watson*, 262 F.3d at 1299. Using the language on which the dissent relies, the Court stated that the position-oriented approach was the correct way to analyze a claim for LEO service credit because it

"affirmatively involves consideration of prong (i). . . so as to ensure that *in addition* to consisting of duties that occupy a substantial portion, if not 50 percent or more, of the officers' working time (prong (ii)) and that occurred on a regular and recurring basis (prong (iii)), the position exists currently as a LEO position [prong (i)]." *Id.* (emphasis added).

¶10 The Court therefore linked the percentage of time worked on certain duties to prong (ii), namely, the "substantial portion" criterion. This is logical since the percentage of time spent on various duties *by the incumbent* indicates whether LEO duties are a "substantial portion" of the job. This is an incumbent-oriented approach. Prong (i), in contrast, deals with whether the position does or does not exist as a LEO position. For purposes of that prong, the Board examines whether the duties *of the position* that are "paramount in influence or weight" are LEO duties. 5 C.F.R. § 842.802; *Watson*, [supra] ¶ 12. This is a position-oriented approach. By using the estimated time an incumbent may spend on LEO alleged duties to examine whether the appellants satisfied prong (i), the dissent disregards the Court's holding in *Watson* that we must focus on the duties inherent in the position itself when considering whether, under prong (i), the basic reasons for the position's existence are to perform LEO duties.

¶11 Every part of a regulation should, where possible, be given effect. *Accord, e.g., Perez v. Merit Systems Protection Board*, 85 F.3d 591, 594 (Fed. Cir. 1996) [96 FMSR 7020] (if possible, every word, clause, and sentence of a statute must be given effect); *Ochoa v. Department of the Navy*, [94 FMSR 5530] (it is axiomatic that statutes should be construed to give effect to every provision). Because the Court has stated that the inquiry as to the percentage of time spent performing certain duties is directed at prong (ii), we conclude that prong (i) is not dependent on the percentage of time that an incumbent may, for whatever reason, spend on LEO duties. Rather, the question to be asked and answered in prong (i) is whether the position exists or is designated as a LEO position. Accordingly, we do not accept the dissent's

interpretation of the Court's decision in *Watson*, which, if followed, would render prong (i) redundant and meaningless.

¶12 The dissent expresses concern over the fact that the appellants in *Alford*, who were GS-083 Police Officers, received LEO service credit and these appellants do not. The decision in *Watson* explains that the Board must examine the evidence in the appeal before it to determine whether a position exists to primarily perform LEO duties. [*Watson, supra*] ¶¶ 5-6. As noted in *Watson*, the *Alford* decision was based on the evidence or lack of evidence submitted by the parties in that appeal. *Id.* ¶ 6. The Board in *Watson* therefore examined the evidence offered by the appellants in that case, rather than rely on the fact that the *Alford* appellants were granted LEO coverage. *Id.* Likewise, we will consider the record evidence in these appeals to decide whether the appellants proved that their positions existed to primarily perform LEO duties.

¶13 The dissent suggests that the appellants should receive LEO service credit because the *Alford* appellants were granted such credit. This view is in conflict with the Court's holding in *Watson* that "the official documentation of the GS-083 series indicates that *all officers* in that series in *all departments* of the federal government are presumptively *not entitled* to LEO credit." 262 F.3d at 1304 (emphasis added). Thus, the appellants are presumptively *not* entitled to LEO service credit because they occupy positions classified in the GS-083 series. The evidence clearly shows that the appellants failed to rebut the presumption that their GS-083 positions are not LEO positions.

The evidence

¶14 With respect to prong (i), the Court identified at least 2 types of evidence which are extremely important indicators of whether a position is a LEO position. First, the Court stated that the position description is "quite probative in determining whether the position really exists as a LEO position." *Watson*, 262 F.3d at 1300. Second, the Court found that a maximum age for entry into a

position is "highly probative" as to whether the position is a LEO position in light of the early retirement afforded to LEOs and the fact that LEO positions are limited to young and vigorous individuals. *Id.* at 1302. The Court reasoned that if there is no maximum entry age requirement for service in a GS-083 Police Officer position, an "officer could conceivably enter the Norfolk Naval Base police force at age 50, and retire at age 70," which "hardly seems to be consistent with awarding LEO service only for those positions which are so physically taxing as to warrant retirement after 20 years of service." *Id.* at 1303.

¶15 The parties submitted evidence and argument concerning both the position description and the age at which they entered on duty in their GS-083 positions. We will begin with the position description.

¶16 The administrative judge carefully analyzed the relevant position description and found that it does not describe a position in which the primary duties are the investigation, arrest, apprehension or detention of individuals suspected or convicted of offenses against the criminal laws of the United States. *Id.* at 9. The appellants do not challenge this finding on petition for review, and the record supports it.

¶17 The position description indicates that the incumbent's duties are, on an assigned shift, to walk on foot or operate a patrol car, motorcycle or bicycle to inspect for violations of traffic laws, suspicious activities or persons and disturbances of law and order; to respond to radio dispatches and to answer calls and complaints; to serve warrants, make arrests and testify in court; to provide police escorts and to direct traffic; to be detailed to assignments requiring specialized skills, such as boat patrol, traffic investigator, crime prevention practitioner, classroom training instructor, or field training officer; to report unsafe conditions existing in the street or other public facilities; to assist with criminal investigations by presenting evidence or interviewing victims and witnesses; to record evidence, take photographs and fingerprints, and to perform related identification

tasks; and to maintain records and prepare reports. IAF, Tab 11, Subtab 2d. Such duties are primarily in the nature of maintaining law and order, protecting life and property, and guarding against and inspecting for violations of law, which are not LEO duties.

¶18 Despite all of the language in the position description showing that the appellants' positions did not primarily exist to perform LEO duties, the dissent focuses on one sentence in the position description describing the "purpose of the work" of a GS-083 Police Officer as the "investigation, apprehension, or detention of individuals suspected or convicted of offenses against the criminal laws of the United States." The appellants provided no explanation of how, when or why that sentence was placed in their position descriptions or what duties may have been included in that sentence. Despite that sentence, Ronald Doran, a Precinct Commander who testified on behalf of the appellants, stated that the rest of the position description accurately represented the duties of a GS-083 Police Officer. Hearing Tape (HT) 1, Side B. The specific duties set forth in the position description show that the position of GS-083 Police Officer did not exist as a LEO position, and the other evidence supports that finding.

¶19 Commander Doran said that, notwithstanding the position description's failure to describe a position entitled to LEO service credit, on average, 30 to 40 percent of the work of a Shipyard officer involved the investigation, arrest, apprehension or detention of criminals or suspected criminals. HT 2, Side A. Commander Doran said, however, that the 30 to 40 percent figure was "just a wild guess." *Id.* In addition, he stated that his estimate was based on his personal opinion that "everything [the officers] do is investigative in nature; even a traffic stop is investigative in nature." *Id.* In Doran's view, every person with whom a Police Officer comes in contact is a potential criminal or criminal suspect; all police duties, for example, traffic stops, are investigative; and all routine patrols constitute LEO duties. *Id.*

¶20 Doran's personal definition of "LEO duties"

cannot supplant the statutory and regulatory definition of primary LEO duties. Further, Doran admitted that follow-up investigations of crimes are conducted by detectives of the Naval Criminal Investigative Service (NCIS) because "most police officers do not have time to do follow-up investigations" since they have to return to their patrolling duties after responding to a crime scene. *Id.* Because the duties of routine patrolling, maintaining law and order, and inspecting for violations of law, which Doran described as being the appellants' primary duties, are not LEO duties, his testimony shows that the positions held by the appellants are not LEO positions. Doran's testimony is consistent with Secretary of the Navy Instruction 5520.3B, which states that, within the Department of the Navy, "NCIS is primarily responsible for investigating actual, suspected or alleged major criminal offenses committed against a person, the United States Government, or private property." IAF, Tab 10, Subtab 2c.

¶21 Police Officers Eugene Turner and Clinton Satterfield estimated, respectively, that 75 to 80 percent and 60 to 80 percent of the work of a Shipyard Police Officer involved the investigation, arrest, apprehension or detention of criminals or suspected criminals. HT 5, Side B (Turner); HT 6, Side A (Satterfield). Like Commander Doran, Officer Turner based his estimate on his own definition of "LEO duties" as including every instance where an officer stops someone to issue a traffic citation or to ask a question. HT 6, Side A. These are not LEO duties, however.

¶22 Although Officer Satterfield opined that he performs LEO duties 60 to 80 percent of the time, he followed up that estimate by saying 60 to 70 percent of his day is spent "right out with the patrol." HT 6, Side A. As with the testimony of Commander Doran and Officer Turner, Officer Satterfield's testimony regarding the estimated time he spends on LEO duties is entitled to little if any weight because he did not explain how he arrived at that estimate. Instead, he suggested that his estimate was based on his view that routine patrols were LEO duties, and on his

conclusion that the majority of a Police Officer's time was spent on patrol. Inspecting for possible violations of law and routinely patrolling to maintain law and order are not LEO duties. *See Watson, [supra]* ¶ 19.

¶23 Officer Satterfield stated that GS-083 Police Officers frequently came in contact with criminals as a result of their interaction with a growing number of contract employees at the Shipyard. HT 6, Side A. In Satterfield's view, "most of these people are low income and are criminals." *Id.* There is no evidence to support Satterfield's conjecture that "most" contract employees are criminals. Thus, his testimony on this point is entitled to no weight.

¶24 In *Sandifer v. Department of the Navy*, MSPB Docket No. DC-0831-99-0515-I-3 (Sept. 14, 2001), the Board sustained the agency's denial of LEO service credit to the appellant, who also occupied a GS-083 Police Officer position at the Norfolk Naval Shipyard. In that case, the Board found that the appellant did not show he was entitled to LEO credit because, in part, he stated that he spent about 80 percent of his time "doing police work," which is not LEO work. *Id.* ¶ 12. Although Commander Doran and Officers Turner and Satterfield did not say that the appellants mostly did "police work," their testimony, when considered in context and in its entirety, shows that is exactly what they meant. Thus, consistent with *Sandifer*, the appellants here are not entitled to LEO service credit.

¶25 Officer Satterfield stated that Police Officers are "first responders" to crime scenes. *Id.* First responder duties are not LEO duties. *Watson*, 262 F.3d at 1304. In addition, Officer Satterfield confirmed Commander Doran's testimony that follow-up investigations and the investigation and apprehension of criminal suspects is done in most cases by NCIS personnel, not GS-083 Police Officers. HT 6, Side A.

¶26 In an attempt to prove their entitlement to LEO service credit, the appellants related discrete incidents in which they had been involved. Officer Satterfield said that since he was hired as a GS-083 Police Officer in 1988, he drew his gun once when he

confronted "kids at a bus stop" who were making noise, playing loud music, drinking and cursing. *Id.* He recounted an incident where he subdued someone who did not show his credentials, described a case involving an alleged abduction of a child which he "turned over to Social Services" for investigation, and mentioned an undercover drug operation in which he took part. HT 6, Sides A and B. Officer Bob G. Roberts recounted an incident where he restrained an agitated motorist and a time when he was asked to help make multiple arrests when Naval detectives concluded an undercover drug operation. HT 2, Side B. Officer Street, who had been a GS-083 Police Officer since 1988, told of an incident where he was prepared to draw his gun when a person ran toward him with shears. HT 7, Side A. He said that he almost drew his weapon on another occasion when a person took a shotgun out of the trunk of a parked car. *Id.* Assuming these events describe LEO duties, OPM's regulations provide that duties which are of an emergency, incidental or temporary nature cannot be considered "primary." 5 C.F.R. § 842.802.

¶27 Officer Roberts stated that in cases involving forgeries he took the initial report, but "for the most part" he did not conduct follow-up investigations because they "required computer time and staff not available to [him]." HT 3, Side B. Instead, he turned those cases over to NCIS. *Id.* Roberts testified that he issued about 300 traffic tickets per year, including violations involving reckless driving, speeding and improper headlights. *Id.* He described times when he broke up "scuffles" between "unruly" sailors and patrolled parking lots. *Id.*

¶28 Officer Wilson said that he sometimes works at a stationary guard "post" and other times is on mobile patrol. HT 4, Side A. He averred that he will search a building if he notices that a door is open. *Id.* Wilson stated that he writes about 200 to 240 traffic tickets per year, and that he considered the traffic violators to be criminals. *Id.* He estimated that he has issued, on average, about 20 to 30 speeding tickets per day when he uses radar equipment. *Id.* According to Officer Wilson, he does "quite a few" preliminary

investigations of car thefts, but forwards the initial reports to NCIS personnel. *Id.* He also stated that he responded to "quite a few" complaints of petty larceny at a convenience store where sailors were robbed while using a pay phone. *Id.*

¶29 Officer Satterfield said that he took numerous reports of vehicles being stolen from parking lots, and that he responded to a number of incidents of sailors being robbed while using pay phones outside go-go bars near the Shipyard. HT 6, Side B. Satterfield said that he "quite often" pulled over drunk drivers and handled "a lot of [complaints of] shoplifting." *Id.* The types of activity which these officers commonly encounter, e.g., drunk driving, traffic violations, car thefts and petty larcenies, do not involve primary LEO duties. *See Watson*, 262 F.3d at 1304.

¶30 The appellants presented no evidence showing that their positions had a maximum entry age requirement. On the contrary, appellant Roberts stated that he was a police officer for 26 years for the City of Norfolk before joining the Shipyard force. HT 2, Side B. He stated that, at the time he was hired, the Police Chief at the Shipyard preferred to hire retired police officers. *Id.* Appellant Wilson said that before he applied for a job as a GS-083 Police Officer at the Shipyard, he spent 23 years working at the Newport News, Virginia, Police Department and other city police departments in North Carolina and Virginia. HT 4, Side A. Appellant Satterfield testified that he spent 22 years in the Marine Corps and 2 years in the military police before accepting a position as a GS-083 Police Officer at the Shipyard. HT 6, Side A.

¶31 This evidence shows that no maximum age was required for entry into the GS-083 Police Officer positions held by the appellants. On the contrary, the evidence shows that the majority of the appellants were well beyond the maximum age for entry in a LEO position when they were hired as GS-083 Police Officers. This evidence is highly probative of the fact that the positions occupied by the appellants were not sufficiently rigorous so as to limit employment opportunities to young and physically vigorous

individuals. *Watson*, 262 F.3d at 1302. The dissent therefore is incorrect in stating that we have not identified a sufficient basis on which to make such a finding.

¶32 The one conclusory and unexplained sentence in the position description on which the dissent relies does not outweigh the considerable evidence of record showing that the positions held by the appellants do not exist primarily to investigate, arrest, apprehend or detain individuals suspected or convicted of offenses against the criminal laws of the United States. Thus, we are not persuaded by that sentence.

¶33 The dissent alleges that we have not acknowledged the administrative judge's decision to sanction the agency for denying discovery materials to the appellants. The administrative judge sanctioned the agency by drawing an adverse inference that the requested materials would support the appellants' testimony. *Id.* at 23. Assuming the documents would support the appellants' testimony, the result would be unaltered since the testimony shows that the primary duties of their positions were not LEO duties.

¶34 The evidence establishes that, under prong (i), the GS-083 Police Officer positions held by the appellants at the Norfolk Naval Shipyard are not LEO positions because the duties of the positions that are paramount in influence or weight are not LEO duties. Rather, the positions exist primarily to maintain law and order, inspect for violations of law, and protect life and property. The appellants therefore are not entitled to LEO service credit for work performed in those positions, irrespective of the fact that some of the duties they may have carried out some of the time may have been LEO-related. Because the appellants did not show that their positions met the first prong of the 3-prong test for entitlement to LEO service credit, we need not go on to examine the evidence which is material to prongs 2 and 3, that is, the evidence related to the *Bingaman* factors. *See Watson*, 262 F.3d at 1299. Accordingly, we sustain the agency's denial of the appellants' requests for LEO service credit.

Order

¶35 This is the final decision of the Merit Systems Protection Board in these appeals. Title 5 of the Code of Federal Regulations, section 1201.113(c) (5 C.F.R. § 1201.113(c)).

Notice to the Appellants Regarding Your Further Review Rights

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

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

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

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

* The 3 prongs (or criteria) are identical in 5 C.F.R. §§ 831.902 and 842.802, except that section 831.902 designates the prongs as (i),(ii) and (iii), while section 842.802 uses the letters (a),(b) and (c) to distinguish them. Because the Court chose to use the designations (i),(ii) and (iii) when discussing both regulations, we shall do the same for purposes of our

discussion.

Dissenting opinion

¶1 In *Alford v. Department of the Navy*,⁹⁹ FMSR 5147, the Board determined that 22 GS-0083 series police officers assigned to the Norfolk Naval Shipyard (NNSY) were entitled to law enforcement officer (LEO) retirement credit upon finding that the primary duties of their positions were the investigation, apprehension, or detention of individuals suspected or convicted of offenses against the criminal laws of the United States. Under the Federal Employees Retirement System (FERS), the term "law enforcement officer" means "an employee, the duties of whose position---(i) are primarily---(1) 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." *See* 5 U.S.C. § 8401(17)(A). Although the appellants in this case are also GS-0083 series police officers assigned to the NNSY,¹ the majority concludes that these appellants are not entitled to LEO retirement credit because they did not establish that LEO duties occupied a substantial portion of their working time over a typical work cycle. *See* 5 C.F.R. § 842.802 ("Primary duties means those duties of a position 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 time over a typical work cycle; and (c) Are assigned on a regular and recurring basis."). Because I disagree with this conclusion, I respectfully dissent from the majority opinion.

¶2 As the majority opinion recognizes, the Board announced, in an opinion issued subsequent to the publication of *Alford*, that it was changing its "incumbent-oriented" approach to LEO retirement claims to adopt a "position-oriented" approach that more affirmatively takes into account the basic reasons for the existence of the position. *Watson v. Department of the Navy*,¹⁰⁰ FMSR 5373, *aff'd*, No.

00-3387 (Fed. Cir. Aug. 17, 2001). In affirming the Board's decision in *Watson*, the Federal Circuit indicated its approval of the Board's new approach, noting that "[t]he express language of the regulations promulgated under the CSRS and FERS statutes provides support for considering the reason for the position's 'existence' as part of the LEO-eligibility analysis." *Watson v. Department of the Navy*, No. 00-3387, 2001 WL 931111, (Fed. Cir., Aug. 17, 2001). The court also reviewed the Office of Personnel Management Classification Guide for the GS-0083 series and concluded that "the official documentation of the GS-083 series indicates that all officers in that series in all departments of the federal government are presumptively not entitled to LEO credit." *Watson*, 2001 WL 931111.

¶3 In addition to the change in the Board's basic approach to LEO claims since *Alford*, the majority relies on the fact that Commander Ronald Doran, the Portsmouth Precinct Commander for the NNSY, testified that, on average, 30 to 40 percent of the work of a NNSY police officer was the investigation, arrest, apprehension or detention of criminals and/or suspected criminals. Doran also testified at the hearing in the *Alford* appeal, and, in the *Alford* opinion, the Board noted that although Doran testified that NNSY police officers did not perform LEO duties every day, he did not dispute the fact that these officers spent an average of at least 50 percent of their time performing LEO duties. *Alford*,⁹⁹ FMSR 5147. In this case, the majority finds Doran's testimony concerning the percentage of time NNSY police officers spend performing LEO duties more credible than the testimony offered by the officers themselves, and it concludes that the percentage estimated by Doran does not constitute a substantial portion of the police officers' working time over a typical work cycle. Majority opinion, 10.

¶4 I find, however, that neither the Board's adoption of its "position-oriented" approach in *Watson* nor the testimony of Commander Doran justify treating these appellants differently than the appellants in *Alford*. First, although the appellants'

position description (PD) described a myriad of duties and responsibilities, including such non-LEO duties as directing traffic and reporting unsafe conditions existing in street or other public facilities, several of the described duties, including making arrests, performing assignments as a detective, and assisting with criminal investigations, were clearly LEO duties. Street Initial Appeal File (IAF), Tab 10, Subtab 2d; see *Alford*, *supra* (investigation of crimes has always been identified in the appellants' PDs as a primary duty). In addition, although the PD described the mission of the branch to which the appellants were assigned as the "protection of personnel, maintaining of law and order, safeguarding national defense property[] and material against hazards of fire, theft, damage, hostage situations, terrorist threats, sabotage/espionage, unauthorized access, and enforcement of federal, state, local and NNSY regulations, laws and directives," the PD described the "purpose of the work" as "the investigation, apprehension, or detention of individuals suspected or convicted of offenses against the criminal laws of the United States." Street IAF, Tab 10, Subtab 2d; see Webster's New Collegiate Dictionary (1977) ("purpose" is defined as "something set up as an object or end to be attained"). Thus, the PD clearly identified the "purpose" of the position as the performance of LEO duties. Therefore, although the PD described a variety of both LEO and non-LEO duties required by the position, the PD provides support for the proposition that the LEO duties are the duties of the position that "[a]re paramount in influence or weight; that is, constitute the basic reasons for the existence of the position." See 5 C.F.R. § 842.802. Moreover, if I were convinced that the appellants had not established that their LEO duties constituted the basic reasons for the existence of the position, I would prefer to vacate the initial decision and remand the appeal to the regional office for further proceedings. The Board did not issue its *Watson* decision until after the record on review in this case closed. If the appellants had not established that their LEO duties were paramount, I would

consider it fundamentally unfair to deny the appellants a significant retirement benefit on the basis of *Watson* without affording the appellants the opportunity to offer additional evidence and argument on the issue, especially in light of the fact that the Board's pre-*Watson* decision in *Alford* found similarly-situated police officers entitled to LEO retirement credit.

¶5 The initial decision also demonstrated that, in addition to the PD, the administrative judge properly considered evidence regarding the day-to-day duties performed by the appellants to arrive at his decision. *See Watson*, 2001 WL 931111, (the Board will consider evidence of what duties the appellants performed from day-to-day, along with all of the other evidence of record, to ascertain whether the appellants are entitled to LEO retirement coverage). Several of the appellants who testified at the hearing described their day-to-day duties and identified the investigation, apprehension, and detention of criminals and/or suspected criminals as the primary duties of the position. Hearing Tape (HT) 2 (testimony of Officer Roberts, estimating that 75 to 80 percent of his time is spent on these activities); HT 6 (testimony of Officer Satterfield, estimating that these activities account for 60 to 80 percent of his day as an acting field sergeant); HT 7 (testimony of Officer Street, noting that these activities account for 60 to 70 percent of his work hours). Police Officer Eugene Turner also testified on behalf of the appellants. Although he did not specifically identify the primary duties of the position, he testified that investigation, apprehension, and detention activities accounted for 75 to 80 percent of an officer's time. HT 6; *see* 5 C.F.R. § 842.802 ("In general, if an employee spends an average of at least 50 percent of his or her time performing a duty or group of duties, they are his or her primary duties."). The administrative judge found that the appellants' evidence established that their primary duties were the investigation, arrest, apprehension, or detention of criminals and/or suspected criminals, noting that the agency did not offer direct rebuttal evidence to

counter the sworn testimony of the appellants and their witnesses. Initial Decision (ID) at 25.

¶6 In overturning the administrative judge's determination, the majority opinion relies heavily on Doran's estimate that only 30 to 40 percent of the work of a shipyard police officer was the investigation, arrest, apprehension, or detention of criminals and/or suspected criminals. Majority opinion, 10. However, the majority opinion fails to cite any record evidence to support the proposition that Doran's position placed him in a better position than the officers who actually performed the work to quantify the nature and scope of the work performed by the police officers assigned to the NNSY. *See Chauvin v. Department of the Navy*, 38 F.3d 563, 566 (Fed. Cir. 1994) (when the Board reverses an administrative judge's factual finding based, expressly or implicitly, on the demeanor of a witness, the Court will not sustain the decision on appeal unless the Board has articulated sound reasons, based on the record, for its contrary evaluation of the testimonial evidence). Furthermore, to the extent that the majority relies on the fact that there is no documentary evidence that would indicate that Doran substantially understated the percentage of working hours that the appellants devoted to the performance of LEO duties, the majority fails to acknowledge that the administrative judge determined that the agency denied pertinent discovery materials to the appellants. ID at 23. Accordingly, the administrative judge sanctioned the agency by drawing an adverse inference that the requested materials, such as overtime records, Incident/Complaint Reports, summonses, evidence records, and injury reports, would support the appellants' testimony. ID at 23. In light of this sanction, I would not find that the lack of documentary evidence, which might better establish the percentage of time the appellants performed LEO duties over the course of a typical work cycle, necessarily makes Doran's estimate more believable than the appellants' estimates. Finally, to the extent that the majority concludes that Doran's testimony is more believable than the appellants' testimony

because Doran is presumably unbiased and does not have a personal interest in the outcome of this appeal, I note that the Board has stated on several occasions that the self-serving nature of a witness's testimony does not, by itself, provide sufficient grounds for disbelieving the testimony. *See Bennett v. Department of the Air Force*, 100 FMSR 5022; *Nicoletti v. Department of Justice*, 94 FMSR 5012 (an appellant's testimony should not be discredited as self-serving because most testimony that he is likely to give, other than admissions, can be characterized as self-serving).

¶7 In addition, even if I were to accept the majority's premise that the preponderance of the evidence established that the appellants performed LEO duties for only 30 to 40 percent of their working hours, I do not agree that this premise leads to the conclusion that these duties did not occupy a substantial portion of their working time over a typical work cycle. Although the OPM regulations do not define the term "substantial," its common meaning is synonymous with terms such as significant or material. *Roget's II: The New Thesaurus* (3d ed. 1995); *see Perrin v. United States*, 444 U.S. 37, 42 (1979) ("unless otherwise defined, words will be interpreted as taking ordinary, contemporary, common meaning"). Furthermore, the OPM regulations defining "primary duties," do not require an employee to perform a set of duties more than 50 percent of the time in order for those duties to constitute the primary duties of the position. *See Koenig v. Department of the Navy*, MSPB Docket No. DC-0831-99-0626-1-1, slip op. at *, (Sep. *, 2001) (Chairman Slavet, dissenting). In fact, in *Watson* the Federal Circuit acknowledged that a "substantial portion" under the OPM regulations need not amount to 50 percent or more. *Watson*, 2001 WL 931111, ("The approach used by the Board here affirmatively involves consideration of prong (i) of sections 831.902 and 842.802 so as to ensure that in addition to consisting of duties that occupy a substantial portion, if not 50 percent or more, of the officers' working time and that occurred on a regular and recurring basis, the position exists currently as an

LEO position.") (emphasis added). Given the language used in the OPM regulations defining "primary duties," I am unwilling to conclude that 30 to 40 percent cannot be considered a substantial portion of the whole.

¶8 Despite Doran's estimate and the Board's adoption of the "position-oriented" approach in *Watson*, I believe the evidence of record supports the administrative judge's conclusion that the appellants' established that LEO duties were the primary duties of their positions. In addition, the administrative judge found that positions the appellants' occupied were sufficiently rigorous that employment opportunities should be limited to young and physically vigorous individuals. ID at 30-31. Neither the majority nor the agency in its petition for review has identified a sufficient basis to question this finding. Because the agency has not established a basis to overturn either of the administrative judge's findings regarding the two criteria necessary to establish entitlement to LEO retirement credit under FERS, I would deny the agency's petition for review by short-form order. *See Alford, supra* (Vice Chair Slavet, concurring). Accordingly, I respectfully dissent from the majority opinion.