

100 FMSR 5373

James A. Watson, et al. v. Department of the Navy

U.S. Merit Systems Protection Board

DC-0842-99-0483-I-1(07/17/00); 86 MSPR 318

July 17, 2000

Judge / Administrative Officer

Before: Slavet, Acting Chairman; Marshall, Member

Affirmed without opinion (Fed. Cir. 08/17/01)

Related Index Numbers

91.009 Retirement, Service Credit

91.021 Retirement, Effect of Government Regulations

1002.045 Appellate Jurisdiction of Merit Systems Protection Board, Retirement Benefits

1022.047 Special Employment Categories, Law Enforcement Officers

1027.012 Timeliness, Delay in Filing

Case Summary

THE APPELLANTS WERE NOT ENTITLED TO LEO SERVICE CREDIT BECAUSE THE POSITION THEY OCCUPIED WAS NOT CREATED PRIMARILY TO PERFORM LEO DUTIES AS DEFINED BY STATUTE. IF THE POSITION WAS NOT CREATED FOR THE PURPOSE OF INVESTIGATION, APPREHENSION, OR DETENTION OF KNOWN CRIMINALS OR SUSPECTS, THEN THE INCUMBENTS OF THE POSITION WILL NOT BE ENTITLED TO LEO CREDIT.

The appellants were not entitled to LEO service credit because the GS-05-083 Police Officer position they occupied at the NNB was not created primarily to perform LEO duties as defined by statute. The appellants occupy or had occupied the position of GS-083 Police Officer, grade level GS-05, at the Norfolk, Virginia Naval Base. The appellants requested LEO retirement credit for some or all of the

time spent in the position. After the agency denied the requests, the appellants appealed. The Board observed that the approach set forth in *Bremby v. Navy* [99 FMSR 5131] for determining LEO entitlement placed too much emphasis on the day-to-day duties of a particular incumbent over a limited period of time. The Board said it now adopts an approach that more affirmatively takes into account the basic reasons for the existence of the position (the "position-oriented" approach). Under this approach, if the position was not created for the purpose of investigation, apprehension, or detention, then the incumbents of the position would not be entitled to LEO credit. This is not to say that the Board will not consider evidence of what duties the appellants performed from day to day in the GS-083 Police Officer position. Rather, the Board said, it will consider that evidence, along with all of the other evidence of record, to ascertain whether the appellant is entitled to LEO retirement coverage. In this case, the Board concluded, the appellants were not entitled to LEO service credit for any period of time they occupied the GS-083 Police Officer position at the NNB. OPM's classification standards and guidance showed that the GS-083 Police Officer position was not one whose duties are primarily the investigation, apprehension, or detention of criminals or suspected criminals, and the position description was in accord.

Full Text

APPEARANCES:

Neil C. Bonney, Esquire, Neil C. Bonney & Associates, Virginia Beach, Virginia, for the appellants.

Cynthia W. Clark, Washington, D.C., for the agency.

Opinion and Order

¶1 These cases are before the Board on the agency's petitions for review of the September 3, 1999 initial decision in the *Watson* consolidation of appeals and the September 17, 1999 initial decision in the *Jefferson* consolidation of appeals. The initial decisions in both consolidations awarded law

enforcement officer (LEO) service credit to the appellants. The Board GRANTS the motion of the appellants in the *Watson* and the *Jefferson* consolidations to consolidate those groups of cases on petition for review, finding that this would expedite the processing of the appeals and would not adversely affect the interests of the parties. 1 5 C.F.R. § 1201.36. For the reasons stated below, the Board GRANTS the petitions for review, REVERSES the initial decisions, and SUSTAINS the agency's determination that the appellants are not entitled to LEO service credit.

Background

¶2 The appellants occupy or had occupied the position of GS-083 Police Officer, grade level GS-05, at the Norfolk, Virginia, Naval Base (NNB or Base). The appellants in the *Watson* consolidation are covered under the Federal Employees' Retirement System (FERS), while the appellants in the *Jefferson* consolidation are covered under the Civil Service Retirement System (CSRS). Jefferson Initial Appeal File (IAF), Tabs 10 and 27. The appellants requested LEO retirement credit for some or all of the time spent in the position. After the agency denied the requests, the appellants filed the instant appeals.

¶3 The administrative judge held a single hearing for both groups of appellants and based his initial decisions on a common evidentiary record. He found that the appellants are entitled to LEO status. On petition for review, the agency argues that the primary duties of the position are not ones entitling the incumbents to special LEO retirement credit.

Analysis

¶4 In finding that the appellants are entitled to LEO service credit, the administrative judge followed the approach set forth in *Bremby v. Department of the Navy*, [99 FMSR 5131]. *Watson* Initial Decision (ID) at 30-35. Under that approach, even if the incumbent of a Police Officer position spends the majority of his time patrolling and the evidence shows that his primary duties involve maintaining law and order and protecting life and property, he still is entitled to special LEO retirement credit if he can show that his

primary duties "involve the investigation, apprehension and/or detention of criminals and/or suspected criminals." *Bremby*, [supra] That statement suggests that even if the primary duties of the GS-083 Police Officer position consist of non-LEO duties, namely, maintaining law and order and protecting life and property, the incumbents of the position are nonetheless entitled to LEO credit if their primary duties "involve," to some unspecified degree, LEO duties. Moreover, the *Bremby* approach requires the fact-finder to focus on the incidents and events encountered by the incumbent of the position for certain periods of time to see if he, as an individual, is entitled to LEO service credit, either for that period of time or for his entire period of service in the position (the "incumbent-oriented" approach). *Id.*

¶5 As discussed in Member Marshall's dissent in *Hamilton v. Department of Defense*, [100 FMSR 5210] (*Hamilton* Dissent), a case which also involved GS-05-083 Police Officers at the NNB, the approach set forth in *Bremby* for determining LEO entitlement placed too much emphasis on the day-to-day duties of a particular incumbent over a limited period of time. *Hamilton* Dissent, ¶¶ 9-11. For the reasons stated below, the Board now adopts an approach that more affirmatively takes into account the basic reasons for the existence of the position (the "position-oriented" approach). *Id.* Under this approach, if the position was not created for the purpose of investigation, apprehension, or detention, then the incumbents of the position would not be entitled to LEO credit. This is not to say that the Board will not consider evidence of what duties the appellants performed from day-to-day in the GS-083 Police Officer position. Rather, the Board will consider that evidence, along with all of the other evidence of record, to ascertain whether the appellant is entitled to LEO retirement coverage. *Accord Ferrier v. Office of Personnel Management*, [94 FMSR 5001] (in determining whether a position is an LEO position, the Board must examine all relevant evidence, including the position description), *reconsideration denied*, [95 FMSR 5025].

¶6 The proper approach to adjudicating claims

for LEO service credit may not have been obvious in earlier cases, such as *Bremby*, in part because the evidentiary records in those cases may not have been fully developed. Indeed, the agency here argued that the Board's decision in *Bremby* was "grossly inaccurate" in describing the conditions at the NNB and the primary duties of the GS-083 Police Officer position. Hearing Transcript (Tr.) at 258. However, the voluminous evidence presented in these appeals covers the creation of the Police Officer position and its classification in the GS-093 series, the way security is handled at the NNB, the division of the Base into patrol areas, and the types of positions created by the Navy to deal with criminal, investigative, security, and police matters. Thus, we find it appropriate in these cases to adopt a more position-oriented approach to the adjudication of claims for LEO retirement credit.

The Statute and the Regulation

¶7 "It is axiomatic that statutory interpretation begins with the language of the statute." *VE Holding Corp. v. Johnson Gas Appliance Co.*, 917 F.2d 1574, 1579 (Fed. Cir. 1990) citing *Mallard v. U.S. District Court for the Southern District of Iowa*, 490 U.S. 296, 109 S. Ct. 1814, 1818 (1989). "If . . . the language of the statute is clear and fits the case, the plain meaning of the statute will be regarded as conclusive." *Id.* (citations omitted).

¶8 In relevant part, the FERS statute at 5 U.S.C. § 8401(17)(A) defines a "law enforcement officer" for retirement purposes as---

(A) an employee, the duties of whose position---

(i) are primarily---

(I) the investigation, apprehension or detention, of individuals suspected or convicted of offenses the criminal laws of the United States. . .

The CSRS statute at 5 U.S.C. § 8331(20) contains identical language.²

¶9 Both the FERS and the CSRS statutes give OPM the authority to "prescribe regulations to carry out the provisions of [the statute] administered by [OPM]." 5 U.S.C. §§ 8347(a) and 8461(b). OPM's

interpretation of statutes which Congress charges it to administer, such as the retirement statute here, is normally entitled to great deference. *Newman v. Love*, 962 F.2d 1008, 1012 (Fed. Cir. 1992).

¶10 OPM's FERS regulation at 5 C.F.R. § 842.802 defines "primary duties" for purposes of LEO retirement credit as---

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.

¶11 Under the regulations, "duties that are of an emergency, incidental, or temporary nature cannot be considered 'primary' even if they meet the substantial portion of time criterion." 5 C.F.R. § 842.802. Further, the regulations state that the definition of law enforcement officer "does not include an employee whose primary duties involve 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.* OPM's CSRS regulations contain the same requirements. 5 C.F.R. § 831.902.

¶12 It is clear from the language of the statute that it is the "duties of [the] position" that must be examined to determine whether an employee meets the definition of a "law enforcement officer." Thus, under the statute, an employee may receive LEO credit only if the position he occupies is a LEO position, that is, a position whose primary duties are the "investigation, apprehension, or detention of individuals suspected or convicted of offenses against the criminal laws of the United States." OPM's regulations thus comply with the legislative mandate for a position-oriented approach in cases of requests for LEO credit by requiring that the "basic reasons" for the existence of *the position* must be the

performance of LEO duties. In these appeals, the parties submitted extensive argument and evidence regarding certain on-the-job situations encountered by the appellants during discrete time periods, and the administrative judge spent a great deal of effort reviewing that evidence. However, because the administrative judge followed *Bremby*, he did not look to see why the agency created the GS-083 Police Officer position, but instead examined whether the appellants' experiences showed that their duties "involved" some LEO work. This approach gave no weight to subsection (a) of the regulation quoted above. See 5 C.F.R. § 842.802 (defining "primary duties" for purposes of 5 U.S.C. § 8401(17)).³

The Classification Standards

¶13 The agency stated, and the appellants have never disputed, that the Police Officer position at issue was classified in the GS-083 occupational series using standards promulgated by OPM. Watson IAF, Tab 4, Subtab 1. The agency, again without dispute, quoted the OPM standard for the GS-083 series as follows:

The *primary mission* of police officers in the Federal service is to *maintain law and order*. In carrying out this mission, police officers *protect life and property*, and the civil rights of individuals. They prevent, detect, and investigate violations of laws, rules, and regulations involving accidents, crimes, and misconduct involving misdemeanors and felonies. They arrest violators, assist in the prosecution of criminals, and serve as a source of assistance to persons in emergency situations.

Most police officers are engaged in patrol duties and/or traffic control. In performing patrol duties, they serve as a deterrent to crime and other violations of laws, rules, and regulations. Crime prevention is enhanced by the presence of uniformed officers in an area and by his [sic] being continually alert in observing, inspecting, and investigating circumstances or individuals which appear unusual and suspicious. Police officers regulate pedestrian and vehicular traffic; prevent accidents, congestion, and parking problems; give warnings; issue citations for

traffic violations; and make arrests if necessary. They conduct preliminary investigations of crimes, investigate accidents, dispose of complaints, recover stolen property, counsel adults and juveniles, and assist persons needing help. Typically, investigations that remain incomplete at the end of an assigned shift are turned over for completion by detectives or criminal investigators..

Id. (emphasis added), citing OPM Classification Standards for the GS-083 Occupation Series, Occupational Information at 2-4.

¶14 A December 1997 "Grade Evaluation Guide for Police and Security Guard Positions GS-0083/GS-0085" (the Guide) published by OPM states that the "*primary mission and purpose*" of the Police Officer series, GS-083, is "to enforce law, maintain law and order, preserve the peace, and protect the life and civil rights of persons." Greenfield IAF, Tab 29, Guide at 2 (emphasis added).⁴ The Guide reiterates at least once that "[t]he *primary mission* of police officers in the Federal service is to *maintain law and order*." *Id.*, Guide at 3 (emphasis added). It also says that "[i]n some instances, the distinction between police and guard work may not be an easy one to make, because of the similarities between the two kinds of work." *Id.*, Guide at 2. OPM's Guide explains to classifiers that positions in the GS-083 Police Officer series are distinguished from positions in the GS-1811 Criminal Investigator series in that the latter series consists of "[p]ositions primarily responsible for investigating alleged or suspected major offenses or violations of specialized laws of the United States." *Id.*, Guide at 1. This clarification sets forth OPM's view that, unlike positions in the GS-1811 series, the primary duties of positions in the GS-083 Police Officer series are not the investigation or apprehension of persons suspected or convicted of offenses against the criminal laws of the United States.

¶15 The classification standards and OPM's Guide for evaluating a GS-083 Police Officer position show that the basic reason for the existence of this position is to maintain order, protect life and property,

and guard against or inspect for violations of law. OPM's classification materials thus support a finding that the GS-083 Police Officer position does not meet either the statutory or regulatory definition of a "law enforcement officer." The agency's denial of LEO status to the appellants is therefore consistent with OPM's classification guidance. It is also consistent with *Fitzgerald v. Department of Defense*, [98 FMSR 5316], *aff'd*, No. 99-3001 (Fed. Cir. Dec. 13, 1999) (Table), a case in which the Board sustained the agency's decision to deny LEO credit to Police Officers in the Department of the Navy who also were in the GS-083 classification series.

The Position Descriptions

¶16 Position description (PD) No. 6374A covers the GS-083 Police Officer position, grade level 5, and is the one under which the appellants in the *Watson* and *Jefferson* consolidations worked. *Watson* IAF, Tabs 9 and 26; *Jefferson* IAF, Tab 6, Subtab 2b. The Introduction to PD No. 6374A states that the position is in the Community Policing Division, Security Department, at the NNB, and that the Division "provides community policing, law enforcement, and security for the investigation of crimes, protection of life and property." It also states that this mission "includes arrest, apprehension, and detainment of those person(s) suspected of violations of United States Code, and applicable state statutes." *Id.* (emphasis added). The section of the PD entitled "Major Duties and Responsibilities" begins by saying that "[t]he incumbent serves as a Police Officer assigned to a community policing area." It then states that the "position requires the incumbent to perform police duties that *involve* the investigation, arrest, apprehension or detention of criminals and/or suspected criminals." *Id.* (emphasis added). That section of the PD goes on to say that the incumbent "provides police escorts and directs traffic," "reports unsafe conditions existing in street or other public facilities," responds to emergency situations, and "conducts preliminary investigations."

¶17 The PD shows that while incumbents in the GS-083 Police Officer position were expected to

investigate, apprehend, or detain criminals or suspected criminals as the need arose, the position was created for the primary purpose of maintaining law and order and protecting persons and property by means of community policing and traffic control. The PD is therefore consistent with OPM's classification guidance.

The Duties of GS-083 Police Officers at the NNB

¶18 The witnesses, including the appellants who testified, described the duties of a GS-083 Police Officer at the NNB. Commander Hemmingsen said that GS-083 Police Officers can investigate misdemeanors committed in their presence, traffic violations, and violations of Navy rules or regulations. Tr. at 1505. Other criminal or suspected criminal activity is investigated by NCIS. *Id.*

¶19 Appellant *Watson* stated that he patrols for an 8-hour shift, either in a car or on foot, "looking for criminal activity" and traffic violations. *Id.* at 690. Appellant *Acres* said that when he is patrolling, he is looking for "[a]nything that happens," but he declined to say whether he was looking for any particular criminal or suspected criminal. *Id.* at 798. Commander Hemmingsen averred, without rebuttal, that the majority of patrols are generalized, that is, done for the purpose of being visible and responding to crimes in progress, and that they are not specialized patrols done with the intent of focusing on a particular problem, criminal, or suspect. *Id.* at 1481.

¶20 Appellant *Pennington* said that GS-083 Police Officers act as "first responders" to crime scenes, that is, they render first-aid or assistance to anyone who is injured, check to see if any suspects are still in the immediate area, secure the scene, and gather preliminary information. *Id.* at 131. Commander Hemmingsen stated that the officers patrol up to the perimeter of the Base. *Id.* at 1235-36. In addition to patrolling and responding to emergencies or reports of criminal activity, the appellants also guard the gates through which traffic enters the Base.

¶21 Appellant *Pennington* acknowledged that he

stood guard duty at the gates 24 hours (3 working days) per week. *Id.* 271. Appellant Streat stated that he stands gate duty 2 to 3 times per week. *Id.* at 650. In his view, gate duty is LEO work because each individual who comes through the gate is a potential suspect. *Id.* at 656-57, Commander Hemmingsen declared that, at the time of the hearing, four GS-083 Police Officers were assigned to gate duty as their sole duty. *Id.* at 1727-28. Hemmingsen said that the Police Officers check decals on vehicles entering the NNB and ask visitors for identification in order to protect the property and persons on the NNB. *Id.* at 1463. GS-083, Police Officers also check locks and doors on "hot buildings," that is, buildings which hold money or classified materials and which are unoccupied at night. *Id.* at 1722.

¶22 In an attempt to prove their entitlement to LEO coverage, the appellants who testified offered examples of incidents in which they were involved. Appellant Pennington testified that he once was shot at by an individual who had been drinking and was under the influence of marijuana as he (Pennington) drove by in a marked patrol car. *Id.* at 127. He described talking a sailor out of committing suicide, assisting persons from a vehicle that had caught fire, tackling a person who had pulled a gun on him, and writing 600 traffic tickets in 1997. *Id.* at 146-47, 154, and 171. Appellant Watson stated that he used his gun when he saw an individual brandishing a weapon in front of a restaurant close to one of the Base gates. *Id.* at 682. He also discussed finding a gun in a vehicle that he had stopped and detaining a juvenile who had violated curfew. *Id.* at 684-88. To show that the appellants were not primarily engaged in LEO duties, the agency presented statistics based on Incident Complaint Reports (ICRs).

¶23 ICRs are forms that officers complete on "non-routine" incidents. *Id.* at 1367. They include data such as the date, time, and type of incident, as well as witness statements, advisement-of-rights forms, and information on whether drugs or alcohol were involved. *Id.* at 1367. In preparing for these appeals, Commander Hemmingsen located the ICRs

still in existence for the relevant time periods, tried to "get a feel" for how much time was spent on each incident, looked at computer-aided dispatch records to help him determine how much time an officer spent on an incident, and estimated how much time each task involved in an incident may have taken, e.g., 15 minutes for serving a summons or issuing a speeding ticket. *Id.* at 1381-1422 and 1587-88. He explained that such estimates were necessary because ICRs do not show the time actually spent on an activity or incident. *Id.* at 1586.

¶24 Commander Hemmingsen also looked for information on the ICRs that might indicate if another officer assisted and, if so, how much time that officer spent on the matter. *Id.* at 1369. However, if the person writing the ICR did not include the name of any assisting officer, then the assisting officer was not credited with "LEO work." *Id.* at 1369-70.

¶25 Commander Hemmingsen stated that older ICRs, particularly those filed more than 2 years before the hearing, were not available because they had been destroyed under recordkeeping disposal schedules or because the statute of limitations for the alleged crime had expired. *Id.* at 1432-33. He averred that if an officer did not record a task on an ICR, the officer was not given credit for performing that task. *Id.* at 1679.

¶26 Commander Hemmingsen excluded from his calculations periods of time when some of the appellants were not performing their regular duties at the NNB, for instance, time when appellant Rowland was on light-duty assignment and when appellant Carney was detailed to Oceana. *Id.* at 1436-37. He also declared that some of the ICRs contained, in his opinion, tasks that were outside of the scope of employment, for example, taking photographs of a crime scene with a private camera, searching for a missing child at an off-site supermarket, questioning civilian desk clerks off Base, and breaking up a fight at a bar that was not on the Base. *Id.* at 1443-52. He therefore did not consider those activities to be "LEO work." *Id.*

Discussion of the Evidence and Findings

¶27 OPM's classification standards and guidance show that the GS-083 Police Officer position is not one whose duties are primarily the investigation, apprehension, or detention of criminals or suspected criminals. The PD for the GS-083 Police Officer position, which follows OPM's classification standards and guidance, is in accord. Weighed together with the evidence showing that the GS-083 Police Officer position at the NNB was not created as an LEO position is testimony that persons encumbering that position at the NNB were on the lookout for potential violations of law, conducted generalized patrols, guarded the gates, checked buildings at night to ensure that they were secure, enforced traffic laws, and acted as "first responders" to emergencies or potential crimes. None of these duties individually or collectively show that the GS-083 Police Officer position was created for the basic reason of investigating, apprehending, or detaining known criminals or suspects. While an incumbent's actual duties are relevant under subsections (b) & (c) of OPM's regulation defining "primary duties" for purposes of 5 U.S.C. § 8401(17), *see* 5 C.F.R. § 842.802, the evidence of the actual duties performed in these cases does not persuade us that---contrary to the official documentation of the position---"the basic reasons for the existence of the position" was actually investigation, apprehension, or detention.

¶28 The agency representative said that "no one is arguing that the GS-083 police officers are not real police officers." *Id.* at 1610. Rather, she stated that the "question is one of whether or not their primary duties consist of investigation, apprehension or detention of [criminals] or people suspected of crimes, or whether or not they are primarily responsible for maintaining law and order, for which specifically LEO status is not authorized." *Tr.* at 1610-11. Along those same lines, the Board wishes to make clear that by denying the appellants LEO status, it is in no way implying that they do not face danger, do not perform police duties, and do not make an important contribution to the security of the NNB. Rather, their requests must

be denied because their primary duties of maintaining law and order, protecting life and property, and guarding against potential violations of law do not meet the statutory definition of "law enforcement officer." *See Ryan v. Merit Systems Protection Board*, 779 F.2d 669, 672 (Fed. Cir. 1985) [85 FMSR 7090] (definition of "law enforcement officer" is to be "strictly construed" by the Board); *Morgan v. Office of Personnel Management*, 773 F.2d 282, 286-87 (Fed. Cir. 1985) [85 FMSR 7068] (statutory term "law enforcement officer" should not be given expansive application). We therefore sustain the agency's decision that the appellants are not entitled to LEO service credit for any period of time that they occupied the GS-083 Police Officer position at the NNB.6

Order

¶29 For the reasons stated above, we find that the appellants are not entitled to LEO service credit because the GS-05-083 Police Officer position they occupied at the NNB was not created primarily to perform LEO duties as defined by statute. The initial decisions are REVERSED.7

¶30 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>.

1 The list of the consolidated appeals is attached to this Order as an Appendix.

2 The FERS statute additionally requires that the duties of the position be "sufficiently rigorous that employment opportunities are required to be limited to young and physically vigorous individuals." 5 U.S.C. § 8401(17)(A)(ii). Because the evidence shows that the duties of the GS-083, Police Officer position are not primarily the investigation, apprehension, or detention of persons convicted or suspected of federal offenses, the Board need not consider whether the "sufficiently rigorous" requirement is met for the Watson appellants who are under FERS. Thus, the CSRS and FERS statutes are the same for purposes of this analysis.

3 As *Fitzgerald v. Department of Defense*, [98 FMSR 5316], *aff'd*, No. 99-3001 (Fed. Cir. Dec. 13, 1999) (Table), *Bremby*, *Hamilton*, and these cases illustrate, appeals involving GS-083 Police Officers in the Department of Defense reach the Board at different times, in different legal postures, and with different evidentiary records. Moreover, in many ways it is happenstance which appeals involving a position in the same classification series in the same agency reach the Board first; for instance, the agency may issue final decisions on the LEO requests of

some employees sooner than it does for others or one administrative judge may adjudicate a case involving the same position quicker than another administrative judge might. Consequently, the Board could issue serial opinions which can, as illustrated by *Bremby* and these cases, lead to potentially inconsistent results.

The Board has a procedure for adjudicating an appeal as a "class appeal" if the appellants file as representatives of a class of employees, and the administrative judge finds that "a class appeal is the fairest and most efficient way to adjudicate the appeal and that the representative of the parties will adequately protect the interests of all parties." 5 C.F.R. § 1201.27(a). Use of the class-appeal procedure might be the fairest and most efficient way of deciding the LEO status of a single position, e.g., the GS-083 Police Officer position in the Department of the Navy at the NNB.

4 The appeal of *Greenfield v. Department of the Navy*, MSPB Docket No. DC-0842-99-0481-I-1, was included in the consolidated hearing in these cases. ID at 2. We take note of the Guide because it is in the record accompanying these appeals and because the Board may take official notice of such documents. *See* 5 C.F.R. § 1201.64. The Board is issuing a separate opinion in the *Greenfield* appeal.

5 This opinion refers to the incidents as "LEO work" because the agency assumed, for purposes of compiling its statistics, that each ICR documented a duty that fell under the statutory definition of "law enforcement officer." However, a number of ICRs document activity such as response to traffic accidents and issuance of abandoned vehicle notices and speeding tickets. *See, e.g.*, *Watson IAF*, Vol. II, Exs. C, G, and H; Tr. at 1381-1422 and 1587-88. For purposes of this opinion and in light of the Board's adoption of a position-oriented approach to LEO cases, we have not attempted to sort through the thousands of ICRs to determine which ones describe or arguably describe the investigation, apprehension, or detention of criminals or suspected criminals. Instead, this decision simply refers to the ICRs as

documenting alleged "LEO work."

6 Although not argued by the parties, we note that the approach we adopt today is not precluded by precedent of the Federal Circuit.

In *Bingaman v. Department of the Treasury*, 127 F.3d 1431 (Fed. Cir. 1997), [97 FMSR 7027] the evidence showed that OPM at first informed Mr. Bingaman that, in view of a Board decision in favor of an employee in *Peek v. Office of Personnel Management*, [94 FMSR 5371], *aff'd*, 59 F.3d 181 (Fed. Cir. 1995) (Table), he would be given LEO credit to the date he ceased to encumber his position. 127 F.3d at 1438. This would be consistent with the position-oriented approach. OPM subsequently sent Mr. Bingaman a revised letter stating that if he wished LEO credit for the future, he would have to make annual requests for as long as he remained in his position. *Id.*

Regarding the revised letter, the court noted an administrative judge's finding that OPM's regulation at 5 C.F.R. § 831.906(e) required Bingaman to make an annual application for LEO retirement credit covering the immediately preceding year. 127 F.3d at 1438.

There is no explanation, other than the reference to the regulation, as to why OPM changed its mind and required Mr. Bingaman to submit yearly requests for LEO credit. The regulation cited by the administrative judge does not require annual requests for LEO service credit; rather, it states that a CSRS employee can receive no more than 1 year's retroactive LEO service credit if he files a late request for such credit, absent a finding by the agency under 5 C.F.R. § 831.906(f) that he was prevented by circumstances beyond his control from making a timely request. The regulation does not require employees in LEO positions to file yearly "accountings" with OPM. The fact that an administrative judge apparently misconstrued a regulation and the court did not need to reach the issue because it denied Mr. Bingaman's request for LEO credit on the merits, provides no basis to reject a position-oriented approach, which is firmly grounded

in the language of the statute and OPM's regulations at 5 C.F.R. §§ 831.902 and 842.802.

7 In so finding, we note that individuals who are not parties to these appeals are not precluded in future cases from attempting to show that the basic reason for the creation of the GS-05-083 Police Officer position at the NNB was the performance of LEO duties. See *Kroeger v. U.S. Postal Service*, 865 F.2d 235, 239 (Fed. Cir. 1988) [88 FMSR 7035] (collateral estoppel, or issue preclusion, is appropriate when, among other things, the party precluded was fully represented in the prior action). However, any future appellants who encumber or did encumber this position must show that the position was created as a LEO position, not merely that from time to time they themselves may have performed some LEO duties or that the position "involves," to some extent, LEO duties.