

OFFICE OF THE SECRETARY
CORRESPONDENCE CONTROL TICKET

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Date: Sun, Oct 26, 2003 10:02 PM
Subject: I AM TOLD THAT THERE IS ACTUALLY SOMEONE IN NRC LOOKING INTO THE CORRECTNESS OF RECENT DOCUMENTS SENT TO OPM!

I filled out an Information Correction Request form on the NRC website.

"This is to acknowledge receipt of your INFORMATION CORRECTION REQUEST. NRC is reviewing your request and will be in contact with you in the future concerning it.
Information Quality Coordinator"

I had sent them the following:

A portion of the Nuclear Regulatory Commission's May 28, 2003 response to Mr. Ronald Sanders, Associate Director For Strategic Resources Policy, Office of Personnel Management, regarding the "COLLECTION OF INFORMATION REGARDING EMPLOYEES WITH LAW ENFORCEMENT DUTIES," was that "NRC Office of Investigation (OI) LEOs when deputized as Special Deputy U.S. Marshals have full arrest authority. Deputations are maintained for the duration of the investigation," and "NRC LEOs who are deputized as Special Deputy U.S. Marshals, carry firearms in accordance with agency policy while in the performance of official duties."

I made a FOIA request to the NRC for any records regarding deputization of NRC OI personnel, and got two documents, both related to the proposed deputization of a single OI investigator circa June-August 1992. The documents indicate that there was discussion of this deputization; neither of the documents indicates that the deputization occurred.

As my FOIA request covered 1982-2002, I conclude that no OI personnel have been deputized in that timeframe, some twenty years.

Most recent copy of my file, with minor updates, attached in WordPerfect format.

Jim Foster

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NRC OFFICE OF INVESTIGATIONS (OI) SERIES 1811 MISCLASSIFICATION**Overview**

Basic Issue: A group of Nuclear Regulatory Commission (NRC) employees have obtained criminal investigator job classifications which are not warranted by their positions, which involve only civil investigations. This was done through an eight year (09/75 - 05/84) exchange of letters with the Civil Service Commission and its' successor, the Office of Personnel Management (OPM).

Result: The above employees improperly obtained early, 20 year retirement, a more favorable retirement package, and 25% more salary. A very conservative analysis puts the value of these benefits at \$600,000 per year; this has gone on for some 20 years. This should be stopped.

Actions Needed: General inquiries to the NRC will bring the response that the NRC Inspector General has looked into the matter, and the matter is closed. What is needed is to ask the NRC several simple questions:

- (1) What, specifically, is the statutory basis for NRC criminal investigative authority?
- (2) Do these Investigators investigate individuals suspected of or convicted of violating major violations of the criminal laws of the United States?
- (3) How many criminal investigations have been conducted, each year during 1981-2002? What percentage of the investigative workload does this reflect?
- (4) Do these Investigators have the authority to carry weapons, the authority to arrest, seize evidence, give Miranda warnings, execute search warrants? How many individuals have been arrested by NRC personnel?
- (5) Do these Investigators have a "rigorous" position which includes unusual physical hazards due to frequent contacts with criminals and suspected criminals, working for long periods without a break, and being in on-call status 24 hours a day? What is the justification for certifying these positions as rigorous?
- (6) How can NRC justify the considerable additional expense of classifying these positions as Criminal Investigators if they perform civil investigations only?

Executive Summary

Since at least 1982, Nuclear Regulatory Commission (NRC) Office of Investigations (OI) personnel at grade levels of GS-13, GS-14, and GS-15 have been misclassified as series 1811, "Criminal Investigator." To be classified in this series, an individual must meet most of the "frontline law enforcement" criteria, and have them largely constitute the position duties:

1. Perform investigations (long-term, complicated reviews).
2. Investigate individuals suspected of or convicted of violating criminal laws of the United States (employing agency must have criminal investigation authority).
3. Have the authority to carry weapons.
4. Have the authority to arrest, seize evidence, give Miranda warnings, execute search warrants.
5. Have a "rigorous" position which includes unusual physical hazards due to frequent contacts with criminals and suspected criminals, working for long periods without a break, and being in on-call status 24 hours a day.

OI duties and authorities do not match these criteria, especially since NRC lacks statutory authority

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for performing criminal investigations. They lack arrest responsibilities, authority to carry firearms or other weapons, do not perform undercover work, do not execute search or seizure warrants, do not give Miranda warnings, and are not exposed to hazardous conditions nor inclement weather. Most work takes place in an office setting, and is not "rigorous." OI investigations do not involve felonies, but violations of the regulations contained in 10 Code of Federal Regulations (Energy). None of their work is "frontline law enforcement work, entailing unusual physical demands and hazards." When OI was created, a proposed desk audit of investigative positions to determine the correct job classification did not occur. OI personnel have indicated that "NRC is the best-kept secret on the 1811 circuit!"

Letters from the NRC to the Civil Service Commission or Office of Personnel Management (OPM) on the subject of the 1811 classifications and law enforcement retirement contained vague, erroneous, or misleading and false information. These letters indicated high percentages of criminal investigations, or investigations involving "matters of potential criminality covering a wide spectrum of violations."

The position of "Investigation Specialist," later "Investigator," began with the Atomic Energy Commission (AEC). These positions were series 1810, located in the Division of Compliance, and the investigation reports issued were titled "Compliance Investigations." These positions were clearly originally established to conduct civil investigations to determine compliance with the regulations found in 10 Code of Federal Regulations (Energy).

OI investigative personnel actually perform the duties and responsibilities of the series 1801 or 1810 classifications, and meet the 1801 or 1810 position classification guidelines and qualification requirements. Personnel classified in series 1801 or 1810 do not receive early retirement nor availability premium pay. The 1801 series guide, for example, specifically speaks to positions where investigations relate to violations of regulations and criminal matters are referred to another agency for criminal investigation.

The result of the misclassification is that **the NRC has unnecessarily paid OI investigators early retirement and premium pay (Administratively Uncontrollable Overtime [AUO] or "availability pay" of 25% of their salary), amounting to hundreds of thousands of dollars per year, and totaling millions of dollars during the period 1982-2002.** The 25% availability pay is included in the OI investigators' basic pay, and therefore raises the "high three" salary years utilized to determine retirement pay. Also, a more beneficial percentage is used to calculate retirement benefits. A conservative analysis indicates that the overpayments exceed \$640,000 per year (the effect on Thrift Savings Plan agency contributions and retirement benefits of an additional 25% during an employee's "high three" years was not factored in).

OI Investigations largely consist of interviews with a court reporter present, and document reviews. Between 7% - 30% of the cases are referred to the Department of Justice (DOJ) for prosecutorial review, but few are accepted for further investigation, and even fewer result in convictions. In extremely rare cases, the OI investigator may provide assistance to the DOJ in its review or investigation, and may provide testimony in court or before a Grand Jury. In vanishingly rare cases, the investigator may assist in obtaining and executing a search warrant (accompanying the primary law enforcement officers), collecting physical evidence, or take scene photographs.

A chronology of events indicates that NRC senior management was well aware that NRC did not have the authority to conduct criminal investigations, had not given such authority to OI, and that OI did not perform criminal investigations. In the early years, OI did not even directly interface with

the DOJ, but passed their investigations along to the Office of Inspector and Auditor for referral to DOJ. Of importance is a memorandum dated October 15, 1982 in which the NRC Deputy General Counsel advised that, lacking statutory authority, NRC personnel should not conduct criminal investigations under any circumstances. Subsequently, numerous submittals were made to OPM, claiming that all OI investigations were criminal investigations.

More importantly, on April 9, 1984, the full NRC Commission received a Briefing on Criminal versus Civil Investigations. A draft document giving OI the authority to conduct criminal investigations was discussed, with the Commission strongly objecting to and directing removal of the term "conduct." "we believe that the Commission – and OGC has taken this position in the past – that the Commission does not have independent authority to conduct criminal investigations." "Yes, our policy is to first serve our civil purpose and then help DOJ."

On January 22, 1999 the NRC advised OPM that it had updated OI position descriptions. Attached was an Evaluation Statement dated October 28, 1998, two revised position descriptions, and a selection of previous correspondence between OPM and the NRC. The evaluation statement notes that OI investigators have not "been deputized to make arrests or carry firearms." The attached position descriptions indicate that "much of the work is performed in an office setting." This statement indicates that the previous **NRC certifications that the positions met the definition of "rigorous" were incorrect at best.**

The NRC and NRC Office of Inspector General (OIG) have shown inability to impartially review this issue, and the OIG was extremely reluctant to initiate an investigation. The OIG eventually performed a review of my concerns, but it has many weaknesses, did not address the bulk of the information provided, and likewise did not provide the report's consultant with this information. Mr. Hubert T. Bell and Mr. David C. Lee of the OIG were investigating the classification of Mr. Guy Caputo's (their previous supervisor) current employees. This provides a logical explanation of their extreme reticence to initiate an investigation, and how it could be so inadequate. However, a close reading of the IG report reveals that it does substantiate my statements. My complaint to the Presidents Council on Integrity and Effectiveness (PCIE) regarding the quality and impartiality of the report was, by their words, "not persuasive." An excellent investigation of a very similar complaint, by the Department of Labor, is attached for comparison.

The NRC OIG determined that over the review period, an average of 22 percent of OI's cases were referred to the DOJ for criminal prosecution. During OIG's review of correspondence between OPM and NRC, OIG found that in a number of instances, OPM requested clarification concerning the nature of criminal violations investigated by OI and the amount of time OI spent conducting these investigations. OIG noted that the NRC described the nature of the criminal activities and amount of time OI spent conducting these activities in "various ways." Generally, the correspondence submitted by the NRC to OPM indicated that almost all of the incumbent's time was spent conducting criminal investigations which included violations of the Atomic Energy Act and violations of the Federal criminal code, Title 18.

OPM based its coverage decision on statements that the OI positions involved 100% criminal investigation involvement (or at least more than 50%), and this was never true. Please see the discussion under "What Does OI (Predominantly) Do?" (Page 21)

What would have happened if NRC had approached OPM in the early 1980's, and, in complete honesty, advised that the agency had no criminal investigative authority, did civil investigations

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only, but wanted to grant Law Enforcement Officer retirement and premium pay benefits to their investigators? NRC would have to note that the investigators are not deputized, have no arrest authority, have no necessity to give "Miranda" warnings, cannot carry weapons, nor execute search warrants. The vast bulk of their investigative work is performed in a non-rigorous office setting, and consists of interviews with mostly agreeable individuals, and document reviews. The job does not include unusual physical hazards due to frequent contacts with criminals and suspected criminals, or working for long periods without a break. No minimum physical standards are in place. The investigators rarely testify in court, and almost never are called into the office on an emergency basis. Investigations indicating possible criminality are referred to the Department of Justice, but few are accepted and fewer prosecuted. In such a situation, would OPM have likely agreed with the classification of such investigators in the 1811 series and the granting of LEO retirement benefits and 25% premium pay? The answer should be "no."

Justification of a job classification as making hiring investigators easier is an inappropriate approach. In any case, the NRC is an "exempt" agency, has a relatively high grade structure, with GS-13 and GS-14 non-managerial investigative positions. As a result, attracting and hiring qualified individuals to the investigative positions was never a problem, and vacancies were historically filled as rapidly as the hiring and background investigation process would allow.

OPM has not been anxious to review or revise their May 17, 1984 decision in this matter, even if the NRC provided erroneous information in that determination. OPM should follow their options to provide "oversight of coverage determinations," as provided in 5 CFR 831.911 (a thru d).

Some individuals may claim that they were unaware that the position did not meet series 1811 requirements during their employment with the NRC. However, individuals coming from other law enforcement agencies very rapidly divined that the NRC position was different, when they were not assigned firearms nor handcuffs. It was well known within OI that the series 1811 classification would not stand the light of day.

My complete file on this issue contains much more information in support of the previous comments, and consists of some 190 pages. It is available, on request, in WordPerfect for Windows, Microsoft Word, or Adobe Acrobat (Portable Document Format [PDF]) formats.

James E. Foster
Formerly NRC Region III

Information Removed in Accordance with PII Policy

10/25/2003

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*News***NEW CLASSIFICATION STANDARDS:**

In May, 2002, OPM issued a new 1800 series family of standards. Some new sections are much more detailed than OPM's previous guidance, such as the following:

Investigation Work – Investigation work within this job family covers situations where the employee undertakes extensive investigations primarily for the purpose of establishing and pursuing civil or criminal cases that will be processed and prosecuted by further administrative and judicial action, usually after being turned over by the investigator to other authorities. This category is further divided into two types:

Administrative investigation work is covered by three occupational series:

- General Investigation, GS-1810,
- Wage and Hour Investigation, GS-1849, and
- Equal Opportunity Investigation, GS-1860.

Criminal investigation work is covered by one occupational series:

- Criminal Investigation, GS-1811.

Many of the processes, techniques, and knowledge used in each type may be similar. **The primary distinction between the two is the *purpose of the initial investigation*: administrative or civil actions or criminal prosecution.**

(Emphasis added; NRC initial investigations are for the purpose of administrative or civil actions.)

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SUPPORTING INFORMATION

Office of Personnel Management Documents & Guidance

GS-1800 GROUP

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|--|---------|---|---------|
| General Inspection, Investigation, and Compliance Series | GS-1801 | Alcohol, Tobacco and Firearms Inspection Series | GS-1854 |
| Compliance Inspection and Support Series | GS-1802 | Consumer Safety Inspection Series | GS-1862 |
| General Investigating Series | GS-1810 | Food Inspection Series | GS-1863 |
| Criminal Investigating Series | GS-1811 | Public Health Quarantine Inspection Series | GS-1864 |
| Game Law Enforcement Series | GS-1812 | Customs Patrol Officer Series | GS-1884 |
| Air Safety Investigating Series | GS-1815 | Import Specialist Series | GS-1889 |
| Immigration Inspection Series | GS-1816 | Customs Inspection Series | GS-1890 |
| Mine Safety and Health Series | GS-1822 | Customs Entry and Liquidating Series | GS-1894 |
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| Agricultural Commodity Warehouse Examining Series | GS-1850 | Customs Aid Series | GS-1897 |
| | | Admeasurement Series | GS-1898 |
| | | Investigation Student Trainee Series | GS-1899 |

The 1800 group, shown above, consists of many positions, some not directly related to investigations. Three classifications, series 1801, series 1810, and series 1811, are generally most applicable to federal investigators. The 1801 series is utilized for "Compliance Specialists," otherwise not appropriately classifiable elsewhere in the 1800 group. However, the 1801 series guide specifically speaks to positions where investigations relate to violations of regulations and criminal matters are referred to another agency for criminal investigation. The 1801 series guide provides that:

"Included in this group are occupations established primarily to effect compliance of individuals or organizations with laws, rules, regulations, executive orders, or other mandatory guidelines. Compliance is assessed by such means as inspections, investigations, and analysis of reports. Compliance may be obtained by methods such as persuasion, negotiation, and technical assistance. Compliance may also require actions such as citation of violations, drafting of complaints, and referral of cases for administrative or legal proceedings." (emphasis added)

The determination of which group is the most appropriate is performed by considering both the job classification and qualification requirements, as provided in Title 5, Sec. 5106, US Code, Government Organization and Employees, Part III - Employees, Subpart D - Pay and Allowances, Chapter 51 - Classification, which provides that (a) Each position shall be placed in its appropriate class. The basis for determining the appropriate class is the duties and responsibilities of the position and the qualifications required by the duties and responsibilities. Classification guidelines and qualification requirements are as published by the Office of Personnel Management (OPM).

Series 1810, sometimes defined as "Civil Investigator, sometimes performs Criminal Investigations," provides the following classification information (emphasis added):

GS-1810—General Investigating Series: This series includes positions that involve planning and conducting investigations covering the character, practices, suitability, or qualifications of persons or organizations seeking, claiming, or receiving Federal benefits, permits, or employment when the results of the investigation are used to make or invoke administrative judgments, sanctions, or penalties. These positions require primarily a knowledge of investigative techniques a knowledge of the laws, rules, regulations, and objectives of the employing

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agency; skill in interviewing, following leads, researching records, and preparing reports; and the ability to elicit information helpful to the investigation from persons in all walks of life.

Qualification information for the 1810 position, as currently provided by OPM, is as follows: Use these individual occupational requirements in conjunction with the "Group Coverage Qualification Standard for Administrative and Management Positions." There are basically no special qualification requirements for this position, as it is not expected to entail hazardous conditions, search and seizure, arrest of criminals, use of firearms, or potential hazards to others.

Classification information for the 1811 series, sometimes defined as "Criminal Investigator, sometimes performs Civil Investigations" is as described below (emphasis added):

GS-1811—Criminal Investigating Series: This series includes positions that involve planning and conducting investigations relating to alleged or suspected violations of criminal laws. These positions require primarily a knowledge of investigative techniques and a knowledge of the laws of evidence, the rules of criminal procedure, and precedent court decisions concerning admissibility of evidence, constitutional rights, search and seizure and related issues; the ability to recognize, develop and present evidence that reconstructs events, sequences, and time elements, and establishes relationships, responsibilities, legal liabilities, conflicts of interest, in a manner that meets requirements for presentation in various legal hearings and court proceedings; and skill in applying the techniques required in performing such duties as maintaining surveillance, performing undercover work, and advising and assisting the U.S. Attorney in and out of court. It is also indicated that "most criminal investigators must be skillful in such activities as: Maintaining surveillances; Performing undercover work; Making arrests; Taking part in raids."

Qualification information for the 1811 position, as provided by OPM, but modified for emphasis, is as follows: Use these individual occupational requirements in conjunction with the "Group Coverage Qualification Standard for Administrative and Management Positions." In addition, the following Medical Requirements apply: **The duties of positions in this series require moderate to arduous physical exertion involving walking and standing, use of firearms, and exposure to inclement weather.** Manual dexterity with comparatively free motion of finger, wrist, elbow, shoulder, hip, and knee joints is required. Arms, hands, legs, and feet must be sufficiently intact and functioning in order that applicants may perform the duties satisfactorily. Sufficiently good vision in each eye, with or without correction, is required to perform the duties satisfactorily. Near vision, corrective lenses permitted, must be sufficient to read printed material the size of typewritten characters. Hearing loss, as measured by an audiometer, must not exceed 35 decibels at 1000, 2000, and 3000 Hz levels. **Since the duties of these positions are exacting and responsible, and involve activities under trying conditions, applicants must possess emotional and mental stability. Any physical condition that would cause the applicant to be a hazard to himself/herself, or others is disqualifying.**

Additional guidance is provided for positions which involve mixed duties, such as performing both civil investigations and criminal investigations: **The series determination of such positions should be made in accordance with the General Introduction, Background, and Instructions to the Position Classification Standards.** In general, the guidance is that the predominant duties of the position determine the appropriate series.

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OPM issued guidelines as to eligibility for law enforcement retirement (December 5, 1990 Federal Register, Volume 55, No. 234).

In the case of a determination between the 1810 and 1811 series, detailed, definitive guidance is provided in the "Grade-level Guides for Classifying Investigator Positions, GS-1810/1811," 1972, currently from the OPM Human Resources Compact Disk.

Federal Personnel Manual Bulletin 842-3, "Interim Regulations on Air Traffic Controllers, Law Enforcement Officers, and firefighters Under the Federal Employees Retirement System," was issued on February 9, 1987. The bulletin indicates that a "Rigorous Position" means a position "the duties of which are so rigorous that employment opportunities are required to be limited to young and physically vigorous individuals..."

OPM transferred the responsibility for law enforcement officer determinations under 5 U.S.C. 8336(c) to the various federal agencies on December 7, 1993. Under 5 CFR 831.905, an agency head's determination that a position is a primary position must be based solely on the official position description and any other description of the duties and qualifications. The official documentation for the position must establish that it satisfies the requirements in section 831.902. However, under 5 CFR 831.911(a) "The Director of OPM retains the authority to revoke an agency heads determination that a position is a primary or secondary position, or that an individual's service in any other position is credible under 5 U.S.C. 8336(c)."

The OPM "CSRS and FERS Handbook for Personnel and Payroll Offices," current version, April 1998, Chapter 46, contains guidance on the special retirement provisions for law enforcement officers, firefighters, air traffic controllers, and military reserve technicians. A definition of "primary duties" is included in section 46A3.1-1. Sections 46A3.2-5 and 46B3.2-4 detail OPM's oversight authority regarding coverage determinations, and the records required to be maintained by the determining agency. The following is required:

(1) Upon deciding that a position is a law enforcement officer, each agency head must notify OPM stating the title of the position(s), the number of incumbents, and whether the position is a primary or secondary position, (2) **Each agency must establish a file (5 CFR Sec. 831.803 and Sec. 831.804) containing all coverage determinations made by an agency head, and all background material used in making the determination,** (3) Upon request by OPM, the agency will make available the entire coverage determination file for OPM to audit to ensure compliance with the provisions of this subpart, and, (4) Upon request by OPM, an agency must provide to OPM a list of all approved positions and any other pertinent information requested. For rigorous positions, the list must show the specific entry age requirement and physical qualifications (physical requirements and/or medical standards) for each position.

An agency head's finding that a position is a rigorous position must be based solely on the official position description of the position in question and any other official description of duties and qualifications. The official documentation for the position should as soon as reasonably possible, establish that the primary duties of the position are so rigorous that the agency does not allow individuals to enter the position if they are over a certain age or if they fail to meet certain physical qualifications (physical requirements and/or medical standards) as determined by the employing agency head based on the personnel management needs of the agency for the position in question. A temporary lag between approval of the position and establishment of a maximum entry age and physical qualifications is permitted if necessary. Justification for the lag should be documented.

In June, 2000 (Office of Merit Systems Oversight and Effectiveness, Digest of Significant Classification Decisions and Opinions, Article No. 24-01), OPM determined that the GS-1810/1811 Guide had to be read in conjunction with the information contained in the more recently issued (April 1988) GS-083/085 Guide. That Guide clarifies that the GS-1811 series covers positions primarily responsible for investigating alleged or suspected **major offenses** or violations of specialized laws of the United States. While agency policy typically required the criminal investigations service's involvement in violent crimes, this did not mean that the GS-1811 series alone covered all such crimes within its occupational definition. **The GS-083/085 Guide defines major crimes found in the GS-1811 occupation as a capital crime, those involving prescribed monetary values, or others that may vary in different jurisdictions.**

GAO Reports Related to Criminal Investigators

There are four United States General Accounting Office (GAO) reports relative to criminal investigators, and one which provides information as to the OI caseload. The GAO completed a review of Information on "Certain Agencies Criminal Investigative Personnel and Salary Costs," in November 1995 (GAO/T-GGD-96-38). Report GAO/T-GGD-96-38 contains statistics for NRC investigative personnel, but these are in error or the NRC provided GAO with fraudulent information, as only three series 1811 individuals are listed as employed with the NRC as of March 31, 1995, with a total salary of \$334, 287 (\$111,429 each?).

The estimated OI 1811 series salary expenditures for 1995, based on 1995 pay rates, assuming 3 SES in HQ, 1 GS 15/5 per regional office, 2 GS 14/5 per regional office, and 3 GS 13/5 per regional office, and %15 Administratively Uncontrollable Overtime (AUO) payments (AUO or availability payments can be 10-25% of an individuals salary) comes to \$1,998,000, of which \$260,600 is due solely to AUO expenditures which would not be made if the 1811s were properly classified as 1801s or 1810s. Additional individuals, higher step ratings, or a higher AUO percentage would increase these estimates. Therefore, actual 1995 figures for OI only would more likely be 38-45 such personnel, with a total 1811 salary of well over \$2,000,000. GAO later completed a review of "Investigative Authority and Personnel at 13 Agencies" in September 1996 (GAO/GGD-96-154). GAO subsequently completed a comprehensive report on "Investigative Authority and Personnel at 32 Agencies" in July 1997 (GAO/GGD-97-93).

The information provided to GAO, above, came from the Central Personnel Data File (CPDF) file as of March 31, 1995. This file is maintained by the Office of Personnel Management. This information, utilized by GAO during development of report GAO/T-GGD-96-38 (09/15/95), should have included data regarding individuals employed in the 1811 series for both the NRC's Office of Investigations (OI) and the NRC's Office of Inspector General (OIG). If this information had been correct (43-50 such personnel), NRC would have been a part of the review conducted under report GAO/GGD-97-93, "Investigative Authority and Personnel at 32 Organizations," which reviewed federal organizations with 25 or more law enforcement investigative personnel. GAO would have then concluded that OI personnel do not have criminal investigative authority. Per OPM personnel, the Occupational Survey data as of September 1995 showed 50 full -time 1811 Criminal Investigators at the NRC. (9/97) CPDF data for NRC indicates 45 individuals in the 1811 occupational series. These figures include both OI and OIG personnel.

Report GAO/HEHS-97-162 (Letter Report, 09/02/97), "Nuclear Power Safety: Industry Concerns

With Federal Whistleblower Protection System," contains information on the OI caseload: "Currently, 55 percent of NRC's Office of Investigations (OI) workload consists of investigating whistleblower discrimination allegations. However, in 96 of the 106 discrimination cases closed by OI in fiscal year 1996, no discrimination was found." Further, in the same report, NRC staff advised GAO personnel that "while they do have the authority to refer such cases to Justice for consideration of criminal prosecution, such prosecution has occurred only once."

Report GAO/GGD-97-93 surveyed federal organizations employing from 25 to 699 law enforcement investigative personnel. Employees meeting the GAO definition of law enforcement investigative personnel were located in 32 organizations, 20 of which were Offices of Inspector General. Over 94% of these personnel were authorized to execute search warrants, make arrests, and carry firearms. Only personnel in the Office of Labor Management Standards were not so authorized (in 1993 the Department of Labor Inspector General reviewed law enforcement benefits for this office and concluded their classification was inconsistent with applicable regulations [report 02-SPO-93-OASAM, 9/93]).

These GAO reports are illustrative of the commonly accepted definition of the criminal investigator series as having statutory authority to conduct criminal investigations, authority to execute search warrants, make arrests, and carry firearms if necessary. The GAO report which touches on the OI caseload (55% discrimination cases) strongly suggests that the criminal investigative workload, if any, is proportionately small.

GAO/GGD-89-24, "Federal Workforce, Positions Eligible for Law Enforcement Officer Retirement Benefits," was specifically generated in response to a concern that "agencies may be inappropriately classifying jobs as law enforcement positions to help employee recruitment and retention." The report notes that law enforcement retirement benefits are more generous and costly than the benefits for regular employees. The report also includes an excellent discussion of eligibility criteria and position classification, including the comment that:

"Each position in an occupational series is assessed for retirement coverage on the basis of its own job description. Positions classified under the same job series do not always involve the same duties. Therefore, one position may receive law enforcement retirement coverage while another may not. For example, OPM's records showed that in 14 instances since 1984, OPM denied law enforcement retirement to positions in the Criminal Investigator Series, GS-1811, by far the single largest law enforcement job series, because the specific duties of the positions did not meet the eligibility criteria."

A detailed discussion of "desk audits" as verifying that eligibility criteria are met followed the above. A table (page 23) indicates that the NRC had a total of 38 law enforcement retirement eligible positions in 1987.

Related Merit Systems Protection Board Cases

The issue of who is qualified as a criminal Investigator has been the subject of several Merit System Protection Board (MSPB) reviews. A landmark case was *Hobbs vs. Office of Personnel Management*, 58 M.S.P.R. 628, 1993. The case is cited in multiple MSPB cases, including:

Ferrier vs. Office of Personnel Management, 1/12/1995, SF-0831-93-0365-R-1
Taylor vs. Dept. of the Treasury, 1995, SF-0831-95-0461-I-1

Martinez vs. Dept. of the Treasury, 7/24/1996, DC-0752-95-0698-I-1

Killion vs. Dept. of the Treasury, 9/18/1996, BN-0831-0006-I-1

Houck vs. Dept. of the Navy, 4/15/1999, DC-0842-97-0891-I-1

A case containing recent criteria utilized for determination of performance of criminal investigation duties is *Watson v. Dept. of the Navy*, (Fed. Cir. 08/17/2001). *Houck vs The Department of the Navy*, and *Killion vs. The Department of the Treasury* also have criteria on classification of positions in the 1811 series, and the complainant's position that he was involved in "criminal investigation" is very similar to the OI position.

MSPB cases, in general, use the following criteria to determine criminal investigator status:

1. Performs investigations (long-term, complicated reviews).
2. Investigates individuals suspected of or convicted of violating criminal laws of the United States (employing agency must have criminal investigation authority).
3. Authority to carry weapons.
4. Authority to arrest, seize evidence, give Miranda warnings, execute search warrants.
5. The job includes unusual physical hazards due to frequent contacts with criminals and suspected criminals, working for long periods without a break, and being in on-call status 24 hours a day.

On July 14, 1998, MSPB case DE-0842-96-0551-I-1(1) (*Eatmon, et al. vs. Department of Energy*) addressed whether Department of Energy Couriers or Escorts should be entitled to law enforcement retirement. The Office of Personnel Management itself was an intervener in the case. A portion of this MSPB decision refers to an earlier case (following):

There, the court summarized the "indicia" of LEO status that have emerged from the caselaw: Without holding any single factor to be essential or dispositive, the Board has identified several considerations that bear on the question whether a particular employee qualifies as a "law enforcement officer" for purposes of entitlement to LEO retirement credit. According to the Board, a "law enforcement officer" within the statutory contemplation commonly (1) has frequent direct contact with criminal suspects; (2) is authorized to carry a firearm; (3) interrogates witnesses and suspects, giving Miranda warnings when appropriate; (4) works for long periods without a break; (5) is on call 24 hours a day; and (6) is required to maintain a level of physical fitness. See *Hobbs v. Office of Personnel Management*, 58 M.S.P.R. 628 (1993); *Sauser v. Office of Personnel Management*, 59 M.S.P.R. 489 (1993); *Peek v. Office of Personnel Management*, 63 M.S.P.R. 430 (1994), *aff'd*, 59 F.3d 181 (Fed. Cir. 1995) (Table); *Ferrier v. Office of Personnel Management*, 66 M.S.P.R. 241 (1995). 127 F.3d at 1436.

1997 U. S. Court of Appeals Decision

The U. S. Court of Appeals, in September 23, 1997 (various petitioners vs. Department of the Treasury, 96-3368) reviewed several consolidated cases related to law enforcement officer credit. Portions of the decision follow:

Under both the CSRS and the FERS, an employee who qualifies for LEO retirement credit is eligible to retire upon attaining age 50 and completing 20 years of LEO service. See 5 U.S.C. 8336(c), 8412(d)(2). By contrast, most civil service employees are eligible to retire at age 60 with 20 years of service or age 55 with 30 years of service. See 5 U.S.C.

8336(a), (b); id. 8412(a), (b). **An employee who qualifies for LEO retirement receives a larger annuity than ordinary civil service employees**, but is subject to larger deductions from salary during the employee's period of service. In addition, an LEO employee is subject to mandatory early retirement. See 5 U.S.C. 8334(c), 8425. An employee can qualify for LEO retirement credit either by serving in a position that has been approved as an LEO position or by applying for LEO credit and satisfying the employing agency that he is entitled to LEO retirement status. See 5 C.F.R. 831.903-.906, 831.910(a), 842.803-.804, 842.807(a).

The standards for LEO eligibility differ somewhat between the CSRS and the FERS. The statutory standard for LEO eligibility under the CSRS requires that the duties of the employee's position be "primarily the investigation, apprehension, or detention of individuals suspected or convicted of [federal] offenses." 5 U.S.C. 8331(20). The statutory standard for LEO eligibility under the FERS is similar in pertinent part, but additionally requires that the duties of the employee's position be "sufficiently rigorous that employment opportunities are required to be limited to young and physically vigorous individuals." 5 U.S.C. 8401(17).

Without holding any single factor to be essential or dispositive, the Board has identified several considerations that bear on the question whether a particular employee qualifies as a "law enforcement officer" for purposes of entitlement to LEO retirement credit. According to the Board, a "law enforcement officer" within the statutory contemplation commonly **(1) has frequent direct contact with criminal suspects; (2) is authorized to carry a firearm; (3) interrogates witnesses and suspects, giving Miranda warnings when appropriate; (4) works for long periods without a break; (5) is on call 24 hours a day; and (6) is required to maintain a level of physical fitness.** See *Hobbs v. Office of Personnel Management*, 58 M.S.P.R. 628 (1993); *Sausser v. Office of Personnel Management*, 59 M.S.P.R. 489 (1993); *Peek v. Office of Personnel Management*, 63 M.S.P.R. 430 (1994), *aff'd*, 59 F.3d 181 (Fed. Cir. 1995) (table); *Ferrier v. Office of Personnel Management*, 66 M.S.P.R. 241 (1995).

The court noted, in the same decision, that early retirement was costly to the government::

Because the early retirement 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," *Morgan v. Office of Personnel Management*, 773 F.2d 282, 286-87 (Fed. Cir. 1985), **the statutory term "law enforcement officer" has not been given expansive application. To the contrary, as this court has explained, the definition of law enforcement officer in section 8331(20) has been "strictly construed."** *Ryan v. Merit Sys. Protection Bd.*, 779 F.2d 669, 672 (Fed. Cir. 1985).

It should be noted that the court did not discuss whether the Department of the Treasury had criminal investigation authority, as this was undoubtedly an assumed consideration.

Historical Perspective

The position of "Investigation Specialist," or later "Investigator," began with the Atomic Energy Commission (AEC). These positions were located in the Division of Compliance, and the

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investigation reports issued were titled "Compliance Investigations." These positions were clearly established to conduct civil investigations to determine compliance with the regulations found in 10 Code of Federal Regulations (Energy). The AEC was abolished in 1974, and when I came on with the NRC in 1976, these positions, in the 1810 series, were still performing civil investigations. Investigations with any "criminal aspects" were referred to the Federal Bureau of Investigation (FBI), including some of my own cases. This system worked well; few referrals were made to the FBI, but almost all referrals were accepted for their investigation and possible subsequent prosecution.

AEC or NRC investigations in the 1960-1981 timeframe focused on complaints, radiation overexposures, allegations of improper power reactor construction, or any issue where regional management thought an investigator might aid in developing information. Some of these investigations were technical in nature; one of my investigations tracked the fabrication, heat treatment, and installation of large reactor vessel holddown bolts.

These positions did not involve carrying firearms, giving Miranda warnings, search and seizure, arrests of suspects nor frequent contact with criminals, or working long periods without a break, and had no physical requirements.

The AEC, and its successor, the NRC, as "exempt" agencies, have a relatively high grade structure, with GG-13 and GG-14 non-managerial investigative positions. As a result, attracting and hiring qualified individuals to the investigative positions was never a problem, and vacancies were filled as rapidly as the hiring and background investigation process would allow.

General Conclusions, NRC Documents

OPM, GAO, MSPB, and U.S. Court of Appeals documents provide criteria for determining if an individual should be classified as in the 1811 job series and receive early retirement and premium pay benefits. OI personnel do not meet these criteria.

OI personnel (1) do not perform criminal investigations, (2) perform a low percentage of investigations which could be considered as criminal, and (3) OI positions do not meet the qualification requirements for the 1811 series. They are clearly classifiable in the 1801 or 1810 series by reason of their duties, responsibilities, and job requirements.

1. OI personnel do not perform criminal investigations. OI lacks a statutory basis for performing criminal investigations. The Atomic Energy Act and other legislation give the responsibility for nuclear industry criminal investigation to the FBI. The mission of OI (from NUREG-0325, "NRC Organizational Charts and Functional Statements"), does not include the word "criminal." 10 CFR 1.36, "Office of Investigations" does not contain the word "criminal." The "General Statement and Policy for Enforcement Actions," section XI, indicates that "Alleged or suspected criminal violations of the Atomic Energy Act (and of other relevant Federal laws) are referred to the Department of Justice (DOJ) for investigation." Appendix E of the Enforcement Manual, **The Memorandum of Understanding Between the NRC and DOJ (Attachment 3)** states that NRC will "provide information regarding such criminal violations to the appropriate investigative agency having jurisdiction over the matter." In practice, NRC referrals to DOJ are then investigated either by DOJ personnel or a Grand Jury.

On April 3, 1980, William J. Ward, IE Senior Investigator, wrote (NRC NUDOCS accession #

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8005130140), "We are not proposing that IE [Inspection and Enforcement] or anyone else in NRC undertake criminal investigations, per se. We share the OELD [Office of the Executive Legal Director] view that neither IE nor OIA [Office of Inspector and Auditor] possesses such authority and that legislative changes would be needed to obtain it." Yet, shortly thereafter, William J. Ward signed personnel actions classifying IE investigators in the 1811 series, knowing that they lacked the authority to perform criminal investigations.

The Office of the Executive Legal Director (OELD) reviewed whether NRC conducts criminal investigations and the lack of need to provide "Miranda" warnings in a comprehensive memorandum dated April 14, 1980 (NUDOCS accession number 8005300541): "NRC investigations involve the gathering of evidence for civil enforcement actions and not criminal actions. "Miranda" warnings, a requirement of criminal procedure, are not normally associated with NRC investigations. However, notwithstanding the civil focus of NRC investigations, an NRC investigation may uncover evidence that might form a basis for a criminal referral to the Department of Justice. Examples of such referrals would be willful violations of certain provisions of the Atomic Energy Act and falsification of certain records (18 USC 1001)."

Well before OI was created, and for sometime afterward, OI was not the NRC interface with the Department of Justice; referrals were made through the NRC Office of Inspector and Auditor, the predecessor of the current NRC Office of Inspector General. The "IE/OIA Policy for Referral of Criminal Matters to DOJ/FBI", drafted in August 1980, was finalized November 29, 1980. This was also documented in a memorandum dated July 16, 1982, from Chairman Nunzio Palladino to James A. Fitzgerald, then Acting Director of the Office of Investigations. The memorandum provided OI with various authorities, including the authority to "Advise and assist the Office of Inspector and Auditor in referrals to the Department of Justice stemming from investigations by OI." This long-standing policy was reconfirmed on March 4, 1983, when the "OI Policies" were adopted by the Commission. OI Policy 13 was that "The Office of Inspector and Auditor (OIA) shall be the primary office responsible for referral, and related discussions of investigative matters with the Department of Justice (including U.S. Attorneys and the Federal Bureau of Investigation)."

James Fitzgerald requested that the NRC Office of General Counsel provide him with an opinion on whether the NRC had the authority to conduct criminal investigations on June 25, 1982, prior to the creation of the Office of Investigations. In the response memorandum of October 15, 1982 from Martin Malsch to James Fitzgerald, "Request for Legal Research and Opinion," the NRC Deputy General Counsel advised: "The Atomic Energy Act does not explicitly give the NRC such authority -- indeed the Act should probably be read as depriving NRC of such authority -- and we conclude a court would most likely conclude that the NRC does not have the authority to conduct an investigation solely for criminal purposes."*...Your memo posited a second part to this question, i.e., whether the NRC should conduct criminal investigations under any circumstances. The simple legal answer to this question is that, since it does not have the statutory authority to do so, it should not.* (See Attachment 1)

On August 26, 1983 then Commissioner Victor Gilinsky wrote to the NRC Chairman and other commissioners: "The NRC staff should understand that their investigations of wrongdoing are civil investigations. Criminal investigations are the province of the Department of Justice."

On April 9, 1984, the Commission received a Briefing on Criminal versus Civil Investigations (NUDOCS Accession number 8404110608, microfilm address 24000-207). A draft paper giving OI the authority and responsibility to conduct criminal investigations was discussed, with the

Commission strongly objecting to and then directing the removal of the term "conduct." "we believe that the Commission – and OGC has taken this position in the past – that the **Commission does not have independent authority to conduct criminal investigations.**" (page 5, lines 8-11, J. Fitzgerald). Even assists to the DOJ were to be a secondary priority. "Yes, our policy is to first serve our civil purpose and then help DOJ." (page 57, lines 17-18, NRC Chairman Pallidino).

On March 1, 1988, the NRC provided clarification (NRC NUDOCS accession number 8903100082) regarding the October 8, 1987 testimony of Benjamin B. Hayes, Director, OI, before the Subcommittee on Nuclear Regulation. Hayes indicated "I was also referring to at least three **important authorities** given to Inspectors General, but **currently not given to OI**. These are: (1) the authority of the Director, OI, to appoint, direct, and supervise all subordinate OI personnel, (2) **statutory authority to conduct criminal investigations,**" Hayes was well aware that OI, and the NRC, lacked criminal investigative authority.

That OI lacks statutory authority to perform criminal investigations is known to the Commission; it is not an oversight. Nor is it something which the Commission planned to change. Per a letter from then Chairman Lando W. Zech to Manuel Lujan, of the House of Representatives Subcommittee on Energy and the Environment, Committee on Interior and Insular Affairs, on August 3, 1988 (NRC NUDOCS accession # 8808250031, microfilm address 46647-033): "**The Commission does not believe that a grant of authority to OI to conduct criminal investigations would enhance our ability to protect public health and safety or the government's ability to prosecute criminal violations of the Atomic Energy Act.** The granting of such authority is unnecessary to fill any gap in existing civil and criminal enforcement powers and would merely duplicate existing authority vested in the Department of Justice (DOJ). Under the Atomic Energy Act, the Commission has broad investigative powers that the Commission has authorized OI to exercise in resolving allegations of wrongdoing in activities regulated by the NRC. **Evidence gathered by OI may provide the basis for civil enforcement action as well as reveal possible criminal wrongdoing.** In the latter case, NRC, through OI, refers possible criminal violations to DOJ for its review. DOJ may elect to pursue the matter further using its investigative resources and prosecutorial powers and often requests the assistance of our investigative or technical staff, which we provide. The Commission believes this arrangement has worked well. To expand OI's role by granting it independent criminal investigative authority would unnecessarily complicate civil investigative matters without any appreciable improvement in the government's ability to investigate or prosecute criminal acts. For example, exercise of criminal authority by OI would trigger certain procedural rights (such as Miranda warnings), might require separation of the civil and criminal investigative staff, or could cause delays in civil investigations necessary to resolve public safety issues. The Commission believes the existing scheme of parallel investigative powers in the NRC and DOJ better serves our mutual interest in effective civil and criminal law enforcement."

2. OI personnel perform an extremely low percentage of investigations which could be considered as criminal. OI investigations pertain to violations of 10 Code of Federal Regulations (10 CFR) rather than federal criminal law. While willful violation of certain sections of 10 CFR can have criminal implications, such cases are a very small percentage of the investigative caseloads, and OI findings are provided to DOJ for criminal investigation. Contact with criminals is minimal, at most. Most work is performed in a non-rigorous office setting, performing interviews (with a court reporter to do the transcribing) and document reviews.

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3. OI positions do not meet the qualification requirements for the 1811 series. They lack arrest responsibilities, authority to carry firearms or other weapons, do not perform undercover work, do not execute search or seizure warrants, are not exposed to hazardous conditions nor inclement weather. They clearly meet the series 1801 or 1810 classification and qualification criteria.

How Did This Occur?

The original classification for NRC investigators was series 1810 (1970s-1982). There were several NRC investigative personnel, mostly former Naval Investigative Services, Drug Enforcement Agency and Alcohol, Tobacco and Firearms personnel, who wanted the retirement and premium pay benefits they had in their previous positions, even though this was not justified by the work at NRC. Several knowledgeable senior NRC managers were strongly against changing the classification to series 1811. Peter E. Baci (and Edward C. Gilbert, possibly others) were rumored to have filed a grievance to make their classification 1811, when only W. Ward was so classified. (See "What Did the NRC Tell the Office of Personnel Management?")

The headquarters unit involved with investigations did some very unusual and highly questionable things. At least one individual, Len Williamson, was made an 1811 when he came on with the agency from the Naval Investigative Service in December 1979 (NUDOCS accession # 8002060606), even though the position was not so classified. I have paperwork dated September 7, 1980 incorrectly indicating that William J. Ward was my supervisor, and my classification had changed to series 1811. James G. Keppler, then Region III Regional Administrator, and others found out about this change, and he changed his employees, including me, back to 1810 series on November 30, 1980. The discussion raged, and just before OI was created, there was supposed to be a "desk audit" to determine if the series 1811 classification was supportable. When OI was created, in July 1982, this "desk audit" did not occur. The 1811 series classification was then deliberately put in place. Roger Fortuna and OI Director James Fitzgerald subsequently advised me that the 1811 classification was for reason of easily hiring experienced investigators, and I advised them (7/82) that this was not the purpose of a job classification, to no avail.

When OI went before the Commission and stated that they would conduct criminal investigations, the Commission balked. OI management then scoured the dictionary and came up with the term "wrongdoing" to define the kind of investigation they would pursue. This somewhat vague term was then used in place of the word "criminal" whenever describing OI investigations. More properly, a criminal investigation looks at indications of "criminal wrongdoing."

Roget's II: The New Thesaurus, Third Edition. 1995: wrongdoing: NOUN: 1. A wicked act or wicked behavior: crime, devilry, diablerie, evil, evildoing, immorality, iniquity, misdeed, offense, peccancy, sin, wickedness, wrong. 2. Improper, often rude behavior: horseplay, misbehavior, misconduct, misdoing, naughtiness.

It was, and is well known within OI that the series 1811 classification would not stand the light of day under any kind of objective review. OI investigative duties simply do not measure up to a standard which takes into account your arrest record during the period you are so classified, and the stress of the position. The former RIII OI Field Office Director, Eugene T. Pawlik, once stated that "NRC is the best-kept secret on the 1811 circuit!"

What did the NRC tell the Office of Personnel Management ?

Headquarters personnel first sought to have their positions classified as deserving of law enforcement officer retirement by a letter to the Civil Service Commission on September 9, 1975, indicating that a review of Federal Personnel Manual 831-41 (December 27, 1974) and a substantial in-house review justified this. A subsequent in-house memo from Dudley Thompson to Gary Davidson on June 26, 1979 sought to have two individuals, William J. Ward, and Peter E. Baci classified in the 1811 series. On November 4, 1979, the Acting Chief of OPM's Benefits

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Policy Staff, Mr. Kenneth H. Glass, advised via a letter that the headquarters Executive Office for Operations Support (XOOS) OI investigator (only!) position, held by William J. Ward, was covered under 5 USC 8336(c) (law enforcement retirement). Ward needed other positions in OI similarly classified, to support his classification. A December 23, 1983 letter from Ben B. Hayes to Paul E. Bird, asked for review of all OI investigator positions for consistency with 5 U.S.C. 8331(20).

A letter dated April 11, 1984 from Paul E. Bird to OPM provided answers to several OPM questions. Answer number three addressed the estimated 40-50% percentage of time OI personnel were involved in criminal investigations. **OPM requested a "breakdown of all types of investigations performed by your investigators (criminal and non-criminal) and a comparison of the time (by percentage) devoted to each type of investigation."** **The breakdown was not provided; the answer provided was "virtually all OI investigations involve ostensible criminal violations."** A discussion of crimes related to NRC regulations was included, including a reference to conspiracy and mail fraud! The answer to the primary question was that "all of the incumbents' time is spent on investigations; however, 40 to 50 percent of their time is spent in the field."

Letters were sent to OPM, asking to have the investigator positions as they existed in the previous NRC Office of Inspection and Enforcement qualify for the 1811 series. I personally held such a position for five years, and had been told it did not qualify as 1811 experience. On September 10, 1985, OPM requested additional information regarding the percentage of time the incumbents spend conducting investigations of violations of the criminal codes for these positions. The patently false answer, again was "All of the incumbents' time is spent on these types of investigations."

A letter to OPM on December 24, 1986 erroneously indicated that the OI 1811-9 position involved investigations of fraud against the government, theft of government property, conflicts of interest and bribery!

On June 21, 1988 The NRC advised OPM a review of Federal Personnel Manual (FPM) Bulletin 842-3 had been performed, and the NRC certified that the positions of OI investigators met the "rigorous" definition contained in the FPM. FPM Bulletin 842-3, "Interim Regulations on Air Traffic Controllers, Law Enforcement Officers, and Firefighters Under the Federal Employees Retirement System," was issued on February 9, 1987. The bulletin indicates that a "Rigorous Position" means a position "the duties of which are so rigorous that employment opportunities are required to be limited to young and physically vigorous individuals..." The NRC letter supported this decision by indicating that applicants would be under 35 years, and "every investigator is required to undergo a pre-employment medical examination and an annual examination thereafter." **No minimum physical criteria were provided (none were put in place), and it was not stated that the individual had to "pass" the examination.**

In general, almost all of the communications between the NRC and the Civil Service Commission or Office of Personnel Management on the subject of the 1811 classification and law enforcement retirement contained vague, erroneous, or misleading and false information. This led to an extended 8-year series of letters and responses. None of the above letters indicated that NRC lacked criminal investigative authority, or that NRC investigators did not have arrest authority, carry weapons, issue Miranda warnings, or work under strenuous conditions. Letters from NRC to OPM fraudulently indicated high percentages of criminal investigations, or investigations involving "matters of potential criminality covering a wide spectrum of violations."

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On January 22, 1999 the NRC advised OPM that it had updated OI position descriptions. Attached was an "Evaluation Statement" dated October 28, 1998, two revised position descriptions, and a selection of previous correspondence between OPM and the NRC. The evaluation statement notes, for the first time, that OI investigators have not "been deputized to make arrests or carry firearms." This has been true since July, 1982, and earlier.

The attached position descriptions (not the evaluation) noted, also for the first time, that **"much of the work is performed in an office setting."** This statement indicates that the previous certifications that the positions met the definition of "rigorous" were incorrect, at best.

The Evaluation Statement references the appropriate 1972 grade-level guide. However, portions of that guide also describe the "Distinctions Between General And Criminal Investigating Occupations," indicating that **"most criminal investigators must be skillful in such activities as: Maintaining surveillances; Performing undercover work; Making arrests; Taking part in raids."** This, and other information I provided, was not discussed. The position qualifications were likewise not discussed. Statements concerning the various techniques OI investigators might use are included, without reference to the percentage of time the positions predominantly involve these actions. In some cases, such as "using polygraphs," these appear to be extremely infrequently performed tasks. The criteria developed through case law were absent.

What Does OI (Predominantly) Do?

Predominant, or primary duties are those 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. In general, if an employee spends an average of at least fifty percent of their time performing a duty or group of duties, they are primary duties. A recent (June 2001) report by the NRC Discrimination Task Force stated that 44% of the OI caseload is discrimination cases.

Predominantly, allegations or concerns come to the NRC regional technical staff, to either inspectors or the regional Allegation Coordination Staff. Per a detailed procedure, allegations are documented, reviewed by members of an Allegation Review Board, and assigned as deemed appropriate. Allegations meeting certain criteria, such as possible deliberate violations of the regulations in 10 Code of Federal Regulations (10 CFR), are referred to OI. Some willful violations of portions of the regulations in 10 CFR have associated criminal penalties, but such criminal penalties are imposed extremely rarely. Per agreement, the possible violation(s) of 10 CFR are provided to OI personnel, who may not be conversant with 10 CFR.

OI assigns the case to an investigator. The investigator may confer with the technical staff, and typically travels to interview the alleege with a court reporter present to generate a transcript of the interview. Interviewees are not under arrest or restraint, and may have a lawyer present. Such interviews seldom approach the rigor associated with the term "interrogation." A trip to another location may be made, where other interviews and document reviews are conducted. The investigator may visit a power reactor site, but is not qualified (site access training) for unfettered site access, and will go into the plant itself on an extremely infrequent basis. Most investigators are also not engineers, so complex technical issues are not normally the subject of investigations.

The investigator will write a report summarizing aspects of the various interviews and document analyses, and present a conclusion. The report is often provided to the Department of Justice

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(DOJ) for review. A very low percentage of OI reports are accepted for DOJ action. Those that are accepted normally receive DOJ criminal investigation in the form of a Grand Jury Investigation, or investigation by the Federal Bureau of Investigation. The report is also provided to the regional and Headquarters staff for review, and a determination as to whether the staff finds the report's conclusions defensible. A small but significant number of reports have not been supported following the staffs' review.

There are numerous variations on this theme. The OI investigator may obtain documentation of an investigation conducted by another organization; activist groups may be involved in support of an alleege, and be contacted; some technical issues may be involved which require staff review, etc..

In extremely rare cases, the OI investigator may provide assistance to the DOJ in its review or investigation, and may provide testimony in court or before a Grand Jury. In vanishingly rare cases, the investigator may assist in obtaining and executing a search warrant (accompanying the primary law enforcement officers), collecting physical evidence, or take scene photographs. I am not personally aware of OI personnel using polygraphs, obtaining search warrants (themselves), serving Grand Jury subpoenas, or serving NRC subpoenas.

OI has been in existence for almost twenty years. Years of data could be utilized to determine how often OI personnel perform certain actions. As an example, in the last fifteen years it has been unnecessary for OI investigators to be deputized, to carry weapons, or have physical performance standards. How many total OI investigations have been performed, and how many of these have been accepted by the DOJ for criminal investigation? How many have required OI testimony? How many of the total cases have been investigated by the DOJ and successfully prosecuted (an individual convicted of violating the criminal laws of the United States)?

EXCERPT FROM NRC ANNUAL REPORT FY 1996

Of the 240 investigations closed in FY 1996, 66 cases were referred to the DOJ for prosecutorial review. During FY 1996, OI supported seven Federal grand juries.

EXCERPT FROM NRC ANNUAL REPORT FY 1997

Of the 238 cases closed, 72 cases were referred to the Department of Justice (DOJ) for prosecutorial review. During FY 1997, OI supported five Federal grand juries...

EXCERPT FROM NRC ANNUAL REPORT FY 1998

Of the 194 investigations closed in FY 1998, 53 cases were referred to DOJ for prosecutorial review. During FY 1998, OI supported two Federal grand juries.

Using the chart following, a general analysis can be made. This analysis takes a "leap of faith", and assumes that OI cases referred to the DOJ for "prosecutorial review" are potential criminal cases, and that those accepted for DOJ criminal investigation and prosecution are criminal cases.

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Further assuming that DOJ accepts 30% of the cases referred (higher than 23% estimated), then the OI criminal caseload is typically 5-6% of the total caseload. Conviction percentages are estimated to be 2.3% of the total caseload per data as of 10/10/89. Note that during the timeframe of 1982-1986, when OI personnel were in the process of obtaining criminal investigator classifications, the percentage of referrals was especially low.

FROM DATA IN THE NRC ANNUAL REPORTS

| YEAR | OI CASES CLOSED | OI CASES TO DOJ FOR REVIEW* | PERCENTAGE OF TOTAL CLOSED (%) |
|--------------------|-----------------|-----------------------------|--------------------------------|
| 1998 | 194 | 53 | 27.31% |
| 1997 | 238 | 72 | 30.25% |
| 1996 | 240 | 66 | 27.50% |
| 1995 | 259 | 42 | 16.22% |
| 1994 | 256 | 23 | 8.98% |
| 1993** | 216 | 26 | 12.08% |
| 1992 | 119 | 19 | 16.00% |
| 1991 | 65 | 18 | 27.69% |
| 1990 | 119 | 28 | 23.53% |
| 1989 | 88 | 28 | 31.82% maximum |
| 1988 | 107 | 28 | 26.17% |
| 1987 | 78 | 19 | 24.36% |
| 1986 | 141 | 11 | 7.80% |
| 1982-85*** | 581 | 36 | 6.20% MINIMUM |
| <u>1982-1998</u> | <u>2701</u> | <u>469*</u> | <u>17.36%</u> |
| GRAND TOTAL | | | |

*Does not mean accepted by DOJ; that data was not included in NRC Annual Reports.

**OI referral procedures changed, some "cases" documented telephone contacts.

***Timeframe of many submittals to OPM, claiming 100% criminal investigations.

A letter of February 2, 1987, from M. Winkle, OPM, to Nate Benson, NRC, clearly described OPM's "primary duty" criteria for general coverage under 5. U.S. C. 8336 (c)(1) law enforcement benefits. "In general, if an employee spends an average of at least 50% of his or her time performing a duty or group of duties, they are his or her primary duties."

In the same letter, responding to a December 9, 1986 letter from NRC, OPM further advised that "you informed us that 40% of the incumbent's time is spent managing or conducting criminal investigations, and that approximately 60% of the incumbent's time is spent investigating other irregularities in the administration of Commission programs/activities and inspecting activities within the commission." "Therefore, since the majority of the incumbent's time will be spent investigating non-criminal matters, general coverage for this position is denied."

NRC appealed the decision in the above letter on February 2, 1987. By letter of June 29, 1987, the OPM decision denying coverage for OIA personnel was sustained. OPM expected an OI criminal investigator position to involve at least 50% criminal investigations, and this was **never true**.

So What?

Criminal investigations involve unusual physical hazards for the investigator, deriving from frequent contacts with criminals and suspected criminals and their desire to avoid criminal prosecution. In the *Bingaman v. Department of Treasury* (1997) decision, the court approved of certain factors found by the MSPB to denote a Law Enforcement Officer: (1) Has frequent direct contact with criminal suspects; (2) is authorized to carry a firearm; (3) interrogates witnesses and suspects, giving Miranda warnings when appropriate; (4) works for long periods without a break; (5) is on call 24 hours a day; and (6) is required to maintain a level of physical fitness. OI personnel probably meet none of these factors (are they issued pagers so that they can meet the on-call 24 hours a day criteria?).

If NRC can show that OI Investigators' duties, at times and as needed, do include investigation of individuals suspected or convicted of offenses against the criminal laws of the United States, it is extremely unlikely they can show by preponderant evidence that these are the primary duties of their positions, as required by 5 U.S.C. 8401(17)(A)(i)(I). *Bingaman*, (1997) 127 F.3d at 1434.

NRC also is highly unlikely to show that the duties of OI Investigators positions are "sufficiently rigorous that employment opportunities should be limited to young and physically vigorous individuals." Although OI Investigators must undergo an annual physical examination, they are not required to maintain a particular level of physical fitness by, for example, passing a physical fitness stress test (*Ferrier v. Office of Personnel Management*, 66 M.S.P.R. 241, 245(1995) (the appellant had to pass a five-event Physical Fitness Battery).

What Has Been the Result of the Misclassification?

The result of the misclassification was that OI investigative personnel were eligible for otherwise unavailable **early retirement** and **premium pay**. Public Law 80-879 (7/2/48) extended 20 year retirements to officers and employees whose duties "are primarily the investigation, apprehension, or detention of persons suspected or convicted of offenses against the criminal laws of the United States." Under the Office of Personnel Management guidelines, federal employees who believe a period of their service entitles them to the law enforcement retirement provisions can request a determination that their service is creditable. According to OPM guidelines, "the employee bears the burden of proof with respect to credit under the special provisions covering law enforcement officers..." The guidelines further state that "For law enforcement officers [this proof] includes a list of the provisions of Federal criminal law the incumbent was responsible for enforcing and the arrests made." OI personnel could not possibly meet this test, lacking both federal criminal laws enforced and records of arrests made.

Criminal investigators work both scheduled and unscheduled overtime. This often resulted in investigators working long and unusual hours. 140 Cong. Rec. S15266-01 (1994) (Statement of Sen. DeConcini). In addition, they are required to be on call for certain periods each month. Historically, criminal investigators received overtime compensation of one and one-half times their basic hourly rate for both scheduled and unscheduled overtime hours worked, see 5 U.S.C. 5542(a), but received no compensation for the time they were on call.

5 CFR 550.154 provides information as to Administratively Uncontrollable Overtime (AUO) payments. AUO pay is determined as a percentage, not less than 10 percent nor more than 25 percent, of an employee's rate of basic pay fixed by law or administrative action for the position held by the employee, including any applicable special pay adjustment for law enforcement officers

under section 404 of the Federal Employees Pay Comparability Act of 1990 (Pub. L. 101-509), locality-based comparability payment under 5 U.S.C. 5304, or continued rate adjustment under subpart G of 5 CFR part 531, before any deductions and exclusive of additional pay of any other kind. (See 5 CFR 550.151.)

The Law Enforcement Availability Pay Act of 1994 (LEAP), Pub.L. 103-329, 633 (Sept. 30, 1994) was codified at 5 U.S.C. 5542(d) & 5545a. Congress enacted LEAP to establish a uniform system of compensation for the excessive and unusual hours worked by federal criminal investigators. 140 Cong. Rec. S15266-01 (1994) (Statement of Sen. DeConcini). LEAP provided availability pay for criminal investigators who met eligibility requirements based on an annual minimum average of AUO hours worked. 5 U.S.C. 5545a(d). This availability pay was, in effect, a 25% increase in the basic pay of each qualifying criminal investigator.

Availability pay was primarily intended to be in lieu of premium pay for unscheduled overtime hours. 5 U.S.C. 5545a(c). Despite the suggestion of the designation "availability," it was not solely intended to compensate for on-call time. From the government's perspective, availability pay was designed to gain control over AUO while at the same time recognizing investigators' proper claim for some compensation for the extensive on-call time required of them. The balance was struck by providing a 25% pay increase (over each qualifying investigator's basic pay, including locality pay) to compensate for (1) all on-call time, (2) all unscheduled overtime, and (3) the first two hours of scheduled overtime during a day in the investigator's regular work-week. Thus, after enactment of LEAP, the only premium pay for which the criminal investigators were eligible with respect to a regular work-day was for overtime hours (1) scheduled in advance of the work-week and (2) in excess of ten hours of work. 5 U.S.C. 5542(d). Availability pay was intended to replace AUO pay. 5 U.S.C. 5545a(c). A criminal investigator who is entitled to receive availability pay may not receive AUO pay (5 U.S.C. 5545a(g)).

Per a memorandum from Paul Bird, dated November 3, 1994, OPM had not published implementing regulations for availability pay, but it was to be provided to OI personnel: "All employees on the list are already receiving 25 percent Administratively Uncontrollable Overtime except for those listed below. Nonetheless, these employees [those listed below] also should be paid the 25 percent availability pay." Listed were four individuals.

Each criminal investigator is paid availability pay as provided under section [i.e., 5 U.S.C. 5545a]. Availability pay shall be paid to ensure the availability of the investigator for unscheduled duty. ... Availability pay provided to a criminal investigator for such unscheduled duty shall be paid instead of premium pay provided by ... [5 U.S.C. 5542(a)], except premium pay for regularly scheduled overtime work as provided under [5 U.S.C.] section 5542, night duty, Sunday duty, and holiday duty. During the regular work-week, the only overtime pay criminal investigators are entitled to accrue is for regularly scheduled overtime for work in excess of ten hours per day on a regular work-day 5 U.S.C. 5542(d)(1)(a).

Pursuant to LEAP, such overtime was regularly scheduled overtime, the first two hours of which (on a regular work-day) were compensated by availability pay and the second two hours of which were covered by premium pay under 5 U.S.C. 5542(a). 5 U.S.C. 5542(d)(1)(A) & 5545a(c). Title 5 U.S.C. 5542(d), added by LEAP, provides that, for one receiving availability pay, there shall be no additional compensation for the first two hours of scheduled overtime on a regular workday. **It is my understanding that OI personnel count the first two hours at home as the time when they are "available."** Call-ins are extremely infrequent.

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In applying subsection (a) of this section [providing premium pay for overtime] with respect to any criminal investigator who is paid availability pay under [5 U.S.C.] section 5545a - (1) such investigator shall be compensated under such subsection (a), at the rates there provided, for overtime work which is scheduled in advance of the administrative workweek - (A) in excess of 10 hours on a day during such investigator's basic 40 hour workweek; or (B) on a day outside such investigator's basic 40 hour workweek; and (2) such investigator shall be compensated for all other overtime work under section 5545a [providing for availability pay].5 U.S.C. 5542(d).

The effect of this LEAP provision on computation of regularly scheduled overtime is that each criminal investigators receiving availability pay may be required to work two extra hours during each regular work-day (up to ten extra hours a week) without additional compensation. Congress intended this result in partial exchange for the criminal investigator receiving a guaranteed 25% pay increase. 140 Cong. Rec. S15266-01 (1994, Statement of Sen. DeConcini). Congress foresaw the guarantee of a 25% salary increase for all eligible criminal investigators and uniform application of additional compensation as the best way to maximize cost savings and investigative efforts in the field.

OI investigative personnel receive 25% availability pay. The 25% "availability pay" is included in the OI Investigators basic pay, and therefore raises the total considered for Thrift Savings Plan purposes and the "high three" salary years utilized to determine retirement pay. A calculation of overpayments conducted without this consideration indicated that well over \$640,000 was overpaid each year. Assumedly, the total amount of AUO (1982-2000?) or availability pay (post 1995-2002) received by OI personnel over the years amounts to millions of dollars. Something like \$14,000,000 is involved here.

The impact of series 1811 misclassification has been that OI investigative personnel have obtained the benefits of early retirement and premium pay during 1981-2002 without performing in a position which merits such benefits. There is evidence that those involved with the misclassification were aware that the classification was unsupportable, and that investigators who came from other criminal investigative agencies were well aware that they were misclassified.

Why the "Concern"?

The question has been asked of me several times, "Why the concern over the Office of Investigations 1811 classification?"(usually by those not wanting to address the issues).

I began with the NRC in January 1976, as an Investigation Specialist, series 1810, grade GS-12, eventually progressing to GS-14 over the years. I was totally unaware of any headquarters organization until 1981. When the proposal of investigators going to the 1811 series was initiated, I was not in favor of it for various reasons, including my view that we were not doing criminal investigations. The headquarters group, William J. Ward, Peter E. Baci, Edward Gilbert, and Roger Fortuna strongly wanted the classification. I (and other Region III personnel) were not considered "team players" as a result. Only recently have I found, through a FOIA request, that they had begun their quest for the 1811 classification years before.

When OI was created in 1982, I became the Acting Director, RIII OI Field Office. The position was advertised, and all acting field office directors had to apply for their positions. The OI field office director (GS-14) position was advertised as series 1811 (only). As I had no time as a series 1811,

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and with no consideration was given to my six years as an investigator for the NRC as an 1810, I was not an "A" candidate for the position. Instead, Mr. Eugene T. Pawlik, then part of the Drug Enforcement's FOIA branch, was chosen. When he arrived in RIII, it was clear that a part of his mission was to entice the former regional investigators (myself, Charles Weil, Robert Burton) to find other employment. In time, he succeeded.

I returned to work for RIII, first in Technical Support, then in Emergency Preparedness and Incident Response. I eventually got over my early bitterness and largely either forgot about or ignored OI personnel. The retirement of Roger Fortuna, Eugene T. Pawlik, and a visit by the NRC Inspector General brought back old memories, and I again asked questions regarding the basis for the 1811 classification.

One of the things which recently came to light through FOIA results was that the OI headquarters group later successfully petitioned OPM to determine that the old positions in Inspection and Enforcement (my old job, for example) also qualified for 1811 tenure calculation.

NRC Response to This Concern

On February 11, 1988, I sent an early version of this concern to Victor Stello, Executive Director for Operations. I later sent it to Chairman Selin. There was no response.

On August 6, 1997, I first E-mailed a simple question to NRC Inspector General and Human Resources personnel regarding classification of Office of Investigations personnel as series 1811 (Criminal Investigator) versus series 1810 (Civil Investigator). With some encouragement (an E-mail to the Chairman's staff), Human Resources personnel responded to my question. Their response was that they do not base "classification of positions into the 1811 series on arrest authority, the carrying of weapons or degree of hazard." Knowing this to be incorrect, I began to research series 1811 classification information on the agency document control system and the Internet, finding a wealth of information.

I prepared a comprehensive "concern package" of Office of Personnel Management, Merit System Protection Board, General Accounting Office, NRC documents, appeals court decision, and my own recollections. The package conclusively indicates that the investigators in the NRC Office of Investigations are misclassified as being in the 1811 series. As such, they unnecessarily receive 25% premium pay and early retirement benefits. The 25% premium pay also counts toward higher retirement, as their "high three" salary is higher. A conservative estimate indicates that over \$640,000 per year was overpaid.

I sent this package, over the year, to the NRC Inspector General, NRC Office of Human Resources, NRC Office of Investigations, NRC Commissioners, NRC Chairman, National Treasury Employees Union, NRC budget personnel, NRC Labor Management Partnership Committee, General Accounting Office, the Office of Personnel Management, the OPM Retirement Inspection Branch, the Federal Law Enforcement Officers Association, NEI, UCS, Inside NRC, Federal Times, Vice President Gore, and members of Several Congressional committees. An Employee Suggestion and FOIA request 98-361 were also filed.

On August 20, 1998, NRC Commissioner McGaffigan received my concern and responded that he had contacted the NRC Inspector General, and passed my concern on to the Senate Governmental Affairs Committee. I never heard from the Governmental Affairs Committee.

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GAO and congressional staffs acknowledged the concern package had been received. No response was received from the NRC Inspector General (IG) to any of my communications during 8/97-10/98. As a result, I filed a complaint with the President's Council on Integrity and Efficiency, the oversight body for the Inspector General program. On October 13, 1998, they advised they did not review the IG's "discretionary authority to conduct an investigation."

In mid-October, 1998, Illinois Senator Richard Durbin sent my concern package to the Chairman. On October 26, 1998, I received the first indication (voice mail from IG personnel) that the IG was addressing my concern. No action had been taken for over a year; the NRC had unnecessarily paid several hundred thousand dollars to Office of Investigations personnel during this period. The assigned IG Investigator advised that the investigative phase of his review was completed in December, 1998, and report writing had begun. The IG investigator did not advise me of other related actions, such as the October, 1998 meeting between OI and the Office of Human Resources. The IG investigator left the NRC in March, 1999 without advising me.

My FOIA request (NRC and OPM documents) was provided and I obtained copies of documents of interest. When the IG Investigator would not advise me whether my concern had been sent to OPM, I mailed, E-mailed, and faxed my concern package to OPM, and received indication that the Office of Merit Systems Oversight would review the issue. I subsequently contacted the House Subcommittee on the Civil Service, which took an interest and discussed the status of my issues with the General Accounting Office (GAO) and OPM.

Mr. Stephen Perloff, consultant, prepared a report entitled "Report to the Nuclear Regulatory Commission Office of the Inspector General Regarding the Classification of Positions to GG-1811, Criminal Investigator Series, dated September, 1999. This report was utilized as an attachment to a memorandum to then Chairman Greta Dicus, dated October 25, 1999, entitled "Alleged Improper Classification of Office of Investigations (OI) Investigators in GG-1811 Series (Case File 99-061)." Both documents indicate that a review of my concerns did not validate my position that the OI investigators were misclassified.

However, a review of the documents revealed that most of the information I had provided, such as detailed discussion of the regulations and their bases, the memorandum dated October 15, 1982 in which the NRC Deputy General Counsel advised that, lacking statutory authority, NRC personnel should not conduct criminal investigations under any circumstances, the percentage of times OI investigators actually perform certain functions, OI criminal caseload statistics, discussion of several internal NRC memorandum, testimony of agency personnel, discussion of case law and Merit Systems Protection Board decisions, and the detailed chronology of events had not been addressed. The OIG review was significantly inadequate. A FOIA request revealed that other records referenced in this document had not been reviewed. A detailed chronology, based on data developed by myself and the documents contained in the NRC Inspector General case file, is attached as Attachment 5.

What Now?

Once it is determined that the series 1811 classification is not and never was appropriate, several things will need to be done. First, the classification will need to be changed as appropriate, most likely to the 1801 or 1810 classification. Then, a determination will need to be made if the investigators have been overpaid as a result of the misclassification (25% "availability pay"). Actual overtime worked may reduce this amount. If overpaid, the amount of overpayment should

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be determined and a decision made as to how much of the figure will be "forgiven" by the agency. Normally, federal employees who are found to have been substantially overpaid are required to return overpayments.

The Office of Personnel Management will need to decide if the time spent as an NRC 1811, in either the Office of Inspection and Enforcement or the subsequent Office of Investigations, should be acceptable for law enforcement retirement for current and past employees. Last, a similar determination will have to be made regarding NRC personnel who have already retired, based upon law enforcement time with the NRC. Some of these individuals went to other agencies, but will/have utilized time with the NRC to complete 20 years of law enforcement service prior to retirement. Law enforcement retirement credits for individuals should be reviewed.

They Knew!

Some individuals may claim that they were unaware that the position did not meet series 1811 requirements during their employment with the NRC. However, individuals coming from other government agencies where they had been classified as series 1811 very rapidly divined that the NRC position was different when they were not assigned firearms nor handcuffs. It was well known within OI that the series 1811 classification would not stand the light of day. The former RIII OI Field Office Director, Eugene T. Pawlik, once stated that "NRC is the best-kept secret on the 1811 circuit!" Translation: you get the benefits without the hazards at NRC! They knew!

What About the Chronology?

The Chronology portrays an interesting sequence of events. William J. Ward first succeeds in having his position classified as a primary 1811 position on November 4, 1979 although it should be a secondary position. This was done by indicating that he, himself, did investigations. To my knowledge, William J. Ward never performed investigations himself. The word at NRC headquarters was "Mr. Ward does not travel." Do any reports list him as the investigator? Coverage for others would wait until May 1984 (the rumors of grievances being filed in this timeframe were undoubtedly true)

Then, at various times, the various NRC senior management and legal groups clearly indicate NRC does not have the authority to do, and does not do, criminal investigations. However, the efforts to get the OI positions approved as 1811s by OPM continued, as though OI was ignoring NRC management, and the staff in Human Resources was uninformed and unconcerned that the statements made to OPM were not clear and detailed.

Of Interest, even individuals in OIA and OI generated letters and memoranda which describe NRC investigations as civil investigations, even postponing such civil investigations when requested by Department of Justice (DOJ) personnel.

In summary, it appears that all the parties, with the possible exception of the Office of Human Resources, knew that NRC performed civil investigations which sometimes developed indications of criminal actions. The investigations which indicated likely criminality were referred to the DOJ for review, not even directly, but through the Office of Inspector and Auditor. Those accepted by the DOJ for action were investigated and often prosecuted. The criminal investigation was performed by the DOJ, sometimes (a very small percentage of all cases) with assistance from OI.

Testimony

The September 9, 1999 testimony of Mr. John Vail, of the Department of Justice (DOJ), before the House of Representatives Committee on Government Reform, Subcommittee on the Civil Service, is attached as an Attachment 31. Mr. Vail discusses law enforcement benefit requests by DOJ personnel, and the criteria the DOJ utilizes to determine "front-line" law enforcement positions which deserve the benefits of law enforcement retirement.

Federal Statistics

The U. S. Department of Justice, Office of Justice Programs, Bureau of Justice Statistics, has published statistics regarding Federal Law Enforcement Officers, 1998 (March, 2000), 1996, and 1994. For the purpose of this biennial census, "Federal law enforcement officer" is defined as any full-time Federal employee who is authorized to carry a firearm and make arrests." DOJ personnel advised that "Personnel from the Nuclear Regulatory Commission, Office of Investigations, do not have the authority to make arrests and therefore were not included in our 1998 study and are not included in our 2000 study, currently ongoing."

Attachments:

1. Memorandum, Malsch to Fitzgerald.
2. NRC Commission Briefing on Criminal vs Civil Investigations.
3. Memorandum of Understanding with DOJ.
4. Chronology.
5. OIG report "Alleged Improper Classification of Office of Investigations (OI) Investigators in GG-1811 Series (Case File 99-061).
5. Briefing Comparison with OIG Report.
7. Foster's Comments on OIG report.
8. August 28, 2000 article from "Inside NRC" newsletter.
9. LEO versus Regular Retirement Costs Per Person Per Year, Two Cases.
10. Regional Administrator letter (2/24/1995) regarding law enforcement
11. Names, Addresses, Telephone Numbers, E-mail Addresses.
12. Important Numbers.
13. E-mail Response from Office of Personnel Management.
14. Letter from OPM's Office of Merit System Oversight.
15. Foster's Comments on Attachment 14 (OPM letter).
16. Letter to President's Council on Integrity and Efficiency (PCIE).
17. Response from the PCIE.
18. Two Responses From Police Employment Dot Com.
19. Regarding Secondary Positions; Regarding Law Enforcement Duties & 6(c)
20. Digest of Significant Classification Decisions and Opinions, Art. 24-01.
21. Department of Labor OIG Report.
22. Killion vs The Dept. of the Treasury.
23. Houck vs The Dept. of the Navy.
24. Townsend vs The Dept. Of Justice (August 1999).
25. Nelson vs Dept. of the Navy, 99-3234 (Fed. Cir. 12/28/1999).
26. Appeals Court Case, 2000.
27. Watson vs Dept. of the Navy (Federal Cir. 08/17/2001).
28. Hall vs U.S. Treasury U.S. Court of Appeals (09/04/2001).
29. Gallagher vs U.S. Treasury, U.S. Court of Appeals (09/05/2001).

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- 30. Street vs. Dept of the Navy, MSPB (01/10/2002).
- 31. Testimony of Mr. John Vail, Department of Justice.
- 32. A Portion of the Testimony of Robert Gallegos.

ATTACHMENT 1

The following retyped document is a memorandum from Martin G. Malsch, NRC Deputy General Counsel, to James A. Fitzgerald, Acting Director, Office of Investigations, dated October 15, 1982. The memorandum is entitled "Request for Legal Research and Opinion."

The memorandum indicates that, on June 25, 1982, prior to the formal creation of the NRC Office of Investigations, Mr. Fitzgerald requested legal opinions on (1) whether the NRC has the authority to conduct criminal investigations, and (2) the obligations and responsibilities of the NRC in accepting stolen items as evidence of alleged violations of NRC regulations. The response was:(retyped section follows)

"As explained more fully below, *we believe (1) that the NRC does not have the authority to conduct criminal investigations* (emphasis added), and (2) that the NRC can legally accept and use stolen items where the NRC was not involved in the original wrongful taking.

(1) NRC And Criminal Investigations

(a) Whether the NRC has the authority to conduct criminal investigations

Section 161 (c) of the Atomic Energy Act, 42 U.S.C. 2201 authorizes the Commission to "make such studies and investigations [and] obtain such information....as the Commission may deem necessary or proper to assist it in exercising any authority provided in this Act, or in the administration or enforcement of this Act or any regulations or orders issued thereunder. Since the Atomic Energy Act contains criminal provisions, section 161 (c) can be read as authorizing the NRC to conduct criminal investigations. However, a more specific provision in the Act should be construed as overriding the more general language in 161 (c). Section 221 (b) of the Atomic Energy Act, 42 U.S.C. 2271, provides that "[t]he Federal Bureau of Investigation of the Department of Justice shall investigate all alleged or suspected criminal violations of this Act." This section by its terms seems to give all criminal investigative authority under the Atomic Energy Act to the Department of Justice, and *it would therefore appear that the NRC does not have the statutory authority to conduct criminal investigations.* (emphasis added)

This conclusion is also supported by case law which holds that courts will not enforce agency subpoenas where those subpoenas are issued solely to aid a criminal investigation (citations follow)(omitted).

(Discussion of a Supreme Court case [LaSalle]) (omitted).

(Discussion of a subpoena in a case [McGovern]). (omitted)

Although neither McGovern nor any other case dealt with the explicit question of whether Congress has granted the NRC the authority to conduct criminal investigations, they do indicate that courts will not read such authority into a statute where it is not explicitly granted. The Atomic Energy Act does not explicitly give the NRC such authority -- indeed the Act should probably be read as depriving NRC of such authority -- and we conclude that a court would most likely conclude that the NRC did not have the authority to conduct an investigation solely for criminal purposes. (emphasis added)

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(b) Legal considerations in conducting criminal investigations

Your memo posited a second part to this question, i.e., whether the NRC should conduct criminal investigations under any circumstances. The simple legal answer to this question is that, since it does not have the statutory authority to do so, it should not. (emphasis added) This answer may not appear so simple as a policy matter, however, if the Department of Justice requests the NRC to conduct such an investigation, as it has in the past. If it should be decided as a policy matter that such investigations should be conducted, there are several legal considerations which should be taken into account.

First, as indicated previously, courts will provide no assistance in such an investigation, e.g., they will not enforce subpoenas issued solely to aid a criminal investigation. See, e.g., United States v. LaSalle National Bank, *supra*.

Second, it is possible that a court in a criminal prosecution would exclude evidence obtained through an administrative investigation where that investigation was conducted solely to obtain evidence for a criminal prosecution. See, e.g., United States v. Lawson, 502 F. Supp. 158 (D. Md. 1980). In Lawson the court excluded evidence obtained under an administrative warrant when the sole purpose of issuing the warrant had been to obtain evidence for use in a criminal proceeding. The court's decision was based on the fact that the standard for obtaining an administrative search warrant is much less stringent than that for obtaining a criminal search warrant.

We believe that courts would exclude evidence obtained in a manner that subverted the normal criminal process, as in Lawson. The result would not be so clearcut, however, where investigators do no more than FBI investigators would do and in no way undermine the normal criminal processes. In that type of case we do not believe that a court would necessarily find the "search" to be unreasonable and violate the fourth amendment. Nonetheless, due to a lack of precedent the possibility of exclusion does remain."

(Remainder of memorandum, dealing with stolen evidence, omitted for brevity.)

ATTACHMENT 2

On April 9, 1984, the full NRC Commission received a Briefing on Criminal versus Civil Investigations (61 pages, NUDOCS Accession number 8404110608, microfilm address 24000-207). Attendees:

Nunzio Palladino, Chairman
 Victor Gilinsky, Commissioner
 Thomas Roberts, Commissioner
 James Asselstine, Commissioner
 Frederick Bernthal, Commissioner
 Samuel Chilk, Commission Secretary

George Messenger, Office of Inspector and Auditor
 Benjamin Hayes, Office of Investigations
 Roger Fortuna, Office of Investigations
 James Murray, Office of the Exec. Legal Director
 James Fitzgerald, Office of the General Counsel
 Martin Malsch, Office of the General Counsel

A draft paper giving OI the authority and responsibility to conduct criminal investigations was the subject of the briefing. The relationship of the agency with the Department of Justice (DOJ) was also discussed. The resulting document was to be utilized in devising a Memorandum Of Understanding (MOU) between the NRC and the DOJ. James Fitzgerald, of the Office of the General Counsel (OGC), was the primary presenter before the Commission.

The Commission strongly objected to and then directed the removal of the term "conduct" from the resulting document. James Fitzgerald indicated that "we believe that the Commission – and OGC has taken this position in the past – that the Commission does not have independent authority to conduct criminal investigations." **The Commission clearly understood that OI did not conduct criminal investigations.**

NRC Chairman Palladino also made the point that even investigatory assists to the DOJ were to be a secondary priority, as the NRC had limited resources, and that the rare "loaning of investigators to the DOJ should involve a written request and receive Commission approval.

This document is clear: The NRC lacks authority to conduct criminal investigations; OI conducts civil investigations; requests from DOJ are so rare that a written request and Commission approval should be required for the diversion of our resources from our civil purpose. The entire Nuclear Regulatory Commission participated in this deliberation and conclusion.

SECY-84-212, "Civil Versus Criminal Investigations" (May 22, 1984, 3 pages, NUDOCS Accession number 8406020214, microfilm address 67351-145) was the result of this Commission Briefing. It specifically refers to OI civil investigations.

Selected Portions, Briefing on Criminal vs Civil Investigations

Pg. 2, lines 7-11, Chairman Palladino: By memorandum dated September 1, 1983, I requested OGC, OIA, and OI to develop a Commission paper addressing NRC's conduct of civil v. criminal investigations for our consideration. The paper was provided to us in December, SECY-83-497, and forms the basis for our discussion today.

Pg. 3, lines 8-13, James Fitzgerald: The paper that you have before you discusses two general areas of concern that had been issues in the investigations area for some time. That is the

authority and responsibility for NRC to conduct criminal investigations and the relationship of the agency with the Department of Justice when the Department has on occasion requested that the Commission stay its investigation or enforcement action until completion of a Department action.

Pg. 4, lines 9-13, James Fitzgerald: The real dividing line between these investigations is the purpose for which the investigation is going to be put. Is it going to be to secure enforcement of our civil regulations or orders, or is it for a criminal enforcement purpose.

Pg. 5, lines 8-11, James Fitzgerald: Now, we believe that the Commission – and OGC has taken this position in the past – that the Commission does not have independent authority to conduct criminal investigations.

Pg. 6, line 25, James Fitzgerald: Well, OIA, OGC, and OI in this paper recommend that the Commission in appropriate circumstance assist the Department of Justice.

Pg. 7, line 3-4, Chairman Palladino: It doesn't say that, does it? I thought it says "conduct."

Pg. 7, lines 5-6, Commissioner Asselstine: The way the options were formulated was "conduct," yes.

Pg. 7, lines 7-8, Chairman Palladino: Yes, "Will conduct investigations," and I have comments on that.

Pg. 7, lines 14-23, Chairman Palladino: Incidentally, you say that an investigation can serve both criminal and civil purposes, or civil and criminal purposes. And yet, on page 3 you do talk about the differences and you mention them earlier, between criminal and civil investigations, at least in the footnote. It seems to me that the procedures regarding criminal safeguards do affect that collecting. You can't do exactly the same thing under our procedures as the FBI could do under theirs.

Pg. 13, lines 22-25, Pg 14, line 1: Chairman Palladino: But I want to point out that on page 3 it says, "Terming the investigation 'civil' means only that there is a valid NRC civil enforcement purpose and, therefore, that criminal safeguards and procedures are not required.

Pg. 16, lines 3-17, Ben Hayes: What I have attempted to do over the last year or so is to provide the Commission and the staff with a thorough, complete investigation that hopefully satisfies our regulatory needs. That is my first objective.

Pg. 16, lines 11-17, Ben Hayes: Upon receiving input from the staff at that point, then we looked at it for potential criminal sanctions. There may or may not be some there. And if we feel as though at least there is a potential, or suspected or – I forgotten the Attorney General's language in that area, but then we refer those particular cases where in our view there may be some criminal sanctions, to the Department for their review.

Pg. 20, lines 5-13, Chairman Palladino: Under the recommendations for guidance you say, "That the Commission authorize OI to state in its negotiations with DOJ that NRC, in appropriate circumstances, will (i) conduct investigations at DOJ's request." My feeling would be that we should say, "(i) assist in the conduct of investigations at DOJ's request."

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Pg. 21, lines 18-25, Pg. 22, line 1: Commissioner Asselstine: Is it realistic or feasible to say, "Look, what we would like to do is get our civil investigation done. At that point we'll tell you that we have completed our investigation. We will identify any potential criminal items that we think might be of interest to you. We will give you our investigation materials and then ask for your judgement about whether we can go ahead or whatever."

Pg. 33, lines 23-25, Pg 34, line 1: Chairman Palladino: I think a policy question we ought to address, and that is the loaning of investigators to the Department of Justice should require Commission approval because it does impact on your limited resources.

Pg. 42, lines 14-22, Commissioner Bernthal: Thirdly, I'm concerned that this policy statement here, which you have softened from "conduct investigations" to "assist in investigations," that may still not quite be the right implication, it seems to me. We may want to make sure that we cooperate in every way necessary with DOJ, but that we not by any policy statement give the implication that we are going to be aggressive or proactive in achieving criminal investigation of objectives. (Emphasis added)

Pg. 46, lines 12-16, James Murray: Its bound to be small, Commissioner Bernthal because what we call "material false statement" is very, very rarely a criminal act. I don't know of any that are criminal acts. They are 10.01 violations, 18 USC 10.01, they are not violations of the Atomic Energy Act.

Pg. 47, lines 21-22, Commissioner Bernthal: ...referrals to the Department of Justice, oddly enough, were to go through OIA which implied going through the Commission.

Pg. 55, lines 8-13, Chairman Palladino: Now wait a minute, I'm going to make the following suggestion, that OGC rewrite the 1 and two recommendations to encompass what you think we have said, such as "assist in the conduct of investigations," requiring "written requests from the Deputy Assistant Attorney General."

Pg. 57, lines 17-18, Chairman Palladino: Yes, our policy is to first serve our civil purposes and then help DOJ.

Pg. 57, lines 19-20, Commissioner Asselstine: Yes, But I'm not sure if there is much difference between "cooperate" and "assist."

Pg. 57, lines 22-24, Commissioner Asselstine: But it's certainly better than "conduct."

(Laughter)

NUREG/BR-0195 Rev. 11/98

ATTACHMENT 3**MOU Between the NRC and DOJ**

This document includes a copy of the Memorandum of Understanding (MOU) between the NRC and the Department of Justice (DOJ) that was published in the Federal Register on December 14, 1988.

53 FR 50317
Published 12/14/88
Effective 11/23/88

I. Purpose:

The Nuclear Regulatory Commission (NRC) and the Department of Justice (DOJ) enter into this agreement 1) to provide for coordination of matters that could lead both to enforcement action by the NRC as well as criminal prosecution by DOJ, and 2) to facilitate the exchange of information relating to matters within their respective jurisdictions. This agreement does not affect the procedures and responsibilities set forth in the April 23, 1979 Memorandum of Understanding between the NRC and the Federal Bureau of Investigation regarding cooperation concerning threats, theft, or sabotage in the U.S. nuclear industry. Similarly, this agreement does not apply to those matters arising from internal investigations conducted by the NRC Office of Inspector and Auditor. (*Added Note: Now the Inspector General*)

This Memorandum of Understanding is not intended to, does not, and may not be relied upon to, create any rights or benefits, substantive or procedural, enforceable at law by a party to litigation with the United States. Nor are any limitations hereby placed on otherwise lawful litigative prerogatives of DOJ.

II. Background:

Under federal statutes, the NRC has the responsibility to protect the radiological health and safety of the public, the public interest, the common defense and security, and the environment (hereinafter collectively referred to as public health and safety), from hazards that might arise from the material and facilities which it regulates. The enforcement program of the NRC is designed to fulfill these responsibilities by ensuring compliance with NRC requirements, obtaining prompt correction of violations and adverse conditions affecting safety, encouraging improvement of licensee performance, and deterring future violations. In contrast, **criminal prosecutions for willful violations of NRC requirements are the responsibility of the DOJ.** Such prosecutions provide an additional tool to assure compliance and to deter future violations. Therefore, it is useful and desirable for the NRC and the DOJ to coordinate to the maximum practicable extent their different responsibilities.

Under the Atomic Energy Act of 1954, as amended, **the NRC has the authority to conduct such investigations as it may deem necessary or proper to assist it in determining whether enforcement or other regulatory action is required under the Act, or any regulations, licenses, or orders issued thereunder.**

Enforcement actions within NRC authority include license revocations, suspensions and modifications, cease and desist orders, civil penalties, and notices of violation. The NRC has the

authority to take such action as it deems necessary to protect the public health and safety, including the authority, when appropriate, to take immediate action.

The Department of Justice has the responsibility to determine whether to institute criminal prosecution for violations of all federal statutes, including the Atomic Energy Act of 1954, as amended. Such violations are typically developed and brought to the attention of DOJ by law enforcement or investigative agencies, such as the Federal Bureau of Investigation, the Postal Inspection Service, and the various Treasury enforcement agencies. Similarly, **suspected criminal violations of the Atomic Energy Act, as amended, or Title 18 of the United States Code may be identified during the course of NRC investigations and referred to DOJ for prosecutive determination.**

Thus, both the NRC and DOJ have authority and responsibility to investigate and take action for certain violations that may arise out of the same factual matters. Although each agency will carry out its statutory responsibilities independently, the agencies agree that the public health and safety would be enhanced by cooperation and timely consultation on proposed enforcement actions where both civil and criminal violations appear to exist, and by the timely exchange of information of mutual interest. As an example, it may be appropriate in some cases for the NRC to stay its hand pending a criminal prosecution. Conversely, in other cases the public health and safety may require immediate NRC action that could impact a potential criminal prosecution. Both agencies recognize that these enforcement decisions are inherently matters of judgment for each agency to decide for itself, with due regard, however, for the views of the other.

III. Areas of Cooperation:

A. DOJ Notification to NRC of Information Concerning Public Health and Safety

Should DOJ learn of or discover health or safety related information concerning a matter within the jurisdiction of the NRC, and not already reasonably known to the NRC, DOJ shall communicate such information to the NRC as soon as practicable, unless such information is determined by DOJ to be grand jury material. See Rule 6(e) of the Federal Rules of Criminal Procedure.

Should DOJ, during grand jury proceedings, discover health or safety related information concerning a matter within the jurisdiction of the NRC, and not already reasonably known to the NRC, which may warrant immediate regulatory action to protect the public health and safety, DOJ promptly will seek a court order, pursuant to the inherent authority of the court to supervise the grand jury, for disclosure of such information to the NRC for use in connection with its safety enforcement responsibilities.

B. NRC Notification to DOJ of Suspected Criminal Violations

If NRC learns of or develops information regarding suspected criminal violations on matters not within the regulatory jurisdiction of the NRC, the NRC will provide the information regarding such suspected criminal violations to the appropriate investigative agency having jurisdiction over the matter.

Should NRC learn of or develop information regarding any suspected criminal violations, including Atomic Energy Act violations, on matters within the regulatory jurisdiction of NRC, it will notify DOJ

in the following manner. With respect to matters not involving special circumstances, as described below, the NRC's Director, Office of Investigations (OI), will formally refer the matter to DOJ for prosecutive determination if, on completion of its investigation, the Director, OI, has determined that sufficient evidence has been developed to support a reasonable suspicion that a criminal violation has occurred. Whenever any of the special circumstances listed below occurs, and the Director, OI, has a reasonable suspicion that a criminal violation has occurred, the Director of OI will promptly notify the DOJ of a matter involving such special circumstance(s), notwithstanding the fact that an investigation has not yet been completed by NRC. The special circumstances involve:

- (1) a matter where death or serious bodily injury is involved;
- (2) a matter under investigation which is likely to generate substantial national news media attention;
- (3) a matter where there is evidence of ongoing activity designed to obstruct the investigation;
- (4) a matter which may require extraordinary investigative measures which require legal assistance from DOJ.

When a matter arises in which the NRC concludes that regulatory action is necessary to protect the public health and safety, or that it is necessary to propose a civil penalty, and the Director, Office of Enforcement (OE), has been informed by the Director, OI, that there is a reasonable suspicion that a criminal violation has occurred, the Director of OE will promptly notify the DOJ of such matter, notwithstanding the fact that an investigation has not yet been completed by NRC. Any action by the NRC is to be coordinated with DOJ as prescribed in Section C. below.

Notification to DOJ will not normally result in cessation of the NRC investigation.

C. Procedure When NRC Regulatory Activities Run Parallel to or May Affect Future DOJ Activity

NRC regulatory activities with respect to matters that have been referred to DOJ for criminal prosecution, or to which the notification provisions of Section B. apply, shall be coordinated as follows:

1. If the NRC concludes at any time that it lacks reasonable assurance that activities authorized by a license are being conducted without endangering the health and safety of the public and the NRC concludes that immediate action is required to protect the public health, safety, or interest, it will proceed with such action as is necessary to abate the immediate problem. If time permits, the NRC shall notify DOJ of its proposed action prior to acting, but, in any event, shall notify DOJ of its action as soon as practicable. This paragraph shall apply only to those situations that do not allow sufficient time for reasonable consultation.
2. If the NRC concludes that regulatory action is necessary in the public interest, other than the actions described in paragraphs 1 and 3 herein, the NRC shall first consult with DOJ concerning its contemplated action. The NRC shall take into account the views and concerns of DOJ and proceed in a manner that accommodates such views and concerns to the fullest extent possible, consistent with the regulatory action required. Such cooperation at the staff level shall include the seeking of a stay, upon DOJ's request, of discovery and hearing rights during the proceeding for a reasonable period of time to accommodate the needs of a criminal investigation or prosecution, provided that DOJ supports such action

with appropriate affidavits or testimony as requested by the presiding officer.

3. If the NRC concludes that it is necessary to propose a civil penalty, it shall notify DOJ of its contemplated action, and **shall defer the initiation of such proceeding until DOJ either concludes its criminal investigation/prosecution or consents to the action**, except that if a statute of limitations bar to a civil penalty proceeding is imminent, the NRC may initiate such proceeding after consultation with DOJ. In such event, the NRC staff shall accommodate the needs of DOJ by seeking a stay, upon DOJ's request and with DOJ support as described in paragraph 2 above, of discovery and hearing rights during the civil penalty proceeding for a reasonable period of time.

D. Time Frame for Notification in Matters Referred to DOJ

1. If, on completion of its investigation, the NRC concludes that civil enforcement action is appropriate, it will notify DOJ of its contemplated action normally within 45 days of its referral to DOJ.

2. DOJ will notify the NRC, normally within 60 days of the referral, of its preliminary decision as to whether a criminal investigation or prosecution is warranted.

E. NRC Assistance to DOJ

The NRC will make reasonable efforts, at DOJ's request, to provide **informal assistance** regarding applicable NRC requirements, technical issues, and factual circumstances. Such assistance should be requested directly from the Director, Office of Investigations, who will forward requests for technical assistance to the Deputy Executive Director for Regional Operations. A request that one or more NRC investigators be assigned to the DOJ investigation or that NRC technical experts be assigned to assist DOJ and the grand jury should be made in writing. Such requests must bear the signature of a United States Attorney or Deputy Assistant Attorney General, as appropriate. These requests will be considered by NRC on a case-by-case basis.

F. Exchange of Information Related to Civil or Criminal Enforcement

Following a DOJ decision not to prosecute a referred case, or at the conclusion of a criminal proceeding, DOJ will provide NRC, upon its request, information not protected from disclosure by Rule 6(e), Fed.R.Crim.P., relevant to the associated civil case. Similarly, NRC will provide information to DOJ, upon its request, on matters being considered by DOJ.

IV. Implementation:

The DOJ official responsible for implementation of the notification responsibilities of this agreement is the Chief, General Litigation and Legal Advice Section, Criminal Division; the NRC official responsible for implementation of the notification responsibilities of this agreement with respect to information regarding suspected criminal violations is the Director, Office of Investigations; the NRC official responsible for the notification responsibilities of this agreement with respect to enforcement action is the Director, Office of Enforcement, or the Assistant General Counsel for Enforcement, as appropriate.

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V. Effective Date:

This agreement is effective when signed by both parties.

Original Signed by
Lando W. Zech, Jr.

Chairman
U.S. Nuclear Regulatory Commission
Date: October 31, 1988

Original Signed by
Edward S. G. Dennis

Assistant Attorney General
Criminal Division
U.S. Department of Justice
Date: 11/23/1988

(Emphasis added)

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ATTACHMENT 4

CHRONOLOGY

- 00/02/72 OPM document - Grade-Level Guides for Classifying Investigator Positions
GS-1810/1811 (30 pgs)
- 11/21/74 Memo to JPS/1/Richard Gillen from Director of Inspections Subj: LAW
ENFORCEMENT RETIREMENT INSPECTIONS DIVISION PERSONNEL re: certain
individuals (may be draft document at that time - handwriting on letter (1 pg)1810/1811 (30
pgs)
- 12/27/74 Federal Personnel Manual 831-41 issued.
- 01/03/75 Memo to Chief Payroll Branch from Raymond Sumser, NASA Subj: CIVIL SERVICE
RETIREMENT: LAW ENFORCEMENT OFFICERS AND FIREFIGHTERS (1 pg)
- 01/17/75 Letter to Bureau of Retirement, US CSC from Calvin Jones, NRC w/attached PD's
(9 pgs)
- 09/09/75 Letter to Bureau of Retirement, Civil Service Commission, from Calvin Jones,
OP w/att PD's. Headquarters personnel first seek law enforcement officer
retirement, indicating this is justified by review of Federal Personnel Manual 831-41,
and "substantial in-house review." (9 pgs)
- 09/19/75 Letter to Calvin Jones from Thomas Tinsley re: acknowledgment letter (2 pgs)
- 01/00/76 J. Foster hired as NRC Region III Investigator, series 1810.
- 02/12/76 Note to Hoisington, Lohr, US Civil Service Commission from Randy Pine, OP, NRC
Subj: ADDITIONAL INFO REQUESTED ON THE COVERAGE OF POSITIONS,
INVESTIGATOR AND SUPERVISORY INVESTIGATOR, NRC UNDER 5 USC 8336(c) (1
pg)
- 06/21/76 Letter to Calvin Jones, OPM from John Bowler NRC, re: incumbents meet
retirement requirements (1 pg)
- 05/09/78 Letter, NRC Chairman Hendrie to Moss, Subcommittee on Oversight and
Investigation. Question 44, "With regard to criminal investigations, it is NRC's
practice and policy that once a determination has been made that a suspected or
alleged criminal violation has substance, referral is made to the Department of
Justice. This referral is made by the Office of Inspector and Auditor after
appropriately informing or consulting with the Office of the General Counsel."
- 06/26/79 Memo, Dudley Thompson to OPM, seeks to have two individuals, William J.
Ward, and Peter E. Baci, classified in the 1811 series.
- 08/06/79 Letter to Doyle, OPM from Paul Bird re: Definition of Law Enforcement Officer (1
pg)

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- 10/26/79 Letter to Craig Pettibone, OPM from George Gower, IE (1 pg)
- 11/04/79** Letter, Acting Chief of OPM's Benefits Policy Staff, approves William J. Ward's headquarters Executive Office for Operations Support investigator position, only, as covered under 5 USC 8336(c).
- 11/14/79 Letter to Paul Bird, NRC from Kenneth Glass Benefits Policy Staff (1 pg)
- 00/00/80 Position Description (PD) for RV I&E possibly draft documents (17 pgs)
- 03/07/80 Letter to William Dircks from Lawrence Lippe, Chief Legal Advice Section Criminal Division (4 pgs)
- 03/07/80 Letter to Sniezek, Director from Lawrence Lippe, Chief Legal Advice Section Criminal Division (4 pgs)
- 04/03/80 **Memo, William J. Ward, IE Senior Investigator, "We are not proposing that IE or anyone else in NRC undertake criminal investigations, per se. We share the OELD view that neither IE nor OIA possesses such authority and that legislative changes would be needed to obtain it."**
- 04/14/80 **Memo, NRC OELD: "NRC investigations involve the gathering of evidence for civil enforcement actions and not criminal actions. "Miranda" warnings, a requirement of criminal procedure, are not normally associated with NRC investigations."**
- 07/23/80 Letter to Baker Moy, OPM from Paul Bird w/Annual Report of the Federal Maritime Commission, Letter of 7/15/80 from Hurney to Paul Bird and PD number 66 From C83 (8 pgs)
- 09/07/80 **Paperwork incorrectly stating William J. Ward was my supervisor, and my classification had changed to series 1811.**
- 11/30/80 James G. Keppler, Region III Administrator, changed his employees back to 1810 series.
- 12/12/80 Letter to Paul Bird from Patricia Lancaster re: retirement for investigators (1 pg)
- 05/26/81 **Letter, Greenspun (DOJ) to J. Cummings (NRC OIA): "The following question has been presented to us by the NRC: At what stage or under what circumstances in an investigation by an administrative agency, must the investigators provide information to or clarify for witnesses that the investigation has criminal ramifications?..." This question usually arises when investigations or audits for administrative purposes develop information of possible criminal violations."**
- 05/26/81 Letter to James Cummings, Director, OIA from Lawrence Lippe, Chief Legal Advice Section Criminal Division (duplicate of above?)(5 pgs)

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- 04/20/82 NRC "Yellow Announcement" - FORMATION OF THE NEW OFFICE OF INVESTIGATIONS (3 pgs)
- 05/17/82 Memo for Palladino and Commissioners from J. Fitzgerald Subj: STAFF RESOURCES REQUIREMENTS (2 pgs) w/3 atts - Att 1 - Draft Delegation of Authority (1 pg) Att 2 - Functional Statements (2 pgs) Att 3 - Staffing Requirements (7 pgs) to 4 - draft memo to Dircks from Palladino (2 pgs)
- 06/04/82 Memo for William Dircks from Palladino Subj: RESOURCE SUPPORT FOR THE OFFICE OF INVESTIGATIONS (1 pg)
- 06/17/82 Memo for Palladino, Gilinsky, Ahearn, Roberts, Asselstine from J. Fitzgerald Subj: PROPOSALS ON POLICY PROCEDURAL AND QUALITY CONTROL GUIDANCE AND TRAINING PROGRAMS w/attachments (31 pgs)
- 06/18/82 Memo for R. Haynes, RI, J. O'Reilly, RII, J. Keppler, RIII, J. Collins, RIV, R. Engelken, RV from J. Fitzgerald, Acting Director, OI Subj: FORMAL ESTABLISHMENT OF THE OFFICE OF INVESTIGATIONS w/attached field office structure (2 pgs)
- 06/21/82 Letter to Nunzio Palladino from Tom Bevill (1 pg)
- 06/25/82 **J. Fitzgerald asks for a legal opinion from the Office of General Counsel as to whether the NRC has the authority to conduct criminal investigations. Note that this precedes the formal creation of the Office of Investigations.**
- 07/16/82 Memo from Chairman Nunzio Palladino to J. Fitzgerald, Acting Director of the Office of Investigations. Subj: DELEGATION OF AUTHORITY. This provided OI with various authorities, including the authority to "Advise and assist the Office of Inspector and Auditor in referrals to the Department of Justice stemming from investigations by OI." (2 pgs)
- 07/16/82 Memo for Chairman and Commissioners from James Fitzpatrick, Acting Director, OI Subj: ACTIONS FOR IMPROVEMENT IN NRC INVESTIGATIONS (42 pgs)
- 07/19/82 **OFFICE OF INVESTIGATIONS CREATED.** J. Fitzgerald, Acting Director.
- 09/14/82 Memo for Chilk from Commissioner Roberts Subj: INVESTIGATIONS POLICY w/ Letter from Charnoff & Hickey dated 8/13/82 (8 pgs)
- 09/15/82 Memo for SECY from John Ahearn Subj: COMTR-82-1 (1 pg)
- 09/27/82 Investigative Procedure Memo No. 82-105 Subj: HANDLING OF SAFETY-RELATED INFORMATION SURFACED THROUGH OI INVESTIGATIONS (2 pgs)
- 10/15/82 **Memo, M. Malsch to J. Fitzgerald, "Request for Legal Research and Opinion," the Deputy General Counsel advised: "The Atomic Energy Act does not explicitly give the NRC such authority -- indeed the Act should probably be read as depriving NRC of such authority -- and we conclude a court would most likely conclude that the NRC does not have the authority to conduct an investigation solely for criminal**

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purposes. "Your memo posited a second part to this question, i.e., whether the NRC should conduct criminal investigations under any circumstances. The simple legal answer to this question is that, since it does not have the statutory authority to do so, it should not." (Attachment 1)

- 10/22/82 Memo for Leonard Bickwit, General Counsel from N. Palladino Subj: COMTR-82-1 (1 pg)
- 10/?/?/82 All acting OI Field Office Chiefs have to apply for their positions. Position is classified as series 1811.
- 11/?/?/82 J. Foster told previous time with NRC not qualifying as 1811 experience, Foster not "A" candidate for position. Foster files grievance. Foster loses grievance (Exact dates unknown, probably 11/82-2/83).
- 12/22/82 Memo for Palladino, Gilinsky, Ahearne, Roberts, Asselstine from J/ Fitzgerald, Acting Director Subj COMMISSION ACTION ON OI POLICY PROPOSALS w/att - Att 1 - OI Policy Statement - Att 2 Investigative Procedure Memo Subj: Exclusion of Third Parties From Interviews/Other Interview Conditions Att 3 - Investigative Procedure Memo Subj: Direct Observation/Photography of Violations or Conditions Att 4 - Investigative Procedure Memo Subj: Use of Photographic Equipment
- 02/00/83 Best guess, timeframe of statement by Eugene T. Pawlik that "NRC is the best-kept secret on the 1811 circuit!"
- 02/28/83 Memo for Commissioners Gilinsky, Ahearne, Roberts, Asselstine Subj: OI POLICY PROCEDURES w/att (2 pgs)
- 06/15/83 Memo, Director, OIA, to Plaine, General Counsel. "...the Hartman matter which at this time, is the subject of an ongoing criminal investigation by DOJ and an ongoing civil investigation by NRC."
- 08/26/83 Memo, NRC Commissioner Victor Gilinsky to the NRC Chairman and other commissioners: Subj: NRC INVESTIGATIONS w/att "The NRC staff should understand that their investigations of wrongdoing are civil investigations. Criminal investigations are the province of the Department of Justice." (3 pgs)
- 09/01/83 Memo from NRC Chairman Nunzio Palladino, requesting that OGC, OIA, and OI develop a Commission paper addressing NRC's conduct of civil v. criminal investigations for the Commission's consideration. Resulting paper discussed at 04/09/1984 Commission Briefing on Criminal vs Civil Investigations.
- 11/21/83 Letter to Eileen Kirwan from Susan Dickerson (1 pg)
- 12/06/83 Policy Issue SECY-83-497 Subj: NRC CONDUCT OF CIVIL VERSUS CRIMINAL INVESTIGATIONS (14 pgs)
- 12/15/83 Memo to Paul Bird from George Messenger Subj: COVERAGE OF OIA INVESTIGATORS AND SUPERVISOR FOR PURPOSES OF RETIREMENT UNDER 5

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USC 8336(c) (2pgs)

- 12/23/83 Letter, NRC OI Director Benjamin B. Hayes to Paul E. Bird, Subj: POSITION DESCRIPTIONS FOR OPM REVIEW FOR 5 USC 8336(c) asks for review of OI investigator positions for consistency with 5 U.S.C. 8331(20). (68 pgs)
- 12/29/83 Memo for Eileen Kirwan from Susan Dickerson Subj: COVERAGE OF INVESTIGATORS AND SUPERVISORS FOR PURPOSES OF RETIREMENT UNDER 5 USC 8336(c) (2 pgs)
- 01/05/84 Letter to Susan Dickerson from Eileen Kirwan re: acknowledgment letter (1 pg)
- 01/25/84 Policy Issue SECY-84-32 Subj: STATUS OF TWO ENFORCEMENT MATTERS INVOLVING DOJ REQUESTS (10 pgs)
- 02/15/84 Letter to Susan Dickerson, NRC from Roland Arrington asking for organizational chart for OI (2 pgs)
- 02/23/84 Letter to Eillen Kirwan from Paul Bird w/OIA Position Descriptions (8 pgs)
- 03/02/84 Letter to Eillen Kirwan, OPM from Paul Bird, NRC confirming retirement coverage for 1811's and enclosing PD's (8 pgs)
- 03/05/84 Report of Contact (1 pg)
- 04/09/84 NRC Commission Briefing On Criminal v. Civil Investigations;** page 5, lines 8-11: "we believe that the Commission – and OGC has taken this position in the past – that the Commission does not have independent authority to conduct criminal investigations." (J. Fitzgerald). Page 57, lines 17-18: "Yes, our policy is to first serve our civil purpose and then help DOJ." (NRC Chairman Palladino).
- 04/11/84 Letter to Roland Arrington, OPM from Paul Bird, NRC asking for additional info w/attachments (9 pgs)
- 04/11/84 Letter, Paul E. Bird to OPM provides answers to several OPM questions.
- 05/17/84 Letter to Paul Bird from Roland Arrington, OPM, re General coverage under 5 USC 8336(c)(1) OPM approved general coverage for the OI investigator positions. (2 pgs) w/atts (13 pgs) 09/09/75 - 05/17/84 letter exchange ends!**
- 05/22/84 J. Fitzgerald, Policy Issue SECY-84-212, "CIVIL VERSUS CRIMINAL INVESTIGATIONS," Revised per 04/09/84 briefing (above). "With regard to assisting DOJ in criminal investigations, OI may provide such assistance..., and when to do so would not adversely affect those **OI civil investigations** requiring prompt action for public health and safety reasons...and wishes the NRC to delay its **civil investigation** or enforcement action,.."(20\9 pgs)
- 06/08/84 Letter to David Baker from Paul Bird, NRC (1 pg)
- 06/18/84 Civil Service Retirement System contact records (1 pg)

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06/29/84 Letter to OPM from Paul Bird re: request for coverage (2 pgs)

09/10/84 J. Fitzgerald, SECY-84-212A, CIVIL VERSUS CRIMINAL INVESTIGATIONS,"as above, but adds "NRC will not defer its civil investigation for a period longer than 120 days..."

01/05/85 Letter from Eileen Dirman to Susan Dickerson (1 pg)

03/18/85 Letter to Palladino from Steven Trott, Assistant Attorney General, DOJ (3 pgs)

04/02/85 Letter to the Honorable Tom Bevill from Lando Zech w/Memorandum of Understanding between the NRC and DOJ (16 pgs)

04/04/85 Letter to James Cunningham from Michael Sunner re: reply to request for reconsideration denying law enforcement retirement (3 pgs)

04/05/85 Letter to Leslie El-Amin from Paul Bird w/1811 positions (3 pgs)

04/08/85 Letter to Leslie El-Amin from Paul Bird w/PD (5 pgs)

04/15/85 Letter to Paul Bird from Leslie El-Amin (1 pg)

04/18/85 Letter to Paul Bird from Leslie El-Amin (duplicate?)(1 pg)

04/24/85 Letter to Paul Bird from Michael Sunner, Reconsideration and Debt Collection Division (3 pgs)

04/25/85 Letter to Leslie El-Amin from Paul Bird w/attached PD's for OI (7 pgs)

05/13/85 Letter to Paul Bird from Leslie El-Amin (1 pg)

05/00/85 OPM approved coverage for the Director and Deputy Director of OI under the secondary/administrative category of 5 U.S.C. 8336(c).

05/20/85 Letter to Paul Bird from Nancy Wolf (1 pg)

06/13/85 Letter to Leslie El-Amin from Paul Bird re: sending additional info (1 pg)

08/19/85 Letter to Paul Bird from Franklin Lattanzi (1 pg)

09/10/85 Letter, from Franklin Lattanzi, OPM, to Paul Bird, requests additional information regarding the percentage of time investigators, as they were in the Office of Inspection and Enforcement, conducted investigations of violations of criminal codes. (3 pgs)

12/18/85 Letter to Franklin Lattanzi, OPM from Nate Benison, OP (1 pg)

12/20/85 Letter to Nancy Wolf from Nate Benison OP (1 pg)

01/02/86 Letter to Nate Benson from Nancy Wolf (1 pg)

01/07/86 Letter to Nate Benson from Nancy Wolf (possible duplicate)(1 pg)

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- 04/01/86 Report of Telephone/Walk-in contact, handwritten notes (5 pgs)
- 07/21/86 Letter to Nancy Wolf, OPM from James McDermott, OP w/GG-15 OIA PD (6 pgs)
- 08/07/86 Letter to James McDermott from Nancy Wolf (1 pg)
- 08/11/86 Letter to Franklin Lattanzi, OPM from James McDermott (5 pgs) re: requesting additional info on law enforcement positions
- 10/21/86 Letter to Nate Benson, NRC from Margaret Winkle (2 pgs)
- 12/09/86 Letter to Margaret Winkle from James McDermott (1 pg)
- 12/10/86 Letter to J. McDermott from Margaret Winkle re: determination of credibility of retirement for former positions in IE (4 pgs)
- 12/15/86 Letter to James McDermott from Woody Klinger (1 pg)
- 12/24/86 Letter to Margaret Winkle, OPM from J. McDermott, NRC (2 pgs)
- 01/12/87 Letter to Woody Klinger from James McDermott, OP re: concern of coverage for Assistant to the Director, OIA (1 pg)
- 01/16/87 Letter to James McDermott from Nancy Wolf re: acknowledgment letter (1 pg)
- 02/02/87 Letter to Nate Benson, NRC, describing OPM's "primary duty" criteria: "In general, if an employee spends an average of at least 50% of his or her time performing a duty or group of duties, they are his or her primary duties..."40% of the incumbent's time is spent managing or conducting criminal investigations. ...Therefore, since the majority of the incumbent's time will be spent investigating non-criminal matters, general coverage for this position is denied." (2 pgs)
- 02/09/87 FPM Bulletin 842-3, "Interim Regulations on Air Traffic Controllers, Law Enforcement Officers, and Firefighters Under the Federal Employees Retirement System." A "Rigorous Position" means a position "the duties of which are so rigorous that employment opportunities are required to be limited to young and physically vigorous individuals..."
- 02/18/87 Letter to James McDermott, OP from Woody Klinger (1 pg)
- 02/27/87 Letter to Nancy Wolf, OPM from Barbara Williams, NRC (1 pg)
- 03/04/87 Civil Service Retirement System (1 pg)
- 03/04/87 Letter to Nancy Wolf from Barbara Williams (1 pg)
- 03/16/87 Letter to Barbara Williams from Nancy Wolf (1 pg)

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- 04/15/87 Letter to Nancy Wolf from Barbara Williams (2 pgs)
- 04/29/87 Civil Service Retirement System (1 pg)
- 04/30/87 Routing slip with handwritten note (1 pg)
- 05/01/87 Letter to James McDermott, NRC from Woody Klinger, OPM (1 pg)
- 05/15/87 Memo, Benjamin B. Hayes to Weld, Asst. Atty. General: OI "will comply with your request to hold the OI investigation concerning activities at Advanced Medical Systems, Inc. (AMS) in abeyance until a criminal investigation has been completed. OI will, therefore, stop its investigation on this matter...."
- 05/27/87 Letter to Susan Dickerson from Nancy Wolf re: copies of all correspondence between NRC and OPM re: 8336(c)(1) (1 pg)
- 06/04/87 Letter to Nancy Wolf, Initial Claims Branch from Susan Dickerson, NRC (1 pg)
- 06/09/87 Letter to Susan Dickerson, NRC, from Woody Klinger, Initial Claims Branch 6(c) (1 pg)
- 06/29/87 Letter to Barbara Williams from Margaret Winkle re: retirement coverage (4 pgs)
- 06/29/87 Letter to Susan Dickerson, NRC from Woody Klinger, OPM (1 pg)
- 07/30/87 Letter to Nancy Wolf, from Barbara Williams w/atts Note: two of these pages are blank (5 pgs)
- 08/28/87 Letter to Barbara Williams, OP, NRC from Woody Klinger re: credibility of 6(c) retirement for OIA criminal investigator (2 pgs)
- 02/02/89 **GAO Report GAO/GGD-89-24, "Federal Workforce, Positions Eligible for Law Enforcement Officer Retirement Benefits"**
- 02/11/88 Memo for Victor Stello, NRC Executive Director for Operations, from James Foster, early version of this concern, Subj: RECOMMENDATIONS FOR IMPROVEMENT OF THE NRC INVESTIGATIVE PROGRAM w/att (6 pgs) No response.
- 03/01/88 NRC clarification, regarding October 8, 1987 testimony of Benjamin B. Hayes, Director, OI, before Subcommittee on Nuclear Regulation. Hayes indicated "I was also referring to at least three important authorities given to Inspectors General, but currently not given to OI. These are: (1) the authority of the Director, OI, to appoint, direct, and supervise all subordinate OI personnel, (2) statutory authority to conduct criminal investigations..."
- 04/14/88 Letter to Woody Klinger from Paul Bird w/ PD for Office of Inspector and Auditor, Organizational Chart and Elements and Standards (8 pgs)
- 04/21/88 Letter to Paul Bird from Elsa Kurtz, Initial Claims Branch 6(c) (1 pg)

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- 05/25/88 Memo for Zech, Roberts, Carr, Rogers from W. Parler, Subj: ISSUES REGARDING OI MISSION AND ROLE OF INVESTIGATIONS (8 pgs)
- 06/21/88 Letter, NRC advises OPM that a review of Federal Personnel Manual (FPM) Bulletin 842-3 had been performed, and certified that positions of OI investigators met "rigorous" definition.**
- 08/03/88 Letter, NRC Chairman Lando Zech to M. Lujan Jr., of the House of Representatives Committee on Interior and Insular Affairs: **"The Commission does not believe that a grant of authority to OI to conduct criminal investigations would enhance our ability to protect public health and safety or the government's ability to prosecute criminal violations of the Atomic Energy Act."** (1 pg)
- 11/08/89 Letter to Irving Shapiro, OPM from Robert Loach, OP re: PD for AIGI (5 pgs)
- 11/15/89 Letter to Irving Shapiro from Paul Bird, OP (2 pgs)
- 11/17/89 Letter to Elsa Kurtz from Debbie Chan w/NRC Form 772-B (2 pgs)
- 12/12/88 Letter to Paul Bird, OP from Patricia Lancaster, Initial Claims Branch 6(c) (1 pg)
- 12/18/89 Letter to Paul Bird from Elna Kurtz re: request for coverage (1 pg)
- 12/20/89 Letter to Woody Klinger from Paul Bird re: certain positions located in former NRC Office of Inspection and Enforcement (1 pg)
- 02/05/90 Federal Register (4 pgs)
- 02/07/90 Letter to Paul Bird from Woody Klinger (1 pg)
- 08/01/90 Letter to Paul Bird from Baker Moy w/handwritten note (1 pg)
- 08/16/90 Letter to Irving Shapiro, OPM, from Robert Loach, OP, NRC (1 pg)
- 09/12/90 Letter to Robert Loach, OP from Woody Klinger (1 pg)
- 11/28/90 Letter to Robert Loach from Gloria Young (1 pg)
- 12/05/90 OPM issued guidelines for law enforcement retirement, Federal Register, Volume 55, No. 234).**
- 02/11/91 Letter to Paul Bird from Carlton Williams re: approving general coverage (2 pgs)
- 02/25/91 Letter to Carlton Williams from Paul Bird re: assigning PD numbers (1 pg)
- 03/12/91 Letter to Irving Shapiro from Paul Bird re: approval for retirement coverage (1 pg)
- 04/04/91 Letter to Paul Bird from Gloria Young re: retirement coverage (1 pg)

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- 01/13/92 Letter to Irving Shapiro, OPM from Paul Bird re: retirement coverage (1 pg)
w/attached PD's (11 pgs)
- 01/23/92 Letter to Paul Bird from Woody Klinger, OPM (1 pg)
- 04/06/92 Letter to Gloria Young from Debbie Chan, OP (1 pg)
- 05/12/92 Letter to Gloria Young from Debbie Chan re: PD numbers, w/attached Criminal
Investigator Positions, Position Action and Evaluation Grades 16-18 & STS and SES and
PD's (15 pgs)
- 07/29/92 Letter to Paul Bird from Gloria Young re: retirement coverage (1 pg)
- 02/04/93 Letter to Franklin Lattanzi, OPM from D. Williams w/PD attachment for Deputy
Assistant Inspector General and Organizational Chart and Functional Statement for OIG (8
pgs)
- 02/26/93 Letter to D. Williams from Gloria Young re: 6c retirement entitlement (1 pg)
- 09/00/93 Department of Labor OIG Report re 1811 misclassification. (Attachment 21)
- 12/07/93 OPM transferred responsibility for law enforcement officer determinations
under 5 U.S.C. 8336(c) to federal agencies.
- 01/09/94 Mr. Guy Caputo begins work at the NRC, coming from the Secret Service.
- 11/03/94 Memo, Paul Bird to Scroggins, Deputy Chief Financial Officer, Implementation
of law enforcement availability pay act of 1994. "All employees on the list are
already receiving 25 percent Administratively Uncontrollable Overtime except for
those listed below. Nonetheless, these employees also should be paid the 25
percent availability pay."
- 00/00/95 Ferrier v. Office of Personnel Management, 66 M.S.P.R. 241, 245, the appellant
had to pass a five-event Physical Fitness Battery.
- 07/14/95 E-mail from Carlton C. Kammerer, ADM, to Russell A. Powell, ADM, regarding long
ago discussion with Jim Fitzgerald, OGC, regarding why (j)(2) [FOIA] exemption does not
apply to OI. ((J)(2) FOIA exemption is only for agencies whose principal function is
enforcement of criminal laws). NUDOCS 9607150221 960711.
- 11/15/95 GAO Report Testimony entitled, "Information on Certain Agencies' Criminal
Investigative Personnel and Salary Costs" (GAO/T-GGD-96-38) .(33 pgs)
- 01/16/96 5 U.S.C. Sec. 5545a provides for availability pay for criminal investigators, to
"ensure the availability of criminal investigators for unscheduled duty in excess of a 40 hour
week based on the needs of the employing agency."
- 09/00/96 GAO report : "Investigative Authority and Personnel at 13 Agencies" (GAO/GGD-96-
154).

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- 09/18/96 Killion vs. Dept. of the Treasury, MSPB case BN-0831-0006-I-1. (Attachment 22)
- 00/06/97 OPM Grade level guide for classifying investigator positions (with emphasis added by James E. Foster) (53 pgs)
- 08/06/97 Foster E-mailed a question to the NRC Inspector General and Human Resources personnel regarding classification of Office of Investigations personnel as series 1811 (Criminal Investigator) versus series 1810 (Civil Investigator).
- 09/02/97 Report GAO/HEHS-97-162, "Nuclear Power Safety: Industry Concerns With Federal Whistleblower Protection System."
- 09/06/97 Bingaman v. Department of Treasury court decision, from website, the court approved of certain factors found by the MSPB to denote a Law Enforcement Officer.(Federal Circuit Home Page) (8 pgs)
- 09/23/97 U. S. Court of Appeals, (various petitioners vs. Department of the Treasury, 96-3368).
- 10/29/97 MSPB transcripts re: R. Davis and Dept of Veteran Affairs and retirement, from Internet (14 pgs)
- 01/22/98 E-mail from James Foster re: OI Misclassification - related GAO reports (1 pg)
- 02/09/98 E-mail from James Foster re: OI CLASSIFICATION FRAUD, WASTE & ABUSE IN THE NRC (1 pg)
- 02/17/98 E-mail from James Foster re: last weekend research (1 pg)
- 02/18/98 Case Assignment Form (1 pg)
- 02/24/98 Memo to Hubert Bell from Ashok Thadani Subj: ALLEGATION OF MISCLASSIFICATION AND POTENTIAL FRAUD, WASTE AND ABUSE w/various e-mails from J. Foster (6 pgs)
- 02/27/98 Report of Interview (1 pg)
- 03/11/98 Memo for NRC Chairman Lando Zech from H. Thompson (2 pgs) Subj: RECOMMENDATIONS OF THE OI ORGANIZATIONAL REVIEW GROUP w/ two Reports of the Organizational Review Group to the Commission. (67 pgs)
- 05/05/98 Memo to J. Childs from Special Agent re: Allegation 3618 (5 pgs)
- 07/14/98 MSPB case DE-0842-96-0551-I-1(1) (Eatmon, et al. vs. Department of Energy).
- 08/17/98 Report of Interview (2 pgs)
- 08/20/98 Memo to Dixon, Freeman, Meyer and Spring Subj: 1811 CRIMINAL INVESTIGATOR STATUS (28 pgs)

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- 08/27/98 Memo to Chairman Jackson from Hubert Bell Subj: OIG NO 3618/ALLEGATION OF 1811 SERIES MISCLASSIFICATION (2 pgs)
- 08/28/98 Memo to Hubert Bell from Edward McGaffigan Subj: YOUR MEMO TO CHAIRMAN JACKSON OF AUGUST 27, 1988 (2 pgs)
- 09/04/98 OIG Interoffice Memo re: allegation by Foster (1 pg)
- 09/21/98 OIG Interoffice Memo re: allegation by Foster (1 pg)
- 10/05/98 Newspaper clipping re: VA Plans to Arm its Police Officers (3 pgs)
- 10/13/98 Letter from PCIE to Shirley Jackson re: matter of J. Foster (12 pgs)
- 10/14/98 Letter to James Childs from Mary Ellen Wilson, Chief, Retirement Policy Division, OPM (1 pg)
- 10/19/98 Letter, Illinois Senator Richard Durbin to NRC, concerns attached.
- 10/19/98 Letter to Shirley Jackson from Richard Durbin, United States Senator re: request from James Foster (12 pgs)
- 10/26/98 I received the first indication (voice mail from IG personnel) that the NRC IG was addressing my concern (following Durbin and PCIE letters).
- 10/26/98 Case Assignment Form (2 pgs)
- 10/28/98 "Evaluation Statement" documenting meeting between OI and NRC Office of Human Resources personnel.
- 10/28/98 Memo to File 99-06 re: telephone conversation (1 pg)
- 10/28/98 OIG Interoffice Memo re: telephone conversation (1 pg)
- 10/30/98 E-mail from James Foster (1pg)
- 11/02/98 Report of Interview (1 pg)
- 11/03/98 Report of Interview (2 pgs)
- 11/04/98 OIG Interoffice Memorandum (1 pg)
- 11/10/98 OIG Investigative Plan (1 pg)
- 11/10/98 Letter, NRC Executive Director for Operations W. Travers to Illinois Senator Richard Durbin.
- 11/11/98 Interoffice memo from OIG Investigator Lewis H. McClam to Fitzgerald re: 1811 misclassification w/att (12 pgs)

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- 12/01/98 Memo to Chairman Jackson from William Travers Subj: EVALUATION OF INVESTIGATOR POSITIONS IN THE OFFICE OF INVESTIGATIONS w/revised PD's and Evaluation Statement (19 pgs)
- 12/10/98 E-mail from James Foster to Carol Ann Reed re: OIG review of documents (1 pg)
- 12/11/98 E-mail from Carol Ann Reed to Lewis H. McClam re: FOIA req from Foster (1 pg)
- 01/22/99 Letter, to William Flynn from Paul. Bird, NRC advises OPM of updated OI position descriptions. (1 pg) Attached was the "Evaluation Statement" dated October 28, 1998, two revised position descriptions, and selection of previous correspondence.
- 02/08/99 Series 1811 Misclassification - Concern 8 - from Foster (15 pgs)
- 02/12/99 **Response Letter, NRC Executive Director for Operations W. Travers to Honorable Senator Richard Durbin: positions properly classified. (Predates 10/99 OIG report considerably) (21 pgs)**
- 02/16/99 Various documentation from James Foster e-mail concern 83 (21 pgs)
- 02/25/99 Report of Interview (2 pgs)
- 03/11/99 Report of Interview (1 pg)
- 03/11/99 Interoffice Memorandum to File 99-061 (5 pgs)
- 03/14/99 Fax cover sheet (2 pg)
- 03/16/99 E-mail from James E. Foster to Lewis H. McClam (1 pg)
- 03/16/99 OIG Interoffice memorandum (1 pg)
- 03/24/99 Report of Interview (1 pg)
- 03/??/99 **NRC Inspector General Investigator Lewis H. McClam (assigned investigator) leaves the agency.**
- 04/01/99 Closing Memo to File 99-061 (5 pgs)
- 04/09/99 Letter to Mary Ellen Wilson from George Mulley (2 pgs)
- 04/15/99 Houck vs. Dept. of the Navy, 4/15/99, DC-0842-97-0891-I-1, MSPB case, no LEO retirement if not a rigorous position. (Attachment 23)
- 06/22/99 Letter to Hubert Bell from Edward J. Markey, Member of Congress re: alleged misclassification of OI employees. w/envelope (2 pgs)
- 09/09/99 Testimony by Mr. John Vail, of the Department of Justice, before the subcommittee on the Civil Service. (Attachment 31)

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- 09/20/99 Letter to Dennis Rathbun from Richard Durbin, United States Senator w/Letter from Foster (2 pgs)
- 09/23/99 Personnel Management Consultants, Inc. report "Report to the Nuclear Regulatory Commission Office of the Inspector General Regarding the Classification of Positions to GG-1811, Criminal Investigator Series". (33 pgs)
- 09/27/99 Press from Department of Justice (9 pgs)
- 10/06/99 Facsimile request (1 pg)
- 10/08/99 Letter to James Foster from Paul Bird (1 pg)
- 10/18/99 Letter to OIG employee from Patrick Jennings, Retirement Policy Division, OPM w/enclosure (8 pgs)
- 10/25/99 OIG Investigative Index form (1 pg)
- 10/25/99 Closed Investigation Checklist (1 pg)
- 10/25/99 **Memo to Chairman Dicus from Hubert Bell Subj: ALLEGED IMPROPER CLASSIFICATION OF OFFICE OF INVESTIGATIONS (OI) INVESTIGATIONS IN GG1811 SERIES (CASE FILE 99-061) (20 pgs) (Attachment 5)**
- 11/09/99 Letter to Mary Ellen Wilson from Hubert Bell (3 pgs)
- 11/09/99 Letter to Honorable Richard Durbin from Hubert Bell, transmitting report (3 pgs)
- 11/22/99 E-mail from James Foster to Stephen Perloff (1 pg)
- 11/23/99 E-mail from James Foster to Dicus, McGaffigan, Bell, etc (1 pg)
- 11/23/99 E-mail to James Foster (1 pg)
- 12/28/99 Nelson vs. Department of the Navy, No. 99-3234 (Fed. Cir. 12/28/1999)
(Attachment 25)
- 02/??/00 OPM Retirement and Insurance Branch meet to discuss issues.
- 03/14/00 Patrick Jennings, OPM, advises no further action contemplated, based on NRC OIG report conclusions (E-mail). **(Attachment 13)**
- 03/12/00 **Foster files complaint with Office of Special Counsel (OSC). (approximate)**
- 03/17/00 Foster files complaint with Presidents Committee on Integrity and Efficiency (PCIE) (approximate). Complaint subsequently sent to OPM Inspector General Patrick E. McFarland as Chairman of the PCIE Committee on Investigations.
- 03/24/00 Acknowledgment letter from the Office of Special Counsel, case is DI-00-1206.

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- 05/24/00 Article in NTEU chapter 208 newsletter "Your Voice."
- 06/00/00 Office of Merit Systems Oversight and Effectiveness, Digest of Significant Classification Decisions and Opinions, Article No. 24-01, OPM determined that the GS-1810/1811 Guide had to be read in conjunction with the information contained in the more recently issued (April 1988) GS-083/085 Guide. That Guide clarifies that the GS-1811 series covers positions primarily responsible for investigating alleged or suspected major offenses. (Attachment 20)
- 06/09/00 Foster letter to PCIE. (Attachment 16)
- 06/18?/00 Letter from PCIE advises that Integrity Committee will consider new information.
- 06/19/00 Letter from Mr. Patrick E. McFarland, OPM IG, Investigations Committee does not review IG reports, but he has forwarded my case "to OPM's Office of Merit Systems Oversight and Effectiveness and requested their review and determination in this matter."
- 06/26/00 E-mail from Mr. James F. Hicks, OPM Assistant General Counsel, Merit Systems Division: "OPM's Office of the General Counsel has received this and several subsequent e-mail messages from you on this matter. Your inquiries have been assigned to one of the attorneys in this office. OGC will respond as soon as possible with our analysis of the issues you raised." (Never responded.)
- 07/01/00 (estimated) McGraw-Hill publishing company sends FOIA request for OIG report on 1811 criminal investigators (Jenny Weil, Inside NRC)(FOIA/PA 2000-0276).
- 07/12/00 Letter from Ms. Anna Marie Schuh, Assistant Director, OPM's Office of Merit Systems Oversight, "OPM's Retirement and Insurance Service has responded to you about this matter numerous times in the past and continues to believe its original [1985] decision was correct." "Such coverage determinations have been delegated to agencies since 1993, and, since then, NRC has continued to consider its GS-1811 positions as eligible for section 8336(c) coverage." "We have considered all of your concerns and do not believe that there is anything further that we can do in this matter." (Attachment 14)
- 08/10/00 Foster petitions OPM Director J. Lachance, as the head of the Office of Personnel Management (OPM) to take action to correct a fraudulent classification and terminate unjustified retirement and premium pay benefits. Under 5 CFR 831.911(a) "The Director of OPM retains the authority to revoke an agency heads determination that a position is a primary or secondary position, or that an individual's service in any other position is credible under 5 U.S.C.8336(c)."
- 08/16/00 E-mail from P. Jennings:"Thank you for your August 10, 2000, e-mail to Director Lachance. Your e-mail was forwarded to this office (Retirement Policy Center) for a reply. On February 22, 2000, you sent an e-mail to us describing the same concerns that you raised in your August 10, 2000, e-mail to the Director. We believe that our reply to your e-mail of February 22, 2000, fully responds to the issues raised in your e-mail. We cannot add anything to our response. We are attaching a copy of our previous response to your

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concerns.

- 08/28/00 Article by Jenny Weil in newsletter "Inside NRC." (Attachment 8)
- 08/29/00 Letter from the PCIE, "your argument was not persuasive. The Office of Government Ethics (OGE) advised the IC that relationships between former business associates are not covered by OGE regulations. The IC decided to refer the position classification issue to the Office of Personnel Management for whatever action is deemed appropriate. The IC will take no further action concerning this matter and has placed this file in a closed status." (Attachment 17)
- 02/02/2001 Letter from OPM, Atomic Energy Act gives OPM "no legal authority to review classification determination by the NRC." Believed to be inaccurate, and inconsistent with a recent Presidential Order.
- 06/26/2001 OSC contacts Foster, case assigned to Francisco Ruben for review.
- 06/28/2001 OSC writes to Foster, returns documents supplied. "In view of the [NRCIG] investigation that has already been conducted, we will take no further action in connection with this matter." Letter received 07/02/2001.
- 06/29/2001 Foster visits the Chicago office of Senator Richard Durbin, leaves file for Michael Vernon, of Durbin's staff.
- 07/02/2001 Foster receives OSC 06/28/2001 letter and documents supplied to them.
- 07/??/2001 Durbin staff contacts NRC, obtains IG report, closes case.
- 08/17/2001 Watson v. Dept. of the Navy (Fed. Cir. 08/17/2001).
- 09/04/2001 Hall v. Treasury, U. S. Court of Appeals.
- 09/05/2001 Gallagher v. Treasury, U. S. Court of Appeals.
- 02/20/2002 Merit Systems Protection Board, Chicago Office, contacts Foster.
- 02/22/2002 Foster faxes OSC letters (2) to MSPB.
- 03/04/2002 Chicago MSPB Judge Cooper contacts Foster, discusses case.
- 03/26/2002 D. D. White, Classification Division, advises NRC does not fall under Title 5, and OPM has no oversight of NRC.
- 03/27/2002 Conrad Johnson, of the Atlanta OPM office, advises that his office has oversight of NRC and that they will review NRC and look at my issues at some currently unscheduled date.

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ATTACHMENT 5

SCANNED DOCUMENT
UNITED STATES
NUCLEAR REGULATORY COMMISSION
WASHINGTON, D.C. 20555-0001

October 25, 1999

OFFICE OF THE
INSPECTOR GENERAL

MEMORANDUM TO: Chairman Dicus

FROM: Hubert T. Bell
Inspector General

SUBJECT: ALLEGED IMPROPER CLASSIFICATION OF OFFICE OF
INVESTIGATIONS (OI) INVESTIGATORS IN GG-1811 SERIES
(CASE FILE 99-061)

The Office of the Inspector General (OIG), U.S. Nuclear Regulatory Commission (NRC), initiated this review after receiving an allegation from James E. Foster, Region III, that since 1982, Office of Investigations (OI) investigators have been inappropriately classified in the criminal investigator GG-1811 series. Foster claimed that OI duties and authorities do not match the criteria for OI investigators to be classified in the GG-1811 series because the NRC lacks statutory authority to perform criminal investigations. Foster further alleged that the OI investigators lack arrest authority, authority to carry firearms or other weapons, do not perform undercover work, do not execute search or seizure warrants, and are not exposed to hazardous conditions or inclement weather. Finally, Foster stated that OI investigators actually perform all the duties and responsibilities of a general investigator GG-1810 series and should be classified as such.

In addition to his concerns that OI investigators were inappropriately classified in the GG-1811 positions, Foster claimed that as a result of the improper classification, OI investigators had wrongly benefitted from the early retirement provisions given to federal law enforcement personnel. Foster maintained that OI investigators obtained the benefits of the early retirement provisions without performing in a position which merits such benefits. Additionally, during the course of this review, Foster submitted correspondence to OIG alleging that the NRC provided vague, erroneous or misleading information to the Office of Personnel Management (OPM) concerning the criminal investigative activities conducted by OI.

During an OIG interview, Foster stated that in the early 1980s, prior to the OI investigators becoming GG-1811s, he was the Director of the Region III OI Field Office. Foster stated that after the OI investigators became GG-1811s, he was forced from the Director's position because he did not have prior GG-1811 experience. Foster maintained that OI does not have criminal investigative authority and that OI investigators should not be classified in the GG-1811 series.

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The focus of this OIG review was whether there was any misconduct on the part of NRC staff with respect to the classification of OI investigators in the GG-1811 series and the resultant granting to OI investigators by OPM special law enforcement officer retirement provisions. Consequently, this OIG review examined the accuracy of the position descriptions developed by the NRC to classify the OI investigators as GG-1811 and the appropriateness of the classification of OI investigators in the GG-1811 series. Also, OIG examined the accuracy of the information provided to OPM by the NRC in 1983, after OI was created, which was used by OPM in making their determination to grant the OI investigator positions general coverage under 5 U.S.C. 8336(c), the special law enforcement retirement provisions for law enforcement officers.

During the course of this review, OIG examined historical documents leading up to and following the creation of OI. Also, OIG obtained and reviewed the OPM file containing correspondence between NRC and OPM which was used by OPM to grant coverage under 5 U.S.C. 8336(c) for the OI criminal investigator positions (GG-1811 series). OIG relied on the OPM file because it contained the most complete documentation of the position descriptions that existed at the time the agency classified the criminal investigator positions in the GG-1811 series. These position descriptions were then used by OPM as the basis for granting the special law enforcement retirement coverage to OI investigators. During our review of NRC historical documents concerning OI, OIG noted that SECY-84-32 and SECY-84-212, dated January 25, 1984 and May 22, 1984, respectively, documented that OI has the authority to conduct investigations that have both criminal and civil enforcement implications and to assist the Department of Justice (DOJ) in conducting investigations solely for criminal prosecution purposes.

The OPM file reviewed by OIG contained correspondence between the NRC and OPM dated between September 1975 and November 1990. OIG learned that in November 1979, the U.S. Civil Service Commission (CSC), OPM's predecessor, approved a request by the NRC for coverage under the law enforcement retirement provisions for an investigator position in the Office of Inspection and Enforcement (OIE), NRC. After OI was created in July 1982, NRC requested OPM to approve law enforcement retirement provisions for the investigator positions in the newly created OI. The following chronology is taken from the correspondence between OPM and the NRC regarding the agency's request for 5 U.S.C. 8336(c) coverage:

In December 1983, Division of Organization and Personnel (DOP), NRC, requested that OPM approve the OI investigators and supervisors under the special retirement provisions for law enforcement officers. As documentation of the duties performed by the investigators, copies of the investigators' job descriptions were attached to the memorandum. The duties outlined in the job descriptions stated in part that an agent investigates violations of NRC regulations and/or Federal laws; administers oaths and affirmations; serves subpoenas; gathers facts through such methods as interview, observation, and interrogation; gathers and preserves evidence; uses cameras, photostatic machines and tape recorders to obtain and record evidence and documents. Also, an agent assists in the referral of assigned cases for criminal prosecution at the request of federal, state or local prosecutors.

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In addition, the job descriptions stated that investigations were frequently conducted at power plant construction sites which could expose the investigator to a hostile environment as well as plant hazards and that investigators met with individuals in remote locations which could pose a threat to the investigator. These job descriptions made no mention of investigators making arrests, carrying a firearm, or executing search warrants.

In February 1984, OPM advised NRC that their December 1983 request would be considered as an initial request for coverage for the OI investigator positions under 5 U.S.C. 8336(c) because the prior approval granted by CSC in November 1979 was for one investigative position in OIE, NRC. Additionally, OPM requested more information on the OI investigator positions which was subsequently provided by NRC. OIG noted that the information provided by NRC to OPM essentially described the OI investigative function.

In May 1984, OPM approved general coverage for the OI investigator positions under 5 U.S.C. 8336(c). Subsequently, in May 1985, OPM approved coverage for the Director and Deputy Director of OI under the secondary/administrative category of 5 U.S.C. 8336(c).

OIG interviewed James F. McDermott, Deputy Director, Office of Human Resources (HR), NRC, who stated that the information contained in correspondence from NRC to OPM concerning the OI investigator positions was provided by OI to HR and reviewed by the NRC, Office of the General Counsel (OGC). He said he was comfortable with the information NRC provided to OPM.

James A. Fitzgerald, former Assistant General Counsel, OGC, NRC, who is currently the Deputy Director in OI, told OIG that he was part of a group which formed OI in 1982. Fitzgerald stated that from April 20, 1982 to January 1983, he was the Acting Director of OI. At OIG's request, Fitzgerald reviewed the OI investigators' job descriptions which were sent to OPM in 1983 to support NRC's request for the law enforcement retirement provisions for these positions. Fitzgerald advised OIG that the job descriptions accurately described the work performed by the OI investigators in 1983 as well as today. Fitzgerald pointed out to OIG that OPM's guidelines regarding the GG-1811 series criminal investigator positions do not mandate that GG-1811s carry a firearm or make arrests; it merely stipulates that these functions are normally associated with the duties and responsibilities of an GG-1811 criminal investigator.

William D. Hutchinson, Assistant to the Director, OI, NRC, advised OIG that since he began his employment with OI on August 19, 1984, OI investigators have been conducting criminal investigations. Hutchinson further stated that OI investigators execute search warrants, serve grand jury subpoenas, prepare affidavits and testify in criminal court like any other GG-1811 criminal investigator. Hutchinson pointed out to OIG that the only difference between the OI GG-1811 criminal investigators and the GG-1811 criminal investigators assigned to other federal law enforcement agencies is OI investigators do not carry firearms or make arrests. He said that each year, OI submits an annual report to the

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NRC Commission which outlines the number of criminal cases OI referred to DOJ for prosecution.

OIG reviewed the Annual Reports submitted by OI to the NRC Commission for the period 1989 to 1997. These Annual Reports gave a narrative outline of significant investigations conducted by OI as well as the cases that resulted in DOJ referrals. **OIG determined that over the review period, an average of 22 percent of OI's cases were referred to the DOJ for criminal prosecution. (Emphasis added)**

As an illustration of the sort of criminal investigations conducted by OI, OIG recently learned that between 1996 and 1999, OI participated in a major investigation concerning a major utility in the northeast which resulted in the utility's pleading guilty to 19 federal felony criminal counts for lying to the NRC. OIG found that OI conducted the investigation of NRC licensee criminal wrongdoing in conjunction with DOJ and that OI is continuing to pursue additional potentially criminal matters with DOJ.

Based on OIG's review of records and interviews of cognizant individuals, OIG determined that the position descriptions developed by the agency after OI was created in 1982 accurately characterized the activities of an OI investigator. However, OIG did not have the expertise to determine whether NRC's initial classification of the OI investigator positions in the GS-1811 series was handled appropriately by the agency. Therefore, OIG secured the services of an independent consultant with the expertise to review this issue. As a consultant, OIG obtained an individual who was a former supervisory personnel management specialist at OPM and employed by that agency and its predecessor from 1973 to 1998.

The OIG consultant reviewed whether it was appropriate for the NRC to classify the OI positions as criminal investigators, GG-1811, at the time OI was established. The consultant examined documents and materials related to the establishment of OI and whether the OI mission supported the use of GG-1811 positions. In addition, the consultant reviewed the OPM file documenting the correspondence between NRC and OPM from September 1975 through November 1990, which contained the relevant OI GG-1811 position descriptions used by the NRC to support their request for 5 U.S.C. 8336(c) coverage. The consultant compared these position descriptions with the OPM Grade-Level Guides For Classifying Investigator Positions, GS-1810/1811, dated February 1972. The consultant also reviewed OPM guidance for distinguishing between the general investigator, GS-1810 and GS-1811, criminal investigator positions. The OIG consultant concluded that the decision to classify the OI investigator positions as criminal investigators, GG-1811, was reasonable and appropriate.

During OIG's review of correspondence between OPM and NRC, OIG found that in a number of instances, OPM requested clarification concerning the nature of criminal violations investigated by OI and the amount of time OI spent conducting these investigations. OIG noted that the NRC described the nature of the criminal activities and amount of time OI spent conducting these activities in various ways. Generally, the correspondence submitted by the NRC to OPM indicated that almost all of the incumbent's time was spent conducting criminal investigations which included violations of the Atomic Energy Act and violations of the Federal criminal code, Title 18.

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Based on their review of information submitted by the NRC, OPM granted law enforcement retirement coverage under 5 U.S.C. 8336(c) to the OI investigator positions. OIG noted that in its review of the OI law enforcement retirement coverage, OPM asked a series of questions that it deemed were material to its decision, and OPM required the NRC to provide answers to these questions. OIG found no information provided in response to these questions by the NRC to OPM that was false. OIG found that the correspondence over the years contained various descriptions of the criminal investigations conducted by OI and the amount of time OI spent conducting these activities. OIG learned from OPM that the information provided by NRC that may have varied was not material in OPM's decision to grant approval to the NRC for law enforcement retirement coverage under 5 U.S.C. 8366(c) for the criminal investigator positions in OI.

During this review, OIG uncovered no indication of wrongdoing by NRC staff concerning the classification of OI investigators in the GG-1811 series which resulted in OPM granting the OI investigator positions special law enforcement retirement coverage under 5 U.S.C. 8336(c). Specifically, this review determined that the information contained in the position descriptions developed by the agency after OI was created in 1982 and in correspondence submitted by NRC to OPM essentially described the OI investigative function. Also, the OIG consultant concluded that the agency's decision to classify the OI investigator positions as GG-1811 criminal investigators was reasonable and appropriate. Based on the agency's classification of the OI investigators in the GG-1811 series, OPM granted these positions law enforcement retirement coverage under 5 U.S.C. 8336(c).

Attachment:
OIG Consultant Report

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REPORT TO THE NUCLEAR REGULATORY
COMMISSION OFFICE OF THE INSPECTOR GENERAL
REGARDING THE CLASSIFICATION OF POSITIONS
TO GG-1811, CRIMINAL INVESTIGATOR SERIES
SEPTEMBER, 1999

Stephen Perloff, Personnel Management Consultants, Inc.
1170I Silent Valley Lane, Gaithersburg, MD 20878

INTRODUCTION

The purpose of this report is to advise the Office of the Inspector General (OIG), Nuclear Regulatory Commission (NRC), regarding the appropriateness of actions taken by the NRC to classify several positions as Criminal Investigators, GG-1811. These actions were accomplished generally coincidental to the establishment of the NRC Office of Investigations (OI).

THE TASK

My specific task was to determine whether it was appropriate for the NRC to classify positions as Criminal Investigators, GG-1811, at the time when the OI was established. The process used to draw a conclusion for this report consisted of an analysis of relevant OI GG-1811 position descriptions and a comparison of those position descriptions with the U.S. Office of Personnel Management Grade-Level Guides For Classifying Investigator Positions, GS-1810/1811, dated Feb 1972. The analysis also included an examination of documents and materials related to the establishment and early days of the OI in order to assess the mission and organization of OI and whether the OI mission supported the use of GG-1811 positions.

METHODOLOGY

This task focused on actions taken and decisions made years ago. However, even though substantial time had elapsed and many organizational changes had occurred, documentation sufficient to carry out this task was available from the OI, the Office of Human Resources (OHR), and the OIG.

Since it was not possible to perform a "desk audit" of positions that are almost 20 years old (i.e., interview the incumbents of the positions), the only reasonable approach in carrying out this analysis is to accept that "official" position descriptions (supplemented and confirmed by information from other official documents and interviews with NRC officials with direct knowledge of the establishment of OI) accurately reflect the GG-1811 positions and their organizational environment during the time period of interest.

The general fact finding approach included discussions with individual staff listed below from several NRC organizations, review of available documents, further follow up discussion, and analysis of the available materials and information, finally synthesized in this report.

Persons Interviewed:

Office of the Inspector General
Rossana Raspa
Office of Human Resources

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Paul Bird, Director
Michael Fox
James McDermott
Office of Investigations
Guy P. Caputo, Director
James Fitzgerald, Deputy Director

MATERIALS REVIEWED AND CONSIDERED

Item 1. U.S. Office of Personnel Management, The Classifier's Handbook.

Item 2. U.S. Office of Personnel Management Grade-Level Guides For Classifying Investigator Positions, GS-1810/1811, dated Feb 1972.

Item 3. Position Descriptions attached to memorandum dated December 23, 1983, from Ben Hayes, Director, Office of Investigations to Paul Bird, Director, Division of Organization and Personnel, Office of Administration. These include the following position descriptions:

Primary Positions

Senior Investigator, GG-1811-14, task Leader, OI Field Office
Investigator, GG-1811-13, OI Field Office
Investigator, GG-1811-12, OI Field office
Investigator, GG-1811-11, OI Field Office
Investigator, GG-1811-13, OI Field Operations
Investigator, GG-1811-12, OI Field Operations

Secondary positions

Supervisory Investigator, GG-1811-14, Director, OI Field Office
Supervisory Investigator, GG-1811-15, Director, OI Field Operations
Policy and Special Projects Assistant, GG-1811-15, OI HQ
Senior Investigator, Operations Officer, GG-1811-14, OI Field Operations

Item 4. Letter to William Dirks, Acting Executive Director for Operations, NRC, from Lawrence Lippe, Criminal Division, U.S. Department of Justice, dated 3/7/80.

Item 5. Letter to James E. Cummings, Director, Office of Inspector and Auditor, NRC, from Lawrence Lippe, Criminal Division, U.S. Department of Justice, dated 5/26/81.

Item 6. Memorandum for NRC Commissioners, Proposals on Policy, Procedural and Quality Control Guidance, and Training Programs, from James Fitzgerald, Acting Director, OI, dated 6/17/82.

Item 7. Memorandum for NRC Commissioners, Actions for Improvement in NRC Investigations, from James Fitzgerald, Acting Director, OI, dated 7/16/82.

Item 8. Policy Issue for NRC Commissioners, NRC Conduct of Civil Versus Criminal Investigations, from George Messenger, Acting Director, Office of Inspector and Auditor, dated 12/6/83.

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Item 9. Memorandum for William J. Dircks, Executive Director for Operations, NRC, from Samuel J. Chilk, Secretary, NRC, 4/18/84.

Item 10. Policy Issue for NRC Commissioners, NRC Conduct of Civil Versus Criminal Investigations, from James Fitzgerald, Assistant General Counsel, NRC, 5/22/84.

Item 11. Letter to Chairman Nunzio Palladino, NRC, from Stephen S. Trott U.S. Department of Justice, dated 3/18/85.

Item 12. Letter to Chairman Tom Bevill, Subcommittee on Energy and Water Development, from Commissioner Asselstine, dated 4/2/85.

Item 13. Memorandum of Understanding between the Nuclear Regulatory Commission and the Department of Justice, signed 10/31/88 and 11/23/88, outlining responsibilities of each agency in criminal investigation and prosecution matters:

Item 1, above, provides guidance to Federal government position classification specialists in the classification of positions to the correct series and grade. Items 2 and 3 are the core documents used in the evaluation of the NRC GG-1811 positions. Item 2 is the U.S. Office of Personnel Management Classification Standard and Grade Level Guide to determine the correct series and grade for investigator positions for U.S. Government Executive Branch agencies covered by competitive service requirements. Although NRC is not required to be covered by competitive service rules and regulations, since it is in the "excepted service", it has chosen to abide by the competitive service classification standards issued by the U.S. Office of Personnel Management. Item 3 includes NRC position descriptions for investigators at the time of and immediately after the establishment of NRC's OI.

The other items are memoranda, letters, and other documents that serve to illustrate and describe some important environmental and organizational issues related to the establishment of the OI and the classification of the investigator positions. They have been used to help better understand the organizational intent of NRC in establishing OI and the criminal investigator positions.

A review of these documents shows that for many years the NRC has been debating and considering the role of investigation activities within the NRC, the need to improve the effectiveness of NRC investigation activities, how such work should be defined, and where and how such work should be assigned, carried out, and managed. These issues were discussed prior to and during the time of the establishment of OI, and the discussions continued even after the establishment of OI. The overall theme of the wide ranging analyses and discussions was clearly a effort to improve the effectiveness of NRC investigation activities, and that led to the establishment of OI and the assignment of investigatory responsibilities to OI. Based on the document review, criminal investigation has been accepted as, and appears to be, a legitimate activity in the regulatory enforcement process.

Several conclusions can be drawn from the reviewed documents.

- Before the establishment of OI, there was concern expressed by Congress and the Department of Justice that the NRC investigation program was not adequately managed and carried out. Such concerns, in addition to those expressed within NRC, provided the impetus for the efforts directed at improving the investigatory capabilities of the NRC and the establishment of OI. Items 4 and 12 include discussions of these issues.

- It is of little or no relevance to the analysis of the classification issues whether properly done investigation work results in either civil or criminal penalties. According to the reviewed documents, including statements made by Department Justice officials, the matter of type of penalty often arises after the investigation has been initiated (and possibly conducted) by NRC investigators. During the investigatory phase of the process, the investigation work that results in a civil or a criminal penalty is basically the same. The issue, therefore, is whether NRC investigators applied the appropriate investigation techniques, rather than the nature of the potential resolution of the investigations. This is addressed in item 5, above, where Mr. Lippe stated that "Conceivably, every investigation or audit by the NRC could have criminal, as well as civil potential, since the same conduct can be the basis for both violations. Accordingly, virtually all process, questions or documents obtained have the potential for revealing evidence of a crime, or confirming that one took place."

- It is clear that NRC has the authority to conduct investigations that may result in criminal penalties, although that is not a central issue in this task. Regarding this point, the discussion within the NRC often combines several issues related to the authority of NRC to conduct "criminal" investigations. Several times, these discussions swayed between using the term criminal to mean relating to a crime not necessarily within the investigatory authority of the NRC (i.e., theft), and using the term criminal to refer to a possible or likely penalty (i.e., a criminal penalty, as opposed to a civil penalty).

Significantly, item 8 concludes that, while the NRC does not have the authority to unilaterally carry out investigations of crimes, there is no prohibition on the NRC to assist the Department of Justice in its investigations of criminal activities. This is further discussed in item 10, that summarized the NRC Commissioners decisions to permit NRC criminal investigators to assist the Department of Justice in criminal investigations upon the written request of the Department of Justice, and to notify the Department of Justice when NRC investigators uncovered matters of possible criminal violation. This is of significance to support the conclusion that NRC investigators worked in an environment where GG-1811 work is performed.

- Item 13, the Memorandum of Understanding between the NRC and the Department of Justice), signed in 1988, puts into affect all the earlier discussions and decisions related to the long discussed criminal investigation issues, including formally establishing that NRC criminal investigators could assist the Department of Justice in carrying out criminal investigations. That document makes clear that NRC had the authority and the responsibility to conduct the kinds of investigations that have all the characteristics of investigations that are performed by criminal investigators properly classified to criminal investigator positions.

OCCUPATIONAL ANALYSIS

The U.S. Office of Personnel Management (OPM) publication, "The Classifier's Handbook," (beginning on page 26) provides the following guidance for determining the appropriate series of a position:

- "Important to fully understanding the position is consideration of such factors as the position's relationship to other positions, its primary purpose or reason for existence, the mission and responsibility of the organization in which it is located, and the qualifications required to do the work. It is helpful to review organization charts, mission and function statements, technical and procedural manuals, classification standards and agency guides, position description files, and any other available documents relating to the position. Supervisors and managers can be helpful, and

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often essential, sources of information."

- "In most cases, the occupational series will represent the primary work of the position, the highest level of work performed, and the paramount qualifications required."

- "Mixed Series"

A 'mixed series' position involves work covered by more than one occupational series. For most positions, the grade-controlling work determines the series. Sometimes, however, the lower grade duties are more closely related to the basic purpose of the position. When the work of the position is covered by two or more series in one occupational group and no one series predominates, use the general series for that group, typically the -01 series, for the position. Use the general series also for positions that are not covered properly by any other series in the group but are related closely to the work of the group. When the work of the position falls into more than one occupational group, the proper series may be more difficult to determine. You must consider a number of factors as described below regarding the position. Consider these factors together, since no single one necessarily will result in the most logical decision.

Paramount knowledge required: Most positions have a paramount knowledge requirement even though there may be several different kinds of work assigned to the position. The paramount knowledge is the most important type of subject matter knowledge or experience required to do the work.

Reason for existence: The primary purpose of the position or management's intent in establishing the position is a positive indicator to the appropriate series.

Organizational function: The mission or function of an organization can often provide an indication of the appropriate series for a position. Thus, for example, the Supply Clerical and Technician Series, GS-2005, may be the most appropriate series for a position located in a supply services organization and assigned supply, procurement, and financial clerical duties. On the other hand, a similar position located in an acquisitions organization may be classified better in the Procurement Clerical and Technician Series, GS-1106.

Line of promotion: The normal line of promotion for the position and/or similar positions in the organization frequently will indicate the occupational specialization toward which the position is oriented.

Recruitment source: Supervisors and managers can help by identifying the occupational areas that provide the best qualified applicants to do the work."

Key to determining the most appropriate series of a position, then, is 1) the mission and responsibility of the organization in which the position is located, 2) the position's relationship to other positions in the organization, 3) the position's primary purpose or reason for existence, 4) the line of promotion of the position, 5) the qualifications and knowledge required to do the work of the position, and 6) sources of recruitment for well qualified candidates for the position. These are all important considerations and they have been considered in attempting to resolve this particular issue. (Although I do not consider the positions in question to be mixed series, I believe that it still useful to consider the mixed series determination factors since they are generally applicable in determining the series of any position.)

These general criteria are addressed in the following paragraphs.

General Considerations

- 1) The mission and responsibility of the organization in which the position is located,
- 2) The position's relationship to other positions in the organization, and 3) The position's primarily purpose or reason for existence

From a review of items 4 through 9, it is clear that prior to the establishment of OI, there was a great deal of concern expressed by the Department of Justice and Members of Congress about the ability, training, and effectiveness of NRC investigators and the organizational placement of those investigators within NRC. Those documents make clear that OI was established to improve the effectiveness of NRC criminal investigation activities, with a greater emphasis on successful criminal investigation activities in those areas for which NRC had investigatory authority and responsibilities. Although it was not within the scope of this work to conduct an organizational analysis of the NRC at the time of the establishment of OI in order to fully explore the relationship of OI GG -1811 positions to investigators in other parts of NRC, it is clear from a review of the cited documents that a more effective criminal investigation program was the goal of the establishment of OI and the employment of experienced criminal investigators.

4) The line of promotion of the position

The documents did not directly address the line of promotion for criminal investigators. However, since there was a well established career structure with positions established at the grade 14 and 15 levels, and those positions required criminal investigation experience, it would be reasonable to assume that any lower graded criminal investigators would aspire to and be promoted to higher graded criminal investigator positions.

5) The qualifications and knowledge required to do the work of the position

Regarding the qualifications and knowledge required to do the work, all the position descriptions make clear that criminal investigation experience was required at each of the grade levels.

6) Sources of recruitment for well qualified candidates for the position

The documents and interviews with NRC staff involved with the establishment of OI show that the intent of OI was to hire experienced criminal investigators to staff the new OI. Staffing efforts were focused on obtaining experienced criminal investigators from well established criminal investigation agencies that would have employed well trained staff with up to date skills. This was done to enable OI to quickly assume expanded and more focused criminal investigation activities. As far as I was able to determine, inexperienced staff were not hired into OI criminal investigator positions.

Specific Considerations in Classifying Positions as Criminal Investigators

Item 2, the OPM Grade-Level Guides For Classifying Investigator Positions, GS-1810/1811, dated Feb 1972, provides specific guidance for distinguishing between General Investigator, GS-1810, and GS-1811, Criminal Investigator positions.

That Guide defines the work of General Investigators, GS-1810, as follows:

"This series includes positions that involve planning and conducting investigations covering the character, practices, suitability or qualifications of persons or organizations seeking, claiming, or receiving Federal benefits, permits, or employment when the results of the

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investigation are used to make or invoke administrative judgments, sanctions, or penalties. These positions require primarily a knowledge of investigative techniques and a knowledge of the laws, rules, regulations and objectives of the employing agency; skill in interviewing, following leads, researching records, and preparing reports; and the ability to elicit information helpful to the investigation from persons in all walks of life."

Criminal Investigators, GS-1811, are defined as follows:

"This series includes positions that involve planning and conducting investigations relating to alleged or suspected violations of criminal laws. These positions require primarily a knowledge of investigative techniques and a knowledge of the laws of evidence, the rules of criminal procedure, and precedent court decisions concerning admissibility of evidence, constitutional rights, search and seizure and related issues; the ability to recognize, develop and present evidence that reconstructs events, sequences, and time elements, and establishes relationships, responsibilities, legal liabilities, conflicts of interest, in a manner that meets requirements for presentation in various legal hearings and court proceedings; and skill in applying the techniques required in performing such duties as maintaining surveillance, performing undercover work, and advising and assisting the U.S. Attorney in and out of court."

That OPM guide, in the section titled Distinctions Between General and Criminal Investigating Occupations, states:

"All Federal investigators perform fact-finding and reporting duties on assignments that normally unfold over a period of time. The key distinctions between the general and criminal investigating occupations lie in the different kinds of investigations performed by each and the different knowledge, skills, and abilities those different kinds of investigations impose.

General Investigating Series, GS-1810

Investigations in this occupation result in civil or administrative actions, judgments, sanctions, or decisions. For example, employees in this occupation investigate individuals or organizations seeking or receiving benefits, licenses, loans or employment from the Federal Government or otherwise involved in civil matters of concern to Federal agencies, such as claims, loans or loan guarantees, insurance, malpractice suits, guardianship and custody matters, pensions, etc. This work requires a knowledge of the laws, rules and regulations of the employing agency, skill in interviewing, following leads, researching records, and reconstructing events, and the ability to prepare reports of findings.

Criminal Investigating Series, GS-1811

Positions in this occupation are concerned with investigations of alleged or suspected violations against the laws of the United States. This work requires, in addition to the knowledge, skills, and abilities described for the General Investigating Series, GS-1810, a knowledge of the criminal laws and Federal rules of procedure which apply to cases involving crimes against the United States, for example:

Knowledge of what constitutes a crime or violation as defined in pertinent statutes, including the Uniform Code of Military Justice, and statutes with antifraud or similar criminal penalties;
- The kind of evidence that is required to prove that a crime was committed;

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- The relationships among the criminal investigative jurisdictions of various agencies;
- Decisions and precedent cases involving:
 - admissibility of evidence
 - search and seizure
 - arrest authority
- Sources of information, i.e., informants, and methods of obtaining required evidence;
- The methods and patterns of criminal operations;
- Availability and use of modern detection devices and laboratory services;
- Awareness of continuing advances in investigative technology.

The purpose of the case, i.e., alleged or suspected violation of criminal law, imposes additional requirements on most positions in the Criminal Investigating Series, GS-1811. For example, most criminal investigators must be skillful in such activities as:

- Maintaining surveillance;
- Performing undercover work;
- Making arrests;
- Taking part in raids.

There are also instances in which investigators follow leads that indicate a crime will be committed rather than begin an investigation after a crime has been committed."

As is evident from the above, there are some basic similarities between the General and Criminal Investigator positions. However, there are some very key characteristics that distinguish Criminal Investigator from General Investigator positions. Most importantly, Criminal Investigators are concerned with investigations of alleged or suspected violations against the laws of the United States. In order to carry out this work, criminal investigators must possess a knowledge of the criminal laws and Federal rules of procedure which apply to cases involving crimes against the United States. In addition, they must have knowledge of the kind of evidence that is required to prove that a crime was committed, be aware of and understand the relationships among the criminal investigative jurisdictions of various agencies, be familiar with decisions and precedent cases involving admissibility of evidence, search and seizure, and arrest authority, understand how to develop sources of information, have knowledge of and understand the methods and patterns of criminal operations, know how to take advantage of modern detection devices and laboratory services, and have an awareness of continuing advances in investigative technology. These are characteristics the Criminal Investigators generally do not share with General Investigators. It is important to note that the OPM guidance makes clear that although most Criminal Investigators would be expected to be skillful in activities such as maintaining surveillance, performing undercover work, making arrests, and taking part in raids, these are not required activities for all Criminal Investigators, and the absence of regular or frequent participation in such activities by itself would not be reason to exclude persons from the Criminal Investigator category.

SUMMARY OF FINDINGS

Using the position descriptions attached to the December 23, 1983 memorandum, it is possible to determine whether those position descriptions included the characteristics required for classification as a Criminal Investigator. The results of that analysis are summarized in the table on the following page.

Based on my analysis of the above listed position descriptions, and comparison of those position descriptions with the Office of Personnel Management guidance for classifying Criminal

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Investigator positions, and based on the demonstrated need of NRC to conduct criminal investigations in those areas for which NRC has investigatory authority and responsibility, I have concluded that the decision to classify the OI Investigator positions as Criminal Investigators, GG-1811, was reasonable and appropriate.

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| CHARACTERISTIC IDENTIFIED IN EACH POSITION DESCRIPTION? | | COMMENTS |
|---|-----|--|
| Concerned with investigations of alleged or suspected violations against the laws of the United States. | Yes | Explicit statement in each position description. |
| Possess a knowledge of the criminal laws and Federal rules of procedure which apply to cases involving crimes against the United States. | Yes | Explicit statement in each position description. |
| Have knowledge of the kind of evidence that is required to prove that a crime was committed. | Yes | Explicit statement in each position description. |
| Be aware of and understand the relationships among the criminal investigative jurisdictions of various agencies. | Yes | Explicit statement in each position description. |
| Be familiar with decisions and precedent cases involving admissibility of evidence, search and seizure, and arrest authority. | Yes | Explicit statement in each position description. |
| Understand how to develop sources of information. | Yes | Not explicitly stated in each position description, but integrated in broader statements of duties and knowledge required. |
| Have knowledge of and understand the methods and patterns of criminal operations, know how to take advantage of modern detection devices and laboratory services. | Yes | Not explicitly stated in each position description, but integrated in broader statements of duties and knowledge required. |
| Have an awareness of continuing advances in investigative technology. | Yes | |

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ATTACHMENTS (Not included, except for resume)

Resume of Stephen Perloff

U.S. Office of Personnel Management, The Classifier's Handbook.

U.S. Office of Personnel Management Grade-Level Guides For Classifying Investigator Positions, GS-1810/1811, dated Feb 1972.

Position Descriptions attached to memorandum dated December 23, 1983, from Ben Hayes, Director, Office of Investigations to Paul Bird, Director, Division of Organization and Personnel, Office of Administration.

Letter to William Dirks, Acting Executive Director for Operations, NRC, from Lawrence Lippe, Criminal Division, U.S. Department of Justice, dated 3/7/80.

Letter to James E. Cummings, Director, Office of Inspector and Auditor, NRC, from Lawrence Lippe, Criminal Division, U.S. Department of Justice, dated 5/26/81.

Memorandum for NRC Commissioners, Proposals on Policy, Procedural and Quality Control Guidance, and Training Programs, from James Fitzgerald, Acting Director, OI, dated 6/17/82.

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Letter to Chairman Nunzio Palladino, NRC, from Stephen S. Trott, U.S. Department of Justice, dated 3/18/85.

Letter to Chairman Tom Bevill, Subcommittee on Energy and Water Development, from Commissioner Asselstine, dated 4/2/85.

Memorandum of Understanding between the Nuclear Regulatory Commission and the Department of Justice, signed 10/31/88 and 11/23/88, outlining responsibilities of each agency in criminal investigation and prosecution matters.

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ATTACHMENT 6**WHAT THE COMMISSION SAID
During the 1984 Briefing on Criminal vs. Civil Investigations
Compared to: the NRC OIG consultant's Conclusions**

James Fitzgerald:... the Commission does not have independent authority to conduct criminal investigations.

Chairman Palladino: ... on page 3 you do talk about the differences and you mention them earlier, between criminal and civil investigations, at least in the footnote. It seems to me that the procedures regarding criminal safeguards do affect that collecting. You can't do exactly the same thing under our procedures as the FBI could do under theirs.

Chairman Palladino: ... "Terming the investigation 'civil' means only that there is a valid NRC civil enforcement purpose and, therefore, that criminal safeguards and procedures are not required.

Ben Hayes: What I have attempted to do over the last year or so is to provide the Commission and the staff with a thorough, complete investigation that hopefully satisfies our regulatory needs.

Ben Hayes:... we refer those particular cases where in our view there may be some criminal sanctions, to the Department for their review.

Chairman Palladino: ... you say, "That the Commission authorize OI to state in its negotiations with DOJ that NRC, in appropriate circumstances, will (i) conduct investigations at DOJ's request." My feeling would be that we should say, "(i) assist in the conduct of investigations at DOJ's request."

Commissioner Asselstine: Is it realistic or feasible to say, "Look, what we would like to do is get our civil investigation done. At that point we'll tell you that we have completed our investigation. We will identify any potential criminal items that we think might be of interest to you."

Commissioner Bernthal: ..., I'm concerned that this policy statement here, which you have softened from "conduct investigations" to "assist in investigations," that may still not quite be the right implication, it seems to me. We may want to make sure that we cooperate in every way necessary with DOJ, but that we not by any policy statement give the implication that we are going to be aggressive or proactive in achieving criminal investigation of objectives.

Chairman Palladino: Yes, our policy is to first serve our civil purposes and then help DOJ.

WHAT THE OIG CONSULTANT CONCLUDED

It is clear that NRC has the authority to conduct investigations that may result in criminal penalties, although that is not a central issue in this task.

....while **the NRC does not have the authority to unilaterally carry out investigations of crimes**, there is no prohibition on the NRC to assist the Department of Justice in its investigations of criminal activities. This is further discussed in item 10, that summarized the NRC Commissioners decisions to permit NRC criminal investigators to assist the Department of Justice

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in criminal investigations upon the written request of the Department of Justice, and to notify the Department of Justice when NRC investigators uncovered matters of possible criminal violation. **This is of significance to support the conclusion that NRC investigators worked in an environment where GG-1811 work is performed.**

Foster's Notes Regarding this Comparison:

1. The consultant clearly understood that the NRC lacks criminal investigative authority!
2. I am unaware of any agency being prohibited from assisting the DOJ!
3. Anyone can assist the DOJ, even non-citizens, this does not make one an 1811!
4. The "environment" was not the question, and he is totally wrong!
5. One gets the feeling he really had to work at this, and did not want to address the percentage of time spent conducting criminal investigations!
6. Nowhere else in the U. S. Federal workforce would these individuals be classified as 1811's.

ATTACHMENT 7**FOSTER'S COMMENTS ON THE NRC OIG REPORT**

The NRC Office of Inspector General (OIG) review of my concerns regarding the classification of Office of Investigations (OI) Investigators, and their being provided early retirement and premium pay contains many weaknesses. The introduction suggests that I simply made statements and did not submit a highly detailed, documented concern complete with references to numerous documents, a chronology of events and citations from court cases. The many documents I personally provided are not mentioned or addressed. More than sufficient information was provided for a comprehensive investigation.

The review then consists of interviews with the individuals who either approved the provision of law enforcement officer (LEO) benefits, or who were currently benefitting from those benefits. However, no reference was made to the LEO early retirement and 25% "availability pay" benefits. The use of a consultant, while normally very worthwhile, did not appear to aid the comprehension of my concerns, and it appeared that the consultant was not given the information I provided. The consultant's report only lists 13 selected documents, few that I provided. The criteria utilized by the Merit Systems Protection Board and other federal agencies to determine qualification for LEO benefits of early retirement and premium pay were not even mentioned.

Several salient points were not addressed: the "Malsch memorandum" (indicating NRC should not conduct criminal investigations under any circumstances), and the statements by NRC management that NRC did not conduct criminal investigations, and lacked the statutory authority to do so. The certification by NRC that the positions were "rigorous", but later described as consisting of work in an office setting, is not touched upon. The sequence of events where William Ward, and no one else, for quite some time (years, I assume this is where Peter Baci filed a grievance), is given LEO benefits, apparently did not seem unusual.

The report does agree that Office of Investigations Investigators lack arrest authority, authority to carry firearms or other weapons, and that a small percentage of OI cases were referred to the Department of Justice. That this is inconsistent with statements to the Office of Personnel Management is not addressed.

Most importantly, a close reading of the OIG report reveals that it substantiates my statements: OI does not have criminal investigative authority, does not conduct arrests nor have firearms authority, and during the review period, 22% of the OI investigations were referred to DOJ (no mention of the percent of these accepted for investigation by DOJ). The fact that, by my estimate, 6-7% of the OI investigations will be investigated by DOJ is salient; OPM rejected an NRC request for Law Enforcement Officer Retirement for the Director, Office of Inspector and Auditor when advised that 40% of the work was criminal investigation related (less than the required 50%).

I assume that the final report was written by someone other than the initially assigned investigator, who had left the agency months prior to the issuance of the report. The report is inadequate, at best.

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The following comments address sections of the OIG report itself:

Foster alleged that the OI investigators lack arrest authority, authority to carry firearms or other weapons, do not perform undercover work, do not execute search or seizure warrants, and are not exposed to hazardous conditions or inclement weather.

OIG obtained and reviewed correspondence between NRC and OPM which was used to grant coverage under 5 U.S.C. 8336(c) for the OI criminal investigator positions (GG-1811 series). These position descriptions were then used by OPM as the basis for granting the special law enforcement retirement coverage to OI investigators. OIG noted that SECY-84-32 and SECY-84-212, dated January 25, 1984 and May 22, 1984, respectively, documented that OI has the authority to conduct investigations that have both criminal and civil enforcement implications and to assist the Department of Justice (DOJ) in conducting investigations solely for criminal prosecution purposes.

OIG learned that in November 1979, the U.S. Civil Service Commission (CSC), OPM's predecessor, approved a request by the NRC for coverage under the law enforcement retirement provisions for an investigator position in the Office of Inspection and Enforcement (OIE), NRC. After OI was created in July 1982, NRC requested OPM to approve law enforcement retirement provisions for the investigator positions in the newly created OI. (Didn't this seem strange, that only one position (W. Ward) was approved between 11/1979 - 05/1984?)

James A. Fitzgerald, former Assistant General Counsel, OGC, NRC, who is currently the Deputy Director in OI, pointed out to OIG that OPM's guidelines regarding the GG-1811 series criminal investigator positions do not mandate that GG-1811 s carry a firearm or make arrests; it merely stipulates that these functions are normally associated with the duties and responsibilities of an GG-1811 criminal investigator.

William D. Hutchinson, Assistant to the Director, OI, pointed out to OIG that the only difference between the OI GG-1811 criminal investigators and the GG-1811 criminal investigators assigned to other federal law enforcement agencies is OI investigators do not carry firearms or make arrests. (Isn't this some of what I alleged?)

OIG determined that over the review period, an average of 22 percent of OI's cases were referred to the DOJ for criminal prosecution. ("prosecution" should be "prosecutive review", fewer were investigated, and much fewer were actually "prosecuted." This matches my calculations well; how many referred cases by % were accepted for criminal prosecution (23% of referrals estimated)?)

During OIG's review of correspondence between OPM and NRC, OIG found that in a number of instances, OPM requested clarification concerning the nature of criminal violations investigated by OI and the amount of time OI spent conducting these investigations. OIG noted that the NRC described the nature of the criminal activities and amount of time OI spent conducting these activities in various ways. Generally, the correspondence submitted by the NRC to OPM indicated that almost all of the incumbent's time was spent conducting criminal investigations which included violations of the Atomic Energy Act and violations of the Federal criminal code, Title 18. (Yes!, and it was/is not true, see above, actually much less than 22%! Opm based its decision on a number in excess of 50%, and this was never true.)

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See discussion under "What Does OI (Predominantly) Do?"

It is clear that NRC has the authority to conduct investigations that may result in criminal penalties. The discussion within the NRC often combines several issues related to the authority of NRC to conduct "criminal" investigations. Several times, these discussions swayed between using the term criminal to mean relating to a crime not necessarily within the investigatory authority of the NRC (i.e., theft), and using the term criminal to refer to a possible or likely penalty (i.e., a criminal penalty, as opposed to a civil penalty).

Significantly, while the NRC does not have the authority to unilaterally carry out investigations of crimes, there is no prohibition on the NRC to assist the Department of Justice in its investigations of criminal activities. The NRC Commissioners decisions to permit NRC criminal investigators to assist the Department of Justice in criminal investigations upon the written request of the Department of Justice, and to notify the Department of Justice when NRC investigators uncovered matters of possible criminal violation. (Such written requests are nonexistent!)

the Memorandum of Understanding between the NRC and the Department of Justice), signed in 1988, puts into affect all the earlier discussions and decisions related to the long discussed criminal investigation issues, including formally establishing that **NRC criminal investigators could assist the Department of Justice in carrying out criminal investigations.**

Criminal Investigating Series, GS-1811

Positions in this occupation are concerned with investigations of alleged or suspected violations against the laws of the United States. This work requires, in addition to the knowledge, skills, and abilities described for the General Investigating Series, GS-1810, a knowledge of the criminal laws and Federal rules of procedure which apply to cases involving crimes against the United States, for example:

Knowledge of what constitutes a crime or violation as defined in pertinent statutes, including the Uniform Code of Military Justice, and statutes with anti-fraud or similar criminal penalties;

- The kind of evidence that is required to prove that a crime was committed;
- The relationships among the criminal investigative jurisdictions of various agencies;
- Decisions and precedent cases involving:
 - admissibility of evidence
 - search and seizure
 - arrest authority
- Sources of information, i.e., informants, and methods of obtaining required evidence;
- The methods and patterns of criminal operations;
- Availability and use of modern detection devices and laboratory services;
- Awareness of continuing advances in investigative technology.

The purpose of the case, i.e., alleged or suspected violation of criminal law, imposes additional requirements on most positions in the Criminal Investigating Series, GS-1811. For example, most criminal investigators must be skillful in such activities as:

- Maintaining surveillance;
- Performing undercover work;
- Making arrests;
- Taking part in raids.

It is important to note that the OPM guidance makes clear that although most Criminal Investigators would be expected to be skillful in activities such as maintaining surveillance, performing undercover work, making arrests, and taking part in raids, these are not required activities for all Criminal Investigators, and the absence of regular or frequent participation in such activities by itself would not be reason to exclude persons from the Criminal Investigator category. (The merit system protection board thinks it is necessary for law enforcement officer retirement benefits. This conclusion is contrary to several MSPB decisions and court case determinations.)

United States Secret Service

Deputy DirectorGuy P. Caputo

Assistant Director (Protective Research)David C. Lee

Executive Director of Work Force Planning & Diversity Management Hubert T. Bell Jr.

United States Nuclear Regulatory Commission

Current Positions

Director, Office of Investigations (OI) (01/09/94) Guy P. Caputo

Deputy Inspector General (NRCOIG) David C. Lee

Inspector General (NRCOIG) (07/08/96) Hubert T. Bell, Jr.

ATTACHMENT 8

Article in the National Treasury Employees Union Chapter 208, May, 2000 newsletter "Your Voice": DOES NRC NEED AN EMPLOYEE CONCERNS PROGRAM? :

Have you seen the posters exhorting NRC employees to contact the NRC Office of Inspector General (OIG) hotline to report waste, fraud and abuse? Did you know that Investigators in the NRC Office of Investigations (OI) get early, 20-year, retirement; more favorable retirement benefits, and a **25% pay differential** as a result of their duties as law enforcement officers? The 25% premium pay also counts toward a higher retirement income because their "high three" salary is higher. Do you know that to be considered as a law enforcement officer(LEO), you must meet the majority of the criteria listed below?

1. Perform investigations (long-term, complicated reviews).
2. Investigate individuals suspected of or convicted of violating criminal laws of the United States (employing agency must have criminal investigation authority).
3. Have the authority to carry weapons.
4. Have the authority to arrest, seize evidence, give Miranda warnings, execute search warrants. Have a "rigorous" position which includes unusual physical hazards due to frequent contacts with criminals and suspected criminals, working for long periods without a break, and being in on-call status 24 hours a day.

What would many NRC employees do if they were aware of this information? Expressing a concern over such an issue might not be well received, and OIG Investigators are also classified as LEO's. Lacking an employee concerns program, the OIG is the only NRC avenue to express such a concern.

James Foster was an NRC employee and a regional investigator prior to the creation of OI, and knew of the unusual background information that went into obtaining law enforcement benefits for OI personnel. When efforts to be classified as series 1811 "Criminal Investigator" series were initiated, he was not in favor of it, because his view was that NRC was not performing criminal investigations. The headquarters group, which later became OI, strongly wanted the classification because of its benefits.

Foster left OI for the Region III in 1982, and largely forgot his classification disagreement. It laid in the back of his mind, but infrequently bothered him. On February 11, 1988 he sent an memorandum to Victor Stello, Executive Director for Operations, recommending changes and a proper classification for OI Investigators. Sometime later, a similar memorandum was sent to Chairman Selin. There was no response to either memorandum.

The retirement of several OI personnel, and a visit by OIG personnel brought back old memories, and Foster again asked questions regarding the basis for the series 1811 classification. On August 6, 1997, he sent an email to the OIG and Human Resources (HR) personnel regarding classification of OI's personnel as series 1811 versus series 1810 "Civil Investigator".

With some encouragement, HR personnel responded to Foster's question. Their response was that they do not base "classification of positions into the 1811 series on arrest authority, the carrying of weapons or degree of hazard." Knowing this to be incorrect, Foster began to research series 1811 classification information, finding a wealth of information.

He prepared a comprehensive "concern package" that included documents of the Office of Personnel Management, Merit System Protection Board, General Accounting Office, and NRC, appeals court decisions, and his own recollections. He believed that the resulting "concern package" conclusively indicated that OI investigators are misclassified as LEOs in the 1811 series. A conservative estimate indicated that over \$600,000 extra per year in salary and retirement

benefits was paid out as a result.

Foster sent this package, to the NRC's OIG, HR, OI, Commissioners, Chairman, various NRC personnel, General Accounting Office (GAO), and members of Several Congressional committees. An Employee Suggestion was also filed.

On August 20, 1998, NRC Commissioner McGaffigan received Foster's concern and responded that he had contacted the NRC OIG, and passed the concern on to the Senate Governmental Affairs Committee. Foster never heard from the Governmental Affairs Committee.

GAO and other congressional staffs acknowledged the concern package had been received. No response was received from the NRC OIG to any of Foster's various communications. As a result, Foster filed a complaint with the President's Council on Integrity and Efficiency, the oversight body for the Inspector General program. On October 13, 1998, they advised they did not review the IG's "discretionary authority to conduct an investigation."

In mid-October, 1998, Illinois Senator Richard Durbin sent Foster's concern package to the Chairman. On October 26, 1998, Foster received the first indication (voice mail from IG personnel) that the IG was addressing his concern. The assigned IG Investigator advised that the investigative phase of his review was completed in December 1998, and report writing had begun. The IG investigator left the NRC in March 1999 without advising Foster.

Foster subsequently contacted the Senate Committee on Government Reform, Subcommittee on the Civil Service, which took an interest and discussed the status of Foster's issues with the GAO. GAO declined to take action, advising that an agency OIG was the proper avenue for review.

The OIG hired a consultant, who prepared a report entitled "Report to the Nuclear Regulatory Commission Office of the Inspector General Regarding the Classification of Positions to GG-1811, Criminal Investigator Series," in September 1999. This report was utilized as an attachment to a memorandum to then Chairman Greta Dicus, dated October 25, 1999, entitled "Alleged Improper Classification of Office of Investigations (OI) Investigators in GG-1811 Series". Both the OIG review and consultant's report indicate that Foster's concerns had not been validated; OI investigators were not misclassified.

However, the OIG report revealed that most of the information provided, such as detailed discussions of the regulations and their bases, a memorandum dated October 15, 1982 in which the NRC Deputy General Counsel advised that, lacking statutory authority, NRC personnel should not conduct criminal investigations under any circumstances, the percentage of times OI investigators actually perform certain functions, OI criminal caseload statistics, discussion of internal NRC memorandum, certification of the OI positions as "rigorous", testimony of agency personnel, discussion of case law and Merit Systems Protection Board decisions, and the detailed chronology of events had not been addressed.

Those interested may get a copy of Foster's concern package and the resulting OIG report, by accessing ADAMS document ML 003700665, or contacting the headquarters office of the NTEU.

Foster continues to try to obtain an impartial, comprehensive review of his concern. From February 11, 1988 until the current date, he has been trying to get such a review. He has been trying for over a dozen years to get such a review of his concerns; **NRC needs an independent employee concerns program.**

ATTACHMENT 8A**NRC STAFFER VOWS TO CONTINUE CRUSADE ON NRC INVESTIGATIVE PERSONNEL**

For more than a decade, NRC staffer James Foster has argued that NRC investigators in the Office of Investigations (OI) have been intentionally misclassified in order to gain increased pay and benefits. But so far, no one has substantiated his claims. And he's made his case to NRC commissioners, the agency's Inspector General (IG), lawmakers, the President's Council on Integrity & Efficiency, the U.S. Office of Personnel Management, the General Accounting Office, and the Federal Law Enforcement Officers Association, to name a few. Foster, an incident response coordinator for Region III, says he is undeterred by his lack of success to date and will keep speaking out on what he calls a flagrant case of waste, fraud and abuse that is costing the agency hundreds of thousands of dollars each year.

For their part, some OI investigators call Foster's crusade an 18-year grudge and have largely ignored his outcry—until recently. But when Foster posted his complaint—a nearly 95-page document that he calls his "concern file"—on the agency's electronic document system Adams, some said he had taken it too far. "It's a personal affront," said one investigator, "that he is accusing us of complicity in a conspiracy to defraud the government. He's saying that I'm committing a crime."

The investigator said Foster's naming of investigators is what has most angered a group of OI employees, who notified their superiors that they would take legal action if Foster continued. "The agency has been put on notice: Action will be taken if he continues on our (NRC) time," he said. Foster was a regional investigator prior to the creation of NRC's Office of Investigations in 1982. But within the newly established office, he was not granted a GS-1811 status because he did not have prior experience as a criminal investigator. NRC investigators with the federal GS-1811 classification are eligible for special law enforcement retirement benefits and, according to Foster, "premium pay"—25% "availability" pay that increases both take-home and retirement pay.

Foster asserts that OI investigators should be classified as GS-1810 general investigators because they lack authority to carry firearms, do not execute search or seizure warrants, and do not make arrests or perform undercover work or surveillances.

NRC Inspector General Hubert Bell, for one, disagrees. An IG report sent to the commission last year concluded there was no malfeasance in the NRC's classification of OI investigators. The report said an independent consultant whom the IG had hired studied the federal classification guidelines and found that the GS-1811 status was "reasonable and appropriate." Foster calls the IG's report a "crook" and says that it did not investigate the issues he sent them. Since the report was issued, he has continued sending out his complaint. "Hope springs eternal," he said, when asked why he hasn't stopped talking about the issue.

In the National Treasury Employees Union, Chapter 208, May newsletter, Foster said he left OI in 1982 and "largely forgot his classification disagreement." But he said it laid in the back of his mind. He brought up the issue to senior NRC officials 1988 and began his quest in earnest in 1997. Foster says he's "sure I'm on some dart boards" but that he will not give up his fight. "I believe these people are entirely wrong. No matter how many people tell you that, you know deep in your heart you're right." (*Jenny Weil, Washington, Inside NRC*)

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ATTACHMENT 9LEO VS REGULAR RETIREMENT COSTS PER PERSON PER YEAR
TWO ANALYSES

1:

| | High-Three \$75,000 50 years old, 20 years service | | | High-Three \$100,000 57 years old, 25 years of service | | |
|-------------|--|------------------------------|------------|--|------------------------------|------------|
| | Regular Retirement Annuity | LEO Retirement Annuity | Difference | Regular Retirement Annuity | LEO Retirement Annuity | Difference |
| <u>CSRS</u> | \$24,504 | \$37,500 | \$12,996 | \$46,248 | \$60,000 | \$13,752 |
| <u>FERS</u> | \$15,000 | \$25,500 | \$10,500 | \$18,852 | \$39,000 | \$20,148 |

Most current employees will be in the FERS system, so LEO retirement benefits account for \$10,500 - \$20,148 per person, per year of retirement, under this analysis. If the "high three" value is higher (due to 25% availability premium pay, for example) the amounts would increase considerably. Increased costs of \$12,000 - \$22,000 would be involved.

Using the lesser of the two cases, if the retiree is in retirement for ten years before death, costs per individual could range equal \$120,000 or more per individual. **With 20 year early retirement at age fifty, the retirement period could equal or exceed twenty years, and the conservative cost differential for a single individual would be approximately \$240,000.**

Not included in this analysis are the related costs of early retirement; paying a current employee their salary and premium pay and an employee who otherwise would not have retired extra retirement benefits, at the same time. (Adapted from an analysis performed by the Association of Assistant U.S. Attorneys)

2:

At the request of the Department's Office of Personnel Policy, the Treasury OIG developed a model to estimate the costs associated with various proposals for converting Treasury employees to LEO status. The model consists of certain formulas and assumptions, which were based on those previously used by the Office of Personnel Management (OPM) for estimating the financial impacts of granting LEO status to selected employees at several Federal agencies. Additional assumptions were based on discussions with Office of Personnel Policy staff.

In applying the model, the OIG selected a group of 8,172 Treasury employees who were on the Department's payroll for pay period 10 in 1997. As a result, all computations were made using the actual annualized salary information for this group for pay period 10. The estimate includes increased costs to the Government for salary, and retirement and other benefits. Any subsequent changes to legislation or regulations could alter the factors contained in the OIG's formulas and would likely cause a different outcome for the calculations.

The model found that Treasury would annually incur an additional \$50.6 million to provide LEO status to the specific group of 8,172 employees [added:\$6,191.87 per employee per year, not

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counting 25% availability pay]. This projected annual growth consists of the following Departmental increases: (1) \$14.9 million for base pay; (2) \$216,000 for MEDICARE contributions; (3) \$741,000 for Social Security contributions; (4) \$537,000 for Thrift Savings Plan contributions; (5) \$1.1 million for Civil Service Retirement System (CSRS) contributions; and (6) \$33.1 million for Federal Employees Retirement System (FERS) contributions. The Federal Government also would be required to annually provide \$24.4 million in additional contributions to CSRS for this group of employees as current employee and employer contributions fall far short of full funding needs. (As a result of this deficit, funds are appropriated annually to provide additional contributions to CSRS).

The amount of employee and employer contributions for past service will fund only a portion of the estimated increased LEO retirement costs. If the 8,172 Treasury employees are provided credit for past service, no mechanism exists to recover these large costs, which will have to be borne by taxpayers in the form of an unfunded liability to CSRS and FERS. Using the OPM Chief Actuary Office's calculations and factors, the OIG estimated that this one-time unfunded liability for CSRS and FERS would total nearly \$539.1 million. (Department of the Treasury Office of Inspector General Report #OIG-97-E03)

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ATTACHMENT 10

RETYPE DOCUMENT FROM NRC NUDOCS FILE
MEMO BY REGION II REGIONAL ADMINISTRATOR

February 24, 1995

The Citadel Criminal Justice Society
ATTN: R. Boyd Barker, President
Cadet 2nd Lieutenant, S. C. C. C.
MSC 229, The Citadel
171 Moultrie Street
Charleston, SC 29409

Dear Cadet Barker:

Thank you for your February 10, 1995 invitation to participate in your Society's law enforcement career fair. The Nuclear Regulatory Commission (NRC) is supportive of these type fairs to generate interest in careers with the NRC.

Based on your letter, the fair is directed toward **law enforcement careers**. Since the NRC's functions are not directly in this area, but in areas such as engineering, health physics, licensing and inspection, our participation does not appear to suit your needs. Therefore, we will not be participating in the proposed fair. **We would be glad to consider participation in fairs with emphasis in the areas directly related to the functions we perform.**

Sincerely,

Stewart D. Ebnetter
Regional Administrator

9503090237 950224
PDR MISC
9503090237 PDR
Package: 9503090237

Microfilm address: 82997 - 031

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ATTACHMENT 11
NAMES, ADDRESSES, TELEPHONE NUMBERS, E-MAIL ADDRESSES

Name: Mr. Richard Meserve, Chairman
Address: Nuclear Regulatory Commission (NRC)
Washington, D. C. 20555-0001
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E-mail: RAM@NRC.GOV

Name: Mr. Hubert T. Bell, Inspector General
Address: Nuclear Regulatory Commission (NRC)
Washington, D. C. 20555-0001
Telephone: 301-415-5930
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Name: Mr. Guy P. Caputo, Director
Office of Investigations
Address: Nuclear Regulatory Commission (NRC)
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Telephone: 301-415-2373
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Name: Mr. Paul Bird, Director
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Name: Mr. Thomas J. Pickard, Chairman
Integrity Committee, President's Council on Integrity and Efficiency,
Deputy Director, U. S. Department of Justice (DOJ)
Address: Federal Bureau of Investigation
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Washington, D. C. 20535-001
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Name: Mr. Garry M. Ewing, Staff Director,
House of Representatives Committee on Government Reform
Subcommittee on the Civil Service and Agency Organization
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Name: Mr. Conrad U. Johnson, Director
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Name: Mr. Patrick E. McFarland, Chairman, PCIE Investigations Committee,
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E-mail: Jadavis@opm.gov

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E-mail: Ddwhite@opm.gov

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ATTACHMENT 12IMPORTANT NUMBERS:

NRC OIG REPORT "Alleged Improper Classification of Office of Investigations (OI) Investigators in GG-1811 Series": NRC OIG Case File 99-061

PRESIDENT'S COUNCIL ON INTEGRITY AND EFFICIENCY CASE NUMBER: #238

OFFICE OF SPECIAL COUNSEL (OSC) FILE NUMBER: DI-00-1206

GAO FRAUDNET CONTROL NUMBER: 39691

OPM OFFICE OF INSPECTOR GENERAL COMPLAINT NUMBER: C 99-123

NRC EMPLOYEE SUGGESTION NUMBER: (RIII) 25

NRC AGENCY DOCUMENT ACCESS AND MANAGEMENT SYSTEM (ADAMS) NO:
(Inspector General report removed from ADAMS, in compliance with NRC Management Directive prohibiting IG reports in the ADAMS system)

MSPB CASE: CH-1221-02-0322-W-1, James Foster vs NRC.

ATTACHMENT 13

(emphasis added by James Foster)
E-mail From: Patrick J. Jennings, OPM
To: James E. Foster
Date: Tuesday, March 14, 2000

Mr. Foster:

Thank you for your e-mail concerning the November 9, 1999, NRC Inspector General Office review of the classification of the GS-1811 job series in the NRC's Office of Investigations. In our view, **the findings of the NRC Inspector General do not indicate that an OPM review of the retirement coverage of positions at the NRC Office of Investigations (NRC OI) is needed.**

You have made several allegations concerning the classification and retirement coverage of NRC OI positions. **First**, you allege that NRC OI positions have been purposely misclassified as series 1811 Criminal Investigator positions. **Second**, you allege that NRC provided "vague, erroneous, or misleading and false information" concerning the alleged misclassification to mislead OPM into granting law enforcement officer (LEO) retirement coverage to NRC OI positions. **Third**, you allege that fraudulent information was provided to the U.S. General Accounting Office (GAO) to avoid GAO audit. **Fourth**, you allege that due to the alleged misclassification of NRC IO positions, the NRC has unnecessarily incurred costs for the LEO retirement contributions and premium pay of NRC OI personnel. **Fifth**, you allege that "senior NRC management" is aware of the alleged misclassification and alleged erroneous retirement coverage, but "the NRC has shown inability to impartially review [the issues]." In short, all your allegations arise from alleged purposeful misclassification of NRC OI positions and the resulting erroneous LEO retirement coverage of NRC OI positions.

The Office of the Inspector General of the NRC (NRC OIG) is the office tasked with investigating allegations of waste, fraud, and abuse within the NRC including areas such as job classification, pay, and benefits. The NRC OIG investigated your allegations and, on October 25, 1999, issued a memorandum discussing its findings. This memorandum included a report prepared by Stephen Perloff, Personnel Management Consultants, Inc., an independent contractor, on the classification of GS-1811 positions at the NRC OI. The stated purpose of the NRC OIG review was to determine "whether there was any misconduct on the part of NRC staff with respect to the classification of OI investigators in the GS-1811 series and the resultant granting to OI investigators by OPM of special law enforcement officer retirement provisions." The NRC OIG focused on two issues: (1) the appropriateness of the classification of OI investigators in the GS-1811 series; and (2) the accuracy of information provided to OPM in 1983 by the NRC, which was used by OPM to make its LEO retirement coverage decision.

The NRC OIG determined that the "position descriptions developed by the agency after OI was created in 1982 accurately characterized the activities of an OI investigator." The NRC relied on Mr. Perloff's analysis to determine if OI positions were correctly classified in the 1811 series. Mr. Perloff determined that the classification of the OI positions in the 1811 series was reasonable and appropriate. **The NRC OIG also determined that no false information was provided to OPM in response to OPM requests for additional information.** The NRC OIG found no indication of wrongdoing on the part of NRC staff concerning the classification of NRC OI positions which resulted in OPM granting LEO retirement coverage.

Based on the NRC OIG review, there is no basis for an OPM review of the decision which granted LEO retirement coverage to NRC OI positions. A determination of LEO retirement coverage for a position is based on the duties of the position as listed in the position description. Classification of a position in a job series is separate and distinct from an LEO determination. Generally, it is good practice to ensure that the information (series classification and position description information) about a position is accurate before making an LEO coverage decision. However, the duties in the position description are the determining criteria in an LEO retirement coverage decision.

In the case of the NRC OI positions, the NRC OIG has stated that the position descriptions of OI investigators are accurate. Further, the NRC OIG has held OPM was not provided with false information in response to requests for background information on the duties of OI investigators. **Although in one instance information provided to OPM was inaccurate (one NRC response indicated that OI investigators conducted mail fraud investigations when they did not), the elimination of the inaccurate statement would have had no effect on OPM's final decision to grant LEO coverage.** Since the NRC OIG found that the position descriptions and information provided to OPM were accurate, **there is no new and material evidence that would warrant an OPM re-examination of the LEO coverage of OI investigators.**

Thank you for your interest in this matter.

Foster's Comments:

- 1. A well-written E-mail. A detailed recount of my allegations; much more complete than the NRC OIG report summary.**
- 2. While my allegations are outlined, there is no reference to the highly detailed "concern file," documentation, MSPB cases, court cases or chronology. There is no discussion of the certification of NRC positions as "rigorous." This had been sent to OPM multiple times.**
- 3. One instance of information provided OPM is identified as having been "inaccurate", but not "false." The two sentences do not match well. This was not noted in the NRC OIG report.**
- 4. Does not note that a close reading of the NRC OIG report indicates agreement with many of my statements.**
- 5. Total reliance on the NRC OIG report; totally ignores the information I had provided OPM for months.**

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ATTACHMENT 14

SCANNED DOCUMENT
(Emphasis added by Foster)

United States Office Of Personnel Management

Information Removed in Accordance with PII Review.

Dear Mr. Foster:

In Reply Refer To: JUL 12, 2000

This is in reply to your June 23, 2000, and July 8, 2000, e-mail messages to me and several other people in the Office of Merit Systems Oversight and Effectiveness here at the U.S. Office of Personnel Management (OPM).

As you know, our office received a request from Mr. Patrick E. McFarland, the OPM Inspector General, to review your information concerning classification of the criminal investigator position at the Nuclear Regulatory Commission (NRC). We have completed our review of this matter.

We explained to the Inspector General that law enforcement retirement coverage under 5 U.S.C. 8336(c) is not based on the classification of positions in a particular occupational series, as in the General Schedule. Section 8336(c) law enforcement retirement coverage is broadly provided for "an employee the duties of whose position are primarily the investigation, apprehension, or detention of individuals suspected or convicted of offenses against the criminal laws of the United States, including a supervisory or administrative position." 5 U.S.C. 8331(20). We also explained that the NRC is an excepted service agency and is not covered by title 5 classification requirements. Therefore, classification of the positions at NRC that you are concerned with is strictly up to NRC, and is not up to OPM. In fact, NRC's Inspector General has verified that the position descriptions for these investigators have been and are correct.

Accordingly, OPM's granting of section 8336(c) law enforcement retirement coverage to NRC GS-1811 Criminal Investigators in 1985 (see Foster note below) is the central issue in this matter. OPM's Retirement and Insurance Service has responded to you about this matter numerous times in the past and continues to believe its original coverage decision was correct. Also, such coverage determinations have been delegated to agencies since 1993, and, since then, NRC has continued to consider its GS-1811 positions as eligible for section 8336(c) coverage.

We have considered all of your concerns and do not believe that there is anything further that we can do in this matter.

Anna Marie Schuh, Ph.D
Assistant Director
Office of Merit Systems Oversight

Note: Correct date is 05/17/1984. Decision on OI supervisory personnel was 05/1985.

ATTACHMENT 15**Foster's Comments on ATTACHMENT 14:**

The message here is clear, OPM does not want to determine that its decision in 1984 was in error, even if the NRC provided erroneous information in that determination. This would include:

1. Not mentioning that NRC did not have criminal investigation authority, or that;
2. the investigators are not deputized,
3. the investigators do not carry weapons,
4. the investigators have no arrest powers,
5. the investigators do not have frequent contact with criminals,
6. the investigators do not give "Miranda" warnings,
7. the investigators do not/did not have physical standards,
8. the investigators do not have a "rigorous" position, and
9. the percentage of investigations referred to DOJ was small (well under 50%).
10. Most OI investigations did not involve felonies, but regulatory (10 CFR) violations.

All of the above are criteria established by OPM ("rigorous position"), the Merit System Protection Board, and the U. S. court system.

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ATTACHMENT 16

June 9, 2000

Thomas J. Pickard, Chairman
Integrity Committee
President's Council on Integrity and Efficiency
U. S. Department of Justice
Federal Bureau of Investigation
J. Edgar Hoover Building
935 Pennsylvania Ave. N. W.
Washington, D. C. 20535-001

**SUBJECT: ADDITIONAL INFORMATION, MY COMMENTS/ALLEGATIONS RE: THE NRCOIG
REPORT ON MY CONCERNS REGARDING LEO MISCLASSIFICATION**

Gentlemen of the PCIE:

Please find enclosed a copy of my current "concern file" which includes, as an attachment, a report from the Nuclear Regulatory Commission's Office of Inspector General (NRCOIG). This document relates to my allegations regarding tens of millions of dollars of waste, fraud and abuse, and to the Law Enforcement Officer (LEO) benefits fraudulently obtained by Investigators in the NRC Office of Investigations (OI).

It should be clear that my concern was not "de minimus", but alleges that deliberate miscommunication between the NRC and OPM resulted in a small group obtaining tens of millions of dollars in money and benefits.

You may recall that it was extremely difficult to get the NRCOIG to investigate my concerns at all, and I complained to the Presidents Council on Integrity and Efficiency (PCIE) in this regard via letter dated July 9, 1998. The NRCOIG refused to initiate an investigation of my allegations, despite multiple communications from myself, a complaint to the PCIE, and contact from NRC Commissioner McGaffigan, until the NRC received a letter from Illinois Senator Durbin. The PCIE responded to me on October 13, 1998 advising that it did not question the NRCOIG's discretionary authority to initiate an investigation, and providing the reference number IC #238.

Later, the NRCOIG did initiate either a review or an investigation; it is difficult to tell from the resulting report. I highly question the quality of the investigation. The NRC investigator interviewed me briefly, over the telephone. I sent him a highly detailed "concern file," and a considerable collection of documents, almost all of which were not addressed.

The list of individuals interviewed does not include me, but does include OI personnel who benefit from the series 1811 classification, and some of the individuals who participated in getting the Office of Personnel Management (OPM) to support the classification. It is a very short list of individuals interviewed, and no one from OPM was interviewed, as would be logical. I had initially recommended that the NRC OIG obtain the assistance of OPM.

The NRC OIG report totally fails to mention my highly detailed "concern file," or that I provided many documents to substantiate my claims. For example, I provided paperwork that Mr. William J. Ward had signed as my supervisor, when he was not my supervisor. The NRC OIG report does

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not address the majority of the information/allegations I provided, including what I considered to be the "smoking gun" memorandum which indicates that NRC does not have criminal investigative authority. As a further example, I noted that the NRC submitted a letter certifying that the positions were "rigorous," but the job description now indicates that most work is done in an office setting, and this was not addressed. The investigator left the NRC OIG without advising me, months before the report was issued; I assume that the final report was written by someone else.

The consultant hired by the NRCOIG either was not supplied my information or failed to mention it, only listing some thirteen documents items he reviewed to reach his conclusion. The consultant blatantly ignored Merit Systems Protection Board (MSPB) rulings, court cases, and other documents that I supplied and that he should have been aware of in his previous employment.

A careful reading of the NRCOIG report, as detailed in my "concern file," indicates that some of my most significant allegations actually were substantiated; for example, NRC exaggerated the percentage of time OI personnel spend in criminal investigations, claiming 100% when 22% (actually approximately 8%) of their time was actually spent in such activities, using their logic. The NRCOIG failed to recognize that he had substantiated one of my principal complaints.

I strongly believe that my concerns did not receive a comprehensive review. In that the investigation did not address the matters alleged, the investigation certainly did not meet the "Quality Standards for Investigations" issued by the PCIE, Executive Council on Integrity and Efficiency, in September of 1987.

I complained about the NRCOIG report to the PCIE via letter of March 25, 2000. The PCIE advised me by letter of April 11, 2000 that they had referred the NRCOIG report to Mr. Patrick McFarland, OPM IG, for review and comparison with the PCIE standards on investigations as part of his duties as the Chairman of the Investigation Committee. As encouraged by that letter, I have corresponded with Mr. McFarland several times by regular letter and e-mail, he has not responded as yet.

The PCIE apparently felt that in my letter of March 25, 2000, I questioned only the quality of the NRCOIG's investigation, and that is not correct. Additional information follows.

Last September, 1999, OI held a counterpart meeting in the NRC Region III offices where I work. Word came to me that Mr. Guy Caputo, Director of OI, had stated, before the entire group, that my concerns regarding their classification would not be acted upon. Mr. Guy Caputo and Mr. Hubert T. Bell apparently both had previous employment at the U.S. Secret Service. Mr. Bell is a former President of the National Organization of Black Law Enforcement Executives (NOBLE), and surely is aware of the criteria for being classified as a LEO.

Attached (Attachment A) is a copy of an article which just appeared in the May, 2000 newsletter of Chapter 208 of the National Treasury Employee's Union (NTEU), "Your Voice." A number of NRC personnel have made positive comments to me regarding the article.

Along with the comments came a likewise positive anonymous telephone call. The caller advised me of some things I already knew; that Mr. Guy P. Caputo, Director of the Office of Investigations had been a Deputy Director in the Secret Service previously, and that Mr. Hubert T. Bell, NRC Inspector General, had also been previously employed by the Secret Service.

The caller stated that Mr. Hubert T. Bell and Mr. David C. Lee, NRC Deputy Inspector General,

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had both been Secret Service Assistant Directors, and had reported to Mr. Guy P. Caputo. I believe this information is correct; Mr. Guy P. Caputo was a Deputy Director in the Secret Service, and Mr. Hubert T. Bell had also worked there, having been an Assistant Director in 1993. I was not previously aware of any connection regarding Mr. David C. Lee. Attachment B to this letter provides an old document from the internet, an NRC announcement, and the three individual's current positions. This should be easily verifiable.

Apparently, Mr. Hubert T. Bell and Mr. David C. Lee (the NRCOIG) were investigating the classification of their previous supervisor's current employees. This provides a logical explanation of their extreme reticence to initiate an investigation, and how the resulting investigation could be so grossly inadequate. This has all the classic earmarks of a cover-up.

I firmly believe that I did not receive a comprehensive or impartial review from the NRCOIG on a significant allegation, and ask that the PCIE promptly investigate the entire handling of this matter and take appropriate action.

Response requested.

James E. Foster

Note, not in letter: I subsequently found that Mr. Caputo had started with the NRC on January 9, 1994, preceding the others from the Secret Service.

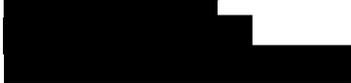
Comment, not in letter: The consultant's report depicts those he interviewed; who did the NRC IG Investigator interview?

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ATTACHMENT 17RESPONSE FROM THE PCIE

PRESIDENT'S COUNCIL on INTEGRITY & EFFICIENCY
August 29, 2000

Information Removed in Accordance with FOIA Review.



IC # 238

Dear Mr. Foster:

This is to advise you that the Integrity Committee (IC) has completed its additional review of your complaint against the Inspector General (IG), Nuclear Regulatory Commission (NRC).

In your complaint, you alleged that the reason the IG, NRC initially refused to investigate your complaint concerning a position classification issue in NRC's Office of Investigations (OI), and then only conducted a limited investigation, was because of a conflict of interest between the IG, Deputy IG (DIG), and the Director of the OI. You advised that the IG, DIG, and the Director of the OI all worked together at the U.S. Secret Service and that the IG and DIG directly worked under the Director of the OI. You alleged that this previous business relationship created a conflict of interest.

Please be advised that the IC has considered your concerns, and it was the opinion of the IC that your argument was not persuasive. The Office of Government Ethics (OGE) advised the IC that relationships between former business associates are not covered by OGE regulations. The IC decided to refer the position classification issue to the Office of Personnel Management for whatever action is deemed appropriate.

The IC will take no further action concerning this matter and has placed this file in a closed status. Thank you for bringing your concerns to the IC's attention.

Sincerely,
Ruben Garcia, Jr.
Chairman

Integrity Committee of the
President's Council on Integrity and Efficiency

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ATTACHMENT 29**TWO RESPONSES FROM POLICE EMPLOYMENT. DOT COM**RESPONSE 1

"We know of no 1811 series criminal investigator position in the federal government that does not require performing criminal investigations and lacks the typical standards such as carrying a gun. Obviously, if you are not conducting criminal investigations it would be contradictory to call yourself a criminal investigator."

RESPONSE 2 (After reading my file)

"Quite interesting. I knew there were agents for the NRC's OIG office. All OIG agents with any agency are 1811s. I did not know they also had an Office of Investigations. You are right in that they probably do not deserve 1811 status and all the benefits that go with it. As you have found, OPM is reluctant to change their status."

The U.S. Marshals Service recently underwent the same scrutiny by OPM. Deputy U.S. Marshals are 1811s. However, for most deputies the majority of their work (transporting prisoners, serving process, courtroom protection, seizing property) does not fall within the criminal investigative guidelines. In order to avoid possibly losing their 1811 status, the USMS for the past two years has only been hiring 1802 Deputy U.S. Marshals. In theory, some day they will have enough 1802s to work the courts and the 1811 deputies can concentrate on working warrants.

"I don't know of any other 1811s that are similar to the NRCs, but with the many government agencies there are probably a few more like them."

PoliceEmployment.com
(02/17/2002)

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ATTACHMENT 19REGARDING SECONDARY POSITIONS

From 1988 until 2001, the regulations define a "primary position" as "a position whose primary duties are . . . investigation, apprehension, or detention of individuals suspected or convicted of offenses against the criminal laws of the United States." Compare 5 C.F.R. § 831.902 (1988) with 5 C.F.R. § 831.902 (2001). A "secondary position" is defined as a position that:

- (1) Is clearly in the law enforcement or firefighting field;
- (2) Is in an organization having a law enforcement or firefighting mission; and
- (3) Is either –
 - (i) Supervisory; i.e. a position whose primary duties are as a first-level supervisor of law enforcement officers or firefighters in primary positions; or
 - (ii) Administrative; i.e., an executive, managerial, technical, semiprofessional, or professional position for which experience in a primary law enforcement or firefighting position, or equivalent experience outside the Federal government, is a prerequisite.

REGARDING LAW ENFORCEMENT DUTIES AND 6C RETIREMENT COVERAGE

(From the new OPM 1800 series family standards 05/2002)

A law enforcement officer as defined by 5 CFR § 831.902 is an employee, the duties of whose position are primarily the investigation, apprehension, or detention of individuals suspected or convicted of offenses against the criminal laws of the United States. This does not include an employee whose primary duties involve maintaining law and order, protecting life and property, guarding against or inspecting for violations of law, or investigating persons other than persons who are suspected or convicted of offenses against the criminal laws of the United States.

There is some confusion about what types of duties and positions are covered by that definition. Recent Merit Systems Protection Board (MSPB) rulings have identified several aspects/functions that are reflective of law enforcement officer (LEO) positions for the purposes of entitlement to LEO retirement credit. The Court of Appeals for the Federal Circuit has recently upheld the Board's new approach that holds "if a position was not created for the purpose of investigation, apprehension, or detention, then the incumbent(s) of the position would not be entitled to LEO credit." **In determining the reasons for the existence of the position, the Board considered all available evidence, including OPM classification standards, the position description, and the duties actually performed by the officers on a near daily basis.**

Positions that are considered law enforcement typically use investigative techniques such as cultivation and use of informants, development and exploitation of leads, interrogation, document reviews, and searching for physical evidence. **The investigative position is traditionally concerned with gathering of evidence and the identification, apprehension, and conviction of groups of individuals and organized crime. The scope or scale of the investigations is typically the "big picture" rather than the "street corner" criminal. Some positions such as**

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police officers may conduct investigations; however, they are generally limited to after-the-fact conditions as first responders. These "preliminary investigations" include victim interviews, documenting the crime scene, noting discrepancies in statements, gathering physical evidence, defining the crime, identifying witnesses, searching the crime scene, and identifying suspects and suspect vehicles.

Investigators work cases or casework rather than being assigned patrol or security duties that are typically associated with police officers. Investigators' cases typically are referred from other Federal law enforcement agencies from complainants, or they are developed through informants. When evaluating law enforcement work, surveillance, plainclothes, or stakeout assignments are not considered comparable to undercover work. Investigators who perform undercover work are trained for the assignment as a regular and recurring part of their duties. Undercover assignments generally are performed at locations removed from the normal duty assignment, where the investigator's identity and purpose are concealed. Surveillance work that is relatively short in duration and is incidental or ancillary to the regular enforcement duties should not be construed as being comparable to undercover work for law enforcement purposes, unless it is directly applicable to the investigation of Federal crimes.

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ATTACHMENT 20Digest of Significant Classification Decisions and Opinions, No. 24, June 2000United States
Office of Personnel ManagementOffice of Merit Systems Oversight and Effectiveness
Digest of Significant Classification Decisions and Opinions
June 2000

Article No. 24-01

Standard: General Investigating, GS-1810 (February 1972)
Criminal Investigating, GS- 1811 (February 1972)
Police, GS-083 (April 1988)**Factor:** N/A**Issue:** Series coverage**Identification of the Classification Issue**

This issue arose as a result of OPM's adjudication of two group classification appeals. The appellants worked in security and law enforcement organizations at the local and regional level. They were not part of the agency's centrally managed criminal investigations organization. Their positions were classified to the General Investigating Series, GS-1810. **The appellants claimed that they planned and conducted investigations relating to alleged or suspected violations of criminal law covered by the Criminal Investigating Series, GS-1811.**

The appellants needed to know what constituted a crime, the kind of evidence required to prove that a crime was committed, the methods and patterns of criminal operations, and the decisions and precedents that control search and seizure, admissibility of evidence, and arrest authority. The appellants worked in cooperation with other Federal, State and local criminal investigation organizations. They employed criminal investigative techniques such as surveillance, covert photography, executed searches, and used information supplied by informants. They were directly authorized to conduct property investigations involving Government funds of up to \$2,500. They also investigated child pornography, computer theft, workers compensation and other cases. The appellants gathered and preserved evidence for forensic analysis and used photography for covert recording of criminal activity. **They had the authority to carry weapons and make arrests.**

Resolution

The Grade-Level Guides for Classifying Investigator Positions (GS-1810/1811 Guide) list specific knowledge, skills, and abilities that distinguish GS-1810 and GS-1811 positions. OPM found that the appellants spent all of their time investigating criminal or **potentially criminal** violations of Federal law. Given these facts, OPM found the positions were excluded from the GS-1810 series.

However, OPM also found that the mission and functions assigned to the appellants' organizations and, therefore their positions, did not support their claim that they performed criminal investigations within the meaning of the GS-1811 series. **The agency's criminal investigations service was responsible for investigating actual, suspected, or alleged major criminal offenses.** In contrast, activities and regional offices (local) were authorized to maintain limited

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investigative capability for resolving minor offenses punishable by confinement of one year or less. An internal agency instruction stipulated that local investigators were permitted to investigate major crimes when the criminal investigations service declined jurisdiction. However, certain matters had to be referred to that service, including such cases as loss of ordnance, narcotics, dangerous drugs or controlled substances; incidents of aberrant sexual behavior involving force/coercion or when children were involved; and thefts of minor amounts of personal property when ordnance, contraband, or controlled substances were involved. The instruction stated that local off-base investigative activities were limited to minor offenses and to the immediate area surrounding the installation and off-base housing areas. However, this policy did not restrict such functions as preventing the escape or loss of identity of suspected offenders, preserving crime scenes, and ensuring the integrity of physical evidence.

The distinction between high level police work, discussed in the Grade Evaluation Guide for Police and Security Guard Positions (GS-083/085 Guide) as detective assignments, and lower level criminal investigating work can be difficult to make because the case work is often similar. OPM determined that the GS-1810/1811 Guide had to be read in conjunction with the information contained in the more recently issued GS-083/085 Guide. That Guide clarifies that the GS-1811 series covers positions primarily responsible for investigating alleged or suspected major offenses or violations of specialized laws of the United States. While agency policy typically required the criminal investigations service's involvement in violent crimes, this did not mean that the GS-1811 series alone covered all such crimes within its occupational definition. The GS-083/085 Guide defines major crimes found in the GS-1811 occupation as a capital crime, those involving prescribed monetary values, or others that may vary in different jurisdictions. Level 1-4 in the GS-083/085 Guide specifically includes investigating violent crimes and conducting long-term investigations, within the meaning of the GS-083 occupation. Therefore, OPM found that higher level detective work in the GS-083 series was very similar to the appellants' assignments.

Both guides recognize employees in the GS-083 and GS-1811 occupations frequently help one another. GS-1810/1811 Guide grade level distinctions are based on primary case agent responsibility. Helping in a case by executing warrants, conducting surveillance, and conducting interviews has no particular impact with respect to determining the grade level of an investigator's position. Similarly, OPM concluded the appellants' assignments in serving warrants, contacting local and State authorities to obtain and/or provide background information on suspects, and traveling across state lines to perform searches and conduct interviews and suspect surveillance failed to prove that the appellants were performing GS-1811 functions. OPM found that travel across state lines in the GS-1811 occupation typically meant investigating criminal enterprises that operate in multiple jurisdictions. It did not necessarily cover conducting interviews and/or searches in the commuting area around a Federal installation, or the similar off-post work examples provided by the appellants.

OPM concluded the appellants' cases were long-term investigations within the meaning of the GS-083/085 Guide in that they extended from several days to several weeks, were local in nature, and were resolved by applying investigative and related techniques typical of the GS-083 occupation. Furthermore, agency policy limited the breadth, depth, and complexity of investigations that could be managed by the appellants. OPM found all the positions were covered by the GS-083 series.

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"Back to the Basics"

The series determination decision in this case [above] illustrates that standards are dynamic. Information in the newer GS-083/085 Guide updated and clarified the meaning of the previously issued GS-1810/1811 Guide.

Duties and responsibilities assigned to positions are controlled by the mission assigned to the organization in which those positions are found. The positions created to perform an assigned mission must be considered in relation to one another; i.e., each position reflects only a part of the organization's work as a whole. The existence of the agency-level criminal investigations service and its responsibility for conducting or controlling investigations of serious crimes so limited the breadth, depth, and complexity of the investigations conducted by the appellants as to exclude their positions from the GS-1811 series.

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ATTACHMENT 21U.S. Department of Labor Office of Inspector General
Inspections ReportSUMMARY

Report Title: LAW ENFORCEMENT OFFICER BENEFITS FOR THE OFFICE OF LABOR-MANAGEMENT STANDARDS

Report Number: 02-SPO-93-OASAM Issue Date: SEPTEMBER 1993

The review was initiated in response to allegations that certain Office of Labor-Management Standards (OLMS) employees were receiving law enforcement officer (LEO) locality pay and special retirement benefits for which they were not qualified.

The report concluded that some OLMS employees may qualify for LEO benefits on an individual basis. However, we concluded that the approval of LEO benefits for all OLMS field employees on the basis of position descriptions and the average agency time devoted to law enforcement activities, despite significant variations in the extent of LEO duties performed by individual employees, was not consistent with applicable regulations.

We also questioned whether some of the duties categorized as law enforcement activities by OLMS, particularly compliance auditing, met the regulatory criteria for eligible LEO duties.

As a result of our review, the Office of Personnel Management (OPM) issued an advisory opinion to the Department of Labor recommending that a new classification be established for OLMS field employees who do not spend the required percentage of their time performing LEO responsibilities. OPM also advised the Department that compliance auditing should not be considered an activity which qualifies under the regulations for LEO benefits.

COMMENT: This is excellent; full report (minus graphics) follows:

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U.S. Department of Labor
SEP 28 1993

Inspector General
Washington, D.C 20210

MEMORANDUM FOR:
Management

THOMAS C. KOMAREK, Assistant-Secretary for Administration and

FROM:

Charles C. Master,
Deputy Inspector General

SUBJECT:

Review of Law Enforcement Officer Benefits
for the Office of Labor-Management Standards
Report No. 02-SPO-93-OASAM

Attached are three copies of the subject final report. The review was conducted at your request in response to an allegation concerning the propriety of law enforcement officer (LEO) special retirement and locality pay coverage which has been authorized and is in effect for certain positions of the Office of Labor- Management Standards (OLMS). The objective of our review was to determine whether the covered OLMS positions currently occupied by 134 investigators and managers qualify for the LEO benefits under the applicable regulatory criteria.

We concluded that, although some OLMS employees may qualify for LEO coverage on an individual basis, the OLMS positions approved by your office and the Office of Personnel Management do not meet the regulatory requirements for LEO coverage. We also question that the time expended performing certain responsibilities classified as OLMS criminal law enforcement duties, particularly compliance audits, qualifies under the regulatory definition of the primary duties of a law enforcement officer. As a result, investigators and managers, some of whom may be ineligible, have received LEO locality pay effective January 1992 and special retirement benefits retroactive to 1984 at a total estimated cost of \$756,011.

We have reviewed OLMS' comments and your September 1, 1993 response to our draft report. We have included your response as an appendix to the report and have made appropriate revisions to the text of the report to address OLMS' comments. In particular, we amended our presentation of OASAM's role in the application and approval process to correct misrepresentations made during the course of the review by officials of the Directorate of Personnel Management.

While we appreciate your recognition of the workload variances in OLMS' New York and Washington field offices and your commitment to refer the eligibility of compliance audits for LEO coverage to OPM for resolution, your response does not fully address the findings or recommendations included in the draft report. Specifically, both the information included in our draft report and our subsequent analysis of workload distribution data for

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individual investigators in three OLMS field offices evidenced that significant individual workload variances are not limited to the Washington and New York field offices but exist throughout OLMS. Furthermore, the regulations provide for the approval of LEO coverage on either an individual or a position basis; there is no provision in the regulations for LEO determinations made on an office basis. Finally, we continue to seriously question the eligibility of OLMS' Compliance Audit Program for LEO coverage in view of the purposes of the audits and the provisions of the regulations. The recommendations, therefore, remain as stated in the draft report and are unresolved at this time. We urge you to further evaluate the propriety of position based LEO coverage throughout OLMS and, in referring the resolution of compliance audits to OPM, to adopt as the Department's official position our reservations concerning the eligibility of this activity for law enforcement coverage and benefits.

We would appreciate receiving your response to the report within 60 days. Your response should address each of the recommendations and advise us of corrective actions which have been taken or are planned. In addition, please provide us with documentation to confirm all completed corrective actions and estimated completion dates for corrective actions planned or in process.

Information copies of the final report will be provided to the Deputy Secretary and to the Acting Director, OLMS.

We appreciate both your bringing this allegation to our attention and your cooperation throughout the review. If we can be of further assistance in the resolution of this matter or if you have any questions concerning the report, please contact Veronica Campbell at 219-8446.

Attachments

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U.S. DEPARTMENT OF LABOR
OFFICE OF INSPECTOR GENERAL
SPECIAL PROJECTS OFFICE

Review of Law Enforcement
Officer Benefits for the
Office of Labor-Management Standards

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ACRONYMS

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|-------|---|
| CAP | Compliance Audit Program |
| CFR | Code of Federal Regulations |
| CSRA | Civil Service Reform Act |
| CSRS | Civil Service Retirement System |
| FSA | Foreign Service Act |
| FERS | Federal Employees Retirement System |
| ICAP | International Compliance Audit Program |
| LCAP | Large Compliance Audit |
| LEO | Law Enforcement Officer |
| LMRDA | Labor-Management Reporting and Disclosure Act |
| OASAM | Office of the Assistant Secretary for Administration and Management |
| OIG | Office of Inspector General |
| OLMS | Office of Labor-Management Standards |
| OPM | Office of Personnel Management |
| PSRA | Postal Service Reform Act |
| USC | United States Code |

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EXECUTIVE SUMMARY

The Office of Inspector General (OIG) conducted a review of the law enforcement officer locality pay and special retirement benefits authorized and in effect for certain positions of the Office of Labor-Management Standards (OLMS). The objective of the OIG review was to evaluate whether the covered OLMS positions qualify under the regulatory criteria for the law enforcement officer benefits.

We concluded that, although some OLMS employees may qualify for law enforcement officer (LEO) benefits on an individual basis, the OLMS positions approved by DOL's Office of Assistant Secretary for Administration and Management (OASAM) and the Office of Personnel Management (OPM) do not meet the regulatory requirements for LEO coverage. We also question that the time expended performing certain responsibilities classified as OLMS criminal law enforcement duties, particularly compliance audits, qualify under the regulatory definition of the primary duties of a law enforcement officer. As a result, employees who may be ineligible have been receiving LEO locality pay effective January 1992 and special retirement benefits retroactive to 1984. The following paragraphs summarize the results of our review.

DOL's request for law enforcement officer coverage for OLMS positions did not clearly portray either the diversity of criminal and non-criminal enforcement responsibilities which constitute the primary duties of the positions involved or the activities classified by the agency as criminal law enforcement duties for purposes of the request. The request for LEO coverage stated that approximately 70 percent of OLMS' staff time nationwide was expended on criminal law enforcement efforts. However, detailed information not submitted with the request disclosed that DOL had classified as criminal law enforcement duties not only criminal embezzlement investigations, which accounted for approximately 39.6 percent of OLMS' staff time for FYs 1985 through 1992, but also the agency's Compliance Audit Program which accounted for approximately 24.1 percent of the total staff time for the same period. We particularly question the inclusion of compliance audit staff time since this activity, both by design and by accomplishments, fulfills multiple OLMS criminal and civil enforcement and administration purposes. Furthermore, conducting compliance audits to uncover potential embezzlements is synonymous, in our opinion, with inspecting for violations of law, a duty which is excluded from LEO coverage by regulation.

DOL's estimate that 70 percent of OLMS' staff time was expended on criminal law enforcement duties represented a nationwide and multi-year average which varied significantly

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between offices, by time periods and among the 134 OLMS investigators and managers whose positions were approved for LEO coverage. As a result of these variations and the specialization of some OLMS staff members in criminal investigations or non-criminal enforcement responsibilities, LEO retirement and locality pay benefits have been extended to employees working in approved positions whose primary duties did not meet the regulatory criteria for such benefits. Thus, while OLMS investigators who specialize in conducting criminal investigations may qualify for LEO coverage on an individual basis, position based coverage for the 134 investigators and managers who are currently receiving LEO locality pay and retirement benefits is not consistent with the applicable regulations.

We recommended that the Assistant Secretary for Administration and Management initiate the following corrective actions:

As provided in section 5 CFR 831.910, request that OPM revoke the coverage of all OLMS primary and secondary positions approved for law enforcement officer locality pay and retirement benefits.

- o In consultation with OPM, determine whether compliance audits and other non-embezzlement investigation staff time, classified as OLMS criminal law enforcement duties, meet the requirements of 5 CFR 831 for LEO coverage.
- o Provide guidance to OLMS regarding eligible criminal investigative duties for use by the agency's investigators in requesting individual LEO coverage.
- o Initiate appropriate actions relative to the recovery of LEO locality pay benefits from and refunds of excess retirement deductions to OLMS employees who are not eligible for LEO coverage.
- o Review the propriety of any retirement actions processed on the basis of the LEO coverage of OLMS positions and initiate appropriate actions, in consultation with OPM, to address these cases.

The Assistant Secretary for Administration and Management responded to our draft report on September 1, 1993 (Appendix A). The response noted that it appears the New York and Washington field offices should have been excluded from the initial request to OPM on the basis of the investigative workload variances in these offices and agreed to work with OLMS to assure proper LEO coverage in the two offices. In addition, the Assistant Secretary advised that he will send our final report and the OLMS response to the draft report to OPM for the resolution of the

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eligibility of OLMS compliance audits for LEO coverage.

OASAM's response does not fully address the findings or recommendations included in the draft report. In this regard, OASAM's commitment to assure proper LEO coverage in the two offices cited is not consistent with either the regulatory basis of LEO coverage or the extent of the workload variances throughout OLMS. The regulations provide for the approval of LEO coverage on either an *individual* or a *position* basis; there is no provision in the regulations for LEO determinations made on an office basis. In addition, both the information included in our draft report and our subsequent analysis of workload distribution data for individual investigators in three OLMS field offices evidenced that significant individual workload variances are not limited to the Washington and New York field offices but exist throughout OLMS. We also continue to seriously question the eligibility of OLMS' Compliance Audit Program for LEO coverage in view of the purposes of the audits and the provisions of the regulations. We, therefore, urge the Assistant Secretary for Administration and Management to further evaluate the propriety of position based LEO coverage throughout OLMS and, in referring the resolution of compliance audits to OPM, to adopt as the Department's official position our reservations concerning the eligibility of this activity for law enforcement coverage and benefits.

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I INTRODUCTION

The Special Projects Office, Office of Inspector General (OIG), U.S. Department of Labor, conducted a review of the law enforcement officer (LEO) coverage of office of Labor-Management Standards (OLMS) personnel. This review was conducted between March 31, 1993 and May 14, 1993 in response to allegations concerning the propriety of law enforcement officer coverage for OLMS field investigator and certain supervisory positions.

The objective of the review was to evaluate whether the covered OLMS positions qualify under the regulatory criteria for law enforcement officer locality pay and special retirement benefits.

II SCOPE

our review consisted of documentary research, interviews with present and former OLMS employees and managers, and analysis of statistical data concerning OLMS' workload, staff time, budget and program results. Special emphasis was placed on analyzing the types of activities and relative percentages of staff time used by OLMS to support its LEO application for the period FY 1985 through FY 1992. This data was also analyzed for individual field offices for three sampled fiscal years.

This review was conducted in accordance with the Quality Standards for Inspections (March 1993), published by the President's Council on Integrity and Efficiency.

III BACKGROUND

a. Functions

OLMS plans, administers and directs the enforcement of those provisions of the Labor-Management Reporting and Disclosure Act of 1959, as amended (LMRDA); the Civil Service Reform Act (CSRA); the Foreign Service Act (FSA); and the Postal Reorganization Act (PSRA), for which the Secretary of Labor has responsibility. In addition, OLMS may also be delegated investigation of USC Title 18 violations from U.S. Attorneys. Administration and enforcement of the LMRDA is, however, the primary function of OLMS.

The LMRDA was enacted into law in 1959 as a result of the Senate McClellan Committee Hearings on labor racketeering. Congress enacted the LMRDA to establish certain rights for union members, to require proper handling of union funds and safeguarding of union assets; to provide for the reporting and disclosure of certain financial transactions and administrative practices of labor organizations, employers and labor relations consultants; to prevent abuses in the administration of trusteeships of labor

organizations; and to ensure that union elections are conducted in accordance with the law.

OLMS administers the LMRDA through the execution of primary administration and enforcement functions, namely:

- **Election Cases:** The oversight of union elections as mandated by the LMRDA, is a high priority activity of OLMS. By law, the Secretary of Labor is obligated to investigate election complaints and, if he finds probable cause that a violation has occurred and has not been remedied, to bring a civil action against the labor organization within 60 days after the filing of the complaint. Similar provisions are included in the CSRA and the FSA for unions in the Federal sector and in the PSRA for unions in the Postal Service. Cases are resolved through voluntary compliance or civil litigation.
- **Embezzlement Investigations:** Under Section 501(c) of the LMRDA, it is a federal crime for a labor union officer or employee to embezzle, steal, or convert funds of the union. OLMS conducts complaint-based and self-initiated embezzlement investigations to protect and safeguard union funds and assets. A Memorandum of Understanding, dated February 16, 1960, between the Secretary of Labor and the Attorney General delegates specific authority for enforcing Section 501(c) which requires OLMS to seek jurisdiction to investigate violations on a case-by-case basis, based on information which suggests potential criminal violations.
- **Compliance Audits:** OLMS uses four, related violation discovery programs to verify union compliance with the civil and criminal provisions of the LMRDA or CSRA (although there are no criminal penalties associated with the CSRA, OLMS advised that they spend a small percentage of their total investigation time conducting investigations of federal sector unions, as directed by the Department of Justice under Title 18 of the U.S. Code). The types of compliance audits are as follows: Compliance Audit Program (CAP), Large Compliance Audit Program (LCAP - same audit program as the CAPS, except on larger unions), International Compliance Audit Program (ICAP - focus on International and national unions), and Field Audits.
- **Reporting Cases:** Under the LMRDA, unions are required to file information and annual reports with the Department. Additionally under certain circumstances, employers, labor relations consultants, union officers

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and employees, and surety companies are required to file reports. OLMS ensures that required reports have been filed timely and are complete and accurate. When attempts to gain voluntary compliance for the filing of timely and accurate reports fail, OLMS may invoke civil litigation to compel compliance. Criminal prosecution in such cases is considered rare by OLMS and is, generally, only attached to an embezzlement case.

- Compliance Assistance/Education: OLMS uses an active education and compliance assistance program to promote voluntary compliance with the LMRDA by informing union officers and others affected by the law of their responsibilities and by encouraging members to exercise their rights under the LMRDA. Activities include: distribution of publications, participation at union conventions, personal seminars/workshops, mailings, speeches, video tapes, and personal visits. Compliance assistance is also provided directly to union officials as an integral part of OLMS' compliance audit activities.
- Other Activities: OLMS also conducts activities aimed at enforcing other provisions of the LMRDA concerning: imposition of trusteeships by unions, bonding of officers and employees, prohibition on some loans to union officials and employees, and ensuring that certain documents are available to union members.

b. Law Enforcement Officer - Regulations

Law enforcement officer (LEO) coverage provides qualifying employees with additional retirement benefits and, in some major metropolitan areas, additional locality pay. The OPM criteria for coverage and requirements for petitioning for coverage under the law enforcement provisions are enumerated in 5 CFR 831 for employees covered under the Civil Service Retirement System (CSRS) and 5 CFR 824 for employees covered under the Federal Employees Retirement System (FERS).

According to the regulations for CSRS employees, an initial determination of whether a position or individual employee meets these criteria is made by the appropriate administrative authority of the agency. Once this determination is made, an agency will submit a request to OPM for a determination that the duties of the position or the employee qualify for law enforcement officer coverage. 5 CFR 831.902 defines "law enforcement officer" in the following manner:

"Law enforcement officer means an employee, the duties of whose position are *primarily* the investigation,

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apprehension, or detention of individuals suspected or convicted of offenses against the criminal laws of the United States, including an employee engaged in this activity who is transferred to a supervisory or administrative position .." The definition does not include an employee whose primary duties involve maintaining law and order, protecting life and property, guarding against or inspecting for violations of law, or investigating persons other than persons who are suspected or convicted of offenses against the criminal laws of the United States."

The regulations define "primary duties" 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 individuals working time over a typical work cycle; and
- c. Are assigned on a regular and recurring basis."

The section further states, "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."

Two types of positions can qualify as law enforcement officers: primary positions and secondary positions. A primary position is defined as "... a position whose primary duties are... investigating, apprehending or detaining individuals suspected or convicted of offenses against the criminal laws of the United States." Secondary positions are defined as:

"...a position that (a) is clearly in the law enforcement or firefighting field; (b) is in an organization having a law enforcement or firefighting mission; and (c) is either-

- (1) supervisory; i.e., a position whose primary duties are as a first-level supervisor of law enforcement officers or firefighters in primary positions; or (2) Administrative; i.e., an executive, managerial, technical, semiprofessional or professional position for which experience in a primary law enforcement or firefighting position, or equivalent experience outside the Federal government, is a mandatory prerequisite."

Sections 831.905 through 831.914 describe procedures for agencies and individuals to request OPM determination of primary and secondary law enforcement positions.

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c. Law Enforcement Officer Coverage - OLMS

OLMS officials advised that they were encouraged by OASAM officials to apply for the general position coverage in view of the number and results of individual applications for coverage by OLMS staff. Fifty former and present OLMS investigators have successfully petitioned the Department and OPM individually for approval of law enforcement officer coverage. To date, none has been refused this coverage by OPM.

After OLMS, with assistance from OASAM, assembled the required documentation for the period FYs 1984 through 1992, the submission package was forwarded to OASAM which reviewed the material, determined that it met the criteria contained in 5 CFR 831, and forwarded the request and material to OPM. OPM reviewed the material and provided approval for law enforcement officer coverage for positions occupied by 134 CSRS employees on September 25, 1992. For the approved positions, LEO locality pay became effective January 1992 and special retirement benefits were provided retroactive to 1984.

A second request for approximately 18 additional CSRS employees with non-standard position description numbers was also approved by OASAM and forwarded to OPM on March 22, 1993. At the time of our review, OLMS was in the process of preparing a request and supporting material for LEO coverage for approximately 71 FERS employees occupying the same positions approved for such coverage under the regulations applicable to the 134 CSRS employees.

d. Cost of Coverage

Approval of OLMS' petition for law enforcement officer coverage for many of its positions impacts the Department and the covered employee in several ways:

- Increases the covered employees' contributions to the retirement fund: pay is adjusted to indicate the increased contribution to the retirement fund from 7 percent to 7 and one-half percent. This coverage was retroactive to 1984. The contribution provides an enhanced annuity for employees, who are eligible to retire at an earlier age than non-covered employees;
- Increases the Department's contributions to the retirement fund: The Department must also contribute an additional one-half percent towards the retirement fund; and
- Increases the Department's payroll costs: for seven major metropolitan areas in which OLMS has offices, locality pay associated with law enforcement officer coverage was paid retroactively to January 1, 1992.

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The LEO locality pay ranges from 4 percent in Chicago, Philadelphia and Washington D.C. to 16 percent in Boston, New York, Los Angeles and San Francisco (in New York, Los Angeles and San Francisco, LEO locality pay represents an increase of 8 percent over the standard 8 percent locality pay provided to all Federal employees stationed in these cities). The Department offset the employees' retroactive contributions to the retirement fund against the retroactive locality pay, when appropriate.

OLMS estimated that the total additional costs of law enforcement officer coverage for the currently covered CSRS employees through FY 1993 would be as shown in Table 1, below:

TABLE 1: ESTIMATED COST OF LEO COVERAGE
Office of Labor-Management Standards
FY 1992 AND FY 1993

| <u>Year/Type</u> | <u>\$ Amount</u> | <u>Source/Notes</u> |
|--------------------------|------------------|--|
| FY 93 Locality Pay | \$258,808 | (current year) |
| FY 93 CSRS Retirement | <u>\$ 66,903</u> | |
| subtotal | \$325,711 | |
| FY 92 Locality Pay | \$141,625 | (retroactive - paid from prior year |
| FY 92 CSRS Retirement | <u>\$ 45,025</u> | funds) |
| subtotal | \$186,650 | |
| FY 89-91 CSRS retirement | \$118,525 | (retroactive - paid from restored funds) |
| FY 87-88 CSRS retirement | \$ 63,775 | (retroactive - paid with current year |
| funds) | | |
| FY 84-86 CSRS retirement | <u>\$ 61,350</u> | (retroactive - paid with FY 92 funds) |
| TOTAL | \$756,011 | |

IV. REVIEW RESULTS

A. Eligibility of OLMS' Responsibilities

Although DOL's request for law enforcement officer (LEO) coverage for OLMS positions stated that 70 percent of the agency's staff time nationwide was expended on criminal law enforcement efforts, this statistic does not clearly portray the diversity of the agency's responsibilities and some of the activities classified as law enforcement duties may not qualify under the regulations. For example, detailed information not included with the request disclosed that criminal embezzlement investigations accounted for approximately 39.6 percent of OLMS' staff time for FYs 1985 through 1992. In addition, the performance of compliance audits, which accounted for approximately 24.1 percent of OLMS' staff time, was classified in total as criminal law enforcement time without a detailed explanation or justification. While our analysis confirmed that the Compliance Audit Program fulfills a significant role in the agency's overall enforcement mission, including criminal enforcement, that role appears to fall within the context of duties, namely inspecting for violations of law, which are excluded from LEO coverage by the regulations. As a result of the classification of certain OLMS activities, particularly compliance audits, as criminal investigative duties, OPM approved LEO retirement and locality pay benefits for positions covering 134 employees all of whom may not qualify under the regulatory requirements.

1. Diversity of OLMS' Responsibilities

Our analysis of OLMS' responsibilities included reviews of the agency's time management reports, strategy documents, program planning guidance memorandums, position descriptions and other program documents. Through their detailed and comprehensive discussions of OLMS' programs and activities, including the agency's objectives, techniques and priorities, these reports and documents more completely portray the diversity of responsibilities which were collectively categorized as criminal law enforcement for LEO application purposes. The reports and documents also provide insights into both the criminal and non-criminal enforcement duties which constitute the basic reasons for the existence of the investigator positions. The following paragraphs summarize the results of our analysis.

DOL's submission for LEO coverage of OLMS' investigator positions did not identify the duties of the positions and the distribution of staff time in the level of detail available in OLMS' time management system. According to OLMS' automated data for the period FY 1985 through FY 1992, the approximately 70 percent of the agency's staff time

expended on criminal investigative duties or criminal enforcement consisted of a number of different and distinct program activities including embezzlement investigations (39.6%), compliance audits (24.1%), case targeting (3.1%) and special investigations and auxiliary activities (1.6%). The remaining 31.7 percent of OLMS' program staff time was spent on areas not considered criminal investigative duties by OLMS, primarily union election cases (21.3%) and compliance assistance. Although the OLMS Criminal Enforcement Statement included in the LEO application package mentioned the agency's conduct of proactive investigative audits, the Statement did not provide a detailed explanation of these audits or specify that the audit time was included as criminal investigative time for purposes of the application. OASAM officials in the Directorate of Personnel Management acknowledged that they were aware of the OLMS activities classified as criminal investigative duties or criminal enforcement and, according to OLMS officials, had instructed the agency not to submit the detailed time records as part of the LEO application package. OPM officials responsible for approving the LEO coverage advised us that they did not realize the subcategories included in the criminal investigative time reported by OLMS and were particularly concerned by the proportion of compliance audit time. A comparison of the distribution of staff time between the application for LEO coverage and OLMS' time management system is shown in Exhibit 1.

In discussing OLMS' objectives and techniques, the agency's Enforcement Strategy, dated June 8, 1990, discusses separately and more comprehensively the diverse duties which were grouped under criminal law enforcement efforts in the request for LEO coverage, as well as other major responsibilities of the investigators. The Enforcement Strategy document states:

In carrying out its statutory responsibilities, OLMS objectives are 1) to detect and correct violations of the law through audit and investigative programs with civil litigation and criminal prosecution of violators, when appropriate, and 2) to encourage and improve voluntary compliance through education of, and assistance to, affected labor organizations and persons To accomplish its objectives in carrying out the responsibilities under the LMRDA, OLMS has four categories of techniques

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- A. *Civil and criminal investigations to determine if the LMRDA has been violated, particularly in regard to union officer elections and handling of union funds;*
- B. *Audits to ensure that unions are complying with LMRDA provisions;*
- C. *Receipt and disclosure of reports required to be filed by the approximately 43,000 labor organizations covered by the LMRDA; and*
- D. *Compliance assistance and education to help union members understand their rights under the LMRDA and to encourage unions and others to comply with the law's provisions.*

The program planning guidance memorandums depict a diversity of agency activities similar to those discussed in the Enforcement Strategy and consistently stress the importance of a balanced enforcement program. In addition, the program planning memorandums provide insight into the non-criminal and criminal enforcement priorities which constitute the basic reasons for the existence of the investigator positions. For example, with regard to enforcement activities, the FY 1992 memorandum stated, "Election investigations, supervised elections and trusteeship cases should continue to receive priority treatment. Criminal investigations are expected to be a major workload factor." Other enforcement activities identified in the FY 1992 memorandum were CAPS, described as essential to overall program operations, and delinquent and deficient reporting cases, bonding and other basic investigations, and employer- consultant cases which were all expected to be part of the annual plan. Compliance assistance was also cited for its importance to overall program operations in the FY 1992 program planning memorandum which noted, "Our objective is to be effective by taking a leadership role, increasing OLMS visibility, promoting communication, and achieving voluntary compliance."

The position descriptions included with the request for LEO coverage further supported the range of duties performed by the OLMS' investigators. However, OLMS officials stated that, on the basis of instructions from OASAM staff, they did not annotate on the position descriptions the percentages of time spent performing the various duties as required by the regulations governing the evidence to be submitted to OPM with an application for LEO coverage. Our analysis of the position description in effect from 1984

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through the present for an Investigator (GS-1801) at the full performance, or grade 12 level, noted that the description summarizes 10 duties and responsibilities. Among those duties is the conduct

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of investigations which, according to the position description, "primarily involve matters such as:

- o failure to file reports
- o deficiencies in annual financial reports
- o violations of an employee's right to copies of collective bargaining agreements and
- o elections of union officers."

The word "criminal" appears three times in the duties and responsibilities section of the position description, always in conjunction with civil prosecution or litigation, and in one of the three instances to explain the investigators responsibilities when no basis for criminal or civil enforcement is indicated.

On the basis of our analysis of OLMS' time management reports, strategy documents, program planning guidance memorandums, position descriptions and other documents, we concluded that the agency's investigators have a diversity of primary duties, as defined under the regulations, which were not clearly presented in the request for LEO coverage. The range of activities classified as criminal law enforcement for the purpose of the LEO coverage application were not similarly categorized, in aggregate, in the other OLMS materials we reviewed. In addition, the agency's priorities, a reflection of the basic reasons for the existence of the investigator positions, are presented as a combination of non-criminal and criminal enforcement responsibilities in the planning guidance, but the LEO application does not include a similar presentation of OLMS' responsibilities and priorities. As a result of the consolidation of OLMS' primary duties in DOL's LEO request, the OPM officials who approved the LEO coverage did not recognize the diversity of the OLMS investigators' primary duties and responsibilities.

2. Qualification of OLMS' Duties for LEO Coverage

Our review of the duties and responsibilities categorized as OLMS criminal law enforcement efforts indicated that certain activities, particularly compliance audits, may not qualify under the regulatory provisions for LEO coverage. Furthermore, while we recognize that many of the procedures

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in the CAP Handbook are designed to detect potential embezzlements, both OLMS documents and program statistics support that the Compliance Audit Program also plays a critical role in the civil enforcement and compliance assistance responsibilities of OLMS.

In defining a law enforcement officer, section 5 CFR 831.902 states, in part:

The definition does not include an employee whose primary duties involve maintaining law and order, protecting life and property, guarding against or inspecting for violations of law or investigating persons other than persons who are suspected or convicted of offenses against the criminal laws of the United States. (emphasis added)

We consulted with the Director and officials of OPM's Disability and Special Entitlements Division to obtain their interpretation and application of the regulations. During our discussion, the OPM officials would not provide a definitive interpretation concerning the eligibility of OLMS, compliance audit time for LEO coverage. However, they advised that OPM has never approved LEO coverage for OIG auditors, including those whose audit efforts are directed primarily towards the detection of fraud and who participate in the resulting criminal investigations. Similarly, the **OPM officials advised that they have refused LEO coverage to other employees, such as Nuclear Regularly Commission Inspectors, whose duties primarily involve inspecting for violations of law.**

OLMS, documents, such as the CAP Handbook and the Enforcement Strategy, establish the significance of the compliance Audit Program not only to the identification of potential embezzlements but also to the agency's overall mission and responsibilities. In this regard, the Compliance Audit Program Handbook, dated April 4, 1985, lists the principal CAP objectives, in order of priority, as follows:

1. To uncover section 501(c) violations (embezzlements) and other criminal and civil violations of the Labor-Management Reporting and Disclosure Act of 1959 (LMRDA).
2. To create a visible enforcement presence in the labor community.
3. To provide effective grass-roots compliance assistance directly to union officials.

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OLMS, Enforcement Strategy described the Compliance Audit Program as a streamlined audit approach to verify LMRDA compliance. In addition, the Enforcement Strategy noted that, "CAP also gives OLMS the opportunity to provide compliance assistance directly to union officials to help them correct problems detected during the audit and to prevent any future LMRDA violations." Lastly, the Enforcement Strategy stated:

CAP has also resulted in other, less quantifiable benefits. It has helped change the enforcement character and focus of the Agency from a predominantly civil to a more balanced civil/criminal posture. OLMS Investigators have become increasingly familiar with and expert in auditing books and records, which is an essential ingredient in conducting embezzlement cases. CAP has also had an immeasurable criminal deterrent value as a result of OLMS's increased on-site enforcement presence.

In order to evaluate the relationship between the Compliance Audit Program and the various responsibilities of OLMS, we reviewed program statistics detailing the results of the audits for FY 1992. Although the compliance audits have been targeted toward detecting embezzlements, the types of violations uncovered by the audits and the dispositions of these violations related primarily to the agency's reporting and compliance assistance program responsibilities. OLMS investigators detected a total of approximately 1300 LMRDA violations as a result of the audits conducted in FY 1992. The most frequent types of violations disclosed by the audits, deficient filing (23%) and failure to keep records (18.5%), are rarely prosecuted criminally unless they accompany an embezzlement case, according to OLMS officials. Potential embezzlement violations accounted for 8 percent of the total reported violations, and were found in 15.5 percent of the total compliance audits. The majority of violations were resolved through voluntary compliance within 30 days (58%), required no action (12%) or were resolved through voluntary compliance achieved after 30 days. Exhibit 2, on the next page, graphically depicts the results of the compliance audits, including the types of violations unresolved after 30 days (fall-out cases), for FY 1992.

We further analyzed the relationship between the Compliance Audit Program and OLMS' criminal investigations by reviewing the sources of the agency's embezzlement investigations for FY 1991. According to OLMS' statistics, embezzlement investigations are mainly initiated based upon information from sources other than compliance audits. The data shows

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that, while compliance audits lead to about one-third of all embezzlement violations, two-thirds come from other sources, particularly allegations or complaints from Union members, officials or anonymous sources. Exhibit 3 graphs the sources of embezzlement investigations for FY 1991.

In summary, the Compliance Audit Program fulfills multiple OLMS program purposes and objectives both by design and by accomplishments. Specifically, the CAP Handbook and the Enforcement Strategy address not only the objective of detecting embezzlements but also the role of compliance audits in uncovering civil violations of the LMRDA, providing direct compliance assistance to union officials and deterring violations of the LMRDA. The results of the compliance audits, particularly the proportion of reporting and record keeping violations disclosed and the resolution

EXHIBIT 3: Sources of Embezzlement Investigations FY 1991

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of the majority of violations through voluntary compliance, further confirm that the program is accomplishing the multiple objectives for which it was designed. Our analysis also supports that an important function of the audits is to uncover criminal violations of the LMRDA, particularly embezzlements, although two-thirds of OLMS' embezzlement investigations originate from sources other than compliance audits. Moreover, auditing for embezzlements is synonymous, in our opinion, with inspecting for violations of law, a duty which is excluded from LEO coverage, according to the regulatory definition of a law enforcement officer. In view of the regulatory exclusion of inspection duties as well as the multiple objectives served by the compliance audits, we concluded that it is questionable that the compliance Audit Program conducted by OLMS qualifies as criminal law enforcement time for the purpose of LEO coverage.

In response to our discussions regarding the eligibility of the investigators' duties for LEO coverage, OLMS officials requested that we consider certain additional information. With respect to the total staff time devoted by the agency to criminal law enforcement efforts, the OLMS officials indicated 70 percent may be an understatement. The officials noted that portions of staff time expended on delinquent reports investigations, deficiency investigations and compliance assistance should be added to their original estimate since these activities all have the potential of generating criminal cases, as well as liaison with other enforcement agencies, which was included under compliance assistance. We were also provided additional information concerning the results of OLMS' criminal law enforcement efforts which show embezzlement indictments and Convictions totaling 1533 and 1394, respectively, for FYs 1984 through 1992. These indictments and convictions represent a significant increase over prior years which OLMS officials attribute to the introduction of the Compliance Audit Program.

The additional data provided by OLMS has not altered our conclusions concerning either the diversity of criminal and non-criminal enforcement responsibilities which constitute the primary duties of OLMS investigators or the questionable eligibility of the Compliance Audit Program for LEO coverage. While the indictment and conviction statistics provide further confirmation of OLMS' success in addressing criminal violations of the LMRDA, they do not refute either the agency's other responsibilities or the relative staff time expended in investigating these cases. With respect to the additional activities OLMS officials are proposing be considered as criminal law enforcement duties, the total actual or potential amount of time expended is minimal and these activities rarely result in criminal investigations or prosecutions, according to other statements by OLMS officials. Therefore, we remain convinced that OLMS' request for LEO coverage did not clearly portray the diversity of the agency's primary duties and the eligibility of

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the Compliance Audit Program for such coverage is questionable. As a result, 134 OLMS

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investigators who may not qualify under the provisions of the regulations are currently receiving LEO retirement and locality pay benefits.

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B. Eligibility of Position Based Coverage

DOL's estimate that 70 percent of OLMS' staff time was expended on criminal law enforcement duties represented a nationwide and multi-year average which varied significantly between offices, by time periods and among the 134 OLMS investigators and managers whose positions were approved for LEO coverage. These variations and the specialization of some OLMS staff members in criminal investigations or non-criminal enforcement responsibilities resulted in the extension of LEO retirement and locality pay benefits to employees in approved positions whose primary duties did not meet the regulatory criteria for such benefits.

Federal regulations, 5 CFR 831 define a law enforcement officer, in part, as an employee whose primary duties....

- (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.*

...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.

During our consultations with the Director and officials of OPM's Disability and Special Entitlements Division, they advised that position based LEO coverage assumes that all employees working in a covered position perform the same duties and devote approximately the same proportion of time to those duties. The OPM officials advised that they had interpreted DOL's data to mean that each OLMS investigator and manager occupying a position for which LEO coverage was requested and approved expended approximately 70 percent of his/her time annually in the performance of criminal law enforcement duties. Position based coverage was not intended, according to the OPM officials, to provide LEO benefits to employees who do not primarily perform qualifying duties or for time periods when an employee performs primarily ineligible duties.

The following paragraphs summarize our analysis of the variances among OLMS field offices and fiscal years in the distribution of selected OLMS responsibilities.

Significant differences were observed among the OLMS field offices in the relative staff time expended in total and within the separate program activities classified as criminal law enforcement duties by OLMS. Our judgmental sample of fiscal years 1989, 1991 and 1992 noted that, using DOL's definition of criminal law enforcement activities, the total time devoted to such activities ranged from an average of over 80 percent in Pittsburgh to less than 45 percent in New York. (Exhibit 4 provides details of the averages for

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PAGE 22 (GRAPHIC) OMITTED

all field offices for the sampled years.) With respect to individual program activities, reported time expended conducting embezzlement investigations, for example, ranged from a high of 60 percent in the Cincinnati OLMS office to a low of 19.4 percent for the Washington, DC. office. We further noted that only 8 of the 29 field offices reported spending an average of 50 percent or more of their staff time during FYs 1989, 1991 and 1992 conducting embezzlement investigations. Time spent performing compliance audits also varied among the offices, ranging from a low of 8.6 percent in New York to a high of 39.7 percent in Kansas City. (Exhibits 5 and 6 display the average amounts of time expended, by program activity, for all field offices for the sampled years.)

Our review of three sampled fiscal years also found variances in the proportions of different program activities performed within individual field offices from year to year. For some offices these variances were significant and were attributable, in part, to the uncontrollable nature of the number of civil election cases received. Exhibits 7, 8 and 9 show three offices with significant changes from year to year in the percentages of staff time spent conducting embezzlement investigations, compliance audits, and/or election cases. For example, the Milwaukee office, for the three sampled years, ranged from 81.6 to 55 percent of their staff time performing embezzlement investigations. During the same period, the Milwaukee office staff spent from 9.1 to 19.3 percent of their time conducting compliance audits. In the Tampa office, from 25.7 to 36.1 percent of the investigators' time was devoted to civil election case work during the sampled time period.

In addition to the office and time period variations, we were advised by OLMS management and some former OLMS investigators that the amount of time that an individual investigator spends conducting criminal investigations may differ significantly from the office average and from his/her workload distribution of the prior year. These individual deviations have occurred, in part, because some investigators specialize in either criminal investigations or non-criminal enforcement responsibilities, according to the current and former OLMS staff, as well as because of the annual office workload changes discussed above. OLMS officials recognized that there are variances between offices and investigators, but stated that they are confident that, over an extended period of time, all offices and investigators will satisfy the paramount duty requirement under OPM regulations since they perform criminal work on a regular and recurring basis. OLMS officials also stated that, during the application process, OASAM officials had advised that the nationwide, multi-year figure would be the controlling factor.

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PAGES 24, 25, 26, 27, 28 (GRAPHICS) OMITTED

In our opinion, an extended period of time does not constitute either regular and recurring assignments or a typical work cycle, nor is OLMS' position compatible with the OPM officials' interpretation of the intent of position based coverage, as discussed above.

In summary, we concluded that, in view of the extent of variances noted in the performance of criminal investigations and other OLMS duties between field offices, by time periods and among the employees working in covered positions, OLMS does not qualify for the position based LEO coverage which has been authorized. While OLMS investigators who specialize in conducting criminal investigations may qualify for LEO coverage on an individual basis, position based coverage for the 134 investigators and managers who are currently receiving LEO locality pay and retirement benefits is not consistent with the applicable regulations.

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V. RECOMMENDATIONS

We recommend that the Assistant Secretary for Administration and Management:

1. As provided in section 5 CFR 831.910, request that OPM revoke the coverage of all OLMS primary and secondary positions approved for law enforcement officer locality pay and retirement benefits.
2. In consultation with OPM, determine whether compliance audits and other non-embezzlement investigation staff time, classified as OLMS criminal law enforcement duties, meet the requirements of 5 CFR 831 for LEO coverage.
 1. Provide guidance to OLMS regarding eligible criminal investigative duties for use by the agency's investigators in requesting individual LEO coverage.
 2. Initiate appropriate actions relative to recovery of LEO locality pay benefits from and refunds of excess retirement deductions to OLMS, employees who are not eligible for LEO coverage.
 3. Review the propriety of any retirement actions processed on the basis of the LEO coverage of OLMS positions and initiate appropriate actions, in consultation with OPM, to address these cases.

OASAM's Response

The Assistant Secretary for Administration and Management provided the following comments:

The OLMS response to the OIG draft report was provided to your staff on August 17, 1993. The draft report was very useful, especially in identifying the variances in the investigative workload for the New York and Washington field offices. It appears that these offices should have been excluded from the initial request to the Office of Personnel Management (OPM). My staff will work with OLMS to assure proper LEO coverage in the two offices. There is one major technical issue, however, which OPM will have to resolve, that is, whether the OLMS compliance audits are appropriately categorized as law enforcement work. I will send your final report and the OLMS response to your draft report to OPM and ask

for a decision.

OIG's conclusion

While we appreciate OASAM's recognition of the workload variances in OLMS' New York and Washington field offices, the response does not fully address the findings or recommendations included in the draft report. In addition, since the Assistant Secretary's response referenced but did not adopt a position on the comments provided by OLMS, we have not included OLMS' comments in their entirety as an attachment to this report, but revised sections of the draft where appropriate. The following paragraphs summarize our concerns with OASAM's response.

OASAM's commitment to assure proper LEO coverage in the two offices cited does not recognize either the regulatory basis of LEO coverage or the extent of the workload variances throughout OLMS. The regulations provide for the approval of LEO coverage on either an individual or a position basis; there is no provision in the regulations for LEO determinations made on an office basis. Our workload analysis, conducted to evaluate consistency throughout OLMS with the nationwide, multi-year averages of time devoted to specific agency responsibilities, provided evidence not only of workload variances among field offices but also of variances over time periods and among investigators within offices. Workload distribution data for individual investigators in three field offices submitted by OLMS subsequent to the issuance of the draft report further confirmed our conclusions regarding significant individual workload variances.

The individual workload data provided for the Washington, Kansas City and Miami field offices substantiated that the proportions of time devoted by individual investigators to embezzlement investigations, compliance audits, election investigations and other OLMS program responsibilities during the period FY 1987 through 1993, to date, deviate significantly from the field office averages and the nationwide, multi-year averages for these activities. For example, in the Washington office which expended an average of only 19.4 percent of total staff time performing embezzlement investigations during the years sampled, in our review, 3 of the 22 investigators reported spending an average of over 50 percent of their total time performing embezzlement investigations while 7 investigators expended an average of 50 percent or more of their total time conducting election or trusteeship investigations, a category not considered by OLMS as criminal enforcement time in their application for LEO (see Exhibit 10A on page 34). As further evidence of specialization among the OLMS staff, one investigator in the Kansas City field office devoted an average of 63.35 percent of his/her time to embezzlement investigations and 17.62 percent to compliance

audits, while another investigator in the same office charged an average of 17.19 percent of his/her time to embezzlement investigations and 67.93 percent to compliance audits (see Exhibits IIA and IIB on pages 37 and 38).

Time distribution records for Kansas City and Miami indicated differences similar to those noted in the Washington field office in the percentages of time devoted by individual investigators to particular program activities. For example, the average percentages of time spent conducting embezzlement investigations in the Kansas City field office during the period FY 1987 through 1993, to date, ranged from a low of 17.19 percent to a high of 73.58 percent among individual investigators. The average amounts of time expended conducting compliance audits varied among the Kansas City investigators from 16.57 percent to 67.93 percent, while time charged to election investigations ranged from 0 percent to 21.21 percent (see Exhibit 10B on page 35). Time distribution records for the 3 Miami investigators reflected an average of from 39.52 to 62.60 percent of their time charged to embezzlement investigations, from 9.51 to 17.75 percent devoted to compliance audits and from 25.16 to 40.94 percent expended performing civil election/trusteeship investigations (see Exhibit 10C on page 36).

The time distribution reports for the three field offices also confirmed that the percentages of time expended by individual investigators in the performance of various OLMS program responsibilities differ significantly from year to year. For example, the annual proportions of time conducting embezzlement investigations ranged from 26.88 to 69.36 percent for an investigator in the Washington office who expended an average of 54.48 percent of his/her time on this activity during the 5 years for which data was provided. For an investigator in the Miami field office who expended an average of 39.52 percent of his/her time performing embezzlement investigations over a 6 year period, the time charged annually to embezzlement investigations ranged from 12.37 percent to 59.06 percent, with over 50 percent of this investigator's time charged to embezzlement investigations during 3 of the years and significantly below 50 percent during the remaining 3 years (see Exhibit 12 on page 39).

The individual, annual workload variances for investigators in the Washington, Kansas City and Miami field offices, as discussed above and illustrated in the supplemental exhibits on the following pages, support our position that OLMS' nationwide, multi-year average of 39.6 percent of staff time expended in the performance of embezzlement investigations bears limited relationship to the proportions of time devoted by individual investigators to this responsibility during a typical work cycle. The individual workload distribution data for the three field offices, therefore, confirm our conclusion that eligibility for

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LEO coverage should be determined on an individual basis throughout OLMS, rather than in two field offices only.

With respect to compliance audits, we recommended that the Department reach a determination, in consultation with OPM, regarding the classification of compliance audits as criminal law enforcement for LEO coverage. OASAM's response indicates that the classification of compliance audits will be referred to OPM for resolution and adopts no position on this issue. We continue to seriously question the eligibility of OLMS' Compliance Audit Program for LEO coverage in view of the purposes of the audits and the provisions of the regulations.

As discussed in the report, within the context of OLM's overall mission to administer and enforce the LMRDA, the agency's Compliance Audit Program fulfills multiple program purposes both by design and by accomplishments. The CAP Handbook and the OLMS Enforcement Strategy address not only the objective of detecting embezzlements but also the role of compliance audits in uncovering civil violations of the LMRDA, providing direct compliance assistance to union officials and deterring violations of the LMRDA. The reported accomplishments of the Compliance Audit Program reflect the multiple objectives of the audits, with potential criminal embezzlements detected in only 15.5 percent of the audits conducted in FY 1992 and accounting for 8 percent of the approximately 1300 LMRDA violations disclosed.

We are further concerned with the classification of compliance audits as criminal law enforcement duties since these audits appear to fall within the context of duties, namely inspecting for violations of law, which are excluded from LEO coverage by the regulations. In this regard, while uncovering criminal violations is cited as an objective in the CAP Handbook, the compliance audit objectives do not include investigating criminal violations. If a potential embezzlement is detected during the course of a compliance audit, the audit is closed and, upon the receipt of a delegation of authority from the Department of Justice, a criminal investigation is opened and usually assigned to the investigator who conducted the compliance audit.

Since OASAM's response neither fully addressed the findings and recommendations of the draft report nor provided a basis for reconsidering our positions, the recommendations remain as stated and are unresolved at this time. We urge the Assistant Secretary for Administration and Management to further evaluate the propriety of position based LEO coverage throughout OLMS and, in referring the resolution of compliance audits to OPM, to adopt as the Department's official position our reservations concerning the eligibility of this activity for law enforcement coverage and benefits.

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PAGES 34, 35, 36, 37, 38, 39 (GRAPHICS) OMITTED

Appendix A

U.S. Department of Labor Office of the Assistant Secretary
for Administration and Management
Washington, D.C. 20210

SEP -1 1993

MEMORANDUM FOR CHARLES C. MASTEN

FROM: THOMAS C. KOMAREK
Assistant Secretary for
Administration and Management

SUBJECT: OIG Draft Report No. 02-SPO-93-OASAM

The work of your staff in reviewing the allegation concerning the propriety of law enforcement officer (LEO) coverage for the office of Labor-Management Standards (OLMS) is appreciated.

The OLMS response to the OIG draft report was provided to your staff on August 17, 1993.

The draft report was very useful, especially in identifying the variances in the investigative workload for the New York and Washington field offices. It appears that these offices should have been excluded from the initial request to the Office of Personnel Management (OPM). My staff will work with OLMS to assure proper LEO coverage in the two offices.

There is one major technical issue, however, which OPM will have to resolve, that is, whether the OLMS compliance audits are appropriately categorized as law enforcement work. I will send your final report and the OLMS response to your draft report to OPM and ask for a decision.

Once again, thank you for your assistance in this matter.

cc: John Kotch

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ATTACHMENT 22

UNITED STATES OF AMERICA MERIT SYSTEMS PROTECTION BOARD

GERALD F. KILLION,

DOCKET NUMBER BN-0831-96-0006-I-1

v.

DEPARTMENT OF THE TREASURY,

DATE: SEPT 18, 1996

OPINION AND ORDER

The agency petitions for review of the February 7, 1996 initial decision that found that the appellant is entitled to retirement coverage as a law enforcement officer (LEO). For the reasons set forth below, we GRANT the petition for review and REVERSE the initial decision; the agency's determination that the appellant is not entitled to LEO retirement coverage is AFFIRMED.

Background

In 1994, the appellant sought LEO retirement coverage for his 22 years of service as a Revenue Agent with the Internal Revenue Service (IRS). Initial Appeal File (IAF). The agency determined that he did not qualify for LEO coverage. Upon this timely appeal, and after a hearing, the administrative judge reversed the agency's determination, and found that the appellant is entitled to LEO retirement coverage for all of his service since 1972. The administrative judge did not order interim relief. The agency argues in its timely petition for review, insofar as is relevant, that the appellant does not meet the criteria for LEO retirement coverage. The appellant opposes the petition.

Analysis

The appellant is covered by the Civil Service Retirement System (CSRS). The CSRS defines "law enforcement officer" as "an employee, the duties of whose position are primarily the investigation, apprehension, or detention of individuals suspected or convicted of offenses against the criminal laws of the United States, including an employee who is engaged in this activity who is transferred to a supervisory or administrative position." 5 U.S.C.8331(20). An employee engaged in investigation, apprehension, or detention occupies a "primary" LEO position. An employee transferred from such a position to a supervisory or administrative position occupies a "secondary" LEO position. See 5 C.F.R. 831.902.

Under the CSRS, an employee in an LEO position becomes eligible for an annuity at a younger age and with fewer years of service, and that is computed at a higher rate, than an employee in a non-LEO position. See 5 U.S.C. 8336(c), 8339(a), (d). This preferential retirement provision was enacted because Congress determined that the ranks of LEOs (as well as firefighters) "should be composed, insofar as possible, of young men and women physically capable of meeting the vigorous demands of occupations which are far more taxing physically than most occupations in the Federal Service." *Felzien v. Office of Personnel Management*, 930 F.2d 898, 901 (Fed. Cir.1991) (quoting S. Rep. No. 948, 93d Cong., 2d Sess. 2). Thus, one of the "primary ... reasons" for special LEO retirement coverage was the legislative determination that "the government's frontline law enforcement work require[s] a youthful workforce capable of meeting ... stringent physical requirements and performing at peak efficiency." *Hobbs v. Office of Personnel*

Management, 58 M.S.P.R. 628, 632 (1993) (citations omitted).

This appeal from the agency's denial of the appellant's request for LEO retirement coverage is within the Board's jurisdiction. 5 C.F.R. 831.910(a). The appellant bears the burden of proving entitlement to LEO retirement coverage. *Taylor v. Department of the Treasury*, 68 M.S.P.R. 693, 696 (1995). The appellant's actual duties, and not just his position description, determine whether he should receive LEO treatment. *Id.* The discussion below pertains only to whether the appellant occupied a primary LEO position. As will become apparent, he was never transferred to a supervisory or administrative position of the sort that could be considered a secondary LEO position.

The appellant has been employed by the IRS as a Revenue Agent since 1964. From 1964 until 1972, he worked in the IRS's general program, where he was responsible for examining the tax returns and financial records of presumptively honest and generally cooperative taxpayers.

Since 1972 the appellant has worked in the Special Enforcement Program (SEP). The SEP is made up of employees of the IRS, Federal Bureau of Investigation, Drug Enforcement Administration, Secret Service, Bureau of Alcohol, Tobacco & Firearms, U.S. Attorney's office, local police, and other agencies. The SEP was established to investigate individuals who derive income from illegal activities, or are suspected of doing so. Typical targets of SEP investigations are suspected drug dealers, racketeers, and organized crime figures. From 1972-74, the appellant worked on the SEP's "drug trafficker" project, during which time his office was located in the IRS's Criminal Investigation Division. From 1974-84, he worked on the SEP's organized crime strike force. Finally, from 1984 through the date of his request for LEO coverage in 1994, and apparently continuing through the present, he has worked in the SEP's grand jury program, during which time his office has been located in a federal courthouse.

Throughout the appellant's time with the SEP, the fundamental nature of his work has been the same: Gathering and analyzing evidence for use in criminal prosecutions. The appellant's expertise is examining trails of records (e.g., income tax returns, canceled checks, bank records, real estate deeds, credit card receipts, motor vehicle records); based on these records, the appellant makes inferences as to whether targets of investigations are involved in money laundering, currency structuring (arranging bank deposits to avoid reporting requirements), conspiring to defraud the United States, income tax evasion, or other criminal activity. See 18 U.S.C. 371; 26 U.S.C. 7201. The appellant has provided evidence to Special Agents and others for use in applications for search warrants and setting up surveillance sites.

Analyses provided by the appellant have led to indictments and convictions. The above-described activities could be considered "investigation" in the ordinary sense of that word. Cf. *Ferrier v. Office of Personnel Management*, 60 M.S.P.R. 342, 347 (1994) ("investigation" means "the act or process of 'observ[ing] or study[ing] by close examination and systematic inquiry'") (citations omitted). Furthermore, these activities were aimed exclusively at those "suspected ... of offenses against the criminal laws of the United States." 5 U.S.C. 8331(20).

Our inquiry into whether the appellant is entitled to LEO retirement coverage does not end here, though. Significantly, many of the traditional indicia of LEO status are lacking. See generally *Taylor*, 68 M.S.P.R. at 698; *Hobbs*, 58 M.S.P.R. at 633. Throughout his time with the SEP, the appellant has never made an arrest or given a Miranda warning. He has never been authorized to carry a firearm. He has generally worked 40 hours per week at regularly-

scheduled times, and has not been on call. See Tr. 82-85. **The appellant has interviewed cooperative witnesses** (such as real estate agents, bankers, car dealers), but he has never interviewed a suspect without a Special Agent present; the Special Agent is responsible for conducting any interview of a suspect.

Although the appellant has frequently driven past the residence of a target of an investigation to get a rough idea of whether the target's reported income is consistent with his or her lifestyle, **he has never executed a search warrant or participated in a raid. In short, the appellant has had minimal contact with criminals or suspected criminals.** Most of his time has been spent obtaining and analyzing documentary evidence held by third parties.

Moreover, **the appellant's work in the SEP has not been hazardous.** Once he was struck in the chest when serving a subpoena. The appellant also believes that he was once followed by the bodyguard of a suspected organized crime figure after he had completed a "drive-by" of the suspect's residence. That the appellant could only describe these two encounters after more than 23 years in the SEP shows that any danger to him has been fleeting and incidental. In fact, **at least 80% of the time the appellant has worked in "an office setting." ; cf. Sauser v. Office of Personnel Management, 59 M.S.P.R. 489, 494 (1993) (an employee's "frequent" involvement in situations presenting "great danger" supported a finding that he was entitled to LEO retirement coverage).**

The appellant argues that the absence of the traditional indicia of LEO status, and in particular the absence of frequent hazards, should not be dispositive. In this connection, he argues that the traditional indicia of LEO status discussed in Taylor and Hobbs are normally associated with "apprehension" or "detention" of individuals suspected or convicted of criminal activity, whereas he claims LEO status because he is engaged in criminal "investigation." See 5 U.S.C. 8331(20).

Criminal "investigation" has a specialized meaning under 5 U.S.C. 8331(20), however. Again, the purpose of preferential LEO retirement treatment is to ensure that the federal law enforcement corps is staffed by young men and women able to perform at peak efficiency and to meet stringent physical demands not found in other federal jobs. **The appellant's work in the SEP has not been any more physically demanding than a typical federal white-collar job. Indeed, there is no physical fitness requirement listed in the two position descriptions under which the appellant has worked.**

Accordingly, we conclude that the appellant is not entitled to LEO retirement coverage. **In the absence of hazards, unusual physical demands, or any other traditional indicia of LEO status, granting preferential retirement treatment based on the appellant's duties with the SEP would not be consistent with the legislative intent.**

The cases relied upon by the appellant do not support a different result. In Graber v. Office of Personnel Management, 20 M.S.P.R. 267 (1984), an Attorney received LEO retirement coverage; the Office of Personnel Management had found that his work as an Investigator was LEO work, and when he was later assigned to the position of Attorney, his duties did not change. In Nielsen v. Office of Personnel Management, 24 M.S.P.R. 364 (1984), a Supervisory Security Specialist with the Federal Aviation Administration was found entitled to LEO retirement coverage because he conducted criminal investigations; there was no elaboration on the specific nature of his duties. In Gustafson v. Office of Personnel Management, 31 M.S.P.R. 92 (1986), an Immigration

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Examiner (IE) with the Immigration & Naturalization Service who coordinated activities leading up to criminal prosecutions was found to have occupied a secondary LEO position; among other things, he had been transferred from an LEO position to the IE position, and his law enforcement experience was a requirement for the IE position. **Contrary to the appellant's argument, these cases do not hold that a position that does not involve hazards, has no unusual physical demands, and lacks the traditional indicia of LEO status, should nevertheless be treated as a primary LEO position.**

ORDER

The initial decision is REVERSED. The agency's determination that the appellant is not entitled to retirement coverage under 5 U.S.C. 8331(20) and 8336(c) is AFFIRMED. This is the final order of the Merit Systems Protection Board in this appeal. 5 C.F.R. 1201.113(c).

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ATTACHMENT 23

UNITED STATES OF AMERICA MERIT SYSTEMS PROTECTION BOARD

MICHAEL HOUCK, ET AL., DOCKET NUMBER DC-0842-97-0891-I-1

vs

DEPARTMENT OF THE NAVY, DATE: APR 15 1999

OPINION AND ORDER

This case is before the Board upon the agency's petition for review of the initial decision that reversed the decisions of the Department of Defense (DoD) that denied the appellants' requests for law enforcement officer (LEO) retirement credit. Because these 3 appeals are factually similar and are governed by the same legal rule, we hereby consolidate them for decision. See 5 U.S.C. § 7701(f). For the reasons discussed below, we GRANT the petition for review, REVERSE the initial decision, and AFFIRM DoD's decision denying the appellants LEO coverage.

BACKGROUND

The appellants occupy Investigator positions with the agency's Norfolk Naval Shipyard, Portsmouth, Virginia (Shipyard). There are only 2 Investigators currently serving at the Shipyard. Hearing Transcript (HT testimony of Ronald Doran, Chief of Police). Upon the appellants' requests that the agency provide them with an LEO retirement coverage determination under the pertinent governing statute--i.e., either 5 U.S.C. § 8336(a) for those individuals covered by the Civil Service Retirement System (CSRS) or 5 U.S.C. § 8412(d) for those individuals covered by the Federal Employees' Retirement System (FERS), the agency notified them that it was denying their requests on the basis that none of their service qualified for LEO retirement coverage under the applicable statute and regulations.

Initial Appeal Files for all of the appellants Appeal File (AF), Stearn v. Department of the Navy, MSPB Docket No. DC-0831-97-0869-I-1. The appellants timely appealed to the Board from those decisions, see Initial Appeal Files for all of the appellants,, and the administrative judge (AJ) consolidated the appeals, AF, After holding the appellants' requested hearing, the AJ issued an initial decision, finding that all of the appellants had shown their entitlement to FERS or CSRS LEO retirement credit. Initial Decision (ID) He therefore reversed the agency's decisions. In its timely petition for review, the agency contests the merits of initial decision, arguing that the appellants were in positions providing security and not LEO duties and responsibilities. 1.The appellants have timely responded in opposition to the agency's petition.

ANALYSIS

In order to qualify for LEO retirement coverage pursuant to 5 U.S.C. § 8336(c) or 5 U.S.C. § 8412(d)(2), an employee must show that the duties of his "position are primarily the investigation, apprehension, or detention of individuals suspected or convicted of offenses against the criminal laws of the United States." 5 U.S.C. §§ 8331(20), 8401(17). Additionally, 5 U.S.C. § 8401(17) requires that an employee seeking LEO retirement credit under FERS show that the duties of his position should be limited to young and physically vigorous individuals. It is well settled, however, that this "young and physically vigorous" requirement applies as well to

employees seeking LEO retirement credit under CSRS. See *Bingaman v. Department of the Treasury*, 127 F.3d 1431, 1435 (Fed. Cir. 1997); *Hobbs v. Office of Personnel Management*, 58 M.S.P.R. 628, 632-33 (1993) ("the legislative intent behind the preferential retirement provisions for firefighters and LEOs was to provide for their early retirement based on a determination that these positions should be 'composed, insofar as possible, of young men and women physically capable of meeting the vigorous demands of occupations which are far more taxing physically than most in the Federal Service").

An LEO covered by FERS or CSRS commonly: (1) has frequent direct contact with criminal suspects; (2) is authorized to carry a firearm; (3) interrogates witnesses and suspects, giving Miranda warnings when appropriate; (4) works for long periods without a break; (5) is on call 24 hours a day; and (6) is required to maintain a level of physical fitness. *Bingaman*, 127 F.3d at 1434; *Hobbs*, 58 M.S.P.R. at 633 & n.5. No single factor, however, is essential or dispositive to the LEO retirement credit determination. *Bingaman*, 127 F.3d at 1436. In determining whether the appellants meet the requirements of establishing their entitlement to LEO retirement coverage, the Board must examine all relevant evidence, including their position descriptions. *Ferrier v. Office of Personnel Management*, 60 M.S.P.R. 342, 345 (1994), recons. denied, 66 M.S.P.R. 241 (1995). The appellants, as applicants for LEO retirement coverage, bear the burden of proving their entitlement to it by preponderant evidence. See 5 C.F.R. § 1201.56(a)(2).

The primary duties of an LEO position are those 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. 5 C.F.R. §§ 831.902, 842.802.

"Primary" duties do not include duties of an emergency, incidental, or temporary nature, even if those duties occupy a substantial portion of the employee's time over a typical work cycle. See *id.* In general, if an employee spends an average of at least 50 percent of his time performing a duty or group of duties, they are his primary duties.

Here, the AJ concluded that the appellants are entitled to LEO retirement credit based on his findings that the primary duties of their positions are the investigation, apprehension, or detention of individuals suspected or convicted of Federal offenses, that their positions should, as soon as reasonably possible, be limited to young and physically vigorous individuals; and that their positions constitute "frontline law enforcement work" entailing numerous unusual physical demands and hazards. For the reasons set forth below, we disagree with the last two findings.

The parties stipulated that the appellants have the authority to make arrests(4) and/or detain persons suspected of committing crimes, including crimes that could constitute violations of the criminal laws of the United States, that they are authorized to carry weapons, and that they interrogate witnesses and suspects and give Miranda warnings when appropriate. The position description (PD) for Investigators states that "[t]he purpose of this position is to plan and conduct investigations of compensation and travel claims, allegations of waste, fraud and abuse, and cases of felonies and/or misdemeanors involving government or private property at the Shipyard and areas under the jurisdiction of the Shipyard Commander." Under "Scope and Effect," the PD

states that the Investigator position "involves investigating and analyzing criminal violations to apprehend and prosecute violators." Almost all of the major duties listed in the PD involve the investigation of Federal offenses.

Thus, according to the parties' stipulations and their PD, the Investigators perform some duties that are clearly law enforcement in nature. See *Bingaman*, 127 F.3d at 1436; *Fitzgerald v. Department of Defense*, 80 M.S.P.R. 1, 26-27 (1998); *Hobbs*, 58 M.S.P.R. at 633 & n.5. The hearing testimony further demonstrates that the Investigators spend a substantial portion of their day performing such duties. See (testimony of Houck); 190 (testimony of Ryland(5) that the duties of an Investigator are to follow up on preliminary investigations done by the uniform services, to question potential suspects, collect potential evidence, preserve the evidence, and apprehend persons suspected of committing crimes). **However, although being authorized to carry a firearm, interrogating witnesses and suspects, giving Miranda warnings, making arrests, investigating Federal offenses, and collecting and preserving evidence are indicia of LEO status, they alone are insufficient to qualify the appellants for primary LEO retirement coverage.** See *Fitzgerald*, 80 M.S.P.R. at 27-28.

It is undisputed that the appellants, as the only 2 Investigators at the Shipyard, handle a large case load. (testimony of Houck that they handled 207 cases in the first 11 months of 1997). It is also undisputed that majority of their cases are larceny and destruction of property crimes. (testimony of Houck that 144 of the 207 cases were larcenies of either personal or government property). In *Fitzgerald*, 80 M.S.P.R. at 27, the Board noted that a substantial number of potential crimes were larceny and the destruction of government property, crimes which the Board found do not typically result in contact with criminal suspects. The appellants testified, however, that they question and interrogate potential suspects nearly every day. (testimony of Houck); (testimony of Ryland); but see (testimony of Houck that, for the most part, you don't have a suspect with larcenies). Thus, **the appellants have shown that they have frequent contact with criminal suspects notwithstanding the large number of their cases that are property crimes.**

In *Fitzgerald*, 80 M.S.P.R. at 28, the Board noted that there were detectives and officers who were the primary criminal investigators for the agency and that their presence affected the frequency of an officer's contact with criminals. Here, however, at most only 40% of the appellants' investigations consist of preliminary or complete investigations, or providing assistance in investigations of cases that are under the jurisdiction of the Naval Criminal Investigative Service (NCIS) or the Federal Bureau of Investigation; the remainder of the cases investigated are under the Shipyard's jurisdiction and are assigned exclusively to the appellants. (Investigator PD); (testimony of Doran that even when cases technically fall within NCIS's jurisdiction, NCIS will send the case back to the appellants because of NCIS's workload or because the appellants have already done most of the work on the case). **Frequent contact with potential criminal suspects, however, is just one indicator of LEO status. LEO eligibility under FERS or CSRS also requires a showing that the duties of the employee's position should be limited to young and physically vigorous individuals.** 5 U.S.C. § 8401(17); *Bingaman*, 127 F.3d at 1434-35; *Hobbs*, 58 M.S.P.R. at 632-33 & n.5. For the reasons discussed below, we find that the appellants have not made such a showing.

Although the appellants carry beepers and are on-call 24 hours a day, (testimony of Doran); (testimony of Houck); (testimony of Ryland), they only occasionally work overtime, (overtime statistics showing that Ryland worked 59 hours and Houck 17 hours of overtime during the first 11 months of 1997). Furthermore, the appellants have not shown that they regularly work long

periods without breaks. (testimony of Ryland that he has not worked for long periods of time without breaks since he became an Investigator); (testimony of Doran that sometimes they work for long periods without breaks); (testimony of Houck that it can happen that he has to work for a long period without breaks). Further, like the appellants in *Fitzgerald*, 80 M.S.P.R. at 28-29, the appellants are required to pass an annual physical, but not a physical fitness stress test, (testimony of Blount); cf. *Ferrier v. Office of Personnel Management*, 66 M.S.P.R. 241, 245 (1995) (police officers were required to pass a five-event Physical Fitness Battery). Houck testified that he does not go to the gym like he used to before he became an Investigator. Moreover, the PD for Investigators does not set forth particularly dangerous conditions or physically rigorous duties. (under "Physical Demands," the PD merely states that "[t]he work is partly sedentary and partly requires standing and walking associated with the examination of facilities and contacts with personnel incident to the law enforcement program," and under "Work Environment," states that the "[w]ork is performed in both an office environment, through the shipyard and, to a lesser degree, detached activity facilities, annexes, detachments, and housing areas, the local community including federal and state courts").

Nor have the appellants shown that their work is particularly hazardous. Cf. *Taylor v. Department of the Treasury*, 68 M.S.P.R. 693, 698 (1995) (inherent danger of handling explosives made the Explosive Enforcement Officer's position particularly hazardous and weighed in favor of a decision granting LEO retirement coverage), *aff'd on recons.*, 72 M.S.P.R. 317 (1996); *Sauser v. Office of Personnel Management*, 59 M.S.P.R. 489, 493-94 (1993) (finding that the CSRS-covered Customs Inspector was entitled to LEO credit because his area of operations along the southwestern border of the United States was characterized by an especially heavy flow of drug smuggling and the importation of other illegal contraband, and he frequently pursued and helped apprehend suspected criminals in situations involving great danger to himself and was in fact injured on a few occasions). Although Ryland testified that he has been involved in confrontations with individuals where it took 4 people to wrestle one individual down, he did not specify whether these incidents took place when he was a Police Officer or an Investigator. Further, he testified that, if he determines that a situation is dangerous, he will not make an arrest, himself, but will instead call for backup. Although Houck described one incident in 1993, when he was shot at by a suspect, he did not state how often such incidents occurred. Accordingly, we find that the appellants have not shown that the duties of their Investigator positions should be limited to young and physically vigorous individuals. See 5 U.S.C. § 8401(17); *Bingaman*, 127 F.3d at 1435; *Hobbs*, 58 M.S.P.R. at 632-33.

Under all of the above circumstances, we conclude that the appellants have not met their burden of showing that they have met the requirements that would entitle them to LEO coverage.

Accordingly, we REVERSE the initial decision and AFFIRM DoD's decision denying the appellants LEO coverage. ORDER This is the final order of the Merit Systems Protection Board in this appeal. 5 C.F.R. § 1201.113(c).(footnotes omitted for brevity).

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ATTACHMENT 24

RONALD J. TOWNSEND

v.

DEPARTMENT OF JUSTICE

DOCKET Number DC-0842-95-0656-I-1 DATE: August 31, 1999

The appellant did not establish his entitlement to LEO service credit. To be entitled to LEO service credit under FERS, the appellant must show that he meets the definition of a law enforcement officer set forth at 5 U.S.C. § 8401(17). In pertinent part, "law enforcement officer" means an employee, the duties of whose position is primarily (1) "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." *Id.*; *Fitzgerald v. Department of Defense*, 80 M.S.P.R. 1, 22-23 (1998). As the applicant for a retirement benefit, the appellant bears the burden of proving his entitlement to it by preponderant evidence. *Houck v. Department of the Navy*, 82 M.S.P.R. 7, ¶ 5 (1999).

In determining whether an appellant has established his entitlement to LEO service credit, the Board will consider all relevant factors, including the individual's position description. *Ferrier v. Office of Personnel Management*, 60 M.S.P.R. 342, 345, remanded, 22 F.3d 1106 (Fed. Cir. 1994) (Table), recons. denied, 66 M.S.P.R. 241 (1995). **Some of the factors associated with entitlement to LEO service credit are: (1) frequent direct contact with criminal suspects; (2) authorization to carry a firearm; (3) interrogation of witnesses and suspects, giving Miranda warnings when appropriate; (4) working for long periods without a break; (5) being on call 24 hours a day; and (6) being required to maintain a level of physical fitness.** *Bingaman v. Department of the Treasury*, 127 F.3d 1431, 1437 (Fed. Cir. 1997); *Fitzgerald*, 80 M.S.P.R. at 26-27. In addition to these general factors, the Board has emphasized that "it is not a position's efficacy or its contribution to a particular law enforcement mission which determines eligibility for [LEO] retirement credit, but rather its character as 'frontline law enforcement work,' entailing unusual physical demands and hazards." *Peek v. Office of Personnel Management*, 63 M.S.P.R. 430, 433-34 (1994), aff'd, 59 F.3d 181 (Fed. Cir. 1995) (Table); see also *Bingaman*, 127 F.3d at 1437-38; *Hannon*, slip op. ¶¶ 8, 29.

Regarding the appellant's claim for primary LEO coverage during the 1986 to 1991 period, the Board found in *Hannon* that **Diversion Investigators as a group do not meet several of the indicia of law enforcement work: (1) the DI position description emphasizes regulatory investigations and lists support of the criminal investigation program as the last of a number of major duties; (2) DIs do not carry firearms; (3) DIs do not make undercover purchases, or control or pay confidential informants; (4) DIs do not make arrests or execute search warrants; and (5) DIs are not required to maintain a high level of physical fitness.** See *Hannon*, slip op. ¶¶ 5, 15, 24-26.

The evidence regarding the other factors is similar to the evidence adduced in *Hannon*. As in *Hannon*, the record indicates that the appellant sometimes had to work in bad neighborhoods and deal with unsavory individuals, that he interrogated witnesses and suspects, giving Miranda warnings where appropriate, that he sometimes worked long and irregular hours, and that the businesses' premises he visited were sometimes unclean and uncomfortable. ID at 22-24. The

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appellant has not adduced evidence, however, indicating that his duties were any more rigorous or hazardous than were Hannon's. See IAF, Tab 33, at 51-66.

Over half of the appellant's duties during the 1986 to 1991 period may well have been in support of criminal investigations. As in Hannon, however, the evidence shows that, based on all the relevant factors, the appellant's primary duties as a Diversion Investigator did not constitute the "frontline law enforcement work," entailing unusual physical demands and hazards," that is required for primary LEO service credit. Hannon, slip op. ¶ 29 (quoting Peek, 63 M.S.P.R. at 433-34); IAF, Tab 34, at 31-53. Given our finding that the appellant is not entitled to primary LEO service credit, he can have no entitlement to secondary LEO service credit for his later service as a supervisor. See 5 U.S.C. § 8401(17)(C).

ATTACHMENT 26**Nelson vs. Department of the Navy, No. 99-3234 (Fed. Cir. 12/28/1999)
United States Court of Appeals for the Federal Circuit, 99-3234****December 28, 1999****JERRY D. NELSON VS DEPARTMENT OF THE NAVY**

The Merit Systems Protection Board denied Mr. Jerry D. Nelson retirement coverage as a law enforcement officer (LEO). See *Nelson v. Department of Navy*, No. DC-0831-97-0869-I-1 (Apr. 16, 1999) (Nelson II). Because Mr. Nelson has not shown that the Board erred in its denial, this court affirms.

DISCUSSION

Mr. Nelson is a police officer, a position within the Civil Service Retirement System (CSRS), at the Amphibious Base of the Department of the Navy in Little Creek, Norfolk, Virginia. In early 1997, Mr. Nelson requested LEO retirement coverage under 5 U.S.C. § 8336(a) (1994). The Department of the Navy denied Mr. Nelson's request. He appealed the agency's decision to the Board. The administrative judge consolidated Mr. Nelson's appeal with the appeals of forty-seven other appellants. In an initial decision, the administrative judge reversed the agency's decision and found that Mr. Nelson was entitled to LEO retirement coverage. See *Nelson v. Department of Navy*, No. DC-0831-97-0869-I-1 (Dec. 8, 1997) (Nelson I).

Upon the agency's petition, the Board reversed the administrative judge's decision and affirmed the agency's decision to deny Mr. Nelson the coverage. See Nelson II. The Board found that Mr. Nelson "has not shown that the duties of a Police Officer are primarily the investigation, apprehension, and arrest of criminal suspects." *Id.* at 6. Mr. Nelson appeals to this court.

Under 5 U.S.C. § 7703(c), this court reviews Board decisions to determine, inter alia, whether they were "obtained without procedures required by law, rule, or regulation having been followed." 5 U.S.C. § 7703(c) (1994). An applicant for LEO retirement coverage bears the burden of proving entitlement by a preponderance of the evidence. See 5 C.F.R. § 1201.56(a)(2) (1999). This court reviews the fact-finding of the Board to ensure that it was not arbitrary, capricious, an abuse of discretion, or unsupported by substantial evidence. See 5 U.S.C. § 7703(c); *Cheeseman v. Office of Personnel Management*, 791 F.2d 138, 140 (Fed. Cir. 1986).

An employee who qualifies for LEO retirement receives a larger annuity than ordinary civil service employees. The statutory standard for LEO eligibility under the CSRS requires that the duties of the employee's position be "primarily the investigation, apprehension, or detention of individuals suspected or convicted of offenses against the criminal laws of the United States." 5 U.S.C. § 8331(20) (1994); 5 C.F.R. § 831.902 (1999). "[T]he definition of law enforcement officer in § 8331(20) has been 'strictly construed[,] ... [and] the statute was intended to ensure that the covered positions should be composed, insofar as possible, of young men and women physically capable of meeting the vigorous demands of occupations which are far more taxing physically than most in the Federal Service.'" *Bingaman v. Department of Treasury*, 127 F.3d 1431, 1435 (Fed. Cir. 1997).

The Board, in its analysis, reviewed the six factors relevant to determining whether an employee qualifies as a "law enforcement officer": **(1) frequent contact with criminal suspects, (2) authorized to carry firearms, (3) interrogates witnesses and suspects, giving Miranda warnings when appropriate, (4) works for long hours without a break, (5) is on call 24 hours a day, and (6) required to maintain a level of physical fitness.** See *id.* at 1436. In so doing, the Board first examined the position description for police officers at Little Creek, which sets forth the following major duties and responsibilities:

Maintaining law and order, protecting life, property and the civil rights of individuals; prevents, detects and conducts preliminary investigations of crimes, misdemeanors and felonies; arrests violators; performs patrol duties; responds to scenes of vehicle accidents; establishes traffic controls; protects and preserves crime scenes and evidence; escorts the movement of explosives, VIP's and other valuables; performs security checks; conducts surveillance; and performs police dispatcher duties.

The Board found that this passage describes "some duties that are clearly law enforcement in nature, e.g., conducting investigations of crimes and making arrests, and others that do not satisfy the requirement for LEO retirement coverage, e.g., maintaining law and order, providing escorts, and traffic control."

Thus, the Board reviewed the hearing testimony to determine "what portion of a Police Officer's average day is spent on law enforcement duties." *Id.* In particular, the Board considered the testimony of two witnesses from Little Creek: Harold Oakley, the Director of Law Enforcement and Physical Security at Little Creek, and Joseph Brady, the Training Officer for Little Creek. In particular, Harold Oakley testified that "although officers routinely come in contact with suspects . . . during the day, a large portion of a Police Officer's time is spent on traffic enforcement and, during the night, 'it's more presence, building checks . . . and DUI's'." *Id.* Joseph Brady testified that although "officers have daily contact with criminal suspects" that he has not "been on the street in a while."

However, the Board noted that Nelson "has not shown how many incident complaint reports, on the average, are filed by a Police Officer each year. Moreover, no testimony or evidence was offered to show the average number of arrests made each year." *Id.* Therefore, we find no error in the Board's conclusion that Nelson failed to show that a substantial portion of a Police Officer's working time over a typical work cycle is spent on LEO-eligible activities.

On appeal, Mr. Nelson does not dispute that the Board applied the proper legal standards for LEO eligibility. Instead, Mr. Nelson's primarily protests that he was not granted the opportunity to testify during the hearing before the administrative judge. However, as Mr. Nelson himself admits in his brief and as the trial transcript reflects, the parties stipulated that the testimony of representative witnesses would reflect the work of all police officers. ("[T]he stipulation that the parties have entered into is that the testimony is reflective of all the individuals in the group.").

Based on the entire record, the Board found that Mr. Nelson "has not shown that a substantial portion of a Police Officer's working time over a typical work cycle is spent on investigating, arresting, and apprehending criminal suspects or that a Police Officer has frequent contact with criminal suspects." Accordingly, this court finds that substantial evidence supports the Board's

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decision that Mr. Nelson is not entitled to LEO retirement coverage.

This court also finds unpersuasive Mr. Nelson's alternative contention that this case should be remanded if this court reverses the Board's decision in another pending appeal, *Fitzgerald v. Department of Defense*, 80 MSPR 1, 27 (1998). Mr. Nelson presents no evidence as to why the present case, which appears to have been severed from the related cases based on differing factual circumstances, should turn on the outcome of a separate appeal.

Accordingly, because the Board did not commit reversible error in denying LEO retirement coverage to Mr. Nelson, this court affirms.

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ATTACHMENT 26**Appeals Court Case, 2000****Federal Employees News Digest August 7, 2000****Court rules against police officer's LEO bid**

A federal police officer did not meet the statutory definition of "law enforcement officer," and thus was not entitled to the special retirement benefits provided LEOs under the Federal Employees' Retirement System, according to the U.S. Court of Appeals for the Federal Circuit.

The case stems from a request filed by a General Services Administration police officer seeking LEO classification from the agency. Earlier, GSA had turned down a bid by the National Federation of Federal Employees to have the agency classify all of its police officers in the LEO category. According to GSA, the primary duties of the officer position were "to maintain law and order by protecting life, property, and the civil rights of individuals," which did not qualify the officers for LEO status. In his suit, however, the employee testified that his primary duties were to investigate, apprehend, and detain criminals, and that he spent 75 to 80 percent of his time performing investigative work.

Upholding a Merit Systems Protection Board decision, the appeals court agreed that the employee failed to show that the actual duties he performed on the job qualified as LEO activities

(Slater v. General Services Administration, CA FC, No. 00-3130, 7/12/2000)

Watson v. Dept. of the Navy
(Fed. Cir.)

August 17, 2001

Appealed from: Merit Systems Protection Board

ATTACHMENT 27

Opinion for the court filed by Circuit Judge MICHEL. Dissenting opinion filed by Senior Circuit Judge FRIEDMAN.

James A. Watson et al. petition for review of the July 17, 2000 final decision of the Merit Systems Protection Board ("Board"), sustaining the Department of the Navy's ("Navy" or "agency") determination that petitioners did not satisfy the statutory and regulatory criteria for early retirement coverage as law enforcement officers ("LEO") under the Civil Service Retirement System ("CSRS"), 5 U.S.C. § 8336(c) (1994), or the Federal Employees' Retirement System ("FERS"), 5 U.S.C. § 8412(d) (1994). *Watson v. Dep't of the Navy*, 86 M.S.P.R. 318 (2000). The petitioners are thirteen current or former police officers employed by the Navy at the Norfolk Naval Base in Norfolk, Virginia.

In upholding the Navy's denial of the officers' applications for LEO retirement credit, the Board employed a new approach that more affirmatively considered the reasons for the creation and existence of the positions than it had used in its prior LEO decisions, which emphasized the officers' actual, even if incidental or occasional, duties. *Id.* at 321.

In this case, after reviewing the Office of Personnel Management ("OPM") classification standards for the GS-083 Occupation Series to which the officers belonged, a December 1997 "Grade Evaluation Guide for Police and Security Guard Positions GS-0083/GS-0085" ("the Guide") published by OPM, the Position Description for the officers' positions, and the duties actually performed by the officers on a regular and recurring basis, the Board concluded that the officers' positions did not exist primarily for the purpose of investigating, apprehending, or detaining individuals suspected or convicted of federal offenses. *Id.* at 328; see also 5 U.S.C. §§ 8331(20), 8401(17) (1994).

We hold that the approach used by the Board is consistent with the statutes and regulations of the LEO retirement coverage program, and that it does not conflict with our decision in *Bingaman v. Department of the Treasury*, 127 F.3d 1431 (Fed. Cir. 1997), or with its own decision in the same case. We also hold that under this approach, the Board's determination that these Norfolk Naval Base police officers did not satisfy the definition of a LEO was free of legal error and supported by at least substantial evidence. Therefore, we affirm.

Background

Congress established a special retirement system in order for federal employees in certain positions to retire at an unusually early age. Either of two statutes governs entitlement to such special retirement coverage. Under both the CSRS and FERS, an employee who qualifies for LEO retirement credit is eligible to retire upon attaining the age of 50 and after completing 20 years of eligible LEO service. See 5 U.S.C. §§ 8336(c), 8412(d)(2). Additionally, under the FERS, a LEO can retire at any age after completing 25 years of service. 5 U.S.C. § 8412(d)(1). This is far earlier than the age at which most civil service employees are eligible to retire, and is based on shorter service. 5 U.S.C. § 8336(c) (1994). An employee qualifying for LEO retirement receives a larger

annuity than ordinary civil service employees, but is subject to larger salary deductions during his or her employment. A LEO may also be subject to mandatory early retirement. See 5 U.S.C. §§ 8335, 8425 (1994). An employee can qualify for LEO retirement credit either by serving in a position that has been approved as such, or by applying for LEO credit and satisfying the employing agency that he or she is entitled to LEO retirement credit because his or her actual duties primarily involve pursuing or detaining criminals. See 5 C.F.R. §§ 831.903-906, 831.910(a), 842.803-804, 842.807(a) (1994).

The CSRS and the FERS prescribe somewhat different standards for determining whether an employee may be eligible for LEO retirement credit. In order to be eligible under the CSRS, the duties of the employee's position must be "primarily the investigation, apprehension, or detention of individuals suspected or convicted of [federal] offenses." 5 U.S.C. §§ 8331(20), 8401(17)(A)(ii). The standard for LEO eligibility under the FERS adds the further requirement 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).

All petitioners, with the exception of Mr. Rowland, were assigned to the patrol division; Mr. Rowland was assigned to the traffic division. The parties had stipulated that the officers were authorized to carry firearms, had arrest authority, were required to maintain a level of physical fitness by passing an annual physical fitness test if hired after March 1991, had interrogated witnesses and suspects, and had given Miranda warnings, and in the case of military suspects, warnings under Article 31 of the Uniform Code of Military Justice.

The Navy denied the officers LEO early retirement credit. The officers filed two separate appeals to the Board, since two of the officers were covered under the CSRS, and the remaining eleven officers were covered under the FERS. On July 12-16, and August 2-3, 1999, the Administrative Judge ("AJ") conducted a consolidated hearing. In initial decisions dated September 3 and 17, 1999, the AJ reversed the final decision of the Navy, and held that the officers were entitled to LEO retirement credit. See *Watson v. Dep't of the Navy*, DC-0842-99-0483-I-1 (Sept. 3, 1999) (discussing FERS); *Jefferson v. Dep't of the Navy*, DC-0831-99-0482-I-1 (Sept. 17, 1999) (discussing CSRS). The full Board consolidated the *Watson* and *Jefferson* appeals, and granted the agency's petition for review.

On July 17, 2000, the Board reversed the AJ's initial decisions, and held that the officers were not entitled to LEO retirement credit. The Board noted that in its prior cases, it had placed too much emphasis on the duties performed by a particular applicant over a limited period of time, with too little emphasis on the purpose of the applicant's position. *Watson*, 86 M.S.P.R. at 320-21. Using that approach, the Board previously held that Norfolk Naval Base police officers in the same series as petitioners here (the 083 series) were entitled to LEO retirement credit. *Id.* (citing *Bremby v. Dep't of Navy*, 81 M.S.P.R. 450 (1999); *Hamilton v. Dep't of Defense*, 85 M.S.P.R. 409 (2000)).
*fn1

In order to be more faithful to the language of the statutes and the regulations, the Board expressly adopted a new "position-oriented approach" that would "more affirmatively" assess the "basic reasons for the existence of the position," as required by OPM regulations, 5 C.F.R. §§ 831.902, 842.802 (1994). *fn2 *Id.* at 321. Under this new approach, the Board stated that "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." *Id.* In determining the reasons for the existence of the position, the Board considered all available evidence, including OPM

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classification standards, the OPM Guide, the Position Description, and the duties actually performed by the officers on a near daily basis. *Id.* at 328.

After reviewing that evidence, the Board concluded that the petitioners' positions did not exist primarily for the purpose of investigating, apprehending, or detaining those suspected or convicted of federal offenses. *Id.* On the contrary, it held that the officers' primary duties were maintaining law and order, protecting life and property, and guarding against potential violations of law. *Id.* at 329. It therefore sustained the agency's decision that the officers were not entitled to LEO credit. *Id.*

The police officers filed a timely petition for review to this court under 5 U.S.C. § 7703 (1994). On appeal, petitioners and amicus, the Fraternal Order of Police, argue that the Board's approach represents a "sweeping policy change" that reverses the approach previously adopted by this court in *Bingaman* in analyzing LEO retirement coverage cases, and that is contrary to the statutes and the regulations governing LEO eligibility. We heard oral argument on June 6, 2001, and have jurisdiction under 28 U.S.C. § 1295(a)(9) (1994).

Analysis

A. Requirements for LEO Retirement Credit

Federal police officers are only eligible for early retirement credit under the CSRS or FERS if they meet the statutory definition of a LEO. Both statutes define an LEO as one who holds a position, the "primary duties" of which involve the "investigation, apprehension, or detention" of those suspected or convicted of federal offenses. 5 U.S.C. §§ 8331(20), 8401(17). By regulation, OPM has defined "primary duties" in a three-part test. "Primary duties" are those duties 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. 5 C.F.R. §§ 831.902, 842.802 (emphasis added).

In general, if an employee spends at least fifty percent of his or her time performing certain duties, those duties are his or her primary duties. *Id.* Under the regulations, "[d]uties that are of an emergency, incidental, or temporary nature cannot be considered 'primary' even if they meet the substantial portion of time criterion." *Id.* Further, the regulations state that the definition of a LEO "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.* (emphasis added). The police officers seeking LEO retirement coverage bear the burden of proving entitlement by preponderant evidence. 5 C.F.R. § 1201.56(a)(2). Eligibility for LEO retirement coverage must be "strictly construed," because the LEO retirement 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." *Bingaman*, 127 F.3d at 1435 (quoting *Morgan v. Office of Pers. Mgmt.*, 773 F.2d 282, 286-87 (Fed. Cir. 1985)).

B. The Board's Approach

Petitioners and amicus argue that the approach used by the Board places too much reliance on the reason why the position was initially created. In its prior cases, petitioners note, the Board and this court in *Bingaman* had undertaken a fact-specific inquiry into the daily or frequent duties actually performed by the officer seeking LEO coverage, even if those duties were not listed in the Position Description as primary duties. Petitioners argue that the new "position-oriented" approach relies excessively on broad and unclear OPM classification standards and the Position Description in order to determine why the position was originally created many years ago, without sufficient examination of the regular duties actually performed by the particular employee. This approach, petitioners contend, is contrary to the plain language of the statutes creating the LEO retirement program, and conflicts with our decision in *Bingaman*.

The government argues that the approach used by the Board is permissible, and is more faithful to the statutes and the regulations than its earlier approach. As noted by the Board in this case, the approach formerly used by the Board in cases such as *Bremby* permitted an employee to be deemed eligible for LEO retirement credit so long as he or she could show that to some unspecified degree his or her primary duties "involve" the investigation, apprehension, or detention of those suspected or convicted of federal offenses, even if the employee's primary duties consist of non-LEO duties, such as maintaining law and order or protecting life and property. The *Bremby* approach, the government argues, ignored the first criterion of 5 C.F.R. §§ 831.902, 842.802, which defined the term "primary duties" to require an assessment of the "basic reasons for the existence of the position." 5 C.F.R. §§ 831.902, 842.802.

1. Consistency with Statutes and Regulations

We hold that the approach used by the Board in this case is indeed consistent with the statutory and regulatory criteria for LEO retirement credit. The 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. A LEO is defined in both the CSRS and the FERS statutes as one "the duties of whose position" are "primarily" the "investigation, apprehension, or detention" of those suspected or convicted of federal offenses. 5 U.S.C. §§ 8331(20), 8401(17) (emphasis added). Thus, under the statutes, an employee may only receive LEO retirement credit if the position he or she occupies primarily involves certain specified duties.

Moreover, the Board's approach is consistent with OPM regulations. The inclusion of the conjunctive "and" in sections 831.902 and 842.802 clearly indicates that all three criteria must be demonstrated in order for a position to be LEO-eligible. The 6-factor *Bingaman* test 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))." ³The 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 officer's working time and that occurred on a regular and recurring basis, the position exists currently as a LEO position.

Placing emphasis on why the position exists is also consistent with the legislative intent in providing for the LEO retirement program: to limit LEO-eligibility to rigorous positions that retirement at an unusually early age is appropriate. A Senate Report stated that LEO positions should be "composed, insofar as possible of young men and women physically capable of meeting

the vigorous demands of occupations which are far more taxing physically than most in the federal service." S. Rep. No. 93-948, at 2 (1974), reprinted in 1974 U.S.C.C.A.N. 3698, 3699. Accordingly, Congress established maximum retirement ages for LEO employees such as FBI Special Agents and for employees serving in other positions which are statutorily entitled to LEO retirement coverage. See 5 U.S.C. §§ 8335, 8425. LEO employees, for instance, are often required to retire no later than between 55 and 57 years of age, or when they have accrued twenty years of creditable service if they are beyond those ages when they completed the twenty years. See *id.* Congress further has authorized an agency head to determine and fix minimum and maximum limits of age within which an original appointment may be made to a LEO position. See 5 U.S.C. § 3307(e) (1994). For instance, all Department of Justice LEO positions have a maximum entry age of 37, which may be waived for applicants up to 40 years of age. In assessing why the position exists, factors such as an early mandatory retirement age and a maximum entry age should be considered in determining whether the "basic reasons for the existence of the position" consists of duties that will make the employee LEO-eligible. Examination of such factors will be quite probative in determining whether the position really exists as a LEO position, that is, its job description and actual duties consist of tasks that only a young and physically fit individual could perform.

The dissent concludes that the Board improperly "treated the purpose of the 'existence' of the position . . . as turning on the basic reasons for the position's 'creation.'" Although in several places, including the concluding paragraph, the Board's opinion misstates the law as requiring that the position be "created" primarily for the performance of LEO duties, the Board's examination of the duties actually performed by the officers demonstrates that it knew it had to determine the reasons why the position existed at the time of application for LEO credit, not merely when it was originally created. As noted by the dissent, early in its opinion, the Board stated that under its new, position-oriented 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." Watson, 86 M.S.P.R. at 321. Significantly, however, the Board did not stop there. It went on to state in the very next sentence:

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. *Id.*

This statement indicates that the Board knew that even if the official documentation of the position's creation did not support an applicant's LEO eligibility, the Board still needed to inquire into the applicant's actual duties as alleged. Moreover, in describing why it was departing from the Bremby approach, the Board specifically noted that its new approach would "more affirmatively take into account the basic reasons for the existence of the position." *Id.* (emphases added).

The Board's approach included consideration of both the position documentation and actual duties. First, the Board determined the purpose for the creation of the officers' position in the GS-083 series. *Id.* This is an altogether logical and proper place to begin. In doing so, it considered the OPM Classification Standards, the OPM Guide, and the Position Description. *Id.* at 323-26. It found that, as created, the position was not LEO-eligible. *Id.* at 326. The Board next determined whether the purpose for the position changed, i.e., whether the purpose for the position's existence was different than the purpose for its creation. *Id.* at 321. In doing so, it considered -- in equivalent detail and at an equivalent length of its treatment of position documents -- the testimony

regarding the officers' actual, day-to-day duties. *Id.*

It found that the basic reasons for the position's existence were not different from those for its creation, and thus, that the officers were not LEO-eligible. *Id.* at 328. This second step was also proper and necessary, as the Board clearly understood. In concluding its analysis, the Board stated: "While an incumbent's actual duties are relevant . . . 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 [sic] actually investigation, apprehension, or detention." *Id.* If the Board believed that eligibility for LEO retirement credit is determined solely by the reasons for the position's creation, it would not need to consider, much less devote equivalent treatment to, the testimony regarding the officers' day-to-day duties. Nor did it consider actual duties only as an alternative ground for decision. Indeed, the Board specifically noted that its new position-oriented approach did not foreclose other officers in the GS-083 series from showing that the basic reasons for the existence of their positions had shifted from peace-keeping to the investigation, apprehension, or detention of criminals or suspects. *Id.* at 330 n.7.

We note that footnote 7 of the Board's opinion, like the concluding paragraph, incorrectly states the law as requiring that applicants "must show that the position was created as an LEO-position." *Id.* However, the portion of the Board's opinion explaining its analysis reflects that it correctly understood that the reasons for the position's existence, not merely its creation, are determinative. Such reasons could be shown by proof that the duties an employee performs day-to-day differ from those of the OPM classification standards, the OPM Guide, or the Position Description. *Id.* at 321; see also *Ellis v. United States*, 610 F.2d 760 (Ct. Cl. 1979) (finding that the duties actually performed by the officer were not properly set forth in their position description, and thus granting a retirement annuity under 5 U.S.C. § 8331(21)). By providing this alternative way to show entitlement to LEO credit, the Board necessarily concluded that the reasons for the existence of the position can be established not only by the position papers but also by actual duties performed. Thus, contrary to the dissent's suggestion, we conclude that the Board applied the correct legal standard. The Board's analysis properly included the reasons for the position's existence, and not merely its creation.

2. Consistency with *Bingaman*

The Board's approach is also wholly consistent with the approach taken by this court in *Bingaman*. Petitioners seem to read *Bingaman* to require a rigid, bright-line test based on the six factors of the Board's decision. Petitioners also argue that other factors -- such as whether the officers' duties are commensurate with Norfolk City police officers -- should be considered as well. This court, however, has never adopted the *Bingaman* factors; nor has the court held that federal employees are always entitled to LEO coverage so long as they satisfy the *Bingaman* factors.

Indeed, as noted in *Bingaman and Hannon v. Department of Justice*, 234 F.3d 674 (Fed. Cir. 2000), the *Bingaman* factors were developed by the Board, not by this court as "captur[ing] the essence of what Congress intended." *Bingaman*, 127 F.3d at 1436; *Hannon*, 234 F.3d at 677-78 (noting that in *Bingaman*, this court "merely recognized and applied the [*Bingaman*] factors," factors which had been "developed" by "the Board, not this court"). In examining the duties performed by these petitioners, the *Bingaman* court only addressed prongs (ii) and (iii) of 5 C.F.R. §§ 831.902, 842.802. *Bingaman*, 127 F.3d at 1436 ("Applying [the *Bingaman* factors], the [AJ] properly found that *Bingaman* failed to establish that he is eligible for LEO retirement credit."). The court did not need to consider prong (i) of the test --examining the "basic reasons for the existence of the position --because the court found that the petitioners had failed to meet their burden of

proof regarding the second and third prongs of 5 C.F.R. §§ 831.902, 842.802.

Moreover, some of the most probative factors are not even a part of the six-factor Bingaman test. Hannon, 234 F.3d at 678. For instance, in Hannon, this court held that the Board should consider hazard as a probative factor in assessing LEO retirement coverage. *Id.* at 679 ("The Board has recognized . . . that hazard is a significant element of law enforcement work."). Moreover, in light of evident legislative intent to grant LEO credit only to those who have jobs requiring physically demanding work, other factors, such as whether the officer must retire at an early age or whether there is an early maximum entry age, would also be highly probative in determining whether the officer is entitled to LEO retirement credit. Indeed, while all of the Bingaman factors may always be considered, some are more probative than others. For example, whether the job requires an annual physical fitness test may be probative in assessing whether the position is designed to be limited to young and physically fit individuals who would be forced to retire at an unusually early age, depending on the stringency of the test.

Other Bingaman factors, however, are normally less probative because they do not always distinguish between officers who do LEO work and those who do not. For example, guards mainly protecting life and property and police officers whose jobs primarily involve pursuing or detaining criminals all might carry a firearm, be on call 24 hours a day, or have to work long periods without taking a break. The regulations, however, specifically exclude guards who mainly protect life and property from LEO retirement coverage. See 5 C.F.R. §§ 831.902, 842.802. Other factors, proposed by petitioners, have little relevance. For instance, that petitioners' positions are equivalent to those of Norfolk City police officers has little probative value because not all Norfolk City police officers would be entitled to LEO credit if they were federal employees.

C. Determining LEO Eligibility for these Norfolk Naval Base Police Officers

In this case, the Board held that petitioners' applications for LEO retirement credit were properly denied, because the relevant evidence of record (including OPM classification standards, the OPM Guide, the Position Description, and the testimony detailing the officers' daily or frequent duties) did not show that the GS-083 police officer position was "created for the basic reason" of conducting LEO activities. *fn5* Watson, 86 M.S.P.R. at 328-29. The Board's review of the "primary duties" of the officers as detailed in official documentation and in their testimony before the AJ, and the fact that the officers' positions were neither limited by an early mandatory retirement age nor a youthful maximum entry age all support the Board's conclusion that these Norfolk Naval Base police officers are not entitled to LEO retirement credit.

In order to determine that an officer is entitled to LEO retirement credit, the officer must show that the primary duties of his or her position, as defined by 5 C.F.R. §§ 831.902, 842.802, are the investigation, apprehension, and detention of criminals or suspects. The most probative factors, we hold, are: 1) whether the officers are merely guarding life and property or whether the officers are instead more frequently pursuing or detaining criminals; 2) whether there is an early mandatory retirement age; 3) whether there is a youthful maximum entry age; 4) whether the job is physically demanding so as to require a youthful workforce; and 5) whether the officer is exposed to hazard or danger. The six Bingaman factors may also be considered as necessary and appropriate.

Evaluation of those factors in this case supports the Board's conclusion that the petitioners'

positions as Norfolk Naval Base police officers did not exist primarily for the purpose of investigating, apprehending, or detaining criminals or suspects. Individuals applying for a position as a Norfolk Naval Base police officer, unlike LEO appointments in many other departments, are not required to retire at an early age; nor are officers required to satisfy certain maximum entry age requirements. An officer could conceivably enter the Norfolk Naval Base police force at age 50, and retire at age 70. This hardly seems to be consistent with awarding LEO retirement credit only for those positions which are so physically taxing as to warrant retirement after 20 years of service.

The official documentation of the officers' position provides further support that the position was not designed to be LEO-eligible. The OPM classification standards for GS-083 officers supports the Board's conclusion that the Norfolk Naval Base police officers do not satisfy the definition of an LEO. The standards state that the "primary mission and purpose of police organizations is to enforce law, maintain law and order, preserve the peace, and protect the life and civil rights of persons." OPM Classification Standards for the GS-083 Occupation Series, Occupational Information at 2-4. The OPM classification standards also state that "[m]ost police officers are engaged in patrol duties and/or traffic control." *Id.* Those duties are specifically designated by the OPM regulations to be non-LEO duties. 5 C.F.R. §§ 831.902, 842.802.

The OPM Guide reiterates the point made by the OPM Classification Standards that "[t]he primary mission of police officers in the Federal service is to maintain law and order." Although noting that the "distinction between police and guard work may not be an easy one to make," the Guide differentiates between police officers who are eligible for LEO credit and guards who are not. For instance, the Guide notes that Criminal Investigators in the GS-1811 series are eligible for LEO credit because the series consists of "[p]ositions primarily responsible for investigating alleged or suspected major offenses or violations of specialized laws of the United States." As noted by the Board, "[t]his 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." *Watson*, 86 M.S.P.R. at 325 (emphasis added).

The Position Description also supports the Board's conclusion that these Norfolk Naval Base police officers are not entitled to LEO retirement coverage. The introduction to the Position Description states that the police officers "provide[] community policing, law enforcement, and security for the investigation of crimes, [and] protection of life and property." The section of the Position Description entitled "Major Duties and Responsibilities" states that "[t]he incumbent serves as a Police Officer assigned to a community policing area." It then states, *inter alia*, that the "position requires an incumbent to perform duties that involve the investigation, arrest, apprehension or detention of criminals and/or suspected criminals" (emphasis added); significantly, however, the Position Description does not state that the duties are primarily the investigation, apprehension or detention of criminals and/or suspected criminals. Other major duties listed in the Position Description include: 1) providing police escorts and directing traffic; 2) serving warrants and issuing summons; 3) making arrests; 4) testifying in court; 5) reporting unsafe conditions existing in the streets and/or public facilities; 6) responding to emergency situations; and 7) conducting preliminary investigations, such as by interviewing witnesses or collecting and preserving evidence.

The Board also properly concluded that the testimony of the officers describing their daily or frequent duties did not show that the officers were entitled to LEO retirement coverage. While

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the officers testified to some instances involving great danger, the Board concluded that the testimony as a whole showed that the police officers' duties mostly involved being "on the lookout for potential violations of law, conduct[ing] generalized patrols, guard[ing] the gates, check[ing] buildings at night to ensure that they were secure, enforc[ing] traffic laws, and act[ing] as 'first responders' to emergencies or potential crimes." *Id.* at 328. The Board also considered conflicting evidence as to whether at least 50 percent of the officers' duties consisted of LEO-type work. The Board opinion credited the testimony of Police Commander Hemmingsen, who reviewed the Incident Complaint Reports to determine whether the officers performed LEO duties. *Id.* at 326. Commander Hemmingsen also testified before the AJ that the Norfolk Naval Base police officers did not perform LEO-type work at least 50 percent of the time, as required by sections 831.902 and 842.802. This contradicted the testimony of petitioners' witnesses who testified that their duties were over 50 percent. Substantial evidence thus supports the Board's conclusion that the officers' primary duties were not LEO duties. *Id.* at 328-29.

Indeed, 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. Thus, officers in that series would only be eligible for LEO credit if they could persuade the agency or Board that "contrary to the official documentation of the position," the duties actually performed by the officers on a regular and recurring basis clearly indicate that the "basic reasons for the existence of the position" was the investigation, apprehension, or detention of criminals or suspects. *Id.*

Conclusion

Under a legally correct construction of the statutes and regulations, a federal police officer seeking LEO early retirement credit must prove that he or she occupied a position that primarily required the investigation, apprehension, or detention of criminals or suspects, rather than merely the protection of life or property, and that their duties were so physically demanding as to necessitate his or her retirement at an unusually early age. The Board held that these Norfolk Naval Base police officers have not proven that their primary duties nor those of their position involved the investigation, apprehension, or detention of criminals or suspects. The Board's finding is supported by substantial evidence. Further, the Board's method of analysis was consistent with the statutes, the regulations, and the case law. Therefore, the Board's decision is

AFFIRMED.

FRIEDMAN, Senior Circuit Judge, dissenting in part.

I agree with most of what the court says. I part company with it, however, in its analysis and approval of the theory upon which the Board upheld the Navy's denial of law enforcement officer (LEO) status to these employees.

I agree that the Board justifiably adopted its broader "position-oriented" approach in LEO cases as more accurately reflecting the statutory test for LEO status of whether the "duties of [the employee's] position (i) are primarily (l) the investigation, apprehension, or detention" of criminals, 5 U.S.C. § 8401(17)(A), and OPM's implementing regulations that define "primary duties" as duties that, among other things, "(i) [a]re paramount in influence or weight; that is, constitute the basic reasons for the existence of the position," 5 C.F.R. § 831.902. As I read the Board's opinion, however, the Board treated the purpose of the "existence of the position" in the regulatory

definition as turning on the basic reasons for the position's "creation."

Early in its opinion the Board stated that under the new "position-oriented" approach it was adopting, "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." 86 M.S.P.R. at 321. After stating that the OPM regulations require that "the 'basic reasons' for the existence of the position must be the performance of LEO duties," the Board stated that the administrative judge "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." Id. at 323.

The Board ruled that "[t]he 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." Id. at 325. It stated that the position's description shows that "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." Id. at 326. It pointed out that there was "evidence showing that the GS-083 Police Officer position at the NNB was not created as an LEO position" and stated that "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." Id. at 328-29.

The penultimate paragraph of the opinion, captioned "ORDER," stated:

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 Id. at 330.

The Board reiterated the view that LEO status turned upon the reason for the "creation" of the position in footnote 7, where it stated: "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 for the GS-05-083 Police Officer position at the NNB was the performance of LEO duties . . . any future appellants who encumber or did encumber this position must show that the position was created as a LEO position." Id.

Although the Board referred three times to the reason for the "existence" of the position, a fair reading of its opinion indicates to me that the critical and controlling factor for the Board in determining LEO status was the reason for the "creation" of the position and not for its "existence," as the regulation provides. The reasons for the creation of a position are not necessarily the same as those for its existence. A position could have been created for non-LEO purposes, but over time the duties could change sufficiently that it continued to exist for LEO purposes. Of course, the reason for the creation of a position may be a significant factor in determining the reasons for its existence. The two concepts are not the same, however, and the reasons for the existence of a position cannot be based solely upon the historical reasons for its creation.

OPM's regulation merely defines one element of the statutory standard governing the existence of LEO status - the meaning of the "primary duties" of the position. The portion of that definition here involved - duties that "constitute the basic reasons for the existence of the position" - is unambiguous. In applying the LEO statute, the Board's responsibility was to apply that definition to the facts of this case, not to reformulate the definition by substituting the concept of the reasons

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for "creation" of the position for the reasons for its "existence."

I would vacate the Board's decision and remand for the Board to reconsider under the proper standard.

Opinion Footnotes

*footnote 1: The Board also notes that in others cases involving police officers in the GS- 083 series, it did not hold that the GS- 083 police officers were entitled to LEO credit. Watson, 86 M.S.P.R. at 323 n.3 (noting that appeals at different times, in different legal postures, and with different evidentiary records . . . lead to potentially inconsistent results"); see also Fitzgerald v. Dep't of Defense, 80 M.S.P.R. 1 (1998), aff'd, 230 F.3d 1373 (Fed. Cir. 1999) (holding that officers in the GS- 083 series were not entitled to LEO credit).

*footnote 2: Section 831.902 applies to CSRS determinations; section 842.802 applies to FERS determinations. Both regulations are worded identically.

*footnote 3: Under the six Bingaman factors, an LEO "commonly 1) has frequent direct contact with criminal suspects; 2) is authorized to carry a firearm; 3) interrogates witnesses and suspects, giving Miranda warnings when appropriate; 4) works for long periods without a break; 5) is on call 24 hours a day; and 6) is required to maintain a level of physical fitness." Bingaman, 127 F.3d at 1436 (citing Hobbs v. Office of Pers. Mgmt., 58 M.S.P.R. 628 (1993)).

*footnote 4: The dissent believes that the Board looked exclusively at why the position was created. The dissent states, "the reasons for the existence of the position cannot be based solely upon the historical reasons for the creation." This premise is crucial to the dissent's conclusion that the Board applied the wrong legal standard.

*footnote 5: Under the FERS statute, the duties of the position must 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). The Board noted that because the evidence showed that the duties of the Norfolk Naval Base police officers were not primarily the investigation, apprehension, or detention of persons convicted or suspected of criminal offenses, it need not consider whether the duties of the Watson petitioners met the "sufficiently rigorous" requirement under the FERS. Watson, 86 M.S.P.R. at 321 n.2. We see no error in this approach, which, we note, has the virtue of judicial efficiency.

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ATTACHMENT 28

United States Court of Appeals for the Federal Circuit

00-3067
LOUIS D. HALL, SR.,
Petitioner,
v.
DEPARTMENT OF THE TREASURY,
Respondent.

Appealed from: Merit Systems Protection Board United States Court of Appeals for the Federal Circuit

DECIDED: September 4, 2001

Before GAJARSA, Circuit Judge, ARCHER, Senior Circuit Judge, and LINN, Circuit Judge. LINN, Circuit Judge.

Louis D. Hall appeals the decision of the Merit Systems Protection Board ("MSPB" or "Board"), denying law enforcement officer service credit for his duties as a Canine Enforcement Officer. Hall v. Dep't of the Treasury, No. DA-0831-98-0507-I-1 (Sept. 29, 1999). Because the Board's factual determinations are supported by substantial evidence and its legal conclusions are not arbitrary, capricious, or an abuse of discretion, and are otherwise in accordance with law, we affirm the Board's denial of service credit for the period at issue in this appeal. However, because the Department of the Treasury ("Treasury") waived its right to request limitation of the time period for which the Board may review Hall's entitlement to service credit, we hold that the Board erred in restricting the time period at issue in Hall's appeal. Thus, we reverse that portion of the decision and remand for a determination of whether Hall's previous duties qualify for the service credit he requests.

BACKGROUND

Petitioner, Louis D. Hall, Sr., is a Canine Enforcement Officer ("CEO") with the United States Customs Service. He has been employed as a CEO since 1979, except for a period between May 1987 and July 1989. Hall filed requests for Law Enforcement Officer ("LEO") service credit on December 22, 1994, December 22, 1995, December 22, 1996, and on December 22, 1997. On June 24, 1998, Treasury denied each of his requests for LEO service credit. LEO service credit would have permitted Hall to retire with an increased annuity after becoming fifty years of age and completing twenty years of service as a LEO. 5 U.S.C. § 8336(c)(1) (1994). Hall appealed Treasury's 1998 denial to the MSPB. Prior to Hall's hearing on October 20, 1998, the administrative judge limited the period of retroactive service for which Hall could seek LEO service credit to one year prior to each of his requests for LEO service credit. Thus, the period for review of Hall's duties was limited to December 22, 1993 through December 21, 1997. This ruling was based on 5 C.F.R. § 831.906(e), which provides that credit for past LEO service will not be granted for a period greater than one year prior to the date of the employee's request for such credit. In an initial decision dated November 25, 1998, the administrative judge held that Hall had not established that he is entitled to receive LEO service credit for his CEO duties from December 22, 1993 through December 21, 1997.

Hall appealed the administrative judge's determination regarding LEO service credit, and her decision to limit the period for review of his duties. On September 29, 1999, the full Board denied Hall's request for review, thereby adopting the administrative judge's initial decision as its final decision. Hall timely appealed to this court. We have jurisdiction pursuant to 28 U.S.C. § 1295(a)(9) (1994).

DISCUSSION

Standard of Review

This court must affirm an MSPB decision unless it is "(1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) obtained without procedures required by law, rule, or regulation having been followed; or (3) unsupported by substantial evidence." 5 U.S.C. § 7703(c)(1)-(3) (1994); *Hayes v. Dep't of the Navy*, 727 F.2d 1535, 1537 (Fed. Cir. 1984). The burden of establishing reversible error in the Board's decision rests upon Hall. *Harris v. Dep't of Veterans Affairs*, 142 F.3d 1463, 1467 (Fed. Cir. 1998).

Analysis

There are two main issues present in this appeal. The first issue is whether the Board's conclusion that Hall had not shown that he is entitled to receive LEO service credit is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. *Hannon v. Dep't of Justice*, 234 F.3d 674, 677 (Fed. Cir. 2000). The second issue is whether the Board erred in limiting the period for review of Hall's duties to December 22, 1993 through December 21, 1997.

The relevant statute for LEO service credit states that "[a]n employee who is separated from the service after becoming 50 years of age and completing 20 years of service as a law enforcement officer . . . is entitled to an annuity." 5 U.S.C. § 8336(c)(1) (1994) (emphasis added). "Law enforcement officer" is defined as "an employee, the duties of whose position are primarily the investigation, apprehension, or detention of individuals suspected or convicted of offenses against the criminal laws of the United States . . ." 5 U.S.C. § 8331(20) (1994). "Law enforcement officer" is further defined by regulation to exclude employees whose duties involve "maintaining order, protecting life and property, guarding against or inspecting for violations of law, or investigating persons other than persons who are suspected or convicted of offenses against the criminal laws of the United States." 5 C.F.R. § 831.902 (2000). The "primary duties" of a position are those that "[a]re paramount in influence or weight; that is, constitute the basic reasons for the existence of the position; [o]ccupy a substantial portion of the individual's working time over a typical work cycle; and [a]re assigned on a regular and recurring basis." 5 C.F.R. § 831.902(1) (2000).

In determining whether Hall's duties as a CEO were primarily the investigation, apprehension, or detention of criminal suspects, the Board considered his position description. The CEO position description states in relevant part: [T]he incumbent of this position serves as an enforcement officer with responsibility to enforce laws governing the importation of merchandise; interdict smuggled merchandise or contraband; detect violations of Customs laws and those of other federal agencies, e.g., DEA, Immigration, Agriculture; and arrest, if warranted, persons involved in the violations. The major portion of the incumbent's time is spent working directly with his/her dog in one of three work situations: (1) vehicle search (which includes vessels, trains, aircraft, trucks and autos); (2) cargo and baggage processing; or (3) mail processing . . . Trains and utilizes dogs and special detection equipment used in interdiction of drugs and other prohibited

substances. (emphasis added).

Regarding the Board's determination that Hall failed to show that he is entitled to receive LEO service credit, Hall argues that the Board erred in failing to use its own interpretation, as set forth in prior Board decisions, of the statutory definition of an LEO in evaluating Hall's duties. Hall argues that the Board instead placed erroneous weight on the Bingaman considerations – using them as a substitute for the statutory definition. See *Bingaman v. Dep't of the Treasury*, 127 F.3d 1431, 1435 (Fed. Cir. 1997).

Hall asserts that the Board has appropriately formulated a definition of the terms "investigation" and "apprehension," based on the text of the statute and the legislative history.¹ Hall cites *Hobbs v. Office of Personnel Management*, 58 M.S.P.R. 628 (1993), and *Ferrier v. Office of Personnel Management*, 66 M.S.P.R. 241 (1995), as defining the term "investigate." In *Hobbs*, the Board noted that "Webster's Ninth New Collegiate Dictionary 636 (1990) defines 'investigate' as: 'to observe or study by close examination and systematic inquiry' or 'to make a systematic examination; esp[.] to conduct an official inquiry.'" 58 M.S.P.R. at 632 n.2. 1 Regarding the meaning of the term "apprehension," the Board has stated that apprehension is the "seizure, taking, or arrest of a person on a criminal charge." *Ferrier v. Office of Pers. Mgmt.*, 66 M.S.P.R. 241, 244 (1995) (citing *Black's Law Dictionary* 101 (6th ed. 1990)). Because Hall acknowledged in his own testimony that he did not apprehend anyone in the time period at issue, whether the Board erred in ignoring its own prior definition of "apprehension" is irrelevant. While Hall's duties indicate that he causes the apprehension of criminal suspects, the statute is written to cover those who apprehend criminal suspects, not those who cause the apprehension of criminal suspects..In *Ferrier*, the Board stated that "investigation in section 8331(20) refers to criminal investigation Factors that distinguish criminal investigation from non-criminal investigation include unusual physical hazards for the investigator arising from frequent contacts with criminals and suspected criminals, working for long periods without a break, on-call status 24 hours a day, and carrying weapons An investigation is an observation or study by close examination and systematic inquiry." 66 M.S.P.R. at 244 (internal citations omitted) (emphasis added).

As to the Bingaman considerations, Hall asserts that they should not have been used by the Board to usurp the plain language of the statute as interpreted in *Hobbs* and *Ferrier*. Hall, like many other LEO service credit applicants with similar appeals presently pending before this court, reads the statutory language to require him to simply prove that his duties "are primarily the investigation, apprehension, or detention of . . . suspected or convicted [criminals]." 5 U.S.C. § 8331(20) (1994). Hall, in effect, argues that being required to present proof regarding the considerations set forth in *Bingaman*, when such factors are not set forth in the statute (or even the legislative history), is unfair and improper.

We do not consider Hall's argument to be persuasive. The Bingaman considerations are not a substitute for and do not supplant or usurp the language of the statute. 5 U.S.C. § 8331 serves as the ultimate measure of LEO credit activity. In "capturing the essence of what Congress intended" in enacting 5 U.S.C. § 8331, the Bingaman considerations serve simply as a set of tools to assist the Board in gauging whether an employee's assigned activities properly fall within the scope of the law enforcement duties recognized by and contained within the statutory ambit of the Act. *Bingaman*, 127 F.3d at 1436. Thus, the Bingaman considerations reflect and do not replace the language of the statute itself. Application of the Bingaman considerations by the Board to the facts of a particular case suggests not a disregard of the statute but a proper and thorough consideration of facts relevant to a determination of statutory coverage.

This court thoroughly considered the statutory language and legislative history in *Bingaman*. *Id.* at 1436 (setting forth the genesis and relevance of the *Bingaman* factors). Based on that thorough review, this court held that the statutory term "law enforcement officer" should be strictly construed, and that the legislative history of the statute indicates that it was enacted to ensure that the covered LEO positions "should be composed, insofar as possible, of young men and women physically capable of meeting the vigorous demands of occupations which are far more taxing physically than most in the Federal Service." *Bingaman*, 127 F.3d at 1435 (quoting S. Rep. No. 93-948, at 2 (1974), reprinted in 1974 U.S.C.C.A.N. 3698, 3699).

From these two considerations, this court in *Bingaman* determined that the statutory term "law enforcement officer" should be limited to "those law enforcement personnel who are most immediately involved in the process of criminal investigation and arrest." *Id.* at 1436; see also *Hannon*, 234 F.3d at 677, 680. To determine whether a particular employee is "most immediately involved in the process of criminal investigation and arrest," the court reiterated the Board's formulation of the following factors: (1) has frequent direct contact with criminal suspects; (2) is authorized to carry a firearm; (3) interrogates witnesses and suspects, giving *Miranda* warnings when appropriate; (4) works for long periods without a break; (5) is on-call twenty four hours a day; and (6) is required to maintain a level of physical fitness. *Bingaman*, 127 F.3d at 1436.

These factors were not set forth as a substitute for the statute, but rather as a framework for the factual inquiry needed to ascertain coverage under the statutory scheme. The *Bingaman* factors are thus considerations that bear on the question of whether an employee qualifies for LEO retirement credit. Although no single factor is essential or dispositive, we stated in *Bingaman* that these considerations "capture[] the essence of what Congress intended" in enacting 5 U.S.C. § 8331. *Bingaman*, 127 F.3d at 1436. In other words, the *Bingaman* considerations are relevant to determining whether an employee is a law enforcement officer because they are relevant to determining whether an employee's duties are primarily criminal investigation, apprehension, or detention. See *Hannon*, 234 F.3d at 677-79. It bears repeating that no single factor is essential or dispositive. *Bingaman*, 127 F.3d at 1436. In addition, the list of considerations set forth in *Bingaman* is by no means an exhaustive or exclusive list of the considerations that bear on whether an employee qualifies for LEO service credit under the statute. *Id.*

Application of the *Bingaman* Considerations

Regarding the first *Bingaman* consideration, frequent direct contact with criminal suspects, Hall testified that he had frequent direct contact with criminal suspects because the people working at the seaport have criminal records, and there is organized crime and other criminal activity there. However, Hall testified that he has no direct knowledge of organized crime at the seaport. In addition, Hall did not allege that the organized crime and other criminal activity at the seaport is something that he investigates. Even if Hall had frequent direct contact with individuals who may have criminal records, this is not the frequent direct contact with criminal suspects referred to in the *Bingaman* considerations. The statute, as reflected in the *Bingaman* considerations, requires investigation of criminals or individuals suspected of having committed a criminal act. In Hall's case, whatever direct contact he may have had with criminal suspects was incidental to his primary duties of employing his "active response" detector dog to detect narcotics.

Regarding the second and third *Bingaman* considerations, authorization to carry a firearm and interrogation of criminal suspects, the Board found that Hall is authorized to carry a firearm while

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performing his CEO duties and while driving to and from work. However, in the time period considered by the Board, Hall had not given any Miranda warnings and had only questioned one individual that he spotted in a restricted area without proper identification.

Regarding the fourth and fifth Bingaman considerations, working for long periods without a break and being on-call, Hall testified that he frequently works overtime and has been called out at 1:00 am, 2:00 am, and 3:00 am to work overtime. Hall is called in for overtime because he is on an overtime list, but testified that he does not know whether he can take himself off the list. Hall's supervisor testified that CEOs are not required to stay in a "readiness mode." Hall's supervisor also testified that Hall is not in a paid status for twenty-four hours a day and that Hall must technically be in such a paid status to be on call. However, Hall's supervisor admitted that he can call someone in for overtime at any time.

The Board found that while Hall is allowed to plan days off in advance, his scheduled day off may be canceled if no one else is available to work. Hall testified that on several occasions his scheduled day off has been canceled. The Board considered all of this testimony and further noted that because Hall's detector dog is limited to working sixteen hours per day, Hall does not work more than sixteen hours per day. The Board also found that even if Hall works long hours, he does not do so without taking breaks.

Regarding the sixth Bingaman consideration, being required to maintain a level of physical fitness, Hall argues that although he is not formally required to maintain a specified level of physical fitness as a condition of employment, his position informally requires him to remain physically fit because it involves strenuous activity. Hall had to pass an initial physical before qualifying as a CEO. Hall points out that the CEO position description states that incumbents must be able to work out-of-doors under all types of conditions and will encounter physical demands such as running over rough surfaces, climbing heights, driving for extended periods of time, and heavy lifting, pushing, stooping, crouching, crawling, and reaching. The position description also states that a CEO may be required to defend himself against attack by hostile suspects, and warns that the work environment includes high risks and possible dangerous situations.

Hall further points out that his primary investigative tool, his detector dog, weighs approximately ninety pounds. Hall alleges that he must lift the dog repeatedly to investigate warehouses, aircraft, vessels, and other cargo containers. He at times must hoist his dog using a rope tied to a bag that cradles the dog. Hall also alleges that he must lift and move freight, climb to reach stacked cargo containers, crawl through various cargo containers, and hoist himself into bellies of aircraft. The Board considered the fitness requirements of Hall's position along with the other Bingaman considerations in making an overall determination of whether Hall is the type of law enforcement person who is most immediately involved in the process of criminal investigation and arrest, and whether his position includes vigorous demands that are far more taxing physically than most in the Federal Service.

Upon reviewing the Board's analysis of the Bingaman considerations, we discern no abuse of discretion in this portion of the Board's decision.

Physical Demands and Hazard

Hall next argues that the Board failed to properly consider the physically demanding nature of his duties. In its decision, the Board acknowledged Hall's testimony that his position involved "strenuous" activity. Just because the Board did not give a detailed list of the strenuous activities included in Hall's duties does not lead us to conclude that the Board failed to properly consider the physically demanding nature of Hall's duties.

Hall also argues that the Board failed to properly consider the hazardous nature of his duties. In Hannon, this court noted that the Board has consistently recognized that hazard is a significant element of law enforcement work, 234 F.3d at 679 (citing Ferrier, 66 M.S.P.R. at 244; Peek, 63 M.S.P.R. at 434; and Sauser, 59 M.S.P.R. at 492), and that nothing in the legislative history of the relevant statutory provisions suggests that Congress intended to prohibit consideration of hazard in determining law enforcement officer status. *Id.* at 680.

Hall bases his argument on the fact that the Board never mentioned the voluminous record evidence concerning the hazards to which Hall is exposed. Hall alleges that his work at the seaport includes life-threatening searches of cargo holds and containers. He also alleges that he is exposed to danger of physical attack from stowaways, armed crew members, and longshoremen with whom he comes into contact, as well as from narcotics smugglers. Hall carries narcotics in his van, to be used as training aids, thereby exposing himself to the risk of attack.

In Hobbs, the Board acknowledged that the existence and degree of hazard may not itself be an appropriate factor to consider in determining LEO status, but that it may be relevant insofar as physical stamina and vigor are necessary to overcome the hazards inherent in frontline LEO duties. 58 M.S.P.R. at 633. We agree with the Board's analysis in Hobbs that the relevance of hazard to a LEO analysis is that physical stamina and vigor are necessary to overcome such hazards. Hall likens the alleged hazards inherent in his duties to those set forth in *Taylor v. Department of the Treasury*, 68 M.S.P.R. 693 (1995). In *Taylor*, the Board initially found that Taylor primarily investigated criminal suspects. *Id.* at 696. In addition, the Board found that Taylor's duties were hazardous because they required rendering explosive and incendiary devices safe. *Id.* at 697. The Board stated that "the criminal aspect of his contact with explosives adds to the inherent dangers of working with explosives." *Id.* at 698. The Board therefore found that the hazardous nature of Taylor's duties entitled him to LEO service credit.

Based on the evidence presented by Hall regarding the allegedly hazardous nature of his duties, we hold that even if the Board in *Taylor* had correctly applied the proper interpretation of "hazard" as set forth in prior case law, Hall's duties do not present the same level of hazard present in the facts of *Taylor*. Hall's duties as a CEO are significantly less dangerous than rendering explosive and incendiary devices safe. 5 C.F.R. § 831.902

In addition to the foregoing, Hall argues that the Board erred in relying upon 5 C.F.R. § 831.902 to deny each of his requests for LEO service credit. The statutory definition of "law enforcement officer" is set forth in 5 U.S.C. § 8331(20) as "an employee, the duties of whose position are primarily the investigation, apprehension, or detention of individuals suspected or convicted of offenses against the criminal laws of the United States" Section 831.902 further defines "law enforcement officer" to exclude employees whose duties involve "maintaining order, protecting life and property, guarding against or inspecting for violations of law, or investigating persons other than persons who are suspected or convicted of offenses against the criminal laws of the United

States." The initial decision holds: "Considering the record as a whole, I find that the appellant's primary duties are more in the nature of 'protecting life and property, guarding against or inspecting for violations of law, or investigating persons other than persons who are suspected or convicted of offenses against the criminal laws of the United States.'"

Hall appears to be arguing that the Board erroneously viewed 5 U.S.C. § 8331(20) and 5 C.F.R. § 831.902 as an either/or proposition. According to Hall, the Board's decision in *Ferrier* makes clear that section 831.902 may not be read to deny LEO status to employees who meet the statutory definition of a LEO, even though their duties may also be cast as the type excluded from coverage by section 831.902. That is, 5 U.S.C. § 8331(20) and 5 C.F.R. § 831.902 should not be read as an either/or proposition. In *Ferrier*, the Board stated:

We have not disregarded [5 C.F.R. § 831.902]. Rather, we read [5 U.S.C. § 8331(20)] and [section 831.902] in *pari materia*. We find that the appellant has demonstrated that he meets the statutory LEO definition. Because [section 831.902] repeats the statutory LEO definition, the appellant meets the regulatory definition as well. The language of the regulation excluding an employee whose primary duties "involve maintaining law and order, [and] protecting life and property" cannot be read to exclude from LEO coverage an employee like the appellant whose primary duties are the "investigation, apprehension, or detention of individuals suspected or convicted of offenses against the criminal laws of the United States," even though those duties could also be cast as maintaining law and order. *Ferrier*, 66 M.S.P.R. at 250.

Upon reviewing the Board's decision, we cannot say that the Board erroneously applied 5 U.S.C. § 8331(20) and 5 C.F.R. § 831.902 as an either/or proposition. The Board stated that Hall's duties are "more in the nature of 'protecting life and property, guarding against or inspecting for violations of law, or investigating persons other than persons who are suspected or convicted of offenses against the criminal laws of the United States.'" (emphasis added). The Board so-stated after a thorough analysis of the *Bingaman* factors and its determination that once Hall finds narcotics, a function that the Board found to be primarily an inspection, the Office of Investigations is notified to investigate, apprehend, give Miranda warnings to and interrogate the criminal suspect. Nowhere does the Board state that because Hall primarily guards against or inspects for violations of law, he cannot therefore primarily investigate, apprehend, or detain criminal suspects.

As we stated in *Hannon*, the evaluation of and weight to be given to the various *Bingaman* considerations and the other evidence in the record are judgment calls that rest primarily within the discretion of the Board. *Hannon*, 234 F.3d at 681. Here the Board, based upon a consideration of all of the relevant factors, concluded that Hall had not established law enforcement officer status. Since the Board considered all of the relevant factors, it is not our function to substitute our judgment for that of the agency regarding the weight to be given to those considerations. Weighing of such evidence is for the fact-finder, not the reviewing court. *Id.* We hold that the Board did not abuse its discretion in determining that Hall was not entitled to LEO service credit. 5 C.F.R. § 831.906(e)

In a Memorandum of Prehearing Conference and Rulings dated October 2, 1998, the administrative judge limited the time period at issue in this appeal to December 22, 1993 through December 21, 1997. Although not set forth in the Memorandum, the administrative judge based this time limitation on 5 C.F.R. § 831.906(e), which states: Coverage in a position or credit for past service will not be granted for a period greater than 1 year prior to the date that the request from

an individual is received by . . . the employing agency, the agency where past service was performed, or OPM..Hall makes two arguments against the imposition of such a time limitation. First, he argues that section 831.906(e) is invalid because: (1) it is contrary to the statutory provisions of the CSRS;2 or (2) it is arbitrary and unreasonable. Second, Hall argues that even if section 831.906(e) is valid, Treasury waived the restriction when it issued a decision on the merits of his requests for LEO coverage for the CEO position³ and his requests for LEO service credit for his own position as a CEO.

We first consider Hall's waiver argument because it is dispositive on this issue. In its denial of Hall's requests for service credit, Treasury noted that his requests for LEO coverage for the CEO position were untimely. However, with respect to his requests for LEO service credit for his own position as a CEO, Treasury considered Hall's service as a CEO beginning in 1979. Treasury did not limit its analysis to the time period between December 22, 1993 and December 21, 1997.

In support of his argument that Treasury waived its right to enforce the time limitation of 5 C.F.R. § 831.906(e), Hall cites *Trivett v. Department of the Navy*, 83 M.S.P.R. 61 (1999). In *Trivett*, the Board held that 5 C.F.R. § 842.804(c), imposing a similar time limit on employees seeking LEO service credit through the Federal Early Retirement System, "is not a substantive condition of eligibility for LEO coverage mandated by statute, but instead is a procedural, 'regulatory time limit.'" *Id.* at 63. As such, the Board held that the time limit was waived if not enforced at the employing agency level. *Id.*

The government argues that the time limitation of section 831.906(e) was not waived by 2. Specifically, Hall alleges that this regulatory time bar is contrary to 5 U.S.C. § 8336(c)(1) and 5 U.S.C. § 8332. Section 8336(c)(1) states, "[a]n employee who is separated from the service after becoming 50 years of age and completing 20 years of service as a law enforcement officer . . . is entitled to an annuity." Section 8332 states in relevant part, "[t]he service of an employee shall be credited from the date of original employment to the date of separation on which title to annuity is based in the civilian service of the Government." Treasury because "[w]hile it is not clear that the agency excluded any of Mr. Hall's service or limited [its] review to any particular date period, it is clearly stated that the agency 'examine[d] his request under 5 C.F.R. § 831.906' which specifically incorporates the time limitation." In fact, the government alleges that the agency "did a reasoned analysis of the time limits contained in § 831.906 [sic] to determine whether Mr. Hall's request for position coverage was untimely." We are not persuaded by this argument, because Treasury only applied section 831.906 in its denial of LEO service credit for the CEO position, not in its denial of LEO service credit for Hall's own position as a CEO.

Other cases that, like *Trivett*, are persuasive but not precedent for this court, have held that an agency waives its timeliness defense when it decides the merits of a complaint without addressing the question of timeliness. *Ester v. Principi*, 250 F.3d 1068, 1071-72 (7th Cir. 2001); see also *Bowden v. United States*, 106 F.3d 433, 438-39 (D.C. Cir. 1997) (holding that when agency decides a case on the merits without mentioning timeliness, its failure to raise the issue of timeliness in the administrative process may lead to waiver of a timeliness defense); *Smith v. Danzig*, No. Civ.00-216-PH, 2001 WL 823642 (D. Me. July 20, 2001) (quoting *Ester* and *Bowden*, and holding that a timeliness defense was waived by the Navy when the Navy issued a final decision on the merits without so much as alluding to the statute of limitations). In *Ester*, the Seventh Circuit based its waiver holding on the policy of judicial economy. 250 F.3d at 1072.

In this case, we choose to follow the guidance of the Seventh Circuit. We hold that 3 Hall does not

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appeal Treasury's denial of LEO coverage for the CEO position. Instead, Hall appeals Treasury's denial of LEO service credit for his own duties as a CEO..Treasury waived its timeliness defense under section 831.906(e). Treasury's denial of Hall's requests for LEO service credit was decided on the merits. Treasury considered Hall's service as a CEO beginning in 1979. Although Treasury mentioned section 831.906 in its denial of Hall's request for coverage for the CEO position, it never mentioned section 831.906 in its denial of Hall's requests for LEO service credit for his own position as a CEO.

CONCLUSION

Because the Board's factual determinations are supported by substantial evidence and its legal conclusions are not arbitrary, capricious, or an abuse of discretion, and are otherwise in accordance with law, we affirm the Board's denial of service credit for the period at issue in this appeal. However, because Treasury waived its right to request limitation of the time period for which the Board may review Hall's entitlement to service credit, we hold that the Board erred in restricting the time period at issue in Hall's appeal. Thus, we reverse that portion of the decision and remand for a determination of whether Hall's previous duties qualify for the service credit he requests.

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ATTACHMENT 29

United States Court of Appeals, Federal Circuit

JOHN J. GALLAGHER, Petitioner,
v.
DEPARTMENT OF THE TREASURY, Respondent
No. 00-3108
Sept. 5, 2001

Before NEWMAN, RADER, and LINN, Circuit Judges. LINN, Circuit Judge:

John J. Gallagher seeks review of the final decision of the Merit Systems Protection Board (the "Board"), affirming the decision of the Department of the Treasury (the "Agency") that the petitioner does not qualify for Law Enforcement Officer ("LEO") retirement coverage because he failed to establish by a preponderance of the evidence that his actual duties were primarily LEO-qualifying. *Gallagher v. Dep't of Treasury*, No. NY-0831-99-0034-I-2 (MSPB Sept. 11, 1999). Because the Board's factual determinations are supported by substantial evidence and its legal conclusions are not arbitrary or capricious, an abuse of discretion, and are otherwise in accordance with the law, this court affirms. 1

Footnote 1 Gallagher also seeks review of the Board's determination that it does not have jurisdiction over the Agency's designation of his position as non-covered. In other words, Gallagher would like his position description to be designated by OPM as LEO qualifying based on the actual duties he performs. However, because we affirm the Board's determination that Gallagher's actual duties are not LEO-qualifying, any argument that his position should be designated as LEO-covered based on those duties he performs is moot. Consequently, we need not, and do not, reach the jurisdictional issue raised by Gallagher.

BACKGROUND

Gallagher became employed by the United States Customs Service ("Customs") as an Import Specialist in November 1971. He transferred to the position of Customs Patrol Officer on February 3, 1974. On June 22, 1975, he became a Special Agent. The positions of Customs Patrol Officer and Special Agent were both designated as Law Enforcement Officer ("LEO") positions. On August 19, 1976, Gallagher transferred to the position of Customs Inspector ("Inspector"). Gallagher served exclusively on a Customs' Contraband Enforcement Team called the "Exodus" team. This team investigated violations of law involving exported merchandise. He served in that position until January 18, 1987, when he was promoted to Supervisory Customs Inspector, which position he still holds.

Gallagher filed for LEO credit for his service as an Inspector and Supervisory Inspector on December 12, 1994. Treasury denied his application on September 24, 1998 finding that Gallagher performed a variety of processing and inspectional duties in support of the enforcement of customs requirements, but "did not perform primary duties involving investigating, apprehending or detaining individuals suspected or convicted of offenses against the criminal laws of the United States, as 5 U.S.C. §8331(2) plainly requires." *Id.*, slip op. at 5.

After the agency denied the application, Gallagher appealed to the Board. In the initial decision, which became the final decision of the Board on October 16, 1999, the administrative judge found

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that Gallagher's position description as Inspector emphasized regulatory investigations and listed support of the criminal investigative program as the last of a number of major duties. The administrative judge thus found that the position description does not support LEO credit. The administrative judge, however, recognizing that actual duties and not position description control entitlement to LEO credit, analyzed the evidence regarding Gallagher's actual duties. This evidence related to the Bingaman factors and consisted of Gallagher's testimony, as well as the testimony of Richard Peeler, Frederick Tingley, Wilburn Stringer, Douglas Knorr, and Steven Lofredo.

Gallagher's testimony related to the duties he performed and the hours he worked. Peeler is a retired Federal employee who had worked as an Inspector with specialized enforcement teams from 1981 through 1986. Peeler testified that based on his observation, Gallagher's primary duty as an Inspector was the interdiction of narcotics, prohibited merchandise entering or leaving the country, and the apprehension of people who have warrants outstanding against them. Peeler also testified that in about 98% of the cases, inspections performed by Customs Inspectors result in no enforcement action, arrest, or seizure.

Tingley is a reemployed annuitant with the Immigration and Naturalization Service, who had worked for Customs in the capacity as Chief of Position Classification and Compensation Policy. Tingley testified that it was the sole responsibility of Special Agents within the Office of Investigations to conduct investigations into suspected violations of the law, and it was only when a person was armed, carrying explosives, or somehow a danger to people around him that an Inspector would detain that person.

Stringer is Chief Inspector for Customs and has worked with Gallagher at the Port of Buffalo for a number of years. He testified that Gallagher supervises Inspectors who perform primary screening of vehicles entering the United States and perform secondary inspections on vehicles sent around to the secondary area for further search, and he noted that 99% of the traffic entering that port is in compliance with the laws and regulations of the United States. Stringer also testified that while Inspectors may have to overpower individuals and handcuff them in some instances, the most common enforcement at the Buffalo port is the arrest for an existing state or local warrant. Furthermore, Stringer testified that only about 10-15% of an Inspector's tour of duty is spent on processing enforcement actions and the remainder of time is spent screening traffic, making secondary inspections, and working various counter operations and paperwork.

Knorr is a former Customs Special Agent who had worked with Gallagher on the Exodus team. He testified that some of the work on that team was investigational and some was inspectional.

Lofredo is Gallagher's supervisor. He testified that the Inspectors he supervises perform screening functions, and that where a violation of Federal law is suspected the Office of Investigations is contacted to handle the matter. Lofredo also testified that his Inspectors perform administrative functions and that arrests are infrequent, noting that in 1998 only forty-one arrests for warrant and non-warrant matters were made at the Buffalo port in 1998 out of over nine million conveyances during that period of time.

Based on this evidence, the administrative judge found, as might be suspected, that the vast majority of persons crossing the border are law-abiding persons and not criminal suspects. The administrative judge concluded from this that Gallagher's job activities did not include frequent direct contact with criminal suspects and were not unusually hazardous.

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Furthermore, the administrative judge found that while Gallagher was authorized to carry a firearm, he did not interrogate witnesses or give Miranda warnings on a regular basis. The administrative judge also noted that although Gallagher occasionally worked long hours and could be called in to work on his day off, he generally did not work long hours and was not actually on call twenty-four hours a day. Finally, the administrative judge noted that Gallagher did not have to maintain a level of physical fitness in his position as an Inspector.

In sum, the administrative judge found that **Gallagher's primary duties did not capture the essence of what Congress intended to be law enforcement work in the sense of the LEO statute. Indeed, his primary duties were ones specifically excluded from the regulatory definition of a law enforcement officer at 5 C.F.R. §831.902, namely, maintaining law and order, protecting life and property, guarding against or inspecting for violations of law, and investigating persons other than persons who are suspected or convicted of offenses against the criminal laws of the United States.** Thus, the administrative judge concluded that Gallagher failed to show that a significant portion of his time as an Inspector was spent on duties that were consistent with "the front-line law enforcement work entailing unusual physical demands and hazards" required for LEO credit, despite the fact that some of his work held a significant potential for hazard. *Id.* slip op. at 13.

Gallagher timely appealed to this court. We have jurisdiction pursuant to 28 U.S.C. §1295(a)(9) (1994).

DISCUSSION

This court must affirm an MSPB decision unless it is "(1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) obtained without procedures required by law, rule, or regulation having been followed; or (3) unsupported by substantial evidence." 5 U.S.C. §7703(c)(1)-(3) (1994); see also *Hayes v. Dep't of the Navy*, 727 F.2d 1535, 1537 (Fed. Cir. 1984). The burden of establishing reversible error in the Board's decision rests upon Gallagher. See *Harris v. Dep't of Veterans Affairs*, 142 F.3d 1463, 1467 (Fed. Cir. 1998).

Gallagher asserts that the administrative judge misconstrued and misapplied the statutory standard for granting LEO credit. In particular, Gallagher contends that the administrative judge construed the term "investigation" as something more than "the act or process of observing or studying by close examination and systematic inquiry," which definition the Board set forth in *Ferrier v. Office of Personnel Management*, 60 M.S.P.R. 342, 247 (1994). Gallagher contends that this must be so because he presented detailed corroborating testimony and hundreds of pages of documents describing how he employs direct questioning, observation, search techniques, and sophisticated investigational tools, including crime databases shared with other state and federal law enforcement agencies, to ferret out evidence of criminal activity.

Gallagher also contends that the administrative judge construed the term "apprehension" as something more than "the seizure, taking, or arrest of a person on a criminal charge," which definition the Board set forth in *Ferrier v. Office of Personnel Management*, 66 M.S.P.R. 241, 244 (1995). According to Gallagher this must be so because the evidence establishes that Gallagher's duty is to apprehend both persons seeking to enter the United States where that person is subject to an arrest warrant and persons he may, through questioning or searching, suspect have violated

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a criminal law. Moreover, the evidence establishes that he in fact makes or supervises between two and five arrests per month and in so doing detains the suspect at the detention cells maintained at the Customs facility.

The foregoing arguments are essentially that Gallagher was a law enforcement officer because he was involved in criminal investigations and he arrests and detains criminals. However, that is not the standard that the Board applies in determining whether one qualifies for law enforcement officer credit. Something more is required before the employee can be said to have engaged in the " 'frontline law enforcement work,' entailing unusual physical demands and hazards" that is necessary for "a particular position" to "qualif [y]" as a "law enforcement officer" under 5 U.S.C. §8331(20). *Hannon v. Dep't of Justice*, 234 F.3d 674, 680 (Fed. Cir. 2000) (internal citations omitted); see also *Hall v. Dep't of Treasury*, No. 00-3067, slip op. at 6-8 (Fed. Cir. Sept. 4, 2001).

The definition of law enforcement officer defined in 5 U.S.C. §8331(20) is strictly construed. *Hannon*, 234 F.3d at 677. The Board has developed six factors that it uses to determine whether a particular employee qualifies as a law enforcement officer. *Id.* (citing *Bingaman v. Dep't of the Treasury*, 127 F.3d 1431, 1436 (Fed. Cir. 1997)). We have noted that though no single factor is essential or dispositive, these factors "capture the essence of what Congress intended." *Id.*; *Hall*, slip op. at 6-8. Thus, a law enforcement officer "commonly (1) has frequent direct contact with criminal suspects; (2) is authorized to carry a firearm; (3) interrogates witnesses and suspects, giving Miranda warnings when appropriate; (4) works for long periods without a break; (5) is on call 24 hours a day; and (6) is required to maintain a level of physical fitness." *Id.* (quoting *Bingaman*, 127 F.3d at 1436.). In addition, the Board has placed the further gloss on the definition of law enforcement officer that the critical factor in determining whether a particular position so qualifies is whether it involves " 'frontline law enforcement work,' entailing unusual physical demands and hazards." *Id.* (quoting *Peek v. Office of Pers. Mgmt.*, 63 M.S.P.R. 430, 433-34 (1994), *aff'd*, 59 F.3d 181 (Fed. Cir. 1995) (table)). The Board must also consider whether the primary duties of an employee's position are investigation, apprehension or detention. Primary duties are those that: a) are paramount in influence or weight; in other words, constitute the basic reasons for the existence of the position; b) occupy a substantial portion of the individual's working time over a working cycle; and c) are assigned on a regular recurring basis. 5 C.F.R. §831.902.

In this case, the administrative judge determined that Gallagher's primary duties were not investigation, apprehension, or detention. The administrative judge analyzed the evidence in view of the *Bingaman* factors and found that **while Gallagher is authorized to carry a firearm, he does not have frequent direct contact with criminal suspects; and the contact he does have is not unusually hazardous. Furthermore, the administrative judge found that Gallagher does not interrogate witnesses and give Miranda warnings on a regular basis, he does not generally work long hours, nor was he actually on call twenty-four hours a day. Finally, the administrative judge found that Gallagher was not required to maintain any specific level of physical fitness as an Inspector.** This decision of the administrative judge became that of the Board's when no petition by Gallagher was filed and the Board chose not to reopen the case on its own.

The determination of factual issues and the drawing of appropriate inferences from them is for the administrative judge and the Board, not for this reviewing court. In view of the testimony of Tingly, Stringer, Knorr, and Lofredo, we can say that the administrative judge's findings are "supported by such relevant evidence as a reasonable mind might accept as adequate to support a conclusion,"

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i.e., substantial evidence. *Hogan v. Dep't of the Navy*, 218 F.3d 1361, 1364 (Fed. Cir. 2000).

The evaluation of and weight to be given to the various Bingaman factors and the other evidence in the record are judgment calls that rest primarily within the discretion of the administrative judge and the Board. *Hannon*, 234 F.3d at 681. Here the administrative judge, based on consideration of all the relevant factors, concluded that Gallagher had not established law enforcement officer status. The Board adopted that position. Since the administrative judge and the Board considered the relevant factors, it is not our function to substitute our judgment for that of the agency regarding the weight to be given them. *Id.*

We review the Board's ultimate determination whether a particular employee is a law enforcement officer under 5 U.S.C. §8331(20) to under an arbitrary, capricious, abuse of discretion, or otherwise not in accordance with law standard. 5 U.S.C. §7703(c). We cannot say that, considering all the circumstances, the Board's decision that Gallagher was not a law enforcement officer was arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law. Consequently, the decision of the Board is affirmed.

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ATTACHMENT 30**MERIT SYSTEMS PROTECTION BOARD**

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| JOHN STREET,CLINTON D. | DOCKET |
| SATTERFIELD,BOB G. | NUMBERSDC-0842-00-0210-I-1DC- |
| ROBERTS,JOHN J. | 0842-00-0186-I-1DC0842-00-0185-I- |
| WILSON,Appellants,v.DEPARTMEN | 1DC-0842-00-0084-I-1 |
| T OF THE NAVY,Agency. | DATE: January 10, 2002 |

BEFORE: Beth S. Slavet, Chairman, Barbara J. Sapin, Vice Chairman, Susanne T. Marshall, Member; Chairman Slavet issues a dissenting opinion.

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*, 81 M.S.P.R. 569 (1999), 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).

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*, 86 M.S.P.R. 318 (2000), 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), that decisions like *Alford* placed too much emphasis on the day-to-day activities of an individual during a limited period of time. 86 M.S.P.R. 318 ¶ 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; 86 M.S.P.R. 318 ¶ 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).

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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*, 86 M.S.P.R. 318 ¶¶ 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) (if possible, every word, clause, and sentence of a statute must be given effect); *Ochoa v. Department of the Navy*, 65 M.S.P.R. 39, 44 (1994) (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. 86 M.S.P.R. 318 ¶ 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, 86 M.S.P.R. 318 ¶ 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-0831-99-0515-1-3 (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.*

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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 (1), 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.

*The 3 prongs (or criteria) are identical in 5 C.F.R. §§ 831.902 and 842.802

DISSENTING OPINION OF BETH S. SLAVET

1 In *Alford v. Department of the Navy*, 81 M.S.P.R. 569, 27 (1999), 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- (I) 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, 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*, 86 M.S.P.R. 318, 4 (2000), 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, *4 (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, *9.

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*, 81 M.S.P.R. 569, 15. 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.

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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, 81 M.S.P.R. 569, 11 (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, *5 (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*, 84 M.S.P.R. 132, 10 (1999); *Nicoletti v. Department of Justice*, 60 M.S.P.R. 244, 249 (1993) (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-I-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, *4 ("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"

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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, 81 M.S.P.R. 569, 581 (Vice Chair Slavet, concurring). Accordingly, I respectfully dissent from the majority opinion. January 10, 2002
Beth S. Slavet, Chairman

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ATTACHMENT 31

Testimony of Mr. John Vail of the Department of Justice, before the House of Representatives Committee on Government Reform, Subcommittee on the Civil Service, September 9, 1999:

Mr. Chairman, thank you for the opportunity to testify about the Department of Justice's views on H.R. 1228 and H.R. 583, which would extend law enforcement officer retirement coverage to Immigration Inspectors of the Immigration and Naturalization Service (INS), Diversion Investigators of the Drug Enforcement Administration (DEA), and Assistant United States Attorneys. In addition, you have requested our views on H.R. 1748, which would raise the mandatory retirement age for law enforcement officers.

Law Enforcement Retirement For Immigration Inspectors

With respect to Immigration Inspectors, the Department views this legislation as part of an overall effort to ensure that Federal employees in positions with similar duties receive equivalent pay and other benefits. While we understand that this is an area of significant concern to Immigration Inspectors and INS as a whole, it is also a complex issue that requires detailed planning and coordination between Federal agencies. As a result, the Administration is studying the issue of parity in pay and benefits, and further work will be required before all the policy questions raised by this matter can be resolved. Until that time, the Department cannot endorse amending title 5 to provide law enforcement retirement coverage for Immigration Inspectors.

Law Enforcement Retirement Coverage for Diversion Investigators

Diversion Investigators review records of pharmacies, doctors, and pharmaceutical companies, and some are involved in investigation of DEA registrants suspected of diverting controlled substances into the illicit drug market. Their efforts support the criminal investigation program, but they do not perform front-line law enforcement work. **They do not carry weapons; they do not have the authority to execute any arrest or search warrants; they do not conduct surveillance or undercover work of any kind; they are not required to maintain a high level of physical fitness.** The front-line work is done by DEA special agents and state and local police officers. In short, DIs do not perform the kind of hazardous front-line duties typically performed by law enforcement officers (LEOs), they are not trained to do so, and the Department has no plans to change its policies regarding DI duties. **Therefore, the Department does not support extending LEO retirement coverage to Diversion Investigators, because they do not and are not expected to perform front-line law enforcement duties.**

The Department also has fiscal concerns about extending LEO retirement coverage. It is estimated that the full year cost to implement LEO coverage for DIs prospectively, based on fiscal year 1999 employment levels (488), would have been approximately \$2.69 million. In addition, DEA's hiring ceiling for DIs is 522. If it hired an additional 34 DIs, the cost to DEA of prospectively implementing LEO retirement coverage for DIs would increase to almost \$2.9 million. A retroactive application of LEO retirement coverage would have a significantly greater impact on the Department's budget. Our estimates show that retroactive LEO retirement coverage for DI would cost the agency more than \$30 million. Again, these potential obligations are not included in the Department's FY 2000 budget. For these reasons, the Department opposes amending title 5 to

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provide LEO retirement coverage to DIs.

Law Enforcement Retirement Coverage for Assistant U.S. Attorneys

The Department recognizes that Assistant United States Attorneys (AUSAs) are hard-working, dedicated employees whose jobs are increasingly demanding and dangerous. Many work closely with their law enforcement counterparts on ongoing investigations. Every year since 1996, personal threats of death or injury made against AUSAs have increased by seven to eight percent. In 1998, 114 threats were made against AUSAs. As the threats of violence have increased, many AUSAs have had to install physical security devices in their houses, unlist their telephone numbers, receive Department permission to carry weapons, or obtain U.S. Marshals Service protection.

The Department, however, does not support extending law enforcement retirement coverage to AUSAs because they do not perform and are not expected to perform front-line law enforcement duties. As an initial matter, a number of AUSAs handle civil rather than criminal cases. Of those AUSAs who work on criminal cases, their primary duty is the preparation and presentation of the Government's case in the prosecution of individuals suspected of violating Federal criminal laws. While they may participate in the investigative process, it is not in a front-line law enforcement capacity. **They ordinarily do not carry weapons; they do not have the authority to execute arrest or search warrants; they do not conduct surveillance or undercover work of any kind; and they are not required to maintain a high level of physical fitness.** In addition, LEO coverage would result in disruption to the AUSA workforce and extremely high costs, which the Department could not sustain.

While we recognize that some AUSAs may confront greater risks in their jobs than lawyers in other lines of work, we do not believe that LEO coverage is appropriate for AUSAs. Their duties are those of counsel rather than of law enforcement officers. As an illustration, even in situations where AUSAs have been threatened, it is the law enforcement officers such as U.S. Marshals and special agents or local law enforcement who are expected to perform the LEO duties of protection, investigation, and apprehension of the suspects. The enhanced retirement package provided to LEOs is simply not appropriate for this class of employees. That retirement package recognizes the physical hazard inherent in front-line law enforcement work and the need to assure that LEOs make up "a young, vigorous Federal law-enforcement organization." See S. Rep. No. 948, 93rd Cong., 2nd Sess., reprinted in 1974 U.S.C.C.A.N. 3698, 3705. As a matter of policy, the Department cannot endorse treating AUSAs the same as LEOs for purposes of retirement benefits.

Moreover, the Department cannot justify the impact of LEO coverage on the AUSA workforce. Title 5, Sec. 8401(17) defines a "law enforcement officer" as:

"an employee...whose duties in connection with individuals in detention suspected or convicted of offenses against the criminal laws of the United States or of the District of Columbia .require frequent direct contact with the individuals in their detention and are sufficiently rigorous that employment opportunities should be limited to young and physically vigorous individuals...(emphasis added)"

To assure a young and physically vigorous workforce, LEO-covered occupations include mandatory retirement age, and defined medical requirements that must be met in order to perform

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physically vigorous work. Covering AUSAs under these requirements, with a mandatory retirement age and therefore limiting the age of hiring in the case of an individual who wished to become a career AUSA, could significantly alter the AUSA workforce:

* Maximum employment age. In the last year (August 1, 1998, through August 21, 1999), 336 new AUSAs were hired nationwide, 96 (28.5%) of whom were 37 years of age or older. During the same period, 53 attorneys transferred from other Departmental components to Assistant United States Attorney positions, and of that group, 22 (41.5%) were 37 years of age or older. Under current LEO eligibility in Department of Justice Order 1338.1B, these talented lawyers may not have considered careers as AUSAs because of the limitations concerning their retirement coverage.

* Mandatory retirement age. There currently are 86 AUSAs who are over 57 years of age. This cadre of our most experienced legal talent could be lost under current LEO rules because they would have to retire, pursuant to 5 U.S.C. '8335(b) for CSRS employees and 5 U.S.C. '8425(b) for FERS employees.

* Immediate retirement. Approximately 420 AUSAs could elect LEO coverage under the proposed legislation and retire on an immediate annuity. This could result in a dramatic, and immediate, loss of talented and experienced prosecutors.

* Physical Standards. Physical standards defining a "physically vigorous" AUSA would need to be set in order to meet the definition under 5 U.S.C. '8401 of a law enforcement officer. Although the effect of imposing such standards on the AUSA workforce is not yet known, we are concerned that their implementation might deprive the Department of the services of outstanding AUSAs who have physical disabilities or who otherwise do not meet the standards. More importantly, there is no reason to impose stringent physical standards for the AUSA position.

The Department also cannot afford the **cost of LEO coverage for AUSAs. The proposed change to law enforcement benefits in H.R. 583 would cost the United States Attorneys an estimated \$585 million in the first year.** Of this, \$300 million would cover the agency's obligation to retroactively pay the employer and employee contributions to the retirement system as required by section 3(e)(2) of the bill, \$220 million would cover the cost of interest on the payment, \$60 million would cover the first of the annual agency contributions, and \$5 million would cover the lump sum leave payments to those who would be eligible to retire immediately if this legislation is passed. Without additional funding, the cost would be impossible to absorb; it is over 50 percent of the United States Attorneys appropriation for FY 1999. The United States Attorneys are the principal litigators for the United States government. Despite technological advances, which can assist attorneys in case development, management, and presentation, litigation continues to be a personnel intensive function. Because 83 percent of the United States Attorneys budget is devoted to payroll and rent, there is very little room left to absorb such a large, unexpected budget item.

In summary, despite the very important contributions to law enforcement by Assistant United States Attorneys, the Department cannot endorse LEO coverage for AUSAs as a policy matter because they do not perform the kind of duties associated with front-line LEOs. The significant budget problems and disruption of the AUSA workforce resulting from LEO coverage similarly do not make it a viable option. The Department thus does not support this proposed amendment to title 5.

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Raising the Mandatory Retirement Age for Law Enforcement Officers

H.R. 1748 would amend title 5 to raise the mandatory retirement age for LEOs from the current age of 57 years to 60 years of age. The Administrations position with regard to this proposal is under review. We will be pleased to apprise you of the results of that review when it is complete.

I thank the Subcommittee for giving the Department of Justice an opportunity to testify on this matter. I will be happy to answer any questions you may have.

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ATTACHMENT 32

A PORTION OF THE TESTIMONY
Of
Gilbert G. Gallegos
National President,
Fraternal Order of Police
On
Enhanced Retirement Benefits for Law Enforcement Officers,
Firefighters and Public Safety Personnel Under
Chapters 83 and 84 of Title 5, US Code
Before the
House Committee on Government Reform,
Subcommittee on Civil Service
9 September 1999

The Merit Systems Protection Board has also been extremely active in deciding on a case by case basis the issue of law enforcement status and retirement. Under current law, the recourse for a Federal officer who believes that he or she has been improperly denied law enforcement status is to appeal their agency's or OPMs decision to the MSPB. In an April 1999 decision in the case of *Bremby v. Navy*, the MSPB ruled that GS-083 police officers and supervisory police officers stationed at the Norfolk Navy Base in Norfolk, VA, were entitled to CSRS law enforcement retirement coverage based on the duties they perform and as described in their official Position Description (PD). The Board ruled that these officers were entitled to coverage because they have full arrest authority and perform much of the same duties as city police officers with the addition of investigative responsibilities, the investigation of crimes has always been identified in their Position Description as a primary duty, and in this case, their base is immediately adjacent to a high crime area and is open to the public. The Board went on to note that a law enforcement officer covered by CSRS commonly has frequent direct contact with criminal suspects; is authorized to carry a firearm; interrogates witnesses and suspects, giving *Miranda* warnings when appropriate; works for long periods without a break; is on call 24 hours a day; and is required to maintain a minimum level of physical fitness. The existence or degree of physical hazard associated with a position is also a factor in the determination of law enforcement officer status, however, the Board determined that no single factor mentioned above is essential or dispositive to the law enforcement officer retirement credit determination.