

LEXSEE

JOHN BURKETT, TIMOTHY G. HANLON, GREGORY L. MILES, AND MATTHEW J. YAKUBOWSKI, Appellants, v. DEPARTMENT OF VETERANS AFFAIRS, Agency.

DOCKET NUMBERS AT-0842-99-0008-I-1, AT-0842-99-0004-I-1, AT-0842-98-1142-I-1, AT-0842-99-0003-I-1

MERIT SYSTEMS PROTECTION BOARD

86 M.S.P.R. 345; 2000 MSPB LEXIS 699

July 13, 2000

[\*\*1]

Michele W. Snyder, Esquire, Virginia Beach, Virginia, for the appellants.

Austin G. Moody, Esquire, West Palm Beach, Florida, for the agency.

**OPINIONBY: TAYLOR**

**OPINION:**

BEFORE

Beth S. Slavet, Acting Chairman

Susanne T. Marshall, Member

Member Marshall issues a separate opinion.

**OPINION AND ORDER**

[\*P1] The appellants' n1 petition for review of the initial decision that affirmed the agency's decision dismissing their requests for law enforcement officer (LEO) retirement coverage as untimely filed. For the reasons set forth below, we GRANT their petition, VACATE the initial decision, and REMAND the appeals to the regional office for adjudication on the merits of the appellants' requests for LEO retirement coverage under the Federal Employees' Retirement System (FERS).

n1 These four appeals were consolidated at the parties' requests on October 22, 1998. Initial Appeal File, Tab 8.

**BACKGROUND**

[\*P2] The appellants are Police Officers at the Veterans Administration Medical Center in West Palm Beach, Florida. Hearing Tape (HT) 1, Sides A, B; HT 2, Side A. Burkett and Hanlon were hired in 1995. *Id.* Miles and Yakubowski were hired in 1996. *Id.* In 1998, they requested coverage [\*\*2] by the FERS special retirement provisions for LEOs. Initial Appeal File (IAF), Tab 6, Subtab 4c. The agency denied their requests based on its determination that the requests were filed more than 6 months after they were hired and they knew of their non-LEO status based on the SF-50s that they received which specifically showed that their retirement plan was "FERS & FICA." IAF, Tab 6, Subtab 4b. The appellants petitioned for appeal. IAF, Tab 1. They alleged that, although they were aware that they were covered by FERS, they were unaware of the availability of the LEO retirement coverage option under FERS until shortly before they made their requests. IAF, Tabs 1, 9.

[\*P3] The administrative judge found that the appellants' allegations constituted facts which, if proven, could establish that they were prevented by circumstances beyond their control from timely requesting a change in their official

status, and thus were entitled to a hearing on the issue of Board jurisdiction over their appeals. IAF, Tab 12. Based on the appellants' testimony at the jurisdictional hearing and other evidence of record, the administrative judge found that the appellants were aware that they were covered [\*\*3] by FERS at least 2 years before they requested LEO retirement coverage, and that, because the appellants knew that they were not being given a special 20-year retirement status, they were therefore aware of their LEO status. IAF, Tab 26 (Initial Decision (ID) at 4 n.3). She also found that there was no evidence that the agency misinformed the appellants that they had no rights to appeal their retirement status. *Id.* (ID at 5). She found additionally that the agency was not obligated to inform the appellants of their right to request an LEO determination. *Id.* Thus, she found that the appellants were not prevented by circumstances beyond their control from timely requesting LEO retirement coverage within 6 months of their employment, and she affirmed the agency's decision. *Id.*

[\*P4] The appellants have now petitioned for review, reiterating their argument made below that their mere knowledge that they were covered under FERS without specific knowledge of the possibilities of other retirement options was an insufficient basis to find that they were aware of their LEO retirement status. Petition for Review File (RF), Tab 1. The agency has responded in opposition to the petition. [\*\*4] RF, Tab 3.

#### ANALYSIS

[\*P5] If an employee is in a position that is not subject to the higher withholding rate applicable to LEOs, he must seek, formally and in writing, a determination from the employing agency that his position is properly covered by the higher withholding rate. 5 C.F.R. § 842.804(c). If the employee does not seek such a determination within 6 months after entering the position, or after any significant change in the position, the agency head's determination that the service was not so covered at the time it was performed is presumed to be correct. *Id.* The employee may rebut this presumption by presenting preponderant evidence that he was unaware of his status or was prevented by cause beyond his control from requesting that the official status be changed at the time the service was performed. *Id.* If an individual's request for LEO coverage is denied by an agency as untimely under the regulation, the individual may appeal to the Board. *Dusenberry v. Department of Justice*, 81 M.S.P.R. 12, P6 (1999) (relying on 5 U.S.C. § 8461(e)(1)).

[\*P6] Here, it is undisputed that the appellants [\*\*5] requested determinations of their status after the requisite 6-month periods and that there is no claim of significant changes in their Police Officer positions. IAF, Tab 24. All of the appellants assert that nothing in their personnel action forms indicated that they had the option of getting LEO pay and retirement, and that they diligently initiated their requests for agency determinations after learning in August 1998 about their right to request LEO coverage and the procedure for making these requests. *Id.*

[\*P7] As noted above, the agency found that the appellants should have been aware of the availability of LEO retirement status based on the information on their SF-50s, and the administrative judge found that the appellants should have been aware of their LEO status based upon their knowledge that they were in FERS. When an appellant claims that he was unaware of his LEO status, the test is whether the appellant proved by preponderant evidence that he was actually unaware of that status, and not whether the appellant should have been aware of the existence of LEO coverage or whether the agency notified or attempted to notify him about the retirement status. *Fitzgerald v. Department of Defense*, 80 M.S.P.R. 1, 20-21 (1998). [\*\*6]

[\*P8] Here, the appellants testified without contradiction that, notwithstanding that they had received SF-50s and that they were aware that they were covered under FERS, they were unaware of the existence of LEO coverage and thus of their LEO status during the 6-month period referenced in the regulation. HT 1, Sides A, B; HT 2, Side A. As the appellants point out on review, virtually every employee knows he is in the federal retirement program; for 5 C.F.R. § 842.804(c) to mean anything, being "unaware" of one's status must mean not knowing that there is a special retirement program that is at least potentially available. We find that the appellants were unaware of their status within the meaning of the regulation. They also established that they requested LEO status within weeks of learning of the existence of LEO coverage. We conclude that the appellants are entitled to adjudication of their substantive eligibility for LEO coverage.

#### ORDER

[\*P9] Because the administrative judge affirmed the agency's decision denying the appellants' request for LEO coverage as untimely, she did not develop the record regarding the appellant's duties and decide the merits of the appellants' [\*\*7] entitlement to primary or secondary LEO retirement coverage. The appellants are entitled to primary LEO coverage if they encumber positions that directly involve the duties specified at 5 U.S.C. § 8331(20); they are entitled to secondary LEO retirement coverage if they transferred from primary positions to positions that: (1) are clearly in the

law enforcement field; (2) are in an organization having a law enforcement mission; and (3) are either supervisory, i.e., a position whose primary duties are as a first-level supervisor of LEOs, or administrative, i.e., an executive, managerial position. See 5 C.F.R. § 831.902; 5 C.F.R. § 831.904(a). Accordingly, we remand these appeals to the Atlanta Regional Office for adjudication on the merits of the appellants' requests for LEO retirement coverage.

FOR THE BOARD:

Robert E. Taylor  
Clerk of the Board

Washington, D.C.

**SEPARATE OPINION OF  
SUSANNE T. MARSHALL, MEMBER**

in

*John F. Burkett, et al. v. Department of Veterans Affairs*

**MSPB Docket No. AT-0842-99-0008-I-1**

[\*P1] I have reluctantly adopted this decision because I am constrained to do so by the Board's prior interpretation [\*\*8] of the controlling law enforcement officer (LEO) regulation in *Fitzgerald v. Department of Defense*, 80 M.S.P.R. 1 (1998). However, I write separately to point out a significant factual difference between these two cases. In *Fitzgerald*, at 22, those appellants testified that "based on the fact that they occupied Police Officer positions, . . . they had no reason to believe that they were not LEOs entitled to LEO based special retirement benefits." In the present case, the appellants argued that they "were unaware of the 20-year retirement option" provided for by the LEO based special retirement benefit system. ID, p. 5, n. 3. In other words, the appellants in *Fitzgerald* mistakenly believed that they were LEO-entitled for several years before learning that they were not. The appellants in the present case *did not* mistakenly believe that they were LEO-entitled because they did not know that LEO retirement benefits were available. Unfortunately, this distinction was not before us when we considered *Fitzgerald*, and the language of that decision is broad enough to cover the present situation.

July 13 2000

Date

Susanne T. Marshall

Member