

HQ DEPARTMENT OF THE ARMY

Guidance for Analysis of LEO Positions for Determining the Position's Eligibility for Special Retirement Coverage (SRC)

ENCLOSURE 3

1. GENERAL INFORMATION FOR SRC REVIEW:

- a. Authority to Approve SRC Position Coverage: The Under Secretary of Defense for Personnel and Readiness (USD (P&R)) has sole authority for approval of Department of Defense law enforcement officer positions for special retirement coverage. No further delegation is authorized. SRC is regulated by the Office of Personnel Management (OPM). The Army Benefits Center – Civilian certifies employee service records for special retirement eligibility to OPM.
- b. Source Document(s) Used for SRC Determination: Title 5 C.F.R. §§ 831.905 and 842.804 require that the agency head's finding (the USD (P&R)) that the position meets eligibility for special retirement be based on the official position description and any other documentation deemed appropriate by the agency head.
- c. OPM Documentation Requirements: OPM requires the approving agency validate eligibility for special retirement coverage and maintain official records of position approval. As employees retire, OPM requires the employing agency to provide verification and agency certification of the employee's service in approved special retirement positions. The verification record, and documentation of agency position approval, are required for the determination of the employee's eligibility to retire under the special retirement provisions.
- d. SRC LEO Definition:
 - 1) Under CSRS, a law enforcement officer means 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 engaged in this activity who is transferred to a supervisory or administrative position.
 - 2) Under FERS, a law enforcement officer means an employee occupying a rigorous position, whose primary duties are the investigation, apprehension, or detention of individuals suspected or convicted of offenses against the criminal laws of the United States, or the protection of officials of the United States against threats to personal safety; or an employee who is transferred directly to a supervisory or administrative position after performing duties in a rigorous position for at least 3 years.

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e. Primary Duty Requirement: The primary duties of a position are those duties that:

1) are paramount in influence or weight; that is, constitute the basic reasons for the existence of the position;

2) occupy a substantial portion of the individual's working time over a typical work cycle; and

3) are assigned on a regular and recurring basis.

Note: 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. In general, if an employee spends an average of a least 50% of his/her time performing a duty or group of duties, they are his/her primary duties.

f. Guidance for Review:

1) Section 3 below provides the steps for review of SRC requirements that must be contained in the PDs. These steps are based on Merit Systems Protection Board (MSPB) and Federal Circuit case law. Applicable MSPB and US Court of Appeals decisions related to eligibility of law enforcement positions for SRC are cited for your review, reference, and application.

2) Reference (i) provides detailed guidance required by DOD in the evaluation and submission of positions seeking law enforcement special retirement coverage. This guide was developed by the Defense Civilian Personnel Advisory Service to assist DOD components in submitting PDs for a coverage determination by the USD (P&R).

g. Submission to OSD. Positions verified by AG-1(CP) to be properly classified in the 1811 series, but have not yet been approved for SRC, will be submitted by AG1 CP to the USD (P&R) for an SRC position coverage determination.

2. BACKGROUND/EVOLUTION OF LEO SRC DETERMINATION CRITERIA:

a. The Civil Service Retirement System (CSRS) and the Federal Employee Retirement System (FERS) define Law Enforcement Officer (LEO) positions under Title 5 USC §8336(20) and §8401(17) respectively.

b. The Merit Systems Protection Board has jurisdiction over appeals on LEO eligibility determinations.

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- c. LEO SRC coverage eligibility determinations across the Federal government vary widely, primarily due to the variety of "law enforcement" related work. This has resulted in misunderstanding and misapplication of Congressional intent for some law enforcement positions as indicated in Office of Personnel Management (OPM) & Government Accounting Office law enforcement studies. OPM has the delegated regulatory authority for guidance and oversight of special retirement. Title 5, Code of Federal Regulations, Parts 831 & 842 provide OPM regulatory guidance for LEOs under CSRS and FERS respectively.
- d. Over the past two decades there have been a number of MSPB and US Court of Appeals, Federal Circuit decisions specifically addressing determinations of LEO SRC status. Evolution of case law resulted in the development of a framework unique to the evaluation of LEO positions for special retirement. The framework was established by the case law referenced in this guide.
- e. The U.S. Court of Appeals in Crowley v. United States, 398 F.3d 1329, (Fed. Cir. 2005) outlines the framework to include, the identification of the two essential requirements that must first be met in the analysis of the LEO position. The Crowley decision is precedential, which means that the evaluative tools provided in the case will be applied as the basis to evaluate if an employee's assigned activities properly fall within the scope of the law enforcement officer duties for SRC purposes.

3. STEPS REQUIRED TO EVALUATE A LEO POSITION FOR SRC ELIGIBILITY:

- a. The most important consideration for a position-oriented approach to a LEO determination is the physical vigorousness required by the position in question. The legislative history behind the special retirement provisions emphasized 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." The Court of Appeals, Federal Circuit determined that the factors provided below are the exclusive factors the courts will consider in determining whether a position is sufficiently vigorous to qualify for LEO status. These factors must be applied to Army LEO positions.
- b. The Crowley decision holds that there are two major factors that should be considered in determining whether a position should be conferred LEO status.

First and predominant is physical vigorousness required by the position: This factor is the "*sine qua non*" (essential, indispensable, absolutely necessary) in a LEO

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status determination. Absent a showing of a position's requirements of physical vigorousness, an employee cannot successfully qualify for LEO status. Relevant considerations in any vigorousness determination are whether or not the position brings with it (in order of importance):

- 1) Strenuous physical fitness requirement;
- 2) Age requirements (such as a mandatory retirement age or a maximum entry age); or
- 3) A requirement that an employee be on call 24 hours a day. (Satisfaction of only the twenty-four hour on-call requirement will not satisfy the physical vigorousness factor.)

If the position is determined to require vigorousness, the second major factor in determining whether a position should be conferred LEO status is hazardousness. While the existence and degree of hazard may not by itself be an appropriate factor to consider in determining LEO status, the relevance of hazard to LEO analysis is that physical stamina and vigor are necessary to overcome such hazards.

Exclusive factors to be considered in determining a position's hazardousness (in order of importance):

- 1) Frequent and consistent contact with criminal suspects on the part of the employee (including the interrogation of suspects and pursuit and detention of criminals);
 - 2) Authority to carry a firearm (satisfaction of the firearm requirement alone will not satisfy the hazardousness factor. There must be some showing of a requirement of frequent and consistent contact with criminals or suspects in order for hazardousness to be met. Anecdotal evidence of criminal contact cannot in and of itself confer LEO status.
- c. If the position in question meets the test for BOTH of the two major factors above, the probative factors and sub-factors may then be applied to determine whether a position, not the employee, is entitled to LEO status. Application of factors will better capture whether or not the hazard associated with a position's duties and the physically demanding nature of the work were associated with law enforcement duties. First, evaluate the five most probative factors:

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- 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.

d. Next apply the **six Hobbs-Bingaman Factors** (discussed below and to be considered as necessary and appropriate in addition to the five most probative factors).

- 1) frequent direct contact with criminal suspects (for the purpose of criminal prosecution if warranted);
- 2) authority to carry a firearm; and has a requirement to maintain proficiency;
- 3) interrogation of witnesses and suspects, giving Miranda warnings when appropriate;
- 4) working for long periods without a break
- 5) on call 24 hours a day; and is required to work overtime frequently; and
- 6) required to maintain a level of physical fitness.

4. LEO SRC Related Case Law/References/Synopsis:

Hobbs v. Office of Personnel Management, 58 M.S.P.R. 628 (M.S.P.B. 1993); – This is the case that first articulated case-by-case framework. The Merit Systems Protection Board (Board) relied on the legislative history behind 5 U.S.C. 8331(20) to establish a series of factors that would help in determining an employee's LEO status. The Board construed the term "investigation" under section 8331(20) to mean "criminal investigation," or specifically, the "investigation of suspected or known criminals for the immediate purpose of criminally prosecuting them if warranted." The Board went on to identify hazard and physical stamina requirements as integral to LEO determinations. The Board identified six factors to consider in evaluating whether a particular employee qualifies as a LEO: 1) frequent contact with suspected or known criminals; 2) authorization to carry a weapon and requirement to maintain proficiency in using a weapon; 3) giving Miranda warnings to witnesses interviewed in the course of investigation; 4) requirement to be on call twenty four hours a day; 5) working overtime frequently, and/or 6) requirement to maintain a level of physical fitness. The Board determined that the appellant in Hobbs was not a LEO since his position did not met the established factors.

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Bingaman v. Department of the Treasury, 127 F.3d 1431 (Fed. Cir. 1997) – The US Circuit Court of Appeals, Federal Circuit affirmed the Board’s denial of LEO status based on an analysis of the facts performed under the rubric of Hobbs. The court adopted the six Hobbs factors and explained, “while the scope of the statutory category of “law enforcement officer” cannot be crisply defined with a single phrase, the set of factors the Board has developed [in Hobbs] captures the essence of what Congress intended.”

Hannon v. Department of Justice, 234 F.3d 674 (Fed. Cir. 2000) – The Court of Appeals applied the Hobbs-Bingaman factors to a case involving a Diversion Investigator (DI) request for LEO retirement credit. The court affirmed the Board’s determination that a DI who failed to meet four of the six Hobbs-Bingaman factors was not a LEO. Since the DI’s job activities did not include frequent direct contact with criminal suspects, the court affirmed the Board’s determination that the DI’s duties were not “primarily the investigation, apprehension, or detention of individuals...” as required for LEO status by 5 USC 8331(20).

Hall v. Department of the Treasury, 264 F.3d 1050 (Fed. Cir. 2001) – The Court of Appeals affirmed the Board’s denial of LEO retirement credit to a Canine Enforcement Officer of the Customs Service. Hall described the Hobbs-Bingaman factors as being 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 retirement statutes dealing with LEOs. The court noted that the 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.”

Watson v. Department of the Navy, 262 F.3d 1292 (Fed. Cir. 2001) – Marked a further step in the evolution of the case-by-case framework first adopted in Bingaman. The court adopted the Board’s new position-oriented approach that more affirmatively considered the reasons for the creation and existence of positions than the officers’ actual, even if incidental or occasional duties. The actual duties carried out by federal employees would be relevant only if they run counter to the reasons for the existence of their positions. In addition to adopting the position-oriented approach, the court identified the FIVE “most probative” factors in determining a federal officer’s entitlement to LEO statutes. Those five factors 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.