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(iii) A waiver under paragraph (c)(2)(i) of this section cannot be revoked.

[56 FR 6552, Feb. 19, 1991, as amended at 60 FR 54587, Oct. 25, 1995]

Subpart H—Law Enforcement Officers, Firefighters, and Air Traffic Controllers

SOURCE: 52 FR 2069, Jan. 16, 1987, unless otherwise noted.

§ 842.801 Applicability and purpose.

(a) This subpart contains regulations of the Office of Personnel Management (OPM) to supplement—

(1) 5 U.S.C. 8412 (d) and (e), which establish special retirement eligibility for law enforcement officers, firefighters, and air traffic controllers employed under the Federal Employees Retirement System (FERS);

(2) 5 U.S.C. 8422(a)(2)(B), pertaining to deductions;

(3) 5 U.S.C. 8423(a), pertaining to Government contributions; and

(4) 5 U.S.C. 8425, pertaining to mandatory retirement.

(b) The regulations in this subpart are issued pursuant to the authority given to OPM in 5 U.S.C. 8461(g) to prescribe regulations to carry out the provisions of chapter 84 of title 5 of the United States Code, and in 5 U.S.C. 1104 to delegate authority for personnel management to the heads of agencies.

[52 FR 2069, Jan. 16, 1987, as amended at 57 FR 32689, July 23, 1992]

§ 842.802 Definitions.

In this subpart—

Agency head means, for the executive branch agencies, the head of an executive agency as defined in 5 U.S.C. § 105; for the legislative branch, the Secretary of the Senate, the Clerk of the House of Representatives, or the head of any other legislative branch agency; for the judicial branch, the Director of the Administrative Office of the U.S. Courts; for the Postal Service, the Postmaster General; and for any other independent establishment that is an entity of the Federal Government, the head of the establishment. For purposes of this subpart, *agency head* is also deemed to include the designated representative of the head of an executive department as defined in 5 U.S.C. § 101, except that, for provisions dealing with law enforcement officers and firefighters, the designated representative must be a department headquarters-level official who reports directly to the executive department head, or to the deputy department head, and who is the sole such representative for the entire department.

Air traffic controller means a civilian employee of the Department of Transportation or the Department of Defense in an air traffic control facility or flight service station facility who is actively engaged in the separation and control of air traffic or in providing preflight, inflight, or airport advisory service to aircraft operators, as provided in 5 U.S.C. 2109. Also included in this definition is an employee who is the first-level supervisor of any air traffic controller as described above.

Detention duties means duties that require frequent direct contact in the detention, direction, supervision, inspection, training, employment, care, transportation, or rehabilitation of individuals suspected or convicted of offenses against the criminal laws of the United States or the District of Columbia or offenses against the punitive articles of the Uniform Code of Military Justice (chapter 47 of title 10, United States Code). (See 5 U.S.C. 8401(17).)

Employee means an employee as defined by 5 U.S.C. 8401(11).

Firefighter means an employee occupying a rigorous position, whose primary duties are to perform work directly connected with the control and extinguishment of fires, as provided in 5 U.S.C. 8401(14). Also included in this definition is an employee occupying a rigorous firefighter position who moves to a supervisory or administrative position and meets the conditions of § 842.803(b).

First-level supervisors are employees classified as supervisors who have direct and regular contact with the employees they supervise. First-level supervisors do *not* have subordinate supervisors. A first-level supervisor may occupy a rigorous position or a secondary position if the appropriate definition is met.

Frequent direct contact means personal, immediate, and regularly-assigned contact with detainees while performing detention duties, which is repeated and continual over a typical work cycle.

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, as provided in 5 U.S.C. 8401(17). Also included in this definition is an employee occupying a rigorous law enforcement officer position who moves to a supervisory or administrative position and meets the conditions of §842.803(b). *Law enforcement officer* also includes, as required by 5 U.S.C. 8401(17)(B), an employee of the Department of the Interior or the Department of the Treasury who occupies a position that, but for enactment of chapter 84 of title 5, United States Code, would be subject to the District of Columbia Police and Firefighters' Retirement System, as determined by the Secretary of the Interior or the Secretary of the Treasury, as appropriate. Except as provided above, the definition 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.

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.

Duties that are of an emergency, incidental, or temporary nature cannot be considered ''primary'' even if they meet the substantial portion of time criterion. 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.

Rigorous position means a position the duties of which are so rigorous that employment opportunities should, as soon as reasonably possible, be limited (through establishment of a maximum entry age and physical qualifications) to young and physically vigorous individuals whose primary duties are—

(a) To perform work directly connected with controlling and extinguishing fires; or

(b) Investigating, apprehending, or detaining individuals suspected or convicted of offenses against the criminal laws of the United States or protecting the personal safety of United States officials.

The condition in this definition that employment opportunities be limited does not apply with respect to an employee who moves directly (i.e., without a break in service exceeding 3 days) from one rigorous law enforcement officer position to another or from one rigorous firefighter position to another. *Rigorous position* is also deemed to include a position held by a law enforcement officer as identified in 5 U.S.C. 8401(17)(B) (related to certain employees in the Departments of the Interior and the Treasury).

Secondary position means 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; that is, a position whose primary duties are as a first-level supervisor or law enforcement officers or firefighters in rigorous positions; or

(2) Administrative; that is, an executive, managerial, technical, semiprofessional, or professional position for which experience in a rigorous law enforcement or firefighting position, or equivalent experience outside the Federal Government, is a mandatory prerequisite.

[52 FR 2069, Jan. 16, 1987, as amended at 57 FR 32689–32690, July 23, 1992; 60 FR 3339, Jan. 17, 1995]

§ 842.803 Conditions for coverage.

(a) *Rigorous positions.* (1) An employee's service in a position that has been determined by the employing agency head to be a rigorous law enforcement officer or firefighter position is covered under the provisions of 5 U.S.C. 8412(d).

(2) An employee who is not in a rigorous position, nor covered while in a secondary position, and who is detailed or temporarily promoted to a rigorous position is not covered under the provisions of 5 U.S.C. 8412(d).

(3) A first-level supervisor position may be determined to be a rigorous position if it satisfies the conditions set forth in § 842.802.

(b) *Secondary positions.* (1) An employee's service in a position that has been determined by the employing agency head to be a secondary law enforcement officer or firefighter position is covered under the provisions of 5 U.S.C. 8412(d), if all of the following criteria are met:

(i) The employee, while covered under the provisions of 5 U.S.C 8412(d), moves directly (that is, without a break in service exceeding 3 days) from a rigorous position to a secondary position;

(ii) The employee has completed 3 years of service in a rigorous position, including any such service during which no FERS deductions were withheld; and

(iii) The employee has been continuously employed in a secondary position or positions since moving from a rigorous position without a break in service exceeding 3 days, except that a break in employment in secondary positions that begins with an involuntary separation (not for cause), within the meaning of 5 U.S.C. 8414(b)(1)(A), is not considered in determining whether the service in secondary positions is continuous for this purpose.

(2) An employee who is not a rigorous position, nor covered while in a secondary position, and who is detailed or temporarily promoted to a secondary position is not covered under the provisions of 5 U.S.C. 8412(d).

(c) *Air traffic controller.* An employee's service in a position that has been determined to be an air traffic controller position by the employing agency head is covered under the provisions of 5 U.S.C. 8412(e).

(d) Except as specifically provided in this subpart, an agency head's authority under this section cannot be delegated.

[52 FR 2069, Jan. 16, 1987, as amended at 57 FR 32690, July 23, 1992]

§ 842.804 Evidence.

(a) An agency head's determination under § 842.803(a) (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 is 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 (that is, physical requirements and/or medical standards), as determined by the employing agency head based on the personnel management needs of the agency for the positions in question.

(b) A determination under §§ 842.803 (b) or (c) must be based on the official position description and any other evidence deemed appropriate by the agency head for making the determination.

(c) If an employee is in a position not subject to the one-half percent higher withholding rate of 5 U.S.C. 8422(a)(2)(B), and the employee does not, within 6 months after entering the position or after any significant change in the position, formally and in writing seek a determination from the employing agency that his position is properly covered by the higher withholding rate, the agency head's determination that the service was not so covered at the time of the service is presumed to be correct. This presumption may be rebutted by a preponderance of the evidence that the employee was unaware of his or her status or was prevented by cause beyond his or her control from requesting that the official status be changed at the time the service was performed.

[52 FR 2069, Jan. 16, 1987, as amended at 57 FR 32690, July 23, 1992]

§ 842.805 Withholding and contributions.

(a) During service covered under the conditions established by § 842.803 (a), (b), or (c), the employing agency will deduct and withhold from the employee's base pay the amounts required under 5 U.S.C. 8422(a)(2)(B) and submit that amount to OPM in accordance with payroll office instructions issued by OPM.

(b) During service described in paragraph (a) of this section, the employing agency must submit to OPM the Government contributions required under 5 U.S.C. 8423(a)(1)(B) in accordance with payroll office instructions issued by OPM.

(c) If the correct withholdings and/or Government contributions are not timely submitted to OPM for any reason whatsover, including cases in which it is finally determined that past service of a current or former employee was subject to the higher deduction and Government contribution rates, the employing agency must correct the error by submitting the correct amounts (including both employee and agency shares) to OPM as soon as possible. Even if the agency waives collection of the overpayment of pay under any waiver authority that may be available for this purpose, such as 5 U.S.C. 5584, or otherwise fails to collect the debt, the correct amount must still be submitted to OPM as soon as possible.

(d) Upon proper application from an employee, former employee or eligible survivor of a former employee, an employing agency or former employing agency will pay a refund or erroneous additional withholdings for service that is found not to have been covered service. If an individual has paid to OPM a deposit or redeposit, including the additional amount required for covered service, and the deposit is later determined to be erroneous because the service was not covered service, OPM will pay the refund, upon proper application, to the individual, without interest.

(e) The additional employee withholding and agency contributions for covered service properly made are not separately refundable, even in the event that the employee or his or her survivor does not qualify for a special annuity computation under 5 U.S.C. 8415(d).

(f) While an employee who does not hold a rigorous, secondary, or air traffic controller position is detailed or temporarily promoted to such a position, the additional withholdings and agency contributions will not be made.

(g) While an employee who holds a rigorous, secondary, or air traffic controller position is detailed or temporarily promoted to a position that is not a rigorous, secondary, or air traffic controller position, the additional withholdings and agency contributions will continue to be made.

[52 FR 2069, Jan. 16, 1987, as amended at 57 FR 32690, July 23, 1992; 60 FR 3340, Jan. 17, 1995]

§ 842.806 Mandatory separation.

(a) The mandatory separation provisions of 5 U.S.C. 8425 apply to all law enforcement officers, firefighters, and air traffic controllers including those in secondary positions and supervisory air traffic controller positions. A mandatory separation under 5 U.S.C. 8425 is not an adverse action under part 752 of this chapter or a removal action under part 359 of this chapter.

(b) Exemptions from mandatory separation are subject to the conditions set forth under 5 U.S.C. 8425. An exemption may be granted at the sole discretion of the head of the employing agency or by the President in accordance with 5 U.S.C. 8425(c).

(c) In the event that an employee is separated mandatorily under 5 U.S.C. 8425, or is separated for optional retirement under 5 U.S.C. 8412 (d) or (e), and OPM finds that all or part of the minimum service required for entitlement to immediate annuity was in a position that did not meet the requirements of a primary or secondary position and the conditions set forth in this subpart or, if applicable, in part 831 of this chapter, such separation will be considered erroneous.

§ 842.807 Review of decisions.

(a) The final decision of an agency denying an individual's request for approval of a position as a rigorous, secondary, or air traffic controller position made under § 842.804(c) may be appealed to the Merit Systems Protection Board under procedures prescribed by the Board.

(b) The final decision of an agency denying an individual coverage while serving in an approved secondary position because of failure to meet the conditions in § 842.803(b) may be appealed to the Merit Systems Protection Board under procedures prescribed by the Board.

[57 FR 32690, July 23, 1992]

§ 842.808 Oversight of coverage determinations.

(a) Upon deciding that a position is a law enforcement officer or firefighter position, each agency head must notify OPM (Attention: Associate Director for Retirement and Insurance) stating the title of each position, the number of incumbents, whether the position is rigorous or secondary, and, if the position is rigorous, the established maximum entry age (or if no maximum entry age has yet been established, the date by which it will be established). The Director of OPM retains the authority to overrule an agency head's determination that a position is a rigorous or secondary position, except such a determination under 5 U.S.C. 8401(17)(B) (concerning certain employees in the Departments of the Interior and the Treasury) or under 5 U.S.C. 8401(17)(D) (concerning certain positions primarily involved in detention activities).

(b) Each agency must establish a file containing all coverage determinations made by an agency head under § 842.803, and all background material used in making the determination.

(c) 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.

(d) Upon request by OPM, an agency must submit to OPM a list of all covered positions and any other pertinent information requested. For rigorous positions, the list must show the specific entry age requirement and physical qualification requirements for each position.

[52 FR 2069, Jan. 16, 1987, as amended at 57 FR 32691, July 23, 1992]

§ 842.809 Transitional provisions.

(a) Any service as an air traffic controller, within the meaning of this term under 5 U.S.C. 2109 as in effect on or after January 1, 1987—even if performed before that date—is included in determining an employee's length of air traffic controller service under 5 U.S.C. 8412(e) for the purposes of retirement eligibility and for mandatory separation under 5 U.S.C. 8425(a) as long as the annuity is based on a separation from service occurring after 1986.

(b) Any service as a law enforcement officer or firefighter, within the meaning of these terms under 5 U.S.C. 8331 (20) and (21), that was performed before the date on which an employee becomes subject to chapter 84 of title 5, United States Code, is included in determining the employee's length of law enforcement officer and firefighter service under 5 U.S.C. 8412(d) for the purposes of retirement eligibility and mandatory separation under 5 U.S.C. 8425(b). Service performed as a law enforcement officer or firefighter within the meaning of 5 U.S.C. 8331, other than service in a supervisory or administrative position, is considered to be service in a rigorous position for the purpose of the 3-year requirement of § 842.803(b)(1)(ii). The FERS definitions of firefighter under 5 U.S.C. 8401(14) and law enforcement officer under 5 U.S.C. 8401(17) are not applicable to service performed—

(1) Before 1987; or

(2) After 1986 and before an employee first becomes subject to chapter 84 (that is, subject to FERS deductions), unless that service was neither subject to CSRS deductions nor creditable in a CSRS component as described in § 846.304(b).

(c)(1) An individual who—

(i) Is covered as a law enforcement officer or firefighter under 5 U.S.C. 8336(c) in a supervisory or administrative position, having already met the transfer requirement of subpart I of part 831 of this chapter; and

(ii) Elects under section 301 of Pub. L. 99–335 to become subject to chapter 84 of such title and begins service in a secondary position with no break in service is considered to have met the transfer and 3-year requirements of §§ 842.803(b)(1)(i) and (ii) for coverage in a secondary position upon the effective date of the election.

(2) An individual who—

(i) Is covered as a law enforcement officer or firefighter under 5 U.S.C. 8336(c) in a supervisory or administrative position, having already met the transfer requirement of subpart I of part 831 of this chapter; and

(ii) Automatically becomes subject to chapter 84 of title 5 of the United States Code (not by election under section 301 of Pub. L. 99–335) serving in a secondary position is considered to have met the 3-year requirement of § 842.803(b)(1)(ii) for coverage in a secondary position. The employee is not covered as a law enforcement officer or firefighter in a secondary position if he or she had a break in coverage as a law enforcement officer or firefighter (within the meaning of 5 U.S.C. 8331) exceeding 3 days immediately before becoming subject to chapter 84 of title 5 of United States Code. However, a break in coverage in supervisory or administrative positions occurring before the individual becomes subject to such chapter 84 that began with an involuntary separation (not for cause), within the meaning of 5 U.S.C. 8414(b)(1)(A), is not considered to be a break in service for this purpose.

(d) (1) The CSRS definitions of law enforcement officer under 5 U.S.C. 8331(20) and firefighter under 5 U.S.C. 8331(21) are applicable to service performed before an employee became subject to chapter 84 if the service was—

(i) Subject to CSRS deductions at the time it was performed (including service that becomes creditable under FERS annuity computation rules);

(ii) Performed before 1987 and not subject to retirement deductions; or

(iii) Performed after 1986 and not subject to retirement deductions but is creditable in a CSRS component as described in § 846.304(b).

(2) The determination of whether any service meets the CSRS definitions of law enforcement officer under 5 U.S.C. 8331 (20) or firefighter under 5 U.S.C. 8331(21) must be made in accordance with the provisions of subpart I of part 831 of this chapter.

[52 FR 2069, Jan. 16, 1987, as amended at 57 FR 32691, July 23, 1992]

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