

Dated: June 5, 1997.

James S. Milford,

Acting Deputy Administrator.

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DEPARTMENT OF JUSTICE

Drug Enforcement Administration

Importation of Controlled Substances Application for Radian International LLC; Notice of Correction

In the **Federal Register** (FR Doc. 97-13088) appearing on page 27281 in the issue of Monday, May 19, 1997, the third paragraph should read: "The firm plans to import small quantities of the listed controlled substances for the manufacture of analytical reference standards."

Dated: June 3, 1997.

John H. King,

Deputy Assistant Administrator, Office of Diversion Control, Drug Enforcement Administration.

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MERIT SYSTEMS PROTECTION BOARD

Opportunity to File Amicus Briefs in *Fitzgerald et al. versus Department of Defense*, MSPB Docket No. PH-0842-94-0200-B-1

AGENCY: Merit Systems Protection Board.

ACTION: The Merit Systems Protection Board is providing interested parties with an opportunity to submit amicus briefs on the following issues: (1) Whether the Board has jurisdiction over an appeal from a final agency decision denying an employee law enforcement officer (LEO) retirement coverage where the employee made no request for such coverage in accordance with 5 CFR 842.807(a); and (2) whether 5 CFR 842.804(c), which creates a rebuttable presumption that an agency head's denial of LEO retirement coverage is correct where a formal, written request is not filed within six months after entering a position or after any significant change in the position, is invalid, unreasonable, or violates due process.

SUMMARY:

Issue 1

In these consolidated appeals, the appellants, who are covered by the Federal Employees' Retirement System

(FERS), 5 U.S.C. chapter 84, did not request a determination of their LEO status. Rather, the agency issued a final decision on its own initiative finding that the appellants' positions were not covered by the special retirement provisions of FERS, and providing the appellants with notice of a right to appeal to the Board.

Under 5 CFR 842.807(a), "[t]he 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 5 CFR 842.804(c) may be appealed to the * * * Board under procedures prescribed by the Board." In adopting this regulation, the Office of Personnel Management (OPM) indicated that it was amending the section "to clarify that * * * only agency denial decisions made in response to individual requests under § 842.804(c) are subject to appeal * * *." 57 FR 32,685, 32,689 (July 23, 1992).

The Board has generally interpreted section 842.807(a) as requiring that an employee who is covered by FERS first formally request a determination on LEO coverage from his or her agency before appealing the agency's LEO determination to the Board. *See, e.g., Fitzgerald versus Department of Defense*, 70 M.S.P.R. 152, 155 (1996). The Board, however, is reconsidering this interpretation where, as in these cases, the agency has already issued a final decision on its own initiative. In this regard, the Board notes that under 5 U.S.C. 8461(e)(1), an administrative action or order affecting the rights or interests of an individual under the provisions of chapter 84 administered by OPM may be appealed to the Board.

The Board is inviting interested parties to submit amicus briefs addressing whether an employee request is a jurisdictional requirement where the agency has issued a final decision on its own initiative.

Issue 2

The Board has interpreted 5 CFR 842.804(c) as an additional restriction on its jurisdiction over FERS LEO matters. *See, e.g., DeVitto versus Department of Transportation*, 64 M.S.P.R. 354, 357-58 (1994). Section 842.804(c) provides that if an employee is in a position not subject to the higher LEO withholding rate, and the employee does not, within six 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 or her 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. The 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 when the service was performed. Thus, under *DeVitto*, if a request for LEO coverage is not made within the time limit set forth in the regulation and neither of the circumstances specified in the regulation is present, an appeal of the agency's denial of LEO coverage must be dismissed for lack of jurisdiction.

The appellants and amicus curiae National Treasury Employees Union argue that section 842.804(c) is invalid because it is contrary to statute and congressional intent. The appellants and amicus curiae assert that the statutory scheme grants special retirement coverage for LEOs, contains no deadlines for challenging adverse agency determinations as to employee status, and provides that an administrative action or order affecting the rights or interests of an individual under the provisions of chapter 84 maybe appealed to the Board under procedures prescribed by the Board." 5 U.S.C. § 8461(e)(1). Thus, they contend that the Board's jurisdiction to review the merits of agency head determinations is not qualified by any statutory obligation to presume the correctness of those determinations. Alternatively, they assert that section 842.804(c) is entitled to no deference because it is an arbitrary and unreasonable exercise of OPM's regulatory authority and violates the constitutional guarantees of due process.

The agency, by contrast, argues that the statute is silent on the matters covered in section 842.804(c), and that the section, promulgated pursuant to OPM's authority to prescribe regulations to carry out 5 U.S.C. chapter 84, is a time limit that is not arbitrary, capricious, or contrary to statute because it furthers the intent of the statute to provide LEO retirement coverage when a determination can be made that entitlement to coverage exists. The agency contends that it would be difficult to make these determinations based on the evidence required if employees could wait twenty years, until they believed they were eligible to retire, to request LEO retirement coverage.

The Board is inviting interested parties to submit amicus briefs addressing whether 5 CFR 842.804(c) is