

TESTIMONY

Of

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On

**Personnel Issues Affecting Law Enforcement Employees of
the Federal Government**

Before the

**Subcommittee on Civil Service and Agency Organization
Subcommittee on Criminal Justice, Drug Policy and Human Resources
Committee on Government Reform
United States House of Representatives**

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Good morning Chairwoman Davis, Chairman Souder, Ranking Members Davis and Cummings and members of the two Subcommittees. My name is Louis Cannon, and I am the President of the Fraternal Order of Police – District of Columbia State Lodge, and Chairman of the National F.O.P.'s Federal Officers' Committee. I am also an Inspector with the United States Mint Police, and have previously served with the Library of Congress Police and the Metropolitan Police Department here in Washington. I am here today on behalf of National President Chuck Canterbury to discuss our views on several important personnel issues affecting Federal law enforcement officers, and the various legislative proposals which have been put forward to address them.

The Fraternal Order of Police is the nation's largest law enforcement labor organization, with over 306,000 members in 43 State Lodges. Included in that total are more than 25,000 Federal law enforcement officers, representing agencies from each of the three branches of the Federal government. For our organization, the most pressing concern is the continuing inequality in the retirement benefits afforded to Federal officers under the "law enforcement officer" (LEO) or "6(c)" retirement system. In particular, the definition of what constitutes a law enforcement officer under current law is outdated, and does not reflect the increased hazards faced by today's Federal law enforcement personnel.

Each and every day, tens of thousands of Federal police officers and other law enforcement employees place their lives on the line in defense of the citizens and institutions that are the foundation of our democracy. They serve as our Federal government's first responders and are asked to face the same hazards as their State and local counterparts; and when one of them falls in the line of duty, their names are added to the National Law Enforcement Officers Memorial here in Washington. They are also the brave men and women who were among the first to respond to the devastating terrorist attacks in New York City and at the Pentagon.

Yet these same individuals, despite carrying out their sworn duty to protect and serve with honor and dedication, are consistently denied equal status with their Federal law enforcement colleagues under the "law enforcement officer" retirement provisions of Chapters 83 and 84 of Title 5, U.S. Code. Their exclusion under current law and the regulations of the Office of Personnel Management is not based on the duties they are asked to perform, forcing these officers to constantly appeal to OPM or bring a case before the Merit Systems Protection Board to fight for the status to which they are already entitled.

That is why the Fraternal Order of Police strongly supports amending current law to clarify the definition of "law enforcement officer" and ensuring the inclusion of Federal police officers and others whose primary duties are law enforcement and who are currently denied LEO retirement coverage. And that is also why we support H.R. 2442,

the “Law Enforcement Officers Equity Act,” introduced by Representatives Filner and McHugh last month. I think it is important to note at this point, that this issue has been designated as the top legislative priority for the F.O.P.’s Federal Coalition, which is comprised of both law enforcement employees who are included in, and excluded from, the LEO retirement system.

Current Law

As mentioned above, the laws governing the LEO provisions of the Federal Employees Retirement System (FERS) and Civil Service Retirement System (CSRS) are contained in Chapters 83 and 84 of Title 5, U.S. Code.¹ Under current law, Federal law enforcement officers, firefighters, and air traffic controllers are provided enhanced retirement coverage which allows them to retire after 20 years of service at age 50, or at any age after 25 years of service. These employees must contribute a slightly larger percentage of pay (.5%) to the Federal government’s retirement fund, and the positions may be subject to a maximum hiring age of 37, and are subject to a mandatory separation age of 57.

Under Section 8401 (17), a 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, or... the protection of officials of the United States against threats to personal safety.” In addition, the duties performed by a “law enforcement officer” are “sufficiently rigorous that employment opportunities should be limited to young and physically vigorous individuals.” Those who are not deemed eligible for LEO coverage under this definition are those employees 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.”²

The regulations governing law enforcement officer retirement further expand upon the definition of key terms contained in Section 8401.³ “Primary duties” is defined as those that constitute the basic reason for the existence of the position, occupy a substantial portion of the individual’s working time, and are assigned on a regular and recurring basis.⁴ A “rigorous position” is one in which the duties are so rigorous that they should be limited to young and physically vigorous individuals. U.S. Park Police and Secret Service Uniformed Division law enforcement officer positions are also deemed to be rigorous positions under current law and regulations.

¹ Since most Federal employees are now covered by the FERS retirement system, this paper will rely primarily on references from Chapter 84 as well as the regulations contained in 5 CFR 842.

² 5 CFR 842.802

³ 5 CFR Ch. I, Subpart H

⁴ *Id.*

In addition to the officers of the Park Police and Secret Service-Uniformed Division, those who are considered to meet the definition or who now receive LEO retirement include most criminal investigators (GS-1811 series), Metropolitan Washington Airport Authority police, and employees of the Bureau of Prisons or Federal Prison Industries, Inc.⁵

The Need for Reform

According to OPM, in 1997 there were over 22,000 employees throughout the Federal government with law enforcement duties who were not deemed to meet the requirements of the “law enforcement officer” definition—including over 6,000 Federal police officers (GS-083 series). The F.O.P. believes that there are three primary reasons for enactment of H.R. 2442 and to reform the current definition of who is and is not classified as a law enforcement officer for retirement purposes: that the extension of LEO status will improve the recruitment and retention efforts of law enforcement agencies throughout the Federal government, that it will bring equity among the various law enforcement and police occupations, and that it will permanently end the confusion regarding which requirements qualify law enforcement employees for law enforcement status.

Expanded LEO Coverage Means Enhanced Recruitment and Retention of Qualified Law Enforcement Employees

Perhaps the most pressing problem facing Federal law enforcement agencies today is the ability to recruit qualified applicants for their police and investigative positions, and the challenge of retaining fully trained and qualified personnel in the face of a competitive market for the services they perform. This has become increasingly evident in the aftermath of September 11, as agencies work to enhance their security and assist in the fight to improve homeland security. In August 2002, for example, *Government Executive* magazine reported on the efforts of Federal law enforcement agencies to recruit experienced officers, stating that “[t]he Transportation Security Administration is hiring thousands of air marshals, uniformed officers and criminal investigators...[t]he Immigration and Naturalization Service is hiring 20,000 Border Patrol agents, immigration inspectors and other law enforcement personnel over the next two years...[and] the FBI is looking for 900 special agents...this year.”⁶ Thus far, perhaps the most successful in their efforts has been the Transportation Security Administration. According to the magazine’s tally, “federal agencies lost more than 1,400 law enforcement officers and support personnel to the Transportation Security Administration between September [2001] and June [2002].”⁷ The reason is simple: TSA positions, specifically Federal Air Marshals, typically receive better pay and benefits than most other Federal law enforcement employees.

⁵ While not specifically included in 5 USC 8401(17), the officers of the U.S. Capitol Police also qualify for LEO retirement.

⁶ “Law enforcement officers benefit from hiring bonanza,” Brian Friel, GovExec.com, 13 August 2002.

⁷ “Marshal Draw,” Brian Friel, GovExec.com, 1 August 2002.

In particular, the lack of law enforcement retirement coverage is one of the primary incentives for police officers and others to seek employment with other agencies. In the Washington, D.C. area alone there are scores of Federal, State and local agencies from which an individual seeking a career in law enforcement can choose from, without the inconvenience of having to relocate himself and his family. The movement of Federal law enforcement employees from one agency to another in search of better pay and benefits is not a new phenomenon. In 1999, the Fraternal Order of Police-Bureau of Engraving and Printing Police Labor Committee reported that in the preceding year, of sixteen officers who left the BEP force, twelve left to pursue careers with other law enforcement agencies, and eight were hired by agencies that provide LEO retirement. Moreover, the average length of service with BEP police for these officers was less than 14 months, meaning that the Bureau expended funds to train, compensate and equip these officers for their short terms of service, and the agencies to which they transferred received a crop of fully trained and qualified law enforcement officers without spending an equal amount for new officer recruits.

Ensuring Equity Among Federal Law Enforcement Employees

Another positive situation which would result from the passage of H.R. 2442 would be the elimination of inequitable situations between and among law enforcement employees. The major duties of the GS-083 Federal police position—whether or not they are currently covered by law enforcement retirement—are “the performance or supervision of law enforcement work in the preservation of the peace; the prevention, detection, and investigation of crimes; the arrest or apprehension of violators; and the provision of assistance to citizens in emergency situations, including the protection of civil rights.”⁸ These responsibilities are indistinguishable from those of State and local law enforcement, however, they are not enough to distinguish many Federal law enforcement officers from other government employees under the retirement laws.

The Office of Personnel Management reached a similar conclusion in a 1993 report to Congress entitled *A Plan to Establish a New Pay and Job Evaluation System for Federal Law Enforcement Officers*.⁹ In their report, OPM noted that “[i]t is undeniable that uniformed police work is considered a core law enforcement function outside of the Federal Government...[and] the Federal Government has also recognized it as law enforcement by including some Federal police positions in the definition of law enforcement officer for pay purposes under current law.”¹⁰ While not specifically recommending the extension of LEO retirement coverage, OPM did note that as they “studied the law enforcement and protective occupations and worked on the design of a separate job evaluation and pay system, it became clear that a different definition of ‘law

⁸ See Section Four, “Handbook of Occupational Groups and Families,” Office of Personnel Management, August 2001.

⁹ Authorized by Section 412 of Title IV of the Federal Employees Pay Comparability Act of 1990 (FEPCA), P.L. 101 – 509.

¹⁰ Page 18, “Report to Congress: A Plan to Establish a New Pay and Job Evaluation System for Federal Law Enforcement Officers,” U.S. Office of Personnel Management, September 1993.

enforcement officer' would be needed for system coverage purposes."¹¹ Accordingly, OPM concluded that:

“‘law enforcement officer’ should be defined for job evaluation and pay system coverage purposes to include all executive branch employees who meet the retirement definitions, . . . plus all positions properly classified as police officers that are not now covered . . .

“This definition would provide greater consistency to the definition of ‘law enforcement officer’ since it would encompass only those positions in which the primary knowledge, skills, abilities and duties are law enforcement . . . The addition of police officer and law enforcement Park Ranger positions not now covered by the law enforcement pay entitlements would provide for equitable treatment of all executive branch police forces . . . Moreover, it is clear from OPM’s research that staffing problems for this occupational group are significantly greater than for the General Schedule as a whole. The overall quit rate for police officers is twice that of the General Schedule as a whole.”¹²

Unfortunately, OPM’s recommendations were never fully explored, and any action which may have arisen because of the report were set aside in favor of implementing the proposals put forward by the National Performance Review.¹³

Eliminating confusion surrounding which requirements qualify Federal law enforcement employees for law enforcement status

The issue of who is and is not a law enforcement officer for retirement purposes is a source of great confusion for the thousands of police officers employed by the Federal government, and hinges primarily on judicial and administrative interpretations of the definition contained in current law. For them, achieving law enforcement status is not about bigger paychecks or enhanced benefits, but about achieving parity with their fellow officers. They have trouble comprehending how they can perform the same functions as their LEO-covered Federal counterparts yet receive unequal benefits. Over the years, the Merit Systems Protection Board (MSPB) has been extremely active in trying to determine, on a case-by-case basis, the answer to this question. Two MSPB decisions in particular—*Bremby v. Navy* and *Watson v. Navy*, both involving police officers at the Norfolk Navy Base in Norfolk, Virginia—illustrate the confusion surrounding the interpretation of the term “law enforcement officer” under Title 5, and highlight the constraints imposed by it.

In April 1999, the MSPB ruled in *Bremby v. Navy* that GS-083 police officers and supervisory police officers stationed at the Norfolk Navy Base were entitled to CSRS law

¹¹ *Id.*, page 16

¹² *Id.*, page 18

¹³ See Statement of Barbara L. Fiss, Assistant Director for Compensation Police, U.S. Office of Personnel Management, before the Subcommittee on Compensation and Employee Benefits, House Committee on Post Office and Civil Service, November 4, 1993.

enforcement retirement coverage based on the duties they perform and as described in their official Position Descriptions. Based on a decision in a 1997 case before the U.S. Court of Appeals for the Federal Circuit, the Board reiterated certain criteria which a law enforcement officer covered under CSRS must frequently meet.¹⁴ In *Bremby*, the Board restated that “an LEO covered by 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...no single factor, however, is essential or dispositive to the LEO retirement credit determination.”¹⁵ The Board further found, that the “existence or degree of physical hazard associated with a position is a factor in the determination of LEO status.”¹⁶ In this, and in several similar cases, the Board focused on 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,” also known as the “incumbent-oriented” approach.¹⁷

In *Watson*, the MSPB and the Court of Appeals for the Federal Circuit, denied LEO coverage to police officers at the same Naval base, and in the process, moved from an “incumbent-oriented” to a “position-oriented” approach for the purposes of determining entitlement to LEO retirement. In its decision, the Board ruled that the “approach set forth in *Bremby* for determining LEO entitlement placed too much emphasis on the day-to-day duties of a particular incumbent over a limited period of time.”¹⁸ In adopting this new standard for evaluating LEO cases, the Board determined that a position-oriented approach “more affirmatively takes into account the basic reasons for the existence of the position...[and] 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.”¹⁹ In determining these “basic reasons,” the MSPB relied heavily on OPM’s classification standards for the GS-083 position, and found that these materials substantiated the finding that the police officer position “does not meet either the statutory or regulatory definition of a ‘law enforcement officer.’”²⁰

The problem, however, is that these classification standards explain neither why the Navy decided to create a police force at Norfolk nor the actual duties of an individual officer’s position. In addition, these standards do not reflect the current realities of Federal law enforcement work; particularly the increased responsibilities thrust upon these officers in the wake of events such as the September 11, 2001, terrorist attacks and the bombing of the Murrah Federal Building in Oklahoma City in 1995. Rather, the classification standards establish a government-wide pay system through grades of particular positions that are based on analysis of general statements of duties,

¹⁴ See *Bingaman v. Treasury* (127 F.3D 1431 (Fed. Cir. 1997))

¹⁵ See *Bremby v. Navy* [81 M.S.P.R. 450 (1999)]

¹⁶ *Id.*

¹⁷ See *Watson v. Department of the Navy* (Fed. Cir. 2001)

¹⁸ See *Watson v. Department of the Navy*, 86 M.S.P.R. 318 (2000)

¹⁹ *Id.*, emphasis added

²⁰ *Id.*

responsibilities, and qualification requirements.²¹ The F.O.P., which filed an *amicus* brief in this case before the Court of Appeals, believes that the Board's decision in *Watson* abandoned a workable, objective, factually specific evaluation based on direct evidence of the performance of certain duties, for a subjective estimate based upon secondary evidence of the historical motivation underlying the creation of a specific position.

The Need for Enactment of H.R. 2442

When a Federal law enforcement officer falls in the line of duty, the government does not look at whether or not they were considered "LEO" or "Non-LEO" for the purposes of providing Public Safety Officer Benefits to their family. Likewise, State and local law enforcement agencies do not maintain two separate classes of police officers within their departments. It is only within the Federal government that an employee who performs basic law enforcement functions would be considered something other than a law enforcement officer. Today, all Federal law enforcement officers, regardless of their classification or grade, must shoulder greater burdens in the post-September 11 world. These brave men and women are now asked to serve as first responders, to be prepared and capable of responding to incidents and situations which threaten our nation, and to be on the front lines in the fight to improve homeland security.

In addition, the issue of law enforcement status and retirement is one that must be examined in terms of fairness and professionalism. Amending current law to clarify the definition of "law enforcement officer" and ensuring the inclusion of Federal police officers and others who are denied coverage will improve the recruitment and retention of qualified officers, ensure equity among law enforcement employees, and eliminate the confusion surrounding the current definition. But more importantly, the passage of the "Law Enforcement Officers Equity Act" would afford Congress the opportunity to do what is right, and what is needed, to ensure that the Federal government is protected by the most highly trained, qualified, and professional corps of law enforcement officers available.

Other Issues Affecting Federal Law Enforcement Officers

In addition to H.R. 2442, I would like to briefly discuss several other issues which affect Federal law enforcement officers, and the legislation which has been introduced to address them.

²¹ "Position classification standards are descriptive of work as it exists and is performed throughout the Federal service. While they indicate the proper series, titles, and grades of positions, they do not alter the authority of agency managers and supervisors to organize programs and work processes; to establish, modify, and abolish positions; to assign duties and responsibilities to employees; and to direct and supervise the accomplishment of their assigned missions. The classification systems should be a guide to judgment and supportive of each agency's efforts to manage its workforce," Pg. 7, *Introduction to the Position Classification Standards*, Office of Personnel Management, August 1991.

Inaction on Expanding LEO Retirement to FBI Police

Last Year, Congress extended “law enforcement officer” retirement to the police officers at the Federal Bureau of Investigation (FBI). Included in Public Law 107 – 273, Section 11024 of the 21st Century Department of Justice Appropriations Authorization Act authorized the FBI Police to receive pay and benefits similar to that provided to members of the US Secret Service Uniformed Division (USSS-UD), effective after 1 January 2003. However, because Congress did not specifically identify the Executive Branch agency which was to be responsible for crafting the regulations to implement this provision of the Act, no further action has occurred. In late April the Office of Personnel Management submitted a legislative proposal to Congress to repeal this section of the Act, denying the FBI the ability to effectively compete with other agencies for qualified police recruits. In their letter to the President of the Senate, OPM cited several reasons for submitting their proposal in addition to the lack of an identifiable agency to proffer regulations, including: that the “legislation is insufficient to authorize enhanced benefit payments from the Civil Service Retirement and Disability Fund,” that “no appropriations have been provided for the additional costs of enhanced benefits,” and that Section 11024 “is technically insufficient to accomplish its objective.” The Fraternal Order of Police believes that rather than accept OPM’s arguments on the need for repeal, Congress should instead work to make the necessary changes to Section 11024, so that the clear intent of Congress can be carried out.

Increased Locality Pay for FLEOs/Removal of Limitation on Premium Pay

Over the last two Congresses, several proposals have been put forward to increase the locality payments received by Federal law enforcement officers, and to remove the limitations on the amount of premium pay that can be received by these employees. While we have taken no position on any of these proposals, I would like to advise the Subcommittee of our general position on this issue.

First and foremost, the F.O.P. believes that if locality pay is increased for Federal LEOs, it must be a total, nationwide increase which would affect Federal employees in all thirty-two Metropolitan Statistical Areas (MSAs). Second, we believe that to improve recruitment and retention, the enhanced locality pay should be extended to all Federal law enforcement officers, regardless of whether or not they are currently deemed to meet the definitions of Sections 8331 or 8401 of Title 5, U.S. Code. Third, we agree that Congress should eliminate the limitation on the “premium pay” Federal law enforcement officers can receive, which at present keeps criminal investigators and others from receiving compensation in excess of certain caps.

We are concerned, however, with the provision in some of these bills which would require OPM to essentially redo their 1993 report on a separate pay, evaluation and promotion system for Federal law enforcement officers, authorizing them to establish demonstration programs to put such a system into effect on a trial basis. As currently written, the updated study and any demonstration project would be limited to only those

officers who meet the retirement definition, excluding many agencies whose officers could benefit from inclusion in this section. In a recent report, which the F.O.P. helped to facilitate, the General Accounting Office (GAO) studied pay, recruitment and retention at thirteen Federal police forces in the D.C. area. GAO noted that, among the agencies they reviewed, 1) the entry-level pay for police officers varied by more than \$10,000 in FY 2002; 2) total turnover nearly doubled between 2001 and 2002; 3) in FY 2002 eight of the 13 agencies experienced their highest turnover rate in six years; 4) officials at nine of the 13 agencies reported some difficulty in recruiting officers; and 5) none of the police forces used “important human capital flexibilities, such as recruitment bonuses and student loan repayments, during fiscal year 2002.”²²

As the GAO report shows, the problems with the recruitment and retention of Federal law enforcement personnel is not limited to one particular GS classification or agency. Now is not the time for enacting measures which have the effect of continuing the disparities which exist between and among Federal law enforcement employees, or which allow one agency to recruit officers at the expense of another. Rather, it is time for those which recognize the important work performed by these brave men and women throughout the Federal government, and which will attract the best and brightest to Federal law enforcement work. Therefore the F.O.P. believes that any study or demonstration project which OPM is authorized to perform must also include all uniformed Federal law enforcement personnel, and those who are outside of the LEO retirement system.

Expansion of LEO Retirement to Assistant United States Attorneys & Federal Prosecutors

Several pieces of legislation have also been put forward in past Congresses to include Assistant United States Attorneys (AUSA) and other Federal prosecutors within the LEO retirement system. We realize that other groups and occupations often seek coverage under these provisions of Chapters 83 and 84 of Title 5, US Code, because of the more generous retirement benefits they provide. In addition to doing nothing to rectify the disparity among law enforcement personnel, the legislation which has been introduced on this issue is problematic for several other reasons. They contain provisions which would exempt Federal prosecutors from the maximum hiring age and mandatory separation requirements applicable to Federal law enforcement officers, and which help agencies maintain young and vigorous workforces. They also contain provisions which would require the government to pay both the individual and the agency costs for employees who elect LEO coverage. Thus, what Federal prosecutors would gain by enactment of this legislation is above and beyond what is available even to current recipients of LEO retirement coverage.

But perhaps most importantly, these bills beg the question: Should Federal prosecutors qualify as law enforcement officers when not all Federal law enforcement officers qualify as law enforcement officers? The F.O.P. believes that the answer is

²² “Federal Uniformed Police: Selected Data on Pay, Recruitment, and Retention at 13 Police Forces in the Washington, D.C., Metropolitan Area (GAO-03-658),” U.S. General Accounting Office, June 2003, Pg. 23.

obvious, and that Congress should not expand the number and types of employees eligible for LEO coverage unless and until it first acts to remedy the existing disparity within the law enforcement and police occupations under current law.

Thank you very much, Chairmen Davis and Souder, for the opportunity to appear before you here today. We very much appreciate the support of yourself, Madam Chairman, Mr. Davis, and the numerous Members of both Subcommittees who were cosponsors of the “Law Enforcement Officers Equity Act” in the 107th Congress. We look forward to working with the Subcommittees to advance legislation important to Federal law enforcement officers, and I would be pleased to answer any questions you may have at this time.