

STATEMENT OF  
DONALD J. WINSTEAD  
DEPUTY ASSOCIATE DIRECTOR  
CENTER FOR PAY AND PERFORMANCE POLICY  
OFFICE OF PERSONNEL MANAGEMENT

at a joint hearing of the

SUBCOMMITTEE ON CIVIL SERVICE AND  
AGENCY REORGANIZATION  
COMMITTEE ON GOVERNMENT REFORM  
U.S. HOUSE OF REPRESENTATIVES

and the

SUBCOMMITTEE ON CRIMINAL JUSTICE,  
DRUG POLICY AND HUMAN RESOURCES  
COMMITTEE ON GOVERNMENT REFORM  
U.S. HOUSE OF REPRESENTATIVES

on

PERSONNEL ISSUES AFFECTING  
LAW ENFORCEMENT EMPLOYEES  
OF THE FEDERAL GOVERNMENT

JULY 23, 2003

MADAM CHAIRWOMAN, MR. CHAIRMAN, AND MEMBERS OF THE  
SUBCOMMITTEES:

ON BEHALF OF OFFICE OF PERSONNEL MANAGEMENT (OPM) DIRECTOR KAY COLES JAMES, I AM PLEASED TO BE WITH YOU TODAY TO DISCUSS PERSONNEL ISSUES AFFECTING LAW ENFORCEMENT EMPLOYEES IN THE FEDERAL GOVERNMENT. LET ME ASSURE YOU AT THE OUTSET THAT WE DEEPLY APPRECIATE THE MANY SIGNIFICANT CONTRIBUTIONS TO THE NATION'S SECURITY MADE BY THE DEDICATED MEMBERS OF THE FEDERAL LAW ENFORCEMENT COMMUNITY.

THE PROVISIONS GOVERNING PAY AND BENEFITS FOR EMPLOYEES IN THAT COMMUNITY AND THOSE IN RELATED OCCUPATIONS HAVE EVOLVED OVER MANY YEARS. SINCE MUCH OF THAT DEVELOPMENT IS ATTRIBUTABLE TO THE SPECIAL RETIREMENT PROVISIONS GOVERNING LAW ENFORCEMENT OFFICERS, AND BECAUSE MANY CURRENT PAY ENTITLEMENTS ARE LINKED TO THOSE PROVISIONS, PLEASE PERMIT ME TO BEGIN WITH A REVIEW OF THEIR HISTORY AND SIGNIFICANCE.

WHILE I AM SURE YOU WILL NOT OBJECT IF I OMIT READING IT TODAY, I AM INCLUDING AS AN APPENDIX TO MY FORMAL STATEMENT A BRIEF CHRONOLOGY OF SIGNIFICANT EVENTS IN THE HISTORY OF THOSE SPECIAL RETIREMENT PROVISIONS.

SPECIAL RETIREMENT ELIGIBILITY AND COMPUTATIONAL PROVISIONS WERE FIRST ENACTED IN 1947 FOR FBI SPECIAL AGENTS. OVER THE YEARS, THESE PROVISIONS HAVE BEEN MODIFIED ON A NUMBER OF OCCASIONS.

GROUPS ADDED INCLUDE CRIMINAL INVESTIGATORS, PRISON GUARDS, NON-GUARD PRISON EMPLOYEES, FIREFIGHTERS, CAPITOL POLICE, NUCLEAR MATERIALS COURIERS, AND SUPREME COURT POLICE.

THE STATED PURPOSE OF THE SPECIAL PROVISIONS HAS BEEN TO MAKE IT POSSIBLE FOR THE GOVERNMENT TO MAINTAIN A YOUNG AND VIGOROUS WORKFORCE IN CERTAIN OCCUPATIONS REQUIRING SUCH EMPLOYEES. THE SPECIAL PROVISIONS HAVE NEVER BEEN INTENDED AS A REWARD OR AS ADDITIONAL COMPENSATION FOR EMPLOYEES WHO PERFORM CERTAIN TYPES OF WORK.

NOW, AS YOU KNOW, IN RESPONSE TO A JOINT REQUEST FROM YOUR COMMITTEE, THE COMMITTEE ON THE JUDICIARY, AND ONE OF ITS SUBCOMMITTEES, WE RECENTLY COMPLETED A REPORT ON FEDERAL EMPLOYEES WITH LAW ENFORCEMENT DUTIES.

#### OPM'S REPORT TO CONGRESS

PRINCIPALLY, THE REPORT WAS DESIGNED TO COVER EMPLOYEES WITH LAW ENFORCEMENT DUTIES WHO HAVE ARREST AUTHORITY. SOME OF THE EMPLOYEES IN THE GROUP STUDIED MEET THE DEFINITIONS OF "LAW ENFORCEMENT OFFICER" (LEO) IN THE LAWS GOVERNING THE CIVIL SERVICE RETIREMENT SYSTEM (CSRS) AND THE FEDERAL EMPLOYEES' RETIREMENT SYSTEM (FERS), WHILE OTHERS DO NOT. AS YOU WILL NOTE FROM THE HISTORICAL DISCUSSION IN THE APPENDIX, THOSE DEFINITIONS RELY ON EMPLOYEES HAVING CERTAIN PRIMARY DUTIES RELATED TO CRIMINAL LAW ENFORCEMENT, BUT ALSO COVER EMPLOYEES IN A VARIETY OF OCCUPATIONS WHO HAVE FREQUENT AND DIRECT CONTACT WITH SUSPECTED OR CONVICTED CRIMINALS IN A DETENTION SETTING, SUCH AS SUPPORT STAFF WORKING AT FEDERAL PRISONS.

IN RESPONSE TO OUR REQUEST FOR INFORMATION, ALL FIFTEEN DEPARTMENTS AND TWENTY-NINE OTHER AGENCIES, INCLUDING SOME IN THE LEGISLATIVE AND JUDICIAL BRANCHES, PROVIDED DATA. OPM CONSOLIDATED THAT INFORMATION AND PRESENTED OUR FINDINGS ON JUNE 30, 2003.

TO SUPPLEMENT THE AGENCY SUBMISSIONS, OPM ALSO PREPARED VARIOUS COMPUTER RUNS FROM OUR CENTRAL PERSONNEL DATA FILE (CPDF).

MOST LEO'S ARE COVERED BY THE STANDARD GOVERNMENTWIDE PAY AND BENEFITS SYSTEMS ESTABLISHED UNDER TITLE 5, UNITED STATES CODE. THE STANDARD BASIC PAY SYSTEMS INCLUDE THE GENERAL SCHEDULE, THE PAY SCHEDULES ESTABLISHED FOR SENIOR-LEVEL AND SCIENTIFIC OR PROFESSIONAL POSITIONS AND MEMBERS OF THE SENIOR EXECUTIVE SERVICE, THE FEDERAL WAGE SYSTEM, AND OTHER STATUTORY PAY SYSTEMS. CERTAIN SPECIAL PAY PROVISIONS APPLY TO LEO'S UNDER THOSE STANDARD SYSTEMS. LEO'S HAVE SPECIAL RETIREMENT BENEFITS WITHIN THE STANDARD RETIREMENT SYSTEM.

OPM ALSO REQUESTED THAT AGENCIES PROVIDE INFORMATION ON NONSTANDARD BASIC PAY, PREMIUM PAY, AND RETIREMENT BENEFITS.

#### KEY FINDINGS OF OPM'S REPORT

#### **QUANTITATIVE DATA PROVIDED BY AGENCIES**

*LEO'S*

- THE AGENCIES IDENTIFIED A TOTAL OF 99,249 EMPLOYEES AS “LAW ENFORCEMENT OFFICERS” UNDER THE DEFINITIONS IN THE LAWS GOVERNING CSRS AND FERS. (THIS INCLUDES CERTAIN SECRET SERVICE UNIFORMED DIVISION AND PARK POLICE OFFICERS WHO ARE COVERED BY THE D.C. POLICE RETIREMENT PLAN.)
- OF THESE LEO'S, THE AGENCIES REPORTED THAT 17,466 EMPLOYEES (17.6 PERCENT) OBTAINED LEO RETIREMENT COVERAGE AS A RESULT OF HAVING FREQUENT DIRECT CONTACT WITH SUSPECTED OR CONVICTED CRIMINALS, AS OPPOSED TO HAVING THE PRIMARY DUTIES OF INVESTIGATION, APPREHENSION, AND DETENTION. THE AGENCIES REPORTED THAT THESE EMPLOYEES WORK IN 205 DIFFERENT OCCUPATIONAL SERIES. THE LEO'S WHOSE STATUS IS BASED ON PRIMARY DUTIES WORK IN 37 DIFFERENT OCCUPATIONAL SERIES.
- THE MAJORITY OF LEO'S WORK IN THE DEPARTMENT OF JUSTICE (54,891) AND THE DEPARTMENT OF HOMELAND SECURITY (24,724). THESE TWO DEPARTMENTS EMPLOY 80 PERCENT OF THE LEO'S REPORTED BY THE AGENCIES.
- THE AGENCIES REPORTED 7,719 EMPLOYEES IN SECONDARY (I.E., SUPERVISORY OR ADMINISTRATIVE) LEO POSITIONS. WE NOTE, HOWEVER, THAT THIS NUMBER REPRESENTS A MINIMUM TOTAL BECAUSE NOT ALL AGENCIES PROVIDED SECONDARY EMPLOYEE SUBCOUNTS.

*NON-LEO'S WITH ARREST AUTHORITY*

- THE AGENCIES IDENTIFIED 30,595 EMPLOYEES WHO HAVE AUTHORITY TO MAKE ARRESTS UNDER FEDERAL LAW (OR AN EQUIVALENT AUTHORITY TO DETAIN PERSONS UNDER MILITARY LAW), BUT WHO ARE NOT COVERED BY THE SPECIAL RETIREMENT PROVISIONS FOR LEO'S UNDER CSRS OR FERS.
- THE MAJORITY OF NON-LEO'S WITH ARREST AUTHORITY ARE EMPLOYED BY THE DEPARTMENT OF HOMELAND SECURITY (17,199). THESE EMPLOYEES CONSTITUTE 56 PERCENT OF THE GOVERNMENTWIDE TOTAL REPORTED BY THE AGENCIES.

**DATA FROM THE CENTRAL PERSONNEL DATA FILE (CPDF)***TURNOVER DATA FOR SELECTED LEO AND NON-LEO OCCUPATIONS FOR FY 2001-2002*

- CPDF DATA FOR FY 2001 AND FY 2002 SHOW THAT THE TWO LARGEST LEO OCCUPATIONS—GS-1811 CRIMINAL INVESTIGATOR AND GS-0006 CORRECTIONAL OFFICER—HAVE AVERAGE ANNUAL QUIT RATES OF LESS THAN 1 PERCENT. THE NEXT LARGEST LEO OCCUPATION, GS-1896 BORDER PATROL AGENT, HAS AVERAGE ANNUAL QUIT RATES OF LESS THAN 2 PERCENT AT THE JOURNEY LEVEL. THIS COMPARES TO AN OVERALL AVERAGE ANNUAL QUIT RATE OF ABOUT 1.7 PERCENT FOR ALL FEDERAL EMPLOYEES IN FY 2002.

- WITH RESPECT TO THE MAJOR GROUPS OF NON-LEO'S WITH ARREST AUTHORITY, CPDF DATA SHOW THAT THE AVERAGE ANNUAL QUIT RATES FOR IMMIGRATION AND CUSTOMS INSPECTORS ARE LESS THAN 2 PERCENT, WHILE THE RATES FOR POLICE OFFICERS ARE 5-6 PERCENT. (OPM ANTICIPATES THAT THE QUIT RATES FOR POLICE OFFICERS WILL DECLINE IN RESPONSE TO THE HIGHER SPECIAL RATE SCHEDULES ESTABLISHED FOR MANY OF THESE EMPLOYEES EARLIER THIS YEAR.)

#### *MARCH 2003 DATA*

- THE MARCH 2003 CPDF DATABASE IDENTIFIED 96,137 EMPLOYEES WHO ARE COVERED BY THE SPECIAL RETIREMENT PROVISIONS FOR LEO'S UNDER CSRS OR FERS. THE DIFFERENCE BETWEEN THIS COUNT AND THE 99,249 COUNT PROVIDED BY AGENCIES IS, IN PART, ATTRIBUTABLE TO THE FACT THAT CERTAIN AGENCIES DO NOT REPORT TO THE CPDF (IN PARTICULAR, JUDICIAL BRANCH COURT UNITS AND THE ADMINISTRATIVE OFFICE OF THE U.S. COURTS, THE U.S. POSTAL INSPECTION SERVICE, AND THE U.S. POSTAL SERVICE).
- OF THE 96,137 LEO'S IDENTIFIED BY THE CPDF, 84,924 OF THEM (88 PERCENT) ARE PAID UNDER THE GENERAL SCHEDULE.
- THE MAJOR OCCUPATIONAL SERIES FOR LEO'S IDENTIFIED BY THE CPDF INCLUDE CRIMINAL INVESTIGATORS (38,109 LEO'S, WHICH ACCOUNTS FOR NEARLY 40 PERCENT OF THE GOVERNMENTWIDE TOTAL), CORRECTIONAL OFFICERS (14,951, 15.5 PERCENT OF THE GOVERNMENTWIDE TOTAL), AND BORDER PATROL AGENTS (10,112 LEO'S, 10.5 PERCENT OF THE GOVERNMENTWIDE TOTAL.)
- THE CPDF IDENTIFIED 8,400 NON-LEO POLICE OFFICERS IN THE GS-0083 OCCUPATIONAL SERIES. THIS COUNT WAS LESS THAN THE TOTAL REPORTED BY THE AGENCIES (10,191) PRIMARILY BECAUSE CERTAIN AGENCIES INCLUDED IN OUR COUNTS DO NOT REPORT TO THE CPDF (THE CAPITOL POLICE, THE LIBRARY OF CONGRESS, THE NATIONAL SECURITY AGENCY, AND THE SUPREME COURT.)

#### **STANDARD PAY AND BENEFITS SYSTEMS**

- MOST LAW ENFORCEMENT OFFICERS (LEO'S) AND OTHER EMPLOYEES (NON-LEO'S) WITH ARREST AUTHORITY ARE COVERED BY STANDARD BASIC PAY AND BENEFITS SYSTEMS.
- WITHIN THE STANDARD PAY SYSTEMS, LEO'S HAVE SPECIAL GOVERNMENTWIDE PAY ENTITLEMENTS, SUCH AS HIGHER SPECIAL SALARY RATES AT GRADES GS-3 THROUGH 10, SPECIAL GEOGRAPHIC ADJUSTMENTS, A HIGHER OVERTIME HOURLY RATE CAP, A HIGHER RELOCATION BONUS CAP, FOREIGN LANGUAGE BONUS AUTHORITY, AND LAW ENFORCEMENT AVAILABILITY PAY. ALSO, ADMINISTRATIVELY UNCONTROLLABLE OVERTIME PAY FOR LEO'S IS CREDITABLE AS BASIC PAY FOR RETIREMENT AND LIFE INSURANCE PURPOSES.
- LEO'S ALSO HAVE SPECIAL RETIREMENT BENEFITS WITHIN THE STANDARD RETIREMENT SYSTEMS, AS DESCRIBED EARLIER.

## **NON-STANDARD PAY AND BENEFITS SYSTEMS**

- OTHER LEO'S AND NON-LEO'S ARE COVERED BY NON-STANDARD PAY SYSTEMS, PREMIUM PAY PROVISIONS, AND RETIREMENT PROVISIONS ESTABLISHED UNDER INDEPENDENT LEGISLATIVE AUTHORITY OR THE DEMONSTRATION PROJECT AUTHORITY UNDER CHAPTER 47 OF TITLE 5, UNITED STATES CODE.
- THE AGENCIES IDENTIFIED 9,407 LEO'S (9.5 PERCENT) WHO ARE COVERED BY NONSTANDARD BASIC PAY SYSTEMS.
- THE JUDICIAL BRANCH (CONSISTING OF COURT UNITS AND THE ADMINISTRATIVE OFFICE OF THE U.S. COURTS) HAS THE LARGEST NUMBER OF LEO'S (5,432) COVERED BY A NON-STANDARD BASIC PAY SYSTEM. THE CAPITOL POLICE HAVE THE LARGEST NUMBER OF NON-LEO'S (1,490) COVERED BY A NON-STANDARD BASIC PAY SYSTEM.
- SOME OF THE NON-STANDARD BASIC PAY SYSTEMS COVERING LEO'S HAVE A STRUCTURE THAT IS SIMILAR TO THE GENERAL SCHEDULE'S GRADES AND STEPS. HOWEVER, SOME BASIC PAY SYSTEMS PROVIDE HIGHER PAY RANGES THAN THE GENERAL SCHEDULE—IN PARTICULAR, THE SYSTEMS IN THE FINANCIAL REGULATORY AGENCIES, THE SECRET SERVICE UNIFORMED DIVISION, THE PARK POLICE, AND THE TRANSPORTATION SECURITY ADMINISTRATION.
- THE DEPARTMENT OF HOMELAND SECURITY HAS THE MOST NON-STANDARD PREMIUM PAY PROVISIONS. THE SPECIAL RULES FOR CUSTOMS INSPECTORS AND IMMIGRATION INSPECTORS STAND OUT. THESE INSPECTORS RECEIVE SIGNIFICANTLY HIGHER PAYMENTS FOR OVERTIME AND OTHER SPECIAL WORK THAN OTHER FEDERAL EMPLOYEES.
- THE LARGEST GROUPS COVERED BY NON-STANDARD RETIREMENT PROVISIONS ARE SUPREME COURT POLICE OFFICERS, CAPITOL POLICE OFFICERS, AND DIPLOMATIC SECURITY SERVICE AGENTS (IN THE DEPARTMENT OF STATE). WHILE NOT UNDER THE CSRS OR FERS DEFINITION OF "LAW ENFORCEMENT OFFICER," SUPREME COURT POLICE OFFICERS AND CAPITOL POLICE OFFICERS ARE ENTITLED TO CSRS/FERS RETIREMENT BENEFITS THAT ARE EQUIVALENT TO THOSE FOR LEO'S. DIPLOMATIC SECURITY SERVICE AGENTS ARE COVERED BY ONE OF THE FOREIGN SERVICE RETIREMENT PLANS.

WE BELIEVE THE INFORMATION IN OPM'S JUNE 30<sup>TH</sup> REPORT PROVIDES THE FOUNDATION FOR A GREATER UNDERSTANDING AND APPRECIATION OF THE COMPLEXITY OF THE PAY AND BENEFITS PROVISIONS CURRENTLY APPLICABLE TO FEDERAL LAW ENFORCEMENT PERSONNEL.

### DEPARTMENT OF HOMELAND SECURITY

YOUR INTEREST IN THE DIFFERENCES IN PAY AND BENEFITS SYSTEMS APPLICABLE TO FEDERAL LAW ENFORCEMENT PERSONNEL COINCIDES WITH OPM'S CURRENT JOINT RESPONSIBILITY WITH THE DEPARTMENT OF HOMELAND SECURITY (DHS) TO DEVELOP A NEW PAY SYSTEM THAT

WILL COVER MANY LAW ENFORCEMENT OFFICERS. SECTION 881 OF THE HOMELAND SECURITY ACT OF 2002 (PUBLIC LAW 107-296, NOVEMBER 25, 2002) REQUIRED THAT THE SECRETARY OF HOMELAND SECURITY, IN CONSULTATION WITH THE DIRECTOR OF OPM, SUBMIT A PLAN TO CONGRESS FOR ENSURING THE ELIMINATION, TO THE MAXIMUM EXTENT PRACTICABLE, OF UNWARRANTED DISPARITIES IN THE PAY AND BENEFITS OF EMPLOYEES BEING TRANSFERRED TO DHS. IN RESPONSE TO THIS REQUIREMENT, DHS SUBMITTED A REPORT TO CONGRESS ON MARCH 5, 2003, PROVIDING INFORMATION ON POSSIBLE DISPARITIES WARRANTING FURTHER REVIEW.

THAT REPORT POINTED OUT THAT THE ISSUE OF PAY AND BENEFITS DISPARITIES IS INTEGRAL TO THE DESIGN AND ESTABLISHMENT OF A NEW HUMAN RESOURCES MANAGEMENT (HRM) SYSTEM FOR DHS EMPLOYEES, AS AUTHORIZED UNDER 5 U.S.C. 9701. (THAT SECTION WAS ENACTED BY SECTION 841(A)(2) OF THE HOMELAND SECURITY ACT.) THE REPORT FURTHER STATED THAT IT WOULD BE PREMATURE TO MAKE RECOMMENDATIONS REGARDING THE RESOLUTION OF POSSIBLE DISPARITIES, SINCE DHS AND OPM INTEND TO PROPOSE NEW HRM SYSTEMS FOR DHS LATER THIS YEAR, AFTER COLLABORATION WITH KEY STAKEHOLDERS, INCLUDING EMPLOYEE REPRESENTATIVES. THE DHS/OPM PROPOSAL WILL BE PUBLISHED IN THE *FEDERAL REGISTER* FOR PUBLIC COMMENT.

TO CARRY OUT SECTION 9701, DHS AND OPM HAVE ESTABLISHED A DHS HUMAN RESOURCES SYSTEMS DESIGN TEAM, WHICH IS COMPOSED OF DHS MANAGERS AND EMPLOYEES, HUMAN CAPITAL EXPERTS FROM DHS AND OPM, AND FEDERAL EMPLOYEE UNION REPRESENTATIVES. THIS DESIGN TEAM HAS BEEN CHARGED WITH DEVELOPING A RANGE OF OPTIONS FOR NEW HUMAN RESOURCES SYSTEMS IN THE AREAS OF BASIC PAY, CLASSIFICATION, PERFORMANCE MANAGEMENT, DISCIPLINARY ACTIONS AND APPEALS, AND LABOR-MANAGEMENT RELATIONS. SINCE PREMIUM PAY AND RETIREMENT BENEFITS CANNOT BE MODIFIED UNDER THE SECTION 9701 AUTHORITY, ANY CHANGES IN THESE PROVISIONS WOULD REQUIRE ADDITIONAL LEGISLATION.

DHS AND OPM WILL WORK WITH THE OFFICE OF MANAGEMENT AND BUDGET TO HELP FORMULATE THE ADMINISTRATION'S POSITION ON ANY POSSIBLE LEGISLATIVE PROPOSAL(S) INVOLVING LAW ENFORCEMENT PERSONNEL. WE WILL BE ESPECIALLY INTERESTED IN EVALUATING THE IMPACT OF ANY SUCH PROPOSAL ON OPTIONS FOR MODIFYING THE BASIC PAY OF DHS EMPLOYEES UNDER THE SECTION 9701 AUTHORITY. IN GENERAL, WE ARE WARY OF ANY PROPOSAL THAT WOULD HAVE THE EFFECT OF CREATING NEW PAY OR BENEFITS DISPARITIES WITHOUT A CLEARLY ARTICULATED RATIONALE FOR DIFFERENCES IN TREATMENT.

OUR HUMAN CAPITAL PHILOSOPHY IS PREDICATED ON THE BASIC PREMISE THAT ANY CONSIDERATION OF CHANGES IN LAWS AFFECTING EMPLOYEES, PARTICULARLY THEIR PAY AND BENEFITS AND WORKING CONDITIONS, SHOULD BE DRIVEN BY AN ASSESSMENT OF THE IMPACT OF THOSE CHANGES ON THE ABILITY OF AGENCIES TO MEET THEIR STRATEGIC GOALS AND OBJECTIVES.

ONCE AGAIN, THE HISTORY OF THE LAW ENFORCEMENT RETIREMENT PROVISIONS IS PARTICULARLY INSTRUCTIVE IN TERMS OF THE EBB AND

## FLOW OF ATTENTIVENESS TO STRATEGIC HUMAN CAPITAL CONSIDERATIONS.

FROM THE INCEPTION OF THOSE PROVISIONS UNTIL 1974, EACH EMPLOYEE'S RETIREMENT REQUIRED THE RECOMMENDATION OF THE AGENCY HEAD AND THE APPROVAL OF OPM'S PREDECESSOR, THE CIVIL SERVICE COMMISSION. RETIREMENTS WERE APPROVED ONLY WHEN THEY SERVED THE HUMAN RESOURCES MANAGEMENT PURPOSES OF THE LAW.

THE APPELLATE AND JUDICIAL AUTHORITIES REVIEWING COVERAGE ISSUES FORMERLY GAVE DEFERENCE TO THE INTERPRETATION OF THE LEGISLATION BY THE EXECUTIVE BRANCH, WHICH USED THE PURPOSE OF THE LEGISLATION AS A PRINCIPAL TOOL OF INTERPRETATION. HOWEVER, IN RECENT YEARS, THE APPELLATE AND JUDICIAL AUTHORITIES HAVE TENDED TOWARDS ANALYZING ELIGIBILITY MORE AS AN ENTITLEMENT ISSUE. ALTHOUGH THE "POSITION ORIENTED" APPROACH ADOPTED BY THE MERIT SYSTEMS PROTECTION BOARD AND THE COURT OF APPEALS IN RECENT YEARS HAS RESTORED A MEASURE OF CONSISTENCY TO THE LAW ENFORCEMENT COVERAGE AREA, OTHER PRECEDENTS HAVE MUDDIED THE WATERS RATHER THAN CLARIFYING THE SITUATION.

THE EVOLUTION OF SPECIAL RETIREMENT COVERAGE HAS CREATED A SITUATION THAT APPEARS TO HAVE DEPARTED FROM FUNDAMENTAL HUMAN RESOURCES MANAGEMENT CONSIDERATIONS. COVERAGE DECISIONS ARE NOT ALWAYS CONSISTENT AND ARE REGARDED IN SOME CASES AS INEQUITABLE. WHILE THE CURRENT CRITERIA FOR DETERMINING COVERAGE ARE INTENDED TO CREATE CONSISTENCY, IN PRACTICE THEY SOMETIMES YIELD ANOMALOUS RESULTS. A FURTHER RESULT IS CONFUSION AS TO ELIGIBILITY AMONG AGENCIES AND EMPLOYEES.

### PREFERRED APPROACH IN CONTEMPLATING CHANGE

WE BELIEVE THE APPROPRIATE MEANS OF IMPROVING PAY AND BENEFITS PROVISIONS IS A RETURN TO AN EMPHASIS ON THE CONTEXT OF HUMAN CAPITAL MANAGEMENT. OTHERWISE, EXPENDITURES FROM THE AGENCIES' BUDGETS AND THE RETIREMENT FUND MAY NOT SERVE TO ADVANCE THE INTERESTS FOR WHICH THEY ARE INTENDED.

THE DETERMINATION AS TO WHAT TYPES OF POSITIONS ARE TO BE COVERED BY WHICH PROVISIONS MUST BE BASED UPON OBJECTIVELY DEMONSTRATED NECESSITY AND EFFICACY. THERE SHOULD NOT BE A MAJOR CHANGE IN THE COMPOSITION OF THE COVERED CLASSES WITHOUT A COMPREHENSIVE ANALYSIS OF EACH AFFECTED PROGRAM AS A WHOLE. MOREOVER, IT IS IMPORTANT THAT WE BE CIRCUMSPECT IN THE PROCESS OF MAKING COVERAGE DECISIONS. ALL MATTERS THAT MIGHT AFFECT OR BE AFFECTED BY A CHANGE IN THE PAY OR RETIREMENT BENEFITS STRUCTURE SHOULD BE TAKEN INTO ACCOUNT. MATTERS TO BE CONSIDERED SHOULD INCLUDE RECRUITMENT, RETENTION, PHYSICAL AND MENTAL DEMANDS OF EMPLOYMENT, EFFECTS OF THE AGING PROCESS, TREATMENT OF OTHER TYPES OF EMPLOYEES IN SIMILAR CIRCUMSTANCES, WHAT HUMAN RESOURCES MANAGEMENT PROBLEMS (IF ANY) EXIST UNDER CURRENT PROVISIONS, AND HOW ANY PROPOSED MODIFICATION OF PAY OR RETIREMENT PROVISIONS WOULD AFFECT OVERALL FEDERAL EXPENDITURES. ONCE THE POLICIES HAVE BEEN DECIDED, ANY LEGISLATION SHOULD BE DRAFTED IN SUCH A MANNER

THAT APPLICATION OF THOSE POLICIES IS CLEAR-CUT, OBJECTIVE, AND CONSISTENT.

REGARDLESS OF THE COVERAGE DECISIONS THAT RESULT, IT IS ESSENTIAL THAT FUNDING OF THE COSTS, PARTICULARLY IN THE CASE OF RETIREMENT, BE PROVIDED FOR IN A RESPONSIBLE MANNER. IT IS IMPORTANT THAT THE PROSPECTIVE COSTS OF BENEFITS BE RECOGNIZED AT THE TIME THEY ARE INCURRED AS AN EXPENSE OF THE PROGRAM THAT BENEFITS FROM THEM. FURTHER, PROVISION MUST BE MADE FOR THE ADDITIONAL COST OF BENEFITS RESULTING FROM A CHANGE IN THE TREATMENT OF PRIOR SERVICE. TO CREATE AN EXPENSE WITHOUT A FUNDING MECHANISM FAILS TO PLACE RESPONSIBILITY FOR THOSE COSTS WHERE THEY BELONG AND REQUIRES THOSE COSTS TO BE ADDRESSED IN THE FUTURE.

THE CURRENT FERS DYNAMIC NORMAL COST (THE PERCENTAGE OF SALARY NECESSARY TO FUND RETIREMENT BENEFITS) IS 11.5 PERCENT FOR REGULAR EMPLOYEES. THE CURRENT FERS DYNAMIC NORMAL COST IS 24.0 PERCENT FOR LAW ENFORCEMENT OFFICERS, FIREFIGHTERS, AND OTHER SPECIAL RETIREMENT EMPLOYEES. UNDER CSRS, THE DYNAMIC NORMAL COST IS 24.4 PERCENT FOR REGULAR EMPLOYEES AND 39.0 PERCENT FOR LAW ENFORCEMENT OFFICERS, FIREFIGHTERS, AND OTHER SPECIAL RETIREMENT EMPLOYEES. THESE RATES ARE HIGHER BECAUSE OF THE ENHANCED BENEFIT STRUCTURE AND EARLIER RETIREMENT ELIGIBILITY. MOREOVER, IT IS IMPORTANT TO UNDERSTAND THAT THOSE RATES FUND ONLY THE COSTS OF THE SERVICE TO WHICH THEY APPLY, AND DO NOT FUND CREDIT FOR PRIOR SERVICE.

A FEW YEARS AGO, OUR ACTUARY'S OFFICE PREPARED AN ESTIMATE OF WHAT IT WOULD COST TO COVER ALL OF THE GROUPS SEEKING INCLUSION UNDER THE SPECIAL LAW ENFORCEMENT PROVISIONS OF CSRS OR FERS. ALTHOUGH IT IS BASED IN LARGE PART UPON 1999 DATA THAT HAVE NOT BEEN UPDATED AND SHOULD NOT BE CONSIDERED AS PRECISELY ACCURATE, IT IS STILL ILLUSTRATIVE OF THE SCALE OF THE COSTS INVOLVED.

THE GROUPS INCLUDED DEPARTMENT OF DEFENSE POLICE, BUREAU OF ENGRAVING AND PRINTING POLICE, SECRET SERVICE SPECIAL OFFICERS, REVENUE OFFICERS, INS INSPECTORS, CUSTOMS INSPECTORS, AND A FEW OTHER SMALL GROUPS. THE ESTIMATE IS THAT TO INCLUDE SUCH GROUPS WITH CREDIT FOR PAST SERVICE WOULD RESULT IN AN INCREASE IN THE RETIREMENT FUND UNFUNDED LIABILITY OF \$1.335 BILLION. THAT ESTIMATE PRESUMES FULL RETROACTIVE COVERAGE FOR PAST SERVICE, BUT DOES NOT INCLUDE THE ADDITIONAL COSTS TO EMPLOYING AGENCIES OF RETIREMENT DEDUCTIONS AT THE HIGHER LAW ENFORCEMENT CONTRIBUTION RATES OF \$778 MILLION. THE ADDITIONAL COSTS ATTRIBUTABLE TO HIGHER LAW ENFORCEMENT SALARY RATES WOULD INCREASE THE ANNUAL PAYROLL COSTS OF AGENCIES BY ABOUT \$57.6 MILLION IN THE FIRST YEAR ALONE, AND WOULD REQUIRE ADDITIONAL FUTURE AGENCY CONTRIBUTIONS OF \$1.205 BILLION. IN OTHER WORDS, TO INCLUDE ALL THESE GROUPS WOULD COST ABOUT \$3.3 BILLION IN RETIREMENT COSTS PLUS THE FUTURE ADDITIONAL PAYROLL COSTS REQUIRED UNDER CURRENT LAW ENFORCEMENT PAY ENTITLEMENTS. WHILE THERE WOULD NOT BE ADDITIONAL PAYROLL COSTS TO INCLUDE ASSISTANT U.S. ATTORNEYS, ANOTHER FREQUENTLY

MENTIONED GROUP, THEY WOULD ADD AN ADDITIONAL \$1.2 BILLION IN ADDITIONAL RETIREMENT COSTS. TO FURTHER EXTEND COVERAGE TO OTHER EMPLOYEES (SUCH AS THOSE WHO HAVE ARREST AUTHORITY AND CARRY GUNS, AS HAS BEEN SUGGESTED) WOULD INCREASE COSTS EVEN MORE.

TO SUMMARIZE, WE CANNOT OVEREMPHASIZE THE NEED TO ASSESS THE IMPACT OF ANY CHANGES IN LAW ON THE ABILITY OF AGENCIES TO ACCOMPLISH THEIR MISSION-CRITICAL GOALS AND OBJECTIVES THROUGH THE STRATEGIC MANAGEMENT OF HUMAN CAPITAL. THE FAILURE TO DO SO WILL INEVITABLY GENERATE IMMENSE COSTS WITHOUT PRODUCING THE RESULTS THE AMERICAN TAXPAYER WANTS AND DESERVES.

I WOULD BE PLEASED TO ANSWER ANY QUESTIONS THE MEMBERS OF THE SUBCOMMITTEES MAY HAVE.

**APPENDIX**

- 1947 PUBLIC LAW 80-168 EXTENDED SPECIAL RETIREMENT BENEFITS UNDER THE CIVIL SERVICE RETIREMENT SYSTEM (CSRS) TO SPECIAL AGENTS AND CERTAIN OTHER EMPLOYEES OF THE FBI. COVERED INDIVIDUALS COULD RETIRE WITH THE APPROVAL OF THE ATTORNEY GENERAL AT AGE 50 AFTER 20 YEARS OF SERVICE WITH AN ANNUITY OF 2 PERCENT FOR EACH YEAR OF SERVICE AND A MAXIMUM BENEFIT OF 60 PERCENT OF AVERAGE SALARY.
- 1948 PUBLIC LAW 80-879 EXTENDED THE PROVISION TO OTHER EMPLOYEES, THE DUTIES OF WHOSE POSITIONS “ARE PRIMARILY THE INVESTIGATION, APPREHENSION, OR DETENTION OF PERSONS SUSPECTED OR CONVICTED OF OFFENSES AGAINST THE CRIMINAL LAWS OF THE UNITED STATES . . . .” EACH RETIREMENT REQUIRED THE RECOMMENDATION OF THE AGENCY HEAD AND THE APPROVAL OF THE CIVIL SERVICE COMMISSION (CSC).
- 1956 PUBLIC LAW 84-854 EXTENDED THE PROVISION TO OTHER NON-CUSTODIAL CORRECTIONAL EMPLOYEES WITH FREQUENT AND DIRECT PRISONER CONTACT. IT ALSO INCREASED THE MAXIMUM ANNUITY BENEFIT TO 80 PERCENT OF AVERAGE SALARY FOR ALL RETIREES.
- 1972 PUBLIC LAW 92-382 EXTENDED THE SPECIAL RETIREMENT PROVISIONS TO FIREFIGHTERS.
- 1974 PUBLIC LAW 93-350 MADE MAJOR CHANGES IN THE SPECIAL RETIREMENT PROVISIONS.
1. MANDATORY RETIREMENT AT AGE 55 WAS REQUIRED.

2. THE COMPUTATION WAS INCREASED TO 2 ½ PERCENT FOR EACH OF THE FIRST 20 YEARS OF SERVICE AND 2 PERCENT FOR EACH YEAR OF ADDITIONAL SERVICE.
  3. FOR THE FIRST TIME, THE TERM “LAW ENFORCEMENT OFFICER” WAS APPLIED TO EMPLOYEES COVERED BY THIS BENEFIT.
  4. THE REQUIREMENT THAT THE AGENCY HEAD RECOMMEND AND THE CSC APPROVE EACH RETIREMENT WAS ELIMINATED.
  5. PROVISION WAS MADE FOR MAXIMUM ENTRY AGE SO THAT INDIVIDUALS WOULD COMPLETE THE REQUIREMENTS FOR RETIREMENT BY THE TIME THEY REACH MANDATORY RETIREMENT AGE.
  6. THE EMPLOYEE DEDUCTION AND AGENCY CONTRIBUTION RATES WERE EACH INCREASED BY ½ PERCENT, TO 7 ½ PERCENT. PREVIOUSLY, BOTH WERE AT THE REGULAR EMPLOYEE’S RATES.
- 1979 THE COURT OF CLAIMS OVERTURNED THE LONG-STANDING POLICY THAT SPECIAL RETIREMENT ELIGIBILITY COULD BE BASED ONLY ON THE OFFICIAL DUTIES OF AN EMPLOYEE’S POSITION OF RECORD (*ELLIS V. U.S.*, 610 F.2D 760 (CT.CL.1979)).
- 1986 PUBLIC LAW 99-335 ESTABLISHED THE FEDERAL EMPLOYEES’ RETIREMENT SYSTEM (FERS), UNDER WHICH THE SPECIAL RETIREMENT BENEFITS WERE MODIFIED WITHOUT CHANGING THE CSRS RULES. UNDER FERS--
1. RETIREMENT ELIGIBILITY BEGINS AT AGE 50 WITH 20 YEARS OF SERVICE, OR AT ANY AGE WITH 25 YEARS OF SERVICE.
  2. THE BENEFIT IS 1.7 PERCENT FOR EACH OF THE FIRST 20 YEARS OF SERVICE AND 1 PERCENT FOR EACH YEAR OF ADDITIONAL SERVICE.
  3. EMPLOYEES WHO PROTECT FEDERAL OFFICIALS AGAINST THREATS TO PERSONAL SAFETY WERE ADDED TO THE CLASS.
  4. CERTAIN FEDERAL EMPLOYEES WERE ADDED TO THE CLASS WHO (PRIOR TO FERS) WOULD HAVE BEEN COVERED BY THE DISTRICT OF COLUMBIA POLICE AND FIREFIGHTERS’ RETIREMENT SYSTEM.
- 1990 PUBLIC LAW 101-428 EXTENDED THE SPECIAL RETIREMENT PROVISIONS TO CAPITOL POLICE AS A SEPARATE GROUP NOT WITHIN THE DEFINITION OF LAW ENFORCEMENT OFFICER.

PUBLIC LAW 101-509 RAISED THE MANDATORY RETIREMENT AGE FROM 55 TO 57 FOR LAW ENFORCEMENT OFFICERS, BUT LEFT IT AT 55 FOR FIREFIGHTERS AND CAPITOL POLICE.

- 1994 PUBLIC LAW 103-283 RAISED THE MANDATORY RETIREMENT AGE FROM 55 TO 57 FOR CAPITOL POLICE.
- 1993-95 IN A SERIES OF CASES, THE MERIT SYSTEMS PROTECTION BOARD (MSPB) ESTABLISHED A NUMBER OF “INDICIA” OF LAW ENFORCEMENT EMPLOYMENT. APPELLATE REVIEW SHIFTED FROM EXAMINATION OF DUTIES TO REVIEW OF INDICIA.
- 1997 THE COURT OF APPEALS DENIED AN APPEAL FROM A DISALLOWANCE OF LAW ENFORCEMENT RETIREMENT, RELYING UPON THE MSPB INDICIA. AS A RESULT OF THIS DECISION, MSPB MAY NOW USE THE INDICIA AS A BASIS TO ALLOW LAW ENFORCEMENT CREDIT WITHOUT REGARD TO THE OVERALL DUTIES OF THE INDIVIDUAL (*BINGAMAN, V. TREASURY*, 127 F.3D 1431 (FED. CIR.1997)).
- 1998 PUBLIC LAW 105-261 EXTENDED THE SPECIAL RETIREMENT PROVISIONS TO NUCLEAR MATERIALS COURIERS AS A SEPARATE GROUP NOT WITHIN THE DEFINITION OF “LAW ENFORCEMENT OFFICER.”
- 2000 MSPB ANNOUNCED THAT IT WAS ADOPTING A “POSITION-ORIENTED” APPROACH TO LAW ENFORCEMENT COVERAGE DECISIONS (*WATSON V. DEPT. OF THE NAVY*, 86 M.S.P.R. 318 (2000)).
- 2001 PUBLIC LAW 106-553 EXTENDED THE SPECIAL RETIREMENT PROVISIONS TO SUPREME COURT POLICE AS A SEPARATE GROUP NOT WITHIN THE DEFINITION OF “LAW ENFORCEMENT OFFICER.”
- THE COURT OF APPEALS FOUND THAT MSPB’S “POSITION-ORIENTED” APPROACH WAS CONSISTENT WITH APPLICABLE STATUTORY PROVISIONS. THE COURT ALSO NOTED THAT OPM’S REGULATORY DEFINITION OF “PRIMARY DUTIES” (5 CFR §§ 831.902 AND 842.802) ESTABLISHES A “THREE-PRONGED” TEST FOR LAW ENFORCEMENT OFFICER COVERAGE (*WATSON V. DEP’T OF THE NAVY*, 262 F.3D 1296 (FED. CIR. 2001)).
- 2002 MSPB STATED THAT IT MAY STILL CONSIDER THE *BINGAMAN* INDICIA UNDER THE SECOND AND THIRD PRONGS OF THE THREE-PRONGED TEST (*STREET V. DEPT. OF THE NAVY*, 90 M.S.P.R. 652 (2002)).