

**UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD**

2011 MSPB 84

Docket No. DC-0842-10-0561-I-1

**Michael D. Olszak,
Appellant,**

v.

**Department of Homeland Security,
Agency.**

September 20, 2011

Michael D. Olszak, Vienna, Virginia, pro se.

Julie Anne Miles, and Kurt Lauer, Washington, D.C., for the agency.

BEFORE

Susan Tsui Grundmann, Chairman
Anne M. Wagner, Vice Chairman
Mary M. Rose, Member

OPINION AND ORDER

¶1 The appellant has filed a petition for review of the initial decision (ID) that affirmed the agency's reconsideration decision denying the appellant's request for benefits under the agency's Customs and Border Protection Officer (CBPO) enhanced retirement coverage. We AFFIRM the ID as MODIFIED by this Opinion and Order, still affirming the agency's reconsideration decision.

BACKGROUND

¶2 The appellant is a Program Manager with the agency's Bureau of Customs and Border Protection. Initial Appeal File (IAF), Tab 1 at 5. The agency denied

his request for enhanced retirement benefits under the agency's CBPO enhanced retirement coverage based on his primary service as an Immigration Inspector from June 4, 1989, through May 15, 1994, and his subsequent service that included his service as an Asylum Officer with the Immigration & Naturalization Service, which he asserted constituted covered secondary service. *Id.* at 1-2. In a reconsideration decision, the agency affirmed its denial of his request. *Id.* at 1-3. The agency determined that, although the appellant met the primary coverage requirements of Public Law 110-161, Division E, Section 535, he did not meet the eligibility criteria for an enhanced CBPO retirement benefit because the time he spent as an Asylum Officer did not qualify as covered secondary service; thus, he had a disqualifying break in coverage. *Id.* at 2.

¶3 The appellant filed an appeal with the Board.¹ IAF, Tab 1. He argued, among other things, that the agency's determination that the Asylum Officer position does not meet the criteria for a covered secondary position is "factually incorrect." *Id.* at 9. He contended that the duties of the Asylum Officer position are similar to the duties of the "recognized" positions of Center Adjudications Officer and District Adjudications Officer, and he asserted that the agency did not "clearly articulate the reason for exclusion." *Id.* He also raised the affirmative defense of harmful procedural error based on the agency's failure to publish regulations and formal policy directives pertaining to the implementation of the CBPO enhanced retirement coverage. *Id.*; IAF, Tab 19 at 4. After the administrative judge informed the appellant of the applicable burdens of proof

¹ As the administrative judge stated in the initial decision, the Board has jurisdiction over this appeal because the agency's decision affected the appellant's rights and interests under the Federal Employees Retirement System. IAF, Tab 27 at 1; [5 U.S.C. § 8461\(e\)\(1\)](#); see generally *Fitzgerald v. Department of Defense*, [80 M.S.P.R. 1](#), 19 (1998) (citing *Elias v. Department of Defense*, [114 F.3d 1164](#), 1167 (Fed. Cir. 1997) (interpreting the Civil Service Retirement System law enforcement officers (LEO) regulations as providing for de novo Board review of agency LEO coverage determinations), *aff'd*, 230 F.3d 1373 (Fed. Cir. 1999) (Table)).

and held the requested hearing, the administrative judge affirmed the agency's decision and found that the appellant offered no evidence or argument to show that experience in a primary covered position was required for the Asylum Officer position; thus, his service as an Asylum Officer was not covered secondary service. IAF, Tab 24 at 5-9, Tab 27, ID at 13. The administrative judge also found that he failed to prove his affirmative defense of harmful procedural error or that the agency's criteria for an enhanced retirement benefit was arbitrary or unreasonable. ID at 15.

¶4 The appellant filed a petition for review reasserting most of his arguments below in support of approving the Asylum Officer position as a secondary covered position eligible for CBPO enhanced retirement benefits, including his argument that the agency administers the enhanced retirement benefits program in an arbitrary fashion. Petition for Review (PFR) File, Tab 1. The agency has filed a response in opposition to his petition. PFR File, Tab 3.

ANALYSIS

¶5 This case presents a question concerning CBPO enhanced retirement coverage. A federal employee who serves as a CBPO is entitled to the same enhanced retirement benefits as law enforcement officers (LEOs) and firefighters.² See [5 U.S.C. §§ 8401\(36\)](#), [8412\(d\)](#); IAF, Tab 21 at 26. The appellant bears the burden of proving his entitlement to CBPO retirement coverage. See *Fritts v. Department of Homeland Security*, [102 M.S.P.R. 265](#), ¶ 6 (2006) (discussing LEO retirement coverage). The primary benefit of the enhanced CBPO retirement coverage is that it allows qualified employees in covered service to take early optional retirement. IAF, Tab 21 at 27. To receive

² The Consolidated Appropriations Act, 2008, authorized specified CBPO positions to receive enhanced retirement benefits comparable to those received by LEOs. IAF, Tab 21 at 26; ID at 3-4; see Consolidated Appropriations Act, 2008, Pub. L. No. 110-161, 121 Stat. 1844 (2007).

the enhanced CBPO retirement coverage benefit, the employee must occupy a covered position (primary coverage) or have transferred directly to a supervisory or administrative position in the agency without a break in service of more than 3 days, after occupying a covered position for at least three years (secondary coverage). IAF, Tab 21 at 25-26; *see* [5 U.S.C. § 8401](#)(36).

¶6 It is undisputed that the appellant occupied a primary service position for more than 3 years and that he transferred into the Asylum Officer³ position without a break in service. IAF, Tab 24 at 3. It is also undisputed that the Asylum Officer position was not a primary position. *Id.* at 4. In denying the appellant's request for the enhanced CBPO retirement benefit, the agency determined that his service as an Asylum Officer was not covered secondary service and, therefore, the period of his service as an Asylum Officer constituted a break in covered service. IAF, Tab 1 at 2-3; Tab 24 at 3-4. The administrative judge agreed with the agency and, on review, the appellant argues that the agency's determination that the Asylum Officer position is not a secondary covered position is "factually incorrect." ID at 13, 15; PFR File, Tab 1 at 8.

¶7 Here, Congress authorized the Office of Personnel Management (OPM) to prescribe regulations to carry out the provisions of the Consolidated Appropriations Act, 2008, Pub. L. No. 110-161, 121 Stat. 1844 (2007), but OPM has not yet promulgated the regulations. *See* Pub. L. 110-161, Div. E, § 535(d), set out as note under [5 U.S.C. § 3307](#). In the interim, and in consultation with OPM, the agency developed its own criteria to implement the law. IAF, Tab 22 at 13, 24-33. The agency's criteria for determining whether a position qualifies as secondary states:

Secondary position means a position that is **either**

³ There was no enhanced retirement benefit for CBPOs when the appellant held the Asylum Officer position from 1994-98; thus, there is no underlying detrimental reliance or due process issue. *See generally Fitzgerald*, 80 M.S.P.R. at 14-15.

(1) Supervisory-whose primary duties are as a first-, second-, or third-level supervisors of [CBPOs], GS-1895 whose duties include activities relating to the arrival and departure of persons, conveyances, and merchandise at ports of entry.

or

(2) Administrative-executives, program managers, technical, semi-professional, or professional positions *for which experience as a [CBPO] or equivalent experience in DHS is a mandatory prerequisite.*

[Emphasis added]; IAF, Tab 22 at 24.

¶8 The appellant stipulated that he did not supervise or manage GS-1816 immigration inspectors and the agency considers immigration inspector, GS-1816 positions to be the equivalent of CBPO, GS-1895 service for enhanced retirement purposes. *Id.* at 7-8. Moreover, the appellant offered no evidence that, as an Asylum Officer, he supervised or managed any CBPOs, GS-1895. Thus, his position does not qualify as secondary under the “supervisory” prong of the test. *Id.* at 24. Therefore, in order to qualify under the remaining “administrative” prong, he is required to show that “experience as a [CBPO] or equivalent experience in DHS is a mandatory prerequisite” for the Asylum Officer position. *Id.*

¶9 On review, the appellant reasserts his argument that the Asylum Officer position requires the same skills as the “classified District, Center Adjudication Officers and Immigration Inspector,” and asserts that those skills are not required of the “identified secondary positions of [Customs and Border Protection] Program Managers and Supervisor Program Managers.” PFR File, Tab 1 at 8; IAF, Tab 21 at 4. He also reargues that Asylum Officers, like Immigration Inspectors, have “direct port of entry responsibilities,” with the “added responsibility of credible fear determinations for arriving aliens at U.S. Ports of Entry,” unlike Center Adjudications Officers and District Adjudications Officers. *Id.* His arguments nonetheless still fail to show any factual or legal error in affirming the agency’s determination that the Asylum Officer position is not a

covered secondary position because: (1) he stipulated below that, during the relevant period, “Asylum Officers could be hired as outside applicants without CBPO or Immigration Inspector experience,” and (2) he does not offer any new argument or evidence demonstrating that “experience as a [CBPO] or equivalent experience in DHS is a mandatory prerequisite” for the Asylum Officer position. [Emphasis added]; IAF, Tab 22 at 24, Tab 24 at 4. This precludes him from establishing that his service as an Asylum Officer was a covered secondary position under the “Administrative” prong of the test, regardless of what his actual duties were. *Id.*; see *Villarreal v. Department of Justice*, 87 F. App’x 161, 163 (Fed. Cir. 2004) (LEO case).⁴

¶10 The appellant also argues, as he did below, that the agency’s implementation of the enhanced retirement benefits program is “unpredictable,” “arbitrary and unreasonable,” and the law is “broadly written and allows for an inclusive reading.” PFR File, Tab 1 at 8-9; IAF, Tab 21 at 4. He initially raised these arguments in his affirmative defense of harmful procedural error below although he does not reassert his harmful procedural error defense on review. The administrative judge thoroughly considered this line of arguments and, for the reasons stated in the initial decision, we agree with her well-reasoned finding that the appellant failed to show that the agency imposed arbitrary and unreasonable requirements for the implementation of its CBPO enhanced retirement coverage program. ID 14-15. Although the extension of LEO benefits to CBPOs by Congress in 2007 is relatively new, there is extensive case law interpreting the existing regulations governing eligibility for LEO benefits that the administrative judge reasonably applied to analyze the agency’s CBPO

⁴ The Board may rely on nonprecedential decisions of the U.S. Court of Appeals for the Federal Circuit if it finds the court’s reasoning persuasive. *See, e.g., Maibaum v. Department of Veterans Affairs*, [116 M.S.P.R. 234](#), ¶ 15 n.3 (2011). We find the court’s reasoning persuasive.

eligibility criteria and the appellant's claim for CBPO enhanced retirement benefits. ID at 3-6.

¶11 As the administrative judge observed in the initial decision, the agency provided un rebutted testimony stating that it developed the criteria for implementing CBPO enhanced retirement benefits in consultation with OPM and that the agency modeled its CBPO retirement system on the LEO retirement system. ID at 8-9, 14-15. The record supports the testimony of the agency's witnesses on this issue, and the criteria the agency developed closely resembles the criteria established in the Federal Employees Retirement System regulation defining primary and secondary LEO positions. IAF, Tab 22 at 24; ID at 14-15; *see* [5 C.F.R. § 842.802](#). Thus, the agency's criteria is rational, reasonable,⁵ and consistent with Congressional intent based on past interpretation, in regulation and case law, of the section of LEO retirement law into which Congress incorporated the amendment providing the same enhanced retirement benefit for CBPO officers. *See Fitzgerald v. Department of Defense*, [80 M.S.P.R. 1](#), 14-15 (1998) (When Congress adopts a new law incorporating a section of a prior law without change, Congress is presumed to have been aware of the administrative or judicial interpretation of the incorporated sections and to have adopted that interpretation), *aff'd*, 230 F.3d 1373 (Fed. Cir. 1999) (Table).

¶12 With regard to the appellant's additional argument that "the law is broadly written and allows for an inclusive reading," we disagree. PFR File, Tab 1 at 9. Because these enhanced retirement benefit programs are more costly to the government than traditional retirement plans and often result in the retirement of important people at a time when they would have otherwise continued to work for a number of years, eligibility for these programs is strictly construed. PFR File,

⁵ We note that the administrative judge did not defer to the agency's interpretation in making her decision.

Tab 3 at 8 & n. 26; *see Fritts*, [102 M.S.P.R. 265](#), ¶ 6; *Watson v. Department of the Navy*, [262 F.3d 1292](#), 1298 (Fed. Cir. 2001) (LEO cases).

¶13 Although the appellant further argues that the administrative judge did not consider the agency’s inconsistent application “of its core definition of what constitutes a secondary position,” his argument merely reflects his disagreement with the administrative judge’s well-reasoned and explained findings of fact and credibility determinations and does not warrant full review of the record. PFR File, Tab 1 at 8; *see Weaver v. Department of the Navy*, [2 M.S.P.R. 129](#), 133-34 (1980), *review denied*, [669 F.2d 613](#) (9th Cir. 1982) (*per curiam*). Moreover, the administrative judge considered the testimony of the director of the implementation team, Ronelle Rotterman, who explained that the agency determined that CBPO, GS-1895 experience was not required for the administrative Asylum Officer position and, therefore, she had recommended against designating the Asylum Officer position as a covered secondary position. We conclude that Ms. Rotterman’s testimony is consistent with the record as a whole and the agency’s “core definition of what constitutes a secondary position.” IAF, Tab 22 at 24.

¶14 The appellant also contends that the agency unreasonably excluded the Asylum Officer position from covered secondary service because he believes that certain individuals occupying covered secondary positions do not have prior experience in a covered primary position. His argument, however, does not change our determination on whether the agency was required to designate the Asylum Officer *position* as a covered secondary position under the applicable criteria. PFR File, Tab 1 at 7; *see generally Villarreal*, 87 F. App’x at 163 (discussing the purpose of the secondary LEO credit provision of the LEO retirement statute and finding that the Immigration & Naturalization Service had a rational reason for creating “particular administrative positions in which employees with prior law enforcement experience receive additional LEO credits,

even though some incumbents of those positions are not receiving LEO retirement benefits”).

¶15 Accordingly, we conclude that the administrative judge properly affirmed the agency’s reconsideration decision, which denied the appellant’s request for benefits under the agency’s CBPO enhanced retirement coverage.

ORDER

¶16 This is the final decision of the Merit Systems Protection Board in this appeal. Title 5 of the Code of Federal Regulations, section 1201.113(c) ([5 C.F.R. § 1201.113\(c\)](#)).

NOTICE TO THE APPELLANT REGARDING YOUR FURTHER REVIEW RIGHTS

You have the right to request the United States Court of Appeals for the Federal Circuit to review this final decision. You must submit your request to the court at the following address:

United States Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, DC 20439

The court must receive your request for review no later than 60 calendar days after your receipt of this order. If you have a representative in this case and your representative receives this order before you do, then you must file with the court no later than 60 calendar days after receipt by your representative. If you choose to file, be very careful to file on time. The court has held that normally it does not have the authority to waive this statutory deadline and that filings that do not comply with the deadline must be dismissed. *See Pinat v. Office of Personnel Management*, [931 F.2d 1544](#) (Fed. Cir. 1991).

If you need further information about your right to appeal this decision to court, you should refer to the federal law that gives you this right. It is found in Title 5 of the United States Code, section 7703 ([5 U.S.C. § 7703](#)). You may read

this law, as well as review the Board's regulations and other related material, at our website, <http://www.mspb.gov>. Additional information is available at the court's website, www.cafc.uscourts.gov. Of particular relevance is the court's "Guide for Pro Se Petitioners and Appellants," which is contained within the court's Rules of Practice, and Forms 5, 6, and 11.

FOR THE BOARD:

William D. Spencer
Clerk of the Board
Washington, D.C.