

# AFGE FIREFIGHTERS COUNCIL



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## **REPORT ON PATH TO RESOLUTION OF RETIREMENT PROBLEMS FACED BY DOD FIREFIGHTERS**

Beginning well over a year ago, many DoD firefighters who wanted to retire or who had reached the mandatory retirement age of 57, were being told that they lacked service credit to be eligible to retire under the special firefighter retirement provisions of CSRS and FERS. These firefighters occupied firefighter positions; their PD's indicated they were in "covered" positions; and they had consistently been paying the additional retirement contributions required by those in "covered" positions so it was not readily apparent as to why they were deemed ineligible.

The AFGE Firefighters Council included this item in its Action Plan completed in August 2009 and since that time, it has been diligently working toward a resolution of the problem and we believe that good faith efforts are now being made to address this situation.

To help you better understand the situation, we have prepared this background paper and suggest that you give it wide dissemination to help other firefighters understand the problem and what is being done about it.

### **I. What positions qualify a firefighter for retirement under the special retirement provisions of either CSRS or FERS?**

Both retirement systems have special provisions for firefighters. To start with, you must ask "who is a firefighter". The definition is different under each system. Under CSRS, a firefighter is an:

"...employee, the duties of whose position are primarily to perform work directly connected with the control and extinguishment of fires or the maintenance and use of firefighting apparatus and equipment, including an employee engaged in this activity who is transferred to a supervisory or administrative position;..." (5 USC 8331 (21))

Once federal employees were brought under Social Security, a new retirement system needed to be developed for federal employees for the reason that if it were not, then employees hired after SS coverage was mandated would have been forced to contribute approximately 7% to SS and 7% to CSRS while employees hired before 1984 would only be contributing 7% to CSRS. Clearly this would have been inequitable as well as deemed punitive by employees. So, a new retirement system, FERS, was designed and passed into law. Needless to say, I've been around a long time and I was intimately involved in the design and passage of FERS. At that time, it was clear that the Administration as well as many members of Congress was opposed to the special retirement provisions but we fought hard and prevailed. However, the definition of a firefighter was changed. Under FERS, a firefighter is an:

- “(A) an employee, the duties of whose position –
- (I) Are primarily to perform work directly connected with the control and extinguishment of fires; and
  - (II) Are sufficiently rigorous that employment opportunities should be limited to young and physically vigorous individuals, as determined by the Director considering the recommendations of the employing agency; and
- “(B) an employee who is transferred directly to a supervisory or administrative position after performing duties described in subparagraph (A) for at least 3 years;...” (5 USC 8401 (14))

Not only does FERS change the definition of a firefighter but it also imposes the additional requirement that in order to be eligible for special retirement, firefighters who move to a supervisory or administrative position must serve a minimum of 3 years in a position performing rigorous duties and both CSRS and FERS require that the move from what is often referred to as a “primary” or rigorous position to a secondary position must be without a break of more than 3 days in service.

The rest of this discussion will focus primarily on the FERS provisions applicable to firefighter retirement for the reasons that (1) most firefighters are now under FERS rather than CSRS and (2) it is the more stringent FERS definitions and requirements for eligibility that are at the root of the current problems.

The regulations implementing the FERS statutory provisions further clarify the firefighter special retirement provisions. They are found At 5 CFR Part 842. First, 5 CFR 842.802 provides various definitions which are key to understanding the so-called firefighter retirement. Under that section, a “Firefighter” is defined as 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 position and meets the conditions of §842.803(b).”

Review of this definition is in and of itself enlightening with respect to the current debate. The definition refers to a “rigorous position”. However, this is a regulatory definition and cannot override a statutory definition and as cited above, the statutory definition talks about “duties that are sufficiently rigorous” but this contradiction is somewhat mooted by the regulatory definition of “Rigorous position” which is that it:

“...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;...” (5 CFR §842.802)

It is also in the definition section that a distinction is made between primary and secondary firefighter positions. A primary position means one where the duties are “...paramount in influence or weight, that is, constitute the basic reason for the existence of the position...” (5 CFR 842.802). This goes hand-in-hand with the manner in which the Position Classification Standard for Fire Protection and Prevention Series, GS-0081 was been developed and published by OPM.

Specifically, it is stated at page 2 of the standards that “...if the position does not have a primary requirement for firefighting knowledge and skills, the position must be classified using other standards.”

Next, again relying on OPM’s determinations as set forth in the GS-0081 classification series, all nonsupervisory firefighter positions including the so-called parenthetical positions, appear to meet the first part of the definition of a “primary position”. This is because (1) the introduction to the GS-0081 series, as pointed out above, requires the primary duties of the position to be firefighting and it recognizes the “arduous” nature of the duties to be performed and (2) each successive nonsupervisory position specifies that the incumbent will perform...in addition to the duties of an entry-level firefighter, etc.

The GS-0081 series makes it clear that work leader positions are considered to be nonsupervisory. This would include lead firefighters. It also makes clear that for other positions where the title might sound as though it is a supervisory position, and hence, a secondary position, it is the duties that clearly define the type of position it is. Again, the definition section of 5 CFR Part 842, provides insight. First-level supervisors are defined as those supervisors “...who have direct and regular contact with the employees they supervise. First-level supervisors do not have subordinate supervisors...” (5 CFR §842.802). This definition encompasses many crew Chief and station captain positions but in order to make a final determination of whether their positions are primary or secondary, the duties performed by individuals occupying those positions have to be examined to insure that their primary duties are the control and extinguishment of fires. If so, then it can be said that they occupy primary positions.

With respect to fire protection/inspection positions, again an examination would have to be made to determine the nature of the duties they are required to perform. While most of these positions would be deemed to be secondary, many could be primary if the duties are primarily the control of fires and are sufficiently rigorous to satisfy the definitional standard.

Secondary positions are defined for firefighter retirement purposes under the FERS regulations as being clearly in the firefighting field and which are either:

“(1) Supervisory, that is, a position whose primary duties are as a first-level supervisor of...firefighters in rigorous positions; or (2) Administrative, that is, an executive, managerial, technical, semiprofessional, or professional position for which experience in rigorous...firefighting position...is a mandatory prerequisite.”

What is described above indicates that the duties of a position are paramount in making the determination that a position is (1) a firefighter position and (2) if it is a firefighter position, whether it is a primary or a secondary firefighter position. However, the statutory provisions also require two other factors to be met. The first is that employment opportunities for firefighters must be limited to young individuals. Pursuant to 5 U.S.C. 3307, DoD and most other agencies have established a maximum entry age for firefighters (age 37) so this poses no problems at this time.

The second statutory requirement is that the employment opportunities be limited to “physically vigorous” individuals. We believe this statutory requirement is met by the requirement that applicants for firefighter position must meet medical standards and must continue to meet those standards throughout the time they occupy a position.

Most of the above pertains to “positions” and to applicants for positions. What is important is to be aware that the time an employee occupies a firefighter position may not make that particular individual eligible for retirement under the firefighter provisions. To be eligible under FERS, an individual must have 25 years of service or be at least 50 years of age and have 20 years of service in a firefighter position. In addition, if that individual is in a secondary position, he/she must have completed at least 3 years of continuous service in a primary position and then moved to a secondary position without a break of more than 3 days. (5 CFR §842.803).

2. How is approval for coverage under the firefighter provisions obtained?

OPM has the statutory authority to make the determination that a position is a “covered” position but it has delegated this responsibility to the Agencies. 5 CFR §842.803 provides in pertinent part:

“Agency head means, for the executive branch, the head of an executive agency as defined in 5 U.S.C. 105;...For the purpose of an approval of coverage under this subpart, agency head is also deemed to include the designated representative of the head” who “...for provisions dealing with ...firefighters, ...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. For the purpose of a denial [of] coverage under this subpart, agency head is also deemed to include the designated representative of the agency head, as defined in the first sentence of this definition, at any level within the agency.”

5 U.S.C. 105 refers to “Executive Departments” which means retirement coverage determinations for firefighter positions is delegated to DOD and not to the service components.

3. What is the cause of the current problem?

In a nutshell, for years position descriptions for various firefighter positions were routinely submitted through the chain of command for approval as being “covered” for firefighter retirement eligibility. There was no standardized methodology for determinations and no one seemed to pay particular attention to what duties were actually being performed by firefighters. After OPM amended the GS-081 series to recognize that the performance of certain HazMat and EMS duties was grade controlling which it did by creating the so-called “parenthetical” job titles, e.g. Firefighter (Haz/Mat Technician), most of the service components issued new PD’s for their firefighter positions. They coded by PD’s and SF-50’s indicating that the positions were “covered” positions and the incumbents continued to pay the additional retirement contributions required for firefighter retirement eligibility. However, few of these positions had ever been officially approved by DoD’s designated agent (DoD General Counsel) as either firefighter primary or secondary positions.

A few years later and after the change in top DoD personnel, the problem came to the fore. Firefighters who had reached the mandatory retirement age or who wanted to retire voluntarily believing they had sufficient service credit, were being told that they were ineligible to retire because they had not occupied a position approved for firefighter retirement coverage for the past few years. At first the problem seemed to be mostly an Army problem but it soon became apparent that some firefighters employed by the other service components also were being told that lacked service credit.

The Army problem was more widespread simply because in the past, they had attempted to obtain coverage approval for positions based on grades rather than on the duties of the position.

### 3. What is being done to correct the problem?

By January of 2010, it appeared that there were perhaps over 1,000 firefighter positions affected and as more and more firefighters either faced retirement, wanted to retire, or simply became aware of the problem, the number of affected positions seemed to grow daily. And, as the numbers grew, so did the number of individuals and groups who wanted to solve the problem. Unfortunately, many of those neither understood the statutory and regulatory provisions pertaining to the firefighter retirement provisions nor did they understand the duties performed by firefighters or the organizational chart for fire departments. This led to Congressional inquiries, threatened enforcement actions and other actions all of which neither solved the problem nor sped up resolution.

The AFGE Firefighters Council's Executive Committee discussed this problem in August 2009 and included it in its action plan. Since that time, it has diligently pursued resolution. Most recently, it prepared a background paper for the DoD F&ESWG for use by the F&ES Program Managers. That paper clearly defined the problem, set forth the statutory and regulatory requirements to be met for position coverage approval and suggested a course of action to be taken.

Next, at the AFGE Firefighters Council's urging, the DoD F&ESWG met with representatives from CPMS. Approval for coverage must be submitted from the service components to CPMS who reviews and recommends and then forwards to PPS for final review and then to DoD's General Counsel for final approval. CPMS has prepared and issued to each service component explicit "Guidelines for Requesting Special Retirement Coverage for a Firefighter (FF) Position". It has put together a team of 15 or so individuals to deal with the current back-log and it has prioritized the pending cases. Those who are facing mandatory retirement are moved to the top of the list followed by those who have indicated they desire to retire followed by all other cases. Once a package is submitted to CPMS, the processing time is about 30 days before it is sent to PPS and then to the General Counsel—the whole process taking 30-60 days. In addition, the DoD General Counsel has approved an extension of time for those facing mandatory retirement coverage.

### 4. What next and What Can or Should You Do?

CPMS has requested the service components (Manpower) to identify priority cases, e.g. those facing mandatory retirement followed by those who have indicated their desire to retire. And, it has requested that the service components not send any totally new position descriptions for approval until such time as the current back-log is well under control.

The AFGE Firefighter Council will continue its work with the DoD F&ESWG in resolving this problem. It recognizes that there are some issues that are raised by the current actions being taken and it will endeavor to insure that those issues are properly and promptly resolved. This is not a problem that will be permanently fixed and it will require the Council's constant attention and action.

The F&ES Program Managers are currently tasked with developing a career roadmap for firefighters. They will coordinate their efforts so that there will not be significant differences between the service components. Once that is done, the AFGE Firefighters' Council will work toward F&ESWG's development of position templates that can be utilized at every installation so that all firefighter

position descriptions will resemble one another and contain the elements necessary to obtain approval for firefighter retirement coverage. It is envisioned that such templates will set forth the basic duties of a position and indicate where installation mission-specific duties should be set forth.

Every firefighter should determine whether the position they currently occupy as well as all former positions occupied have been approved for coverage under the firefighter retirement provisions. This can be done by contacting your local HR who can assist you. The coding on personnel actions and on PD's is not sufficient. There must be an approval letter. If your position has been approved, then no problems should arise unless your PD is changed. If any position you occupied was not approved, then you must work with your HR to move an approval request up through the chain of command.

If you are waiting for approval and want to know where your package is, then you should start with your HR who should be able to find out if your package has been forwarded to CPMS. If it has, then final action should be taken and notification received within 30-60 days.

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