

TESTIMONY

of

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**“Time to Bite the Bullet: Fixing Federal Law
Enforcement Pay and Benefits”**

Before the
Subcommittee on Civil Service and Agency Organization
Committee on Government Reform
U.S. House of Representatives

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Good Morning Madam Chairman, Ranking Member Davis and distinguished members of the Subcommittee. I am Lou Cannon, President of the District of Columbia Lodge of the Fraternal Order of Police, and Chairman of the National F.O.P.'s Federal Officers Committee. It is a pleasure to appear before you again on behalf of National President Chuck Canterbury and the more than 318,000 members of our organization to discuss the issue of Federal law enforcement pay and benefits. The title of today's hearing is extremely appropriate, and highlights the focus which the Subcommittee has placed on these issues throughout the 108th Congress. The Subcommittee is to be commended for its efforts on this and other issues important to Federal employees, and we are grateful for the opportunity to appear before you here today.

In July 2003, the F.O.P. appeared before the Subcommittee to present its views and concerns with respect to inequities in the pay and benefits received by Federal law enforcement officers. Among the issues we raised at that time was the top priority for the more than 25,000 Federal officers who are members of our organization: the continued inequitable treatment of Federal police officers and other law enforcement employees under the "LEO" or "6(c)" retirement provisions of Chapters 83 and 84 of Title 5, U.S. Code, and our support for H.R. 2442, the "Law Enforcement Officers Equity Act," introduced by Representatives Bob Filner and John McHugh. The release of the Department of Homeland Security's (DHS) proposed regulations regarding a new human resources management system and the passage of similar legislation for the Department of Defense—and their potential effects on existing provisions of law concerning pay—again brought this issue to the fore.

At no time in our nation's history has there been a greater need to ensure that the Federal government is able to effectively recruit and retain its Federal law enforcement workforce. Since the 9/11 terrorist attacks, the responsibilities of law enforcement at every agency have changed dramatically. In addition to their role maintaining law and order, Federal law enforcement officers must now confront new challenges such as those posed by terrorists using chemical, biological or radiological weapons to attack our nation. Because of the critical nature of these issues, the F.O.P. was pleased to support the "Federal Law Enforcement Pay and Benefits Parity Act of 2003" introduced by you, Madam Chairman, and your counterpart on the Governmental Affairs Committee, Senator George Voinovich. As you know, the legislation which was signed into law in December directed the Office of Personnel Management (OPM) to report to Congress by 30 April on the disparities in law enforcement classification, pay and benefits across the Federal government, and to provide recommendations for addressing these disparities. The contents of the final report, which was released this past Friday, has been a subject of great interest to the membership of the F.O.P. And while we are still reviewing the findings and recommendations it contains, we would like to briefly discuss our views on a number of key issues.

Retirement

When the F.O.P. last appeared before the subcommittee, we argued that reform of the "law enforcement officer" retirement system would improve the recruitment and retention efforts of law enforcement agencies throughout the Federal government, bring equity among the various law enforcement and police occupations, and permanently end the confusion regarding which requirements qualify law enforcement employees for law enforcement status. OPM has made

several general recommendations with regard to the future of the law enforcement officer retirement system; based primarily on OPM being “given the authority necessary to modernize LEO retirement benefits.”¹ One option which they presented was the creation of a “second tier” of law enforcement benefits, which would fall between current LEO benefits and regular retirement benefits. In addition, they noted that if provided with this broad authority, they would be able to ensure consistency in benefits (“where appropriate”), allow flexibility in establishing retirement eligibility standards and mandatory requirements, and have “the ability to establish a more responsive benefits structure that will give agencies maximum flexibility for recruitment and retention of experienced personnel.”²

Thus, OPM’s report raises several important issues regarding reform of the law enforcement retirement system:

1. If the goal is to eliminate disparities in the LEO retirement system, how can Congress ensure that granting OPM the authority they seek to tailor the program, through regulations, to agency-specific needs will not in fact create new disparities or increase existing ones? For example, if OPM was able to grant a specific agency the authority to offer enhanced retirement benefits to meet an urgent staffing crisis, what safeguards would be needed to ensure that it did not result in a drain on the personnel of other agencies who were not given this authority? Obviously, the problems with the current system were showcased in the success of the Transportation Security Administration’s (TSA) efforts to draw experienced law enforcement personnel from other agencies because of their ability to provide higher pay and better retirement benefits. Thus, is it advisable to detach what is a guaranteed benefit for all Federal employees from statutory law and, in essence, allow each agency to have its own retirement program for law enforcement officers? Eliminating the existing disparities in the LEO retirement system would seem to require, at a minimum, a basic statutory framework under which all Federal law enforcement personnel are included and provided with a fixed benefit.

2. If the primary purpose of the LEO retirement system is to enable agencies to maintain young and vigorous workforces and, as OPM has acknowledged it has been successful in this regard, what problems have been caused by the requirements for retirement for those agencies which provide this benefit to their employees? The concerns which have been expressed regarding the loss of experienced personnel if LEO retirement is offered across the board are only valid if you discount the importance to the law enforcement mission for agencies to be able to maintain a young and vigorous workforce. An officer who joins a Federal police force at, for example, the age of 22 would not be eligible for regular retirement until age 47 at the earliest. As the officer ages into his fifties, the question becomes not whether he or she can still provide his agency with additional years of service, but what type of service will he or she be capable of performing.

The jobs performed by Federal public safety employees are unique compared to most occupations throughout the government. Regardless of the physical rigors which may be required in an average workweek, they are still required to place their lives on the line each and every day

¹ *Report to the Congress: Federal Law Enforcement Pay and Benefits*, Office of Personnel Management, July 2004, Page 8.

² *Report*, Page iii.

to protect U.S. officials, their fellow employees, and the visitors to their facilities. This uniqueness also means that, unlike most other positions within the Federal government, such factors as age and physical ability are extremely relevant to an employee's ability to perform his or her assigned duties. That is why having a young and vigorous workforce is essential to ensuring that when the need arises, every officer in a given department is ready and capable of subduing an individual resisting arrest or chasing a fleeing subject.

In 1996, Congress addressed this issue when it enacted a permanent exemption for public safety employers from the *Age Discrimination in Employment Act* as part of the omnibus spending bill of 1996. This law allowed State and local governments to again set and enforce maximum hiring ages for new employees and a mandatory retirement age without facing individual lawsuits alleging age discrimination. The Fraternal Order of Police strongly supported the enactment of this law to ensure that public safety personnel are able to meet the physical demands of their profession. During floor consideration of a similar bill which passed the House of Representatives in 1995, then Subcommittee on Employer-Employee Relations Chairman Harris Fawell noted that "the public safety field is one of the rare exceptions where one's age is relevant to one's ability to perform effectively as a firefighter or law enforcement officer."³ Rep. Major Owens also spoke on the need for mandatory hiring and maximum separation ages:

"Age does indeed affect an individual's ability to perform the duties of a public safety officer. This is not a stereotype. This is not ageism. This is a medical fact. Physical ability declines with age. For example, aerobic capacity declines at a rate of 1 percent per year after age 30. Strength declines at a rate of 10-13 percent every decade. The risk of sudden incapacitation also clearly increases with age, increasing sixfold between the age of 40 and 60 years of age. These physical effects are not experienced by all people to the same degree or at the same precise time. But they pose a significant problem to public safety agencies in their efforts to maintain a fit and effective workforce."⁴

Not only is an appreciation of the unique physical demands and abilities required in law enforcement work essential to understanding the need for an earlier retirement for public safety officers; but the health and physical risks associated with their particular occupation must also be taken into account. One recent study, for example, found that "police officers are twice as likely as the rest of us to suffer heart attacks, strokes and other cardiovascular disease." The study, conducted by Iowa State University and published in 1998, looked at 232 retired male law enforcement officers and found that the rate of heart attacks and related conditions among these individuals was 31.5 percent, compared to 18.4 percent for the general population. When known risk factors were taken out of the equation, "working as a law enforcement officer meant a 2.34 times greater risk of disease." These unseen risks, such as the prevalence of on the job injury or disability, constant stress, and the increased risk of heart and hypertension disorders, are all factors that need to be considered when looking at the necessity for police officers and others to retire earlier than other Federal employees.

³ Statement of Rep. Harris Fawell, *Congressional Record*, 28 March 1995, Page: H3822.

⁴ Statement of Rep. Major Owens, *Congressional Record*, 28 March 1995, Page H3823.

3. If the definition of “law enforcement” officer is inflexible and does not allow agencies to easily expand LEO retirement coverage to their employees, how should the statutory definition be revised to better reflect the hazards and requirements of the modern day law enforcement mission? A “first step” in any reform effort is to amend the definition of what constitutes a law enforcement officer under the law. There appears to be very little if any disagreement that the current definition is outdated and does not reflect the increased hazards faced by today’s Federal law enforcement personnel. Indeed, OPM notes in the report that the current definition of “law enforcement officer” “has not kept pace with the evolution of the Federal law enforcement workforce,” and “imposes an out of date, black-and-white concept of law enforcement and criminal investigation on the broad continuum of law enforcement duties of the present day.”⁵

The question, then, is not whether OPM should be granted with the regulatory authority to make alterations to the Federal LEO retirement system, but with the eventual breadth and scope of that authority, and what issues must be addressed through revisions to existing law.

Classification, Basic Pay & Premium Pay

In its report to Congress, OPM has recommended that it be “given the authority to establish a flexible basic pay framework for Federal law enforcement employees throughout the Government,...Consistent with the paybanding framework that has been proposed for DHS, this Governmentwide framework would include a common structure of law enforcement occupations, a structure of bands or rate ranges for various levels of work, and provisions for establishing and adjusting those rate ranges.”⁶ Such a framework would provide Federal law enforcement agencies with “considerable flexibility to design tailored systems for performance management and individual employee pay adjustments.”⁷

With regard to the issue of premium pay, OPM has again recommended that Congress grant the agency the “regulatory authority necessary to establish a framework of premium pay rules for Federal law enforcement employees throughout the Government,” and to work with the agencies to “develop appropriate solutions to existing problems associated with premium pay caps or other premium pay provisions.”⁸ This would allow OPM to “work with agencies so that premium pay rules can be more easily modified to address current needs or adjusted to correct any problems that surface;” and develop regulations governing system coverage, overtime pay for FLSA-exempt employees, pay differentials, hazardous duty pay, other special payments and differentials, and when overtime is creditable as basic pay for retirement purposes.⁹

We agree with OPM’s assertion that the General Schedule system does not fully value the work performed by Federal law enforcement personnel, and that a new, separate pay and classification system may be necessary for these occupations. Likewise, we believe that all law enforcement employees can be accommodated under a framework that provides for general consistency

⁵ *Report*, Page 14.

⁶ *Report*, Page 26.

⁷ *Ibid.*

⁸ *Report*, Page 44.

⁹ *Report*, Page 57.

among law enforcement agencies, recognizes the fluctuations in different labor markets around the country, and which would prevent the type of “talent drain” which was evident in 2002 with the creation of the Transportation Security Administration and the increased staffing requirements of their Federal Air Marshal program. However, given OPM’s request for basic and premium pay- and classification-setting authority similar to that provided to the Department of Homeland Security (DHS), it is important to look at those issues which were raised by the release of the proposed DHS Human Resources Management System earlier this year.

In creating the Department of Homeland Security, Congress recognized the need for a centralized national effort to strengthen the safety and security of our nation in the wake of the devastating terrorist attacks of 11 September 2001. To carry out its primary mission, Congress transferred more than 20 agencies from Departments across the Federal government. Each of these agencies brought with them certain personnel policies and practices which were uniquely their own, creating a need for the new Department to develop a human resources management system which would bring all of their employees within a single, consolidated system. As the preamble to the proposed regulations made clear, “the Department of Homeland Security was created in recognition of the paramount responsibility to safeguard the American people from terrorist attacks and other threats to homeland security.”¹⁰ This primary mission of the Department is carried out by its more than 40,000 law enforcement employees, which makes DHS the second largest employer of law enforcement officers in the Federal government behind the Department of Justice.

In its formal public comments, the F.O.P. argued that DHS and OPM had not successfully taken into consideration the unique and distinctive work performed by the Department’s law enforcement employees as opposed to that performed by those in its other administrative and non-law enforcement positions when drafting the proposed rule. With respect to the three areas of pay, classification and performance management, DHS and OPM intend to establish a “pay for performance” system “designed to ensure that employees have a clear understanding of their expected performance and to reinforce and reward high-performing employees who advance and support the Department’s mission.”¹¹ This is indeed a laudable goal—one which should be the same for all Federal agencies—however, the problem lies primarily in extending such a system to the rank and file law enforcement employees of the Department who serve on the front lines in the war on terror at home, and whose positions are not comparable to any other in the Federal service.

Given the lack of specificity in the proposed rule, the F.O.P. is primarily concerned with how such a system would be applied to the law enforcement employees of the Department, as well as with its implementation. First and foremost, the Department has not provided any evidence that a “pay for performance” system is appropriate or feasible for law enforcement work in general or, in particular, that such a system as DHS and OPM are contemplating can be successfully applied on the scale which has been proposed.

¹⁰ Proposed Rule, Department of Homeland Security/Office of Personnel Management, *Federal Register*, Vol. 69, No. 34; 20 February 2004, Page 8035.

¹¹ Proposed Rule, Page 8036.

Experts in the human resources field have noted that there are several potential downsides of “pay for performance” systems, ones which could be potentially exacerbated by their application to law enforcement positions and, more importantly, compromise the ability of DHS to carry out its mission. Steven Kelman, a professor at Harvard University’s John F. Kennedy School of Government, has noted that one potential problem arises from the effect that providing extra pay for strong performance has on “people who are intrinsically motivated to perform,” in that the use of “increased extrinsic rewards might actually produce poorer performance among intrinsically motivated people.”¹² Kelman argues that such a system presents a special problem for government agencies where public sector workers are more likely to be intrinsically motivated to perform their work than those in the private sector, and where the size of the rewards available to high-performers in the public sector are likely to be “modest” when compared to those available from private sector companies. In addition, Kelman argues that a second problem with such systems is that “individually based reward systems can cause harm when collaboration, teamwork and information sharing in a work group are crucial to good performance.”¹³ Nowhere are these statements more applicable than to the law enforcement profession. The mission carried out by front-line police officers and criminal investigators works best when it works in a team environment, where officers are not expected to compete with one another but to work together to prevent crimes, and arrest those who violate the law.

The second problem with implementing a pay for performance system for law enforcement officers arises from the need to establish “performance appraisal factors” for a position which all too often has no counterpart outside of the Federal government and whose duties, responsibilities, and impact on public safety are extremely difficult to quantify. Obviously, basing the annual raises and pay adjustments on such factors as seizures made, number of arrests, or other factors related to the performance of the employee’s official duties would create a culture that weakens the homeland security mission. In addition, the problem with developing these standards is that “job standards were much easier to define in the industrial age than today, now that most federal employees are expected to act more independently and use more discretion...[and] beyond some basic output measures and standards of conduct, many jobs rely on subjective standards of effectiveness.”¹⁴ During a briefing on the proposed regulations, held on 9 March at OPM headquarters, OPM and DHS officials acknowledged that the scope and nature of these performance appraisal factors were still under review. Therefore, it would seem to be unwise to implement such a system for law enforcement employees at DHS or elsewhere without first ascertaining whether such a system is feasible or appropriate for a profession which values teamwork over individualism, and which requires an employee to willingly place his life on the line as a regular part of his everyday duties.

The question again is not whether OPM should be provided with authority to set a classification and pay structure specifically tailored for Federal law enforcement personnel, but with the breadth and scope of that authority. Further, despite OPM’s assertion that ensuring consistency does not require policies that are “set in the ‘concrete’ of statute,” the F.O.P. believes that there are many areas in which consistency can only be achieved through law. Indeed, resolution of such issues as system coverage, the level of flexibility provided to individual agencies, long term

¹² “The Right Pay,” by Steven Kelman, GovExec.com, May 15, 2003.

¹³ *Ibid.*

¹⁴ “The Rating Game,” by Brian Friel, *Government Executive Magazine*, 15 August 2003.

policies to improve recruitment and retention of personnel across the board, and many others will require congressional involvement and oversight.

In conclusion, Madam Chairman, let me say again on behalf of National President Chuck Canterbury and the membership of the Fraternal Order of Police, that we appreciate your proven commitment to America's Federal, State and local law enforcement officers. The F.O.P. looks forward to working with you and the other Members of the Subcommittee on this critically important issue, and I would be pleased to answer any questions you may have.