

No. 05-147

In the Supreme Court of the United States

JOHN D. CROWLEY, PETITIONER

v.

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT*

BRIEF FOR THE UNITED STATES IN OPPOSITION

PAUL D. CLEMENT
*Solicitor General
Counsel of Record*

PETER D. KEISLER
Assistant Attorney General

DAVID M. COHEN
JAMES M. KINSELLA
SCOTT D. AUSTIN
*Attorneys
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217*

QUESTION PRESENTED

Whether the court of appeals properly concluded that petitioner is not a “law enforcement officer” within the meaning of the Federal Law Enforcement Pay Reform Act of 1990, Pub. L. No. 101-509, §§ 401-407, 104 Stat. 1465-1467 (5 U.S.C. 5305 note), which incorporates the definition contained in the civil service retirement statute, 5 U.S.C. 8331(20).

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	7
Conclusion	14

TABLE OF AUTHORITIES

Cases:

<i>Bingaman v. Department of Treasury</i> , 127 F.3d 1431 (Fed. Cir. 1997)	3, 8, 10
<i>Hall v. Department of the Treasury</i> , 264 F.3d 1050 (Fed. Cir. 2001)	6, 8, 11
<i>Hannon v. DOJ</i> , 234 F.3d 674 (Fed. Cir. 2000), cert. denied, 534 U.S. 1065 (2001) ..	3, 7, 11
<i>Hobbs v. OPM</i> , 58 M.S.P.R. 628 (1993)	8, 10
<i>Koenig v. Department of the Navy</i> , 315 F.3d 1378 (Fed. Cir. 2003)	6
<i>Litton Indus. Prods. Inc. v. Solid State Sys.</i> <i>Corp.</i> , 755 F.2d 158 (Fed. Cir. 1985)	13
<i>Obremski v. OPM</i> , 699 F.2d 1263 (D.C. Cir. 1983)	11
<i>Watson v. Department of the Navy</i> , 262 F.3d 1292 (Fed. Cir. 2001), cert. denied, 534 U.S. 1083 (2002)	4, 8, 11, 12
<i>Watson v. Department of the Navy</i> , 86 M.S.P.R. 318 (2000)	12

IV

Statutes and regulations:	Page
Back Pay Act of 1966, 5 U.S.C. 5596	6
Controlled Substances Act, 21 U.S.C. 801 <i>et seq.</i>	5
Federal Law Enforcement Pay Reform Act of 1990, Pub. L. No. 101-509, §§ 401-407, 104 Stat. 1465-1467	2
§ 404, 104 Stat. 1466	2
5 U.S.C. 5541(3)(A)	2
5 U.S.C. 5545a(a)(2)	10
5 U.S.C. 8331(20)	2, 11
5 U.S.C. 8347(a)	2
5 U.S.C. 8401(17)	11
5 C.F.R.:	
Section 831.902	3
Section 831.903-831.906	2
Section 831.906(a)	2
Section 842.802	12
Miscellaneous:	
119 Cong. Rec. 30,596 (1973)	11
S. Rep. No. 948, 93d Cong., 2d Sess. (1974)	10

In the Supreme Court of the United States

No. 05-147

JOHN D. CROWLEY, PETITIONER

v.

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT*

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-24a) is reported at 398 F.3d 1329. The opinions of the United States Court of Federal Claims (Pet. App. 26a-39a, 40a-54a, 55a-173a, 174a-200a) are reported at 57 Fed. Cl. 376, 56 Fed. Cl. 291, 53 Fed. Cl. 737, and 48 Fed. Cl. 15.

JURISDICTION

The judgment of the court of appeals was entered on February 17, 2005. A petition for rehearing was denied on April 27, 2005 (Pet. App. 25a). The petition for a writ of certiorari was filed on July 26, 2005. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Federal Law Enforcement Pay Reform Act of 1990 (FLEPRA), Pub. L. No. 101-509, §§ 401-407, 104 Stat. 1465-1467 (5 U.S.C. 5305 note), entitles a federal “law enforcement officer” (LEO) to special pay benefits, including supplemental pay for working in selected cities. 5 U.S.C. 5305 note (FLEPRA § 404, 104 Stat. 1466). An employee may qualify for LEO special pay benefits in one of two ways: (1) by serving in a position that is formally designated as an LEO position; or (2), if the employee does not occupy such a position, by asking his employer to recognize that he nonetheless qualifies for LEO status. 5 C.F.R. 831.903-831.906. An employee who applies for LEO special pay benefits bears the burden of proving that he qualifies as an LEO. 5 C.F.R. 831.906(a); see Pet. App. 19a n.11.

To qualify as an LEO under FLEPRA, a federal employee in the Civil Service Retirement System (CSRS) must meet the definition of “law enforcement officer” contained in the civil service retirement statute. See 5 U.S.C. 5541(3)(A) (incorporating 5 U.S.C. 8331(20)). That CSRS statute defines “law enforcement officer” 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, including an employee engaged in this activity who is transferred to a supervisory or administrative position.

5 U.S.C. 8331(20).

The Office of Personnel Management (OPM) has promulgated regulations elaborating on this definition. See 5 U.S.C. 8347(a). The regulations specify that an LEO

“does *not* include an employee whose primary duties involve maintaining law and order, protecting life and property, guarding against or inspecting for violations of law, or investigating persons other than persons who are suspected or convicted of offenses against the criminal laws of the United States.” 5 C.F.R. 831.902 (emphasis added).

In addition, the Merit Systems Protection Board (MSPB)—which adjudicates disputes over whether employees qualify for LEO special retirement benefits—has extrapolated from the statutes and regulations various factors that it has determined illuminate the inquiry whether an employee meets the statutory definition of an LEO. As the Federal Circuit has explained:

According to the Board, [an LEO] within the statutory contemplation 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.

Bingaman v. Department of Treasury, 127 F.3d 1431, 1436 (Fed. Cir. 1997); see Pet. App. 12a-13a. The Board also “consistently has recognized * * * that hazard is a significant element of law enforcement work.” *Hannon v. DOJ*, 234 F.3d 674, 679 (Fed. Cir. 2000) (citing MSPB decisions), cert. denied, 534 U.S. 1065 (2001). The Federal Circuit has observed that the Board’s factors capture “the essence of what Congress intended.” *Ibid.* (quoting *Bingaman*, 127 F.3d at 1236).

Subsequent to *Bingaman*, the MSPB adopted an approach of more affirmatively examining the reasons

for the creation and existence of the employee's position, in addition to the employee's actual duties. See *Watson v. Department of the Navy*, 262 F.3d 1292, 1297 (Fed. Cir. 2001), cert. denied, 534 U.S. 1083 (2002). In *Watson*, the Federal Circuit agreed with the MSPB that this position-oriented approach was "more faithful to the language of the statutes and the regulations," which refer specifically to the "position" at issue. *Id.* at 1297, 1299. In so doing, *Watson* identified the five "most probative" factors in determining whether the statutory definition of LEO is met:

- 1) whether the officers are merely guarding life and property or whether the officers are instead more frequently pursuing or detaining criminals;
- 2) whether there is an early mandatory retirement age;
- 3) whether there is a youthful maximum entry age;
- 4) whether the job is physically demanding so as to require a youthful workforce; and
- 5) whether the officer is exposed to hazard or danger.

Id. at 1303. The Federal Circuit noted that the *Bingaman* factors "may also be considered as necessary and appropriate." *Ibid.* Thus, as the decision below recognized, "*Watson* marked a further step in the evolution of the case-by-case framework first adopted in *Bingaman*." Pet. App. 13a.

2. a. Petitioner served as a diversion investigator for the Drug Enforcement Administration (DEA) within the United States Department of Justice (DOJ), and in subsequent supervisory or administrative positions. See Pet. App. 4a-5a, 57a; see also *id.* at 5a n.5 (explaining that "[i]n order to qualify for supplemental pay under the FLEPRA, [petitioner] must show that he served in a primary LEO position and was properly transferred

from that position to a valid secondary (administrative or supervisory) LEO position”). The work of a DEA diversion investigator involves the investigation of the diversion of legal but controlled substances from legitimate channels of commerce to illegal ones. *Id.* at 4a. The work involves inspections of manufacturers and distributors of controlled substances to assure compliance with the Controlled Substances Act, 21 U.S.C. 801 *et seq.* Pet. App. 4a. Diversion investigators also may participate in criminal investigations; under agency policy, however, they cannot carry firearms, execute arrest or search warrants, participate in undercover activities of any kind, direct or pay informants, or conduct moving surveillance. *Ibid.* In addition, at the time petitioner served, diversion investigators had no physical fitness requirements, age requirements, or agency-imposed obligations to be on call 24 hours a day. *Ibid.*

The position of a DEA diversion investigator is not formally designated as an LEO position, but petitioner applied to DOJ for LEO status on the ground that he qualified as an LEO under the CSRS. In 1999, DOJ denied petitioner’s claim that he served as an LEO (or in qualifying secondary positions) between October 1, 1991, and June 15, 1997. Pet. App. 6a.

b. Petitioner filed a complaint with the MSPB for LEO retirement credit and, concurrently, a complaint in the Court of Federal Claims to recover supplemental pay under FLEPRA for the period from October 1, 1991, to October 1, 2001. Pet. App. 6a. Before the MSPB determined petitioner’s retirement claims, the Court of Federal Claims issued a decision following trial reversing DOJ’s determination that petitioner did not serve as an LEO. *Id.* at 55a-173a. The court thus concluded that petitioner was entitled to supplemental

pay under FLEPRA Section 404 from January 1, 1992, to April 1, 2001, *id.* at 173a, plus interest under the Back Pay Act of 1966, 5 U.S.C. 5596. Pet. App. 39a.

3. The Federal Circuit reversed. Pet. App. 2a-23a.¹ The court of appeals reviewed the evolution of its precedent interpreting the statutory definition of “law enforcement officer.” *Id.* at 12a-15a (discussing *Bingaman, Hannon, Watson, Hall v. Department of the Treasury*, 264 F.3d 1050 (Fed. Cir. 2001), and *Koenig v. Department of the Navy*, 315 F.3d 1378 (Fed. Cir. 2003)). The court of appeals reaffirmed that the analytical approach adopted in *Watson*—consideration of the reasons for the creation and existence of the employee’s position as well as the individual facts of each employee’s actual duties—was consistent with the language of the statute. *Ibid.* In so doing, the court explained that the factors set forth in its prior decisions to assist in determining whether a particular position satisfied the statutory definition of an LEO could be synthesized into “two main considerations”: (1) “the physical vigorousness required by the position in question” and (2) “the hazardousness of a position,” although it observed that “[h]azard, while important, is secondary to physical vigorousness.” *Id.* at 16a-17a. The court reiterated that, even if a position fails to qualify for LEO status, the employee nevertheless may be able to demonstrate that his actual duties in fact qualify for LEO status. *Id.* at 20a.

Applying that carefully developed framework to the facts of this case, the Federal Circuit concluded that petitioner did not satisfy the definition of an LEO. Pet. App. 20a-23a. The Federal Circuit concluded that the

¹ The Federal Circuit affirmed the trial court’s conclusion that it had jurisdiction over petitioner’s FLEPRA claims. Pet. App. 8a-11a.

position of diversion investigator had no strenuous physical fitness requirements, no maximum entry level age requirement or mandatory retirement age, and no official requirement that diversion investigators be on call 24 hours a day. *Id.* at 21a-22a. The court also concluded that “there is little in the official duties of a [diversion investigator] that would incline us to find the position to be hazardous in nature.” *Id.* at 22a. The court noted that it was undisputed that employees occupying the position were not authorized to carry a firearm and that there was no evidence that the position existed for the purpose of pursuing and detaining criminals. *Ibid.* The court further observed that nothing in the position description for diversion investigators mentions requirements for contact with or interrogations of criminal suspects; agency policy specifically led diversion investigators away from activity that would tend to lead to contact with criminals and suspects; and anecdotal contacts with criminals were insufficient to show that petitioner’s position required frequent and consistent criminal contact. *Id.* at 22a & n.14. Finally, the Federal Circuit concluded that petitioner had failed to establish that his “actual duties conflict[ed] with his job description to the extent required to gain LEO status.” *Id.* at 23a.

ARGUMENT

The court of appeals properly concluded that petitioner does not qualify for LEO supplemental pay. The court of appeals’ unanimous decision does not conflict with any decision of this Court or any other court of appeals, or with any other decision of the Federal Circuit. This Court recently denied a petition for a writ of certiorari that sought review of a substantially similar question. See *Hannon v. DOJ*, 234 F.3d 674 (Fed. Cir. 2000),

cert. denied, 534 U.S. 1065 (2001) (No. 01-372).² Further review is not warranted in this case either.

1. Petitioner's central contention (Pet. 6) is that the court of appeals has "strayed from the plain language of the statute" in determining an employee's eligibility for LEO status. In particular, petitioner objects (Pet. 9) to the court of appeals' consideration of the factors developed by the Federal Circuit and the MSPB to assist in determining whether the statutory definition of LEO is met. That contention is without merit.

The purpose of the factors in adjudicating claims to LEO status is to assist the finder of fact in determining when the statutory definition is met, not to displace that definition. The factors articulated in *Bingaman*, which were first identified by the MSPB, were "extrapolated from the statutory and regulatory language, in light of the legislative history" and "capture[] the essence of what Congress intended." *Bingaman*, 127 F.3d at 1436; see *Hobbs v. OPM*, 58 M.S.P.R. 628, 632 (1993) (discussing legislative history). As the court of appeals has explained, the *Bingaman* factors "were not set forth as a substitute for the statute, but rather as a framework for the factual inquiry needed to ascertain coverage under the statutory scheme." *Hall*, 264 F.3d at 1056; Pet. App. 13a. Similarly, in *Watson*, the court of appeals approved the position-oriented approach of the MSPB because it was "consistent with the statutory * * * criteria for LEO retirement credit" and the "legislative intent in providing for the LEO retirement program" and was adopted "[i]n order to be more faithful to the language of the statutes." 262 F.3d at 1297, 1299. As the Federal Cir-

² See also *Watson v. Department of the Navy*, 262 F.3d 1292 (Fed. Cir. 2001), cert. denied, 534 U.S. 1083 (2002) (No. 01-725).

cuit explained in this case, the *Watson* approach “is more in keeping with the original language of the relevant statutes than an analysis of an employee’s actual duties.” Pet. App. 15a. Thus, while discussing and synthesizing the factors set forth in its precedent, the court below recognized that the statutory definition remains the touchstone for determining whether an employee qualifies for LEO status. See *id.* at 11a, 16a-19a, 23a.

The consideration of certain factors in deciding whether the statutory definition is met is especially appropriate when the court is faced with close and quintessentially fact-bound questions as to the nature of a particular position and the duties of individual employee-claimants occupying that position. DEA diversion investigators do not qualify as LEOs within the meaning of the statutory definition established by the CSRS. And the use of relevant factors as general guidelines for giving effect to the statutory definition helps to ensure that federal employees who Congress intended to be LEOs are granted such status and that others are not improperly awarded such status.

Petitioner suggests (Pet. 15) that the Federal Circuit’s case law in this area is “muddled.” That is incorrect. The Federal Circuit has carefully monitored and refined the criteria that it applies in determining whether the statutory definition has been met. There is no conflict in the circuits on this issue, nor even in the Federal Circuit’s own decisions. And there is no need for this Court to undertake plenary review of this issue.

2. Petitioner claims (Pet. 11) that the legislative history of the civil service retirement statutes provides “no support” for the decision below. That is incorrect. The legislative history indicates that Congress intended LEO positions to be occupied by “young men and women

physically capable of meeting the vigorous demands of occupations which are far more taxing physically than most in the Federal Service.” *Bingaman*, 127 F.3d at 1435 (quoting S. Rep. No. 948, 93d Cong., 2d Sess. 2 (1974)); Pet. App. 16a (same); see *Hobbs*, 58 M.S.P.R. at 632. At the same time, the interpretation urged by petitioner (Pet. 10)—that an employee may qualify as an LEO simply by demonstrating that he spends a majority of his time participating in criminal investigations, without regard to the nature of the activities performed in connection with those investigations—could extend LEO supplemental pay and retirement benefits to a broad class of employees such as chemists, laboratory technicians, paralegals and secretaries in prosecutors’ offices, and others who do not perform strenuous, frontline law enforcement duties. There is no evidence—in the legislative history, much less the statute—that Congress intended to include such employees within the statutory definition of LEOs.

Petitioner claims (Pet. 10-11) that 5 U.S.C. 5545a(a)(2), which contains a statutory definition of the term “criminal investigator,” is “the best place to look for clarification” of what constitutes LEO status. Not so. Section 5545a(a)(2) defines those LEOs who are also “criminal investigators.” Because LEO status is a necessary predicate for a criminal investigator under Section 5545a(a)(2), the definition of “criminal investigator” does not address the requirements for LEO status. Rather, it addresses the specific requirements, *in addition* to LEO status, necessary to meet the statutory definition of “criminal investigator.”

Petitioner suggests (Pet. 8) that the court of appeals erred in concluding that the degree of hazard faced by petitioner is a proper factor to consider in determining

whether he met the statutory definition. First, the court of appeals determined that petitioner was not an LEO without regard to the degree of hazard he faced. Pet. App. 22a. Second, the court of appeals, and the MSPB, have recognized on numerous occasions that “hazard is a significant element of law enforcement work.” *Hannon*, 234 F.3d at 679 (citing MSPB cases); see *Watson*, 262 F.3d at 1303; *Hall*, 264 F.3d at 1058. In *Hannon*, the Federal Circuit completely reviewed the legislative history of the retirement statutes and concluded that “[n]othing in this history shows, or even suggests, that Congress intended to prohibit consideration of hazard in determining law enforcement officer status.” 234 F.3d at 680.³

Petitioner also asserts (Pet. 12-13) that the court of appeals “erred in refusing to defer” to OPM’s regulations implementing the statutes at issue. That is incorrect. Nothing in the court of appeals’ decision in this case is inconsistent with the regulations implementing the civil service retirement statutes. Moreover, in a regulation implementing 5 U.S.C. 8401(17), the retirement statute under the Federal Employees Retirement System (FERS), which is parallel to 5 U.S.C. 8331(20), OPM

³ Petitioner relies (Pet. 8, 11-12 & n.32) on *Obremski v. OPM*, 699 F.2d 1263, 1272 n.31 (D.C. Cir. 1983), in challenging the Federal Circuit’s consideration of the hazard posed by a position. The footnote cited by petitioner relies upon a portion of a floor speech made by Congressman Daniels, who stated that enhanced retirement benefits included in the 1974 Amendments were not a “reward” for performing hazardous duties. 119 Cong. Rec. 30,596 (1973). Daniels’ statement emphasizes that the *reason* for providing early retirement to LEOs was not to reward them for hazardous duty, but rather to encourage early retirement because it typically becomes more difficult to perform hazardous duties as one ages. Daniels began that portion of his speech by stating that “the element of hazard was, and is, recognized.” *Ibid.*

provided that, to meet the FERS's definition of an LEO, an employee's duties must be "so rigorous" that they should "be limited * * * to young and physically vigorous individuals." 5 C.F.R. 842.802.

3. Petitioner's disagreement (Pet. 13-16) with the Federal Circuit's decision in *Watson*, is misplaced and in any event provides no reason to review the decision below. The Federal Circuit here approved of the *Watson* position-oriented approach, also used by the court in *Koenig*, because it agreed with the MSPB that the approach is more in keeping with the original language of the relevant statutes than an analysis of an employee's actual duties. Pet. App. 15a (citing *Watson v. Department of the Navy*, 86 M.S.P.R. 318, 320-321 (2000)).

Petitioner claims (Pet. 7) that, in *Watson*, the Federal Circuit "recognized the infirmity of [the] *Bingaman/Hannon* approach." To the contrary, the *Watson* Court recognized that the MSPB's position-oriented approach is "wholly consistent with the approach taken by this court in *Bingaman*," and that those factors may still be considered. 262 F.3d at 1301; see Pet. App. 15a-16a. Moreover, as was the case in *Watson*, 86 M.S.P.R. at 321, the court of appeals here emphasized that "notwithstanding the absence of a described LEO position," the employee may nevertheless attempt to demonstrate that there is a "conflict between the description of the position and the real-life facts of occupying the position." Pet. App. 20a.

4. Petitioner also claims (Pet. 16-17) that the court of appeals applied the wrong standard of review. That is incorrect and in any event presents no question warranting this Court's review. As the court of appeals correctly stated, "[l]egal analysis involving the application of law to the facts is a legal question that is reviewed de

novo.” Pet. App. 8a (citing *Litton Indus. Prods., Inc. v. Solid State Sys. Corp.*, 755 F.2d 158, 164 (Fed. Cir. 1985)); *ibid.* (“We review the Court of Federal Claims’ conclusions of law de novo and all of its findings of fact for clear error.”). Applying this standard, the court of appeals concluded that the trial court failed to properly apply the law to the facts. See, e.g., *id.* at 21a (concluding that the trial court “failed to find that [petitioner’s] position had any strenuous physical fitness requirement” and improperly relied upon incidental physical labor as satisfying the physical fitness requirement).

In this case, the Federal Circuit determined that, based on its review of all the evidence, petitioner had not established that his position met the statutory definition of an LEO. Among other things, the court explained that “nothing in [petitioner’s] position description or in any of the official documentation regarding his position articulated a physical fitness requirement,” Pet. App. 21a; “[petitioner’s] position did not authorize him to carry a firearm,” *id.* at 22a; “there is no evidence that [petitioner’s] position existed for the purpose of pursuing and detaining criminals,” *ibid.*; “nothing in [petitioner’s] position description mentions any requirements for contact with or interrogation of criminal suspects,” *ibid.*; and, because “it has not been established by a preponderance of the evidence that fifty percent or more of [petitioner’s] actual duties were LEO duties,” *id.* at 23a, petitioner “cannot show that his actual duties conflict with his job description to the extent required to gain LEO status.” *Ibid.* That highly factbound determination is correct and does not warrant further review in this Court.

CONCLUSION

The petition for certiorari should be denied.

Respectfully submitted.

PAUL D. CLEMENT
Solicitor General

PETER D. KEISLER
Assistant Attorney General

DAVID M. COHEN
JAMES M. KINSELLA
SCOTT D. AUSTIN
Attorneys

OCTOBER 2005