Supreme Court of the United States.
Phillip G. LAWRENCE, and all other persons similarly situated, Petitioner,
v.
UNITED STATES DEPARTMENT OF THE INTERIOR, agency; Dirk Kempthorne, Secretary of the Department of the Interior, Respondents.
No. 08-173.
August 11, 2008.

On Petition For A Writ Of Certiorari To The United States Court of Appeals For the Ninth Circuit

Petition For A Writ Of Certiorari

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QUESTIONS PRESENTED

1. Can the Department of Interior ignore the imperative of the Indian Preference Act (25 USC § 47.2) by "blindly" applying civil service regulations [5 USC § 831.906(b)], which effectively deprives Indian firefighters on Indian Reservations of the enhanced retirement benefits [5 USC § 8336(c)(1)] to which they may otherwise be entitled.

2. Whether the Secretary of Interior can, by failing to adopt any standards by which the BIA could identify Indian employees as firefighters, thereby exclude the majority of Indian civil service firefighters on Indian Reservations from timely filing for previous years credits toward their enhanced retirement benefits. [*Preston v. Heckler*, 734 F.2d 1359 (9th Cir. 1984)]

3. Whether the trial, court erred in ruling that evidence of few BIA Indian firefighter employees applying for enhanced retirement benefits, when, in fact, the BIA employs a majority of Indian firefighters, did not satisfy a prima facie showing of disparate impact.

***ii** TABLE OF CONTENTS

***iv** TABLE OF AUTHORITIES

Cases

Statutes

Code of Federal Regulations

***1** OPINION BELOW

The decision of the Ninth Circuit Court of Appeals is reported in 525 F.3d 916 (2008).

JURISDICTION

The Ninth Circuit filed its decision, on May 13, 2008. This Court has jurisdiction under 28 USC § 1254 (1) to review the circuit court's decision on a writ of certiorari.

STATUTORY PROVISIONS INVOLVED

25 USC § 472. Standards for Indians appointed to Indian Office.

The Secretary of the Interior is directed to establish standards of health, age, character, experience, knowledge, and ability for Indians who may be appointed, [without regard to civil-service laws,] to the various positions maintained, now or hereafter, by the Indian Office, in the administration of functions or services affecting any Indian tribe. Such qualified Indians shall hereafter have the preference to appointment to vacancies in any such positions. (June 18, 1934, ch 576 § 12, 48 Stat. 986.)

5 USC § 8336(c)(1) "An employee who is separated from the service after becoming 50 years of age and completing 20 years of service as a law enforcement officer, firefighter, or nuclear material courier, or any ***2** combination of such service totaling at least 20 years, is entitled to an annuity."

CODE OF FEDERAL REGULATIONS INVOLVED

5 CFR § 831.906(c) A current or former employee (or the survivor of a former employee) who believes that a period of past service in an unapproved position qualifies as service in a primary or secondary position and meets the conditions for credit must follow the procedure in paragraph (b) of this section. Except as provided in paragraph (d) of this section, the request must be made to the agency where the claimed services was performed.

5 CFR § 831.906(e) Coverage in a position or credit for past service will not be granted for a period greater than 1 year prior to the date that the request from an individual is received under paragraphs (b), (c), or (d) of this section by the employing agency, the agency where past service was performed or OPM.

5 CFR § 831.906(f) An agency head, in the case of a request filed under paragraph (b) or (c) of this section, or OPM, in the case of request filed under paragraph (d) of this section, may extend the time limit for filing when, in the judgment of such agency head or OPM, the individual shows that he or she was prevented by circumstances beyond his or her control from making the request within the time limit.

***3** STATEMENT OF THE CASE

Appellant Lawrence; a Native American former employee of the Department of Interior's (Department) Bureau of Indian Affairs (BIA), fought fires for 23 years (1976-1999) on the Colville Indian Reservation. Mr. Lawrence seeks to overturn, the Department's denial of 22 of these firefighting years of service from being used as credits to enhance his retirement annuity benefits in accordance with 5 USC § 8336(c)(1), which provides:
"An employee who is separated from the service after becoming 50 years of age and completing 20 years of service as a law enforcement officer, firefighter, or nuclear material courier, or any combination of such service totaling at least 20 years, is entitled to an annuity."

The computation of the retirement annuity benefit is computed, in part, on the length (number of years) of service devoted to firefighting. The Secretary has never adopted any qualifications or standards to identify BIA employees, mostly Indians, with firefighting duties who are entitled to apply for the retirement benefit annuity.

The Department left it to individual Indian employees to learn about the retirement benefit annuity and how to apply for the benefit even if they discovered its existence.

***4** In 1987, civil service regulation, 5 CFR § 831.906(e), went into effect limiting the number of years of firefighting service that could be used in the computation of benefits to only one year prior to the filing of the application for benefits unless the application was filled within one year of the new regulation. An exemption from this one-year limitation applies if the applicant is able to show "he or she was prevented by circumstances beyond his or her control from making the request within the time limit," e.g. within one year of the 1987 regulation. [5 CFR § 831.906(f)]

The Department reorganized the new limitation on receiving service credits was a significant change that would negatively impact BIA employees if they were not notified of the change:
"All personnel offices are asked to remind those employees who believe they are eligible for consideration of prior service that their requests are due no later than September 30, 1989."
.....
"Every effort should be made to submit the evidence substantiating the request for consideration by September 30, 1989."

[*PERSONNEL MANAGEMENT BULLETIN (PMB)* No. 89-137 August 21, 1989 (ER 78)]

"Please insure that Bureau employees who may be eligible under the special retirement provisions are again reminded of the deadline."

***5** [*PMB,* 'No. 89-23, August 28, 1989 (ER 77)]

However, because the Secretary had adopted no standards or qualifications for identifying Indian firefighters, the Department's urgent *PMB's* to BIA agencies to notify employees who might qualify for enhanced retirement benefits was fruitless.
"At this time the Bureau has no special qualification or medical standards, or a maximum entry age for firefighters."

[*PMB,* No. 88-04, March 4, 1988 (ER 187-188)]

As early as 1990, the Department acknowledged its inadequate efforts, to notify employees of the entitlement to file for retirement benefits and the need to file timely. As part of this acknowledgement, the Department "apologized for the lateness of its notification due to the lack of guidance from OPM:
"We apologize for the late issuance of this information; however, we have been in contact with OPM over the past few months regarding specific guidance. Since we have no specific guidance from OPM at this time, we are tentatively advising servicing personnel offices to accept late submissions up to November 1, 1990 from employees in Category 1 and Category 2 above. A specific statement signed by the employee should be included in the declaration or in the case file stating that specific instructions regarding the provisions of 5 CFR 83.1.908 had not been received in order to ***6** submit a timely submission of the request for service credit through September 30, 1990."
"In order to protect the interests of employees affected by threse provisions, personnel offices are asked to assure that affected employees are notified."

[*PMB,* No. 90-140, September 27, 1990 (ER 269.1-.2)]

Mr. Lawrence, one Of the premier[FN1] firefighters with the BIA during his 23 years of service, was never notified of the filing deadline and had no personal knowledge of the retirement annuity filing deadline until 12 years after the regulation's adoption.

FN1. Summary Record of Lawrence's firefighting record from 1976 through 1998. (ER 173-177)

In 1998, the Department of Interior, realizing that BIA employees were not aware of the filing deadline, went to the effort and expense to create an entire new organization. The agency was entitled the Firefighter/Law Enforcement Retirement Team (FLERT). Its purpose was to hold workshops to notify employees who might qualify for the retirement annuity benefit of its existence, how to apply, and the necessity of applying early on to preserve bonus credits for years of service. Obviously the workshops were 11 years to late for Mr. Lawrence and all other Indian career employees.

Operating out of the Interagency Fire Center in Boise, Idaho, FLERT held a workshop on the Colville Indian Reservation in December 1998 to alert individual employees, who had firefighting duties, of the ***7** then 11-year old, past due deadline to preserve prior years' service credits toward enhancement of their retirement annuity benefits. The workshop's personnel erroneously advised attendees that if they filed within one year of the workshop, they would be eligible for all years' prior service.

Plaintiff did, in accordance with the firefighter workshop instructions, file his application for retirement annuity benefits, within the year, seeking credit for his 23 years of firefighting service with the BIA. The Department denied 22 of Lawrence's prior year's service credits (1976-1998), "… solely…." on the basis that his application was "…untimely…." even though he had no knowledge of the annuity or the deadline for filing. The reason lack of actual notice did not constitute "circumstances beyond his control" was because of the Department's position that the filing deadline regulations were published in the *Federal Register* in 1987, and the *Federal Register* constituted constructive notice to an civil service employees. The

Department's blind application of civil service rules of construction without regard to Lawrence's Indian status was unlawful.

Following receipt of Lawrence's application, the Department identified Lawrence as being in a firefighting position and immediately notified him personally that he would be subject to drug testing. *UNITED STATES GOVERNMENT MEMORANDUM* October 5, 1999 (ER 162, attached) If the Secretary was half as concerned about treating the BIA Indian employees with the preference they are to be accorded as the Department's concern over drug testing, it would ***8** have provided individual notice to Indian employees of the retirement program and the filing deadline in a timely manner, not 12 years after the fact.

Neither the Department's decision, nor the Court's affirming of that decision, is in accordance with the law either as to the Department's statutory Indian preference responsibility, trust responsibility, or its common law duty. Additionally, the Department's action resulted in discriminatory impact to BIA Indians employees.

REASONS FOR GRANTING THE PETITION

1. THIS COURT SHOULD DECLARE THAT BIA INDIAN EMPLOYEES WHO SPEND THEIR CAREERS FIGHTING FIRES ON INDIAN RESERVATIONS (TRUST ASSETS) ARE NOT SUBJECT TO THE BLIND APPLICATION OF CIVIL SERVICE REGULATIONS DEPRIVING THE INDIAN FIREFIGHTER OF THE RETIREMENT ANNUITY SERVICE CREDIT BENEFITS AUTHORIZED BY CONGRESS.

Phillip Lawrence is not like all other federal employees. Phillip Lawrence is a Native American employed by the Bureau of Indian Affairs who fought fires for 23 years protecting assets held in Trust by the United States for Indians. As such there cannot be a "blind transference" of Civil Service standards to him as has happened in this case to date, based on the holding in *Stern v. Dept. of Navy*, 280 F.3d 1376 (9th Cir. 2002). *Stern* held that publication in the *Federal* ***9** *Register* Constituted notice to a NON-INDIAN civil service employee of annuity benefit filing deadlines. In contradiction of *Stern* is the Ninth Circuit Court decision in *Preston v. Heckler*, 734 F.2d 1359, 1370 (9h Cir. 1984), relying on the Eighth Circuit Court's decision in *Ogala Sioux Tribe v. Andrus*, 603 F.2d 707, 716 (8h Cir. 1979), that "blind transference" of Civil Service standards to Indians is condemned.
"Here, because the Secretary has allegedly not adopted separate and independent standards for Indians, we are unable to say with any certainty whether or not Preston would have met those standards."
.....
"…Secretary has violated the Indian Preference Act by failing to adopt the statutorily mandated separate and independent standards for evaluating the employment qualifications of Indians. As a bona fide Indian applicant for the position, Preston was entitled to have her qualifications measured by those standards."

Preston, Id. p. 1365.

Although the government acknowledges that the Indian Reorganization Act of 1934 (June 18, 1934, Ch. 576, § 12, 48 Stat 986) (Indian Preference Act) 25 USC § 472 and 25 CFR Chap. 1 Pt. 5 § 5.2 was enacted and adopted for the purpose of affording Indians greater participation economically in their own affairs such purpose does not extend (full or ***10** equal compensation for work performed) to Indian retirement compensation matters.

Petitioner contends one of the most important aspects of any Indian employee's participation in a capitalistic economic system is the matter of retirement compensation. The government's position is contrary to the Ninth Circuits holding in *Preston v. Heckler*, 734 F.2d 1359 (9th Cir. 1984)
"We must interpret the language of the Indian Preference Act (IPA) in light of its purpose and in light of the purpose of the comprehensive act of which it is a part. *See Brothers v. First Leasing*, 724 F.2d 789, 792 (Ninth Cir. 1984); *see e.g.*, *Rose v. Lundy*,

455 U.S. 509, 517-18, 71 L.Ed. 2d 379, 102 S. Ct. 1198 (1982); *Turner v. Prod*, 707 F.2d 1109, 1121 (9th Cir. 1983)."

Preston, Id. p. 1370.

If the Department and courts must interpret the IPA in light of its purpose and its central purpose is to provide Indians greater participation economically in their own affairs, then preference in their hiring, transfer, etc., necessarily includes preference in qualifying Indians for the retirement benefits, which are an inherent aspect of their hire and essential to their participation economically in their own affairs.

In *Preston v. Heckler*, 734 F.2d 1359 (9th Cir. 1984), a dispute involving the application of civil service requirements, vis a vis the Indian Reorganization Act, ***11** to an Indian applicant seeking employment with the Indian Health Service, the Court determined that without Indian qualifications for the position having been adopted by the Secretary the Indian applicant could not be subjected to generally applicable civil service regulations. The same holding should apply in the instant case.

The IPA requires that the failure of the Department to adopt standards and eligibility for identifying Indain firefighters and/or to provide actual notice to Indian BIA employees with firefighting experience of the filing, deadline, "in light of their unique background and experience," constituted circumstances beyond their control in accordance with 5 CFR § 831.906(f).

The purpose behind the law providing for enhanced retirement annuity benefits [5 USC § 8336(c)(1)] was to encourage skilled firefighters and law enforcement officers to remain employed whereby the government could obtain the benefits of their experience and skill. Firefighters on Indian Reservations are engaged in preserving and protecting assets held in Trust for Indians. Unfortunately, all government employees were not treated the same as between law enforcement officers and firefighters regardless of their Indian/non-Indian status. As noted in the Department's March 4, 1988, *PMB* (ER 187-188), unlike law enforcement officer qualifications, which were established, the Secretary had developed no qualifications or standards for Indian firefighters let alone non-Indians.
***12** "At this time the Bureau has no special qualification or medical standards or a maximum entry age for firefighters."

[*PMB*, No. 88-04, March 4, 1988 (ER 187-188)]

As to who qualified as a firefighter and who did not, the standards could be the same, but they do not have to be. According to the IPA, they should not be if the Indian employee is to be given preference in hiring.

The Secretary of Interior's lack of compliance with the Indian Preference Act and 25 CFR 5.2 by not establishing separate and independent regulations for evaluating BIA Indian firefighter retirement applications with consideration of Indians "unique background and experience," "…without regard to Civil Service laws," deprived Lawrence of the preferential opportunity to receive credit for his 22 years as a premier firefighter on the Colville Indian Reservation. Lawrence, with his 23 years of fire fighting skills is the exact type person congress intended to benefit with the retirement annuity credit bonus for years of service. The same holding in *Preston, Id.*, should apply to Lawrence.

The concept of "constructive notice" does not square with the Indian's unique background and experience. Many Indians do not speak English well if at all. Indians and Alaska Natives are without actual knowledge of a *Federal Register* posting or the American jurisprudence concept of constructive notice. When fighting fires off their home ***13** reservations, Hopi and Navajo, fire crews have their own translators with, the crews. The Department gave and gives no consideration to the Indian and the preference to which they are entitled in terms of being provided actual notice of the annuity benefit and regulations affecting its award. Neither did the

Department give any consideration to the Indian's "unique background and experience without regard to civil service rules."

As noted by Matt Wagers, FLERT Team Leader at the Colville Reservation workshop, the civil service regulations were applied to Indian and non-Indians alike without regard to the Indians status as Indians:
"6 Q. Okay. But in administering the provisions that
7 you were to administer, you needed to be aware of BIA
8 personnel provisions as to who would qualify and who
9 would not qualify, correct?
10 A. Incorrect, sir. The regulations in which the
11 fire and law enforcement retirement program were based on
12 were from the CFR, and we also had direction from the
13 department; **but the overriding regulations that we used**
14 to adjudicate not only BIA, but National Park Service,
15 U.S. For- -- excuse me, U.S. Fish and Wildlife Service,
***14** 16 and Bureau of Land Management **were from the CFR, which**
17 **applied to all federal employees.**" (our emphasis)

(ER 244.1)

How can an Indian firefighter be held to notice, either actual or constructive, preferentially or otherwise, if the Department has no standards or qualifications by which to identify firefighters in the first instance?

Indians are to be accorded preference in all aspects of hiring, which necessarily includes the retirement benefits which Congress intends for those who are hired to or actually do fight fires, without regard to civil service regulations

2. THIS COURT SHOULD DETERMINE THAT THE SECRETARY OF INTERIOR CANNOT PREVENT INDIAN FIREFIGHTERS FROM QUALIFYING FOR CONGRESSIONAL AUTHORIZED RETIREMENT ANNUITY BENEFITS BY FAILING TO ADOPT QUALIFICATIONS AND STANDARDS BY WHICH THE BIA CAN IDENTIFY AND NOTIFY INDIAN FIREFIGHTERS.

Ever since 5 CFR § 831.906(e) was first adopted, limiting the time period for firefighters to file in order to qualify all prior years firefighting service for computing retirement annuity benefits, the Department understood the importance of notification to BIA employees of the change.

***15** A series of *PERSONNEL MANAGEMENT BULLETINS* issued from the Department's Office of Personnel Management (OPM), were directed to BIA agency officers on Indian reservations, concerning the importance of reminding employees "who believe they are eligible, for consideration of prior years service that their requests are due no later than September 30th, 1989"
"All personnel offices are asked to remind those employees who believe they are eligible for consideration of prior service that their requests are due no later than September 30, 1989."
.....
"Every effort should be made to submit the evidence substantiating the request for consideration by September 30, 1989."

[*PMB*, No. 89-137, August 21, 1989 (ER 78)]

However, the *Bulletin* was useless as the Department admitted in *PERSONNEL MANAGEMENT BULLETIN* No. 88-04 March 4, 1988, that it did not know who qualified to be notified:
"At this time the Bureau has no special qualification or medical standards or a maximum entry age for firefighters." (ER 187-188)

As late as September 1990 in *PMB*, No. 90-140 (ER 269.2) BIA offices still had not been provided ***16** directions on how to administer the filing deadline

regulation 5 CFR § 831.906(e):
"Specifically of concern are the provisions of 5 CFR 831.906(e)…"
.....
"We apologize for the late issuance of this information; however, we have been in contact with OPM over the past few months regarding specific guidance. Since we have no specific guidance from OPM at this time, we are tentatively advising servicing personnel offices to accept late submissions up to November 1, 1990 from employees in Category 1 and Category 2 above. A specific statement signed by the employee should be included in the declaration or in the case file stating that specific instructions regarding the provisions of the 5 CFR 831.908 had not been received in order to submit a timely submision of the request for service credit through September 30, 1990."

[*PMB*, No. 90-140 (ER 269.1-269.2), attached]

However, when Lawrence was first apprised of the retirement annuity benefit and service credits at the FLERT meeting in 1998, his application, asserting that he had no knowledge of and was never notified of any filing deadlines for the service credits, was rejected out of hand solely on the basis that it was untimely.

***17** There was no compliance by the Secretary with its own policy to allow exemption from the deadline let alone acting in accordance with the IPA. Lawrence's "unique background and experience, e.g., he was and is an Indian with no experience with the *Federal Register* nor with the concept of "constructive notice" requires consideration by the Secretary. Without that consideration, Lawrence cannot be subjected to the blind transference of civil service regulations.

Even as late as 2002, it was reported that the Department still had not adopted any standards or qualifications by which to identify firefighters.
" 'We have a huge fire fighting capability within our department and yet we only have 51 employees that are classified as fire fighters,' David Anderson, deputy director of the department's Office of Personnel Policy, told last week's Federal Executive and HR Professionals Conference, sponsored by the National Academy of Public Administration (NAPA), at the University of Maryland.
'All of the rest are additional duty (employees): biologists, range technicians; forestry technicians that on a day-to-day basis do other things, but when the fire comes along they put on a hard had and they go out and fight fires,' he said.
However, DOI doesn't know how many personnel it has battling the blazes through its ***18** data system. The reason is that the department can only pull up the 51 fire protection specialists. It doesn't know how many biologists and other employees are involved in these efforts."

Federal Employees News Digest, Vol. 52, No. 8, September 16, 2002 (ER 185)

3. THIS COURT SHOULD RULE THAT THE IMPACT OF THE SECRETARY OF INTERIOR'S FAILURE TO ADOPT QUALIFICATIONS AND STANDARDS BY WHICH BIA EMPLOYEES CAN KNOW OF AND PROTECT CONGRESSIONALLY AUTHORIZED RETIREMENT ANNUITY BENEFITS FALLS DISPROPORTIONALLY ON INDIAN EMPLOYEES.

It is Indians who are predominately employed by the BIA. It is Indians who predominately fight fires on Indian Reservations and it is Indians who are predominately excluded from the enhanced retirement benefits intended for firefighters.

The majority of employees employed by the BIA, as a result of Indian preference hiring practices, ensures that any action or lack of action inhibiting or preventing BIA employees from applying for or to be considered for retirement annuity benefits will inherently have a disproportionate and discriminatory impact on Indian employees. Disparate impact can occur without regard to whether the impact was intentional or motivated by ***19** illicit conduct. *Rose v. Wells Fargo & Co.*, 902 F.2d 1417, 1424 (9th Cir. 1990).

The decision of the Secretary to not adopt qualifications and standards by which to identify employees as firefighters and to not notify Indian firefighters in a manner to alert them to the filing deadline by which they had to file in order to preserve their right to claim entitlement to enhanced retirement annuity benefits necessarily targets Indians regardless of whether some non-Indians may be impacted as well. In fact, the Secretary's failure in terms of violating the Indian Preference Act impacts only Indians 100 percent.

The proof is in the pudding. Out of 246 BIA positions identified by Lawrence with job titles referring to firefighting duties as listed in the *Indian Forestry & Natural Resources National Directory - Tribal and Bureau of Indian Affairs Officers 2004* (ER 190-235), only 14 Native Americans had ever applied as of 2005. (ER 58-62). None have been approved. The Department's contention that Lawrence could not produce statistical ratios as between Indian and non-Indian to sustain his claim is disingenuous when it cannot even identify those who may supposedly qualify for firefighter status in the first instance.

CONCLUSION

This Court should grant the petition for a writ of certiorari and reverse the decision Of the Ninth Circuit Court of Appeals.

***20** In Order to mandate that the Secretary of Interior (1) adopt criteria and/or standards to allow Indians with firefighting duties to be identified, (2) apprise Indian employees with firefighting duties, by way of actual notice, of their right to apply, for congressionally authorized service credit retirement annuity benefits, and (3) accept lack of actual knowledge of the benefit and filing requirements as a “circumstance beyond the Indian employee's control” in lieu of the blind transference of civil service rules.

This remedy is necessary for substance to prevail over form in order that hundreds and possibly thousands of Indians, who have spent theft careers engaged in firefighter duties, may apply for the congressionally authorized economic benefit and have their prior years of firefighting service be considered. Such a remedy will require the Secretary to act in accordance with the Indian Preference Act, the Government's Trust responsibility and thereby undo the disparate impact befalling Indian employee's within the BIA.

Lawrence v. United States Dept. of the Interior
2008 WL 3540284 (U.S.)

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