

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

_____)	
RONALD L. MOULTON,)	DOCKET NUMBER
Appellant,)	DE-0841-18-0053-I-1
)	
v.)	
)	
U.S. OFFICE OF PERSONNEL)	
MANAGEMENT,)	December 18, 2023
Agency,)	
)	
and)	
)	
DIRECTOR OF THE OFFICE OF)	
PERSONNEL MANAGEMENT,)	
Intervenor,)	
)	
and)	
)	
JILL MOULTON,)	
Intervenor.)	
_____)	

**MOTION TO STAY OF INTERVENOR,
DIRECTOR OF THE OFFICE OF PERSONNEL MANAGEMENT**

Pursuant to Federal Rule of Appellate Procedure 18 and 5 U.S.C. § 7703(d)(1), the Director of the United States Office of Personnel Management respectfully submits this motion to stay the order issued by the Merit Systems Protection Board in its November 28, 2023, precedential decision and order. The requested stay is necessary to protect the Director’s ability to exercise her authority under § 7703(d)(1), which gives the Director 60 days to file a petition for judicial review in the United States Court of Appeals for the Federal Circuit. As demonstrated below, the Board should stay its November 28, 2023, order until 14 days after (1) the time to petition the Federal Circuit for review expires and no petition is filed, or (2) any

appellate proceedings are final and unappealable, whichever is later to determine whether to petition for judicial review and, if a petition is filed, to pursue the appeal.

Appellant, Ronald Moulton, opposes this motion. On December 15, 2023, we contacted Intervenor, Jill Moulton, via email to obtain her position on this motion, but have not received a response.

BACKGROUND

On August 25, 2016, OPM issued letters to Appellant and Intervenor Ms. Moulton, explaining that it had incorrectly calculated the court-ordered apportionment due to Intervenor. The letters notified them that OPM must recompute Ms. Moulton's court-ordered apportionment to include Mr. Moulton's FERS annuity supplement in the computation of the division of Mr. Moulton's employee annuity. *Moulton v. OPM et al.*, Opinion and Order, at ¶ 3 (Nov. 28, 2023) (Order).

Appellant requested reconsideration of the decision, and OPM issued a final decision affirming its initial decision on December 12, 2017. *Id.* Appellant appealed to the MSPB. *Id.* The Director intervened in her capacity under 5 U.S.C. § 7701(d), having concluded that the interpretation and application of civil service laws and regulations under OPM jurisdiction are at issue in this case, and that an erroneous decision would have substantial impact on civil service laws and regulations under the jurisdiction of OPM. *Id.*, at ¶ 7, n. 5. The Administrative Judge reversed OPM's decision, and OPM filed a petition for review to the Board. *Id.*, at ¶¶ 7, 8.

On November 28, 2023, the Board upheld the Administrative Judge's decision. *Id.*, at ¶ 22. The Board ordered OPM to rescind its December 12, 2017, final decision, stop apportioning the annuity supplement, and refund all previously apportioned annuity supplement amounts to the Appellant by December 18, 2023. *Id.*, at ¶ 23.

A petition for review to the Court of Appeals for the Federal Circuit would be due January 27, 2024. *See* 5 U.S.C. § 7703(d)(1). The Government currently is working through the necessary internal review process to determine whether to petition for review and, if a decision to do so is made, to prepare that petition.

ARGUMENT

The Board should stay its November 28, 2023, order. The Board has the discretion to stay its own order pending judicial review. 5 U.S.C. § 705; *Blaha v. Off. of Pers. Mgmt.*, 106 M.S.P.R. 494 (M.S.P.B. 2007).¹ The Board considers four factors when deciding whether to grant a stay: “(1) [w]hether the stay applicant has made a strong showing that he or she is likely to prevail on the merits; (2) whether the applicant will be irreparably harmed absent a stay; (3) whether the issuance of a stay will substantially harm the other parties interested in the proceeding; and (4) where the public interest lies.” *Id.*

The Director Is Likely To Prevail On Appeal

The Director is likely to prevail at the Federal Circuit. The first step to obtaining Federal Circuit review is filing a petition for review. The Federal Circuit grants such petitions when it agrees with the Director that the Board has erred in interpreting a civil service law affecting personnel management, and the Board’s decision “will have a substantial impact on civil service law.”² *James v. Von Zemenszky*, 284 F.3d 1310, 1314 (Fed. Cir. 2002). As the Federal Circuit

¹ The Board’s regulations specifically contemplate issuing a stay in cases where the Director files a petition for reconsideration, which is required prior to petitioning the Federal Circuit for review if the Director has not already intervened in the case. 5 C.F.R. § 1201.119(d); *see* 5 U.S.C. § 7703(d)(1). In this case, the Director is already an intervenor.

² The Board already approved the Director’s intervention in this case on substantially similar grounds. *See* 5 U.S.C. § 7701(d) (Director may intervene when, as applicable here, the interpretation of any civil service law under OPM’s jurisdiction is at issue and the Director is of the opinion that an erroneous decision would have a “substantial impact on any civil service law . . .”).

has explained, “[i]t is particularly appropriate to grant OPM’s petition for review when the interpretation of a statutory or regulatory provision is at issue.” *Id.* The Board’s decision in this case involves the interpretation of § 8421(c) and resolves a question of first impression for the Board. OPM is likely to prevail on a petition for review.

Turning to the merits of OPM’s statutory interpretation, we recognize the Board found that the “the plain meaning of the statute does not support OPM’s interpretation.” Order, at ¶ 19. But other adjudicators have held the exact opposite. A Federal District Court concluded that the Director’s “interpretation of Section 8421(c) is consistent with the unambiguous language of the statute.” *Fed. L. Enf’t Officers Ass’n v. Ahuja*, 2021 WL 4438907, at *4 (D.D.C. 2021), *vacated on other grounds*, 62 F.4th 551 (D.C. Cir. 2023) (dismissing appeal for lack of jurisdiction and concluding that MSPB was proper forum). One of the Board’s Administrative Judges also agreed with the Director’s interpretation of the statute, concluding that “the plain language of section 8421(c) requires OPM to include the appellant’s FERS annuity supplement in its calculations of the appellant’s ex-wife’s pro rata share.” *Kuebbeler v. Off. of Pers. Mgmt.*, 2019 WL 4252309 (2019) (non-precedential).

At a minimum, this disagreement about the meaning of the “plain language” of § 8421(c) demonstrates that there is a substantial legal question at issue and the likelihood of prevailing on the merits is sufficient for purposes of a stay pending appeal. *See E.I. DuPont de Nemours & Co. v. Phillips Petroleum Co.*, 835 F.2d 277, 278 (Fed. Cir. 1987) (granting a stay pending appeal and explaining, “[t]he very existence of the conflict [between a district court and the Patent and Trademark Office] supports [petitioner’s] argument that substantial legal questions concerning claim interpretation exist.”); *Power Integrations, Inc. v. Fairchild Semiconductor Int’l, Inc.*, 2008 WL 5351038 (D. Del. 2008) (citing *DuPont*).

Lastly, to the extent the conflicting interpretations of § 8421(c) suggest the statute is ambiguous, then deference would be due to OPM's interpretation, strengthening the likelihood of prevailing on the merits. *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984); *Aguayo v. S. Coast Refuse Corp.*, 1999 WL 547861, at *8 (C.D. Cal. 1999) (the fact that some deference was due to agency action suffices to show likelihood of success on merits). Compare *W. Watersheds Project v. Dyer*, 2009 WL 484438, at *28 (D. Idaho 2009); *Nat. Res. Def. Council, Inc. v. Evans*, 232 F. Supp. 2d 1003, 1032 (N.D. Cal. 2002); *Tozzi v. E.P.A.*, 148 F. Supp. 2d 35, 49 (D.D.C. 2001) (parties challenging agency action were not likely to prevail on merits because agency was due deference).

The Director Will Be Irreparably Harmed Absent A Stay

Complying with the Board's order risks mooting the Director's potential appeal, depriving her of her statutory authority under 5 U.S.C. § 7703. Where an appealable action is canceled or rescinded by an agency, and the appellant is returned to the status quo ante, any appeal from that action becomes moot. *See, e.g., Wells v. MSPB*, 730 Fed. Appx. 909, 912 (Fed. Cir. 2018) (citing *Cooper v. Dep't of the Navy*, 108 F.3d 324, 326 (Fed. Cir. 1997)). An appeal is moot when the appellant receives all the relief they could have received if the matter had been adjudicated and they had prevailed. *Fernandez v. Dep't of Justice*, 105 M.S.P.R. 443, 446 (2007). Mootness deprived the reviewing court of jurisdiction. *See, e.g., Haskins v. Dep't of the Navy*, 106 M.S.P.R. 616, 624 (2007).

Absent a stay, OPM would be compelled to rescind its decision; recompute Ms. Moulton's court-ordered apportionment, excluding the FERS annuity supplement from the computation of the court-ordered division of Mr. Moulton's employee annuity; and refund

Mr. Moulton any annuity underpayments that result. Additionally, OPM would be compelled to inform Ms. Moulton of amounts she has been overpaid in apportionment.

Taking these steps risks mooted any potential appeal. The Federal Circuit has recognized that the Director's interest in civil service personnel practices and policies can be "more than sufficient" to satisfy any Article III case or controversy requirement. *Berry v. Conyers et al.*, 692 F.3d 1223, 1227 n.5 (Fed. Cir. 2012) (citing *Horner v. MSPB*, 815 F.2d 668, 671 (Fed. Cir. 1987)). But in later proceedings in that same case, the *en banc* Court found that it did not possess jurisdiction to review a case brought under § 7703(d)(1) where the agency had rescinded the personnel action at issue and returned the appellant to the status quo ante. *Kaplan v. Conyers*, 733 F.3d 1148, 1153 (Fed. Cir. 2013); *see also Wells v. MSPB*, 730 Fed. Appx. 909, 912 (Fed. Cir. 2018) (retirement appeal was moot when OPM completely rescinded its final decision and gave the appellant an opportunity to make the post-separation deposit she sought to make).

Moreover, 71 other cases at the Board involve the correct interpretation of 5 U.S.C. § 8421(c). If the Director's appeal is rendered moot, these other cases are likely to be resolved pursuant to the Board's precedential decision in this case, and similarly rendered moot. Therefore, the Director could be permanently deprived of the statutory right to seek judicial review of the important question of statutory interpretation at issue.

A Stay Will Not Cause Substantial Harm To Other Parties

Other interested parties will not be substantially harmed by a stay. Jill Moulton, Intervenor, would benefit if the Federal Circuit agrees with OPM's interpretation of the statute. The Board's order works to her detriment (*i.e.*, under the Board's order, she is paid less in court-ordered apportionment), so a stay would not harm her.

If the Board stays its order and the Director prevails on appeal, Appellant Ronald Moulton will remain in the same position he is in today. OPM will continue to include Mr. Moulton's FERS annuity supplement in the computation of Ms. Moulton's court-ordered apportionment. OPM has waived his overpayment based on OPM's determination that it had incorrectly computed Ms. Moulton's apportionment benefit, and therefore, OPM will take no action to collect any overpayment from Mr. Moulton. *See* Order, at ¶ 3. In that case, Appellant will suffer no harm due to a stay. And if Appellant is ultimately successful on appeal, he will receive complete relief. *Cf. Donati v. Off. of Pers. Mgmt.*, 2007 WL 447228 (M.S.P.B. 2007) (when the Board does not anticipate a protracted delay during the appeals process, it has found that a delay in benefits does not constitute a substantial harm).

A Stay is in the Public Interest

As noted above, 71 other cases will be determined, at least in part, by the resolution in this case. A stay furthers the public's interest by allowing the Federal Circuit to interpret the statute at issue. When Congress granted the Director the right to appeal the Board's final order in cases like this one, it made clear its sense that allowing the issues to be fully developed before and resolved by the Federal Circuit is in the public's interest. 5 U.S.C. § 7703(d).

Respectfully submitted,

S/ Roxann Johnson

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