

IN THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

KIRAN A. AHUJA, Director,
Office of Personnel Management

Petitioner,

v.

RONALD MOULTON,

Respondent,

MISC. NO. 24-109

JILL MOULTON,

Respondent,

and

MERIT SYSTEMS PROTECTION BOARD,

Respondent.

RESPONDENT MERIT SYSTEMS PROTECTION BOARD'S
RESPONSE TO OPM'S PETITION FOR JUDICIAL REVIEW
UNDER 5 U.S.C. § 7703(D)

Pursuant to Federal Circuit 47.9(g), Respondent Merit Systems Protection Board ("MSPB" or "Board") respectfully submits this response to the petition filed by the Director of the Office of Personnel Management

(“OPM”) seeking judicial review of the Board’s November 28, 2023 Opinion and Order under 5 U.S.C. § 7703(d).

MSPB agrees that this Court has jurisdiction to entertain OPM’s petition under 5 U.S.C. § 7703(d) because the Board’s November 28, 2023 Opinion and Order is a final decision of the Board; the Director of OPM intervened in the matter before the Board; and the Director has determined in her discretion that “the Board erred in interpreting a civil service law, rule, or regulation affecting personnel management and that the Board’s decision will have a substantial impact on a civil service law, rule, regulation, or policy directive.”* *See* 5 U.S.C. § 7703(d)(1); *see also Moulton v. Office of Pers. Mgmt.*, 2023 MSPB 26 (Nov. 28, 2023); OPM Petition for Review, ECF No. 2 (“OPM Pet.”), at 2.

MSPB further agrees with OPM that this matter has not been rendered moot by the recent death of Respondent Jill Moulton because Respondent Ronald Moulton, the former federal employee and annuitant, maintains a cognizable interest in the outcome of the appeal—namely, his interest in a refund of all previously apportioned annuity supplement amounts pursuant to

* MSPB does not concede any error in the November 28, 2023 Opinion and Order and will defend the Board’s decision if OPM’s petition for judicial review under section 7703(d) is granted.

the Board's Opinion and Order. *Moulton*, 2023 MSPB 26 at *6; see *Kaplan v. Conyers*, 733 F.3d 1148, 1153 (Fed Cir 2013) (en banc). OPM additionally argues that this case is not moot because "OPM has a live interest in resolving the question of how OPM must apportion a retirement annuity supplement pursuant to a court order under U.S.C. § 8421(c)." OPM Pet. at 5 n.4 (citing *Horner v. Merit Sys. Prot. Bd.*, 815 F.2d 668, 671 (Fed. Cir. 1987)). It is unclear, however, whether OPM's interest alone would be sufficient to establish a live case or controversy following the Court's en banc decision *Kaplan*, which dismissed OPM's request for review under section 7703(d) as to respondent Conyers because she no longer had cognizable interest in the outcome of the appeal. *Kaplan*, 733 F.3d at 1153. Nonetheless, in the presence of Mr. Moulton's cognizable interest in the outcome of this appeal, MSPB agrees that there exists a live case or controversy.

In light of the foregoing, MSPB does not oppose the Court's exercise of its discretion to grant OPM's petition for judicial review.

Respectfully submitted,

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General Counsel

KATHERINE M. SMITH
Deputy General Counsel

/s/ DeAnna Schabacker

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DATE: February 20, 2024

CERTIFICATE OF COMPLIANCE

Pursuant to Rule Federal Circuit Rule 47.9(c), I hereby certify that the textual portion of the foregoing response contains 528 words as determined by the word counting feature of Microsoft Word.

/s/ DeAnna Schabacker

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