

OPM's Recent Policy Change on the Retiree Annuity Supplement

to exclude the FERS annuity supplement from division because 5 U.S.C. 8421(c) requires its inclusion.

Title 5 C.F.R. 838.305 allows court orders to direct OPM to apply a formula to the gross annuity, which may eliminate or alter normal variables used in the retirement annuity computation, reducing the gross annuity used to compute the apportionment. OPM can process any formula given in a court order as long as it can be computed using normal OPM files and it is clear and unambiguous. For example, OPM can process a court order if it states not to apply any salary adjustments after a certain date, to exclude the unused sick leave in the gross annuity computation, or to compute the apportionment against the gross annuity after deducting the HB premiums, etc. However, a court order cannot require OPM to exclude something from division that is statutorily prohibited. Therefore, OPM cannot exclude the FERS annuity supplement from division when a court order expressly divides a FERS annuity benefit because 5 U.S.C. 8421(c) requires its inclusion. And to the extent that 5 C.F.R. 838.305 may seem to contradict the statutory provision under 5 U.S.C. 8421(c), OPM must defer to the statutory provision.

If a COAP attempts to prevent OPM from dividing a FERS annuity supplement which is prohibited in 5 U.S.C. 8421(c), it does not render the entire court order unacceptable for processing. OPM simply may not honor provisions that are inconsistent with federal law. However, if there are provisions in that same court order that are consistent with federal law, OPM may honor those provisions.”

In 2024, FLEOA plans to continue its efforts to remedy this situation with a legislative solution, the RAS Clarity Act, and an appeal of the recent court decision.

Until this injustice is overturned legislatively, or in the courts, as we stand here today, there is no language that we can place in to a COAP that will keep OPM from apportioning the RAS. The only way we can keep the RAS from being apportioned is to express the former spouse's award as a stated dollar amount.

STOP THE PRESSES! On November 28, 2023, the appellant that I referenced, from Denver, received his “Opinion and Order” from the MSPB in Washington, DC! The MSPB found FOR the appellant, and AGAINST OPM!

I encourage all affected parties to read this 20-page Opinion and Order. It's easy-to-read and expertly-crafted. https://www.mspb.gov/decisions/precedential/Moulton_Ronald_L_DE-0841-18-0053-I-1_Opinion_and_Order.pdf

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Specifically, the Opinion and Order states:

We ORDER 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. OPM must complete this action no later than 20 days after the date of this decision.

This is HUGE.

This mess started in June of 2016 and took until November 2023 to be resolved. Over seven years! I have worked tirelessly on this matter alongside FLEOA.

If you have been affected by OPM's June 2016 policy, I encourage you to read the 20-page Opinion and Order on my website. It's an easy read and makes perfect sense as you read through it. After reading it, you may say, "that was a no-brainer," but remember, the MSPB in DC was without a quorum for over FIVE years. Between January 7, 2017, and March 3, 2022, the Merit Systems Protection Board did not have a quorum of members and therefore could not vote on any petitions for review or other cases requiring action by the Board.

I thought that the beauty of this MSPB Order is that OPM could not appeal the outcome. Well, I was certainly wrong on that point. Turns out, OPM has 60 days from the date of the 11/28/2023 MSPB ruling to file an appeal with The United States Court of Appeals for the Federal Circuit, which they did, right at the 60-day mark, on 1/26/2024. OPM's Petition For Review Of A Final Decision of the Merit Systems Protection Board in No. DE-0841-18-0053-I-1 is filed as case 24-109 in the referenced court.

I check PACER daily on this matter and I have created a free page on my website where you can obtain the latest information on this appeal: <https://fersguide.com/opm-mspb-decision-on-the-ras/>. The webpage is updated with every change I see in PACER.

The Petition itself is a pretty short read, at 17 pages. The balance of the filing consists of the MSPB decision. The best part can be found on the lower part of page 14 through page 15. OPM's argument is that if they are forced to follow the MSPS ruling, it may cost \$50 million to resolve and involve 7,000 or more cases. They also cite the increased workload if state courts issue amended COAPs. How lame! Your argument is that you have done some much that was wrong, it creates a burden too large for repair?

The beauty of this decision is that it was obtained by ONE person. Not a class-action lawsuit. Just one determined man. Always fight injustice!