No. 2024-1774

IN THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

DIRECTOR OF THE OFFICE OF PERSONNEL MANAGEMENT,
Petitioner,

v.

RONALD L. MOULTON, MERIT SYSTEMS PROTECTION BOARD,
Respondents.

Petition for Review From the Merit Systems
Protection Board in Case No. DE-0841-18-0053-I-1

REPLY BRIEF OF PETITIONER

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REPLY BRIEF OF PETITIONER

SUMMARY OF THE ARGUMENT

In our opening brief, we explained that the Merit Systems Protection Board's (MSPB or board) interpretation of 5 U.S.C. § 8421(c) should be rejected because it violates the fundamental canon of statutory construction that statutes should be construed to give meaning to every word or phrase within the statute. We further demonstrated that the interpretation set forth by the Office of Personnel Management (OPM) is consistent with the plain language of the statute, affords meaning to all of the statutory terms, renders no provision superfluous, and makes practical sense. In their response brief, Mr. Moulton[1] (Moulton Br.) and the MSPB

[1] As explained in our opening brief, when initially computing the share of benefits due to Mr. Moulton's former spouse, OPM incorrectly divided Mr. Moulton's gross basic annuity because it did not include the annuity supplement in

(MSPB Br.) argue that: (1) OPM's interpretation ignores the plain language of the statute; (2) the board's interpretation does not pose a superfluidity problem; (3) Congress knew how to draft a provision consistent with OPM's interpretation but chose not to; and (4) OPM's interpretation poses practical concerns.

As shown below, Mr. Moulton and the MSPB's arguments are wrong. OPM's interpretation is entirely consistent with section 8421(c) (and even with Mr. Moulton's and the MSPB's own proposed plain meaning articulations of section 8421(c)). Further, OPM's interpretation is the only reasonable interpretation because it is the only interpretation that affords meaning to section 8421(c). According to Mr. Moulton and the MSPB, section 8421(c) should be interpreted to mean that the rules set forth in section 8467 apply to the annuity supplement. But section 8467, by its own terms, applies to the annuity supplement. Under the board's interpretation, then, section 8421(c) is entirely unnecessary and is superfluous. Further, that Congress enacted a similar rule for CIA agents under "FERS-Special" provisions bolsters OPM's interpretation, as neither Mr. Moulton nor the MSPB offer support for the notion that Congress intended CIA agents to be subject to a different rule. Finally, as a practical matter, if the board's

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the computation of Ms. Moulton's apportionment. As Mr. Moulton correctly notes, however, OPM has waived collection of the overpayment resulting from the initial incorrect division of his annuity. Moulton Br. at 14 n.3. Accordingly, Mr. Moulton does not stand to gain or lose any money as a result of this case.

interpretation is adopted, OPM must ignore the directive of state courts regarding the apportionment of annuities absent "magic" language specifically addressing the annuity supplement in the order.

ARGUMENT

I. OPM's Interpretation Is Consistent With The Plain Language Of 5 U.S.C. § 8421(c)

Section 8421(c) states: "An amount under this section shall, for purposes of section 8467, be treated in the same way as an amount computed under section 8415." 5 U.S.C. § 8421(c). As we showed in our opening brief, section 8421's direction that OPM apportion annuity supplements "in the same way" as the basic annuity requires OPM to apportion the annuity supplement "in the same way" that it apportions the basic annuity, regardless of whether the annuity supplement is explicitly identified in a court order.

Both Mr. Moulton and the MSPB argue that this interpretation disregards the plain language of the statute. According to Mr. Moulton, "the statute's direction that the annuity supplement shall be 'treated in the same way' as the basic annuity means that [the] supplement should be handled using the same method as the basic annuity." Moulton Br. at 18. Similarly, the MSPB argues that "the plain language of the statute requires that the FERS annuity supplement be *dealt with* in the same way as a basic annuity for the purposes of section 8467." MSPB Br. at 20. OPM's interpretation is entirely consistent with either definition. Applying Mr. Moulton's

definition, if the basic annuity is apportioned according to a court order, then the same "method" should apply to the annuity supplement, and the annuity supplement should likewise be apportioned. Under the MSPB's definition, if the basic annuity is apportioned under a court order, then the annuity supplement should be dealt with in the same way and likewise apportioned.

Mr. Moulton contends that OPM ignores the plain language of section 8421(c) because OPM's interpretation requires the Court to conclude that the basic annuity and annuity supplement are part of the same payment. Moulton Br. at 18-19. Not so. To be sure, OPM's regulations expressly state that an "employee annuity" consists of "recurring payments under . . . FERS made to a retiree," 5 C.F.R.§ 838.103, and an "employee annuity" is the only *recurring* benefit payable under FERS that may be divided by court order. *See* 5 C.F.R. §§ 838.201(a), 211(a); 5 C.F.R. § 838.221(a)-(b); 5 C.F.R. § 838.222(a)-(b). Because the annuity supplement is paid monthly along with the basic annuity amount, *see* 5 U.S.C. § 8421(b)(1); 5 C.F.R. § 842.502, the annuity supplement is necessarily a "recurring payment" that is part of the "employee annuity." Accordingly, both the basic annuity and annuity supplement are part of the "employee annuity." In any event, OPM's interpretation of section 8421(c) does not hinge on the Court determining

that the basic annuity and annuity supplement are part of the same payment.[2] Even if the Court concludes they are different payments, section 8421(c) mandates that the annuity supplement be treated (*i.e.*, handled or dealt with) in the same way that the basic annuity is handled or dealt with in this particular circumstance. When the basic annuity is apportioned, the annuity supplement must be treated the same way and must also be apportioned.

According to the MSPB, OPM asks the Court to determine that "treat" means divide or apportion. MSPB Br. at 20. This argument is misleading. In the context of determining how to divide or apportion the annuity supplement pursuant to a court order, the operative question is, of course, how should the annuity be divided or apportioned. Indeed, the MSPB's argument would undermine its own interpretation: the MSPB argues that "treated in the same way" means "divided or apportioned according to the same rules" as the basic annuity. Accordingly, the MSPB likewise argues that "treat" means divide or apportion. The operative question, for the purposes of this case, is how an annuity supplement should be divided or apportioned. Interpreting section 8421(c) in light of that question does

[2] Similarly, Mr. Moulton argues that other portions of the FERS Act show that Congress did not mean "treated in the same way" to suggest that the annuity supplement is part of the basic annuity. Moulton Br. at 20-22. Regardless of whether the annuity supplement is part of the basic annuity, Congress directed that the annuity supplement must be treated the same way as the basic annuity in this circumstance and thus apportioned when the basic annuity is apportioned.

not run afoul of the statute's plain language. In short, the parties do not dispute what "treat" means, but whether "in the same way" refers to the same allocation or the same rule.[3]

The MSPB likewise argues that OPM's interpretation ignores other provisions of section 8467 not specifically related to whether an apportionment is "expressly provided" in a court order. MSPB Br. at 21. For example, section 8467 directs that, if OPM is served with more than one court order involving the same payment, OPM shall process the orders "on a first-come, first-served basis." 5 U.S.C. § 8467(a). Nothing about OPM's interpretation ignores this portion of the statute. The rule is simple: OPM must divide the annuity supplement under section 8421(c) in the same manner as it divides the basic annuity under section 8467. Thus, so long as OPM complied with section 8467 in dividing the basic annuity, it would likewise necessarily be complying with section 8467 by applying the same allocation to the annuity supplement under section 8421(c).

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[3] Mr. Moulton and the MSPB argue that "in the same way" means that OPM must divide a FERS annuity supplement using the *same procedures* required under 5 U.S.C. § 8467(a). As explained below, their argument suggests that Congress merely intended to repeat the instructions it provided under 5 U.S.C. § 8467(a), which would render section 8421(c) superfluous and unnecessary. To give meaning to section 8421(c), the statute must be interpreted to mean that treating the annuity supplement "in the same way" as the basic annuity requires OPM to divide the annuity supplement whenever it divides the basic annuity.

In short, OPM's interpretation is entirely consistent with the plain language of the statute. As stated in our opening brief, to "be treated in the same way" could mean "be subject to the same rule" (*i.e.*, allocate only if expressly mentioned in a court order) or "be subject to the same allocation." But as explained below, OPM's interpretation is correct because it accords meaning to section 8421 and section 8467, while the board's interpretation renders section 8421(c) superfluous.

II. Only OPM's Interpretation Gives Meaning To Sections 8421 And 8467

As we explained in our opening brief, only OPM's interpretation affords meaning to each provision in the statutory scheme. According to Mr. Moulton and the MSPB, section 8421(c) should be interpreted to mean that the rules set forth in 5 U.S.C. § 8467 apply to the annuity supplement because those rules apply to the basic annuity. But section 8467 states that its rules apply to "payments under this chapter." 5 U.S.C. § 8467(a). Chapter 84 includes both the basic annuity and annuity supplement. Accordingly, section 8467(a) does all the work that Mr. Moulton and the MSPB attribute to section 8421(c), rendering section 8421(c) entirely meaningless and superfluous.

Mr. Moulton argues that section 8421(c) is not meaningless because it clarifies that the same rules that apply to the basic annuity also apply to the annuity supplement. Moulton Br. at 25-26 (citing *Ali v. Federal Bureau of Prisons*, 552 U.S. 214, 226 (2008)). Mr. Moulton's reliance on *Ali* is misplaced. In *Ali*, The

Supreme Court was tasked with deciding whether a statutory phrase in the Federal Tort Claims Act (FTCA) – "any officer of customs or excise or any other law enforcement officer" – included Bureau of Prison (BOP) officers. 552 U.S. at 218. The petitioner argued that the phrase "any other law enforcement officer" "includes only law enforcement officers acting in a customs or excise capacity." *Id.* The Supreme Court disagreed, holding that that the term "any other law enforcement officer" carries a broad meaning and includes BOP officers. *Id.* Among many other flaws with the petitioner's argument, the Supreme Court rejected the petitioner's argument that, by construing "any other law enforcement officer" broadly, the term "any officer of customs or excise" would be superfluous. *Id.* at 226. The Supreme Court held that Congress may have intended to "remove any doubt" that officers of customs or excise were included in "law enforcement officers." *Id.*

The rationale from *Ali* does not apply here. Unlike the FTCA, which did not otherwise state whether "any officer of customs or excise" were included in "law enforcement officers," 5 U.S.C. § 8467 expressly states that its rules apply to *all* payments under Chapter 84. Mr. Moulton does not challenge that the annuity supplement is a payment under Chapter 84. Accordingly, section 8467 already makes the clarification that Mr. Moulton attributes to section 8421(c), rendering section 8421(c) meaningless. *See Splane v. West*, 216 F.3d 1058, 1068 (Fed. Cir.

2000) ("We must construe a statute, if at all possible, to give effect and meaning to all its terms."); *Marx v. General Revenue Corp.*, 568 U.S. 371, 386 (2013) ("the canon against surplusage is strongest when an interpretation would render superfluous another part of the same statutory scheme").

Moreover, if Congress had intended to clarify which annuity payments were subject to section 8467's rules, as Mr. Moulton contends, then Congress would have, presumably, included similar language in section 8415, which sets forth the rules for computing the basic annuity. However, Congress does not specify in section 8415 that section 8467's rules apply. This strongly suggests that Congress did not intend section 8421(c) to mean that section 8467's rules apply – a proposition that was already clear from section 8467 – but instead that the annuity supplement should be subject to the same allocation as the basic annuity.

The MSPB similarly argues that section 8421(c) serves a clarifying function by reiterating that section 8467's rules apply to the annuity supplement, but, as explained above, section 8421(c) is not necessary in demonstrating that section 8467's rules apply to the annuity supplement. Additionally, the MSPB argues that OPM's interpretation renders section 8467(a) inoperative because it requires the annuity supplement to be divided in the same manner as the basic annuity even if not "expressly provided for" in the court order. MSPB Br. at 25. That argument is flawed. First, section 8467(a) is not inoperative because it would still apply to the

basic annuity. Second, section 8421(c) does not render section 8467(a) inoperative as to the annuity supplement, but explains how section 8647(a) applies in the context of the annuity supplement. That is, when the basic annuity is expressly divided pursuant to a court order, that express division also includes the annuity supplement.

In short, the board's interpretation assigns no meaning to section 8421(c) that is not already set forth in section 8467. To the extent Mr. Moulton and the MSPB argue that section 8421(c) clarifies that the annuity supplement qualifies as a "payment under this chapter," they fail to explain why Congress chose not to likewise apply that clarification to the basic annuity. Here, it is possible to "give effect and meaning to all" of the statute's terms by construing section 8421(c) to mean that the annuity supplement must be subject to the same allocation as the basic annuity. *Splane*, 216 F.3d at 1068. Because that is the only interpretation that gives meaning to all of the statute's terms, it should be adopted. *Marx*, 568 U.S. at 385 (holding that the canon against surplusage applies when a competing interpretation gives effect to every clause and word of a statute).

III. A Highly Specific Statute Addressing CIA Agents Does Not Undermine OPM's Interpretation

Both Mr. Moulton and the MSPB argue that a highly specific statute addressing annuity apportionments for retired CIA agents undermines OPM's arguments. Moulton Br. at 23; MSPB Br. at 28-30. The FERS Act included

"special rules for former spouses" of CIA agents. FERS Act of 1986, Pub. L. No. 99-335, 100 Stat. 514. In section 304(g), Congress provided that:

> The entitlement of a former spouse to a portion of an annuity of a retired officer or employee of the Agency under this section shall extend to any supplementary annuity payment that such officer or employee is entitled to receive under section 8421 of title 5, United States Code.

According to Mr. Moulton and the MSPB, Congress could have used this same language in section 8421(c) if it intended the annuity supplement to be subject to the same allocation as the basic annuity. Moulton Br. at 23; MSPB Br. at 29.

To be sure, Congress could have used different language to accomplish the same goal. Indeed, the same could be said for the board's interpretation – Congress could have simply stated that an annuity supplement may only be paid to another person "if and to the extent expressly provided for in the terms of" a state court order. To use Mr. Moulton's and the MSPB's own words, Congress "knew how to" make an annuity payment subject to the express terms of a state court order, but intentionally chose not to do so. *See* Moulton Br. at 23; MSPB Br. at 29.

The better reading of these FERS-Special provisions dealing with CIA agents is that Congress set forth the same rules for CIA agents as it did for other Federal employees. In other words, because the annuity supplement is subject to the same allocation as the basic annuity for other Federal employees, it would make sense that the annuity supplement for a former CIA agent would likewise be

subject to the same allocation as the basic annuity available to that former CIA agent. Neither Mr. Moulton nor the MSPB explain why a different rule would apply to CIA agents.

IV. The Facts Of This Case Highlight The Flaw In The Board's Interpretation

As we explained in our opening brief, OPM's interpretation is consistent with the statute's plain language and longstanding rules of statutory interpretation, and it makes practical sense. Indeed, under the board's interpretation, state courts (or parties to a divorce), which may not even be aware that an annuity supplement exists, must speculate, sometimes years or even decades in advance, as to whether an employee will be entitled to an annuity supplement if the court intends to subject the supplement to division.

Mr. Moulton and the MSPB counter that OPM's interpretation would cause confusion and "cabin state courts' authority to craft divorce decrees." Moulton Br. at 29, 32-36; MSPB Br. at 39. However, the Court need look no further than the facts of this case to see the flaw in the board's interpretation. The Colorado state court divorce decree stated:

> The Employee is (or will be) eligible for retirement benefits under the Federal Employee Retirement System based on employment with the United States Government. The Former Spouse is entitled to a pro rata share of the Employee's gross monthly annuity under the Federal Employees Retirement System, including any

> benefit the Employee earns based on special ATC service.

Appx23-24.

The state court stated that Ms. Moulton should be entitled to a pro rata share of Mr. Moulton's "gross monthly annuity," without any qualification. Neither Mr. Moulton nor the MSPB can argue that the annuity supplement is not part of the overall annuity payment that Mr. Moulton receives. However, because the state court did not expressly address the annuity supplement, the board's interpretation requires OPM to ignore the directive of the state court.

Further, any concerns about OPM's interpretation "cabin[ing] state courts' authority to craft divorce decrees" is overstated and a matter for Congress. In section 304(g) of the FERS Act, which is the section addressing the annuity supplement in the context of CIA agents, Congress mandated that annuity supplements be divided when the agent's basic annuity is divided. Accordingly, Congress has shown a willingness to "cabin" state courts in order to protect the equities of the division of a Federal employee's annuities.

Common sense and logic dictate that when a state court orders the apportionment of an annuity, the full scope of the annuity, including any annuity supplement that the Federal retiree may be entitled to, should be included in that apportionment. Accordingly, OPM's reading of the statute is consistent with its plain language and common sense.

CONCLUSION

For these reasons, we respectfully request that this Court reverse the MSPB's decision.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the typeface and type-style limitations of Federal Rules of Appellate Procedure 32(a)(5) and 32(a)(6) because it was prepared in a proportionally spaced typeface, 14-point Times New Roman, using Microsoft Word. This brief also complies with the length limitation of Federal Circuit Rule 32(b)(1) because it contains 3,117 words.

/s/Kyle S. Beckrich