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

PETITIONER'S MOTION FOR STAY PENDING APPEAL

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March 17, 2025

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PETITIONER'S MOTION FOR STAY PENDING APPEAL

Pursuant to Rule 8(a) of the Rules of this Court, petitioner, the Director of the Office of Personnel Management (OPM), respectfully requests a stay of the Merit Systems Protection Board's (MSPB) opinion and order in this case pending a resolution of this case on appeal. As set forth below and fully in our merits briefing, the MSPB's opinion and order is premised on a misinterpretation of statute and, if not stayed pending appeal, will irreparably harm OPM and the public. Pursuant to Rule 8(b) and 27(a)(2) of the Rules of this Court, counsel for OPM consulted with counsel for respondents, Ronald Moulton and the MSPB, regarding this motion. Counsel for the MSPB indicated that the MSPB takes no position with respect to this motion. Counsel for Mr. Moulton indicated that Mr. Moulton opposes this motion.

BACKGROUND

This case concerns how OPM must apportion a retirement annuity supplement pursuant to a court order (such as a divorce decree). Some Federal retirees receive a temporary "annuity supplement" in addition to their basic annuity. Section 8421(c) of Title 5 governs how OPM must treat an annuity supplement when a court order expressly divides an employee annuity (in divorce proceedings, for example). Under that provision, OPM must apportion the annuity supplement owed to a Federal retiree "in the same way" as a basic annuity. Consistent with the plain language of section 8421(c), beginning in August 2016, OPM has included annuity supplements in the computation of a court-ordered apportionment when a court order expressly divides an employee annuity, regardless of whether the court order explicitly references the annuity supplement.

Mr. Moulton was an air traffic controller and subject to mandatory separation before age 62. Appx19.[1] As such, he qualified for a section 8421 annuity supplement. 5 U.S.C. § 8425(a). When Mr. Moulton retired in 2010, his annuity was subject to a Colorado state court divorce decree that expressly awarded his former spouse, Jill Moulton, a portion of his FERS gross monthly annuity:

> The Employee is (or will be) eligible for retirement benefits under the Federal Employee Retirement System based on

[1] "Appx" refers to the appendix attached to this motion. Per Rule 8(a) of this Court's rules, the appendix includes a copy of our petition for review, a copy of the MSPB's opinion and order on the merits, and a copy of the MSPB's order denying OPM's motion to stay its order pending appeal.

> 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.

Appx5.

When initially computing the share of benefits due to Ms. Moulton, OPM incorrectly divided Mr. Moulton's gross basic annuity because it did not include the annuity supplement in the computation of Ms. Moulton's apportionment. Appx19. In August 2016, OPM notified Mr. Moulton of the error in computing the division of his annuity and informed him that he had been overpaid (and Ms. Moulton had been underpaid) by $24,535.[2] Appx20. Mr. Moulton requested reconsideration, which OPM denied. Appx20.

Mr. Moulton challenged OPM's decision at the MSPB. Appx21. OPM's Director intervened in the MSPB proceedings as a matter of right under 5 U.S.C. § 7701(d). Appx22. Mr. Moulton's former spouse also intervened. Appx22. In April 2018, an MSPB administrative judge reversed OPM's decision. Appx22. The administrative judge interpreted section 8421(c) to allow OPM to divide an annuity

[2] While Mr. Moulton's board appeal was pending, on March 13, 2018, OPM issued Mr. Moulton a final decision on his overpayment, informing him that, using its authority under 5 U.S.C. § 8470(b), OPM had determined he was entitled to waiver of the annuity overpayment he received from July 1, 2010, until June 30, 2016. OPM determined that he was not at fault for creating the overpayment and that collection would be against equity and good conscience because of OPM's delay in adjusting his annuity in accordance with 5 U.S.C. § 8421(c). *See* 5 C.F.R. § 845.302-303.

supplement only when a court order expressly provides for such division. Appx22. OPM filed a petition for review with the full board. Appx23.

On November 28, 2023, the MSPB issued a precedential decision. Like the administrative judge, the MSPB concluded that the plain language of 5 U.S.C. § 8421(c) allows OPM to divide a FERS annuity supplement only if a court order expressly requires division of that benefit. Appx27.

In its opinion and order, the MSPB ordered OPM to "stop apportioning the annuity supplement" and "refund all previously apportioned annuity supplements amounts" to Mr. Moulton. Appx31. On December 18, 2023, the Director requested that the MSPB stay its opinion and order pending appeal to this Court. Appx40. On February 24, 2025, the MSPB denied the Director's request for a stay. Appx38-44.

ARGUMENT

I. Standard of Review

In evaluating a request for stay pending appeal, this court considers "(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." *Standard Havens Products, Inc. v. Gencor Industries, Inc.*, 897 F.2d 511, 512 (Fed. Cir. 1990). "This court has . . . adopted a flexible approach in analyzing the four factors," so that a strong showing on one factor balances a weaker showing on another factor. *Id.* at 513. This Court "is not

required to find that ultimate success by the movant is a mathematical probability," but merely that the case presents issues "so serious, substantial, difficult, and doubtful as to make them a fair ground for litigation." *Wash. Metro. Area Transit Comm'n v. Holiday Tours, Inc.*, 559 F.2d 841, 844 (D.C. Cir. 1977) (citation and quotation omitted).

II. The Stay Factors Favor OPM

A. OPM Has Made a Strong Showing of Its Likelihood of Success on the Merits

As OPM has already demonstrated in its petition for review and merits briefing, OPM is likely to succeed on the merits of this appeal.

Section 8421 directs OPM to apportion annuity supplements "in the same way" as the basic annuity. Section 8467, titled "Court orders," establishes the general rule for when benefits ordinarily due an annuitant must be paid to another individual under a court order: "if and to the extent expressly provided for in the terms of" the court order. 5 U.S.C. § 8467(a)(1). Section 8421(c) applies section 8467's general rule to the specific context of the annuity supplement, directing that the supplement be treated the same way as the basic annuity payments. The section 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). Section 8415, in turn, provides the rules OPM uses to compute the basic FERS annuity.

Together, these provisions plainly require the annuity supplement to be apportioned "in the same way" as the basic annuity amount, regardless of whether the

annuity supplement is explicitly identified in a court order. Stated differently, for purposes of court orders, the basic annuity amount and the annuity supplement are considered to be part of the same retirement payment. Thus, if the basic annuity portion of that payment is explicitly divided, the annuity supplement must be divided "in the same way."

Not only is OPM's interpretation consistent with the statute's plain language, but the MSPB's interpretation of the statute violates fundamental principles of statutory construction. According to the MSPB, section 8421(c)'s mandate that the FERS supplement and the basic annuity be treated "in the same way" for purposes of section 8467 means only that OPM must divide the annuity supplement if the court order explicitly requires such a division. However, this reading renders section 8421(c) superfluous. *See Gumpenberger v. Wilkie*, 973 F.3d 1379, 1382 (Fed. Cir. 2020) (rejecting an interpretation of a statute that would render a term superfluous). Section 8467 already applies to all "[p]ayments under this chapter." 5 U.S.C. § 8467(a). Section 8421 falls under the same chapter as section 8467. Absent section 8421(c), section 8467, which applies to annuity supplements, would require supplements to be apportioned only if required by a divorce decree or similar court order. Thus, section 8467 already accomplishes everything that the board attributes to section 8421(c). Put another way, section 8421(c) is designed to depart from how section 8467 would otherwise apply to an annuity supplement, by treating an express division of a basic

annuity as applying to the supplement even in the absence of an express court order covering the supplement.

To the extent there were any doubt about OPM's likelihood of success on the merits, another court considering this exact issue adopted OPM's interpretation of section 8421(c). *Federal Law Enforcement Officers Assoc. v. Ahuja*, No. 19-735, 2021 WL 4438907, at *5 (D.D.C. Sept. 28, 2021), *vacated*, 62 F.4th 551 (D.C. Cir. 2023) (*FLEOA*).[3] In *FLEOA*, the district court agreed with OPM that sections "8421(c) and 8467 unambiguously require OPM to *divide* the annuity supplement 'in the same way' as basic annuity when a court order directs a division of federal retirement annuity." *Id.* (emphasis in original). "In other words, to 'treat' the annuity supplement 'in the same way' means to divide it 'in the same way' as [the] basic annuity; not . . . to require a court order expressly and separately directing that the annuity 'supplement' be divided." *Id.* The district court noted that "the structure and context of the statutory scheme support this conclusion." *Id.* Specifically, the district court noted that the annuity supplement "is located within the subchapter entitled 'Basic Annuity.'" *Id.* Thus, "the subchapter about [the] 'basic annuity' encompasses . . . the annuity supplement," and "it is logical that if a court order directs division of [the] basic annuity, that order would also encompass division of the

[3] The United States Court of Appeals for the District of Columbia held that the district court lacked jurisdiction over the case, and thus vacated the district court's opinion and remanded the case with instructions to dismiss for lack of jurisdiction. *FLEOA*, 62 F.4th at 567.

annuity supplement 'in the same way,' without the need to distinguish between the two." *Id.*

In short, OPM has shown that is likely to succeed on the merits. Certainly, OPM has shown that the case presents issues "so serious, substantial, difficult, and doubtful as to make them a fair ground for litigation." *Wash. Metro. Area Transit Comm'n*, 559 F.2d at 844. Thus, the first factor favors OPM and granting a stay pending appeal.

B. OPM Will Be Irreparably Harmed Absent a Stay

Absent a stay pending appeal, OPM would be compelled to rescind its decision apportioning Mr. Moulton's annuity between Mr. Moulton and Ms. Moulton; 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's estate that she has been overpaid in apportionment.

This process puts OPM at serious risk of suffering irreparable harm. Namely, there is no guarantee that OPM would be able to collect the alleged overpayment from Ms. Moulton. Further, should OPM choose to waive its right to collect the overpayment (as it did with Mr. Moulton), OPM would be forced to pay Mr. Moulton out of the retirement fund, which could result in a substantial loss to the fund. Should OPM prevail in this appeal, that loss may not be reparable if OPM cannot

then recoup the unnecessary overpayment back from Mr. Moulton. This is precisely why courts grant stays of money judgments pending appeal – "to protect the judgment debtor from satisfying the judgment only to find that restitution is impossible after reversal on appeal." *Dixon v. United States*, 900 F.3d 1257, 1268 (11th Cir. 2018) (cleaned up).

This problem is exacerbated by the fact there are at least 70 other cases pending before the MSPB involving this same issue that will likely be resolved in the same manner absent a stay pending appeal. Appx43. The MSPB's decision in this case was issued as an "Opinion and Order," meaning that it is a precedential decision of the MSPB that must be followed by the MSPB in other cases. 5 C.F.R. § 1201.117(c)(1). Accordingly, absent a stay pending appeal, the MSPB will likely resolve the other pending cases in the same manner that it resolved this case. OPM will thus be forced to attempt overpayments from *dozens* of former spouses, and will risk substantial harm to the retirement fund if it is unable to collect the overpayment.

By contrast, a stay will ensure that Mr. Moulton's annuity (and every other annuity that will be affected by this case) are apportioned once. This protects OPM from seeking to recoup overpayments (potentially twice) and thus protects OPM (and the public fisc) from suffering irreparable harm.

C. A Stay Will Not Substantially Injure the Other Parties

Neither Mr. Moulton nor the MSPB will be substantially injured by a stay of the MSPB's opinion and order. The MSPB, as the adjudicatory body below, does not

stand to gain or lose any money as a result of this appeal (or its own opinion and order). By definition, then, a stay cannot substantially injure the MSPB.

As for Mr. Moulton, the most "harm" he could incur would be a delay in being repaid that portion of the annuity paid to Ms. Moulton from 2016 to 2023. This harm is not irreparable and is inherent in our system of justice, which recognizes the right to appeal. *See Hughes Network Sys., Inc. v. InterDigital Commc'ns Corp.*, 17 F.3d 691, 694 (4th Cir. 1994).

"[T]he temporary loss of income, ultimately to be recovered, does not usually constitute irreparable injury." *Sampson v. Murray*, 415 U.S. 61, 90 (1974). Should Mr. Moulton prevail, he will be made whole by receiving the full extent of the annuity to which he would be entitled. And because OPM has waived overpayment based on OPM's determination that it incorrectly computed Ms. Moulton's apportionment prior to 2016, Mr. Moulton stands to lose no money from a stay (or from an adverse decision in this case). To the extent Mr. Moulton may claim an immediate need for the monetary relief under the MSPB opinion and order, this need highlights the risk that the public fisc may never be able to recover the payment should OPM ultimately prevail in this appeal.

Therefore, a stay pending appeal will not substantially injure any other parties.

D. A Stay Is in the Public's Interest

The public interest would be served by maintenance of the *status quo* during this appeal. "[T]here is a strong policy interest advocating for the protection of the public

fisc." *United States v Paez*, 866 F. Supp. 62, 65 (D.P.R. 1994). Further, as noted above, over 70 other cases will be decided by the resolution of this case. Rather than forcing OPM to attempt to collect the annuity overpaid to former spouses under the MSPB's incorrect interpretation of 5 U.S.C. § 8421(c), or otherwise forcing OPM to remit payment to annuitants out of the public fisc, which OPM may not be able to recollect later should it prevail in this case, the public's interest in protecting the public fisc is served by maintaining the *status quo* during the pendency of this case. Once the case is finally resolved, all parties will be made whole in accordance with the final resolution.

CONCLUSION

For these reasons, we respectfully request that the Court issue a stay of the MSPB's opinion and order pending appeal.

Respectfully submitted,

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March 17, 2025

CERTIFICATE OF COMPLIANCE

I certify that, pursuant to Fed. R. App. Procedure 27(d)(2)(a), this motion complies with the type-volume limitation. This motion was prepared using Microsoft Word, Garamond, 14-point font. In making this certification, I have relied upon the word count function of the Microsoft Word software application used to prepare this motion. According to the word count, this motion contains 2,618 words.

/s/ Kyle S. Beckrich
KYLE S. BECKRICH
Trial Attorney
March 17, 2025

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No. _____

IN THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

KIRAN A. AHUJA, Director,
Office of Personnel Management,
Petitioner,

v.

RONALD L. MOULTON,
Respondent.[1]

Petition For Review Of A Final Decision Of The Merit Systems Protection Board In No. DE-0841-18-0053-I-1

PETITION FOR REVIEW OF KIRAN A. AHUJA,
Director, Office of Personnel Management

Pursuant to 5 U.S.C. § 7703(d) and Rule 47.9 of the Rules of the United States Court of Appeals for the Federal Circuit, Kiran A. Ahuja, Director of the Office of Personnel Management (OPM), respectfully requests review of the final decision of the Merit Systems Protection Board (board or MSPB). In the board's review of OPM's apportionment of retirement benefits between respondent, Ronald L. Moulton, and his former spouse, the board misinterpreted the plain

[1] Mr. Moulton's former spouse, Jill Moulton, was an intervenor in this case below. Mr. Moulton recently informed the board that Ms. Moulton died after the board issued its decision in this case.

language of 5 U.S.C. § 8421(c), which governs the apportionment of certain Federal retirement benefits in accordance with court orders, such as divorce decrees. Section 8421(c) requires OPM to apportion an annuity supplement "in the same way" as a basic annuity, regardless of whether the annuity supplement is expressly mentioned in a court order. The board in this case misinterpreted a civil service law, section 8421(c), when it concluded that OPM cannot divide the annuity supplement at all, unless expressly provided for in a court order. Accordingly, the Director of OPM seeks immediate review of the board's precedential decision so that the board's ruling can be corrected as a matter of law.

STATEMENT OF JURISDICTION

This Court possesses jurisdiction over this petition for review because the OPM Director has "determine[d], 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." 5 U.S.C. § 7703(d). The board possessed jurisdiction over this case pursuant to 5 U.S.C. §§ 8461(e) and 7701(d). The board's opinion became final upon issuance on November 28, 2023, 5 C.F.R. § 1201.113(b), and this petition was filed within 60 days. 5 U.S.C. § 7703(d); Fed. Cir. R. 47.9(a).

STATEMENT OF THE ISSUE

Whether the plain language of 5 U.S.C. § 8421(c) requires OPM to include an annuity supplement in the computation of a court-ordered apportionment when a court order expressly divides an employee annuity, regardless of whether the court order explicitly references the annuity supplement.

STATEMENT OF THE CASE

This case concerns how OPM must apportion a retirement annuity supplement pursuant to a court order (such as a divorce decree). On November 28, 2023, the board affirmed the initial decision of an administrative judge determining that 5 U.S.C. § 8421(c) allows OPM to divide an annuity supplement only when that annuity supplement is expressly addressed in a court order. Appx1-20.[2]

STATEMENT OF FACTS

I. Statutory Background

Under the Federal Employees' Retirement System (FERS) Act, Federal employees hired after December 31, 1983, are eligible for three Federal benefits: FERS, which is a defined benefit plan; the Thrift Savings Plan (TSP), a defined contribution plan; and a Social Security benefit. To obtain Social Security benefits, a retiree must be at least 62. 42 U.S.C. § 402.

[2] "Appx__" refers to pages in the appendix attached to this petition for review.

Because some Federal employees are eligible to retire prior to reaching age 62 (and thus before they become eligible for Social Security benefits), Congress enacted 5 U.S.C. § 8421. Section 8421 provides an annuity supplement to retirees until they reach age 62 and are entitled to a Social Security benefit. *Id.* § 8421(a)(3)(B). When apportioning the annuity supplement between an annuitant and another individual (such as a former spouse) pursuant to a court order, the statute provides that the amount of the annuity supplement apportioned "shall . . . be treated in the same way as an amount computed under" the basic FERS annuity. *Id.* § 8421(c). Section 8467(a), which provides the general rule that applies to court orders, states:

> Payments . . . which would otherwise be made to an employee, Member, or annuitant . . . based on service of that individual shall be paid (in whole or part) by [OPM] . . . to another person if and to the extent expressly provided for in the terms of . . . any court decree of divorce, annulment, or legal separation.

5 U.S.C. § 8467(a)(1); s*ee also* 5 C.F.R. 838, subparts A through F.[3]

[3] OPM's implementing regulations, in turn, provide that the only "payments" that may be divided by court order are an "employee annuity" or "refunds of retirement contributions." *See* 5 C.F.R. part 838, subparts B through F. "Employee annuity" means "recurring payments under CSRS and FERS made to a retiree," 5 C.F.R. § 838.103, which necessarily includes an annuity supplement as it is a recurring payment under FERS.

II. Mr. Moulton's Factual Background

Mr. Moulton was an Air Traffic Controller. Appx2. Because he was subject to mandatory separation before age 62, he qualified for a section 8421 annuity supplement. 5 U.S.C. § 8425(a). When Mr. Moulton retired in 2010, his annuity was subject to a Colorado state court divorce decree that expressly awarded his former spouse, Jill Moulton,[4] a portion of his FERS gross monthly annuity:

> 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.

When initially computing the share of benefits due to Ms. Moulton, OPM incorrectly divided Mr. Moulton's gross annuity, but did not divide any portion of his annuity supplement. Appx2. In August 2016, OPM notified Mr. Moulton of the error in computing the division of his annuity and informed him that he had

[4] As noted above, Mr. Moulton informed the board that Ms. Moulton died after the board issued its decision. However, there remains a live case or controversy with respect to which the OPM had statutory right to seek judicial review. First, Mr. Moulton seeks the return of alleged underpayments of his annuity. Second, OPM has a live interest in resolving the question of how OPM must apportion a retirement annuity supplement pursuant to a court order under 5 U.S.C. § 8421(c). *See Horner v. MSPB*, 815 F.2d 668, 671 (Fed. Cir. 1987).

been overpaid (and Ms. Moulton had been underpaid) by $24,535. Appx3. Mr. Moulton requested reconsideration, which OPM denied. Appx3. Mr. Moulton then challenged OPM's decision at the MSPB. Appx4. The Director intervened in the MSPB proceedings as a matter of right under 5 U.S.C. § 7701(d). Appx5. Mr. Moulton's former spouse also intervened. Appx5.

In April 2018, an MSPB administrative judge reversed OPM's decision. Appx5. The administrative judge determined that section 8421 was subject to multiple interpretations. Appx5. The administrative judge declined to defer to OPM's interpretation because OPM's regulations did not directly address the purpose of section 8421(c) or otherwise interpret that section. Appx5. Instead, the administrative judge read the statute as allowing OPM to divide an annuity supplement only when a court order expressly provides for such division. Appx5. Because the court order in this case did not expressly divide the annuity supplement, the administrative judge determined that OPM erred in apportioning the annuity supplement in the same way as the basic annuity. Appx5-6. OPM petitioned for review with the full board.[5] Appx6.

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[5] While OPM's petition for review was pending, an MSPB administrative judge in another section 8421 case adopted OPM's interpretation of the statute. *Kuebbeler v. OPM*, No. AT-0843-19-0356-I-1, 2019 WL 4252309 (M.S.P.B. Sept. 4, 2019). In that case, the administrative judge held that the statute is "clear and unambiguous" and "require[es] OPM to include any employee's FERS annuity supplement as part of an ex-spouse's share of any FERS annuity divided pursuant

On November 28, 2023, the board issued a precedential decision. The board concluded that the plain language of 5 U.S.C. § 8421(c) allows OPM to divide a FERS annuity supplement only if a court order expressly requires division of that benefit. Appx10. According to the board, because section 8467 requires OPM to divide a FERS basic annuity only when a court order expressly divides the benefit, the direction in section 8421(c) to treat the annuity supplement "in the same way" means that OPM may divide the FERS annuity supplement only when a court order expressly divides the supplement. Appx10. Accordingly, the board denied OPM's petition for review and affirmed the administrative judge's reversal of OPM's final decision. Appx14.

ARGUMENT

As demonstrated below, and as we would demonstrate in greater detail in a merits brief, the board erred in interpreting the plain language of 5 U.S.C. § 8421(c). Contrary to the statute's plain language requiring that an annuity supplement be divided "in the same way" as a basic annuity, the board determined that OPM may only divide an annuity supplement if it is expressly addressed in a court order.

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to court order without the need for the court order to separately direct OPM to include such annuity supplement." *Id.* Mr. Kuebbeler filed a petition for review of the board's initial decision but withdrew his appeal while the petition for review was pending, and the full board dismissed Mr. Kuebbeler's appeal as withdrawn.

As we show below, the board misapplied at least two fundamental rules of statutory construction in rendering its decision. First, the board failed to give meaning to the various provisions of the statutory scheme and instead rendered section 8421(c) superfluous. Second, the board disregarded the rule that specific terms of a statute govern general terms.

Finally, the board's precedential decision will have a substantial impact on civil service law, as it will significantly alter how OPM apportions annuities pursuant to court orders, in addition to presenting risk of loss to the retirement fund and practical concerns for both state courts and former spouses.

I. The Board Erred In Interpreting A Civil Service Law, Rule, Or Regulation Because The Board's Decision Is Contrary To The Plain Language Of 5 U.S.C. § 8421(c)

The board erred in interpreting 5 U.S.C. § 8421(c). Section 8421 directs OPM to apportion annuity supplements "in the same way" as the basic annuity. Section 8467, titled "Court orders," establishes the general rule for when benefits ordinarily due an annuitant must be paid to another individual under a court order: "if and to the extent expressly provided for in the terms of" the court order. 5 U.S.C. § 8467(a)(1). Section 8421(c) applies section 8467's general rule to the specific context of the annuity supplement, directing that the supplement be treated the same way as the basic annuity payments. The section 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). Section 8415, in turn, provides the rules OPM uses to compute the basic FERS annuity.

Together, these provisions plainly require the annuity supplement to be apportioned "in the same way" as the basic annuity amount, regardless of whether the annuity supplement is explicitly identified in a court order. Stated differently, for purposes of court orders, the basic annuity amount and the annuity supplement are considered to be part of the same retirement payment. Thus, if the basic annuity portion of that payment is explicitly divided, the annuity supplement must be divided "in the same way."

This construction harmonizes and gives effect to both section 8421 and section 8467. *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."); *Mittleman v. Postal Regulatory Comm'n*, 757 F.3d 300, 306 (D.C. Cir. 2014) (quoting *New Process Steel, L.P. v. National Labor Relations Bd.*, 560 U.S. 674, 680 (2010)) (holding that courts must attempt "to harmonize and give meaningful effect to" all provisions in a statute). Section 8467 governs when the basic annuity may be divided, and section 8421 provides that the annuity supplement should be divided in the same way.

Further, as a district court considering this issue reasoned, OPM's interpretation is consistent with the overall structure of the FERS Act. *Federal*

Law Enforcement Officers Assoc. v. Ahuja, No. 19-735, 2021 WL 4438907, at *5 (D.D.C. Sept. 28, 2021), *vacated*, 62 F.4th 551 (D.C. Cir. 2023) (*FLEOA*).[6] In *FLEOA*, the district court agreed with OPM that sections "8421(c) and 8467 unambiguously require OPM to *divide* the annuity supplement 'in the same way' as basic annuity when a court order directs a division of federal retirement annuity." *Id.* (emphasis in original). "In other words, to 'treat' the annuity supplement 'in the same way' means to divide it 'in the same way' as [the] basic annuity; not . . . to require a court order expressly and separately directing that the annuity 'supplement' be divided." *Id.* The district court noted that "the structure and context of the statutory scheme support this conclusion." *Id.* Specifically, the district court noted that the annuity supplement "is located within the subchapter entitled 'Basic Annuity.'" Thus, "the subchapter about [the] 'basic annuity' encompasses . . . the annuity supplement," and "it is logical that if a court order directs division of [the] basic annuity, that order would also encompass division of the annuity supplement 'in the same way,' without the need to distinguish between the two." *Id.* Thus, OPM's reading of the statute is consistent with its plain language.

[6] The United States Court of Appeals for the District of Columbia held that the district court lacked jurisdiction over the case, and thus vacated the district court's opinion and remanded the case with instructions to dismiss for lack of jurisdiction. *FLEOA*, 62 F.4th at 567.

Not only is OPM's interpretation consistent with the statute's plain language, but the board's interpretation of the statute also violates fundamental principles of statutory construction. According to the board, section 8421(c)'s mandate that the FERS supplement and the basic annuity be treated "in the same way" for purposes of section 8467 means only that OPM must divide the annuity supplement if the court order explicitly requires such a division. However, this reading renders section 8421(c) superfluous. *See Gumpenberger v. Wilkie*, 973 F.3d 1379, 1382 (Fed. Cir. 2020) (rejecting an interpretation of a statute that would render a term superfluous). Section 8467 already applies to all "[p]ayments under this chapter." 5 U.S.C. § 8467(a). As the *FLEOA* court explained, section 8421 falls under the same chapter as section 8467. 2021 WL 4438907, at *5. Absent section 8421(c), section 8467, which applies to annuity supplements, would require supplements to be apportioned only if required by a divorce decree or similar court order. Thus, section 8467 already accomplishes everything that the board attributes to section 8421(c). Put another way, section 8421(c) is designed to depart from how section 8467 would otherwise apply to an annuity supplement, by treating an express division of a basic annuity as applying to the supplement even in the absence of an express court order covering the supplement.

Thus, the only reasonable reading of the statutory scheme is that section 8467 provides a general rule and section 8421(c) explains how that general rule

applies specifically to the annuity supplement. In such a case, the "commonplace [rule] of statutory construction [is] that the specific governs the general." *Biogen MA, Inc. v. Japanese Foundation for Cancer Research*, 785 F.3d 648, 657 (Fed. Cir. 2015) (quoting *RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 566 U.S. 639, 645 (2012)). That rule should be given particular force here, "where Congress 'has enacted a comprehensive scheme and has deliberately targeted specific problems with specific solutions.'" *Id.* (quoting *RadLAX*, 566 U.S. at 645).

Further, in addressing a different annuity—a survivor annuity—Congress directs OPM to pay a former spouse the annuity "if and to the extent expressly provided for . . . in the terms of any decree or divorce or annulment or any court order." 5 U.S.C. § 8341(h)(1). That Congress elected not to include such language in section 8421(c) further undermines the board's interpretation. *See Russello v. United States*, 464 U.S. 16, 23 (1983) (quoting *United States v. Wong Kim Bo*, 472 F.2d 720, 722 (5th Cir. 1972)) ("Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.").

In addition to being consistent with the statute's plain language and longstanding rules of statutory interpretation, OPM's interpretation makes practical

sense. Marital courts may not know at the time of a divorce whether an employee will receive an annuity supplement in the future. Although some Federal employees, like Mr. Moulton, are subject to mandatory separation provisions, most Federal employees are not. Thus, a court typically cannot know whether an employee will qualify for the annuity supplement. Under OPM's interpretation, this uncertainty is accounted for by dividing the supplement "in the same way" as the basic annuity. Under the board's interpretation, state courts, 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.[7] This practical consideration further supports the plain reading of section 8421(c) that annuity supplements must be divided "in the same way" as the basic annuity, even if the supplement is not expressly addressed in the court order.

Accordingly, the Court should grant the Director's petition to correct the board's erroneous interpretation of section 8421(c). Indeed, when "the interpretation of a statutory . . . provision is at issue, it is particularly appropriate to

[7] To be sure, a court order apportioning an employee annuity can be amended at any time before an annuitant's death. *See* 5 C.F.R. § 838.225. Even so, under the board's interpretation, state courts will be required to either speculate as to whether an employee will be entitled to an annuity supplement, or risk the parties asking for an amended order years after a divorce is final. Those practical concerns do not exist under OPM's interpretation.

grant an OPM petition for review." *Kaplan v. Hopper*, 533 F. App'x 997, 999 (Fed. Cir. 2013); *Springer v. Adkins,* 230 F. App'x 973, 975 (Fed. Cir. 2007). This case provides compelling circumstances for the Court to grant the Director's petition for review, given that the interpretation of 5 U.S.C. § 8421(c) is at issue.

II. The Board's Erroneous Decision Will Have A Substantial, Adverse Impact Upon The Civil Service

This Court has held that OPM "has demonstrated the requisite [substantial] impact" when it shows that a board's decision will significantly impact the administration of FERS benefits. *Springer*, 230 F. App'x at 974-75. The board's decision will require OPM to substantially alter its method of apportioning annuities in cases involving divorced annuitants whose retirement includes annuity supplements. *See* 5 U.S.C. §§ 8467, 8421(c). Consequently, the Director has determined that "the Board's decision will have a substantial impact on a civil service law, rule, regulation, or policy directive." 5 U.S.C. § 7703(d)(1); Fed. Cir. R. 47.9(b)(3).

Further, because the board's decision is precedential, moving forward, the MSPB will apply its interpretation of section 8421(c) to all cases involving that statute. More broadly, OPM will be required to apply the decision to approximately 7,000 annuitants and former spouses who were subject to court-ordered division of annuities and whose retirements include annuity supplements. OPM estimates that recalculating annuity supplement apportionments could result

in underpayments to annuitants of almost $50 million. OPM would be required to either attempt to collect that money from former spouses or waive its right to collect that money and pay annuitants out of the retirement fund, which could result in a substantial loss to the fund. *See* 5 U.S.C. § 8470(b) (setting forth the waiver authority). In these circumstances, where the board's decision will have far-reaching impacts beyond the limited facts of the case at hand, a petition for review should be granted. *Cf. King v Wilson*, 56 F.3d 80, 1995 WL 303949, at *2 (Fed. Cir. May 8, 1995).

Not only will the board's precedential decision have a substantial impact on how OPM administers FERS, but it will also substantially impact state courts and former spouses. As explained above, the board's decision leaves state courts (and former spouses advocating for their proper share of retirement funds) in the unenviable position of learning what annuities are potentially available to Federal employees and then attempting to predict, years or even decades in advance of retirement, whether a Federal employee will be entitled to an annuity supplement. And though the state court may amend its order if necessary, that imposes additional time, uncertainty, and expenses on the parties and the courts, and administrative burden on OPM.

In short, the board erred in interpreting a statutory provision. That error will substantially and adversely impact OPM's administration of FERS and impact the

rights of thousands of annuitants and former spouses. The Court should thus grant this petition for review.

CONCLUSION

For these reasons, we respectfully request that the Court grant the Director's petition for review.

Respectfully submitted,

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January 26, 2024

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Circuit Rule 47.9(c), the undersigned certifies that the word processing software used to prepare this petition indicates there are a total of 3,488 words. The petition complies with the typeface requirements and type style requirements of Fed. R. App. 32(a)(5) and has been prepared using Times New Roman 14 point font, proportionally spaced typeface.

/s/ Kyle S. Beckrich
KYLE S. BECKRICH

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2023 MSPB 26

Docket No. DE-0841-18-0053-I-1

Ronald L. Moulton,

Appellant,

v.

Office of Personnel Management,

Agency,

and

Director of the Office of Personnel Management,[1]

Intervenor,

and

Jill Moulton,[2]

Intervenor.

November 28, 2023

Ronald L. Moulton, Longmont, Colorado, pro se.

Jessica Johnson, Nicole M. Lohr, and Tynika Faison Johnson, Washington, D.C., for the agency and for the intervenor, the Director of the Office of Personnel Management.[3]

Jill Moulton, Oro Valley, Arizona, pro se.

[1] The now-former Director of the Office of Personnel Management (OPM) intervened below.

[2] Although the Board originally identified Jill Kuryvial as a potential intervenor, that individual has referred to herself as Jill Moulton, and thus we have done so here.

[3] It appears that the agency's representatives in this matter are also appearing as representatives for the Director of the OPM as intervenor. Petition for Review (PFR) File, Tab 20 at 15.

BEFORE

Cathy A. Harris, Vice Chairman
Raymond A. Limon, Member

OPINION AND ORDER

¶1 The Office of Personnel Management (OPM) petitions for review of the initial decision reversing its final decision recalculating the apportionment of the appellant's Federal Employees' Retirement System (FERS) benefit payable to his former spouse. For the following reasons, we DENY OPM's petition and AFFIRM the initial decision as MODIFIED by this Opinion and Order, which supplements the initial decision and still reverses OPM's final decision.

BACKGROUND

¶2 The appellant and his former spouse (hereinafter "intervenor") were married on November 11, 1988. Initial Appeal File (IAF), Tab 13 at 54. On July 12, 2004, a Colorado state court entered a decree of dissolution of marriage and a domestic relations court order awarding the intervenor a pro rata share of the appellant's "gross monthly annuity" under FERS, including "any benefit the Employee earns based on special ATC [Air Traffic Controller] service." *Id.* at 53-57. Effective May 31, 2010, the appellant retired with over 25 years of creditable service as an ATC with the Federal Aviation Administration. *Id.* at 9, 43, 45, 101-03. OPM thereafter granted the appellant's application for immediate retirement under FERS and determined that he was entitled to a basic annuity under the statutory provision for ATCs and an annuity supplement under 5 U.S.C. § 8421. *Id.* at 9, 14, 43, 101. In December 2010, OPM notified the appellant and the intervenor that it would pay the intervenor a pro rata share of the appellant's basic annuity as provided for in the court order. *Id.* at 5, 28-29. At that time, OPM did not include the appellant's FERS annuity supplement in its computation of the intervenor's court-ordered apportionment. *Id.* at 5.

¶3 Nearly 6 years later, OPM issued August 25, 2016 letters to the appellant and the intervenor informing them that it had incorrectly calculated the benefit the intervenor was receiving under the court order. IAF, Tab 13 at 24-27. OPM indicated that the appellant's FERS annuity supplement "is to be treated the same way" as the FERS basic annuity for purposes of calculating the benefit paid to the intervenor, and that the amount he receives under the FERS annuity supplement provisions must be included in the calculation of the benefit paid to the intervenor. *Id.* at 24. Thus, OPM notified the appellant and the intervenor that the appellant's annuity payment would be prospectively reduced, and the intervenor's benefit prospectively increased, due to the change in calculation, and that OPM would also retroactively collect the additional benefits due the intervenor back to June 1, 2010, which was the date the appellant's FERS annuity supplement payments began. *Id.* at 24-29. This retroactive treatment resulted in an underpayment the appellant owed to the intervenor in the amount of $24,535.30, to be deducted by OPM in installments from the appellant's annuity. *Id.* After the appellant requested reconsideration of the decision, *id.* at 9, 25, OPM issued a December 12, 2017 final decision affirming its initial decision. OPM concluded that it is required under 5 U.S.C. § 8421(c) and the terms of the domestic relations court order to include the appellant's FERS annuity supplement in the computation of the court-ordered division of his FERS annuity, and that this determination did not involve a "policy change" by OPM.[4] *Id.* at 8-12. OPM noted that it would take no action to collect the $24,535.30 overpayment until after the appellant exhausted his administrative and appeal rights, and OPM notified him of his right to appeal to the Board. *Id.* at 12.

[4] OPM issued reconsideration decisions on February 23, 2017, and October 16, 2017, reaching the same conclusion, but notifying the appellant of its intent to temporarily suspend its collection efforts. IAF, Tab 13 at 15-23, Tab 30, Initial Decision (ID) at 2-3, 5-6. OPM rescinded those decisions, and the December 12, 2017 reconsideration decision is the subject of this appeal. IAF, Tab 13 at 9, 15-23; ID at 2-3.

¶4 On appeal, the appellant asserted that OPM erred in providing his former spouse a pro rata share of his annuity supplement because the domestic relations court order did not expressly provide for a division of his annuity supplement, as required by 5 U.S.C. § 8467, and OPM's decision to apportion such payments constituted a new "legislative rule" that required notice and comment rulemaking before implementation. IAF, Tab 17 at 17-18, Tab 29 at 4.

¶5 The appellant submitted with his appeal a February 5, 2018 Management Advisory issued by OPM's Office of the Inspector General (OIG), Office of Legal & Legislative Affairs, addressing its review of OPM's "Non-Public Decision to Prospectively and Retroactively Re-Apportion Annuity Supplements." IAF, Tab 17. The Management Advisory, which resulted from a complaint OIG received from the Federal Law Enforcement Officers Association (FLEOA), noted that, for almost 30 years until July 2016, OPM applied the state court-ordered marital share to the basic annuity only and not to the annuity supplement except when the state court order expressly addressed the annuity supplement. *Id.* at 5, 15. OIG disagreed with OPM's assertion—that it was required by law to effect the above change—because the "language of the statute simply does not mandate the conclusion that the Basic Annuity and the Annuity Supplement should be deemed to be one and the same." *Id.* at 15-16. OIG indicated that, while OPM's approach is one possible interpretation of the statute, section 8421(c) could also be reasonably construed to mean that the annuity supplement is subject to division by a state court order in divorce proceedings "in the same way" that the basic annuity may be subject to division in those proceedings. *Id.* at 16. OIG noted that OPM's regulations, as well as court decisions, require it to perform purely ministerial actions in carrying out a court's instructions, and that "it is not a 'ministerial' function to create a division of payment that the court order does not expressly contain." *Id.* at 16-17. Rather, OIG opined that OPM created a new rule regarding allocation of the annuity supplement that is subject to notice and comment rulemaking and that may not be given retroactive effect. *Id.* at 17-20.

OIG recommended that OPM, among other things, cease applying the state court-ordered marital share to annuity supplements unless the court order expressly so provides, and make whole all annuitants affected by OPM's re-interpretation of the statute. *Id.* at 21-23.

¶6 OPM responded to the Board appeal by asserting that the unambiguous language of 5 U.S.C. § 8421(c) required it to apportion the annuity supplement "in the same way" as the basic annuity for purposes of computing a court-ordered division of a FERS retirement benefit. IAF, Tab 13 at 10, Tab 27 at 13-17. Alternatively, OPM asserted that if the statute were ambiguous, its interpretation was entitled to deference under *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). IAF, Tab 13 at 10, Tab 27 at 13-17. The appellant withdrew his request for a hearing. IAF, Tab 11 at 1.

¶7 After the close of the record, the administrative judge reversed OPM's final decision.[5] IAF, Tab 30, Initial Decision (ID) at 3. He found that 5 U.S.C. § 8421(c) was not unambiguous, as OPM alleged, but instead was subject to multiple interpretations. ID at 10-11. He further found that OPM's regulations, purportedly requiring it to apportion the appellant's annuity supplement, were not entitled to deference under *Chevron* because they did not directly address the purpose of section 8421(c) or otherwise interpret that section. ID at 11-13. The fact that OPM's regulations do not differentiate between a basic annuity and an annuity supplement "could just as easily reflect the agency's conclusion that the annuity supplement was" a Social Security benefit and thus presumptively not allocable between an employee and a former spouse. ID at 13. The administrative judge therefore read section 8421(c) to require OPM to divide an annuity supplement between a FERS employee and his or her former spouse only if the court order expressly provided for such division, as required by 5 U.S.C. § 8467. ID at 16. After reviewing the terms of the court order, the administrative

[5] The administrative judge granted the Director of OPM's request to intervene as a matter of right under 5 U.S.C. § 7701(d) and permitted the appellant's former spouse to intervene in this matter. IAF, Tabs 26, 28.

judge determined that it did not expressly provide for the division of the appellant's annuity supplement. ID at 16-21. He therefore found that the appellant proved by preponderant evidence that OPM erred in recalculating the intervenor's share of the appellant's FERS annuity. ID at 21. The administrative judge ordered OPM to rescind its final decision and refund all previously apportioned annuity supplement amounts to the appellant. ID at 22. The administrative judge declined to consider the appellant's claims of harmful error, age discrimination, and reprisal for protected disclosures and activity, as well as the appellant's request for interim relief. ID at 21-22.

¶8 OPM has filed a timely petition for review arguing that the administrative judge erred in reversing its reconsideration decision. Petition for Review (PFR) File, Tab 8. OPM reasserts that section 8421(c) unambiguously requires it to apportion the annuity supplement in the same way it apportions the appellant's basic annuity and, alternatively, that its interpretation of the statute as establishing that requirement is entitled to deference. *Id.* at 8-19. The appellant has filed a response to OPM's petition for review. PFR File, Tab 9.

¶9 After the parties submitted their pleadings, the Acting Clerk of the Board issued an Order directing OPM to clarify its position regarding how it categorizes a supplemental annuity and to submit relevant documents, including specifically identified policy statements addressing its approach to apportioning supplemental annuities. PFR File, Tab 13. OPM and the Director of OPM submitted a pleading that contends, among other things, that its regulations support what it claims are the "clear, unambiguous provisions of 5 U.S.C. § 8421(c)." PFR File, Tab 20 at 6-11. In a separate submission, the Director of OPM asserts that the portion of the Acting Clerk's Order seeking documents was improper and not in accordance with the Board's regulations, and moves for the Board to vacate that portion of

the Order.[6] PFR File, Tab 21 at 5-7. The appellant has filed a response in which he also reasserts his age discrimination claim.[7] PFR File, Tab 23.

ANALYSIS

¶10 OPM asserts on review that 5 U.S.C. § 8421(c) is clear and the administrative judge improperly read ambiguity into the statute by looking beyond its text. PFR File, Tab 8 at 8-13. OPM further asserts that, if the Board must look beyond the plain language of the statute, the placement of section 8421(c) within the FERS "Basic Annuity" subchapter shows that Congress intended for the basic annuity and the annuity supplement to be treated as indivisible components of the entire annuity. *Id.* at 9. OPM also claims that, for FERS benefits to replicate Civil Service Retirement System (CSRS) benefits as Congress intended, OPM must treat the basic annuity and the annuity supplement as a unitary entitlement. *Id.* at 15-16.

¶11 An employee who is separated from the service, except by removal for cause on charges of misconduct or delinquency, after completing 25 years of service as an ATC or after becoming 50 years of age and completing 20 years of service as an ATC, "is entitled to an annuity." 5 U.S.C. § 8412(e). Under 5 U.S.C. § 8415(a), entitled "Computation of basic annuity," "the annuity" of an

[6] The Board may order "any Federal agency" to comply with "any order" issued by the Board under its authority. 5 U.S.C. § 1204(a)(1)-(2). In any case that is reviewed, the Board may require that briefs be filed and take any other action necessary for final disposition of the case. 5 C.F.R. § 1201.117(a). OPM was afforded an opportunity to provide evidence to support its final decision in this case but chose not to do so. Given our resolution of this appeal on the existing record, the motion of the Director of OPM to vacate a portion of the Acting Clerk's Order is now moot.

[7] The appellant asserts that, "I believe that the OPM has discriminated against me and other retired annuitants based on our age . . . ." PFR File, Tab 23 at 5. An appellant may prove a claim of age discrimination by showing that such discrimination was a motivating factor in the contested action. *Pridgen v. Office of Management and Budget*, 2022 MSPB 31, ¶ 21. There are various methods of proving such a claim. *Id.*, ¶¶ 23-24. Having reviewed the appellant's arguments on this issue, *e.g.*, IAF, Tab 1 at 5, Tab 29 at 5, we find that he has not met his burden of proving by preponderant evidence that age was a motivating factor in OPM's final decision in this case.

employee retiring under subchapter II of chapter 84, Title 5, United States Code, is 1% of that individual's average pay multiplied by such individual's total service. For individuals with ATC service like the appellant, the computation involves a higher percentage multiplied by total service. 5 U.S.C. § 8415(f). In general, an individual shall, if and while entitled to "an annuity" under 5 U.S.C. § 8412(e), "also be entitled to an annuity supplement under this section." 5 U.S.C. § 8421(a)(1). The annuity supplement is designed to replicate the Social Security benefit (based on Federal civilian service) available at age 62 for those employees retiring earlier, and is subject to the same conditions as payment of the Social Security benefit. *Henke v. Office of Personnel Management*, 48 M.S.P.R. 222, 227 (1991). The annuity supplement, therefore, ceases no later than the last day of the month in which such individual attains age 62. 5 U.S.C. § 8421(a)(3)(B). Thus, the formula for calculating the annuity supplement incorporates the amount of old-age insurance benefit that would be payable under the Social Security Act upon attaining age 62. 5 U.S.C. § 8421(b).

¶12 When a Federal employee and the employee's spouse divorce, additional statutes come into play. Section 8467 of Title 5, United States Code, addresses "Court orders." Under 5 U.S.C. § 8467(a)(1), payments under 5 U.S.C. chapter 84 that would otherwise be made to an annuitant based on the service of that individual shall be paid to another person "if and to the extent expressly provided for in the terms of . . . any court decree of divorce, annulment, or legal separation, or the terms of any court order or court-approved property settlement agreement incident to any court decree of divorce, annulment, or legal separation." Section 8421 is entitled "Annuity supplement." Under 5 U.S.C. § 8421(c), "[a]n amount under this section shall, for purposes of section 8467, be treated in the same way as an amount computed under section 8415." These two statutes are at issue in this case.

¶13 The interpretation of a statute begins with the language of the statute itself. *Semenov v. Department of Veterans Affairs*, 2023 MSPB 16, ¶ 16. If the language

provides a clear answer, the inquiry ends and the plain meaning of the statute is regarded as conclusive absent a clearly expressed legislative intent to the contrary. *Id.* Further, the whole of the statute should be considered in determining its meaning. *Johnson v. Department of Veterans Affairs*, 91 M.S.P.R. 405, 408 (2002). The provisions of a statute should be read in harmony, leaving no provision inoperative or superfluous or redundant or contradictory. *Id.* A section of a statute should not be read in isolation from the context of the whole Act, and the Board, in interpreting legislation, must not be guided by a single sentence or part of a sentence, but should look to the provisions of the whole law and to its object and policy. *Joyce v. Department of the Air Force*, 83 M.S.P.R. 666, ¶ 14 (1999), *overruled on other grounds by Sacco v. Department of Justice*, 90 M.S.P.R. 37 (2001). Reading the relevant provisions as a whole, we find that the plain language of the applicable statutes provides a clear answer and there is no clearly expressed legislative intent to the contrary.

¶14 We begin by considering how an amount "computed under section 8415" is "treated," so as to then determine how an annuity supplement must also be treated, "in the same way," for purposes of section 8467.[8] *See* 5 U.S.C. § 8421(c). As set forth above, 5 U.S.C. § 8415 addresses the manner in which a basic annuity is computed, and thereby becomes a "[p]ayment under this chapter which would otherwise be made to an employee . . . ." 5 U.S.C. § 8467(a). As a "[p]ayment under this chapter," the basic annuity shall be paid (in whole or in part) to another person "if and to the extent expressly provided for" in the terms of, among other things, any court decree, court order, or court-approved property settlement agreement. 5 U.S.C. § 8467(a)(1). An amount under section 8421, i.e., an annuity supplement, shall be treated in the same way. That is, an amount

[8] We interpret the "for purposes of section 8467" language of section 8421(c) as simply meaning "when applying section 8467." *See In re Hill*, No. 06-50972, 2007 WL 2021897 at *12 (Bankr. E.D. Tenn. July 6, 2007) (holding, under a straightforward reading of a statute, that the phrase "for purposes of paragraph (5)" simply means "when applying paragraph (5)"). Thus, an annuity supplement amount shall, *when applying section 8467*, be treated in the same way as a basic annuity amount.

computed under 5 U.S.C. § 8421(b) is a payment under chapter 84 that would otherwise be made to an employee pursuant to 5 U.S.C. § 8421(a). *See* 5 U.S.C. § 8467(a). To be treated in the same way when applying section 8467, that payment shall be paid to another person "if and to the extent expressly provided for in the terms of," among other things, any court decree, court order, or court-approved property settlement agreement. A basic annuity amount computed under section 8415 shall be paid to another person only when the "expressly provided for" requirement in section 8467(a) is met. Similarly, an annuity supplement amount under section 8421 shall be paid to another person only when it, too, meets the "expressly provided for" requirement of section 8467(a).

¶15 OPM's interpretation to the contrary would improperly read section 8421(c) in isolation from section 8467(a), *see Joyce*, 83 M.S.P.R. 666, ¶ 14, render the "expressly provided for" language of section 8467(a) inoperative or superfluous, and not read the statutory provisions as a whole and in harmony. In this regard, we note that Congress could have used different language to reach the result OPM proposes in this case. For example, Congress could have specified in section 8467(a) that, "except as provided for in 5 U.S.C. § 8421(c)," payments under this chapter which would otherwise be made to an employee shall be paid to another person if and to the extent expressly provided for in the terms of a court decree, court order, or court-approved property settlement agreement. There is, however, no such proviso language in section 8467(a), and the Board will not supply such language in interpreting the statute. *See, e.g., Crockett v. Office of Personnel Management*, 783 F.2d 193, 195 (Fed. Cir. 1986) (rejecting a statutory interpretation that would add to statutory language requirements that are not specified or reasonably implied in the statute); *Acting Special Counsel v. U.S. Customs Service*, 31 M.S.P.R. 342, 347 (1986) (declining to read an exclusion into a statute). In fact, section 8467(a) applies to "[p]ayments under this chapter . . . based on service of that individual," and an annuity supplement qualifies under that broad language. *See* 5 U.S.C. § 8421(b)(3)(A) (basing the

amount of an annuity supplement in part on a fraction that includes "the annuitant's total years of service"). Alternatively, Congress could have provided in section 8421(c) or elsewhere that an amount under section 8421 shall, for purposes of section 8467, be "considered a part" of the payment made to another person under section 8467(a), shall be "included" in the amount of the payment made to another person under that section, or shall "extend to" such an amount. However, the statute does not so provide. Instead, it provides that such an amount shall be "treated in the same way" as an amount computed under 5 U.S.C. § 8415. As set forth above, that means that it shall be paid to another person when the "expressly provided for" requirement is met.

¶16 Congress knew how to speak more directly to this issue in a separate section of the same public law that enacted sections 8421 and 8467. When it enacted the FERS provisions at issue in this appeal, Congress also addressed how to treat the annuity supplement for former spouses of employees of the Central Intelligence Agency (CIA). Section 506 of the Federal Employees' Retirement System (FERS) Act of 1986, Pub. L. No. 99-335, 1986 U.S.C.C.A.N. (100 Stat.) 514, 624, amended the Central Intelligence Agency Retirement Act of 1964 by providing for the participation of certain CIA employees in the FERS. In section 304(g) of the amendment, covering "Special Rules for Former Spouses," Congress provided that "[t]he 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."[9] *Id.* at 626-27. The legislative history confirms that section 304(g) "provides that the entitlement of a retired CIA FERS employee's former spouse to a portion of the employee's annuity extends to any annuity supplement the employee receives

[9] The current version of the applicable statutes similarly indicates that an annuity supplement is to be included in the "benefits payable" to an employee for purposes of determining a former spouse's share of those benefits. *See* 50 U.S.C. § 2154(c)(1)-(2).

under section 8421 of title 5, United States Code (as added by section 101 of the conference agreement)." H.R. Rep. No. 99-606, at 157-58 (1986) (Conf. Rep.).

¶17 When Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion. *Russello v. United States*, 464 U.S. 16, 23 (1983); *see Hyundai Steel Co. v. United States*, 19 F.4th 1346, 1353 (Fed. Cir. 2021). Here, the fact that Congress specifically provided that annuity supplements shall be included in the benefits payable to a former spouse of a CIA employee shows that it decided to do so for those individuals but chose not to do so for others, *see, e.g., Weed v. Social Security Administration*, 112 M.S.P.R. 323, ¶18 (2009); *Ellefson v. Department of the Army*, 98 M.S.P.R. 191, ¶ 10 (2005), instead allowing for court decrees, court orders, or court-approved property settlement agreements to resolve that question under 5 U.S.C. § 8467(a) and 5 U.S.C. § 8421(c).

¶18 OPM asserts that, if the Board must look beyond the plain language of the applicable statutes, the placement of section 8421(c) within the FERS "Basic Annuity" subchapter shows that Congress intended for the basic annuity and the annuity supplement to be treated as indivisible components of the entire annuity. PFR File, Tab 8 at 9. Although the title and headings of a statute may be permissible indicators of meaning and can aid in resolving an ambiguity in the legislation's text, a wise rule of statutory interpretation is that the title of a statute and the heading of a section cannot limit the plain meaning of the text. *Maloney v. Executive Office of the President*, 2022 MSPB 26, ¶ 11 n.8. As explained above, the plain meaning of the statute does not support OPM's interpretation. Moreover, although OPM claims that it must treat the basic annuity and the annuity supplement as a unitary entitlement to replicate CSRS benefits, such considerations do not outweigh the statutory text.

¶19 Even if the applicable statutory provisions could be viewed as ambiguous, i.e., as susceptible of differing, reasonable interpretations, *see Pastor v.*

Department of Veterans Affairs, 87 M.S.P.R. 609, ¶ 18 (2001), we agree with the reasoning set forth by the administrative judge that OPM's regulations and internal instructions are not entitled to deference. As the administrative judge found, OPM's regulations, among other things, address other types of annuities but not the annuity supplement, either in the regulations themselves or in the rulemaking process implementing those regulations. ID at 11-13. In any event, the Board will decline to give effect to OPM's interpretation of a regulation when, as here, there are compelling reasons to conclude that such interpretation is erroneous, unreasonable, or contrary to the law that it purports to interpret. *Evans v. Office of Personnel Management*, 59 M.S.P.R. 94, 104 (1993). We also agree with the administrative judge's determination that OPM's internal instructions, which OPM chose not to submit into the record, are not persuasive. ID at 14-16. As the administrative judge explained, ID at 15-16, those instructions were not issued under formal notice-and-comment rulemaking procedures, and are therefore not entitled to the deference given to regulations, but may be entitled to some weight based on their formality and persuasiveness and the consistency of the agency's position. *See Brandt v. Department of the Air Force*, 103 M.S.P.R. 671, ¶ 14 (2006). However, OPM did not submit those documents into the record, even after being ordered to do so by the Acting Clerk of the Board. PFR File, Tab 13 at 3. Information relating to that previous interpretation is essential to evaluating the persuasiveness of OPM's current guidance.

¶20 Finally, while this appeal was pending before the Board, the U.S. Court of Appeals for the District of Columbia Circuit issued a decision that addressed, in a different context, OPM's apportioning of the annuity supplement in these types of cases. In *Federal Law Enforcement Officers Association v. Ahuja*, 62 F.4th 551, 554 (D.C. Cir. 2023), FLEOA brought an action against OPM in district court claiming that its apportioning method violated the Administrative Procedure Act. The circuit court vacated the district court's orders and remanded with instructions to dismiss the case for lack of jurisdiction. *Id.* at 555. In so doing,

the court held that the Civil Service Reform Act and the FERS Act precluded district court review of FLEOA's claims because judicial review of OPM's method of apportioning retirement benefits was available only in the U.S. Court of Appeals for the Federal Circuit following administrative exhaustion before the Board. *Id.* at 557-60, 567. We therefore find that this court decision does not require a different result in this case.

¶21 Having determined that apportionment of an annuity supplement must be expressly provided for under 5 U.S.C. § 8467(a), we agree with the administrative judge that the specific terms of the court order in this case do not expressly provide for a division of the appellant's annuity supplement. ID at 16-21; *see Thomas v. Office of Personnel Management*, 46 M.S.P.R. 651, 654 (1991) (describing a provision as "express" when it is "clear; definite; explicit; plain; direct; unmistakable; not dubious or ambiguous"); *cf., e.g., Hayward v. Office of Personnel Management*, 578 F.3d 1337, 1345 (Fed. Cir. 2009) (holding, in interpreting similar "expressly provided for" language, that the intent to award a survivor annuity "must be clear"); *Davenport v. Office of Personnel Management*, 62 F.3d 1384, 1387 (Fed. Cir. 1995) ("The statute requires that the pertinent court order or property settlement 'expressly' provide for a survivor benefit, so as to ensure that OPM will not contrive a disposition that the state court did not contemplate.").

¶22 Accordingly, we find that OPM improperly included the appellant's FERS annuity supplement in its computation of the court-ordered division of his FERS annuity. OPM's reconsideration decision is, therefore, reversed.

ORDER

¶23 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.

¶24 We also ORDER OPM to tell the appellant promptly in writing when it believes it has fully carried out the Board's Order and to describe the actions it took to carry out the Board's Order. We ORDER the appellant to provide all necessary information OPM requests to help it carry out the Board's Order. The appellant, if not notified, should ask OPM about its progress. *See* 5 C.F.R. § 1201.181(b).

¶25 No later than 30 days after OPM tells the appellant it has fully carried out the Board's Order, the appellant may file a petition for enforcement with the office that issued the initial decision on this appeal if the appellant believes that OPM did not fully carry out the Board's Order. The petition should contain specific reasons why the appellant believes OPM has not fully carried out the Board's Order and should include the dates and results of any communications with OPM. *See* 5 C.F.R. § 1201.182(a).

¶26 This is the final decision of the Merit Systems Protection Board in this appeal. Title 5 of the Code of Federal Regulations, section 1201.113 (5 C.F.R. § 1201.113).

NOTICE TO THE APPELLANT REGARDING YOUR RIGHT TO REQUEST ATTORNEY FEES AND COSTS

You may be entitled to be paid by the agency for your reasonable attorney fees and costs. To be paid, you must meet the requirements set out at Title 5 of the United States Code (U.S.C.), sections 7701(g), 1221(g), 1214(g) or 3330c(b); or 38 U.S.C. § 4324(c)(4). The regulations may be found at 5 C.F.R. §§ 1201.201, 1201.202, and 1201.203. If you believe you meet these requirements, you must file a motion for attorney fees WITHIN 60 CALENDAR DAYS OF THE DATE OF THIS DECISION. You must file your attorney fees motion with the office that issued the initial decision on your appeal.

NOTICE OF APPEAL RIGHTS[10]

You may obtain review of this final decision. 5 U.S.C. § 7703(a)(1). By statute, the nature of your claims determines the time limit for seeking such review and the appropriate forum with which to file. 5 U.S.C. § 7703(b). Although we offer the following summary of available appeal rights, the Merit Systems Protection Board does not provide legal advice on which option is most appropriate for your situation and the rights described below do not represent a statement of how courts will rule regarding which cases fall within their jurisdiction. If you wish to seek review of this final decision, you should immediately review the law applicable to your claims and carefully follow all filing time limits and requirements. Failure to file within the applicable time limit may result in the dismissal of your case by your chosen forum.

Please read carefully each of the three main possible choices of review below to decide which one applies to your particular case. If you have questions about whether a particular forum is the appropriate one to review your case, you should contact that forum for more information.

(1) Judicial review in general. As a general rule, an appellant seeking judicial review of a final Board order must file a petition for review with the U.S. Court of Appeals for the Federal Circuit, which must be received by the court within **60 calendar days** of the date of issuance of this decision. 5 U.S.C. § 7703(b)(1)(A).

If you submit a petition for review to the U.S. Court of Appeals for the Federal Circuit, you must submit your petition to the court at the following address:

[10] Since the issuance of the initial decision in this matter, the Board may have updated the notice of review rights included in final decisions. As indicated in the notice, the Board cannot advise which option is most appropriate in any matter.

U.S. Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, D.C. 20439

Additional information about the U.S. Court of Appeals for the Federal Circuit is available at the court's website, www.cafc.uscourts.gov. Of particular relevance is the court's "Guide for Pro Se Petitioners and Appellants," which is contained within the court's Rules of Practice, and Forms 5, 6, 10, and 11.

If you are interested in securing pro bono representation for an appeal to the U.S. Court of Appeals for the Federal Circuit, you may visit our website at http://www.mspb.gov/probono for information regarding pro bono representation for Merit Systems Protection Board appellants before the Federal Circuit. The Board neither endorses the services provided by any attorney nor warrants that any attorney will accept representation in a given case.

(2) Judicial or EEOC review of cases involving a claim of discrimination. This option applies to you only if you have claimed that you were affected by an action that is appealable to the Board and that such action was based, in whole or in part, on unlawful discrimination. If so, you may obtain judicial review of this decision—including a disposition of your discrimination claims—by filing a civil action with an appropriate U.S. district court (*not* the U.S. Court of Appeals for the Federal Circuit), within **30 calendar days** after you receive this decision. 5 U.S.C. § 7703(b)(2); *see Perry v. Merit Systems Protection Board*, 582 U.S. 420 (2017). If you have a representative in this case, and your representative receives this decision before you do, then you must file with the district court no later than **30 calendar days** after your representative receives this decision. If the action involves a claim of discrimination based on race, color, religion, sex, national origin, or a disabling condition, you may be entitled to representation by a court-appointed lawyer and to waiver of any

requirement of prepayment of fees, costs, or other security. *See* 42 U.S.C. § 2000e-5(f) and 29 U.S.C. § 794a.

Contact information for U.S. district courts can be found at their respective websites, which can be accessed through the link below:

http://www.uscourts.gov/Court_Locator/CourtWebsites.aspx.

Alternatively, you may request review by the Equal Employment Opportunity Commission (EEOC) of your discrimination claims only, excluding all other issues. 5 U.S.C. § 7702(b)(1). You must file any such request with the EEOC's Office of Federal Operations within **30 calendar days** after you receive this decision. 5 U.S.C. § 7702(b)(1). If you have a representative in this case, and your representative receives this decision before you do, then you must file with the EEOC no later than **30 calendar days** after your representative receives this decision.

If you submit a request for review to the EEOC by regular U.S. mail, the address of the EEOC is:

Office of Federal Operations
Equal Employment Opportunity Commission
P.O. Box 77960
Washington, D.C. 20013

If you submit a request for review to the EEOC via commercial delivery or by a method requiring a signature, it must be addressed to:

Office of Federal Operations
Equal Employment Opportunity Commission
131 M Street, N.E.
Suite 5SW12G
Washington, D.C. 20507

(3) Judicial review pursuant to the Whistleblower Protection Enhancement Act of 2012. This option applies to you only if you have raised claims of reprisal for whistleblowing disclosures under 5 U.S.C. § 2302(b)(8) or other protected activities listed in 5 U.S.C. § 2302(b)(9)(A)(i), (B), (C), or (D). If so, and your judicial petition for review "raises no challenge to the Board's

disposition of allegations of a prohibited personnel practice described in section 2302(b) other than practices described in section 2302(b)(8), or 2302(b)(9)(A)(i), (B), (C), or (D)," then you may file a petition for judicial review either with the U.S. Court of Appeals for the Federal Circuit or any court of appeals of competent jurisdiction.[11] The court of appeals must receive your petition for review within **60 days** of the date of issuance of this decision. 5 U.S.C. § 7703(b)(1)(B).

If you submit a petition for judicial review to the U.S. Court of Appeals for the Federal Circuit, you must submit your petition to the court at the following address:

U.S. Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, D.C. 20439

Additional information about the U.S. Court of Appeals for the Federal Circuit is available at the court's website, www.cafc.uscourts.gov. Of particular relevance is the court's "Guide for Pro Se Petitioners and Appellants," which is contained within the court's Rules of Practice, and Forms 5, 6, 10, and 11.

If you are interested in securing pro bono representation for an appeal to the U.S. Court of Appeals for the Federal Circuit, you may visit our website at http://www.mspb.gov/probono for information regarding pro bono representation for Merit Systems Protection Board appellants before the Federal Circuit. The Board neither endorses the services provided by any attorney nor warrants that any attorney will accept representation in a given case.

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[11] The original statutory provision that provided for judicial review of certain whistleblower claims by any court of appeals of competent jurisdiction expired on December 27, 2017. The All Circuit Review Act, signed into law by the President on July 7, 2018, permanently allows appellants to file petitions for judicial review of MSPB decisions in certain whistleblower reprisal cases with the U.S. Court of Appeals for the Federal Circuit or any other circuit court of appeals of competent jurisdiction. The All Circuit Review Act is retroactive to November 26, 2017. Pub. L. No. 115-195, 132 Stat. 1510.

Contact information for the courts of appeals can be found at their respective websites, which can be accessed through the link below:

http://www.uscourts.gov/Court_Locator/CourtWebsites.aspx.

Jennifer Everling

Jennifer Everling
Acting Clerk of the Board
Washington, D.C.

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

RONALD L. MOULTON,
Appellant,

v.

OFFICE OF PERSONNEL MANAGEMENT,
Agency,

and

DIRECTOR OF THE OFFICE OF PERSONNEL MANAGEMENT,
Intervenor.[1]

DOCKET NUMBER
DE-0841-18-0053-N-1

DATE: February 24, 2025

THIS STAY ORDER IS NONPRECEDENTIAL[2]

Ronald Lance Moulton, Longmont, Colorado, pro se.

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[1] The appellant's former spouse, Jill Moulton, intervened during the proceedings in the underlying appeal. *Moulton v. Office of Personnel Management*, MSPB Docket No. DE-0841-18-0053-I-1, Initial Appeal File, Tab 24. Both in his response to this stay request and in his response to the petition to the U.S. Court of Appeals for the Federal Circuit (Federal Circuit) to review the Board's Opinion and Order in the underlying appeal, *Moulton v. Office of Personnel Management*, 2023 MSPB 26, the appellant represented that Ms. Moulton had passed away. Stay File (SF), Tab 3 at 3; *Director of the Office of Personnel Management v. Moulton*, No. 2024-109, 2024 WL 1953955 (Fed. Cir. May 3, 2024). Based on this representation, the Federal Circuit removed Ms. Moulton from the caption. *Director of the Office of Personnel Management v. Moulton*, No. 2024-1774, Notice of Revised Caption (Fed. Cir. June 4, 2024). We have done the same here. Nonetheless, we have served a copy of this Stay Order on the intervenor at her address of record.

[2] A nonprecedential order is one that the Board has determined does not add significantly to the body of MSPB case law. Parties may cite nonprecedential orders, but such orders have no precedential value; the Board and administrative judges are not required to follow or distinguish them in any future decisions. In contrast, a precedential decision issued as an Opinion and Order has been identified by the Board as significantly contributing to the Board's case law. *See* 5 C.F.R. § 1201.117(c).

Allison Kidd-Miller, Esquire, Julie Ferguson Queen, Esquire, Nicole M. Lohr, Esquire, and Roxann S. Johnson, Washington, D.C., for the agency.

BEFORE

Cathy A. Harris, Chairman
Henry J. Kerner, Vice Chairman
Raymond A. Limon, Member

ORDER DENYING REQUEST FOR A STAY

The Director of the Office of Personnel Management (OPM)[3] has filed a request for a stay of the Board's Opinion and Order in *Moulton v. Office of Personnel Management*, 2023 MSPB 26, pending its appeal of that decision to the U.S. Court of Appeals for the Federal Circuit (Federal Circuit). *See Moulton v. Office of Personnel Management*, MSPB Docket No. DE-0841-18-0053-N-1, Stay File (SF), Tab 1 at 5-12. The appellant has opposed OPM's request. SF, Tab 3. For the reasons set forth below, OPM's request for a stay is denied.

BACKGROUND

The Board found in *Moulton*, 2023 MSPB 26, ¶¶ 1, 10-22, that OPM improperly recalculated the apportionment of the appellant's Federal Employees' Retirement System (FERS) annuity supplement to his former spouse. In particular, the Board disagreed with OPM's 2016 reinterpretation of

[3] Only the Director of OPM has the authority to request a stay. *See* 5 U.S.C. § 7703(d)(1) (authorizing the Director of OPM to seek Federal Circuit review of final Board orders under certain circumstances); *Schuck v. U.S. Postal Service*, 31 M.S.P.R. 52 (1985) (denying OPM's request for a stay because only the Director of OPM can request a stay when filing a petition for reconsideration with the Board); *see* 5 C.F.R. § 1201.119(a), (d) (reflecting that the Director of OPM can request that the Board stay a final decision while the Director's petition for reconsideration to the Board is pending). We need not distinguish here between OPM and the Director of OPM because the Director has filed this stay request. SF, Tab 1 at 5. Further, the Director of OPM and OPM are represented by the same attorneys. *Id.* at 2.

5 U.S.C. § 8421(c). *Id.* According to OPM, this provision required it to retroactively and prospectively reduce the appellant's annuity supplement according to his and his former spouse's domestic relations court order, i.e., their divorce order, to pay his former spouse a portion of the FERS supplement regardless of the absence of an express provision requiring such an allocation. *Id.*, ¶¶ 2-3, 6. OPM suspended collection of the resulting alleged overpayment to the appellant of $24,535.30 during the proceedings before the Board. *Id.*, ¶ 3; Initial Appeal File (IAF), Tab 13 at 12.

The Board's decision in *Moulton*, 2023 MSPB 26, ¶ 23, required OPM to, among other actions, "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. On that date, OPM filed the instant stay request. SF, Tab 1. It indicated that it was considering whether to appeal the Board's decision to the Federal Circuit). *Id.* at 7. It has since done so, and its Federal Circuit appeal is currently pending. *Director of the Office of Personnel Management v. Moulton,* No. 2024-109, 2024 WL 1953955 (Fed. Cir. May 3, 2024).

ANALYSIS

The Board has the authority to enforce its orders and decisions. 5 U.S.C. § 1204(a)(2). The Board may exercise its discretion to stay the enforcement of a final decision pending judicial review. *Special Counsel v. Lee*, 114 M.S.P.R. 393, ¶ 2 (2010). In determining whether to grant a stay, the Board evaluates four criteria: (1) whether 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 the stay will substantially harm the other parties interested in the proceeding; and (4) where the public interest lies. *Id.* The Board balances the likelihood of success on appeal with the last three criteria. *Id.* If the stay applicant convincingly argues

that the last three criteria are met, we will grant a stay if a serious legal question exists on the merits. If support for a stay on the basis of the last three criteria is slight, we will issue a stay if there is a strong possibility of success on appeal. *Id.* However, the Board will not address the first criterion if the applicant fails to demonstrate any support for a stay based on the last three criteria. *Id.* We find that OPM has not supported its contentions regarding the last three criteria, and therefore we deny its stay request.

As to the second factor, whether OPM will be irreparably harmed absent a stay, OPM argues that complying with the Board's order will render its appeal to the Federal Circuit moot. SF, Tab 1 at 9-10. A party claiming harm to itself or others must show that the harm is substantial and certain and must offer proof that the harm will occur. *Rogers v. Office of Personnel Management*, 67 M.S.P.R. 698, 700 (Fed. Cir. 1995). OPM has not provided any evidence supporting its claim of possible mootness, and its argument does not address the specific facts of this case. "A case becomes moot—and therefore no longer a 'Case' or 'Controversy' for purposes of [an] Article III [court, like the Federal Circuit]—when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome." *Acceleration Bay LLC v. 2K Sports, Inc.*, 15 F.4th 1069, 1075-76 (Fed. Cir. 2021) (quoting *Already, LLC v. Nike, Inc.*, 568 U.S. 85, 91 (2013) (citation omitted)). The party asserting mootness bears the burden of proving that the case or controversy is no longer "live." *Mitchco International, Inc. v. United States*, 26 F.4th 1373, 1378 (Fed. Cir. 2022). The Opinion and Order directed OPM to cease apportioning the annuity supplement and refund its underpayment to the appellant. *Moulton*, 2023 MSPB 26, ¶ 23. Doing so may cause Mr. Moulton, as a respondent in the litigation, to lose his legally cognizable interest in the case.[4] *See Acceleration Bay LLC*, 15 F.4th

[4] In the pending litigation before the Federal Circuit, OPM agreed that there is a live case or controversy "based on at least Mr. Moulton's cognizable interest in a refund of his previously apportioned supplement payments." *Moulton*, 2024 WL 1953955, at *1 n.2.

1069, 1075-76; *Alexis v. Office of Personnel Management*, 106 M.S.P.R. 315, ¶ 7 (2007) (determining that an appeal was moot when OPM completely rescinded its overpayment decision and refunded to the appellant the money it withheld from his retirement annuity). However, it would appear to increase rather than decrease the Government's interest in the outcome of the litigation, as the payment would presumably come out of the Civil Service Retirement and Disability Fund. *See* 5 U.S.C. §§ 8401(6) (defining the "Fund" for purpose of FERS as the Civil Service Retirement and Disability Fund), 8461(a) (requiring OPM to pay FERS annuity benefits from the Civil Service Retirement and Disability Fund); *see also* 5 U.S.C. § 8348(a)(1) (providing that the Fund "is appropriated for the payment of" Federal employment annuity benefits and OPM's "administrative expenses"). OPM does not address this apparent gap in its argument.

Further, OPM does not address another possible reason that providing relief to the appellant might not render the appeal moot. "[T]here is an exception to the mootness doctrine for cases capable of repetition but evading review." *NIKA Technologies, Inc. v. United States*, 987 F.3d 1025, 1027 (Fed. Cir. 2021). The exception is applicable when the litigation is likely to become moot before it concludes and the same party can reasonably expect the same issue to arise. *Id.* at 1027-28.

Here, there is no immediate threat of mootness because OPM has not indicated that it intends to comply with the Board's Opinion and Order and the appellant has not filed a petition for enforcement before the Board. In any event, as noted above, it appears that OPM will continue to retain an interest in its Federal Circuit appeal because the appellant would be paid out of the Civil Service Retirement and Disability Fund. Further, we cannot assume at this time that the Federal Circuit would find the appeal moot despite the likely repetition of the payment issue as other annuitants seek to challenge the impact of OPM's 2016 policy change on their FERS annuity supplements. OPM represents that

there are "71 other cases at the Board" involving the issue in the instant appeal, but it has not stated its intent to rescind its final decisions in those appeals or refund any withheld amounts to the appellants. SF, Tab 1 at 10. Thus, we find that OPM has not met its burden of proving that the case or controversy is no longer "live" in this matter.

The third stay factor is whether a stay will substantially harm the other parties interested in the proceeding. *Blaha Office of Personnel Management*, 106 M.S.P.R. 494, ¶ 4 (2007). OPM reasons that, if the Board were to grant the stay request, the appellant would be "in the same position he is in today," and if he is the prevailing party in OPM's appeal to the Federal Circuit, "he will receive complete relief" at that time. SF, Tab 1 at 11. In contrast, the appellant argues that, due to OPM's delays, he has been waiting to be "made whole" for 7 years and requests that the stay be denied. SF, Tab 3 at 3. In *Rogers*, the Board denied a stay where the only claim advanced as to the third criterion was that the appellant would not be harmed by any temporary deprivation of an enhanced annuity awarded to him in an earlier decision. *Rogers v. Office of Personnel Management*, 77 M.S.P.R. 626, 628 (1998), *reversed in part on other grounds, Rogers v. Office of Personnel Management*, 83 M.S.P.R. 154 (1999). In the instant case, absent the enforcement of the Board's order, the appellant will not receive the refund of $24,535.30, representing the previously apportioned annuity supplement amounts. *Moulton*, 2023 MSPB 26, ¶¶ 3, 23; IAF, Tab 13 at 12. The Board has also previously rejected as speculative the argument that compliance with an order could create an overpayment to an appellant, with the necessity for administrative or judicial proceedings to recover it. *See Sangenito v. Office of Personnel Management*, 85 M.S.P.R. 211, ¶ 6 (2000). Furthermore, the Board has consistently held that the possibility that OPM may be unable to recoup monies paid from the Fund does not support the granting of a stay. *See Rose v. Office of Personnel Management*, 85 M.S.P.R. 490, ¶ 3 (2000); *Rogers*, 77 M.S.P.R. 626, 628-700.

Finally, as to the fourth factor relating to the public interest, OPM argues that 71 unidentified cases "will be determined, at least in part, by the resolution of this case." SF, Tab 1 at 11. The existence of other claims that will require payments from the public fisc implicates the public interest. *Donati v. Office of Personnel Management*, 104 M.S.P.R. 658, ¶ 8 (2007). However, statements of a party's representative in a pleading do not constitute evidence, and OPM has neglected to produce any support for its attorneys' assertion as to the number of cases that may be impacted. *Hendricks v. Department of the Navy*, 69 M.S.P.R. 163, 168 (1995). Nor has it provided the dollar amounts at issue. OPM's arguments are thus speculative and fail to meet the requirement that a party claiming harm show that the harm is substantial and certain and offer proof that the harm will occur. *See Rogers*, 67 M.S.P.R. 698, 700.

ORDER

OPM's request for a stay is denied.

FOR THE BOARD:

Gina K. Grippando

Gina K. Grippando
Clerk of the Board

Washington, D.C.