

**THE UNITED STATES COURT OF APPEALS FOR THE
FEDERAL CIRCUIT**

DIRECTOR OF THE OFFICE OF)
PERSONNEL MANAGEMENT,)

Petitioner,)

v.)

No. 2024-1774

RONALD L. MOULTON,)

and)

MERIT SYSTEMS PROTECTION)
BOARD)

Respondents.)

**PETITIONER’S REPLY IN SUPPORT OF
ITS MOTION FOR STAY PENDING APPEAL**

Pursuant to the Court’s March 18, 2025 order, petitioner, the Director of the Office of Personnel Management (OPM), respectfully submits this reply in support of its motion to stay the Merit Systems Protection Board’s (MSPB) opinion and order in this case pending a resolution of this case on appeal.

ARGUMENT

I. OPM Is Likely to Succeed on the Merits

Making the same flawed arguments as he did in his merits briefing, Mr. Moulton’s response to our motion to stay fails to show that this factor weighs against a stay.

The question presented in this case is simple. Under 5 U.S.C. § 8421(c), OPM must apportion annuity supplements “in the same way” as the basic annuity. The parties dispute whether that instruction means that OPM must apportion the annuity supplement however the basic annuity is apportioned, or if OPM can only apportion the annuity supplement in the same circumstances in which the basic annuity can be apportioned (i.e., “if and to the extent expressly provided for in the terms of” the court order, 5 U.S.C. § 8467(a)(1)). OPM contends that to apportion the annuity supplement in the same way as the basic annuity means that it must apportion the annuity supplement however the basic annuity is apportioned, regardless of whether the court order is silent on the matter or attempts to expressly include or exclude its division. Notwithstanding the treatment of the annuity supplement in a state court order, the provision under 5 U.S.C. § 8421(c) controls whenever a court order expressly divides a FERS basic annuity benefit and a FERS annuity supplement is payable. Mr. Moulton counters that OPM may only apportion the annuity supplement if the apportionment of the annuity supplement is expressly provided for in the terms of a court order. Mr. Moulton’s interpretation of section 8421(c) is wrong.

Mr. Moulton simply cannot overcome the fact that his interpretation of section 8421(c) renders the provision meaningless. According to Mr. Moulton, section 8421(c) should be interpreted to mean that the rules set forth in 5 U.S.C. § 8467 apply to the annuity supplement because those rules apply to the basic annuity. But section

8467 states that its rules apply to “payments under this chapter.” 5 U.S.C. § 8467(a). Chapter 84 includes both the basic annuity and annuity supplement. Accordingly, section 8467(a) does all the work that Mr. Moulton attributes to section 8421(c), rendering section 8421(c) entirely meaningless and superfluous.

Mr. Moulton argues that section 8421(c) is not meaningless because it clarifies that the same rules that apply to the basic annuity also apply to the annuity supplement. Moulton Resp. at 9-19 (citing *Ali v. Federal Bureau of Prisons*, 552 U.S. 214, 226 (2008)). Mr. Moulton’s reliance on *Ali* is misplaced. In *Ali*, the Supreme Court was tasked with deciding whether a statutory phrase in the Federal Tort Claims Act (FTCA) – “any officer of customs or excise or any other law enforcement officer” – included Bureau of Prison (BOP) officers. 552 U.S. at 218. The petitioner argued that the phrase “any other law enforcement officer” “includes only law enforcement officers acting in a customs or excise capacity.” *Id.* The Supreme Court disagreed, holding that that the term “any other law enforcement officer” carries a broad meaning and includes BOP officers. *Id.* Among many other flaws with the petitioner’s argument, the Supreme Court rejected the petitioner’s argument that, by construing “any other law enforcement officer” broadly, the term “any officer of customs or excise” would be superfluous. *Id.* at 226. The Supreme Court held that Congress may have intended to “remove any doubt” that officers of customs or excise were included in “law enforcement officers.” *Id.*

The rationale from *Ali* does not apply here. Unlike the FTCA, which did not otherwise state whether “any officer of customs or excise” were included in “law enforcement officers,” 5 U.S.C. § 8467 expressly states that its rules apply to *all* payments under Chapter 84. Mr. Moulton does not challenge that the annuity supplement is a payment under Chapter 84. Accordingly, section 8467 already makes the clarification that Mr. Moulton attributes to section 8421(c), rendering section 8421(c) meaningless. *See Splane v. West*, 216 F.3d 1058, 1068 (Fed. Cir. 2000) (“We must construe a statute, if at all possible, to give effect and meaning to all its terms.”); *Marx v. General Revenue Corp.*, 568 U.S. 371, 386 (2013) (“the canon against surplusage is strongest when an interpretation would render superfluous another part of the same statutory scheme”).

Mr. Moulton also asserts, without any rationale, that OPM’s reliance on a district court decision cannot support a stay. Moulton Resp. at 10 (citing *Federal Law Enforcement Officers Assoc. v. Abuja*, No. 19-735, 2021 WL 4438907, at *5 (D.D.C. Sept. 28, 2021), *vacated*, 62 F.4th 551 (D.C. Cir. 2023) (*FLEOA*)). In *FLEOA*, the district court carefully considered the statutory language at issue in this case and determined that principles of statutory interpretation show that OPM’s interpretation of section 8421(c) is correct. That is the identical issue in this case, and the district court’s decision shows that the only other Article III tribunal to consider this issue agreed with OPM. That is certainly evidence that OPM is likely to succeed on the merits.

Further, at least one administrative judge at the MSPB 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 5 U.S.C. § 8421(c) 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 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. The full board dismissed Mr. Kuebbeler's appeal as withdrawn.

In short, OPM has shown that it is likely to succeed on the merits, and at the very least, 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 v. Holiday Tours, Inc.*, 559 F.2d 841, 844 (D.C. Cir. 1977). The first factor weighs in favor of OPM and granting a stay pending appeal.

II. OPM Will Be Irreparably Harmed Absent a Stay

Absent a stay pending appeal, OPM will be irreparably harmed because it 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 may be compelled to try to collect the portion of Mr. Moulton's annuity supplement paid to Ms. Moulton.

Mr. Moulton downplays the irreparable harm suffered by OPM, stating that it will have the ability to recover any overpayment to Mr. Moulton should OPM ultimately prevail in this appeal. Moulton Resp. at 11. Specifically, he maintains that OPM can simply deduct any overpayment from its ongoing annuity payments to Mr. Moulton. *Id.* Mr. Moulton assumes that OPM's ongoing annuity payments to Mr. Moulton will continue long enough for OPM to recover any overpayment to him, but that is no guarantee. Further, Mr. Moulton fails to acknowledge that, by refunding to Mr. Moulton any underpayments, OPM would simultaneously be creating a debt for Ms. Moulton's overpayments. Given that Ms. Moulton is deceased and is not receiving apportionment payments that OPM can deduct the overpayment from, it would be difficult to recover any overpayment made to Ms. Moulton through her estate or otherwise.

Mr. Moulton also downplays the significance of the MSPB's decision in this case. Mr. Moulton notes that the MSPB has been holding similarly situated cases in abeyance "ever since [the] initial decision underlying this petition for review—which issued in September 2019." Moulton Resp. at 12. But Mr. Moulton ignores that the MSPB 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). Further, Mr. Moulton ignores that, until February 24, 2025,

OPM's motion to stay the MSPB's order pending appeal had been pending. Accordingly, until February 24, 2025, it was not clear whether the MSPB would require compliance with its precedential decision. Now, however, absent a stay pending appeal in this Court, there is no reason to believe the MSPB will continue to hold its similarly situated cases in abeyance, as the MSPB will require compliance with its opinion and order.

Although Mr. Moulton seemingly believes a loss of \$30,000 to the public fisc is too insignificant to warrant irreparable harm, that loss is likely to significantly increase absent a stay pending appeal. OPM will likely be forced to attempt to collect overpayments from at least 70 former spouses, and will risk substantial harm to the retirement fund if it is unable to collect the overpayment.

A stay will ensure that Mr. Moulton's annuity and every other annuity that will be affected by this case are only apportioned consistent with this Court's decision. This protects OPM from seeking to recoup overpayments and thus protects OPM (and the public fisc) from suffering irreparable harm.

III. A Stay Will Not Substantially Injure the Other Parties

Mr. Moulton does not meaningfully attempt to show that he will be injured absent a stay. To be sure, he argues that he *may* lose out on interest without a stay, but ultimately takes no position on the issue. His primary response is that if Mr. Moulton can be made whole at the end of the case by receiving the approximately \$30,000 if he prevails, then OPM can likewise be made whole by trying to collect that

money back from him if OPM prevails. However, as explained above, Mr. Moulton takes too narrow of a view of the harm that will be suffered by OPM absent a stay.

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

IV. A Stay Is in the Public's Interest

As explained in our motion, 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). For the reasons explained above, the public fisc will be at risk of suffering irreparable harm absent a stay, and thus this factor favors OPM and issuing a stay.

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 28, 2025

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CERTIFICATE OF COMPLIANCE

I certify that, pursuant to Fed. R. App. Procedure 27(d)(2)(a), this reply complies with the type-volume limitation. This reply 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 reply. According to the word count, this reply contains 1,793 words.

/s/ Kyle S. Beckrich
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March 28, 2025