

No. 24-1774

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 OF A FINAL DECISION OF THE MERIT SYSTEMS
PROTECTION BOARD IN
No. DE-0841-18-0053-I-1

CORRECTED AMICUS BRIEF OF FEDERAL LAW ENFORCEMENT
OFFICERS ASSOCIATION IN SUPPORT OF AFFIRMANCE AND THE
POSITION OF THE MERIT SYSTEMS PROTECTION BOARD AND
RONALD L. MOULTON

Ryan E. Griffin
Daniel M. Rosenthal
Charlotte H. Schwartz
James & Hoffman, P.C.
1629 K Street, NW, Suite 1050
Washington, DC 20006
(202) 496-0500
regriffin@jamhoff.com
dmrosenthal@jamhoff.com
chschwartz@jamhoff.com

Dated: October 21, 2024

*Counsel for Amicus Federal Law
Enforcement Officers Association*

CERTIFICATE OF INTEREST

Counsel for Amicus Federal Law Enforcement Officers Association certifies the following:

1. The full name of every party represented in the case by the counsel filing the certificate is:

Federal Law Enforcement Officers Association

2. The names of the real parties in interest represented by the counsel filing the certificate are:

Federal Law Enforcement Officers Association

3. All parent corporations and any publicly-held companies that own 10% or more of stock in the parties represented by the counsel filing the certificate:

N/A

4. The names of all law firms, partners and associates that have not entered an appearance in the appeal and appeared for the party in the lower tribunal or are expected to appear for the party in this court are:

N/A

5. The title and number of any case known to counsel to be pending in this or any other court or agency that will directly affect or be directly affected by this Court's decision in the pending appeal is:

Counsel for Amicus is aware of the following cases pending before the Merit Systems Protections Board which will be directly affected by this Court's decision in the pending appeal:

Jeffrey Schoenberger v. Office of Personnel Management, No. CH-0841-19-0603-I-2; *Theresa Meyer v. Office of Personnel Management*, No. CH-0842-21-0428-I-6; *John Gregg v. Office of Personnel Management*, No. CH-0845-20-0395-I-5; *Gregory Nigro v. Office of Personnel Management*, No. DC-0841-20-0047-I-9; *Charles Knowles v. Office of Personnel Management*,

No. DC-0841-20-0074-I-9; *Paul Geboski v. Office of Personnel Management*, No. DC-0845-19-0850-I-11; *Raymond Gonzales v. Office of Personnel Management*, No. DE-0842-19-0457-I-9; *Angelo Santiago v. Office of Personnel Management*, No. NY-0841-21-0098-I-5; *Ingolf Hack v. Office of Personnel Management*, No. NY-0841-24-0089-I-1; *Joseph Coakley v. Office of Personnel Management*, No. PH-0841-20-0349-I-3; and *Richard Young v. Office of Personnel Management*, No. PH-831M-19-0459-I-1.

6. All information required by Federal Rule of Appellate Procedure 26.1(b) and (c) that identifies organizational victims in criminal cases and debtors and trustees in bankruptcy cases.

N/A

Dated: October 21, 2024

By: /s/ Ryan E. Griffin
Ryan E. Griffin

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of Legal & Legislative Affairs, *Management Advisory: Review of the
U.S. Office of Personnel Management's Non-Public Decision to
Prospectively and Retroactively Re-Appportion Annuity Supplements*
(hereinafter *Management Advisory*), Report No. L-2018-1
(February 5, 2018)3

DISCLOSURE STATEMENT

The Federal Law Enforcement Officers Association is a privately-held 501(c)(3) non-profit corporation organized on behalf of its members. It has no parent or subsidiary corporations and no publicly-held company owns 10% or more of its stock.

INTEREST OF AMICUS CURIAE¹

The Federal Law Enforcement Officers Association (FLEOA) is a professional association of federal law enforcement officers. More than 30,000 federal employees are members of FLEOA, including employees of the Federal Bureau of Investigation, Internal Revenue Service, Secret Service, Supreme Court Police, and more than 60 other federal agencies.

FLEOA's members are disproportionately affected by misallocation of the retirement benefits at issue in this case. Many federal law enforcement officers are subject to mandatory retirement at age 57 or after 20 years of service. *See* 5 U.S.C. § 8335(b)(1). As a result, these officers frequently rely on the Annuity Supplement under the Federal Employee Retirement System (FERS) to provide income before they become eligible for social security.

¹ Pursuant to Federal Circuit Rule 29(a)(4)(E), FLEOA states that no counsel for any party authored this brief in whole or in part; no party or party's counsel contributed money that was intended to fund preparing or submitting the brief; and no person, aside from amicus curiae, its members, or its counsel, contributed money that was intended to fund preparing or submitting the brief.

Consequently, FLEOA has a longstanding interest in the treatment of the Annuity Supplement, which led the Association to complain to the Office of Personnel Management and to challenge OPM's conduct in court. *See Fed. Law Enf't Officers Ass'n v. Ahuja*, 62 F. 4th 551 (D.C. Cir. 2023) (finding that the court lacked jurisdiction over FLEOA's claim). In addition, a number of FLEOA members have individual cases before the MSPB in which they raise the same issue; many of those cases have been stayed pending a decision in this appeal.

FLEOA received consent from all parties to file this brief in accordance with Federal Circuit Rule 29(a)(2).

INTRODUCTION AND SUMMARY OF ARGUMENT

When the Office of Personnel Management (OPM) changed the rules for allocating the Annuity Supplement between a federal employee and his or her former spouse, the Agency upended the financial lives of many retired federal law enforcement officers. The Agency enacted the change with no notice to the thousands of retirees who had relied on the longstanding allocation system. The Agency further deprived those individuals of any opportunity to comment on the change. And the Agency applied the change retroactively, imposing an immediate and significant debt on thousands of affected individuals.

Respondent Ronald Moulton has persuasively shown in his brief that the Agency acted unlawfully and that the Merit System Protection Board (MSPB)

correctly invalidated OPM's action. FLEOA submits this brief to elaborate on the history of this issue and to illustrate the impact of the Agency's conduct on FLEOA members.

ARGUMENT

I. In response to a complaint from FLEOA, OPM's Inspector General correctly found in 2018 that the Agency acted unlawfully, yet OPM failed to correct its mistakes.

In 2016, FLEOA learned that OPM had changed its policy regarding allocation of the Annuity Supplement and complained to then-acting OPM Director Beth Cobert. *See* U.S. Office of Personnel Management Office of the Inspector General, Office of Legal & Legislative Affairs, *Management Advisory: Review of the U.S. Office of Personnel Management's Non-Public Decision to Prospectively and Retroactively Re-Appportion Annuity Supplements* (hereinafter *Management Advisory*), Report No. L-2018-1, page i (February 5, 2018), <https://www.oversight.gov/sites/default/files/oig-reports/management-advisory-report-review-of-the-us-office-of-personnel-management%E2%80%99s-non-public-decision-to-prospectively-and-retroactively-re-apportion-annuity-supplements.pdf>.

In response to the Association's complaint, OPM's Inspector General investigated OPM's conduct and found that OPM should have engaged in notice-and-comment rulemaking. *Id.* at 9-10. The Inspector General further found that

OPM unlawfully applied a retroactive effect to its new interpretation and recommended that OPM return to its longstanding prior practice. *Id.* at 12-15.

OPM rejected the Inspector General's analysis and recommendations, while asking the Inspector General to keep its report secret. *Id.* at 14-17.

Given OPM's maintenance of its position, FLEOA filed a lawsuit under the Administrative Procedure Act in 2019. *See Fed. Law Enf't Officers Ass'n v. Ahuja*, 62 F. 4th 551, 556 (D.C. Cir. 2023). However, the D.C. Circuit held that there was no jurisdiction because OPM's decision could only be challenged through the MSPB and the Federal Circuit under the Civil Service Reform Act. *Id.* at 576.

For the reasons stated in the appeal brief of Respondent Moulton and the report of the Agency's Inspector General, FLEOA believes that OPM unlawfully implemented its new interpretation without notice-and-comment rulemaking and wrongly imposed it retroactively on Moulton and other federal employees, including many FLEOA members. Further, on the merits, OPM's new interpretation of the statute is incorrect.

II. The Agency's erroneous interpretation has had devastating effects on FLEOA members.

OPM's sudden change in interpretation has had devastating consequences for retired law enforcement officers. OPM's action has imposed a financial burden that retirees could not have anticipated or planned for, causing many FLEOA members to scramble to make up the difference, taking on jobs, putting off

retirement plans, and having to go without. This sudden change also upset the carefully negotiated divorce settlements they had entered into, depriving members of the benefit of their bargain and overriding the careful balance that state courts attempted to strike. Finally, OPM implemented its erroneous interpretation in a chaotic and secretive manner, which only further exacerbated the financial and emotional toll on FLEOA members.

A. The Agency's erroneous interpretation imposed a devastating financial burden on FLEOA's retiree members, forcing many to return to work.

When OPM changed its interpretation out of the blue and without notice, retirees who had settled their divorces years ago suddenly had to make do with less than the full amount of their Annuity Supplement, upending their careful retirement planning. Making matters worse, OPM applied this sudden change retroactively and began seeking to recover thousands, and sometimes tens of thousands, of dollars in alleged "overpayments" from affected retirees. The result was a double hit to affected retirees: OPM reduced their Annuity Supplement going forward *and* began withholding a further amount from these reduced monthly payments each month to effectuate its claw back of the alleged overpayments.

After long careers in dangerous professions, retired law enforcement officers and firefighters carefully planned and budgeted for retirement. Indeed, the

individuals affected by OPM's changed interpretation are required to retire by a specified date precisely because of the physical rigors and inherent risks of their law enforcement and firefighting duties. *See* 5 U.S.C. §§ 8335(b); 8425(b) (setting mandatory retirement age for law enforcement officers, firefighters, and customs and border protection officers, among others); 8401(14),(17) (defining firefighter and law enforcement officers as employees whose duties are "sufficiently rigorous" such that employment opportunities must be "limited to young and physically vigorous individuals."). As a result, after OPM imposed a significant and unexpected financial burden on them, many were barred from returning to the jobs they had retired from. But many still had to return to some kind of work to make up the difference, especially given that OPM's change corresponded with a historic rise in inflation. Given their work experience, for many that meant returning to precisely the type of physically demanding and dangerous jobs that the federal government forced them to retire from. For others, it meant taking on a series of part time jobs.

For example, shortly after Steve C.² finalized his divorce in 2015, OPM sent him a notice confirming that, pursuant to his divorce decree, when he retired he would receive the entire amount of his supplemental annuity. But then, seven years

² Steve C. and Rudy M. are identified by their first names and last initial for privacy reasons. When discussing the experiences of individual FLEOA members in this brief, we rely on interviews of them conducted by counsel.

later, and two years into his retirement, OPM went back on its word. Steve C. would now not only be receiving less of his supplemental annuity going forward, but OPM told him he owed some \$15,000 in overpayments. Between the reduction in the supplemental annuity and the withholdings OPM was using to pay back this alleged debt, Steve C. started receiving nearly \$1,000 less per month than he had previously received—and that he had planned his retirement around receiving. Steve C.'s day-to-day life changed completely as a result. After retiring, Steve C. moved across several states to be closer to family, and especially his aging father, whom he was caring for during the first two years of his retirement. But now, Steve C. has had to find a new job. Rather than spend time with his father, who recently had a stroke, Steve C. spends a significant amount of time working. After 30 years working for the DEA, Steve C. hoped to never have to put his life at risk for work again. But now he has a new job in security, where he once again has to carry a gun to protect himself and others.

When Brian Crow retired after serving over 30 years as a Special Agent with the United States Department of Agriculture, he was surprised to learn that he would be receiving nearly \$600 less per month than he had anticipated. To date, OPM's changed interpretation has cost Crow over \$30,000. At the same time that Crow learned about this huge reduction in his Annuity Supplement, he also started supporting his son who was diagnosed with kidney failure, representing another

significant financial burden he could not have anticipated. At first, Crow started taking money out of his Thrift Savings Plan (TSP) to try to make up the difference. But he quickly realized that doing so was effectively a double loss since it also deprived him of future interest earnings, all coming from an account that he could never put more money into. Crow had never expected to have to go back to work, but had no other option. Since “retiring,” he has worked as a security guard at a federal courthouse and now works part time for the U.S. Marshals, helping to escort prisoners to and from lock up. After getting remarried and retiring, rather than a new start in life, Crow finds himself in a yet another job where he has to carry a gun every day. And even then, the more Crow earns at his job, the less he gets from his Annuity Supplement. Every avenue for trying to make up the difference caused by OPM’s changed interpretation only sets retirees back even more; every option is effectively one step forward, two steps back.

Rudy M. had planned for a comfortable retirement after carefully calculating what he could afford. But after OPM unexpectedly reduced his Annuity Supplement payments, he now finds himself falling behind by several hundred dollars every month. He scrimps and saves and is forced to take money out of his TSP. He is now selling his car to get by and is looking into going back to work. Rudy M. never thought he was going to have to worry about money, but now it is a constant source of stress. A trip to visit his children and other family members has

to be very carefully budgeted, and almost always means relying on his steadily declining savings.

Kevin O'Brien always took pride in himself as a meticulous planner. After a difficult divorce, he worked closely with a financial advisor to ensure that he could afford to retire after more than two decades working as an FBI Supervisory Special Agent. This careful planning included confirmation that O'Brien had received from OPM in 2003 that he would receive the entirety of his supplemental annuity upon retirement. But that planning was all for naught; once OPM changed its interpretation, O'Brien had no choice but to put off retirement for several years. He still had significant childcare expenses, including college expenses. He drove an old car and refinanced his home to an adjustable-rate mortgage to get by (a risky financial decision he never would have made if he had another option). After retiring, O'Brien had to get a full-time job to make up the difference. And when O'Brien got a job, he lost his supplemental annuity completely for several years, meaning that the difference he had to make up for only increased the more he worked.

After 26 years of service in federal law enforcement, Mark Discenza was looking forward to being able to visit his wife's family who live in Honduras and had planned to help care for his 90-year-old mother and help his daughters with school tuition. But all of those plans went to the wayside when OPM reduced his

supplemental annuity and told him he owed more than \$20,000 in alleged overpayments. Discenza took on a new job conducting background investigations, but that was still not enough to make up the difference. He and his wife could not visit her family and could not spend the time with his aging mother that he had hoped to. When his mother-in-law was diagnosed with cancer, he could not help pay for her extensive medical bills. His daughters had to unexpectedly take out school loans.

Two years into retirement, following a 35-year career as a U.S. Marshal, William Laster was told that his supplemental annuity payments would be reduced by nearly a third, and was told that he owed over \$20,000 in alleged overpayments. In order to make up the difference, rather than take a long-awaited and well-earned vacation, Laster had to significantly increase the amount of time he worked at a job delivering tires.

David Walker retired as a career Fire Management Officer after 38 years helping to fight and manage wildland fires. Walker, upon mandatory retirement at age 57, found out a year after retiring that his supplemental annuity payment would be reduced by half and that he owed over \$10,000 in “overpayments.” Shortly after Walker received this news, the COVID-19 pandemic hit, and finding a job became incredibly difficult. Walker has managed to cobble together several part time positions, from surveying to working at Lowe’s, in addition to temporary

firefighting to make ends meet, but only after moving to a new state with a lower cost of living—something he had not planned to do. After several years, and after restructuring his entire retirement plan and daily life to account for the financial impact of OPM’s change, Walker is only now able to pay for trips to visit his grandchildren who live across the country, something he had been looking forward to doing in retirement after a long and dangerous career.³

B. OPM’s sudden change upset FLEOA members’ carefully negotiated divorce settlements, effectively nullifying the balance struck by state courts.

Many retirees spent a significant amount of time, effort, and money to carefully negotiate their divorce settlements, including the division of their basic FERS annuities, based on the expectation that they would receive the entirety of their supplemental annuity. And they did so based on OPM’s guidance, which had been consistent for over thirty years.

Many FLEOA members, for example, noted that their divorce settlements were premised on an overall 50/50 split of marital assets, and that OPM’s sudden change regarding the annuity supplement completely upset that balance. Some

³ The adverse financial impacts of OPM’s actions on additional individual federal law enforcement officers are detailed in the OPM Inspector General’s report. *See* Management Advisory, at 2–3 (detailing four cases in which retired law enforcement officers saw their annuity supplement payments reduced by as much as 37% and suddenly faced retroactive debts of as much as \$28,389 as the result of OPM’s actions).

gave up significant portions of their TSP savings, including the opportunity to earn interest on those savings, based on the premise that they would retain the entire amount of their supplemental annuity. And in some cases, FLEOA members' ex-spouses were not supposed to get additional money due to their egregious conduct during their marriage; OPM's decision effectively nullified state courts' determinations on that front.

FLEOA members uniformly reported that they would have negotiated these settlements differently had they known their annuity supplements would also be apportioned to their former spouses.

Paul Geboski, who retired after over 25 years of service as an investigator for the FBI and the Department of Labor, specifically negotiated his settlement with the expectation that he would receive the full amount of his supplemental annuity. If he had known OPM was going to deprive him of \$42,000 that he had expected to receive in retirement, he would have entered into an entirely different settlement agreement.

Similarly, Discenza explained that he let his ex-spouse keep their house with the expectation that he would receive the entirety of his supplemental annuity. Now, due to OPM, he is out a house and a good portion of his supplemental annuity.

The nature of OPM's change also reopened many old wounds. Many retirees had long ago settled their divorces, and when OPM sprung a huge, unexpected financial burden on them, they had to make the difficult decision whether to attempt to open up a settlement that they thought they had put behind them. FLEOA members reported a great deal of anxiety in having to even think about revisiting a settlement that had ended a painful, acrimonious divorce. Further, after having their retirement payments severely cut, the prospect of having to pay a divorce attorney to try to renegotiate a settlement represented yet another unanticipated expense that they would have to figure out how to pay for. And retirees had to take on this expense without knowing whether their ex-spouse or the court would even permit renegotiation of the agreement.

C. OPM implemented its erroneous interpretation in a manner that only exacerbated the anguish and distress caused by the enormous financial burden it imposed on retired law enforcement officers.

In addition to the devastating financial consequences of OPM's abrupt change, the manner in which it implemented the change caused significant anguish. Whereas retirees followed the rules and carefully planned for their retirement, OPM's abrupt change to its interpretation and retroactive application happened without any notice and without even the opportunity to comment on the change.

FLEOA members explained that they felt completely cheated and like OPM had pulled the rug out from under them without so much as a warning. In

Discenza's words, "my whole life I have always tried to do what is considered the right thing, and they did me wrong." As Crow put it, as a thirty-year law enforcement officer, he always followed the rules. Not only was this, as another member put it, a "kick in the teeth" after decades of public service, but many now fear for their financial future. As Steve C. explained, how can he be sure OPM will not change the rules again, and take away more money? After thirty years of service in a dangerous job, he feels extorted and uncertain about his future.

FLEOA members also related how stressful and difficult it was to try to figure out what was going on when the money they relied on to get by was suddenly missing. Many retirees found out about the change only after their monthly annuity payments were slashed, and then were told they owed thousands of dollars in "overpayments."

When Richard Young, who worked for two decades as a special agent with the Bureau of Alcohol, Tobacco, and Firearms, suddenly started receiving less money, he tried calling OPM repeatedly, but no one could explain what was happening. Geboski had a similar experience: after calling OPM multiple times, where no one would even answer the phone, he finally just traveled to OPM's headquarters to try to get answers in person. OPM only responded to Rudy M.'s questions after FLEOA's counsel sent the Agency a letter; it only gave O'Brien the

information he asked for after he got his congressman and senators involved in his case.

OPM's failure to appropriately communicate with retirees also resulted in even worse financial consequences in some cases. When Crow went back to work so that he could get by, OPM promptly reduced the amount of his annuity supplement each month based on his increased earnings. But OPM kept paying his spouse as if his annuity supplement never went down. In other words, the Agency did not reduce the amount that his ex-spouse received by a proportionate amount, meaning that Crow was now out several hundred dollars more each month. It took Crow four months of constant emailing (since no one ever picked up the phone) to get this error fixed.

After devoting their careers to public service and losing out on thousands of dollars they had expected to rely upon in retirement, OPM could not even do retired law enforcement officers the courtesy of explaining what was happening. At every turn, OPM's erroneous interpretation has caused nothing but chaos and distress for retirees who did nothing wrong. Retirees have devoted years of their life to figuring out what happened, trying to get by in the meantime, and fighting to get the money they are owed. As O'Brien puts it, this is the last thing he wants to spend his retirement doing, but just trying to keep on top of OPM has effectively become yet another unexpected part-time job. As Crow sees it, his job in federal

law enforcement is what caused his divorce. The job was incredibly stressful and placed a huge burden on his family. After devoting his life to a career in law enforcement, and sacrificing his marriage to that career, OPM has now taken even more from him, and did so without even the benefit of advanced notice.

CONCLUSION

The Federal Circuit should affirm the ruling of the Merit Systems Protection Board.

Respectfully submitted,

/s/ Ryan E. Griffin

Ryan E. Griffin

Daniel M. Rosenthal

Charlotte H. Schwartz

James & Hoffman, P.C.

1629 K Street, NW, Suite 1050

Washington, DC 20006

(202) 496-0500

regriffin@jamhoff.com

dmrosenthal@jamhoff.com

chschwartz@jamhoff.com

Dated: October 21, 2024

*Counsel for Amicus Federal Law
Enforcement Officers Association*

CERTIFICATE OF SERVICE

I hereby certify that on this date, October 21, 2024, service of the Corrected Amicus Brief of Federal Law Enforcement Officers Association in Support of Affirmance and the Position of the Merit Systems Protection Board and Ronald L. Moulton was filed through CM/ECF and served electronically on all parties.

/s/ Ryan E. Griffin

Ryan E. Griffin

James & Hoffman, P.C.

1629 K Street, NW, Suite 1050

Washington, DC 20006

(202) 496-0500

regriffin@jamhoff.com

Dated: October 21, 2024

*Counsel for Amicus Federal Law
Enforcement Officers Association*

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(g)(1) of the Federal Rules of Appellate Procedure, I hereby certify that the foregoing brief was prepared using a proportionally spaced typeface, 14-point font, and that the textual portion of the brief, exclusive of the tables of contents and authorities, certificates of service and compliance, and statement of related cases, but including headings, footnotes, and quotations, contains 3650 words as determined by the word counting feature of Microsoft Word, and therefore complies with Rule 32(a)(7)(B).

Dated: October 21, 2024

/s/ Ryan E. Griffin
Ryan E. Griffin