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

JOINT APPENDIX

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December 13, 2024

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TABLE OF CONTENTS

Appendix Page

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.

[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
Acting Clerk of the Board
Washington, D.C.

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
DENVER FIELD OFFICE

RONALD L. MOULTON,
Appellant,

v.

OFFICE OF PERSONNEL MANAGEMENT,
Agency,

and

JILL KURYVIAL
Intervenor,

and

DIRECTOR OF THE OFFICE OF PERSONNEL MANAGEMENT,
Intervenor.

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

DATE: April 16, 2018

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

Tynika Faison Johnson, Washington, D.C., for the agency.

Jason Foster, Esquire, and Jessica Johnson, Esquire, Washington, D.C., for the Director of Office of Personnel Management /Intevenor.

BEFORE
James A. Kasic
Administrative Judge

INITIAL DECISION

INTRODUCTION

On November 4, 2017, the appellant filed a timely petition for appeal of the Office of Personnel Management's (OPM or agency) October 16, 2017 reconsideration decision finding OPM had miscalculated the apportionment of the appellant's Federal Employees' Retirement System (FERS) annuity payable to his former spouse because it had not included the appellant's FERS annuity supplement in its computation of the court-ordered division of his FERS annuity. Initial Appeal File (IAF), Tab 1. [1] As a result, OPM determined that it had overpaid the appellant $24,535.30 in FERS annuity benefits. *Id*. That petition for appeal, over which the Board had jurisdiction pursuant to 5 U.S.C. § 8461(e)(1) and 5 C.F.R. § 841.308, was docketed by the Board as DE-0845-18-0053-I-1.

While the appeal was pending, OPM issued a new reconsideration decision, dated December 12, 2017, that again found that it was required to include the appellant's FERS annuity supplement in its computation of the court-ordered division of his FERS annuity. IAF, Tab 13 at 8-12. That reconsideration decision also notified the appellant that the agency would take no collection action on the $24,525.30 in alleged overpayments and instead would reissue the appellant a new initial decision regarding any overpayment he may owe after the appellant had exhausted his administrative and appeal rights with respect to the issue of whether OPM was appropriately apportioning his annuity. *Id*.

Although the agency's December 12, 2017 reconsideration decision divested the Board of jurisdiction over the appellant's original appeal of the agency's October 16, 2017 reconsideration decision, I found that administrative economy was best served by continuing the appeal from the December 12, 2017 decision, over which the Board has jurisdiction pursuant to 5 U.S.C. § 8461(e)(1) and 5 C.F.R. § 841.308, rather than dismissing and refiling a new appeal. IAF,

[1] While the reconsideration decision is dated October 16, 2016, it is undisputed that this was a typographical error, and that the actual date of the decision is October 16, 2017.

Tab 14. The docket number of the appeal, however, was changed to its current number, DE-0841-18-0053-I-1, to reflect the fact that OPM was not seeking to collect an overpayment from the appellant at this time. *Id.*, n. 1.

The appellant withdrew his request for a hearing, *see* IAF, Tab 11, and this decision is therefore being issued on the written record. For the reasons set forth below, I REVERSE the agency's December 12, 2017 reconsideration decision.

ANALYSIS AND FINDINGS

Background

The appellant is a former Air Traffic Controller (ATC) with the Department of Transportation. IAF, Tab 13 at 42 and 54. He and his former spouse, Jill Kuryvial, divorced in July 2004 after over fifteen years of marriage. *Id.* at 93; Tab 27 at 10.[2] On July 12, 2004, the Larimer County, Colorado District Court (Court) issued a "Decree of Dissolution of Marriage" (Divorce Decree) dissolving the appellant's and Ms. Kuryvial's marriage. *Id.*, Tab 13 at 56-57. A June 17, 2004 "Separation Agreement" attached to the Divorce Decree included the following provision:

> The pensions and retirement accounts of the parties shall be divided as follows: The marital portion of the Husband's FERS shall be divided equally between the parties pursuant to a domestic relations court order.

Id. at 62.

A July 22, 2004, "Domestic Relations Court Order" provided the following with respect to the appellant's FERS annuity.

> 6. **Award of Benefits and Instruction to Pay**. The Employee is (or will be) eligible for retirement benefits under the Federal Employees 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

[2] Pursuant to my March 16, 2018 Order Granting Requested Extension to File Closing Submission, I added Ms. Kuryvial as an intervenor in this appeal, given that her apportioned annuity benefits may be affected by the Board's final decision in this appeal. *Id.*, Tab 26. The Director of OPM has also exercised his right to intervene in this appeal. *See* 5 U.S.C. § 7701(d)(1); IAF, Tabs 21, 27 and 28.

> Retirement System, including any benefit the Employee earns based on special ATC service. The marriage began on November 11, 1988 and ended on July 12, 2004. The United States Office of Personnel Management is directed to pay the Former Spouse's share directly to the Former Spouse. The Former Spouse's share shall be calculated based on the following formula:
>
> 50% x number of months worked during the marriage X The pension
> Total months worked at time of retirement
>
> 8. **Award of Survivor Annuity**. Under Section 8445 of Title 5, United States Code, the Former Spouse is awarded a former spouse survivor annuity under the Federal Employees Retirement System. The amount of the former spouse survivor annuity will be equal to a pro rata share, including such share based on the Employee's special ATC service. The marriage began on November 11, 1988 and ended on July 12, 2004.

Id. at 54.

The appellant retired from his position as an ATC on May 31, 2010 at the age of 47 with over 25 years of service. *Id.*, Tab 13 at 9 and 43. Pursuant to 5 U.S.C. § 8412(e), an ATC with at least 25 years of service is eligible for an immediate FERS annuity at any age. Pursuant to 5 U.S.C. § 8421, the appellant was also entitled to receive a FERS annuity supplement at the time of his retirement. The annuity supplement "approximates the value of FERS service in a Social Security benefit. The general purpose is to provide a level of income before age 62 similar to what the retiree will receive at age 62." OPM's CSRS & FERS Handbook for Personnel and Payroll Offices (OPM Handbook), Chapter 051, §51A2.1-3A, https://www.opm.gov/retirement-services/publications-forms/csrsfers-handbook/c051.pdf. *See also* 5 U.S.C. § 8421(b)(2) ("The amount under this paragraph for an annuitant is an amount equal to the old-age insurance benefit which would be payable to such annuitant under title II of the Social Security Act … upon attaining age 62 and filing application therefor….").

On November 3, 2010, OPM notified the appellant that the agency had determined that the court order providing Ms. Kuryvial with a survivor annuity

qualified as a court order under applicable federal law, and that the agency would therefore pay a survivor annuity to Ms. Kuryvial upon the appellant's death. IAF, Tab 13 at 30.[3] On December 3, 2010, OPM informed the appellant and Ms. Kuryvial in separate letters that, in accordance with their court order, Ms. Kuryvial would receive her pro rata share of the appellant's "gross annuity benefit of $4,415.00." *Id.* at 28-29.

On August 25, 2016, OPM sent the appellant a letter informing him that the agency had adjusted the apportionment amount payable from his annuity to Ms. Kuryvial because, when OPM had originally calculated Ms. Kuryvial's apportionment, it had mistakenly failed to include his FERS annuity supplement in the division of his FERS annuity, which OPM stated it was required to do pursuant to 5 U.S.C. § 8421(c) and the court order. *Id.* at 24-25. OPM notified the appellant in that same letter that, as a result of this oversight, it had overpaid him $24,535.30. *Id.* at 25. The agency notified the appellant that it would deduct this amount from his annuity in 98 installment of $250.00, with a final installment of $35.30. *Id*.

The appellant requested reconsideration of OPM's initial decision on September 1, 2016. *Id.*, Tab 8 at 14. On February 23, 2017, the agency issued a reconsideration decision to the appellant affirming its initial decision. *Id.* at 20-22. On March 13, 2017, the appellant filed an appeal of the agency's reconsideration decision with the Board, which was docketed as DE-0845-17-0222-I-1. While that appeal was pending, OPM informed the Board that it was rescinding its February 23, 2017 reconsideration decision, resulting in a dismissal of the appeal for lack of jurisdiction. *Id.*, Tab 9 at 7; DE-0845-17-0222-I-1 (IAF, Tab 8 (Initial Decision)).

[3] While the record does not contain a similar notice from the agency confirming that the court order relating to the distribution of the appellant's FERS retirement annuity was a qualifying court order, the division of the appellant FERS retirement annuity and the survivor annuity are addressed in the same court order, and there is no dispute that this court order was in fact a "qualifying court order" under OPM rules.

On October 16, 2017, OPM issued a new reconsideration decision, which affirmed the determination made in its initial decision that it must include the appellant's FERS annuity supplement in the computation of the court-ordered division of the appellant's FERS annuity. IAF, Tab 13 at 15-20. The agency also notified the appellant that it would not take any collection action at that time with respect to the overpayment. *Id.* at 19. Rather, the agency indicated it would reissue the appellant a new initial decision regarding any overpayment he might owe after the appellant exhausted his administrative and appeal rights on the underlying issue of whether the agency appropriately included the appellant's annuity supplement in apportioning his annuity. *Id*.

The appellant timely appealed the agency's October 16, 2017 reconsideration decision. *Id.*, Tab 1. While the appeal was pending, the agency issued a new reconsideration decision dated December 12, 2017. *Id.* at 8-12. The December 12, 2017 reconsideration decision appears to have been issued solely to correct several typographical errors in the October 16, 2017 reconsideration decision. *Id.* at 12 and 19. The December 12, 2017 reconsideration decision did not otherwise change the agency's October 16, 2017 decision with respect to the apportionment of the appellant's FERS annuity supplement or the collection of any overpayment.

As discussed above, while the agency's December 12, 2017 reconsideration decision divested the Board of jurisdiction over the appellant's original appeal of the agency's October 16, 2017 reconsideration decision, I found that administrative economy was best served by continuing the appeal from the December 12, 2017 decision, over which the Board has jurisdiction pursuant to 5 U.S.C. § 8461(e)(1) and 5 C.F.R. § 841.308, rather than dismissing and refiling a new appeal, and the appeal was renumbered as DE-0841-18-0053-I-1. *Id.*, Tab 14.

Burden of Proof

In cases where OPM is seeking the recovery of an overpayment, it has the initial burden of proof to establish by a preponderance of the evidence that an overpayment occurred. *See* 5 C.F.R. § 845.307. Pursuant to OPM's December 12, 2017 reconsideration decision, however, the agency is not seeking to recover an overpayment from the appellant at this time. Rather, it is now only proposing to prospectively reduce the appellant's annuity and increase Ms. Kuryvial's pro rata share of that annuity based on the July 22, 2004 court order.

If, as OPM contends, Ms. Kuryvial is statutorily entitled under 5 U.S.C. § 8421(c) to an apportioned share of the appellant's annuity supplement, neither it nor the Board can deny paying her such apportioned share for equitable reasons, such as its delay in finding that she was entitled to the apportioned share, its belated correction of its practice of not apportioning the supplemental benefit, or other equitable reasons. *See Office of Personnel Management v. Richmond*, 496 U.S. 414, 416, 434 (1990). Where such an entitlement is at issue, the appellant has the burden of proving, by a preponderance of the evidence, that his former spouse is not entitled to the portion of his annuity benefits awarded by OPM. *See Adler v. Office of Personnel Management*, 114 M.S.P.R. 651, ¶ 9 (2010) (citing *Hamilton v. Office of Personnel Management*, 114 M.S.P.R. 439, ¶ 14 (2010)). A preponderance of the evidence is that degree of relevant evidence that a reasonable person, considering the record as a whole, would accept as sufficient to find that a contested fact is more likely to be true than untrue. 5 C.F.R. § 1201.4(q).

Applicable Law and Findings

5 U.S.C. § 8467 governs court-ordered divisions of FERS retirement benefits. Pursuant to 5 U.S.C. § 8467(a), OPM is required to pay to the former spouse of a FERS employee the retirement benefits that the employee would otherwise have received "***if and to the extent expressly provided for in the terms***

of – (1) 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 such court decree. (Emphasis added).

OPM has promulgated regulations at 5 C.F.R. Part 838 to govern the handling of court orders affecting both the Civil Service Reform System and FERS. Part 838 prescribes—

> (1) The requirements that a court order must meet to be acceptable for processing under this part;
>
> (2) The procedures that a former spouse or child abuse creditor must follow when applying for benefits based on a court order under sections 8341(h), 8345(j), 8445 or 8467 of title 5, United States Code;
>
> (3) The procedures that OPM will follow in honoring court orders and in making payments to the former spouse or child abuse creditor; and
>
> (4) The effect of certain words and phrases commonly used in court orders affecting retirement benefits.

5 C.F.R. § 838.101(b)(1)-(4).

OPM's regulations provide specific instructions on how to implement "qualifying" court orders which divide retirement benefits between a FERS employee and a former spouse. OPM's regulations recognize that its role in executing these qualifying court orders is circumscribed:

> In executing court orders under [Part 838], OPM must honor the clear instructions of the court. ***OPM will not supply missing provisions, interpret ambiguous language***, or clarify the court's intent by researching individual State laws, in carrying out the court's instructions. ***OPM performs purely ministerial actions in accordance with these regulations***. Disagreement between the parties concerning the validity or the provisions of any court order must be resolved by the court.

5 C.F.R. § 838.101(a)(2) (emphasis added). *See also* 5 C.F.R. §§ 838.121 ("OPM is responsible for authorizing payments in accordance with clear, specific and express provisions of court orders acceptable for processing") and 838.201(a) ("OPM must comply with qualify court orders … that award a portion of an

employee annuity to a former spouse"). As the Federal Circuit has stated, "OPM is neither qualified nor obligated to resolve disputes about the import of state divorce decrees … OPM's task is 'purely ministerial' with respect to court-ordered property settlements." *Perry v. Office of Personnel Management*, 243 F.3d 1337, 1341 (Fed. Cir. 2001) (quoting *Snyder v. Office of Personnel Management*, 136 F.3d 1474, 1477 (Fed. Cir. 1998)).

The court order at issue in this appeal makes no express reference to the appellant's annuity supplement. *See* IAF, Tab 13 at 54. Rather, it uses only general terms, referring to the appellant's FERS "retirement benefits" and awarding Ms. Kuryvial a pro rata share of the appellant's "gross monthly annuity under" FERS. *Id*. It is the appellant's position, as well as that of the agency's own Office of Inspector General (OIG) – which recently issued a Management Advisory, a copy of which the appellant has filed with the Board – that an annuity supplement is separate and distinct from a basic annuity, and that the agency's recent decision to include the annuity supplement as part of the court-ordered division of the appellant's FERS annuity reaches beyond its ministerial role in implementing court orders. IAF, Tab 17 at 16-17; Tab 29 at 4. The appellant has also taken the position espoused by OIG in its Management Advisory that the agency's position in this appeal is a new "legislative rule" requiring notice and comment rulemaking prior to its implementation. IAF, Tab 17 at 17-18; Tab 29 at 4.

The agency argues that it is compelled by the language in 5 U.S.C. § 8421(c) to include an annuity supplement in the court-ordered division of FERS retirement benefits whenever a qualifying court order orders the division of the "employee annuity." IAF, Tab 27 at 9-10. In both its December 12, 2017 Reconsideration Decision and on appeal, the agency argues that the wording of section 8421(c) – requiring the amount of the annuity supplement "to be treated in the same way" as the basic annuity computation for purposes of the court-ordered divisions of FERS retirement benefits under 5 U.S.C. § 8467 – is "clear

and unambiguous language" requiring OPM to include an employee's FERS annuity supplement as part of an ex-spouse's share of any FERS annuity being divided pursuant to court order, without need for the court order to separately direct OPM to include such annuity supplement. IAF, Tab 13 at 10; Tab 27 at 13-14. *See Chevron, U.S.A. Inc. v. NRDC, Inc.*, 467 U.S. 837, 842-43 (1984) ("If the intent of Congress is clear, that is the end of the matter; for … the agency must give effect to the unambiguously expressed intent of Congress."). The agency alternatively argues that, even if the language in section 8421(c) is ambiguous, the agency's implementing regulations at 5 C.F.R. Part 838 are a reasonable interpretation of section 8421(c) that are entitled to deference under *Chevron*. *See* IAF, Tab 27 at 14-15.

As an initial matter, I am unpersuaded by the agency's argument that 5 U.S.C. § 8421(c) unambiguously requires that supplemental annuities be deemed part of any court-ordered division of a FERS annuity. Congress did not elaborate in section 8421(c) or elsewhere in the FERS retirement statutory scheme as to its intent in requiring that annuity supplements be "treated in the same way" as a basic annuity for purposes of these court-ordered divisions of FERS retirement benefits, and I have found no legislative history clarifying the purpose of section 8421(c), nor have the parties or the intervenors directed me to any such legislative history.

I find the agency's argument particularly unavailing given that, under the FERS statutory scheme, an annuity supplement is treated as a separate and distinct entitlement from a basic annuity. *See* 5 U.S.C. §§ 8421(a)(1)-(3). Notably, the formula used to compute the FERS annuity supplement is quite different from the formulas used to compute other benefits paid by OPM, such as the basic annuity, since it is an adaptation of the Social Security benefits formula. *See* 5 U.S.C. § 8421(b)(2)-(4); OPM Handbook, Chapter 051, §51A2.1-3A, https://www.opm.gov/retirement-services/publications-forms/csrsfers-handbook/c051.pdf ("[T]he retiree annuity supplement is computed using a methodology

derived from the Social Security law."). Notably, Social Security benefits are not transferable or assignable, nor can they be subject to any form of attachment by creditors. *See* 42 U.S.C. § 407(a). Given the fact that annuity supplements are intended to replicate Social Security benefits and are computed in the same manner as such Social Security benefits, it is quite possible that Congress promulgated section 8421(c) to make clear that an annuity supplement can be divided pursuant to court order just like a basic annuity, notwithstanding its Social Security-like nature. It does not necessarily follow, however, that an annuity supplement must be divided along with a basic annuity, as the agency argues here. Indeed, such a reading of the statute would appear to run directly counter to 5 U.S.C. § 8467(a)'s requirement that a court order must "expressly provide" for the division of a FERS retirement benefit before OPM can make any payment of such benefits to a former spouse. *See, e.g., Adoptive Couple v. Baby Girl*, 570 U.S. 637, 652 (2013) (statutory provisions "should be read in harmony") (citing *United Savings Assn. of Texas v. Timbers of Inwood Forest Associates, Ltd.*, 484 U.S. 365, 371 (1988) (explaining that statutory construction "is a holistic endeavor" and that "[a] provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme")).

Based on the foregoing, I am unpersuaded by the agency's argument that section 8421(c) is unambiguous. Rather, I find the section to be subject to multiple interpretations. Given that there are several possible readings of section 8421(c), it cannot be said that Congress has "directly addressed the precise question at issue here." *Chevron*, 467 U.S. at 842. In such an instance, "the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Id.* at 843. "If Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific

provision of the statute by regulation. Such legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute." *Id.* at 843-844.

Here, OPM argues that its regulations at 5 C.F.R. Part 838 do in fact elucidate the meaning of section 8421(c) and are therefore entitled to deference. The agency is correct that *Chevron* deference would apply were that the case. *See Christensen v. Harris County*, 529 U.S. 576, 587 (2000) ("[T]he framework of deference set forth in *Chevron* does apply to an agency interpretation contained in a regulation."). The agency, however, fails to point to any provision in Part 838 that directly address the purpose of section 8421(c). Rather, the agency essentially works its way backwards from the fact that its regulations at Part 838 nowhere differentiate between a basic annuity and an annuity supplement. The agency instead uses a broad term, "employee annuity," throughout Part 838. "Employee annuity" is defined as:

> the recurring payments under CSRS or FERS made to a retiree, the recurring phased retirement annuity payments under CSRS or FERS made to a phased retiree in phased retirement status, and recurring composite retirement annuity payments under CSRS or FERS made to a phased retiree when he or she attains full retirement status. Employee annuity does not include payments of accrued and unpaid annuity after the death of a retiree or phased retiree under 5 U.S.C. 8342(g) or 8424(h).

5 C.F.R. § 838.103. The agency's regulations require it, for example, to "comply with qualifying court orders . . . that award a portion of an ***employee annuity*** to a former spouse" as long as such order, *inter alia*, "expressly divides the ***employee annuity***" and "provides for OPM to pay the former spouse a portion of the ***employee annuity***." 5 C.F.R. §§ 838.201(a), 838.303(a), 838.304(a). While Part 838 refers to "types" of annuities, it does not differentiate between a basic annuity and an annuity supplement when doing so. *See, e.g.*, 5 C.F.R. § 838.306.

It is difficult to see how this lack of differentiation in Part 838 between a basic annuity and an annuity supplement can be viewed as a regulatory

interpretation of 5 U.S.C. § 8421(c), however. Indeed, as the OIG's Management Advisory (citing internal agency emails) suggests, the omission of any references to the annuity supplement in the agency's regulations could just as easily reflect the agency's conclusion that the annuity supplement was "a Social Security benefit and thus presumptively *not* allocable as between an employee and a former spouse." IAF, Tab 17 at 15 (emphasis in original). In addition, the agency's claim that the term "employee annuity" in Part 838 was meant to include both the basic annuity and the annuity supplement is belied by certain provisions in Part 838 itself discussing the "types" of "employee annuity." These types of employee annuities are listed as "phased retirement annuity, composite retirement annuity, net annuity, gross annuity, or self-only annuity," terms that, as the agency itself recognizes in its December 12, 2017 reconsideration decision, are not even applicable to annuity supplements. *See* 5 C.F.R. § 838.306(a); IAF, Tab 13 at 11. This at least creates the possibility that, in promulgating Part 838, the agency was working under the assumption that annuity supplements were never intended to be a part of a court-ordered division of an employee's FERS annuity.

Given the fact that an annuity supplement is a Social Security-like benefit, and given the ambiguity raised by 5 U.S.C. § 8421(c), it would seem incumbent upon the agency to have addressed this issue head-on in its regulations at Part 838. But, for whatever reason, it failed to do so. Indeed, annuity supplements aren't even discussed in the agency's rule-making process implementing Part 838. *See* 51 FR 47189 (Dec. 31, 1986) (Interim rule regarding court orders affecting FERS retirement benefits) and 57 FR 33570 (1992) (Final rule regarding same). Because it cannot be said that 5 CFR Part 838 "elucidates" the meaning of 5 U.S.C. § 8421(c), I am unable to give these regulations the "controlling weight" the agency claims I must when interpreting the meaning of 5 U.S.C. § 8421(c).

Thus, rather than applying an existing rule in its December 12, 2017 reconsideration decision, the agency appears to be applying an entirely new rule with respect to court-ordered divisions of FERS annuities. Citing the OIG's

Management Advisory, the appellant alleges that the agency is in fact attempting to implement a "legislative rule," which the appellant claims the agency cannot do without first undertaking notice and comment rulemaking. IAF, Tab 17 at 17; Tab 29 at 4. The appellant is correct that "[a]n agency's failure to comply with notice-and-comment procedures, when required, is grounds for invalidating a rule." *Preminger v. Secretary of Veterans Affairs*, 632 F.3d 1345, 1350 (Fed. Cir. 2011); *see also National Mining Ass'n v. McCarthy*, 758 F.3d 243, 250 (D.C. Cir. 2014) ("Legislative rules have the 'force and effect of law' and may be promulgated only after public notice and comment.") (quoting *INS v. Chadha*, 462 U.S. 919, 986 n. 19 (1983)). I am not vested with the authority to make such a determination, however. Nor is the Board, which has only been granted limited authority to review and potentially find invalid any OPM regulation that, "on its face, would require an employee to commit a prohibited personnel practice if any agency implemented the regulation." 5 C.F.R. § 1203.2(a); *See* 5 U.S.C. §§ 1204(a)(4) and 1204(f); 5 C.F.R. Part 1203. I must therefore limit my review to question of whether the agency has misinterpreted 5 U.S.C. § 8421(c) in its December 12, 2017 reconsideration decision.

The record evidence demonstrates that OPM first issued an internal work instruction to its staff, entitled "OS Clearinghouse 359 and Unnumbered Request; Division of FERS Annuity Supplement," on or about October 23, 2014. IAF, Tab 17 at 14; Tab 27 at 9. This work instruction was then followed by an additional work instruction, Retirement and Insurance Letter 2016-12, "Processing Court Ordered Benefits Affecting the Federal Employees Retirement System (FERS) Basic Annuity and the FERS Annuity Supplement" (June 28, 2016)" (RIL 2016-12). *Id.*, Tab 17 at 14; Tab 27 at 10. According to the agency, these instructions addressed how to divide a FERS annuity pursuant to court order when the monthly annuity payment included both a basic annuity under 5 U.S.C. § 8415 and a supplemental annuity under 5 U.S.C. § 8421. Specifically, these internal instructions advised agency staff that "under the express and unambiguous

language of 5 U.S.C. § 8421(c) – and consistent with OPM's regulation in 5 C.F.R. § 838.103, which requires division of the "employee annuity" (without any words of limitation permitting division only of certain components) – both the basic and supplemental components must be divided, when a court orders the division of the employee annuity." IAF, Tab 27 at 9-10. It is undisputed that neither of these instructions has been made publicly available nor have they ever been provided to annuitants or employees planning for retirement. *Id*., Tab 17 at 14. The agency also did not submit either of these instructions into the record in connection with this appeal.

The Supreme Court in *Christensen,* 529 U.S. at 587, held that "interpretations contained in policy statements, agency manuals, and enforcement guidelines, all of which lack the force of law—do not warrant *Chevron*-style deference." *See also Martin v. Occupational Safety and Health Review Comm'n,* 499 U.S. 144, 157 (1991) (interpretative rules and enforcement guidelines are "not entitled to the same deference as norms that derive from the exercise of the Secretary's delegated lawmaking powers"); *James v. Von Zemensky,* 301 F.3d 1364, 1366 (Fed. Cir. 2002) (relying on *Christensen* in finding that a directive and handbook promulgated by the Department of Veterans Affairs were not entitled to *Chevron* deference). "Instead, interpretations contained in formats such as opinion letters are 'entitled to respect' … but only to the extent that those interpretations have the 'power to persuade.'" *Id.* (quoting *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)).

Thus, the agency's unpublished internal instructions at issue here are not entitled to *Chevron* deference. Furthermore, I do not find the position taken by the agency in these internal instructions – *i.e.*, that 5 U.S.C. § 8421(c) requires it to divide both the annuity supplement and the basic annuity even where a court order does not expressly provide that the FERS employee's annuity supplement be divided – to be persuasive. Rather, for the reasons already discussed, I read

section 8421(c) to require the agency to divide an annuity supplement between a FERS employee and his or her former spouse only if the court order expressly provides for such a division, as required by 5 U.S.C. § 8467.

I therefore must look to the specific terms of the appellant's July 22, 2004 court order to determine if that order does in fact "expressly provide" for a division of the appellant's annuity supplement, as required by 5 U.S.C. § 8467(a). The Board has interpreted section 8467(a)'s "expressly provides for" language "as precluding OPM or the Board from undertaking its own determination of spousal entitlements or making an award of survivor benefits based on uncertain or ambiguous state court orders." *Kincaid v. Office of Personnel Management,* 104 M.S.P.R. 42, ¶ 9 (2006) (quoting *Thomas v. Office of Personnel Management,* 46 M.S.P.R. 651, 654 (1991)). "For OPM or the Board to construe unclear and ambiguous state court orders as they relate to former spouse annuities would improperly make them, and not the state courts, the arbiters of spousal entitlements." *Id.* (quoting *Thomas,* 46 M.S.P.R. at 654 n. 3).

Both the Federal Circuit and the Board have held that this "expressly provided for" language does not necessarily require the use of "magic words." *See, e.g., Downing v. Office of Personnel Management,* 619 F.3d 1374, 1377 (Fed. Cir. 2010); *Hayward v. Office of Personnel Management,* 578 F.3d 1337, 1345 (Fed. Cir. 2009) (quoting *Fox v. Office of Personnel Management*, 100 F.3d 141, 145 (Fed. Cir. 1996); *Snyder v. Office of Personnel Management,* 463 F.3d 1338, 1342 (Fed. Cir. 2006); *Thomas*, 46 M.S.P.R. at 654. While all of these cases involved the question of whether there was a court-ordered apportionment of a CSRS survivor annuity, not an annuity supplement, I find these decisions instructive, given that they were applying the same "expressly provided for" language that is at issue here.[4]

[4] In *Thomas,* the Board was applying [redacted]5 U.S.C. § 8345(j)(1), a provision applicable to CSRS annuities, while *Fox* and its progeny were applying 5 U.S.C. § 8341(h)(1).

In the case of survivor annuities, the Federal Circuit has established the following framework for determining whether a court order "expressly provides for" the division of an annuity:

> Specifically, to determine that a court order without any magic words does provide the survivor annuity benefit, the tribunal must first determine whether the order contains a pertinent clause regarding a survivor annuity. If so, then it must inquire whether the operative terms in that clause can "fairly be read as awarding" the annuity. If so, then it must "examine any evidence introduced concerning the marriage parties' intent and the circumstances surrounding the execution of the document" to interpret the clause. If the evidence only dictates that the "clause refers to a CSRS survivor annuity—then it is legal error to conclude that the document has not 'expressly provided for' the award of a survivor annuity" as required by 5 U.S.C. § 8341(h)(1).

Snyder, 463 F.3d at 1342 (citations omitted) (quoting *Fox*, 100 F.3d at 146).

Applying the Federal Circuit's framework, the initial question is whether the clause at issue here – namely, paragraph 6 of the July 22, 2004 Divorce Decree – is a "pertinent clause" with respect to the appellant's annuity supplement. Paragraph 6 of the court order is entitled "Award of Benefits and Instructions to Pay." IAF, Tab 13 at 54. The first and second sentence of this paragraph provide that, "The Employee is (or will be) eligible for retirement benefits under the Federal Employees 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." *Id.* Paragraph 6 is at least arguably "pertinent" to an annuity supplement to the extent that it discusses the appellant's FERS "retirement benefits," of which his annuity supplement is undeniably a part. This in fact appears to be the position taken by the agency in its December 12, 2017 reconsideration decision. *See* IAF, Tab 13 at 11. But I read the Federal Circuit decisions as requiring a greater level of specificity than paragraph 6 provides

before I am able to find that such a clause is "pertinent" to the annuity in question. In each instance where the Federal Circuit found a clause to be "pertinent" to a survivor annuity, the court order either made an express reference to a "survivor benefit" or referred to the impact of a benefit after death. *See Hayward*, 578 F.3d at 1340 (pertinent clause of qualified domestic relations order (QDRO) referred to employee's eligibility "for the Survivor Benefit Plan"); *Snyder*, 463 F.3d at 1340 (pertinent clause of QDRO provided that the "assignment of benefits" to the former spouse "shall not be reduced, abated or terminated as a result of the death of the participant"); *Fox*, 100 F.3d 141 (pertinent clause of property settlement agreement stated that retired federal employee was to keep his former spouse covered under "Survivor Benefit Plan"). *Cf. Downing*, 619 F.3d at 1375, 1377 (court order was not pertinent to a survivor annuity where it simply provided that the employee's former spouse was to receive one-half of the CSRS benefits for the employee's retirement and did not mention any "survivor benefits" for the former spouse after the employee's death.) The court order at issue here fails to use any term that contains this level of specificity with respect to the appellant's annuity supplement. To the extent that paragraph 6 does refer to the term "annuity," it simply refers to a "gross annuity," which, as discussed above, is a term only applicable to a basic annuity, not an annuity supplement.[5] I also do not find the court order's clarification that the apportioned annuity must include "any benefit the employee earns based on special ATC service" to provide the necessary specificity with respect to the appellant's annuity supplement. While ATCs, along with certain other FERS

[5] As the agency notes in its December 17, 2017 reconsideration decision, the language of paragraph 6 appears to be based on the agency's own suggested model language set forth at ¶ 101 of Appendix a of 5 C.F.R. Part 838, Subpart F. IAF, Tab 13 at 11. The agency concludes that, as a result, the paragraph was intended to include the appellant's "employee annuity." *Id.* For the reasons already discussed, however, the fact that the court order may have been intended to include the "employee annuity" still begs the question of what the term "employee annuity" was intended to encompass, and whether a court order's reference, directly or indirectly, to that term must be read to include an annuity supplement.

employees such as law enforcement officers and firefighters, are eligible for both the basic annuity and an annuity supplement earlier than FERS employees in non-designated positions, *see* 5 U.S.C. §§ 8412(d),(e) and 8421(a), their underlying eligibility for an annuity supplement is not in and of itself the result of any "special ATC service." Indeed, any FERS employee under the age of 62 who is eligible for an immediate retirement is entitled to an annuity supplement in addition to the basic annuity. *See* 5 U.S.C. §§ 8412(a), (b) and 8421(a).

Thus, while paragraph 6 of the July 22, 2004 court order can be read to be "pertinent" to an annuity supplement in the broadest sense –*i.e.*, it does not expressly exclude the annuity supplement from the "retirement benefits" being apportioned – I find that this lack of specificity fails to comport with the standards set out by the Federal Circuit in determining whether a court order "expressly provides for" an annuity. Based on the foregoing, I find that paragraph 6 of the July 22, 2004 court order is not "pertinent" to an annuity supplement, and therefore does not "expressly provide" for the division of the annuity supplement between the appellant and his former spouse.

Even assuming that this paragraph can be deemed to at least be "pertinent" to an annuity supplement, I do not find that it can "fairly be read" to award the appellant's former spouse a share of his annuity supplement, given its lack of specificity and overall ambiguity with respect to the appellant's annuity supplement. Finally, even assuming that paragraph 6 could "fairly be read" to award Ms. Kuryvial an annuity supplement, the record lacks the type of extrinsic evidence "concerning the marriage parties' intent and the circumstances surrounding the execution of the document" that the Federal Circuit has found necessary to show that the court order expressly provided for an award of the annuity in question. *Fox*, 100 F.3d at 146. Significantly, the record lacks any evidence as to the intent of either the appellant or Ms. Kuryvial at the time that their divorce was being finalized. The June 17, 2004 Separation Agreement that preceded the July 22, 2004 court order does provide that "The marital portion of

the Husband's FERS shall be divided equally between the parties pursuant to a domestic relations court order," *see* IAF, Tab 13 at 62, but this provision, like the court order itself, still leaves unanswered the question of whether the appellant's FERS benefits were presumed to include the annuity supplement. Extrinsic evidence demonstrates that a court order "expressly provides for" the annuity in question only if it "dictates only one possible meaning for" a disputed term in a court order. *Fox*, 100 F.3d at 146. I do not find anywhere in the record the type of extrinsic evidence that could be said to dictate only one possible meaning for paragraph 6 of the July 22, 2004 court order.

While both the Federal Circuit and the Board have recognized that "magic words" do not need to be used, these decisions at the same time recognize that the intent of a court order to award the annuity in question "must be clear." *Hayward*, 578 F.3d at 1345; *see also Fox*, 100 F.3d at 146 (a court order does not "expressly provide for" a survivor annuity unless the extrinsic evidence "clearly establishes that the term could *only* refer to a survivor annuity); *Thomas*, 46 M.S.P.R. at 654 (A provision is "express" when it is "'clear, definite; explicit; plain; direct; unmistakable; not dubious or ambiguous.'") (quoting Blacks' Law Dictionary 521 (5th ed. 1979)). To do otherwise would "improperly" make the Board, "the arbiter[] of spousal entitlements." *Kincaid*, 104 M.S.P.R. 42, ¶ 9 (quoting *Thomas*, 46 M.S.P.R. at 654, n. 3); *see also Fox*, 100 F.3d at 145 ("We and the Board are … without authority to construe an ambiguous statement in a property settlement agreement to bend its plain meaning to award a sympathetic widower or widow survivor benefits where there is no 'express provi[sion] doing so.").

Accordingly, I find that the appellant has proven by a preponderance of the evidence that OPM, in its December 12, 2017 reconsideration decision, improperly included the appellant's FERS annuity supplement in its computation of the court-ordered division of his FERS annuity.

The appellant's affirmative defenses are unproven/misplaced.

Although set forth as affirmative defenses (harmful procedural error and violations of 5 U.S.C. §§ 2302(b)(1)[age discrimination], (b)(8) [whistleblower retaliation] and (b)(9) [retaliation for exercising other protected rights]), what the appellant objects to is OPM apportioning his annuity supplement before he has exhausted his appeal rights. *See* IAF, Tab 1 at 4; Tab 29 at 5-7. I find, however, that I lack the authority to order OPM to refund what I have found to be the improper apportioning of the annuity supplement unless/until my decision becoming the final decision of the Board or the Board issues a final decision in his favor. Further, as noted below, I have found that granting interim relief, *i.e.*, relief until my decision becomes the final decision of the Board or the Board issues a final decision in the appellant's favor, is not appropriate. Accordingly, the appellant can: 1) raise his objection to OPM's continued apportioning of the annuity supplement in either his petition for review or appeal of my decision or his response to a petition for review or appeal by OPM or its Director; or 2) file a petition for enforcement when/if there is a final decision of the Board in his favor.[6]

DECISION

The agency's December 12, 2017 reconsideration decision is REVERSED.

ORDER

OPM is ORDERED to rescind its December 12, 2017 reconsideration decision, stop apportioning the annuity supplement, and refund all previously apportioned annuity supplement amounts to the appellant.

[6] Further, I note that even if the appellant's allegation of age discrimination goes beyond the objection to OPM's apportioning of the annuity supplement prior to a final decision in this case, his age-discrimination affirmative defense is moot in light of my decision awarding him full relief. *See Harris v. Department of the Air Force,* 96 M.S.P.R. 193, ¶ 11 n. * (2004) (compensatory damages are not authorized for age discrimination).

OPM is further ORDERED to inform appellant in writing of all actions taken to comply with the Board's Order and the date on which it believes it has fully complied. If not notified, appellant should ask OPM about its efforts to comply.

INTERIM RELIEF

Although appellant is the prevailing party, I have determined not to order interim relief pursuant to 5 U.S.C. § 7701(b)(2)(A). *See Steele v. Office of Personnel Management*, 57 M.S.P.R. 458, 461-64 (1993) (although the interim relief provisions of the Whistleblower Protection Act are applicable to appeals involving retirement rights, the granting of interim relief is usually not warranted in such cases), *aff'd*, 50 F.3d 21 (Fed. Cir. 1995) (Table).

FOR THE BOARD: _____

James A. Kasic
Administrative Judge

NOTICE TO APPELLANT

This initial decision will become final on **May 21, 2018**, unless a petition for review is filed by that date. This is an important date because it is usually the last day on which you can file a petition for review with the Board. However, if you prove that you received this initial decision more than 5 days after the date of issuance, you may file a petition for review within 30 days after the date you actually receive the initial decision. If you are represented, the 30-day period begins to run upon either your receipt of the initial decision or its receipt by your representative, whichever comes first. You must establish the date on which you or your representative received it. The date on which the initial decision becomes final also controls when you can file a petition for review with one of the authorities discussed in the "Notice of Appeal Rights" section, below. The paragraphs that follow tell you how and when to file with the Board or one of

those authorities. These instructions are important because if you wish to file a petition, you must file it within the proper time period.

BOARD REVIEW

You may request Board review of this initial decision by filing a petition for review.

If the other party has already filed a timely petition for review, you may file a cross petition for review. Your petition or cross petition for review must state your objections to the initial decision, supported by references to applicable laws, regulations, and the record. You must file it with:

The Clerk of the Board
Merit Systems Protection Board
1615 M Street, NW.
Washington, DC 20419

A petition or cross petition for review may be filed by mail, facsimile (fax), personal or commercial delivery, or electronic filing. A petition submitted by electronic filing must comply with the requirements of 5 C.F.R. § 1201.14, and may only be accomplished at the Board's e-Appeal website (https://e-appeal.mspb.gov).

NOTICE OF LACK OF QUORUM

The Merit Systems Protection Board ordinarily is composed of three members, 5 U.S.C. § 1201, but currently only one member is in place. Because a majority vote of the Board is required to decide a case, *see* 5 C.F.R. § 1200.3(a), (e), the Board is unable to issue decisions on petitions for review filed with it at this time. *See* 5 U.S.C. § 1203. Thus, while parties may continue to file petitions for review during this period, no decisions will be issued until at least one additional member is appointed by the President and confirmed by the Senate. The lack of a quorum does not serve to extend the time limit for filing a petition or cross petition. Any party who files such a petition must comply with the time limits specified herein.

For alternative review options, please consult the section below titled "Notice of Appeal Rights," which sets forth other review options.

Criteria for Granting a Petition or Cross Petition for Review

Pursuant to 5 C.F.R. § 1201.115, the Board normally will consider only issues raised in a timely filed petition or cross petition for review. Situations in which the Board may grant a petition or cross petition for review include, but are not limited to, a showing that:

(a) The initial decision contains erroneous findings of material fact. (1) Any alleged factual error must be material, meaning of sufficient weight to warrant an outcome different from that of the initial decision. (2) A petitioner who alleges that the judge made erroneous findings of material fact must explain why the challenged factual determination is incorrect and identify specific evidence in the record that demonstrates the error. In reviewing a claim of an erroneous finding of fact, the Board will give deference to an administrative judge's credibility determinations when they are based, explicitly or implicitly, on the observation of the demeanor of witnesses testifying at a hearing.

(b) The initial decision is based on an erroneous interpretation of statute or regulation or the erroneous application of the law to the facts of the case. The petitioner must explain how the error affected the outcome of the case.

(c) The judge's rulings during either the course of the appeal or the initial decision were not consistent with required procedures or involved an abuse of discretion, and the resulting error affected the outcome of the case.

(d) New and material evidence or legal argument is available that, despite the petitioner's due diligence, was not available when the record closed. To constitute new evidence, the information contained in the documents, not just the documents themselves, must have been unavailable despite due diligence when the record closed.

As stated in 5 C.F.R. § 1201.114(h), a petition for review, a cross petition for review, or a response to a petition for review, whether computer generated, typed, or handwritten, is limited to 30 pages or 7500 words, whichever is less. A reply to a response to a petition for review is limited to 15 pages or 3750 words, whichever is less. Computer generated and typed pleadings must use no less than 12 point typeface and 1-inch margins and must be double spaced and only use one side of a page. The length limitation is exclusive of any table of contents, table of authorities, attachments, and certificate of service. A request for leave to file a pleading that exceeds the limitations prescribed in this paragraph must be received by the Clerk of the Board at least 3 days before the filing deadline. Such requests must give the reasons for a waiver as well as the desired length of the pleading and are granted only in exceptional circumstances. The page and word limits set forth above are maximum limits. Parties are not expected or required to submit pleadings of the maximum length. Typically, a well-written petition for review is between 5 and 10 pages long.

If you file a petition or cross petition for review, the Board will obtain the record in your case from the administrative judge and you should not submit anything to the Board that is already part of the record. A petition for review must be filed with the Clerk of the Board no later than the date this initial decision becomes final, or if this initial decision is received by you or your representative more than 5 days after the date of issuance, 30 days after the date you or your representative actually received the initial decision, whichever was first. If you claim that you and your representative both received this decision more than 5 days after its issuance, you have the burden to prove to the Board the earlier date of receipt. You must also show that any delay in receiving the initial decision was not due to the deliberate evasion of receipt. You may meet your burden by filing evidence and argument, sworn or under penalty of perjury (*see* 5 C.F.R. Part 1201, Appendix 4) to support your claim. The date of filing by mail is determined by the postmark date. The date of filing by fax or by electronic

filing is the date of submission. The date of filing by personal delivery is the date on which the Board receives the document. The date of filing by commercial delivery is the date the document was delivered to the commercial delivery service. Your petition may be rejected and returned to you if you fail to provide a statement of how you served your petition on the other party. *See* 5 C.F.R. § 1201.4(j). If the petition is filed electronically, the online process itself will serve the petition on other e-filers. *See* 5 C.F.R. § 1201.14(j)(1).

A cross petition for review must be filed within 25 days after the date of service of the petition for review.

NOTICE TO AGENCY/INTERVENOR

The agency or intervenor may file a petition for review of this initial decision in accordance with the Board's regulations.

NOTICE OF APPEAL RIGHTS

You may obtain review of this initial decision only after it becomes final, as explained in the "Notice to Appellant" section above. 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 decision when it becomes final, 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 the two 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 this decision becomes final. 5 U.S.C. § 7703(b)(1)(A).[7]

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:

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

[7] A provision of the Whistleblower Protection Enhancement Act (WPEA) of 2012 provided for judicial review of MSPB decisions in whistleblower reprisal cases in circuit courts of appeal other than the United States Court of Appeals for the Federal Circuit. That authority expired on December 27, 2017, which means that requests for judicial review of MSPB decisions in whistleblower reprisal cases filed after that date must now be filed with the Federal Circuit.

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 this decision becomes final under the rules set out in the Notice to Appellant section, above. 5 U.S.C. § 7703(b)(2); *see Perry v. Merit Systems Protection Board*, 582 U.S. ____, 137 S. Ct. 1975 (2017). 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 this decision becomes final as explained above. 5 U.S.C. § 7702(b)(1).

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