

# How your annuity supplement can be affected by divorce



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**L**ast month, I received a call from a 56-year-old recently retired divorced letter carrier requesting assistance with the Office of Personnel Management (OPM). This letter carrier was being affected by OPM's change in policy on the calculation of his Federal Employees Retirement System (FERS) Special Annuity Supplement. His divorce decree does not address how much, if any, of the supplement his ex-spouse was entitled to.

He waited five months to receive his first annuity check. During those five months, he experienced frustrations with OPM, including loss of his divorce decree and the

changing of case workers. Two months after receiving his first basic annuity check, and without notice, OPM started to reduce his annuity. The reductions included \$240 a month out of the supplement, \$250 a month out of the basic annuity, and an assessment of \$1,600 in retroactive payments. After speaking multiple times with this member, I decided to write this article to inform others of the potential impact a divorce decree can have on the FERS supplement.

## OPM reinterprets law in favor of ex-spouse

Since the establishment of FERS on Jan. 1, 1984, when OPM began administering court-ordered settlements for retirees, OPM would exclude the supplement from the ex-spouse's share unless the court order explicitly stated that the supplement, or a portion of it, would be granted to the ex-spouse. In other words, if a court order remained silent on the supplement, OPM would determine that the spouse was not entitled to a share of the supplement. However, in July 2016, OPM reinterpreted the law and changed the process by granting the ex-spouse a portion of the supplement when the divorce decree was silent on the supplement. Additionally, OPM applied this change retroactively. This meant that some retirees had received overpayments from OPM.

After OPM reinterpreted the law, the Office of Inspector General (OIG) received a complaint from the Federal Law Enforcement Officers Association (FLEOA) protesting OPM's reversal of the long-standing decision. The FLEOA represents approximately 27,000 law enforcement officers and agents. These officers are subject to mandatory retirement at age 57 due to the physical demands of the position. That mandatory retirement subjects this group of federal employees to greater financial harm.

The OIG examined OPM's policy regarding the treatment of the division of the annuity supplement in the context of divorce decrees and the recent changes in that policy. In Report Number L-2018-1, the OIG analyzed whether OPM properly reinterpreted the law, whether the change in policy required OPM to follow the rule-making process, and whether the new interpretation should be applied retroactively. The OIG's analysis finds that OPM's reinterpretation was not mandated by the law, stating:

OPM's assertion that it is required "by law" to effect this change is incorrect. 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. While this is one possible interpretation of the statute, the language of the statute also supports another interpretation.

OPM's regulations require that the agency perform ministerial actions only and is bound to follow the terms of a court order. The OIG report states:

Therefore, at most, the omission of any reference to the Annuity Supplement creates an ambiguity as to whether the court intended to address the Annuity Supplement. OPM is neither equipped nor empowered to resolve any such ambiguity.

If the reinterpretation is proper, the next question becomes whether OPM followed the proper rule-making procedure. Generally, when a government agency changes its rules the agency must first publish the proposed changes and take comments from the public prior to implementing changes. The OIG report states:

In sum, if OPM wishes to reinterpret the meaning of Section 8421(c), the OIG concludes that OPM must do so in formal rulemaking, using notice and comment procedures.

The next important question is, assuming that OPM's reinterpretation is correct, may OPM apply the new interpretation retroactively? The OIG concluded that OPM may not apply its reinterpretation retroactively. It would make sense that OPM announce the policy change prior to implementation so that those entering into a divorce decree can take the change into account.

It's important to note that the OIG report does not dictate OPM's policy, and the OIG's analysis is not controlling. In fact, OPM disagreed with the OIG's analysis and recommendations.

## Law enforcement group files suit against OPM

The FLEOA has filed a subsequent lawsuit against OPM. The FLEOA is not alone in this fight. The National Active and Retired Federal Employees (NARFE) and Sen. James Lankford (R-OK), chairman of the Senate Subcommittee on Regulatory Affairs and Federal Management, are urging OPM to re-evaluate its current policy.