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United States Senate

COMMITTEE ON
HOMELAND SECURITY AND GOVERNMENTAL AFFAIRS
WASHINGTON, DC 20510-6250

CHRISTOPHER R. HIXON, STAFF DIRECTOR
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May 9, 2018

The Honorable Jeff T. H. Pon
Director
U.S. Office of Personnel Management
1900 E Street, NW
Washington, DC 20415

Dear Director Pon:

As Chairman of the Senate Homeland Security and Governmental Affairs Subcommittee on Regulatory Affairs and Federal Management, I conduct oversight of both the federal regulatory process and the federal workforce. I write today regarding the U.S. Office of Personnel Management's (OPM) July 2016 decision to use internal guidance to reverse duly promulgated regulations for how the Federal Employees Retirement System (FERS) Annuity Supplement is apportioned between an annuitant and a former spouse pursuant to a state court order. It appears OPM's re-interpretation of the underlying statute and retrospective application may have violated the Administrative Procedure Act (APA) and caused undue hardship to annuitants without providing adequate notice of the policy change or opportunity for public input.

On February 5, 2018, the OPM Office of the Inspector General (OIG) issued a report finding OPM to have violated the APA by using internal guidance to re-interpret a legislative rule and apply that re-interpretation retroactively.¹ The APA makes clear a rule may not take effect unless Congress grants the agency authority to issue the rule and the agency follows notice and comment rulemaking procedures. An exception is made for "interpretive rules;" however, OPM's new interpretation is legislative, not interpretive, as it changes legally binding court orders. The OPM OIG report correctly found OPM's new interpretation went "beyond merely advising the public of the agency's interpretation of [the statute]. It not only creates a new rule or practice, it also imposes real financial consequences.... By any measure, that change imposes 'new duties or rights.'"²

Additionally, this new interpretation was applied retroactively which is contrary to both Congressional intent and Supreme Court precedent.³ In this case, OPM's decision to re-interpret legislative rules had the effect of recalculating the amount the annuitant owes a former spouse from the time the court order was entered. This resulted in annuitants owing former spouses

¹ U.S. Office of Personnel Management Office of the Inspector General Office of Legal and Legislative Affairs, L-2018-1, Review of the U.S. Office of Personnel Management's Non-Public Decision to Prospectively and Retroactively Re-Apportion Annuity Supplements (2018).

² Id. at 11 (quoting *Nw. Nat'l Bank v. U.S. Dep't of the Treasury*, 917 F.2d 1111, 1117 (8th Cir. 1990)).

³ Id. at 12 (citing *Bowen v. Georgetown University Hospital*, 488 U.S. 204, 208-09 (1988)).

significant sums of money, in one case, more than \$28,000.⁴ This abrupt change was not authorized by Congress and imposed on annuitants without notice. OPM has the authority to re-interpret existing legislative rules, but the regulatory process must be followed, and a new regulatory policy may not be applied retroactively.

I strongly urge you to re-evaluate the current policy. If OPM determines the long-standing interpretation of how the Annuity Supplement was applied to state court orders was incorrect, any new policy may only be implemented through the promulgation of a new legislative rule by adhering to the regulatory process outlined in the APA.

To address these concerns, I ask you respond to the following by June 25, 2018:

1. The decision to change how OPM applied state court-ordered marital share to the Annuity Supplement was made under the previous Administration, do you support that policy decision and interpretation of 5 U.S.C. §8421(c)?
2. The February 2018 Inspector General report made three recommendations and included OPM's response to those recommendations, do those responses reflect OPM's current position to each of the recommendations made in the report?
3. In response to "Recommendation 2" found in the February 2018 Inspector General report, OPM stated it disagreed with the characterization the statutory and regulatory provisions governing Annuity Supplements were re-interpreted. OPM viewed state court orders that were silent as to the Annuity Supplement as applying to only the Basic Annuity for nearly three decades, but in 2016 began including both Basic Annuity and the Annuity Supplement in court orders that did not specifically mention the Annuity Supplement. Please fully explain why this was not a change in policy and why OPM believes the Inspector General report's characterization to be incorrect.
4. The February 2018 Inspector General Report listed two internal documents that establish this new policy: "OS Clearinghouse 359 and Unnumbered Request; Division of FERS Annuity Supplement" and "Retirement and Insurance Letter, RIL 2016-12, 'Processing Court Ordered Benefits Affecting the Federal Employees Retirement System (FERS) Basic Annuity and the FERS Annuity Supplement.'" Please provide unredacted copies of these documents to the Subcommittee.
5. Did OPM consider implementing this policy change through the promulgation of a new rule through notice and comment rulemaking?
6. Did OPM consult with the White House Office of Information and Regulatory Affairs prior to this change in policy?
7. Did OPM conduct any cost-benefit analysis prior to this change in policy?

⁴ Id. at 3.

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If you have any questions about this request, please have your staff contact James Mann at 202-224-3823. Thank you for your prompt attention to this matter.

Sincerely,



James Lankford
Chairman
Subcommittee on Regulatory Affairs
and Federal Management

cc: The Honorable Neomi Rao
Administrator
Office of Information and Regulatory Affairs
Office of Management and Budget

The Honorable Heidi Heitkamp
Ranking Minority Member
Subcommittee on Regulatory Affairs
and Federal Management