

August 26, 1997
L-97-36

Approved by the Board
September 16, 1997

TO : The Board

FROM : Catherine C. Cook
General Counsel

SUBJECT : Last Person Employment Deductions for Dual Annuitants

The Chairman requested that we review the above referenced cases and advise the Board concerning options in handling them. In our view, the Board could decide to review these cases on its own motion. Set out below is our recommendation concerning this review.

The annuitant filed her application for an employee annuity under the Act on March 14, 1994. On that application she stated that she was an elected public official and earned approximately \$5,000.00 per year. The agency failed to adjust her annuity for this last person employment. After a wage match with the Social Security Administration, it was determined that based on annuitant's earnings of approximately \$14,000 for 1994 - 1997, she and her husband had been overpaid approximately \$21,000.

In our view, there are two aspects of these cases to consider. First, is the amount of the overpayment. As noted above, the claimed overpayment exceeds the amount of the earnings giving rise to the overpayment. In Legal Opinion L-96-20, we explored a similar situation and expressed the opinion that under a literal reading of section 2(f)(6) of the RRA, "the reduction could be greater than the amount of earnings [in cases] where there are three or more annuities involved." This occurs in cases such as the annuitant's where both the husband and wife are retired railroad employees and receive employee and spouse annuities. The statute provides for deductions in the employee's annuity and the annuity of the employee's spouse. In addition, a spouse who is engaged in last person employment will also have a reduction in his or her spouse annuity. While the literal reading of section 2(f)(6) would suggest that a reduction in excess of the amount of earnings is authorized, a more reasonable interpretation, in our opinion, would be that the reduction may not exceed the amount of actual earnings. Under this interpretation, the proposed overpayment in this case would be reduced to approximately \$14,000, the amount of the earnings from last person employment.

The second aspect of these cases which must be considered, is the question of waiver of recovery of the overpayment. In our opinion, the annuitant is without fault in causing the overpayment to occur. She clearly stated on the application that she was an elected public official and accurately stated her approximate earnings. However, the Board failed to properly assess last person employment work deductions.

If the Board were to agree that the annuitant is without fault, we recommend that the case be developed further to determine whether recovery would be contrary to the purpose of the act or against equity or good conscience.

