UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
OFFICE OF APPEALS COUNSEL

PATRICIA ROLFINGSMEYER,
Appellant,

v.

OFFICE OF PERSONNEL MANAGEMENT,
Agency.

DOCKET NUMBER
PH-0843-16-0235-I-1

DATE: April 25, 2017

John W. Purcell, Esquire, Harrisburg, Pennsylvania, for the appellant.

Tiffany Slade, Washington, D.C., for the agency.

BEFORE
Mark Syska
Administrative Judge

INITIAL DECISION

On March 21, 2016, the appellant filed an appeal of the final decision of the Office of Personnel Management (OPM) that denied her application for a Federal Employees' Retirement System (FERS) spousal survivor annuity. The Board has jurisdiction over this appeal under 5 U.S.C. § 8461(e)(1) and 5 C.F.R. § 841.308. The appellant's requested hearing was conducted by telephone on May 19, 2016. For the following reasons, OPM's final decision is AFFIRMED.

BACKGROUND

The material facts of this case are undisputed. The decedent, Tina K. Sammons, was employed by the U.S. Postal Service from June 20, 1998 until her

death on February 4, 2014. Appeal File (AF), Tab 6 at 11, 15, 18, 20-21. She was covered under FERS. *Id.* at 18. In January 1998, the appellant entered into a committed same-sex relationship with Ms. Sammons in Illinois, and they began living together from that date forward. AF, Tab 6 at 4, Tab 16 at 3. They bought a house together as joint tenants with right of survivorship, and Ms. Sammons named the appellant as her beneficiary for retirement and insurance purposes. AF, Tab 16 at 3. In September, 2003, the appellant and Ms. Sammons attempted to formalize their relationship; although neither same-sex marriage nor common law marriage was recognized in Illinois at the time, they purchased matching wedding bands, and, in the privacy of their home, placed those bands on each other's fingers and declared that they were now married. AF, Tab 13 at 2-4, Tab 16 at 3; *see Blumenthal v. Brewer*, 69 N.E.3d 834, ¶ 58 (Ill. 2016) (The Illinois legislature abolished common law marriage in 1905.); *In re Marriage of Allen*, 62 N.E.3d 312, ¶ 12 (Ill. 2016) (Illinois legally recognized same-sex marriage effective June 1, 2014.).

In October 2007, Ms. Sammons and the appellant moved to Pennsylvania and continued living together in the manner of a married couple. AF, Tab 6 at 20, Tab 13 at 5. Like Illinois, however, Pennsylvania recognized neither same-sex nor common law marriage at that time. 23 Pa.C.S. § 1103 (Common law marriages contracted in Pennsylvania after January 1, 2005, are invalid.); *Commonwealth of Pennsylvania, Department of Health v. Hanes*, 78 A.3d 676 (Pa.Commw.Ct. 2013) (recognizing that Pennsylvania law effective at the time defined marriage as being between one man and one woman and pronounced void same-sex marriages entered into in foreign jurisdictions.).

While the couple was living in Pennsylvania, however, the law regarding same-sex marriage was changing. Effective January 1, 2013, Maryland joined a growing number of states (in addition to the District of Columbia) to allow same-sex marriage, Civil Marriage Protection Act, 2012 Md. Laws Ch. 2, and on June 26, 2013, the Supreme Court of the United States issued *United States v.*

Windsor, 133 S.Ct. 2675, 2682-83, 2695-96 (2013), striking down § 3 of the Defense of Marriage Act (DOMA), 110 Stat. 2419 (1996), which had prohibited the Federal government from treating same-sex marriages as valid. On November 25, 2013, Ms. Sammons and the appellant were married in the Circuit Court for Baltimore County, Maryland, although they continued to reside in Pennsylvania, which pursuant to 23 Pa.C.S.A. § 1704, still did not recognize their marriage as valid. AF, Tab 6 at 16. A little more than 2 months later, on February 4, 2014, Ms. Sammons passed away. *Id.* at 15.

On February 28, 2014, the appellant filed an application for FERS survivor benefits. *Id.* at 11-14. OPM denied the application on the basis that the appellant was not entitled to an annuity because she and Ms. Sammons were not married for at least 9 months before Ms. Sammons's death. *Id.* at 8. The appellant requested reconsideration, and OPM issued a final decision denying her application on the same basis. *Id.* at 5-6. However, during the interim between OPM's initial and final decisions, there was another change in Federal law regarding same-sex marriages; on June 26, 2015, the Supreme Court issued the landmark decision *Obergefell v. Hodges*, 135 S.Ct. 2584, 2607-08 (2015), holding that "same-sex couples may exercise the fundamental right to marry in all States," and "there is no lawful basis for a State to refuse to recognize a lawful same-sex marriage performed in another State on the ground of its same-sex character." This appeal followed.

ANALYSIS

The applicant for a survivor annuity benefits bears the burden of proving entitlement to benefits by a preponderance of the evidence.[1] *Cheeseman v. Office*

[1] A preponderance of the evidence is the 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).

of Personnel Management, 791 F.2d 138, 140-41 (Fed. Cir. 1986); 5 C.F.R. § 1201.56(b)(2)(ii). Under 5 U.S.C. § 8442(b)(1), if an employee dies after completing 10 years of creditable civilian service under FERS and is survived by a widow, the widow is entitled to both a basic employee death benefit and a current spouse survivor annuity. *See* 5 C.F.R. §§843.309, .310.

It appears to be undisputed that Ms. Sammons completed 10 years of creditable civilian service. AF, Tab 6 at 20-21. The issue in this appeal is whether the appellant meets the definition of "widow" under 5 U.S.C. § 8441(1). That section provides that the term "'widow' means the surviving wife of an employee . . . who was married to [her] for at least 9 months immediately before [her] death."[2] *See* 5 C.F.R. § 843.303(a)(1). It is undisputed that the appellant and Ms. Sammons were married at the time of Ms. Sammons's death, but the duration of the marriage is in dispute. AF, Tab 6 at 4. OPM argues that the appellant and Ms. Sammons were not legally married until the November 25, 2013 wedding ceremony in Maryland, and thus did not meet the 9-month marriage duration requirement at the time of Ms. Sammons's death on February 4, 2014. *Id.* at 4-5. The appellant argues that she and Ms. Sammons had a valid common law marriage dating back to their 2003 private ceremony in Illinois. AF, Tab 13 at 3-6. She argues in the alternative that she should be deemed to have been married to Ms. Sammons for more than 9 months on the basis that the law is unconstitutional as applied to her. *Id.* at 7-8. I will address each of these arguments in turn.

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[2] An individual may also meet the definition of "widow" if she is the mother of a child born of the marriage or if the employee's death was accidental. 5 U.S.C. § 8441(1)(B); 5 C.F.R. § 843.303(2)-(3). The appellant does not argue that she meets the definition of "widow" under either of these provisions, and the record does not appear to indicate that she would.

The appellant and Ms. Sammons did not have a valid common law marriage.

As noted above, neither of the two states in which the appellant and Ms. Sammons resided recognized same-sex marriage during the relevant time period. *Supra* at 2. I see this as a non-issue, however, in light of the Supreme Court's decision in *Obergefell*, 135 S.Ct. 2584. I will therefore analyze the validity of the appellant's claimed common law marriage without regard to its same-sex character.

For purposes of a FERS current spouse survivor annuity, "*Marriage* means a marriage recognized in law or equity under the whole law of the jurisdiction with the most significant interest in the marital status of the employee . . . ." 5 C.F.R. § 843.102. In this case, the appellant's legal argument proceeds from the premise that Pennsylvania is the relevant jurisdiction. AF, Tab 13 at 4-6. Considering that the appellant and Ms. Sammons spent the majority of their relationship in Pennsylvania and were living there at the time of Ms. Sammons's death, and considering that OPM has not advanced any contrary position, I agree that Pennsylvania is the jurisdiction with the most significant interest in Ms. Sammons's marital status. I will therefore apply Pennsylvania law.

Under Pennsylvania law, prior to its abolition in 2005, a common law marriage was created by an exchange of words in the present tense, spoken with the specific purpose that the legal relationship of marriage be established from that moment forward. *Commonwealth v. Gorby*, 527 Pa. 98, 110, 588 A.2d 902, 907 (Pa. 1991). There is no specific form of words required, as long as those words convey an agreement to enter into the legal relationship of marriage at the present time. *Estate of Gavula*, 417 A.2d 168, 171 (Pa. 1980). In this case, I find that the appellant has shown by clear and convincing evidence that she and Ms.

Sammons had the requisite exchange of words during their private ceremony in 2003 at their Illinois home.[3] AF, Tab 13 at 2-4, Tab 16 at 3.

However, as noted above, at the time of their private ceremony, common law marriage had been abolished in Illinois for nearly a century. *Supra* at 2. For a marriage in that state to be valid, Illinois law requires that a marriage license be obtained, the marriage be solemnized by an authorized person, and the marriage be duly registered by the county clerk. 750 ILL. COMP. STAT. 5/201, 5/203, 5/209, 5/210. There is no evidence that the appellant's marriage satisfied any of these requirements, and it does not appear that the appellant and Ms. Sammons believed at the time that their marriage was legally recognized. Therefore, I find, and the appellant does not dispute, that the marriage was not valid in Illinois. *See In re Estate of Hall*, 707 N.E. 2d 201, 204-05 (Ill. App. Ct. 1998). Because the marriage was not valid in Illinois, it appears to fall under the general precept that a marriage that was invalid in the state where it was contracted is invalid in Pennsylvania as well. *See Sullivan v. American Bridge Co.*, 176 A. 24, 25 (Pa. Super. Ct. 1935).

Nevertheless, the court in *Sullivan* 176 A. at 25, recognized exceptions to this rule, and the appellant argues that, like the marriage at issue in *Sullivan*, her 2003 marriage should be recognized as valid under Pennsylvania law notwithstanding its invalidity in the state where it was contracted. AF, Tab 13 at

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[3] Although Board law generally requires that entitlement to benefits be proven by preponderant evidence, Pennsylvania law requires (with a statutory exception not applicable here) that the existence of a common law marriage be proven by clear and convincing evidence. *Staudenmayer v. Staudenmayer*, 714 A.2d 1016, 1020-21 (Pa. 1998). In determining whether a claimant seeking federal benefits has entered into a valid marriage under the laws of a particular state, the Board will apply not only the substantive elements of state law, but also state law evidentiary burdens. *See Burden v. Shinseki*, 727 F.3d 1161, 1168 (Fed. Cir. 2013). In any event, as explained below, regardless of the evidentiary standard applied, and regardless of the words exchanged and other indicia of a marital relationship, Pennsylvania law prohibits the recognition of a common law marriage under the circumstances of this case.

5-6. In *Sullivan*, the couple, residents of New Jersey, decided to get married on December 1, 1925. 176 A. at 24. Because they did not have two witnesses as required by New Jersey law, and they did not want to wait the requisite 48 hours after obtaining their marriage license, the couple drove to Maryland. *Id.* They did not meet the marriage requirements in Maryland either for want of a witness. *Id.* So instead of going through a formal ceremony, they turned to each other, exchanged words of present intent, and declared that they were now married.[4] *Id.* They then returned to New Jersey and lived there for more than 6 years as husband and wife until Mr. Sullivan left for Pennsylvania to find work.[5] *Id.* Although they were living separately at the time, until the date of his death, in 1933, Mr. Sullivan continued to support Mrs. Sullivan and refer to her as his wife. *Id.* at 24-25. The court found that, although the Sullivans' marriage was not valid where it was contracted, their exchange of words in Maryland, combined with "[t]heir conduct towards each other in the eye of the public while in New Jersey" "was as effective to establish the status of marriage in New Jersey as if it had been made in words of the present tense while they were domiciled in that state." *Id.* at 26 (quoting *Travers v. Reinhardt*, 205 U.S. 423, 440 (1907)).

However, I find that the case before me is more akin to *Cooney v. Workers' Compensation Appeal Board (Patterson UTI, Inc.)*, 94 A.3d 425 (Pa. Commw. Ct. 2014). Like *Sullivan*, *Cooney* was a workers' compensation case arising out of the death of the claimant's purported common law husband. The claimant and the decedent resided together in Wyoming, a state that does not recognize common law marriage. *Cooney*, 94 A.3d at 426; *see Kinnison v. Kinnison*, 627 P.2d 594, 595 (Wyo. 1981) (Wyoming does not recognize the doctrine of common law

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[4] Maryland has never recognized common law marriage. *John Crane, Inc. v. Puller*, 889 A. 2d 879, 910 (Md. Ct. Spec. App. 2006).

[5] New Jersey recognized common law marriage at the time. *See* N.J. STAT. ANN. § 37:1-10 (abolishing common law marriage prospectively after December 1, 1939).

marriage.). They had two children together, and in 2003, they exchanged words of present intent, declaring themselves to be married. *Cooney*, 94 A.3d at 427. In June, 2009, the family moved to Pennsylvania together and the claimant and decedent continued to hold themselves out to the community as husband and wife until the decedent's death in 2011. *Id.* at 428. The court distinguished *Sullivan* and *Travers* on the basis that, after their common law ceremonies in states that did not recognize common law marriage, the couples in *Sullivan* and *Travers* both lived together as husband and wife in New Jersey, a state that did recognize common law marriage at the time. *Id.* at 434-35. The court concluded as follows:

> Here, however, Claimant and Decedent neither entered into a common-law marriage nor resided as husband and wife while in a state that recognized common-law marriage. Consequently, even assuming Claimant and Decedent attempted to celebrate a common-law marriage in Wyoming in 2003, and then lived together as husband and wife in Pennsylvania beginning in June 2009, this would be insufficient to establish a valid common-law marriage under 23 Pa.C.S. § 1103.

Id. at 435.

Similarly, in this case, the appellant and Ms. Sammons exchanged words of present intent in 2003, in a state that did not recognize common law marriage, and they moved to Pennsylvania after common law marriage there had already been abolished. Because the appellant and Ms. Sammons never lived together in a state that currently recognized common law marriage, I find that this case is materially indistinguishable from *Cooney*, and that the appellant has not shown that she had a valid marriage in Pennsylvania prior to the marriage ceremony in Maryland on November 25, 2013.

The appellant also cites a declaratory judgement in which a Pennsylvania court verified the validity of a same-sex common law marriage in which the ceremony was performed in New Jersey in 2001, and the couple moved to

Pennsylvania and lived there together as a married couple from 2002 onward.[6] AF, Tab 13 at 4, 9-12. Again, however, this cited case is distinguishable because the couple, although married in New Jersey, moved to Pennsylvania together and lived there prior to the abolition of common law marriage in 2005. The common element in the cases that the appellant relies on is that the couples in those cases were all, at some point, domiciled in a state that recognized common law marriage while they were living there. This element is lacking in the appellant's case, and as explained in *Cooney*, 94 A.3d at 434-35, this element is dispositive.

For these reasons, I find that, putting the same-sex character of her relationship aside, appellant did not have a valid marriage in Pennsylvania prior to November 25, 2013.

The appellant has not identified a constitutional basis to reverse the Office of Personnel Management's decision.

The appellant argues that the 9-month marriage requirement of 5 U.S.C. § 8441(1)(A) and 5 C.F.R. § 843.303(a)(1) is unconstitutional as applied to her.[7] AF, Tab 13 at 8. Specifically, she argues that she was barred under DOMA from receiving a spousal annuity based on Ms. Sammons's service until the Supreme Court issued the *Windsor* decision on June 26, 2013. AF, Tab 13 at 7-8.

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[6] Because of its same-sex character, the marriage was not recognized as valid in New Jersey at the time it was contracted. *See Lewis v. Harris*, 875 A.2d 259, 279 (N.J. Super. Ct. App. Div. 2005) ("While New Jersey statutes do not specifically limit marriage to a union of a man and a woman or expressly prevent a person from marrying someone of the same sex, it is clear that they do so.").

[7] The Board's authority over constitutional matters is limited. The Board lacks authority to determine the constitutionality of a Federal statute per se, but it does have the authority to adjudicate a constitutional challenge to an agency's application of a statute. *Bain v. Office of Personnel Management*, 49 M.S.P.R. 307, 314 (1991). A facial challenge is independent of the individual bringing the complaint and the circumstances surrounding her challenge, whereas an as-applied challenge is specific to the facts of the particular individual involved in the suit. *Preminger v. Secretary of Veterans Affairs*, 517 F.3d 1299, 1311 (Fed. Cir. 2008). I find that the appellant here is clearly raising an as-applied challenge. AF, Tab 13 at 7-8.

Therefore, before June 26, 2013, there was no reason from a federal annuity standpoint to solemnize their marriage beyond what they had done in 2003, but after that point, and even if she and Ms. Sammons had married the very day that *Windsor* was issued, the appellant would still not have been able to meet the 9-month marriage requirement in light of Ms. Sammons's death 8 months later. *Id.* Thus, the appellant argues that OPM's application of the 9-month marriage requirement violated the Equal Protection Clause "by making it physically impossible for the Appellant to qualify for the retirement survivor annuity," while allowing similarly-situated opposite-sex couples to enjoy that same benefit.[8] *Id.* at 8.

As an initial matter, I must note that it was not impossible for the appellant to have qualified for a current spouse survivor annuity because she and Ms. Sammons could have gotten married in any of the several jurisdictions that had previously legalized same sex marriage, beginning with Massachusetts in 2004. *See Charron v. Amaral*, 889 N.E. 2d 946, 948 (Mass. 2008) (Massachusetts permitted marriage licenses for same sex-couples beginning May 17, 2004.). However, the appellant's point is well-taken to the extent that it would have made little practical sense for her and Ms. Sammons to undertake the time and expense of traveling to a foreign jurisdiction to obtain a marriage certificate that would not have been recognized by their home state or by the Federal government. AF, Tab 21 at 1. I find that these circumstances did, in fact, put the appellant at a

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[8] The Equal Protection Clause provides that "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1. This clause does not apply to the Federal government. *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954). Nevertheless, the Due Process Clause of the Fifth Amendment provides the same protections vis-à-vis the Federal government. *Weinberger v. Wiesenfeld*, 420 U.S. 636, 638 n.2 (1975); *see* U.S. CONST. amend. V. Equal protection principles under the Constitution are essentially directions that "all persons similarly situated should be treated alike." *See City of Cleburne, Texas v. Cleburne Living Center*, 473 U.S. 432, 439 (1985). I interpret the appellant's argument as a Fifth Amendment challenge based on the equal protection component of the Due Process Clause.

disadvantage as compared to the situation she would have found herself in with an opposite-sex partner, whom she could have married at any time in her state of residence and been confident that the marriage would be recognized for all legal purposes throughout the United States.

Nevertheless, recent Federal Circuit precedent compels a finding that OPM's application of the 9-month marriage requirement did not violate the appellant's constitutional right to equal protection. In *Becker v. Office of Personnel Management*, 2017 WL 1291312 (Fed. Cir. 2017), OPM denied Ms. Becker's spousal survivor annuity application on the basis there were no children of the marriage and the marriage was for less than 9 months. Ms. Becker filed a Board appeal, which made its way to the Federal Circuit. In that appeal, she challenged the 9-month marriage requirement of 5 U.S.C. § 8441(1) on substantially the same Fifth Amendment basis that the appellant is advancing in the instant appeal. *Becker*, 2017 WL 1291312 at *1-*2. Ms. Becker argued that the definition of "widow" under 5 U.S.C. § 8441(1) interfered with the exercise of her fundamental rights to marry and procreate, and that it arbitrarily discriminated against widows who do not satisfy the 9-month requirement or the child-bearing requirement. *Id.* at *2. The court disagreed. Relying on *Weinberger v. Salfi*, 422 U.S. 749 (1975), it found that notwithstanding the nature of the fundamental rights at issue, the statute was entitled to rational basis review because it concerned the receipt of public funds under a noncontractual claim. *Id.* The court acknowledged that the reason for the marriage duration rule is to prevent abuse of the survivor annuity benefit by excluding sham marriages that were contracted shortly before death for the sole purpose of receiving such benefits, and that the rule may be overbroad to the extent that it excludes some marriages that were not shams. *Id.* Nevertheless, for all its imprecision, the 9-month requirement has a rational basis as a proxy for "the assumption of responsibilities normally associated with marriage." *Id.* (quoting *Weinberger*, 422 U.S. at 781).

The appellant is in this case is likewise arguing that the 9-month requirement is unconstitutional as applied to her because of its relationship to her fundamental right to marry. That the appellant's marriage was to someone of the same sex and Ms. Becker's marriage was to someone of the opposite sex provides no basis to distinguish the cases; the same basic "right to marry" is implicated in both. *See Obergefell*, 135 S.Ct. at 2602 (The right of same-sex couples to marry is part and parcel of the right to marry in general.). I recognize that the appellant faced practical obstacles to contracting a valid marriage that Ms. Becker did not face, and that these obstacles stemmed from longstanding violations of equal protection principals. *See Obergefell*, 135 S.Ct. at 2604-05; *Windsor*, 133 S.Ct. at 2695. However, the Federal Circuit in *Becker* made clear that equal protection principles do not entitle claimants to individual determinations of eligibility where Congress has seen fit to impose a general prophylactic bar to guard against abuse.[9] 2017 WL 1291312, *2 (quoting *Salfi*, 422 U.S. at 777).

Although I find that the 9-month rule of 5 U.S.C. § 8441(1) is not unconstitutional on equal protection grounds as applied to the appellant, I nevertheless agree with her that the policy reason behind the rule (to screen out sham marriages) is in no way furthered by its application to her case. AF, Tab 13 at 7-8. The appellant and Ms. Sammons formally committed to each other in 2003 – well before there was any indication that the appellant might one day be able to share in Ms. Sammons's FERS annuity benefits, and they stuck together for many years after that with no realistic prospect of the appellant ever qualifying for those benefits until shortly before Ms. Sammons's death.

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[9] In *Salfi*, the Court acknowledged that "Congress may not invidiously discriminate among . . . claimants on the basis of a 'bare congressional desire to harm a politically unpopular group.'" 422 U.S. at 772 (quoting *United States Department. of Agriculture v. Moreno*, 413 U.S 528, 534 (1973)). I find that the discriminatory effect of the statute at issue is not "invidious" in this sense, but is merely incidental to the legitimate purpose for which it was enacted and to which it is rationally related.

Unfortunately, the equities of this case do not empower me to decide in her favor because the Appropriations Clause is explicit that "[n]o Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law." U.S. CONST. art. 1, § 9, cl. 7. "[I]n other words, the payment of money from the Treasury must be authorized by a statute." *Office of Personnel Management v. Richmond*, 496 U.S. 414, 424 (1990). Because payment of a spousal survivor annuity in this case would be in direct contravention of 5 U.S.C. §§ 8441(1) and 8442(b)(1), I cannot rule that these circumstances, however compelling, are sufficient to authorize payment of such an annuity. *See id.* The power to remedy this situation lies solely with the Congress, either through general or private legislation. *See id.* at 431.

DECISION

OPM's final decision is AFFIRMED.

FOR THE BOARD:

Mark Syska
Administrative Judge

NOTICE TO APPELLANT

This initial decision will become final on **May 30, 2017**, 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 the Court of

Appeals. The paragraphs that follow tell you how and when to file with the Board or the federal court. 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 to the Appellant Regarding Your Further Review 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 TO THE APPELLANT REGARDING YOUR FURTHER REVIEW RIGHTS

You have the right to request review of this final decision by the United States Court of Appeals for the Federal Circuit. You must submit your request to the court at the following address:

United States Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, DC 20439

The court must receive your request for review no later than 60 calendar days after the date this initial decision becomes final. *See* 5 U.S.C. § 7703(b)(1)(A) (as rev. eff. Dec. 27, 2012). If you choose to file, be very careful to file on time. The court has held that normally it does not have the authority to waive this statutory deadline and that filings that do not comply with the deadline must be

dismissed. *See Pinat v. Office of Personnel Management*, 931 F.2d 1544 (Fed. Cir. 1991).

If you need further information about your right to appeal this decision to court, you should refer to the federal law that gives you this right. It is found in Title 5 of the United States Code, section 7703 (5 U.S.C. § 7703) (as rev. eff. Dec. 27, 2012). You may read this law as well as other sections of the United States Code, at our website, http://www.mspb.gov/appeals/uscode/htm. Additional information 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, and 11.

If you are interested in securing pro bono representation for your court appeal, that is, representation at no cost to you, the Federal Circuit Bar Association may be able to assist you in finding an attorney. To find out more, please click on this link or paste it into the address bar on your browser:

https://fedcirbar.org/Pro-Bono-Scholarships/Government-Employees-Pro-Bono/Overview-FAQ

The Merit Systems Protection Board neither endorses the services provided by any attorney nor warrants that any attorney will accept representation in a given case.

CERTIFICATE OF SERVICE

I certify that the attached Document(s) was (were) sent as indicated this day to each of the following:

Appellant

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April 25, 2017
(Date)

Dennis E. Matthews, Jr.
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