

**UNITED STATES OF AMERICA  
MERIT SYSTEMS PROTECTION BOARD**

REYNOLD R. DE SANTO,  
Petitioner,

DOCKET NUMBER  
CB-1205-13-0003-U-1

v.

OFFICE OF PERSONNEL  
MANAGEMENT,  
Agency.

DATE: December 31, 2012

**THIS FINAL ORDER IS NONPRECEDENTIAL<sup>1</sup>**

Reynold R. De Santo, Locust Grove, Virginia, pro se.

JoAnn Chabot, Washington, D.C., for the agency.

**BEFORE**

Susan Tsui Grundmann, Chairman  
Anne M. Wagner, Vice Chairman  
Mark A. Robbins, Member

**FINAL ORDER**

The petitioner requests that the Board review an Office of Personnel Management (OPM) regulation, 5 C.F.R. § 838.1012, which sets forth how OPM considers the death of a former spouse in awarding employee retirement benefits.

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<sup>1</sup> A nonprecedential order is one that the Board has determined does not add significantly to the body of MSPB case law. Parties may cite nonprecedential orders, but such orders have no precedential value; the Board and administrative judges are not required to follow or distinguish them in any future decisions. In contrast, a precedential decision issued as an Opinion and Order has been identified by the Board as significantly contributing to the Board's case law. *See* 5 C.F.R. § 1201.117(c).

MSPB Docket No. CB-1205-13-0003-U-1, Request File (RF), Tab 1 at 1. For the reasons discussed below, we DENY the petitioner's request. This is the final decision of the Merit Systems Protection Board in this proceeding. Title 5 of the Code of Federal Regulations, section 1203.12(b) (5 C.F.R. § 1203.12(b)).

### DISCUSSION

The petitioner contends that 5 U.S.C. § 838.1012, which sets forth how OPM considers the death of a former spouse in awarding employee retirement benefits, is invalid because the agency exceeded its statutory authority in promulgating it. RF, Tab 1 at 2. He further contends that unspecified "decisions made by the judge, the OPM and the MSPB" in a case pertaining to him were "based on erroneous, if not fraudulent, interpretation of" the regulation and its authorizing statute. *Id.* at 3.

OPM interprets the petitioner's request as challenging 5 C.F.R. § 838.1012(b), which states that OPM will honor a qualifying court order that directs OPM to pay the former spouse's share of a retiree's annuity to one or more of the retiree's children as defined in 5 U.S.C. §§ 8342(c) or 8424(d). RF, Tab 4 at 4. Specifically, petitioner asserts that "child" as used in the regulation means an individual under 18 years of age, and that OPM violated the regulation by paying his former spouse's share of his annuity to their children, who are over 18 years of age. *Id.* OPM contends that the petitioner has failed to explain why the regulation would require or has required an employee to commit a prohibited personnel practice as defined by 5 U.S.C. § 2302(b). *Id.* at 6-7. OPM further contends that the petitioner's request is barred by *res judicata* because he previously litigated OPM's decision apportioning his annuity to his children before the Board and the Federal Circuit, and obtained a final judgment on the merits. *Id.* at 7.

The petitioner's response does not meaningfully address OPM's arguments. *See* RF, Tab 5.

### Analysis

The Board has original jurisdiction to review rules and regulations promulgated by OPM. 5 U.S.C. § 1204(f). The Board is authorized to declare an OPM rule or regulation invalid on its face if the Board determines that the provision would, if implemented by an agency, on its face, require any employee to violate a prohibited personnel practice as defined by 5 U.S.C. § 2302(b). *See also* 5 U.S.C. § 1204(f)(2)(A). Similarly, the Board has authority to determine that an OPM regulation has been invalidly implemented by an agency, if the Board determines that the provision, as implemented, has required any employee to violate a prohibited personnel practice. 5 U.S.C. § 1204(f)(2)(B).

The Board's regulations direct the individual requesting review to provide the following information: the requester's name, address, and signature; a citation identifying the challenged regulation; a statement (along with any relevant documents) describing in detail the reasons why the regulation would require or has required an employee to commit a prohibited personnel practice; specific identification of the prohibited personnel practice at issue; and a description of the action the requester desires the Board to take. 5 C.F.R. § 1203.11(b); *see DiJorio v. Office of Personnel Management*, 54 M.S.P.R. 498, 500 (1992).

Here, the petitioner has failed to identify any OPM regulation that he contends has required or would require an employee to violate a prohibited personnel practice. As OPM notes, although the petitioner requests review of 5 C.F.R. § 838.1012, he has not explained why the regulation would require or has required an employee to commit a prohibited personnel practice. Nor has he identified any prohibited personnel practice at issue. Therefore, the petitioner has not articulated a regulation review claim that is within the Board's jurisdiction under 5 U.S.C. § 1204(f).<sup>2</sup> *DiJorio*, 54 M.S.P.R. at 500.

Accordingly, we DENY the petitioner's request for regulation review.

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<sup>2</sup> In light of this finding, we need not address OPM's *res judicata* argument.

**NOTICE TO THE APPELLANT REGARDING  
YOUR FURTHER REVIEW RIGHTS**

You have the right to request the United States Court of Appeals for the Federal Circuit to review this final decision. 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 your receipt of this order. If you have a representative in this case and your representative receives this order before you do, then you must file with the court no later than 60 calendar days after receipt by your representative. 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). You may read this law, as well as review the Board's regulations and other related material, at our website, <http://www.mspb.gov>. Additional information is available at the court's website, [www.cafc.uscourts.gov](http://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.

FOR THE BOARD:

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William D. Spencer  
Clerk of the Board

Washington, D.C.