

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

CONSUELA A. KELLY-CRISLER,  
Petitioner,

DOCKET NUMBER  
CB-1205-12-0016-U-1

v.

OFFICE OF PERSONNEL  
MANAGEMENT,  
Agency.

DATE: February 1, 2013

**THIS FINAL ORDER IS NONPRECEDENTIAL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

Consuela A. Kelly-Crisler, Augusta, Georgia, pro se.

Megan Erb, Washington, D.C., for the agency.

**BEFORE**

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

**FINAL ORDER**

The petitioner asks the Board to review an Office of Personnel Management (OPM) regulation implementing Executive Order (EO) 13473, which permits agencies, at their discretion, to hire certain military spouses under

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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 A nonprecedential order is one that the Board has determined does not add significantly to the body of MSPB case law. Parties may cite nonprecedential orders, but such orders have no precedential value; the Board and administrative judges are not required to follow or distinguish them in any future decisions.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\(c\)](#).

noncompetitive appointments.<sup>2</sup> MSPB Docket No. CB-1205-12-0016-U-1, Request File (RF), Tab 1 at 3; [5 C.F.R. § 315.612](#). 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 is the spouse of a member of the armed forces serving on active duty. *See* RF, Tab 1 at 3-4. On March 31, 2010, the petitioner's husband received a permanent change of station order directing him to report to Fort Gordon, Georgia, no later than June 10, 2010. *Id.* at 11. On March 5, 2012, the petitioner applied for a position advertised under announcement number SCDZ12698305. *Id.* at 7. The position was not advertised to the general public, but was open to federal employees and certain other specified groups, including military spouses "eligible under EO 13473." *Id.* at 8. On April 4 and 5, 2012, the petitioner interviewed for the position. *Id.* at 3-4. On April 10, 2012, the agency extended her a "tentative job offer" for the position. *Id.* at 12. However, on April 19, 2012, the agency withdrew the tentative job offer because the petitioner's eligibility under EO 13473 had expired on March 31, 2012, two years from the date of her husband's permanent change of station order. *Id.* at 13. The two year eligibility requirement is found in the regulation implementing the executive order. *See* [5 C.F.R. § 315.612\(d\)\(i\)](#). The agency explained that it had attempted to hire the petitioner under the noncompetitive appointment authority provided by EO 13473, but, because her eligibility had expired, it could not do so. *Id.* at 13-17.

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<sup>2</sup> Except as otherwise noted in this decision, we have applied the Board's regulations that became effective November 13, 2012. We note, however, that the request for regulation review in this case was filed before that date. Even if we considered the request under the previous version of the Board's regulations, the outcome would be the same.

The petitioner now seeks review of [5 C.F.R. § 315.612](#). She contends that the agency erred in its hiring process because it did not need to interview her in order to appoint her under the executive order; or alternatively, that the agency's decision to interview her demonstrated that it attempted to appoint her under some authority other than that found in the executive order. RF, Tab 1 at 4-5. The petitioner also requests that we invalidate the regulation or amend it so that the two-year eligibility requirement runs from the date the military service member actually reports to his new position, rather than the date he receives his permanent change of station order (as specified in the regulation). *See* [5 C.F.R. § 315.612\(d\)\(i\)](#); RF, Tab 1 at 3-5. The petitioner asserts that the regulation's current form adversely impacts military spouses because it denies them appointment rights or may induce them to resign from other employment before their federal appointments are finalized. RF, Tab 1 at 3-5.

The agency moves to dismiss the petitioner's request, contending that the petitioner failed to identify a prohibited personnel practice at issue or explain how the regulation, or the agency's implementation of the regulation, required the commission of a prohibited personnel practice. RF, Tab 18 at 8. The agency also asserts that, even if the petitioner has established Board jurisdiction, the Board should decline to review her request because she failed to "present any colorable argument against the validity of the regulation." *Id.* at 10; *see also* *McDiarmid v. United States Fish and Wildlife Service*, [19 M.S.P.R. 347](#), 349 (1984) (setting forth discretionary review factors). The agency notes that OPM expressly addressed the issues the petitioner raises during the rulemaking process. RF, Tab 18 at 10.

The petitioner responds that, "[d]ue to the improper implementation of the policy" and "under the policy as it is currently written," she "did not receive fair and equal opportunity for appointment to the position to which [she] applied. This is a violation of the first MSPB principle." RF, Tab 19 at 5. The petitioner further responds that the "prohibited personnel practice that has been applied is

failure of CPAC to support the decision of the hiring agency not to use the hiring authority. CPAC has insisted and forced the application of eligibility under EO 13473 where it is not applicable.” *Id.* at 6. We interpret these statements as alleging: (1) the regulation and its implementation violate the merit system principle set forth in [5 U.S.C. § 2301\(b\)\(1\)](#); (2) the agency’s use of EO 13473 and [5 C.F.R. § 315.612\(d\)\(1\)](#) required commission of an unspecified prohibited personnel practice; and (3) the agency’s refusal to appoint the petitioner under an authority other than that provided by EO 13473 and 5 C.F.R. § 315.612 required commission of an unspecified prohibited personnel practice.

### **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 commit 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 commit 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: 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 Roesel v. Office of Personnel Management*, [119 M.S.P.R. 15](#), ¶ 7 (2012); *DiJorio v. Office of Personnel Management*, [54](#)

[M.S.P.R. 498](#), 500 (1992). This information is required to state a case within the Board's jurisdiction.

Here, the petitioner alleges that: (1) the regulation and its implementation violate the first merit system principle set forth in [5 U.S.C. § 2301](#)(b)(1); (2) the agency's use of EO 13473 and [5 C.F.R. § 315.612](#)(d)(1) required commission of an unspecified prohibited personnel practice; and (3) the agency's refusal to appoint the petitioner under an authority other than that provided by EO 13473 and 5 C.F.R. § 315.612 required commission of an unspecified prohibited personnel practice.

The petitioner's first allegation does not state a claim within the Board's jurisdiction. Violation of a merit system principle alone does not confer Board jurisdiction; rather, the petitioner must allege that the challenged regulation requires commission of a prohibited personnel practice, as defined in [5 U.S.C. § 2302](#)(b). See [5 C.F.R. § 1203.11](#)(b); *DiJorio*, 54 M.S.P.R. at 500. The merit system principles are hortatory and do not themselves impose legal requirements. See 5 C.F.R. § 2301(b) ("Federal personnel management *should be implemented* consistent with the following merit system principles . . .") (emphasis added); *Brooks v. Office of Personnel Management*, [59 M.S.P.R. 207](#), 212 (1993), *superseded on other grounds, see Johnson v. Office of Personnel Management*, [93 M.S.P.R. 265](#), 269 n.5 (2003). Therefore, failure to adhere to the merit system principles is not by definition commission of a prohibited personnel practice under § 2302(b). See *Brooks*, 59 M.S.P.R. at 212.

The petitioner's second and third allegations also do not state claims within the Board's jurisdiction because the petitioner fails to identify a particular prohibited personnel practice, or explain how the regulation, its application, or its non-application require commission of a specific prohibited personnel practice. Nor can we identify any prohibited personnel practice that the regulation or the agency's actions might implicate. For instance, at least as applied to the petitioner, the regulation does not confer any veterans' preference the curtailment

of which could constitute a personnel practice prohibited under [5 U.S.C. § 2302\(b\)\(11\)](#).

The petitioner has not articulated a regulation review claim that is within the Board's jurisdiction under [5 U.S.C. § 1204\(f\)](#). *Roesel*, [119 M.S.P.R. 15](#), ¶ 7; *DiJorio*, 54 M.S.P.R. at 500. Accordingly, we DENY the petitioner's request for regulation review.

**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 the date of this order. 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](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.