

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

DEAN T. HARA,
Appellant,

DOCKET NUMBER
PH-0831-08-0099-M-1

v.

OFFICE OF PERSONNEL
MANAGEMENT,
Agency.

DATE: April 30, 2014

THIS FINAL ORDER IS NONPRECEDENTIAL*

Cathy A. Harris, Esquire, Washington, D.C., for the appellant.

Roxann Johnson, Washington, D.C., for the agency.

BEFORE

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

**ORDER REMANDING APPEAL TO OFFICE OF PERSONNEL
MANAGEMENT**

The U.S. Court of Appeals for the Federal Circuit issued an Order vacating the Board's final decision in this matter and remanding the matter for further proceedings consistent with the Supreme Court's opinion in *United States v.*

* A nonprecedential order is one that the Board has determined does not add significantly to the body of MSPB case law. Parties may cite nonprecedential orders, but such orders have no precedential value; the Board and administrative judges are not required to follow or distinguish them in any future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

Windsor, [133 S. Ct. 2675](#), 2695 (2013), holding that section 3 of the Defense of Marriage Act, Pub. L. No. 104-199, § 3(a), 110 Stat. 2419 (1996) (enacted on September 21, 1996) (codified at [1 U.S.C. § 7](#)), “is unconstitutional as a deprivation of liberty of the person protected by the Fifth Amendment of the Constitution.” *Hara v. Office of Personnel Management*, No. 2009-3134, slip op. (Fed. Cir. Sept. 16, 2013) (citing *Windsor*, 133 S. Ct. at 2695); MSPB Docket No. PH-0831-08-0099-L-1, Litigation File, Tab 3. Following the court’s remand to the full Board, the parties entered into settlement discussions. Thereafter, the Office of Personnel Management (OPM) filed a pleading captioned Agency’s Rescission of its Reconsideration Decision, in which it rescinded its final decision issued on June 24, 2008, and granted the appellant’s application for survivor annuity benefits under the authority of *Windsor*. MSPB Docket No. PH-0831-08-0099-M-1, Court Remand File (CRF), Tab 3. OPM then requested that the pending matter be dismissed for lack of jurisdiction because OPM has rescinded the decision under appeal and there no longer remains any matter subject to an OPM final decision upon which the Board retains jurisdiction. *Id.* (citing to [5 U.S.C. § 8347\(d\)](#) and [5 C.F.R. §§ 831.109](#) and 831.110). CRF, Tab 3.

The Board issued an order to show cause why the appeal should not be dismissed due to OPM’s rescission of the final reconsideration decision upon which the underlying appeal is based. CRF, Tab 4. The appellant agrees that the Board no longer has jurisdiction over the referenced matter for the reasons set forth herein, and that “this matter should be dismissed for lack of jurisdiction so that, as the prevailing party, he may seek an award of attorney fees under [5 C.F.R. § 1201.203](#).” CRF, Tab 6.

Accordingly, because OPM rescinded its reconsideration decision, we VACATE the initial decision, DISMISS this appeal for lack of jurisdiction, and REMAND the appeal to OPM for issuance of a new reconsideration decision. If the appellant is dissatisfied with any subsequent OPM decision regarding his spousal survivor annuity benefits, he may request that OPM reconsider the

decision and, if he is still dissatisfied, he may appeal OPM's final decision to the Board within the time limits set forth in the Board's regulations. See [5 U.S.C. § 8347\(d\)\(1\)](#); [5 C.F.R. §§ 831.110](#), 1201.22, 1201.23; *Anthony v. Office of Personnel Management*, 524 F. App'x 634, No. 2013-3018 (Fed. Cir. Apr. 9, 2013); *Sugg v. Office of Personnel Management*, [120 M.S.P.R. 488](#) (2014) (Table).

**NOTICE TO THE APPELLANT REGARDING
YOUR RIGHT TO REQUEST
ATTORNEY FEES AND COSTS**

You may be entitled to be paid by the agency for your reasonable attorney fees and costs. To be paid, you must meet the requirements set out at Title 5 of the United States Code (U.S.C.), sections 7701(g), 1221(g), 1214(g) or 3330c(b); or [38 U.S.C. § 4324\(c\)\(4\)](#). The regulations may be found at [5 C.F.R. §§ 1201.201](#), 1201.202, and 1201.203. If you believe you meet these requirements, you must file a motion for attorney fees **WITHIN 60 CALENDAR DAYS OF THE DATE OF THIS DECISION**. You must file your attorney fees motion with the office that issued the initial decision on your appeal.

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

This is the Board's final decision in this matter. [5 C.F.R. § 1201.113](#). 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. 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:

William D. Spencer
Clerk of the Board

Washington, D.C.