

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

KAREN GOLINSKI,

Plaintiff,

No. C 10-00257 JSW

v.

UNITED STATES OFFICE OF PERSONNEL
MANAGEMENT and JOHN BERRY, Director
of the United States Office of Personnel
Management, in his official capacity,

**NOTICE OF QUESTIONS FOR
HEARING**

Defendant.

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD, PLEASE TAKE
NOTICE OF THE FOLLOWING QUESTIONS FOR THE HEARING SCHEDULED ON
DECEMBER 17, 2010 AT 10:00 A.M.:

The Court has reviewed the parties' papers and, thus, does not wish to hear the parties
reargue matters addressed in those pleadings. If the parties intend to rely on authorities not
cited in their briefs, they are ORDERED to notify the Court and opposing counsel of these
authorities reasonably in advance of the hearing and to make copies available at the hearing. If
the parties submit such additional authorities, they are ORDERED to submit the citations to the
authorities only, with reference to pin cites and without argument or additional briefing. *Cf.*
N.D. Civil Local Rule 7-3(d). The parties will be given the opportunity at oral argument to
explain their reliance on such authority. The Court suggests that associates or of counsel
attorneys who are working on this case be permitted to address some or all of the Court's
questions contained herein.

United States District Court
For the Northern District of California

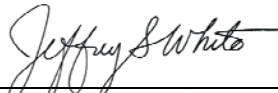
1 The parties shall each have 30 minutes to address the following questions:

- 2 1. The Federal Employees Health Benefits Act of 1959 (“FEHBA”) confers authority on
3 the Office of Personnel Management (“OPM”) to contract with “qualified carriers”
4 offering health insurance plans and to prescribe regulations necessary to carry out the
5 statute’s objectives. *See* 5 U.S.C. §§ 8902, 8913. How does the conduct of sending a
6 letter to Plaintiff’s insurer instructing the company not to follow the tribunal’s directive
7 qualify as either contracting with carriers or prescribing regulations under the FEHBA?
8 The corrective authority OPM cites refers merely to making corrections of
9 administrative errors. *See* 5 C.F.R. § 890.103(b). Where is the statutory support for
10 OPM’s argument that its authority to regulate federal healthcare benefits is more broad?
- 11 2. If OPM was acting within its statutory authority, how does its conduct and interpretation
12 of the operation of federal law not violate 5 U.S.C. § 8902(f) which forbids approving a
13 health insurance contract which excludes an individual (in this case, Plaintiff’s wife)
14 because of her sex?
- 15 3. In order to grant mandamus relief, Plaintiff must establish that there is no other adequate
16 remedy available. *See, e.g., Pit River home & Agr. Co-op, Ass’n v. United States*, 30
17 F.3d 1088, 1097 (9th Cir. 1994).
- 18 a. Would this case be better positioned as an action for declaratory
19 judgment instead of mandamus?
- 20 b. Could Plaintiff file a direct action against the OPM for an injunction?
- 21 c. What is a “petition for enforcement” as recommended by Judge
22 Kozinski? *See In re Golinski*, 587 F.3d 956, 964 (9th Cir. 2009).
- 23 d. What further administrative proceeding could Plaintiff pursue and what
24 would be the governing law? How could Plaintiff proceed under the
25 Administrative Procedures Act? *See Veit v. Heckler*, 746 F.2d 508, 511
26 (9th Cir. 1984). Why should judicial employees be treated any
27 differently from legislative employees in the same situation? Why should
28 the Executive be deemed to have waived its immunity in the context of a
legislative employee but not a judicial employee?
4. To the extent Plaintiff only seeks affirmative action by Defendants, on what basis do
Defendants contend the prospective equitable relief in requiring OPM to abide by Judge
Kozinski’s order is barred by sovereign immunity? *See Edelman v. Jordan*, 415 U.S.
651, 668 (1974).
5. How does the explanation provided by Defendants for passage of DOMA (i.e.,
consistency among application of federal law to married couples) provide a rational
basis for the law? Under DOMA, federal officials are now, for the first time, tasked
with determining the validity of a particular marriage that has been sanctioned under
state law? How does that promote consistency?

1 6. Do the parties have anything further they wish to address?
2

3 **IT IS SO ORDERED.**

4 Dated: December 16, 2010



JEFFREY S. WHITE
UNITED STATES DISTRICT JUDGE

5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28