Lambda Legal
making the case for equality

December 18, 2010

General Services Administration, Regulatory Secretariat (MVCB)
1275 First Street, NW., 7th Floor, Attn: Hada Flowers
Washington, DC 20417

Via Electronic Submission

RE: Support and Recommended Clarification For Regulation Providing Domestic Partners of Federal Employees With Access to Travel and Relocation Benefits (FTR Case 2010-303)

To the General Services Administration:

Lambda Legal Defense and Education Fund, Inc. ("Lambda Legal") respectfully submits this comment in support of the proposed regulation that would provide domestic partners of federal employees with access to certain travel and relocation benefits but recommends a clarification with respect to benefits that accrue prior to the effective date of the final regulation, March 31, 2011. See FTR Case 2010-303, "Federal Travel Regulation (FTR); Terms and Definitions for 'Dependent', 'Domestic Partner', Domestic Partnership' and 'Immediate Family.'"

I. About Lambda Legal

Lambda Legal is the oldest and largest national legal organization committed to achieving full recognition of the civil rights of lesbian, gay, bisexual, and transgender ("LGBT") people and those living with HIV through impact litigation, education, and public policy work. Lambda Legal's work includes significant work on behalf of lesbian, gay, and bisexual public employees who have been denied domestic partner or spousal benefits. *See, e.g.*, *Golinski v. U.S. Office of Personnel Management*, No. 3:10-cv-00257 (CRB) (N.D. Cal.) (seeking health insurance benefits for same-sex spouse of federal judicial employee); *Collins v. Brewer*, 2:09-cv-2402-JWS, 2010 LEXIS 747103, at *25 (D. Ariz. July 23, 2010) (obtaining preliminary injunction to preserve health insurance coverage for same-sex domestic partners of state employees).

II. The Final Regulation Should Apply Both Prospectively and Retrospectively

We write to request that the General Service Administration (GSA) make clear that it will provide travel and relocation benefits on both a prospective and retrospective basis to lesbian, gay, and bisexual employees. The regulation at issue here provides travel and relocation benefits to members of an employee's immediate family, which is determined "at the time he/she reports for duty at the new permanent duty station or performs other authorized travel involving family

members." 41 C.F.R. § 300-3. The proposed regulation would include domestic partners in the definition of immediate family as of March 3, 2011. To the extent that this effective date is intended to operate as a denial of benefits that accrue prior to March 3, 2011 – which is not altogether clear – it would fail to remedy the discrimination that it seeks to address.

As President Obama acknowledged in his June 2, 2010 memorandum, "[f]or far too long, many of our Government's hard-working, dedicated LGBT employees have been denied equal access to the basic rights and benefits their colleagues enjoy." While the proposed regulation would provide some measure of redress for the injuries that lesbian, gay, and bisexual employees would otherwise continue to suffer in the future, it should also expressly address the injuries that these employees have already suffered in the past and, indeed, that continue to this day. These injuries are unique to lesbian, gay, and bisexual employees in the sense that heterosexual employees have always had both the ability to marry and to have their marriages respected for federal purposes, including for travel and relocation benefits.

To take but one example that has been brought to our attention, Susan Earle has worked for the federal government for approximately 33 years and currently works for the Defense Logistics Agency, which provides supplies and services to America's military forces worldwide. Susan was recently transferred from Puget Sound, Washington to San Joaquin, California at the government's request. Her relocation orders were issued on June 3, 2010 – the day after President Obama directed federal agencies to provide lesbian, gay, and bisexual employees with a means of access to the travel and relocation benefits afforded to heterosexual employees. Although Susan had to uproot her family and sell their home in Washington, she complied with the government's request. Nevertheless, the government has withheld approximately $37,000 in relocation benefits stemming from the sale of her Washington home, because it refuses to recognize the relationship between Susan and her registered domestic partner (and wife), who was also on the deed to the home.

Providing federal employees like Susan with retrospective relief is important for several reasons. First, the animating purpose of President Obama's directive – to ensure equal pay for equal work – cannot be achieved while ignoring the historical discrimination that lesbian, gay, and bisexual employees have suffered. The government cannot draw a principled distinction between discrimination occurring the day after the effective date of the regulation – which the President recognizes would perpetuate "systematic inequality" – and discrimination occurring the day before. Discrimination set in time is no less discriminatory.

Second, while the federal government has voluntarily undertaken the amendment of regulations regarding travel and relocation benefits, it must comply with the federal Constitution. As several federal judges have recognized, denying lesbian, gay, and bisexual employees the benefits afforded to their heterosexual coworkers violates equal protection. *See Gill v. Office of Personnel Management*, 699 F. Supp. 2d 374, 386-97(D. Mass. 2010) (finding that the denial of health, dental, and vision insurance benefits to same-sex spouses of employees violates equal

protection); *In re Brad Levenson*, 587 F.3d 925, 929-34 (9th Cir. 2009) (Reinhardt, J.) (same); *In re Karen Golinski*, No. 09-80173, 2009 U.S. App. LEXIS 25432, *4-7 (9th Cir. Jan. 13, 2009) (Kozinski, J.) (finding that the denial of health insurance to same-sex spouse of employee impermissibly discriminates on basis of sex and sexual orientation); *Collins v. Brewer*, 09-2402, 2010 LEXIS 747103, at *25 (D. Ariz. July 23, 2010) (finding no rational basis to deny health insurance to same-sex partners of state employees). Indeed, when such benefits have been denied for many years, retrospective relief can be an appropriate remedy. *See In re Brad Levenson*, 587 F.3d at 936-37 (ordering back pay as remedy for denial of federal benefits); *In re Karen Golinski*, 587 F.3d 956, 958-60 (9th Cir. 2009) (same).

Third, President Obama's directive requires executive departments and agencies to provide domestic partner benefits to lesbian, gay, and bisexual employees to the maximum extent permitted by law, and there is no statutory bar to affording retrospective relief. See June 17, 2009 Memorandum (ordering access to benefits "where doing so can be achieved" consistent with federal law); June 2, 2010 Memorandum (instructing agencies to review benefits and provide "*any* that could be extended" to same-sex partners) (emphasis added). Indeed, the President's directive reinforces that which may already be required by federal statute: the Civil Service Reform Act prohibits personnel actions based upon any characteristic unrelated to performance, which should include sexual orientation. 5 U.S.C. §§ 2302(b)(10) (prohibiting personnel actions that "discriminate . . . against any employee . . . on the basis of conduct which does not adversely affect the performance of the employee") & 2302(b)(2)(A)(ix) (defining personnel action to include "a decision concerning . . . benefits").

Recognizing that the provision of retrospective relief may require some administration, the government could establish reasonable procedures and limits for how an employee could obtain benefits that have been wrongfully denied in the past. For example, it could create a reasonable deadline by which any such claims would need to be submitted (e.g., two years from the issuance of the final regulation) and require that the employee be able to satisfy the definition of domestic partnership as of when the benefit accrued. The government could also consider limiting claims to those that accrue by a certain date. For example, in the context of a back pay award stemming from the government's failure to provide health insurance coverage to the same-sex spouse of a federal employee, it was appropriate to look back at least six years, the relevant statute of limitations in that context. *See In re Brad Levenson*, 587 F.3d at 937. Employees with claims within the limitations period could likely recover unpaid benefits by resort to litigation, in which case the government would also likely be required to pay attorneys' fees. *See, e.g.*, *In re Karen Golinski*, No. 09-80173 (9th Cir. Jan. 28, 2010) (report by commissioner recommending $6,272 in back pay and $68,512.17 in attorneys' fees). At the very least, it makes no sense for an employee such as Susan Earle – who received her relocation orders *after* President Obama's directive and who is still employed by the government – to be denied relocation benefits.

Finally, it bears keeping in mind that whatever the cost of providing retrospective relief covering an appropriate limitations period, it will almost certainly be dwarfed by the amount that the federal government would have paid had it properly provided benefits to the same-sex partners of employees in the first place.

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In sum, while we strongly support the efforts underway to reduce the discrimination in federal employment compensation currently facing lesbian, gay, and bisexual employees with a same-sex life partner, we urge the government to provide some redress for the injuries that have already been sustained in the past in a manner consistent with the President's stated policy goal.

Respectfully Submitted,

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