# EXHIBIT E

**NOT FOR PUBLICATION**

**UNITED STATES COURT OF APPEALS**

**FOR THE NINTH CIRCUIT**

FILED
MAR 05 2010
MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

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| IN THE MATTER OF KAREN GOLINSKI et ux. | No. 09-80173<br><br>**ORDER** |

I previously determined that Ms. Golinski is entitled to an award under the Back Pay Act and directed the Appellate Commissioner to prepare a report and recommendations on the matter. In re Golinski, 587 F.3d 956, 959–60, 963 (9th Cir. 2009). He began by ordering Ms. Golinski to file and serve a written demand for relief. Order at 1, In re Golinski, No. 09-80173 (filed Nov. 25, 2009). That order also invited any parties or individuals aggrieved by her demand to file a response, id. at 2, but if they exist, none came forward. So, the Commissioner took responsibility for rounding out the record himself by seeking additional evidence from Ms. Golinski. Order at 2–3, In re Golinski, No. 09-80173 (filed Jan. 20, 2010). He again invited responses. Id. at 3. None were filed.

**1.** The evidence shows that no health insurance plan on the private market provides exactly the same benefits as Ms. Golinski's FEHBP Blue Cross and Blue

Shield Service Benefit Plan (BC/BS). Having independently reviewed the Commissioner's analysis, I agree that the Blue Shield Active Start 25 plan comes closest to providing the same benefits as the benchmark, Ms. Golinski's BC/BS plan. Order at 10, In re Golinski, No. 09-80173 (filed Jan. 28, 2010). Having independently reviewed the Commissioner's calculations based on that choice, id., I agree with his recommended award. Ms. Golinski is entitled to $6,272.00 in back pay for the period from September 2008 through December 2009, see 5 U.S.C. § 5596(b)(1)(A)(i), and $164.31 in interest on that amount, see id. § 5596(b)(2).[1] I defer consideration of the Commissioner's recommendation on attorneys' fees as the matter is not yet ripe for decision. Ms. Golinski may request that I revisit it once the Judicial Council resolves the now-pending appeal.

**2.** Today's order only compensates Ms. Golinski through December 2009. She has requested the right to seek additional back pay from then until OPM complies, or is ordered to comply, with my earlier orders. She's entitled to do so

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[1] Ms. Golinski is entitled to interest from "the period beginning on the effective date of the withdrawal or reduction involved," September 2, 2008, and "ending on a date not more than 30 days before the date on which payment is made." 5 U.S.C. § 5596(b)(2)(B)(i). The $164.31 figure only covers interest through December 31, 2009, which is more than thirty days before Ms. Golinski will be paid. Ms. Golinski may submit within three days from today a proposed nunc pro tunc correction of the interest award.

as, until then, she remains subject to "an unjustified or unwarranted personnel action." 5 U.S.C. § 5596(b)(1).

I consider this remedy—ongoing back pay—just as inadequate as it was before. See Golinski, 587 F.3d at 960. Its computation will undervalue the benefit Ms. Golinski is being denied because all of the private plans identified as potentially comparable are inferior to the BC/BS plan; back pay may have adverse tax consequences, see, e.g., Tanaka v. Dep't of Navy, 788 F.2d 1552, 1553–54 (Fed. Cir. 1986), that can't be remedied, see, e.g., Hopkins v. Dep't of Navy, 86 M.S.P.R. 11, 12 (M.S.P.B. 2000); it's a cumbersome hassle for the court; it's a waste of taxpayer dollars because addition of Ms. Golinski's wife to her BC/BS plan would not cost the government a penny; it's a burdensome hassle for Ms. Golinski, one that a person without her tenacity might find stigmatizing; and it relegates her to a de facto separate, and therefore inherently unequal, benefits system based on her sex and sexual orientation.

More back pay is, however, the only remedy I have left to give in the face of ongoing workplace discrimination. That makes it "necessary and appropriate," even though it's inadequate and wasteful. U.S. Court of Appeals for the Ninth Circuit, Employment Dispute Resolution Plan 9 (1997). I therefore authorize Ms. Golinski to move for additional back pay before the Commissioner until she's

permitted to enroll her wife for the benefits afforded an opposite-sex spouse of a court employee.[2]

Once this order is final, the Circuit and Court of Appeals Executive shall promptly complete, and forward to me to sign, any paperwork necessary for the Court to satisfy its liability for the amounts awarded. The back pay and interest portions of this matter shall then be remanded to the Appellate Commissioner.

March 5, 2010

Alex Kozinski
Chief Judge

[2] Unless objections are lodged with the Commissioner within 7 days of his recommendations on any motions Ms. Golinski elects to file, the Commissioner may order relief by and for this tribunal. See 9th Cir. Gen. Order 6.3(e). If objections are filed, I will resume jurisdiction.