



DEPARTMENT OF THE NAVY
BOARD FOR CORRECTION OF NAVAL RECORDS
2 NAVY ANNEX
WASHINGTON DC 20370-5100

DJC
Docket No. 11995-08
9 September 2009

From: Chairman, Board for Correction of Naval Records
To: Secretary of the Navy

Subj: REVIEW OF NAVAL RECORD ICO
[REDACTED]

Ref: (a) Title 10 U.S.C. 1552

Encl: (1) DD Form 149 w/attachments and followup correspondence
(2) NPC Memo dtd 12 Aug 09
(3) Subject's naval record and DFAS correspondence

1. Pursuant to the provisions of reference (a) Subject's former spouse, hereinafter referred to as Petitioner, filed enclosure (1) with this Board requesting, in effect, that the applicable naval record be corrected to show that after his divorce from [REDACTED] in December 2006, Subject submitted a written request changing his Survivor Benefit Plan (SBP) beneficiary election from "spouse" to "former spouse."

2. The Board, consisting of Mr. Pfeiffer, Mr. Zsalman, and Mr. George, reviewed Petitioner's allegations of error and injustice on 8 September 2009 and, pursuant to its regulations, determined that the corrective action indicated below should be taken on the available evidence of record. Documentary material considered by the Board consisted of the enclosures, naval records, and applicable statutes, regulations and policies.

3. The Board, having reviewed all the facts of record pertaining to Petitioner's allegations of error and injustice, finds as follows:

a. [REDACTED] and [REDACTED]
[REDACTED] were married on 10 December 1955.

b. [REDACTED] transferred to the Retired Réserve without pay on 1 November 1972. On 21 October 1987, at age 60, he became eligible for retired pay. At that time, he enrolled in SBP in the "spouse" category of coverage.

c. On 16 May 1995 [REDACTED] passed away. At [REDACTED] request, SBP coverage was suspended.

d. [REDACTED] then married [REDACTED]

[REDACTED] They were married on 12 September 1997.¹

e. In 2003, [REDACTED] notified the Defense Finance and Accounting Service (DFAS) of his remarriage and asked to have his spouse [REDACTED] enrolled in the SBP. Because he had married [REDACTED] in September 1997 and he had not requested that SBP coverage be terminated within one year of his marriage, DFAS reestablished his enrollment in the "spouse" category of coverage retroactive to October 1998 (when coverage restarted automatically by law).

f. [REDACTED] and [REDACTED] were divorced on 14 December 2006 after 9 years of marriage. The divorce decree included the following provision: "Upon [REDACTED] death, to the extent that the law allows, [REDACTED] will be entitled to make claim upon Harold's Navy survivor benefits. To obtain these benefits, within one year of the entry of this judgment, [REDACTED] must direct the Navy by sending them a letter asking to 'deem election for survivor benefits of the retiree.'"²

g. There is no record that [REDACTED] requested a "deemed election" under 10 U.S.C. § 1450(f)(3) to change the

¹ Under the rules governing SBP, when a person with suspended "spouse" coverage remarries, the new spouse automatically becomes the eligible spouse beneficiary at the same rate previously elected on the first anniversary of the marriage unless within one year after remarriage the retiree elects in writing to increase the level of coverage or to terminate coverage.

² Under the rules governing SBP, when a married retiree enrolled in the "spouse" category of coverage divorces, coverage ceases. (Upon divorce, the retiree does not have a "spouse"). The Survivor Benefit Plan specifically permits a retiree to maintain a survivorship annuity benefit for a former spouse in one of two ways: either (a) the retiree voluntarily makes an appropriate "former spouse" election within one year of the date of divorce (See 10 U.S.C. § 1448 (b)(3)(A)(i)-(iii)), or (b) the former spouse makes an election through a process known as a "deemed election" (See 10 U.S.C. § 1450 (f)(3)). If no request is received by DFAS within one year of the date of divorce, coverage is suspended. Thus, as a retiree who was previously enrolled in the "spouse" category of coverage, upon his divorce from [REDACTED] [REDACTED] could have made a voluntary election to change the SBP coverage from "spouse" to "former spouse" within one year of the divorce. Moreover, in light of the terms of the divorce decree pertaining to SBP, as his former spouse, [REDACTED] could have sought to be "deemed" as the SBP beneficiary under 10 USC § 1450(f)(3) within one year of the divorce.

beneficiary category from "spouse" to "former spouse" within one year of the date of divorce.

h. There is no record that [REDACTED] requested a change in beneficiary category from "spouse" to "former spouse" within one year of the date of divorce.

i. There is no evidence that [REDACTED] ever reported his divorce to DFAS before his death.

j. [REDACTED] died on 30 June 2008, approximately eighteen months after his divorce from [REDACTED]. He had not remarried and had no spouse at the time of his death. DFAS had not been notified that he and [REDACTED] were divorced. Accordingly, although divorced and single (with no spouse), [REDACTED] was still enrolled in SBP in the "spouse" category of coverage. "Spouse" category SBP premiums had been deducted from his retired pay during the time of his marriage to his first wife [REDACTED] from 1987 to 1995. "Spouse" category premiums had also been deducted after his marriage to [REDACTED] (1998) until the time of his death in 2008. Because DFAS was not aware of his divorce in 2006, "spouse" category premiums were deducted even after his divorce from [REDACTED] until June 1998 when he died.

k. Upon learning of [REDACTED] death, DFAS refunded the overpayment of "spouse" SBP premiums (for the period between the 2006 divorce and [REDACTED] 2008 death) to [REDACTED] children [REDACTED] and [REDACTED] had previously named his children as his beneficiaries for arrearages of pay.

l. [REDACTED] is now requesting that the record be changed to show that after her divorce from [REDACTED] in December 2006, [REDACTED] submitted a written request changing his SBP beneficiary election from "spouse" to "former spouse." Such change would entitle [REDACTED] to an SBP annuity.

m. Per enclosure (2), the Bureau of Naval Personnel, provided their opinion that the evidence is insufficient to support the requested record change. The advisory opinion relies on the facts stated above that (1) [REDACTED] never requested a change in beneficiary category from "spouse" to "former spouse" within one year of the date of divorce and (2) [REDACTED] never requested a "deemed

election" to change the beneficiary category from "spouse" to "former spouse" within one year of the date of divorce (even though her divorce decree specifically directed her to send a letter asking to "deem election for survivor benefits.")

CONCLUSION

Upon review and consideration of all the evidence of record, and notwithstanding the opinion expressed in enclosure (2), the Board finds the existence of an injustice warranting corrective action. The Board relied heavily on the following factors: (a) the divorce decree contemplated the establishment of "former spouse" coverage for [REDACTED] (b) [REDACTED] continued to pay (spouse) premiums even after his divorce during the period between 15 December 2006 and 30 June 2008 when he was not married, (c) [REDACTED] never remarried. The Board concluded, based on these factors, that it was likely that [REDACTED] desired to provide "former spouse" coverage for [REDACTED]. The Board also accepted [REDACTED] Scholle's explanation that she did not make a timely "deemed election" because she believed such election was to be made within one year of [REDACTED] death. Accordingly, the Board concluded that the record should be changed to show that [REDACTED] made a timely request to change the SBP coverage from "spouse" to "former spouse" within one year of his divorce.

RECOMMENDATION:

That Subject's naval record be corrected, where appropriate, to show that:

a. On 15 December 2006, the day after his divorce, [REDACTED] submitted a written request to change the category of Survivor Benefit Plan coverage from "spouse" to "former spouse" naming [REDACTED] as the "former spouse" beneficiary.

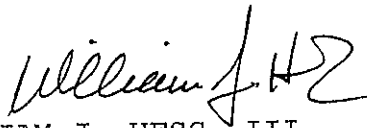
b. Any SBP premiums which become due as a result of this change will be deducted from Petitioner's future benefits.

c. Subject died on 30 June 2008.


d. A copy of this Report of Proceedings will be filed in Subject's naval record.

4. It is certified that quorum was present at the Board's review and deliberations, and that the foregoing is a true and complete record of the Board's proceedings in the above entitled matter.


ROBERT D. ZSALMAN
Recorder


WILLIAM J. HESS, III
Acting Recorder

5. The foregoing action of the Board is submitted for your review and action.


W. DEAN PFEIFFER
Executive Director

Reviewed and approved.


9-24-09

Robert T. Cali
Assistant General Counsel
(Manpower and Reserve Affairs)