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DEPARTMENT OF THE NAVY

BOARD FOR CORRECTION OF NAVAL RECORDS

2 NAVY ANNEX

WASHINGTON DC 20370-5100

WJH
Docket: 3075-10
23 June 2011

[redacted]

[redacted]

This is in reference to your application for correction of the naval record of [redacted], United States Marine Corps (ret)(deceased) pursuant to the provisions of 10 USC 1552.

A three-member panel of the Board for Correction of Naval Records, sitting in executive session, considered your application on 23 May 2011. Your allegations of error and injustice were reviewed in accordance with the administrative regulations and procedures applicable to the proceedings of this Board. Documentary material considered by the Board consisted of your application, together with all material submitted in support thereof, the naval record and applicable statutes, regulations and policies. In addition, the Board considered the advisory opinion furnished by the United States Marine Corps letter 1760 MMSR-6K of 23 March 2011, and comments provided by the Defense Finance and Accounting Service (DFAS), copies of which are attached and were previously furnished to you.

After careful and conscientious consideration of the entire record, the Board found that the evidence submitted was insufficient to establish the existence of probable material error or injustice. In this connection the Board substantially concurred with the comments contained in the advisory opinion and DFAS's comments. The records show that [redacted] married [redacted] in 1982. In 1983, [redacted] transferred to the United States Marine Corps Fleet Reserve (retired) from active duty. At that time, he elected to

participate in the Survivor Benefit Plan (SBP) in the "spouse" category of coverage. In 1995, after 13 years of marriage, [redacted] and [redacted] separated. After mid-1995, they lived separate and apart without interruption. In April 2009, the parties divorced. As part of the divorce, it was certified that no reconciliation had taken place and that no reconciliation was probable. A final decree of divorce was issued on 22 April 2009 which (a) decreed that the parties do not have legal or equitable interests in any assets or debts and (b) incorporated, by reference, a confidential addendum. The final decree of divorce has been reviewed by the Board, however, the confidential addendum has not been reviewed as it was not provided by applicant to the Board.

The divorce was final on 22 April 2009. The final decree of divorce did not address the Survivor Benefit Plan (SBP) at all. Evidence shows that on 12 June 2009, you [redacted], submitted a request to DFAS seeking to continue SBP coverage for [redacted] in the "former spouse" category of coverage. As part of your request, you submitted a "general power of attorney" and a copy of the final decree of divorce. DFAS, however, did not make the requested change. [redacted] passed away on 19 June 2009.

After [redacted] death, [redacted] (the former spouse) applied to DFAS seeking an SBP annuity. On 24 August 2009, [redacted] claim for SBP was denied because she was divorced from [redacted] and he had not made a valid former spouse election.

You have asked that this Board change the naval record to show that a timely and effective election was made to change SBP coverage from "spouse" to "former spouse."

The laws and regulations implementing SBP permit a retiree to maintain a survivorship annuity benefit for a former spouse after divorce even when the divorce decree does not address SBP. The retiree may maintain the "former spouse" by voluntarily making a "former spouse" election within one year of the date of divorce. However, the election must be made by the retiree himself. (See 10 U.S.C. § 1448 (b)(3)(A)(i)-(iii) "Any such election must be written (and)

signed by the person making the election"). A narrow exception exists for retirees who are "determined to be mentally incompetent by medical officers of the armed force concerned or of the Department of Veterans Affairs, or by a court of competent jurisdiction." See 10 USC 1449.

There is no evidence that [redacted] voluntarily made a "former spouse" election by submitting a written request, signed by him, to DFAS. There is no evidence that [redacted] was determined to be mentally incompetent by medical officers of the armed force concerned or of the Department of Veterans Affairs, or by a court of competent jurisdiction.

Review of the general power of attorney you submitted to DFAS reveals that it was executed by [redacted] on 16 March 2009 and, by its terms, provided you [redacted] certain limited powers to act on [redacted] behalf. Nothing in the general power of attorney evidences that [redacted] was mentally incompetent. Nor does it show that he was completely incapable of managing his own affairs. By the terms of the document, [redacted] withheld some power for himself and specifically limited the power he granted to you. In particular, he prohibited you [redacted] from cancelling or changing "the beneficiary of any policy of life insurance." The Board agreed with the advisory opinion and the comments provided by DFAS that, under these circumstances, DFAS's decision to deny an SBP annuity to the former spouse was proper and that no relief is warranted. The divorce decree did not contemplate the continuation of SBP. [redacted] did not make a "former spouse" election after his divorce. He was not determined to be mentally incompetent. He retained the authority to manage some of his own affairs. The general power of attorney could not be used to make a former spouse election.

Accordingly, your application has been denied. The names and votes of the members of the panel will be furnished upon request.

It is regretted that the circumstances of your case are such that favorable action cannot be taken. You are entitled to have the Board reconsider its decision upon

submission of new and material evidence or other matter not previously considered by the Board. In this regard, it is also important to keep in mind that a presumption of regularity attaches to all official records. Consequently, when applying for a correction of an official naval record, the burden is on the applicant to demonstrate the existence of probable material error or injustice.

Sincerely,

W. DEAN PFEIFFER
Executive Director