

**DEPARTMENT OF HOMELAND SECURITY
BOARD FOR CORRECTION OF MILITARY RECORDS**

Application for the Correction of
the Coast Guard Record of:

BCMR Docket No. 2011-041

XXXXXXXXXXXXXXXXXXXX
XXXXXXXXXXXXXXXXXXXX

FINAL DECISION

This is a proceeding under the provisions of section 1552 of title 10 and section 425 of title 14 of the United States Code. The Chair docketed the case after receiving the applicant's completed application on December 6, 2010, and assigned it to staff member J. Andrews to prepare the decision for the Board as required by 33 C.F.R. § 52.61(c).

This final decision, dated December 8, 2011, is approved and signed by the three duly appointed members who were designated to serve as the Board in this case.

APPLICANT'S REQUEST AND ALLEGATIONS

The applicant, a xxxxxxxx in the Coast Guard Reserve, asked the Board to correct his record to show that he has elected his wife as his beneficiary under the Reserve Component Survivor Benefit Plan (RCSBP or Plan).¹ The applicant alleged that he discovered the error in his record on March 6, 2009.

The applicant alleged that his "wife has been unfairly and unjustly denied concurrency and the benefit of the [RCSBP] should [he] die before [he is] of age to next elect her as a beneficiary." The applicant provided the following timeline of events:

May 2001—The applicant was notified of his completion of 20 years of satisfactory service for a Reserve retirement and his opportunity to make an RCSBP election with 90 days.

June 2001—The applicant submitted his RCSBP election form. In response to questions 5 and 6 on the form, the applicant checked blocks showing that he was not married and

¹ The Plan, which reduces members' retired pay so that their survivor(s) may receive an annuity, allows reservists who qualify for retired pay to make elections regarding their participation in the Plan and beneficiaries (a) within 90 days of their notification that they have completed 20 satisfactory years of service; (b) during the six months prior to their 60th birthday (when they first receive retired pay); and (c) if they marry or acquire a child in the interim between (a) and (b), during the first year after they marry or acquire the child. U.S. COAST GUARD, COMDTINST M1000.6A, PERSONNEL MANUAL, Arts. 18.F.5.a., 18.F.6.c. & 18.F.12.a. (Change 40, Oct. 2005).

did not have dependent children. In response to question 7, regarding what kind of coverage he wanted, he checked the last block, 7f, for coverage for a “natural person with insurable interest,” instead of one of the blocks requesting coverage for a spouse only, spouse and children, children only, former spouse, or former spouse and children. In response to question 8, also concerning the type of coverage he wanted, the applicant checked the block stating “I do not wish to make an election at this time,” instead of electing coverage (a) upon his 60th birthday or his death, whichever is later, or (b) upon his death, whether before or after his 60th birthday. Question 19 on the form states, “If you are unmarried and have no dependent children and you checked 7f complete this section with information pertaining to the person you want to receive an annuity who has an insurable interest in you.” The applicant named his sister in response to question 19.

October 2006—The applicant married. He advised the Coast Guard of his marriage, which was entered in his record in November 2006. However, he alleged, he and his wife received no notice of his one-year opportunity to change his RCSBP election.

March 2009—The applicant learned that his wife was not covered by the Plan. He subsequently sent two letters to the Commandant requesting coverage for her, but his requests were denied.

The applicant stated that when he completed his original election form on June 4, 2001, he was confused because he did not understand why he needed to name a beneficiary (insurable interest) if he was not electing coverage in response to question 8 and he did not have to show whether he wanted the annuity to be based on his full retirement pay or a reduced amount in response to question 9. In addition, he noted that even though he named his sister as his beneficiary, the Coast Guard’s database states that “no annuity has been chosen,” and the PSC advised him in August 2010 that his beneficiary designation was invalid and that his sister was not an eligible choice. The applicant argued that his sister was an insurable interest, according to Article 18.F.3.g. of the Personnel Manual, and that if she was not an eligible choice, he should have been informed in 2001. He noted that in 2001, a chief warrant officer serving as the District Personnel Officer counseled him about how to fill out the election form, witnessed his signature, and submitted the form to the proper office, where it was accepted and entered in the system. He argued that he should have been able to rely on the guidance he received from the District Personnel Officer regarding his elections, but he did not. As evidence that the 2001 election form was confusing, the applicant pointed out that it has been revised several times since 2001. The applicant argued that if his beneficiary election is actually invalid, as the PSC claims, he should have the opportunity to change his election.

The applicant stated that when he married in October 2006, he was still drilling actively at his unit, and he asked his Servicing Personnel Office (SPO) what forms needed completion because of his marriage. He completed forms regarding Servicemembers’ Group Life Insurance, housing allowance, and dependency, but he “was not notified of the need to update an RCSBP Election Certificate.” The applicant alleged that he relied on the SPO to tell him what forms to fill out, and the SPO did not mention the Plan. He alleged that the Coast Guard operates the Plan poorly and fails to educate reservists and administrative personnel about it adequately. There-

fore, he argued, it was not unreasonable for him to forget to inquire about his coverage under the Plan after he married. The applicant also alleged that he believed that “the marriage certificate and the other forms [he] had completed provided notice of my marriage to the Coast Guard to qualify my wife for insurance and benefits should I predecease her.” When he learned in March 2009 that his RCSBP election had not been updated by the Coast Guard to reflect his marriage, he tried to have his election corrected through the Personnel Service Center (PSC) to no avail.

The applicant stated that under 10 U.S.C. § 1448, a spouse must consent to a married member not electing the spouse as an RCSBP beneficiary and under § 1455(a)(1)(A), retiring members and spouses must be informed of RCSBP options and effects. The applicant alleged that the Coast Guard violated both of these provisions because even though he informed the Coast Guard of his marriage, the PSC has never attempted any communication with his wife about his RCSBP coverage. The applicant argued that his wife should have the same right to notification as other spouses and that, even if these statutes do not require notice to his wife, in the interest of justice and equity the intent of the statutes should be fulfilled to protect her interest and she should be covered by the Plan as his beneficiary. The applicant argued that even if no law requires her to consent to her non-coverage under the Plan, she should be included in the interests of equity and justice because the statute “clearly is meant to protect the spousal interest regardless of the member’s failure to include a spouse in the Plan.”

The applicant complained that spouses, former spouses, and spouses acquired after a reservist’s qualification for a 20-year retirement are treated very differently under the Plan. He listed the notification and consent entitlements afforded a spouse or former spouse when a member makes an RCSBP election that are not afforded to a spouse acquired after the election is made. He alleged that spouses acquired after the 20-year mark are unjustly denied notice of their entitlements under the RCSBP. The applicant argued that this discrimination among types of spouses is unjust and that all spouses should receive the same notification and protection. He noted that his next opportunity to change his election is his 60th birthday, xxxxxxxxxxxx, and that his wife will be ineligible for RCSBP benefits if he dies before then.

The applicant alleged that the Plan “is complicated, and many [administrative personnel] who should understand RCSBP do not. To place the burden solely on the Reservist to understand RCSBP and how to make elections is unfair and unjust.” Moreover, he argued that information about the RCSBP is not readily accessible, as the Coast Guard claims, since throughout his career he has received information about it only once, when the election form was mailed to him in 2001, except in response to his complaints about his coverage in 2009 and 2010. He pointed out that active duty members get to attend a Transition Assistance Program with a great deal of information about retirement planning before they retire, whereas reservists receive only a pamphlet in the mail, and it says nothing about what to do if the reservist marries after the 20-year mark.

The applicant noted that the law allows that the “Secretary concerned may revoke an election when necessary to correct an administrative error” and asked the Board to correct his election form to show that he elected coverage and his wife is his beneficiary.

SUMMARY OF THE EVIDENCE

In March 2001, the applicant completed 20 years of satisfactory service towards a Reserve retirement, including receipt of retired pay following his 60th birthday in 20xx. The Coast Guard sent him his 20-year notification letter with RCSBP information on May 1, 2001. The letter notes that the “Plan permits you to provide an annuity for your spouse, spouse and children, children alone, or persons with an insurable interest in the event you die before reaching age 60. It is very important that you carefully read the options described in enclosure (2). By law, you must make your choice within 90 days of the date of this letter. If you choose Option A with spousal concurrence, you are deferring any opportunity for a Coast Guard annuity until your 60th birthday. There will be no RCSBP coverage if you die before you reach age 60. In addition, you should be aware that your decision is irrevocable after the 90-day period.” At the time, the applicant was not married and had no children. The RCSBP pamphlet sent to the applicant with the 20-year letter stated the following in pertinent part:

Reserve Component Survivor Benefit Plan (RCSBP)

VERY IMPORTANT INFORMATION

Please take a moment to read this very important information concerning coverage for your family in the event of your death.

Introduction: Reservists who complete 20 years of satisfactory service are entitled to apply for retired pay once they reach age 60. If the Reservist dies prior to reaching age 60, entitlement to retired pay terminates. The only way your survivor(s) may receive a payment from the Coast Guard in the form of an annuity, if you die prior to age 60, is through the Reserve Component Survivor Benefit Plan (RCSBP).

• NOTE: Effective 1 January 2001, Reservists completing 20 years satisfactory service will be automatically covered under the RCSBP at the maximum level (OPTION C), unless the reservist declines coverage, or elects reduced coverage. If the Reservist declines, or elects reduced coverage, the member’s spouse must concur with that election.

Election Options at time of 20 year satisfactory service letter:

Option A. Under this option, the reservist declines coverage until reaching retired pay eligibility at age 60. At that time, survivor coverage will become automatic under the Survivor Benefit Plan (SBP) unless specifically declined, or a lesser coverage is elected with the reservist’s spouse’s concurrence. Election of Option A means that if the member dies prior to reaching age 60, the survivor **is not** covered by a Coast Guard annuity.

Option B. Election of this option means that if the member dies prior to reaching age 60, the beneficiary would be entitled to an annuity when the Reservist would have reached aged 60. Member may elect to provide an annuity based on full or reduced retired pay.

Option C. Election of this option means that if the member dies prior to reaching age 60, the beneficiary would be entitled to an annuity starting immediately. Member may elect to provide an annuity based on full or reduced retired pay.

• **NOTE: If an election is not made by the Reservist, or not received by HRSIC (RAS) within 90 days from the issuance of the 20 years satisfactory service letter, the member will be automatically enrolled in Option C at the full level of retired pay.**

Beneficiaries: You may elect to provide an annuity under the RCSBP for the following beneficiaries:

- Spouse ...
- Spouse and Children ...
- Children Only ...
- Incapacitated Children ...
- Former Spouse ...
- Former Spouse and Children ...
- Insurable Interest Person – A person who depends on your income for support, i.e., Parent, Dependent or Non-Dependent Child, Relative, Business Associate, etc. Electing Insurable Interest provides an annuity during the life of the beneficiary.

Election Opportunities:

- Within 90 days from the issuance of your 20 year satisfactory service letter.
- If Option A is elected at time of 20 year satisfactory service letter, and spouse concurs, member will have an opportunity to elect into the Survivor Benefit Plan (SBP) at age 60.
- **NOTE: If Reservist declines RCSBP at completion of 20 years (elects Option A with spouse concurrence), and dies before reaching age 60, the survivors will not be entitled to receive a Coast Guard annuity.**

Annuity:

FULL LEVEL - ... the annuity will be computed based on the reserve member's full amount of retired pay ...

REDUCED LEVEL - ... the annuity will be computed based on the member's elected dollar amount, any amount from \$300.00 to full amount of retired pay ...

Cost for RCSBP Coverage:

No premiums are collected for election into the RCSBP until the reservist begins receiving retired pay [at age 60]. ...

Between 20 Years Satisfactory Service and Reaching Age 60

- If you have no spouse or children at the 20 year point, and later acquire a spouse and/or children you may elect to enroll your new beneficiaries in the RCSBP. You must request enrollment in writing, **within one year** of obtaining a spouse and/or child. A copy of the marriage and/or birth certificate must accompany request.
- If you elect spouse coverage under Option B or C and your spouse dies ...
- If you elect spouse coverage under Option B or C and later divorce ...
- If you remarry after losing your RCSBP spouse beneficiary ...

NOTE: The opportunity to make any changes to your RCSBP election must be made within one year of your remarriage by written notification to us at the address provided below. ... [Address of Commanding Officer, Retiree & Annuitant Services (RAS) in Topeka, Kansas, which is part of the Personnel and Pay Center (PPC)]

On June 4, 2001, the applicant submitted his RCSBP election form showing that he did “not wish to make an election at this time,” as opposed to choosing coverage beginning immediately or coverage beginning only at age 60. When instructed by the form to identify a beneficiary, he elected the last option, “natural person with an insurable interest (may be elected only if you have no spouse and/or children).” In addition, he identified his sister as the “natural person with an insurable interest.”

On October 15, 2006, the applicant married. His marriage was entered in the Coast Guard’s database on November 15, 2006.

On March 16, 2009, someone sent the following inquiry by email to the PPC in Topeka: “We have a reserve member [name] who was single when he went over 20 (so SBP wasn’t an issue at that time). I’m actually not sure what election he made. He’s since gotten married. Can he now elect SBP?” In response, the PPC advised that if the applicant “would like pre-age 60 RCSBP coverage for his new spouse, he’ll want to submit an election within one year of marriage.”

On June 24, 2009, the applicant submitted a letter to the PSC attempting to elect his spouse as his beneficiary under the Plan and to elect coverage for an immediate annuity based on his full retired pay in case of his death. The applicant stated that he was never notified that his election form needed to be updated. He complained that the RCSBP pamphlet he received in 2001 was confusing and erroneously stated that one’s beneficiary election could not be changed. In addition, after he submitted a copy of his marriage license to his unit SPO in November 2006, he alleged, he was given only the “Designation of Beneficiaries (CG PSC-2020D), BAH/Dependency Data (CG-4170A), and Servicemembers’ Group Life Insurance Election and Certificate (SGLV-8286)” to update, and no mention of updating his RCSBP election was made even after he asked whether there were any other forms he needed to fill out. He noted that the form CG PSC-2020D is particularly misleading because it “gives the impression that all other programs and forms are satisfactorily covered. It further validates this point by stating a member’s ‘spouse and eligible children are automatically covered designated by law of your death gratuity.’” The applicant also noted that unit administrative personnel appear to be unaware of the RCSBP form and requirements because the form is not generated at the unit level, it is not required to be kept in the unit records, it does not appear on a unit’s administrative check list, and it “does not appear in Direct Access, on the Dependency/Emergency Data ‘update’ tab.” He stated that the only reason he discovered that he should have filled out a Plan election form to ensure his wife’s coverage after their marriage is that he was recently inspired to review his own election form after helping another member complete his and that, when he subsequently contacted numerous administrative and personnel officers, none of them could answer his questions about changing his election until someone contacted the RAS for him.

On December 10, 2009, the Commandant (Compensation Division; CG-1222) responded to the PPC's inquiry forwarding the applicant's letter dated June 24, 2009. The Commandant stated that RCSBP matters are handled "directly between members and PPC" and that unit SPOs "have no requirement to process or forward retired pay applications or SBP/RCSBP designations to PPC on behalf of a member; the responsibility for timely and correct submission of such administrative correspondence lies with the member." The Commandant noted that under 10 U.S.C. § 1454 and DoD Financial Management Regulation, Vol. 7B, Military Pay Policy and Procedures – Retired Pay, members have one year after marrying to change their RCSBP election. The Commandant claimed that the RCSBP guide mailed to the applicant with his 20-year letter "provided understandable, specific guidance on what to do should he acquire a dependent." The Commandant noted that the instructions in the current RCSBP guide about what to do if a member has no dependents when he receives his 20-year letter have not changed. The Commandant stated that in 2001, the applicant "did not have an eligible beneficiary" but "designated his sister as his beneficiary under the insurable interest rule."

The Commandant also noted that under 10 U.S.C. § 1448, the Coast Guard may correct or revoke any election made when "necessary to correct an administrative error. ... An agency commits administrative error when it fails to take a required action. The Comptroller General determined agency administrative error occurs when an agency does not 'carry out written administrative policy of a non-discretionary nature or to comply with administrative regulations having mandatory effect.' [Citation omitted.] Despite [the applicant's] assertion, he does not cite any written administrative policy or regulation that requires his SPO to ensure that his RCSBP election was updated at the time they processed his change in dependency status. Accordingly, there was no administrative error on his SPO's part." Exploring the legislative history of § 1448, the Commandant quoted from a Senate report regarding the Retired Serviceman's Family Protection Plan, which was the precursor of the RCSBP. The Senate report states the following:

Void elections. The election forms of certain members have been found to be void due to administrative deficiencies and irregularities. Where a sufficient time remains prior to the applicable deadline date, it is possible for the service to return the form to the member for resubmission. However, if this is not accomplished before the deadline date, the election is not effective. For that reason, it is proposed that, if an election made under section 1431 is found to be void for any reason except fraud or willful intent of the member, a corrected election may be submitted within 90 days after he is notified in writing that the election is void.

The Commandant concluded that the applicant bore the responsibility of changing his RCSBP election within a year of his marriage to satisfy the statute, that the Coast Guard had not committed any administrative error, and that his request to change his election was therefore denied.

On March 30, 2010, the applicant submitted a letter to the Commandant again asking to correct his election under the Plan. The applicant complained that the Direct Access database shows that "no annuity has been chosen" and yet the Commandant acknowledged that his sister was his beneficiary under the insurable interest rule. He argued that these statements are inconsistent and the inconsistency was caused by the confusing election form. Regarding the Commandant's statement that it was his responsibility to update his Plan election after his marriage, the applicant claimed that the other military services "regularly educate their personnel about SBP benefits" and noted that active duty members attend a transition program with information

about SBP before they retire, whereas reservists receive only a pamphlet. The applicant admitted that in 2006—five years after he read the pamphlet and completed the confusing election form—he did not recall that he needed to change his election within one year of his marriage or that updating other forms was insufficient to change his RCSBP election.

The applicant made many of the same complaints and recommendations for improvement that he made in his application. He also repeated his claim that his original election form is inaccurately completed and should have been rejected by Headquarters.

On August 25, 2010, the Commandant (Office of Military Personnel; CG-122) replied to the applicant's second letter. The Commandant stated that in 2001, if a reservist failed to make an election during the 90 days following the 20-year letter, the reservist was ineligible for benefits (had no coverage) until age 60, when he could make a new election. The Commandant noted that the law changed in 2006 so that no election within 90 days results in automatic spouse-only coverage. The Commandant also noted that the rule about having one year to change SBP coverage after a marriage had not changed since 2001.

Regarding the applicant's election in 2001, the Commandant claimed that the applicant's election of his sister as a beneficiary was invalid since she was married at the time and living in another state with her husband.

Regarding the applicant's marriage in 2006, the Commandant stated that the unit SPO whom the applicant informed of his marriage did not have any statutory or regulatory requirement or duty to counsel members about SBP and that all inquiries about SBP must be directed to the PPC. The Commandant stated that the applicant was notified in his 20-year letter of the need to change his SBP election through the PPC within a year of the marriage and that because he did not do so, his election could not be changed until he attained age 60.

VIEWS OF THE COAST GUARD

On March 16, 2011, the Judge Advocate General (JAG) of the Coast Guard submitted an advisory opinion in which he recommended that the Board deny the applicant's request. In so doing he adopted the findings and analysis provided in a memorandum prepared by the Personnel Service Center (PSC).

The PSC stated that the Coast Guard committed no error in this case and that the applicant has not put forth any new evidence of error that has not already been reviewed and rejected by the Commandant. The PSC adopted the Commandant's memorandum dated August 25, 2010, in its entirety in this regard and recommended that the Board deny the applicant's request.

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

The applicant stated that he served more than 20 years to earn his pension, which does not begin until age 60, but that if he dies before age 60, his wife receives no SBP. He argued that this situation is clearly unjust. He noted that the advisory opinion failed to argue that no injustice was committed and so the Board should find that it is in the interest of justice to correct the

applicant's SBP election. The applicant also submitted an affidavit from his wife requesting coverage under the SBP. He argued that his failure to elect coverage for her within a year of their marriage constitutes a *de facto* declination of spousal coverage without the assent of the spouse, which is impermissible under the law. He argued that the SBP statute requires the concurrence of a spouse in not electing coverage even if the spouse is acquired after the 90-day election period following the 20-day letter has passed. Therefore, when the one-year period for making an election after the marriage passed without any election being made, by default, his wife's coverage should have been automatic. In this regard, the applicant alleged that the Coast Guard erred by failing to notify her of his *de facto* declination of coverage for her.

The applicant also argued that not requiring his spouse's concurrence constitutes an unconstitutional taking of property in violation of the Fifth Amendment to the Constitution. The applicant also reiterated many of the arguments he made in his application and in his letters to the Coast Guard.

APPLICABLE LAW

United States Code

The SBP and RCSBP are authorized under 10 U.S.C. §§ 1447 *et seq.* Although the statutes have been amended since the applicant first made his election in 2001, none of the amendments affected the provisions relevant to the disposition of this case.² Section 1448, "Application of Plan," states the following in pertinent part:

(a) General rules for participation in the Plan.--

(1) Name of Plan; eligible participants.--The program established by this subchapter shall be known as the Survivor Benefit Plan. The following persons are eligible to participate in the Plan:

(A) Persons entitled to retired pay.

(B) Persons who would be eligible for reserve-component retired pay but for the fact that they are under 60 years of age.

(2) Participants in the Plan.--The Plan applies to the following persons, who shall be participants in the Plan:

(A) Standard annuity participants.--A person who is eligible to participate in the Plan under paragraph (1)(A) and who is married or has a dependent child when he becomes entitled to retired pay, unless he elects (with his spouse's concurrence, if required under paragraph (3)) not to participate in the Plan before the first day for which he is eligible for that pay.

(B) Reserve-component annuity participants.--A person who (i) is eligible to participate in the Plan under paragraph (1)(B), and (ii) is married or has a dependent child when he is notified under section 12731(d) of this title that he has completed the years of

² Pub. L. 107-107, § 642(a), (c)(1), 115 Stat. 1151, 1152 (2001); Pub. L. 108-136, §§ 644(a), (b), 645(a), (b)(1), (c), 117 Stat. 1517 (2003); Pub. L. 108-375, § 1084(d)(10), 118 Stat. 2061 (2004); Pub. L. 109-364, §§ 643(a), 644(a), 1071(a)(8), 120 Stat. 2260, 2261, 2398 (2006).

service required for eligibility for reserve-component retired pay, unless the person elects (with his spouse's concurrence, if required under paragraph (3)) not to participate in the Plan before the end of the 90-day period beginning on the date on which he receives that notification.

A person who elects under subparagraph (B) not to participate in the Plan remains eligible, upon reaching 60 years of age and otherwise becoming entitled to retired pay, to participate in the Plan in accordance with eligibility under paragraph (1)(A).

(3) Elections.--

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(B) Spousal consent for certain elections respecting reserve-component annuity.

--A married person who is eligible to provide a reserve-component annuity may not without the concurrence of the person's spouse elect--

(i) not to participate in the Plan;

(ii) to designate under subsection (e)(2) the effective date for commencement of annuity payments under the Plan in the event that the member dies before becoming 60 years of age to be the 60th anniversary of the member's birth (rather than the day after the date of the member's death);

(iii) to provide an annuity for the person's spouse at less than the maximum level; or

(iv) to provide an annuity for a dependent child but not for the person's spouse.

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(4) Irrevocability of elections.--

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(B) Reserve-component annuity.--An election under paragraph (2)(B) is irrevocable if not revoked before the end of the 90-day period referred to in that paragraph.

(5) Participation by person marrying after retirement, etc.--

(A) Election to participate in Plan.--A person who is not married and has no dependent child upon becoming eligible to participate in the Plan but who later marries or acquires a dependent child may elect to participate in the Plan.

(B) Manner and time of election.--Such an election must be written, signed by the person making the election, and received by the Secretary concerned within one year after the date on which that person marries or acquires that dependent child.

(C) Limitation on revocation of election.--Such an election may not be revoked except in accordance with subsection (b)(3).

(D) Effective date of election.--The election is effective as of the first day of the first calendar month following the month in which the election is received by the Secretary concerned.

(E) Designation if RCSBP election.--In the case of a person providing a reserve-component annuity, such an election shall include a designation under subsection (e).

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(b) Insurable interest and former spouse coverage.--

(1) Coverage for person with insurable interest.--

(A) General rule.--A person who is not married and does not have a dependent child upon becoming eligible to participate in the Plan may elect to provide an annuity under the Plan to a natural person with an insurable interest in that person. In the case of a person providing a reserve-component annuity, such an election shall include a designation under subsection (e).

• • •

(e) Designation for commencement of reserve-component annuity.--In any case in which a person is required to make a designation under this subsection, the person shall designate whether, in the event he dies before becoming 60 years of age, the annuity provided shall become effective on--

(1) the day after the date of his death; or

(2) the 60th anniversary of his birth.

Title 10 U.S.C. § 1454 states the following regarding the “Correction of administrative errors” in the administration of the Plan:

(a) Authority.--The Secretary concerned may, under regulations prescribed under section 1455 of this title, correct or revoke any election under this subchapter when the Secretary considers it necessary to correct an administrative error.

(b) Finality.--Except when procured by fraud, a correction or revocation under this section is final and conclusive on all officers of the United States.

Title 10 U.S.C. § 1455 states the President “shall prescribe regulations to carry out this subchapter. Those regulations shall, so far as practicable, be uniform for the uniformed services” and the following:

(b) Notice of elections.--Regulations prescribed under this section shall provide that before the date on which a member becomes entitled to retired pay--

(1) if the member is married, the member and the member’s spouse shall be informed of the elections available under section 1448(a) of this title and the effects of such elections; ...

Reserve Policy Manual

Chapter 8.C.7. of the Reserve Policy Manual states that the Coast Guard “will notify members in writing within one year of completing satisfactory federal service for retirement purposes, of eligibility for retired pay at age 60. The written notification is commonly called the 20-year letter. The notification shall contain information about the Reserve Component Survivor Benefit Plan (RC-SBP), which is described in the Personnel Manual.”

Personnel Manual

The Coast Guard’s regulations for the Plan appear in Article 18.F. of the Personnel Manual. In 2001, when the applicant first made his election, and in 2006, when he married, the following provisions applied:

Article 18.F.5.a.3. states that those eligible for coverage under the Plan include “[a]ny

member or former member of the Coast Guard Reserve qualifying for retired pay at age 60 in accordance with 10 U.S.C. 1331-1337. Reservists in this category who do not submit an election or who elect option A under the Reserve Component Survivor Benefit Plan (RC-SBP) (refer to Article 18.F.12.), will be covered AUTOMATICALLY at the MAXIMUM LEVEL, unless they choose, prior to entitlement to retired pay, to elect reduced coverage as described in Article 18.F.4.c. Such a member will be notified concerning SBP and its provisions approximately six months before reaching age 60.”

Article 18.F.12.b. states that upon completing 20 years of satisfactory service, reservists are sent “a comprehensive packet explaining RC-SBP,” under which they have three options:

1. Option A. This option is chosen by a reservist who is undecided about a RC-SBP election upon completing 20 years service, and defers that decision until reaching age 60. If the retired reservist dies before age 60 and has chosen option A, no annuity under RC-SBP will go to the spouse. An election under this option states: I decline to make an election at this time. (I will remain eligible to make an election for coverage at age 60).

2. Option B. Choosing this option allows an SBP annuity to flow to the widow(er) should the reservist die before reaching age 60. The annuity will not begin, however, until the date on which the reservist would have been age 60. An election under this option states: I elect to provide an annuity beginning on the 60th anniversary of my birth should I die before that date, or on the day after the date of death should I die on or after my 60th birthday.

3. Option C. This option allows a SBP annuity to begin being paid to the survivor upon the death of the reservist whether before or after the reservist’s 60th birthday. An election under this option states: I elect to provide an immediate annuity beginning on the day after date of my death, whether before or after my 60th birthday.

Article 18.F.6.b. states that “[i]f a member elects not to participate or participate at less than the maximum level, or elects children-only coverage when there is an otherwise eligible spouse, that spouse must sign a statement concurring with the member’s election.”

Article 18.F.6.c. states that a “member who has no spouse and/or child(ren) on date of retirement, but who later acquires a spouse and/or child(ren), may elect to participate in the Plan, provided he/she elects to do so within one year of such acquisition. Such election must be submitted in writing to the Pay and Personnel Center (PPC). Spouse coverage becomes effective one year after marriage, unless a child is born of that marriage before the first anniversary.”

Article 18.F.6.d.1. states that a Plan election may be changed if “a member elected to provide coverage for an insurable interested person, that election may be ... changed to cover a newly acquired spouse or dependent child(ren), provided such election is received by PPC within one year of acquisition of the spouse and/or child(ren).”

Article 18.F.4.d. states that a “member who is unmarried and has no dependent child(ren) on the date of entitlement to retired pay, may elect to provide an annuity for a person with an insurable interest in the member.” Article 18.F.3.g. defines and “insurable interest person” as “any person having a reasonable and lawful expectation of monetary benefit from the continued life of a retiree. Some examples are: parents; stepparents; grandparents; grandchildren; aunts; uncles; sisters; brothers; half-sisters; half-brothers; child(ren); or a nonrelative business asso-

ciate, employee, etc. If the designation is for a nonrelative, proof of financial benefit from the continuance of life of the retiree must be submitted.”

FINDINGS AND CONCLUSIONS

The Board makes the following findings and conclusions on the basis of the applicant’s military record and submissions, the Coast Guard’s submissions, and applicable law:

1. The Board has jurisdiction concerning this matter pursuant to 10 U.S.C. § 1552. The record supports that the applicant’s claim that he discovered that his wife was not covered under the RCSBP in 2009. Therefore, his application is timely.

2. The applicant requested an oral hearing before the Board. The Chair, acting pursuant to 33 C.F.R. § 52.51, denied the request and recommended disposition of the case without a hearing. The Board concurs in that recommendation.³

3. The applicant alleged that his current lack of coverage under the RCSBP is erroneous and unjust and that it should be corrected to show that he has coverage for the spouse he married in 2006. The Board begins its analysis in every case by presuming that the disputed information in the applicant’s military record is correct as it appears in his record, and the applicant bears the burden of proving by a preponderance of the evidence that the disputed information is erroneous or unjust.⁴ Absent evidence to the contrary, the Board presumes that Coast Guard officials and other Government employees have carried out their duties “correctly, lawfully, and in good faith.”⁵

4. The applicant alleged that he completed the RCSBP election form improperly in 2001 and so that election form should be considered invalid. The record shows that the applicant had no wife or dependent child when he received his 20-year letter in 2001. Therefore, when directed to pick a beneficiary in block 7f of the election form, he elected a “natural person with insurable interest” as a beneficiary, and in block 8 he elected to defer his decision about whether to actually participate in the Plan. In block 19, he named his sister as a person having an insurable interest in him. Whether she qualified in 2001 or might at some point qualify as someone having an “insurable interest” is unclear.⁶ Although the applicant’s sister might not ever have

³ See *Steen v. United States*, No. 436-74, 1977 U.S. Ct. Cl. LEXIS 585, at *21 (Dec. 7, 1977) (holding that “whether to grant such a hearing is a decision entirely within the discretion of the Board”); *Flute v. United States*, 210 Ct. Cl. 34, 40 (1976) (“The denial of a hearing before the BCMR does not *per se* deprive plaintiff of due process.”); *Armstrong v. United States*, 205 Ct. Cl. 754, 764 (1974) (stating that a hearing is not required because BCMR proceedings are non-adversarial and 10 U.S.C. § 1552 does not require them).

⁴ 33 C.F.R. § 52.24(b) (2011).

⁵ *Arens v. United States*, 969 F.2d 1034, 1037 (Fed. Cir. 1992); *Sanders v. United States*, 594 F.2d 804, 813 (Ct. Cl. 1979).

⁶ See U.S. DEPARTMENT OF DEFENSE, FINANCIAL MANAGEMENT REGULATION 7000.14-R, vol. 7B, chap. 44, para. 440205, which defines a “natural person with an insurable interest” as

A. A person who has a reasonable and lawful expectation of pecuniary benefit from the continued life of the member. This category may include parents, stepparents, grandparents, grandchildren, aunts, uncles, sisters, brothers, half-sisters, half-brothers, dependent or non-dependent child or stepchild, or any other person more nearly related than cousin; or

benefited as someone with an “insurable interest” under the law, the applicant completed the form logically in accordance with the instructions as if his sister had an insurable interest in him, and his manner of completion did not render the election form as a whole illogical or invalid. The fact that a beneficiary may later be deemed unqualified does not *ipso facto* render the entire election form invalid. In this regard, the Board notes that the naming of a beneficiary on an RCSBP election form is always actually the naming of a *potential* beneficiary because receipt of benefits depends upon the beneficiary’s qualification as a beneficiary at the time of death and the reservist’s participation in the Plan at the time of death. For example, even a reservist’s spouse or child at the time of completion of the form may not be an eligible beneficiary when the reservist dies if the couple divorce or the child becomes independent.⁷ As the election form was arranged in 2001, the naming of a beneficiary and the decision to defer choosing or to choose a type of annuity were presented as independent questions, and the applicant’s answers to those questions were not illogical. For example, even though he chose option A on the form and deferred his election, a named person with an insurable interest on his 2001 election form would have been automatically covered under the Plan if he had failed to decline coverage when he turned 60 years old.⁸

5. The applicant alleged that his 2001 RCSBP election form was invalid because the Coast Guard does not consider his sister a valid beneficiary, as stated in the Commandant’s letter dated August 25, 2010. As noted in finding 4, the record before the Board is not certain about whether his sister had, has, or could in the future have an insurable interest in him. However, because in 2001 the applicant chose to defer his decision about electing coverage—option A in block 8 and option A in the RCSBP guidance he received—the Board is not persuaded that the applicant erroneously believed, after he completed the form, that his sister would receive a benefit if he died before age 60. Although the applicant alleged that someone should have returned the election form to him in 2001 if his sister did not qualify as a person with an insurable interest in him, he has not shown that the Coast Guard had a duty at the time to make a legal assessment of whether his sister had a “lawful expectation of monetary benefit from [his] continued life” before accepting the form. Article 18.F.4.d. of the Personnel Manual requires a member to submit proof of the named person’s insurable interest only if the named person is not a family member. And as noted in finding 4, any named beneficiary on the election form is really only a potential beneficiary, contingent upon that person’s qualification as a beneficiary at the time of the reservist’s death. The Board concludes that the applicant has not proved by a preponderance of the evidence that his 2001 RCSBP election form is invalid or void.

B. Any individual having a reasonable and lawful basis, founded upon the relationship of parties to each other, either pecuniary or of blood or affinity, to expect some benefit or advantage from the continuance of the life of the retiree. Proof of financial benefit from the continuance of the life of the member is required for persons other than those listed in subparagraph 440205.A.

⁷ *Bonewell v. United States*, 87 Fed. Cl. 413 (2009) (noting that coverage elected for a spouse does not convert to coverage for a former spouse after a divorce unless a subsequent election for “former spouse” coverage is made).

⁸ U.S. COAST GUARD, COMDTINST M1000.6A, PERSONNEL MANUAL, Art. 18.F.5.a.3. (Change 33, Sept. 2000) (stating that those eligible for coverage under the Plan included any reservist qualifying for a Reserve retirement and that such reservists “who do not submit an election or who elect option A under the Reserve Component Survivor Benefit Plan (RC-SBP) (refer to Article 18.F.12.), will be covered AUTOMATICALLY at the MAXIMUM LEVEL, unless they choose, prior to entitlement to retired pay, to elect reduced coverage as described in Article 18.F.4.c.”).

6. The applicant complained that although he named his sister as his beneficiary on his RCSBP election form, the Coast Guard's Direct Access database states that "no annuity has been chosen." The Board finds that this notation in Direct Access is not inconsistent with the applicant's RCSBP election form because in block 8 of the form, the applicant deferred his election of an annuity.

7. Under 10 U.S.C. § 1448(a)(5), entitled "Participation by person marrying after retirement, etc.," the applicant was eligible to change his election and elect coverage for his spouse within one year of his marriage. Because he did not do so, the Coast Guard's refusal to allow him to change his election at this time is not erroneous. Although the applicant alleged that his spouse was or should be entitled to notification of his failure to change his election and to consent to (or not—i.e., veto) his failure to ensure her coverage, nothing in the statute creates these alleged entitlements. As the applicant noted, Congress has conferred different rights upon spouses under the RCSBP and SBP depending upon the circumstances of the marriage. For example,

- someone who is already a spouse when the reservist receives his 20-year retirement eligibility letter has the right to consent to—in essence, to veto—a member's decision not to provide full coverage for the spouse;⁹
- someone who marries a reservist who, when he received his 20-year letter, elected spouse coverage for a prior spouse, which would cover the new spouse if no change was made to the election, is entitled to notification of (but not to veto) the member's decision within the year after the new marriage to change his election to decline spouse coverage;¹⁰
- someone who, like the applicant's wife, marries a reservist who has no spouse coverage because he had no spouse when he received his 20-year letter is not entitled to notification of or to consent to the reservist's failure to take advantage of the opportunity to elect coverage for his new spouse within one year of the marriage;¹¹ and
- once former spouse coverage is in effect, the reservist may not change it without a court order or the former spouse's consent.¹²

Thus, it appears that the law assumes that a new spouse knows and accepts a reservist's RCSBP coverage election—i.e., the status quo—at the moment of marriage and provides a right to notification of or to consent to a change in the status quo but not to the continuance of the status quo if the reservist decides not to change a pre-existing election upon a new marriage. The Board notes that the applicant argues that the right of election consent granted reservists' spouses under 10 U.S.C. § 1448(a)(3)(B) should also apply when a reservist has an opportunity to make a new election because of a new marriage under 10 U.S.C. § 1448(a)(5). However, neither Coast Guard regulations nor Department of Defense regulations apply the consent requirement under

⁹ 10 U.S.C. § 1448(a)(3) (2006).

¹⁰ 10 U.S.C. § 1448(a)(6) (2006).

¹¹ 10 U.S.C. § 1448(a)(5) (2006).

¹² 10 U.S.C. § 1448(f)(2) (2006).

§ 1448(a)(3)(B) to spouses acquired after the original election is made.¹³ Although the applicant argues that these differences in treatment under the statute are unintended and/or unjust, the military services have been interpreting these statutes in this way for many years and that interpretation is entitled to deference.¹⁴ The Board finds that the applicant has not proved by a preponderance of the evidence that the Coast Guard erred or committed an injustice when it did not notify his wife of his failure to change his extant, deferred RCSBP election within the year following their marriage or give her the authority to consent to that election.

8. Because the applicant did not comply with the requirement in 10 U.S.C. § 1448(a)(5) to elect RCSBP coverage for his spouse within one year of his marriage, he is not entitled to spouse coverage under the statute and his prior election remains irrevocable until he gains a new dependent or becomes eligible for retired pay upon his 60th birthday. The applicant argued that the Coast Guard has violated his property rights under the Fifth Amendment¹⁵ to the Constitution and that the deprivation of spouse coverage under the RCSBP is an unjust “taking” of his and/or his wife’s “vested interest” in that coverage. However, federal military and civilian pensions, allowances, and survivor benefits are privileges and gratuities granted by Congress through statutes—not vested property rights.¹⁶ Therefore, because the applicant is not currently entitled to spouse coverage under the statute, he is not entitled to it under the Constitution.

9. The applicant argued that the Coast Guard’s failure to notify him of his opportunity to change his RCSBP election when he advised his unit of his marriage in 2006 and its reliance on his notification of that right in the RCSBP guidance he received in 2001 is unjust. The Board finds the Coast Guard’s policy unwise to the extent that the Coast Guard does not automatically inform all retired or retirement-eligible members who notify the Coast Guard (even through a unit SPO) of a new dependent of the opportunity to change their elections. However, the applicant has not shown that he was treated differently than other reservists or active duty retirees because the policy places no duty on unit SPOs to counsel members about the Plan and requires all members to remember the guidance provided with the 20-year letter or upon retirement (if active duty retired) and to act accordingly by notifying Topeka (RAS/PPC) of one’s intent to change one’s election under the Plan because of a newly acquired dependent. Although the applicant argued that the RCSBP guidance he received in 2001 is confusing, the

¹³ U.S. COAST GUARD, COMDTINST M1000.6A, PERSONNEL MANUAL, Art. 18.F.6.b. & c. (Change 40, Oct. 2005); U.S. DEPARTMENT OF DEFENSE, FINANCIAL MANAGEMENT REGULATION 7000.14-R, vol. 7B, chap. 43, para. 430303.E. (“Spousal Concurrence”).

¹⁴ See *Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984).

¹⁵ U.S. CONSTITUTION, amend. V (“No person shall be ... deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.”).

¹⁶ *Holmes v. United States*, 98 Fed. Cl. 767, 782 (2011) (holding that a court order awarding SBP benefits to a former spouse pursuant to a divorce “does not, on its own, cause unvested government benefits to vest” and that “[t]he BCNR followed these limiting conditions in concluding that neither Mr. Holmes nor Ms. Noreen Holmes had fulfilled the statutory requirements to elect SBP former-spouse coverage”); *Schism v. United States*, 316 F.3d 1259, 1268 (Fed. Cir. 2002) (“Benefits for retired military personnel—and for civilian retired federal employees ...—depend upon an exercise of legislative grace, not upon principles of contract, property, or ‘takings’ law.”); *Zucker v. United States*, 758 F.2d 637, 640 (Fed. Cir. 1985) (explaining that federal workers’ “entitlement to retirement benefits must be determined by reference to the statute[s] and regulations governing these benefits, rather than to ordinary contract principles”); *Lynch v. United States*, 292 U.S. 571, 577 (1934) (“Pensions, compensation allowances, and privileges are gratuities. They involve no agreement of parties; and the grant of them creates no vested right. The benefits conferred by gratuities may be redistributed or withdrawn at any time in the discretion of Congress.”).

Board finds no ambiguity whatsoever in the guidance's instruction that "[i]f you have no spouse or children at the 20 year point, and later acquire a spouse and/or children you may elect to enroll your new beneficiaries in the RCSBP. You must request enrollment in writing, **within one year** of obtaining a spouse and/or child. A copy of the marriage and/or birth certificate must accompany request." Nor has he shown that active duty members receive clearer instructions on what to do regarding their SBP election if they acquire a new dependent after retiring. Although the Board agrees with the applicant that the Coast Guard should have an automatic reminding system that reminds retirement-eligible reservists of the opportunity to change their RCSBP elections after they acquire a new dependent—even if they only notify their unit SPO of the new dependent—the applicant's failure to remember the guidance and to elect coverage for his new spouse is not rendered unjust because of the shortcomings in the Coast Guard's policy and technology in this regard.

10. Accordingly, the applicant's request should be denied.

[ORDER AND SIGNATURES APPEAR ON NEXT PAGE]

ORDER

The application of xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx, USCGR, for correction of his Coast Guard military record is denied.

Donna M. Bivona

Reid Alan Cox

Adrian Sevier