



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

BAN
Docket No. 09561-09
19 March 2010

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
(2) HQMC memo 1760 MMSR-6K of 18 Nov 09
(3) Memo from [REDACTED] dtd 5 Feb 2010

1. Pursuant to the provisions of reference (a) Subject, hereinafter referred to as Petitioner, filed enclosure (1) with this Board requesting, in effect, that the applicable naval record be corrected to show a timely written request for conversion from spouse to former spouse coverage under the Survivor Benefit Plan (SBP) within one year of his divorce.

2. The Board, consisting of Messrs. Pfeiffer, Zsalman, and George, reviewed Petitioner's allegations of error and injustice on 22 February 2010 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. Before applying to this Board, Petitioner exhausted all administrative remedies available under existing law and regulations within the Department of the Navy.

b. Petitioner married [REDACTED] on 10 October 1983.

c. On 1 May 1997, Petitioner was transferred to the Fleet Reserve and he elected "spouse only" coverage in the SBP program, enclosure (2).

d. On 21 July 2004, Petitioner and [REDACTED] were divorced. Their separation agreement contained a provision that contemplated continued participation in the SBP.¹ However, neither [REDACTED] nor Petitioner took the action required within one year following their divorce to continue coverage.

e. In November 2008, approximately four years after Petitioner's divorce, [REDACTED] attorney submitted an election to the Defense Finance Accounting Service (DFAS), seeking to "deem" a former spouse election for SBP. However, since the request was submitted after the one-year deadline, DFAS did not honor the request and furthermore, issued Petitioner a refund of all SBP premiums that had been paid since the date of his divorce.

f. On 13 October 2009, Petitioner submitted a request to the Board for Corrections of Naval Records (BCNR) requesting a change to the record to show that he made a timely request to continue SBP coverage. He agreed to payback all funds that were returned to him, (enclosure (3)).

g. By enclosure (2), Headquarters, United States Marine Corps recommended that no relief be granted, stating that neither Petitioner nor [REDACTED] took the action required to continue coverage within one year of their divorce. Moreover, DFAS has already refunded Petitioner all the premiums paid since his divorce.

¹ The laws and regulations implementing the SBP specifically permit a retiree to maintain a survivorship annuity benefit for a former spouse after divorce. The "former spouse" benefit may be maintained 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. Section 1448 (b)(3)(A)(i) - (iii), or (b) in cases where the retiree will not or does not make the appropriate selection, the former spouse makes an election through a process known as a "deemed election." The statute provides that the retiree shall be deemed to have made a "former spouse" election if the Secretary concerned receives the following: (i) A written request, deemed to have been made, and (ii) a copy of court order or other official statement, regular on its face, which requires such election. See 10 U.S.C Section 1450 (f)(3)(A). Additionally, the deemed election request must be received within one year of the date of divorce.

CONCLUSION:

Upon review and consideration of all the evidence in the record, the Board concludes that Petitioner's request warrants favorable action. The Board determined that neither Petitioner nor the former spouse were aware of the requirement to take action to continue SBP within one year of their divorce. Petitioner thereafter, made a request for a correction to the Board and provided evidence that his separation agreement contained a provision requiring continued SBP coverage for his former spouse. The Board also noted that Petitioner provided a notarized statement that he was willing to pay back the refunded premiums and to have the monthly premiums taken out of his retirement pay. Therefore, the Board finds that in light of these circumstances, there is no significant disadvantage to the naval service by allowing Petitioner to change his SBP election from spouse to former spouse. Accordingly, the Board concludes that the record should be corrected to show that Petitioner submitted, in a timely manner, a request changing his SBP coverage from spouse to former spouse within one year of his divorce.

RECOMMENDATION:

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

a. Petitioner executed a written request for conversion from spouse to former spouse SBP coverage, at the same level of coverage as previously elected, naming [REDACTED] as the sole beneficiary. The request was received by cognizant authority and became effective 22 July 2004, the day following the date of divorce.

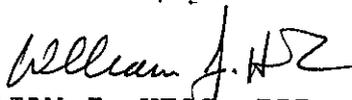
b. The request was in compliance with a court order.

c. Petitioner is responsible to pay the retroactive costs that are due a result of the election described above. The total sum of costs and method of payment will be determined by the Defense Finance and Accounting Service. No waiver of the costs will be granted.

d. That a copy of the Report of Proceedings, be filed in the Petitioner's naval record.

4. Pursuant to Section 6(c) of the revised Procedures of the Board for Correction of Naval Records (32 Code of Federal Regulations, Section 723.6(c)) 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.

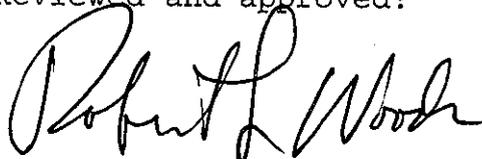
ROBERT D. ZSALMAN
Recorder


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:

 4/1/10
Assistant General Counsel
(Manpower and Reserve Affairs)