



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

BAN
Doc No. 03362-10
12 October 2010

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

Subj: REVIEW OF NAVAL RECORD [REDACTED]

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

Encl: (1) DD Form 149 w/attachments
(2) Headquarters United States Marine Corps (HQMC) memo
1760 MMSR-6K of 21 Jun 10
(3) Email btwn [REDACTED] and [REDACTED]
[REDACTED] BCNR dtd 9 Jul 10
(4) Affidavit of [REDACTED] dtd 27 Mar 10

1. Pursuant to the provisions of reference (a) 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) electing [REDACTED] as the sole beneficiary.

2. The Board, consisting of Messrs. Pfeiffer, Zsalman, and George, reviewed Petitioner's allegations of error and injustice on 31 August 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. The Board also considered an advisory opinion provided by Headquarters United States Marine Corps, attached as enclosure (2) that recommended no relief be granted.

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 24 May 1980. On 2 September 2003, while serving on active duty, Petitioner divorced [REDACTED]. Under the terms of the divorce, Petitioner was to "maintain the maximum amount of Survivors Benefits for the benefit of the [former spouse [REDACTED]]."¹ However, Petitioner failed to notify the Defense Finance Accounting Service (DFAS) within one year of his divorce of his election for "former spouse" SBP coverage, and his former spouse, [REDACTED] failed to make a timely deemed election.

c. On 5 August 2006, while still on active duty, Petitioner married [REDACTED]

d. In May 2008, Petitioner retired from naval service. In conjunction with his retirement, he submitted a DD Form 2626 (Data for Payment of Retired Personnel) seeking to elect "spouse" SBP coverage at the reduced amount of \$500.00. However, because of a defect in the form,² he was automatically-enrolled at the full base amount. Because he was married, he was enrolled in the "spouse" category of coverage. Petitioner has paid costs or premiums under the spouse category since his retirement. See enclosure (1).

e. In March 2010, Petitioner applied to the Board to correct his record to show that he elected "former spouse" coverage within one year of his divorce. Petitioner states that the failure to elect "former spouse" coverage was made because

¹ The laws and regulations implementing the SBP specifically permit a service member or 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. § 1448 (b) (3) (A) (i)-(iii)), or (b) in cases where the retiree will not or does not make the appropriate election, 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, from the former spouse requesting that such an election be 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. § 1450 (f) (3) (A). Additionally, the deemed election request must be received within one year of the date of divorce. 10 U.S.C. § 1450 (f) (3) (C).

² Petitioner failed to check an election under block 26 of the DD Form 2656.

he simply did not understand the correct method of electing "former spouse" coverage. Petitioner's current spouse, [REDACTED] concurs with Petitioner's request to change his SBP election from spouse to former spouse. See enclosures (3) and (4).

f. By enclosure (2), HQMC recommended that no relief be granted. HQMC bases its recommendation on two grounds. First, the former spouse [REDACTED] failed to notify the Defense Finance and Accounting Service of her intent to "deem" an election within one year of the divorce as required under 10 U.S.C. § 1450 (f)(3)(A). Second, at the time of his retirement, Petitioner demonstrated his intent to provide coverage for his spouse, [REDACTED] at the reduced amount of \$500.00".

CONCLUSION:

Upon review and consideration of all the evidence in the record, the Board concludes that Petitioner's request warrants favorable action. The Board understood and carefully considered the comments made in enclosure (2). However, the Board found that the following factors militated in favor of relief.

Petitioner's divorce order stipulated that he would provide "former spouse" SBP protection; he has paid premiums each month since his retirement at the full base amount; now that he knows the correct procedures to elect former spouse SBP coverage he has reconfirmed his desire/intent to provide "former spouse" SBP coverage; and although Petitioner has remarried, his current spouse concurs with his decision to honor his state divorce decree by maintain SBP coverage for his former spouse; and finally, because the amount of time that elapsed between the retirement and the application is relatively short, the burden on the agency of granting the request is small compared to the potential burden of resolving a future claim by the former spouse after the retiree's eventual death. For these reasons, the Board finds that, as an exception to policy, Petitioner's request should be granted favorable action.

RECOMMENDATION:

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

a. Petitioner executed a written request to elect "former spouse" SBP coverage, at the full base amount naming [REDACTED] as the sole beneficiary. The request was received by [REDACTED]

cognizant authority on 3 September 2003, the day following the date of divorce.

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

c. Upon his retirement on 1 May 2008, Petitioner was enrolled in the Survivor Benefit Plan in the "former spouse" category of coverage with [REDACTED] as the sole beneficiary.

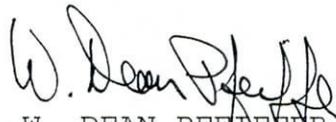
d. That a copy of the Report of Proceedings, be filed in the Petitioner's naval record.

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:


ROBERT L. WOODS
Assistant General Counsel
(Manpower and Reserve Affairs)
1000 Navy Pentagon, Rm 4D548
Washington, DC 20350-1000

10/22/10