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DECISION

THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D.C. 20548

FILE: B-205173 DATE: June 9, 1982

MATTER OF: Chief Warrant Officer Paul H. Schmelzer, USN, Retired

DIGEST: A Navy warrant officer who retired prior to the effective date of the Survivor Benefit Plan was in a divorced status during the 18-month period to elect to participate in the Plan, but his divorce was later set aside by a court of competent jurisdiction. In those circumstances an election made by the retiree shall be considered valid if made within a reasonable period from the time that the voidance of the divorce decree properly established the previous existence of the marriage. For purposes of computing reduction of retired pay, the effective date of the election is the first day of the first calendar month following the month in which the election is received by the Secretary of the Navy. The member's wife shall be considered an eligible spouse beneficiary from the time of the election.

This action is in response to an August 28, 1981 request from the Disbursing Officer, Navy Finance Center, Cleveland, Ohio, for an advance decision concerning the validity of an election to participate in the Survivor Benefit Plan made by Chief Warrant Officer Paul H. Schmelzer, USN, Retired. Should our decision be that Mr. Schmelzer made a valid election, guidance is also requested as to the date that costs of participating in the Plan should be deducted from his retired pay, and the date that his wife, Mrs. Edna M. Schmelzer, becomes an eligible spouse beneficiary. For the reasons set out below, we conclude that Mr. Schmelzer made an effective election on June 24, 1981, that costs of the Plan should be deducted from his retired pay based upon the effective date of that election (i.e., the first day of the first calendar month following the month in which his election was received by the Secretary of the Navy), and that Mrs. Schmelzer was an eligible spouse beneficiary at the time of the election.

The matter has been assigned control number DO-N-1373 by the Department of Defense Military Pay and Allowance Committee.

Paul and Edna Schmelzer were married in Astoria, Oregon, on May 3, 1930. Mr. Schmelzer retired from the Navy on February 1, 1949, and on September 25, 1968, he obtained a Nevada divorce from Mrs. Schmelzer. It appears that in 1980 Mrs. Schmelzer filed an action for a declaratory judgment in a circuit court in Oregon, where apparently both Mr. and Mrs. Schmelzer were residents, seeking to have the Nevada divorce ruled invalid. On October 13, 1980, Mrs. Schmelzer was awarded a default judgment by the Oregon circuit court, declaring the Nevada divorce decree invalid and void. On June 6, 1981, Mr. Schmelzer submitted an election for Survivor Benefit Plan coverage, listing Mrs. Edna M. Schmelzer as his wife, and showing the same address in Astoria, Oregon, for himself and Mrs. Schmelzer. No previous election under the Plan had been made by Mr. Schmelzer.

For purposes of this case the Survivor Benefit Plan, established under 10 U.S.C. §§ 1447-1455, is applicable to an individual, such as Mr. Schmelzer, who was entitled to retired pay on the effective date of the Plan (September 21, 1972) if he was married on the effective date of the Plan and elected coverage before the expiration of an 18-month period, March 20, 1974. See section 3(b) of Public Law 92-425, approved September 21, 1972, 86 Stat. 706, as amended, 10 U.S.C. § 1448 note (1976). The Plan also applies to such retirees who were unmarried on the first anniversary of the effective date of the Plan but who later become married and elect coverage within 1 year of the marriage. See section 3(b), Public Law 92-425, and 10 U.S.C. § 1448(a)(5) (Supp. III 1979).

As a general rule, we recognize that where a court of competent jurisdiction voids a decree of divorce, the effect is as though the divorce had never taken place: the marriage is retroactively reinstated. See Matter of Cowan, B-186676, October 28, 1976. Application of this rule to the present case, however, would mean that Mr. Schmelzer, who was already retired on the effective date of the Plan, would be considered to have been

"married" at the first anniversary of the effective date of the Plan, and would have had to elect coverage before the expiration of the 18-month period ending March 20, 1974. He did not make such an election, considering himself to be in a divorced status at the time, and indeed could not have done so. In addition, because Mr. and Mrs. Schmelzer chose to effect their reconciliation through an annulment of their divorce, rather than through a remarriage, they cannot avail themselves of the later-marriage election privilege of a retiree, available under section 3(b) of Public Law 92-425, and 10 U.S.C. § 1448(a)(5). See Matter of Goss, 57 Comp. Gen. 98 (1977).

Because of the confusion as to the marital status of Mr. and Mrs. Schmelzer, and because the method used to effect their reconciliation does not fall precisely within the statutory framework, strict adherence to a rule of retroactive marriage reinstatement would have the effect of denying the benefits of the Survivor Benefit Plan to the very person the Congress intended to protect. It would not be consistent with that intention to hold a member to an 18-month time limitation for election, where he in fact did not know that he was married at the time. Recognizing the member's dilemma, we consider that, once the Schmelzer's marital status was cleared up, a Survivor Benefit Plan election, made within a reasonable time after the existence of the marriage is properly established, should be given full effect. As would be the case with a member who retired prior to the effective date of the Survivor Benefit Plan and who elects coverage based on a later marriage, Mr. Schmelzer's election, if otherwise correct, should be effective on the first day of the first calendar month following the month in which his election was received by the Secretary of the Navy. See 10 U.S.C. § 1448(a)(5).

A question remains as to the date that Mrs. Schmelzer becomes an eligible spouse beneficiary. Under the Plan, the phrase "eligible spouse beneficiary," as used in 10 U.S.C. § 1452(a), is defined in terms of the definition of "widow" or "widower" contained in 10 U.S.C. § 1447. Under that provision, the term "widow" includes a surviving spouse who, if not married to the member at the time he became eligible for retired or retainer pay, "was

married to him for at least one year immediately before his death," or "is the mother of issue by that marriage." For persons already retired on the effective date of the Plan, we have held that these two restrictions apply to the wife of a retiree not married to the retiree "at the time of initial election into the Plan," i.e., within the 18-month period ending March 20, 1974. See Matter of Metzler, 56 Comp. Gen. 1022, 1025 (1977).

As stated above, the legal effect of the voidance of the divorce decree in the case of the Schmelzers was to retroactively reinstate their marriage. Technically, therefore, Mrs. Schmelzer, having been married to her husband since the time that he became eligible for retired pay, was an eligible spouse beneficiary at the time of his election. In addition, application of the rule of retroactive marriage reinstatement would be consistent with the purposes of 10 U.S.C. § 1447(3) which was intended only to prevent surviving spouses to qualify on the basis of "death bed" marriages. See Metzler at 1024-25.

Accordingly, for the above reasons, we conclude that Mr. Schmelzer made an effective election into the Plan on June 24, 1981; that deductions from his retired pay should be based on the effective date of that election, i.e., the first day of the first calendar month following the month in which his election was received by the Secretary of the Navy; and that Mrs. Schmelzer was an eligible spouse beneficiary at the time of the election.

for Milton J. Socolar
Comptroller General
of the United States