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8 **UNITED STATES OF AMERICA**
9 **MERIT SYSTEMS PROTECTION BOARD**

10
11 Sherry Brooks Burton,)
12 Appellant,) Docket No. SF-0831-02-0378-I-1
13 vs.) **PETITION FOR REVIEW OF**
14 Office of Personnel Management,) **INITIAL DECISION**
15 Agency.)
16 (CSF 2 718 357))
17

18 **I. INTRODUCTION**

19 On August 16, 2002, the Merit Systems Protection Board, the Honorable Craig A. Berg,
20 administrative judge, presiding, issued its Initial Decision in this matter. The Initial Decision
21 focuses on the facts and the law primarily as they pertain to language in a certain Qualified
22 Domestic Relations Order ("QDRO"). The conclusion reached in the Initial Decision was that
23 appellant should be denied survivor annuity benefits as the former spouse of James W. Burton.
24 The rationale of the decision was that the language utilized in the QDRO did not satisfy the
25 specificity requirements established by 5 U.S.C. § 8339(j).

26 In this petition, appellant stands by her position that the language utilized in the QDRO
27 satisfied the statutory requirements. For that reason, appellant will devote a section of this
28 petition to that language and the application of the relevant law. However, appellant relegates

1 the arguments she makes in connection with the language in the QDRO to secondary status. As
 2 her primary argument, appellant will focus on the timing sequence of the late Mr. Burton's
 3 retirement, divorce, and death, as that sequence relates to certain notice requirements imposed on
 4 the government with respect to re-election of designation of benefits to a retiree's spouse. See, 5
 5 U.S.C. § 8339. The sequence of events demonstrates that appellant's application for spousal
 6 annuity benefits should be granted because of the government's not having complied with certain
 7 requirements of 5 U.S.C. § 8339.

8 **II. THE FACTS.**

9 The underlying facts appear to be undisputed. For purposes of the present petition,
 10 appellant submits that the most important of those facts are the following:

11	8/18/75	James W. Burton begins his government employment.
12	12/6/80	James W. Burton and Sherry B. Burton are married.
13	2/19/00	James W. Burton and Sherry B. Burton separate.
14	11/16/00	James W. Burton signs Application for Immediate Retirement, initialing choice 1(a) on the "Standard Form 2801," requesting the reduction of his annuity in order to provide for a survivor annuity for his spouse.
15	1/10/01	Date of "Received" stamp on Application for Immediate Retirement by USDA NEC, Payroll Section.
16	2/27/01	Effective date of dissolution of marriage of James W. Burton and Sherry B. Burton, as established by terms of <i>nunc pro tunc</i> judgment of 5/16/01.
17	5/16/01	Entry of order dissolving marriage of James W. Burton and Sherry B. Burton, with <i>nunc pro tunc</i> effective date of 2/27/01. <i>Nunc pro tunc</i> order effective provides that Sherry B. Burton is "to receive one-half of the community interests in [James W. Burton's] retirement pension, according to the <i>Brown</i> rule." Subsequent language in the same order establishes that the court is to retain jurisdiction relating to retirement benefits and possible QDRO.
18	5/25/01	Attorney Sheila M. Kornblum, on behalf of Mrs. Burton, sends letter to O.P.M. requesting approval of draft QDRO.
19	6/1/01	O.P.M. sends letter to Attorney Kornblum, indicating that it would not review draft language in advance, and referring her its publication entitled "A Handbook for Attorneys."
20	6/5/01	Attorney Kornblum sends certified copy of <i>nunc pro tunc</i> dissolution order to O.P.M.
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1 2 3	8/14/01	Attorney Kornblum speaks with Mr. Ralph Daniels in O.P.M.'s Court Order Benefits Section, and is told that a certified copy of the QDRO signed by the judge is needed by the O.P.M.
4	8/16/01	Superior Court enters QDRO order.
5	8/20/01	Attorney Kornblum writes to Mr. Ralph Daniels of O.P.M., forwarding certified copy of QDRO order.
6	11/15/01	Mrs. Burton writes to Mr. Ralph Daniels at O.P.M., requesting information and action on the QDRO.
7	12/16/01	James W. Burton dies.
8 9 10 11 12 13 14	12/??/01	O.P.M. sends James W. Burton a Notice of Annuity Adjustment pertaining to his payment of 1/2/02 (Exhibit A). The Notice states that a monthly survivor annuity would be payable in the event of Mr. Burton's death in the amount of \$1,679. The Notice contains language with respect to the right of a retiree to elect a reduced annuity to provide a survivor annuity for a former spouse. According to affidavit of Donna G. Lease of O.P.M. dated 5/2/02, such general notices regarding survivor elections were sent to all annuitants on an unspecified date in December of 2001. Ms. Lease's affidavit further states that the method of mailing was to provide a so-called "Master Annuity Roll" to a private contractor specializing in mass mailings.
15 16	12/27/01	Mrs. Burton sends letter to O.P.M., informing it of death of James W. Burton, and again requesting that it take action with respect to Court orders.
17 18	12/31/01	Mrs. Burton calls O.P.M. to telephonically inform O.P.M. of the death of Mr. Burton. An O.P.M. official informs Mrs. Burton during the phone call that death benefit application forms will be sent to her within two to three weeks.
19 20 21 22 23	1/25/02	U.S. Postal Service places forwarding label on the Notice of Annuity Adjustment addressed to Mr. Burton, forwarding the correspondence from its initial address in New Cuyama, California, to an address Portola, California. The date of the forwarding label was more than one month after Mr. Burton's death, which proves that he could not have received it. There does not appear to be any information on the Notice which would establish the date of its being mailed.
24 25 26 27 28	1/30/02	Not having received any further correspondence from O.P.M., Mrs. Burton calls O.P.M. to report that applications for death benefits have not been received. Mrs. Burton is informed by O.P.M representative during the call that because there are court orders involved, a paralegal would have to review the court orders for compliance with its requirements.

1/31/02	Athena Rodgers, O.P.M Paralegal Specialist. writes to Mrs. Burton, informing her that the court orders are not acceptable for processing for Civil Service retirement benefits, and that the application for benefits would therefore be denied.
2/5/02	U.S. Forest Service District Ranger Sharon R. Sprouse sends letter to Mrs. Burton advising her that she must move out of her home in the Los Prietos Mobile Home Park, in the Los Padres National Forest.
2/6/02	Mrs. Burton sends O.P.M. her initial request (Exhibit B) that it reconsider its ruling.
3/19/02	Elizabeth Roberts, O.P.M. Benefits Specialist, writes to Mrs. Burton in response to Mrs. Burton's February 6 reconsideration request (Exhibit C). Ms. Roberts restates O.P.M. rejection of the application, based on a conclusion that the QDRO of 8/16/02 does not comply with the requirements of 5 U.S.C. § 8341(h)(1) and (4).
4/16/02	Mrs. Burton sends letter (Exhibit D) to M.S.P.B., making detailed arguments as to why the QDRO should be accepted for processing, and further arguing that by its dilatory handling of her application, O.P.M. failed to abide by the provisions of 5 C.F.R. § 838.723. Mrs. Burton's argument in that regard is that O.P.M.'s failure to timely respond during 2001 deprived her late husband of knowledge that there was a problem, and thus deprived him of an opportunity even to attempt to correct such problems.
5/14/02	Mr. Michael Shipley, O.P.M. Agency Representative, sends letter to Administrative Judge Craig A. Berg, explaining the March 19 decision of his office to reject Mrs. Burton's application. The focus of Mr. Shipley's letter is on the issue of whether the August 2001 order is acceptable for processing under 5 C.F.R. § 838.806.
5/20/02	Mrs. Burton sends request for discovery to O.P.M (Exhibit E).
6/4/02	O.P.M. responds to discovery request. Response includes affidavit of Ms. Donna G. Lease of O.P.M. with respect to mailing of notices related to civil service annuity payments (Exhibit F).
6/20/02	Mrs. Burton sends Statement of Facts and Issues to Administrative Judge Craig A Berg. Statement addresses in detail the dilatory nature of O.P.M.'s handling of her application, and sets out in detail the facts of her case. It also addresses in detail the QDRO/modification issue under § 8341(h), and the required notice to annuitants, citing <i>Lillian C. Jones v. O.P.M.</i> (The letter is actually erroneously dated June 20, 2001.)

1 2 3 4	7/8/02	Mrs. Burton writes to Judge Berg, arguing in favor of the granting of her application for survivor annuity. The letter focuses on the question of whether the terms of the QDRO were in compliance with § 8341. However, it also cites <i>Mroz v. O.P.M.</i> and <i>Jones v. O.P.M.</i> and refers to the issue of the government’s mailing of required notices to annuitants raised in those cases.
5 6 7	7/10/02	Agency Representative Michael Shipley of O.P.M. sends letter to Judge Berg concerning issues raised in a certain “Summary of Telephonic Prehearing Conference.” Position of O.P.M. focuses on language of QDRO, with no mention of notice requirements imposed on government under 5 U.S.C. § 8339.
8 9	7/12/02	Mrs. Burton writes to Judge Berg, presenting arguments concerning O.P.M.’s letter of 7/10/02 with respect to Mr. Burton’s signing or agreeing, at least implicitly, to the language in the QDRO.
10 11 12 13 14 15 16 17	8/16/02	Judge Berg issues an eleven-page decision denying benefits. The decision focuses on the content of the order of dissolution and the QDRO, and concludes that those orders are insufficient to be processed for survivor benefits. The decision observes, at pages 10-11, that Mr. Burton could not have received any notice regarding survivor elections between the date of his divorce and the date of his death. However, it does not discuss, or even mention, the relationship between the lack of such notice to Mr. Burton, and the notice requirements imposed on the government under 5 U.S.C. § 8339. More specifically, the decision does not consider whether the fact that Mr. Burton did not receive such notice leads to the conclusion that the government failed to comply with the notice requirements in this case.

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19 **III. OVERVIEW OF RELEVANT LAW WITH RESPECT TO CIVIL SERVICE**
20 **RETIREMENT BENEFITS.**

21 The language of and interactions among the statutes pertaining to spousal retirement
22 benefits are confusing and far less than crystal clear. See, *Belanger v. O.P.M.*, 1 F.3d 1223 (Fed.
23 Cir. 1993.) The starting point is that a retiring civil service employee may elect to provide a
24 survivor annuity benefit to his spouse. 5 U.S.C. § 8339(j)(1). Such an election is irrevocable. 5
25 U.S.C. 8339(j)(1). It results in a reduction in the retiree’s annuity. 5 U.S.C. § 8339(j)(1).

26 One case has indicated by way of *dicta* that a retiree’s divorce following his retirement
27 extinguishes an election made at retirement. See, *Holder v. O.P.M.* 47 F.3d 412, citing 5 U.S.C.
28 § 8339(j)(5)(A) (1988). Notwithstanding the *Holder* court’s observation, the statute itself does

1 not speak directly in terms of a retiree’s divorce extinguishing an election made at retirement.
2 Rather, it provides that upon a retiree’s divorce, there is to be an immediate termination of the
3 reduction in the annuitant’s benefits to fund the survivor annuity benefits. See, 5 U.S.C. §
4 8339(j)(5)(A)(ii). It is only by negative inference from this language, with no independent
5 analysis, that the *Holder* court made its observation in *dicta* concerning the effect of the statute.

6 Notwithstanding an annuitant’s divorce and the requirement of § 8339(j)(5)(A)(ii), a
7 reduction in the annuitant’s monthly retirement benefits remains in effect post-divorce if the
8 spouse is entitled to a survivor annuity under 5 U.S.C. § 8341(h). 5 U.S.C. § 8339(j)(5)(A)(ii).
9 The interplay between § 8339 and 8341 provide the basis for much litigation concerning
10 QDRO’s and their specific language. Section § 8341(h)(1) provides that a former spouse of a
11 deceased annuitant is entitled to a survivor annuity to the extent provided in 5 U.S.C. §
12 8339(j)(3). Section 8339(j)(3), in turn, provides that “an employee or Member [of Congress]
13 who has a former spouse may elect” to provide a survivor annuity at the time of retirement or
14 within two years after dissolution. 5 U.S.C. § 8339(j)(3).

15 The O.P.M. has a statutory obligation to annually notify annuitants of the right of election
16 under 5 U.S.C. § 8339(j)(3). 5 U.S.C. § 8339 notes; *Brush v. O.P.M.*, 982 F.2d 1554 (Fed. Cir.
17 1992); *Wood v. O.P.M.* 241 F.3d 1364 (Fed. Cir. 2001). The required notice to annuitants is
18 mandatory. 5 U.S.C. § 8339 notes; *Brush v. O.P.M.* supra. If the such notice is not provided,
19 O.P.M. cannot deny the annuity even if the annuitant does not make a formal election during the
20 applicable time period, so long as there is some evidence that the employee wished his former
21 spouse to receive the annuity. *Wood v. O.P.M.* 241 F.3d 1364 (Fed. Cir. 2001); see, *Vallee v.*
22 *O.P.M.*, 58 F.3d 613 (Fed. Cir. 1995); *Brush v. O.P.M.*, supra.

23 The government has the burden of proof with respect to its having provided the
24 mandatory notice to the annuitant. *Brush v. O.P.M.*, 982 F.2d 1554 (Fed. Cir. 1992). In *Brush*,
25 the court held that the burden is on O.P.M. to show that the notice was actually sent, and also to
26 offer proof as to the contents of the notice. *Brush*, 982 F.2d at 1561. Once O.P.M. establishes by
27 preponderance of the evidence that notice was actually sent, the appellant is burdened with
28 proving that the particular annuitant did not receive the notice. (*Id.*) The Merit Systems

1 Protection Board must then determine whether the appellant's evidence overcomes the
2 presumption that the notice was received. (*Id.*) Evidence regarding the annuitant's conduct is
3 probative with respect to the question of whether the annuitant would have made the election in
4 question. (*Id.*)

5 In this case, Mr. Burton began receiving retirement annuity payments immediately upon
6 his retirement, which occurred on November 16, 2001. He elected at that time to provide
7 survivor annuity benefits. His divorce became final in on February 27, 2002, three months after
8 his retirement. Hence, at the time of his divorce, Mr. Burton was an annuitant. See, *Jones v.*
9 *O.P.M.*, 84 M.S.P.B. 504 (1999). Mr. Burton died on December 16, 2001.

10 From the time of Mr. Burton's retirement through to the date of his death, the government
11 continued to send him monthly retirement payments which were reduced by the amount
12 necessary to fund the survivor annuity. It did so notwithstanding its having notice of Mr.
13 Burton's divorce. Even if it is assumed that Mr. Burton himself did not notify the O.P.M. of the
14 divorce, O.P.M. had ample notice, well before the date of Mr. Burton's death. This so because at
15 the very least, such notice was effectively provided via the correspondence sent to O.P.M. by
16 appellant and her attorney, requesting that O.P.M. accept the dissolution orders for processing of
17 spousal benefits. During this time, for approximately three months before the divorce and ten
18 months after the divorce, the government continued to send Mr. Burton reduced payments. Mr.
19 Burton accepted such reduced payments, and never requested elimination of the continued
20 reduction.

21 The declaration of the government agent responsible for sending the notice to annuitants
22 does not specify a mailing date for the mass mailing she arranged, other than to state that it took
23 place in December of 2001. The U.S. Postal Service forwarding sticker placed on the envelope
24 shows that it was forwarded to the late Mr. Burton's address in Portola, California, in mid-
25 January of 2002, more than a month after Mr. Burton died. It is unclear whether Mr. Burton had
26 provided the government with a correct mailing address prior to December. However, the
27 forwarding sticker certainly makes it clear that Mr. Burton never received the notice prior to his
28 death.

1 **IV. TIMING OF INITIAL CLAIM, AND LACK OF RESPONSE FROM O.P.M.**

2 On May 25, 2001, Attorney Kornblum sent a copy of a draft QDRO for approval as to
3 form by O.P.M. That draft order was accompanied by a copy of the judgment of dissolution
4 entered May 16 *nunc pro tunc* to February 27. On June 1, O.P.M. responded with a form letter
5 stating that O.P.M. does not approve such documents in advance, and calling attention to the
6 availability of its Handbook for Attorneys. On August 16, 2001, the superior court entered the
7 QDRO. Ultimately, Judge Berg considered the language in the orders of May 16 and August 16,
8 and decided that neither satisfied the statutory requirements for processing for former spouse
9 benefits.

10 **V. DISCUSSION OF O.P.M.’S REJECTION OF CLAIM FOR BENEFITS, ITS**
11 **STATED RATIONALE, AND THE INITIAL DECISION OF ADMINISTRATIVE**
12 **JUDGE.**

13 On January 31, 2002, the O.P.M. made its initial rejection of appellant’s claim. Its letter
14 of that date provided the following rationale for doing so:

15 “*In accordance with Title 5, Code of Federal Regulations, § 838.806, if the*
16 *first order dividing marital property does not award a survivor annuity, then any*
17 *orders submitted after that order has been filed with the courts, is considered an*
18 *amended order. OPM does not accept amended orders for the purpose of*
19 *awarding survivor benefits. In your case, your Qualified Domestic Relations*
20 *Order that awards you survivor benefits, was issued after the first order dividing*
21 *marital property.*”

22 The first order dividing marital property was dated May 16, 2001, the
23 Qualified Domestic Relations Order was not filed with the Clerk of Courts until
24 August 16, 2001, thus making it an amended order per the above mentioned
25 regulation.”

26 The January 31 letter makes no mention of the death of Mr. Burton, or the notice requirements of
27 § 8339.

28 Some six months later, on July 10, 2002, in a letter to Judge Berg arguing in support of
O.P.M.’s position, an O.P.M. official wrote the following:

 “According to 5 U.S.C. § 8341(a)(1), there are two ways a former spouse
may be eligible for a survivor annuity. The first is an election that ‘expressly
provides’ for the former spouse survivor annuity under 5 U.S.C. § 8339(j)(3). The
second is in the terms of any decree of divorce or annulment of any court order or
court-approved property settlement agreement incident to such decree. The two
are exclusive of each other and are treated as such in the existing statute and
regulations. Therefore, it is incorrect to address or decide whether or not the
language of the QDRO ‘expressly provides’ for a former spouse annuity. The

1 QDRO cannot, and should not, be constituted as an election. Even if the board
2 looks at the QDRO as an 'election', please note that Mr. Burton did not sign the
3 QDRO. There is no evidence that he was aware of, or agreed to, the terms of the
4 QDRO.

5 "OPM determined that the QDRO was not acceptable for processing
6 because it was not the first order that divided the parties' property and it was
7 issued after Mr. James Burton's retirement. Claims of administrative error,
8 including misinformation, cannot estop OPM from applying statutory requirement
9 for retirement benefits. *OPM v. Richmond*, 496 U.S. 414 (1990)."

10 As with the January 31 letter, the July 10 letter does not discuss Mr. Burton's death or the notice
11 requirements of § 8339. This is problematic because three weeks prior to that date, on June 20,
12 Mrs. Burton had served on O.P.M. a copy of her Statement of Facts and Issues addressed to
13 Judge Berg. The statement of Facts and Issues raised the notice issue, citing *Jones v. O.P.M.*, 84
14 M.S.P.B. 504 (1999). The lack of discussion of the notice issue in O.P.M.'s July 10 letter is
15 unexplainable.¹

16 Consistent with the focus of O.P.M. on the QDRO issue, the Initial Decision of Judge
17 Berg similarly focuses on the language of the orders of May 16, 2001, and August 16, 2001, and
18 whether they satisfied the government's requirements for processing. Judge Berg decided in
19 favor of O.P.M. He concluded that neither of the two orders before him contained the requisite
20 language for O.P.M. to accept them for processing. Based on that determination, Judge Berg
21 rejected appellant's application.. Although the decision mentions at the outset the issue of the
22 change in content of the orders from one to the next, Judge Berg appears to have concluded that
23 he did not need to reach that issue in order to make his decision.

24 **VI. THE GOVERNMENT DID NOT TIMELY INFORM DECEDENT OF HIS
25 RIGHTS OF ELECTION UNDER 5 U.S.C. § 8339. FOR THAT REASON, THE
26 APPLICATION SHOULD BE APPROVED**

27 In *Brush v. O.P.M.*, 982 F.2d 1554 (Fed. Cir. 1992), the Court of Appeals considered a
28 case very similar to the case at bar. In *Brush*, the appellant sought former spouse survivor
annuity benefits. In *Brush*, the employee-husband retired in 1984. On his retirement forms, he

¹ Mrs. Burton again raised the notice issue in her filing with Judge Berg entitled "Statement of Facts and
Issues Regarding the Language of the QDRO," dated July 8, 2002. In that document, Mrs. Burton cites both *Jones*,
supra, and *Mroz v. O.P.M.*, 71 M.S.P.R. 299 (1996). Presumably Mr. Shipley, the author of the July 10 O.P.M.
letter, had not yet received Mrs. Burton's July 8 document before issuing the July 10 letter. However, O.P.M. has at
no point in this case briefed, or even commented on, the notice issue raised by Mrs. Burton.

1 elected to receive a reduced annuity in to provide a survivor annuity to Mr. Brush. The couple
2 divorced in November of 1987. Their divorce decree did not make any mention of survivor
3 annuity benefits or retirement benefits. Mr. Brush died in September of 1989, just under two
4 years after his divorce became final. During the period between Mr. Brush's divorce and his
5 death, O.P.M. did not provided Mr. Brush with any notice concerning his right to re-elect
6 survivor spouse benefits during the two years following his divorce. He had not made the post-
7 divorce election required in 5 U.S.C. § 8339(j) during. Mr. Brush never made such a re-election.

8 The *Brush* court found for the appellant. It first found that O.P.M.'s providing the notice
9 is mandatory under the statute. The court focused on the fact that at the time of Mr. Brush's
10 death, time remained in the two-year period. The court stated:

11 "When Brush died, there still was remaining time within which he could
12 have restated that choice. The happenstance of death is not an appropriate hook
13 upon which to hang a finding of deficiency in meeting this technical or 'paper'
14 requirement, when all substantive economic requirements have been met. Failure
15 of the agency to issue notice . . . prevent[ed] Brush from being notified of the
16 'paper' requirement, and conclusively so at the time of his death."

17 In footnote 11 of *Brush*, the court discussed the position of the O.P.M. that Mr. Brush's
18 death without having restated his election served to terminate the right of election. It observed
19 that the better argument was the exact opposite. Namely, that Mr. Brush's death before the
20 expiration of the two-year period served to irrevocably restate the election made at the time of
21 retirement:

22 "The accident of death, before that period expired, terminated his ability to
23 yav (sic) or nay that election. The stronger and more plausible inference is that
24 the election he had made, in writing in 1984, and with which he had complied in
25 every respect for five years, in fact **became irrevocably restated at the time of his
26 death**, which was within the two year period. We need not decide that question,
27 but this record strongly suggests the elements of an estoppel that might be
28 permitted through the crack left in the door by the language in *Office of Personnel
Management v. Richmond*, 496 U.S. 414 . . . [1990]." Emphasis added.

29 Member Slavet comments on *Brush*, with approval, in footnote 3 of her dissenting opinion in
30 *Simpson v. O.P.M.*, ___ M.S.P.R. ___, Docket Number PH-0831-00-0273-I-2. Another factor in
31 *Brush* which is also present in the present case is that in both cases, the couple had already
32 separated at the time the retiree made his initial election.

33 In *Mroz v. O.P.M.*, 71 M.S.P.R. 299 (1996), the Board considered another case similar to

1 the present case. In *Mroz*, as in the present case, the employee made a survivor annuity election
2 in favor of his then-spouse at the time of his retirement. Mr. Mroz apparently immediately began
3 to receive his own benefits. Mr. Mroz and his wife divorced some four years after his retirement,
4 and Mr. Mroz died approximately one year later. In considering the Mroz case, the Board
5 discussed in detail the requirements placed on the O.P.M. with respect to notices to annuitants as
6 to the right to elect to provide survivor annuities to former spouses.

7 The Board in *Mroz* then observed that the administrative judge in that case did not make
8 any findings with respect to whether the O.P.M. provided the annuitant with the required notice.
9 It therefore decided that the appeal must be remanded to the regional office for further
10 consideration of the issue. The Board instructed that upon remand, the administrative judge
11 should receive evidence from the parties with respect to the issue of O.P.M.'s compliance with
12 notice requirements. The Board then stated:

13 "If the evidence considered on remand shows that OPM did not comply
14 with the statutory notice requirements and the appellant's former spouse did not
15 attempt to restore his full annuity or take other action indicating that he did not
16 wish to provide a survivor annuity for her, the administrative judge ***must find that
the appellant is entitled to a former spouse survivor annuity.***" [Emphasis
added.]

17 Additional detailed discussion concerning the required notice to annuitants can be found
18 in *Simpson v. O.P.M.*, ___ M.S.P.R. ___, Docket No. PH 0831-00-0273-I-2 (August 14, 2002).
19 In particular, the dissenting opinion of Member Slavet in *Simpson* discusses in detail the content
20 of the notice of annuitants provided by O.P.M. The language in the notice utilized in the present
21 case is virtually identical to that considered in *Simpson*. At paragraph 15 of her dissenting
22 opinion, Member Slavet concludes that none of the notices provided to the annuitant in that case
23 explained to the annuitant the effect that his post-retirement divorce had on the election he made
24 at retirement. Member Slavet concludes that:

25 ". . . there is nothing in either notice indicating that Simpson's election at
26 the time of his retirement, which was in writing and received by OPM prior to the
deadline, was ineffective to satisfy this requirement."

27 Based on her analysis, Member Slavet would have found that O.P.M. failed to provide the
28 annuitant in *Simpson* with adequate notice of his election rights under 5 U.S.C. § 8339(j).

1 Member Slavet concludes that she therefore would have held that the appellant in that case had
2 established her entitlement to a former spouse annuity because of government's failure to provide
3 proper notice.

4 In *Wood v. O.P.M.*, 241 F.3d 1364 (Fed. Cir. 2001) the Court of Appeal considered a case
5 in which, as in the present case, a retiree elected to take a fully-reduced annuity in order to
6 provide the maximum survivor annuity to his spouse, who was then his wife. The couple in
7 *Wood* then divorced. Before the divorce became final, Mr. Wood wrote to the Office of
8 Personnel Management, requesting information concerning preservation of the survivor annuity.
9 Some time later, the divorce became final. One year after that, the O.P.M. provided Mr. Wood a
10 notice pertaining to his rights relating to retirement benefits. The notice informed Mr. Wood that
11 in order to preserve the survivor annuity, he must elect a survivor annuity for the former spouse
12 within two years after the marriage ended, and accept a reduced annuity payment accordingly.

13 The *Wood* court first noted that the providing of such notice is mandatory. See, *Brush v.*
14 *O.P.M.* 982 F.2d 1554, 1559 (Fed. Cir. 1992). As a result, as stated by the Court of Appeal in
15 *Wood*:

16 “. . . if the required notice is not provided, OPM cannot deny the annuity
17 even if formal election has not been made during the applicable time period, so
18 long as there is some evidence that the employee wished his former spouse to
19 receive the annuity.” *Wood v. O.P.M.*, 241 F.3d 1364.

20 Having made the threshold finding that the required notice was not provided, the Court of Appeal
21 then considered whether Mr. Wood had “adequately manifested his intension that his former
22 spouse receive the annuity.” The court concluded that Mr. Wood had done so, and that the
23 spouse should therefore receive the survivor annuity.

24 In this case, as in *Wood*, there is ample evidence to support a finding that Mr. Burton had
25 intended for appellant to receive the annuity after his death. He elected reduced benefits to
26 himself and elected survivor annuity benefit at the time of his retirement. Another important
27 factor supporting such an inference is that here, as in *Wood*, the retiree continued to receive a
28 reduced annuity. This fact alone is sufficient to justify a finding that the employee's intent was
to provide a survivor annuity for the former spouse. *Brush v. O.P.M.* 982 F.2d 1554, 1559 (Fed.

1 Cir. 1992); *Vallee v. O.P.M.*, 58 F.3d 613 (Fed. Cir. 1995); *Wood v. O.P.M.*, supra.

2 In the present case, the administrative judge apparently made certain findings of fact
3 concerning notice from the O.P.M. Unfortunately, the court did not apply the notice requirement
4 to those findings. Specifically, at page nine of the initial decision, the Court states:

5 “There is no evidence in the record that Mr. Burton received notice from
6 OPM after his divorce from the appellant on February 27, 2001, and before his
7 death on December 16, 2001, specifying that his annuity would continue to be
8 reduced to fund a survivor annuity unless he indicated a contrary intension. The
9 appellant acknowledges that the Notice of Annuity Adjustment she submitted that
10 provided such information was mailed by OPM in January, 2002, after Mr.
11 Burton’s death. HT; IAF, Tab 9 Exh. B. If OPM mailed similar Notices to
12 annuitants every January, the only Notice Mr. Burton would have received would
13 have been prior to his divorce, in January, 2001, and he would have had no reason
14 to take any action.”

15 Appellant respectfully submits that this finding is extremely important, but not for the reason
16 identified by the administrative judge. Rather, it is important because it demonstrates that the
17 government has not satisfied its obligation under 5 U.S.C § 8339 to inform the annuitant of his
18 rights of election under §§ 8339(j) and 8339(k)(2).

19 Applying these principles to the present case, appellant respectfully submits that the
20 Initial Decision is based upon different legal principles from those which should have been
21 applied. The correct principles are the notice requirements discussed in *Brush*, *Mroz*, *Wood*, and
22 the dissent in *Simpson*. As a result, the Board should, at the very least, remand this case to the
23 administrative judge for findings on the notice issue. Going one step further, appellant submits
24 that given the sequence of events described above, in particular the timing of the annuitant’s
25 death, his proven non-receipt of the Notice to Annuitants, his continued acceptance of reduced
26 benefits, and his death within the two-year period following the divorce, the government did not
27 satisfy its notice requirements in this case, as a matter of law. As a result, appellant should be
28 awarded survivor annuity benefits.

VII. THE QDRO EXPRESSLY PROVIDES FOR FORMER SPOUSE SURVIVOR ANNUITY.

As indicated above, appellant has consistently argued that the August 16 QDRO contains language which sufficiently “expressly provides” her with a former spouse annuity. Appellant makes no arguments in the present petition which have not been previously considered by the

1 administrative judge. However, should the notice issues argued above be determined not to carry
2 the day in appellant's favor, appellant respectfully requests that the Board review and reconsider
3 the Initial Decision with respect to the language in the QDRO, and its satisfaction or non-
4 satisfaction of the statutory requirements. Of course, should the Board accept appellant's
5 position with respect to the notice issue, it presumably will decide this matter on that issue, and
6 will not need to reach the issue of the specific language of the QDRO.

7 **VIII. THE POLICY CONSIDERATIONS UNDERLYING THESE STATUTES**
8 **SUPPORT THE POSITION THAT APPELLANT SHOULD BE AWARDED THE**
9 **ANNUITY.**

10 As the Board is aware, the framework for deciding this case is contained in the Civil
11 Service Retirement Spouse Equity Act of 1984 ("CSRSEA"). The act was adopted to protect
12 persons in the position of appellant. It is codified in "scattered sections" of 5 U.S.C. *Mroz v.*
13 *O.P.M.*, 71 M.S.P.R. 299 (1996). Among other things, it provides that the spouse of a federal
14 employee has a vested interest in the employee's retirement account, and that such an interest is
15 presumed to continue unless and until both spouses agree in writing to the contrary. 5 U.S.C. §
16 8339(j)(1). This essentially made it the employee's problem to demonstrate unfettered
17 ownership of retirement annuity payments by way of a writing signed by the non-employee
18 spouse, rather than the non-employee spouse's problem to demonstrate an ownership interest.

19 In order to avoid an administrative nightmare, the federal government established specific
20 rules to guide its pension personnel in considering the status of pension entitlements. Those
21 rules ensured that a divorcing couple could clearly present to the government the results of their
22 presumably arm's-length negotiations regarding pension rights. Where, as in the present case,
23 there is a question about precise compliance with those rules, the anomalous result too frequently
24 is that a system enacted to protect non-employee spouses is interpreted in such a way as to injure
25 the very persons it is designed to protect.

26 Appellant is a 54-year-old woman. She is young enough to have significant work years
27 ahead of her. But she has, along with her late husband, devoted twenty years of her life to her
28 husband's Forest Service employment. Appellant has limited employment skills. She has
extremely limited savings. As indicated in the attached copy of appellant's 2001 federal tax

1 return, her income for 2001 was less than \$15,000. Because she has not received retirement
2 annuity payments, appellant has already been forced to move from her home in Santa Barbara to
3 less-expensive housing some fifty miles distant, in Lompoc, California. She commutes that
4 distance to work in Goleta, near Santa Barbara. Once appellant's meager savings are depleted - a
5 matter of months - she will likely need to move in with her elderly mother in the hope of making
6 ends meet. If appellant succeeds in this petition, and begins to receive monthly spousal annuity
7 payments as a result, she will more than double her income. Much is at stake here.

8 A rejection of this petition will produce precisely the *opposite* result from that which
9 Congress intended in enacting the CSRSEA. Petitioner's late husband intended for her to receive
10 these benefits. She herself had a vested interest in the benefits. Appellant respectfully submits
11 that if the Board rejects this petition, it will have exalted form over substance, producing a result
12 which would be completely inconsistent with the intent of the CSRSEA, and would be grossly
13 unfair. The Board should not permit such a result to occur.

14 **IX. CONCLUSION**

15 For the reasons described above, appellant respectfully submits that the Board should
16 award her a former spouse annuity in this matter.

17 Dated: November 20, 2002



18 Dennis J. Shea,
19 Attorney for Appellant,
20 Sherry B. Burton

EXHIBIT A

NOTICE OF ANNUITY ADJUSTMENT

This notice informs you of a change in the amount of your payments. Please read the back of the notice. If you have any questions, call us or write to the address shown below.

GROSS MONTHLY ANNUITY		MONTHLY HEALTH INSURANCE PREMIUM		OTHER DEDUCTIONS OR ADDITIONS		NET MONTHLY ANNUITY	
OLD STATUS				LI	-3.03		
				17	-126.48		
				18	-97.50		
				19	-1.95		
				46	-20.82		
	2701.00	-130.01		31	-344.00		1977.21
NEW STATUS				LI	-3.03	35	-879.00
				17	-126.48		
				18	-97.50		
				19	-1.95		
				46	-20.82		
	2771.00	-130.01		31	-363.00		1149.21

*SEE BACK FOR CODES FOR OTHER DEDUCTIONS OR ADDITIONS.
UNITED STATES OFFICE OF PERSONNEL MANAGEMENT
RETIREMENT OPERATIONS CENTER
PO BOX 45
BOYERS PA 16017-0045

YOUR PAYMENT DATED: 01/02/2002

REFER TO THIS NUMBER WHENEVER YOU CONTACT OPM

CLAIM NUMBER

A3994355

Reason for adjustment. *You may use this notice as proof of your current rate of annuity.*

YOUR NEW GROSS MONTHLY ANNUITY REFLECTS THE 2.6% COST-OF-LIVING ADJUSTMENT. BY LAW, THE INCREASE IS ROUNDED DOWN TO THE NEXT WHOLE DOLLAR.

THE GROSS MONTHLY SURVIVOR ANNUITY CURRENTLY PAYABLE IN EVENT OF YOUR DEATH IS \$1679.

THE AMOUNT OF FEDERAL INCOME TAX WITHHELD FROM YOUR ANNUITY HAS CHANGED BECAUSE YOUR ANNUITY AMOUNT HAS CHANGED OR YOU HAVE SUBMITTED A REVISED WITHHOLDING REQUEST.

THE NET AMOUNT OF YOUR FEBRUARY 2002 PAYMENT WILL REFLECT THE CHANGE IN HEALTH INSURANCE PREMIUMS AND ANY OPEN SEASON CHANGE YOU MAY HAVE MADE.

To call our toll-free number, dial 1-888-767-6738. Within local Washington, DC, area, dial 202-606-0500.

*****AUTO** 3-DIGIT 932
 JAMES W BURTON
 15 BELL DR

Handwritten signature: James W. Burton

BURT776 934562010 1102 34 01/25/02
 NOTIFY SENDER OF NEW ADDRESS
 BURTON, JAMES
 PO BOX 1414
 PORTOLA CA 96122-1414



THIS STUB

The Federal Long Term Care Insurance Program (FLTCIP)
Will Be Here in 2002!
 If you're interested in receiving information about this exciting new insurance program to help you pay for your long term care needs, please call our contractor toll-free at 1-800-LTC-FEDS (1-800-582-3337) or register with them through the FLTCIP website at www.opm.gov/insur/ltc.
 The FLTCIP is not part of the Federal Employees Health Benefits Program or Medicare, which provide health insurance. It's a separate, completely new program providing long term care insurance. Most annuitants and their spouses will be eligible to apply. Successful applicants must show they are insurable by answering a number of questions about their health.
 Call or visit the website today!

CODES FOR OTHER DEDUCTIONS OR ADDITIONS

Deductions

01-09	Collection of Union or Membership Dues
10	Collection of Government Claim
11	Collection of Interim Payments
12	Collection of Annuity Overpayment
13	Collection of Annuity Waiver
14	Collection of Deposit or Redeposit for Civilian Service
15	Reduction for National Guard
17	Life Insurance to prevent reduction of Basic
18	Insurance for Additional Optional
19	Premiums for Family Optional
20	Checking/Savings Allotment
22	Collection of Retroactive Health Benefits Premiums
23	
24	Collection of Retroactive Medicare Premiums
25	Collection of Standard Optional Life Insurance Premiums
LI	Collection of an Erroneous Payment
27	
29	Collection of Military Deposit
31	Federal Income Tax
32	State Income Tax
33	Survivor Reduction Deposit
35	Garnishment
36	
37	Bankruptcy
38	Apportionment
39	
40	FERS Annuity Supplement Overpayment
44	Post-Retirement Marriage Deposit
45	U.S. Savings Bond(s), Association Withholding, Other Allotment
46	Basic Life Insurance

Additions

50	Government Claim Adjustment*
51	Interim Payment
52	Accrued Annuity Due*
53	Annuity Waiver Release*
54	Erroneous Payment Adjustment*
55	Refund of National Guard Deduction*
56	Refund of Union or Membership Dues*
57	Post-Retirement Basic
58	Additional Optional
59	Family Optional
66	Refund of Military Deposit*
67	FERS Annuity Supplement
68	Alternative Annuity Lump Sum*
69	Interest on pre-1957 Contributions Portion of Alternative Annuity Lump Sum*
70	Checking/Savings Allotment*
72	Retroactive Health Benefits Premium Adjustment*
73	
74	Retroactive Medicare Premium Adjustment*
75	Standard Optional Life Insurance Premium Refund*
77	Basic Life Insurance Premium Refund*
78	Post-Retirement Marriage Deposit Refund*
81	Federal Income Tax Adjustment*
82	Refund of State Income Tax*
83	Refund of Survivor Reduction Deposit*
85	Garnishment
86	
87	Bankruptcy
88	Apportionment
89	

*This additional amount is a one time only payment.

Survivor Annuity Benefits

1. Survivor Benefits for the Spouse You Were Married to at Retirement

Eligibility- You are eligible to elect a reduced annuity to provide a survivor annuity or an increased survivor annuity for your spouse if you 1) have been retired less than 18 months, 2) were married when you retired, 3) elected less than the maximum survivor annuity for your spouse at retirement, and 4) are still married to the same person.

Cost- A deposit is required to make this new election if your annuity has not been appropriately reduced since retirement. We will compute any deposit due after we receive your request to make an election. The election is cancelled if you do not pay the deposit after we notify you of the amount due. The deposit cannot be collected from your annuity.

Time Limits- Your request to make the new election must be received by OPM no later than 18 months after the date your annuity began. The election is valid only if any required deposit is paid no later than 18 months after your annuity began or within 30 days after OPM sends you a notice of the amount due, whichever is later.

How to Make an Election- Call or write to OPM at the address on this notice within the 18-month time limit, state that you want to make a new survivor annuity election for your spouse, and sign your request. We will send you detailed information about the effect of the election, the exact amount of your annuity if you decide to make the election, and an election form to sign and return to us if you want to take this action.

2. Survivor Annuity Benefits for a Spouse You Marry After Retirement

Eligibility and Time Limits- You are eligible to elect a reduced annuity to provide a survivor annuity benefit for a spouse you married after retirement if you send a signed request to OPM within 2 years after the date of your marriage. With some exceptions, retirees may also make this election within 2 years after a former spouse loses entitlement to a survivor annuity benefit; we will notify you if any exceptions apply to your situation.

Cost- If you meet the eligibility requirements stated above and decide to make the survivor annuity election, OPM will make an actuarial reduction to your annuity. This is a permanent reduction. In most cases, the actuarial reduction will be less than 5% of your annuity.

How to Make an Election- Call or write to OPM at the address on this notice within the two-year time limit, state the election you want to make, include proof of your marriage, and sign your request. We will send you detailed information about the effect of the election, the exact amount of your annuity if you decide to make the election, and an election form to sign and return to us if you want to take this action.

3. Survivor Annuity Benefits for a Former Spouse

Eligibility and Time Limits- With some exceptions, retirees are eligible to elect a reduced annuity to provide a survivor annuity for a former spouse if they send a signed request to OPM 1) within 2 years after the date the marriage ended by divorce or annulment or 2) within 2 years after the date another former spouse loses entitlement to a survivor annuity benefit. We will inform you if any exceptions apply to your situation. If you are married, your spouse must consent in writing to the former spouse election unless you request, and OPM approves, a waiver of the consent requirement.

To qualify for a survivor annuity, your former spouse must have been married to you for a total of at least nine months and must not have remarried before reaching age 55. However, a former spouse who was married to you for at least 30 years qualifies for a survivor annuity even though he or she remarries before reaching age 55.

Cost- If you meet the eligibility requirements stated above and decide to make the survivor annuity election, OPM will make an actuarial reduction to your annuity. This is a permanent reduction. In most cases, the actuarial reduction will be less

How to Make an Election- Call or write to OPM at the address on this notice within the two-year time limit, state the election you want to make, and sign your request. We will send you detailed information about the effect of the election, the exact amount of your annuity if you decide to make the election, and an election form to sign and return to us if you want to take this action.

4. Insurable Interest Survivor Annuities

If you elected an insurable interest survivor annuity benefit at retirement and need information about electing a survivor annuity for your spouse, call or write OPM at the address on this notice within 2 years after the date of your marriage. We will send you detailed information and an election form. If you are receiving a reduced annuity because of a court-ordered survivor annuity for a former spouse and have elected an insurable interest survivor annuity for your spouse, write to OPM within 2 years after your former spouse is no longer eligible for the court-ordered survivor annuity or dies. We will send you detailed information about the options available to you.

Sharing Information by Computer Matching

The information you furnish may be shared with other Federal, State and local government agencies through computer matching programs, even if you do not agree to the sharing of information. The law authorizes us to match computerized records with other agencies to verify whether a person qualifies or continues to qualify for benefits being paid by OPM or the agencies with which the matches are made. The records are also used to collect debts owed to other Federal and State agencies. The overall purpose is to prevent fraud, waste, and abuse in government programs.

If information from a computer match leads us to conclude that you are not entitled to a benefit, we will send you a written explanation and a notice about your due process rights.

Correcting Mailing Addresses

If the address on this form is not correct, you should inform us immediately of your mailing address. The Postal Service may not forward your mail from us in the future. Always remember to give us your correct mailing address, even if your payments are deposited in your financial institution, so that important information we send will be sure to reach you.

Payments Received After the Death of the Annuitant

All payments received from OPM to or for a person who has died must be returned to the Treasury Department. To return checks, please write "deceased" and the date of death on the check or the outside of the envelope and ask the Postal Service to return it to the Treasury Department.

If payments are deposited in an account in a financial institution, please inform the institution of the death. The Treasury Department and the financial institution will collect the payment from the account.

Also, please notify OPM about the death by calling or by writing to the address on this notice.

How to Contact OPM

To contact us about your benefits call our Retirement Information Office at 1-888-767-6738. Between the hours of 7:30 a.m. and 7:45 p.m. Eastern time, Customer Service Specialists are available to answer calls. Customers within local calling distance to Washington, DC, must contact us on 202-606-0500.

Be sure to have your retirement claim number when you call.

We provide information on the internet at <http://www.opm.gov/retire> and respond to email sent to us at retire@opm.gov.

EXHIBIT B

Sherry Brooks Burton
176 Paradise Rd.
Santa Barbara, CA 93105

Athena Rodgers
Paralegal Specialist
Retirement Operations Center
Office of Personnel Management
PO Box 45
Boyers, PA 16017

Re: James W. Burton
SSN 567 76 2838
CSA 3994355

February 6, 2002

Dear Ms. Rodgers:

I wish to take issue with your opinion that I am not entitled to survivor benefits. I have written to OPM about the QDRO and received no reply. My attorney has written to OPM about the QDRO and received no reply. If the QDRO was not acceptable, why was I not notified? Why was my attorney not notified? Jim elected survivor benefits for me and did not change the election after the divorce. Why was he not notified? Jim's annuity was reduced for survivor benefits. How could OPM have done that if they had no intention of paying me a survivor annuity? What is an amended court order? The QDRO is a part of the original Judgement.

Enclosed are copies of the Judgement entered May 16, 2001 in which the Court reserved jurisdiction over the CSRS retirement and the TSP savings account for the purpose of entering the QDRO, Article (1). The Attachment to Judgement was signed by Jim September, 2000.

The last hearing on the dissolution was February 27, 2001. My judgement was entered effective February 27, 2001. The Findings and Order of May 17, 2001 specifically reserved jurisdiction over the retirement account (item 7), "for the purpose of entering a QDRO." This Order was "merged with and [shall be] read as an integral part of the Judgement entered Feb. 27, 2001."

The QDRO was signed by Judge Jennings August 16, 2001. It had been sent to OPM earlier for approval, and returned without OPM approval, as OPM required the judge sign it first.

The QDRO is "intended to be an Order for division of Community Interest in CSRS Employee's Deferred income plan **from all funds/sources**." (AT III) "If participant dies before the effective date of his retirement benefit and before the effective date of distribution to alternate payee, and if alternate payee survives participant, then alternate payee shall be treated as "Surviving Spouse" of participant." (At A.(4)).

The Court still retains jurisdiction to enforce and clarify this order (C.)

The QDRO was sent to Ralph Daniels in your Court Ordered Benefits Section in August, 2001. Both my attorney and I wrote to him asking for confirmation and

acceptance of the QDRO. Mr. Daniels *never replied*. Had Mr. Daniels or OPM responded to these queries would the reply have been that the QDRO was not accepted? Would he have stated that I was not entitled to survivor benefits? What about the question of my receiving an interest in the annuity while Jim was still alive? I am also entitled to those funds.

Had OPM delared the QDRO invalid in a timely fashion I could have applied to OPM to have the survivor annuity reinstated. OPM did not give me a chance to do that.

Ms. Rogers, I ask for only what is due me. You refer to an amended Court Order. The QDRO is clearly part of the original Judgement. Since Mr. Daniels failed to reply to my attorney's requests for acceptance of the QDRO and my requests to him for information, I feel that OPM has done me a gross injustice. OPM denied me any opportunity to rectify a potential problem with its silence on a vital matter. Your regulations require me to respond to you within 30 days. Why is it that OPM feels no obligation to respond at all?

I request that OPM reverse its decision to deny me survivor benefits. It was Jim's intent that I have them. It is the Court's intent that I have them. I also request that OPM pay me my interest in Jim's annuity while he was still alive. Had OPM done its job in the first place, this situation would never have arisen.

OPM regulations require me to respond to you "within 30 calendar days from the date of OPM's initial decision." Kindly respond to me within 30 calendar days of the date of this letter.

Very Truly Yours,

Sherry Brooks Burton

EXHIBIT C



United States
**Office of
Personnel Management** Washington, DC 20415-0001

March 19, 2002

James W. Burton
CSF-2 718 357

Sherry Brooks Burton
176 Paradise Road
Santa Barbara, CA 93105

Dear Mrs. Burton:

This is in reply to your February 22, 2002, request for reconsideration of the initial decision of the Office of Personnel Management (OPM). This decision found that you are not entitled to survivor annuity benefits as the former spouse of the late Mr. James W. Burton. For the reason(s) explained below, we affirm the initial decision.

BACKGROUND

Mr. Burton retired under the Civil Service Retirement System (CSRS) on November 10, 2000. At the time of retirement, he was married to you and elected a fully reduced annuity to provide a survivor annuity benefit. You and Mr. Burton were divorced on February 27, 2001. Mr. Burton died on December 16, 2001. You applied for a former spouse survivor annuity based on the JUDGMENT OF DISSOLUTION OF MARRIAGE, issued by the Superior Court of Santa Barbara County, California on May 16, 2001. This judgment was the first order dividing marital property and it did not award you a former spouse survivor annuity under the CSRS. Nor did it direct Mr. Burton to elect a survivor annuity under CSRS for you. Therefore, when you applied for former spouse survivor benefits, OPM denied your application dated February 4, 2002. You requested reconsideration of this decision.

ANALYSIS AND FINDINGS

The Office of Personnel Management is charged with the administration of the Civil Service Retirement law and is expected to pay benefits as provided by law. Also, we are obligated under law and regulation to correct any error(s) in payment of benefits. The laws and regulations that apply to your case are Section 8341(h)(1) of title 5, United States Code, and Section 838 of Title 5 Code of Federal Regulations which provides in pertinent part:

§8341 (h)(1) Subject to paragraphs (2) through (5) of this subsection, a former spouse of a deceased ...annuitant...is entitled to a survivor annuity under this subsection, if and to the extent expressly provided for...in the terms of any decree of divorce or annulment or any court any court order or court-approved properly settlement agreement incident to such decree.

Section 838.804 of title 5, Code of Federal Regulation, provides in pertinent part:

§838.804 Court orders must expressly award a former spouse survivor annuity or expressly direct an employee or retiree to elect to provide a former spouse survivor annuity.

(a) A Court order awarding a former spouse survivor annuity is not a court order acceptable for processing unless it expressly awards a former spouse survivor or expressly directs an employee or retiree to provide a former spouse survivor annuity as described in paragraph (b) of this section.

(b) To expressly award a former spouse survivor annuity or expressly direct an employee or retiree to elect to provide a former spouse survivor annuity as required by paragraph

(a) of this section the court order must-

(1) Identify the retirement systems using terms that are sufficient

To identify the retirement system as explained in section 838.911;

2) (i) Expressly state that the former spouse is entitled to a former spouse survivor annuity using terms that are sufficient to identify the survivor annuity as explained in §838.912;

(Emphasis Added)

To satisfy the requirements of §838.804(b)(1), a court order must contain language identifying the retirement system affected. For example, "CSRS," "FERS," "OPM," "or Federal Government" survivor benefits, or "survivor benefits payable based on service with the U.S. Department of Agriculture," etc., are sufficient identification of the retirement system [§838.911].

We have carefully reviewed the JUDGMENT OF DIVORCE issued by the Superior Court of Santa Barbara County, California, on May 16, 2001, and find in **Section A:** on page 5 of 10 reads:

...I agreed [sic] that should I be terminated or forced to resign from Federal Employment, that Sherry Brooks Burton, ... would be entitled to a total of 75% of my retirement contributions and TSP savings, to be shared equally for their support...

Section B: Petitioner shall receive one-half of the community interest in Respondent's retirement pension, according to the Brown rule...

Your court order did not specifically provide you a **Civil Service** survivor annuity and thus you are not entitled to survivor's annuity under statute, which entitles former spouse to obtain annuity if it was "expressly provided for" in divorce decree or by statutory election, 5 U.S.C. §8341(h)(1).

We have reviewed the QUALIFIED DOMESTIC RELATIONS ORDER issued in Superior Court of the State of California, Santa Barbara Cook Division on August 16, 2001. Title 5, United States Code, §8341(h)(4) provide the following:

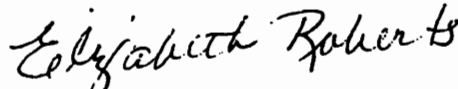
§8341(h)(4) For purposes of this subchapter, a modification in a decree, order, agreement, or election referred in paragraph (1) of this subsection shall not be effective—
(A) if such modification is made after the retirement or death of the employee or Member concerned, and
(B) to the extent that such modification involves an annuity under this subsection. [Emphasis added]

In view of the above, we affirm the initial decision and deny your claim for survivor annuity benefits as the former spouse of James W. Burton.

APPEAL RIGHTS

This constitutes the final decision of OPM. You have the right to appeal to the Merit Systems Protection Board (MSPB). The enclosed packet contains 1) MSPB Regulations, 2) MSPB office locations, 3) and MSPB application form providing filing instructions. An appeal must be filed within 30 calendar days after the date of this decision, or 30 days after receipt of this decision, whichever is later.

Sincerely,



Elizabeth Robert, Benefits Specialist
Disability, Reconsideration and Appeals Division

Enclosure

cc: Congressman Lois Capps

EXHIBIT D

Appellant: Sherry Brooks Burton
176 Paradise Rd.
Santa Barbara, CA 93105
805.964.7338
SSN: 552-78-9247

TO: Regional Director
Merit Systems Protection Board
250 Montgomery St.
San Francisco, CA 94104-3401

RE Office of Personnel Management
Washington, DC 20415-0001

CSRS Annuitant: James W. Burton
CSF- 2 718 357

April 16, 2002

On March 19, 2002, the Office of Personnel Management (OPM) denied that I am entitled to survivor annuity benefits as the former spouse of James W. Burton. I am appealing that decision. I am further raising the issue of my community interest in James W. Burton's retirement annuity. I am raising this issue in the appeal because I raised the issue in my letter requesting reconsideration, but OPM did not respond to it.

BACKGROUND

James W. Burton and I were married December 6, 1980. We had two children. We were divorced February 27, 2001. He retired November 10, 2000. He died December 16, 2001. He retired under the Civil Service Retirement System. He elected a survivor annuity upon his retirement. He did not change that election after the divorce.

APPEAL

1. The Court Orders identify the retirement system affected.

In the Judgment of Divorce, page 5 of 10, Section 1A, Disposition of Retirement and Savings, "Forest Service" and "Federal Employment" are clearly stated.

ct
The Qualified Domestic Relations Order (using language that OPM requires to make the use of a QDRO acceptable) uses the words CSRS and Civil Service Retirement System numerous times.

Therefore, the requirements of section 838.804(b)(1) title 5, CFR are met. The retirement system is clearly identified.

2. The Court Orders expressly provide for a survivor annuity.

Hunt

The QDRO is "intended to be an Order for division of Community Interest in CSRS Employee's Deferred income plan **from all funds/sources.**" (AT III) "If participant dies before the effective date of his retirement benefit and before the effective date of distribution to alternate payee, and if alternate payee survives participant, then alternate payee shall be treated as "Surviving Spouse" of participant." (At A.(4)).

Again, the requirements of section 838.804(b)(1) title 5 CFR are met. The court order expressly refers to survivor benefits.

3. The Qualified Domestic Relations Order is not modified.

In its March 19, 2001 letter to me OPM quotes title 5, United States Code

Thomas

8341 (h)(1) Subject to paragraphs(2) through (5) of this subsection, a former spouse of a deceased... annuitant...is entitled to a survivor annuity under this subsection, if and to the extent expressly provided for...in the terms of *any* decree of divorce or annulment or *any* court any court(sic) order or court-approved properly(sic) settlement agreement incident to such decree. (*Italics added*)

A court-approved property settlement agreement (the QDRO) incident to such decree (the Judgment of Divorce) awarded me survivor benefits *and* a community interest in the retirement annuity, expressly stated such, and specifically mentions CSRS. The QDRO is incident to the Judgment of Divorce, not modified, and therefore acceptable.

The QDRO discusses survivor benefits. The Judgment does not. Perhaps this is what OPM refers to when it avers the QDRO is modified. However, James W. Burton elected survivor benefits at retirement, agreed with the terms of the QDRO, and continued to have his annuity reduced for survivor benefits after the divorce. His intentions did not change before or after his retirement, nor before or after the divorce.

HARMFUL ERROR

In accordance with 5CFR, section 1201.56, OPM has committed a harmful error in its procedures. OPM committed a harmful error when it abrogated its obligation to respond to the Court Orders. Title 5, CFR section 838.723 states:

If OPM receives an application from a former spouse not based on a court order acceptable for processing, OPM will inform the former spouse that OPM cannot approve the application and provide specific reasons for disapproving the application.

I applied to OPM through The Judgment of Divorce and the QDRO which were sent to OPM May 25, 2001. My attorney requested that the QDRO be "approved as to form" by OPM. OPM sent a form letter back on June 1, 2001 offering to sell her "A Handbook for Attorneys". On August 14, 2001, my attorney spoke to Ralph Daniels in OPM's Court Ordered Benefits Section, clarifying that a court certified copy of the QDRO signed by the judge was needed by OPM. This was mailed to Ralph Daniels at OPM on August 20, 2001. I wrote to Ralph Daniels at OPM on November 15, 2001 requesting information and action on the order. I received no reply.

Despite receiving the two court orders and despite my written request and my attorney's written request for confirmation, OPM remained silent. OPM requires me (as does the MSPB) to respond within thirty days to an action they take. I am denied equal protection in that OPM did not decide that my application through the court orders was not acceptable for processing until January 31, 2002. Nearly seven months elapsed between the time OPM first received the court orders and my former husband's death. It took my reporting his death to get OPM to respond at all.

OPM has *never* addressed the issue of my community share of James W. Burton's retirement annuity despite the court orders and my two written requests for them to do so.

OPM had ample time to either accept or not accept the Judgment of Divorce and QDRO. By remaining silent OPM denied me the opportunity to seek a remedy in a state court. By remaining silent, OPM failed in its duty to James W. Burton by not giving him the opportunity to clarify his intentions regarding the survivor benefit.

The CSRS and FERS Handbook states in section 52A5.1-2:

The reduction in the retiree's annuity to provide a survivor annuity for his or her current spouse ends if the marriage terminates because of death, divorce, or annulment.

However, the retiree may elect, within two years after the marriage ends, to continue the reduction to provide a former spouse survivor annuity.

OPM does not mention that my former husband's retirement annuity continued to be reduced for survivor benefits after the date of our divorce and through his final CSRS annuity payment, a total of ten months. He did not remarry. Nor did I. It is reasonable to suppose that, in the absence of OPM action, my former husband, assumed that his original designation combined with court orders were sufficient to provide me with survivor benefits. He elected a former spouse annuity by continuing the reduction in his retirement annuity,

Under 5, CFR section 1201.56(b), the Merit Systems Protection Board is required to overturn the action of the agency, even where the agency has met the evidentiary standard....if the appellant: (1) shows harmful error in the application of its procedures in arriving at its decision;

OPM's blatant silence has caused me substantial harm in that I am denied a remedy to obtain money that I desperately need. OPM's blatant silence denied James W. Burton the remedy of formally electing a former spouse survivor benefit. Should you find that OPM has met the evidentiary standard in this instance, OPM's negligent delay requires you to overturn its decision.

STATEMENT OF ACTION I WOULD LIKE THE BOARD TO ORDER.

Payment of my community interest in James W. Burton's CSRS annuity from the date of his retirement November 10, 2000.

Payment of survivor benefits from James W. Burton's CSRS annuity from December 17, 2001.

CONCLUSION

I was married to James W. Burton for nearly twenty years. His job in Fire and Law Enforcement consistently kept him from home days, weeks and months at a time. He was often called out on a moment's notice. I stayed at home or worked part time in order to care for our children. Jim struggled with alcoholism for about ten years. When he gave up that struggle I acted in my children's and my interest and separated from him. He died of alcoholic liver disease. He always recognized that he had failed our marriage and never disagreed with any court orders. Jim was gravely ill. He intended that the mother of his children have sufficient income to continue to provide those children with guidance and support through their young adult years.

Jones

Notice of
Appellate
Hd.

MROSE
notification
Annual
Notice

Wood -
not
misleading

Jim selected a survivor annuity upon his retirement. He did not change that election after the divorce. He was denied the opportunity to clarify his election. I am that survivor.

The Judgment of Divorce and the QDRO clearly state the source of his annuity and expressly award me a survivor benefit. The QDRO was written in compliance with OPM requirements. It is an integral part of the Judgment of Divorce.

Even should you find that the court orders are flawed, you must agree that the intent of the parties is clear. Even if you find that OPM has met the evidentiary standard I ask you to overturn its decision in that OPM has committed a harmful error in the application of its procedures by failing to either accept or reject the court orders in a timely manner. OPM also failed to reply to written requests for confirmation. OPM chose to reply only upon the death of James W. Burton, nearly seven months after receiving the original court orders. OPM has failed in its fiduciary duty to both me and James W. Burton. Please find in my favor.

Should a hearing be necessary, I request the right to have one.

I do not have access to his SF50.

I certify that all of the statements made in this appeal are true, complete, and accurate to the best of my knowledge and belief.

Sherry Brooks Burton
Appellant

Attachments

OPM letter of March 19, 2002 denying survivor benefits
Sherry Burton letter of February 6, 2002 requesting reconsideration
OPM letter of January 31, 2002 denying benefits
Sherry Burton letter of November 15, 2001 requesting status of court orders
McCarthy and Kornblum letter of August 14, 2001 detailing conversation with OPM
McCarthy and Kornblum letter of August 20, 2001 sending QDRO and requesting action
OPM form letter of June 1, 2001
McCarthy and Kornblum letter of May 25, 2001 transmitting Judgment and QDRO to OPM
Judgment of Divorce
Qualified Domestic Relations Order

EXHIBIT E

FROM: Sherry Brooks Burton
176 Paradise Rd.
Santa Barbara, CA 93105

TO: Michael Shipley
U.S. Office of Personnel Management
Disability, Reconsideration, & Appeals Div.
P.O. Box 664
Washington, D.C. 20044

Craig A. Berg
Administrative Judge
Merit Systems Protection Board
250 Montgomery St., Suite 400
San Francisco, CA 94104-3401

RE: James W. Burton
CSF 2 718 357

Docket # SF -0831-02 -0378 - I -1

REQUEST FOR DISCOVERY

I request that the U.S. Office of Personnel Management make available to me copies of the following documents:

1. Any document that contains a change of election in James W. Burton's CSRS annuity.
2. The annual notice to all retirees informing them about survivor annuity elections including the original notation of the date of mailing to James W. Burton and the address to which it was mailed.
3. Any other document, form, or notice sent to James W. Burton regarding election of survivor benefits
4. Any correspondence from James W. Burton regarding retirement benefits.
5. All internal OPM writings re Dissolution of Marriage, QDRO, apportionment of retirement benefits and survivor benefits, especially, but not limited to, those of Ralph Daniels.

I request that these documents be provided to me at the address shown above within twenty days of the date of this request.

May 20, 2002
Date


Sherry Brooks Burton, Appellant

EXHIBIT F

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
SAN FRANCISCO REGIONAL OFFICE

Sherry Brooks Burton) Docket # SF-0831-02-0378-I-1
Appellant)
) CSF # 2 718 357
v.)
)
Office of Personnel Management)
Agency)

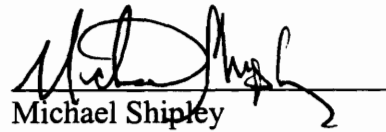
RESPONSE TO APPELLANT'S DISCOVERY REQUEST

1. No such document exists.
2. See attached copy of Exhibit #1 for affidavit evidence of the mailing, a copy of the mailing, and the address of record for James W. Burton.
3. A complete copy of the file was submitted with the agency response. No further documentation was sent to Mr. Burton regarding the election of survivor benefits.
4. Although not related to the instant appeal, the only correspondence/information from Mr. Burton regarding his retirement benefits are the attached copies of the SF 2808, Designation of Beneficiary forms. See attached Exhibit #2.
5. A complete copy of the file was submitted with the agency response file. No further documentation exists.

I hereby certify that the above Response to Appellant's Discovery Request was sent this day to each of the following:

Sherry Brooks Burton
176 Paradise Road
Santa Barbara CA 93105

6/4/02
Date


Michael Shipley
Agency Representative

UNITED STATES OF AMERICA

DISTRICT OF COLUMBIA

)
)
) SS
)

I, Donna G. Lease, being duly sworn state:

1. I administer the contract for printing and distribution of forms and notices for the Retirement and Insurance Service, U.S. Office of Personnel Management.

2. In that capacity, I am familiar with the history of notices related to civil service annuity payments.

3. General notices regarding survivor elections required by Public Law 95-317 were sent to all annuitants in September 1989, September 1990, December 1991, December 1992, December 1993, December 1994, December 1995, December 1996, December 1997, December 1998, December 1999, December 2000, and December 2001.

4. On OPM's computer master annuity roll created and maintained by Office of Systems, Finance and Administration, Systems Modernization and Maintenance Division (SMMD), separate addresses are recorded for purposes of sending payments and for sending correspondence.

5. Beginning with the December 1986 mailing, notices were sent to all annuitants in the same manner. This was accomplished by:

(a) The computer generating a tape created by SMMD, listing all annuitants and their correspondence addresses (referred to as the "Master Annuity Roll") which is sent to a private contract firm specializing in mass mailing.

(b) The tape created by SMMD, thus generated, is used to print the name and address directly on franked, printed notices which are then mailed by the contractor.

EXHIBIT #1

p. 1/5

6. All mailing lists are generated entirely by machine from the annuity roll; a notice is sent to each annuitant contained on the tape.

Donna G. Lease

Donna G. Lease
Budget and Administrative Services Division
Office of Systems, Finance and Administration
Retirement and Insurance Service
U.S. Office of Personnel Management

Sworn and subscribed before me this _____ of April 2, 2002

Connie E. Torillo

Connie E. Torillo

Notary Public

My commission expires 08-14.04

EXHIBIT #1

p 2/5

- 01-09 Collection of Union or Membership Dues
- 10 Collection of Government Claim
- 11 Collection of Interim Payments
- 12 Collection of Annuity Overpayment
- 13 Collection of Annuity Waiver
- 14 Collection of Deposit or Redeposit for Civilian Service
- 15 Reduction for National Guard
- 17 Life } to prevent reduction of Basic
- 18 Insurance } for Additional Optional
- 19 Premiums } for Family Optional
- 20 Checking/Savings Allotment
- 22 } Collection of Retroactive Health Benefits Premiums
- 23 }
- 24 Collection of Retroactive Medicare Premiums
- 25 Collection of Standard Optional Life Insurance Premiums
- 27 Collection of an Erroneous Payment
- 29 Collection of Military Deposit
- 31 Federal Income Tax
- 32 State Income Tax
- 33 Survivor Reduction Deposit
- 35 } Garnishment
- 36 }
- 37 Bankruptcy
- 38 } Apportionment
- 39 }
- 40 FERS Annuity Supplement Overpayment
- 44 Post-Retirement Marriage Deposit
- 45 U.S. Savings Bond(s), Association Withholding, Other Allotment
- 46 Basic Life Insurance

- 50 Government Claim Adjustment*
- 51 Interim Payment
- 52 Accrued Annuity Due*
- 53 Annuity Waiver Release*
- 54 Erroneous Payment Adjustment*
- 55 Refund of National Guard Deduction*
- 56 Refund of Union or Membership Dues*
- 57 Post-Retirement Basic } Refund of
- 58 Additional Optional } Insurance
- 59 Family Optional } Premiums*
- 66 Refund of Military Deposit*
- 67 FERS Annuity Supplement
- 68 Alternative Annuity Lump Sum*
- 69 Interest on pre-1957 Contributions Portion of Alternative Annuity Lump Sum*
- 70 Checking/Savings Allotment*
- 72 } Retroactive Health Benefits Premium Adjustment*
- 73 }
- 74 Retroactive Medicare Premium Adjustment*
- 75 Standard Optional Life Insurance Premium Refund*
- 77 Basic Life Insurance Premium Refund*
- 78 Post-Retirement Marriage Deposit Refund*
- 81 Federal Income Tax Adjustment*
- 82 Refund of State Income Tax*
- 83 Refund of Survivor Reduction Deposit*
- 85 } Garnishment
- 86 }
- 87 Bankruptcy
- 88 } Apportionment
- 89 }

*This additional amount is a one time only payment.

Survivor Annuity Benefits

1. Survivor Benefits for the Spouse You Were Married to at Retirement

Eligibility- You are eligible to elect a reduced annuity to provide a survivor annuity or an increased survivor annuity for your spouse if you 1) have been retired less than 18 months, 2) were married when you retired, 3) elected less than the maximum survivor annuity for your spouse at retirement, and 4) are still married to the same person.

Case- A deposit is required to make this new election if your annuity has not been appropriately reduced since retirement. We will compute any deposit due after we receive your request to make an election. The election is cancelled if you do not pay the deposit after we notify you of the amount due. The deposit cannot be collected from your annuity.

Time Limits- Your request to make the new election must be received by OPM no later than 18 months after the date your annuity began. The election is valid only if any required deposit is paid no later than 18 months after your annuity began or within 30 days after OPM sends you a notice of the amount due, whichever is later.

How to Make an Election- Call or write to OPM at the address on this notice within the 18-month time limit, state that you want to make a new survivor annuity election for your spouse, and sign your request. We will send you detailed information about the effect of the election, the exact amount of your annuity if you decide to make the election, and an election form to sign and return to us if you want to take this action.

2. Survivor Annuity Benefits for a Spouse You Marry After Retirement

Eligibility and Time Limits- You are eligible to elect a reduced annuity to provide a survivor annuity benefit for a spouse you married after retirement if you send a signed request to OPM within 2 years after the date of your marriage. With some exceptions, retirees may also make this election within 2 years after a former spouse loses entitlement to a survivor annuity benefit; we will notify you if any exceptions apply to your situation.

Case- If you meet the eligibility requirements stated above and decide to make the survivor annuity election, OPM will make an actuarial reduction to your annuity. This is a permanent reduction. In most cases, the actuarial reduction will be less than 5% of your annuity.

How to Make an Election- Call or write to OPM at the address on this notice within the two-year time limit, state the election you want to make, include proof of your marriage, and sign your request. We will send you detailed information about the effect of the election, the exact amount of your annuity if you decide to make the election, and an election form to sign and return to us if you want to take this action.

3. Survivor Annuity Benefits for a Former Spouse

Eligibility and Time Limits- With some exceptions, retirees are eligible to elect a reduced annuity to provide a survivor annuity for a former spouse if they send a signed request to OPM 1) within 2 years after the date the marriage ended by divorce or annulment or 2) within 2 years after the date another former spouse loses entitlement to a survivor annuity benefit. We will inform you if any exceptions apply to your situation. If you are married, your spouse must consent in writing to the former spouse election unless you request, and OPM approves, a waiver of the consent requirement.

To qualify for a survivor annuity, your former spouse must have been married to you for a total of at least nine months and must not have remarried before reaching age 55. However, a former spouse who was married to you for at least 30 years qualifies for a survivor annuity even though he or she remarries before reaching age 55.

Case- If you meet the eligibility requirements stated above and decide to make the survivor annuity election, OPM will make an actuarial reduction to your annuity. This is a permanent reduction. In most cases, the actuarial reduction will be less than 5% of your annuity.

How to Make an Election- Call or write to OPM at the address on this notice within the two-year time limit, state the election you want to make, and sign your request. We will send you detailed information about the effect of the election, the exact amount of your annuity if you decide to make the election, and an election form to sign and return to us if you want to take this action.

4. Insurable Interest Survivor Annuities

If you elected an insurable interest survivor annuity benefit at retirement and need information about electing a survivor annuity for your spouse, call or write OPM at the address on this notice within 2 years after the date of your marriage. We will send you detailed information and an election form. If you are receiving a reduced annuity because of a court-ordered survivor annuity for a former spouse and have elected an insurable interest survivor annuity for your spouse, write to OPM within 2 years after your former spouse is no longer eligible for the court-ordered survivor annuity or dies. We will send you detailed information about the options available to you.

Sharing Information by Computer Matching

The information you furnish may be shared with other Federal, State and local government agencies through computer matching programs, even if you do not agree to the sharing of information. The law authorizes us to match computerized records with other agencies to verify whether a person qualifies or continues to qualify for benefits being paid by OPM or the agencies with which the matches are made. The records are also used to collect debts owed to other Federal and State agencies. The overall purpose is to prevent fraud, waste, and abuse in government programs.

If information from a computer match leads us to conclude that you are not entitled to a benefit, we will send you a written explanation and a notice about your due process rights.

Federal Income Tax Withholding Information

The amount of Federal income tax (shown as Code 31) we are withholding from your annuity payment may have changed, even if you have asked us to withhold a specific dollar amount. This is because the Internal Revenue Service revised the tax withholding table effective with your January 2, 2002, payment.

If you would like to change the amount of Federal tax we withhold, you may call our computer-based telephone service at 1-800-409-6528. Use a touchtone telephone for this call. If you cannot use a touchtone telephone, you may contact our Retirement Information Office (see below).

Correcting Mailing Addresses

If the address on this form is not correct, you should inform us immediately of your mailing address. The Postal Service may not forward your mail from us in the future. Always remember to give us your correct mailing address, even if your payments are deposited in your financial institution, so that important information we send will be sure to reach you.

Payments Received After the Death of the Annuitant

All payments received from OPM to or for a person who has died must be returned to the Treasury Department. To return checks, please write "deceased" and the date of death on the check or the outside of the envelope and ask the Postal Service to return it to the Treasury Department.

If payments are deposited in an account in a financial institution, please inform the institution of the death. The Treasury Department and the financial institution will collect the payment from the account.

Also, please notify OPM about the death by calling or by writing to the address on this notice.

How to Contact OPM

To contact us about your benefits call our Retirement Information Office at 1-888-767-6738. Between the hours of 7:30 a.m. and 7:45 p.m. Eastern time, Customer Service Specialists are available to answer calls. Customers within local calling distance to Washington, DC, must contact us on 202-606-0500.

Be sure to have your retirement claim number when you call.

We provide information on the Internet at <http://www.opm.gov/retire> and respond to email sent to us at retire@opm.gov.

HEALTH BENEFITS COVERAGE FOR SURVIVING SPOUSES - In the event of your death, your spouse will have health benefits coverage *only* if you:
 - Elect survivor benefits for your spouse, and
 - Have family health benefits coverage when you die.
 There are no exceptions to these two requirements.

RI 20-53
(Rev. 12/01)

Keep This Notice With Your Personal Records.

EXHIBIT # 1
p. 3/5

back of the notice. If you have any questions, call us or write to the address shown below.

	GROSS MONTHLY ANNUITY	MONTHLY HEALTH BENEFITS	MONTHLY MEDICARE	OTHER DEDUCTIONS OR ADDITIONS*				NET MONTHLY PAYMENT
				CODE	AMOUNT	CODE	AMOUNT	
OLD STATUS								YOUR PAYMENT BEFORE ADJUSTMENT
NEW STATUS								YOUR PAYMENT AFTER ADJUSTMENT

*SEE BACK FOR CODES FOR OTHER DEDUCTIONS OR ADDITIONS.
 UNITED STATES OFFICE OF PERSONNEL MANAGEMENT
 RETIREMENT OPERATIONS CENTER
 PO BOX 46
 BOYERS PA 16017-0046

REFER TO THIS NUMBER WHEREVER YOU CONTACT OPM

YOUR PAYMENT DATED: 01/02/2002

CLAIM NUMBER

Reason for adjustment. You may use this notice as proof of your current rate of annuity.

YOUR NEW GROSS MONTHLY ANNUITY REFLECTS THE 2.6% COST-OF-LIVING ADJUSTMENT. BY LAW, THE INCREASE IS ROUNDED DOWN TO THE NEXT WHOLE DOLLAR.

To call our toll-free number, dial 1-888-767-6736. Within local Washington, DC, area, dial 202-606-0500.

PAR AVION

U.S. GOVERNMENT PRINTING OFFICE: 2001-48-172

Call or visit the website today!

If you're interested in receiving information about the exciting new insurance program to help you pay for your long term care needs, please call our contractor at 1-800-LTC-FEDS (1-800-582-3337) (toll-free) or register with them through the FLICIP website at www.opm.gov/insur/ltc. The FLICIP is not part of the Federal Employees Health Benefits Programs or Medicare, which provide health insurance. It's a separate, completely new program providing long term care insurance. Most annuitants and their spouses will be eligible to apply. Successful applicants must show they are insurable by answering a number of questions about their health.

The Federal Long Term Care Insurance Program (FLICIP) Will Be Here In 2002!

U.S. GOVERNMENT PRINTING OFFICE
 25 OFFICE OF PERSONNEL MANAGEMENT
 RETIREMENT OPERATIONS CENTER
 PO BOX 46
 BOYERS PA 16017-0046

OFFICIAL BUSINESS
 PENALTY FOR PRIVATE USE, \$300
 50-107 (REV. 10-97)

EXHIBIT #1
 P. 4/5

ARID04 POST ADJUDICATION SUPPORT SYSTEM

PAYEE ADDRESS DISPLAY FUNCTION

CLIENT ACCOUNT NUMBER: A39943550

REVIEWER ID: ()

LOCATOR NBR: RM25 01102 1234 LOCATOR NBR: RM25 01102 1234

ENTRY ID: RGCRCDA (CRGBAP) ENTRY ID: RGCRCDA (CRGBAP)

TYPE PAYEE: ANNUITANT/SURVIVOR

CURRENT PAYMENT: 04/12/01 CURRENT CORRESP: 04/12/01

JAMES W BURTON

JAMES W BURTON

15 BELL DR
NEW CUYAMA CA 93254

EFT

ACCT: C07617489995

ROUT: 122000247

PRIOR PAYMENT:

PENDING ADDRESS INFORMATION:

LOCATOR NBR:

DATE ENTERED:

PRESS ENTER,CLEAR OR USE PFKEY PAGING:

PFKEYS: 7/19--PRIOR 8/20--NEXT 10/22--FIRST 11/23--LAST

ADDRESS OF RECORD

WARNING—Do not fill out this form until you have read all instructions.

**DESIGNATION OF BENEFICIARY
CIVIL SERVICE RETIREMENT SYSTEM**

OMB Approved: No. 3200-0142 Expires 5/31/87
Standard Form No. 2806 Rev. July 1984
Office of Personnel Management FPM Supplement 831-1, 2806-106
NSN 7540-00-804-4200 Previous editions usable

A. INFORMATION CONCERNING THE DESIGNATOR

1. Name (Last, first, middle)

BURSTON, JAMES W.

2. Date of birth (Month, day, year)

11-20-50

3. Social Security Number

567-76-2838

4. Department or agency in which presently or last employed, including bureau or division

USDA - Forest Service, Cleveland, N.F.

5. Claim number if retired

CSA-

I, the employee or former employee identified above, canceling any and all previous designations of beneficiary heretofore made by me, do now designate the beneficiary or beneficiaries named below to receive any lump-sum benefits which may become payable under the Civil Service Retirement law after my death. I understand that this designation of beneficiary will not effect the rights of any survivors who may qualify for annuity benefits after my death, and that this designation will remain in full force and effect unless or until canceled by me in writing.

B. INFORMATION CONCERNING THE BENEFICIARY OR BENEFICIARIES

Type or print first name, middle initial, and last name of each beneficiary	Type or print address (including zip code) of each beneficiary	Relationship	Share to be paid to each beneficiary (See example)
Maryann B. Burston	174 Paradise Road Santa Barbara, CA 93105	Son	50%
Patricia E. Burston	Same as above	Daughter	50%

I hereby direct, unless otherwise indicated above, that, if more than one beneficiary is named, the share of any deceased beneficiary or beneficiaries who may die before a lump-sum benefit becomes payable shall be distributed equally among the surviving beneficiaries, or entirely to the survivor, if none of the beneficiaries are alive when the lump-sum benefit becomes payable, this designation shall be void.

Date of this designation (Month, day, year)

11-16-80

Signature of designator (Do not print)

JAMES W. BURSTON

C. WITNESSES (A witness is ineligible to receive payment as a beneficiary)
We, the undersigned, certify that this instrument was signed in our presence.

Signature of witness (Do not print)

James W. Burston

Number and street

PO Box 3604

City, state, zip code

Newburgh, NY 12551

Signature of witness (Do not print)

Therese Calaveray

Number and street

3430 Hwy 33

City, state, zip code

Cupertino, CA 93252

Print or type your name and address (including zip code) to insure return of copy

JAMES W. BURSTON
15 BELL DRIVE
NEWburgh, NY 12551

(Reserved for recording stamp of Office of Personnel Management)

WARNING—Do not fill out this form if you are satisfied to have any lump-sum benefit which may become payable after your death paid according to the order of precedence which follows.

CIVIL SERVICE RETIREMENT LAW ORDER OF PRECEDENCE

If there is no designated beneficiary living, any lump-sum benefit which becomes payable after the death of an employee or former employee will be payable to the first person or persons listed below who are alive on the date title to the payment arises.

1. To the widow or widower.
 2. If neither of the above, to the child or children in equal shares, with the share of any deceased child distributed among the descendants of that child.
 3. If none of the above, to the parents in equal shares or the entire amount to the surviving parent.
 4. If none of the above, to the executor or administrator of the estate of the decedent.
 5. If none of the above, to the next of kin under the laws of the State in which the decedent was domiciled at date of death.
- It is not necessary for any employee or former employee to designate a beneficiary unless he or she wishes to name some person or persons not included above, or in a different order.

PURPOSE OF DESIGNATING A BENEFICIARY

A designation of beneficiary is for lump-sum benefit purposes only, and does not affect the right of any person who qualifies to receive *survivor annuity* benefits. Such benefits are payable either by operation of law or as a result of an election made by a retiring employee. Survivor annuity benefits are never based on this form.

DESIGNATING A TRUST AS A BENEFICIARY

If you wish to designate a trust fund as your beneficiary, see your agency personnel office for information before filling out this form.

INSTRUCTIONS

1. The examples printed on the back of the first page may be helpful to you.
2. Type or print all entries except signatures.
3. Fill out and mail both copies to the Office of Personnel Management, Civil Service Retirement System, Washington, D. C. 20415. The designation of beneficiary must be received by the Office of Personnel Management prior to the death of the employee or former employee to be valid.
4. Cancellation of a prior designation may be effected without the naming of a new beneficiary by making out a new Standard Form 2808 and in-

- serting in the space provided for name of beneficiary the words "Cancel Prior Designation." All designations of beneficiary filed before September 1, 1950, have been canceled by law. It is not necessary to file a new form to cancel a designation made before that date.
5. This form is not intended as a will, and miscellaneous provisions, such as payment of just debts, payment on the monthly installment plan, etc., will not be recognized.
6. A designation free of erasures or alterations should be filed in order to avoid a possible contest after death.
7. The duplicate will be returned to you as evidence that the original has been received and filed. When you receive the duplicate, file it with your important papers. After your death the beneficiary, or someone acting for the beneficiary, should request the Office of Personnel Management to furnish a blank on which to make application for any lump-sum benefit which may be payable.

LAW AND REGULATIONS

1. By law, the designation of beneficiary shall be in writing, signed and witnessed, and received in the Office of Personnel Management prior to the death of the designator.
2. By law, no change or cancellation of beneficiary in a last will or testament, or in any other document not witnessed and filed as required by these regulations, shall have any force or effect.
3. A witness to a designation of beneficiary is ineligible to receive payment as a beneficiary.
4. Any person, firm, corporation, or legal entity may be named as beneficiary.
5. A change of beneficiary may be made at any time and without the knowledge or consent of the previous beneficiary, and this right cannot be waived or restricted.

PRIVACY ACT STATEMENT

Title 5, U.S. Code, authorizes solicitation of this information. Your designation of beneficiary will be used to determine who will receive a lump-sum benefit in the event of your death.

This information may be shared with national, State, local, or other charitable social security administrative agencies to determine and issue benefits under their programs or, with law enforcement agencies when they are investigating a violation or potential violation of the civil or criminal law. Executive Order 9397 (November 22, 1943) authorizes use of the Social Security number to distinguish you and people with similar names. Furnishing your Social Security number, as well as the other data, is voluntary, but failure to do so may result in OPM's inability to determine who is eligible to receive a lump-sum benefit in the event of your death.

11/21/71
2
1-210X12

WARNING—Do not fill out this form until you have read all instructions.

**DESIGNATION OF BENEFICIARY
CIVIL SERVICE RETIREMENT SYSTEM**

STANDARD FORM NO. 2808 JUNE 1966
U. S. Civil Service Commission
FPM Supplement 831-1 2808-104

A. INFORMATION CONCERNING THE DESIGNATOR

1. NAME (Last) (First) (Middle)	2. DATE OF BIRTH (Month) (Day) (Year)	3. SOCIAL SECURITY NUMBER
BURTON JAMES WILLIAM	11 10 50	567-76-2838

4. DEPARTMENT OR AGENCY IN WHICH PRESENTLY OR LAST EMPLOYED, INCLUDING BUREAU OR DIVISION

Department of Agriculture, Forest Service, Los Padres N.F., Santa Barbara, CA

I, the employee or former employee identified above, canceling any and all previous designations of beneficiary heretofore made by me, do now designate the beneficiary or beneficiaries named below to receive any lump-sum benefit which may become payable under the Civil Service Retirement Act after my death. I understand that this designation of beneficiary will not affect the rights of any survivors who may qualify for annuity benefits after my death, and that this designation will remain in full force and effect unless or until canceled by me in writing.

B. INFORMATION CONCERNING THE BENEFICIARY OR BENEFICIARIES

TYPE OR PRINT FIRST NAME, MIDDLE INITIAL, AND LAST NAME OF EACH BENEFICIARY	TYPE OR PRINT ADDRESS (Including ZIP Code) OF EACH BENEFICIARY	RELATIONSHIP	SHARE TO BE PAID TO EACH BENEFICIARY (See Example)
If alive	Star Rt. Box 188, 473 Ranger Sta. Circle, Santa Barbara, CA 93105	Wife	all
Sherry C. Brooks-Burton	279 5th Ave., Box 1414, Portola, CA. 96127	Father	all
James T. Burton			

I hereby direct, unless otherwise indicated above, that, if more than one beneficiary is named, the share of any deceased beneficiary or beneficiaries who may die before a lump-sum benefit becomes payable shall be distributed equally among the surviving beneficiaries, or entirely to the survivor. If none of the beneficiaries are alive when the lump-sum benefit becomes payable, this designation shall be void.

11/26/80

DATE OF THIS DESIGNATION
(MONTH) (DAY) (YEAR)

James W. Burton
(SIGNATURE OF DESIGNATOR—DO NOT PRINT)

C. WITNESSES (A witness is ineligible to receive payment as a beneficiary)

WE, THE UNDERSIGNED, CERTIFY THAT THIS INSTRUMENT WAS SIGNED IN OUR PRESENCE.

<i>John R. Burton</i> (SIGNATURE OF WITNESS—DO NOT PRINT)	Star Rt. Box 169 (NUMBER AND STREET)	Santa Barbara, CA 93105 (CITY, STATE, AND ZIP CODE)
<i>Shirley Burton</i> (SIGNATURE OF WITNESS—DO NOT PRINT)	1700 Alameda Drive (NUMBER AND STREET)	Del Mar, CA 92015 (CITY, STATE, AND ZIP CODE)

PRINT OR TYPE YOUR NAME AND ADDRESS (Including ZIP Code) TO INSURE RETURN OF COPY

(Reserved for Receiving Stamp of U. S. Civil Service Commission)

James William Burton
Star Route Box 188
473 Ranger Station Circle
Santa Barbara, CA, 93105

WARNING—Do not fill out this form until you have read all instructions.

**DESIGNATION OF BENEFICIARY
CIVIL SERVICE RETIREMENT SYSTEM**

STANDARD FORM NO. 2808 JUNE 1966
U.S. Civil Service Commission
FPM Supplement 831-1 2808-104

A. INFORMATION CONCERNING THE DESIGNATOR

1. NAME (Last) BURTON	(First) JAMES WILLIAM	2. DATE OF BIRTH (Month) 11 (Day) 10 (Year) 50	3. SOCIAL SECURITY NUMBER 567-76-2835
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4. DEPARTMENT OR AGENCY IN WHICH PRESENTLY OR LAST EMPLOYED, INCLUDING BUREAU OR DIVISION

USDA-Forest Service Santa Barbara Rd.

5. CLAIM NUMBER IF RETIRED
CSA-

I, the employee or former employee identified above, canceling any and all previous designations of beneficiary heretofore made by me, do now designate the beneficiary or beneficiaries named below to receive any lump-sum benefit which may become payable under the Civil Service Retirement Act after my death. I understand that this designation of beneficiary will not affect the rights of any survivors who may qualify for annuity benefits after my death, and that this designation will remain in full force and effect unless or until canceled by me in writing.

B. INFORMATION CONCERNING THE BENEFICIARY OR BENEFICIARIES

TYPE OR PRINT FIRST NAME, MIDDLE INITIAL, AND LAST NAME OF EACH BENEFICIARY	TYPE OR PRINT ADDRESS (Including ZIP Code) OF EACH BENEFICIARY	RELATIONSHIP	SHARE TO BE PAID TO EACH BENEFICIARY (See Example)
Rosalie E. Foster	28 Commercial, Box 1173 Portola, Ca. 96122	Francee	75%
James T. Burton	279 5th Ave., Box 1417 Portola, Ca. 96122	Father	25%

I hereby direct, unless otherwise indicated above, that, if more than one beneficiary is named, the share of any deceased beneficiary or beneficiaries who may die before a lump-sum benefit becomes payable shall be distributed equally among the surviving beneficiaries, or entirely to the survivor. If none of the beneficiaries are alive when the lump-sum benefit becomes payable, this designation shall be void.

DATE OF THIS DESIGNATION **10-2-77** (MONTH) (DAY) (YEAR)

SIGNATURE OF DESIGNATOR—DO NOT PRINT **JAMES W. BURTON**

C. WITNESSES (A witness is ineligible to receive payment as a beneficiary)

WE, THE UNDERSIGNED, CERTIFY THAT THIS INSTRUMENT WAS SIGNED IN OUR PRESENCE.

SIGNATURE OF WITNESS—DO NOT PRINT Barbara Conwell	(NUMBER AND STREET) Star Court	(CITY, STATE AND ZIP CODE) Santa Barbara Ca 93105
SIGNATURE OF WITNESS—DO NOT PRINT Star Court	(NUMBER AND STREET) Star Court	(CITY, STATE AND ZIP CODE) Santa Barbara Ca 93105

PRINT OR TYPE YOUR NAME AND ADDRESS (Including ZIP Code) TO INSURE RETURN OF COPY

(Reserved for Receiving Stamp of U. S. Civil Service Commission)

James W. Burton
Box 1173
Portola, Ca 96122

1 **PROOF OF SERVICE**

2 **DECLARATION OF SERVICE BY MAIL**

3 **STATE OF CALIFORNIA**

4 **COUNTY OF SANTA BARBARA**

5 I, Christina Doemeny, am over the age of eighteen years and not a party to the within
6 entitled action. My business address is 903 State Street, Suite 208, Santa Barbara, California.

7 On November 20, 2002, I served a copy of the within on the interested parties in the
8 within **PETITION FOR REVIEW OF INITIAL DECISION** action by placing for collection
9 and mailing with the United States Postal Service at Santa Barbara, California a true copy of the
10 above-referenced document(s), enclosed in a sealed envelope, first class, postage prepaid, and
11 addressed as follows:

12 Ms. Sherry B. Burton
13 3942 Mesa Circle Drive
14 Lompoc, California 93436

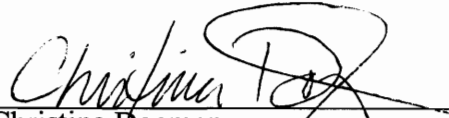
15 Michael Shipley, Esquire
16 U.S. Office of Personnel Management
17 Retirement Appeals - Room 4H19
18 P.O. Box 664
19 Washington, D.C. 20044

20 Kenneth L. Bates, Esquire
21 U.S. Office of Personnel Management
22 Employee Relations Division
23 1900 E Street N.W., Room 7412
24 Washington, D.C. 20415

25 Hon. Craig A. Berg
26 Administrative Judge
27 U.S. Merit Systems Protection Board
28 Western Regional Office
29 250 Montgomery Street, Suite 400
30 San Francisco, California 94104-3401

31 I declare under penalty of perjury under the laws of the United States of America that the
32 foregoing is true and correct.

33 Dated: November 20, 2002

34 
35 Christina Doemeny