

Hon. Millett Keller, Commissioner
Department of Administration

July 11, 1991

663-91-0281

465-3600

Distribution of SBS
annuity benefits under a
QDRO after member
terminates employment

Virginia B. Ragle
Assistant Attorney General
Governmental Affairs - Juneau

You have asked whether the Supplemental Benefits System (SBS) annuity account of a participant who is a former employee may be distributed to the member's former spouse under a divorce or dissolution decree even though the participant has not reached normal retirement age and has not filed a request for distribution of the account. This confirms oral advice that the distribution should be made, as long as the decree otherwise meets the requirements of a qualified domestic relations order (QDRO).

The value of pension and other employee benefits accrued during marriage has long been recognized as marital property. ^{1/} However, "anti-alienation" clauses in statutes and in the SBS Supplemental Annuity Plan (Plan) prevented distribution of benefits directly to a participant's ex-spouse by the state's retirement systems or SBS. ^{2/} This limitation was particularly problematic in cases in which there was insufficient other marital property to award to the nonparticipant spouse to offset the value of pension plan benefits accrued during a marriage.

In 1984, Congress enacted the Retirement Equity Act of 1984 (REA). ^{3/} The REA amended the Internal Revenue Code to provide that, in order for a private annuity plan to be qualified for tax-exempt status under the Code, the plan must honor any court order that distributes all or a portion of a plan participant's benefits to an alternate payee if the order is a

^{1/} See Rice v. Rice, 757 P.2d 60 (Alaska 1988); Mann v. Mann, 778 P.2d 590 (Alaska 1989).

^{2/} See AS 14.25.200 (Teachers' Retirement System); AS 39.35.500 and 39.35.505 (Public Employees' Retirement System); AS 39.30.162 and Supplemental Annuity Plan Article VIII C (Supplemental Annuity Plan).

^{3/} P.L. 98-397.

QDRO. 4/ Because the Supplemental Annuity Plan (Plan) is a governmental plan, it is not subject to this requirement. 5/ However, after the REA was enacted, the Plan was amended by the Public Employees Retirement Board, as recommended by the administrator, to permit distribution of a participant's supplemental annuity account to an alternate payee under a QDRO, as that term is defined by 26 U.S.C. 414. 6/

Among the requirements for a QDRO set out in 26 U.S.C. 414(p) is a provision that the order may not require payment of a type or form of benefit not otherwise provided under the plan. An exception to this requirement is that an order is not treated as requiring a different type or form of benefit if it requires payment to the alternate payee on the date the participant attains earliest retirement age, as if the participant retired on that date, even if the participant has not separated from service.

Language in the Plan alters this exception for domestic relations orders submitted to the Plan. The Plan provides:

Payments to an alternate payee pursuant to a qualified domestic relations order may commence when the Participant attains Normal Retirement Age as if the Participant retired on such date, regardless of whether the Participant continues working past Normal Retirement Age.

This language differs from the federal definition of QDRO only in that it establishes age 65, 7/ rather than the earliest retirement age, as the age a participant who has not separated from service must reach before an alternate payee may receive payments from SBS. 8/

4/ 26 U.S.C. 401(a)(13).

5/ See language following 26 U.S.C. 401(a)(30).

6/ Supplemental Annuity Plan Article VIII G.

7/ "Normal Retirement Age" is defined by Article I K of the Plan as age 65.

8/ Although statutes providing for the public employees', teachers', judicial, and National Guard retirement systems were amended after the Plan to allow assignment of payments to an alternate payee under a QDRO, the definition of QDRO in those statutes did not permit payment of benefits to the alternate

SBS has received several decrees in the past few years that order lump sum payments to alternate payees of portions of the SBS accounts of members who have separated from service. Based on the provisions that an order may not require payment of a type or form of benefit not otherwise provided under the plan and that an alternate payee may receive a benefit from the account of an active employee only after the employee has reached normal retirement age, the SBS staff concluded that those orders were not QDROs. We believe that this interpretation is incorrect. The Plan specifically authorizes payment of a benefit in a lump sum. Therefore, all or a portion of a participant's account may be distributed to an alternate payee under a QDRO in a lump sum. The provision of the Plan regarding payment of benefits from the account of a participant who is still an active employee under SBS does not affect the availability under a QDRO of money in the account of a participant who has separated from service.

We find no support in statute or in the Plan for requiring an application for benefits to be filed by the participant before an alternate payee may receive benefits under a QDRO. It would be antithetical to the purpose of allowing distributions under a QDRO if an absent or recalcitrant participant were allowed to abrogate an alternate payee's rights under a QDRO by refusing or merely failing to apply for benefits. The QDRO itself creates or recognizes the existence of the alternate payee's right to receive benefits, and no application by the participant is required. 9/

For the foregoing reasons, SBS should comply with a domestic relations order that orders a distribution to an alternate payee from a former employee's annuity account if the order otherwise meets the requirements of a QDRO. Please let us know if you need further advice in this matter.

VBR: jr

payee of an employee who had not terminated service.

9/ Of course, if a QDRO requires payment in the form of one of the life annuities provided by the Plan, you will need information regarding the age of the alternate payee. It would not be unreasonable to require the alternate payee to file an application with the Plan, providing any information needed for payment of the benefit not otherwise set out in the QDRO.

Hon. Millett Keller, Comm./Admin.
AG file: 663-91-0281

July 11, 1991
Page 4

cc: Gary Bader, Director
Division of Retirement and Benefits