
STATE OF NEW HAMPSHIRE SUPREME COURT

Docket No. 2021-0308

PETITION OF LOUIS L. LAFASCIANO

**Appeal Pursuant To A Writ Of Certiorari
(NEW HAMPSHIRE RETIREMENT SYSTEM)**

**BRIEF FOR RESPONDENT
NEW HAMPSHIRE RETIREMENT SYSTEM
BOARD OF TRUSTEES**

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100-A:13 Optional Allowances

I. Any member who has reached service retirement age as provided in RSA 100-A:5, I(a), or II(a), or RSA 100-A:19-b, any retiree within 120 days after the effective date of retirement, or any retiree within 120 days after a decision by the board of trustees granting the retiree disability retirement benefits pursuant to RSA 100-A:6, may elect to receive, instead of the retirement allowance otherwise payable, a retirement allowance of equivalent actuarial value under one of the options named in paragraph III, or to redesignate any such option previously elected. When the member or retiree elects to receive an optional retirement allowance under paragraph III, the beneficiary or beneficiaries whom the member or retiree nominates may include the member's spouse and/or children. The notice of non-election, election, or change of retirement option shall be on a form designated by the board, which, if the member or retiree is married, shall include a spousal acknowledgment. The optional allowance shall be effective upon retirement if the election is made before the effective date of retirement, and on the first day of the month following receipt by the board of the notice of election or change of option if made during a 120-day grace period. When an election or change of option is made during a 120-day grace period, no retroactive adjustments will be made in payments already received by the retiree. When an election or change of option is made within 120 days after a decision by the board of trustees granting the retiree disability retirement benefits, the optional allowance shall be calculated using retiree and beneficiary age factors applicable as of the first day of the month following receipt by the board of the notice of election or change in option. After expiration of the 120-day grace period no

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change in option selection shall be permitted except as provided in paragraph II. If a retiree dies after filing notice of election or change of option during the 120-day grace period but before the effective date, the election or change shall be effective as of the date of death. If a member dies after filing an election for a survivorship retirement option and before the effective date of retirement, whether or not the member has filed for retirement, the beneficiary who was nominated by the member in the election of the option may elect to receive either the optional survivor benefit which the member had elected or the ordinary death benefit provided under RSA 100-A:9, whichever is more advantageous to the beneficiary; provided that, in the case of the member's death before retirement, if the beneficiary named in the survivorship option election is not the same person as the beneficiary under RSA 100-A:9, then the death benefit under RSA 100-A:9, II, and not the survivorship option shall apply.

II. (a) Any retired member who has elected option 2, 3, or 4, and whose beneficiary nominated by the retiree under such option was the retiree's spouse at the time of such election, may:

(1) Terminate such elected option upon the issuance of a divorce decree and subsequent remarriage of the former spouse, or in accordance with the terms of the final divorce decree or final settlement agreement which provides that the former spouse shall renounce any claim to a retirement allowance under RSA 100-A. Upon termination, the allowance received under the elected option shall be converted to the retirement allowance that would have been payable in the absence of such election. Any supplemental allowance, or COLAs, granted to the retiree and effective before the date of termination of the option shall continue in effect and shall not be adjusted as a result of the termination. Notice of such termination shall be given by the retiree on a form designated by the board. Payment of the converted allowance shall commence on the first day of the month following receipt of termination by the board. For any retiree whose divorce and the subsequent remarriage of the former spouse occurred on or before July 1, 1990, the notice shall be given to the board on or before October 1, 1990. Said termination action shall become effective on the first day of the month following receipt of such notice by the board. If the retiree dies after giving valid notice of such termination but before the effective date, the option shall terminate as of the date of the retiree's death.

(2) Following the retiree's subsequent remarriage, elect to nominate the current spouse as beneficiary under one of the options named in paragraph III, due to either the death of a former spouse, the termination of an elected option under subparagraph (1), or the termination of an elected option by a former spouse

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under subparagraph II(b). The notice of election shall be on a form designated by the board. The optional allowance shall be effective the first of the month following receipt of the notice. If a retiree dies after filing such notice but before the effective date, the change shall be effective as of the date of death. The optional allowance shall be of equivalent actuarial value. Any supplemental allowances, or COLAs, granted to the retiree before the effective date of the election shall terminate on such effective date, but the value of such COLA's shall be included in the actuarial determination of the amount of the allowance payable under the elected option.

(b) Where a retired member has elected option 2, 3, or 4, and has designated a single beneficiary, the beneficiary may at any time voluntarily renounce his or her right to any future benefits by signing and filing with the board a form designated by the board. Upon such renunciation, the allowance received under the elected option shall be converted to the retirement allowance that would have been payable in the absence of such election. Any supplemental allowance, or COLAs, granted to the retiree and effective before the date of renunciation of the option shall continue in effect and shall not be adjusted as a result of the renunciation. The renunciation shall become effective, and payment of the converted allowance shall commence, on the first day of the month following receipt of the signed form by the board. If the retiree dies after the board's receipt of such renunciation but before the effective date, the option shall terminate as of the date of the retiree's death.

(c) Any retired member who has elected option 2, 3, or 4, and has designated a single, non-spouse beneficiary, may at any time prior to the death of the beneficiary terminate such elected option without the consent of the beneficiary by signing and filing with the board a form designated by the board. Upon termination, the allowance received under the elected option shall be converted to the retirement allowance that would have been payable in the absence of such election. Any supplemental allowance, or COLAs, granted to the retiree and effective before the date of termination of the option shall continue in effect and shall not be adjusted as a result of the termination. Such termination shall become effective, and payment of the converted allowance shall commence, on the first day of the month following receipt of such form by the board. If the retiree dies after giving notice of such termination but before the effective date, the notice shall be deemed valid, the previously elected option shall terminate as of the date of the retiree's death, and no survivor annuity shall be paid pursuant to the previously elected option.

TEXT OF RELEVANT AUTHORITIES

III. The options, each of which shall be of equivalent actuarial value to the allowance payable in the absence of election of an option, are:

Option 1. A reduced retirement allowance payable during the retired member's life, with the provision that at the member's death a lump sum equal in amount to the difference between the accumulated contributions at the time of retirement and the sum of the member annuity payments made to the member during the member's lifetime shall be paid to the beneficiaries or contingent beneficiaries, if any, nominated by written designation duly acknowledged and filed with the board of trustees if such beneficiaries or contingent beneficiaries survive the member, otherwise to the retired member's estate.

Option 2. A reduced retirement allowance payable during the retired member's life, with the provision that it shall continue after the member's death for the life of, and to, the beneficiary nominated by written designation duly acknowledged and filed with the board of trustees at the time of retirement, or as provided in subparagraph II(a)(2).

Option 3. A reduced retirement allowance payable during the retired member's life, with the provision that it shall continue after death at 1/2 the rate paid to the member and be paid for the life of, and to, the beneficiary nominated by written designation duly acknowledged and filed with the board of trustees at the time of retirement, or as provided in subparagraph II(a)(2).

Option 4. A reduced retirement allowance payable during the retired member's life, with some other benefit payable after death, provided that such other benefit shall be approved by the board of trustees, or a reduced retirement allowance payable during the retired member's life, with some other benefit payable after death, pursuant to the provisions of subparagraph II(a)(2).

100-A:27 Protection Against Fraud

Any person who shall knowingly make any false statement or shall falsify or permit to be falsified any record or records of this retirement system in any attempt to defraud the system as a result of such act, shall be guilty of a class B felony if a natural person, or guilty of a felony if any other person. Should any change or error in the records result in any member or beneficiary receiving from the system more or less than he would have been entitled to receive had the records been correct, the board of trustees shall have the power to correct such error, and to adjust as far as practicable the payments in such a manner that the actuarial equivalent of the benefit to which such member or beneficiary was correctly entitled shall be paid.

QUESTIONS PRESENTED

- I. Whether the New Hampshire Retirement System (NHRS) Board of Trustees correctly determined that, because Petitioner's divorce decree expressly retains his former spouse's NHRS survivorship benefit rights, RSA 100-A:13 prohibits Petitioner from terminating the NHRS survivorship benefit elected at the time of retirement to be provided to his former spouse.

- II. Whether the NHRS Board of Trustees correctly determined that it has the authority under RSA 100-A:27 to correct an error in a NHRS member's record without a finding of fraud.

- III. Whether it was a violation of procedural due process for the NHRS Board of Trustees to provide Petitioner with a non-evidentiary hearing to resolve an administrative appeal that involved no issues of material fact.

STATEMENT OF THE CASE

Petitioner is a retired Group I member of the New Hampshire Retirement System who seeks to challenge a NHRS Board of Trustees decision that prevents him from terminating the survivorship benefit option elected at the time of his retirement to be provided to Intervenor Margaret Emily Murray, Petitioner's then spouse.

By letter dated July 16, 2020, NHRS notified Petitioner that his November 2016 request to terminate his former spouse's survivorship benefit had been processed in error and that, pursuant to the requirements of RSA 100-A:13 and the terms of Petitioner's and Ms. Murray's divorce

decree, the NHRS was required to reinstate her survivorship benefit. Certified Record (hereinafter “CR”) 19.¹ Petitioner appealed this administrative determination by letter dated July 31, 2020 and the matter was referred to a Board-appointed hearings examiner pursuant to Ret 204.01(c). CR 20.

The hearings examiner initially scheduled a prehearing conference for August 19, 2020 but, after granting Petitioner’s two separate requests for a continuance, the prehearing conference was rescheduled and held on October 8, 2020. At the prehearing conference, the hearings examiner raised with the parties the issue of whether any material fact was in dispute and whether the matter was appropriate for resolution via a non-evidentiary hearing pursuant to Ret 204.09. Transcript I (hereinafter “Tr. I”) at 5-6, 23-31.

A prehearing order was issued on October 13, 2020 which determined that “the issue in this matter is limited to whether the divorce decree ‘provides that the former spouse shall renounce any claim to a retirement benefit under RSA 100-A.’” CR 8, quoting RSA 100-A:13, II (a)(1). Because, under New Hampshire law, the interpretation of a divorce decree is a question of law, the hearings examiner, citing *Estate of Frederick v Frederick*, 141 N.H. 530, 532 (1996), concluded that there was no issue of material fact in dispute and, as a result, no need for a factual hearing. CR 8.

As such, on January 7, 2022, a non-evidentiary hearing was held on the issue of the proper interpretation of the divorce decree after which the

¹ All citations to the Certified Record are to the page number of the Portable Document Format copy of the certified record docketed on January 14, 2022.

hearings examiner recommended that the Board of Trustees “uphold the NHRS Staff decision [of July 16, 2020] to reinstate the 100% joint and survivor option with the Intervenor the named beneficiary”. CR 17. On March 9, 2020, the NHRS Board of Trustees approved the hearings examiner’s recommendation (CR 13-17) and, on June 8, 2021, the Board denied Petitioner’s request for reconsideration. CR 48-51. Petitioner filed his appeal petition on July 16, 2021.

STATEMENT OF FACTS

Petitioner is a retired Group I member of the New Hampshire Retirement System (“NHRS”) who is receiving a monthly service retirement allowance from the NHRS pursuant to RSA 100-A:5.

Respondent, the New Hampshire Retirement System Board of Trustees, is the administrative body overseeing the New Hampshire Retirement System which was established pursuant to RSA 100-A:2 to serve as a qualified pension trust for state and local government employees. RSA 100-A:2, RSA 100-A:14, I. The System is funded by member and employer contributions and the members of the Board are the trustees of the System’s funds. RSA 100-A:15, RSA 100-A:16. The Board is authorized to establish such rules and regulations as it deems necessary for the proper administration of RSA 100-A. RSA 100-A:14, II.

Intervenor, Margaret Emily Murray², is Petitioner’s former spouse and designated survivorship beneficiary pursuant to RSA 100-A:13, I.

² On October 6, 2020, the hearings examiner granted Ms. Murray’s motion to intervene “in the interests of justice” based on her uncontested allegation that she “is at risk of the loss of survivorship benefits which would impact her financial security”. CR 6.

Upon retirement, vested members of the NHRS are eligible to receive a monthly retirement allowance that has been funded by the member's accumulated contributions account and the state annuity fund which consists of employer contributions and investment earnings. *See* RSA 100-A:5, I (b). Prior to, or within 120 days after, their retirement, NHRS retirees may elect to receive a reduced monthly retirement allowance and, thereby, provide a survivorship benefit to a designated beneficiary or beneficiaries. *See* RSA 100-A:13, I.

Petitioner retired effective May 1, 2010 and elected to provide a monthly survivorship benefit³ to his spouse, Margaret Emily Murray. CR 36-37. Petitioner and Ms. Murray were subsequently divorced pursuant to the terms of a "Final Marital Settlement Agreement" that was approved and incorporated into a Vermont Superior Court "Final Divorce Decree and Order" dated November 2, 2014. CR 24. At both the time of Petitioner's retirement in 2010 and the time of Petitioner's and Ms. Murray's divorce in 2014, RSA 100-A:13 provided that a NHRS retiree could only terminate a spousal survivorship benefit provided to a subsequently divorced spouse upon the death, remarriage, or voluntary renunciation of the divorced spouse. RSA 100-A:13, II (a)(1), *see* 2016 Laws, Chapter 292:2 (amending RSA 100-A:13).

³ Petitioner elected "Option 4 B 100% pop-up" which requires a reduction in the member's retirement allowance with the provision that, if the member's beneficiary were to predecease the member or renounce his or her survivor benefit, the retirement allowance would revert back ("pop up") to the member's maximum benefit. RSA 100-A:13, III (NHRS annotation); *see* CR 19.

Effective August 20, 2016, RSA 100-A:13, II (a)(1) was amended to also allow the termination of a spousal survivorship benefit “in accordance with the terms of the final divorce decree...which provides that the former spouse shall renounce any claim to a retirement allowance under RSA 100-A”. 2016 Laws, Chapter 292:2.

On November 17, 2016, Petitioner filed a completed NHRS “Termination of Benefit Option of Death Beneficiary” Form which indicated that he was submitting as supporting documentation a divorce decree “showing mandate of former spouse to renounce his/her pension benefit”. CR 23. By letter dated November 28, 2016, a NHRS retirement benefits technician confirmed receipt of Petitioner’s benefit termination request and informed the Petitioner that, effective December 1, 2016, his monthly retirement allowance would be increased from the “100% pop-up” survivorship rate he had elected at his retirement to the “Maximum Allowance”⁴ amount with no survivorship benefit reduction. CR 36-37.

The relevant portion of the divorce decree submitted by the Petitioner is Paragraph 14 of the court-approved settlement agreement which provides as follows:

- a. Lou is awarded his Horace Mann Roth IRA, his Horace Mann IRA, his Horace Mann 403(b), his Vermont pension and his New Hampshire pension, free and clear of any claim of Emily.

⁴ As set forth in an attachment to Petitioner’s August 12, 2021 “Petition for Original Jurisdiction”, Petitioner’s monthly “100% pop-up” benefit is \$1796.46 and his “Maximum Allowance” amount is \$1950.55. “Petition for Original Jurisdiction” at 7 (“Benefit Adjustment Calculation Form”) (docketed on August 12, 2021 as “Petitioner’s additional information”).

- b. Emily is awarded her 403(b), her IRA, her New Hampshire pension, and her Vermont pension, free and clear of any claim of Lou.
- c. *Nothing in this paragraph shall be construed to be a voluntary surrender by either party of any rights, including any survivorship benefits, which he or she may have under the terms or elections of either party's pension plan(s).* Further, nothing in this paragraph shall be construed to constrain either party from exercising any rights, including the revocation of any survivorship benefit elections, which he or she may have under the terms or elections of either party's pension plan(s).

CR. 27-28 (emphasis added).

In light of the foregoing language in subparagraph 14(c), NHRS Associate Counsel and Compliance Officer Mark F. Cavanaugh notified Petitioner by letter dated July 16, 2020, that his November 2016 request to terminate the survivorship benefit provided to Ms. Murray had been processed erroneously in that the November 2014 divorce decree failed to mandate the renunciation of Ms. Murray's survivorship benefit as required by RSA 100-A:13, II. CR 19.

As such, the July 16, 2020 letter went on to inform Petitioner that:

Consequently, we will be rescinding that termination and reinstating the 100% joint and survivorship option you originally selected for your former spouse...As a result, your monthly benefit will be restored to the amount payable prior to the benefit "pop-up" that began in December 2016.

CR 19.

By letter dated July 31, 2020, Petitioner appealed the July 16, 2020 administrative order⁵ to a NHRS hearings examiner pursuant to the Ret 204.01.

At a prehearing conference held on October 8, 2020, Petitioner stated that he had filed a motion in the Vermont court to have the 2014 divorce decree clarified and indicated that he would also be filing a motion to stay the NHRS proceeding pending the Vermont court's consideration of his request for clarification. Tr. I at 7-11.

In an October 13, 2020 prehearing order, Petitioner was granted thirty days from the prehearing conference "to file a motion to stay with supporting documentation establishing the current status of the Vermont proceeding". CR 8. Although Petitioner failed to comply with the thirty-day filing deadline, his Motion to Stay was considered by the hearings

⁵ The July 16, 2020 decision letter also notified Petitioner that "if the administrative action is upheld on appeal, NHRS will send you a notice of recoupment for any amounts owing at that time" and that he would then "also have the right to ask for the waiver of any recoupment pursuant to the NHRS Pension Recoupment and Hardship Policies, located at https://www.nhrs.org/docs/default-source/board-policies/pension_recoupment_and_hardship_policies.pdf?sfvrsn=2ee39b44." CR. 19.

The NHRS pension recoupment policy provides that "adjustments can be granted based on consideration of the...principles of general trust law and equity" including: "How much time has elapsed since the overpayment was made"; "The amount of the overpayment"; "The cause of the overpayment and whether a plan fiduciary or NHRS Staff was in error" and "Whether recoupment of the overpayment would create a financial hardship for the member." NHRS Pension Recoupment and Hardship Policies (revised August 15, 2015).

examiner and denied “based on the lack of evidence of any pending Vermont proceedings”. CR 10.

As explained by the NHRS hearings examiner:

The Petitioner has provided no documentation that establishes the current status of the proceeding. He offers, without providing any proof from the Vermont Family Court, that the proceedings are awaiting service on the Intervenor. In short there is no evidence from the Vermont court system that shows any proceedings have been initiated by the Petitioner or that the Vermont court is likely to ever act on the issue.

Id.

Although NHRS legal counsel represented at both the prehearing conference (Tr. I at 13-15, 18, 20) and the non-evidentiary hearing (Tr. II at 15) that NHRS would prospectively implement the terms of any valid Vermont clarification order, Petitioner has provided no further information regarding his pursuit of that potential legal remedy.

After conducting a non-evidentiary hearing on January 7, 2021, the hearings examiner issued a recommendation to uphold the July 16, 2020 administrative order with the following rationale:

Although subparagraph (a) of Paragraph 14 awards the Petitioner his NHRS pension ‘free and clear of any claim of [the Intervenor]’, subparagraph (c) specifically states that “nothing in this paragraph shall be construed to be a *voluntary surrender* by either party of any rights, *including any survivorship benefits*, which she or he may have under the terms *or elections* of either party’s pension plan(s)....

At the time of their divorce, the Petitioner's NHRS pension provided the Intervenor with a survivorship benefit. Nowhere in the divorce decree does it require her to renounce that benefit, and subparagraph (c) specifically reserves her right to any survivorship benefits previously elected. To read the settlement agreement as the Petitioner seeks to have it read, the Intervenor would have, in fact, voluntarily surrendered her survivorship benefits in the Petitioner's NHRS pension.

CR 15 (emphasis in the original).

Accordingly, because the survivorship benefit had, under RSA 100-A:13, II, been terminated erroneously, the hearings examiner concluded that, pursuant to the Board's statutory authority to correct "any change or error in the records", the July 16, 2020 administrative decision had properly reinstated the survivorship benefit to Ms. Murray. CR 13-17. *See* RSA 100-A:27.

The hearings examiner's recommendation was approved by the NHRS Board of Trustees on March 9, 2021 (CR 13) and reconsideration was denied by the Board's order of June 8, 2021. CR 48-52. As stated in the System's July 16, 2020 administrative order, however, enforcement of the Board's decision has been held in abeyance pending the final resolution of Petitioner's pending appeal. CR 19.

SUMMARY OF THE ARGUMENT

The NHRS Board of Trustees acted reasonably and lawfully when it determined that RSA 100-A:13 prohibits Petitioner from terminating the survivorship benefit provided to his former spouse. A divorced NHRS retiree may only terminate a spousal survivorship benefit under limited

circumstances. If, as here, the former spouse has not remarried, RSA 100-A:13, II mandates that the former spouse's survivorship benefit may only be terminated if "the final divorce decree...provides that the former spouse shall renounce any claim to a retirement allowance under RSA 100-A." Petitioner's divorce decree fails to comply with this "express renunciation" requirement.

Petitioner incorrectly relies on subparagraph 14(a) of the Final Marital Settlement Agreement which awards him his monthly NHRS pension and does not pertain to spousal survivorship benefits. In contrast, subparagraph 14(c) of the Final Marital Settlement Agreement establishes the clear interpretive mandate that "nothing in this paragraph shall be construed to be a voluntary surrender by either party of any...survivorship benefits".

The proper interpretation of Paragraph 14, therefore, is that subparagraphs (a) and (b) award Petitioner and Ms. Murray their full individual pensions without having to share them with each other while subparagraph (c) mandates that any previously provided survivorship rights relative to those pensions remain fully with the survivorship beneficiary.

As, under these circumstances, the final divorce decree does not authorize Petitioner to terminate his former spouse's survivorship benefit, the NHRS Board of Trustees properly ordered that the benefit be reinstated.

The Board's benefit reinstatement order was issued pursuant to its authority under RSA 100-A:27 to correct any error in a NHRS member's record that would "result in any member or beneficiary receiving from the system more or less than he [or she] would have been entitled to receive had the records been correct". Here, Petitioner's member record

erroneously provided for the termination of Ms. Murray's survivorship benefit. This error has resulted in the Petitioner receiving a greater monthly retirement allowance than he would have received otherwise and, if not corrected, would deprive Ms. Murray of her previously provided survivorship benefit.

Petitioner incorrectly asserts that because the title of RSA 100-A:27 is "Protection Against Fraud" a finding of fraud is required before the Board can correct an error in a member's record. As a matter of statutory construction, however, when the language of a statute is clear and unambiguous, the title is not considered in determining the statute's meaning. As a result, the mere fact that the statute is entitled "Protection Against Fraud" does not impose a fraud requirement where one is not mandated by the text of the statute.

The fact that this interpretation of RSA 100-A:27 has been the longstanding practice of NHRS without any legislative intervention to the contrary further supports the Board's action to correct the error in Petitioner's record and restore Ms. Murray's erroneously terminated survivorship benefit.

Petitioner's final argument involves a procedural due process claim that was waived due to Petitioner's failure to address it in Petitioner's Brief. If the Court chooses to consider it, however, the due process issue can be easily resolved as Petitioner's appeal was adjudicated in accordance with the non-evidentiary disposition process set forth in Ret 204.09.

Ret 204.09 (a) provides that if the hearings examiner determines that there is no issue of material fact in dispute then the matter can be resolved through the non-evidentiary disposition process. Pursuant to RSA 100-

A:13, II (a), the sole legal issue in this matter is whether the Petitioner’s divorce decree provides that his former spouse “shall renounce any claim to a retirement allowance under RSA 100-A”. Petitioner’s divorce decree was included in the record as a stipulated exhibit and the interpretation of the language of a divorce decree, like the interpretation of other written documents, is a question of law.

As all the facts that were material to Petitioner’s administrative appeal were undisputed and included in the administrative record, there was no factual basis for the evidentiary hearing requested by Petitioner. Under these circumstances, Petitioner was properly provided with a non-evidentiary hearing, pursuant to Ret 204.09, to present argument on the legal issue of the meaning of Paragraph 14 of the divorce decree. Following the hearing, the Board correctly approved the hearing examiner’s recommendation to reinstate Ms. Murray’s survivorship benefit.

ARGUMENT

I. STANDARD OF REVIEW

Decisions of the NHRS Board of Trustees are reviewed by this Court through a writ of certiorari. *Petition of Concord Teachers*, 158 N.H. 529, 533 (2009). The scope of judicial review is narrow and deferential with the Court’s jurisdiction being limited to determining “whether the board acted illegally with respect to jurisdiction, authority or observance of the law, whereby it arrived at a conclusion which cannot legally or reasonably be made, or abused its discretion or acted arbitrarily, unreasonably, or capriciously.” *Petition of Farmington Teachers*, 158 N.H. 453, 455 (2009) quoting *Petition of Bailey*, 146 N.H. 197, 198 (2001).

The Trustees' findings of fact are considered "prima facie lawful and reasonable" and Petitioner's burden is to demonstrate that the Trustees' decision "is clearly unreasonable or unlawful." *Petition of Concord Teachers*, 158 N.H. 529, 533 (2009) (quoting RSA 541:13).

II. THE NHRS BOARD OF TRUSTEES CORRECTLY DETERMINED THAT RSA 100-A:13 PROHIBITS PETITIONER FROM TERMINATING THE SURVIVORSHIP BENEFIT PROVIDED TO HIS FORMER SPOUSE

A. Petitioner's Divorce Decree Expressly Provides That His Former Spouse, Intervenor Murray, Shall Retain Her NHRS Survivorship Benefit

RSA 100-A:13, I authorizes a NHRS member to elect, at the time of retirement, to provide a survivorship benefit to the member's spouse or another designated beneficiary or beneficiaries. RSA 100-A:13, I. The statute also allows a retired member to change a survivorship benefit election within 120 days of retirement but, specifically mandates that "after expiration of the 120-day grace period no change in option selection shall be permitted except as provided in paragraph II" of the statute.

RSA 100-A:13, II provides that a retired member who has designated the member's spouse as the member's survivorship beneficiary may terminate the benefit only under limited circumstances. If a divorce decree has been issued, a retired member may terminate a spousal survivorship benefit if the former spouse subsequently remarries. RSA 100-A:13, II (a)(1). However, if, as here, the former spouse has not remarried, the survivorship benefit may only be terminated if "the final

divorce decree...provides that the former spouse shall renounce any claim to a retirement allowance under RSA 100-A.” *Id.*

This “express renunciation” requirement demonstrates the legislature’s clear intent to provide for the retention of previously elected spousal survivorship benefits unless and until the benefit is expressly renounced by the spousal beneficiary.⁶ Moreover, in the present case, the language of the divorce decree establishes that allowing the Petitioner to terminate Ms. Murray’s spousal survivorship benefit would violate this statutory mandate.

Petitioner’s termination argument relies on subparagraph 14(a) of the Final Marital Settlement Agreement which provides as follows:

Lou is awarded his Horace Mann Roth IRA, his Horace Mann IRA, his Horace Mann 403(b), his Vermont pension, and his New Hampshire pension, free and clear of any claim of Emily.

CR 27.

Although subparagraph 14(a), standing alone, could potentially support the conclusion that Intervenor Murray renounced her NHRS survivorship benefit, the provision fails to include an express statement of

⁶ The legislature’s concern over the protection of spousal retirement benefits is also demonstrated in a separate provision of RSA 100-A:13 which requires a married member/retiree to submit a written “spousal acknowledgement” of the retiree’s choice of benefit option before the retiree’s benefit election can be approved by the Board. RSA 100-A:13, I (“The notice of non-election, election, or change of retirement option shall be on a form designated by the board, which, if the member or retiree is married, shall include a spousal acknowledgment”.)

renunciation. Indeed, the same language and the same potential ambiguity is included in subparagraph 14(b), a parallel provision to subparagraph 14(a), in which Intervenor Murray is similarly awarded her IRA and her Vermont and New Hampshire pensions “free and clear of any claim” of Petitioner. *Id.*

Any question regarding the applicability of subparagraphs 14(a) and (b) to survivorship benefits is definitively answered, however, by subparagraph 14(c) which establishes the following clear interpretive mandate:

Nothing in this paragraph shall be construed to be a voluntary surrender by either party of any rights, including any survivorship benefits, which he or she may have under the terms or elections of either party’s pension plan(s).

R. 28.⁷

Indeed, instead of supporting Petitioner’s claim that Ms. Murray had voluntarily renounced her right to a NHRS survivorship benefit, the terms of Paragraph 14(c) lead to the exact opposite conclusion.

By expressly excluding any “voluntary surrender” of Ms. Murray’s survivorship benefit, subparagraph 14(c) directly contradicts Petitioner’s claim that the “free and clear” *pension* benefit language of subparagraph

⁷ Paragraph 14(c) also contains language stating that it should not be “construed to constrain either party from exercising any rights, including the revocation of any survivorship benefit elections, which he or she may have under the terms or elections of either party’s pension plan(s)”. Because Petitioner does not have the right under RSA 100-A to revoke a survivorship option without Intervenor Murray’s consent, this language is inapplicable to Petitioner’s appeal.

14(a) is sufficient to meet the *survivorship* benefit renunciation requirement of RSA 100-A:13, II.

The proper interpretation of Paragraph 14, therefore, is that subparagraphs (a) and (b) award Petitioner and Ms. Murray their full individual pensions without having to share them with each other while subparagraph (c) mandates that any previously provided survivorship rights relative to those pensions remain fully with the survivorship beneficiary. *See In the Matter of Duquette and Duquette*, 159 N.H. 81, 84-85 (2009) (distinguishing between a divorced spouse's interest in a share of a NHRS member's monthly retirement allowance from the divorced spouse's interest in a NHRS survivorship benefit granted pursuant to RSA 100-A:13, I).

Accordingly, as subparagraph 14(c) expressly retains Ms. Murray's survivorship benefit rights, "the terms of the final divorce decree" do not authorize Petitioner to terminate her rights pursuant to RSA 100-A:13, II (a)(1). As such, the Board properly ordered the reinstatement of Ms. Murray's survivorship benefit and denied Petitioner's attempt to increase his current pension at the future expense of his former spouse.

**B. The Board Properly Reinstated Ms. Murray's
Survivorship Benefit Pursuant To Its Authority
Under RSA 100-A:27 To Correct Errors In
Member Records**

The Board of Trustees' benefit reinstatement order was issued pursuant to its authority under RSA 100-A:27 to correct any error in a NHRS member's record that would "result in any member or beneficiary receiving from the system more or less than he [or she] would have been entitled to receive had the records been correct". RSA 100-A:27.

Petitioner claims that a finding of fraud is required before the Board can correct an error in a member's record. Under RSA 100-A:27, however, a showing of fraud would only be relevant to a felony fraud violation brought pursuant to the first sentence of the statute.⁸ As NHRS Staff does not allege in this proceeding that Petitioner has attempted to defraud the System, the criminal fraud provision of RSA 100-A:27 is inapplicable to Petitioner's adjudicative proceeding under Ret Part 200 and to this appeal.

Moreover, the Board corrected Petitioner's member record and reinstated Ms. Murray's survivorship benefit pursuant to the second sentence of RSA 100-A:27 which does not include a fraud requirement and provides, in full, as follows:

Should any change or error in the records result in any member or beneficiary receiving from the system more or less than he would have been entitled to receive had the records been correct, the Board of Trustees shall have the power to correct such error, and to adjust as far as practicable the payments in such a manner that the actuarial equivalent of the benefit to which such member or beneficiary was correctly entitled shall be paid.

RSA 100-A:27.

⁸ The first sentence of RSA 100-A:27 provides that:

Any person who shall knowingly make any false statement or shall falsify or permit to be falsified any record or records of this retirement system in any attempt to defraud the system as a result of such act, shall be guilty of a class B felony if a natural person, or guilty of a felony if any other person.

In *Petition of Lussier*, 161 N.H. 153, 160 (2010), a case involving a Board of Trustees decision correcting an error in the calculation of a NHRS member's monthly retirement allowance, the Court relied on this language in upholding the Board's action to reduce the member's pension concluding that "upon becoming aware of the error in the [member's] records, the Board was authorized to correct it". *Petition of Lussier*, 161 N.H. at 160.

The sole basis of Petitioner's argument for the imposition of a fraud requirement is that RSA 100-A:27 is entitled "Protection Against Fraud". As a matter of statutory construction, however, "the title of a statute is not conclusive of its interpretation and, where the statutory language is clear and unambiguous, this court will not consider the title in determining the meaning of the statute." *State v. Kilgus*, 125 N.H. 739, 742 (1984).

The text of RSA 100-A:27 is not ambiguous. It clearly provides the Board of Trustees with the authority to correct an error in the records of NHRS that "result[s] in any member or beneficiary receiving from the system more or less than [they] would have been entitled to receive had the records been correct". Here, Petitioner's member record erroneously provided for the termination of Ms. Murray's survivorship benefit. This error has resulted in the Petitioner receiving a greater monthly retirement allowance than he was entitled to receive under his elected survivorship option and, if not corrected, would deprive Ms. Murray of her previously provided survivorship benefit.

The mere fact that RSA 100-A:27 is entitled "Protection Against Fraud" does not impose a fraud requirement where one is not mandated by the text of the statute. *Vera Chem. Co. v. State*, 78 N.H. 473 (1917). Moreover, in the second sentence of RSA 100-A:27, the Board has been

granted broad authority to correct errors in NHRS records without any reference to an underlying fraud requirement. *See Petition of Lussier*, 161 N.H. at 160.⁹

As such, the Board’s authority to correct NHRS records can’t be restricted merely because the legislature didn’t happen to include it in the title of the statute. *Vera Chem. Co.* 78 N.H. at 475 (1917) (“If we find within the body of the act an express and unequivocal grant of powers and rights not mentioned in the title..., we cannot restrict the grant of those rights merely because the terms of such grant are more extensive than the terms of the title...”).

In addition, the fact that this interpretation of RSA 100-A:27 has been the longstanding practice of the Board of Trustees without any legislative intervention to the contrary further supports the Board’s action to correct the error in Petitioner’s record and restore Ms. Murray’s erroneously terminated survivorship benefit. CR. 43-46 (referencing *In the Matter of David Little* a July 14, 2015 Board ruling that RSA 100-A:27 applies to any mistake or error in the record without a requirement to show fraud); *see New Hampshire Retirement System v. Sununu*, 126 N.H. 104, 109 (1985) (when the meaning of a statute is at issue, “the long-standing practical and plausible interpretation applied by the agency responsible for its implementation, without any interference by the legislature, is evidence

⁹ Although the opinion in *Lussier* did note that “the petitioner makes no argument that this statute does not apply under these circumstances”, it is significant that the Court found RSA 100-A:27 to be applicable and affirmed the Board’s correction of the petitioner’s record without a showing of fraud.

that the administrative construction conforms to the legislative intent.”)
(citation omitted).

C. Non-Evidentiary Disposition Pursuant to Ret 209 Does Not Violate Procedural Due Process

Petitioner incorrectly asserted in his appeal petition that the adjudication of this matter via the non-evidentiary disposition process set forth in Ret. 204.09 violated his right to procedural due process. As Petitioner has, subsequently, declared the issue to be “moot” and failed to argue the issue in his brief, the Court should deem Petitioner’s due process claim to be waived. Brief of Petitioner at 1; *see State v. Berry*, 148 N.H. 88, 93 (2002); *see also, Lussier* at 159-60 (“Judicial review is not warranted for complaints regarding adverse rulings without developed legal argument, and neither passing reference to constitutional claims nor off-hand invocations of constitutional rights without support by legal argument or authority warrants extended consideration.”) (citation omitted).

If the Court chooses to address the issue, however it can be easily resolved as Ret 204.09 (a) sets forth the procedure for conducting a non-evidentiary hearing and provides as follows:

If, at any time after receipt of a petition pursuant to Ret 203.01, the presiding officer determines that there is no issue of material fact in dispute, the presiding officer shall issue an order authorizing the parties to file legal memoranda or request that a non-evidentiary hearing be scheduled to hear argument on any remaining legal issues.

Ret 204.09(a).¹⁰

The sole legal issue in this matter involves whether the terms of Petitioner’s divorce decree provide that his former spouse “shall renounce any claim to a retirement allowance under RSA 100-A”. RSA 100-A:13, II (a). Petitioner’s divorce decree was entered into the administrative record by Petitioner and included as a stipulated exhibit. CR 18, 24-35. In addition, the interpretation of the language of a divorce decree, like the interpretation of other written documents, is a question of law. *In re Oligny & Oligny*, 169 N.H. 533, 535 (2016), citing, *Estate of Frederick v. Frederick*, 141 N.H. 530, 531, (1996).

As such, the hearings examiner correctly determined that there were no material facts in dispute and, pursuant to Ret 204.09, issued an order that 1) authorized the parties to file legal memoranda and 2) scheduled a non-evidentiary hearing for the parties to present oral arguments. CR 8.

Petitioner’s only proffered justification for an evidentiary hearing was “to question the individual at NHRS who made the decision in 2016 to ask what had changed between 2016 and 2020”. CR 48; *see* CR 59 (where

¹⁰ The “no issue of material fact” standard makes non-evidentiary disposition under Ret 204.09 (a) the administrative adjudication equivalent of summary judgment in civil litigation. *See Community Oil Co. v. Welch*, 105 N.H. 320, 321 (1964) (“The mission of the summary judgment procedure is to pierce the pleadings and assess the proof in order to determine if there is a genuine issue of material fact requiring a formal trial of the action.”). Petitioner has presented no case precedent from any jurisdiction that would support his argument that non-evidentiary disposition (or the analogous summary judgment process) raises an issue of procedural due process.

Petitioner alleged in motion for reconsideration that questioning NHRS Staff would have allowed him to “gather prima facie evidence that would support the 2016 decision”). The hearings examiner and the Board properly rejected Petitioner’s argument under the following reasoning:

Denying the Petitioner the opportunity to question NHRS Staff regarding the 2016 decision did not deprive him of due process because questioning NHRS Staff would not have led to relevant evidence. The issue is not why the NHRS Staff made its decision in 2016, but whether the decision in 2020 to reverse the 2016 decision was correct. The NHRS Staff have acknowledged granting Petitioner’s request to terminate his beneficiary in 2016 was a mistake. Ascertaining why NHRS Staff made this mistake is irrelevant to deciding whether the 2020 decision to reinstate the benefit was correct.

CR 49.

As all the facts that were material to his administrative appeal were undisputed and included in the administrative record, there was no relevant reason for Petitioner to call a NHRS staff person as a witness and no factual basis for the evidentiary hearing requested by Petitioner. Under these circumstances, Petitioner was properly provided with a non-evidentiary hearing, pursuant to Ret 204.09, to present argument on the legal issue of the meaning of Paragraph 14 of the divorce decree. Following the hearing, the Board correctly approved the hearings examiner’s recommendation to reinstate Ms. Murray’s survivorship benefit. *See* Ret 204.09(b)(2).

CONCLUSION

For the foregoing reasons, Petitioner has failed to meet his appellate burden of establishing that the NHRS Board of Trustees' decision to reinstate the survivorship benefit of Intervenor Murray is "clearly unreasonable or unlawful." *See Petition of Concord Teachers*, 158 N.H. at 533 (2009). Accordingly, the decision of the Board should be affirmed and Petitioner's appeal should be dismissed.

Respectfully Submitted,

New Hampshire Retirement
System Board of Trustees

By Its Attorney,

March 24, 2022

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CERTIFICATE OF SERVICE

I, Peter T. Foley, hereby certify that 2 copies of this brief have been mailed this 24th day of March, 2022 to both the Petitioner and the Intervenor.

Peter T. Foley, Esq.