

RECORD OF PROCEEDINGS

IN THE MATTER OF:

DOCKET NUMBER: BC-2020-02793

XXXXXXXXXXXXXXXXXX

COUNSEL: XXXXXXXXXXXXXXXX

HEARING REQUESTED: NO

APPLICANT'S REQUEST

His record be corrected to show he made a timely election for former spouse coverage under the Survivor Benefit Plan (SBP).

APPLICANT'S CONTENTIONS

He and his former spouse divorced in 2004. According to their divorce decree, he was ordered to elect his former spouse as his SBP beneficiary. He was not aware his SBP election was rejected because it was completed after he retired.

The applicant's complete submission is at Exhibit A.

STATEMENT OF FACTS

The applicant is a retired Air National Guard (ANG) colonel (O-6).

On 26 Jul 80, according to SBP Marital Status Affidavit - Retiree, the applicant married his former spouse.

On 23 Sep 04, the applicant and his former spouse divorced. The divorce decree provided by counsel required the applicant to provide SBP coverage for his former spouse. As of 22 Sep 05, the applicant had not filed a change to his SBP election under Title 10 United States Code, Section 1448(b) (3) (A) (iii) (10 U.S.C. § 1448(b) (3) (A) (iii)), nor had his former spouse filed a deemed election under 10 U.S.C. § 1450(f) (3) (C).

On 25 Jan 08, according to Special Order **Work-Product** dated 4 Jan 08, the applicant was permanently disability retired from the ANG.

On 29 Jan 08, according to DD Form 2656-1, *Survivor Benefit Plan (SBP) Election Statement for Former Spouse Coverage*, the applicant elected to change his SBP coverage due to divorce naming his former spouse as the eligible beneficiary.

On 29 Jan 08, according to DD Form 2656, *Data for Payment of Retired Personnel*, Section IX, *SBP Election*, the applicant elected Option 26e, *Coverage for Former Spouse*, based on full retired pay and his spouse concurred with the decision.

On 30 Nov 20, the Board sent the applicant the following standard forms, in order to establish whether there are persons with competing interests in the case or who should receive notice of the requested correction to the record: SBP Marital Status Affidavit (Former Spouse); SBP Marital Status Affidavit (Retiree); SBP Release of Benefits Affidavit (Current Spouse).

On 28 Jul 21, the applicant returned all required completed affidavits. The applicant's current spouse signed an affidavit stating she understood the applicant's intention to comply with a court order naming the applicant's former spouse as the SBP beneficiary. Further, the current spouse

indicated she would relinquish any competing interest she may have in the Arrears of Pay in favor of the applicant's former spouse.

For more information, see the excerpt of the applicant's record at Exhibit's A and B and the advisory at Exhibit C.

APPLICABLE AUTHORITY

10 U.S.C. § 1450(f) (3) (C). If a court has ordered a service member to elect former spouse SBP, then a former spouse can submit his or her own request to DFAS for former spouse SBP coverage. This is known as a "deemed election request." There is a time limit: "An election may not be deemed to have been made ... unless the Secretary concerned receives a request from the former spouse of the person within one year of the date of the court order or filing involved."

10 U.S.C. § 1448(b) (3) (A) (iii). "An election to convert spouse coverage to former spouse coverage, "must be written, signed by the person making the election, and received by the Secretary concerned within one year after the date of the decree of divorce, dissolution, or annulment."

AIR FORCE EVALUATION

AFPC/DPFFF recommends approving the application. Defense Enrollment Eligibility Reporting System (DEERS) records reflect the applicant and his former spouse were married prior to his retirement, and divorced on 24 Sep 04. In the parties' Final Judgement of Dissolution of Marriage, the applicant was ordered to designate his former spouse as his former spouse beneficiary under SBP upon his retirement. At the time of his 25 Jan 08 retirement, the applicant was remarried to his current spouse. On 29 Jan 08, the applicant elected Former Spouse Coverage, with current spouse concurrence, and completed both the DD Form 2656 and the DD Form 2656-1. An election made after the date of retirement is invalid and defaults to Automatic SBP coverage. Automatic SBP coverage covers a retiree's current spouse. There is no evidence of an Air Force error in this case and absent a competing claimant, it would be appropriate to enforce the parties' court-ordered agreement to provide former spouse coverage. To deny the request would be to deny the former spouse an asset awarded to her by the court.

The complete advisory opinion is at Exhibit C.

APPLICANT'S REVIEW OF AIR FORCE EVALUATION

The Board sent a copy of the advisory opinion to the applicant on 21 Sep 21 for comment (Exhibit D), but has received no response.

FINDINGS AND CONCLUSION

1. The application was timely filed.
2. The applicant exhausted all available non-judicial relief before applying to the Board.
3. After reviewing all Exhibits, the Board concludes the applicant is the victim of an error or injustice. The Board notes the applicant's current spouse signed an affidavit stating she understood the applicant's intention to comply with a court order naming the applicant's former spouse as the SBP beneficiary. Further, the current spouse indicated she would relinquish any competing interest she may have in the Arrears of Pay in favor of the applicant's former spouse. Therefore, the Board concurs with the rationale and recommendation of AFPC/DPFFF and finds

a preponderance of the evidence substantiates the applicant's contentions. Accordingly, the Board recommends correcting the applicant's records as indicated below.

RECOMMENDATION

The pertinent military records of the Department of the Air Force relating to APPLICANT be corrected to show that:

a. On 25 Jan 08, he submitted an election for former spouse coverage under the Survivor Benefit Plan, based on the previous full level of retired pay, naming FORMER SPOUSE as the eligible beneficiary.

b. Approval should be contingent upon recovery of Survivor Benefit Plan premiums. If applicable, the monthly survivor benefit annuity will be applied to the premium debt until the total amount of premiums owed is recovered.

CERTIFICATION

The following quorum of the Board, as defined in Air Force Instruction (AFI) 36-2603, *Air Force Board for Correction of Military Records (AFBCMR)*, paragraph 1.5, considered Docket Number BC-2020-02793 in Executive Session on 19 May 22:

Panel Chair
Panel Member
Panel Member

All members voted to correct the record. The panel considered the following:

- Exhibit A: Application, DD Form 149, dated 15 Oct 20.
- Exhibit B: Documentary Evidence, including relevant excerpts from official records.
- Exhibit C: Advisory, AFPC/DPFFF, dated 19 Nov 20.
- Exhibit D: Notification of Advisory, SAF/MRBC to Counsel, dated 21 Sep 21.

Taken together with all Exhibits, this document constitutes the true and complete Record of Proceedings, as required by AFI 36-2603, paragraph 4.11.9.

X

Board Operations Manager, AFBCMR