

RECORD OF PROCEEDINGS

IN THE MATTER OF:

DOCKET NUMBER: BC-2021-01009

XXXXXXXXXXXX

COUNSEL: NONE

HEARING REQUESTED: NO

APPLICANT'S REQUEST

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

APPLICANT'S CONTENTIONS

He married his same sex spouse in 2008, prior to the repeal of repeal of Don't Ask, Don't Tell. He submitted requests to the Defense Finance and Accounting Service (DFAS) to add SBP coverage for his husband in December 2011 and October 2019; however, both requests were rejected. The first time was because the policy still not allow same sex spouses SBP coverage. The second time was because he did not timely submit the request for coverage within one year. As a same sex couple, he and his husband were not properly counseled, which has caused delays in their receipt of benefits that other similarly situated couples enjoy. Neither of the DFAS denial letters mentioned that he could have completed a request to the Board's for consideration. His experience has been lengthy and is an injustice.

The applicant's complete submission is at Exhibit A.

STATEMENT OF FACTS

The applicant is a retired Air Force colonel (O-6)

On 28 February 2001, according to DD Form 214, *Certificate of Release or Discharge from Active Duty*, the applicant was discharged for the purpose of retirement on 1 March 2001.

On 12 September 2008, according to a Certificate of Marriage, provided by the applicant, he married his husband.

On 3 December 2011, according to DD Form 2656-6, *Survivor Benefit Plan Election Certificate*, the applicant requested SBP coverage due to marriage, naming his husband as the eligible beneficiary.

On 21 December 2011, the Defense Finance and Accounting Service (DFAS) informed the applicant they could not add spousal coverage without a marriage certificate.

On 7 October 2019, according to DD Form 2656-6, the applicant requested spouse only coverage based on full retired pay.

On 7 November 2019, DFAS informed the applicant they could not add his husband to his SBP because he did not notify them prior to the first year anniversary of their marriage.

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

APPLICABLE AUTHORITY

DoDI 1332.42, *Survivor Benefit Plan*. Effective 26 June 2013, a member who becomes eligible to participate in SBP, who is married to a same-sex spouse will have the SBP programs applied as for any other married couple, including the requirement for written spousal concurrence for less than full coverage. Members who were legally married to a same-sex spouse before first becoming eligible to participate in SBP and who retired before 26 June 2013, had one year from 26 June 2013, to elect, with written spousal concurrence, to decline or reduce coverage. If no election was received before 25 June 2014, such retirees are considered full participants in SBP or RCSBP and are responsible for payment of premiums effective from 26 June 2013. A member who was not married upon becoming eligible to participate in SBP, but who later married a same-sex spouse before 26 June 2013, had until 25 June 2014 to elect to cover his or her same-sex spouse as spouse or former spouse beneficiaries.

AIR FORCE EVALUATION

AFPC/DPFFF recommends denying the application. Title 10 U.S.C., Section 1448(a) allows a member, who is unmarried at retirement to voluntarily elect SBP coverage for the first spouse acquired after retirement. Such an election must be received within one year of the marriage. The new spouse's eligibility would begin on the first anniversary of the marriage. If the member fails to elect SBP spouse coverage within the allotted time, SBP coverage may not be elected for that spouse or any future spouse, unless Congress authorizes an open enrollment.

The applicant was single, with no eligible beneficiaries, and declined SBP coverage prior to his 1 March 2001 retirement. The applicant married his husband on 12 September 2008, but did not notify DFAS of the change to his marital status or request SBP coverage be established on his spouse's behalf within the first year of their marriage. The applicant contends that he submitted requests to DFAS to add Spouse coverage in December 2011 and October 2019. DFAS records reflect both requests were denied due to the requests not being received within one-year of the marriage.

Neither of the applications forwarded by the applicant identified he was in a same-sex marriage. If that was disclosed in the first request, he would have been advised that the law governing SBP in 2011 did not support coverage for a same-sex spouse. Effective 5 September 2013, the Department of Defense issued implementing guidance extending SBP coverage to same-sex spouses of military members and retirees. The guidance states that a person who is unmarried at retirement, but who later married a same-sex partner before 26 June 2013, had until 25 June 2014, to make a spouse election under 10 U.S.C. 1448(a)(5). A member who did not make such an election within that one-year period is prohibited by law from making such an election.

If the Board's decision is to approve the request, the applicant's record should be corrected to show that on 27 June 2013, well within the allotted one-year period, he submitted a request to DFAS to elect SBP coverage, based on full retired pay, for his same-sex spouse. Approval should be contingent upon the recovery of all retroactive costs that may be due.

The complete advisory opinion is at Exhibit B.

APPLICANT'S REVIEW OF AIR FORCE EVALUATION

The Board sent a copy of the advisory opinion to the applicant on 9 June 2021, for comment (Exhibit C), but has received no response.

FINDINGS AND CONCLUSION

1. The application was not timely filed, but it is in the interest of justice to excuse the delay.

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. While the Board notes the recommendation of AFPC/DPFFF against correcting the record, the Board finds a preponderance of the evidence substantiates the applicant's contentions. The applicant married his same sex spouse in 2008, prior to the repeal of Don't Ask, Don't Tell. In 2011 he submitted his initial SBP request; however, it was rejected because he did not provide a marriage certificate. As noted by AFPC/DPFFF, even if he had provided a marriage certificate, his application would have been rejected since the law governing SBP in 2011 did not support coverage for a same-sex spouse. Since the applicant retired before 2013, and did not make an election with written spousal concurrence, he should have been considered a full SBP participant per DoDI 1332.43, and be responsible for payment of premiums effective from 26 July 2013. Therefore, 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 27 June 2013, he submitted a timely and effective election for spouse coverage under the Survivor Benefit Plan, based on full retired pay, naming SPOUSE as the eligible beneficiary.

b. Approval is 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-2021-01009 in Executive Session on 22 July 2021:

, Panel Chair
, Panel Member
, Panel Member

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

Exhibit A: Application, DD Form 149, w/atchs, dated 7 May 2021.
Exhibit B: Advisory, AFPC/DPFFF, dated 7 June 2021.
Exhibit C: Notification of Advisory, SAF/MRBC to Applicant, dated 9 June 2021.

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.

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Board Operations Manager, AFBCMR