

RECORD OF PROCEEDINGS

IN THE MATTER OF:

DOCKET NUMBER: BC-2021-02698

XXXXXXXXXXXXXXXXXX

COUNSEL: NONE

HEARING REQUESTED: NO

APPLICANT'S REQUEST

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

APPLICANT'S CONTENTIONS

Upon retirement, he elected SBP coverage for his spouse. In July 2005 after 31 years of marriage, they divorced, and he was ordered by the court to continue SBP coverage. He was later informed that after their divorce, the designation should have changed from spouse to former spouse. He believed his former spouse was the beneficiary as he intended, since her birthday has been and still is listed on his retirement account statement. He attempted to correct the error numerous times but was unsuccessful. It was, is, and shall be his intention that his former spouse is the sole beneficiary of his SBP. His current wife knows, understands, and agrees with the decision.

The applicant's complete submission is at Exhibit A.

STATEMENT OF FACTS

The applicant is a retired Air Force technical sergeant (E-6).

On 1 November XXXX, according to Special Order XX-XXXXXX, dated 16 February 1991, the applicant retired from the Regular Air Force.

On 21 July XXXX, according to a divorce decree provided by the applicant, he was required to provide SBP coverage for his former spouse. As of 21 July 2006, 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 2 October XXXX, according to a Certificate of Marriage, provided by the applicant, he married his current spouse.

On 23 June 2016 and 16 August 2020, according to DD Forms 2656-1, *Survivor Benefit Plan (SBP) Election Statement for Former Spouse Coverage*, provided by the applicant, he elected Option 1, *Due to Divorce, Change my SBP Coverage to Former Spouse*, and his former spouse agreed with the election.

On 3 May 2022, 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 (Retiree); SBP Release of Benefits Affidavit (Current Spouse); SBP Marital Status Affidavit (Former Spouse).

On 10 October 2022, the applicant returned the 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 his 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 B and the advisory at Exhibit C.

APPLICABLE AUTHORITY

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."

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 the Defense Finance and Accounting Service (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."

AIR FORCE EVALUATION

AFPC/DPFFF (SBP Program) recommends denying the application indicating there is no evidence of an error or injustice. A person's eligibility to receive a spouse SBP annuity terminates upon divorce; however, the law provides two mechanisms for changing spouse coverage to former spouse coverage. One of the following actions must be taken within the first year following divorce: (1) the retiree may file an election change, or (2) the former spouse may request the retiree be deemed to have made such a change on his or her behalf. In the latter case, the former spouse must provide legal documentation the member agreed, or the court ordered the member to establish former spouse coverage. If neither the member nor the former spouse requests the election change during the one-year eligibility period, former spouse coverage may not be established thereafter. Even though a member fails to notify DFAS of the divorce and continues to pay SBP premiums afterwards, the former spouse is not eligible for annuity payments upon the member's death.

The applicant was married to his former spouse at the time of his 1 November 1991 retirement and elected spouse coverage at that time. The parties were divorced on 23 August XXXX¹ [sic] with the divorce decree awarding former spouse SBP coverage to the former spouse. The applicant later married his current spouse on 2 October XXXX, and by law, she became the eligible SBP beneficiary. The applicant discovered the error in coverage and attempted to rectify the situation, as his intent is to honor the court-awarded SBP coverage for his former spouse. He unsuccessfully submitted DD Form 2656-1 on 23 June 2016 and 16 August 2020 to DFAS for correction of SBP. Additionally, the applicant's current spouse has provided a notarized statement of her concurrence to change SBP coverage to former spouse coverage with the former spouse as the named beneficiary.

Nevertheless, neither the applicant nor the former spouse notified DFAS to change the election from spouse to former spouse within the required one-year period following their divorce. To grant relief would be contrary to the criteria of the one-year eligibility period established by law in effect at the time of the alleged error or injustice.

¹ 21 July XXXX

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 4 January 2023, for comment (Exhibit D), 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. In this respect, the Board took notice of the divorce decree awarding the applicant's former spouse SBP coverage and the applicant's intent to comply with the decree. Furthermore, the applicant's current spouse was fully advised of her right to SBP benefits, and relinquished any competing interest she may have in favor of the applicant's former spouse. There is no evidence of an Air Force error in this case; however, 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. Therefore, in the interest of justice, 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 22 July 2005, he submitted a timely and effective election for former spouse coverage under the Survivor Benefit Plan, based on full 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 Department of the Air Force Instruction (DAFI) 36-2603, *Air Force Board for Correction of Military Records (AFBCMR)*, paragraph 2.1, considered Docket Number BC-2021-02698 in Executive Session on 14 December 2023:

, 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 22 July 2021.
Exhibit B: Documentary Evidence, including relevant excerpts from official records.
Exhibit C: Advisory, AFPC/DPFFF, dated 17 November 2022.
Exhibit D: Notification of Advisory, SAF/MRBC to Applicant, dated 4 January 2023.

Taken together with all Exhibits, this document constitutes the true and complete Record of Proceedings, as required by DAFI 36-2603, paragraph 4.12.9.

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Board Operations Manager, AFBCMR