

## RECORD OF PROCEEDINGS

**IN THE MATTER OF:**

**DOCKET NUMBER:** BC-2022-00446

XXXXXXXXX (DECEASED MEMBER)

**COUNSEL:** NONE

XXXXXXXXXX (APPLICANT)

**HEARING REQUESTED:** YES

### APPLICANT'S REQUEST

She be given her deceased spouse's retired pay.

### APPLICANT'S CONTENTIONS

Her spouse was eligible to receive retired pay at age 60 but did not apply to receive his pay until later. His application for retired pay was initiated in Mar 20 and he elected Survivor Benefit Plan (SBP) coverage for her. However, prior to his application being processed for payment, he passed away. After her spouse's death, she applied for SBP annuity and his retirement back pay. The Defense Finance and Accounting Service (DFAS) paid and continues to pay SBP payments but declined to pay retroactive retired payments. Due to delays in processing her spouse's application for retired pay, DFAS did not receive the request before he passed away.

The applicant's complete submission is at Exhibit A.

### STATEMENT OF FACTS

The service member is a former Air National Guard master sergeant (E-7).

On 1 Aug 99, AF Form 131, *Application for Transfer to the Retired Reserve*, indicates the service member applied to be transferred to the Retired Reserve, which was approved.

On 1 Sep 31 Aug 99, according to Special Order XXXX, dated 31 Aug 99, the service member was honorably discharged from the Air National Guard and transferred to the Retired Reserve List, effective 3 Sep 99.

On 1 Sep 99, NGB Form 22, *National Guard Bureau Report of Separation and Record of Service*, reflects the service member was honorably discharged from the Air National Guard after serving 16 years, 11 months, and 5 days of total service for pay. He was discharged, with a narrative reason for separation of "Retirement and Medical Disqualification."

On 16 Mar 20, according to AFPC Form 83, *Application for Retired Pay*, the service member applied for retired pay effective 28 Oct 13.

On 16 Mar 20, according to DD Form 2656, *Data for Payment of Retired Personnel*, provided by the applicant, the service member elected Spouse Only SBP coverage based on full retired pay. The application was witnessed by a Retirement Services Officer.

On 1 May 20, Reserve Order XXXX was published indicating the service member was placed on the Retired Reserve List, effective 3 Sep 99.

On 23 Oct 20, Reserve Order XXXX was published indicating the service member's spouse (the applicant) would only receive the Reserve Component Survivor Benefit Plan, with an effective date of 10 Jun 20.

On 8 Jan 22, ARPC/DPTT sent the service member the standard Notification of Eligibility for retired pay (20-year letter) informing him that he has completed the required years under the provisions of Title 10 United States Code, Section 12731 (10 U.S.C. § 12731), and is entitled to retired pay upon application prior to age 60.

On 28 Feb 22, the Board sent the applicant a non-viable letter requesting a notarized affidavit of her claim, a marital status affidavit, marriage certificate, and death certificate. The applicant replied on 16 Jun 22 and provided the following required documents that indicate:

a. On 27 Oct 84, according to a Certificate of Marriage, provided by the applicant, she married the service member.

b. On 31 Aug 20, according to a Certificate of Death, provided by the applicant, the service member passed away.

For more information, see the excerpt of the applicant's record at Exhibit B and the advisories at Exhibits C, F, and H.

#### **APPLICABLE AUTHORITY/GUIDANCE**

Air Force Instruction (AFI) 36-3209, *Separation and Retirement Procedures for Air National Guard and Air Force Reserve Members*, dated 14 Apr 05. Paragraph 1.2.1. *Former Members*. All members who are eligible for transfer to the Retired Reserve and choose discharge must be formally counseled concerning this policy and its effects on their benefits.

#### **AIR FORCE EVALUATION**

ARPC/DPTT (Transition Division) recommends denying the applicant's request for her deceased spouse's back pay finding no evidence of an error or injustice. A review of the service member's Military Personnel Record shows that as of 3 Sep 99, he completed 16 years of satisfactory service and was transferred to the Retired Reserve after being found physically disqualified. The service member was eligible to start receiving retirement pay on his 60th birthday in 2013; however, ARPC reviewed his record and confirmed that an application for retired pay in conjunction with a DD Form 2656 was not received. In accordance with AFI 36-3203, paragraph 2.1.2, members must apply for reserve retired pay if they have attained the eligibility age of 60 and have performed at least 20 creditable years. The applicant passed away on 31 Aug 20.

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 12 Sep 22 for comment (Exhibit D), and the applicant replied on 20 Oct 22. In her response, the applicant contends her deceased spouse did apply for retirement benefits in Mar 20 when he became aware of the requirement, The form was sent to Buckley Air Force Base but was never processed. Her spouse began this process but quickly passed away within months of doing what he needed to do. She was not in the right state of mind and was dealing with her spouse's death and did not follow up with the application immediately. She has been struggling financially since her spouse's passing. He served his country proudly; it is disheartening knowing he served all those years without receiving

his retired pay. She should not be held accountable for someone else “dropping the ball.” As further evidence, she submitted ARPC Form 83, *Application for Retired Pay*, with a 28 Oct 13 effective date, which was signed by the service member on 20 Mar 20. She also provided DD Form 2656, which indicates the service member signed the document on 16 Mar 20 and was witnessed by a Retirement Services Officer.

The applicant’s complete response is at Exhibit E.

#### **ADDITIONAL AIR FORCE EVALUATION**

ARPC/DPTT (Transition Division) recommends denying the applicant’s request for her deceased spouse’s retirement back pay finding no evidence of an error or injustice. Although DD Form 2656 was provided by the applicant in her response, ARPC finds no record of an attempt to apply for reserve retirement pay through ARPC prior to this AFBCMR application.

The complete advisory opinion is at Exhibit F.

#### **APPLICANT’S REVIEW OF ADDITIONAL AIR FORCE EVALUATION**

The Board sent a copy of the advisory opinion to the applicant on 2 May 23 for comment (Exhibit G), but has received no response.

#### **ADDITIONAL AIR FORCE EVALUATION**

ARPC/DPTT (Transition Division) recommends denying the applicant’s request for her deceased spouse’s retirement back pay finding no evidence of an error or injustice. The deceased member was eligible to start receiving retirement pay on his 60th birthday in 2013; however, ARPC reviewed his record and confirmed that an application for retired pay in conjunction with a DD Form 2656, was not received until this AFBCMR submission. The applicant passed away on 31 Aug 20. The member’s family was issued a deceased Retirement order, effective the day after his death for the family to receive RCSBP annuity. According to AFI 36-3203, paragraph 2.1.2, members must apply for reserve retired pay if they have attained the eligibility age of 60 and have performed at least 20 creditable years. As an applicant, the Barring Act, 31 U.S.C. § 3702(b), allows one to request reserve retired back pay; however there is a six year statute of limitations on receipt of reserve retired pay.

The complete advisory opinion is at Exhibit H.

#### **APPLICANT’S REVIEW OF ADDITIONAL AIR FORCE EVALUATION**

The Board sent a copy of the advisory opinion to the applicant on 4 Aug 23 for comment (Exhibit I), 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 recommendation of ARPC/DPTT against correcting the record because they found no evidence the service member attempted to apply for reserve retirement; however, the Board finds a preponderance of the evidence substantiates the applicant’s

contentions. Specifically, in 1999, the service member was discharged from the Air National Guard and transferred to the Retired Reserve List. However, there is no evidence he was formally counseled on the requirement to apply for Retired pay at age 60 as required per AFI 36-3209. It appears the service member may have become aware he had to apply for retired pay because on 16 Mar 20, he submitted ARPC Form 83, *Application for Retired Pay*, and DD Form 2656, *Data for Payment of Retired Personnel*. Subsequently, on 1 May 20, prior to the service member's death, Reserve Order XXX was published transferring him to the Retired Reserve List effective 3 Sep 99, over 20 years later. On 8 Jan 22, over one year after his death, and well after the service member qualified for a Reserve retirement with pay, ARPC sent the service member a 20-year Notification of Eligibility for Reserve Retired Pay at age 60 letter stating as of 3 Sep 99 he had completed the required years of service under the provisions of 10 U.S.C. § 12731, and would be entitled to retired pay upon application, normally at age 60. In view of the forgoing, the Board finds that if the applicant had known the proper procedures for the retirement application process, he would have adhered to them since he served sufficient time to be eligible for retired pay. To deny relief in this circumstance would be to place form over substance, to the detriment of the applicant. In addition, the Board finds it highly unlikely the service member would have knowingly elected not to pursue this important benefit he was entitled to. While there appears to be no Air Force error in this case, in balancing the equities in this case, the Board finds that justice can best be served by correcting the service member's records as indicated below.

4. The applicant has not shown a personal appearance, with or without counsel, would materially add to the Board's understanding of the issues involved.

## **RECOMMENDATION**

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

a. MEMBER elected Option A, *Previously declined to make an election until eligible to receive retired pay*, for his RCSBP within 90 days of his Notification of Eligibility and his spouse concurred with the decision.

b. On 1 Oct 13, he submitted a timely and effective election for spouse only coverage under the Survivor Benefit Plan, based on a full level of retired pay, naming APPLICANT as the eligible beneficiary.

c. On 28 Oct 13, MEMBER applied for and was approved for retired pay under the provisions of 10 U.S.C. § 12731.

d. On 31 Aug 20, APPLICANT submitted a timely and effective claim for survivor benefit annuity.

e. 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 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-2022-00446 in Executive Session on 17 Aug 23 and 5 Sep 23:

, 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 4 Oct 21.
- Exhibit B: Documentary evidence, including relevant excerpts from official records.
- Exhibit C: Advisory Opinion, ARPC/DPTT, w/atchs, dated 1 Sep 22.
- Exhibit D: Notification of Advisory, SAF/MRBC to applicant, dated 12 Sep 22.
- Exhibit E: Applicant's Response, w/atchs, dated 20 Oct 22.
- Exhibit F: Advisory Opinion, ARPC/DPTT, w/atchs, dated 26 Apr 23.
- Exhibit G: Notification of Advisory, SAF/MRBC to applicant, dated 2 May 23.
- Exhibit H: Advisory Opinion, ARPC/DPTT, dated 13 Jul 23.
- Exhibit I: Notification of Advisory, SAF/MRBC to applicant, dated 4 Aug 23.

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