

**UNITED STATES AIR FORCE
BOARD FOR CORRECTION OF MILITARY RECORDS**

RECORD OF PROCEEDINGS

IN THE MATTER OF:

DOCKET NUMBER: BC-2022-01256

Work-Product

COUNSEL: Work-Product

Work-Product

HEARING REQUESTED: YES

APPLICANT'S REQUEST

The deceased service member's record be changed to show he made a timely election for former spouse coverage under the Survivor Benefit Plan (SBP).

APPLICANT'S CONTENTIONS

She asks the Board to declare her SBP application to be timely filed, even though it was not filed within one year after her divorce and direct the Defense Finance and Accounting Service (DFAS) to pay the Survivor Benefit as ordered by the [State] Clerk of the Superior Court. Her former husband did not file the paperwork, and no one told her she had to do so. If the Board does not do so, she will be irreparably harmed and will lose her pension benefit from the SBP.

The applicant's complete submission is at Exhibit A.

STATEMENT OF FACTS

The applicant is the former spouse of a deceased retired Air Force master sergeant (E-7).

On 1 Jul 53, according to a Certificate of Marriage, provided by the applicant, the applicant and the service member married.

On 1 Aug 74, according to Special Order **Work-Product**, dated 29 Mar 74, the service member retired from the Regular Air Force.

On 16 Jun 83, the applicant and the service member divorced. The divorce decree required the service member to provide SBP coverage for his former spouse. As of 16 Jun 84, the service member 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 13 Oct 83, the applicant requested a Statement of Service for the deceased service member. She requested benefits under Public Law 97-252, *Former Spouse Protection Act*.

On 25 Feb 21, DFAS advised the applicant the court order submitted must be received within one year of being issued by the court. Therefore, they were unable to honor her request since the date they received her deemed election is more than one year after the court order was filed.

On 9 Feb 22, according to a Certificate of Death, provided by the applicant, the service member passed away.

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On 28 Jun 22, the Board sent the applicant the following standard forms, to establish whether there are persons with competing interests in the case or who should receive notice of the requested correction to the record Marital Status Affidavit (Former Spouse), Release of Benefits Affidavit (Arrears of Pay).

On 26 Sep 23, the applicant returned the completed SBP Marital Status Affidavit (Former Spouse), which indicated her former spouse remarried. The applicant (former spouse), not his widow signed the SBP Release of Benefits Affidavit (Arrears of Pay).

For more information, see the excerpt of the deceased service member's record at Exhibit B and the advisory at Exhibit D.

APPLICABLE AUTHORITY/GUIDANCE

SAF/GCM (Secretary of the Air Force General Counsel) Legal Opinion, dated 18 Oct 06. The Secretary of the Air Force General Counsel's office has advised the Board to exercise prudence when correcting a record that may be unfavorable to a person other than the applicant. This is called a competing interest. While there is no strict statutory prohibition, there is a strong presumption that no record correction should be made if the result would be unfavorable to another person eligible to seek relief from the Board. For this reason, in Survivor Benefit Plan cases, the Board insists on receiving affidavits or notarized statements of consent from all parties, including the current spouse, the former spouse, eligible children, and the service member. In the absence of such affidavits, the Board typically denies relief.

The complete SAF/GCM advisory is at Exhibit C.

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 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 Manager) makes no recommendation since it involves competing claimants. 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 member was married to the applicant at the time of his 1 Aug 74 retirement and the member did elect spouse coverage at that time. The parties were divorced 16 Jun 83 with the divorce decree

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awarding former spouse SBP coverage to the applicant. The member did not notify DFAS to change the election from spouse to former spouse and no deemed election was submitted by the applicant within the one-year requirement following their divorce. The category of coverage remained spouse coverage. The member later married his current spouse on 29 Jun 83; therefore, she became the eligible beneficiary for the spouse SBP coverage. Upon the member's 9 Feb 22 passing, the current spouse applied for the SBP annuity and is in receipt of the monthly payments.

The complete advisory opinion is at Exhibit D.

APPLICANT'S REVIEW OF AIR FORCE EVALUATION

The Board sent a copy of the advisory opinion to the applicant on 15 Feb 23, for comment (Exhibit D), and the applicant replied on 9 Mar 23. In her response, the applicant, counsel and her son contended she has every right to receive the SBP by court order, pursuant to the newly passed Uniformed Services Former Spouses' Protection Act, 10 U.S.C. 1408. Under that Act, Congress directed the Department of Defense and DFAS to honor and give full credit to that court order, a copy of which was provided to the Air Force Board for Correction of Military Records (AFBCMR). By the time of her divorce, her husband was already retired and SBP had been elected either by actual application or by deemed election and she had no reason to think otherwise. During their divorce, it was discussed and implemented by court order.

She was never told of the one-year filing requirement by her attorney or by the court and she had no knowledge of such matters. She had been entirely dependent on her ex-husband's support. The internet did not exist in 1983, so she could not have researched this even if she wanted to do so. She is an elderly woman who depended on the payment of the pension she received through an allotment. She is in very poor health and can barely get around. She has heart disease (congestive heart failure) and has had stints put in with bypass surgery. She will likely soon be in a wheelchair. She is the aggrieved former spouse who had a legitimate expectation, and the current spouse had no such expectation and should have known this.

Most importantly, the one-year rule was established to protect the former spouse and prevent a military retiree from committing fraud. In this instance, the Air Force has allowed the opposite to take effect. Her ex-husband knew that he had an obligation to keep her as the survivor beneficiary and he did not do so. For the foregoing reasons, she asks that the AFBCMR declare the actions taken by DFAS and the Air Force to be an error and injustice.

The applicant's complete response is at Exhibit E.

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 not the victim of an error or injustice and finds a preponderance of the evidence does not substantiate the applicant's contentions. The applicant, her son, and counsel contend the applicant is the rightful SBP beneficiary; however, the evidence shows the decedent did not elect former spouse coverage, nor did the applicant request he be deemed to have made an election for former spouse coverage within one year of their divorce as required by law. The Board also notes the decedent's widow is currently receiving the SBP benefits, and the applicant did not provide the Board the SBP release of benefits affidavit. The Secretary of the Air Force General Counsel has advised the Board to exercise prudence when correcting a record that may be unfavorable to a person other than the

applicant. This is called a competing interest. While there is no strict statutory prohibition, there is a strong presumption that no record correction should be made if the result would be unfavorable to another person eligible to seek relief from the Board. For this reason, in SBP cases, the Board insists on receiving affidavits or notarized statements of consent from all parties, including the current spouse, the former spouse, eligible children, and the service member. In the absence of such affidavits, the Board typically denies relief. Therefore, the Board recommends against correcting the deceased service member's records.

RECOMMENDATION

The Board recommends informing the applicant the evidence did not demonstrate material error or injustice, and the Board will reconsider the application only upon receipt of relevant evidence not already presented.

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-2022-01256 in Executive Session on 19 Oct 23:

- Work-Product**, Panel Chair
- Work-Product**, Panel Member
- Work-Product**, Panel Member

All members voted against correcting the record. The panel considered the following:

- Exhibit A: Application, DD Form 149, w/atchs, dated 22 Apr 22.
- Exhibit B: Documentary Evidence, including relevant excerpts from official records.
- Exhibit C: SAF/GCM, Legal Opinion, dated 18 Oct 06.
- Exhibit D: Advisory, AFPC/DPFFF, dated 17 Nov 22.
- Exhibit E: Notification of Advisory, SAF/MRBC to Applicant, dated 15 Feb 23.
- Exhibit F: Applicant's Response, w/atchs, dated 9 Mar 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.

11/3/2023

X **Work-Product**

Board Operations Manager, AFBCMR
Signed by: **Work-Product**