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

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RECORD OF PROCEEDINGS

IN THE MATTER OF:

DOCKET NUMBER: BC-2022-02106

Work-Product

COUNSEL: Work-Product

HEARING REQUESTED: Work...

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

There were extenuating circumstances that prevented him and his former spouse from making a timely SBP election following their divorce. It was never their intention to cancel the SBP benefit. Their dissolution agreement directed SBP coverage for his former spouse. Neither of them realized it required an active response from them to keep the SBP going post-divorce, per the former spouse retired pay approval letter. His former spouse had a year after the dissolution to elect the SBP before it expired. Neither of them caught this in the letter. The extenuating circumstances were a combination of the dissolution itself, a change of address and move for them both as well as working through all of this at the beginning of a pandemic. He mainly emphasizes this as a data point for re-instatement, he would ask that the Board consider they divorced at the height of the COVID-19 pandemic. His former spouse had difficulty obtaining military healthcare and an ID card as well as having to deal with her former spouse responsibilities during this time. While none of these circumstances is an excuse for missing the critical step of actively selecting SBP coverage after their divorce, he would ask that the Board consider them and re-instate the benefit for his former spouse. From a personal standpoint, he would want his former spouse to be protected and cared for in the event of his death. She spent over 21 of his 24 years of active duty serving as a military spouse and he believes she deserves this benefit.

The applicant's complete submission is at Exhibit A.

STATEMENT OF FACTS

The applicant is a retired Air Force lieutenant colonel (O-5).

On 20 Sep 12, according to DD Form 2656, *Data for Payment of Retired Personnel*, the applicant elected Option B, *Coverage for Spouse and Child[ren]*, based on full retired pay.

On 1 Feb 13, according to Special Order Work-Product, dated 6 Mar 12, the applicant retired from the Regular Air Force.

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On, 27 May 20, according to a Divorce Decree, provided by the applicant, the applicant and his former spouse divorced. The divorce decree required the applicant to provide SBP coverage for his former spouse within one year after the filing of a final judgment of divorce, legal separation, or dissolution. As of 27 May 21, 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 16 Aug 22, 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); SBP Release of Benefits Affidavit (Arrears of Pay).

On 4 Aug 23, the applicant returned the completed affidavits for him and his former spouse. Neither indicated they were currently married.

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 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 Manager) recommends denying the application. 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 using DD Form 2656-6, *SBP Change Certificate*, or (2) the former spouse may request the retiree be deemed via DD Form 2656-10, *SBP Former Spouse Request for Deemed Election*, 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 the Defense Finance and Accounting Service – Cleveland (DFAS-CL), of the divorce and continues to pay SBP premiums afterwards, the former spouse is not eligible for annuity payments upon the member's death.

A Defense Enrollment Eligibility Reporting System search reflects the applicant, and his former spouse were married 10 Jan 92, and divorced 27 May 20. At the time of his 31 Jan 13 [sic]¹

¹ Per Special Order **Work-Product**, the applicant retired on 1 Feb 13.

retirement, the applicant did elect to participate in the SBP, and premiums were deducted from his retired pay. The applicant did not notify DFAS to change the election from spouse to former spouse coverage and no deemed election was submitted by the former spouse within the one-year requirement following their divorce. Section E (5) of the divorce decree reflects the one-year requirement for the submission of the change. Additionally, the Law Office of Peterson and Peterson, LLC submitted to DFAS a DD form 2293, *Application for Former Spouse Payments from Retired Pay*, on behalf of the former spouse to receive 50 percent of the applicant's disposable military retired pay in accordance with the divorce decree and separation agreement. Although SBP was awarded to the former spouse there was nothing mentioned about SBP, nor a deemed election provided. After DFAS received the above-mentioned request, a letter was sent to both the former spouse and her attorney confirming the DD form 2293 was received and notifying them of what action to take for requesting the SBP deemed election for Former Spouse coverage, dated 13 Jul 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 2 Aug 23, 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 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, the records that continued to show the applicant's former spouse as the eligible SBP beneficiary, albeit as spouse instead of former spouse, and determined these factors are indicative of the applicant's intent to maintain SBP coverage for his former spouse. Furthermore, there is no evidence of a competing interest. As such, the Board finds it 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 28 May 20, he submitted a timely and effective 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 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-2022-02106 in Executive Session on 16 Nov 23:

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

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

- Exhibit A: Application, DD Form 149, w/atchs, dated 19 Jul 22.
- Exhibit B: Documentary Evidence, including relevant excerpts from official records.
- Exhibit C: Advisory, AFPC/DPFFF, dated 1 Aug 23.
- Exhibit D: Notification of Advisory, SAF/MRBC to Applicant, dated 2 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.

12/1/2023

X

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Board Operations Manager, AFBCMR

Signed by:

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