

## RECORD OF PROCEEDINGS

**IN THE MATTER OF:**

**DOCKET NUMBER:** BC-2023-01782

XXXXXXXXXXXXXXXXXX (DECEASED)

**COUNSEL:** XXXXXXXXXXXXXXX

XXXXXXXXXXXXXXXXXX (APPLICANT)

**HEARING REQUESTED:** NO

### APPLICANT'S REQUEST

She be given her deceased spouse's retired pay from 19 Jan 18 to 1 Sep 20.

### APPLICANT'S CONTENTIONS

Counsel, on behalf of the applicant, contends the service member was transferred to the Retired Reserve in May XX and was eligible to receive retirement pay on his 60th birthday. On 10 Oct 17, he received a letter instructing him to apply for retirement pay by submitting ARPC Form 83, *Application for Retired Pay*, along with DD Form 2656, *Data for Payment of Retired Personnel*; unfortunately, due to his deteriorating health and cognitive decline, he could not. On 1 Sep 20, he passed away without ever receiving retirement pay. She notified the Total Force Service Center of her husband's passing and inquired about any benefit entitlements, but no action was taken.

The applicant's complete submission is at Exhibit A.

### STATEMENT OF FACTS

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

On 9 Apr 98, ARPC/DPKA sent the service member the standard Notification of Eligibility (NOE) 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 entitled to retired pay upon application prior to age 60. In addition, he was eligible to participate in the Reserve Component Survivor Benefit Plan (RCSBP) and should receive detailed RCSBP information by certified mail within 30 days. By law, he received immediate full coverage until the 90th day after receipt of the RCSBP package. To continue coverage beyond 90 days, he was required to submit his election using ARPC Form 123, *Reserve Component Survivor Benefit Plan Election Certificate*.

On 23 Apr 98, according to PS Form 3811, *Domestic Return Receipt*, an RCSBP package was delivered to the service member's address and was signed. There is no documentation in the military human resources record that indicates the service member completed and returned ARPC Form 123 making an RCSBP election.

In a letter dated 25 Mar 05, the service member requested a waiver to retire within 60 days of the date of the letter, due to a physical condition not likely to improve, rendering him unable to participate. According to accompanying AF Form 131, *Application for Transfer to the Retired Reserve*, dated 7 Mar 05, the service member applied for transfer to the Retired Reserve, which was approved.

On 31 May 05, according to Reserve Order XX-XXXX, dated 19 Aug 05, the service member was assigned to the Retired Reserve Section and placed on the Reserve Retired List.

In a letter dated 10 Oct 17, provided by the applicant, ARPC (Transition Division) sent the service member a notification stating he may be eligible for retired pay under 10 U.S.C. § 12731 in the near future (normally age 60).

On X XXX XX, according to Certificate of Death, provided by the applicant, the service member passed away.

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

### **APPLICABLE AUTHORITY**

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 chose discharge must be formally counseled concerning this policy and its effects on their benefits.

### **AIR FORCE EVALUATION**

ARPC/DPTT (Sustainment Division) recommends denying the application. A review of the decedent's military personnel record shows he was transferred to the Retired Reserve, effective 31 May 05 after completing 26 years, 10 months, and 27 days of satisfactory service. On 19 Jan 18, he was eligible to receive retired pay; however, a review of the military personnel record confirmed an application for retired pay in conjunction with DD Form 2656 was not received. In accordance with AFI 36-3203, *Service Retirements*, paragraph 2.1.2, members must apply for retired pay if they have attained the eligibility age of 60 and have performed at least 20 creditable years. On X XXX XX, the service member passed away.

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 counsel on 18 Sep 23 for comment (Exhibit D) and he replied on 13 Oct 23. In his response, counsel contends the service member was required to enroll himself in the retirement system to begin receiving retirement pay; however, due to his deteriorating health and cognitive decline, he could not. All efforts were focused on his declining health as he experienced multiple doctor visits and frequent trips to the hospital. His ability to perform simple daily tasks was impaired by his condition and he did not have the opportunity to complete the necessary paperwork.

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 the victim of an injustice. The Board notes the recommendation of ARPC/DPTT against correcting the record as they found no evidence the service member attempted to apply for retired pay; however, the Board finds a preponderance of the evidence substantiates the applicant's contentions. Specifically, in Mar 05 the service member submitted AF Form 131, *Application for Transfer to the Retired Reserve*, and a waiver request to retire within 60 days of the date of the letter, due to a physical condition not

likely to improve, rendering him unable to participate in the Reserve. His request was approved, and he was transferred to the Retired Reserve List, effective 31 May 05. On 10 Oct 17, ARPC sent the service member a Notification of Eligibility for Reserve Retired Pay at age 60. In view of the foregoing, the Board finds that if the service member had not experienced multiple challenges with his deteriorating health and cognitive decline, and if he 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 service member. In addition, the Board finds it highly unlikely the service member would have knowingly elected not to pursue retired pay, a benefit to which he was entitled. While there appears to be no Air Force error, in balancing the equities in this case, the Board finds that justice is best served by correcting the service member's records as indicated below.

## RECOMMENDATION

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

a. On 1 Dec 17, MEMBER applied for and was approved for retired pay under the provisions of 10 U.S.C. § 12731, effective 19 Jan 18.

b. On 2 Sep 20, APPLICANT submitted a timely and effective claim for MEMBER'S unpaid compensation.

## 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-2023-01782 in Executive Session on 29 Feb 24:

, 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 1 May 23.

Exhibit B: Documentary Evidence, including relevant excerpts from official records.

Exhibit C: Advisory, ARPC/DPTT, dated 13 Sep 23.

Exhibit D: Notification of Advisory, SAF/MRBC to Counsel, dated 18 Sep 23.

Exhibit E: Counsel's Response, dated 13 Oct 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