

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 16 February 2024

DOCKET NUMBER: AR20230005873

APPLICANT REQUESTS:

- in effect, correction of his records to show he elected Reserve Component Survivor Benefit Plan (RCSBP) coverage for his spouse within 1 year of marriage
- a personal appearance hearing before the Board via video/telephone

APPLICANT'S SUPPORTING DOCUMENT(S) CONSIDERED BY THE BOARD:

- DD Form 149 (Application for Correction of Military Record under the Provisions of Title 10, U.S. Code, Section 1552)
- Self-authored Letter, 2 March 2023
- State Superior Court Judgment of Dissolution, filed 13 July 2017 (one page only)
- Headquarters, California Army National Guard, Memorandum (Notification of Eligibility for Retired Pay for Non-Regular Service (20 Years)), 1 October 2018
- DD Form 2656-5 (RCSBP Election Certificate), 1 August 2019
- DD Form 2656-5, 12 May 2022
- State Marriage Certificate, 8 November 2022, with State License and Certificate of Marriage
- Email (DEARS (should read Defense Enrollment Eligibility Reporting System (DEERS)) Says Not in System), 9 February 2023
- DD Form 2656-5, 2 March 2023

FACTS:

1. The applicant states, in effect, that his RCSBP should be updated to show his current wife as his beneficiary. He was never informed by his command or any other authority in 2017 or 2018 that he only had 1 year from the date of his divorce from his previous spouse to submit a revised DD Form 2656 (Data for Payment of Retired Personnel). He submitted a DD Form 2656-5 in 2019 and 2022 and never received any correspondence or information regarding RCSBP issues until he called his Army National Guard unit (see self-authored letter for further details).

2. His records contain a marriage certificate showing he and P____ R____ S____ married on 1 June 1994.

3. Following service in the Regular Navy and a break in service, he enlisted in the California Army National Guard (CAARNG) on 13 September 2012 in the rank/grade of sergeant/E-5.

4. His records contain numerous State Superior Court documents, filed 6 July 2017 or 13 July 2017, wherein he is shown as the "Petitioner" and his then-wife, P____ R. E____, is shown as the "Respondent."

a. The State Superior Court Judgment – Dissolution, filed 13 July 2017, with an Addendum to Judgment shows the following under the "Retirement Benefits" section, in part:

Any retirement benefits distributed to a non-employee spouse shall be made payable upon or after death of either party consistent with Family Code § 2550 and the employee shall elect a survivor benefit annuity, where available, for the benefit of the other party to ensure that the non-employee party's share of the community property interest in the pension plan is distributed to that party. A copy of this order shall be provided to the plan administrator and each party shall inform the plan administrator of any change in assets until all benefits are paid.

Petitioner [Applicant] is awarded one-half interest in all retirement benefits earned during the marriage or domestic partnership and prior to the date of separation, as a result of Respondent's [former spouse's] employment with RW Smith & CO [Company]. All retirement benefits earned by Petitioner [Applicant] through his/her employment with before the date of marriage or domestic partnership and after the date of separation, if any, are confirmed to Petitioner [Applicant].

Respondent [former spouse] is awarded one-half interest in all retirement benefits earned during the marriage or domestic partnerships and prior to the date of separation, as a result of Petitioner's [Applicant's] employment with US Military. All retirement benefits earned by Respondent [former spouse] through his/her employment with RW Smith & CO [Company] before the date of marriage or domestic partnership and after the date of separation, if any, are confirmed to Respondent [former spouse].

b. He and his then-wife each signed the form approving the contents on 29 June 2017.

5. He provided one page of his State Superior Court Judgment Dissolution, filed 14 July 2017, showing he and P____ R. E____ were granted a divorce on 11 July 2017.

6. The Headquarters, CAARNG, memorandum (Notification of Eligibility for Retired Pay for Non-Regular Service (20 Years)), 1 October 2018, notified him that having completed the required years of service, he was eligible for retired pay upon application at age 60 in accordance with statutory guidance. Paragraph 4 stated:

You are eligible to participate in the Reserve Component Survivor Benefit Plan (RCSBP). The RCSBP will provide an annuity based on your retired pay to a surviving spouse, spouse and dependent child or children, child or children only, or a person with an insurable interest in you.

Upon receipt of this Notification of Eligibility, if you are married, or have a dependent child you will automatically be enrolled in accordance with Title 10, U.S.C. [U.S. Code] Section 1448(a)(2)(B) in the RCSBP under Option C (Immediate Annuity), Spouse and Child(ren), based on full retired pay unless you elect different or no coverage within 90 days after the date you receive this notification. If you are married on the date of your election, and you elect less than full and immediate coverage, your spouse's concurrence is required by law. That concurrence will be recorded in section IX of DD Form 2656-5 (Reserve Component Survivor Benefit Plan (RCSBP) Election Certificate), and the signature must be notarized.

You must complete and return the enclosed DD Form 2656-5 to the address in the letterhead. We will retain a copy of your completed election with a copy of this notification in your iPERMS [interactive Personnel Electronic Records Management System] and State records. Detailed information on the RCSBP program and its estimated cost is enclosed. You may contact us with questions on the RCSBP.

Single Soldiers are not required or permitted to make an election in the Reserve Component Survivor Benefit Plan (RCSBP) unless they meet one of the options in the written materials provided with their NOEs [Notification of Eligibility for Retired Pay for Non-Regular Service (20 Years)].

7. His National Guard Bureau Form 23B (Army National Guard Retirement Points History Statement), prepared 1 October 2018, shows he had 20 years of creditable service for retired pay.

8. The DA Form 4187 (Personnel Action), 8 December 2018, shows he acknowledged receipt of the notification of Enlisted Qualitative Review Board review, and he elected transfer/reassignment to the U.S. Army Reserve Control Group (Reinforcement) (commonly known as the Individual Ready Reserve), if not selected for retention. His commander verified this form on 20 December 2018.

9. The Joint Force Headquarters, Office of the Adjutant General, CAARNG, memorandum (Non-selection for Continued Unit Participation), 10 April 2019, notified

him that he was not selected for retention by a qualitative retention board. He would be discharged from the CAARNG no later than 23 September 2019 and transferred as a Reserve of the Army to the U.S. Army Reserve Control Group (Reinforcement) (commonly known as the Individual Ready Reserve (IRR)) or transferred to the U.S. Army Reserve Control Group (Retired Reserve) according to his selected option.

10. Joint Force Headquarters, CAARNG, Orders 183-1156, 2 July 2019, honorably discharged him from the Army National Guard and assigned him to the U.S. Army Reserve Control Group (Reinforcement) effective 23 September 2019 by reason of non-retention by an Enlisted Qualitative Retention Board.

11. His DD Form 2656-5, 1 August 2019, shows in:

a. Section II (Marital/Dependency Status), item 7 (Are You Married?), he checked "No"; and item 8 (Do You Have Any Dependent Children?), he checked "No";

b. Section IV (Coverage), item 12 (Options), he checked "Option C (Immediate Annuity. I elect to provide an immediate annuity beginning on the day after date of my death, whether before or after age 60.)";

c. Section IV, item 13 (Type of Coverage), he checked "Natural Person with an Insurable Interest";

d. Section VI (Insurable Interest Coverage), item 15 (Insurable Interest Beneficiary), he listed D____ M. Y____ as his fiancée; and

e. Section VIII (Member Signature), he signed the form on 1 August 2019 and his signature was witnessed the same date in Lake Elsinore, CA.

12. U.S. Army Human Resources Command Orders D-10-924454, 15 October 2019, honorably discharged him from the U.S. Army Reserve effective 15 October 2019.

13. His DD Form 2656-5, 12 May 2022, shows the same information as shown on the DD Form 2656-5, 1 August 2019, with the exception of his witness and his signature date of 12 May 2022.

14. He provided:

a. his marriage certificate showing he and D____ M. Y____ married on 8 November 2022;

b. email correspondence (DEARS (should read DEERS) Says Not in System), 9 February 2023, noting his current wife is not enrolled in DEERS and he is trying to rectify the situation; and

c. another DD Form 2656-5, 2 March 2023, showing in:

(1) Section II (Marital/Dependency Status), item 7 (Are You Married?), he checked "Yes"; and item 8 (Do You Have Any Dependent Children?), he checked "No";

(2) Section III (Spouse/Dependent Child(ren) Information), he listed D____ M. Y____-E____ as his spouse with a marriage date of 8 November 2022.

(3) Section IV (Coverage), item 12 (Options), he checked "Option C (Immediate Annuity. I elect to provide an immediate annuity beginning on the day after date of my death, whether before or after age 60.)";

(4) Section IV, item 13 (Type of Coverage), he checked "Spouse Only";

(5) Section V (Level of Coverage), he checked "Full Retired Pay"; and

(6) Section VIII (Member Signature), he signed the form on 2 March 2023 and his signature was witnessed the same date in Temecula, CA.

15. On 20 December 2023, a Defense Finance and Accounting Service pay technician stated the Defense Finance and Accounting Service database does not contain any paperwork or show the applicant as being on the retired rolls.

16. The applicant will reach age 60 in 2028. He may be eligible for early retirement under the provisions of the National Defense Authorization Act for 2008 (reduced retirement age).

17. On 10 January 2024, a member of the Army Review Boards Agency Case Management Division contacted the National Guard Bureau, requesting copies of the applicant's original 2018 RCSBP election showing he did or did not voluntarily elect former spouse coverage in compliance with his court-ordered divorce decree and/or a DD Form 2656-10 (SBP/RCSBP Former Spouse Request for Deemed Election) from his former spouse. The National Guard Bureau representative stated there are no RCSBP records on file for the applicant.

18. On 10 January 2024, a member of the Army Review Boards Agency Case Management Division contacted the applicant via email, requesting copies of the applicant's original 2018 RCSBP election showing he did or did not voluntarily elect former spouse coverage in compliance with his court-ordered divorce decree and/or a

deemed election from his former spouse. The applicant has not responded as of 8 February 2024.

BOARD DISCUSSION:

1. After reviewing the application, all supporting documents, and the evidence found within the applicant's military records, the Board found that relief was not warranted. The applicant's contentions, his military records, and regulatory guidance were carefully considered.
2. The evidence of record shows the applicant, a CAARNG Soldier, was properly discharged from the CAARNG and transferred as a Reserve of the Army into the IRR in accordance with his own elections. In addition, DFAS has no record of the applicant or of any of the SBP election forms that he has purportedly submitted.
3. The applicant's request regarding SBP enrollment is premature until his status/transition from the IRR to the retired Reserve is rectified and DFAS is tracking Applicant in its files.

BOARD VOTE:

Mbr 1 Mbr 2 Mbr 3

:	:	:	GRANT FULL RELIEF
:	:	:	GRANT PARTIAL RELIEF
:	:	:	GRANT FORMAL HEARING
█	█	█	DENY APPLICATION

BOARD DETERMINATION/RECOMMENDATION:

The evidence presented does not demonstrate the existence of a probable error or injustice. Therefore, the Board determined the overall merits of this case are insufficient as a basis for correction of the records of the individual concerned.

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I certify that herein is recorded the true and complete record of the proceedings of the Army Board for Correction of Military Records in this case.

REFERENCES:

1. Army Regulation 15-185 (Army Board for Correction of Military Records) prescribes the policies and procedures for correction of military records by the Secretary of the Army, acting through the Army Board for Correction of Military Records (ABCMR). The ABCMR will decide cases on the evidence of record; it is not an investigative body. The ABCMR begins its consideration of each case with the presumption of administrative regularity. The applicant has the burden of proving an error or injustice by a preponderance of evidence. The ABCMR may, in its discretion, hold a hearing (sometimes referred to as an evidentiary hearing or an administrative hearing) or request additional evidence or opinions. Applicants do not have a right to a hearing before the ABCMR. The Director or the ABCMR may grant a formal hearing whenever justice requires.
2. Army Regulation 140-10 (Assignments, Attachments, Details, and Transfers), paragraph 2-3, provides that Soldiers who have completed 20 or more qualifying years of service for Non-Regular (Reserve) retirement can elect to transfer to the Retired Reserve.
3. Army Regulation 135-180 (Retirement for Non-Regular Service) implements statutory authorities governing granting retired pay for Non-Regular service to Soldiers in the Army National Guard, Army National Guard of the United States, or U.S. Army Reserve.
 - a. Paragraph 2-2 states an individual need not have military status at the time of application, but must have completed a minimum of 20 years of qualifying service computed under Title 10, U.S. Code, section 12732.
 - b. Paragraph 4-1 states it is the responsibility of all qualified individuals to submit their application for retired pay no earlier than 9 months and no later than 90 days prior to the date retired pay is to begin. Applications must be submitted on a DD Form 108 (Application for Retired Pay Benefits) and DD Form 2656 (Data for Payment of Retired Personnel).
4. Army Regulation 600-8-7 (Retirement Services Program), paragraph 4-6, states that between receipt of the Notification of Eligibility for Retired Pay for Non-Regular Service (20 Years) and 60 days after receipt of the 20-year letter, Reserve Component Soldiers and spouses should be counseled on the RCSBP, to include categories available under Title 10, U.S. Code, section 1448(a), and the effects of such elections, in accordance with Title 10, U.S. Code, section 1455(b)(1). After receiving the notification of eligibility, Reserve Component Soldiers have 90 days to make their RCSBP elections using a DD Form 2656-5.

5. Public Law 92-425, enacted 21 September 1972, established the Survivor Benefit Plan (SBP). The SBP provided that military members on active duty could elect to have their retired pay reduced to provide for an annuity after death to surviving dependents. An election, once made, was irrevocable except in certain circumstances. Elections are made by category, not by name. The election must be made before the effective date of retirement or coverage defaults to automatic spouse coverage. Since its creation, it has been subjected to a number of substantial legislative changes.

6. Public Law 95-397, enacted 30 September 1978, established the RCSBP. The RCSBP provided a way for Reserve Component members who qualified for Non-Regular (Reserve) retirement but were not yet age 60 and eligible to participate in the SBP, to provide an annuity for their survivors should they die before reaching age 60. A member must have made the election within 90 days of receiving the notification of eligibility to receive retired pay at age 60 or wait until he/she applies for retired pay and elect to participate in the standard SBP. Once a member elects either Option B or C in any category of coverage, that election becomes irrevocable. Option B and C participants do not make a new SBP election at age 60. They cannot cancel SBP participation or change options they had in the RCSBP; the options automatically convert to SBP coverage. Three options are available:

- Option A – elect to decline enrollment and choose at age 60 whether to start SBP participation
- Option B – elect that a beneficiary receive an annuity if the member dies before age 60, but delay payment until the date of the member's 60th birthday
- Option C – elect that a beneficiary receive an annuity immediately upon the member's death if before age 60

7. Public Law 106-398, enacted 30 October 2000, required written spousal consent for a Reserve service member to delay making an RCSBP election until age 60. The law is applicable to cases where 20-year letters have been issued after 1 January 2001. In other words, failure to elect an option upon receipt of the 20-year letter results in the default election of Option C.

8. Title 10, U.S. Code, section 1448(a)(5), provides that a person who is not married and has no dependent child upon becoming eligible to participate in the SBP but who later marries or acquires a dependent child may elect to participate in the SBP. Such an election must be written, signed by the person making the election, and received by the Secretary concerned within 1 year after the date on which that person marries or acquires that dependent child.

9. The National Defense Authorization Act for 2008 reduced the retirement age for Reserve Component and National Guard Soldiers from 60 to a lesser age, but not

below age 50, for those who served on active duty in an eligible status on or after 29 January 2008.

a. For qualifying service on or after 29 January 2008, each day on that active duty tour could count toward a reduction in retirement age. Active duty, for this purpose, means service pursuant to a call or order to active on orders specifying, as the authority for such orders, a provision of law referred to in Title 10, U.S. Code, section 101(a)(13)(B), and performed under sections 688, 12301(a), 12302, 12304, 12305, 12406, and chapter 15 (insurrection), or under section 12301(d).

b. Even though each day counts, days are credited in aggregates of 90 days only within any fiscal year. During any fiscal year, a Reserve Component member can accrue 90 days toward early retirement. Fewer days will not count or be carried over to the next fiscal year and more days beyond 90 will not count and will not be carried over to the next fiscal year. That 90-day period does not have to be continuous. It could be the sum of more than one mobilization, so long as it meets the U.S. codes within that fiscal year.

10. SBP elections are made by category, not by name. Options include "Spouse Only," "Spouse and Children," "Former Spouse," "Children Only," "Natural Interest Person," "No Beneficiary," and "Decline."

11. "Gray area" retirees are members who served in the National Guard or Reserve, are qualified for retired pay, and have "retired" from their service (transferred to the Retired Reserve), but are not yet at the age where they can begin receiving retired pay. The time between their "retirement" from the service and the date when they are eligible to begin receiving retired pay is the "gray area." The "gray area" applies even if the member is in the Retired Reserve.

12. DEERS is a computerized database of military sponsors and eligible family members who are entitled to benefits under the law, such as medical care, post exchange privileges, and commissary privileges, among other benefits. Informing sponsors about SBP updates is not the responsibility of DEERS.

//NOTHING FOLLOWS//