

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: ██████████

BOARD DATE: 22 March 2024

DOCKET NUMBER: AR20230006263

APPLICANT REQUESTS: in effect, correction of her records to show her Reserve Component Survivor Benefit Plan (RCSBP) election as Option A instead of Option C or, in the alternative, termination of her RCSBP.

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

- DD Form 149 (Application for Correction of Military Record)
- DD Form 2656-5 (RCSBP Election Certificate), (pages 1 and 2 only)
- DD Form 2656-5, 28 April 2005
- Office of the Adjutant General of North Carolina (OTAGNC) Form 1883-1-R (Signature Verification of Required Document Counseling), 28 April 2005
- DA Form 1559 (Inspector General Action Request), 11 April 2023
- SBP and RCSBP Open Season Election to Discontinue Participation, 20 April 2023
- North Carolina Inspector General Email Correspondence, 14 May 2023

FACTS:

1. The applicant states she requests voidance of the DD Form 2565-5 she and her husband signed on 28 April 2005 and reinstatement of their original election of declining their election until age 60. She also requests voidance of her SBP and RCSBP Open Season Election to Discontinue Participation that she and her husband signed on 20 April 2023, which stated they understood they would be required to pay any premiums to date in order to opt-out of the RCSBP.

a. This correction should be made because she and her husband did not understand the form. Staff Sergeant (SSG) B____ O____ misrepresented the form which caused them to enroll in the RCSBP when they thought they were saying they did not want to participate. They now believe they will have to pay approximately \$50,000.00 for something they did not want. She attended her first retirement seminar at the North Carolina Joint Force Headquarters (NC-JFHQ) on 4 March 2023. SSG K____ W____, the retirement counselor, told her there was an open season for the RCSBP because it was found that Soldiers were not being properly counseled. No one in the auditorium had ever heard of the RCSBP, including herself. SSG W____ said

they made the election when they received their 20-year letter. SSG W____ had to explain what the RCSBP was to all of them. She is a Soldier who was not properly counseled. She and her husband originally completed a DD Form 2565-5 declining to make an option until age 60. She handed the form in to the unit S-1 section. She handed the form to now-Sergeant First Class (SFC) B____ O____. She asked him at that time if she could opt-out of the SBP on the form and if there were any instructions for the form. He told her if there were not any with the form then there are not any, but it was his responsibility to explain to them what the options were and what the form meant.

b. SFC O____ advised them that they would have to check Option C in block 12 if they did not want the SBP. They did not understand why they needed to do that if they were opting out. SFC O____ said she had to make that election in order to check block 15, which showed she declined supplemental coverage for her spouse. He convinced her that checking those blocks would allow her to let the Army National Guard (ARNG) know they were opting out. She asked if she could wait to discuss it with her husband but was told it had to be completed at that time due to the unit's imminent deployment and the form had to be completed and witnessed within 90 days from receiving her 20-year letter. Had she and her husband been properly counseled, they would have submitted their original choice of declining an election until age 60. They did not get a copy of the form signed by SFC O____ and he did not sign it in front of them because he had things to do for the unit before he departed the next day for deployment.

c. They were given inaccurate information by the subject matter expert and lied to. They were tricked into electing Option C and she wants that election terminated.

2. The applicant and J____ E____ M____ married on 25 June 1992.

3. After having prior enlisted service in the Regular Army, she enlisted in the North Carolina ARNG in the rank/grade of sergeant/E-5 on 11 August 1993.

4. She was promoted to the rank/grade of SFC/E-7 effective 19 December 2002.

5. The Office of the Adjutant General Department of Crime Control and Public Safety memorandum (Notification of Eligibility for Retired Pay at Age 60 (20-Year Letter)) (also known as National Guard Bureau (NGB) Form 23D), 15 April 2005, notified her that having completed the required years of service, she was eligible for retired pay upon application at age 60 in accordance with statutory guidance. Paragraph 4 stated:

Public Law 95-397, 30 September 1978, created the RCSBP, in which you are entitled to participate. RCSBP is your sole means of protecting your retired pay entitlement. NOTE: Public Law 106-398, 30 October 2000, requires that upon

receipt of this Letter, a qualified Reserved Component member, who is married, will automatically be enrolled in the RCSBP under option C, Spouse and Child(ren) coverage based on Full Retired Pay, UNLESS different coverage is selected within 90 days of receipt of this letter. Notarized spousal concurrence is required in order to decline full and immediate coverage for annuitants. FAILURE TO MEET THIS REQUIREMENT WILL RESULT IN THE RETENTION OF FULL COVERAGE FOR YOUR SPOUSE AND CHILD(REN). If you elect to remain covered under the automatic provision of the Law you must provide this Command written correspondence (the enclosed DD Form 2656-5 (formerly DD Form 1883 [RCSBP Election Certificate]) is required stating who you have designated as annuitant(s). The cost for this participation will commence upon your receipt of retired pay at age 60. Detailed information concerning RCSBP program and cost is enclosed. You must contact this Command for answers to specific individual questions.

6. Her DD Form 2656-5 (RCSBP Election Certificate), 28 April 2005, shows in:

a. Section II (Marital/Dependency Status), she placed an "X" in the "Yes" box "Are you married?" and placed an "X" in the "No" box "Do you have any dependent children?"

b. Section III (Spouse/Dependent Child(ren) Information), block 9a, she entered J____ E. M____ with a marriage date in 1992.

c. Section IV (Coverage), block 12 (Options), she placed an "X" in the block "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."

d. Section IV, block 13 (Type of Coverage), she placed an "X" in the "Spouse Only" box.

e. Section V (Level of Coverage), block 14, she placed an "X" in the "Full Retired Pay" box.

f. Section IX (Member Signature), she signed the form on 28 April 2005 and her signature was witnessed on the same date by B____ J. O____ in Fremont, NC.

7. In conjunction with her DD Form 2656-5, 28 April 2005, she and her spouse were counseled by using an OTAGNC Form 1883-1-R (Signature Verification of Required Document Counseling), 28 April 2005, that shows in:

a. Block 1 (Statement Regarding Receipt of NGB Form 23D), she signed the following statement: "I [Applicant], acknowledge receipt of NGB Form 23D, Notification

of Eligibility For Retired Pay, on 28 April 2005 and understand I have 90 days to complete DD Form 1883, Survivor Benefit Plan Election Certificate, and return it to OTAGNC-SIB."

b. Block 2 (Statement of Understanding), contains the statement: "I [Applicant], acknowledge I received information on the Uniformed Services Survivor Benefit Plan elections available to me on my retirement and the effects of these elections. I understand these elections as explained to me. I am aware that after I retire, the election I make before retirement is, in general, permanent and irrevocable by me. I understand that if I agreed, under a court order or spousal agreement, to provide an annuity to a former spouse, such election is to be made at this time." She and a witness signed this block on 28 April 2005.

c. Block 3 (Statement by Survivor Benefit Plan Counselor) contains the statement: "On 28 April 2005 I counseled the above named soldier (and spouse/former spouse) on available Reserve Component Survivor Benefit Plan and the Reserve Component Supplemental Survivor Benefit Plan." B____ J. O____ signed this block on 28 April 2005.

d. Block 4 (Statement by Spouse/Former Spouse of Soldier) contains the statement: "I acknowledge receipt of the letter addressed to me explaining the Reserve Component (RC) Survivor Benefit Plan (SBP) and RC Supplement SBP." Her spouse and a witness each signed this block on 28 April 2005.

e. Block 5 (Spouse SBP Concurrence Statement) contains the statement: "I J____ E. M____, spouse of [Applicant], do hereby concur in my spouse's Survivor Benefit Plan election to: I do concur with spouse's election." He signed this block on 28 April 2005.

8. She was promoted to the rank/grade of master sergeant/E-8 effective 1 June 2007.

9. The SBP and RCSBP Open Season Election to Discontinue Participation, 20 April 2023, explained to her the advantages and disadvantages of SBP/RCSBP participation wherein she initialed confirmation of reading, understanding, and agreeing to its contents. The form shows in:

a. Section II (Retiree or Reservist (Awaiting Pay) Identification), block 4 (Type of Existing Coverage), she placed an "X" in the box "RCSBP (Complete 6)"; block 6 (Notice of Eligibility Date (if awaiting non-regular retired pay at eligibility age (YYYYMMDD)) is blank.

b. Section III (Current Coverage), she placed an "X" in the "Spouse" box.

c. Section IV (Request to Discontinue) (Retiree: By my signature, I hereby VOLUNTARILY request to discontinue participation in SBP (or RCSBP, if applicable). I have read and understand the disadvantages and advantages of this decision, as listed on the first page of this form. I understand that SBP/RCSBP coverage will discontinue on the first day of the month following the month that this request is received by the Defense Finance and Accounting Service or the appropriate Reserve Component Personnel Center, as applicable. I understand that no refund of costs already paid for SBP coverage will be made and if discontinuing RCSBP coverage, I will be responsible to pay the premiums for coverage already received, and that SBP/RCSBP benefits will not be paid upon my death. I further understand that once I discontinue SBP or RCSBP coverage, I cannot reenter the Plan.), she printed and signed her name on 20 April 2023.

d. Section V (Certification (SBP Counselor or Notary Public), the SBP Counselor signed and dated this section on 20 April 2023.

e. Section VI (Spouse Concurrence) (Spouse: By my signature, I certify that I am the legal spouse of the above listed retiree. I have read and understand the disadvantages and advantages of this decision, as listed on the front of this form, I understand that I will receive no SBP or RCSBP benefits upon the death of my spouse. I concur with the decision to discontinue participation in SBP or RCSBP and have signed this statement voluntarily and of my own free will. I further understand that once my spouse discontinues participation in SBP or RCSBP, he/she cannot reenter the Plan.), her spouse printed and signed his name on 20 April 2023.

f. Section VII (Certification (SBP Counselor or Notary Public), the SBP Counselor signed and dated this section on 20 April 2023.

10. The applicant provided an undated and incomplete DD Form 2656-5 that shows in:

a. Section II (Marital/Dependency Status), she placed an "X" in the "Yes" block "Are you married?"

b. Section III (Spouse/Dependent Child(ren) Information), block 9a, she listed J____ E. M____ as her spouse with a marriage date in 1992.

c. Section IV (Coverage), block 12 (Options), she placed an "X" in the block "Option A. I decline to make an election until age 60." Note: This form was not signed or dated by her, her spouse, or a witness).

11. Her DA Form 1559, 11 April 2023, shows she requested assistance from the North Carolina Inspector General in opting out of the RCSBP and exception from paying any premiums due to being improperly counseled.

12. The email from the North Carolina Inspector General Noncommissioned Officer (Reply: North Carolina National Guard Inspector General Request for Assistance (Applicant)), 14 May 2023, noted:

After thoroughly reviewing all applicable SBP laws and policies, we determined that SPB elections are irrevocable once elected. Unfortunately, you should have received the appropriate guidance in 2005 to make the best decision for your family. Still, our office is not the proper means of redress to address SBP issues.

There is a due process option that SSG W_____ in the G1 Retirement office informed you of. The Army Board for Correction of Military Records is the appropriate due process to address your complaint.

13. On 24 February 2024, a Defense Finance and Accounting Service (DFAS) pay technician stated the DFAS database does not show the applicant as being on the retired rolls. The service member can submit a DD Form 2656-5 or DD Form 2656-6 (SBP Election Change Certificate) when she applies for retired pay. The DFAS database does contain the same SBP and RCSBP Open Season Election to Discontinue Participation, 20 April 2023, that she provided and is contained in her records.

14. She will reach age 60 in 2025. She may be eligible for early retirement under the provisions of the National Defense Authorization Act for 2008 (reduced retirement age).

BOARD DISCUSSION:

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 Board carefully considered the applicant's record of service, documents submitted in support of the petition and executed a comprehensive and standard review based on public law, policy and regulation. Upon review of the applicant's petition and available military records, the Board determined there is insufficient evidence the applicant did not understand the process. The Board cannot assume she was not properly counseled as SBP elections are required when members request new designation.

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. Public Law 92-425, enacted 21 September 1972, established the 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.

2. 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 for Retired Pay at Age 60 to receive retired pay at age 60 or else 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 RCSBP automatically converts to SBP. 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

3. Title 10, U.S. Code, section 1448, requires notice to a spouse if a member elected not to participate in the SBP. The statute also provided for automatic enrollment for spouse coverage at the full base amount unless a member affirmatively declined to participate in the SBP prior to receiving retired pay.

4. Public Law 99-145, enacted 8 November 1985 but effective 1 March 1986, required written concurrence by the spouse in a member's decision to decline the SBP or elect spouse coverage at less than the full base amount.

5. Public Law 105-85, enacted 18 November 1997, established the option to terminate SBP participation. Retirees have a 1-year period beginning on the second anniversary of the date on which their retired pay started to withdraw from the SBP. The spouse's concurrence is required. No premiums will be refunded to those who opt to disenroll.

The effective date of termination is the first day of the first calendar month following the month in which the election is received by the Secretary concerned.

6. 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.

7. Army Regulation 135-180 (Retirement for Nonregular Service), 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).

8. Army Regulation 600-8-7 (Retirement Services Program), paragraph 4-6, states that between the receipt of the Notification of Eligibility for Retired Pay at Age 60 (20-Year Letter) 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 for Retired Pay at Age 60, Reserve Component Soldiers have 90 days to make their RCSBP elections using a DD Form 2656-5.

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 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) of Title 10, U.S. Code.

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 of early retirement. Fewer days will not count or be carried over to the next fiscal year and more days past 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. Periodically Congress authorizes an open enrollment season to allow retirees certain changes to their SBP participation or non-participation. The National Defense Authorization Act for Fiscal Year 2023 authorized an open enrollment season from 23 December 2022 through 1 January 2024.

a. The SBP open season allowed for retirees receiving retired pay, eligible members, or former members awaiting retired pay who are currently not enrolled in the SBP or RCSBP to enroll. For a member who enrolls during the SBP open season, the law generally requires that the member will be responsible to pay retroactive SBP premium costs that would have been paid if the member had enrolled at retirement (or enrolled at another earlier date, depending on the member's family circumstances).

b. The SBP open season also allowed eligible members and former members who are currently enrolled in either the SBP or RCSBP to permanently discontinue their SBP coverage. The law generally requires the covered beneficiaries to concur in writing with the election to discontinue. Previously paid premiums will not be refunded.

//NOTHING FOLLOWS//