

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 19 March 2024

DOCKET NUMBER: AR20230008891

APPLICANT REQUESTS: correction of his records to show he elected "Former Spouse" Survivor Benefit Plan (SBP) coverage within 1 year of divorce.

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)
- Counsel's Letter, 23 May 2023
- Exhibit A – Superior Court Affidavit of Clerk of Court – Settlement Agreement, 6 November 2019
- Exhibit B – Superior Court Final Judgment and Decree of Divorce, 8 November 2019
- Exhibit C – Certificate of Marriage, 25 August 2005
- Exhibit D – Affidavit of (Applicant), 24 April 2023
- Exhibit E – Affidavit of J\_\_\_\_\_ P. R\_\_\_\_\_ (Former Spouse), 13 April 2023
- DD Form 2656-10 (SBP Former Spouse Request for Deemed Election), 3 May 2023

FACTS:

1. The applicant states he wishes to designate his former spouse as the beneficiary of his SBP pursuant to their divorce settlement agreement. Both he and his former spouse believed the designation was the other party's responsibility and they were both unaware of the 1-year filing deadline. They became aware of the issue when they retained an attorney to prepare their Military Pension Division Order.
2. Counsel states the applicant and his former spouse both seek to have the applicant's military records corrected to reflect his designation of his former spouse as the "Former Spouse" beneficiary of his SBP as of 8 November 2019, the date of the Superior Court order, in accordance with their Settlement Agreement.

a. The applicant and his former spouse married on 25 August 2005 and divorced on 8 November 2019.

b. Prior to their divorce, the applicant had not designated an SBP beneficiary. In their Settlement Agreement, they clearly agreed that J\_\_\_\_ P. R\_\_\_\_ would be the applicant's sole SBP beneficiary, provided that she pay for the coverage. Following their divorce, each party believed the other party would effect this designation. Neither was aware of the 12-month deadline for doing so. On 8 November 2020, the SBP designation window lapsed.

c. The applicant consents to designation of J\_\_\_\_ P. R\_\_\_\_ as his "Former Spouse" beneficiary under the SBP as contemplated in their original Settlement Agreement and ordered by the Court. Further, the applicant agrees that J\_\_\_\_ P. R\_\_\_\_ should be so designated now.

d. This request to correct the applicant's military records is necessary to effectuate the original intent of the parties and the order of the Superior Court that incorporated their Settlement Agreement into its Final Judgment and Decree of Divorce on 8 November 2019.

e. Accordingly, they request correction of the applicant's military records to reflect J\_\_\_\_ P. R\_\_\_\_ as the beneficiary of his SBP "Former Spouse" coverage as of 8 November 2019, the date of the Court order.

3. Following prior enlisted service in the U.S. Navy Reserve, he enlisted in the Army National Guard (ARNG) of the United States on 1 February 2003.

4. State of Georgia, Department of Defense, Military Division, Orders 238-015, 25 August 2004, appointed him as a Reserve commissioned officer of the ARNG.

5. He and J\_\_\_\_ M\_\_\_\_ P\_\_\_\_ married on 25 August 2005.

6. The Joint Forces Headquarters – Georgia memorandum (Notification of Eligibility for Retired Pay for at Age 60 (20-Year Letter)), 15 September 2008, notified him that having completed the required years of service, he was eligible for retired pay upon application at age 60. Paragraph 3 stated:

Public Law 95-397, 30 September 1978, created the Reserve Components Survivor Benefit Plan (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 Reserve 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 (formally [formerly] DD Form 1883) 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.

7. There is no evidence indicating he completed a DD Form 2656-5 (RCSBP Election Certificate) within 90 days of receipt of his Notification of Eligibility for Retired Pay for at Age 60.

8. The Superior Court Settlement Agreement, 6 November 2019, states: "Husband [Applicant] shall notify Wife of his date of retirement within fourteen days of retirement. To the extent possible, Wife shall be entitled to elect to receive the survivor benefit provided that she pays for same"

9. He and J\_\_\_\_ P. R\_\_\_\_ divorced on 8 November 2019. The Superior Court Final Judgment and Decree of Divorce, 8 November 2019, states: "The parties hereto have entered into a Settlement Agreement signed by the Plaintiff [Applicant] and Defendant and file with this Court on the 6th of November, 2019, settling between themselves all questions in this case with reference to division of property, alimony, division of assets and division of debts. he Settlement Agreement entered into between the parties is hereby incorporated into and made part of this Final Judgment and Decree of Divorce."

10. Military Division Department of Defense Office of the Adjutant General, Orders 188-0403, 7 July 2022, retired him and placed him on the Retired List in the rank/grade of major/O-4 effective 1 January 2023.

11. His DD Form 2656 (Data For Payment of Retired Personnel), 26 August 2022, shows he indicated he was single and had two dependent children. He did not specify a previously made RCSBP election. He elected SBP "Child(ren) Only" coverage based on his full gross pay. He signed the form on 26 August 2022 and his signature was witnessed the same day.

12. His former spouse's affidavit, 13 April 2023, and his affidavit, 24 April 2023, both state they married on 25 August 2005 and divorced 8 November 2019. Prior to their divorce, they voluntarily entered into a Settlement Agreement wherein he agreed to designate her as his "Former Spouse" SBP beneficiary. At the time they divorced, they were unaware of any time limit required to designate her as his former spouse in order to secure her beneficiary status under the SBP. It is now and always has been his intent that she be his SBP beneficiary. He consents to the designation of her as the SBP "Former Spouse" beneficiary pursuant to their Settlement Agreement that was incorporated into their Final Judgment and Decree of Divorce on 6 November 2019.

13. His former spouse's DD Form 2656-10, 3 May 2023, shows in:

a. Section I (Member Identification), the applicant;

b. Section II (Former Spouse Identification):

(1) block 6a (Former Spouse Name), J\_\_\_\_\_ P. R\_\_\_\_\_

(2) block 12 (Marriage History):

- Date Married to Member – 25 August 2005
- Date of Divorce – 8 November 2019
- Are You Currently Married – "No"

c. Section III (Authority to Request Deemed SBP Election):

- block 13 (Is election made pursuant to requirements of a court order?), she placed an "X" in the "Yes" box
- block 14 (Is election being made pursuant to written agreement as part of or incident to a proceedings of divorce, dissolution, or annulment that has been incorporated in, ratified, or approved by a court order?), she placed an "X" in the "Yes" box

d. Section V (Former Spouse Signature), she signed the form on 3 May 2023.

14. The email correspondence from a Defense Finance Accounting Service technician, 4 March 2024, states the applicant's current SBP coverage on his retired pay account is "Child(ren) Only."

**BOARD DISCUSSION:**

After reviewing the application, all supporting documents, and the evidence found within the applicant's military records, the Board found that relief is as warranted. Counsel's and the applicant's contentions, his military records, and regulatory guidance were carefully considered.

a. The applicant indicates that, at or near the time of his 8 November 2019 divorce, it was his and his former spouse's joint intention to have the applicant designate his soon-to-be former spouse as his new SBP beneficiary. In his application, the applicant claims neither he nor his former spouse nor their attorneys knew that the SBP rules required the applicant to make a former spouse election within one year of their 8 November 2019 divorce. A member with spouse or spouse and child coverage may, within 1 year of the date of the decree of divorce, dissolution, or annulment, whichever is later, change that election to provide an annuity to a former spouse or to a former spouse and child.

b. The issue in this case is that the applicant claims he did not know that he needed to make the election for former spouse coverage within 1 year of his 8 November 2019 divorce from his former spouse. The Board found the applicant's claim credible and agreed with the applicant and his counsel that an error or injustice exists when the applicant credibly claims insufficient knowledge of some of the more SBP rules. Based upon a perceived injustice of dispossessing the former spouse from her SBP coverage due to an understandable misapprehension of SBP rules, the Board determined relief is warranted by correcting the records to reflect that he made a former spouse SBP election shortly after his 8 November 2019 divorce. This action will likely cause DFAS to immediately create a debt payable by the applicant for unpaid past SBP premiums.

BOARD VOTE:

Mbr 1      Mbr 2      Mbr 3

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

BOARD DETERMINATION/RECOMMENDATION:

The Board determined the evidence presented is sufficient to warrant a recommendation for relief. As a result, the Board recommends that all Department of the Army records of the individual concerned be corrected, by:

- Showing the applicant made a former spouse SBP election within one year of, and shortly after his 8 November 2019 divorce
- Showing the appropriate office timely received, accepted, and processed his election

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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. The election must be made before the effective date of retirement or coverage defaults to automatic spouse coverage. Elections are made by category, not by name. Since its creation, it has been subjected to a number of substantial legislative changes.

2. Public Law 97-252, the Uniformed Services Former Spouses Protection Act (USFSPA), enacted 8 September 1982, established SBP for former military spouses. This law also decreed that State courts could treat military retired pay as community property in divorce cases if they so choose. It established procedures by which a former spouse could receive all or a portion of that court settlement as a direct payment from the service finance center. The USFSPA contains strict jurisdictional requirements. The State court must have personal jurisdiction over the service member by virtue of the member's residence in the State (other than pursuant to military orders), domicile in the State, or consent.
3. Public Law 95-397, the Reserve Component Survivor Benefit Plan (RCSBP), enacted 30 September 1978, provided a way for those who qualified for Reserve retirement but were not yet age 60 to provide an annuity for their survivors should they die before reaching age 60. Three options were available: (A) elect to decline enrollment and choose at age 60 whether to start SBP participation, (B) elect that a beneficiary receive an annuity if they die before age 60 but delay payment of it until the date of the member's 60th birthday, and (C) elect that a beneficiary receive an annuity immediately upon their death if before age 60. Once a member elects either Option B or C in any category of coverage, that election is irrevocable. Option B and C participants do not make a new Survivor Benefit Plan (SBP) election at age 60. They cannot cancel SBP participation or change options they had in RCSBP; RCSBP coverage automatically converts to SBP coverage upon retirement.
4. Public Law 106-398, enacted 30 October 2000, required written spousal consent for a Reserve service member to be able 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 now results in the default election of Option C. The declination, with the spouse's consent, must be made before the end of the 90-day period beginning on the date on which the member receives his/her 20-year letter.
5. Title 10, U.S. Code, section 1448(b)(3), incorporates the provisions of the USFSPA relating to the SBP. It permits a person to elect to provide an annuity to a former spouse. Any such election must be written, signed by the person making the election, and received by the Secretary concerned within 1 year after the date of the decree of divorce. The member must disclose whether the election is being made pursuant to the requirements of a court order or pursuant to a written agreement previously entered into voluntarily by the member as part of a proceeding of divorce.
6. Title 10, U.S. Code, section 1450(f)(3)(A), permits a former spouse to make a written request that an SBP election of "former spouse" coverage be deemed to have been made when the former spouse is awarded the SBP annuity incident to a proceeding of

divorce. Section 1450(f)(3)(C) provides that an election may not be deemed to have been made unless the request from the former spouse of the person is received within 1 year of the date of the court order or filing involved.

//NOTHING FOLLOWS//