

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 1 October 2024

DOCKET NUMBER: AR20230009856

APPLICANT REQUESTS: in effect, correction of his records to show he elected Reserve Component Survivor Benefit Plan (RCSBP) coverage for his current spouse within 1 year of marriage.

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)
- District Court Decree of Divorce, 20 July 2009
- Marriage Certificate, 6 July 2011
- DD Form 2656 (Data for Payment of Retired Personnel), 9 October 2021
- Notarized Survivor Benefit Plan (SBP) Concurrence Statement, 25 January 2024

FACTS:

1. The applicant states he was in the midst of a permanent change of station move and newly divorced when he received his Notification of Eligibility for Retired Pay at Age 60 (20-Year Letter). The RCSBP was not something he was focused on. He was not properly counseled about the need to make an election even though he was divorced. When he remarried, he was not aware of or counseled about the need to make any elections. In fact, he was not made aware of the requirement until a few months after his retired pay started and his SBP election was changed from his requested election of "Spouse Only" coverage to "Child Only" coverage. He believes the lack of guidance/ counseling should not cause potential future financial hardship for his current spouse. He requests approval of an exception to his automatic SBP election of "Child Only" coverage due to not filing paperwork upon receipt of his 20-year letter and the approval of his election for "Spouse Only" coverage per the paperwork filed with his application for retirement.

2. Following enlisted service in the Army National Guard and commissioned officer service in the Regular Army, he was commissioned as a Reserve officer in the U.S. Army Reserve (USAR) and executed his oath of office on 24 June 1996.

3. The District Court Decree of Divorcee, 20 July 2009, shows the applicant and his then-spouse, T____ D____ H____, were granted a divorce on 20 July 2009. The court order does not contain language regarding entitlement to an SBP annuity or military retired pay.

4. The U.S. Army Human Resources Command (HRC) memorandum (Notification of Eligibility for Retired Pay at Age 60 (20-Year Letter)), 23 July 2009, notified him that he completed the required qualifying years of service for retired pay upon application at age 60. Paragraph 4 states:

Public Law 95-397, 30 Sep[tember] 1978, created the Reserve Component 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 Oct[ober] 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 spouse concurrence is provided to allow one of the following elections:

a. Option A (defer enrollment until age 60 when you apply for retired pay).

b. Option B (enroll and pay an annuity when YOU would have been age 60):

(1) Enroll spouse or spouse and child(ren) at LESS THAN the maximum level.

(2) Enroll child(ren) only.

c. Option C (enroll and pay an annuity immediately upon your death) but:

(1) Enroll spouse or spouse and child(ren) at LESS THAN the maximum level.

(2) Enroll children only

You must notify this Command, using the DD Form 2656-5, Reserve Component Survivor Benefit Plan (RCSBP) Election Certificate or DD Form 1883, Survivor Benefit Plan – Election Certificate, one of which is found in the enclosed booklet, of your decision within 90 days of the date of this Letter. If you have been mobilized and deployed OCONUS [outside the continental United States], you or your spouse may notify this Command of your status and inability to make an election. During the period of your mobilization/active duty deployment you will automatically be covered under SBP for Spouse and Children. Upon receipt of a

written request for deferment, accompanied by a copy of the mobilization/ deployment order, you will be granted a deferment from election. The deferment will end 90 days following your release from active duty. At that time you must have notified this Command of your election or you will be automatically enrolled under Option C, Full Coverage, Spouse and Children. The cost for this participation will commence upon your receipt of retired pay at age 60. Detailed information concerning the RCSBP program and costs is enclosed. ANY WRITTEN CORRESPONDENCE (letter or forms) THAT INVOLVE A CHANGE FROM FULL COVERAGE UNDER OPTION C FOR SPOUSE REQUIRE THE SIGNATURE OF YOUR SPOUSE BEFORE A NOTARY, OR A RETIREMENT SERVICES OFFICER AND ONE OTHER WITNESS. FAILURE TO MEET THIS REQUIREMENT WILL RESULT IN THE RETENTION OF FULL COVERAGE FOR YOUR SPOUSE AND CHILD(REN). You may contact this Command for answers to specific individual questions by dialing 1-800-318-5298, extension 4.

5. His records do not contain an RCSBP election within 90 days of receipt of his Notification of Eligibility for Retired Pay at Age 60.
6. HRC Orders B08-106010, 30 August 2011, promoted him to the rank/grade of lieutenant colonel/O-5 effective 30 August 2011.
7. His marriage certificate shows he and S_____ E_____ M_____ married on 18 June 2011.
8. His records do not contain a DD Form 2656-6 (SBP Election Change Certificate) requesting to add spouse coverage within 1 year of his marriage to his current spouse.
9. HRC Orders C-03-304398, 26 March 2013, reassigned him from the USAR Standby Reserve (Inactive List) by reason of non-participation and assigned him to the Retired Reserve effective 26 March 2013.
10. HRC Orders B-08-106010A01, 15 August 2014, amended HRC Orders B08-106010, 30 August 2011, to show his effective date for promotion to the rank/grade of lieutenant colonel/O-5 as 26 April 2011.
11. His DD Form 108 (Application for Retired Pay Benefits), 17 August 2021, shows he requested retired pay beginning 2 May 2023.
12. His DD Form 2656-5 (RCSBP Election Certificate), 23 August 2021 (12 years after issuance of his 20-year letter), shows in:
 - a. Section II (Marital/Dependency Status), block 7 (Are You Married?), he placed an "X" in the "Yes" box;

b. Section II, block 8 (Do You Have Any Dependent Children?), he placed an "X" in the "Yes" box;

c. Section III (Spouse/Dependent Child(ren) Information), he listed S____ E. H____ as his spouse with date of marriage in 2011, and one child, E____ M____, a stepdaughter born in 2006;

d. Section IV (Coverage), block 12 (Options), he placed an "X" in the box by the statement: "Option C (Immediate Annuity). I elect to provide an immediate annuity beginning on the day after the date of my death, whether before or after age 60";

e. Section IV, block 13 (Type of Coverage), he placed an "X" in the box by the statement: "Spouse Only";

f. Section V (Level of Coverage), he placed an "X" in the box by the statement: "Full Retired Pay"; and

g. Section IX (Member's Signature), he signed the form on 23 August 2021 and his signature was witnessed in Health, OH, on the same date.

13. His DD Form 2656, 9 October 2021, shows in:

a. Part I (Retired Pay Information), Section I (Pay Identification), block 4 (Retirement/Transfer Date), he entered 2 May 2023;

b. Part I, Section VI (Federal Income Tax Withholding Information), block 17 (Marital Status), he placed an "X" in the "Married" box;

c. Part III (SBP), Section IX (Dependency Information), block 29 (Spouse) and block 32 (Dependent Children) are void of any information;

d. Part II (SBP), Section X (SBP Election), block 33 (Reserve Component Only) (Reserve/National Guard members who achieve 20 qualifying years of service make the election to participate in the Reserve Component (RC) SBP on DD Form 2656-5 within 90 days of being notified of eligibility for a non-regular retirement not when applying for retired pay, unless that member previously elected to defer coverage. You must indicate your previous election in Block 33a through 33c before proceeding to Block 34. If you previously elected Option B or Option C, DO NOT enter an election in Block 34. (Check only one in Block 33a. through 33c.)), he placed an "X" in the box by the statement: "Option A – Previously declined to make an election until eligible to receive retired pay (proceed to Block 34 to make an election)";

e. Part III, Section X, block 34 (SBP Beneficiary Categories), he placed an "X" in the box by the statement: "I elect coverage for spouse only" and an "X" in the "Yes" box by the statement: "I have dependent children";

f. Part III, Section X, block 35 (SBP Level of Coverage), he placed an "X" in the box by the statement: "I elect coverage based on full gross pay"; and

g. Part IV (Certification), Section XI (Certification), he signed the form on 9 October 2021 and his signature was witnessed on the same date in Newark, OH.

14. The HRC Gray Area Retirements Branch letter, 23 March 2023, with allied documents, notified him that his application for retired pay was approved.

15. His DA Form 5016 (Chronological Statement of Retirement Points), 23 March 2023, shows he completed 26 years of qualifying service for retirement.

16. HRC Orders C03-393168, 23 March 2023, retired him and placed him on the Army of the United States Retired List in the grade of lieutenant colonel effective 2 February 2023.

17. He reached age 60 in May 2023; however, he qualified for early-age retirement based on qualifying active duty service.

18. He provided a Concurrence Statement – SBP Spouse Election by (Applicant) addressed to the Board with his DD Form 2656 attached wherein his spouse concurs with his request to change his SBP election from "Child Only" to "Spouse Only." His spouse signed this document on 25 January 2024 and it was witnessed and notarized by a notary public on the same date.

19. The email correspondence from the DFAS Board for Correction of Military Records/ Congressional Lead (Reply: Army Review Boards Agency Assistance), 4 June 2024, notes the applicant currently has "Child(ren)-only" RCSBP coverage. The DFAS database contains copies of the following documents described above:

- Notification of Eligibility for Retired Pay at Age 60 (20-Year Letter), 23 July 2009
- HRC Orders B08-106010, 30 August 2011
- HRC Orders C-03-304398, 26 March 2013
- DD Form 108, 17 August 2021
- DD Form 2656-5, 8 August 2021
- DD Form 2656, 9 October 2021
- HRC Gray Area Retirements Branch Letter, 23 March 2023
- HRC Orders C03-393168, 23 March 2023
- DA Form 5016, 23 March 2023

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 warranted. The applicant's contentions, his military records, and regulatory guidance were carefully considered. The evidence shows the applicant was issued a Notification of Eligibility for Retired Pay at Age 60 (20-Year Letter)) on 23 July 2009. The evidence also shows the applicant and his first spouse divorced on 20 July 2009, three days before he received his 20-year letter. His records do not contain an RCSBP election within 90 days of receipt of his Notification of Eligibility for Retired Pay at Age 60. His marriage certificate shows he and his spouse married on 18 June 2011. Again, his records do not contain a DD Form 2656-6 (SBP Election Change Certificate) requesting to add spouse coverage within 1 year of his marriage to his current spouse. He was ultimately placed on the retired list in February 2023. The applicant states he was not aware of or counseled about the need to make an SBP election for his later-acquired spouse. He states he was automatically enrolled in "child only" SBP. He requests that the Board amend his records to reflect that he elected "Spouse Only" coverage, consistent with paperwork filed with his retirement application in October 2021. The Board considered the evidence provided and determined that the applicant's assertions about not being properly counseled are credible. Therefore, the Board determined an injustice occurred and voted to grant the requested relief.

BOARD VOTE:

Mbr 1 Mbr 2 Mbr 3

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:	:	:	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 submitted a Reserve Component Survivor Benefit Plan (RCSBP) electing Option C (Immediate Coverage), within 1 year of his remarriage on 11 June 2011
- showing DFAS or the appropriate office timely received, processed, and entered his Option C election in his records
- showing the applicant's RCSBP coverage converted into an SBP, spouse coverage upon retirement in February 2023

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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.

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 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. Three options are 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 the annuity 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. 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 applied for retired pay and elect to participate in the standard SBP. If RCSBP Option B or C is elected, there is a Reservist Portion cost added to the basic cost of the SBP to cover the additional benefit and assured protection should the member die prior to age 60. If death does not occur before age 60, the RCSBP costs for Options B and C are deducted from the member's retired pay (costs for Option C being the more expensive). 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 SBP election at age 60. They cannot cancel SBP participation or change options they had in the RCSBP; RCSBP coverage automatically converts to SBP coverage upon retirement.

7. Public Law 106-398, enacted 30 October 2000, required written spousal consent for a Reserve Component service member to delay making an RCSBP election until age 60. The law is applicable to cases where 20-year letters were issued after 1 January 2001. In essence, 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), 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. The Defense Finance and Accounting Service interprets the first part of Title 10, U.S. Code, section 1448(a)(5), to mean "who is not married OR has no 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 assigned to the Retired Reserve.

//NOTHING FOLLOWS//