

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 1 October 2024

DOCKET NUMBER: AR20230010496

APPLICANT REQUESTS:

a. correction of his records to show:

- he declined to make a Reserve Component Survivor Benefit Plan (RCSBP) election until age 60 with spousal concurrence upon receipt of his Notification of Eligibility for Retired Pay at Age 60
- he declined to participate in the Survivor Benefit Plan (SBP) with spousal concurrence upon application for retired pay at age 60

b. reimbursement of Survivor Benefit Plan (SBP) premiums deducted from his retired pay.

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, 13 July 2023
- New Mexico Department of Military Affairs Memorandum (Notification of Eligibility for Retired Pay at Age 60 (20-Year Letter)), 3 August 2008
- two Acknowledgments of Receipt, 29 July 2009 (one unsigned by commander)
- Self-authored Memorandum for Record (Retirement Letter), 3 August 2009
- DD Form 2656-5 (RCSBP Election Certificate), 3 August 2009
- DD Form 2656 (Data for Payment of Retired Personnel), 11 May 2021

FACTS:

1. The applicant states:

a. Upon receiving his 20-year letter on 29 July 2009, he noticed it was dated 3 August 2008. He signed the attached acknowledgement of receipt to show the date he received the 20-year letter. He completed his retirement paperwork, including a DD Form 2656-5 on 3 August 2009, 5 days after receiving his 20-year letter. At that

time, he elected not to make an SBP election until age 60. When he reached age 60, he and his spouse elected not to participate in the SBP.

b. The Defense Finance and Accounting Service (DFAS) has been deducting SBP premiums from his retired pay since his retirement. He has contacted DFAS on several occasions and was informed that the acknowledgment of receipt of his 20-year letter was not valid because it did not contain the commander's signature. He contacted the New Mexico Army National Guard (NMARNG) to request a copy of the acknowledgment of receipt of his 20-year letter bearing the commander's signature. Upon receipt, he sent the copy to DFAS in June 2022. DFAS confirmed receiving his acknowledgment of receipt in July 2023, and noted it was uploaded into their system.

c. He returned the required retirement paperwork within 5 days, but he is still being penalized for the erroneous date on his 20-year letter.

2. Following prior Regular Air Force enlisted service, he enlisted in the NMARNG on 29 July 1998 in the rank/grade of staff sergeant/E-6.

3. The New Mexico Department of Military Affairs memorandum (Notification of Eligibility for Retired Pay at Age 60 (20-Year Letter)), 3 August 2008, notified him that he completed the required qualifying years of service for retired pay upon application at age 60. Paragraph 3 states:

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 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.

4. His records contain no evidence showing he made an RCSBP election within 90 days of the date of the Notification of Eligibility for Retired Pay at Age 60.

5. He acknowledged receipt of his 20-year letter on 29 July 2009 (two copies). One of the acknowledgements is not signed by his unit commander.

6. His memorandum for record (Retirement Letter), 3 August 2009, requested retirement from the NMARNG effective 3 August 2009 and placement in the Retired Reserve.

7. His DD Form 2656-5, 3 August 2009, shows in:

- block 12 (Options) – he placed an "X" in "Option A – I decline to make an election until age 60"
- block 17 (Member Signature) – he signed the form on 3 August 2009
- block 19 (Witness) – a witness signed the form on 3 August 2009
- block 20 (Spouse) – his spouse signed the form on 3 August 2009
- block 21 (Notary Witness) – the notary public signed the form on 3 August 2009

8. His DD Form 2656, 11 May 2021, shows in:

- block 4 (Retirement/Transfer Date) – 3 August 2009
- block 29 (Spouse) – he entered "R \_\_\_\_\_, F \_\_\_\_\_ O." with a marriage date of 10 October 2000
- block 33 (Reserve Component Only) – he placed an "X" in "Option A – Previously declined to make an election until eligible to receive retired pay"
- block 34 (SBP Beneficiary Categories) – he placed an "X" in block g – "I elect not to participate in SBP"
- block 39 (Member) – he signed the form on 11 May 2021
- block 40 (Witness) – a witness signed the form on 11 May 2021
- block 41 (Spouse) – his spouse signed the form on 11 May 2021
- block 42 (Notary Witness) – a notary public signed the form on 11 May 2021

5. U.S. Army Human Resources Command Orders C10-290753, 27 January 2022, retired him and placed him on the Army of the United States Retired List in the grade of second lieutenant effective 11 February 2022. U.S. Army Human Resources Command Orders C10-290753A01, 16 May 2022, corrected his retired grade to read first sergeant. He reached age 60 in February 2022.

7. On 15 July 2023, he simultaneously submitted applications to this Board and to DFAS on an SBP and RCSBP Open Season Election to Discontinue Participation form, requesting discontinuance in the SBP.

8. Email correspondence with DFAS shows on 18 April 2022, he faxed correspondence to DFAS wherein he requested resolution of the SBP premiums being

withheld from his retired pay despite declining coverage. He noted this was due to the date of his 20-year letter vice when he received the letter. He included his acknowledgement of receipt as proof of the actual date of receipt of the 20-year letter. On 22 April 2024, a DFAS Supervisory Military Pay Specialist stated the applicant was automatically enrolled in the SBP for "Spouse and Child(ren)" coverage due to no election being made within 90 days of his notification of eligibility on 3 August 2008. He later elected to decline coverage, but his election was not valid due to his notification of eligibility date. The applicant applied to DFAS during the 2023 SBP open season and discontinued coverage effective 21 March 2023; however, he will continue to pay the RCSBP cost since he was automatically enrolled in the RCSBP at his retirement date based on his notification of eligibility date.

#### BOARD DISCUSSION:

After reviewing the application, all supporting documents, and the evidence found within the military record, the Board found that relief was warranted. The applicant's contentions, the military record, and regulatory guidance were carefully considered.

a. The applicant's 20- Year Letter (Notification of Eligibility for Retired Pay at Age 60) was dated 3 August 2008. The letter informed him of the 90-day requirement to make an Reserve Component Survivor Benefit Plan (RCSBP) election. He asserts that although his unit was in possession of the letter for some time, he did not receive it until July 2009. He signed a form acknowledging receipt of the letter on 29 July 2009; the acknowledgment is also signed by his commander on the same date. The applicant submitted an RCSBP election with Option A selected (deferral of election until age 60) and containing his spouse's notarized signature, dated 3 August 2009. He was transferred to the Retired Reserve effective 8 August 2009. In May of 2021, he submitted a DD Form 2656 indicating he had previously selected to defer his SBP election and now wished to decline participation in SBP; the form also contains his spouse's notarized signature. The applicant was fully retired on 11 February 2022.

b. Upon beginning to receive retired pay, the applicant discovered that he had been enrolled in RCSBP because his initial 2009 RCSBP election was submitted beyond the 90-day deadline after the date of his 20-Year Letter. DFAS confirms that this was the case. Although the applicant's later election to decline participation in SBP was effective as it was made during Open Season, he is being charged for the years of coverage between 2008-2021. The applicant asserts that it was not his fault that his unit did not deliver the 20-Year Letter until 2009, and that he believed he had properly made his RCSBP election. The Board accepted his argument and found the unit's delay in delivering his 20-Year Letter resulted in an injustice, because, by the time he received it, the 90-day time limit for making an RCSBP election had already passed. The Board

determined relief is warranted by amending Applicant's record to reflect that he submitted his RCSBP election (Option A) form within the 90-day after date of the letter.

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 submitted a Reserve Component Survivor Benefit Plan (RCSBP) electing Option A (Defer to Age 60) with spouse concurrence, within 90 days of his 20-Year Letter, dated 3 August 2008
- showing DFAS or the appropriate office timely received, processed, and entered his Option A election in his records
- showing the applicant timely submitted a DD Form 2656, prior to his February 2022 age 60 retirement, declining SBP coverage and his spouse concurred with his decline coverage
- showing DFAS or the appropriate office timely received, processed, and entered his age 60 DD Form 2656 in which he declined SBP coverage

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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 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 and DD Form 2656.
2. Army Regulation 600-8-7 (Retirement Services Program), paragraph 4-6, states Reserve Component Soldiers and spouses should be counseled on the RCSBP between the member's receipt of the 20-year letter and 60 days after receipt of the 20-year letter, 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.
3. Public Law 95-397, enacted 30 September 1978, established the RCSBP. The RCSBP provided a way for those who qualified for Nonregular (Reserve) retirement but were not yet age 60 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 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 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.
4. Title 10, U.S. Code, section 1448, requires notice to a spouse if a member elects not to participate in the SBP. The statute also provides 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.
5. 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.
6. 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.

7. Department of Defense Instruction 1332.42 (Survivor Annuity Program Administration) states a member may elect to discontinue participation by submitting DD Form 2656-2 during the period that is more than 2 years but less than 3 years after the first date of entitlement to receive retired pay. The member must submit the request no earlier than the 1st day of the 25th month, and no later than the last day of the 36th month from the date of entitlement to retired pay, with spousal concurrence if applicable. A member electing to terminate coverage is not eligible for continuation in the Program; however, the member has 30 days after submitting a request to discontinue participation to revoke the request.

8. The National Defense Authorization Act for Fiscal Year 2023 included an SBP open season. The SBP open season began on 23 December 2022 and ended on 1 January 2024.

a. The SBP open season allowed retirees receiving retired pay, eligible members, or former members awaiting retired pay who were currently not enrolled in the SBP or RCSBP as of 22 December 2022 to enroll. For a member who enrolled during the SBP open season, the law generally required that the member would 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). For retirees receiving pay, enrollment requires paying the premiums plus interest for the period since the date they were first eligible to enroll, as well as the monthly premiums moving forward.

b. The SBP open season also allowed eligible members and former members who were currently enrolled in the SBP or RCSBP as of 22 December 2022 to permanently discontinue their SBP coverage. The law generally required the covered beneficiaries to concur in writing with the election to discontinue. Previously paid premiums will not be refunded.

//NOTHING FOLLOWS//