

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 12 November 2024

DOCKET NUMBER: AR20230012956

APPLICANT REQUESTS:

- a. correction of U.S. Army Human Resources Command (HRC) Orders C08-392832, 30 August 2023, to show Regular active duty retirement;
- b. notification to the Defense Finance and Accounting Service (DFAS) upon correction of his retirement orders to prompt a retroactive change to his Reserve Component Survivor Benefit Plan (RCSBP) election to a standard Survivor Benefit Plan (SBP) election at retirement; and
- c. reimbursement of RCSBP premiums paid.

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)
- DD Form 2656 (Data for Payment of Retired Personnel), 8 August 2023
- HRC Gray Area Retirements Letter, 30 August 2023
- HRC Orders C08-392832, 30 August 2023
- DFAS Retiree Account Statement, 20 September 2023

FACTS:

1. The applicant states he retired at age 60 with a full Regular retirement and did not have any "gray area" service. He selected the \$300 SBP option, but DFAS is charging him \$500 for the default SBP coverage and \$116 per month for RCSBP costs.
2. Following prior enlisted service in the U.S. Navy and Nevada Army National Guard, he was appointed as a Reserve commissioned officer of the Army and executed his oath of office in the Nevada Army National Guard on 9 March 2003.
3. He and L____ A____ M____ married on 18 August 2004.

4. His records show he entered active duty in an Army National Guard Active Guard Reserve status on 17 September 2010.

5. The Joint Force Headquarters, Nevada National Guard, memorandum (Notification of Eligibility for Retired Pay for Non-Regular Service (20 Years)), 21 December 2012, notified him that he completed the required qualifying years of service for retired pay upon application at age 60 in accordance with statutory guidance. Paragraph 4 states:

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 [Spouse Concurrence] 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 [notifications of eligibility].

6. His records contain no evidence indicating he made an RCSBP election within 90 days of receipt of his 20-year letter. As a result, he was automatically enrolled in the RCSBP under Option C for "Spouse" coverage based on full retired pay.

7. Nevada Military Department Office of the Adjutant General Orders 303-012, 30 October 2018, separated him from the Army National Guard in the rank/grade of major/O-4 effective 1 November 2018 and transferred him to the U.S. Army Reserve Individual Ready Reserve.

8. He was honorably released from active duty in the rank/grade of major/O-4 on 1 November 2018. His DD Form 214 (Certificate of Release or Discharge from Active Duty) shows he completed 8 years, 11 months, and 1 day of net active service during this period with 15 years, 6 months, and 10 days of total prior active service and 3 years, 2 months, and 15 days of prior inactive service.

9. His National Guard Bureau Form 22 shows he was discharged from the Nevada Army National Guard in the rank/grade of major/O-4 effective 1 November 2018 and transferred to the U.S. Army Reserve Individual Ready Reserve.

10. HRC Orders B-03-902235, 29 March 2019, promoted him to lieutenant colonel effective 2 November 2018.

11. His DD Form 108 (Application for Retired Pay and Benefits) (page 1 only), 3 May 2023, shows his Active and Reserve Component service credit from 15 September 1983 through 13 September 2020.

12. Department of the Army Orders 0005290103.00, 7 July 2023, reassigned him to the U.S. Army Reserve Control Group (Retired Reserve) in the rank/grade of lieutenant colonel/O-5 effective 31 July 2023 by reason of mandatory retirement. He completed 30 years, 11 months, and 29 days of total service, including 25 years, 7 months, and 15 days of active federal service.

13. He reached age 60 in July 2023.

14. His DA Form 5016 (Retirement Accounting Statement), 2 August 2023, shows he completed 31 years, 7 months, and 11 days of qualifying service for retirement.

15. His DD Form 2656 (Data for Payment of Retired Personnel), 8 August 2023, shows in:

a. Section I (Pay Identification):

- block 4 (Retirement/Transfer Date) – 31 July 2023
- block 7 (Member or Former Member of the) – Reserve Component – Regular Retirement

b. Section IX (Dependency Information), block 29 (Spouse), he entered "L_____ A. M_____" with a marriage date of 18 August 2004;

c. Section IX, block 32 (Dependent Children), no entry;

d. Section X (SBP Election), block 35 (Reserve Component Only – This section refers to the decision you previously made on the DD Form 2656-5 when you were notified of eligibility to retire, in most cases you do not have the right to make a new election on this form), no entry;

e. Section X (SBP Election), block 36 (SBP Beneficiary Categories), he checked the box "I Elect Coverage for Spouse Only" and did not indicate if he had dependent children;

f. Section X, block 37 (Level of Coverage), he checked the box for "I Elect Coverage with a reduced base amount of \$300 (Spouse concurrence is required in Part V)";

g. Section XI (Certification), block 41 (Member), he digitally signed and dated the form on 8 August 2023; and

h. Section XI, block 40 (Witness), his witness signed and dated the form on 8 August 2023.

i. Section XII (SBP Spouse Concurrence – Completion of this section is required only in certain circumstances if you declined to elect SBP coverage, elected less than the maximum coverage, or elected child-only coverage while having an eligible spouse. If you are completing this form electronically and this section does not appear, you do not have to obtain spousal concurrence.) is missing in its entirety.

16. The HRC Gray Area Retirements Branch letter, 30 August 2023, approved his request for retired pay under Title 10, U.S. Code, section 12731.

17. HRC Orders C08-392832, 30 August 2023, retired him and placed him on the Army of the United States Retired List in the grade of lieutenant colonel effective 1 August 2023.

18. His DFAS Retiree Account Statement, 20 September 2023, shows "Spouse SBP Only Cost: \$457.73" and "RCSBP Cost: \$116.19." The statement further notes: "You have been charged 2 months toward your 360 months of paid-up RC/SBP coverage. Once you have paid at least 360 months towards your coverage and turn age 70, your costs will be terminated but your coverage will remain active."

19. His DA Form 1506 (Statement of Service), 13 May 2024, shows he was credited with 31 years, 11 months, and 7 days of total service, including 25 years, 7 months, and 8 days of total active service.

20. On 13 May 2024 in response to his request, HRC issued him a DD Form 215 (Correction to DD Form 214) correcting his DD Form 214 for the period ending 1 November 2018 as follows:

- item 9 –
 - delete – "N/A"
 - add – "USAR CON GP (RETRES) [U.S. ARMY RESERVE CONTROL GROUP (RETIRED RESERVE)] 1600 SPEARHEAD DIVISION AVE FT KNOX KY 40122"
- item 18 –
 - add – "RETIRED LIST GRADE: MAJ/O04 [MAJOR/O-4]"
 - add – "SUBJECT TO ACTIVE-DUTY RECALL BY THE SECRETARY OF THE ARMY"
- item 23 –
 - delete – "RELEASE FROM ACTIVE-DUTY"
 - add – "RETIREMENT"
- item 28 –
 - delete – "COMPLETION OF REQUIRED ACTIVE SERVICE"
 - add – "SUFFICIENT SERVICE FOR RETIREMENT"

21. The HRC memorandum from the Personnel Services Division Chief (Advisory Opinion for (Applicant) AR20230012956 – Issue: Full Active-Duty Retirement Review by HRC Retired Activities Division), 24 May 2024, states:

a. The Gray Area Retirements Branch reviewed the applicant's military records. He is currently receiving a Non-Regular retirement under the provisions of Title 10, U.S. Code, section 12731, and he is paying for the RCSBP and SBP. The Gray Area Retirements Branch called DFAS and requested that DFAS advise on which retirement would be more advantageous for the applicant to receive, a Regular retirement or a Non-Regular retirement.

b. DFAS informed the Gray Area Retirements Branch that it would be more beneficial for the applicant to keep the Non-Regular retirement over a Regular retirement. Therefore, the Gray Area Retirements Branch opined that the applicant should stay retired under the Non-Regular retirement law and noted they called the applicant and informed him of this.

22. Department of the Army Orders 0005290103.01, 24 May 2024, amended Orders 0005290103.00 to show he completed 31 years, 11 months, and 8 days of total service, including 25 years, 7 months, and 15 days of total active federal service.

23. On 3 June 2024, the Army Review Boards Agency Case Management Division provided the applicant with a copy of the HRC Personnel Services Division advisory opinion and placed his application on hold for 15 days to allow him the opportunity to submit comments. He did not respond.

24. Email correspondence from the DFAS Board for Correction of Military Records/ Congressional Team Lead, 24 July 2024, notes the applicant's current coverage is RCSBP "Spouse Only" and no changes have been made since his retirement on 1 August 2023. The applicant's DFAS records contain the documents described above.

BOARD DISCUSSION:

After reviewing the application, all supporting documents, and the evidence found within the military record, the Board found that relief was not warranted. The applicant's contentions, the military record, and regulatory guidance were carefully considered.

a. The evidence shows the applicant, received a DD Form 214 reflecting his release from active duty as a member of NVARNG-AGR program as a Major on 1 November 2018, and immediately transferred to the IRR. Then, immediately on the following day, the applicant – now a member of the IRR – was promoted to LTC where he remained until 31 July 2023 when he was mandatorily transferred to the Retired Reserve as a result of turning 60 years of age.

b. His issue then becomes confusing due to the addition of a DD Form 215 which 'corrected' the previously granted DD Form 214 by deleting the applicant's transfer to the IRR; and changing his discharge from release from active duty to retirement in the grade of major. The Board believes the applicant was issued a DD Form 215 in error because he was not retire (despite having sufficient active service at that time); he was only released from active duty and transferred to the IRR, where he was promoted to LTC (in the IRR) and continued to perform military duty with pay for several years through 2023. HRC and DFAS agree that it would be disadvantageous to him to amend his order to change his retirement date to the date he was released from active duty and void his subsequent promotion to LTC. It is clear that when he was released from active duty, he was a Major. Although he was selected for promotion to LTC, his promotion to LTC was after his release from active duty. Therefore, the Board found it reasonable to note that his transfer to the IRR was for the purpose of promotion to LTC.

c. As far as the RCSBO, the Board found the applicant's premise flawed. He claims he should not be paying RC/SBP related expenses because of the accumulated active-duty years qualifying him for a regular retirement is inaccurate. The evidence shows he received a 20-Year Letter while deployed. He had 90 days from return from deployment to take action regarding the RCSBP but took no action. Therefore, since he was married, he was automatically defaulted/enrolled in the RCSBP. The Board noted that AGR active-duty time is credible for qualifying in both regular & non-regular retirements. However, the fact the applicant retired from the IRR and is referred to as "Lieutenant Colonel" on his DFAS generated LES indicates that his current pension is derived from his ARNG/Reserve affiliation; the HRC advisory opinion explicitly acknowledges the applicant is receiving a non-regular retirement under 10 USC, §12731.

d. The DD Form 215, inferentially appears, to have been initiated by the applicant in order to receive a regular retirement that if accurate would preempt RCSBP expenses, but it appears DFAS either has not acted on the document or received it. Further, the advisory opinion also indicates, "[the applicant] should stay retired under the nonregular Law 12731" as being more advantageous. If the applicant's request were to be honored, DFAS would very likely initiate an involuntary debt against future pay for all service-related income gained as a LTC and the difference of MAJ-LTC pension income.

e. Further, whether the applicant realizes or not, any IRR authorized drills or active duty for training periods he may have performed would be deemed a nullity, as if it never happened. This would create a secondary order of effect by creating an Anti-Deficiency Act (ADA) violation. The ADA, among other facets, prevents the government from accepting "voluntary services for the United States, or employing personal services not authorized by law, except in cases of emergency involving the safety of human life or the protection of property (31 U.S.C. § 1342).

BOARD VOTE:

Mbr 1 Mbr 2 Mbr 3

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|---|---|---|----------------------|
| : | : | : | 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 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). Board members will review all applications that are properly before them to determine the existence of an error or injustice and direct or recommend changes in military records to correct the error or injustice, if persuaded that material error or injustice exists and that sufficient evidence exists in the record. 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 the evidence.

2. National Guard Regulation 600-5 (The Active Guard Reserve Program – Title 32, Full Time National Guard Duty Management) sets policy and procedures for the management of Army National Guard Soldiers serving on full-time National Guard duty in the Active Guard Reserve Program. Paragraph 6-8 provides that satisfactory service in an Active Guard Reserve status is creditable as qualifying service for both Regular and Non-Regular retirement.

a. Soldiers may retire after completing 20 years of active service calculated from their Basic Active Service Date.

b. Soldiers will retire in the grade held on the date of retirement per Army Regulation 600-8-24 (Officer Transfers and Discharges) and Army Regulation 635-200 (Active Duty Enlisted Administrative Separations).

3. Army Regulation 135-180 (Retirement for Non-Regular Service) prescribes policies and procedures governing Non-Regular (Reserve Component) retirement. This regulation 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, and U.S. Army Reserve.

a. Chapter 2 provides that to be eligible for Non-Regular retired pay, an individual must have attained the minimum age prescribed by law, which is age 60. To be eligible for retired pay at or after age 60, an individual need not have military status at the time of application, but must have completed a minimum of 20 creditable years of qualifying service computed under Title 10, U.S. Code, section 12731(f).

b. Chapter 3 provides policies and procedures for implementing the RCSBP. Soldiers who were issued a Notification of Eligibility for Retired Pay at Age 60 after 1 December 1979 have been or will be furnished the RCSBP information and election certificate with their 20-year letter. All eligible personnel have 90 days from receipt of the 20-year letter to make their elections and return the form to the appropriate office.

4. 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. Since its creation, it has been subjected to a number of substantial legislative changes.

5. Public Law 95-397, enacted 30 September 1978, established the RCSBP. The RCSBP provided a way for those who qualified for Non-Regular 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 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. If RCSBP Option B or C is elected, there is a Reserve Component 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.

6. 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.

7. The Antideficiency Act prohibits federal agencies from obligating or expending federal funds in advance or in excess of an appropriation, and from accepting voluntary services.

//NOTHING FOLLOWS//