

RECORD OF PROCEEDINGS
AIR FORCE BOARD FOR CORRECTION OF MILITARY RECORDS

IN THE MATTER OF:

DOCKET NUMBER: 97-0300

FEB 12 1999

COUNSEL: None

HEARING DESIRED: Not indicated

APPLICANT REQUESTS THAT:

His records be corrected to show that he did not exercise a Survivor Benefit Plan (SBP) option and that he be reimbursed all premiums deducted from his retirement pay since 1 August 1996.

APPLICANT CONTENDS THAT:

In the two years from the time his wife left, he has not been able to contact her. He understands the concept of the SBP program. However, his request for correction of military records seems to be the only way to obtain equitable treatment. He did not ask his wife to leave or did he initiate the divorce. He did spend two years following up and finally succeeded in obtaining the divorce. All the while having the premium deducted from his retirement pay. He believes the injustice can be corrected by updating his records to reflect that he never initiated the program and reimbursing him for premiums deducted since 1 August 1996.

Applicant's complete submission is attached at Exhibit A.

STATEMENT OF FACTS:

The applicant was separated from his spouse effective July 1995, however, he was legally married when he retired from the Air Force on 1 August 1996. He did not complete the documents required to correctly establish his retired pay account; consequently, the Defense Finance and Accounting Service - Cleveland Center (DFAS-CL) established full spouse and child coverage to comply with the law.

On 26 September 1997, the applicant divorced and he submitted a copy of the divorce decree to DFAS-CL, and spouse premiums and coverage have been suspended. Upon remarriage, the applicant will have the option to extend or decline coverage for a new spouse.

AIR FORCE EVALUATION:

The Chief, Retiree Services Branch, Directorate of Pers Program Management, AFPC/DPPTR, reviewed this application and states that when a member fails to make an SBP election prior to retirement or fails to obtain a valid spouse concurrence in an election that does not provide maximum spouse coverage, full coverage is established by operation of law. However, the law also provides that the Secretary of the Air Force (SAF) may waive the requirement to obtain a spouse's written concurrence if the member establishes, to the satisfaction of the SAF, that the spouse's whereabouts cannot be determined. The request for waiver must be accompanied by proper documentation (i.e., missing persons report, all efforts to locate spouse, notarized affidavits, etc.). A legal separation, pending divorce, martial discord, or the member's disinterest in locating a spouse are not considered justifications to request a waiver. The applicant acknowledges that during his 2 April 1996 SBP briefing at Fairchild AFB, WA, he was informed that if his wife's concurrence was not obtained prior to the date of his retirement, full coverage would be established. The member had almost four months after that briefing to obtain his wife's concurrence or to request a waiver of the requirement. Approval of this request would provide the applicant an opportunity not afforded other retirees and is not justified. There is no evidence of error or injustice on the part of the Air Force in this case; therefore, they recommend denial of applicant's request.

A complete copy of the evaluation is attached at Exhibit C.

APPLICANT'S REVIEW OF AIR FORCE EVALUATION:

On 9 March 1998, a copy of the Air Force evaluation was forwarded to the applicant for review and response within 30 days. As of this date, no response has been received by this office.

ADDITIONAL AIR FORCE EVALUATION:

The Chief, General Law Division, Office of the Judge Advocate General,, AFPC/DPPTR, reviewed this application and states that they do not agree that the applicant's petition supports relief. On the contrary, his retirement pay has been handled in accordance with the requirements established in 10 U.S.C. 1448(a)(3)(A) and AFI 36-3006, Survivor Benefit Plan (SBP), para 2.2. In fact, paragraph A2.8.1. of AFI 36-3006 provides that a waiver of spouse concurrence may not be based solely on martial discord, the fact that the member and spouse are legally separated, or the fact that the member is not interested in locating the spouse. Therefore, any claim for reimbursement for premiums already paid is not legally supportable because the

premiums already paid is not legally supportable because the actions taken in the applicant's case were completely consistent with the applicable statute and regulation. The only question presented is whether the board should now allow the applicant to prove that under 10 U.S.C. 1448(a)(3)(C), he should be allowed to prove his wife's whereabouts still cannot be determined or that exceptional circumstances justify termination of the wife's SBP coverage. They believe that if the applicant proves to the Board's satisfaction that one of these exigencies exists, then the Board may act on the Secretary's behalf to terminate any further SBP coverage for the applicant's former spouse without the spouse's concurrence. The only supporting evidence reviewed by this office is a copy of the divorce documents filed by his attorneys in September 1997 and an affidavit by a paralegal which indicates that his attorneys had difficulty serving the documents on his wife's attorney. That is less than convincing evidence. One need only consider some of the practical steps the applicant could have taken over the past four years if he truly wanted to locate his wife. For example, there are no statements from his wife's family members or friends that the wife's whereabouts are unknown and no indication that he asked his attorneys to help him locate his wife. Note that there is no mention of the applicant's missing wife in his divorce documents: did the court realize that they were conducting the proceeding with the petitioner in absentia? There is no indication the applicant personally visited San Antonio nor any other location where his wife might have relocated. In short, the lack of any substantiation strongly supports the impression that the applicant made only a token effort to find his wife and, not surprisingly, was unsuccessful. They, therefore, recommend that the application be denied and only reconsidered upon the applicant's submission of convincing proof that his former wife cannot be located for purposes of making a SBP election. Only then should the Board consider waiving the wife's statutory protection. Further, any relief should only be applied to retired pay earned subsequent to the Board's decision.

A complete copy of the evaluation is attached at Exhibit D.

APPLICANT'S REVIEW OF AIR FORCE EVALUATION

The applicant reviewed the Air Force evaluation and states that while he was never able to speak with his ex-wife, he did discover that her father was providing her with the funds to file for divorce. He learned this when he was served with notice that she had filed for divorce. Several months later, her attorney dropped the case. The reason was the attorney was unable to find his ex-wife and she never returned any paperwork. To this date, he still has not been able to contact her and her family continues to deny knowledge of her whereabouts. His ex-wife chose to abandon the marriage just prior to his retirement. She indicated her desires to end the marriage when she had him

served. His ex-wife's statutory protection has carried forth despite her actions in abandoning the marriage and her indications of intent to end the marriage. Without the assistance of her family or the employment of a private investigator he is and has been unable to determine her location.

Applicant's complete response is attached at Exhibit G.

THE BOARD CONCLUDES THAT:

1. The applicant has exhausted all remedies provided by existing law or regulations.
2. The application was timely filed.
3. Sufficient relevant evidence has been presented to demonstrate the existence of probable error or injustice. After thoroughly reviewing all the documentation submitted with this appeal, the Board believes that due to the applicant's situation of being separated and unable to locate his ex-spouse after what appears to be many attempts through her family, his record should be corrected to show he declined SBP coverage. In this respect, we note the Declaration of L--- G---, Maryann & Moreno Associates, submitted by the applicant, indicating their unsuccessful attempts in contacting the applicant's spouse. In view of the foregoing, we recommend his records be corrected to the extent indicated below.

THE BOARD RECOMMENDS THAT:

The pertinent military records of the Department of the Air Force relating to APPLICANT, be corrected to show that the Secretary of the Air Force determined that he could not locate his spouse, and on 31 July 1996, pursuant to 10 U.S.C., Section 1448(a)(3)(C), he elected to decline Survivor Benefit Plan coverage.

The following members of the Board considered this application in Executive Session on 7 July 1998 and 27 October 1998, under the provisions of AFI 36-2603:

Mrs. Barbara A. Westgate, Panel Chair
Mr. Frederick R. Beaman, 111, Member
Mr. Steven A. Shaw, Member

All members voted to correct the records, as recommended. The following documentary evidence was considered:

- Exhibit A. DD Form 149, dated 6 Oct 97, w/atchs.
- Exhibit B. Applicant's Master Personnel Records.
- Exhibit C. Letter, AFPC/DPPTTR, dated 20 Feb 98
- Exhibit D. Letter, AFBCMR, dated 9 Mar 98.
- Exhibit E. Letter, AF/JAG, dated 24 Aug 98.
- Exhibit F. Letter, AFBCMR, dated 9 Sept 98.
- Exhibit G. Applicant's Response, undated.


BARBARA A. WESTGATE
Panel Chair



DEPARTMENT OF THE AIR FORCE
WASHINGTON, DC

FEB 12 1999

Office of the Assistant Secretary

AFBCMR 97-03000

MEMORANDUM FOR THE CHIEF OF STAFF

Having received and considered the recommendation of the Air Force Board for Correction of Military Records and under the authority of Section 1552, Title 10, United States Code (70A Stat 116), it is directed that:

The pertinent military records of the Department of the Air Force relating to [REDACTED] be corrected to show that the Secretary of the Air Force determined that he could not locate his spouse, and on 31 July 1996, pursuant to 10 U.S.C., Section 1448(a)(3)(C), he elected to decline Survivor Benefit Plan coverage.


JOE G. LINEBERGER
Director
Air Force Review Boards Agency