COMPTROLLER GENERAL OF THE UNITED STATES
WASHINGTON, D.C. 20548

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B-178965

SEP 28 1973

The Honorable James R. Schlesinger
The Secretary of Defense

Dear Mr. Secretary:

Further reference is made to a letter dated June 18, 1973, from the Acting Assistant Secretary of Defense (Comptroller), requesting a decision regarding the obligation of the Government to pay an annuity under the provisions of the Survivor Benefit Plan, 10 U.S.C. 1447-1455, as added by Public Law 92-425, under certain circumstances. A copy of the Department of Defense Military Pay and Allowance Committee Action No. 474, setting forth and discussing the questions was attached.

The questions posed in the Committee Action are:

"If upon becoming entitled to retired or retainer pay, member states that he does not have a spouse or child eligible for an annuity under the Survivors Benefit Plan, and is accordingly relieved from reduction in retired or retainer pay on that basis; but it is discovered upon his death that he did in fact have an eligible spouse or child at the time of his retirement:

"a. Does the statement relieve the Government of the obligation to pay an annuity to the surviving spouse and child; and

"b. If the answer to a. above is negative, should the charges which were not withheld from retired pay be offset from the annuity; and

"c. If the answer to b. above is affirmative, should the amount be considered delinquent and interest charges also be assessed?"

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The brief discussion of the question in the committee action expresses the view that it would appear that a false statement by a retiring member with regard to the existence of an eligible beneficiary under the Plan would be tantamount to his having elected not to provide for coverage for such a spouse or child.

The Survivor Benefit Plan applies to members of the Armed Forces when they become entitled to retired or retainer pay. Section 1448 of title 10, United States Code provides in pertinent part that:

> "(a) The Plan applies to a person who is married or has a dependent child when he becomes entitled to retired or retainer pay unless he elects not to participate in the Plan before the first day for which he is eligible for that pay. If a person who is married elects not to participate in the Plan at the maximum level, that person's spouse shall be notified of the decision. An election not to participate in the Plan is irrevocable if not revoked before the date on which the person first becomes entitled to retired or retainer pay. * * *"

and section 1455 provides in pertinent part that,

> "The President shall prescribe regulations to carry out this subchapter. * * * Those regulations shall —
>
> "(1) provide that, when the notification referred to in section 1448(a) of this title is required, the member and his spouse shall, before the date the member becomes entitled to retired or retainer pay, be informed of the elections available and the effects of such elections; * * *"

A review of the legislative history of the act of September 21, 1972, discloses that the act was the culmination of a long recognized need for the protection of military widows and dependent children. As a result, spouses are to be brought in at the decision making level in order that all of the ramification of nonparticipation in the Plan may be explained.

In House Report No. 92-481, to accompany H.R. 10670, which became the act of September 21, 1972, Public Law 92-425, 86 Stat. 706, 10 U.S.C. 1447-1455, it is stated on pages 8-9 that,

"* * * the Committee is concerned that in a relatively few cases survivors may unknowingly be left in a situation of great hardship because a retiree, for one reason or another, did not join the program or otherwise provide an adequate annuity for his dependents.

"It is the intention of the Committee, therefore, that regulations designed to carry out this provision of the bill provide for counseling by competent officers for those about to retire who elect not to participate or elect to participate at less than the maximum level. It is further the intention of the Committee that the spouse of the member concerned will be present at the counseling session if possible or provided separate counseling as necessary to be made fully aware of the options available and the election made by her husband. It is the intention of the Committee that in satisfaction of this requirement counseling officers shall certify, in the event the retiree elects not to participate or to participate at less than the maximum level, that counseling has been provided and shall present the spouse with a statement that specifies she has been counseled and indicates the counseling officer's satisfaction that she fully understands the implications of her husband's election. * * *

"This new survivor annuity program makes a significant addition to the estate of the military retiree, and the Committee does not want a benefit of this magnitude lost to an individual service family through lack of awareness. It therefore wishes responsibility clearly placed on administrative officers to see that full counseling has been provided * * *."

It is clear from the above that members are not to be permitted to simply participate in the Plan at less than the maximum level or not to participate at all without positive action being taken by administrative officers to insure that the details of the Plan and its benefits are fully explained and understood by retiring service personnel. Consistent with this responsibility it is the implied responsibility of those officers to determine whether there is an eligible spouse or dependent child.

Thus, in cases where a member states in his election certificate that he does not have a spouse or child eligible for an annuity under the Plan, the service records of that member should be administratively examined to determine the accuracy of his representations. If, after such an examination, there is no evidence of record which would tend to cast doubt on the truthfulness of those representations, such an election may be accepted. And, since an election under the Plan becomes irrevocable under the plain terms of the statute upon becoming eligible to receive retired or retainer pay, it is our view that the Government would gain a good acquittance in the matter should it be posthumously discovered that the member did in fact have an eligible spouse or child at the time of his retirement. Compare 37 Comp. Gen. 131 (1957).

Accordingly, question (a) is answered in the affirmative subject to the conditions herein stated and your other questions require no answer.

Sincerely yours,

PAUL G. DEMBLING

Acting Comptroller General
of the United States