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DECISION

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

FILE: B-195625

DATE: February 28, 1980

MATTER OF: Colonel Elton L. Perrine, USAF (Deceased)

DIGEST: Survivor Benefit Plan annuity for the surviving spouse of member who dies while on active duty when otherwise eligible to retire, is computed on grade and years of service as though member retired on the day he died. Computation includes limitations on grade for retirement purposes such as the 6-month in grade requirement. However, where a member who was missing in action is determined to have been killed in action, the 6-month in grade requirement does not apply since promotions received while in a missing status are "fully effective for all purposes," under 37 U.S.C. 552(a).

This action is in response to a request for advance decision from the Air Force Accounting and Finance Center concerning the computation of annuity to be paid under the Survivor Benefit Plan (SBP), 10 U.S.C. 1447-1455, to Mrs. Joyce A. Perrine, as widow of the late Colonel Elton L. Perrine, USAF. The matter has been assigned Control Number DO-AF-1328, by the Department of Defense Military Pay and Allowance Committee.

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The reported facts are that the member, Elton L. Perrine, who was serving on active duty in the Air Force as a commissioned officer, was reported as missing in action (MIA) in Vietnam on May 22, 1967. While in that status, he was promoted to the permanent grade of lieutenant colonel (O-5), effective April 20, 1977, and to the temporary grade of Colonel (O-6), effective November 1, 1978. On February 6, 1979, his status was changed to killed in action for the purpose of terminating pay and allowances, settlement of accounts and payment of death gratuity.

As a result of that action, an SBP annuity account was opened in favor of Mrs. Perrine under the provisions of 10 U.S.C. 1448(d), effective February 7, 1979.

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The annuity payable to her was computed based on Colonel Perrine's rate of basic pay as a Lieutenant Colonel rather than that of Colonel because he had not held the grade of Colonel for a minimum of 6 months as required by 10 U.S.C. 8963(a), prior to the date he was declared dead.

In view of the foregoing and because of certain language in 37 U.S.C. 552(a) and its legislative history, uncertainty is indicated as to whether the annuity authorized to be paid Mrs. Perrine under 10 U.S.C. 1448(d) should be computed on the rate of basic pay of a Lieutenant Colonel or Colonel.

The provisions of the SBP authorizing payment of an annuity to surviving spouses of service members who die while serving on active duty are contained in 10 U.S.C. 1448(d). That subsection provides in part:

"(d) If a member of an armed force dies on active duty after he has * * * qualified for * * * [retired or retainer] pay except that he has not applied for or been granted that pay * * * the Secretary concerned shall pay to the spouse an annuity equal to * * * 55 percent of the retired or retainer pay to which the otherwise eligible spouse * * * would have been entitled if the member had been entitled to that pay based upon his years of active service when he died."

The basic concept of the SBP is to provide a means whereby a service member may provide his spouse and dependent children with financial protection in the form of an annuity in the event of his death. The basic provisions of the SBP only authorize payment of an annuity to a survivor of a member who dies while entitled to receive retired or retainer pay. However, under 10 U.S.C. 1448(d) a member with over 20 years of service and who is otherwise eligible to retire is covered by the SBP as if he had retired on the day he died.

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As is indicated in the submission, the entitlement to an SBP annuity in such cases depends generally on the provisions of law governing retirement. As it relates to commissioned officers of the Air Force, those provisions would be 10 U.S.C. 8911, with retired pay computed under 10 U.S.C. 8991, based on years of service computed under 10 U.S.C. 8925, with grade on retirement established under 10 U.S.C. 8961 and 8963.

Section 8961 of title 10, United States Code, provides generally that a Regular or Reserve of the Air Force retiring for other than physical disability retires in the grade held at retirement. However, section 8963 of the same title restricts the use of a temporary grade to those cases where the member had a minimum of 6 months satisfactory service in that temporary grade at retirement.

In 53 Comp. Gen. 887 (1974), we held that time spent in an MIA-status was qualifying service time for 10 U.S.C. 1448(d) annuity computation purposes so long as the date of determination of death occurred after September 21, 1972, the date of enactment of the SBP. In the process of so concluding, we recognized that among those members who die while serving on active duty, those whose status came within the purview of the provision of the Missing Persons Act, 37 U.S.C. 551-558, occupy a special niche. That is, since it was not known if they were actually dead or alive, it was congressionally mandated that for the purpose of Federal benefits to the immediate families, continuation of the life of the member was presumed to exist until that status was later terminated for cause. Thus, the entitlement of survivors to receive Federal benefits based upon that status and termination thereof is to be established under those provisions.

Section 552 of title 37, United States Code, as amended by Public Law 93-26, approved April 27, 1973, 87 Stat. 26, provides in part:

"(a) A member of a uniformed service who is on active duty * * * and who is in a missing status, is--

"(1) for the period he is in that status, entitled to receive or have credited to his account the same pay and allowances, as defined in this chapter, to which he was entitled at the beginning of that period or may thereafter become entitled;

* * * * *

"Notwithstanding section 1523 of title 10 or any other provision of law, the promotion of a member while he is in a missing status is fully effective for all purposes, even though the Secretary concerned determines * * * that the member died before the promotion was made."
(Underscoring supplied.)

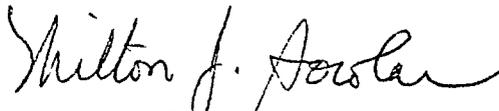
The legislative history of the underscored sentence shows that it was originally added to section 552 by section 1 of Public Law 92-169, November 24, 1971, 85 Stat. 489; inadvertently repealed by Public Law 92-428, October 13, 1972; and reenacted by section 1 of Public Law 93-26, April 27, 1973, 87 Stat. 26. The purpose was to "insure that promotions * * * are valid for all purposes, including Federal benefits to survivors," and to "assure that survivors of members * * * in a missing status and promoted * * * will not be deprived of benefits based on that promotion." See U.S. Code Cong. and Adm. News (1973), pages 1293 and 1294.

In light of the foregoing, survivor benefits under the SBP are included in the package of survivor entitlements under 37 U.S.C. 551-558. Further, in view of the fact that promotions made under those provisions are "fully effective for all purposes", it is our view that

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the limitation contained in 10 U.S.C. 8963(a) restricting the use of a promotion to a temporary grade for retired pay computation purposes is not for application in establishing an SBP annuity under 10 U.S.C. 1448(d) to the surviving spouse of a member in cases covered by the missing persons provisions.

Accordingly, the SBP annuity due in Mrs. Perrine's case is to be computed based on the late Colonel Perrine's grade of Colonel (O-6), effective February 7, 1979, and the voucher is being returned to the finance and accounting officer for payment, if otherwise correct.



Acting

Comptroller General
of the United States