



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

091674  
31290

B-178850

August 27, 1973

Captain Gorman C. Merrick, USN, Retired  
540 Alameda Boulevard  
Coronado, California 92118

Dear Captain Merrick:

Further reference is made to your letter dated April 25, 1973, requesting further consideration of your claim for refund of deductions made from your retired pay in connection with your revocation of your election to receive benefits under the provisions of the Retired Serviceman's Family Protection Plan, 16 U.S.C. 1431-1446, for the period July 1, 1961, to April 30, 1963.

This matter was the subject of a settlement issued by our Claims Division dated May 21, 1962 (now our Transportation and Claims Division), which disallowed your claim for the reason that the applicable provisions of law in force at the time of your attempted revocation required that in order for a revocation to be valid it must be made more than 5 years prior to retirement.

The record in your case shows that by action dated October 25, 1954, you filed an election under the Uniformed Services Contingency Option Act of 1953 (renamed the Retired Serviceman's Family Protection Plan), choosing options 3 and 4 for the purpose of providing an annuity of one-half of your retired pay for your wife and dependent children. On March 30, 1961, you requested that the fractional amount be reduced from one-half to one-fourth and on May 26, 1961, you requested that your participation in the program be cancelled.

By letter dated June 2, 1961, the U.S. Navy Family Allowance Activity acknowledged receipt of your revocation and advised you that such revocation would be made effective on the day prior to your retirement.

On July 1, 1961, you were transferred to the retired list pursuant to the provisions of Public Law 85-155. By letter dated August 8, 1961, the U.S. Navy Finance Center advised you that the acceptance of revocation contained in the letter to you of June 2, 1961, was in error. Further, you were advised that neither your attempt to modify your

BEST DOCUMENT AVAILABLE

719299

election nor your attempt to revoke participation under the act ever became effective since these actions were not taken prior to 5 years before the date of your retirement and that RSRP deductions from your retired pay would continue based on your original election of options 3 and 4 at one-half.

You say that section 3 of Public Law 86-155, which provided for revocation anytime prior to retirement, as amended by Public Law 85-616, was placed in the law in order to release retirees under Public Law 86-155 from the limitations contained in the Retired Serviceman's Family Protection Plan, since no one retiring under Public Law 86-155 could have known when they would receive an early retirement. You say further that you learned about your retirement under that law about one year or less prior to your actual retirement and you contend that since your revocation had been accepted on that basis the decision cancelling acceptance of your revocation and the reestablishment of your participation in the plan was in error. You further indicate that the Chief of Naval Personnel subsequently allowed you to withdraw from the annuity program because of financial hardship.

Section 3 of the act of August 11, 1959, Public Law 86-155, 73 Stat. 336, to which you refer, provides in pertinent part:

"Notwithstanding section 1431 of title 10, United States Code \* \* \* a revocation of an election made under that section by an officer retired under this Act is effective if made before his retirement."

At the time you attempted to notify and then revoke your election under the Retired Serviceman's Family Protection Plan (March and May 1961), section 3 of Public Law 86-155, as written, was no longer in effect, having been completely replaced by the provisions of section 12 of the act of July 12, 1960, Public Law 86-616, 76 Stat. 506. Section 12 of that act reads in pertinent part:

"Effective as of August 11, 1959, section 3 of the Act of August 11, 1959, Public Law 86-155 (73 Stat. 336), is amended to read as follows:

"Sec. 3. Notwithstanding section 1431 of title 10, United States Code, a change or revocation of an election made under that section \* \* \* is effective if made at such a time that it would have been effective had he been retired on the date prescribed by section 6376, 6377, or 6379 of title 10, United States Code, as appropriate."

BEST DOCUMENT AVAILABLE

Under the provisions of subsection (c) of 10 U.S.C. 1431 of the Contingency Option Act of 1953, an election may be changed or revoked before the member's retirement or before he is entitled to receive retired pay. However, that subsection also contains the provision that such change or revocation is not effective if it is made within 5 years of the date such member is retired or the date he becomes entitled to receive retired pay.

The date of retirement or the becoming entitled to retired pay considered under 10 U.S.C. 1431(c), is the member's actual date of retirement or the actual date that he becomes entitled to receive retired pay. However, under the provisions of section 12 of Public Law 86-616, the 5-year period is counted not from that date, but rather from the normal date an officer in the United States Navy would have been retired or would have become entitled to retired pay under the provisions of 10 U.S.C. 6376, 6377, or 6379, but for the early retirement provisions contained elsewhere in Public Law 86-155.

Concerning the situation in your case involving the filing of a change or revocation within 5 years of date of retirement or entitlement to retired pay, we invite your attention to letter dated August 29, 1961, from the Navy Finance Center to you which reads in part as follows:

"In your case the Navy Register shows that your service date is 30 June 1934; by adding thirty (30) years to that date, we have determined that your normal tour of duty would have ended on 30 June 1964 and you would have been retired on 1 July 1964. A retirement date a year later, on 1 July 1965, would not alter the status of either the request of 30 March 1961 for change, or the request of 26 May 1961 for revocation; neither request was made five (5) years before 1 July 1964 or 1 July 1965."

Our file shows that the earliest date you attempted to modify or revoke your election was in March 1961. Since that action occurred within 5 years of your otherwise normal retirement date, as indicated in the above-quoted letter of August 29, there is no basis upon which your claim for refund of Retired Serviceman's Family Protection Plan deductions may be allowed. Your situation is governed by Public Law 86-616 quoted above.

Accordingly, the action taken by our Transportation and Claims Division is sustained. However, your attention is invited to the provisions of 10 U.S.C. 1552 which authorizes the Secretary of the

BEST DOCUMENT AVAILABLE

B-178350

Navy, through the procedure there provided, to correct a naval record when he considers such action necessary "to correct an error or remove an injustice."

Sincerely yours,

Paul G. Denbling

For the Comptroller General  
of the United States

BEST DOCUMENT AVAILABLE