



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

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December 3, 1973

The Honorable  
The Secretary of Defense

Dear Mr. Secretary:

Further reference is made to letter dated May 14, 1973, from the Acting Assistant Secretary of Defense (Comptroller) in which a decision is requested with regard to certain questions concerning modifications or changes of elections made by members retired prior to September 21, 1972, under the provisions of the Survivor Benefit Plan, Public Law 92-425, September 21, 1972,, 86 Stat. 706 (10 U.S.C. 1447-1455). Department of Defense Military Pay and Allowance Committee Action No. 473 containing a discussion of the circumstances involved was enclosed with the letter.

The questions are as follows:

- "1. May a member who retired prior to 21 Sep 1972, change or revoke his initial election:
  - a. During the one year period allowed for the election;
  - b. At any time during his lifetime after the one year period?
- "2. If the answer to question 1 is in the affirmative, is there a limit to the number of times such election may be changed?
- "3. May such retirees submit a conditional election before the end of the one year grace period and stipulate a future effective date:
  - a. Before 21 Sep 1973?
  - b. Any other future effective date?"

[Changes in Elections by Retired Service Members]

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In the discussion contained in the Committee Action it is pointed out that some retirees elected into the new Plan before they received detailed information about the program and then later learned through news media and information released by the military departments of various restrictions in the law and now desire to change the limit of their coverage or completely revoke their elections.

The Committee Action also refers to various provisions of the Survivor Benefit Plan which allow changes or revocations under specific circumstances. Reference is made to delayed elections or changes which are authorized in 10 U.S.C. 1448 (election within one-year after marriage or acquisition of a child); 10 U.S.C. 1449 (revocation after determination of competency in the case of a mentally incompetent member; and 10 U.S.C. 1450(f) (change from natural interest person to a spouse or children). However, it is pointed out that the law appears to be silent in the matter of change or revocation as applied to existing retirees on the effective date of the law.

It is noted in the Committee Action that the Plan applies to a person who is married or has dependent children when he becomes entitled to retired pay unless he elects not to participate in the Plan and such election is irrevocable if not revoked prior to entitlement to retired pay (10 U.S.C. 1448(a)). It is indicated in the Committee Action that under this provision it would appear that a member who retired on or after September 21, 1972, may change his election as many times as he desires before the day on which he becomes entitled to retired pay.

Generally, the Survivor Benefit Plan provides for automatic coverage for 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, such election being irrevocable unless revoked before the first day for which he is eligible for that pay (10 U.S.C. 1448(a)). In other words, once a member becomes entitled to retired or retainer pay he is bound by his election made prior thereto unless he falls within the specific exceptions provided for in the act.

Section 3(b) of Public Law 92-425 provides that "Any person who is entitled to retired or retainer pay on the effective date of this

Act (September 21, 1972), may elect to participate in the Survivor Benefit Plan \* \* \* before the first anniversary of that date." This section has been amended to extend the one-year period to 18-months by Public Law 93-155, November 16, 1973. The purpose of the 18-months period appears to allow those members to which it applies to seriously consider their participation in the Plan prior to making a decision regarding participation.

Concerning the correction or revocation of an election under the Survivor Benefit Plan, the law, 10 U.S.C. 1454, as added by the act of September 21, 1972, vests in the Secretary concerned the authority to correct or revoke any election when he considers it necessary to correct an administrative error. This authority is identical with the authority presently contained in the Retired Servicemen's Family Protection Plan (10 U.S.C. 1445). We have construed the latter provision as being sufficiently broad to authorize the correction of an administrative error with respect to any action by a retired member pending his election under the Retired Servicemen's Family Protection Plan. See B-174552, July 10, 1972.

As provided in Section 3(b) of the Act of September 21, 1972, and its legislative history, Congress extended coverage of the Plan to those persons who were entitled to retired or retainer pay on September 21, 1972, provided they elect to participate in the Plan within a specified period, now 18-months of that date. We find nothing in the law or its legislative history, however, which indicates that such an initial election, which is shown to have been made on the basis of insufficient information regarding the Plan, is irrevocable. Where, as indicated in the Committee Action, the individual was not provided adequate information to make an intelligent election or there is a misunderstanding on his or her part concerning such election, it is our view that the individual may change or revoke his or her initial election provided the change or revocation is made within the 18-month period. Compare 49 Comp. Gen. 837 (1970). Moreover, we believe the failure of the administrative office to provide the individual with adequate information on which to make an intelligent election constitutes an administrative error within the meaning of 10 U.S.C. 1454. Accordingly, question 1a is answered in the affirmative.

As to question 1b, since Congress granted retirees a substantial period of time (18 months) following September 21, 1972,

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to consider participation in the Plan, we do not believe that any change or revocation of an initial election made after the 18-month period would be proper. However, the Secretaries concerned could invoke 10 U.S.C. 1454 in certain circumstances.

With respect to question 2, where it is shown that an election was made on the basis of adequate information within the 18-month period, no reason is perceived for thereafter allowing further elections. Question 2 is answered in the affirmative.

With respect to question 3, the pertinent provision of the Survivor Benefit Plan provides only that a member who is entitled to retired or retainer pay on the effective date of that Act has 18 months to elect to participate in the Plan. No reference in any part of the Act or the legislative history is made to a conditional election. Accordingly, question 3 is answered in the negative.

We have been asked informally to consider the effect of a retired member's action of specifically stating within the 18-month period that he does not desire to participate in the Plan or if he fails to take any action whatever. It is clear that a retired member may elect coverage under the Plan any time up to the end of the 18-month allowable period. His silence up to the last hour of that period could not be construed as an election not to be covered if in fact he elects to be covered before the period expires. We do not consider that a retired member who states he does not desire coverage should be given any lesser period of time to finally elect coverage than the member who fails to make any participation statement up to the last hour of the authorized period. Accordingly we do not consider an earlier statement of nonparticipation as precluding the member from electing coverage if such election is made within the 18-month period.

Sincerely yours,

Paul G. Dembling

For the Comptroller General  
of the United States