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DECISION



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

FILE: B-201229

DATE: August 24, 1981

MATTER OF: Colonel Franklin B. Nihart, USMC, Retired

DIGEST: A service member retired before enactment of the Survivor Benefit Plan (SBP) and was entitled to elect SBP coverage for his spouse under the provisions of subsection 3(b) of Public Law 92-425, 86 Stat. 706, 711, as amended, during the 18 months after enactment of the SBP. Before he made an election, but during the 18-month period, he was recalled to active duty and was not returned to the retired list until after the close of the election period. In view of the purpose of the plan--to include as many retirees as possible--and since the statutory provisions do not contain a rule applicable to this situation the election made at the end of the period of extended active duty which began during the 18-month period may be considered valid.

This action is in response to a request for decision from the Disbursing Office, Marine Corps Finance Center, as to the propriety of reducing the retired pay of Colonel Franklin B. Nihart, USMC, Retired, to provide coverage for his spouse under the Survivor Benefit Plan (SBP), 10 U.S.C. 1447-1455. For the reasons given we have determined that Colonel Nihart is covered by the SBP and that reduction in his pay for coverage is proper.

The case has been assigned Control No. DO-MC-1355, by the Department of Defense Military Pay and Allowance Committee.

According to the submission, Colonel Nihart was transferred to the retired list effective July 1, 1966. On July 1, 1973, he was recalled to active duty for 2 years. In June 1975, his tour of duty was extended for an additional 2-year period and later extended through October 31, 1978. On November 1, 1978, he was returned to the retired list.

On October 31, 1978, not having elected into the SBP as authorized by subsection 3(b) of Public Law 92-425, 86 Stat. 706, 711, prior to his recall to active duty on July 1, 1973, Colonel Nihart submitted an SBP election under 10 U.S.C. 1448 to provide full coverage for his spouse. Based on that

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election, the Finance Center initiated an SBP coverage deduction from his retired pay, effective November 1978. Doubt is expressed as to the propriety of that action since Colonel Nihart failed to elect coverage within the time authorized for individuals who were retired at the time the SBP provision was passed.

Based on the foregoing, the following question is asked:

"In that Colonel Nihart was a member on the retired list approximately nine months of the eighteen months enrollment period authorized by the Survivor Benefit Plan * * * and he made no election to participate, is his election of 31 October 1978 to now participate a valid election?"

Subsection 3(b) of Public Law 92-425, September 21, 1972, 86 Stat. 706, 711, as amended by section 804 of Public Law 93-155, November 16, 1973, 87 Stat. 605, 616, provides in part:

"(b) Any person who is entitled to retired or retainer pay on the effective date of this Act may elect to participate in the Survivor Benefit Plan * * * at any time within eighteen months after such date. * * *"

Section 1448 of title 10, United States Code, as amended by section 202 of Public law 95-397, September 30, 1978, 92 Stat. 843, 844, provides in part:

"(a)(1) * * * The following persons are eligible to participate in the Plan:

"(A) Persons entitled to retired or retainer pay.

* * * * *

"(2) The Plan applies--

"(A) to a person who is eligible to participate in the Plan under paragraph (1)(A) and who is married * * * when he

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becomes entitled to retired or retainer pay."

A member who was entitled to retired or retainer pay on September 21, 1972, the effective date of the plan and who was married or had a dependent child was eligible to elect to participate in the SBP during the 18-month period following such effective date (until March 21, 1974). The legislative history of that provision shows that the participation of individuals already retired was to be "consistent with the rules for participation established for future retirees." See S. Rept. No. 92-1089, September 6, 1972, at page 29.

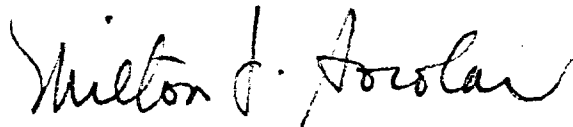
An individual retired before the effective date of the Act could elect coverage in the Plan at any time during the entire 18-month period, but after an election was made it could not be revoked or changed except on the basis of a finding that administrative error was involved. 53 Comp. Gen. 393 (1973). However, an individual retired prior to the effective date of the Plan who took no action to elect coverage before the 18-month period expired was precluded from participating in the absence of additional legislation to reopen the Plan to him. B-187179, November 30, 1976.

Our response in these cases was based on an assumption that the retiree did not return to active duty during the 18-month election period. Colonel Nihart could have elected coverage during that period. However, during the latter part of the 18-month period, he was on extended active duty. During this period of active duty he was covered by the SBP under 10 U.S.C. 1448(d), the provision applicable to those on active duty. 53 Comp. Gen. 847 (1974). Although he could have exercised the option to elect SBP coverage under section 3(b) of the act at any time during the 18-month period provided by that section, we do not believe that the action taken to permit him to elect coverage at the time his extended active duty terminated need be questioned. Section 1448(a) provides eligibility for coverage when members become entitled to retired pay. Also, the purpose of the 3(b) provision was to permit the widest coverage possible so as to prevent widows or widowers of military retirees from becoming destitute. In view of that purpose and since the statutory provisions themselves do not provide a specific rule to be applied in this situation, we believe it would be unnecessarily strict to hold

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that the individual was required to elect coverage by the end of the 18-month period even though he was on extended active duty during the latter part of that period. In these circumstances an election made at the time the individual returns to retired status may be considered a valid election of SBP coverage.

Accordingly, Colonel Nihart's retired pay was properly reduced for SBP coverage and he may be considered as covered under the Plan under the terms of his election.

A handwritten signature in cursive script, reading "Milton J. Fowler".

Acting Comptroller General
of the United States