

Comptroller General  
of the United States

Washington, D.C. 20548

## Decision

**Matter of:** Major General Ira DeMent III, USAFR  
(Retired)--Payment of Survivor Benefit Plan  
Premiums

**File:** B-252391

**Date:** October 22, 1993

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### DIGEST

A military officer elected Survivor Benefit Plan (SBP) coverage when he qualified for retired pay. He began receiving retired pay in 1991, but it was suspended when he became a United States District Court judge in 1992. His SBP coverage is irrevocable; and as long as he has an eligible beneficiary, he must continue to pay premiums even though he is not receiving military retired pay.

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### DECISION

This is in response to a request from the Defense Finance and Accounting Service (DFAS), Denver Center, for an advance decision regarding Survivor Benefit Plan (SBP) participation by Major General Ira DeMent III, USAFR (Retired).<sup>1</sup> For the reasons presented below, we conclude that Major General DeMent remains a participant in the SBP while on active judicial duty, and, as long as he has an eligible beneficiary, he must remit SBP premiums to the United States Treasury during any period when he is not entitled to military retired pay.

Major General DeMent elected coverage for his spouse and children under the Reserve Component SBP in 1982. In December 1991, at age 60, he became eligible to receive retired pay. When his retired pay commenced, DFAS began deducting the cost of coverage from his retired pay. In April 1992, Major General DeMent became a United States District Court judge, and his receipt of military retired pay was suspended in its entirety. Since he was no longer receiving retired pay from which SBP premiums could be deducted, the DFAS requested that he make monthly payments to the Treasury to cover his SBP premiums. The DFAS has

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<sup>1</sup>The DFAS has assigned the submission DFAS No. 92-13-M for control purposes.

asked us whether Major General DeMent is still a participant in the SBP, and if so whether he must pay his own SBP premiums or whether they may be paid by the government under 5 U.S.C. § 5532(c)(2)(B).

The Survivor Benefit Plan, 10 U.S.C. §§ 1447-1460b, is an income maintenance plan for surviving dependents of deceased members of the uniformed services. An election to participate in the SBP is generally irrevocable. See 53 Comp. Gen. 470, 474 (1974). Under 10 U.S.C. § 1452(d), a participating member who has been awarded retired pay, but is not entitled to receive it for a period of time, must deposit in the Treasury the amount which would have been deducted from his pay for SBP coverage.

The retired pay of a Regular military officer who holds an elective or appointive government "position" as defined in 5 U.S.C. § 5531(2) is subject to reduction by a formula set forth in 5 U.S.C. § 5532(b). Under section 5532(c), members (including Reserves) receiving retired pay are also subject to a "pay cap" limiting combined retired pay and federal civilian pay to the rate for level V of the Executive Schedule. However, under section 5532(c)(2)(B), the retired pay for members receiving federal civilian pay cannot be reduced to less than the amount to be deducted to pay premiums for SBP coverage.

Section 371(e) of title 28 of the United States Code states that notwithstanding 5 U.S.C. § 5532(c) a military member who becomes a judge may not receive his military retired pay while performing regular judicial active service as a judge; when he retires from judicial active service or enters senior status as a judge, his military retired pay is resumed.

In DOD Military Pay and Allowance Committee Action No. 536, B-188932, December 23, 1977, we dealt with a member who entered the Foreign Service after retiring from the Armed Forces. He had elected SBP coverage for his spouse when he retired. Upon retirement from the Foreign Service, he elected a Foreign Service survivor annuity for his spouse and waived his military retired pay so that his years of military service could be included in the computation of his Foreign Service annuity. We nonetheless concluded he was required to continue his SBP participation and make the deposits required by 10 U.S.C. § 1452(d), because the statutes governing the Foreign Service retirement system offered no relief from these requirements. We noted that under the Civil Service Retirement System, in contrast to the Foreign Service retirement system, a retired military member participating in the SBP may choose a Civil Service survivor annuity rather than the SBP for his surviving dependents and may waive his retired pay in order for his

years of military service to be included in the computation of his Civil Service annuity. If he chooses the SBP, premiums are still due; if he chooses the Civil Service annuity, the SBP premiums cease. In that situation only one survivor annuity is payable to his eligible beneficiaries. See 10 U.S.C. §§ 1450(d) and 1452(d) and (e). However, because no such option is provided for Foreign Service officers, we determined that the retired member had to continue to pay for his SBP coverage, and his eligible beneficiary was entitled to both annuities after his death.

After we issued our decision B-188932, supra, we wrote to the chairmen of the respective Armed Services Committees in the U.S. Senate and House of Representatives to propose amendments to the SBP law which would have provided for the same statutory coordination between the SBP and various other survivor annuity plans administered by the federal government as currently exists between the SBP and the Civil Service plan. See B-183457 and B-188932, April 3, 1978. However, the proposed amendments have not been enacted.

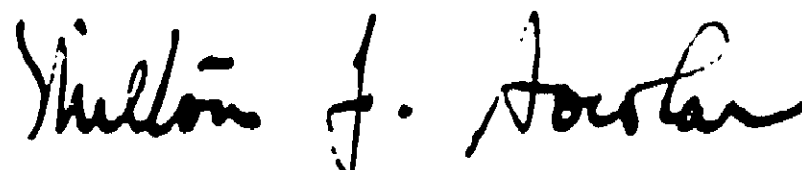
Thus, except for the Civil Service plan, the law does not currently allow termination of SBP coverage for participation in other survivor benefit plans administered by the federal government. Major General DeMent's election to participate in the SBP when he qualified for retired pay is irrevocable and cannot be terminated except in very limited circumstances specifically provided by statute. We therefore conclude he remains a participant in SBP so long as he has an eligible beneficiary.

DFAS has also asked us whether 5 U.S.C. § 5532(c)(2)(B), which in effect authorizes the government to cover the annuity costs of members whose retired pay is subject to the "pay cap," is applicable to judges such as Major General DeMent, whose retired pay is suspended pursuant to another statutory provision. DFAS points out in its submission to us that prior to 1988, when Pub. L. No. 100-702, § 1005, 102 Stat. 4666 (codified at 28 U.S.C. § 371(e)) was enacted, the military retired pay of judges receiving it was subject to 5 U.S.C. § 5532, and that under § 5532(c)(2)(B) their military retired pay could not be reduced below the amount needed to cover deductions to meet SBP premiums. However, the express language of Pub. L. 100-702 (28 U.S.C. § 371(e)) removed military retired pay received by judges from the coverage of 5 U.S.C. § 5532, with the result that the limit on reductions to military pay in § 5532(c)(2)(B) is no longer available.

DFAS urges that since the purpose of 28 U.S.C. § 371(e) was to benefit retired military officers who become judges by allowing them to collect their retired pay as well as their judicial pay once they attained senior judicial status, it

is unlikely that the Congress intended the same provision to take away a significant element of financial protection afforded to them by § 5532(c)(2)(B). Along the same lines, the Administrative Office of the United States Courts argues that § 371(e) should be interpreted as simply relieving senior judges of the offset requirement that would otherwise be imposed by 5 U.S.C. § 5532(c). Thus, judges who have not attained senior status would be unaffected by § 371(e), apparently on the theory that the offset required by 5 U.S.C. § 5532(c) would reduce their retired pay to zero in any event. The Administrative Office points out that remedial or social legislation should be interpreted liberally in favor of the intended beneficiaries. However, in our view, the plain language of 28 U.S.C. § 371(e) clearly removes judges from § 5532; it remains for Congress to amend this language if it intends otherwise.

Accordingly, we conclude that Major General DeMent remains a participant in the SBP and must pay his own SBP premiums as requested by DFAS.

*for*   
Comptroller General  
of the United States