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

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B-170098

January 17, 1973

Dear Mr. Secretary:

This refers to letter dated September 11, 1972, from the Assistant Secretary of Defense (Comptroller) transmitting for decision Department of Defense Military Pay and Allowance Committee Action No. 467 involving the following question:

> "1. May a Civil Service retiree with 5 or more years civilian service who used his military service to establish eligibility for an annuity, revoke his waiver of military retired pay upon reaching age 62, have his military retired pay reinstated, and have his Civil Service annuity recomputed on the basis of civilian service only?"

In reaching our decision, the Assistant Secretary asks us to consider a statement (copy of which was enclosed) made by the Deputy Assistant Secretary of Defense (Manpower and Reserve Affairs) on H. R. 10670 before the Special Subcommittee on Survivor Benefits, Senate Committee on Armed Services. H. R. 10670 has become Public Law 92-425, approved September 21, 1972. This law establishes a survivor benefit plan for military personnel.

In 50 Comp. Gen. 80 (1970) it was held, quoting from the syllabus, that:

> "A retired member of the uniformed services whose military service upon retirement from civilian employment is not used to establish his civil service annuity eligibility but is only used in the computation of the annuity to increase the amount payable, may withdraw his waiver of retired pay and have the pay reinstated as no double benefit would result from the same service by terminating the use of the military service to compute the civil service annuity and reinstating the retired pay, and 5 U.S.C. 8332(e) provides that a civil service retirement does not affect the right of an employee to retired pay, pension, or compensation in addition to an annuity payable upon retirement from the Federal civilian service."

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PUBLISHED DECISION
52 Comp. Gen._____

In the circumstances giving rise to the question the military service was required to be used to establish eligibility for an immediate annuity under 5 U.S.C. 8336(a). The committee action sets forth the following example concerning the type of situation involved:

> "A military member retires with 20 years service at age 47; he thereafter is employed by the Federal Government for 10 years; at age 57 he applies for and is granted a Civil Service annuity based on 30 years service, having waived the military retired pay. At age 62 he requests his military retired pay be reinstated, with concurrent reduction of Civil Service annuity by excluding credit for military service."

The Committee is of the view that with the passage of time the annuitant having attained the age at which he would have been eligible for an annuity based on civilian service only, the question should be answered in the affirmative there being no double benefit even though the military service was initially used for eligibility. The committee action states that to conclude otherwise and deny the request for reinstatement of military retired pay would appear to be contrary to the intent of 5 U.S.C. 8332(j). Hence, in effect the annuitant is deemed to have become eligible for a deferred annuity.

Subsection 8338(a), title 5, U.S. Code, provides as follows:

> "(a) An employee who is separated from the service or transferred to a position in which he does not continue subject to this subchapter after completing 5 years of civilian service is entitled to an annuity beginning at the age of 62 years."

The "civil service retiree" in the question presented is not "an employee who is separated from the service" but is a civil service annuitant who was granted immediate retirement at age 57. Having acquired the status of an annuitant which status would continue even if he were to be reemployed in the civil service which he was not, no entitlement or eligibility arises under 5 U.S.C. 8338(a) upon his having become 62 years of age. See 49 Comp. Gen. 581 (1970).

Section 8332(j) of title 5, U.S. Code, requires the exclusion of military service performed by an individual after December 1956 in

determining creditable service in the computation of a civil service annuity if the annuitant or his widow or child receives or is eligible to receive monthly old-age or survivor social security benefits based on his wages. The law further provides that where an individual or widow becomes 62 years of age and otherwise eligible for social security benefits, the Civil Service Commission is required to redetermine the aggregate period of service on which the annuity is based, so as to exclude such military service when he or she becomes 62 years of age.

We find nothing in section 8332(j) or its legislative history which would warrant the conclusion that Congress intended that the military service which is to be excluded in computing the civil service annuity may now be used to reinstate his military retired pay.

Since it appears from the quoted example that the member's military service was initially used to establish his eligibility for a civil service annuity--as distinguished from using his military service in the computation of the annuity to increase the amount thereof--it is our view that to permit revocation of his waiver of military retired pay and reinstate such payments would amount to a double benefit based on the same service which the law does not contemplate. See 41 Comp. Gen. 460 (1962) and 49 Comp. Gen. 581 (1970). If it is considered that the law should be changed in this respect the matter should be presented by the Department of Defense to the Congress for its consideration.

Accordingly, the question, as it relates to military retired pay, is answered in the negative. Concerning the recomputation of the annuity on the basis of civilian service only, this is a matter primarily within the jurisdiction of the Civil Service Commission and should be resolved by that office.

We recognize that if the member, upon reaching age 62, will not be permitted to reinstate his military retired pay after waiver thereof and use his military service to establish a civil service annuity, the effect may be to reduce the total annuity benefits that he would otherwise receive upon reaching that age. There is also for noting, however, that a retired member who, at age 57, as in the example cited, does not apply for and receive an immediate civil service annuity based on his civilian and military service but waits until he becomes 62 years of

age when he is otherwise eligible for a deferred annuity based on his civilian service only, would not receive the civil service annuity benefits for the period prior to reaching age 62.

Sincerely yours,

PAUL G. DEMBLING

For the Comptroller General
of the United States

The Honorable
The Secretary of Defense