

DECISION**THE COMPTROLLER GENERAL
OF THE UNITED STATES**

WASHINGTON, D. C. 20548

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FILE: B-185453

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MATTER OF: Department of Defense Military Pay and
Allowance Committee Action No. 522

- DIGEST:
1. A military retiree, who elects to participate in Survivor Benefit Plan (SBP) 10 U. S. C. 1447-1455, and who later elects to combine his military service credits with his civil service credits for the purpose of receiving a civil service annuity, may elect to participate in the civil service survivor benefit program at a level lower than that which he has in the SBP.
 2. During period that a Survivor Benefit Plan (SBP) participant has in effect a waiver of military retired pay for purposes of receiving a civil service annuity based on combining military service with civil service, under provisions of 10 U. S. C. 1450(d) and 1452(e) such SBP participation is suspended, but if waiver is no longer effective for any reason, previously elected SBP participation would be resumed and military retired pay reduced thereafter.

This action is in response to a letter dated November 14, 1975, with enclosure, from the Assistant Secretary of Defense (Comptroller), in which he requests an advance decision concerning the level of participation in the civil service survivor benefit program permitted when a military retiree who is participating in the Survivor Benefit Plan (SBP) under 10 U. S. C. 1447-1455 (Supp. II, 1972) elects to combine his military service with civilian service for the purpose of increasing his civil service annuity. The specific question and discussion thereof is contained in Department of Defense Military Pay and Allowance Committee Action No. 522.

The specific question is stated as follows:

"When a military retiree, participating in the Survivor Benefit Plan under the provisions of subchapter II, chapter 73 of title 10 USC, elects to combine his military service with his

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civil service for the purpose of receiving a civil service annuity, may he elect to participate in the civil service survivor benefit program at a level lower than that which he holds in the military plan, thereby terminating his coverage in the military plan?"

The discussion in Committee Action No. 522 refers to and quotes a portion of S. Rep. No. 92-1089, 93d Cong., 2d Sess. (1972), which states on page 26 that:

"The committee [Committee on Armed Services] intends that the waiver of contributions be effective only if the member joins the civil service survivor benefit plan at least at the same level of survivor protection as he was carrying under the military plan." (Emphasis supplied.)

It also refers to a memorandum addressed to the Deputy Assistant Secretary of Defense (Military Personnel Policy) dated January 5, 1973, from the Office of the Office of the General Counsel of the Department of Defense, in which it is indicated that the above-quoted portion of the Senate report was inserted to make it clear that if a person under the Plan elected to combine his military service with his civil service and receive a civil service annuity computed on the basis of such total service, he is not excused from continuing payment of premiums under the military plan, unless the civil service survivor benefit plan is at least at the same level as he was carrying under the military plan. It was also indicated that if the law were construed otherwise a person could be relieved of his financial obligation under the SBP by specifying as the base for the civil service survivor annuity a very small portion of his civil service annuity. In accord with such view, Department of Defense Directive 1332.27 was published requiring coverage in the civil service survivor benefit plan of at least the amount of coverage provided under the military plan.

In connection with the foregoing, the discussion also refers to our decision 53 Comp. Gen. 857 (1974), in which it was stated that the express language of subsection 1450(d), as well as the explanation of that section in S. Rep. No. 92-1089, clearly precludes payment of a SBP annuity where there is in effect a waiver of retired pay for the

purpose of increasing civil service retirement benefits unless at the time of civil retirement the employee elected not to provide an annuity for his spouse in accordance with 5 U. S. C. 8341(b) (1970).

It is suggested that the language of that decision can be interpreted to permit a member to elect to participate in the civil service survivor benefit plan at any level and thereby terminate his coverage in the military plan, notwithstanding the language of the Senate Report quoted above.

Subsection 1450(d) of title 10, United States Code, provides as follows:

"(d) If, upon the death of a person to whom section 1448 of this title applies, that person had in effect a waiver of his retired or retainer pay for the purposes of subchapter III of chapter 83 of title 5, an annuity under this section shall not be payable unless, in accordance with section 8339(i) of title 5, he notified the Civil Service Commission that he did not desire any spouse surviving him to receive an annuity under section 8341(b) of that title."

Subsection 1452(e) provides as follows:

"When a person who has elected to participate in the Plan waives his retired or retainer pay for the purpose of subchapter III of chapter 83 of title 5, he shall not be required to make the deposit otherwise required by subsection (d) as long as that waiver is in effect unless, in accordance with section 8339(i) of title 5, he has notified the Civil Service Commission that he does not desire any spouse surviving him to receive an annuity under section 8341(b) of title 5."

As indicated in 53 Comp. Gen. 857, supra, in general, deductions from military retired pay for SBP cost are not required when a retiree waives his right to receive such pay for the purpose of receiving a civil service annuity. The exception occurs when a retiree notifies the Civil Service Commission that he does not desire any spouse surviving him to receive "an annuity" under 5 U. S. C. 8341(b).

Subsection 8341(b)(1) of title 5, United States Code (1970) provides that if an employee dies after having retired under subchapter III of chapter 83 of title 5 and is survived by a spouse to whom he was married at the time of retirement, or by a widow or widower whom he married after retirement, the spouse, widow or widower is entitled to an annuity equal to 55 percent, or 50 percent if retired before October 11, 1962, of an annuity computed under subsections 8339(a)-(h) of title 5, or of such portion thereof as may have been designated for this purpose under subsection 8339(i) of title 5. Thus, the survivor annuity authorized under 5 U. S. C. 8341(b) may be computed as a percentage of the member's total civil service annuity or a percentage of a portion thereof.

The language of the quoted provisions of the SBP appears to be clear and unambiguous; however, the passage from S. Rep. No. 92-1089, quoted in the Committee Action, suggests an interpretation beyond that which appears to be the plain meaning of those provisions. Our analysis of the SBP indicates that the language of the Senate report cannot be construed as providing legal authority to mandate that the level of SBP participation be carried over into the Civil Service Commission annuity program as a required minimum.

There is nothing in 5 U. S. C. 8341, supra, which requires, or even restricts as an exception to those provisions, that a retired service member previously participating in the SBP may not choose any of the optional annuity coverages authorized therein. Therefore, in view of the fact that 10 U. S. C. 1450(d) prohibits payment of an SBP annuity when a retired member waives receipt of military retired pay for Civil Service Commission annuity purposes and 10 U. S. C. 1452(e) specifically eliminates the deposit requirement (10 U. S. C. 1452(d)) in such circumstances, there is no legal basis upon which the military departments can require a retired military member to select a Civil Service Commission annuity at a level not less than his previously selected SBP participation level, or in lieu thereof, require a continuation of SBP participation at any level in order to make up the difference should the member choose not to maintain annuity coverage under the Civil Service Commission plan at the same minimum level as his SBP coverage.

Based on the foregoing, it is our view that a member, who elects to combine his military service with his civilian service for the purpose of receiving a Civil Service Commission annuity, may elect to participate in the Civil Service Commission annuity program at a level lower than that which he holds in the SBP.

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With regard to the matter of termination of SBP coverage, it is our view that such a member's SBP participation is not terminated in such circumstances, but is merely suspended. Under the provisions of both 10 U. S. C. 1450(d) and 1452(e), the restrictions as to payment of an annuity or requirement to pay for coverage either by reduction in retired pay or deposit under subsection 1452(d) apply only as long as the waiver of military retired pay is in effect for purposes of subchapter III of chapter 83 of title 5. Should waiver no longer be effective for any reason, then he would resume his previously elected SBP participation and have his military retired pay reduced thereafter in accordance with 10 U. S. C. 1452(a)-(c).

The question presented is answered accordingly.

R. F. KELLER

Deputy]

**Comptroller General
of the United States**