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computation of his Foreign Service annuity. In addition, he elected to receive his Foreign Service annuity in a reduced amount in order to provide survivor benefits for his spouse under the Foreign Service Retirement and Disability System, title VIII of the Foreign Service Act of 1946, approved August 12, 1946, ch. 967, 60 Stat. 999, 1018, as amended, 22 U.S.C. 11061 et seq.

The specific questions asked are:

"1. Is the member required to make contributions to the Survivor Benefit Plan as a result of the provisions of 10 U. S. C. 1452(d) after he waived his retired pay so that his military service could be included in the computation of his Foreign Service annuity?

"2. If the answer to question 1 is in the affirmative, would the surviving spouse of the member be entitled to receive both an annuity under the Survivor Benefit Plan and under the Foreign Service Retirement System?"

The discussion in the Committee Action indicates that by virtue of the language contained in 10 U. S. C. 1450(d), 1452(d); and 1453(e), there is a clear interface between the provisions of the SBP and the Civil Service survivor annuity plan. Under these provisions a retired service member who elected SBP coverage for his spouse and who later waives receipt of military retired pay for the purpose of including his military service time in the computation of his Civil Service annuity is entitled to Civil Service survivor annuity coverage only, unless he declines such coverage. If the member declines Civil Service annuity coverage he retains SBP coverage but must pay for it through deposits or into the Treasury of the United States.

The Committee Action points out that the survivor annuity provisions of the Foreign Service Retirement and Disability System, as amended by the Foreign Service Retirement Amendments of 1976, Title V, Public Law 94-350, approved July 12, 1976, 90 Stat. 834, are generally parallel to and interface with the survivor annuity provisions of the Civil Service Retirement System. However, the Committee Action goes on to point out that neither the survivor annuity provisions for Foreign Service retirees nor the SBP contains language establishing a similar interface relationship between those

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survivor annuity plans. In the absence of precise words in the SEP regarding Foreign Service survivor annuities it is suggested that the provisions of 28 U.S.C. 1452(d), would require the member to continue to make deposits for SEP coverage even though he has waived receipt of his military retired pay in order to have his military service counted in the computation of a Foreign Service annuity and is covered by Foreign Service survivor annuity provisions. On the assumption of the accuracy of such a conclusion, it is suggested in the Committee Action that a surviving spouse of a retired service member who subsequently retired from the Foreign Service in the circumstances described, might be entitled to both SEP and Foreign Service survivor annuities. This result is contrasted to the fact that a survivor may receive only one annuity if the member was covered by SEP and the Civil Service survivor annuity provisions or was covered by a Civil Service survivor annuity and a Foreign Service survivor annuity.

The Committee Action goes on to state that the foregoing analysis and conclusion is not without reservation, since the amendment adding subsection 822(h) to the Foreign Service Act (28 U.S.C. 1452(h)) by section 105(g) of Public Law 94-350, *supra*, prohibits a surviving spouse from receiving a Foreign Service survivor annuity if such spouse is entitled to a survivor annuity from any other "retirement system for Government employees."

The Committee Action points out that the difficulty in applying subsection 822(h) to SEP survivor annuities is that members of the armed forces, active or retired, are not generally regarded as employees of the Government. Therefore, considerable doubt exists whether the SEP should be regarded as a "retirement system for Government employees." It is stated that although the plain meaning of that section seems to support the conclusion of nonapplicability, the legislative history of that provision indicates the purpose of that section to be general recognition of the possible payment of dual survivor annuities to a spouse, and limits receipt to only the higher of such Government annuities, but not both at the same time. It is pointed out that since the only exemption from the required payment for SEP coverage is when the member elects to participate in the Civil Service survivor annuity plan, if only single survivor coverage is authorized, the member would have to continue SEP coverage payments without the prospect of coverage and without possible refund of payments made.

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With regard to question 1., it is noted that while the various survivor annuity plans available under Federal law all have a common purpose and many parallel provisions, each plan is separate and distinct and must be so treated, except to the extent that certain of their respective provisions specifically provide otherwise.

If at the time a service member retires from military service, he validly elects into the SBP, unless the law governing SBP participation or provisions of some other law specifically permit termination or suspension of such participation, he may not voluntarily withdraw from the Plan, and shall continue to have his retired pay reduced (10 U.S.C. 1452(a)). Compare 55 Comp. Gen. 188 (1976).

In this connection, subsection 1452(k) of title 10, United States Code, provides that:

"If a person who has elected to participate in the Plan has been awarded retired or retainer pay and is not entitled to that pay for any period, he must deposit in the Treasury the amount that would otherwise have been deducted from his pay for that period, except when he was called or ordered to active duty for a period of more than 30 days."

The only statutory exemption from the requirements of continued monthly coverage payments other than the member being recalled to active duty for more than 30 days, and the provisions for terminating deductions when there is no eligible beneficiary, is contained in 10 U.S.C. 1452(e). That subsection provides that when a member waives receipt of retired pay in order to use his military service for Civil Service annuity purposes and elects a survivor annuity under that plan, "he shall not be required to make the deposit otherwise required by subsection (d) as long as that waiver is in effect \* \* \*."

Since we find no reference to retirements and survivor annuities under the Foreign Service Retirement and Disability System in the SBP or its legislative history, it is our view that the retired member, having elected SBP spouse coverage is required to make deposits under the SBP pursuant to 10 U.S.C. 1452(d), even though he subsequently retires under the Foreign Service Retirement and Disability

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System and waives receipt of retired pay in order to receive a larger Foreign Service annuity and also has survivor coverage under that system. Accordingly, your first question is answered in the affirmative.

With regard to question 2., section 505(g) of Public Law 84-866, added subsection (h) to section 831 of the Foreign Service Act of 1946, 22 U.S.C. 1976(h), that provision is:

"(h) A surviving spouse shall not hereafter be entitled to a survivor annuity \* \* \* from the Fund [Foreign Service Retirement and Disability System] unless the survivor elects to receive it instead of any other survivor annuity to which he or she may be entitled under this or any other retirement system for Government employees."

It may be recognized that the term "employee" is used in connection with personnel in Government service does not usually include members of the services. The definitions in chapter 51 of title 5, United States Code, clearly limit that term to civilian personnel. See particularly 5 U.S.C. 5101, 5104. Also, the definitions in 10 U.S.C. 101 and 37 U.S.C. 101, relating to the armed forces and pay and allowances for the uniformed services respectively, do not refer to personnel of the uniformed services as employees. Even the provisions of the Foreign Service Retirement and Disability System clearly distinguish between civilian employment and service in the uniformed services, e.g., 22 U.S.C. 1976. On the other hand, the legislative history of the Foreign Service Retirement Act Amendments of 1976 contains the statement at page 41 of House Conference Report No. 94-1368 that:

"Hereafter, the spouse of a retiree may receive the higher of two Government survivor annuities but not both simultaneously."

Although the quoted statement may be viewed as indicating that the amendment adding section 831(h) to the Foreign Service Act of 1946 was not intended to be restricted to survivor annuities based on civilian service, we are faced with the problem that, as indicated above, RFP contributions must be made by a retiree even though he has survivor benefit protection under the Foreign Service Retirement

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System. If we were to hold that survivors are not entitled to KIP benefits, payment of the member after his retirement from the Foreign Service would be required although no benefit would accrue to his survivors as a result thereof. In view thereof and since the term "employee" is used in the statute in question, we are inclined to the view that receipt of survivor benefits under the Foreign Service Retirement and Disability System does not preclude payment of an KIP annuity even though the retiree's military service was used in computing his annuity and his survivor's annuity under the Foreign Service Retirement and Disability System. Accordingly, question 2 is answered in the affirmative.

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of the United States