

DATE: October 8, 2019

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In Re: )  
[REDACTED] ) Claims Case No. 2018-CL-112801.2  
Claimant )

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**CLAIMS APPEALS BOARD  
RECONSIDERATION DECISION**

**DIGEST**

The *de facto* rule which permits retention of erroneous payments of pay and allowances received by members of the Uniformed Services in good faith while in a *de facto* status may not be extended to permit inclusion of the erroneous receipt of pay during the period of *de facto* service in calculating a member's retired pay base under 10 U.S.C. § 1407.

**DECISION**

A retired member of the U.S. Army requests reconsideration of the appeal decision of the Defense Office of Hearings and Appeals (DOHA) in DOHA Claim No. 2018-CL-112801, dated July 30, 2019. In that decision, our Office sustained the Defense Finance and Accounting Service's (DFAS's) denial of his claim for an increase in the calculation of his retired pay under 10 U.S.C. § 1407.

**Background**

On October 15, 1995, the member entered active duty in the Army. On August 1, 2000, he was promoted to Captain. On October 31, 2006, the member was erroneously promoted to Major without consent of the Senate. The error was not discovered until his selection to the rank of Lieutenant Colonel six years later. Upon discovery of its error, the Army approved *de facto* status at the grade of Major for the period the member unlawfully served and was erroneously paid as a Major, October 31, 2006, through April 23, 2013. The Army waived collection of the erroneous payment of pay and allowances resulting from the difference between the Captain's and Major's pay for that period. The Army then reverted the member back to grade of Captain.

The member's promotion to Major was then submitted to the Senate. However, despite a number of senior officials lobbying on the member's behalf, the Senate returned the promotion without confirmation in January 2017. The member opted to retire.

The Army G-1 recommended to DFAS that the member's time at the grade of Major should be used to calculate his retired pay under the "High-36" retirement rule. The High-36 rule provides that the retired pay or retainer pay of any person entitled to that pay who first became a member of a uniformed service after September 7, 1980, is calculated using the retired pay base or retainer pay base determined under 10 U.S.C. § 1407.

Pursuant to 10 U.S.C. § 1407, DFAS established the member's retired pay, not including his service in a *de facto* status for calculation purposes. The member appealed DFAS's calculation. DFAS denied the member's claim on the basis that he was not entitled to grade of Major, and therefore, this time could not be used to calculate his High-36 for his retired pay. In denying the claim, DFAS cited the Army's regulation addressing *de facto* status which states the period of *de facto* status will be from the date of the erroneous promotion until the date the officer received notice that it was void, allowing the member to keep any pay and allowances received at the higher grade. However, service during the period of *de facto* status is not creditable for retirement purposes. *See Army Regulation (AR) 135-155, Promotion of Commissioned Officers and Warrant Officers Other than General Officers*, July 13, 2004.

In the appeal decision, the DOHA adjudicator upheld DFAS's determination to not use the period the member served as a *de facto* Major to calculate his High-36 for his retired pay. In the request for reconsideration, the member states that the DOHA appeal decision misapplied the law, contained factual and legal errors, and exceeded DOHA's statutory authority. He argues that DOHA and DFAS did not use the current statute, 10 U.S.C. § 1407, but used the statute as it existed prior to 1986. He contends that this led to DOHA's misapplication of the Supreme Court's decision in *United States v. Royer*, 268 U.S. 394 (1925), and the Comptroller General decisions which address *de facto* status, all of which he dismisses as not relevant.

## **Discussion**

Under 31 U.S.C. § 3702, this Office settles claims for retired pay of members of the uniformed services. The burden of proving a valid claim against the United States is on the person asserting the claim. A claimant must prove their claim by clear and convincing evidence on the written record that the Department of Defense is liable under the law for the amount claimed. The interpretation of a statutory provision and implementing regulation by those charged with their execution, and the implementation of them by means of a consistent administrative practice, is to be sustained unless shown to be arbitrary, capricious, or contrary to law. *See DOHA Claims Case No. 05033105* (November 30, 2005); and *DOHA Claims Case No. 05021409* (March 30, 2005). Thus, a claimant must prove that DFAS's interpretation or implementation of its authority was arbitrary, capricious or contrary to law. *See DoD Instruction 1340.21* (May 12, 2004) ¶ E7.3.4; and *DOHA Claims Case No. 08020701* (February 28, 2008).

Payment of a claim may only be made for an expense authorized by statute or regulation. When the language of a statute is clear on its face, the plain meaning of the statute will be given effect, and that plain meaning cannot be altered or extended by administrative action. *See* DOHA Claims Case No. 2018-CL-062601.2 (April 8, 2019); DOHA Claims Case No. 2017-CL-062708.2 (December 11, 2017); and DOHA Claims Case No. 2016-CL-052003.2 (September 27, 2016).

The statutory authority for calculating a member's retired pay is found under 10 U.S.C. § 1407. Under 10 U.S.C. § 1407(c)(1), the high-three average of a member entitled to retired pay is the amount equal to:

- (A) The total amount of monthly basic pay to which the member was entitled for the 36 months (whether or not consecutive) out of all the months of active service of the member for which the monthly basic pay to which the member was entitled was the highest, divided by
- (B) 36.

Therefore, 10 U.S.C. § 1407(c)(1)(A) provides for the use of the total amount of basic pay to which the member "was entitled" to receive in the calculation of the retired pay base. A prior section of 1407 existing between 1980 and 1986, used the word "received" as it related to a member's retired pay base calculation.<sup>1</sup> On February 1, 1983, the Comptroller General held that erroneous payments of basic pay should not be included in the calculation of a member's retired pay base for the purposes of calculating his retired pay entitlement under the prior section 1407. *See* 62 Comp. Gen. 157 (1983). Although the Comptroller General found no specific explanation in the legislative history of Congress's use of the word "received" as it related to retired pay base calculations, he held that Congress's intention was to use the basic pay rate at retirement to an average of the basic pay the member was legally entitled to receive. *Id* at 160. As set forth in the current statute, there is no need to examine Congress's intent because the plain meaning of the language is clear on its face. Congress changed the word "received" to "was entitled."

A *de facto* officer is one who holds a position with apparent right, but without actual entitlement because of some defect in his qualifications or in the action placing him in the office or position. *See* 58 Comp. Gen. 734 (1979); and B-207109, Nov. 29, 1982. The doctrine of *de facto* service originated from the Supreme Court's decision in *United States v. Royer*, which allowed an officer to retain the pay and allowances actually received by him in good faith on the basis that he served in that capacity under color of authority and without knowledge of the fact that he had been ordered to active duty in a grade higher than that actually held by him. *See United States v. Royer*, 268 U.S. 394 (1925).

The *de facto* service case law and the Army's regulations protect a member who was acting in good faith for the period he unlawfully worked in higher grade. In such situations, the *de facto* officer who erroneously served on active duty in the higher grade, is permitted to retain

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<sup>1</sup>The prior section of 1407 was added by Public Law 96-342, Title VIII, § 813(a)(1), Sept. 8, 1980, 94 Stat. 1100, but repealed by Public Law 99-348, Title I, § 104(b), July 1, 1986, 100 Stat. 686.

the erroneous pay and allowances received. *See* 33 Comp. Gen. 475 (1954). The Comptroller General's decisions have limited how *de facto* service is applied for longevity pay purposes. When the service is effectively "prohibited by law," the *de facto* officer may still retain the compensation he has already received, but the *de facto* service may not be credited for longevity pay or other purposes. *See* 32 Comp. Gen. 397 (1953). The Comptroller General concluded that the Congress did not intend to authorize credit and increased pay for service prohibited by law. In addition, AR 135-155 ¶ 3-18(c), makes clear that service during the period of *de facto* status is not creditable for retirement purposes. Therefore, neither the case law nor the regulations expand or eviscerate the High-36 rule in 10 U.S.C. § 1407.

In this case, the Army determined that the member was in a *de facto* status during the period October 31, 2006, through April 23, 2013, and therefore, permitted him to retain the erroneously paid pay and allowances he received during that period. Although the Office of the Deputy Chief of Staff G-1 initially recommended that the member's *de facto* time be used to calculate his High-36, DFAS exercises the sole authority to calculate a member's retired pay. DFAS then determined that the member's *de facto* service was not creditable towards the total amount of monthly basic pay to which he was entitled for the 36 months used to calculate retired pay under 10 U.S.C. § 1407.

We find no error in DFAS's calculation of the member's retired pay. By definition *de facto* status is not a lawful status within a specific pay grade.<sup>2</sup> The language contained under 10 U.S.C. § 1407 is clear on its face that the calculation of an officer's retired pay base is an average of basic pay he "was entitled" to on active duty over a period of months.

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<sup>2</sup>A comprehensive analysis of *de facto* officer status can be found in an article by Major Boyd W. Allen, Jr. for the Military Law Review. *See* 39 Mil. L. Rev. 1 (January, 1968).

## Conclusion

The member's request for reconsideration is denied, and we affirm the appeal decision in DOHA Claim No. 2018-CL-112801 disallowing the claim. In accordance with DoD Instruction 1340.21 ¶ E7.15.2, this is the final administrative action of the Department of Defense in this matter.

SIGNED: Catherine M. Engstrom

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Catherine M. Engstrom  
Chairman, Claims Appeals Board

SIGNED: Charles C. Hale

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Charles C. Hale  
Member, Claims Appeals Board

SIGNED: Ray T. Blank, Jr.

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