



DEPARTMENT OF DEFENSE  
DEFENSE LEGAL SERVICES AGENCY  
DEFENSE OFFICE OF HEARINGS AND APPEALS  
POST OFFICE BOX 3656  
ARLINGTON, VIRGINIA 22203-1995



DATE: August 7, 2025

In Re:

[REDACTED]

Claimant

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Claims Case No. 2024-CL-102116.2

**CLAIMS APPEALS BOARD  
RECONSIDERATION DECISION**

**DIGEST**

The Defense Finance and Accounting Service (DFAS) is required to honor the request for a direct payment of a portion of the member's retired pay under 10 U.S.C. § 1408 when a former spouse presents a proper court order requiring such a payment.

**DECISION**

A retired member of the United States Navy requests reconsideration of the appeal decision of the Defense Office of Hearings and Appeals (DOHA) in DOHA Claim No. 2024-CL-102116, dated June 2, 2025.

**Background**

The member entered military service on May 26, 1999. On January 10, 2000, while on active duty, he was married. The member was married until March 27, 2012, when a state court decreed that he was divorced. Under the terms of the final decree of divorce, the member's former spouse was awarded forty percent of his military retired pay. The state appellate court affirmed the trial court's rulings in its entirety on December 4, 2012, upholding the award of spousal support and equitable distribution.

The member's former spouse submitted a DD Form 2293, *Application for Former Spouse Payments from Retired Pay*, to the Defense Finance and Accounting Service (DFAS) on June 4, 2012. On July 9, 2012, DFAS notified the member of that application and gave the member 30 days in which to provide an updated court order, if such existed. The record contains no evidence that the member contested the court order or provided an updated court order within the

required 30-day period. On June 1, 2019, the member retired from the Navy. On August 19, 2019, DFAS notified the member's former spouse that her application for direct payment under the Uniformed Services Former Spouses' Protection Act (USFSPA) had been approved and to expect her first payment in September 2019. On August 19, 2019, DFAS sent the member a letter advising him that he had 30 days to provide any update to the court order. Again, nothing in the record reflects that the member responded to DFAS within the 30 days. DFAS commenced direct payment of a portion of the member's retired pay to his former spouse in September 2019.

On January 24, 2023, the member requested that DFAS reconsider its determination to allow direct payments to his former spouse under the USFSPA. He stated that the "10-10" requirement of the USFSPA had not been satisfied. He asserted that the divorce decree awarding his former spouse a portion of his retired pay established the duration of his marriage as 9.6 years. DFAS subsequently upheld its determination that 10-10 rule was satisfied and direct payment pursuant to the divorce decree was proper. The member appealed that determination to DOHA.

In the appeal decision, the DOHA attorney examiner outlined in specific detail the arguments presented by the member. After examining the facts and applying the applicable statute and regulation to those facts, the attorney examiner sustained DFAS's denial of the claim, finding that the 10-10 rule in the USFSPA was met.

In the member's request for reconsideration, he disagrees with the attorney examiner's finding that he had 13 years of creditable military service, had been married for over 12 years, all of which overlapped with his service. He argues that the attorney examiner erred by using the date of the divorce order to define the duration of his marriage instead of using the court's specific finding of the duration of his marriage. He cites to the Department of Defense Financial Management Regulation (DoDFMR), Volume 7B, Chapter 29, Paragraph 6.16, which states:

#### 6.16 Factual Errors in Court Orders

If a party submits documentary evidence that shows a factual error in a court order, this will not be sufficient to modify or stop payments being made pursuant to the court order. Subject to compliance with existing law, if a court order provides elements needed to calculate a former spouse award, including but not limited to, formulas, hypotheticals, and/or NDAA awards, the designated agent will use the elements provided even if the elements vary from the member's actual figures and result in a different percentage (higher or lower) than the parties set forth in the court order. The party asserting the error must petition the court to correct the order. The designated agent does not have the authority to correct errors in court orders.

The member argues that given this regulation DFAS cannot ignore the court's specific finding of the duration of his marriage as 9.6 years for USFSPA purposes. He again cites the language in the divorce decree wherein the court stated:

This Court makes an equitable distribution of the Defendant's contingent retirement with the United States Navy as follows: 40% of the marital share is awarded to Plaintiff according to the following formula: 9.67 years of marriage (divided by) total number of years Defendant served = marital share x .4 will be the share awarded to Plaintiff.

He maintains that the state court defined the duration of his marriage independent of the date of the divorce decree. He believes that DFAS's use of the date of the divorce decree to define the duration of his marriage to apply 10 U.S.C. § 1408(d)(2) is arbitrary, capricious, and contrary to law.

### **Discussion**

Under 10 U.S.C. § 1408, the USFPA, a state court may, subject to certain limitations, treat military retired pay as the property of the member or as the property of the member and his spouse in accordance with applicable state law. A former spouse who is awarded a portion of a member's retired pay may request direct payment of that portion by DFAS. If the former spouse meets the requirements of the statute and submits a court order which is valid on its face, DFAS is to honor the request. *See* B-261160, November 21, 1995.

The burden of proving the existence of a valid claim against the United States is on the person asserting the claim. The claimant must prove their claim by clear and convincing evidence on the written record that the United States Department of Defense is liable under the law for the amount claimed. *See* DoD Instruction 1340.21 (May 12, 2004) ¶ E5.7. Federal agencies and officials must act within the authority granted to them by statute in issuing regulations. The liability of the United States is limited to that provided by law (including implementing regulations). Thus, a claimant must prove that DFAS's implementation of its authority was arbitrary, capricious or contrary to law. *See* Instruction ¶ E.7.3.4; and DOHA Claims Case No. 08020701 (February 28, 2008).

In *McCarty v. McCarty*, 453 U.S. 210 (1981), the United States Supreme Court held that in the absence of specific authority granted by federal statute, state courts could not properly treat military retired pay as marital community property in divorce proceedings. In reaching this conclusion, the Court stated that allowing state courts to divide military retired pay would do clear damage to important military personnel objectives. 453 U.S. at 232-235. The Court reasoned that Congress intended military retired pay to reach the member and no one else. 453 U.S. at 228. In direct response to *McCarty*, Congress enacted the USFSPA in 1982. *See* Title X, Public Law 97-252, 96 Stat. 760 (1982). This Act added section 1408 of title 10 of the United States Code, which expressly authorizes state courts to treat disposable retired or retainer pay either as the property of the member or as the property of the member and the member's former spouse, in accordance with applicable state law of the court concerned. *See* 10 U.S.C. § 1408(c)(1). Disposable retired or retainer pay is defined as the total monthly retired or retainer pay to which a military member is entitled minus certain deductions. *See* 10 U.S.C. § 1408(a)(4).

The USFSPA does not require a division of military retired pay; it merely provides a mechanism to enforce a valid state court order directing such a division of retired pay. *See Mansell v. Mansell*, 490 U.S. 581, 585 (1989). Under 10 U.S.C. § 1409(d), the USFSPA creates a payment mechanism under which the federal government will make direct payments to a former spouse who presents to the Secretary concerned a state court order granting the former spouse a portion of the member's disposable retired pay. Specifically, 10 U.S.C. § 1408(d)(1), which creates this direct payment mechanism, provides in pertinent part the following:

After effective service on the Secretary concerned of a court order providing for the payment of child support or alimony or, with respect to a divisions of property, specifically providing for the payment of an amount of the disposable retired pay from a member to the spouse or a former spouse of the member, the Secretary shall make payments (subject to the limitations of this section) from the disposable retired of the member to the spouse or former spouse . . . in an amount sufficient to satisfy the amount of child support and alimony set forth in the court order and, with respect to a division of property, in the amount of disposable retired pay specifically provided for in the court order.

The direct payment mechanism set forth in 10 U.S.C. § 1408(d)(1) is subject to an express limitation set forth under subsection (d)(2). That condition is that only a former spouse who was married to a member for at least ten years during which time the member performed at least ten years of military service can use the direct payment mechanism. Specifically, 10 U.S.C. § 1408(d)(2) states:

If the spouse or former spouse to whom payments are to be made under this section was not married to the member for a period of 10 years or more during which the member performed at least 10 years of service creditable in determining the member's eligibility for retired pay, payments may not be made under this section to the extent that they include an amount resulting from the treatment by the court under subsection (c) of disposable retired pay of the member as property of the member or property of the member and his spouse.

This portion of the USFSPA is referred to as the 10-10 rule. We note that when the original version of the USFSPA was being considered in Congress, the House version of the bill contained a substantive limit in that a member's retired pay could be treated as community property only if the couple had been married for 10 years or more. *See H.R. Cong. Rep. No. 97-749*, p. 167 (1982). After hearing extensive testimony on the subject, the Senate concluded that there should be no duration of marriage requirement on the substantive limit. *See S. Rep. No. 502*, (1982). Congress agreed to remove the House restriction and instead, limit the direct federal payment mechanism to marriage that had lasted 10 years or more. Under that compromise, and the final version of the USFSPA, state courts have the statutory authority to award a portion of disposable retired pay to former spouses who were married to the member for less than 10 years, but such former spouse are unable to use the direct payment mechanism contained under 10 U.S.C. § 1408(d)(1). Therefore, it is clear from the language and the statutory history that the 10-10 rule authorizing direct payment of a member's retired pay to a

spouse was applicable if the marriage lasted at least 10 years while the service member was performing creditable service.

The USFSPA gives the Department of Defense authority to prescribe implementing regulations, which are found in Chapter 29, Volume 7B of DoDFMR. *See* 10 U.S.C. § 1408(j). Paragraph 6.4.2 of Volume 7B states that in order for the designated agent to make direct payment, DFAS must be able to determine from the USFSPA direct payment application that “the former spouse and the member were married for a least 10 years during which the member performed 10 years or more of service creditable toward retirement eligibility (the “10/10” requirement).”

In this case, the member contends that the Government is restricted from making direct payment of his retired pay to his former spouse because the duration of his marriage was 9.6 years as set forth in the formula used by the state court in calculating the amount of the former spouse’s award. The member continues to argue that the 10-10 rule does not apply because the state court’s formula for calculation of the former spouse’s portion of the retired pay contains the element of 9.6 years of marriage, not 10 years. However, copies of state court actions in the record reflect the member’s contentions have been litigated and the issues resolved adversely to him by the state courts. The state court of appeals in 2012 applied the law based on the lower court’s determinations that the member was married on January 10, 2000, separated on August 17, 2009, and divorced on March 27, 2012. Despite this, the member is arguing that the Department of Defense disagree with the actual duration of his marriage and accept that he was only married 9.6 years as set forth in the language used by the trial court in setting the formula used for the equitable division of his retired pay.

In his reconsideration request, the member now asserts that DoDFMR ¶ 6.16 requires DFAS to accept that he was only married for 9.6 years because DFAS is restricted from correcting an error in the divorce decree. We find this argument unpersuasive and no merit to the member’s objections to direct payment. As the language of the statute, the structure of the USFSPA and its legislative history make clear, 10 U.S.C. § 1408(d) does not require the division of the member’s retired pay, it merely provides a mechanism for direct payment. The state court is still left with the statutory, substantive authority to make the equitable determination of the amount of a marital award (which includes former spouses who were married less than the required 10 years). As stated in the statutory history of the USFSPA and reaffirmed by the Supreme Court in *Mansell v. Mansell*, 490 U.S.C. 581 (1989), the state court is left with the authority over determining the equitable marital award; the Government is limited to direct payment of that award by the duration of the marriage, the 10-10 rule. Just as the Government has no authority to dictate a state court’s equitable division in a divorce proceeding, the state court cannot dictate in its calculation of that division how long the marriage lasted for purposes of the application of the direct payment provision in 10 U.S.C. § 1408(d). The language contained in the divorce decree, which included a factor of 9.6 years, was used by the state court for the purpose of calculating an award to the former spouse of her portion of an equitable distribution of the retired pay. The USFSPA makes clear under 10 U.S.C. § 1408(f), the Government shall not be liable with respect to any payment made from the retired pay to a former spouse pursuant to a court order that is regular on its face if such payment is made in

accordance with the USFSPA and the regulations prescribed under it. It is that very section of the USFSPA, a disclaimer of liability, that is implemented in DoDFMR ¶ 6.16.

The state court in the member's divorce proceeding reached an equitable award to the member's former spouse using a formula with included a factor of 9.6 years. As set forth under 10 U.S.C. § 1408(d), the member's former spouse was able to request direct payment of her court-ordered portion of the member's retired pay from DFAS, because the marriage lasted at least ten years. Since the member was married to the former spouse for at least 10 years, DFAS is required by law to honor the court order and make direct payment to member's former spouse. The state court's use of a formula for making an equitable award does not nullify the actual duration of the marriage and abrogate the Government's responsibility to make direct payment. The order requiring payment to the member's former spouse is valid on its face and therefore, DFAS is obligated to make payment under 10 U.S.C. § 1408(d). *See* DOHA Claims Case No. 08020701, *supra*; and B-221190, Feb. 11, 1986.

## Conclusion

The member's request for reconsideration is denied, and we affirm the appeal decision dated June 2, 2025, 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.

Catherine M. Engstrom

Catherine M. Engstrom  
Administrative Judge  
Chair, Claims Appeals Board

David F. Hayes

David F. Hayes  
Administrative Judge  
Member, Claims Appeals Board

Charles C. Hale

Charles C. Hale  
Administrative Judge  
Member, Claims Appeals Board