KEYWORDS: service member claim; Uniformed Services Former Spouses' Protection Act

DIGEST: The interpretation of a statutory provision and implementing regulation by an agency 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.

CASENO: 09051901

DATE: 7/16/2009

DATE: July 16, 2009

In Re: [REDACTED] Claimant	)))))	Claims Case No. 09051901

CLAIMS APPEALS BOARD
RECONSIDERATION DECISION

DIGEST

The interpretation of a statutory provision and implementing regulation by an agency 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.

DECISION

The Defense Finance and Accounting Service (DFAS) requests reconsideration of the March 20, 2009, Appeal Decision of the Defense Office of Hearings and Appeals (DOHA) in DOHA Claim Case No. 09020203. In the Appeal Decision, a DOHA adjudicator disallowed the

claim of a retired member of the United States Army Reserve for discounting his former spouse's share of his retired pay for mortality, interest, or inflation. The adjudicator partially allowed, as part of the claim was time-barred, his claim for deduction of his tax liability from his retired pay before calculation of the amount payable to his former spouse.

Background

The record shows that the member was married on December 21, 1962, and subsequently divorced on November 1, 1988. The member attained the rank of colonel in the United States Army Reserve (USAR) on November 15, 1985, and subsequently retired from the USAR on January 16, 2001.[1] He received his first retired pay check in February 2001, and his former spouse claimed her share of his retired pay under the Uniformed Services Former Spouses' Protection Act (USFSPA), specifically by an Application for Former Spouse Payments from Retired Pay, DD Form 2293, dated February 14, 2001, pursuant to the judgment of their November 1988 divorce.

The November 1988 final judgment issued by a Circuit Court in Florida, stated, "The Court finds and determines that the wife is entitled to a vested property interest in the amount of 43% of the **present-day value** of the husband's United States Army Reserve retirement . . ." (emphasis added). After the former spouse made application for her share of the member's retired pay, the Defense Accounting and Finance Service (DFAS) advised the former spouse by letter dated March 1, 2001, that they could not honor her request. DFAS indicated that they were unable to compute the entitlement as of the day of the divorce. DFAS stated they could not honor the application until they received a certified copy of a clarifying order awarding either a percentage or a fixed amount of the member's current retired pay.

The former spouse returned to court and obtained a clarifying order dated October 2, 2003, and signed December 5, 2003. The Circuit Court stated that, "The plain language of [the judge's] judgment indicates that the former wife's portion (43%) of the former husband's total gross marital retirement would be ascertained and paid when the former husband began to collect his pension. . . The formula used to determine the marital amount as outlined by the former wife's expert [name deleted] is the proper method of calculation obviously intended by the 1988 judgment and the one which this Court adopts. Said calculation is based on the following: marital points earned during the marriage = 2109, value per point = .50763, former wife's percentage of the marital points and their value = 43%. . . The former husband's position that [the judge's] judgment contains reversible errors is moot, in that no appeal was ever taken of the judgment." The Circuit Court ordered that the former wife was entitled to 43% of the former husband's USAR retired pay both prospectively and retroactively to February 2001 (the date the former husband began receiving the retired pay).

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[1]On this date, the member became entitled to receive retired pay under the provisions of Chapter 1223 of title 10, United States Code, based on his non-regular service.

The member appealed the 2003 Circuit Court order to the appropriate district Court of Appeals of Florida, objecting that payment was not being made from his disposable retired pay, as required by title 32, Code of Federal Regulations (C.F.R.), § 63.3, and 10 U.S.C. §1408. The Court of Appeals ruled on December 30, 2004, that the 1988 military pay scale should have been used rather rather than the 2001 military pay scale used in the 2003 order. Pursuant to that decision, the Circuit Court issued Order Calculating Former Spouse's Share of Military Retirement Pay dated June 7, 2006, which stated: "The trial court has recalculated the award using the 1988 scale. The former spouse is, therefore, awarded 43% of the **disposable** military retired pay the member would have received had the member become eligible to receive military retired pay with a retired pay base of [$]4,685.10 and with 2,109 reserve retirement points. The actual dollar amount is to be determined by the Defense Finance and Accounting Service (DFAS)." (emphasis added).

The former spouse submitted that decision along with a new DD Form 2293 dated June 12, 2006. DFAS notified the former spouse by letter dated August 9, 2006, it was suspending payments pending notification from the Court of Appeals to it regarding the member's retired pay. In an opinion filed on June 11, 2007, the Court of Appeals upheld the 2006 decision of the trial court.

Because the court awarded the member's former spouse a portion of his military retired pay based on conditions other than those which actually existed upon his retirement, DFAS had to compute a "hypothetical" amount of retired pay. Hypothetical awards are computed in accordance with the proposed regulation (unimplemented) Volume 60, Federal Register (Fed. Reg.) page 17507 (Apr 6, 1995)[2] and DFAS's attorney instruction entitled *Dividing Military Retired Pay* (attorney instruction).[3] DFAS computed the amount to be $331.88, and confirmed to the member that because the former spouse had been awarded a percentage of his retired pay, cost-of-living-allowances (COLAs) would be included. The member returned to court seeking a clarifying order regarding the issue of COLAs and the Circuit Court issued an Amended Order Calculating Former Spouse's Share of Military Pay, dated February 6, 2008, amending the June 2006, order. The

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[2]DFAS computed a hypothetical award to adjust the percentage awarded as the member retired with more pay and service points. The award is 43% of what the member would have received had the member retired with a base pay amount of $4,685.10 and 2,109 points. Hypothetical gross pay = .025 x 2,109 points/360 points x $4,685.10 = $686.00 (cents are dropped). Actual gross pay = .025 x 2,755 points/360 points x $7,309.80 = $1,398. The adjustment is computed by dividing the hypothetical gross pay by the actual gross pay: $686/$1,398 = .490701 x 43% (percent awarded) = 21.1001%. The member's gross monthly retired pay was $1,626.00. The amount of his federal income tax withholding, or $53.07, is an itemized deduction. That left $1,572.93 as disposable pay for the purposes of computing his former spouse's payment, or $1,572.93 x 21.1001% = $331.88, as the amount his former spouse should receive.

[3]*See* http://www.dfas.mil/garnishment/retiredmilitary.html last accessed on July 8, 2009.

Circuit Court reiterated that the 1988 scale was to be used. It repeated that the former spouse was to receive 43% of the disposable military retired pay the member would have received had the member become eligible to receive military retired pay with a retired pay base of $4,685.10 and with 2,109 reserve retirement points. It then stated: "This figure shall remain fixed and shall not be adjusted to give credit for cost of living allowances increases." DFAS then recalculated the former spouse's share to be the fixed amount of $294.97 per month, which is the monthly amount DFAS has been paying since that time.

The member then began a series of correspondence with DFAS arguing that his tax rate should reduce the gross divisible retirement pay from which his former spouse's share should be determined.[4] DFAS indicated to the member they had reduced his divisible income by one itemized deduction and they had no authority to reduce the amount further.

The member next provided DFAS with an Order on Motion to Amend the Amended Order Calculating Former Spouse's Share of Military Retired Pay, issued by the Circuit Court dated July 31, 2008. That order stated: "1. The Court has no jurisdiction to modify the property distribution contained in the Final Judgment of Dissolution of Marriage as requested by the Former Husband; 2. The Court has no authority to require [DFAS] to re-calculate the former spouse's share of military retired pay pursuant to the [USFSPA]; however 3. Because this case was originally decided before 1990, it appears that the Comptroller General's Decision B-271052, dated August 6, 1996, in the Matter of [servicemember] would govern the allocation of income taxes in the calculation of the Former Wife's share of the retired pay. . . ."[5]

The member's appeal with a final administrative report was received by the Defense Office of Hearings and Appeals (DOHA) and opened as DOHA Claim No. 09020203. The member again argued his gross divisible pay should be reduced by his tax deduction, and he further amended his claim to include a discount for mortality, interest, and inflation from 1989

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[4]Actually the member's first mention of tax rate deduction was in a fax to DFAS dated August 2, 2007. This was in conjunction with a request for a deduction for the Survivor Benefit Plan (SBP). DFAS pointed out to the member that a deduction for SBP was only appropriate if the member was making the payment on behalf of the former spouse. In this case, the member had remarried and was making SBP payments on behalf of his current spouse.

By letter to DFAS dated February 20, 2008, the member argued that a tax deduction in his gross divisible retired pay would mean his former spouse should be entitled to $271.89. By letter to DFAS dated April 10, 2008, he argued she should be entitled to $277.66.

[5]The member filed an appeal of his claim with the DFAS Inspector General Office, Indianapolis Center, by letter dated October 24, 2008, citing B-271052, and argued that a tax deduction in his gross divisible pay would mean his former spouse would be entitled to $264.30.

through 2000.[6] DFAS's position was that they complied with the regulation that specifies how to compute hypothetical awards, *i.e.*, 60 Fed.Reg.17507, *supra,* and DFAS's attorney instruction. The member's spouse was awarded 43% of his retired pay assuming certain conditions (certain base pay and certain retirement points). Since the member retired under different circumstances, DFAS had to adjust the percentage awarded. Additionally, since the award specified no cost-of-living-allowances, DFAS adjusted to obtain a fixed amount. DFAS also informed the member that if he wanted to modify the award to his former wife, he would need to obtain another court order.

In the Appeal Decision of DOHA Claims Case No. 09020203, the adjudicator denied the member's claim for mortality, interest, and inflation from 1989 through 2000, due to the belated nature of the claim, the fact that the claim was time-barred, and the fact that no provision for paying the claim existed in statute or regulation. The adjudicator found that DFAS should have allowed for the deduction of tax liability from his retired pay payments to his former spouse, to the extent the claim was not time-barred.

DFAS filed a Request for Reconsideration of Appeal Decision on May 19, 2009. DFAS made numerous points in its request, but the main point was it disputed DOHA's application of what it termed a "fictional tax rate to compute what it estimated to be the amount of hypothetical disposable retired pay" the member would have received in 1988. DOHA provided a copy of the DFAS request to the member and requested any comments. The member reiterated that he disagreed with DFAS's method of calculating his former wife's benefits. He contends that DFAS should use the law in effect at the time of the dissolution of the marriage in 1988. He contends that the hypothetical formula imputes to his former wife the benefits of thirteen years of post-dissolution service, which the courts clearly did not intend. He indicates that he is prepared to send his taxes in yearly so they might be deducted from his gross divisible pay. Finally, the member notes that there is another hearing scheduled August 6, 2009, in the court in Florida. The member suggests that DOHA suspend execution of the appeal decision and allow DFAS to notify the former spouse she must obtain a clarifying order. This would, of course, once again terminate the former spouse's payments until a further court order is obtained. Meanwhile, the member suggests that DOHA hold in abeyance enforcement of the appeal decision.

Discussion

The Uniformed Services Former Spouses' Protection Act, 10 U.S.C. § 1408, gives state courts the authority to treat a member's disposable retired pay either as the property of the member or as the property of the member and his spouse, in accordance with the law of the state concerned. *See* 10 U.S.C. § 1408(c). Under prescribed limitations, the law provides that the

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[6]The member calculated that after tax withholding, and discounting for mortality, interest, and inflation from 1989 through 2000, his former's spouse's share of his retired pay was $105.80 per month. He claimed the refund of past payments in excess of that amount.

department concerned shall make payments directly to the spouse or former spouse of a portion of the member's disposable retired pay under state court order as child support, alimony, or, as here, a division of property. *See* 10 U.S.C. § 1408(d). The term "disposable retired pay" as defined in 10 U.S.C. § 1408(a)(4) is the member's total monthly retired pay from which certain deductions have been made. At the time that the member and his former spouse divorced, those deductions included the authorized and required amount of withholding for federal, state or local income tax (formerly at 10 U.S.C. § 1408(a)(4)(C) (1988 ed.)) and additional withholding requested by the member if the member presents evidence of a tax obligation to support such withholding (formerly at 10 U.S.C. § 1408(a)(4)(D) (1988 ed.)).[7]

In construing the concept of what, if any, additional tax withholding would qualify for deduction to reach disposable retired pay for retired members divorced before February 3, 1991, the Comptroller General approved the use of a "single effective tax rate" absent more specific statutory or regulatory guidance.[8] This tax rate is calculated by dividing the anticipated total tax due for the year by the anticipated total income for the year, then applying that rate to the member's retired pay. The maximum authorized deduction for both regular and additional withholding together cannot exceed the total tax due on the retired pay after applying the single effective tax rate to it. *See* the Comptroller General's decisions in B-271052, *supra*, and 63 Comp. Gen. 322 (1984). The additional tax withholding may be allowed only to the extent the member is able to demonstrate that his effective tax rate is in excess of the rate of regular income tax withholdings prescribed in the former 10 U.S.C. § 1408(a)(4)(C), and may not be continued beyond the date the retiree is required to file his next federal income tax return unless the retired member renews his request for additional withholdings by submitting new estimates and evidence concerning his then current financial situation. *See* 63 Comp. Gen. at 329-330. The record contains an unsigned copy of the member's 2007 IRS Form 1040, and an IRS abstract of the member's 1988 tax return, but these documents were not the anticipatory type of evidence the Comptroller General required. For this reason alone, we cannot allow the member's claim

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[7]For divorces that became effective on or after February 3, 1991, the definition in 10 U.S.C. §1408(a) of "disposable retired pay" was changed to eliminate deductions for income tax withholding and additional tax withholding in the computation of disposable retired pay. *See* Pub. L. No. 101-510, §555(b)(3), 104 Stat. 1569 (1990). For former spouse and member divorces on or before February 2, 1991, current implementing regulations in volume 7B of DoD 7000.14-R, the DoD Financial Management Regulation (DoDFMR), Military Pay Policy and Procedures-Retired Pay, ¶ 290701, authorizes deductions for "[a]mounts withheld as Federal and State income tax withholding consistent with the member's current actual tax liability." Implementing regulations are authorized in 10 U.S.C. § 1408(j).

[8]In both B-271052, Aug. 6, 1996 and 63 Comp. Gen. 322 (1984), the Comptroller General pointed out, as we do now, that the authority to issue authoritative revenue rulings on federal income tax withholding rests with the Internal Revenue Service, and the decision here concerns tax withholdings to the extent that the amounts withheld affect the calculation of disposable retired pay only for purposes of 10 U.S.C. § 1408.

regarding additional withholding, and for the same reason, we cannot sustain the portion of the appeal decision that allows an increase in the deduction pursuant to volume 7B of the DoDFMR, ¶ 290701-A(2) for additional withholding based on hypothetical1988 tax information.

The burden of proving a valid claim against the United States is on the person asserting the claim. A member must prove his 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. All relevant evidence to prove the claim should be presented when a claim is first submitted. In the absence of compelling circumstances, evidence that is presented at later stages of the administrative process will not be considered. *See* DoD Instruction 1340.21, ¶ E5.7 (May 12, 2004). Federal agencies and officials must act within the authority granted to them by statute in issuing regulations. Thus, the liability of the United States is limited to that provided by law (including implementing regulations).

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); DOHA Claims Case No. 05021409 (March 30, 2005); and DOHA Claims Case Nos. 02101611 through 02101635 (December 12, 2002). Thus, a member must prove that DFAS's interpretation or implementation of its authority was arbitrary, capricious, or contrary to law. *See* DoD Instruction 1340.21, ¶ E7.3.4; and DOHA Claims Case No. 07032201 (April 4, 2007).

As discussed earlier, we agree with DFAS that the application of a 1988 "hypothetical tax rate" is not appropriate. Furthermore, the basis DFAS used to justify payments made to the former spouse under the 2006 (those made through January 2008) and 2008 orders are sustainable.

DFAS argues that it implemented the 2006 order at 21.1001 percent of the member's disposable retired pay, applying its then standard method for calculating hypothetical retired pay awards.[9] While the member argues that the award is not hypothetical, the fact remains that in 1988 he did not yet qualify for retirement for non-regular service, and would not do so until 2001.[10] If, for example, the member had died before reaching the age of 60, there would have been no payments to him or his former spouse. Moreover, the 1988 award was based on a retired pay amount which differed from his actual retired pay amount when he did qualify. DFAS's application of the practices that it used in calculating hypothetical awards, therefore, appears reasonable.

At the time it calculated payments to the former spouse under the 2006 order (as described

[9]As explained, it later modified its approach to the member's pay account.

[10]*See generally* 10 U.S.C. § 12731.

in its letter to the member of December 4, 2006), DFAS followed the practice of treating hypothetical awards of this nature as percentage awards with automatic cost of living adjustments. DFAS refers to the February 6, 2006, version of its attorney instruction, which describes the automatic cost of living adjustment practice. DFAS concludes that it is likely that the member and/or his former spouse knew about this practice when the state court judge issued the 2006 order because the order uses language almost identical to the model language recommended in the attorney instruction. The order did not take issue with this practice, and DFAS could reasonably argue that the parties should have contemplated it. DFAS also explains that during this period, the retired pay system calculated disposable retired pay using an authorized deduction for regular withholding based on a tax status of married with one exemption. In the absence of anticipated income and tax information from the member, there is no basis for an enhanced deduction based on additional withholding. Overall, we see nothing about these practices that is arbitrary, capricious, or contrary to law, including the USFSPA and its effective implementing regulations.

The Circuit Court's February 2008 order, amending the June 6, 2006, order, provided that cost-of-living-allowance increases not be included in the former spouse's award, and DFAS immediately recalculated the amount of the former spouse's payment from $331.88 per month to $294.97 per month. This adjustment is consistent with 7B DoDFMR ¶ 290601. This Board specifically rejects the member's argument that using the hypothetical formula in any way imputes a benefit of the member's thirteen years of post-dissolution service. DFAS's re-calculation of the former spouse's award to eliminate cost of living allowances reasonably addressed any issue of benefit from post-dissolution service.[11]

The member now asks us to consider a court order not previously submitted in the process for the dispositive point that the trial court ordered his former spouse to receive 43% of the member's military retirement benefits "as of the date of the parties' divorce."[12] As we construe the order, the quoted language is only a summarization of the case and is not meant to be a dispositive holding. The court also indicated in the summarization that the member retired in 2001, and from that time forward he has litigated the amount of the former spouse's entitlement, and the trial court's subject matter jurisdiction to determine the amount. The point of the case was that the Court had previously ordered the member to show cause as to why legal fees should not be imposed on him pursuant to section 57.105, Florida Statutes. This was because in his second appeal of the amount of his retired pay his former spouse should be entitled to receive, the

[11]DFAS notes in their attorney instruction, at 8, that: "A hypothetical award is an award based on a retired pay amount different from the member's actual retired pay. It is usually figured as if the member had retired on the date of separation or divorce. Many jurisdictions use hypothetical formulas to divide military retired pay. Unlike a formula award, a hypothetical award does not give the former spouse the benefit of any of the member's pay increases due to promotion or increased service time after divorce."

[12]This is a published decision of the Florida Court of Appeals. We are not citing it herein to protect the privacy of the member.

court thought that all the claims the member raised were either raised in the first appeal, or those not raised in the first appeal were wholly without legal merit. The court found the member's reply to the show cause order to be wholly unresponsive and imposed fees.

There is no basis for a deduction for mortality, interest, or inflation. The well-established rule is that reimbursement may be paid only for an expense authorized by statute or regulation. *See* DOHA Claims Case No. 97031401 (April 9, 1997), and GAO Decision B-205113, Feb. 12, 1982. Volume 7B, DoDFMR Chapter 29 outlines the calculation of retired pay under the USFSPA. There is no provision for discounting the amount payable for mortality, interest, or inflation. Therefore this claim is disallowed.

DFAS has correctly calculated the amount owed to the member's former's spouse to this point, and we now return this matter to DFAS. If the member believes this to be not in keeping with the laws of the State of Florida, he may obtain a court order from them.

The member has asked that DOHA hold the Appeal Decision in abeyance. Once the jurisdiction of the Board has been requested in a claim for reconsideration, under DoD Instruction 1340.21, ¶ E7.15.1.2, DOHA may affirm, modify, reverse, or remand the appeal decision (generally with instructions to provide additional information). There is no provision to hold decisions in abeyance.

Conclusion

The Appeal Decision as to the denial of the member's claim for mortality, interest, and inflation is affirmed. The Appeal Decision to the extent it allows the member's claim for a deduction for taxes is denied. The calculation of DFAS of the former spouse's share of retired pay has been correct under both the 2006 and 2008 order. Any other claims of the member are denied. In accordance with DoD Instruction 1340.21, ¶ E7.15.2, this is the final administrative action of the Department of Defense.

///Original Signed///

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Michael D. Hipple
Chairman, Claims Appeals Board

///Original Signed///

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Jean E. Smallin
Member, Claims Appeals Board

///Original Signed///
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Member, Claims Appeals Board