DATE: March 24, 2020

In Re:	)	
[REDACTED]	)	Claims Case No. 2018-CL-101803.2
Claimant	)	

CLAIMS APPEALS BOARD
RECONSIDERATION DECISION

DIGEST

An agency's interpretation of a statutory provision and implementing regulation shall be sustained, unless shown to be arbitrary, capricious, or contrary to law.

DECISION

A former member of the U.S. Marine Corps requests reconsideration of the appeal decision of the Defense Office of Hearings and Appeals (DOHA) in DOHA Claim No. 2018-CL-101803, dated November 14, 2019. In that decision, our Office sustained the Defense Finance and Accounting Service's denial of his claim for back pay while he was awaiting retrial.

Background

On October 12, 2012, the member, an E-6, was convicted at general court-martial, contrary to his pleas, of violating: a lawful general regulation, rape, aggravated sexual contact, forcible sodomy, assault consummated by battery, and adultery in violation of Articles 92, 120, 125, 128, and 134, Uniform Code of Military Justice (UCMJ), 10 U.S.C. §§ 892, 920, 925, 928, and 934. He was sentenced to eighteen years of confinement, reduction to pay grade E-1, forfeiture of all pay and allowances, and a dishonorable discharge. On October 26, 2012, the Defense Finance and Accounting Service (DFAS) stopped the member's pay and allowances. The Convening Authority then approved the adjudged findings and sentence.

The member appealed his conviction. On May 22, 2014, the Navy-Marine Corps Court of Criminal Appeals (NMCCA) issued an opinion that set aside the findings of guilty and the

sentence, based on allegations of unlawful command influence. In the opinion, the NMCCA provided that a rehearing could be ordered. On June 25, 2014, the Convening Authority ordered that there be a rehearing. On June 26, 2014, the member was released from confinement and returned to active duty in a full-duty status. While awaiting the rehearing he was permitted to wear his pre-conviction rank insignia (E-6) and assigned commensurate duties. The member's command advised him that although he was entitled to wear the E-6 rank and perform duties commensurate with that rank, he did not rate the pay at that rank or back pay until the pending rehearing results. The command's statement regarding the member's entitlement to pay at the E-1 rate was in conformance with guidance from the DFAS General Counsel's Office.

On September 17, 2014, the member filed a pretrial motion seeking (1) restoration of back pay from the date NMCCA set aside his sentence and (2) restoration of pay grade pre-conviction pay until a future sentence to reduction in pay grade. On October 8, 2014, the Military Judge (MJ) denied the request to restore forfeited pay as premature under Article 75(a), UCMJ, 10 U.S.C. § 875(a), but ruled that the member should be paid at his pre-conviction rank pending his rehearing. The MJ determined the failure to pay the member at his pre-conviction rank after his conviction had been set aside amounted to illegal pretrial punishment in violation of Article 13, UCMJ, 10 U.S.C. § 813. The MJ acknowledged he lacked the authority to order the Government to pay the member at his pre-conviction rank, and instead awarded one day of confinement credit for every day the member was paid at pay grade E-1 pending rehearing. The Government filed a Motion for Reconsideration, and the MJ affirmed his earlier decision.

On November 13, 2014, DFAS General Counsel's Office issued a memorandum in light of the MJ's ruling. DFAS found that their position was unchanged and upheld the decision to pay the member as an E-1 while on active duty awaiting rehearing. DFAS found that Article 75, UCMJ, 10 U.S.C. § 875, provides that to the extent an executed court-martial sentence is set aside and not reimposed by a rehearing or new trial, a member is entitled to restoration of the rights, privileges and property affected by the original sentence. DFAS addressed the Court of Appeals for the Federal Circuit's application of 10 U.S.C. § 875 in *Dock v. United States*, 46 F.3d 1083 (Fed. Cir. 1995). DFAS found that in *Dock,* the Court ruled that to the extent penalties contained in the original sentence are included in the sentence imposed by a new trial, they relate back to the date they originally took effect. DFAS relied on the holdings in both *Dock*, and *Combs v. United States*, 50 Fed. Cl. 592 (2001). DFAS found that when a new trial is conducted, entitlement to restoration of pay is dependent upon the outcome of the new trial. DFAS found that *Combs* was particularly relevant to the member's case at hand because the Court of Federal Claims specifically addressed a member's pay entitlement for the period of active duty awaiting rehearing. The Court of Federal Claims held that because the original sentence and the sentence imposed at rehearing included reduction to E-1, the member was entitled to E-1 pay while on active duty awaiting rehearing. DFAS noted that the MJ distinguished *Dock* and *Combs* from the case at hand on the grounds that both courts applied a *post hoc* analysis to the pay issue, having the benefit of knowing the outcome of the rehearing. DFAS determined that although the pay entitlements were questioned at a different procedural point in both *Dock* and *Combs*, the pay entitlement remains the same. DFAS found that *Combs* is controlling as to a member's entitlement while on active duty awaiting rehearing when both the original sentence and the sentence at rehearing impose the same reduction in grade, *i.e.*, if both sentences impose the reduction, the member is entitled to pay at the reduced rate while on

active duty awaiting retrial. The entitlement does not change depending on when the entitlement is questioned. DFAS noted that 10 U.S.C. § 875 governs the restoration of rights, privileges and property resulting from a court-martial sentence being set aside; and DFAS shall restore the pay in accordance with the statute. DFAS stated that the Court of Appeals for the Federal Circuit and the Court of Federal Claims have jurisdiction to decide questions regarding pay entitlements of military members. DFAS noted that military criminal courts do not have this jurisdiction citing 10 U.S.C. § § 862, 866, 867. DFAS then concluded that since DFAS is bound by *Combs*, DFAS must determine how to correctly pay the entitlement, as it is used in *Combs*, prospectively, before the results of the rehearing are known.

DFAS then analyzed the two potential ways to apply *Combs* prospectively to the case at hand. First, DFAS would pay the member at the reduced rate before the rehearing has taken place and then pay the member back pay if the reduction is not imposed at rehearing. Or second, DFAS would pay the member at his pre-conviction rate before the rehearing has occurred and place him in debt for the overpayment if the reduction is imposed at rehearing. DFAS concluded that it was required to use the former. Citing *Dock*, DFAS found that this method was intended by Congress. In *Dock*, the Court of Appeals for the Federal Circuit found that the congressional history of 10 U.S.C. § 875 makes clear that a forfeiture ordered by court-martial and then found to be erroneous is to be restored, except that in a situation in which a rehearing is ordered, no restoration is called for "until the outcome of the rehearing is known, and then only to the extend the forfeiture is not reimposed." *See Dock*, 46 F.3d at 1088. DFAS noted that although Dock involved the legislative intent of 10 U.S.C. § 875 in terms of forfeitures, the same logic applies to the effect of reductions in grade on pay. DFAS concluded that restoration is not to be made until the outcome of the rehearing. DFAS further noted that paying a member at the unreduced rate before the rehearing results are known is highly problematic, because this would result in DFAS making speculative payments. Under 31 U.S.C. § 3528, DFAS stated that certifying officers are responsible for the legality of a proposed payment. Therefore, according to *Dock*, no restoration is to be made until the outcome of the rehearing is known, and according to *Combs*, the member's entitlement while awaiting rehearing is wholly dependent on the outcome at rehearing. DFAS stated that certifying officers cannot certify a payment to which a member may be entitled depending on the outcome of a future event. Thus, DFAS cannot pay members awaiting rehearing at an unreduced rate until it is known whether the reduction has been imposed at rehearing.

During the period June 26, 2014, through April 29, 2015, in accordance with guidance from DFAS General Counsel's Office, the member was paid as an E-1 while awaiting his rehearing.

The retrial was conducted April 29, 2015. At the rehearing, the member was convicted, contrary to his pleas, of violating a lawful general order, abusive sexual contact, and adultery, in violation of Articles 92, 120, and 134, UCMJ, 10 U.S.C. §§ 892, 920, 934. The member was sentenced to a dishonorable discharge, confinement for nine years, forfeiture of all pay and allowances, and a reduction to E-1.

On August 10, 2015, prior to any action by the Convening Authority, the Government appealed the MJ's decision to grant the member confinement credit. The Government filed a petition for extraordinary relief with the NMCCA pursuant to the All Writs Act, 28 U.S.C. § 1651(a). On December 29, 2015, the NMCCA upheld the MJ's ruling in substantial part. The NMCCA agreed that the Government had engaged in pretrial punishment by failing to pay the member at the E-6 rate; and ruled that issuance of confinement credit was the proper remedy. However, the NMCCA disagreed with the MJ with respect to when the confinement credit should begin. The MJ had ruled that the member was entitled to confinement credit for every day he was paid at the E-1 rate after the sentence was set aside. The NMCCA ruled that the member was entitled to confinement credit beginning the day after he was released from confinement.

As a result of the NMCCA's decision, the member filed a writ-appeal with the Court of Appeals for the Armed Forces (CAAF), challenging the NMCCA's jurisdiction to hear the Government's petition for extraordinary relief. The Judge Advocate General of the Navy certified four additional issues for review by the CAAF. The issue presented by the Judge Advocate General before the CAAF concerning the member's pay was stated as:

> If a member's original sentence includes an executed reduction to pay grade E-1 and the sentence is subsequently set aside, does the action of paying that member at the E-1 rate pending rehearing constitute illegal pretrial punishment in the absence of any punitive intent?

On July 19, 2016, the CAAF issued its decision. The CAAF found there was no punitive intent behind the Government's decision to pay member as an E-1 pending the rehearing results. The CAAF interpreted 10 U.S.C. § 875 as requiring the member to be paid at his unreduced rate while performing duty awaiting rehearing. While the CAAF did not agree with DFAS's interpretation of Article 75(a), UCMJ, it still found that DFAS had taken a good-faith position supported by regulations, statutes, and case law interpreting Article 75(a), UCMJ, to conclude that there was no authority to pay the member at his former pay grade pending the results of the rehearing. The CAAF found the Government's interpretation of Article 75(a), UCMJ, was in furtherance of a legitimate, non-punitive governmental objective to provide the member pending rehearing with the proper pay entitlement as prescribed by Congress. *See* 75 MJ 386 (July 2016).

On October 17, 2016, the member filed a petition for a *writ of certiorari* with the United States Supreme Court. The *writ* was denied on May 15, 2017.

On September 11, 2017, the member, through his attorney, filed a claim with DFAS in the amount of $24,000 for the difference between pay at the E-1 rate and E-6 rate from June 26, 2014, to April 29, 2015. On November 16, 2017, DFAS denied the claim. On December 22, 2017, the member filed a timely appeal of DFAS's pay determination. On August 3, 2018, DFAS issued its Administrative Report that concluded the member was entitled to pay at the rate of E-1 while he awaited rehearing, based upon 10 U.S.C § 875 and interpreting case law. After receiving an extension, the member filed his rebuttal on September 28, 2018, requesting DOHA to defer to the CAAF regarding its interpretation of Article 75, UCMJ. He argued that the CAAF

was the court of competent jurisdiction to interpret Article 75, UCMJ, and matters of military justice. He asserted that the Court of Appeals for the Federal Circuit and the Court of Federal Claims must defer to the CAAF concerning interpretation of the UCMJ, and those courts had misinterpreted Article 75, UCMJ, in several cases before them. Finally, he argued that the proposed changes to Article 75, UCMJ, demonstrated that DFAS's interpretation of the statute was impermissible. The appeal was forwarded to DOHA on October 4, 2018.

On November 14, 2019, DOHA disallowed the claim. In doing so, the DOHA attorney examiner relied upon precedent established in *Dock* and *Combs*, finding DFAS's interpretation was reasonable and based upon a valid judicial interpretation of the law. He thoroughly explained the jurisdictional authority of both the Court of Appeals for the Federal Circuit and the Court of Federal Claims. He also found that the CAAF did not have the jurisdiction to order the member to be paid as an E-6 pending the outcome of his rehearing after his court-martial findings and sentence were first set aside. He found that the CAAF's decision in the instant case merely held that the MJ exceeded his authority in giving confinement credit for conduct that did not violate Article 13, UCMJ. Although the CAAF opined that the Government was not entitled to withhold pay based upon Article 75, UCMJ, they declined to award back pay. The attorney examiner found that the CAAF noted that the Government, based upon the guidance of DFAS and case law, took a "wait-and-see" approach to restoring the member's pay grade until after the results of the rehearing were known. However, the CAAF acknowledged that the Government's position was not an unreasonable interpretation of Article 75, UCMJ, even though it disagreed with that interpretation.

On December 30, 2019, the member, through his attorney, requested reconsideration of DOHA's appeal decision dated November 14, 2019. In the member's request for reconsideration, through his attorney, he argues that *Dock* and *Combs* are not applicable to the member's case. He states that DOHA maintains that the member is not entitled to back pay because it is bound to abide by the interpretations of Article 75, UCMJ, set forth by the Federal Circuit and Court of Federal Claims in Dock and Combs. He states that while the Court of Federal Claims may adjudicate matters of military pay, interpreting the UCMJ is the purview of the military justice system. He states that the CAAF held that the interpretation of Article 75(a), UCMJ, "is the sort of issue for which the military court ought not to defer to an Article III court's interpretation." Therefore, he maintains that DOHA should have deferred to the CAAF's interpretation of Article 75, UCMJ. He also states that the member's case is distinguishable from *Dock* and *Combs*. He states that both *Dock* and *Combs* only address what pay a member is entitled to receive while he awaits rehearing either in a confined status or when other convictions remain. Therefore, neither case addresses the member's situation in which the accused is released from confinement, his convictions are completely set aside, and he is restored to a full-duty status while awaiting a rehearing. In addition, he notes that the member initially raised his claim while he awaited the completion of his rehearing and was presumed innocent.

The member's attorney distinguishes the fact in *Dock*. He explains that the member was initially convicted of murder and sentenced to a reduction to pay grade E-1, a dishonorable discharge, total forfeitures and death. On appeal, the Army Court of Military Review set aside both the findings of guilt and the sentence, and ordered a rehearing. During the period between the Army Court's decision and the member's second trial, the member was held in pretrial

confinement. In addition, the member had reached the end of active obligated service (EAOS) before his initial conviction was set aside, which meant he was not entitled to receive pay. At the rehearing, the member was again found guilty of murder and again sentenced to reduction to pay grade E-1, a dishonorable discharge and total forfeitures. However, instead of death, he was sentenced to life imprisonment. He then sued in the Courts of Appeals for the Federal Circuit seeking restoration of the pay and allowances withheld from him prior to his second sentence. The Court found that he was not entitled to restoration of any pay and allowances, including the period between the set-aside and the second sentences. In contrast, member in the instant case had been released from confinement, was wearing the rank of E-6, performing duties commensurate with that rank, and was in a pay status, unlike *Dock*.

In *Combs*, the Court of Federal Claims denied a member's request for back pay during the interim period between his two trials, when he was stripped of his rank and his pay was reduced to that of an E-1. However, he was released from confinement and brought back to a full-duty status. The Court held that he was not entitled to back pay because it was permissible to pay him as an E-1 during the interim period due to his other convictions from his first trial that were not set aside and the fact that he was convicted at his second trial. In contrast to *Combs*, he states that in his case, his convictions and sentence from his first trial were completely set aside.

The member's attorney maintains that the Government should have complied with the NMCCA's order and decision by ceasing to execute the original sentence entirely due to the presumption of the member's innocence as he awaited completion of his rehearing. Instead, he states that based on DFAS's incorrect interpretation of Article 75(a), the Government paid the member as an E-1 even though he was performing duties as an E-6 and wearing E-6 insignia. He states that without a valid conviction the Government did not have the statutory basis to withhold pay. Although he was convicted at his rehearing, he was presumed innocent while he awaited retrial because the NMCCA had completely set aside his original convictions, and any attempt to pay him as an E-1 during the interim period amounts to retroactive punishment.

Discussion

Under 31 U.S.C. § 3702, this Office settles claims of retired pay of members of the uniformed services. The burden of proving a valid claim against the United States is on the member asserting the claim. A member 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. 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. 2012-CL-070601.4 (August 31, 2015) and 2011-CL-020701.2 (May 19, 2011). The interpretation of a statutory provision, as expressed in the implementing regulations by the agency responsible for execution of the statute, is entitled to great deference and will be sustained and deemed consistent with Congressional intent unless found to be arbitrary, capricious, or contrary to law. *Id*. 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 ¶ E7.3.4; and DOHA Claims Case No. 08020701 (February 28, 2008).

Article 75(a), UCMJ, in effect at the time of the member's sentencing stated:

> Under such regulations as the President may prescribe, all rights, privileges, and property affected by an executed part of a court-martial sentence which has been set aside or disapproved, except an executed dismissal or discharge, shall be restored unless a new trial or rehearing is ordered and such executed part is included in a sentence imposed upon the new trial or rehearing.

We note that Article 75(a), UCMJ, has been amended and an applicable Rule for Courts-Martial has been published that would allow payment in this type of factual situation. In this regard, Congress, in response to a recommendation by the Military Justice Review Group that the President be given the authority to prescribe Rules pursuant to Article 75(a), UCMJ, modified Article 75(a), UCMJ, to give the President such authority. *See* Pub. L. 114-328, Div. E, Title LIX, § 5337, Dec. 23, 2016, 130 Stat. 2937. On March 1, 2018, the President issued an Executive Order that included changing Rule for Courts-Martial 1208 to direct the member's rank and pay be restored when findings and sentence have been set aside pending a rehearing. However, the amendment to 10 U.S.C. § 875, and its associated regulation did not become effective until January 1, 2019. Our analysis is based on statutes and regulations in effect at the time of the member's court-martial. *See* DOHA Claims Case No. 05021409 (March 30, 2005). Therefore, we must base our decision on the law as it was written prior to the effective date of the statutory change and its resulting regulatory change.

As the CAAF noted in its July 2016 decision, during the period in question, a legitimate debate existed on the proper interpretation of Article 75(a), UCMJ, and the question of whether what pay members pending rehearing should receive. *See* 75 MJ 386, 394 (C.A.A.F. 2016). In his claim, the member requests pay at the rate of E–6 for the entire period, *i.e*., June 26, 2014, through April 29, 2015. Article 75(a), UCMJ, clearly addresses this situation. The language is unequivocal and shows that member is not entitled to be restored any pay that was forfeited by the second sentence when the same punishment was awarded. Had the member been resentenced to a lesser punishment, then only that part of the executed first sentence that is not included in the second sentence would be restored to the member.

DFAS, in addition to its plain reading of Article 75(a), UCMJ, relied on the interpretation of the restoration provisions of Article 75(a), UCMJ, contained in *Dock* and *Combs*. In *Dock*, the member was found guilty in his court-martial, but his conviction and sentence were set aside. The member at a rehearing, was once again found guilty. On both occasions, his sentence included forfeiture of all pay and allowances. The *Dock* court noted that ordering a rehearing, in effect, nullified the member's first conviction and sentence. The *Dock* court relied on Article 75(a), UCMJ, to withhold pay for the interim period after the *vacatur*, but before re-sentencing, noting that Congress created a statutory right for members to receive pay, but subject to limitations. *See Dock* at 1087. "Congress has declared that no restoration is made if a rehearing reimposes the same forfeiture." *Id*. at 1087–88. In *Combs*, restoration of the member's pay grade was delayed until after the results of the rehearing were known. DFAS's position, that when a new trial is conducted, entitlement to restoration of pay is dependent upon the outcome of the new trial, is a reasonable interpretation of Article 75(a), UCMJ. DFAS's interpretation and

implementation of its authority in this situation was not arbitrary, capricious, or contrary to law. *See* Instruction 1340.21 ¶ E7.3.4; and DOHA Claims Case No. 08020701 (February 28, 2008).

The member's attorney argues *Combs* and *Dock* are not applicable to the member's claim and asks this Board to defer to the CAAF's interpretation of Article 75(a), UCMJ. However, the member's attorney does not address the CAAF's conclusion that the Government's interpretation of Article 75(a), UCMJ, was in furtherance of a legitimate, nonpunitive governmental objective to provide an accused pending rehearing with the proper pay entitlement as prescribed by Congress. *See* 75 MJ 386, 395 (C.A.A.F. 2016). The CAAF held that there was no intent to punish the member by paying him as an E-1 while he was performing duties as and wearing the uniform of an E-6. Thus, there was no violation of Article 13, UCMJ, and the MJ abused his discretion in awarding confinement credit. Therefore, DFAS's interpretation or implementation of its authority was not arbitrary, capricious or contrary to law.

Conclusion

The member's request for reconsideration is denied, and we affirm the appeal decision in DOHA Claim No. 2018-CL-101803 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: Jennifer I. Goldstein

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Jennifer I. Goldstein
Member, Claims Appeals Board