

KEYWORDS: former spouse claim for portion of member's retired pay

DIGEST: 1) 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. 2) Unless shown to be arbitrary, capricious, or contrary to law, an agency's interpretation of a statutory provision and implementing regulation shall be sustained.

CASENO: 2017-CL-042502.2

DATE: 12/11/17

DATE: December 11, 2017

	)	
In Re:	)	
[REDACTED]	)	Claims Case No. 2017-CL-042502.2
	)	
Claimant	)	

**CLAIMS APPEALS BOARD DECISION**

**DIGEST**

1) 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.

2) Unless shown to be arbitrary, capricious, or contrary to law, an agency's interpretation of a statutory provision and implementing regulation shall be sustained.

**DECISION**

The claimant, a former spouse of 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. 2017-CL-042502, dated August 28, 2017. In that decision, our Office sustained the Defense Finance and Accounting Service's (DFAS's) denial of her claim for a portion of the member's retired pay under 10 U.S.C. § 1408, the Uniform Services Former Spouses' Protection Act (USFSPA).

## Background

On December 17, 1976, the member and the claimant were married. On July 11, 2011, they divorced. At the time of the divorce the member was serving in the U.S. Army Reserves, but had not qualified for receipt of retired pay. He had not achieved sufficient creditable years of service and Reserve retirement points at the time the divorce decree was entered. Although the member did not retire from the Army Reserves until November 2014, the 2011 divorce decree stated the member had retirement accounts with the U.S. Army and Veteran's Administration. Specifically, paragraph XVIII (8) of the decree awarded claimant 50% of the member's "retirement benefits as valued as of May 16, 2011 through the U.S. Army and the Veteran's Administration." The decree stated that the interest in the retirement accounts was to be established pursuant to a Domestic Relations Order (DRO), with claimant's attorney having the responsibility to draft the order.

On November 12, 2012, the claimant's attorney submitted an application for a portion of the member's retired pay. On December 3, 2012, DFAS denied the application because the language in the divorce decree did not meet the legal requirements under 10 U.S.C. § 1408. Specifically, a member's retired pay does not vest until he retires and DFAS had not been provided the information necessary to calculate the former spouse's award. DFAS advised the claimant's attorney that a new court order should be obtained to clarify the former spouse's portion of the member's retired pay as a property award.

On June 9, 2015, the claimant's attorney resubmitted an application for a portion of the member's retired pay with an unsigned draft DD Form 2293, *Application for Former Spouse Payments from Retired Pay*, and an unsigned draft DRO. The attorney requested that DFAS review and preapprove the draft DRO. On June 22, 2015, DFAS again rejected the application because it had not been provided the proper information to calculate the former spouse's award as required under the USFSPA and its implementing regulations contained in the Department of Defense Financial Management Regulation (DoDFMR).

On August 11, 2015, the claimant's attorney submitted a certified copy of a DRO issued on July 28, 2015. The DRO stated:

Former Spouse shall receive a fraction of Service Member's total Disposable Retired Pay including any cost-of-living or other post-retirement increases, the numerator of which is the reserve retirement points earned by Service Member during the marriage through the date of Service Member's retirement, divided by Service Member's total number of reserve retirement points earned; which fraction is then multiplied by (a) fifty percent (50%) and further multiplied by (b) the amount of Service Member's Disposable Retired Pay, to determine the total amount payable to Former Spouse. . . . Payments shall commence immediately.

On September 10, 2015, DFAS again rejected the claimant's application. DFAS cited the language from the June 2011 divorce decree. DFAS stated that the DRO failed to provide for a division of retired pay by a means of a formula wherein the numerator (reserve points earned during the marriage) is not specified. DFAS advised that the claimant must provide a certified

copy of a clarifying order awarding either a fixed amount or a percentage of the member's retired pay, or which provides a formula wherein the only missing element is the denominator (total points earned by a reservist).

On November 18, 2015, the claimant's attorney submitted another application which included an amended DRO, dated October 20, 2015, containing the language required by the USFSPA and its implementing regulations found in the DoDFMR. On February 17, 2016, DFAS approved the claimant's application and began payments to the claimant May 1, 2016, within 90 days of the approval. DFAS later determined that payments should have begun effective February 1, 2016, 90 days from the submission of the amended DRO in November 2015 and paid the claimant accordingly.<sup>1</sup>

The claimant, through her attorney, claimed retroactive payments of a portion of the member's retired pay beginning in August 2015. DFAS denied the claim because the initial divorce decree and DRO submitted prior to October 2015 failed to contain the acceptable language under statute and regulation, specifically there was no clarifying order to calculate the former spouse's award. DFAS also noted that even with a proper court order, the claim for arrearages was not payable under the DoDFMR. A former spouse can collect current retired pay awards, but not retired pay award arrearages. *See* DoDFMR Vol. 7B ¶ 290304. DFAS advised the claimant that she could petition the state court for arrearages owed.

In the appeal decision, the DOHA attorney examiner upheld DFAS's denial of the claim for retired pay award arrearages. The attorney examiner found that there was no valid court order meeting the legal requirements for calculation of a former spouse award until the October 20, 2015, amended DRO was submitted in November 2015. Payments properly began to the claimant 90 days from the date of submission.

In the request for reconsideration, the claimant asserts that the June 9, 2015 DRO should not have been rejected by DFAS.

## **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 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. 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).

---

<sup>1</sup>DFAS discovered that an error in their determination that the former spouse's payments did not begin until May 2016. DFAS had originally rejected the claimant's application after the submission of an amended DRO with the proper language because DFAS found that the claimant had not submitted her social security number. However, DFAS subsequently determined that the claimant had previously submitted it on her DD Form 2293.

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* Instruction 1340.21 ¶ E7.3.4; and DOHA Claims Case No. 08020701 (February 28, 2008).

The USFPSA gives state courts the authority to treat a member's disposable retired pay either as property of the member or as the property of the member and his spouse, in accordance with the law of the jurisdiction of such court. *See* 10 U.S.C. § 1408(c)(1). 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 for retired pay. The USFSPA allows direct payments of retired pay to spouses if the spouse was married to the member for at least ten years during which time the member performed at least ten years of military service. The USFSPA gives the Department of Defense authority to prescribe implementing regulations, which are found in Chapter 29, Volume 7B of the DoDFMR. *See* 10 U.S.C. § 1408(j).

A former spouse must submit a completed DD Form 2293 and a copy of the court order awarding military retired pay. Court order is defined as a final decree of divorce, dissolution, annulment or legal separation issued by a court, or a property settlement incorporated into such an order. *See* DoDFMR Vol. 7B ¶ 290204. The court order must be certified by the court that issued the order. *See* ¶ 290401. The court order must be regular on its face and must award the former spouse a portion of the member's retired pay. Although there is no requirement that specifies how military retired pay is to be divided, an award must be expressed as a fixed dollar amount or as a percentage of disposable retired pay. *See* ¶ 290601. If a former spouse's award is expressed in terms of a formula, all the variables needed to calculate the formula must be included in the court order. *See* ¶ 290607. While DFAS may conditionally preapprove an application for payments, it must first perform a legal review based upon the information available at the time of that review. *See* ¶ 290405.

DFAS has no authority to go behind a court order, nor can it modify or amend the court order. In addition, DFAS cannot honor awards based on the value of what has accrued because military retired pay does not accrue over time. Military retired pay is not a pension, it is a statutory entitlement computed at the time the member retires, and it is based on the member's rank and total years of service at the time of retirement, or the member's high-3 and total years of service. *See* ¶ 290614. DFAS also cannot honor an award of a percentage of the marital portion of a member's retired pay unless the court order provides instructions on how to calculate the marital portion, and all variables necessary for the calculation. *See* ¶ 290615. A former spouse can collect current retired pay award payments, but not retired pay award arrearages. *See* ¶ 290304.

In this case, the member was not entitled to retired pay in 2011 when his divorce was final. In addition, the information necessary for a formula award was not contained in the 2011 judgment. DFAS advised the claimant that a new court order was required to clarify the retired pay as a property award and to express it in an acceptable manner. Even though claimant's

attorney resubmitted a new application on June 9, 2015, it only contained a draft DD Form 2293 to be signed by the claimant at some future time, a draft DRO and an uncertified copy of the divorce decree. The attorney asked DFAS to review and preapprove the unsigned draft DRO. However, these documents were not signed by a judge or certified by a court administrator. DFAS again informed the claimant that retired pay had no value prior to the member's retirement and that DFAS had not been provided with the necessary variables needed to compute the award. Further, DFAS stated that the application contained an invalid provision instructing DFAS to increase claimant's share to satisfy arrearages. Claimant's attorney submitted another application in August 2015 for payment of a portion of the member's retired pay. This application included a signed DRO, dated July 28, 2015, which included a formula for the division of disposable retired pay but failed to include the number of Reserve retirement points earned during the period of the marriage. The DRO again included a provision instructing DFAS to increase claimant's share to satisfy arrearages. DFAS again rejected the application citing the same reasons as it had in June 2015. DFAS specifically noted that the court order did not contain the points earned for the numerator portion of the formula, and indicated a clarifying order was required either awarding a fixed amount or a percentage, or which provides a formula where the only missing variable was the denominator (total points earned by a Reservist). It was not until November 18, 2015, when claimant submitted an amended DRO which contained the language required by the DoDFMR. Therefore, DFAS properly determined that payments would start on February 1, 2016, 90 days from the date of submission.

Claimant continues to argue that the errors throughout the application process were due to DFAS providing inaccurate and incomplete guidance to her attorney. Claimant acknowledges that the first proposed DRO was an unsigned draft. It is unreasonable to dispute the language of an unsigned and unfiled document. Any dispute between the claimant and DFAS over the exact language is irrelevant because there was no final order of the court. DFAS properly rejected the application without a proper certified copy of a court order awarding military retired pay. The court order submitted did not meet the requirement of the statute and the implementing regulations. *See, e.g.,* DOHA Claims Case No. 2014-CL-100601.2 (May 21, 2015) (Absent facial validity invalidity of a court order, the government is not liable with respect to any payments made in conformity with a state court order under authority of the USFSPA.)

DFAS has never asserted the claimant was not entitled to payment of a portion of the member's retired pay. Once claimant complied with the necessary statutory and regulatory requirements DFAS commenced payments of the claimant's share of the member's retired pay. The USFSPA provides that a member is not relieved of liability of court-ordered payments and a claimant may enforce unsatisfied obligations of a member by any other legal means. *See* 10 U.S.C. §1408(e)(6). However, the statute does not provide for the collection of arrearages. *See* DoDFMR Vol. 7B ¶ 290304.

We find DFAS properly concluded claimant was only entitled to receive three months of retroactive payments because the USFSPA application was not in compliance until November 18, 2015. The claimant has failed to show that DFAS's actions were arbitrary, capricious or contrary to law.

### **Conclusion**

The claimant's request for reconsideration is denied, and we affirm the August 28, 2017, appeal Decision in DOHA Claim No. 2017-CL-042502 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

---

Catherine M. Engstrom  
Chairman, Claims Appeals Board

SIGNED: Charles C. Hale

---

Charles C. Hale  
Member, Claims Appeals Board

SIGNED: Gregg A. Cervi

---

Gregg A. Cervi  
Member, Claims Appeals Board