



Claim No. 07110504. In the appeal decision, a DOHA adjudicator disallowed the member's claim for termination of the direct payment of a portion of his retired pay to his former wife under the Uniformed Services Former Spouses' Protection Act (USFSPA).

### **Background**

The member entered military service on June 30, 1971. He was married on November 18, 1972. The member was divorced on July 28, 1988. During his 15-year marriage the member served approximately five years and 11 months of active duty and eight years and nine months of reserve duty. The divorce settlement awarded his former spouse 37.5% of his retired pay. The member's former spouse subsequently applied for direct payments under the USFSPA, and the Defense Finance and Accounting Service (DFAS) approved her application for payments on December 5, 1990.

The member served the equivalent 0.62 years on active duty in the reserves from July 28, 1988, through October 18, 1994. On October 19, 1994, he returned to active duty and served another 10.60 years until his retirement on June 30, 2005. He had served a total of 18.90 years of active duty at the time of his retirement. To reach the minimum requirement of 20 years of active duty, the remaining 1.10 years came from his total equivalent active duty service of 2.03 years while in the reserves.

The member's former spouse contacted DFAS to question why she had not received the retired pay direct payments. DFAS discovered that, due to an administrative error, the payments had not started. DFAS started the former spouse payments effective February 27, 2006, and the member was notified of the action. The member's former spouse was retroactively paid the missed payments.

The member claims that the 10-10 requirement of the USFSPA had not been met, *i.e.*, that while he was married for at least 10 years, he did not perform active duty service of at least 10 years during his marriage. DFAS concluded that the 10-10 requirement was met under both the USFSPA and its implementing regulation if the member and the former spouse had been married for at least 10 years during which time the member performed 10 years of active and/or reserve service creditable towards retirement. Our Office agreed with DFAS and denied the claim.

The member seeks reconsideration of our Office's appeal decision. He argues that the decision was arbitrary, capricious and contrary to law. He states that DOHA used an inappropriate standard of proof. He argues that it was improper for the DOHA adjudicator to accept the agency's (DFAS's) interpretation of its regulations. He asserts that DFAS improperly made payment to his former wife under the USFSPA because the requirements of 10 U.S.C. § 1408(d)(2) were not satisfied. Although he admits that he was married to his spouse for a period of 10 years during which he performed 10 years of creditable service in the reserves and active duty, he contends that because he served an additional 10 years of active duty after he was divorced, becoming eligible to retire based upon his active duty service and electing to do so, his

former spouse would not be entitled to receive direct payment from DFAS. He argues that DFAS's interpretation of the regulation relied solely on a single definition in the Department of Defense Financial Management Regulation (DoDFMR).

The member further argues that there is no authority for DFAS to have allowed the retroactive payments to his former spouse. He also contends that DFAS is taking more than the court-awarded 37.5 % of his retired pay. In addition to the \$37,142.64 he claims DFAS will have improperly paid his former spouse through 2008, he also seeks an additional \$7,500.00 for legal services, postage and personal office expenses.<sup>1</sup> He states that he is able to provide copies of his attorney's billing statements and an itemized listing of the other expenses. Finally, he requests, regardless of the outcome, that all copies of documents relevant to his claim be forwarded to the Department of Defense Inspector General (IG).

### **Discussion**

The burden of proving the existence of 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. *See* DoD Instruction 1340.21 (Instruction) ¶ 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* ¶ E7.3.4 of the Instruction and DOHA Claims Case No. 07032201 (April 4, 2007).

The USFSPA is codified at 10 U.S.C. § 1408. The USFSPA expressly authorizes state courts to 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. *See* 10 U.S.C. § 1408(c)(1). The USFSPA also created a mechanism under which DFAS will make direct payments to a former spouse of the member's disposable retired pay if certain statutory requirements are met. Section 1408(d)(2), provides for the direct payments of retired pay to spouses if the spouse was married to a member for at least 10 years during which time "the member performed at least 10 years of

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<sup>1</sup>The member bases his recovery of these expenses on the following, 10 U.S.C. § 2733(h) and DoD Directive 5515.3, 5 U.S.C. § 504, and 31 U.S.C. § 3702 and DoD Directive 1340.20.

service creditable in determining the member's eligibility for retired pay."<sup>2</sup> However, spouses who do not meet the so called "10-10 requirement" are not precluded from receiving an award of retired pay; they are just not allowed to take advantage of the direct payments mechanism contained in section 1408(d). *See Mansell v. Mansell*, 490 U.S. 581, 592 n.13 (1989). The member asserts that DFAS improperly made payment to his former wife under the USFSPA because he did not perform 10 years of service creditable during his marriage in determining his eligibility for active duty retirement.

The language contained in the USFSPA does not create a distinction between active duty and reserve duty service for purposes of service creditable in determining the member's eligibility for retired pay. Thus, there is nothing in the statute to indicate that reserve duty service is exempt from being considered as service creditable if the member subsequently retires from active duty. There is no evidence in the legislative history to indicate that Congress intended there to be a distinction between active duty and reserve duty service for purposes of determining service creditable. In fact, as pointed out in the appeal decision, the USFSPA's legislative history reflects that Congress rejected the proposal to restrict jurisdiction of the courts to consider military retired pay by applying the 10-10 requirement. *See* H.R. Conf. Rep. 97-749, 97<sup>th</sup> Cong., 2d Sess., (1982), reprinted in 1982 U.S.C.C.A.N. 1569.<sup>3</sup> In order to receive the direct payments from DFAS, the USFSPA merely requires a former spouse to have been married for a period of 10 years while the member performed the same number of years of creditable service.

The USFSPA gives the Department of Defense authority to prescribe implementing regulations, which are found in Chapter 29, Volume 7B of DoD 7000.14-R, the Department of Defense Financial Management Regulation (DoDFMR), Military Pay Policy and Procedures—Retired Pay. *See* 10 U.S.C. § 1408(j). Paragraph 290402 of Volume 7B of the DoDFMR states that in order for the former spouse to qualify for direct payments of retired pay, "the former spouse must have been married to the member for 10 years or more during which time the

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<sup>2</sup>*See* 10 U.S.C. § 1408(d)(2), "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."

<sup>3</sup>After discussion, the House agreed to remove the restriction that would require 10 years of marriage before military retired pay could be considered property by the courts. The House also agreed that direct payments by the service finance centers to a former spouse from the member's retired pay would be limited to situations in which the former spouse was married to the member for at least 10 years while the member performed military service.

member performed 10 years creditable service.” Creditable service is defined as “Service counted towards the establishment of any entitlement for retired pay.” *See* ¶ 290306 of Vol.7B, DoDFMR. The regulation does not make a distinction between the type of entitlement, active duty or reserve, but defines creditable service as service counted toward the establishment of any entitlement, which could mean active duty, reserve or some combination of both.

We agree with DFAS and the DOHA adjudicator that the facts in this case indicate that the 10-10 requirement was met. We do not believe that the fact the member opted to continue on active duty and retire at a later date terminated his former spouse’s right to rely on his reserve service during the marriage for purposes of determining her entitlement to direct payment of a portion of his retired pay. We see nothing in the USFSPA or its implementing regulation that conflicts with this conclusion.

As for the retroactive payments given to the member’s former spouse, we see no prohibition against DFAS awarding these payments to the member’s former spouse since they were amounts that she was entitled to receive under the USFSPA.

As stated above, the liability of the United States is limited to that provided by law. Therefore, absent such authority, there is no legal basis upon which we may authorize payment of the legal and clerical expenses claimed. *See* Comptroller General decision B-195941 (Oct. 18, 1979); and DOHA Claims Case No. 08012401 (January 29, 2008). We do not see the subject matter applicability of 10 U.S.C. § 2733 to the circumstances of this claim, and we are not aware of anything in 31 U.S.C. § 3702 and the implementing regulations granting us jurisdiction over the claimant’s ancillary claim of damages. In any event, the issue is moot because we find no legal basis to predicate payment of the \$37,142.64 claimed for recovery of USFSP payments.

As for the member’s request that his file be forwarded to the IG, the member may contact the IG in that regard and forward the documents himself.

### **Conclusion**

For the reasons stated, the member’s claim is denied, and the appeal decision is sustained. In accordance with 32 C.F.R. Part 282, Appendix E, paragraph o(2), this is the final Department of Defense action in this matter.

Signed: Michael D. Hipple

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Michael D. Hipple  
Chairman, Claims Appeals Board

Signed: Jean E. Smallin

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Jean E. Smallin  
Member, Claims Appeals Board

Signed: Catherine M. Engstrom

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Catherine M. Engstrom  
Member, Claims Appeals Board