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March 16, 2000

In Re:

[Redacted]

Claimant

Claims Case No. 99122104

CLAIMS APPEALS BOARD DECISION

DIGEST

A 1978 divorce decree provided, as part of a community property settlement, that a former spouse had a right to $420 per month of a Navy member's retired pay. This amount was reduced to $200 upon remarriage. The former spouse applied for direct payment under the Uniformed Services Former Spouses' Protection Act (USFSPA), and she remarried in June 1983 without advising the member or the Navy of the change in her status. In 1999, the member discovered that his former spouse had remarried, and filed a claim with DFAS (as the Navy's successor) for underpayment of his retired pay between June 1983 and August 1999. The member bases his claim on an alleged duty of the Navy and DFAS to continually "police" the former spouse's entitlement. No such duty is contained in the USFSPA or its implementing regulations. The member did not provide evidence that the Navy or DFAS violated the USFSPA or its implementing regulations, and therefore, the sovereign immunity provision of the USFSPA precludes recovery in this instance. The risk of loss remains with the member.

DECISION

A retired member of the United States Navy appeals the decision of the Defense Finance and Accounting Service (DFAS) denying his claim of $43,120 for underpaid retired pay accruing to him between June 1983 and August 1, 1999. Due to the nature of the claim and for administrative convenience, we are directly settling this claim.

Background

The member retired from the United States Navy on October 15, 1971, and divorced his spouse on April 26, 1978. As part of the division of community property, the divorce decree awarded the spouse $420 per month as her sole and separate property interest in the member's retired pay, but the court directed that this amount would be reduced to $200 if the spouse remarried. The court also directed the member to pay the applicable amount by means of a Navy allotment or by personal check to be mailed within 5 days of receipt of the "monthly benefit." After it became effective, the spouse applied for and received these payments pursuant to the Uniformed Services Former Spouses' Protection Act (USFSPA). The spouse remarried in June 1983, but did not advise either the Navy (as finance predecessor to DFAS) or the member concerning her changed status. The member became aware of the marriage and forwarded supporting documentation (including a copy of the marriage certificate) to DFAS on July 30, 1999. On August 16, 1999, DFAS advised the spouse of the overpayment and terminated payment of her portion of the military retired pay for 212 months, or until she remitted the overpayment.

The member claims $43,120 ($220 per month overpayment through the payment of August 1, 1999) plus interest. He contends that the risk of loss should be on the Department of Defense because "DFAS did not properly police the former spouse's continuing entitlement, by not requiring periodic reporting by the former spouse to update her marriage status." The member suggests that involuntary deductions began in 1983 pursuant to the former spouse's application, and therefore, this became a matter between her and DFAS. The member points out that of the three parties (DFAS, the former spouse, and the member), he was the only party who committed no error.

DFAS contends that risk of loss is on the member. DFAS assumes that the member, under the law, would have continued to fulfill his obligation to make payments to the former spouse, whether or not the former spouse had taken advantage of the provisions of the USFSPA. Therefore, he still would have made overpayments to the former spouse because she had not advised him of her re-marriage. DFAS made payments directly to the former spouse pursuant to a valid USFSPA application, and as a condition precedent to payment, DFAS notes that a former spouse promises to report changes in marital status. The wording on the current application states that the former spouse must advise the uniformed services of a change in her marital status if remarriage causes payments to be reduced or terminated, and while DFAS is still searching for the former spouse's actual application, DFAS reports that the language was the same in 1983.

DFAS points out that there are no Comptroller General decisions or judicial decisions directly on point. However, it notes that the payment of a government entitlement to an individual not legally entitled to payment is "good acquittance" where the government relied on information it reasonably believed to be accurate and there was no contributory negligence or other fault on the government's part. For example, the government is not liable for a second payment of a service member's death benefits to a proper payee where it was induced by the decedent's representatives, or the deceased member himself, to make the payment to someone who was not a proper payee. *See* 37 Comp. Gen. 131 (1957); and *United States v. Campbell*, 139 F. 2d 424 (4th Cir. 1943). DFAS also cited two decisions in which the court held that the government was not liable to make up dependent allotment payments to plaintiff spouses which were stopped on the basis of divorce decrees later found to be void. *See McLendon v. United States*, 254 F. 2d 361 (2d Cir. 1958); and *Upton v. United States*, 203 F. Supp. 14 (S.D.N.Y. 1962). These decisions involved first spouses alleging erroneous payments to second spouses, while USFSPA cases would involve members alleging erroneous payments to former spouses. But, DFAS believes that the point is the same: the government is not required to make up payments to someone legally entitled to payment where the government exercised reasonable reliance.

Discussion

We agree with the DFAS argument concerning "good acquittance." The Comptroller General's decision *Technical Sergeant Harry E. Mathews, USAF*, 61 Comp. Gen. 229 (1982) finding sovereign immunity under 42 U.S.C. 659(f) for executing a facially valid garnishment order for alimony and child support that was later overturned, also invites comparison. But we will take this opportunity to set forth an additional reason for denying the member's claim.

On September 8, 1982, Congress passed the USFSPA, Pub. L. No. 97-252, 96 Stat. 730 (1982), codified at 10 U.S.C. § 1408.(1) The USFPSA provides that a court may treat disposable retired or retainer pay payable to a member either as property solely of the member or as property of the member and his spouse in accordance with the law of the jurisdiction of the court. *See* 10 U.S.C. § 1408(c). 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 received after June 25, 1981. The USFPSA also allows direct payments of retirement benefits 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. *See generally Chandler v. United States*, *supra*; and *Andrean v. Secretary of United States Army*, 840 F. Supp. 1414, 1419 (D. Kan. 1993). Implementing regulations are found at title 32, Code of Federal Regulations (C.F.R.), Part 63, and they include a provision that court orders issued prior to June 26, 1981, that awarded a division of retired pay as property, shall be honored if they otherwise satisfy the requirements and conditions specified in Part 63. *See* 32 C.F.R. § 63.6(c)(7).

The USFPSA also provides that neither the United States, nor any officer nor employee, shall be liable with respect to any payment made from retired or retainer pay to any member, spouse or former spouse to a court order that is regular on its face if payments are made in accordance with Section 1408 and the regulations prescribed thereunder. *See* 10 U.S.C.

§ 1408(f)(1) and 32 C.F.R. § 63.6(g). The Federal courts have interpreted this provision to mean that the United States has not waived its immunity from suit, and the United States and its officers and employees are not liable, when they comply with Subsection 1408(f)(1). *See Goad v. United States*, 24 Cl. Ct. 777, 784 (1991), *cert. denied*, 506 U.S. 1034 (1992). The *Goad* decision is notable because it also involved a Texas divorce decree entered prior to the *McCarty* decision and the effective date of the USFSPA. The *Goad* court reviewed aspects of facial validity in Texas decrees, and the decree here appears to be very similar to the one in *Goad* except with respect to using a fractional allocation instead of a set dollar amount and the type of violation alleged.

In administrative claims, the Comptroller General has found that, absent facial invalidity of the court order, the government is not liable with respect to any payments made in conformity with a state court order under authority of the USFPSA. *Lieutenant Colonel William A. Smith, Jr., USA (Retired)*, B-221190, Feb. 11, 1986.

The member's claim is based on an alleged duty by the government to "police" payments it makes directly to a former

spouse pursuant to the USFSPA to assure the former spouse continues to meet any condition for payment, including those specified in the underlying divorce decree. The member suggests that such continuing oversight may include an annual or other periodic requirement that the former spouse certify her continuing eligibility for payment. However, the member does not root this obligation in any specific provision of the USFSPA or in the implementing regulations. In fact, the member does not allege that either the DFAS or the Navy violated any specific provision of the USFPSA or the regulations in setting up and paying the former spouse directly pursuant to USFSPA, and our review of the law and regulations does not suggest any colorable violations of these legal authorities. The member is trying to imply a periodic policing duty not specified in the statute or the regulations because he no longer had any active role in making payments to the former spouse. But the fact remains that the government's failure to adhere to such an alleged duty is not a proper basis for overcoming the government's sovereign immunity. The Congress did not intend that the government and its agents be sued for violation of such an alleged duty. It also is clear that the sovereign immunity provision in 10 U.S.C. § 1408(f)(1) is applicable to administrative claims. *See Lieutenant Colonel William A. Smith, Jr., USA (Retired*), *supra*.

Conclusion

We disallow the member's claim.

Signed: Michael D. Hipple

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Michael D. Hipple

Chairman, Claims Appeals Board

Signed: Christine M. Kopocis

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Christine M. Kopocis

Member, Claims Appeals Board

Signed: Jean E. Smallin

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Jean E. Smallin

Member, Claims Appeals Board

1. This was a direct response to the Supreme Court's decision in *McCarty v. McCarty*, 453 U.S. 210 (1981) which held

that the Supremacy Clause precluded state courts from apportioning military retired pay in divorce proceedings in accordance with their community property laws. *See Chandler v. United States*, 31 Fed. Cl. 106 (1994).