

Date: July 16, 1997

VAOPGCPREC 25-97

From: General Counsel (022)

Subj: Treatment of Military Retired Pay Paid Directly to an
Ex-Spouse in Determining Entitlement to Need-Based Benefits
XXXX, XXXXX X. XXX XXX XX XXXX

To: Director, Compensation & Pension Service (21)

QUESTION PRESENTED:

Should military retired pay that is paid directly to a veteran's ex-spouse by a military finance center pursuant to a divorce decree or garnishment order be considered income of the veteran for purposes of determining his or her entitlement to Department of Veterans Affairs (VA) need-based benefits?

COMMENTS:

1. The veteran retired from the Navy in 1979 after qualifying for military retired pay. In January of 1985, the veteran's marriage ended in divorce. A January 1997 Retiree Account Statement issued by the Defense Finance and Accounting Service (DFAS) reflected that the veteran's monthly gross military retired pay was \$1,248.00. This document also showed that the veteran's retired pay was being reduced by the sums of \$181.15 for a garnishment deduction and \$603.88 for a "former spouse deduction." A review of the veteran's claim file reveals that the veteran has been rated by VA as permanently and totally disabled for improved-pension purposes.

2. Under 38 U.S.C. § 1503(a), "annual income" for improved-pension purposes includes "all payments of any kind or from any source" except for the classes of payments expressly excluded in section 1503(a)(1)-(10). The legislative history of section 1503(a) indicates Congress' intent "that a pensioner's total annual non-pension income shall be included in determining the amount of pension payable, unless a specific exclusion from such income is authorized by law." H.R. Conf. Rep. No. 1768, 95th Cong., 2d Sess. 22 (1978),

reprinted in 1978 U.S.C.C.A.N. 5702, 5708. Section 1503(a) does not provide an income exclusion for moneys due or payable to a

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former spouse under a court-ordered property division, a support award, or a garnishment order.¹

3. The answer to the question posed is, therefore, dependent upon whether moneys paid to the veteran's former spouse are properly classified as "income" of the veteran. This question turns on whether the payments are made from assets which are the property of the veteran or from those which are the property of the ex-spouse. If the payments are made from the veteran's property, then such payments must be considered income of the veteran, regardless of

¹ Although the analysis contained in this opinion focuses on entitlement to improved pension, the conclusion reached is equally applicable to other types of need-based VA benefits, i.e., parents dependency and indemnity compensation (DIC) (compensation provided to needy parents of veterans who die of service-connected disabilities), "section 306 pension" (pension entitlement to which was preserved under section 306(a) of the Veterans' and Survivors' Pension Improvement Act of 1978, Pub. L. No. 98-588, 92 Stat. 2497, 2508), and "old-law pension" (pension payable under section 9 of the Veterans' Pension Act of 1959, Pub. L. No. 86-211, 73 Stat. 432, 436, entitlement to which was preserved under section 306(b) of Pub. L. No. 98-588). Statutes governing the parents' DIC and section 306 pension programs contain language identical to that in 38 U.S.C. § 1503(a) requiring inclusion in income of "all payments of any kind or from any source." 38 U.S.C. § 1315(f)(1); former 38 U.S.C. § 503(a) (1978). While this language is not found in the statutes governing old-law pension, entitlement to benefits under that program is subject to an annual-income limitation. Former 38 U.S.C. § 522(a) (1959). None of the statutes governing entitlement to benefits under these programs provides an income exclusion applicable to sums due or payable to a former spouse under a property-division, support, or garnishment order.

whether the payments are made directly to the veteran's ex-spouse. Where such payments are made, voluntarily or involuntarily, to satisfy the veteran's spousal-support obligation, the veteran receives the benefit of the veteran's own property, i.e., the retired pay, since it is used to satisfy a legal obligation of the veteran. In contrast, if the veteran has been divested of some, or all, of the veteran's property interest in the retired pay via a property division in favor of an ex-spouse,

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then payments made directly to the ex-spouse by the military finance activity from the ex-spouse's portion of the retired pay cannot be considered income of the veteran, since they would represent a payment to the ex-spouse of the ex-spouse's own funds.

4. Evaluating the respective property interests of a veteran and his or her ex-spouse with respect to military retired pay requires examination of the terms of the divorce decree and any related documents.² Such analysis must also consider the impact of the Uniformed Services Former Spouses' Protection Act (USFSPA), Pub. L. No. 97-252, Title X, 96 Stat. 718, 730 (1982), as amended. The USFSPA currently provides that, subject to limitations specified therein, "a court may treat disposable retired pay payable to a member for pay periods beginning after June 25, 1981, 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 such court." 10 U.S.C. § 1408(c)(1).

5. While the USFSPA provides the authority for state courts to treat military retired pay as a marital asset, it does not mandate such treatment. This means that state courts are not obligated to treat military retired pay as a marital asset and may instead choose to consider military retired pay in making a spousal-support (alimony) award, if

² Many divorce decrees incorporate a property settlement agreement entered by the parties. Such an agreement is in essence a contract between the parties to a divorce action laying out their rights and responsibilities on matters such as the division of marital property and debts, and spousal and child support.

permitted to do so under state law. See generally 27B C.J.S. *Divorce* § 536 (1986) ("alimony and property rights are distinguishable and have different purposes"); *Williams v. Williams*, No. S97A0236, 1997 WL 286987, at *2 (Ga. June 2, 1997) ("alimony and equitable property division are not synonymous"). State law may limit the ability of courts in particular states to order alimony or to include military retired pay in a property division. Accordingly, the divorce decree, any property settlement, and the domestic relations

law of the particular state must be considered when evaluating whether military retired pay paid to an ex-spouse should be considered income for pension purposes.³

6. In the case which gave rise to this opinion, the divorce was obtained in Oregon, so the laws of that state must be considered in determining whether a division of military retired pay was effected. Under Oregon law as in effect at the time of the divorce, real or personal property of the parties to a divorce action could be divided by the court in a manner deemed just and proper under the circumstances. Or. Rev. Stat. § 107.105(1)(f) (1985). The cited statute further provided that "[a] retirement plan or pension or an interest therein shall be considered as property." Also, the Oregon Court of Appeals has held that "Oregon courts may treat military retirement pay as marital property." *Marriage of Hadley*, 713 P.2d 39, 42 (Or. Ct. App. 1986). Thus, Oregon law authorized the division of military retired pay by courts of that state in connection with issuance of a divorce decree. Further, Oregon law authorized the court, in connection with a divorce decree, to order one party to the divorce action to pay support to the other party. Or. Rev. Stat. § 107.105(d) (1985). The court was also authorized by the cited statute to "approve, ratify, and decree" voluntary agreements for the support of a party.

7. Once the law governing spousal support and division of property in the state in question is known, the terms of the divorce decree and any associated property settlement must be examined. In this case, paragraph 2 of the "Decree of Dissolution of Marriage" (Divorce Decree) states that "[r]espondent [,the veteran,] shall pay to petitioner [,the ex-spouse,] as a contribution towards the support of [the ex-spouse, the veteran's] entire Navy Retirement Allowance until such time as it reaches the sum of \$900.00 per month." The Divorce Decree specifies that payments are to be made directly from the veteran's "military retirement." The parties to the divorce also entered into a "Marital Settlement Agreement" (Settlement Agreement), which was filed with the divorce petition, approved by the court, and incorporated into the Divorce Decree. Divorce Decree,

³ Regional Counsel should be consulted if questions arise concerning the law applicable in a given jurisdiction.

paragraph 3.

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8. The Settlement Agreement in this case specifies the parties rights and responsibilities concerning property and other matters in connection with the divorce. Significantly, the Settlement Agreement has separate sections concerning personal property, after-acquired property, and spousal support. The section of the Settlement Agreement pertaining to personal property states that the parties "have previously divided their marital assets and personal property" and "agree that each party shall be awarded those items of personal property currently in their respective possession, free of any interest in the other." Settlement Agreement, page 2. The section of the Settlement Agreement dealing with after-acquired property states that any property acquired by either party after the date of the Settlement Agreement "shall be the sole and separate property of the one who is acquiring the same." Settlement Agreement, pages 4-5.

9. Military retired pay is not mentioned in the Settlement Agreement in the context of a property division; rather, it is discussed under the separate heading of spousal support. Settlement Agreement, page 3. This section of the Settlement Agreement provides in pertinent part:

[The veteran] receives a Navy Retirement Allowance. [The veteran] agrees to pay to [the ex-spouse] as and for a contribution towards [the ex-spouse's] support [the veteran's] entire Navy Retirement Allowance until such time as it reaches the sum of \$900.00 per month net. At the time the Navy Retirement Allowance reaches the sum of \$900.00 per month net, [the veteran] agrees to pay [the ex-spouse] the sum of \$900.00 per month and shall be entitled to retain, as [the veteran's] sole and separate property, any amounts received over and above the \$900.00 per month net which is being paid to [the ex-spouse]. [The veteran] and [the ex-spouse] agree that these payments to [the ex-spouse] shall continue until [the ex-spouse's] death or remarriage, whichever occurs first.

Settlement Agreement, page 3.

10. The terms of the Divorce Decree and Settlement Agreement in this case establish that the veteran's military retired pay was not divided in the divorce action. Although the court had the authority to divide the veteran's retired

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pay as a marital asset, it instead directed that a portion of the veteran's retired pay be paid to the ex-spouse as spousal support. Such payments were to cease upon the death or remarriage of the ex-spouse. The effect of the court's action is that the veteran retained full ownership of the retired pay, although a portion of that pay was to be paid directly to the ex-spouse as spousal support. Accordingly, the applicable legal authority and the facts in this case would support a finding that amounts paid to the veteran's ex-spouse by the DFAS as a "former spouse deduction" are countable as the veteran's income for purposes of determining entitlement to improved pension.

11. As to amounts paid to the ex-spouse by the DFAS pursuant to a garnishment deduction from the veteran's retired pay, the result is the same. Garnishment is a statutory remedy whereby a creditor obtains "[s]atisfaction of an indebtedness out of property or credits of [a] debtor in possession of, or owing by, a third person." Black's Law Dictionary 680 (6th ed. 1990). In this case, the ex-spouse has obtained a court order directing a third party (a military finance center) to pay the ex-spouse a portion of the veteran's military retired pay, apparently as a means of eliminating a spousal-support arrearage. The property rights of the parties concerning the military retired pay were established under the Divorce Decree and Settlement Agreement, which, as noted above, resulted in the veteran retaining all property rights in the military retired pay. The garnishment order obtained by the ex-spouse represents a means by which the veteran's property may be allocated to satisfy a legal obligation of the veteran. As with the "former spouse deduction," the veteran receives the benefit of the retired pay, since it is used to satisfy the veteran's indebtedness. Consequently, the law and facts would support a finding that amounts paid to the ex-spouse from

the veteran's military retired pay under the garnishment order are income of the veteran for improved-pension purposes.

HELD:

Whether military retired pay paid directly to a veteran's ex-spouse by a military finance center pursuant to a divorce decree must be included in the veteran's annual income for purposes of determining eligibility for need-based veterans' benefits is dependent upon the property rights of the

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parties in the military retired pay, as determined in the pertinent divorce decree and any related property settlement, interpreted in light of applicable state law. Where, in a divorce proceeding, military retired pay is treated as marital property and divided between the parties to the proceeding, only that portion of the retired pay which is determined to be the property of the veteran is countable as income of the veteran for purposes of determining entitlement for need-based veterans' benefits. Where no such division of property has occurred, the full amount of such retired pay is attributable to the veteran, regardless of whether all or a portion of the retired pay is paid directly to the veteran's ex-spouse pursuant to a voluntary or involuntary allotment or a garnishment order.

Mary Lou Keener