



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Master Sergeant Leroy E. Nieman, USA
(Retired)--Claim for termination of payments
under the Former Spouses' Protection Act

File: B-251346

Date: May 18, 1993

DIGEST

A recent amendment to 10 U.S.C. § 1408(c)(1) states that courts may not retroactively divide military retired pay between a member and his former spouse if their final divorce decree was granted before June 25, 1981, *i.e.*, before the Supreme Court's decision in McCarty v. McCarty, 453 U.S. § 210 (1981), and did not treat the member's military retired pay as the property of the member and his spouse or former spouse or reserve jurisdiction to do so. The amendment does not affect modifications issued before McCarty. The claim for termination of the division of retired pay by a member whose divorce decree was modified before McCarty is therefore denied.

DECISION

This is in response to a request from the Office of General Counsel of the Defense Finance and Accounting Service (DFAS), Indianapolis Center, for an advance decision regarding termination of the division of the retired pay of Master Sergeant Leroy E. Nieman, USA (Retired), under 10 U.S.C. § 1408. For the reasons presented below, DFAS should continue to pay the established portion of his retired pay to his former spouse.

Master Sergeant Nieman retired in 1972. He and his spouse were divorced in 1973. Their original divorce decree did not treat the issue of division of retired pay. In 1977 the decree was modified to award "one-half the community retirement benefits" to Master Sergeant Nieman's former spouse. On May 17, 1978, a modification was issued to award her 43.7 percent of his military retired pay. In March 1989 she initiated a request for direct payment of retired pay by DFAS. She is currently receiving direct payments. Through his attorney, Master Sergeant Nieman requested that those payments stop effective November 5, 1992, based on an interpretation of a 1990 amendment to 10 U.S.C. § 1408 which he believes applies to his situation. He argues that the

amendment provides for a termination of payments to his former spouse under the division of his retired pay effected in 1978 because, in his view, the "original" 1973 divorce decree was the final decree, and since the 1973 decree is silent on the question of the division of retired pay, it falls under the terms of the 1990 amendment prohibiting such divisions.

As background, Congress enacted the Uniformed Services Former Spouses' Protection Act, Pub. L. No. 97-252, title X, 96 Stat. 730 (1982), in response to the Supreme Court's decision in McCarty v. McCarty, 453 U.S. 210 (1981). In that decision the Court held that state courts could not divide military retired pay under state community property laws. The effect of the Act was to negate McCarty by establishing that states have the right to treat disposable military retired pay as the property either of the member or the member and his spouse in accordance with state law. The Act provided that orders which became effective before June 26, 1981, would be enforced in accordance with their terms as of that date. See Pub. L. No. 97-252, title X, § 1006(b) Enforcement of orders modified before McCarty was specifically recognized by Congress. See H.R. Conf. Rep. No. 749, 97th Cong., 2d Sess. 167-168.

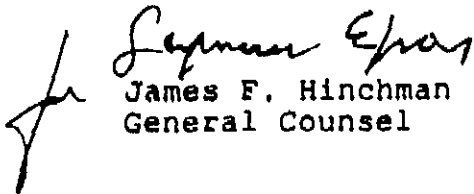
Although orders were to be enforced according to their terms as of June 26, 1981, courts continued to reopen decrees after that date to divide retired pay in cases where they had not divided it before McCarty or reserved jurisdiction to do so. Concerned about the number of divorce decrees being reopened in response to the Act, Congress added a sentence to 10 U.S.C. § 1408(c)(1) in 1990 to prohibit retroactive division of military retired pay after McCarty in decrees issued before McCarty. See Pub. L. No. 101-510, § 555, 104 Stat. 1485, 1569 (1990). The intent of the amendment is clearly stated in H.R. Conf. Rep. No. 923, 101st Cong., 2d Sess. 609, which states that if a court issued a final decree before McCarty and did not treat retired pay as the property of both spouses, it may not, "subsequent to McCarty," modify the decree to do so (emphasis added).

Under section 555(e) of Pub. L. No. 101-510, if a divorce decree issued before McCarty were modified after McCarty to divide retired pay retroactively, the member's obligation to make payments to his former spouse would continue for 2 years after the enactment date of Pub. L. No. 101-510. Since the date of enactment was November 5, 1990, the member's obligation would end on November 5, 1992.

In Master Sergeant Nieman's situation, no modifications to the divorce decree were sought or granted subsequent to McCarty. The original decree was issued in 1973 and

modified in 1978. The decree, as modified in 1978, became the final decree for the purposes of the amendment. All changes having been completed, and the decree made "final" prior to June 26, 1981, the amendment does not apply. DFAS should continue to enforce the 1978 decree. We find no indication in 10 U.S.C. § 1408 or its legislative history that a different result was intended.

Master Sergeant Nieman's claim is therefore denied, and his former spouse should continue to receive a portion of his retired pay from DFAS.


James F. Hinchman
General Counsel