



Comptroller General
of the United States

133268

Washington, D.C. 20548

Decision

Matter of: Major Michael W. Trefethen, USAF (Retired)

File: B-240481.5

Date: August 16, 1994

DIGEST

Retired member is wrong in maintaining that the percentage of retired pay attributable to his service before June 25, 1981, is not subject to division in a divorce proceeding. That date was noted in the Former Spouses' Protection Act (10 U.S.C. § 1408), whose purpose was to eliminate the effect of a Supreme Court decision that state divorce courts could not treat military retired pay as a divisible marital asset. It has no bearing on the amount of retired pay that may be awarded to a former spouse in a state court divorce proceeding.

DECISION

Major Michael W. Trefethen, USAF (Retired), has appealed the settlement of our Claims Group regarding the distribution of his retired pay under the Uniformed Services Former Spouses' Protection Act (FSPA). We affirm the settlement.

Major Trefethen retired on January 31, 1984, and on October 4, 1989, was divorced from his wife. Following various modifications of the divorce settlement pursuant to state court orders, on June 18, 1991, the court found that his former spouse was entitled to 40.9 percent of his disposable retired pay.

Major Trefethen contends that the Air Force is paying too much of his retired pay directly to his former spouse. The FSPA, at 10 U.S.C. § 1408(c), provides that "a court may treat disposable retired pay payable to a member for pay periods 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." Based on this language, Major Trefethen argues that the disposable retired pay attributable to his active duty service prior to June 26, 1981, is not divisible by the court. The Claims Group, however, rejected that argument, and endorsed the Air Force's inclusion of pre-June 26, 1981, service in the calculation of disposable retired pay.

We agree with the Claims Group. The FSPA was enacted in response to the United States Supreme Court's June 26, 1991, decision in McCarty v. McCarty, 453 U.S. 210 (1981), which held that state courts could not treat military retired pay as a divisible marital asset in divorce proceedings; the FSPA permits state courts to treat disposable retired pay as marital property. The reason for the statute's use of a starting date of June 25, 1981, the day before the McCarty decision was issued, was to negate the decision's effect. The date in issue thus is not relevant to the amount of retired pay awarded a spouse.

As noted in the FSPA, disposable retired pay is to be treated "in accordance with the law of the jurisdiction of such court." In California, where Major Trefethen's divorce occurred, the courts have held that military pension rights, earned and accruing during marriage, are the community property of the spouses, without regard to whether such rights accrued before or after June 26, 1981. In re Marriage of Fairfull, 207 Cal. Rptr. 523 (Cal. App. 1 Dist. 1984).

The Claims Group's action is affirmed.

for Robert P. Murphy
Acting General Counsel