

Military Pension Division: The Frozen Benefit Rule

By Mark E. Sullivan²

5.1— Division of Military Benefits Upon Divorce

The New Pension Division Rule

The National Defense Authorization Act for Fiscal Year 2017 (NDAA 17) contained a major revision of how military pension division orders are written and will operate. Instead of allowing the states to decide how to divide military retired pay and what formula or methodology to use, Congress imposed a single uniform method of pension division on all the states, a fictional scenario in which the military member retires on the day that the pension division order is filed. Effective December 23, 2016, the new rule up-ends the law regarding military pension division in almost every state.

The new rule applies to those still serving (active-duty, National Guard or Reserve). It is a “rewrite” of the terms for military pension division found in the Uniformed Services Former Spouses’ Protection

Act, or USFSPA.³ From now on, what’s divided will be the hypothetical retired pay attributable to the rank and years of service of the military member at the time of the order dividing retired pay. The only change will be cost-of-living adjustments which occur under 10 U.S.C. § 1401a (b) between the time of the court order and the time of retirement. There are no exceptions for the parties’ agreement to vary from the new federal rule. Everyone must do it one way, regardless of what the husband and wife decide they want the settlement to say.

How Hard Is This, Anyway?

“Frozen benefit division,” is also known as a *hypothetical clause* at the retired pay centers.⁴ It is the most difficult to draft of all the pension division clauses available. An attorney at one of the retired pay centers which processes military pension division orders put it this way: “... over 90% of the

¹I invite the reader’s attention to www.roa.org/lawcenter. You will find more than 2300 “Law Review” articles about the Uniformed Services Employment and Reemployment Rights Act (USERRA), the Servicemembers Civil Relief Act (SCRA), the Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA), the Uniformed Services Former Spouse Protection Act (USFSPA), and other laws that are especially pertinent to those who serve our country in uniform. You will also find a detailed Subject Index, to facilitate finding articles about specific topics. The Reserve Officers Association, now doing business as the Reserve Organization of America (ROA), initiated this column in 1997.

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³10 U.S.C. § 1408.

⁴For the Army, Navy, Air Force and Marine Corps, the retired pay center is DFAS (Defense Finance and Accounting Service) in Cleveland, Ohio. Pension garnishments for the Coast Guard and the commissioned corps of the Public Health Service and of the National Oceanic and Atmospheric Administration are handled by the Coast Guard Pay and Personnel Center in Topeka, Kansas.

hypothetical orders we receive now are ambiguously written and consequently rejected. Attorneys who do not regularly practice military family law do not understand military pension division or the nature of ... military retired pay. This legislative change will geometrically compound the problem."

Due to the difficulty of doing such orders, more expenses will be involved in the military divorce case and a whole new team of experts will pop up to help ordinary divorce attorneys comprehend and implement the new frozen benefit rule. Without the right help and the proper wording, there will be rivers of rejection letters flowing back to attorneys who submit their orders to the retired pay center in the hope of approval. Since the new frozen benefit rule was written by Congress, which knows next to nothing about the division of property and pensions in divorce, there will be problems galore in applying it in the courts of most states.

Although the method of dividing pensions, as well as the date of valuation and classification of marital or community property, has always been a matter of state law, that will change in the military case. Since no time has been allowed for state legislatures to adjust to the change and rewrite state laws, lawyers will need to adjust "on the fly" to deal with military pension division cases which are presently on the docket or which come to trial before the state legislature can act.

Will the new rule only affect the non-military spouse? Hardly. It will result in many problems – both predictable and unforeseeable – for *both* parties and the courts of most states. Consider this example:

- Charlie and Charlene agree to divide Charlene's retired pay exactly per the frozen benefit rule. She is a major with 16 years of service in the Marine Corps. Their settlement language tracks the new statute by stating that the disposable retired pay to be divided by court order is that of the wife, based on her years of service and rank at the time of the court order, that is, "major over 16."
- They write up the separation agreement or marital settlement document. Both sign it, and they have their signatures notarized.
- They do not, however get divorced immediately. Due to a deployment and an overseas assignment for Charlene, filing for divorce does not take top priority for her. As for the husband, he needs to maintain medical coverage as a dependent spouse so he is not eager to pursue the dissolution either. Five years pass before one of them files. By that time, Charlene is a *lieutenant colonel over 20*, not a "major over 16."
- When the divorce is granted, with the settlement incorporated into it, it is submitted to DFAS. However, that pay center rejects it, since the rank and years of service at the time of the court order is not "major over 16" any more, but "lieutenant colonel over 20." The latter is what must be divided, not the agreed terms.
- The order is rejected. A new one must be submitted, but by this time, the only order which DFAS will accept is one using the latter phrasing, since the statute is worded in terms of hypothetical retired pay "at the time of the order."

Poor draftsmanship in the statute will wind up costing the military member lots of money, in terms of increased pension payments in this scenario, and increased legal fees. Lacking skills in divorce law and property division, Congress didn't even consider adding a sentence which would have allowed the parties to consent to an alternative way of dividing the pension.

Strategy for the Servicemember

The attorney for the SM (servicemember) will have an easier time than the lawyer for the FS (former spouse) in getting through a trial or settlement. The SM has control over all the evidence and testimony needed for either procedure.

To divide the pension under the new rule, the court must know the hypothetical retired pay for the SM at the time of the order. The SM who will retire from active duty needs to give the attorney proof of the "High Three" (i.e., average of the highest three years of continuous compensation) at the time of the order which divides the military pension. That will usually be the most recent three years, and the data will be found in the pay records of the SM. Assuming that the member doesn't retain three years of LES's, the next steps would be a phone call to the retired pay center to order a "pay transcript" which would summarize the last 36 months of base pay.

For the Guard or Reserve member, the work piles up. If Captain John Doe is going through the divorce and property division, he first must get a current retirement points statement. That usually means that John must contact his retired pay center (e.g., Air Reserve Personnel Center, Buckley AFB, Colorado for members of the Air Force Reserve and the Air National Guard) to obtain a current statement (not just the most recent annual statement). With this in hand, John or his attorney would take the total of creditable points and divide that by 360 to get his "equivalent years" for purposes of calculating retired pay (e.g., 3600 points \div 360 = 10 equivalent years). With that number in hand, John would multiply the equivalent years by 2.5% to get the retired pay multiplier which must be used in computing his hypothetical pay at present.

Next, John needs to retrieve his LES (which shows the official date for his entry into the military at the top, called PEBD, or Permanent Entry Base Date). With that in hand, he can figure out his years of service (e.g., "captain over 12"),

Next John must determine his "High Three" compensation. To get this, he must know his dates of promotion, if any, and he will use the pay tables from DFAS for the last three years. Note that these are active-duty pay tables, not ones showing drill pay. They are used to determine his base pay as if he'd been on active duty. This High Three amount is his retired pay base.

Finally, retired pay base just determined is multiplied by the retired pay multiplier, found above, to come up with his hypothetical retired pay. This is the member's hypothetical pay as if he retired when the order was signed and filed.

With this information at the ready, John's attorney can provide the court with the data and the facts needed to come up with a hypothetical amount of retired pay, which will be placed in the court's order. The lawyer must be able to verify or authenticate each of the documents he presents to the judge. The court also must determine the share of that fixed pay which Mary Doe, the spouse, will receive. The attorney for the prevailing party is often tagged with the task of preparing the military pension division order, or MPDO, unless all the necessary language is placed in the divorce decree. It is strongly recommended that John and his attorney seek "outside assistance" from a lawyer experienced in writing such pension orders (see "The Warrant Officer and the Wingman," at Law Review 13169, December 2013). It will hurt John's chances significantly if he tries to "go it alone" and represent himself. For any Guard or Reserve member, the most expensive mistake which he or she can make is to appear pro se, without a good lawyer to handle the case.

The SM needs to insist on prompt entry of the court order. If the order provides the necessary information for a hypothetical award, and DFAS (once the order is received) can verify this, then Mary's pension division will be locked in at the specified years and rank. Otherwise the SM risks rejection of the order and further delay, which can only hurt him or her since "more time" sometimes equates to promotions and step-increases for pay. "Do it now" is the motto of the SM regarding a pension division order. The court should be asked to order the immediate execution of the cover sheet, DD Form 2293, which would then be given to the SM's lawyer for transmittal to the retired pay center along with the divorce decree and court order. The SM must retain complete control over the order and the submission process.

Strategy for the Former Spouse

In most cases the above is also the strategy of the FS as to documents in settlement or trial. The lawyer for the FS must get and submit the above information to the judge in a trial, and must have this information for a settlement so as to write up if the court is to do a proper hypothetical clause in light of the new frozen benefit rule. If the SM is obstinate, it can take weeks or months to obtain this information from the source (that is, the pay center) with a court order or judge-signed subpoena.³

There are several ways to try to get around the immediate division of a frozen benefit for the FS. No single approach is best, and the rules have not been written as of February 2017. The motto is NOT “One Size Fits All.” Some states may restrict or prohibit one or more of these strategies. The FS’s attorney may try out the following to “even the scales” in trial or settlement:

- When the parties agree, spousal support is one way to obtain payments not restricted to a retirement based on rank and years of service (and the *High Three*) at the time of the order. An alimony order – which can be used by skilled attorneys to mimic a pension division – gives much more flexibility in dealing with the retired pay center, so long as the payments do not end at remarriage or cohabitation of the FS. There is, for example, no requirement for 10 years of marriage overlapping 10 years of creditable service. A consent order for spousal support should suffice to obtain the payments to the FS upon retirement of the SM, and the tax consequences will be the same, namely, the FS is taxed on the payments and they are excluded from the income of the payor/retiree. This is an ideal tool to use in preparing “mirror pension orders” when the spouse also has pension benefits and the parties wish to divide their pensions in the same way.
- If the lawyer for the SM is not fully skilled in preparing hypothetical orders (and few attorneys nationwide are), then an imperfect order might result, one which is rejected by the retired pay center. In this case, the FS’s attorney may just sit back and do nothing. The strategy would be to let the “imperfect order” cure for a while – like a fine wine or a country ham – until the SM retires, and then have the FS ask the court for a “clarifying order” which can be properly submitted to the retired pay center. Then it would be the *High Three* at retirement which would be divided.
- The FS might ask the court for an award of spousal support to make up the difference, that is, the money which would be lost to the FS by division of the hypothetical retired pay of the SM. If the FS is awarded alimony while the member is still serving, the FS will try to argue that it should not simply end automatically upon the SM’s retirement, since some amount might be needed to even out the pension division for the FS.
- The FS can always ask the court for an unequal division of the property acquired during the marriage, in an attempt to even out the entire property division scheme due to the division of a truncated asset of the SM, not the final retired pay. Or the FS can ask for a greater share of the pension to make up for the smaller amount which will be divided.
- Finally, the FS can also demand a present-value division of the pension, with an expert witness setting the likely value of the retired pay, so that it can be offset by other assets given to the FS in exchange for a full or partial release of pension division. Evaluating a pension is a complex task. It is not for the faint-hearted, the unprepared, or the amateur. These complicated computations generally demand the evaluation report and testimony of an expert.

Resources

A complete guide to preparation, problems and pitfalls in the “Frozen Benefit Rule” is in the Silent Partner infoletter, “Fixing the Frozen Benefit Rule.” How to write acceptable military pension clauses may be found at the Silent Partner, “Guidance for Lawyers: Military Pension Division.” For the necessary terms for the MPDO, see the Silent Partner, “Getting Military Pension Orders Honored by the Retired Pay Center,” a guide which includes the necessary elements and language for a proper hypothetical clause. All these info-letters are located at www.nclamp.gov > For Lawyers, the website of the N.C. State Bar’s military committee.
