Introduction: SILENT PARTNER is a lawyer-to-lawyer resource for military legal assistance attorneys and civilian lawyers, published by the Military Committee of the American Bar Association’s Family Law Section and the North Carolina State Bar’s military committee. Please send any comments, corrections and suggestions to the address at the end of this Silent Partner. There are many SILENT PARTNER infoletters on military pension division, and other aspects of military divorce. Just go to www.americanbar.org > Family Law Section > Military Committee (the website of the above ABA committee) or www.nclamp.gov > For Lawyers (the website of the military committee, N.C. State Bar).

Frozen Benefit Basics

The military pension division case is tough enough to handle most of the time. It becomes even more complicated, however, when the uniformed services pension to be divided is governed by the Frozen Benefit Rule. The new, required method of military pension division involves a hypothetical amount of retired pay, calculated as of the SM had retired on the date of the decree of divorce, dissolution, annulment or legal separation (hereafter divorce*). Details regarding the Rule may be found in two Silent Partner info-letters, “Fixing the Frozen Benefit Rule,” and “All Clauses Considered: Writing the Frozen Benefit Award.”

The Rule was effective on December 23, 2016 in an amendment to the Uniformed Services Former Spouses’ Protection Act. It states that the pension to be divided - for servicemembers who are not receiving retired pay on a divorce* date after 12/23/16 - will be a hypothetical amount calculated as if the member had retired on the day of divorce.

Data Required

Specific data from the records of the servicemember (SM) are required for the pension division document if it is to be accepted and honored at the retired pay center for garnishment of the military pension as property division. These are:

---

1 You can also find explanations and information at the DFAS website, www.dfas.mil > Garnishment > Notice of Statutory Change, and there is also sample order language to use in complying with the Rule.

2 The pension division document is a decree of divorce, dissolution, legal separation or annulment, or a settlement agreement incorporated therein. 10 U.S.C. § 1408(a)(2).

3 “Disposable retired pay” is that pay which may be divided between the parties in a divorce or separation case. 10 U.S.C. § 1408(a)(4).

4 The terms of the amendment are found at 10 U.S.C. § 1408(a)(4)(B) and at ¶ 2908 of Chapter 29, Vol. 7B of the Dept. of Defense Financial Management Regulation.

5 Retired pay orders for the Army, Navy, Air Force, Marine Corps, as well as the National Guard and Reserves (known as the RC, or Reserve Component), are processed by the Defense Finance and Accounting Service (DFAS), located in Cleveland, Ohio. Pension orders for members of the U.S. Coast Guard and Coast Guard Reserve are sent to the USCG Pay and Personnel Center (http://www.uscg.mil/ppc/), located in Topeka, Kansas. Orders for the commissioned corps of the Public Health Service and the National Oceanic and Atmospheric Administration are also serviced by the Coast Guard PPC.
• The SM’s retired pay base, also known as the “High-3” amount⁶ (i.e., the actual dollar figure); and
• The SM’s years of creditable service.⁷

Counsel for the Servicemember

When the attorney represents the SM, information about Sergeant John Doe’s years of creditable service can usually be provided by John himself. In a pinch, it may be accessed from the Pay Date and DIEMS data shown on his Leave and Earnings Statement.⁸

As to the “High-3” pay for John, however, it may be necessary to request information from government officials who have access to the individual’s military records, especially the ones involving military pay. Information on “High -3” pay might not be readily available to John (i.e., John probably won’t have the applicable 36 months of his LES’s readily available). John’s attorney might consider a communication to John that looks like this:

John: I need you to get letter from the base finance office showing your "High-3" at date of divorce. That means the highest 36 months of base pay. It's usually the 36-month period leading up to the specified date for valuation under state law [which is the divorce date here in the state of East Carolina]. The letter from finance might look like this:

LETTERHEAD, 359th Finance Office, Joint Base Andrews
To: John Q. Doe, Staff Sergeant, U.S. Air Force, xxx-xx-1234
From: Major Ed P. Wilson, Finance Office Commander
Date: August 2, 2018

You asked this office to prepare information on your "High-3" pay as of February 28, 2015, the date of your divorce in Raeford County, East Carolina. The "High-3" pay of a servicemember is the highest three years (36 months) of compensation. 10 U.S. Code 1407(c).

I have reviewed your records, and the highest 36 months of compensation would be the three-year period ending 28 February 2015 in your case. The figures are:

<table>
<thead>
<tr>
<th>Period</th>
<th>Amount</th>
</tr>
</thead>
<tbody>
<tr>
<td>March 1-December 31, 2012</td>
<td>$____</td>
</tr>
<tr>
<td>January - December 2013</td>
<td>$____</td>
</tr>
<tr>
<td>January - December 2014</td>
<td>$____</td>
</tr>
<tr>
<td>January 1 - February 28, 2015</td>
<td>$____</td>
</tr>
<tr>
<td>Total of the above</td>
<td>$____</td>
</tr>
<tr>
<td>Average of the above</td>
<td>$____</td>
</tr>
</tbody>
</table>

The final figure (“Average of the above”) is your High-3 Pay as of 28 Feb. 2015.

---

⁶ The retired pay base for those entering military service before 8 September 1980 is the individual’s final pay, but there are almost none of these SMs still serving today. The “High-3” amount is the highest three years of pay at the time of retirement (or, in the case of the Frozen Benefit Rule, the time of hypothetical retirement). 10 U.S.C. § 1407(c).
⁷ See DoDFMR, Vol. 7B, Ch. 29, ¶290803. In the case of a member of the Reserves or National Guard, the years of creditable service is replaced with “total number of retirement points” as of the date of the decree of divorce.
⁸ For details, see the Silent Partner info-letter, Military Pension Division and the “Big Freeze”: Nuts and Bolts.
If the base finance office cannot help, the military member can try Customer Service at DFAS (or the equivalent office at the Coast Guard Pay and Personnel Center) or whatever other office manages his pay.

Note that John Doe or his attorney will have to specify what period of time is involved. The pay center will not give him the number or the underlying data responding to a request for “my High-3 pay.” Even though the pay center has the information, the officials there may reply that the computers have not been programmed to provide the data. So John may need to phrase his request in terms such as, “My base pay for each month between June 1, 2015 and June 1, 2018,” if that is his highest 36 months of pay. Once that information is obtained, getting the monthly average on a handheld calculator is pretty simple.

In lieu of obtaining the documents and data from the pay center, John can prepare a spreadsheet, such as a chart in Excel. Such a document - based upon military pay tables found at www.dfas.mil for present and past years, as well as his dates of promotion, if any - will show his rank and his pay for the applicable 36-month period.9

For RC (Reserve Component) personnel (that is, those in the Reserves or the National Guard), the issue is finding out how many retirement points exist on the date of divorce. This usually means that the SM has to get on-line and go to the secure personnel portal for his branch of service, such as Human Resources Command at Ft. Knox, Kentucky for Army Reservists, or the Naval Reserve Personnel Center, Millington, Tennessee for sailors in the Naval Reserve. Once the annual points statement is obtained, there might need to be some interpolation to figure out the approximate number of points X months ago when the divorce occurred. Or the attorney might need to extrapolate to come up with a good faith estimate on what the points total would be Y months from now when the divorce is scheduled to occur.

When Representing the Spouse…

If you represent the spouse, you’ll need to try to get information from the other side. Sometimes opposing counsel is cooperative. When that’s the case, one can obtain information by writing a message or a letter that asks the SM to provide the following:

INFORMATION -

*Which were the highest three years (36 months) of your pay as of the date of divorce?

*What was the total amount paid in those 36 months?

*What is your DIEMS (Date of Initial Entry into Military Service)? Note: This is usually shown on the right side of the SM’s LES.

*What is your Pay Date? Note: This is shown on the top of the SM’s LES.

*If applicable, state any periods reflecting a break in your military service.

*What total years and months of creditable service did you have as of the date of divorce? Note: For RC personnel, this would ask for total retirement points in place of “years and months of creditable service.”

*What was your “High-3” pay (i.e., the monthly average of your highest 36 months of compensation, or base pay) as of the date of divorce?

9 An example of an Excel chart is at ATCH 3 of the Silent Partner cited in the previous footnote.
*What is the date of your last promotion?

**DOCUMENTS -**

*Your most recent leave and earnings statement (LES).

*LES’s which include your highest 36 months of pay as of the divorce date (or else official pay data or an extract of pay data from military finance center, either DFAS or the Coast Guard Pay and Personnel Center).

*W-2 Forms for the tax years that include your highest 36 months of pay.

When the other side resists, consider a release and consent form. An example is found at the end of the Silent Partner infoletter, “Docs for Division.” Another option is to pursue discovery by means of interrogatories and document requests. When all else fails and the case involves DFAS as the pay center, try to obtain the documents by using a court order or subpoena signed by the judge. With the Coast Guard, sometimes a phone call, letter or e-mail to the Pay and Personnel Center in Topeka, KS will produce useful information.

(Rev. 10/4/18)

* * *

This Silent Partner was prepared by COL Mark E. Sullivan (USA-Ret.). For revisions, comments or corrections, contact him in Raleigh, N.C. - 919-832-8507, or at mark.sullivan@ncfamilylaw.com.