

The New Definition of “Disposable Retired Pay” In the Division of Military Retirement for Military on Active Duty

By Mary M. Benzinger, Esquire¹
mary.m.benzinger.civ@mail.mil

The 2017 National Defense Authorization Act (NDAA) amends 10 USC §1408 changing the calculation of disposable retired pay for division of retired pay for Servicemembers on active duty on the date of divorce. Defense Finance and Accounting Service (DFAS) now must calculate retired pay as if the Servicemember retired on the date of divorce. The amendment applies to any “*division of property as part of a final decree of divorce, dissolution, annulment, or legal separation involving a member of the Armed Forces to which section 1408 of title 10, United States Code, applies that becomes final after the date of the enactment of this Act.*”²

As amended, 10 USC §1408(a)(4) now reads:

(4) (A) The term “disposable retired pay” means the total monthly retired pay to which a member is entitled (*as determined pursuant to subparagraph (B)*) less amounts which—

(i) are owed by that member to the United States for previous overpayments of retired pay and for recoupments required by law resulting from entitlement to retired pay;

(ii) are deducted from the retired pay of such member as a result of forfeitures of retired pay ordered by a court-martial or as a result of a waiver of retired pay required by law in order to receive compensation under title 5 or title 38;

(iii) in the case of a member entitled to retired pay under chapter 61 of this title, are equal to the amount of retired pay of the member under that chapter computed using the percentage of the member’s disability on the date when the member was retired (or the date on which the member’s name was placed on the temporary disability

retired list); or

(iv) are deducted because of an election under chapter 73 of this title to provide an annuity to a spouse or former spouse to whom payment of a portion of such member’s retired pay is being made pursuant to a court order under this section.

(B) For purposes of subparagraph (A) the total monthly retired pay to which a member is entitled shall be -

(i) The amount of basic pay payable³ to the member for the member’s pay grade and years of service at the time of the court order, as increased by

(ii) each cost-of-living adjustment that occurs under section 1401a(b) of this title between the time of the court order and the time of the member’s retirement using the adjustment provisions under that section applicable to the member upon retirement.

Calculation Before the Amendment: DFAS calculates “total monthly retired pay” (also known as gross retired pay) as $.025$ (retired pay multiplier)⁴ x retired base pay (average “high-3” pay)⁵ x total years of service.⁶ From that gross pay DFAS then subtracts Survivor Benefit Plan (SBP) premiums, Veterans Administration disability offsets, etc. to reach “disposable retired pay.”⁷

Disposable retired pay is then subjected to a formula (e.g. total years of service during marriage/total years of service x 50%) to achieve the former spouse’s share.⁸

For example, Lieutenant Colonel Smith (O-5) has 12 years of service during marriage and 18 years and 3 months of total service at date of separation

of January 10, 2016. He plans to retire at 30 years. Assume he retires as a Colonel (O-6) with a high-3 average pay of \$14,500.00. Colonel Smith's gross monthly retired pay would be $.025(\text{retired pay multiplier}) \times 30 \text{ years} \times \$14,500 (\text{high-3}) = \$1,0875.00$. The parties signed a PSA in August 2016 defining the former spouse's marital share as $.50 \times 12 \text{ years of service during marriage divided by total years of service}$. Former spouse's would share would be $\$1,0875.00 \times .20 = \$2,175.00$

Acceptable Formulae and Requirements After the Amendment:

DFAS has issued guidance for acceptable formulae under the amendment.⁹

DFAS will recognize four possible formulae:¹⁰

1. Fixed award: "The former spouse is awarded \$ _____ (dollar amount) of the member's disposable military retirement pay."
2. Percentage award: "The former spouse is awarded _____ percentage of the member's disposable military retirement pay."
3. Formula award: "The former spouse is awarded a percentage of the member's disposable military retired pay, to be computed by multiplying _____% times a fraction, the numerator of which is _____ months of marriage during the member's creditable military service, divided by the member's total number of months of creditable military service."
4. Active duty hypothetical calculated as of time of division, for members who entered AFTER 9/1/80: "The former spouse is awarded _____% of the disposable military retired pay the member would have received had the member retired with a retired pay base (High-3) of _____ and with _____ years of creditable service on _____."

In addition to one of the above formulae, every retired pay division order must now provide DFAS with the following information:¹¹

- The member's high-3 amount at the time

of divorce (the actual dollar figure);¹²

- The member's years of creditable service at the time of divorce; or in the case of reservist, the member's creditable reserve points at the time of divorce.

Calculating the "High-3":

As stated, DFAS needs the "high-3," the average of the highest 36 months of base pay, to calculate gross retired pay. To calculate this yourself, you'll need the last three years of the Servicemember's Leave and Earnings Statements (LES). If you can't obtain the LES's, you'll need the current and historic military pay charts,¹³ the Servicemember's current years and months of service for pay, and the date the Servicemember attained the current rank.

To do it yourself, keep in mind length of service and dates of promotion change the pay. If LTC Smith's last date of promotion is April 1, 2015 and as of the date of divorce on May 15, 2017 he has 19 years and 7 months of service, his high-3 on the date of divorce is calculated as follows:

June 1, 2014 to December 31, 2014 = $\$7,280.70 \times 7 = \$50,964.90$
(O-4 with over 16 years)
January 1, 2015 to March 30, 2015 = $\$7,353.60 \times 2 = \$22,060.80$
(O-4 with over 16 years)
April 1, 2015 to September 30, 2015 = $\$8,053.80 \times 6 = \$48,322.80$
(promoted to O-5 with over 16 years)
October 1, 2015 to December 31, 2015 = $\$8,281.20 \times 3 = \$24,843.60$
(O-5 with over 18 years)
January 1, 2016 to December 1, 2016 = $\$8,388.90 \times 12 = \$100,666.80$
(O-5 with over 18 years)
January 1, 2017 to May 15, 2017 = $\$8,565.00 \times 5 \text{ mos.} = \$42,825.00$
(O-5 with over 18 years)
Total pay for 36 months = \$289,683.90
Average high-3 = $\$289,683.90/36 = \$8,046.78/\text{month}$

In our Lieutenant Colonel Smith example, the high-3 of an O-5 with 19 years, 7 months of service on the date of divorce of May 15, 2017 is \$8,046.78. DFAS will calculate the gross retired pay as if he retired on the date of divorce as $\$8,046.78 \times .025$ (retired pay multiplier) $\times 19.5833$ years of the creditable service = $\$3,939.56$.¹⁴ Then DFAS will apply the former spouse's marital share of 12/30 (.20) as set forth in the agreement or court order. The former spouse's share will now be $\$3,939.56 \times .2 = \787.91 (plus COLAs) – a big difference from the \$2,175.00 she would have gotten prior to this amendment. As you can see there is an issue for agreements drafted

under the belief that the pre-amendment calculation would apply but where the divorce is entered after December 23, 2016.

Under the amendment, the former spouse does not get the benefit of future promotions and years of service. Because the amendment forces the calculation of the retirement as of the date of divorce, going forward, practitioners should consider modifying the marital share formula from “years of service during marriage divided by total years of service at actual retirement” to “years of service during marriage divided by total years of service at date of divorce.” Applying that concept to this example yields a former spouse share of $\$8,046.78 \times .025$ (retired pay multiplier) $\times 19.5833$ years of the creditable service = $\$3,939.56 \times .3064$ (former spouse percentage $12/19.5833$) = $\$1,207.08$ (plus COLAs to date of actually retirement). ❖

Endnotes

1. This article is written in Ms. Benzinger’s private capacity and does not represent the opinions or position of the U.S. Department of Defense or the U.S. Army.

2. 2017 NDAA Sec. 641, Pub Law 114-328. Enacted December 23, 2016.

(a) IN GENERAL.—Section 1408(a)(4) of title 10, United States Code, is amended—

(1) by redesignating subparagraphs (A), (B), (C), (D) as clauses (i), (ii), (iii), (iv), respectively;

(2) by inserting “(A)” after “(4)”;

(3) in subparagraph (A), as designated by paragraph (2), by inserting “(as determined pursuant to subparagraph (B))” after “member is entitled”; and

(4) by adding at the end the following new subparagraph: the following: “(B) For purposes of subparagraph (A) the total monthly retired pay to which a member is entitled shall be -

“(i) The amount of basic pay payable to the member for the member’s pay grade and years of service at the time of the court order, as increased by

“(ii) each cost-of-living adjustment that occurs under section 1401a(b) of this title between the time of the court order and the time of the member’s retirement using the adjustment provisions under that section applicable to the member upon retirement.”

(b) APPLICATION OF AMENDMENTS.—The amendments made by subsection (a) shall apply with respect to any division of property as part of a final decree of divorce, dissolution, annulment, or legal separation involving a member of the Armed Forces to which section 1408 of title 10, United States Code, applies that becomes final after the date of the enactment of this Act.

3. It appears DFAS interprets this to also mean “high-3.”

4. Financial Management Regulation, DoD 7000.14R, Vol. 7B, Ch. 1, Section 010103.

5. DFAS uses “high-3” – the average of the highest 36 months of base pay for Servicemembers entering service after September 8, 1980. See Financial Management Regulation, DoD 7000.14R, Vol. 7B, Ch. 1, Section 010102.A.2.

6. Financial Management Regulation, DoD 7000.14R, Vol. 7B, Ch. 1, Section 010102.A.2.

7. 10 USC 1408 (a)(4)

8. Financial Management Regulation, DoD 7000.14R, Vol. 7B, Ch. 1, Section 290211.

9. See <https://www.dfas.mil/garnishment/usfsp/NDAA--17-Court-Order-Requirements.html> (February 15, 2017)

10. See link to “Sample Order Language” for Reservists and Servicemembers who entered service before September 8, 1980. <https://www.dfas.mil/garnishment/usfsp/NDAA--17-Court-Order-Requirements.html> (February 15, 2017)

11. For Servicemembers entering service before September 8, 1980 see ID.

12. Yes! YOU must supply this number. DFAS will not calculate it for you.

13. <https://www.dfas.mil/militarymembers/payentitlements/military-pay-charts.html> (February 15, 2017).

14. DFAS will apply retiree cost of living increases (COLAs) on this amount to date of actual retirement.