

TDS INFORMATION PAPER
4133 Regional Trial Defense Team
Oregon Army National Guard
Reserve Retirement Division Calculations in Divorce in Oregon
May 2013

Information papers are intended to provide general guidance in legal issues. They are not intended to substitute for the advice of a qualified attorney. This paper primarily discusses the general concepts for division and calculation of reserve component military retirement. This paper does not constitute legal advice. The law changes all of the time, and the information herein should be considered a starting point. Websites change all of the time, and no recommendations are made as to the information provided in other websites. You should not rely solely on this information paper for the decisions you have to make. If you have questions you should seek out a qualified attorney.

Legal Assistance attorneys (LAA) or Trial Defense Counsel (TDC) may provide legal assistance in family law matters under AR 27-3, and the restrictions provided by the Staff Judge Advocate (SJA) and the Regional Defense Counsel (RDC). These Judge Advocates represent the particular eligible individual and provide advice and assistance to determine their legal rights and obligations. The Oregon Trial Defense Service (TDS), which primarily provides military criminal justice defense matters, only provides legal assistance services in family law cases after a referral from the Office of the Staff Judge Advocate (OSJA) due to conflicts or inability to represent in a particular case. Therefore, requests for legal assistance advice must first go the OSJA LAA. All requests to Oregon TDS must use the Request for Counsel Form (RFC) on the Oregon TDS website at www.oregon.gov/omd/jag.

Judge Advocates (JA or “JAG”) are severely limited in their representation of someone, particularly since JAGs will not file legal papers or appear in court. If you have time sensitive matters, papers to respond to, unless you can see a JAG immediately you should seek out the advice of a qualified private attorney immediately. If you have an attorney already then JAG cannot talk to you without their permission. As there are military issues in many cases, your private attorney can work through you to coordinate issues with a JAG.

The Oregon National Guard (ONG) JAG Office and Oregon TDS only represent ORNG members and eligible family members in the Oregon National Guard. If you are Active Duty or Army Reserve you should contact the closest legal assistance office at an active duty military installation.

If you are representing yourself then you are ‘pro-se’ or ‘self-represented’. Even though you are self represented, it is your responsibility to comply with Law, including statutes, case law, regulations, court rules and supplemental local court rules. You are expected to understand the existence of such and properly apply the law. The judge will not do

it for you. The law is complicated and there is no way that this paper can discuss all aspects of any case type.

References:

2010 Guard and Reserve Handbook, pg. 54-58 (2010); *Entitlement to Retired Pay: Computation of Years in Service*, 10 USC § 12732; *Uniformed Services Former Spouse's Protection Act*, 10 USC §1408 et seq; *Manners and Manners*, 68 Or App 896, 693 P2d 134 (1984); *Kiser and Kiser*, 176 Or App 627, 32 P3d 244 (2001); *Reich and Reich*, 150 Or App 311, 313-314, 946 P2d 319 (1997); DFAS memorandum to Attorneys, ATTORNEY INSTRUCTION, DIVIDING MILITARY RETIRED PAY on line at www.dfas.mil/dms/dfas/garnishments/pdf/garn_attorneyinstruct.pdf .

General Information:

The purpose of this memorandum is to explain reserve military retirement benefits, respondent's actual retirement benefits, and the appropriate division in accordance with Oregon case law and the Uniformed Services Former Spouses' Protection Act, 10 USC §1408 et seq. The Defense Finance and Accounting Service (DFAS) has a good memorandum that really must be examined in conjunction with this memo, currently located on line at www.dfas.mil/dms/dfas/garnishments/pdf/garn_attorneyinstruct.pdf .

Military retirement divisions in divorce are essentially determined by a process that is guided by the requirements of the Defense Finance and Accounting Service (DFAS), other federal law and state law in division of retirement. Nothing herein is legal advice, and you cannot rely on this general information solely in determining a divorce retirement division. You are strongly suggested to secure the advice of an attorney familiar with military retirement division in your case, and to coordinate with DFAS as necessary to assure a retirement order sufficient for them to apply. The final order must be 'filed' with DFAS to assure that the distribution is made at the appropriate time. Assuming such a court order is 'filed' and accepted by DFAS as enforceable is presumptively a false assumption without verification from DFAS.

Summary of Computation of Reserve Retirement Pay: To determine how much retired pay one is eligible to receive in a dollar amount; the first step is to calculate the number of equivalent years of service. The formula for computing equivalent years of service for Reserve retired pay at age 60 is as follows:

a. Total number of Creditable Retirement Points, divided by 360. The formula computes the number of equivalent years of service the soldier has completed (comparable to full time service). For example, 3,600 points equals 10 years.

b. Take the average of the last 36 months of monthly basic pay for the member's grade and length of service at the time the member's grade and length of service at the time the member become entitled to receive retired pay – age 60

c. Multiply the rate by 2.5 percent of the years of service (up to a maximum of 30 years of service) computed (a) above. *2010 Guard and Reserve Handbook*, pg. 54-58 (2010).

d. Examine then the pay scale effective on the SM's date of discharge at their grade and years of service.

e. Take SM's total Creditable Retirement Points, divide by 360 to create the equivalent years of service. (eg $4568/360 = 12.69$).

f. If the SM has retired then the denominator months is known (total points/360 x 12) but if not retired, then an actuarial value would have to be determined based on an assumption on the 20 years for retirement and whether the SM would go past that 20 years. Since the dollar figure results in no COLA, presumably most spouses will object to a dollar figure.

Under both Federal and Oregon State law military retirement pay is divisible marital property. *Uniformed Services Former Spouses Protection Act*, 10 USC §1408 et seq; *Wood and Wood*, 66 Or App 941, 676 P2d 338 (1984). However, the total amount of military retired pay payable under any court orders may not exceed 50 percent of such disposable retired pay. USFSPA at (e).

Oregon case law defines how to determine the actual value of military retirement benefits and how to calculate the divisible marital portion. The following is the applicable Oregon case law:

a. In *Kiser and Kiser* at 630, the court affirmed and remanded the dissolution judgment, with the following instructions regarding the proper division of retirement benefits. "Typically, the value of a nonparticipating spouse's interest in a defined benefit plan is determined as follows:

'The proper method . . . is to determine the 'actuarial present value.' [That] value is by definition that amount of money presently needed to purchase an annuity that would pay a particular monthly amount for the life expectancy of the retired employee. To calculate the present value of this kind of marital asset that accrued during the marriage, the 'time rule' is used. That rule requires multiplying the present value by a fraction, the numerator of which is the years or months of service during which the spouse lived together as a marital unit, the denominator of which is the total years of service required to receive the retirement benefits.' Id. *Reich and Reich*, at 313-314.

b. In *Manners and Manners* at 899, the court held the Husband's Coast Guard Pension was to be divided on his actual receipt of benefits, using the coverture or time rule fraction-

type formula. Here, the court awarded one-half of that portion of the pension accumulated during the marriage. “Because the marriage spanned 86.26 percent of husband’s military career, wife is awarded 43.13 percent of husband’s monthly pension payments as they become due, including any future cost of living increases.” Id.

DFAS Federal Requirements summary:

For direct payment from DFAS, there are requirements:

1. The ten year test. The marriage must overlap with ten years of service creditable toward retirement.
2. Sum certain. The court order must provide for payment from military retired pay, and the amount must be a specific dollar figure or a specific percentage of disposable retired pay.
3. Jurisdiction. The order must show that the court has jurisdiction over the soldier in accordance with USFSPA provisions.

For any court order (a QDRO is not required), for all direct payment orders, there must be:

1. A final decree of divorce, dissolution, legal separation, or court approval of a property settlement agreement; and
2. A statement in the order that the soldier's Servicemembers Civil Relief Act (SCRA) rights were observed (if he or she was not represented in court).

Thus, ordinarily there probably will be 10 years of overlapping marriage, and the determination will have to be made to either seek a dollar amount award of the retirement when it starts paying or a percentage of the retirement amount.

Discussion on the Calculation:

There are two routes of division, one leading to a dollar amount which DFAS probably will not give a cost of living adjustment (COLA) to and the other being a percentage. The dollar amount can fix the benefit at the given rank of the military member without benefit to the other spouse from increases in the rank of the military member but is more likely usable only accurately after retirement. On the other hand a percentage can be used during continuing service, will always take into account the increases in rank of the military member, allow any COLA, but leave the percentage the same as the dollar figure would be. Any determination of division prior to vesting for retirement with a 20 year letter is speculative since the servicemember still must reach that point of eligibility, and the survivors benefit plan plays into the overall situation for whether there will be anything to divide in the post retirement death of a former spouse.

The "Typical" formula for dividing retired pay is a creation of state law, as there is no federal formula. Here is the concept:

Length of overlap of
1/2 x marriage and service x 100 = %
Time in service

Variations on the standard formula:

Length of time the marriage
1/2 x overlap with military service x 100 = spouse's %
Length of military service at separation or divorce

Spouse's % using X retired pay for rank held
standard formula at time separation\divorce = %
Actual Retired Pay

Generally this is calculated by:

1. SM's total points.
2. Overlapping points.
3. The unknown total points that will eventually be earned by the SM.
4. Depending on the court's division, the court can award any percentage up to 50% of the overlapping percentage.

So the basic formula at a 50% division is

OVERLAPPING POINTS / 360 X 12 = MONTHS OF OVERLAPPING MARRIAGE
_____ X 50%

TOTAL POINTS AT RETIREMENT / 360 X 12 = TOTAL MONTHS OF SERVICE

For instance

The servicemember (SM) has 5000 points now at the date of divorce. The parties have been married 10 years (120 months), and SM has been in the service 12 years (144 months). So thus far in the marriage the parties have had a substantial overlap of marital time with military service. SM may or may not retire, but we know that SM must reach 20 years to vest, and will not likely receive retirement pay until age 60, and that electing the former spouse into SBP, while it lowers the retirement dollars, gives a guaranty for the surviving spouse if the service member (SM) dies before age 60 but after vesting. For the example assume that the SM gained 4000 of the 5000 points in the overlapping 10 year marriage. Under a percentage, the SM spouse could claim:

'N' = $4000 / 360 = \text{years} \times 12 = \text{months}$

Over the denominator of

'D' being an Unknown total of points to retirement / $360 = \text{years} \times 12 = \text{months}$

For the example, assume SM retires with 6000 total points at 20 years:

133.33 months overlapping marriage months

Over = $66.66\% \times .50$ or 33.33%

$6000/360 = \text{years} \times 12 = \text{months} = 199.99 \text{ months}$

Thus, under the percentage the final retirement figure is 33.33% of the SM's final disposable retirement pay.

If SM had a bunch of AD time in and gained more points in the last few years then lets look at a points calculation on the denominator that increases to 7880 points.

The calculation would then be 133.33 overlapping months over $7880/360 = 21.888 \times 12 = 262.66$ months and that results in $133.33/262.66 = 50.76 / 2 = 25.38\%$ award to the spouse.

Surviving spouse Benefit Plan (SBP) issues. While the SBP designation probably will ordinarily be included in the Judgment, there is no requirement for any division of money for an order, so presumably an order can be separate from a determination of the actual division to comply with the one year timeline for application for SBP. This paper does not delve deeply in to SPB. One should review the DFAS website, currently at www.dfas.mil, and particularly <http://www.dfas.mil/retiredmilitary/provide/sbp/change.html> and <http://www.dfas.mil/retiredmilitary/provide/rcsbp.html>.

A member may be "deemed" to have designated a former spouse as an SBP beneficiary even if the member did not provide the agreement or court order to finance.

This "deemed" election is not automatic; it must be triggered by a request from the former spouse, and the request must be sent to the appropriate military finance center not later than 1 year after the date of the court order. 10 U.S.C. § 1450(f)(3)(A) or for voluntary agreements, the date of divorce. 10 U.S.C. § 1448(b)(3)(A).

Once a timely request is made, the finance center will flag the service member's records. Upon the member's retirement, the former spouse will be designated as an SBP beneficiary

The Uniformed Services Former Spouse Protection Act (USFSPA) permits the division of "disposable" retired pay. However, "disposable" retired pay is only the portion of the retired pay remaining after the Servicemember elects to receive a dollar-for-dollar offset in the form of disability compensation, or the amount that is the difference between the Servicemember's gross retired pay and his disability pay. The U.S. Supreme Court in *Mansell v. Mansell* held that, in accordance with (IAW) the USFSPA the former spouse may not be awarded any portion of the disability offset that the Servicemember elects to receive.

Often Courts look to indemnity provisions - to the effect that the Servicemember will not take action to reduce the amount or retired pay the former spouse would receive (or if he does so, he will "make up" that portion that the former spouse loses due to his acceptance of disability pay). A Servicemember may want to do this because disability pay is federal income tax free.

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