

# SILENT PARTNER

## A TERA Bite for Military Pension Clauses

*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. 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, the survivor Benefit Plan and other aspects of military divorce. Just go to [www.abanet.org/family/military](http://www.abanet.org/family/military) (the website of the above committee) or [www.nclamp.gov](http://www.nclamp.gov) (the website of the military committee, N.C. State Bar).*

### Drafting for the Retiree

When you're drafting a military pension division clause for the retiree, the client often wishes to "fix the benefit" as of a specific date, such as when the parties separated, when the divorce case was filed, or when the divorce was granted. If the matrimonial settlement was written to require this kind of pension division, then a later-drafted military pension division order (if properly drafted) will be accepted by the retired pay center.<sup>1</sup>

Let's assume that John Doe entered military service the same year that he married Mary Doe, and they broke up 16 years later. Their separation agreement, signed just weeks after they split, states that Mary is to receive 50% of the military retirement benefit to which John would have been entitled if he had retired on their DOS (date of separation). At DOS, John was a lieutenant colonel (LTC) in the Army.

Several months later, they are divorced in the state of East Virginia, and their agreement is incorporated into the divorce decree. Since the parties' attorneys know next to nothing about the intricacies of military pension division, and they don't know any experts to whom they can entrust the task of writing up a military pension division order (MPDO), they let it slide. For one reason or another, nothing is done to implement the distribution of John's pension when it hits "pay status."

### Time to Draft the MPDO

John goes on to serve a full 25 years in the Army, and when he comes to your office, he's about half a year away from becoming a civilian; his final six months are all that stand between him and "life after Army." Well, not quite. You see, Mary Doe found out about John's pending retirement, and now she's back on her lawyer's doorstep, demanding to know what happened to the order dividing John's pension, the order which is supposed to pay her share into her bank account every month by garnishment from John's retired pay. That's when Mary's lawyer calls you and demands a pension division order in time for John's retirement.

Preparing a hypothetical clause is complicated, but the drafting is made easier through the sample clauses contained in the attorney instruction guide prepared by DFAS, the Defense Finance

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<sup>1</sup> The retired pay center for the Army, Navy, Air Force and Marine Corps is the Defense Finance and Accounting Service (DFAS) in Cleveland, Ohio. For the Coast Guard, and the commissioned corps of the Public Health Service and of the National Oceanic and Atmospheric Administration, it is the Coast Guard's Pay and Personnel Center in Topeka, Kansas.

and Accounting Service. This is the Army's retired pay center, and it is responsible for pension division garnishments as property division under the Uniformed Services Former Spouses' Protection Act.<sup>2</sup> The information letter, "Guidance on Dividing Military Retired Pay," is available at the DFAS website, [www.dfas.mil](http://www.dfas.mil) > Garnishment Information > Former Spouses' Protection Act > Attorney Guidance. It explains how to write hypothetical clauses for those who are retiring from active duty, as well as from the Guard or Reserves.

A hypothetical retired pay division clause means that the award is expressed as a percentage of a hypothetical retired pay amount, that is, one which is different from the servicemember's (SM's) actual retired pay. A hypothetical award does not give Mary Doe the benefit of any of John Doe's post-separation pay increases due to promotions or increased service time after the DOS. Since a hypothetical award also works out to a percentage of disposable retired pay, however, hypothetical awards automatically include a proportionate share of the servicemember's COLAs (cost-of-living adjustments). A typical hypothetical clause might read as follows:

The former spouse is awarded \_\_\_\_% of the disposable military retired pay which the servicemember would have received if he had retired with a retired pay base<sup>3</sup> of \$\_\_\_\_ and with \_\_\_\_ years of creditable service on \_\_\_\_ (date).

Filling this in with a sample figure of \$8,000 as John's retired pay base for a lieutenant colonel with over 16 years of service, we would arrive at a clause which reads: *Mary Doe is awarded 50% of the disposable retired pay which John Doe would have received if he had retired with a retired pay base of \$8,000 and with 16 years of creditable service on [the date of separation of the parties].*

### **The TERA Reduction**

Is there anything else which you can do to "improve the lie of the ball" in John's case? Yes – the answer is to apply a reduction due to John's hypothetical retirement before serving a full 20 years. As illustrated in the recent case of *Douglas v. Douglas* in the Texas Court of Appeals,<sup>4</sup> you can apply a reduction factor of 1/12 times 1% for every month short of 240 months of John's service, pursuant to a federal law that's nicknamed "TERA."<sup>5</sup>

TERA, or the Temporary Early Retirement Authority,<sup>6</sup> was a force management tool that Congress enacted in 1992 to allow the Secretary of Defense to reduce manpower levels in the armed

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<sup>2</sup> 10 U.S.C. § 1408.

<sup>3</sup> The retired pay base is the final basic pay at retirement for SMs who entered military service before September 8, 1980, and the "High-3" amount for those who entered military service on or after September 8, 1980. The "High-3" is the highest three years of continuous compensation for a SM, which is usually the most recent 36 months.

<sup>4</sup> *Douglas v. Douglas*, 2014 Tex. App. LEXIS 12398.

<sup>5</sup> "TERA provides the Secretary of Defense a temporary force management tool with which to affect the drawdown of military forces and yet maintain an adequate and effective well-trained military force. TERA provides the authority for voluntary retirement of members on active duty with at least 15 years, but less than 20 years of creditable service. An eligible member of the Armed Forces may apply for early retirement under the program and receive an annuity equivalent to 2.5 percent of retired pay base for each year of service completed and a deduction of 1 percent for each year short of 20 years of service." Dep't of Defense Financial Management Regulation, DoD 7000.14-R, "Military Pay Policies and Procedures—Retired Pay." Vol. 7b, ch.1, ¶ 010105.

<sup>6</sup> National Defense Authorization Act for Fiscal Year 1993, Pub.L. No. 102-484, div. D, tit. XLIV, § 4403(a), 106 Stat. 2315, 2702 (1992) (codified at 10 U.S.C.A. § 1293 note). The Guard/Reserve equivalent of TERA may be found at 10 § U.S.C. 12731a.

services. It provided for paying a pro-rated reduction in retired pay to those who were retired with at least 15 years of creditable service but less than 20 years. The reduction is shown in the preceding paragraph.

TERA is not dead – it’s still around, alive and kicking. The Army is shrinking today. Due to declining budgets, Army leaders agreed in 2012 to cut Army strength from 490,000 to 450,000.<sup>7</sup> The Defense Authorization Act of 2012<sup>8</sup> authorized the Secretary of Defense to again utilize TERA as a force reduction tool. As in the 1990’s, it may be employed for those who have completed at least 15 years of active service but not yet 20.

In the John Doe case, TERA gives an opportunity to reduce the pension share to which Mary Doe is entitled. While the amount may not be significant in each individual pension payment, the yearly sum and the total over several years may make this a worthwhile tactic for John Doe.

### **Doing the Calculations**

Here’s how it works:

- John at the time of separation is 4 years from the minimum 20 years needed for retirement. This is 48 months short of the 240 months stated in TERA.
- The reduction is thus  $1/12 \times 1\% \times 48$  months, or 4%. This equals \$320 shaved off the retired pay base ( $4\% \times \$8,000$ ). You can also multiply the months times .08333% and get the same result.
- So instead of using \$8,000 as John’s retired pay base, you would insert \$7,680 ( $\$8,000 - \$320$ ).
- Retired pay is calculated by multiplying the retired pay base by the “retired pay multiplier.” The latter is 2.5% times John’s years of creditable service. In this case, John’s retired pay multiplier is 40% ( $2.5\% \times 16$ ).
- Thus instead of retired pay (hypothetically calculated) of \$3,200 ( $\$8,000$  retired pay base  $\times$  40% retired pay multiplier), John’s TERA-revised retired pay would be \$3,072 ( $\$7,680 \times 40\%$ ).
- And thus Mary Doe’s 50% interest would be \$1,536 a month, instead of \$1,600 monthly – a savings of \$64 for John Doe. That amounts to \$768 a year.

Knowledge of the potential bite that TERA can take out of the divisible retired pay is important. This means you’re saving John money when his retired pay is calculated on a hypothetical basis, and that results in more for John when pension payments begin from the retired pay center.

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<sup>7</sup> Odierno: Reverse the Cuts to Army End Strength, ARMY TIMES, Dec. 1, 2014.

<sup>8</sup> Pub.L. No. 112-81, enacted December 31, 2011.