



VETERANS AND MILITARY LAW SECTION

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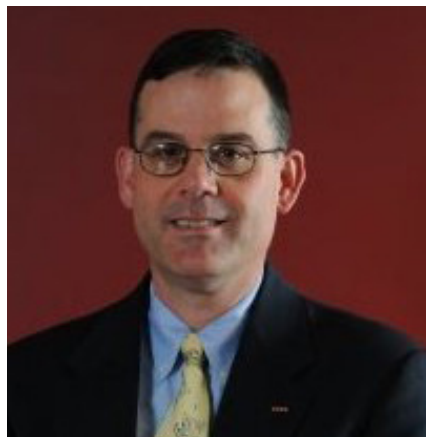
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MESSAGE FROM THE CHAIR: MOVING FORWARD

by Robert J. DeSousa



It's been a successful few months for the Veterans and Military Law Section of the Federal Bar Association. We had a great showing at the Midyear Meeting. More of our section members were there than even the larger sections. Speak-

ing of larger, we are at the 200 member mark thanks to the good work all members asking other people to join. Our full-day CLE in San Juan, Puerto Rico was a huge success. Nearly 100 people attended do the hard work of our CLE committee including past national president James Richardson and Debra Mitchell. We continue to sponsor CLEs across the country and to let our voice be heard on legislative matters thanks to Carrol Wild Scott and her committee. I look forward to seeing as many of you as possible at this year's Annual Meeting and Convention this September in Atlanta Georgia! ●

Robert J. DeSousa

*Past National President, Chair of Veterans and
Military Law Section of the Federal Bar Association
PLEASE JOIN the Veteran's and Military
Law Section at: www.fedbar.org/Veterans*

A Review of the San Juan VMLS Conference

by Sherri Marie Carr

The Federal Bar Association's Veteran and Military Law Section and the Federal Bar Association's Puerto Rico Chapter put together the first ever all-day seminar on the Veterans Administration, Ethics, and Discharge Upgrade issues. Only a top-notch, intriguing, informative, seminar could captivate and engage an audience of about 100 people—while being set ocean

front on the San Juan, Puerto Rico, a tropical paradise, and that is exactly what Past National FBA President Bob DeSousa, the Chair of the Veterans and Military Law Section, and Mariano Mier-Romeu, the President of the Puerto Rico Chapter, were able to orchestrate. The speakers imparted valuable knowledge and the connections made were invaluable. Past National FBA

President Jim Richardson, David Myers, VMLS Board Member Deborah Mitchell and Robert Chisholm each impressed upon the audience members the importance of persistence, ethical challenges and obligations, and strategies for providing the best, most comprehensive advocacy skills to potential and current clients. A great success for the VMLS! ●

VMLS Represented Well at the FBA Midyear Meeting

by Robert DeSousa, Section Chair

Once again the Veteran's and Military Law Section had the greatest attendance of Board Members of any section at the Federal Bar Association Midyear Meeting in Washington, D.C. Pictured are Frank McGovern, Carol W. Scott, Alan Goldsmith, James Richardson and Bob DeSousa with National President Mike Newman. ●



Jim Richardson, Esq.

by Michael O'Brien

In late summer of 1967, practicing law was not on the forefront of Jim Richardson's mind. As a recent graduate of Frostburg University, and as a recently commissioned Second Lieutenant in the U.S. Marine Corps, he had more pressing concerns. Jim was on his way to Vietnam. Upon arrival in Vietnam in September 1967, as a field artillery officer, Jim quickly learned the importance of leadership and responsibility in a concrete and practical sense. Upon completing his combat tour, Jim returned to the United States and began to look for ways to apply the lessons he had learned overseas in a way that would contribute to his country and community.

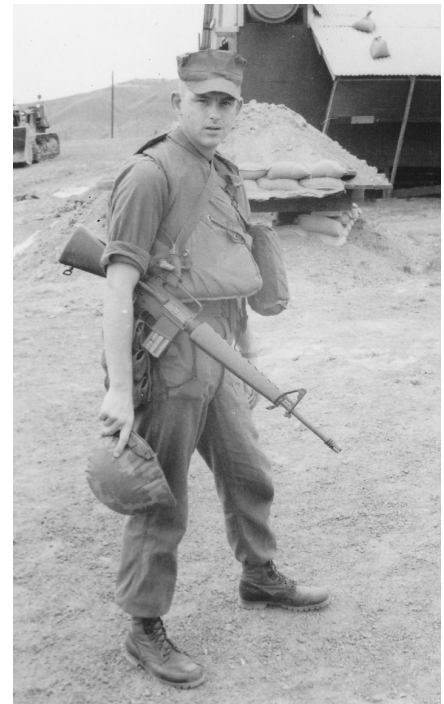
In 1970, Jim was selected by the Marine Corps to attend law school at the University of Maryland School of Law under the Excess Leave Program where he received his J.D. in 1973. After graduating law school, Jim served five years as a judge-advocate of Marines, culminating with a tour as a military judge. His military awards and honors include the Secretary of Defense Meritorious Civilian Service Medal, the Navy Commendation Medal, the Combat Action Ribbon, the National Defense Service Medal, the Presidential Unit Citation with one star, the Vietnamese Campaign Medal with four stars, and the Vietnamese Service Medal with device.

Upon leaving the Marine Corps, Jim served for 26 years as a senior attorney-advisor to the U.S. Court of Appeals for the Armed Forces. During his tenure at the Court he was instrumental in reducing the Court's plenary docket from over 300 cases to approximately 30 in any given term. Before his service at the Court he was the head of the Discharge Review Section of

the Naval Service's Board for Correction of Naval Records. In that capacity he helped revise the Board's procedures and focused its attention on reducing an outstanding backlog of 5,000 cases with a five year processing time to 300 cases and a decisional time frame of approximately 90 days. Upon retirement with 41 years of Federal Service he was awarded the Secretary Defense Meritorious Civilian Service Medal

Jim worked his way up through the ranks of the FBA, serving as National President in 2007-2008. He had previously served as President-Elect (2006-2007), Vice President (2005-2006); Treasurer (2004-2005), Secretary (2003-2004); Deputy Secretary (2002-2003); and Section Coordinator (1997-2000). In addition he served as circuit officer for the Fourth Circuit, vice chair of the Administration of Justice Section, chair of the Military Justice Committee, and co-chair of the Constitutional Law Committee. While serving as section coordinator Mr. Richardson was twice honored with the President's Award for outstanding service to the FBA, and is the only FBA Member to receive that award from two different presidents. His FBA leadership positions also include treasurer, president, and national delegate of the Pentagon Chapter. He is presently vice chair of the Veterans Law and Military Law Section and active in the Pentagon and Capitol Hill chapters.

Jim believes the FBA has provided "access to people, resources and contacts all over the country, and that has enabled me to better serve my clients and better perform the duties and responsibilities



of the positions in which I have served throughout my career." In addition, Jim says, "you don't have to be the named partner of a major corporate law firm to serve in and make a difference in the FBA. Everyone can choose to give as much or as little time as they can manage given their practice and family responsibilities."

Jim is a member of the bar of the Supreme Court of the United States, as well as the bars of Maryland, the Court of Appeals for the Armed Forces, the Fourth, Fifth, Sixth, Ninth, and Federal Circuit Courts of Appeal, and the U.S. Court of Veterans Claims. He lives on the Eastern Shore of Maryland with Cathy, his wife of 47 years, with whom he has three children. Jim and Cathy enjoy traveling, boating,

Fixing the Frozen Benefit Award, Part 2

by Mark E. Sullivan

Note: Part 1 of this article covered the new rule for division of military retired pay (as of 12/23/16), and the “time rule” for pension division used in most states.

Strategy for the Former Spouse

When operating under the new rules, the former spouse needs to realize that time is on his or her side. The longer it takes to obtain the divorce, the higher the servicemember’s rank, years of service and “High Three” will be. Should the servicemember (SM) move to bifurcate the hearing into “divorce now, property division later,” the former spouse (FS) should oppose the request by arguing that judicial economy and efficiency will be impaired, state law frowns upon severance of the issues, and that Congress has joined inextricably the divorce and the division of a military pension by requiring the setting of the retired pay base (the “High Three”) at the time of divorce.¹

Once the divorce case has started, the FS ought to propound discovery immediately, asking – among other things – for verification of when the highest three years of continuous compensation were for the SM, and for information on what the “High Three” is so that the court can calculate this essential element of military pension division. The latter inquiry can be posed in interrogatories and also in document requests. If the SM is less than forthcoming in the responses, the FS can argue for putting off the divorce until the SM begins to cooperate in responding to discovery.

To attempt to find the flaws and wiggle through the loopholes in the new rule, counsel for John Doe (the ex-husband of CDR Mary Doe), faces a daunting task and it doesn’t simply involve the assembly of numbers for the court to use in ruling on a hypothetical award. The strategy for John is more of a global approach to the entire process, and it might involve half a dozen possibilities.

John Doe’s goal is to “restore the equilibrium” in pension division. He needs what he would have received before the new rule was passed: a division of the amount of retired pay which the SM gets *at retirement*. At best, he wants to employ an approach which will yield a result that is numerically the same

as that produced by the *time rule* if that were still available. His “Plan B” would be to obtain other payments or benefits which would help him obtain what he sees as a fairer division of Mary’s retired pay and benefits, or of the marital or community property in general.

As to John’s possible strategies, note that these are not labelled “One Size Fits All.” While some states may prohibit or restrict a particular approach, the summary below is written to set out the entire spectrum of possible strategies, not to advocate one specific method for a particular case or state.

Another *caveat* is that the final rules have yet to be published. Until there are revisions to Volume 7B, Chapter 29 of the Department of Defense Financial Management Regulation, no one will be completely sure how the division of uniformed services retired pay shakes out. At present, the rules are being circulated to all branches of the uniformed services for editing, comments, and revisions. The only information presently available from DFAS is a “Notice of Statutory Change” and a sample order.²

This interim guidance makes it clear that DFAS has settled on the “date of divorce” as the target for when the *High Three* must be fixed. Regardless of what potential pension benefit is earned later in the servicemember’s career, it is the *High Three* as of the *date of divorce* which DFAS interprets as being “the time of the order” as specified in Section 641 of the National Defense Authorization Act for Fiscal Year 2017 (NDAA 17). For those military members who entered service *on or after* September 8, 1980, the following information must be provided to the retired pay center in the order:

1. A fixed amount, a percentage, a formula or a hypothetical which is awarded to the FS;
2. The SM’s *High Three* amount at the time of divorce (i.e., the actual dollar figure); and
3. The SM’s years of creditable service at divorce or, with a member of the Guard or Reserves, the member’s creditable retirement points at divorce.

Spousal Support Settlement. When the

parties are in agreement, a consent order for alimony, maintenance or spousal support is one way to obtain *time-rule* payments from the military pension without the limitations of the frozen benefit rule. An alimony garnishment is based on “remuneration from employment.” It is not tied to DRP, or *disposable retired pay*; thus the new rule and its definition of DRP do not apply to permanent alimony payments which start at retirement and function as a division of retired pay.³

A Spoonful of Alimony. John’s attorney could argue for division of the pension under the new rule, with the remaining amount made up by alimony to be decided upon Mary Doe’s retirement, in order to get the equivalent of a “time rule” order.

Using the Time Rule Formula Anyway. The revised law doesn’t say that a court may not enter a *time-rule* order. It merely states that the retired pay center (DFAS or the Coast Guard Pay and Personnel Center) will only honor “date-of-divorce division” for those still serving. Recognizing this limitation on payments from the pay center, the court may still enter a time-rule order, noting that at Mary’s retirement only a portion of the pension-share payment for John Doe will come from DFAS. The court’s order would provide that Mary will still be responsible for the rest and will indemnify John for any difference between the two amounts. 10 U.S.C. § 1408 (e)(6), the “savings clause” in USFSPA, allows the courts to employ state enforcement remedies for any amounts which may not be payable through the retired pay center.⁴

Be sure not to use “disposable retired pay” in the order to describe what is divided. Disposable retired pay, or DRP, means the restrictive definition in the frozen benefit rule (i.e., the retired pay base at the date of divorce) less all of the other specified deductions, such as the VA waiver and moneys owed to the federal government.

Note: Part 3 of this article will cover other strategies for the former spouse to “even out” the division of retired pay and other benefits.

Endnotes

¹For an excellent summary of arguments against bifurcation of the divorce and the property division, along with case citations for state appellate decisions, *see* Brett R. Turner, *EQUITABLE DISTRIBUTION OF PROPERTY* (3rd Ed. & 2016-2017 Supp.), Sec. 3.2.

²Type into any search engine, “Notice of Statutory Change” and “DFAS” to locate this. DFAS has placed the Notice at its website, www.dfas.mil > Garnishment Information > Former Spouses’ Protection Act > NDAA-’17 Court Order requirements.

³The rules for collecting alimony, child support or both from an individual’s military retired pay are found at 42 U.S.C. § 659 and 5 C.F.R. Part 581. The money from which family support may be withheld is termed “remuneration for employment.”

This includes military retired pay, and even military disability retired pay. DoD 7000.14-R, Department of Defense Financial Management Regulation (DoDFMR), Military Pay Policy and Procedures – Retired Pay (DoDFMR), Vol. 7B, ch. 27, para. 270102. It is advisable to mention the above citation to the DoDFMR in the permanent alimony order so as to avoid confusion by those who are processing the order.

⁴10 U.S.C. § 1408(e)(6), known as the “savings clause,” states: (6) Noting in this section shall be construed to relieve a member of liability for the payment of alimony, child support, or other payments required by a court order on the grounds that payments made out of disposable retired pay under this section have been made in the maximum amount permitted under paragraph (1) or

subparagraph (B) of paragraph (4). Any such unsatisfied obligation of a member may be enforced by any means available under law other than the means provided under this section in any case in which the maximum amount permitted under paragraph (1) [e.g., 50% of disposable retired pay] has been paid... ●

Mark E. Sullivan is a retired Army JAG colonel and author of The Military Divorce Handbook. He practices family law with Sullivan & Tanner, P.A. in Raleigh, N.C. and works with attorneys nationwide as a consultant on military divorce issues and in drafting military pension division orders. He can be reached at 919-832-8507 and mark.sullivan@ncfamilylaw.com (alternate 919-306-3015, law.mark.sullivan@gmail.com).

Court-Martial Jurisdiction Over Retired Service Members Affirmed

by Jonathan Crisp

The Navy-Marine Court of Criminal Appeals recently re-affirmed the concept of court-martial jurisdiction over retired military personnel. In *United States v. Dinger*, No. 201600108 (N-M. Ct. Crim. App. 2017), (available at www.jag.navy.mil/nmcca.htm) the court distinguished both the holding in *Barker v. Kansas*, 503 U.S. 594 (1992) and the language of 10 U.S.C. §6332 to hold that retirees are subject to court-martial jurisdiction and may also be punitively discharged.

Dinger was a Marine Corps Gunnery Sergeant who, after serving on active duty for the requisite number of years to attain retirement eligibility, was a member of the Fleet Marine Corps Reserve List (Fleet Marine Reserve) for ten years from 2003 until 2013 and was then transferred to the active duty retired list. He received retirement benefits when he was in the Fleet Marine Reserve and while on the retired list.

At his general court-martial, Dinger pled guilty to two offenses that occurred while he was a member of the Fleet Marine Reserve and one while he was on the retired list.¹ The gravamen of the offenses were that he engaged in indecent conduct against his daughter and step-daughter; made indecent recordings of his wife without her consent; received,

possessed and viewed child pornography, attempted to produce child pornography and that he also made indecent recordings of his stepdaughter.

The court in *Dinger* focused on two specific areas of inquiry. The first area was whether court-martial jurisdiction still exists over retirees, in light of the U.S. Supreme Court's holding in *Barker* that retirement benefits are not current compensation to retirees for reduced current services but rather deferred pay for past services. The second question addressed was whether the language of 10 U.S.C. §6332 precludes issuance of a punitive discharge for retirees.

As to the former issue, the Navy-Marine Court held that, for purposes of court-martial jurisdiction over retirees, the receipt of retired pay is not wholly dispositive as to the issue of court-martial jurisdiction. The court listed a host of other benefits retirees receive such as medical benefits and commissary privileges as well as the fact a retiree may be recalled for further military service. The court went on to distinguish the holding in *Barker* by asserting it only applied to the tax implications of retired pay.² The court then held that the Constitution allows Congress to permit the court-martial of members of the armed forces as articulated

in Article 2(a) and elsewhere and discussed a litany of cases dating back 140 years that permitted the trial of retired service members.

The court also held that a punitive discharge is authorized in the case of a retired service member. The court noted that the language of 10 U.S.C. §6332 is silent as to whether a retiree can be punitively discharged. The court based its decision on the statute's ordinary meaning and the broader statutory context as represented by the Uniform Code of Military Justice and the Rules for Courts-Martial, neither of which limits the authority of a court-martial to adjudge a discharge for a retired service member. ●

Endnotes

¹Dinger plead guilty to multiple charges but many were merged for sentencing purposes.

²The court said that "at least for tax purposes, 'military retirement benefits are to be considered deferred pay at least for past services' instead of 'current compensation' to retirees 'for reduced current services.'" *Dinger* at 5 (quoting *Barker v. Kansas*, at 605).



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