



Pension Benefit Guaranty Corporation
1200 K Street, N.W., Washington, D.C. 20005-4026

September 29, 2011



Re: Appeal 2010-0152; [redacted] Case 200185; The [redacted]
Company Cash Balance Pension Plan (the [redacted] Plan" or the
"Plan")

Dear [redacted]

This Appeals Board decision responds to your appeal regarding PBGC's December 16, 2009 determination regarding [redacted] benefit under the [redacted] Plan. For the reasons we state below, the Appeals Board found no reason to change PBGC's determination that [redacted] benefit is payable as a monthly annuity rather than as a lump sum. We must, therefore, deny your appeal regarding the form of [redacted] benefit. With respect to the amount of [redacted] benefit, we decided that PBGC will recalculate [redacted] monthly PBGC benefit to take into account any increases resulting from the Plan's Second Amendment. After PBGC recalculates [redacted] benefit, it will send [redacted] a new determination letter with a new 45-day right to appeal the amount of his monthly benefit.

PBGC's Determination and Your Appeal

PBGC's December 16, 2009 determination letter said that [redacted] is entitled to a monthly benefit of \$452.77, payable as a Joint and 50% Survivor Annuity. As this amount (\$452.77) was more than the amount he was then receiving (\$275.90), PBGC informed [redacted] that PBGC would send him a single payment that includes interest to make up for the difference.

In your January 28, 2010 appeal letter, you raised two issues with respect to PBGC's December 16, 2009 determination of [redacted] Plan benefit. First, you questioned whether [redacted] pre-termination application for a lump sum benefit from the [redacted] Plan was improperly denied. You stated that [redacted] applied for a lump-sum distribution of his Plan benefit on August 15, 2003, but that the Administrative Committee of the Plan denied his application in a letter dated [redacted] 2003. You asserted that only the Administrative Committee of the Plan could deny his application for a lump-sum, but that the Board of Directors of [redacted] denied the application, which the Administrative Committee then adopted. You also stated that it was [redacted] belief that the Board of Directors processed other

participants' applications for lump-sum benefits at a September 29, 2003 meeting, a meeting during which the Board signed a resolution to terminate the Plan.

You claimed that [redacted] appealed the denial of his lump-sum request on November 3, 2003, pursuant to the Plan's claims procedures, and that, although the Plan was supposed to answer [redacted] appeal within 60 days (i.e. by January 2, 2004), no decision was ever made. You further claimed that a Notice of Intent to Terminate had not been sent as of this November 3, 2003 appeal-filing date, so that the bar on lump-sum payments under ERISA §4041(c)(3)(D)(i)(I) and (ii)(II) would not apply. You claimed that the Committee violated its fiduciary duties by failing to act in accordance of the Plan and pay [redacted] a lump-sum benefit. You concluded that the Committee violated ERISA §404(a)(1), which requires fiduciaries to "discharge [their] duties solely in the interest of the participants and beneficiaries."

The second issue you raised concerned the amount of [redacted] monthly payments in the event that he is not entitled to a lump-sum payment. You said that you expect your client's \$452.77 monthly annuity amount has a lump-sum value of less than \$100,000. You included with your appeal letter an email from an actuary with PricewaterhouseCoopers that indicated the lump-sum value of [redacted] benefits was \$563,867 as of January 31, 2003. You claimed that [redacted] lump-sum amount should be calculated as of August 31, 2003, his date of termination of employment, plus interest, less all payments made to [redacted]. Should [redacted] not be entitled to a lump sum, you requested that his annuity payment be increased in accordance with the actual value of his Plan benefits.

Legal and Factual Background

PBGC provides pension insurance in accordance with the Employee Retirement Income Security Act of 1974, as amended ("ERISA"). If a plan sponsor is unable to support its single-employer defined-benefit pension plan, PBGC becomes trustee of the plan and pays pension benefits as defined in the plan, subject to legal limitations and requirements set by Congress under ERISA, and PBGC's rules and regulations.

The [redacted] Plan is a cash-balance plan, which was created on May 31, 1998, as the result of the merger of three traditional defined-benefit plans. The Plan Administrator signed a Notice of Intent to Terminate the Plan ("NOIT;" PBGC Form 600) on November 19, 2003, proposing January 21, 2004 as the Plan's termination date, and PBGC received the NOIT on November 25, 2003. The Plan Administrator submitted the Distress Termination Notice (PBGC Form 601) in April 2004, on which it was noted that notices of intent to terminate were issued to all interested parties (other than PBGC) on November 11, 2003. The [redacted] Plan terminated on January 21, 2004, and PBGC became trustee of the Plan on February 23, 2005.

Shortly after PBGC became trustee of the [redacted] Plan, PBGC collected participant data and plan data from a variety of sources, such as the Plan's former administrator and the Plan's former actuary. PBGC necessarily relies on the data it

collects from a former administrator unless (1) PBGC's audit of that data shows that it is wrong, or (2) a participant supplies PBGC with documents showing that the data is wrong.

The data that PBGC received from [redacted] indicated that: (1) [redacted] was born on [redacted] (2) he began working at [redacted] on [redacted] and (3) he continued working at [redacted] until his employment ended on [redacted]. The 1998 Restatement of the [redacted] Plan, as amended, (the "1998 Restatement") was in effect when his employment ended.

Your client signed a written request for a lump-sum distribution of his [redacted] Plan benefit on [redacted]. On [redacted] 2003, [redacted] an Administrative Committee Member, informed your client, on behalf of the Administrative Committee, that the Board of Directors of the [redacted] Company decided in their September 29, 2003 meeting to terminate the [redacted] Plan. [redacted] concluded that: "(b)ecause applicable law prohibits the payment of lump sum distributions in anticipation of the termination of the Plan, your benefit request is being denied."¹

On the General Information Form (PBGC Form 702) that your client signed and dated on [redacted] 2005, before PBGC sent him any estimates of his PBGC benefits, he made the following statement:

Under terms of my pension plan, I am entitled to a Lump sum. I am also entitled to a greater benefit than I am informed the PBGC is required to pay. Absent breaches of fiduciary duty by the plan's fiduciaries, I would have received a lump sum well in advance of the PBGC's takeover of the plan. Therefore, my communication with the PBGC concerning this matter as well as any acceptance of benefits from the PBGC are without prejudice to my claims for those breaches of fiduciary duty.

Effective May 1, 2007, your client began receiving an estimated monthly benefit of \$275.90, payable as a Joint and 50% Survivor Annuity. As a result of the appeal filing, PBGC has not yet increased his monthly benefit to the amount of \$452.77 stated in PBGC's December 16, 2009 determination letter.

Discussion

1. PBGC Cannot Pay Your Client a Benefit in the Form of a Lump Sum

ERISA § 4041(c)(3)(D) states, in general, that a plan administrator cannot pay benefits in a form other than an annuity after it issues a Notice of Intent to Terminate ("NOIT") the plan to PBGC.

¹ We note that, at the same Board of Directors' meeting, the Board denied the lump-sum request of another former executive presumably because he also had actual knowledge of [redacted] intention to terminate the Plan.

PBGC has promulgated a regulation that provides additional guidance regarding the ERISA § 4041(c)(3)(D) requirements. Section 4041.42 of PBGC's regulations² provides as follows:

(a) *General rule.* Except to the extent specifically prohibited by this section, during the pendency of termination proceedings the plan administrator must continue to carry out the normal operations of the plan, such as putting participants into pay status, collecting contributions due the plan, and investing plan assets.

(b) *Prohibitions after issuing notice of intent to terminate.* The plan administrator may not make loans to plan participants beginning on the first day he or she issues a notice of intent to terminate, and from that date until a distribution is permitted pursuant to § 4041.50, the plan administrator may not —

(1) Distribute plan assets pursuant to, or (except as required by this part) take any other actions to implement, the termination of the plan;

(2) Pay benefits attributable to employer contributions, other than death benefits, in any form other than as an annuity; or

(3) Purchase irrevocable commitments to provide benefits from an insurer.

PBGC has established a policy (Policy 5.4-9) regarding Lump Sum Benefit Payments in PBGC's Operating Policy Manual. Based on section 4041.42 of PBGC's regulations, Section D of Policy 5.4-9 explains PBGC's processing of unpaid plan applications for lump-sum benefits as follows:

D. Unpaid Plan Applications for Lump-Sum Payments

1. **Distress Termination.** If a plan terminated in a distress termination, PBGC will not accept a plan application to pay a benefit in a lump sum received by the plan administrator before DoPT - even if it was received before the date of the Notice of Intent to Terminate (the "NOIT"). The same rule applies to a plan application to pay a benefit in a lump sum if a distress termination was subsequently converted to a PBGC-initiated termination (an "involuntary termination"). PBGC will recalculate and value the benefit as of DoPT and determine if the benefit is payable in a lump sum or as annuity as provided in *section C. General Policy*.

2. **PBGC-Initiated Termination.** . . .
[Underling added for emphasis.]

In accordance with the clear terms of Section D.1 of Policy 5.4-9, PBGC cannot accept and honor application for a lump-sum benefit despite the fact that it was submitted before the NOIT date.

The result spelled out in Policy 5.4-9 is dictated by a straightforward reading of ERISA § 4041(c)(3)(D) and § 4041.42 of PBGC's regulations. Both the law and the

² 29 Code of Federal Regulations ("CFR") § 4041.42.

regulation provide a black-line rule in the case of distress terminations, to wit, if the plan administrator did not make a lump-sum distribution of a participant's benefit before the NOIT date, the plan administrator cannot thereafter make a lump-sum distribution of the participant's benefit.

As the [redacted] Plan's former administrator could not make a lump-sum distribution of [redacted] benefit at any time after the NOIT date, no lump-sum distribution was due and payable as of the Plan's termination date. Thus, while PBGC will generally pay benefits that were due and payable as of a plan's termination date as pre-termination-liability payments if a plan's assets are sufficient to pay them, in your client's case, PBGC cannot pay your client a lump-sum benefit because no lump-sum benefit was due and payable to him as of the Plan's termination date.

2. Calculation of [redacted] Benefit under the Second Amendment to the 1998 Restatement

The **Enclosure** is a copy of the Second Amendment to the 1998 Restatement, which is a special amendment providing a Supplemental Executive Retirement Plan ("SERP") benefit solely for [redacted]

When PBGC calculated [redacted] benefit, it was aware of the Second Amendment to the 1998 Restatement but was reportedly told by employees at [redacted] that: (1) the Plan's former administrator did not execute the Second Amendment; and (2) the Plan's former administrator did not intend to honor the Second Amendment when calculating [redacted] benefit.

The Appeals Board reviewed the copy of the Second Amendment that PBGC received from [redacted]. We note that (1) it bears the signature of [redacted] a former Vice President of [redacted] (2) it is dated as if signed on April 26, 2002; and (3) the text of the amendment suggests that the amendment was approved by the former Board of Directors of [redacted]

The Appeals Board reviewed the Actuarial Valuation Report for the Plan year beginning January 1, 2002 that was prepared by the [redacted] Plan's former actuaries. The report, which was addressed to [redacted] stated, in part, as follows:

Changes in Plan Provisions

Effective January 31, 2001, the Plan was amended to provide benefits that were previously provided from a Supplement Executive Retirement Plan ("SERP") for [redacted]. The increase in benefits from the Cash Balance Plan to [redacted] results in a dollar for dollar decrease in benefits provided from the SERP. The increase in normal cost of the Cash Balance Plan resulting from this amendment is approximately \$106,000 in 2002.

The Appeals Board also reviewed documentation that it received from the Plan's former actuarial firm. That documentation showed the results of the nondiscrimination

testing that it performed and submitted to [redacted] benefits attorneys in preparation for the adoption of the Second Amendment. The cover letter from the actuaries to the attorneys concluded that the results of the testing indicated that the addition of the SERP benefit for [redacted] would not violate the nondiscrimination rules.

After reviewing all of the available evidence, a divided Appeals Board decided (by a 2 to 1 vote) that:

- (1) the Second Amendment was executed by the former Plan Administrator and it was a valid amendment to the [redacted] Plan; and
- (2) PBGC will recalculate [redacted] benefit to take into account the provisions of the Second Amendment, to the extent allowed by law, and provide [redacted] with a new 45-day right of appeal regarding the amount of his monthly benefit.

Please note that, it appears that the Second Amendment to the 1998 Restatement could result in a monthly benefit that is larger than the maximum monthly benefit that PBGC is allowed to guarantee for plans that terminated in 2004. See ERISA § 4022(b)(3); 29 U.S.C. § 1322(b)(3).

Please also note that, as the Second Amendment to the 1998 Restatement was adopted on April 26, 2002, it was in effect for less than two full years when the [redacted] Plan terminated on January 21, 2004. As a result, any increases that might otherwise result from the adoption of the Second Amendment will be limited by ERISA's Five-Year Phase-In rule. See ERISA § 4022(b)(7); 29 U.S.C. § 1322(b)(7).

Decision

Having applied provisions of the [redacted] Plan, the law and PBGC's rules to the facts of your case, the Appeals Board found no reason to change PBGC's determination that [redacted] benefit is payable as a monthly annuity rather than as a lump sum. We must, therefore, deny your appeal regarding the form of [redacted] benefit. This decision is PBGC's final action regarding the issues you raised in your appeal. If your client wishes, he may seek review of this decision in an appropriate federal district court.

With respect to the amount of [redacted] benefit, we decided that PBGC will recalculate [redacted] monthly benefit to take into account any increases in his PBGC benefit resulting from the Plan's Second Amendment. After PBGC recalculates [redacted] benefit, it will send [redacted] a new determination letter with a new 45-day right to appeal the amount of his monthly benefit.

We regret the delay in responding to your appeal and appreciate your patience while PBGC prepares [redacted] new determination letter. If [redacted] has other questions about his PBGC benefit, he may call PBGC's Customer Contact Center at

1-800-400-7242 and ask to speak to the authorized representative assigned to the
 Plan (Case 200185).

Sincerely,



Michel Louis
Appeals Board Member