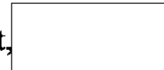
Pension Benefit Guaranty Corporation
1200 K Street, N.W., Washington, D.C. 20005-4026

JUL 15 2005

Re: Weirton Retirement Program, Case #197614
Weirton Steel Corporation Retirement Plan, Case #201097
(the Plans)

Dear

The Appeals Board has reviewed the appeals you filed on behalf of your client,  As explained below, we are denying the appeals.

PBGC's Determinations and Your Appeals

PBGC's October 28, 2004 determination letter told that the $155.70 per month benefit she is currently receiving under the Weirton Retirement Program is correct. By letter dated November 29, 2004, PBGC sent its determination of her benefit under the separate Weirton Steel Corporation Retirement Plan, which stated that the monthly benefit of $397.78 she currently receives under the Plan is the correct amount. Each determination letter pointed out that the benefit amount shown is the same amount received from the prior Plan administrator (i.e., before the Plans terminated and PBGC became responsible for payment of benefits).

Your December 12, 2004 and January 10, 2005 letters of appeal said that you reviewed pension plan documentation that PBGC provided you pursuant to your August 2004 information request and "noticed that my client is not receiving the automatic qualified joint and survivor annuity (QJSA)[1] guaranteed under federal law." You noted that PBGC provided you only one side of the Weirton *Post-Retirement Option Election and Certifications* form (Option Form). You stated that, based on the documentation you received from PBGC and your client, it is your position that

[1] Your December 12, 2004 appeal letter includes reference to a pre-retirement survivor annuity (PRSA), which is not applicable in this case since the participant died *after* retiring.

any "purported waiver of the QJSA is invalid under the strict rules concerning waiver of the QJSA" under the Employee Retirement Income Security Act (ERISA), federal regulations, and the terms of the Plan. Specifically, you asserted that the waiver is invalid because:

- The Option Form lacks the signature (and seal) of a notary public required under page 18 of the Summary Plan Description (SPD) for the Weirton Retirement Program;
- The Plans failed to provide the retiree and spouse with a written explanation concerning the QJSA and the effects of waiving the QJSA;
- The retiree and spouse did not receive a written explanation of the relative financial effects of waiving the QJSA in comparison with other optional forms of benefits; and
- The Option Form "fails to advise the retiree and spouse as to the availability of any additional information or how they may obtain such information."

You contended that your client is entitled to the full amount of the QJSA.

In a letter dated May 4, 2005, you submitted the written "expert opinion" of [redacted] of the University of Kansas School of Law. [redacted] had reviewed the information on a "Post Retirement Option Election and Certifications"(Exhibit C to [redacted] opinion) and an "Explanation of Post Retirement Option" (Exhibit D to her opinion), which were documents that Weirton had used in processing benefit elections under the Plans.[2] [redacted] opined that the written content of Exhibit C failed to satisfy the legal standards under ERISA and applicable regulations for a QJSA waiver because the form:

- uses technical defined terms to describe the election options for the participant and the spouse, which are not defined or explained on the form;
- does not present a general explanation, written in nontechnical language, of the relative financial effect of an election to waive the QJSA form of benefit payment;
- contains no reference to the availability of additional information specified in Treasury Regulation § 1.401(a)-11(c)(3)(iii), or how a participant may obtain this information; and
- does not meet the requirements in Treasury Regulation § 1.401(a)-20, Q&A-36, which is applicable for Plan years beginning after December 31, 1988, concerning disclosure of

---

[2] It appears that, during the course of its administration of the Plans, Weirton made certain changes to its benefit election forms. For example, the Option Form signed by [redacted] is a one page, two-sided document, while Exhibits C and D that were attached to [redacted] opinion appear to be separate documents. There also were some minor variations in the wording of the forms. The Appeals Board concluded, however, that the variations among the forms were not material with respect to the issues raised in your appeals.

additional information concerning the relative values of the optional forms of benefit payment as compared with the QJSA benefit. The form fails this additional information requirement because it does not explain which optional forms of Plan benefits are subsidized in comparison with the QJSA form of benefit payment and does not reveal the interest rates used to calculate the optional benefit forms of payment.

further concluded that, even if the Exhibit C form is supplemented by the Exhibit D document, the form fails to satisfy the legal standards for a valid QJSA waiver because:

- As with Exhibit C, Exhibit D fails to provide a general description of the technical terms "Surviving Spouse Benefit," "100% Co-Pensioner," and "50% Co-Pensioner";

- The method of presentation in the table at the bottom of Exhibit D fails to adequately explain the relative financial effect of an election to waive the QJSA form. For example, Exhibit D does not explain that the "Surviving Spouse Benefit" on line 1 of the Table is a separate and unrelated type of benefit to the QJSA monthly pension that is shown on line 2, and that therefore the decision of whether or not to waive the QJSA form does not affect the amount of the Surviving Spouse Benefit; and

- As is the case with Exhibit C, Exhibit D does not meet the requirements in Treasury Regulation § 1.401(A)-20, Q&A-36 concerning the relative values of the optional forms of benefit payment as compared with the QJSA benefit.

asserted that, for plan years beginning after December 31, 1984, a waiver of the QJSA is not valid unless "it has been executed in full and complete compliance with all of the technical legal requirements for such consent." She therefore asserted that, if the spouse of a participant in the Plan has not executed a valid waiver, the spouse as a Plan beneficiary is entitled to receive the benefit due in the absence of a valid waiver, which under the Retirement Equity Act amendments to ERISA must be a QJSA.

Discussion

According to the records PBGC auditors obtained from Weirton Steel Corporation (Company), your client's husband, retired from the Company on May 1, 1991. On April 17, 1991, he and signed the Company's Option Form, waiving the Automatic 50% Spouse's Option (the QJSA) and electing instead to receive his benefit as a Life Annuity. *The Option Form applied to his benefits under both Plans.*

In addition to the QJSA and other benefit options, both Plans provided a surviving spouse benefit at no reduction to the participant's benefit. died on July 6, 1998, and began receiving the surviving spouse benefits from both Plans effective August 1, 1998. The Weirton Retirement Program terminated as of December 6, 2002, and the Weirton Steel Corporation Retirement Plan terminated as of October 21, 2003. PBGC is the trustee of both Plans.

The Option Form is a one page, two-sided document. Unfortunately, only the back page of the form was initially included on PBGC's automated system, which is the reason you did not previously receive a complete copy of the document. We regret this oversight on PBGC's part. *Enclosure 1*, which the Appeals Board obtained from PBGC, is a complete copy of the Option Form that [redacted] signed when he retired from the Company.

You asserted that [redacted] "purported signature on the Option Form is in question" because she did not sign the consent in the presence of a notary public. You stated that, in the case of *Lasche v. George Lasche Basic Profit Sharing Plan*, 111 F.3d 863 (11th Cir. 1997), "the absence of a notary signature and seal alone invalidated the purported spousal consent."

While the Option Form was not signed by a notary public, the form shows that [redacted] signature was witnessed by a Plan representative, D. L. Brown. This signature by a Plan representative met the applicable statutory requirements, since ERISA § 205(c)(2)(A)(iii) and the identical Internal Revenue Code § 417(a)(2)(A)(iii) provide that the spouse's consent to waiver of the QJSA may be witnessed by *either a notary public or a plan representative*. The Appeals Board also found that your reliance upon the *Lasche* case is misplaced. The *Lasche* decision cites the actual statutory language and clearly and explicitly permits the signature to be either by a notary public or a plan representative. 111 F.3d at 865-66. The flaw that the court found in the waiver in *Lasche* was that there was no signature by anyone in the space for the notary public or employer. That defect is not present here, since the signature by the Plan representative was in the appropriate place on the Option Form.

As noted earlier, it was Company practice to use one Option Form for benefits under both Plans since participants began to receive benefits under the two Plans at the same time. You correctly state that page 18 of the Weirton Retirement Program SPD refers only to the signature of a notary public, and thus does not expressly authorize signature by a Plan representative. However, the Weirton Steel Corporation Retirement Plan allows for the witnessing and signing to be by either a notary public or Plan representative. The Appeals Board decided that the substitution of the signature of a Plan representative for that of a notary public was at most a harmless error with respect to [redacted] waiver of benefits under the Weirton Retirement Program. While you argued that [redacted] consent is "in question," you presented no information that would suggest that [redacted] did not, in fact, sign the form. Furthermore, based on its review of the record, the Appeals Board found no basis to question the validity of the signature.

The court in *Butler v. Encyclopedia Britannica, Inc.*, 41 F.3d 285, 293-94 (7th Cir. 1994) held that the sole purpose of the witnessing requirement is to certify the validity of the spouse's signature. Additionally, as discussed above, the Plan representative's signature met ERISA's and the IRC's requirements, and it further provides evidence that [redacted] signed the form. Thus, the Appeals Board concluded that the failure of the waiver form to meet the technical requirement in the Weirton Retirement Program SPD for a notarized signature should not provide a basis for relief to [redacted]

Your appeal and [redacted] opinion further contended that the Option Form did not provide the written explanation of the waiver required by ERISA section 205(c), Internal Revenue Code § 401(a)(11) and § 417, and Treasury Regs. 1.401(a)-11(c)(3), § 1.401(A)-20, Q&A-36, and 1.417(e)-1(b)(2), and for that reason the waiver on the Option Form is invalid. The Appeals Board concluded, however, that the validity of [redacted] waiver should not be determined solely by examining the language on the Option Form. While the statutory and regulatory provisions you cite require that a participant be provided certain information about benefit options in writing, they do not require that the information be provided on the form itself.

As noted earlier, a Plan representative presented the retirement form(s) to [redacted] and witnessed their signing of the forms. This occurred more than 10 years before PBGC became responsible for payment of benefits under the Plans. Neither PBGC nor the Appeals Board participated in the retirement session(s) the Company had with your client and her husband. Therefore, we have no way of knowing what documents were given to them (other than the Option Form), nor do we know what they were told. However, it is the Board's view that a Plan representative likely would be knowledgeable about the provisions of the Plan and the policies and procedures for retiring and would communicate them to the retiring participant and his spouse. Furthermore, [redacted] certified that the benefit options under the Plans had been explained to him and his spouse, and both acknowledged that they understood the effects of their decision.

Additionally, the Appeals Board concluded that the Option Form itself demonstrates that the Company, as the Plans' Administrator, made an effort to comply with the applicable statutory and regulatory requirements. The front side of the Option Form provides a concise explanation of the QJSA and the effects of waiving the QJSA. It further states that "the various methods available for payment of benefits are explained in detail in the Summary Plan Description," and thus an additional written source of information was identified. Moreover, the bottom of the front side shows the various optional benefit forms available under the terms of the Plans and the benefit amounts the participant and spouse would receive under each option. This part of the Option Form also shows the benefit amounts for the "Surviving Spouse Benefit," with the notation that there is "no reduction to your pension" with respect to the payment of that benefit.[3]

In *Cagna v. Weirton Steel Corp. Retirement Plan-Plan 001*, 68 Fed.Appx. 344, 345 (3d Cir. 2003) (nonprecedential opinion), *cert. denied*, 540 U.S. 1158 (2004) (copy enclosed), the Third Circuit addressed the validity of a spousal waiver with respect to the same two pension Plans that are involved in these appeals. Although the court in *Cagna* found that defects existed in the Plans' waiver form, it rejected the claim that Mrs. Cagna was entitled to the QJSA in question. Among other things, the court noted that Mrs. Cagna "had an opportunity to inquire about the various options," but she signed the form consenting to the waiver of the QJSA. The court further concluded

---

[3] As [redacted] states, the Option Form does not show the relative values of the optional forms of benefit payment as compared with the QJSA benefit. The Appeals Board notes, however, that the apparent purpose underlying this "relative value" requirement is that participants and their spouses be informed of any disparity in value among the Plan's various benefit forms, including the QJSA. You have not demonstrated and we have not seen any evidence that any of the Plans' optional benefit forms are more or less valuable than the QJSA.

that the "form does not misstate the options, and Ms. Cagna does not say that she received misleading answers to questions about the form. " Finally, the court concluded that any attempt to determine what Mr. and Mrs. Cagna would have chosen absent such defects was "too speculative." The court stated: "For all we know, they may have discussed all options more fully and still chosen the waiver in light of his excellent health at the time."

Thus, the Third Circuit in *Cagna* addressed essentially the same issues that you have raised in these appeals under similar facts. (as was the case with the Cagnas) had the opportunity to inquire about the various benefit options, since she and her husband signed the Option Form in the presence of a plan representative. Additionally, there is no evidence showing that had not understood the information on the form or had been misled. Accordingly, as the court concluded in *Cagna*, the Appeals Board likewise is unable to determine, based on the information in your appeal and in PBGC's records, whether or not would have waived the QJSA, if it is assumed that any possible defects with respect to the Plan's disclosure were corrected before they signed the Option Form in April 1991.

Moreover, over 13 years have elapsed since signed the waiver form. Until these appeals were filed, there was no record that either had disputed the form of their benefits. The Board concluded that it would be inappropriate, under these circumstances, to allow the election of a different form of benefits after the passage of this length of time.

Finally, the Appeals Board observes that courts have held that procedural defects, such as a failure to comply fully with ERISA disclosure requirements, do not require a substantive remedy in a claim for benefits, unless they caused a substantive violation or themselves worked a substantive harm. *Davis v. Combes*, 294 F.3d 931 (7th Cir. 2002) (in ERISA cases, plan administrator's substantial compliance with the statute and regulations is sufficient); *Lewandowski v. Occidental Chemical Corp.*, 986 F.2d 1006 (6th Cir. 1993); *Ellenburg v. Brockway, Inc.*, 763 F.2d 1091 (9th Cir. 1985). *Cf. Hozier v. Midwest Fasteners, Inc.*, 908 F.2d 1155 (3d Cir. 1990) (failure to comply with ERISA's disclosure provision does not provide participants with substantive rights with respect to claims for benefits in the absence of extraordinary circumstances).

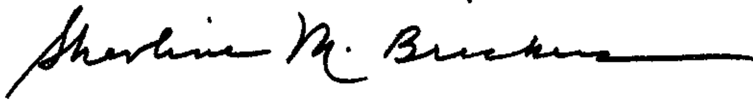
The Appeals Board concluded that there was at least substantial compliance in case with the applicable regulatory requirements for QJSA waivers. As discussed above, the Option Form demonstrates that the Company made an effort to comply with these requirements. certified on the Option Form that the Plan's benefit options had been explained to *both him and his spouse*, and *consented in writing to the QJSA waiver.* You have provided no specific information with respect to the circumstances under which the waiver was signed that would rebut this certification. Accordingly, the Board found that the explanation provided to likely was sufficient for them to make an informed decision concerning their benefits.

As Mr. Eric Rofel's December 27, 2004 letter on behalf of the Appeals Board stated, in accordance with the Rules for Administrative Review of Agency Decisions, an opportunity to appear before the Appeals Board and an opportunity to present witnesses will be permitted at the Appeals Board's discretion. In general, an opportunity to appear will be permitted if the Appeals Board determines that there is a dispute as to material fact (see 29 Code of Federal Regulations §4003.55). The Appeals Board has concluded, however, that you have presented no dispute of material fact that requires a hearing to resolve. Accordingly, the Board denies your request for a hearing.

Decision

For the reasons discussed above, the Appeals Board found that [redacted] waiver of the QJSA was properly executed and valid. Your appeals are therefore denied. This is the Agency's final action regarding [redacted] October 28, 2004 and November 29, 2004 benefit determinations. Your client, may, if she wishes, seek court review of this decision.

Sincerely,



Sherline M. Brickus
Member, Appeals Board

Enclosures (2)

cc: [redacted]