



Pension Benefit Guaranty Corporation

1200 K Street, N.W., Washington, D.C. 20005-4026

August 17, 2010

Re: [redacted] Case 202057, Horizon NR, LLC
Employee Pension Plan (the "Horizon Plan" or the "Plan")

Dear [redacted]

This Appeals Board decision responds to your appeal of PBGC's March 20, 2009 determination of the PBGC benefit payable to your client, [redacted] under the Horizon Plan. For the reasons we state below, the Appeals Board decided that it must deny [redacted] request for a lump-sum payment of his total benefit. But, if [redacted] submits proof of a Social Security Disability Award ("SSDA") with a disability onset date on or before October 1, 2009, PBGC will allow [redacted] the opportunity to elect a retroactive Annuity Starting Date. Such an election would, however, result in smaller monthly retirement benefits for [redacted] (and a smaller monthly survivor benefit for [redacted] because PBGC would have to reduce the monthly amount of his benefit, in accordance with the Horizon Plan's provisions, to account for the longer period of payment.

PBGC's Benefit Determination and Your Appeal

In PBGC's March 20, 2009 determination letter, PBGC informed [redacted] that he was entitled to a monthly benefit of \$856.77 payable as a Straight Life Annuity ("SLA") starting on November 1, 2019 (age 60).

In your April 27, 2009 letter, you requested that [redacted] be allowed to take a lump-sum payment of his vested pension benefit because he is 49 years old, and past the age of eligibility (45) under the Horizon Plan. Your letter suggested that, in the alternative, [redacted] should be allowed to elect an annuity starting at age 45 that would provide a survivor benefit for his wife.

In accordance with PBGC's established procedures, the Appeals Board referred your letter to the Benefits Administration and Payment Department ("BAPD" also known as the Insurance Operations Department) for a response. In its May 18, 2009

response, BAPD told [redacted] that he could retire as early as November 1, 2009 (age 50), in which case he would receive an actuarially reduced benefit of \$430.18 per month if paid as a SLA. The letter said that [redacted] would be able to decide the form of his benefit at the time he obtains an application for PBGC Pension Benefits. Concerning [redacted] request for a lump-sum payment, BAPD's letter noted that [redacted] received a brochure explaining that PBGC may pay a lump sum to a participant if the present value of his benefit is \$5,000 or less. The letter concluded that, as the present value of [redacted] benefit is greater than \$5,000, he is not eligible to receive a lump-sum payment of his benefit. The letter gave [redacted] 45 days to file an appeal if he did not agree with BAPD's explanation.

Your June 12, 2009 appeal letter claimed that BAPD's May 18, 2009 response was "an exact replica of the first determination letter." You stated that [redacted] wishes to appeal "the amount of benefits, the starting date, the way in which the benefits are paid, as well as the form of benefits." You then restated all of the same points that were in your April 27, 2009 letter.

On October 12, 2009, [redacted] applied to PBGC to begin receiving his benefit in the Plan's Automatic Form for a Married Participant with an Annuity Starting Date of November 1, 2009. The Horizon Plan's Automatic Form for a Married Participant is a Joint and 50% Survivor Annuity ("J&50%SA"). PBGC began paying [redacted] his monthly benefit of \$412.55 as a J&50%SA in December 2009, with one backpayment for November 2009. Under the J&50%SA, if [redacted] dies first, his current spouse will receive \$206.28 for the remainder of her life.

Discussion

1. 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 pension plan, PBGC becomes trustee of the plan and pays benefits as defined in the plan, subject to the limitations and requirements set by Congress under ERISA and by PBGC's regulations.

PBGC's records show that the Horizon Plan terminated on March 31, 2004 and PBGC became the Plan's trustee on June 24, 2004.

As you noted in your appeal letter, section 4022(a) of ERISA provides that, subject to certain limitations, PBGC will guarantee the payment of all nonforfeitable benefits under a covered plan that terminates. ERISA § 4001(a)(8) defines a "nonforfeitable benefit" as ". . . a benefit for which a participant has satisfied the conditions for entitlement under the plan or the requirements of [ERISA] (other than submission of a formal application, retirement, completion of a required waiting period, or death in the case of a benefit which returns all or a portion of a participant's accumulated mandatory employee contributions upon the participant's death), . . ."

When Congress enacted ERISA in 1974, it created the PBGC¹ and gave PBGC the authority to adopt "rules and regulations as may be necessary to carry out the purposes of this title."² PBGC published in the Federal Register ("FR") on June 5, 1975 its first proposed regulation³ regarding guaranteed benefits for public comment. After the comment period, PBGC published its first final regulation regarding guaranteed benefits on September 22, 1975⁴.

In its 1975 guaranteed-benefits regulation, PBGC clarified the benefits that PBGC would guarantee in accordance with ERISA's provisions. In particular, 29 Code of Federal Regulations ("CFR") § 4022.3 explains what benefits PBGC will guarantee as follows:

§ 4022.3 Guaranteed benefits.

Except as otherwise provided in this part, the PBGC will guarantee the amount, as of the termination date, of a benefit provided under a plan to the extent that the benefit does not exceed the limitations in ERISA and in subpart B, if –

- (a) The benefit is, on the termination date, a nonforfeitable benefit;
- (b) The benefit qualifies as a pension benefit as defined in § 4022.2; and
- (c) The participant is entitled to the benefit under § 4022.4.

As shown above in § 4022.3, the regulations also provide definitions of "pension benefit" in 29 CFR § 4022.2 and "entitlement" in 29 CFR § 4022.4. Of particular pertinence to your appeal is the definition of a "pension benefit." Section 4022.2 defines a "pension benefit" as follows:

Pension benefit means a benefit payable as an annuity, or one or more payments related thereto, to a participant who permanently leaves or has permanently left covered employment, or to a surviving beneficiary, which payments by themselves or in combination with Social Security, Railroad Retirement, or workmen's compensation benefits provide a substantially level income to the recipient.

In response to comments that PBGC received regarding the 1975 proposed regulation, the Preamble to the September 22, 1975 final rule stated as follows:

¹ See ERISA § 4002.

² ERISA § 4002(b)(3).

³ 40 FR 24206, June 5, 1975.

⁴ See 40 FR 13509. As originally published, the guaranteed-benefits regulation appeared at 29 Code of Federal Regulations ("CFR") Part 2605. It was republished and moved to 29 CFR Part 2613 on June 24, 1981; and republished and moved to its current location at 29 CFR Part 4022 on July 1, 1996. For simplicity, we refer to all sections of the original (1975) guaranteed-benefits regulation as if they were always located in 29 CFR Part 4022, Subpart A. PBGC's guaranteed-benefits regulation is currently available online at <http://www.pbgc.gov/practitioners/law-regulations-informal-guidance/content/page14758.html>.

Guaranteed benefits. One of the important issues raised by the comments concerned the propriety of the definition of pension benefit in [§ 4022.2] of the proposal and the limitation of guaranteed benefits contained in [§ 4022.4(a)(1)] of the proposal. As noted in the proposal, the PBGC has determined that [ERISA] requires the guarantee of basic nonforfeitable pension benefits. Thus, in general, to be guaranteed, a benefit provided under a plan must be (a) payable in periodic installments, (b) designed to provide income for the life of the participant or for his beneficiaries, and (c) nonforfeitable on the date of the termination of the plan.

Although Congress has amended ERISA many times since 1974, the clarification of "guaranteed benefits" as provided in § 4022.3 above has remained the same since it was first published on September 22, 1975 and has always been the starting point for PBGC's determinations of guaranteed benefits.

2. PBGC's Regulations Do Not Allow PBGC to Pay his Benefits in the Form of a Lump Sum

In general, PBGC does not guarantee the payment of benefits in other than a plan's automatic annuity form for single participants or the plan's automatic annuity form for married participants. Per regulation⁵, however, PBGC offers optional forms of benefit for participants who were not already receiving benefits at the time their plan terminated. A lump-sum benefit is not one of PBGC's available optional benefit forms.

In the case of benefits payable under a plan's terms in a single installment (that is, lump sums), section 4022.7⁶ of PBGC's regulations specifically provides as follows:

§ 4022.7 Benefits payable in a single installment.

(a) Alternative benefit. If a benefit that is guaranteed under this part is payable in a single installment or substantially so under the terms of the plan, or an option elected under the plan by the participant, the benefit will not be guaranteed or paid as such, but the PBGC will guarantee the alternative benefit, if any, in the plan which provides for the payment of equal periodic installments for the life of the recipient. If the plan provides more than one such annuity, the recipient may within 30 days after notification of the proposed termination of the plan elect to receive one of those annuities. If the plan does not provide such an annuity, the PBGC will guarantee an actuarially equivalent life annuity.

(b) (1) Payment in lump sum. Notwithstanding paragraph (a) of this section:

(i) In general. If the lump sum value of a benefit (or of an estimated benefit) payable by the PBGC is \$5,000 or less and the benefit is not yet in pay status, the benefit (or estimated benefit) may be paid in a lump sum.

⁵ See 29 CFR § 4022.8(c).

⁶ 29 CFR § 4022.7.

Based on the valuation assumptions for plans that terminated in 2004 set out in PBGC's regulations⁷ PBGC's actuaries calculated the lump-sum value as of the Horizon Plan's termination date (March 31, 2004) of the \$412.55 annuity benefit that is currently receiving to be \$74,201. As the lump-sum value of _____ annuity benefit is greater than \$5,000, section 4022.7 of PBGC's regulations does not allow PBGC to pay _____ his benefit as a lump-sum. As the Appeals Board has no authority to change PBGC's regulations, the Appeals Board cannot change PBGC's determination insofar as it finds that _____ PBGC benefit is payable only as an annuity.

3. _____ Did Not Meet the Horizon Plan's Requirements for Entitlement to a Disability Pension Benefit under Plan Section 7.1

As you claimed in your appeal letter, ERISA requires PBGC to guarantee the payment of a nonforfeitable disability retirement benefit if a participant has satisfied the conditions for entitlement under the plan other than the "completion of a required waiting period."

A typical disability retirement provision found in many plans requires that the participant (1) attain age 45; (2) complete 15 years of service; and (3) incur a disability while in the employment of the plan's sponsor. Such plans typically define disability as an injury or illness that is total and likely to be permanent and that has lasted at least six months. Under such a plan definition, PBGC would guarantee the benefit so long as (1) the participant attained age 45 on or before the plan's termination date; (2) the participant completed at least 15 years of service as of the plan's termination date; and (3) the participant became disabled on or before the plan's termination date. In such a case, PBGC would allow the participant to retire six months after the onset of the disability, even if the six-month waiting period ended after the plan's termination date.

The disability pension provision of section 7.1 of the Horizon Plan, on the other hand, provides as follows:

Upon attaining age 45, a Participant who is receiving a disability accrual under section 4.6 or a prior pension plan that was merged into this Plan may elect to terminate his disability accruals and commence receiving a pension benefit (including a lump sum) beginning on the first day of the month following the month in which the Participant has elected to terminate employment. . . .

Based on the requirements set out in section 7.1 quoted above, we have concluded that _____ is not entitled to a disability pension benefit under the Horizon Plan because (1) he did not meet the age requirement of 45 on or before the plan's termination date; and (2) he did not establish his Plan disability status on or before the Plan's termination date.

⁷ See Appendices A and B of 29 CFR Part 4022.

4. PBGC Determined that the Earliest PBGC Retirement Date under § 4022.11 of PBGC's Regulations for Cash Balance Participants of the Plan is the First of the Month on or after Attainment of Age 50

As you noted in your appeal letter, defined-benefit pension plans that allow for early retirement have historically set the earliest retirement age to be age 55. In more recent years, however, cash-balance plans and other plans have allowed former employees to start receiving their vested benefits as annuities at any age. Thus, for example, in the Horizon Plan, cash-balance participants with at least five years of service were allowed to terminate their employment and start receiving annuity benefits immediately regardless of their age when they terminated employment or at any age thereafter in accordance with section 5.10 (Deferred Cash Balance Annuity) and section 9.1 (Benefits on Termination of Employment).

When Congress enacted ERISA in 1974, it prescribed a detailed set of six priority Categories that PBGC's actuaries must use to allocate the assets remaining in a plan's trust on the plan's termination to benefits payable under the plan. The **Enclosure** is a standard PBGC information sheet. It describes ERISA's six priority Categories.

In determining benefits payable by PBGC, PBGC's actuaries first calculate each participant's benefit payable under the provisions of the participant's terminated plan as of the plan's termination date and then apply the legal limitations on guaranteed benefits⁸ to determine the participant's guaranteed benefit.

The second step in determining what benefits are payable by PBGC is the allocation of assets. For plans that do not have Category 1 and Category 2 benefits (benefits based on employee contributions rather than employer contributions), PBGC's actuaries start by allocating the plan's assets to Category 3 benefits. As described in the Enclosure, Category 3 benefits generally are benefits payable to participants who were retired or could have retired three years before the plan terminated.

The third step in determining what benefits are payable by PBGC is comparing the results of the first two steps. That is, Congress decided in ERISA that, if the funded portion of a participant's benefit in Category 3 is greater than the participant's guaranteed benefit, then PBGC should pay the participant the funded Category 3 benefit instead of the lower guaranteed benefit.

Based on the above considerations, PBGC determined that it must decide which of a terminated pension plan's prescribed annuity commencement dates should be treated as retirement dates for purposes of ERISA and PBGC payments so as not to frustrate Congress's design of the asset-allocation process (Step 2 above).

⁸ For example, the Maximum Guaranteed Benefit limit, the Accrued-at-Normal-Retirement limit, and the Five-Year Phase-In limit.

To formalize PBGC's decision-making process for determining a plan participant's Earliest PBGC Retirement Date ("EPRD"), PBGC published a proposed rule⁹ and solicited comments on December 26, 2000. PBGC published the final rule¹⁰ regarding Earliest PBGC Retirement Dates on April 8, 2002. Section 4022.10¹¹ of PBGC's regulations provides in pertinent part as follows:

§ 4022.10 Earliest PBGC Retirement Date.

The Earliest PBGC Retirement Date for a participant is the earliest date on which the participant could retire under plan provisions for purposes of section 4044(a)(3)(B) of ERISA. The Earliest PBGC Retirement Date is determined in accordance with this § 4022.10. For purposes of this § 4022.10, "age" means the participant's age as of his or her last birthday (unless otherwise required by the context).

(a) ...

(b) Immediate annuity before age 55. If the earliest date on which a participant could separate from service with the right to receive an immediate annuity is before the date the participant reaches age 55, the Earliest PBGC Retirement Date for the participant is the date the participant reaches age 55 (except as provided in paragraph (c) of this section).

(c) Facts and circumstances. If a participant could separate from service with the right to receive an immediate annuity before the date the participant reaches age 55, the PBGC will make a determination, under the facts and circumstances, as to whether the participant could retire under plan provisions for purposes of section 4044(a)(3)(B) of ERISA on an earlier date. If the PBGC determines, under the facts and circumstances, that the participant could retire under plan provisions for those purposes on an earlier date, that earlier date is the Earliest PBGC Retirement Date for the participant. In making this determination, the PBGC will take into account plan provisions (e.g., the general structure of the provisions, the extent to which the benefit is subsidized, and whether eligibility for the benefit is based on a substantial service or age-and-service requirement), the age at which employees customarily retire (under the particular plan or in the particular company or industry, as appropriate), and all other relevant considerations. Neither a plan's reference to a separation from service at a particular age as a "retirement" nor the ability of a participant to receive an immediate annuity at a particular age necessarily makes the date the participant reaches that age the Earliest PBGC Retirement Date for the participant. The Earliest PBGC Retirement Date determined by the PBGC under this paragraph (c) will never be earlier than the earliest date the participant could separate from service with the right to receive an immediate annuity.

(d) Examples. The following examples illustrate the operation of the rules in paragraphs (a) through (c) of this section.

(1) ...

⁹ 65 FR 81456, December 26, 2000.
¹⁰ 67 FR 16950, April 8, 2002.
¹¹ 29 CFR § 4022.10.

(2) ...

(3) Separation at any age. A plan's normal retirement age is age 65. The plan specifies an early retirement age of 60 but offers an immediate annuity upon separation regardless of age. The Earliest PBGC Retirement Date for a participant who, as of the plan's termination date, is age 35 is the date the participant reaches age 55, unless the PBGC determines under the facts and circumstances that the participant could "retire" for purposes of ERISA section 4044(a)(3)(B) on an earlier date, in which case the participant's Earliest PBGC Retirement Date would be that earlier date.

In accordance with the regulation, PBGC reviewed the ages of the Horizon Plan's participants who began receiving benefits more than two years before the Horizon Plan's termination date. We have summarized that retirement data in the following table:

Age at Annuity Starting Date	Number of Annuities Starting on and after 1/1/1992 and before 3/31/2002
55 and older	187
50-54	23
45-49	9
40-44	15
35-39	15
30-34	7
29 and younger	1
Total:	257

The table shows that more than 80%¹² of the participants began receiving annuities at or after age 50. Based on this data and all of the facts and circumstances, PBGC determined that most of the Horizon Plan's participants retired at or after age 50.

Based on our review of all of the records as a whole, the Appeals Board concluded that your appeal did not provide a sufficient basis for changing PBGC's determination of the EPRD for cash-balance participants and the Appeals Board has, therefore, decided to accept PBGC's determination of age 50 as a reasonable EPRD for cash-balance participants of the Horizon Plan.

¹² The data in the table shows that 210 of the 257 participants started receiving annuities at or after age 50. Thus, 81.71% started their annuities at or after age 50, where 81.71% is equal to 210 divided by 257 and 210 is equal to 187 plus 23.

5. If [redacted] Submits Sufficient Evidence that He is Disabled under the Social Security Act, PBGC Will Allow Him to Elect a Retroactive Annuity Starting Date No Earlier than the First of the Month On or After the Onset Date of his Disability (as determined by the Social Security Administration)

Based on the following facts and circumstances of this case, the Appeals Board has decided that PBGC will allow [redacted] the opportunity to elect an Annuity Starting Date ("ASD") that is earlier than his current ASD (November 1, 2009) if he submits a Social Security disability award showing that his actual disability onset date is on or before October 1, 2009:

- a. The only annuity benefit for which [redacted] has satisfied all of the Plan's eligibility requirements on or before the Plan's termination date is the termination benefit payable under Plan § 9.1(b);
- b. In accordance with section 5.10 of the Plan, the benefit payable to [redacted] under Plan § 9.1(b) is actuarially equivalent to the benefit he would receive if he waited until his Normal Retirement Age (age 60) to start receiving his benefit;
- c. As a result of paragraph b, there is no additional actuarial cost to PBGC in providing the benefit starting at an earlier age than there is in providing the benefit starting at age 50 because the Plan reduces the monthly benefit amount to account for the longer period of payment;
- d. [redacted] did not satisfy the Plan's eligibility conditions for a disability retirement benefit under Plan § 7.1 before the Plan terminated and, therefore, his PBGC benefit is subject to the non-disability Maximum Guaranteed Benefit limit and the Accrued-at-Normal-Retirement limit; and
- e. [redacted] did not satisfy the Plan's eligibility conditions for a disability retirement benefit under Plan § 7.1 before the beginning of the three-year period that ended on the Plan's termination date and, therefore, no portion of [redacted] PBGC benefit is a Category 3 benefit.

Accordingly, the Board found that [redacted] earliest possible ASD would be the first of the month coincident with or next following the onset date of his disability as determined by the Social Security Administration. As we noted above, however, if [redacted] submits the described documentation and he thereafter elects an earlier ASD, his monthly benefit will be smaller than the monthly benefit he is currently receiving due to the longer period of payment. For example, if [redacted] submits documentation from the Social Security Administration showing that his disability onset date was October 31, 2004, then his earliest ASD would be November 1, 2004. If he elected to change his ASD to **November 1, 2004**, his monthly PBGC benefit would be reduced to **\$305.86** = $\$856.77 \times 0.3684 \times 0.9686$, where 0.3684 is the early commencement factor for a benefit starting at age 45 and 0.9686 is the form conversion

factor for a J&50%SA for a participant age 45 and a spouse age 43. Thus, if November 1, 2004 were _____ new ASD, _____ monthly survivor benefit would decrease from \$206.28 to **\$152.93**.

Decision

Having applied Horizon Plan provisions, the law, and PBGC's rules to the facts of this case, the Appeals Board decided that it must deny _____ request for a lump-sum payment of his total benefit. But, if _____ submits proof of a Social Security Disability Award with a disability onset date on or before October 1, 2009, PBGC will allow _____ the opportunity to elect a retroactive Annuity Starting Date. Such an election would, however, result in smaller monthly retirement benefits for _____ (and a smaller monthly survivor benefit for _____ because PBGC would have to reduce the monthly amount of his benefit, in accordance with the Horizon Plan's provisions, to account for the longer period of payment.

This decision is PBGC's final action regarding PBGC's March 20, 2009 determination letter. If _____ wishes, he may seek review of this decision in an appropriate federal district court.

If _____ needs other information from PBGC, he may call PBGC's Customer Contact Center at 1-800-400-7242 and ask to speak to the authorized representative assigned to the Horizon Plan (Case 202057).

Sincerely,



Michel Louis
Appeals Board Member

Enclosure

cc: _____