

ARCHDIOCESE OF PHILADELPHIA
SECRETARIAT FOR TEMPORAL SERVICES

222 N. 17th Street • Philadelphia, Pennsylvania 19103 • (215) 587-0570 • Fax (215) 587-3572

HUMAN RESOURCES OFFICE
PENSION ADMINISTRATION

January 18, 2018

[REDACTED]

RE: LERP Retirement and Benefit Payment Options

Dear Mr. [REDACTED]:

Congratulations on reaching retirement age and becoming eligible to commence your pension benefits from the **Archdiocese of Philadelphia Lay Employees' Retirement Plan (LERP)**. This letter is to confirm our telephone conversation related to the benefit payment options available to you as you begin your LERP pension.

The Benefit Payment Options summarized in our letter dated January 3, 2018 are complete and accurately outline all the options available to you as a participant in the LERP. Specifically, those available options include:

- Straight Life Only
- Five Year Certain Benefit
- Ten Year Certain Benefit
- Single Lump Sum Benefit Payment

The two Survivor Options – 60% or 100% available to spouses only, are not available options in your situation. The LERP spousal survivor options must be interpreted in accordance with the canons, disciplines, and usages of the Church (which is permitted because the LERP is a “church plan” for ERISA and tax-law purposes).

As we clarified during our call, you may designate [REDACTED] as your beneficiary in either the Five-Year Certain or Ten-Year Certain Benefit Options. Furthermore, you may use the \$67,129.95 Lump Sum amount to purchase an annuity, with an independent insurance company or bank, which could provide a lifetime of monthly benefit payments to you and surviving benefits to Mr. [REDACTED] as well.

We appreciated the opportunity to further explain this issue with you during our telephone call, and I thank you for this occasion to follow up that conversation. We understand this may not be the decision you were looking for, but under the circumstances and based on the information presented, no other determination is possible.

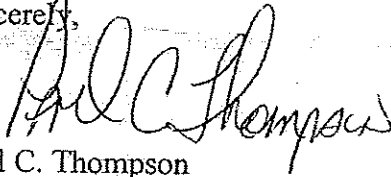
[REDACTED]
January 18, 2018

Page 2

We look forward to receiving your final benefit payment election and providing your LERP pension accordingly. Your LERP benefits will begin retroactive to January 1, 2018.

We wish you a happy and healthy retirement and desire all the best for you and [REDACTED]. Please let us know if you have any additional questions and let us know if we can assist you in any way.

Sincerely,

A handwritten signature in cursive script, appearing to read "Paul C. Thompson".

Paul C. Thompson

Director, Employee Retirement Plan Services

MAPRP

Mid-America Pension Rights Project

Ohio Office
7162 Reading Road, Suite 1150
Cincinnati, Ohio 45237

1-800-488-6070
Fax: 513.338.1501
mid-americanpensions.org

February 21, 2018

Paul C. Thompson
Director, Retirement Plan Services
Archdiocese of Philadelphia
222 N. 17th St.
Philadelphia, PA 19103

Re: [REDACTED] retirement

Via certified mail

Dear Mr. Thompson:

This letter is in response to the 1/18/2018 letter to [REDACTED] from you, Paul C. Thompson, Director of Retirement Plan Services for the Archdiocese of Philadelphia. Mr. Touzell is retiring soon. The letter states that "the two survivor options, available to spouses only, are not available options in your situation." The letter also states that the pension plan options "must be interpreted in accordance with the canons, disciplines, and usages of the church." It also says that the denial of the survivorship option is based on the fact that the pension plan is a church plan.

Therefore, even though [REDACTED] is vested and entitled to a pension, the Archdiocese believes that it is entitled to eliminate his survivorship pension options. No specific right of the Archdiocese to remove survivor options was spelled out in the letter or the plan, nor was Mr. [REDACTED] informed in advance of any such action; therefore, he reasonably expected that he would get the options set forth in the plan document.

The Archdiocese did not set forth a specific reason for the denial of the options. We surmise that the reason for denial is Mr. [REDACTED]'s marriage to another man. If so, the Archdiocese appears to be applying different standards to different people. I am guessing that the Archdiocese is not screening pension applications for divorce, or abortion. A surviving spouse may have had an abortion or may be divorced and remarried. These are also matters subject to the canons, disciplines, and usages of the Catholic Church. If the Archdiocese cannot tolerate Mr. Touzell's situation, it should also deny the options to divorcees who remarry. If not, please advise us what the distinction is. Indeed, there is a whole host of circumstances which could disqualify retirees pursuant to Catholic doctrine, none of which seem to be considered for denial of options, except for same sex marriage. Offering survivor options to a divorced person who

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has remarried and not offering them to [REDACTED] is clearly discriminatory, since both concern marriage. It appears that same sex marriage alone has been singled out for negative treatment. Discrimination against only one class of people is illegal, even for a church.

Applicable Law

The Archdiocese appears to be claiming a religious exemption from providing survivor options to sexual minorities. The Religious Freedom Restoration Act of 1993 (RFRA) prohibits the "Government [from] substantially burden[ing] a person's exercise of religion even if the burden results from a rule of general applicability" unless the Government "demonstrates that application of the burden to the person—(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. §§ 2000bb-1(a), (b). As amended by the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), RFRA covers "any exercise of religion, whether or not compelled by, or central to a system of religious belief." § 2000cc-5(7)(A).

Congress subsequently passed the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), 114 Stat. 803, 42 U.S.C. § 2000cc *et seq.* That statute, enacted under Congress's Commerce and Spending Clause powers, imposes the same general test as RFRA but on a more limited category of governmental actions. See *Cutter v. Wilkinson*, 544 U.S. 709, 715-716, 125 S. Ct. 2113, 161 L.Ed.2d 1020 (2005). What is most relevant is that RLUIPA amended RFRA's definition of the "exercise of religion." See § 2000bb-2(4) (importing RLUIPA definition). Before RLUIPA, RFRA's definition made reference to the First Amendment. See § 2000bb-2(4) (1994 ed.) (defining "exercise of religion" as "the exercise of religion under the First Amendment"). In RLUIPA, in an obvious effort to effect a complete separation from First Amendment case law, Congress deleted the reference to the First Amendment and defined the "exercise of religion" to include "any exercise of religion, whether or not compelled by, or central to, a system of religious belief." § 2000cc-5(7)(A).

Substantial Burden

When we apply these statutes to the case at hand, the first step is determining whether offering survivorship options is a substantial burden on the Archdiocese of Philadelphia. One of the most recent cases on the subject is the *Burwell v. Hobby Lobby Stores Inc.*, 1345 S. Ct. 2751 (2014). Hobby Lobby Stores were closely held by a religious family that does not believe in abortion. They requested exemption from the health care mandate requiring them to provide contraceptives to their employees, arguing that they were facilitating abortion. The court allowed

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an exemption. It determined that substantial harm was inflicted, because opting out of the insurance would cost them around \$4.75 million, and many thousands of employees would be affected by the decision.

In this case, providing the survivor options would cost the Archdiocese nothing, since the pension options are essentially equivalent in cost. Furthermore, we presume that this issue applies to only one, or very few employees. Harm to the Archdiocese is de minimis at best.

Religious Practice

The next issue is whether denying pension options constitutes a religious practice. RULIPA defines a religious practice as any exercise of religion, whether or not compelled by or central to, a system of religious belief, see supra. Examples would include prayer, communion, baptism, etc. The church's position on marriage would constitute religious practice, but pension options are a lay employment issue having nothing to do with religious practices or beliefs. The pension plan is specifically named a "lay pension". [REDACTED] was already married when he chose to apply for retirement benefits. The church was not forced to participate in that marriage. No endorsements or condoning happened, nor can they happen, because this is a one-time private decision. Endorsements require an audience. There is no audience here to be persuaded that the Catholic church endorses same sex marriage. How [REDACTED]'s one single pension decision can possibly burden the Archdiocese is impossible for me to say.

Furthermore, Mr. [REDACTED] has his own religious practice, which embraces his marriage. The Catholic Church may not impose its marital standards on other faith traditions and beliefs.

Compelling Government Purpose

The government may only burden the free exercise of religion if there is a compelling government purpose, and it must be the least restrictive means of furthering the government interest. The compelling government interest is twofold in this case. The government has an interest in provision of survivor options, because they are income for the survivor. Often the participant predeceases the spouse. Without a survivor benefit, the spouse faces a significant reduction of income. Many survivors also experience a big reduction in social security benefits at the same time. Many Americans have no retirement savings. They heavily depend on social security and pensions. To take that source of income away from survivors is unconscionable.

Equal Protection

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Furthermore, the Archdiocese seems to be singling out only sexual minorities only for denial this denial. Such individuals are entitled to the protections of the Equal Protection Clause of the U.S. Constitution. United States v. Windsor, 570 U.S. ____ (2013) (Docket No. 12-307), is a landmark rights case in which the United States Supreme Court held that restricting U.S. federal interpretation of "marriage" and "spouse" to apply only to opposite-sex unions, by Section 3 of the Defense of Marriage Act is unconstitutional under the Due Process Clause of the Fifth Amendment. In the majority opinion, Justice Anthony Kennedy wrote: "The federal statute is invalid, for no legitimate purpose overcomes the purpose and effect to disparage and to injure those whom the State, by its marriage laws, sought to protect in personhood and dignity...by seeking to displace this protection and treating those persons as living in marriages less respected than others, the federal statute is in violation of the Fifth Amendment." [REDACTED] has a right to equal treatment pursuant to the Fifth Amendment.

In this case, providing benefits for survivors and preventing discrimination are compelling government purposes in this case. There is no corresponding burden on the Archdiocese.

Least Restrictive Means

In this case, the question is whether there is as a less burdensome alternative to address the governmental interests. Here there are only two options, whether to offer the survivor benefit or not. Only employers provide retirement benefits. There is no other option. Therefore, there is no other less burdensome way to provide survivor options. There is no other way to protect Mr. [REDACTED]'s equal protection rights either.

Church Doctrine

The Archdiocese cites church doctrine and usages as its reason to deny the survivor options.

First of all, there is nothing in church doctrine which specifically mandates the denial of pension options to anyone. Pensions are not religious practices.

Second of all, there is a great deal of recent Catholic Church doctrine which reflects compassion for sexual minorities. Pope Francis has refused to judge such persons, and in his *Amoris Laetitia* of 4/8/16 he urges Catholic priests to welcome sexual minorities, and to also use their discretion on whether divorced Catholics in new marriages can take communion.

Recently, Catholic theologians signed a memorandum entitled Church 2011. The Memorandum states that "the church's esteem for marriage and celibacy does not require the exclusion of people who responsibly live out love, faithfulness, and mutual care." James Martin

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wrote a book entitled "Building a Bridge: How the Catholic church and the LGBT community can enter into a relationship of respect, compassion and sensitivity."

Conclusion

There is plenty of church doctrine and usage that embraces more favorable treatment for sexual minorities. Allowing Mr. [REDACTED] his survivor options is consistent with contemporary Catholic thought and scholarship with, as quoted above, and the important governmental purpose of providing income during retirement. Offering the options to people in same sex marriages does not burden the Archdiocese. It costs them nothing and no one even knows what options are offered to whom since it is an individual, private, one-time decision. There is no other means to provide survivor benefits to spouses in such marriages. The lack of burden on the Catholic church, the important governmental purposes of providing pension income and requiring fairness, dictate that the Archdiocese should offer the survivor options to Mr. [REDACTED]

Sincerely,

Mid-America Pension Rights Project

Gail Webb
Attorney at Law

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