

~~THE GOODWILL TRUCK RUBBER COMPANY~~
~~ALBANY, OHIO 4316-0001~~

JUL 17

July 16, 2014

Ms. Jeanne M. Medeiros
Managing Attorney
New England Pension Assistance Project
Gerontology Institute, Univ. of Massachusetts
Boston, MA 02125

RE: Appeal for Survivor Pension Payments Under the Retirement Plan for Salaried Employees

Dear Ms. Medeiros:

Your claim on behalf of [REDACTED] for a survivor pension benefit under The [REDACTED] Retirement Plan for Salaried Employees (Plan) has been reviewed by [REDACTED] Claim Review Committee. In arriving at the Committee's decision, the provisions of the plan document, federal regulations and all documentation provided were reviewed.

The Committee had requested the pension area to inform it of the normal procedures and documents reviewed during a retirement election meeting and to perform additional research in archived files to identify those used for this retirement. When Mr. [REDACTED] retired, the procedure involved an individual retirement interview with Human Resource personnel to review and explain all aspects of retirement including the benefit calculation and enhancement to the pension as the result of a special retirement program. Special attention would have been provided to individuals at that time due to the unique provisions of the special program. The documentation that would have been reviewed would have included the retiree's reduced benefit amount per each option as well as the benefit payable to a spouse upon the death of the retiree, pension forms to be completed as well as the spousal rights. Only the Application and signed election form were microfilmed but not the other documents used during the retirement interview. As the Company has recently moved, the prior paper files cannot be found. As a result of the inability to produce that evidence, the Committee has decided to provide a survivor pension payment to Ms. [REDACTED] in the form of a 50 percent Qualified Joint and Survivor Annuity (50% J&S).

The pension payment made to Mr. [REDACTED] was based on the "No Option Election" signed by both Mr. and Ms. [REDACTED] at the time of retirement. As a result there was no reduction in his payment which was \$767.15/month. An election of the 50% J&S would have resulted in a reduction in the amount of his monthly payment. The monthly amount Mr. [REDACTED] would have received under the

50% J&S option would have been \$712.99. The overpayment of \$54.16 per month for 319 months or \$17,277.04 will need to be recovered prior to Ms. [REDACTED] receiving her survivor payment.

The authority that was cited to waive recovery of the overpayment applies to corrections of operational defects made under the Employee Plans Compliance Resolution System. We are not making a correction of operational defects pursuant to that program. The law is clear that the Plan has a fiduciary duty to attempt to collect overpayments and if the overpayment is not repaid, then to offset that amount against future payments. [REDACTED] can either have Mr. [REDACTED]'s estate pay the \$17,277.04 in a lump sum, or, if not, [REDACTED] survivor benefit will be paid after recouping that overpayment. In the Hearn v. Western Conference of Teamsters Pension Trust Fund case, a survivor pension amount found due to a surviving spouse was required to be offset by the amount of the overpayments made as a result of payments of the pension benefit in the higher monthly single life annuity amounts paid prior to the retiree's death. *

Ms. [REDACTED] or her duly authorized representative may appeal the decision by filing written notice with The ERISA Appeal Committee, [REDACTED], within 60 days of receipt of the denial of this claim.

The ERISA Appeals Committee at its regularly scheduled quarterly meeting will consider all information submitted to and made part of the record by the Benefit Review Committee if a written request for an appeal is made. Appeal decisions are made no later than the date of the meeting of the Committee which immediately follows the plan's receipt of a request for appeal, unless the request for appeal is filed with 30 days preceding the date of such meeting. In such case, a decision would be forthcoming no later than the date of the second meeting following the Plan's receipt of the request for appeal. In unforeseen circumstances (such as the accommodation of the schedule of a participant wishing to attend the hearing) a further extension of time may be necessary; however, a decision shall be rendered no later than the third meeting of the Committee following the Plan's receipt of the request for appeal.

The decision on appeal shall be in writing and shall include specific reasons for the decision. It will be written in a manner calculated to be understood by Ms. [REDACTED], as well as including specific references to the pertinent plan provisions on which the decision is based.

The decision on appeal shall be final and binding.

Sincerely,



Manager
Benefit Operations

CC: [REDACTED]



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August 14, 2014

BY CERTIFIED MAIL; RETURN RECEIPT REQUESTED

ERISA Appeal Committee

The Goodyear Building
100 Information Way
Boston, MA 02115-2001

Re:

[REDACTED]

Soc. Sec. No.
D/O/B:

[REDACTED]

Dear Appeal Committee,

As you know, [REDACTED] has requested the assistance of the New England Pension Assistance Project with respect to her entitlement to survivor pension benefits pursuant to the [REDACTED] Retirement Plan for Salaried Employees ("the Plan"). This letter is an appeal of the portion of the July 16, 2014 Benefit Operations decision regarding the Plan's recoupment of overpayment.

Factual Background

[REDACTED]'s husband, Joseph [REDACTED], was employed at [REDACTED] from 1955 through 1987. Joseph [REDACTED] retired from [REDACTED] in 1987 and began receiving a pension benefit thereafter. Joseph [REDACTED] died in November of 2013 and [REDACTED] was subsequently notified via telephone that she was not entitled to a survivor benefit.

Upon request, the election forms executed by Joseph and [REDACTED] were provided to her. The documents provided include a form dated January 23, 1987, which purports to be [REDACTED]'s waiver of her right to a Qualified Joint and Survivor Annuity (hereinafter, "QJSA").¹ As argued in the original claim letter dated March 14, 2014, this document was inherently flawed and did not constitute an effective waiver of Ms. [REDACTED]'s right to a QJSA.

¹ The election forms are enclosed herein as Exhibit 1.

In its July 16, 2014 decision regarding our claim for benefits on behalf of [REDACTED], the Benefit Operations Review Committee agreed to provide a survivor pension payment to [REDACTED] in the form of a fifty-percent Qualified Joint and Survivor Annuity (QJSA) "as a result of the [Plan's] inability to produce evidence" that it had followed the proper ERISA procedures regarding the election forms.² In addition to agreeing to commence payment of Ms. [REDACTED]'s entitled survivor benefits, the Plan stated it would do so only after recouping an "overpayment of \$54.16 per month for 319 months or \$17,277.04."³

The Plan contends that the authority cited in our original claim to support the assertion that the Plan may not seek recoup payments made to Joseph [REDACTED] is not applicable to waive the recovery of these payments because the Plan is "not making a correction of operational defects pursuant" to the Employee Plans Compliance Resolution System (hereinafter "EPCRS").⁴ We argue that the Plan's contention is plainly incorrect and that the Plan may not seek to recoup from [REDACTED] payments made to Joseph [REDACTED].

Argument

As we originally argued and now appeal, the Plan may not seek to recoup any amount that was paid to Joseph [REDACTED] as part of his unreduced pension benefit in calculating [REDACTED]'s QJSA. The Plan's contention that the EPCRS correction procedures do not apply to this Plan failure is incorrect. EPCRS correction procedures govern all corrections to all Plan failures. The Plan's defective election form and failure to properly advise the [REDACTED] of their election options constitute a Plan failure. Further, the Plan is precluded from recoupment of these payments because, due to the defective nature of the Election Form and the Plan's inability to produce evidence that it had actually followed the required ERISA procedures, the Plan was in violation of its fiduciary duties to [REDACTED] as a beneficiary.

Plan Failure and Correction Procedures

EPCRS correction procedures define a Plan failure as "any failure," including failures in Plan operation or in following the terms of the Plan Document.⁵ Here, the Plan's failure to properly advise the [REDACTED] of their election options, coupled with the lack of evidence to support an inference that the Plan properly advised the [REDACTED] of their election options, constitutes a Plan failure in following the terms of the Plan and, more importantly, ERISA procedures.

² The [REDACTED] v. [REDACTED] [REDACTED] "Appeal for Survivor Pension Payments Under the Retirement Plan for Salaried Employees, July 16, 2014.

³ Id.

⁴ Id.

⁵ Rev. Proc. 2013-12, Section 1.02, attached herein as Exhibit 2.

The defective nature of the Plan's Election Form along with the Plan's failure to properly advise the [REDACTED] of their election options requires that the Plan's actions be correctly classified as a Plan failure. Because this is plainly a Plan failure, EPCRS correction procedures apply. Section 6.02 explains that "a failure is not corrected unless full correction is made with respect to all participants and beneficiaries."⁶ Section 6.02(1) further provides that corrections include the "restoration of current and former participants and beneficiaries to the benefits and rights they would have had if the failure had not occurred."⁷ Section 6.02(2) provides that these corrections should be "reasonable and appropriate for the failure" and should, "to the extent possible, resemble one already provided for in the Code, regulations, or other guidance or general applicability."⁸

Section 6.06 would require the Plan to properly follow correction procedures by remitting to [REDACTED] a lump sum retroactive payment with interest of her entitled benefits to the date on which she should have begun receiving her QJSA.⁹ This correction would restore Ms. [REDACTED], the current participant, with the benefits and rights she would have had if the Plan failure had not occurred. This correction is "reasonable and appropriate for the failure" because Ms. [REDACTED] has gone without her survivor benefits since her husband's passing through no fault of her own.

Because of the nature of the Plan's failure, we would direct the Plan's attention to paragraph .07 of Appendix A of the EPCRS.¹⁰ This section pertains to procedures Plans may follow in order to correct operational defects. This provision explicitly states that, "the portion of the qualified joint and survivor annuity payable to the spouse upon the death of the participant may not be actuarially reduced to take into account prior distributions to the participant."¹¹ (emphasis added). If the Plan should attempt offset any amount payable to [REDACTED] by amounts by which her husband was overpaid, the Plan would be acting in contravention of clear IRS procedures and could face plan disqualification.¹²

In its decision withholding [REDACTED]'s survivor benefits until the Plan had recouped payments made to Joseph Arruda, the Benefits Committee cited *Hearn v. Western Conference of Teamsters Pension Trust Fund*¹³ as providing the Committee with the authority to offset survivor benefits to [REDACTED] by overpayments made to Joseph [REDACTED]. The Plan contends that the

⁶ Rev. Proc. 2013-12, Section 6.02, Attached herein as Exhibit 3.

⁷ Rev. Proc. 2013-12, Section 6.02 (1).

⁸ Rev. Proc. 2013-12, Section 6.02 (2).

⁹ Rev. Proc. 2013-12, Section 6.06, relating to failures in distributing before the required minimum distribution date. Attached herein as Exhibit 4.

¹⁰ Rev. Proc. 2013-12, Appendix A, Paragraph .07. Attached herein as Exhibit 5.

¹¹ *Id.* Emphasis added.

¹² *Id.*

¹³ *Hearn v. Western Conference of Teamsters Pension Trust Fund*, 68 F.3d 301 (9th Cir. Cal. 1995).

"law is clear that the Plan has a fiduciary duty to attempt to collect overpayments and if the overpayment is not repaid, then to offset that amount against future payments."¹⁴

The *Hearn* case does not support the Plan's contentions and is distinguishable from Ms. [REDACTED]'s case for a few reasons. First, the Plan in the *Hearn* case was repeatedly referred to by the court as a "deceived fund."¹⁵ The issue in that case was the intentional misrepresentation of marital status by the employee spouse. The employee spouse, who had been separated from his wife but not divorced, intentionally claimed to be single on his election form without the consent of his wife. This act of deceit by the employee spouse led the Plan to reasonably and with good faith treat the annuity as a single life annuity. Here, there were no acts of deceit. There was no intentional misrepresentation by Joseph [REDACTED] in order to obtain the single life annuity for himself. The fact that Mr. [REDACTED] was paid a single life annuity was due to the defective election forms he and Ms. [REDACTED] were presented at the time of election and the lack of clarity with which their options were described. The [REDACTED] Plan was not a "deceived fund."

The second reason that the *Hearn* case is distinguishable from the instant case is the good faith with which the Plan in the *Hearn* case acted upon. In that case, the Plan had no reason to believe the employee spouse was deceiving them and acted upon his misrepresentations. The court ruled that the "Trust Fund's good faith determination is treated as conclusive, but only 'to the extent' the Fund has already made payments."¹⁶ The court further explains that interpretation of the statute would only hold the Fund liable to the surviving spouse if the Fund's "debt to her exceeds its over payment to her husband."¹⁷ The court continued by adding, "In other words, to the extent Mr. Hearn *hornswoggled* the Trust Fund into paying him more than he was entitled to, payments to Mrs. Hearn are suspended until the Fund is more or less where it would have been had Mr. Hearn honestly disclosed his marital status."¹⁸

The court in *Hearn* clearly makes the Fund's ability to suspend payments to or demand recoupment from a surviving spouse contingent upon the Fund's being deceived or misled in some way. This is clearly distinguishable from the [REDACTED] case, as we have argued, because neither Mr. nor Ms. [REDACTED] deceived or misrepresented their desired benefit election. The election was made due the defective nature of the election form and the lack of guidance by the Plan in informing them of their options and rights.

Conclusion

[REDACTED]'s entitlement to a survivor benefit is well-documented by the evidence submitted herein. For the reasons discussed above, we hereby request that the Plan calculate and

¹⁴ The *G... ..*, "Appeal for Survivor Pension Payments Under the Retirement Plan for Salaried Employees," July 16, 2014.

¹⁵ 68 F.3d 301 at 303.

¹⁶ *Id.*

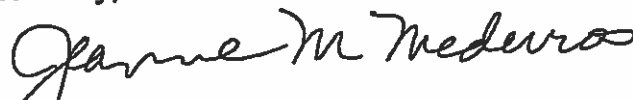
¹⁷ *Id.*

¹⁸ *Id.* Emphasis added.

pay the benefit to Ms. [REDACTED], without recoupment as a factor, that she entitled pursuant to the Plan. Please direct your written response to us at: New England Pension Assistance Project, Gerontology Institute, Univ. of Massachusetts Boston, 100 Morrissey Blvd., Boston, MA 02125. Please feel free to call or email Jeanne Medeiros at 617-287-7332 or Jeanne.medeiros@umb.edu if we can provide you with any further information.

Thank you for your timely response to this appeal of the Benefits Committee decision.

Sincerely,



Jeanne M. Medeiros, Esq.
Managing Attorney

Enclosures

cc: [REDACTED]



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November 13, 2014

BY CERTIFIED MAIL; RETURN RECEIPT REQUESTED

ERISA Appeal Committee

Re:

Soc. Sec. No.: XXX-XX-
D/O/B:

Post-Hearing Memorandum

Dear Appeals Committee:

This memorandum is submitted on behalf of Ms. to clarify and delineate certain points raised during the telephone hearing of November 5, 2014.

Scope of Review

As stated in the plan's own Appeal Exhibit 1, the issue before the Appeals Committee at its hearing on November 5, 2014, was :

"Should's appeal for a survivor pension be granted without offset for previous overpayments of pension amounts made during's life?"

The issue of whether the plan had complied with ERISA in the benefit election process is not before the Committee, as that issue was already determined at the initial claim level, and it was not appealed. For this precise reason, the Appeal Exhibit 1 compiled by accurately characterizes the matter before the Board as a **"Partial Denial at Review Level"**, and states:

After researching Ms. request and considering the facts and finding certain files could not be found to support the Pension department's position that procedures and policies were followed regarding delivery of certain forms and documents, the Benefits review Committee determined that Ms. should be allowed the 50% Joint and

Survivor (J&S) option because the election form did not have the spousal rights prescribed”.

Issues regarding the validity of the spousal waiver are not before the Appeals Committee, as that issue has been determined, and it has been found that, due to deficiencies in the election process, Ms. [REDACTED] should be paid the 50% Joint and Survivor benefit. The only issue before this Committee is whether the benefit payable to her may be properly offset by overpayments made to the late Mr. [REDACTED] during his lifetime.

Applicability of Employee Plans Compliance Resolution System

The Plan contends that the Employee Plans Compliance Resolution System (hereinafter “EPCRS”) is not applicable because the Plan is “not making a correction of operational defects”. The Plan’s contention that the EPCRS correction procedures do not apply to this Plan failure is incorrect. EPCRS correction procedures govern all corrections to all Plan failures.

EPCRS correction procedures define a Plan failure as “any failure,” including failures in Plan operation or in following the terms of the Plan Document.¹ Here, the Plan’s failure to properly advise the [REDACTED] of their election options, coupled with the lack of evidence to support an inference that the Plan properly advised the [REDACTED] of their election options, constitutes a Plan failure in following the terms of the Plan and, more importantly, ERISA procedures.

The fact that failure to obtain valid spousal consent constitutes a plan failure subject to EPCRS correction could not be more obvious, as it is a specifically-enumerated and discussed failure throughout Rev. Proc. 2013-12. See Section 6.04, “Correction of a failure to obtain spousal consent”. The plan’s position that this could be anything other than a “plan failure” requiring correction pursuant to EPCRS defies logic.

The defective nature of the Plan’s Election Form along with the Plan’s failure to properly advise the [REDACTED] of their election options requires that the Plan’s actions be correctly classified as a Plan failure. Because this is plainly a Plan failure, EPCRS correction procedures apply. Section 6.02 explains that “a failure is not corrected unless full correction is made with respect to all participants and beneficiaries.”² Section 6.02(1) further provides that corrections include the “restoration of current and former participants and beneficiaries to the benefits and rights they would have had if the failure had not occurred.”³ Section 6.02(2) provides that these corrections should be “reasonable and appropriate for the failure” and should, “to the extent possible, resemble one already provided for in the Code, regulations, or other guidance or general applicability.”⁴

¹ Rev. Proc. 2013-12, Section 1.02

² Rev. Proc. 2013-12, Section 6.02

³ Rev. Proc. 2013-12, Section 6.02 (1).

⁴ Rev. Proc. 2013-12, Section 6.02 (2).

Section 6.06 would require the Plan to properly follow correction procedures by remitting to [REDACTED] a lump sum retroactive payment with interest of her entitled benefits to the date on which she should have begun receiving her QJSA.⁵ This correction would restore Ms. [REDACTED], the current participant, with the benefits and rights she would have had if the Plan failure had not occurred. This correction is "reasonable and appropriate for the failure" because Ms. [REDACTED] has gone without her survivor benefits since her husband's passing through no fault of her own.

The specific nature of the plan's failure in this case is also directly discussed at paragraph .07 of Appendix A of the EPCRS.⁶ This section pertains to procedures Plans may follow in order to correct operational defects. This provision explicitly states that, "the portion of the qualified joint and survivor annuity payable to the spouse upon the death of the participant may not be actuarially reduced to take into account prior distributions to the participant."⁷ (emphasis added). If the Plan should attempt offset any amount payable to [REDACTED] by amounts by which her husband was overpaid, the Plan would be acting in contravention of clear IRS procedures and could face plan disqualification.⁸

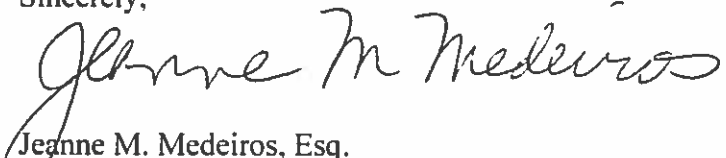
Proposed Resolution

It is clear from the preceding discussion that the Plan has no authority to unilaterally lower or withhold Ms. [REDACTED]'s survivor benefit.

During the telephone hearing, certain committee members inquired about Mr. [REDACTED] probate estate. As an accommodation to the Committee, we contacted the attorney who handled that matter, Michelle Beneski, of Suprenant and Beneski. Her office informed us that there were no assets to be probated upon Mr. [REDACTED]'s death, and no action was filed.

In light of these factors, Ms. [REDACTED] proposes that she would agree to a voluntary reduction of \$25 per month in her survivor annuity to restore to the plan some amount of the payments made to Mr. [REDACTED] during his lifetime.

Sincerely,


Jeanne M. Medeiros, Esq.
Managing Attorney

⁵ Rev. Proc. 2013-12, Section 6.06, relating to failures in distributing before the required minimum distribution date.

⁶ Rev. Proc. 2013-12, Appendix A, Paragraph .07.

⁷ Id. Emphasis added.

⁸ Id.