



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

September 27, 2017



Re: Remand Number [REDACTED]; Case No. 209040; The [REDACTED] Company Pension Plan and Trust (the "Plan")

Dear Mr. [REDACTED]:

This Appeals Board decision constitutes PBGC's final agency action regarding your request that PBGC qualify a domestic relations order dated [REDACTED] 2012 (the "2012 DRO").¹ The 2012 DRO seeks to replace a 2008 domestic relations order qualified by PBGC (the "2008 QDRO").²

As you are aware, on [REDACTED] 2017, the United States District Court for the District of Columbia (the "District Court") issued a Memorandum Opinion and Order vacating the Appeals Board's December 28, 2012 decision not to qualify the 2012 DRO and remanding this matter to PBGC.³

The District Court instructed PBGC to conduct further proceedings consistent with its Opinion.⁴ Consistent with the District Court's guidance, this Board decision is based on an analysis of relevant provisions of the Employee Retirement Income Security Act of 1974, *as amended* ("ERISA"), U.S. Department of Labor ("DOL") and PBGC regulations, and caselaw.

This decision supersedes the Appeals Board's December 28, 2012 decision.

¹ See Enclosure 1.

² See Enclosure 2.

³ See December 28, 2012 Appeals Board decision, at Enclosure 3. United States District Judge [REDACTED] issued his Memorandum Opinion and Order on [REDACTED] 2017, after you (the "Plaintiff") and PBGC (the "Defendant") had filed separate Summary Judgment motions in [REDACTED] v. PBGC, Civil Action No. [REDACTED] (CRC). See [REDACTED] 2017 Memorandum Opinion and Order issued by Judge [REDACTED] at Enclosures 4 and 5, respectively.

⁴ See Memorandum Opinion, at Enclosure 4.

Summary of This September 27, 2017 Appeals Board Decision

As fully explained in this decision, the Appeals Board finds that the 2012 DRO cannot be qualified pursuant to ERISA section 206(d)(3)(D)(i), because the 2012 DRO requires the Plan (now PBGC, as trustee) to provide a type or form of benefit, or an option, that is not otherwise available under the Plan or permitted by DOL and PBGC regulations. Thus, the 2012 DRO does not meet the requirements set forth in section 206(d)(3)(D)(i) of ERISA.

We also explain in this decision that PBGC may qualify a DRO that removes the surviving spouse rights from the remaining benefit due to you under the Plan, if the qualification occurs prior to your benefit commencement date.

Background

PBGC provides pension insurance in accordance with ERISA. If a plan sponsor of a tax-qualified defined benefit pension plan is unable to support its plan, PBGC becomes trustee of the plan and pays benefits pursuant to the terms of the plan, subject to limitations and requirements under ERISA.

The Plan terminated on January 31, 2002, without sufficient assets to provide all benefits PBGC guarantees under ERISA, and PBGC subsequently became trustee of the Plan. The terms of the Plan, the provisions of ERISA, PBGC's regulations and policies, and the terms of any applicable qualified domestic relations order ("QDRO") determine the benefits that PBGC can pay.

When PBGC becomes trustee of a terminated plan, PBGC collects participant data and documents from the former plan administrator. PBGC then audits that information. PBGC relies on the information it receives from a former plan administrator unless PBGC's audit of that information shows that it is incorrect, or a participant supplies PBGC with documents showing that the information is incorrect.

Following the Plan's termination and PBGC's trusteeship of the Plan, PBGC has been responsible for determining the validity (*i.e.*, qualification) of domestic relations orders.

The Divorce Decree

On [REDACTED], 1995, Judge [REDACTED], State of Minnesota, [REDACTED] signed "Findings of Fact, Conclusions of Law, Order for Judgement, & Judgment & Decree" (the "Divorce Decree").⁵ Among other things, the Divorce Decree provides [REDACTED] (now known as [REDACTED]) with an entitlement to a portion of your retirement benefits. Specifically, "Petitioner [Ms. [REDACTED]] is awarded one-half of any retirement or pension benefits to which Respondent [Mr. [REDACTED]] is entitled from his previous employers"⁶

⁵ See Enclosure 6. You and Ms. [REDACTED] had been married since [REDACTED], 1973.

⁶ See page 6 of Divorce Decree, at Enclosure 6.

The 2008 QDRO

On [REDACTED] 2008, a separate interest domestic relations order, naming you as the Participant and Ms. [REDACTED] as the Alternate Payee, was submitted to PBGC for qualification.⁷ Pursuant to Section 3 of the domestic relations order, "PBGC shall pay the Alternate Payee as a separate interest an amount actuarially equivalent to one-half of the Participant's benefit under the Plan. The Participant's benefit shall be determined as of the date the alternate payee elects to begin receiving benefits from the [P]lan."⁸

Pursuant to Section 6 of the domestic relations order, "PBGC shall pay the Alternate's [sic] Payee's benefit in the form elected by the Alternate Payee on the PBGC benefit application." Section 7 of the domestic relations order provides that "PBGC shall stop payments of the Alternate Payee's separate interest in accordance with the form of benefit elected by the Alternate Payee." Section 8 of the domestic relations order provides that "[t]he Participant's death shall not affect payments under the Alternate Payee's separate interest."

Section 10 of the domestic relations order, *Surviving Spouse Rights of Alternate Payee*, provides:

- a. PBGC shall treat the Alternate Payee as the Participant's spouse . . . for purposes of the Participant's qualified joint-and-survivor annuity resulting from the benefit in which the Participant retains a separate interest. . . .
- b. PBGC shall treat the Alternate Payee as the Participant's spouse for the purposes of the Participant's qualified preretirement survivor annuity resulting from the benefit in which the Participant retains a separate interest. . . .

On August 28, 2008, PBGC determined that the domestic relations order is a Qualified Domestic Relations Order (the "2008 QDRO").⁹ Neither you nor Ms. [REDACTED] appealed this determination, which became effective under PBGC regulations after the 45-day appeal period had elapsed.¹⁰

Ms. [REDACTED] Commencement of Her Separate Interest Benefit and
Your Request for a Benefit Application

On July 27, 2009, Ms. [REDACTED] elected to begin her separate interest benefit in the form of a Straight Life Annuity with No Survivor Benefits ("SLA"). Effective October 1, 2009, at age 65, Ms. [REDACTED] began receiving a monthly benefit of \$235.79 in the form of an SLA. Pursuant to the terms of the 2008 QDRO, Ms. [REDACTED] monthly benefit, as an SLA, is payable for her lifetime. Your death will have no effect on her separate interest benefit.

⁷ See Enclosure 2.

⁸ *Id.*

⁹ See Enclosure 7.

¹⁰ See 29 Code of Federal Regulations ("C.F.R.") section 4003.22.

On August 23, 2017, you requested a Benefit Application from PBGC (PBGC Form 700).¹¹ As of the date of this decision, you are 77 years old, Ms. [REDACTED] is 73 years old, and you have not commenced receipt of your PBGC-payable monthly benefit payments.¹²

PBGC Erred in Its 2011 Review of Your Draft DRO

On July 1, 2011, PBGC acknowledged receipt of a draft domestic relations order submitted by you for review.¹³ The draft domestic relations order is identical to the 2012 DRO. In an August 5, 2011 letter, a PBGC representative informed you that, based on PBGC's informal review, the draft domestic relations order, if submitted to PBGC unchanged as an original signed order, would be a qualified domestic relations order.¹⁴ PBGC erred in reaching this conclusion, and we regret this mistake in PBGC's 2011 review of the draft domestic relations order.

The 2012 Minnesota Court Order and the 2012 DRO

Prior to signing the 2012 DRO, Judge [REDACTED], [REDACTED], State of Minnesota, [REDACTED] signed an Order on [REDACTED], 2012, regarding your case. The Order states that "the Respondent [Mr. [REDACTED]] moves the Court to sign a QDRO that he prepared which eliminates the joint survival provision."¹⁵ Specifically, the [REDACTED], 2012 Order provides that "[t]he Respondent shall submit a QDRO for the Court's signature which removes the joint survival provision in the prior QDRO filed [REDACTED] 2008 No other changes are to be made, and the QDRO submitted by the Respondent must still provide for a 50-50 division in the benefits between the parties."¹⁶

On [REDACTED], 2012 (three days later), Judge [REDACTED] signed the 2012 DRO.¹⁷ Pursuant to section 2 of the 2012 DRO, the pension benefit assigned to Ms. [REDACTED] provides her with "50% [×] Participant's Benefit as specified in the divorce decree." Section 3 of the 2012 DRO, *Payment of the Alternate Payee's Benefit*, provides the following:

The Plan (Trustee) [PBGC] is directed to pay the Alternate Payee each month an amount, as indicated in Section 2. The payment shall begin as soon as administratively [possible] and will terminate upon the earlier of either party's death. If the Alternate Payee predeceases the Participant, the Alternate Payee's

¹¹ In response to your request for a Benefit Application, PBGC informed you, in a letter dated September 11, 2017, that once the Appeals Board has reached a decision, PBGC will calculate your benefit and issue an application to you. See your August 23, 2017 letter and PBGC's September 11, 2017 letter, at Enclosure 8.

¹² The Appeals Board has no authority to opine on the applicability of the required minimum distribution provisions in Internal Revenue Code ("Code") section 401(a)(9) or penalties associated with failing to commence benefit payments upon reaching the required minimum distribution date.

¹³ See Enclosure 9.

¹⁴ See Enclosure 10.

¹⁵ See Enclosure 11.

¹⁶ *Id.*

¹⁷ See Enclosure 1.

benefit will revert back to the Participant effective the month following the Alternate Payee's death.

The 2012 DRO seeks to: change the separate interest benefit Ms. [REDACTED] was awarded (and is receiving) pursuant to the 2008 QDRO, replace the separate interest form of benefit in the 2008 QDRO with a shared payment benefit, and remove Ms. [REDACTED] survivor interest from your remaining benefit.

Despite the statement in the [REDACTED], 2012 Order that no changes other than the elimination of the "joint survival provision"¹⁸ be made to a domestic relations order submitted for her approval, Judge [REDACTED] signed the 2012 DRO.

PBGC's Review of the 2012 DRO

You submitted the 2012 DRO to PBGC for qualification in February 2012. On May 25, 2012, PBGC determined that the 2012 DRO is not a QDRO for the following reason:¹⁹

The [2012] Order is a "shared payment" order – an order that gives the alternate payee a portion of the participant's benefit payments under the plan during the participant's lifetime. The alternate payee began receiving benefits before the Order was submitted under the terms of a previously qualified "separate interest" order. Once an alternate payee and/or participant begins receiving benefits under a "separate interest" order, the benefits are to be payable for their life expectancy. Because the Order requires that the alternate payee's benefit be payable for only the participant's lifetime, PBGC would not qualify the Order. PBGC may, however, qualify an amended "separate interest" order.

Your Appeal and the Appeals Board's 2012 Decision

You appealed PBGC's May 25, 2012 determination on July 9, 2012. The Appeals Board denied your appeal on December 28, 2012 (the "2012 Decision").²⁰ For the reasons explained in the 2012 Decision, the Appeals Board found that your appeal did not provide a sufficient basis for changing PBGC's determination that PBGC cannot qualify the 2012 DRO.

In the 2012 Decision, the Appeals Board addressed the circumstances under which PBGC may qualify a subsequent DRO:

Because you have not yet started receiving your benefit, a new amended order could change Section 10 of the 2008 QDRO . . . to state that the Alternate Payee will not be treated as your surviving spouse for purposes of (1) the Qualified Joint and

¹⁸ We believe Judge [REDACTED] meant the "joint and survivor provision." There is no such term in ERISA as a "joint survival" benefit.

¹⁹ See Enclosure 12.

²⁰ See Enclosure 3.

Survivor Annuity; and (2) the Qualified Preretirement Survivor Annuity without violating ERISA's QDRO requirements.

(Emphasis in Original.)

The U.S. District Court Order and Memorandum Opinion

In December 2014, you sued PBGC, seeking review of the Appeals Board's 2012 Decision.

On [REDACTED] 2017, Judge [REDACTED] United States District Court for the District of Columbia, vacated the Appeals Board's December 28, 2012 decision that the 2012 DRO does not constitute a QDRO, and remanded the matter to PBGC. The District Court Order directed PBGC to further consider your request that PBGC qualify the 2012 DRO.²¹ In the Memorandum Opinion, the District Court found that the Appeals Board erred in its reliance on PBGC Operating Policy Manual 6.6-3, *Qualified Domestic Relations Orders*.²² Specifically, the Court stated the following:²³

The [Appeals] Board's reliance on the PBGC's "already in pay status" policy to affirm the Agency's decision suffers from two related problems. First, [United States Code ("U.S.C.") § 1056(d)(3)(D)(ii) [section 206(d)(3)(D)(ii) of ERISA] excludes from qualification only those domestic relations orders that require the payment of increased benefits. That condition necessarily implies that Congress intended for the agency to make some type of determination as to whether a specific order will (or, more accurately, is likely to) increase overall benefits payments. Yet the agency's stated policy relieves it of that statutory responsibility by automatically disqualifying *any* order submitted to the PBGC after the alternate payee begins receiving payment under a separate-interest order. See PBGC Operating Policy Manual [6.6-3(F)(2)(d)]. . . . There is nothing inherent in an alternate payee's receipt of benefits under a separate-interest order that would cause a subsequent shared-interest order to require an increase in benefit payments. . . .

A related flaw in PBGC policy (and the Appeal Board's reliance on it) is that the statute tells the agency precisely how to determine whether a subsequent order will require the plan to pay increased benefits: "on the basis of actuarial value." 29 U.S.C. § 1056(d)(3)(D)(ii). Yet the policy, as applied by the Appeals Board here, rejects *all* subsequent orders if the alternate payee has already begun to receive payments, without regard to actuarial value. . . . PBGC does not consider "actuarial value" when assessing whether a new form of benefit will result in increased payments relative to a prior one, as Congress instructed; rather, it ignores that factor altogether and simply assumes that the mere potential for increased benefits is enough to keep a domestic relations order from being qualified. Because that policy, and thus the Appeals Board decision, disregards a basis of comparison

²¹ See Enclosure 5.

²² See Enclosure 13.

²³ See Enclosure 4.

required by Congress, it is both arbitrary and capricious, and contrary to the agency's statutory mandate.

(Emphasis in Original.)

The Appeals Board has reviewed the 2012 DRO, consistent with the District Court Order and Memorandum Opinion.

The Appeals Board's Correspondence with You

An April 3, 2017 letter from William F. Condron, Jr., Manager of the Appeals Division, informed you that the Appeals Board will issue a decision based on the administrative record and consistent with the District Court's guidance no later than September 30, 2017.²⁴ For administrative convenience, the Board docketed your case as Remand Number [REDACTED].

On June 13, 2017, you faxed a letter to PBGC's General Counsel, Judith R. Starr, challenging the standing of the Appeals Board to review the 2012 QDRO pursuant to the District Court Order.²⁵ Ms. Starr reviewed your request and asked Mr. Condron to respond directly to you. In his June 14, 2017 letter to you, Mr. Condron informed you that "[t]he remand of your case by the U.S. District Court will be handled by the PBGC Appeals Board, as explained in my April 3, 2017 letter to you."²⁶

*The Appeals Board's Notification to Ms. [REDACTED] of
the Review of the 2012 DRO*

Pursuant to PBGC's regulation, at 29 C.F.R. section 4003.57, the Appeals Board notified Ms. [REDACTED] by letter dated May 9, 2017, that the District Court had vacated the Appeals Board's December 28, 2012 decision that the 2012 DRO does not constitute a QDRO and had remanded the matter to PBGC.²⁷ The May 9, 2017 letter also explained that if the Appeals Board were to decide to qualify the 2012 DRO, such decision would be PBGC's final agency action and could affect Ms. [REDACTED] PBGC-payable benefit under the 2008 QDRO, as well as her entitlement to a surviving spouse benefit provided under the 2008 QDRO. Ms. [REDACTED] was given 45 days from May 9, 2017 to submit any written comments.²⁸

The Appeals Board provided you a copy of its May 9, 2017 letter to Ms. [REDACTED].

On June 6, 2017, Ms. [REDACTED] attorney, [REDACTED], submitted a written response on Ms. [REDACTED] behalf. Ms. [REDACTED] response stated the following, in large part:²⁹

²⁴ See Enclosure 14.

²⁵ See Enclosure 15. Pursuant to 29 C.F.R. sections 4003.51 through 4003.61, the Appeals Board is authorized to review this matter.

²⁶ See Enclosure 16.

²⁷ See Enclosure 17.

²⁸ See 29 C.F.R. section 4003.59(b).

²⁹ See Enclosure 18.

First of all, my office was the attorney of record for Ms. ██████ in 2012 when Mr. ██████ received a Default Judgment against Ms. ██████ in order to modify her Qualified Domestic Relations Order. My office did not receive notice of that proceeding as Mr. ██████ was required to do. I am discussing with my client and she is considering bringing a Motion back before the [Minnesota] Court in order to vacate that Order. However, I understand that the Board has been provided with an Order from the [District] Court, which the Board must now consider.

The 2012 Order from Judge ██████ provides that Mr. ██████ can have the joint survival provision eliminated from his previous Qualified Domestic Relations Order. That Order does not allow Mr. ██████ to modify my client's interest from a separate payment interest into a shared payment interest. If that is what is required by PBGC in order to eliminate the joint survival provision and to find the DRO is qualified, then my client objects to that taking place and she asks that the Board doesn't accept Mr. ██████ 2012 Domestic Relations Order. My client does not want her benefit to change. If Mr. ██████ wishes to modify the Domestic Relations Order from a separate payment interest into a shared payment interest, then he needs to take that matter back before Judge ██████, properly serve notice upon my client through her respective counsel, and have that matter heard before Judge ██████ in order to receive an order in conformity with his wishes. At that time, P[B]GC could be presented with any new Order that may be issued by the Court related to modifying my client's separate payment interest.

Ms. ██████ enclosed with her letter an affidavit signed by Ms. ██████ objecting to any changes to her benefits. Ms. ██████ also asked the Board not to qualify the 2012 Order.

Ms. ██████ provided you a copy of her June 6, 2017 letter to the Appeals Board.

Legal Background

The Terms of the Plan

Section 4.01 of the Plan, *Normal Retirement Benefit Form*, provides the following:³⁰

The Normal Retirement Benefit to be provided for every participant under the plan shall be a monthly pension commencing at Normal Retirement Date in the form of a Straight Life Annuity.

Section 4.02 of the Plan explains the method of computing benefits. Sections 4.03 and 4.04 of the Plan describe limitations on benefits. Sections 4.05, 4.06, and 4.07 of the Plan address retirement on a deferred retirement date, retirement on an early retirement date, and disability retirement, respectively.

Section 4.08 of the Plan, *Automatic Joint and Survivor Option*, provides the following:

³⁰ See Enclosure 19.

Unless the participant (after having received a written explanation of the terms and conditions of a Qualified Joint and Survivor Annuity and the effect of an election hereunder) subject to Committee consent elects in writing to receive the Normal Retirement Benefit in one of the Optional Settlements of actuarially equivalent value under Section 4.09; if he is within ten (10) years of his Normal Retirement Age and has been married for the one year period ending on his Early, Normal, or Deferred Retirement Date his benefit shall be in the form of a reduced Qualified Joint and Survivor Annuity, payable during the joint lives of the participant and his spouse, in an amount actuarially equivalent to the participant's Normal Retirement Benefit accrued to date with at least 50% but not more than 100% of such reduced retirement benefit continued to the surviving spouse. The participant may elect not to receive the Joint and Survivor Annuity or he may revoke or reelect the Joint and Survivor Annuity [at] any time prior to the end of the election period. The election or revocation period not to receive a Joint and Survivor Annuity may not end until the later of the 90th day prior to the commencement of benefits or the 90th day following the date applicable information has been furnished to the participant. In no event may the election or revocation period [extend] beyond the benefit commencement date and in every case it must be of at least 90 days in duration.

Under Section 4.09 of the Plan, a participant may elect an optional form of benefit, if certain conditions are met.

The terms of the Plan do *not* provide an option for an individual to commence a benefit in one form and later stop that benefit and restart (or reannuitize) the benefit in a different form.

The Plan document does not address domestic relations orders, despite the requirement in section 206(d)(3)(A) of ERISA that “[e]ach pension plan shall provide for the payment of benefits in accordance with the applicable requirements of any qualified domestic relations order.” However, the Plan’s Summary Plan Description (“SPD”) provides the following text concerning domestic relations orders:³¹

As a general rule, your interest in your Accrued Benefit, including your “vested interest,” may not be alienated. This means that your interest may not be sold, used as collateral for a loan, given away or otherwise transferred. In addition, your creditors may not attach, garnish or otherwise interfere with your Accrued Benefit.

There is an exception, however, to this general rule. The Administrator may be required by law to recognize obligations you incur as a result of court ordered child support or alimony payments. The Administrator must honor a “qualified domestic relations order.” A “qualified domestic relations order” is defined as a decree or order issued by a court that obligates you to pay child support or alimony, or

³¹ See SPD summarizing 1989 amendments to the Plan, at Enclosure 20. An SPD summarizes plan provisions; the SPD does not supplant the terms of a plan. If there is a conflict between an SPD and a plan’s terms, the plan’s terms are controlling. As noted above, the Plan document does not include provisions relating to QDROs; thus, the Appeals Board reviewed the Plan’s SPD.

otherwise allocates a portion of your assets in the Plan to your spouse, former spouse, child or other dependent. If a qualified domestic relations order is received by the Administrator, all or a portion of your benefits may be used to satisfy the obligation. The Administrator will determine the validity of any domestic relations order received.

*A QDRO Is Not Subject to ERISA's Prohibition of Assignment
and Alienation of Benefits*

Under section 206(d)(1) of ERISA, “[e]ach pension plan shall provide that benefits provided under the plan may not be assigned or alienated.”³² ERISA section 206(d)(3)(A) provides that section 206(d)(1) does not apply with respect to a domestic relations order determined to be a qualified domestic relations order.³³ ERISA section 206(d)(3)(A) also provides that “each pension plan shall provide for the payment of benefits in accordance with the applicable requirements of any qualified domestic relations order.”

Section 206(d)(3)(D) of ERISA provides:

- (D) A domestic relations order meets the requirements of this subparagraph only if such order—
 - (i) does not require a plan to provide any type or form of benefit, or any option, not otherwise provided under the plan,
 - (ii) does not require the plan to provide increased benefits (determined on the basis of actuarial value), and
 - (iii) does not require the payment of benefits to an alternate payee which are required to be paid to another alternate payee under another order previously determined to be a qualified domestic relations order.

Section 206(d)(3)(J) of ERISA provides that “[a] person who is an alternate payee under a qualified domestic relations order shall be considered for purposes of any provision of this chapter [of ERISA] a beneficiary under the plan. . . .” As stated in *VanderKam v. VanderKam*, “[t]he protection of beneficiaries – especially spouses – remains a paramount ERISA objective.”³⁴

Pursuant to section 206(d)(3)(K) of ERISA, “the term ‘alternate payee’ means any spouse, former spouse, child, or other dependent of a participant who is recognized by a domestic relations order as having a right to receive all, or a portion of, the benefits payable under a plan with respect to such participant.”

³² Section 206(d) of ERISA is applicable to defined benefit plans, as well as to ERISA-covered individual account plans (e.g., defined contribution plans) over which PBGC has no jurisdiction. See section 206 of ERISA, 29 U.S.C. section 1056, at Enclosure 21.

³³ Parallel provisions regarding QDROs also appear at section 414(p) of the Code.

³⁴ See 776 F.3d 883, 886 (D.C. Cir. 2015), at Enclosure 22. See generally *VanderKam v. Pension Ben. Guar. Corp.*, 943 F.Supp.2d 130 (D.D.C. 2013), at Enclosure 23.

Regulation Issued by the U.S. Department of Labor
and Additional Guidance

In section 1001 of the Pension Protection Act of 2006, Congress directed the Secretary of Labor to do the following:³⁵

. . . [I]ssue regulations under section 206(d)(3) of the Employee Retirement [Income] Security Act of 1974 [ERISA] and section 414(p) of the Internal Revenue Code of 1986 which clarify that—

- (1) a domestic relations order otherwise meeting the requirements to be a qualified domestic relations order, including the requirements of section 206(d)(3)(D) of such Act [ERISA] and section 414(p)(3) of such Code, shall not fail to be treated as a qualified domestic relations order solely because—
 - (A) the order is issued after, or revises, another domestic relations order or qualified domestic relations order; or
 - (B) of the time at which it is issued; and
- (2) any order described in paragraph (1) shall be subject to the same requirements and protections which apply to qualified domestic relations orders, including the provisions of section 206(d)(3)(H) of such Act and section 414(p)(7) of such Code.

On June 10, 2010, the U.S. Department of Labor's Employee Benefits Security Administration ("EBSA") issued a final rule (the "DOL regulation") related to domestic relations orders under ERISA section 206(d)(3).³⁶ Among other things, the DOL regulation addresses subsequent domestic relations orders, the timing of domestic relations orders, and requirements and protections under section 206(d)(3).

PBGC, EBSA, and the Internal Revenue Service ("IRS"), in coordination with each other, have issued publications concerning QDROs. In addition to publishing PBGC Operating Policy Manual 6.6-3, PBGC published a booklet titled "Qualified Domestic Relations Orders & PBGC" (the "PBGC QDRO Booklet").³⁷ Similarly, EBSA published a booklet titled "QDROs[:] The Division of Retirement Benefits Through Qualified Domestic Relations Orders" (the "DOL QDRO Booklet").³⁸ IRS Notice 97-11 also provides sample language for QDROs.³⁹

³⁵ See excerpt from Pub. L. No. 109-280, at Enclosure 24.

³⁶ See 75 Fed. Reg. 32846 (June 10, 2010), at Enclosure 25. The DOL regulation is codified at 29 C.F.R. section 2530.206.

³⁷ The PBGC QDRO Booklet can be found at <https://www.pbgc.gov/sites/default/files/legacy/docs/QDRO.pdf>.

³⁸ The DOL QDRO Booklet can be found at <https://www.dol.gov/sites/default/files/ebsa/about-ebsa/our-activities/resource-center/publications/qdros.pdf>. Question 2-19 addresses the unique nature of defined benefit plans trusted by PBGC.

³⁹ See Enclosure 26. The Sample Language provided in IRS Notice 97-11 also appears at Appendix C of the DOL QDRO Booklet.

The 2008 QDRO Is a Separate Interest QDRO

Generally, there are two ways in which a participant and an alternate payee can divide a participant's pension benefit pursuant to a QDRO, in accordance with ERISA section 206(d)(3). Under one method, the participant's accrued benefit is divided between the participant and the alternate payee. This approach, often referred to as a "separate interest" QDRO, allocates part of the total benefit to the alternate payee, and part to the participant. The other approach for dividing the participant's benefit, often called a "shared payment" QDRO, is not based on the participant's total benefit, but rather on the monthly payments that the participant receives from the pension plan.

Separate interest QDROs require the plan to treat the alternate payee's share of the pension as his or her own plan benefit, which is payable throughout the life of the alternate payee and not dependent upon the life of the participant.

In *Einhorn v. McCafferty*, the court explained that "[t]he defining feature of a separate interest in a pension plan is that the plan administrator [or PBGC, as trustee of the Plan] 'treats each spouse as an independent participant under the plan,' which means that '[e]ach spouse can determine independently the date on which his or her benefits will start [on or after the plan participant's earliest retirement date].'"⁴⁰

The 2008 QDRO, pursuant to its terms, divides your benefit as a separate interest. "[U]nder the separate interest approach, 'because the spouses' benefits are independent, neither spouse's benefits stop upon the death of the other.'"⁴¹

Discussion

As discussed below, the Appeals Board finds that the 2012 DRO cannot be qualified pursuant to ERISA section 206(d)(3)(D)(i), because the 2012 DRO requires PBGC to provide a type or form of benefit, or an option, that is not otherwise available under the Plan or permitted by DOL and PBGC regulations.

Your benefit, payable by PBGC in accordance with the 2008 QDRO, is the remaining benefit due to you under the Plan. PBGC may qualify a future DRO that removes the surviving spouse rights from your remaining portion of the Plan benefit, if the qualification occurs prior to your benefit commencement date.

The 2012 DRO Cannot Require PBGC to Provide a Type or Form of Benefit, or an Option, Not Provided Under the Plan

The 2012 DRO cannot be qualified because it fails to meet the requirements of ERISA section 206(d)(3)(D)(i). ERISA section 206(d)(3)(D)(i) provides that a domestic relations order can be

⁴⁰ *Einhorn v. McCafferty*, 2016 WL 1273937, at 6 (E.D.Pa. March 31, 2016), at Enclosure 27 (quoting Brett R. Turner, *2 Equitable Distribution of Property* § 6.34 (3d ed.), Westlaw (database updated Nov. 2016), at Enclosure 28).

⁴¹ *Einhorn*, at 2, at Enclosure 27 (quoting Turner, *2 Equitable Distribution of Property* § 6.34, at Enclosure 28).

qualified only if such domestic relations order “does not require a plan to provide any type or form of benefit, or any option, not otherwise provided under the plan.”

Forms of benefit payment and options related to benefit payments are specifically addressed in the Plan terms. Section 4.01 of the Plan provides that an unmarried participant’s automatic form of benefit is an SLA. Unless an “optional settlement” is elected by a participant under section 4.09 of the Plan, a married participant’s form of benefit under section 4.08 of the Plan shall be “an amount actuarially equivalent to the participant’s Normal Retirement Benefit accrued to date with at least 50% but not more than 100% of such reduced retirement benefit continued to the surviving spouse.”

As noted earlier, nowhere does the Plan provide “any type or form of benefit or any option” that permits the benefit of a participant or beneficiary to be terminated or revoked once the benefit has commenced. Further, the Plan does not permit the reannuitization of a participant’s or beneficiary’s benefit after the original annuity starting date.

The Appeals Board finds that your situation is analogous to Example 4 in section 2530.206(d)(2) of the DOL regulation. Example 4 in DOL regulation section 2530.206(d)(2) provides the following:

Example (4). Type or form of benefit.

Participant retires and commences benefit payments in the form of a straight life annuity based on the life of Participant, with respect to which Spouse consents to the waiver of the surviving spousal rights provided under the plan and section 205 of ERISA. Participant and Spouse divorce after the annuity starting date and present the plan with a domestic relations order that eliminates the straight life annuity based on Participant’s life and provides for Spouse, as alternate payee, to receive all future benefits in the form of a straight life annuity based on the life of Spouse. *The plan does not allow reannuitization with a new annuity starting date, as defined in section 205(h)(2) of ERISA (and as further explained in 26 CFR 1.401(a)-20, Q&A-10(b)). Pursuant to paragraph (c)(1) of this section [regarding the timing of domestic relations orders], the order does not fail to be a QDRO solely because it is issued after the annuity starting date, but the order would fail to be a QDRO under section 206(d)(3)(D)(i) and paragraph (d)(1) of this section because the order requires the plan to provide a type or form of benefit, or any option, not otherwise provided under the plan.* However, the order would not fail to be a QDRO under section 206(d)(3)(D)(i) and paragraph (d)(1) of this section if instead it were to require all of Participant’s future payments under the plan to be paid instead to Spouse, as an alternate payee (so that payments that would otherwise be paid to the Participant during the Participant’s lifetime are instead to be made to the Spouse during the Participant’s lifetime).

(Emphasis Added.)⁴²

⁴² ERISA section 205(h)(2)(A)(i) provides that an annuity starting date is “the first day of the first period for which an amount is payable as an annuity.”

Like the plan in Example 4, above, the Plan does not permit the reannuitization of a participant's or beneficiary's benefit after the original annuity starting date. Just as reannuitizations are described in the preamble to the DOL regulation,⁴³ the 2012 DRO directs PBGC "to substitute one measuring life for another," by substituting your life for Ms. [REDACTED] life. The 2012 DRO also directs PBGC to "change the form of benefit," by terminating Ms. [REDACTED] SLA and giving her a shared payment measured by your life.⁴⁴ The Appeals Board concludes that the 2012 DRO requires Ms. [REDACTED] benefit to be reannuitized. It therefore cannot be qualified pursuant to ERISA section 206(d)(3)(D)(i) because it requires PBGC to provide a type or form of benefit, or an option, not otherwise provided under the Plan.

If PBGC were to qualify the 2012 DRO, the impact on Ms. [REDACTED] benefit would be significant; Ms. [REDACTED] separate interest benefit of \$235.79 per month under the 2008 QDRO, currently payable as an SLA measured by her lifetime, would terminate. Because you have not commenced your benefit and may elect not to commence your benefit until an unknown date, Ms. [REDACTED] would no longer be entitled to receive a PBGC-payable benefit, at least until the date you elect to commence your benefit. When or if you do elect to commence your benefit, only then would Ms. [REDACTED] benefit recommence as a shared payment benefit. In addition, Ms. [REDACTED] benefit would no longer be payable for her lifetime. Rather, under the 2012 DRO, Ms. [REDACTED] benefit would be measured by your lifetime. If you were to predecease Ms. [REDACTED], who is four years younger than you, she would not be entitled to any further payments from PBGC.

Therefore, as stated above, the Appeals Board concludes that the 2012 DRO cannot be qualified under ERISA section 206(d)(3)(D)(i) because it requires PBGC to provide a type or form of benefit, or an option, not otherwise provided under the Plan.

Further, the Board notes that PBGC regulation section 4022.8(d) prohibits a change in the form of benefit following commencement of benefit payments.⁴⁵ PBGC regulation section 4022.8(d), *Change in benefit form*, provides that "[o]nce payment of a benefit starts, the benefit form cannot be changed." Consistent with the terms of the 2008 QDRO, Ms. [REDACTED] began receiving benefit payments effective October 1, 2009. The Board concludes that any change in the benefit form currently being paid to Ms. [REDACTED] would be inconsistent with PBGC regulation section 4022.8(d).⁴⁶

⁴³ See 75 Fed. Reg. at 32848.

⁴⁴ *Id.*

⁴⁵ 29 C.F.R. section 4022.8(d).

⁴⁶ PBGC anticipated applicability of PBGC regulation section 4022.8 to alternate payees; specifically, section 4022.8(b)(2)(ii) provides the following:

(b) *Automatic PBGC form—*

(2) *Beneficiaries.*

- (ii) *Alternate payees.* The automatic PBGC form with respect to an alternate payee with a separate interest under a qualified domestic relations order is the form an unmarried participant would be entitled to receive from the plan in the absence of an election.

PBGC May Qualify a DRO Removing Surviving Spouse Rights
From Your Remaining Portion of the Plan Benefit

The Appeals Board notes that the 2008 QDRO currently in effect requires that Ms. [REDACTED] as the Alternate Payee, be treated as your surviving spouse for purposes of the Plan's qualified pre-retirement survivor annuity ("QPSA") and qualified joint and survivor annuity ("QJSA"). This means that under the 2008 QDRO, Ms. [REDACTED] is entitled to a portion of your benefit (equal to one-half of the benefit you accrued under the Plan) if you predecease her, regardless of whether you have commenced your benefit. Pursuant to the 2008 QDRO, you must elect a joint and survivor form of benefit when you elect to commence benefit payments.

In *Carmona v. Carmona*, the court held that "QJSA surviving spouse benefits irrevocably vest in the participant's spouse at the time of the annuity start date—in this case the participant's retirement—and may not be reassigned to a subsequent spouse."⁴⁷ As noted above, you have not yet retired and commenced your benefit under the Plan; thus, there is no annuity start date.

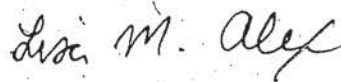
A new domestic relations order, the purpose of which is to remove Ms. [REDACTED] status as your surviving spouse with respect to your remaining benefit pursuant to the 2008 QDRO, may be a qualified domestic relations order, if such qualification is made *prior* to your commencement of your PBGC-payable benefit under the Plan.

Decision

Having reviewed this matter in accordance with the Memorandum Opinion and Order of the United States District Court for the District of Columbia, the Appeals Board finds that the 2012 DRO cannot be qualified for the reasons explained in this decision. Although the outcome is the same, this decision supersedes the Appeals Board's December 28, 2012 decision.

This is the Agency's final decision on this matter and you may, if you wish, seek court review of this decision in the United States District Court for the District of Columbia. If you have any questions about your PBGC-payable benefit, please call PBGC's Customer Contact Center at 1-800-400-7242.

Sincerely,



Lisa M. Alexander
Chair, Appeals Board

cc: [REDACTED], Esq. (with enclosures; with your address redacted)
[REDACTED] (without enclosures; with your address redacted)

⁴⁷ 603 F.3d 1041, 1048 (9th Cir. 2010), at Enclosure 29. See also *VanderKam*, 943 F.Supp.2d at 138, at Enclosure 23.

Twenty-Nine Enclosures:

