



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

March 28, 2019

Appellant's Attorney
Address
Address
Address

Re: Appeal 2018-xxxx, *Appellant Name*; PBGC Case No. xxxxxx, *Company* Defined Benefit Pension Plan (the "Plan")

Dear *Appellant's Attorney*:

This is the decision in the appeal that you filed on behalf of *the Appellant* regarding PBGC's December 29, 2017 benefit determination. *The Appellant* has asked the Appeals Board to increase the amount of *its* lifetime annuity payments from \$5,357.33 per month to \$7,296.67 per month. The appeal is supported by *the Appellant's* unsworn declaration, your legal analysis and the calculations of a credentialed actuary, *the Actuary*.

The Plan administrator paid *the Appellant* an annuity at the rate of \$5,357.33 per month from 2009 until PBGC became statutory trustee of the terminated Plan on *Date*. In a number of pre- and post-determination meetings and communications with *the Appellant* and *the Appellant's* professional team, PBGC considered, but rejected, *the Appellant's* request for a greater amount. PBGC's December 29, 2017 determination did not make any changes to *the Appellant's* lifetime annuity payments of \$5,357.33 per month, which is the benefit *the Appellant* currently receives.

The appeal, however, maintains that PBGC should increase the monthly benefit amount that *the Appellant* has been receiving since 2009. The central issue that *the Appellant* has raised is whether the terms of the Plan and applicable law support PBGC's and the Plan's decision to offset the benefit accruals that *the Appellant* earned from 2003 to 2007 by \$161,177.79 of in-service pension distributions that *the Appellant* received during those years.

Based on our own independent and detailed review of the documented record and applicable law, the Appeals Board has found that PBGC and the Plan administrator reasonably construed and applied the terms of the Plan and applicable law, and we have found no error in PBGC's determination to continue to pay *the Appellant* a lifetime annuity of \$5,357.33 per month. Therefore, as explained in more detail below, we have denied the appeal.

*Factual Background*¹

The Plan Sponsor:

The Appellant founded the Plan sponsor, *Company A* (“*A*”).² During the relevant time, *the Appellant* was the owner of *A*, and he also owned 100% of a related company named *Company B* (“*B*”).³ For the sake of brevity and convenience, we refer to *A* and *B* as the “Employer.”

The Employer operated a *Business*. In 1988, it entered into a contract with a *Customer* to operate a *Project*. The Employer’s main source of revenue came from the payments that the *Customer* made under the contract. In June 2007, *the Appellant* sold the Employer’s name and assets, including the contract, to a *New Owner*. The *Customer* did not renew the contract when it expired on June 30, 2012. Shortly thereafter, the Employer ceased operations, and it was dissolved in June 2013.

The Plan:

The Plan was effective as of January 1, 1997.⁴ Pursuant to Article I, Section J of the Plan, “[a] Participant’s Normal Retirement Benefit shall be equal to 4% of his or her Average Compensation multiplied by the Participant’s Years of Participation not to exceed 25 Years of Participation.”⁵ In other words, participants could earn a pension of 50% of their average compensation after 12½ years, and 100% of their average compensation after 25 years.

¹ Our discussion below summarizes only the most relevant information from the appeal correspondence, the Determination, and certain other documents, copies of which are provided in the Appendix. Our citations to the Appendix begin with the letter “A” and are followed by the page of the Appendix on which the document may be found. For example, a detailed timeline of relevant events can be found in the Appendix on pages A-001 to A-003. A copy of the December 29, 2017 Determination can be found in the Appendix on pages A-005 and A-006.

² A copy of the Certificate of Limited Partnership for *A* that was signed by *the Appellant* and filed with the State’s Secretary of State on October 30, 1991 can be found in the Appendix on page A-007. The Plan document, effective January 1, 1997, also signed by *the Appellant* confirms that *A* was the “Employer.” See Appendix on pages A-008 to A-116.

³ Upon *A*’s formation in 1991, *the Appellant* was its 100% owner. The same was true in 2007 according to the 2007 Employee Census Form which *the Appellant* signed. See Appendix on pages A-117 and A-118. In Section 3.3 of the Asset Purchase Agreement dated effective as of June 22, 2007, regarding the sale of substantially all of the assets used in the business of *A* and *B* to a *New Owner*, *the Appellant* represented that *the Appellant* owned all of the stock in *B*. See Appendix on pages A-119 to A-141. You have provided *the Appellant*’s unsworn statement that *the Appellant* was “at least a 73% owner of *A* from the end of 1988 until prior to *the Appellant*’s retirement in 2007.” Ownership of 100% of *A* is not inconsistent with *the Appellant*’s unsworn statement that *the Appellant* owned “at least” 73% of it.

⁴ A complete copy of the Plan document can be found in Appendix on pages A-008 to A-116.

⁵ See Appendix on page A-018.

Normal Retirement Date is defined as the participant's 65th birthday, yet participants could continue to earn benefit accruals (up to the 25 years of participation maximum) by working after the Normal Retirement Date.⁶ Retirees could elect to receive their retirement benefit as a single lump sum, life annuity, joint and 50% survivor annuity, or installments.⁷ The Plan specified the assumptions to be used in determining actuarial equivalence of the available forms of benefit.⁸

While the Plan, on its face, permitted in-service distributions to participants who continued to work "at or after Normal Retirement Age,"⁹ the Plan included a provision whereby "[r]etirement benefits will be suspended for each calendar month during which the Employee completes at least 40 hours of Service with the Employer"¹⁰ Due to the suspension of benefits provision, all participants who completed 40 or more Hours of Service in a calendar month were prohibited from taking advantage of the Plan's in-service distribution option.

⁶ See Article I, Section H of the Plan, that can be found in the Appendix on page A-018. Article I, Section H also provides as follows (emphasis added):

A Participant who continues in the employ of the Employer after he or she attains Normal Retirement Age or reaches his or her Normal Retirement Date shall remain a Participant while so employed, and shall be entitled to all Plan benefits to the extent he or she would be entitled thereto if he or she had not yet attained Normal Retirement Age, including any benefit accruals for service performed after Normal Retirement Age or due to increases in Compensation.

This apparently was such an important point that the same rule is repeated in Article II, Section A.3(f) of the Plan (regarding the definition of "Accrued Benefit"), see Appendix on page A-033, and in Article V, Section B (regarding Deferred Retirement), see Appendix on page A-057.

⁷ Article I, Section KK, see Appendix on page A-026.

⁸ Article I, Section U, see Appendix on page A-022.

⁹ Article I, Section FF notes that "in-service distributions at or after Normal Retirement Age shall be allowed." See Appendix on page A-025.

¹⁰ Article V, Section B.3, Appendix at page A-057, provides in relevant part as follows:

3. Suspension and Resumption of Benefits. Retirement benefits will be suspended for each calendar month during which the Employee completes at least 40 Hours of Service with the Employer ("Section 203(a)(3)(B) Service"). Consequently, the amount of benefits which are paid later than the Participant's Normal Retirement Date will be computed as if the Employee had been receiving benefits since Normal Retirement Age.

If benefit payments have been suspended, payments shall resume no later than the first day of the third calendar month after the calendar month in which the Employee ceases to be employed in Section 203(a)(3)(B) Service.

Minimum Required Distributions:

The minimum required distribution provisions under Section 401(a)(9) of the Internal Revenue Code (the “Code”) require an individual owning 5% or more of the business sponsoring a qualified retirement plan to begin receiving such distributions by April 1 of the year after the calendar year in which *it* attains age 70½, regardless of whether *it* is retired. In other words, a 5% owner who has attained age 70½ before *it* retires is required to take this type of in-service distribution from a qualified retirement plan.

In contrast, consistent with the minimum required distribution provision under Code Section 401(a)(9), the Plan provides the following rule for non-5%-owners:¹¹

The *required beginning date* for minimum required distributions *for a non-5%-Owner* is the April 1 of the calendar year following the calendar year in which such Participant attains age 70½ or the calendar year in which such Participant retires. (Emphasis added.)

In other words, a non-5%-owner is not required to begin receiving minimum required distributions until *it* retires, even if *it* has attained age 70½. To make this point even clearer, the Plan contained the following language in Article I, Section NN:

Options That Eliminate the Right to Receive Post 70½ Distributions.

The preretirement age 70½-distribution option is only eliminated with respect to non-5%-Owners who attain age 70½ in or after a calendar year that begins after the later of December 31, 1998, or the adoption date of an amendment doing so.

Although drafted as a provision applicable to participants who are non-5%-owners, the effect of the provision, quoted above, is that *only* 5% owners could take advantage of the Plan’s in-

¹¹ Article I, Section NN, Appendix at page A-027, provides in relevant part as follows (with emphasis added):

NN. Right to Defer Receipt of Benefits After Normal Retirement Age and Age 70½.

1. . . .

2. The required beginning date for minimum required distributions for a non-5%-Owner is the April 1 of the calendar year following the calendar year in which such Participant attains age 70½ or the calendar year in which such Participant retires.

Options That Eliminate the Right to Receive Post 70½ Distributions.

The preretirement age 70½-distribution option is only eliminated with respect to non-5%-Owners who attain age 70½ in or after a calendar year that begins after the later of December 31, 1998, or the adoption date of an amendment doing so.

service distribution option upon attaining their required minimum distribution date. *The Appellant* availed *itself* of the opportunity to take in-service distributions from 2003 through 2007, and *the Appellant* claims that *it* was entitled to receive those in-service distributions without any offset to *the Appellant's* benefit accruals during those years.

Plan Administrator's Discretionary Authority:

The Plan administrator had discretionary authority to interpret the Plan and decide issues of Plan administration, including whether to offset yearly benefit accruals to reflect in-service distributions.¹² *The Appellant*, who signed the Plan's Form 5500 Annual Return/Report as the Plan administrator on September 27, 2008,¹³ would have participated in any decision-making about the Plan's rules for in-service distributions and their effect on benefit accruals. The Plan records that were turned over to PBGC do not contain definitive documentation regarding how the Plan administrator (*the Appellant*) or its delegated representative decided the question presented in this appeal. Similarly, *the Appellant* has not provided any such information to PBGC to support the arguments made in the appeal.

The Appellant's Pension:

The Appellant was born on January xx, 1933. *The Appellant* began to participate in the Plan as of January 1, 1997, its effective date, and *it* earned more than half of *its* pension after attaining age 70½ in 2003.¹⁴ On November 3, 2003, the Plan administrator began to pay *the Appellant* in-service, minimum required distributions under Section 401(a)(9) of the Code ("MRDs").¹⁵ *The Appellant's* benefit election form, which *it* signed and dated December 15, 2002, elected the straight-life monthly annuity of \$5,357.31.¹⁶ Table 1 below shows the amounts of the MRDs that *the Appellant* received:

¹² Article XIII.B of the Plan provides the relevant language, which is discussed later in this decision, and can be found in the Appendix on page at A-104.

¹³ Copies of the Plan's 2006 and 2007 Form 5500 Annual Return/Report, which were signed by *the Appellant*, can be found in Appendix on pages A-144 to A-159. Later years' Forms 5500 were signed by *a New Owner*.

¹⁴ According to the handwritten calculation of *the Appellant's* pension, Appendix at page A-004, *the Appellant's* accrued benefit on December 31, 2002 -- days before *the Appellant's* 70th birthday -- was \$2,672.00 per month.

¹⁵ For reasons unknown to the Board, it appears that the Plan administrator concluded that *the Appellant's* required beginning date for MRDs was the year in which *the Appellant* turned age 70½, rather than, pursuant to Code Section 401(a)(9), "April 1 of the calendar year following the calendar year in which such participant [*the Appellant*] attains 70½ . . ." As noted on the following page, the Board has respected, but expresses no opinion about, the Plan administrator's conclusion.

¹⁶ See *the Appellant's* Benefit Payment Form that can be found in the Appendix on pages A-160 to A-163.

Table 1: In-Service Distributions Made by the Plan to the Appellant

<u>Year</u>	<u>Monthly Payment Amount</u>	<u>How Paid</u>
2003	\$1,288.67	\$11,598.00 in one payment on 11/03/2003
2004	\$1,256.92	\$15,083.47 in one payment on 09/07/2004
2005	\$1,485.92	\$17,831.00 in one payment on 01/20/2005
2006	\$4,405.25	\$52,863.96 in one payment on 01/30/2006
2007	\$5,316.75	\$63,801.36 in one payment on 01/13/2007
Total:		\$161,177.79

The Plan's Cash Disbursement Journal, which was maintained by the Plan administrator, recorded all disbursements of Plan assets, including the distributions made to *the Appellant*. The Journal shows that the Plan made distributions to *the Appellant* from 2003 through 2007, generally in yearly, lump-sum payments. The following descriptions were used for the distributions to *the Appellant*: "Minimum Distribution," "Minimum Dist," "Req Min Dist," "MRD," "Minimum Required Dist.," "Required Distribution," or "Min Distrib."

The Appeals Board has not scrutinized the in-service distributions that were paid to *the Appellant*, as they were made by the Plan administrator before PBGC became statutory trustee. Instead, like PBGC, we have respected the Plan administrator's conclusion that the Plan was required to make in-service distributions to *the Appellant* in the amounts listed above to comply with Section 401(a)(9) of the Code. We also have taken notice that the amount of each year's distribution was greater than the amount of the previous year's distribution. This is what one would expect to see for a participant who was continuing to work for the Employer, earning compensation and benefit accruals.

The Appellant sold the business in June 2007 and retired as of December 31, 2007, one week before *its* 75th birthday. The Plan administrator adjusted *the Appellant's* payment amounts as reflected in Table 2 below:

Table 2: Post-Retirement Distributions Made by the Plan to the Appellant

<u>Year</u>	<u>Monthly Payment Amount</u>	<u>How Paid</u>
2008	\$4,775.25	\$57,303.72 in one payment on 02/27/2008
2009	\$5,357.33	\$64,288.00 in two payments: \$20,000.00 on 03/07/2009 and \$44,288.00 on 09/02/2009
2010	\$5,357.33	\$64,288.00 on 10/04/2010
2011	\$5,357.33	\$64,288.00 in two payments: \$20,000.00 on 07/13/2011 and \$44,288.00 on 12/04/2011
2012	\$5,357.33	\$64,288.00 on 04/14/2012 ¹⁷

¹⁷ The Plan's Cash Disbursement Journal suggests that the Plan administrator also made a "January '12 Distribution" of \$5,360.00 to *the Appellant* on January 16, 2012.

2013	\$5,357.33	Payments each month of \$5,357.33
2014	\$5,357.33	January - March payments of \$5,357.33

In 2008, the Plan administrator decreased the amount of distributions to *the Appellant* to the monthly rate of \$4,775.25.¹⁸ In 2009, however, the Plan administrator increased the amount of yearly retirement distributions to *the Appellant* and fixed the amount at the rate of \$5,357.33 per month. In 2013, the Plan administrator changed *the Appellant's* payment frequency so that *it* received monthly payments of \$5,357.33, rather than annual payments, and it also changed the characterization of the distributions from “Required,” or “Minimum” distributions to merely “Distribution.”

The Appellant's 2011 and 2013 benefit statements – the only ones in PBGC’s file for *the Appellant* – state that “[y]our monthly retirement benefit commencing at your retirement date payable for your lifetime” is \$5,357.31.¹⁹ The benefit statements reported *the Appellant's* retirement date as December 31, 2007.

The Plan’s Actuarial Funding Reports Confirm the Value of *the Appellant's* Retirement Benefit:

In accordance with Section 412 of the Code, the Plan’s annual funding requirements were set forth in its actuarial valuation report. To do this, the Plan’s actuary calculated the total amount of retirement benefits that had been promised under the Plan. The Plan’s 2011 actuarial valuation report shows that *the Appellant's* retirement benefit was \$5,357.31 per month for *its* life.²⁰ The actuarial present value of *the Appellant's* retirement benefit was \$505,019.00, which was more than one third of the \$1,350,339.00 total present value of all retirement benefits that had been promised under the Plan. According to Schedule SB of the Plan’s 2011 Form 5500, the Plan’s funding target included \$538,014.00 in liabilities owed to two retirees.²¹ *The Appellant* was one of the two retirees.

¹⁸ As discussed above, *the Appellant* continued to be the Plan administrator until September 27, 2008. Thus, *the Appellant* would have been involved in the Plan’s decision to pay *its* retirement benefit at the rate of \$4,775.25 per month for 2008. The file does not contain any information to support the Plan’s decision to do so, and the Appeals Board is unaware of any reason why the monthly amount of *the Appellant's* retirement benefit payments in 2008 should have been less than the amount of *the Appellant's* minimum required distributions in 2007. This unexplained circumstance, however, tends to contradict your argument that the correct amount of *the Appellant's* monthly retirement benefit is \$7,296.67.

¹⁹ See Appendix on pages A-164 and A-165. There is no explanation in the file regarding why *the Appellant's* actual payments were greater by 2 cents per month.

²⁰ A copy of the Plan’s 2011 Actuarial Valuation Report can be found in the Appendix on pages A-166 to A-173.

²¹ A copy of the Plan’s 2011 Form 5500 and Schedule SB can be found in the Appendix on pages A-174 to A-188. The Schedule SB was signed by *the Actuary*.

The Plan's Underfunded Termination and PBGC's Appointment as Statutory Trustee:

According to PBGC's Actuarial Case Memorandum, as of June 30, 2012, the Plan was less than 50% funded, with total benefit liabilities of \$1,872,509.00 and estimated assets of \$889,778.00. Accordingly, the Plan was terminated as of June 30, 2012 with unfunded benefit liabilities of \$982,731.00. PBGC became statutory trustee of the Plan on March 10, 2014, and it will pay all of the Plan's unfunded guaranteed benefits.²²

PBGC is the United States government agency that provides pension insurance in accordance with the Employee Retirement Income Security Act of 1974, as amended ("ERISA"). When a plan sponsor becomes unable to support its tax-qualified, defined benefit pension plan, PBGC becomes the statutory trustee of the plan. PBGC pays pension benefits according to the terms of the plan, the provisions of ERISA, the Code, and PBGC's regulations and policies.

When PBGC becomes trustee of a terminated plan, PBGC collects participant data and plan 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 wrong, or a participant, beneficiary or alternate payee supplies PBGC with documents showing that the information is wrong.

The Appeals Board was established pursuant to 29 Code of Federal Regulations ("CFR") §§ 4003.51 to 4003.61. The Board reviews challenges to PBGC benefit determinations. The Board conducts its own review of the challenges and the specific reasons why PBGC is claimed to have made an erroneous determination. Issuance of an Appeals Board decision is the final step in PBGC's administrative review process.

Pre-Determination Communication

By letter dated April 28, 2014, PBGC notified *the Appellant* that PBGC had taken responsibility for *the Appellant's* pension.²³ In fact, PBGC continued to pay *the Appellant* the same monthly amount (\$5,357.33) that the Plan administrator had been paying *the Appellant*. PBGC's letter to *the Appellant* dated May 2, 2014 provided additional details regarding *the Appellant's* monthly payments.²⁴

²² *The Appellant* signed the Trusteeship Agreement, a copy of which can be found in the Appendix on pages A-189 to A-191.

²³ See PBGC letter of April 28, 2014, Appendix on pages A-192 and A-193. PBGC files show that *the Appellant* already knew that PBGC had taken responsibility for *its* benefit payments, as *the Appellant* had signed the Trusteeship Agreement on March 2, 2014. See Appendix on pages A-189 to A-191.

²⁴ See PBGC letter of May 2, 2014, that can be found in the Appendix on pages A-194 and A-195.

On May 15, 2014, *the Appellant* provided PBGC with information regarding *its* pension, including the Plan form that waived the 50% spousal survivor annuity. *The Appellant's Spouse*, who had been married to *the Appellant* since *Month xx*, 1952, is shown as having signed the form before a notary public on May 15, 2014. *The Appellant* also provided PBGC with a copy of the form that *the Appellant* had signed, purportedly on December 15, 2002, electing the lifetime monthly annuity of \$5,357.31.²⁵

On May 3, 2017, *the Appellant* signed a Power of Attorney that authorized you to communicate with PBGC. Shortly thereafter, you contacted PBGC on behalf of *the Appellant* and claimed that the amount of *the Appellant's* retirement benefit is erroneous. At your request, PBGC met with you and the other members of *the Appellant's* professional team. According to your appeal letter dated March 15, 2018, *the Appellant's* team communicated a number of times with PBGC, including a conference call on June 29, 2017. You provided PBGC with more information on July 25, 2017, including the calculation of *the Appellant's* pension from . . . *the Actuary*.²⁶

PBGC's Benefit Determination

On December 29, 2017, PBGC issued the benefit determination to *the Appellant* (the "Determination"). According to the Determination, *the Appellant* is entitled to monthly annuity payments of \$5,357.33 for *the Appellant's* lifetime only, unchanged from what the Plan administrator had been paying *the Appellant* since 2009.²⁷

Post-Determination Communication

²⁵ See May 15, 2014 facsimile of *the Appellant's* Election of Form of Benefit Payment, that can be found in the Appendix on pages A-160 to A-163. According to the handwritten calculation by *the Actuary*, *the Appellant's* benefit amount as of December 31, 2002 was \$2,672.00 per month. See Appendix at page A-004. We are skeptical that the benefit amount of \$5,357.31 – the amount stated in *the Appellant's* Election of Form of Benefit Payment – was known on December 15, 2002, which is the date *the Appellant* placed next to *its* signature on such Form.

²⁶ See Appendix at page A-004.

²⁷ The relevant text of the Determination, Appendix on pages A-005 and A-006, is as follows:

You are receiving estimated pension benefits from the PBGC under the pension plan named above. The monthly benefit you currently receive, detailed in the table below, is the same amount you have received from the prior plan administrator. We have finished our review of the plan and your benefit, and we have determined that you are receiving the correct amount.

Payment Frequency	Amount
Monthly	\$5,357.33

Your benefit is paid in the form of a Straight Life Annuity. A Straight Life Annuity provides you with a monthly benefit for the rest of your life but does not provide survivor benefits.

At *the Appellant's* request, PBGC sent you a copy of the Determination on January 8, 2018. You and the other members of *the Appellant's* professional team sent PBGC correspondence and met with PBGC representatives to explain your position that PBGC owed *the Appellant* more than the benefit amount he had accepted from the Plan administrator. PBGC did not change the Determination; rather, by letter dated February 8, 2018, PBGC's Office of Benefits Administration ("OBA") provided the written explanation of its reasons for not changing the amount of *the Appellant's* monthly annuity. The February 8, 2018 letter summarized PBGC's position as follows:

Because you are unable to provide more detailed information on the Plan's calculation of *the Appellant's* benefit, we do not have anything that would indicate an error was made by the Plan, and thus can only conclude that the amount in pay status is reasonable.²⁸

PBGC's February 8, 2018 correspondence contained analysis of Section 401(a)(9) of the Code, but you have objected to some of that analysis as being off-point. In deciding *the Appellant's* appeal, we have *not* applied or relied in any manner on PBGC's Code Section 401(a)(9) analysis to which you have objected.

Your Appeal

You timely filed your appeal on behalf of *the Appellant* on March 15, 2018.²⁹ Your correspondence provided the following succinct summary of your position:

Our position, briefly, is that *the Appellant's* benefit should be a Normal Retirement Benefit as of the date of *its* retirement from the sponsor rather than a Required Minimum Distribution that *the Appellant* began to receive prior to *its* retirement.³⁰

You have claimed that *the Appellant's* Normal Retirement Benefit ("NRB") is a straight-life annuity in the amount of \$7,296.67 per month, but PBGC has improperly reduced it to \$5,357.33 per month by subtracting the value of MRDs that *the Appellant* received while *the Appellant* was working.³¹ In the alternative, you have argued that if such a reduction is warranted, the amount

²⁸ A copy of PBGC's February 8, 2018 explanation letter and enclosure can be found in the Appendix on pages A-196 to A-206.

²⁹ You requested an extension of time on January 30, 2018, and the Appeals Board granted it on February 1, 2018.

³⁰ See Appendix on pages A-207 to A-214.

³¹ Your March 15, 2018 appeal letter, Appendix on pages A-207 to A-214, states as follows:

Basis for Appeal

should be \$6,113.21 per month because the total amount of in-service distributions that *the Appellant* received is equivalent (using the Plan's definition of actuarial equivalence) to an annuity of \$1,183.46 per month. Finally, you contend that *the Appellant* is entitled to a lump-sum payment for underpayments owed to *the Appellant* retroactive to *its* date of retirement.

The Appeals Board's April 16, 2018 Request Letter

We wrote to you on April 16, 2018 and asked for clarification on five questions that were raised by the appeal.³² You provided *the Appellant's* response on May 24, 2018.³³ We have carefully considered your responses in analyzing the issues, as provided in the Discussion below.

Discussion

The Appellant has claimed that PBGC erroneously reduced the amount of the retirement benefit that *the Appellant* earned while *the Appellant* was working for the Employer. As we discuss below, we have rejected *the Appellant's* claims because they are inconsistent with the facts and applicable law.³⁴

I. PBGC Did Not, In Fact, Reduce the Amount of *the Appellant's* Retirement Benefit.

PBGC explained in its February 8, 2018 letter that it did not change the amount of *the Appellant's* monthly annuity payments. Instead, PBGC found that *the Appellant* had not provided evidence of any errors in the Plan administrator's calculation of *the Appellant's* \$5,357.33 per month retirement benefit. The excerpt from the Determination quoted below (with emphasis added) makes this abundantly clear:

You are receiving estimated pension benefits from the PBGC under the pension plan named above. The monthly benefit you currently receive, detailed in the table below [\$5,357.33], is the same amount you have received from the prior plan administrator. We have finished our review of the plan and your benefit, and we have determined that you are receiving the correct amount.

1. There is no legal or other authority for offsetting benefits that *the Appellant* received prior to *the Appellant's* Normal Retirement Date.

³² A copy of our April 16, 2018 request letter can be found in the Appendix on page A-215 and A-216.

³³ A copy of your May 24, 2018 response letter and enclosure can be found in the Appendix on pages A-217 to A-222.

³⁴ For the sake of clarity, we note that our decision to uphold PBGC's determination applies equally to *the Appellant's* claim that *the appellant* is entitled to payments of \$7,296.67 per month and to the alternative claim that *the appellant* is entitled to \$6,113.21 per month, though we have further noted that you did not support the alternative claim with any calculations.

The appeal does not dispute the fact that PBGC has continued to pay *the Appellant* the same amount that *the Appellant* had been receiving from Plan administrator since 2009, after *the Appellant's* retirement. In addition, *the Appellant* has not provided any record of ever having been paid more than the \$5,357.33 per month retirement benefit that PBGC has been paying *the Appellant*. Therefore, we have found that PBGC did not reduce or offset *the Appellant's* retirement benefit.

II. Applicable Law Permitted the Plan to Offset *the Appellant's* Benefit Accruals by The Value of In-Service, Minimum Required Distributions That Were Paid to *the Appellant*.

The appeal letter relies on Code Section 411(b)(1)(H)(i), and it claims as follows:

[T]he relevant applicable law is Code Section 411. Sections 411(b)(1)(H)(i) and 411(c)(3) require that an actuarial adjustment be made when a participant works past Normal Retirement Age (“NRA”). . . . Significantly, an offset of prior distributions is permitted, but not mandated, under Code Section 411(b)(1)(H)(iii)(I).³⁵

We have agreed with you that Code Section 411 provides applicable relevant law. However, your argument to invalidate the offset for the MRDs that *the Appellant* received does not overcome the compelling opposite conclusion that we have reached from applying other language in Code Section 411(b)(1)(H) and related IRS guidance. Specifically, Section 411(b)(1)(H)(iii)(I) of the Code provides as follows:

(iii) Adjustments under plan for delayed retirement taken into account

In the case of any employee who, as of the end of any plan year under a defined benefit plan, has attained normal retirement age under such plan —

(I) if distribution of benefits under such plan with respect to such employee has commenced as of the end of such plan year, then any requirement of this subparagraph for continued accrual of benefits under such plan with respect to such employee during such plan year shall be treated as satisfied to the extent of the actuarial equivalent of in-service distribution of benefits. . . .

The preceding provisions of this clause shall apply in accordance with regulations of the Secretary. Such regulations may provide for the application of the preceding provisions of this clause, in the case of any such employee, with respect to any period of time within a plan year.³⁶

³⁵ See your Appeal Letter, Appendix at page A-212 (emphasis in original).

³⁶ See 26 U.S.C. 411(b)(1)(H)(iii)(I).

Applying just the statutory language above to the facts of this matter, a compelling argument can be made that “any requirement of this subparagraph [Section 411(b)(1)(H)] for continued accrual of benefits under such plan [the Plan] with respect to such employee [*the Appellant*] during such plan year [2003, 2004, 2005, 2006, and 2007] shall be treated as satisfied to the extent of the actuarial equivalent of in-service distribution of benefits [MRDs paid to *the Appellant*].” Viewed in this light, your argument seems to be directed more against application of language in the Code, which is something the Board cannot change, than it is to PBGC’s decision not to overturn the Plan’s application of the offset, which is something the Board would not do without sufficient cause.

The Proposed Treasury Regulations under Code Section 411(b)(1)(H)(iii) illustrate how plans may apply the statutory rule quoted above to offset post-retirement benefit accruals by the actuarial equivalent of pre-retirement distributions:³⁷

Assume B receives 24 monthly benefit payments prior to B’s retirement at age 67. The total monthly benefit payments of \$14,400 (\$600 x 24 payments) have an actuarial value at age 67 of \$15,839 (reflecting interest and mortality) which would produce a monthly benefit payment of \$156 commencing at age 67. The benefit accrual for the two years of credited service B completed after attaining normal retirement age is \$40 per month (\$20 x 2 years). Because the actuarial value (determined as a monthly benefit of \$156) of the benefit payments made during the two years of credited service after B’s normal retirement age exceeds the benefit accrual for the two years of credited service after B’s normal retirement age (\$20 x 2 years = \$40), the plan is not required to accrue benefits on behalf of B for the second year of credited service B completed after attaining normal retirement age and the plan is not required to increase B’s monthly benefit payment of \$600.

The tests that PBGC performed of *the Appellant’s* benefit amount, \$5,357.33 per month, also tracked the above illustration from the Proposed Treasury Regulations:

PBGC tested the reasonableness of the amount of the benefit in-pay, \$5,357.33. . . . We used *the Appellant’s* compensation and years of participation to calculate the accrued monthly benefit including additional accruals and subtracted the actuarial equivalent of the actual distributions made on and after November 3, 2003, until December 31, 2007.³⁸

³⁷ See Prop. Treas. Reg. 1.411(b)-2(b)(4)(iv), Example 3. We have also reviewed A. Bhagat and A. Trichilo, Employee Plans CPE Topics for 2002, Chapter 17, Defined Benefit Accruals (rev. April 2002), a copy of which can be found in the Appendix on pages A-223 to A-251: “Finally, when determining additional accruals for a participant beyond normal retirement age, the plan can also take into account the actuarial equivalent of distributions already made, when an employee attained normal retirement age. (See Code Section 411(b)(1)(H)(iii)(I).) Those distributions can be used to offset any additional benefits accrued by the participant, after normal retirement age.”

³⁸ See PBGC’s February 8, 2018 explanation letter and enclosure, that can be found in the Appendix on page A-196 to A-206.

You have attempted to support your argument against the offset by claiming that Article V, Paragraph B of the Plan compels *the Appellant's* desired result.³⁹ You have claimed that "Article V, Paragraph B of the Plan requires that the actuarial value of a Participant's accrued benefit take into account *the Appellant's* additional years of service and increases in compensation."⁴⁰ We have rejected this argument for two reasons. First, the language in Article V, Paragraph B of the Plan neither requires nor precludes the offset. Second, as we discussed above, PBGC's actuaries tested the reasonableness of the amount that *the Appellant* has been receiving and concluded that the Plan administrator likely did take into account *the Appellant's* additional years of service and increases in compensation.⁴¹ We therefore find that Article V, Paragraph B of the Plan did not curtail the Plan's authority under Code Section 411(b)(1)(H)(iii)(I) and Prop. Treas. Reg. 1.411(b)-2(b)(4) to offset *the Appellant's* benefit accruals from 2003 to 2007 by the actuarial equivalent of MRDs that had been paid to *the Appellant* during that time.

III. The Plan Administrator's Decision to Offset *the Appellant's* Benefit Accruals by *the Appellant's* MRDs Was Made in Accordance with Plan Provisions and Complied with Nondiscrimination Rules.

We have found that the Plan administrator's decision to apply the offset for prior distributions was based on a reasonable interpretation of the Plan, which we have further discussed below. The Plan Administrator was authorized under Section XIII.B of the Plan, quoted below, with emphasis added, to construe and apply the rules of the Plan and to compute retirement benefits:

The Committee, as agent for the administrator and subject to the administrator's approval, shall make such rules, regulations, interpretations and computations and shall take such other action to administer the Plan as the Committee may deem appropriate in its sole discretion. . . . The Committee shall resolve by majority vote all questions involving the interpretation, application and administration of the Plan. The Committee's resolution of such questions shall be final and binding

³⁹ The relevant language in Article V, Paragraph B of the Plan, that can be found in the Appendix on page A-057, is as follows:

B. Deferred Retirement. The Accrued Benefit of a Participant who retires after his or her Normal Retirement Date shall be determined as of the date the Participant actually retires as follows:

1. Service and Compensation Credits. In no event will the Accrued Benefit of a Participant who retires after his or her Normal Retirement Date be less than the benefit calculated under Article I recognizing the Participant's additional Years of Service and increases in Compensation after the Participant's Normal Retirement Date.

⁴⁰ See your Appeal Letter, that can be found in the Appendix on pages A-207 to A-214.

⁴¹ See PBGC's February 8, 2018 explanation letter and enclosure, that can be found in the Appendix on page A-196 to A-206.

upon the Participants, their Beneficiaries, and the successors, assigns, heirs and personal representatives of any of them.

In computing and distributing Plan benefits, Section XV.D(1) of the Plan implemented the special nondiscrimination rules in Treasury Regulations Section 1.401(a)(4)-5(b).⁴² These rules restrict benefit distributions that are made to the plan sponsor's 25 highest paid employees.⁴³ The restrictions in the special nondiscrimination rule applied to *the Appellant* because: (1) the Plan was not funded for 110% of current liabilities,⁴⁴ and (2) *the Appellant* was the highest-paid participant.⁴⁵ Consequently, when *the Appellant* retired, Section XV.D(1) of the Plan required the Plan administrator to compute the sum of all of benefits that had been paid to *the Appellant* (the MRDs) and all of the remaining retirement benefit that *the Appellant* was owed, and it had to

⁴² The relevant provisions from Section XV.A and XV.D(1), that can be found in the Appendix on pages A-110 to A-111, are provided below:

A. Limitations for Highly Compensated Participants. The provisions of this Article XV shall apply only to Participants whose Normal Retirement Benefit exceeds \$1,500 annually and who, at the Effective Date of this Plan, were among the 25 highest paid Employees of the Employer. This Article XV shall apply to such Participants notwithstanding any contrary provision in this Plan. The provisions of this Article XV apply to former or retired Participants as well as actively employed Participants.

...

D. Limitations for Plan Years After December 31, 1993. For Plan Years beginning after December 31, 1993 or such earlier date if elected by the Employer, the benefit of any Highly Compensated Employee or former Highly Compensated Employee shall be limited to a benefit that is non-discriminatory under Section 401(a)(4) of the Code.

1. Restricted Benefits. The annual payments to Highly Compensated Employees and former Highly Compensated Employees, who are among one (1) of the 25 highest paid non-excluded Employees or former Employees during the Plan Year or any prior Plan Year, are restricted to an amount equal to the payment that would be made on behalf of the Employee under a single life annuity that is the Actuarial Equivalent of the sum of the Employee's accrued benefit and the Employee's other benefit under the Plan. For purposes of this paragraph, benefit includes loans in excess of the amount set forth in Section 72(p)(2)(A) of the Code, all payments from the Plan to a Highly Compensated Employee during his or her lifetime and any death benefits not provided for by insurance on such Highly Compensated Employee's life. (Emphasis added.)

⁴³ See 26 CFR 1.401(a)(4)-5(b); Rev. Rul. 92-76; 1992-2 C.B. 76 (July 1992).

⁴⁴ According to Rev. Rul. 92-76, 1992-2 C.B. 76 (July 1992), the special nondiscrimination rules may be relaxed if "the value of plan assets equals or exceeds 110 percent of the value of current liabilities." However, according to the 2007 Form 5500 Schedule B, Appendix at pages A-154 and A-155, the Plan was only about 83% funded, with current liability of \$1,139,837.00 and assets of \$941,835.00, and its current liability percentage for 2006 was listed as 94%.

⁴⁵ The 2007 Employee Census, Appendix at pages A-117, reports that *the Appellant* earned \$231,000.00. According to PBGC records, the next highest paid employee earned \$109,250.00.

test that sum for compliance with the special nondiscrimination rule in Treasury Regulations Section 1.401(a)(4)-5(b).⁴⁶

The record shows that the Plan administrator did so in a manner the Board would call the reasonable way by calculating *the Appellant's* remaining retirement benefit after offsetting the MRDs against the benefit accruals that *the Appellant* earned during years in which MRDs were paid to *the Appellant*.⁴⁷ In particular, and consistent with Sections XIII.B and XV.D(1) of the Plan, the Plan administrator made the following four significant changes to the payments made to *the Appellant* after *the Appellant* had retired:

- (1) It increased the amount of the payments from the final MRD rate of \$5,316.75 per month to \$5,357.33 per month;
- (2) Starting in 2009, it fixed the revised amount, \$5,357.33 per month, as *the Appellant's* benefit payment amount;
- (3) It began to pay *the Appellant* [a] \$5,357.33 benefit on a monthly basis in 2013; and
- (4) It stopped describing the monthly payments as MRDs and, instead, referred to them merely as “distributions.” (See description immediately following Table 2 on page 7 of this decision.)

These actions were consistent with how the Plan was operated and funded. As shown in the 2011 Actuarial Valuation Report and Form 5500, Schedule SB, the certified actuarial calculation of *the Appellant's* retirement benefit was \$5,357.33 per month as a straight-life annuity. *The Appellant's* Plan participant statements also showed *the Appellant's* retirement benefit to be \$5,357.31 per month (i.e., the amount after the offset). Taking these actions also enabled the Plan administrator to avoid having to add back any non-offset MRDs for purposes of the special nondiscrimination testing under Treasury Regulations Section 1.401(a)(4)-5(b). The resulting decision was to pay the offset benefit in the form of a straight life annuity of \$5,357.33 – a result that was perfectly consistent with the Plan, applicable law and IRS guidance.

The analysis described in PBGC's February 8, 2018 letter further supports the finding that the Plan administrator had computed *the Appellant's* retirement benefit of \$5,357.33 per month. PBGC's actuaries tested the reasonableness of the calculation by making its own calculations of

⁴⁶ The distribution restriction in Plan Section XV.D(1) was based on *the Appellant's* “straight life annuity that is the actuarial equivalent of the accrued benefit and other benefits to which [*the Appellant* was] entitled under the plan.” This means that all amounts that were paid or payable by the Plan to *the Appellant*, including the MRDs, would have been includable in the calculation of *the Appellant's* restricted benefit amount for purposes of Section XV.D(1) of the Plan and Treasury Regulations Section 1.401(a)(4)-5(b).

⁴⁷ We call this the reasonable way because it follows the analysis of the Internal Revenue Service in Private Letter Ruling (“PLR”) 9514028 (January 13, 1995). See Appendix on pages A-252 to A-262.

the Appellant's retirement benefit. PBGC actuaries gave *the Appellant* credit for the additional Years of Service and increases in Compensation after *the Appellant's* Normal Retirement Date and subtracted the value of the in-service distributions. PBGC found that *the Appellant's* benefit amount of \$5,357.33 was reasonable as it was within 5% or \$5.00 of the retirement benefit that PBGC actuaries had calculated.⁴⁸

In your response to our April 16, 2018 letter, you acknowledged that *the Appellant* would not be entitled to an unreduced benefit accrual under Section 411(b)(1)(H)(i) of the Code if such a benefit accrual would cause the Plan to discriminate in favor of highly compensated employees within the meaning of Code Section 401(a)(4).⁴⁹ The record strongly suggests that was the case. In addition, we note that your argument against the offset is entirely lacking evidentiary support. If the MRDs were a separate, non-offset benefit as you have claimed, then there would have had to have been a contemporaneous nondiscrimination test performed at *the Appellant's* retirement to properly advise *the Appellant* of *its* distribution rights in accordance with the nondiscrimination rules. According to the IRS guidance discussed above, the total benefit tested would have been based on the annuity value of the of the MRDs, plus the non-offset benefit of \$7,296.67 per month that *the Appellant* has claimed. No other participant benefit under the Plan is anywhere near as large as *the Appellant's* benefit. There are no nondiscrimination tests in the record, and you have not provided any information about them despite the request that we made in our letter dated April 16, 2018.

In addition, because the Plan offered lump-sum distributions, *the Appellant's* distribution election materials would have needed to show *the Appellant* how much of any possible lump sum would have been a restricted benefit under Treasury Regulations Section 1.401(a)(4)-5(b). However, the distribution election form that *the Appellant* provided to PBGC shows only the straight-life annuity benefit of \$5,357.33. The section about the single sum and combination benefit is blank.

Given the clear language in the Plan, which authorizes the Plan administrator to make such interpretations and computations as it deems appropriate, the Appeals Board found that PBGC and the Plan administrator reasonably construed and applied the terms of the Plan and applicable law to offset *the Appellant's* benefit accruals from 2003 to 2007 by the value of the MRDs that *the Appellant* had received.⁵⁰ The Board also found that there is no error in PBGC's determination

⁴⁸ PBGC's February 8, 2018 explanation letter provided in relevant part as follows (*see* Appendix on page A-199):

PBGC tested the reasonableness of the amount of the benefit in-pay, \$5,357.33, comparing it with the estimated accrued benefit as of the date *the Appellant* terminated employment, December 31, 2007, using the Plan provisions in the 1997 document and the regulatory guidance above. . . .

. . . The resulting calculated benefit as of December 31, 2007, was within \$5.00/5% tolerance described above and, thus, PBGC accepted the benefit in pay as reasonable.

⁴⁹ *See* Appendix on page A-219.

⁵⁰ *See e.g. Block v. Pitney Bowes Inc.* 952 F.2d 1450, 1454 (D.C. Cir 1992) ("The essential inquiry here, in short, is

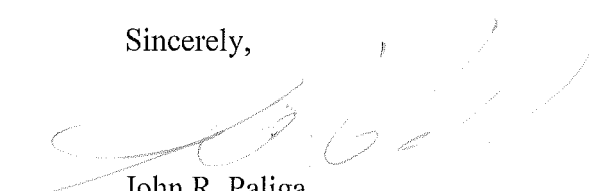
to continue to pay *the Appellant's* retirement benefit as a straight-life annuity in the amount of \$5,357.33 per month. This is the same monthly amount the Plan administrator had recorded as *the Appellant's* benefit and had paid *the Appellant* since 2009.

Decision

The Appeals Board has applied the terms of the Plan and applicable provisions of law to the facts as found in the documented record. For the reasons discussed above, we have found no basis for changing PBGC's December 29, 2017 determination; thus, we have denied the appeal. This is the agency's final decision on this matter, and *the Appellant* may, if *the Appellant* wishes, seek review of this decision in an appropriate United States District Court.

If *the Appellant* has any questions about *the Appellant's* benefit, *the Appellant* may call PBGC's Customer Contact Center at 1-800-400-7242 and ask to speak with the authorized representative for the Plan (Case No. 223408).

Sincerely,



John R. Paliga
Member, Appeals Board

Enclosure: Appendix with 262 pages

cc: *The Appellant*

what the district court understood it to be: Did the Committee reasonably construe and apply the [] Plan in [the participant's] case?"). See also *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 115 (1989).