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

JUN 0 4 2004

Re: ; Case 187163, Nu-Kote International, Inc. (the "Company") Retirement Income Plan (the "Plan")

Dear

The Appeals Board reviewed your appeal of PBGC's May 27, 2003 determination and September 26, 2003 corrected determination of your benefit under the Plan. As explained below, the Board found that: (1) your annualized earnings are $54,212.79 for both 1997 and 1998; (2) your highest five consecutive years of earnings in your last 10 years of employment under the Plan are 1992 through 1996; (3) and your Highest Annual Average Earnings (referred to in PBGC's benefit statements and in this letter as Average Annual Compensation or "ACOMP") is ***$60,712.10***. These are the same values PBGC used in making its May 27, 2003 determination. The Board therefore concluded that the benefit to which you are entitled is the same as stated in that determination, i.e., ***$1,396.24*** per month as Straight Life Annuity ("SLA") beginning June 1, 2009, your Earliest Unreduced Retirement Date.

Please note that PBGC's September 26, 2003 corrected determination was not made in accordance with the provisions of the Plan and, therefore, is incorrect.

PBGC's Determination and Your Appeal

PBGC's determination letter of May 27, 2003 enclosed a benefit statement that showed the data used in determining your benefit and how your benefit was calculated. Among the data listed was your ACOMP of $60,712.10.

You filed an appeal by letter dated July 7, 2003, stating that you believe the ACOMP that PBGC used in its determination is too low. You listed your 1992 - 2000 annual salaries from PBGC's records, which you obtained by telephone:

1992	$59,102.00	1997	$58,667.37
1993	58,968.00	1998	20,154.40
1994	59,421.60	1999	66,330.94
1995	61,798.47	2000	42,005.40
1996	64,270.42		

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In support of your belief that your ACOMP is too low, you listed from your Social Security Statement of February 14, 2003, your *Taxed Social Security Earnings* and *Medicare Earnings* from the Company for the years 1992 through 1999. You show that your highest continuous five years of earnings, in both cases, are 1995 through 1999 and that your average annual earnings are $65,301.80 and $67,741, respectively. You also stated that the Company is willing to work with PBGC to resolve the issue based on the e-mail communications (copies of which you enclosed) exchanged on July 3, 2003 between yourself and the Company's Human Resources Manager, Mr. Kevin Pataluna.

PBGC's Corrected Benefit Determination and Your Appeal

In accordance with established PBGC procedures, the Appeals Board forwarded your July 7, 2003 correspondence to the Insurance Operations Department ("IOD"), the office responsible for determining and paying PBGC benefits, for them to respond to the issues you raised. As a result, on September 26, 2003, IOD issued you a corrected benefit determination stating that you are entitled to a monthly payment of $1,452.06 in the form of a SLA commencing June 1, 2009. PBGC also told you that your 1997 and 1998 pension earnings used to determine your ACOMP were annualized (and determined to be $61,240.33 both years) because you continued to work for an extended period following your recall from a layoff that spanned parts of those two years. Therefore, your highest five consecutive salary years are 1995 through 1999 and your ACOMP is $62,976.10:

1995	$61,798.47
1996	64,270.42
1997	61,240.33
1998	61,240.33
1999	66,330.94

By letter dated November 6, 2003, you filed an appeal of the corrected benefit determination in which you stated that you believe the ACOMP of $62,976.10 is low because the annualized earnings for 1997 and 1998 are too low. You said that your 1997 annualized pension earnings are $71,443.32 (actually $71,433.32), which is the sum of : (1) your year-to-date regular earnings as of October 17, 1997, of $53,574.99 shown on the last Company Earnings Statement you received for that year, a copy of which you enclosed; (2) a vested four weeks vacation due payment of $5,102.38 shown on the Earnings Statement, which you explained was earned from prior employment years through 1996; and (3) $12,755.95 for five additional biweekly payments at $2,551.19, your biweekly rate, to complete the year.

You stated that your annualized pension earnings for 1998 are $66,330.94. You explained that you were reinstated in 1998 at the same salary you had the previous year; therefore, your annualized pension earnings are the product of 26 times your bi-weekly rate of $2,551.19. You listed your pension earnings for the five years that you used in calculating an ACOMP of $66,032.82:

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1995	$61,798.47
1996	64,270.42
1997	71,443.32 (actually $71,433.32)
1998	66,330.94
1999	66,330.94

In addition, you noted that the figures do not include severance pay, which you received, or bonus pay which, if applicable, would be in addition to the above figures.

You stated, as you did in your July 7, 2003 letter, that you would like to reserve the right to review any actions in this case with the right to provide additional information if needed and the right to appear in person before the Appeals Board if you decide to do so at a later date.

By a communication faxed to us April 2, 2004, you supplemented your November 6, 2003 filing. You set forth, among other things, arguments explaining why you believe vacation pay should be included in determining ACOMP. You also presented information explaining your status as an employee and participant in the Plan at the time of your lay off in 1997 and your return to work with the Company in 1998. You attached a number of documents in support of your claims.

The Law

When the Plan terminated on September 30, 2000, it did not have sufficient assets to satisfy all benefits whose payment is guaranteed by the PBGC pursuant to Title IV of the Employee Retirement Income Security Act ("ERISA"). Section 4022(a) of ERISA provides that, subject to certain limitations set forth in Section 4022(b), the PBGC shall guarantee the payment of all nonforfeitable benefits under a plan which terminates. Under ERISA and PBGC regulations a "nonforfeitable benefit" is a ". . . benefit for which a participant has satisfied the conditions for entitlement under the plan or the requirements of this Act . . ." ERISA Section 4001(a)(8), and 29 Code of Federal Regulations ("CFR") Part 4001.2.

The PBGC benefit to which you are entitled is determined by the terms of the Plan, the provisions of ERISA, and PBGC regulations and policies. The governing Plan document is the restated Plan that became effective April 1, 1989, as further amended through August 10, 2000, the effective date of the last amendment to the Plan.

Plan Provisions

Section 14 a. of the Plan states, in relevant part:

> The annual benefit for a Member retiring . . . on or after January 16, 1987 will be determined by the Member's Highest Annual Average Earnings [ACOMP], as defined in Section 41.p. . ..

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Section 41.l. defines "Earnings" as:

> [T]he Employee's salary or wage from the Company, ***including*** any tax deferred contributions under the provisions of the Nu-Kote International, Inc. Savings Plan, shift premiums, area rate differentials, group leader premiums, commissions, incentive payments, and Company payments for non-work periods while in active employment status, but ***excluding*** all other forms of compensation including without limitation, overtime, payments under any bonus plan (including any successor annual bonus plan), payments under any long-term incentive plan, payments under a termination plan or any similar arrangement, overseas supplements, ***unused vacation*** (including banked vacation days or banked paid absence allowances) and any payments or allowances for specific or contingent expenses. ***The earnings of Employees who are credited with less than 1,700 Compensated Hours in any full calendar year of employment shall be annualized to reflect the Earnings those Employees would have received for 1,700 hours of employment.*** When necessary to produce five consecutive calendar years of "Earnings" for purposes of calculating "High Annual Average Earnings." Earnings shall include Earnings, as defined herein, from an Affiliate or an Associated Company prior to becoming a Member of this Plan. (Emphasis added.)

Section 41.p. provides, in relevant part:

> "Highest Annual Average Earnings" shall mean the annual average of an Employee's highest "Earnings", as defined, during any 5 consecutive calendar years of the last 10 of active employment which may include the year in which employment terminates. . .. Notwithstanding the foregoing, Earnings for periods after August 10, 2000, shall not be counted for purposes of determining Highest Annual Average earnings.

Section 41.h. states:

> "Compensated Hour" shall mean (1) [e]ach hour for which an Employee receives compensation paid directly by the Company . . . and also shall include hours credited in accordance with . . . [Company approved leave of absence, compensable injury leave, and disability leave] Each hour of pay at a premium rate shall be included as a straight-time hour.
>
> Each hour for which back pay . . . is either awarded or agreed to by the Company and such Compensated Hours shall be credited to the year during which the services were performed or to which the back pay is applicable.
>
> Notwithstanding the above, or any provision of this Plan to the contrary, an Employee will not be credited with Compensated Hours more than once with respect to the same period of time.

Discussion

After the Plan terminated, PBGC obtained from the Company the Plan and participant records it needed to calculate benefits. Following are your estimated or actual annual Earnings and hours worked during the 10 years ending the year the Plan terminated in PBGC files:

Year	*Earnings*	*Hours Worked*
1991	$55,519.00	2,080
1992	59,102.00	2,160
1993	58,968.00	2,080
1994	59,421.60	2,080
1995	61,798.47	2,080
1996	64,270.42	2,080
1997	58,677.37	1,760
1998	20,154.40	560
1999	66,330.94	2,080
2000	42,005.40	1,216

The types of employee compensation included in pension earnings are determined by the provisions of the Plan's governing document; it is a matter in which PBGC does not have discretion. The Plan's definition of Earnings includes certain specifically cited types of payments and excludes other forms of compensation. Separation pay is not listed in the included items; among the excluded items are "payments under a termination plan or any similar arrangement . . .." Bonuses and unused vacation pay are specifically excluded from Earnings in Section 41.I. of the Plan. Mr. Kevin Pataluna, who started with the Company in March 1998 and served as Chairman of the Retirement Committee that administered the Plan prior to its termination, said in telephone conversations on April 1, 2004, with the analyst assigned your appeal that pension earnings do not include severance pay and pay for unused vacation time.

On April 1, 2004, Mr. Pataluna faxed to us an 8-page listing, entitled an Earnings Analysis, showing the biweekly payments the Company made to you beginning April 22, 1993 (the earliest paydate in the Company's computerized record) and ending December 22, 2000. A copy of the listing is enclosed for your reference. In the April 1, 2004 telephone conversations, Mr. Pataluna said that the annual pension earnings and hours worked for all participants were determined on a 26 pay-period basis; no attempt was made to determine annual earnings and hours starting and ending with the first and last days of a calendar year. Mr. Pataluna further stated that, as provided in the Plan, pension earnings were annualized to 1,700 hours per year when Compensated Hours were less than that. He said that you were regularly scheduled to work 40 hours per week, from Monday through Friday, and that you were laid off on October 17, 1997, and returned to work on September 8, 1998.

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Our review of the Earnings Analysis that Mr. Pataluna sent us confirms your annual pension earnings and the hours worked derived from the earnings listed in the preceding table for the years 1994, 1995, 1996 and 1999.

For 1997, the Earnings Analysis lists you as having had 21 paydates with regular payments of $2,551.19 each. For three of the pay periods you also received $100.00, which Mr. Pataluna said was not a part of pension earnings, but instead for the medical insurance option you had elected. On the last paydate that you received a regular payment, you also were paid $5,102.38 (equal to two biweekly regular payments) for vacation pay. On the next and subsequent paydates you are listed as receiving only severance pay. Your pension earnings of $58,677.37 for 1997 shown in the preceding table apparently was obtained by including the vacation pay with the 21 biweekly regular payments; i.e., 23 x $2,551.19 = $58,677.37. Based on the statement you made in your appeal and our review of the Earnings Analysis, the vacation payment was made in lieu of you having taken a vacation. Under the terms of the Plan, vacation pay is excluded from pension earnings. Therefore, your pension earnings in 1997 were $53,574.99 (21 x $2,551.19), which equates to 1,680 hours worked (21 x 80 hours). Pursuant to the provisions of the Plan, your 1997 annualized pension earnings are therefore $54,212.78 ($53,574.99 divided by 1,680 hours times 1,700 hours).

Your pension earnings of $20,154.40 for 1998 are consistent with the information in the Earnings Analysis, which shows you as having an initial paydate of September 18, 1998 that covers nine days of work beginning September 8, 1998, the date you returned from layoff. (Reference to a universal calendar shows that was a Tuesday with a total of nine working days to the September 18, 1998 paydate; also your regular pay for that period of $2,296.07 is nine-tenths of $2,551.19.) That first paydate is followed by seven more of $2,551.19 each, resulting in 1998 pension earnings of $20,154.40 (7.9 x $2,551.19). Based on this amount, your hours worked are 632 (7.9 x 80 hours) rather than 560 (7 x 80 hours). Therefore, your annualized pension earnings for 1998 are $54,212.78 ($20,154.40 divided by 632 hours times 1,700 hours).

No attempt was made to confirm your pension earnings reported for the year 2000 because that year is clearly outside of your high-five years because the Plan terminated at the end of September and before that the Plan was amended to provide that earnings for periods after August 10, 2000, shall not be counted for determining ACOMP.

Decision

Having applied the Plan's provisions and the law to the facts in this case, the Appeals Board found that : (1) for purpose of the Plan, your Earnings in both calendar years 1997 and 1998 are $54,212.78; (2) your highest five years of earnings in the last 10 years of your employment under the Plan are 1992 through 1996; and (3) your ACOMP is $60,712.10, the same values PBGC used in making its May 27, 2003 determination of your benefit. Therefore, the Board concluded that the benefit to which you are entitled is $1,396.24 per month, the same as stated in the May 2003 determination. This is final Agency action regarding the matters your appeal raised. You may, if you wish, seek court review of the decisions herein.

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Regarding your right to appear before the Appeals Board, the Rules for Administrative Review of Agency Decisions, which governs the Appeals Board, provide that:

> "An opportunity to appear before the Appeals Board (or a hearing officer) and an opportunity to present witnesses will be permitted at the discretion of the Appeals Board. In general, an opportunity to appear will be permitted if the Appeals Board determines that there is a dispute as to a material fact . . .." [29 CFR Part 4003.55]

The Appeals Board determined that there is no dispute as to the material facts in this case and, therefore, decided that an oral hearing is not required.

If you need other information from PBGC, please call our Customer Contact Center at 1-800-400-7242.

Sincerely,

Sherline M. Brickus

Sherline M. Brickus
Member, Appeals Board

Enclosure