



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

August 13, 2010

Re: Case 203572; Retirement Plan for Flight Attendants in
the Service of US Airways, Inc. (the "FA Plan")

Dear

This Appeals Board decision responds to your appeal of PBGC's September 2008 determination that you are not entitled to a PBGC benefit under the FA Plan. As we explain below, the Appeals Board found that your appeal did not provide a sufficient basis for changing PBGC's determination and, therefore, we must deny your appeal.

PBGC's Benefit Determination and Your Appeal

PBGC's determination letter told you that you are not entitled to a PBGC benefit because the FA Plan required at least 5 years of Service to qualify for a vested pension benefit and you did not meet this requirement. The letter said that you had only 3.58 years of Service as of the Plan's termination date (January 10, 2005). PBGC counted your years of Service from your date of hire (1999) until the date of your departure for military leave (2003).

After you requested and were granted an appeal filing extension, you filed an appeal on December 23, 2008. Your December 23 appeal letter said:

This responds to your September 5, 2008 determination and much-appreciated extension that I am not entitled to a pension benefit payable by PBGC. The US Airways Plan [required] that I have 5 years of service in order to qualify for a vested pension benefit. During the furlough/lay-off procedures in 2003, I was serving with the in Baghdad, Iraq since February 2003, while simultaneously an active employee with US Airways based in International Airport.

Due to no fault of my own, my military orders and contract were extended (Stop-Loss) until I was formally and honorably discharged from the US Army Reserve on **May** **2004**. At which time, I have 90 days after completion of 181 + days to report back to work. (Uniformed Services Employment & Reemployment Rights Act USERRA).

Please find my military activation and discharge orders enclosed, while I was an US Airways employee I have computed my US Airways time until my

military release (plus days to report) to qualify me for the vested pension benefit with over 5 years of service.

In support of your appeal, you provided the following documents:

- A letter from the Department of the Army dated February 2003, notifying you that you were ordered to report for "Active Duty" on February 2003. The letter also noted that the period of your active duty was scheduled for 365 days.
- A letter from the Department of the Army stating that, as of May 2004, you were honorably discharged. The letter also noted under additional instructions: "Soldier was held beyond normal discharge date through no fault of the soldier."

Pertinent Plan Provisions

The provisions of the January 1, 2001 Restatement of the FA Plan, *as amended* (the "2001 Restatement"), were in effect when the FA Plan terminated.

Section 2.1(W) of the 2001 Restatement, as amended by the First Amendment effective October 16, 2001, defines "Service" for vesting purposes as follows:

(W) **Service** - employment with the Employer determined in accordance with the following rules for the purposes of determining an employee's vesting status:

(1) An employee will be credited with Service in full 1/12th of a year commencing on his most recent Employment Date and ending on his subsequent Severance Date.

(4) A Severance Date shall not occur and absence from employment shall be counted as Service if the following circumstances apply:

(a) furlough;

(b) medical leave of up to three years as authorized by the Employer's established leave policy;

(c) personal leave of absence of up to 180 days as authorized by the Employer pursuant to the Employer's established leave policy;

(d) military leave while the employee's reemployment rights are protected by law;

provided that the employee returns to active employment with the Employer when recalled (if furlough, except those Employees who elect a voluntary furlough under a voluntary program offered by the Employer and elect to retire upon their Normal Retirement date while on voluntary furlough status), within 180 days (if personal leave of absence), or within 90 days after he becomes

eligible for release from active duty (if military leave). If the Employee does not return to active employment with the employer, except for medical leave of absence, his Severance Date shall be deemed to have occurred and his Service shall be deemed to have ceased on the date his absence commenced.

Section 2.1(Z) of the 2001 Restatement explains that a Participant needs at least five years of Service to qualify for a vested benefit, as follows:

(Z) **Vesting Percentage** - the percentage which may be applied to a Participant's Accrued Benefit in accordance with the further terms of the Plan. A Participant with less than five years of Service has a Vesting Percentage of 0%. A Participant with five years of Service, has a Vesting Percentage of 100%.

Section 3.4 of the 2001 Restatement mentions "military service" as follows:

3.4 Military Service. Notwithstanding any other provision of the Plan to the contrary, contributions, benefits and service credit with respect to qualified military service shall be provided in accordance with Section 414(u) of the [Internal Revenue] Code,

Section 414(u) of the Internal Revenue Code, mentioned in section 3.4 of the 2001 Restatement, requires qualified defined-benefit plans to abide by the provisions of the Uniformed Services Employment and Reemployment Rights Act of 1994 ("USERRA").

USERRA's Provisions

Congress enacted USERRA on October 13, 1994 to amend the provisions of Chapter 43 of Title 38 of the United States Code ("USC") to protect the rights of persons who voluntarily or involuntarily leave civilian employment to undertake military service.

With respect to the rights, benefits and obligations of persons absent from employment for service in a uniformed service, USERRA §§ 4316(a) & (b) provide as follows:

(a) A person who is reemployed under this chapter [38 USC §§ 4301 et seq.] is entitled to the seniority and other rights and benefits determined by seniority that the person had on the date of the commencement of service in the uniformed services plus the additional seniority and rights and benefits that such person would have attained if the person had remained continuously employed.

(b)

(6) The entitlement of a person to a right or benefit under an employee pension benefit plan is provided for under section 4318 [38 USC § 4318].

[Underlining added.]

With respect to pension benefits, USERRA § 4318(a) provides as follows:

(a) (1) (A) . . . in the case of a right provided pursuant to an employee pension benefit plan (including those described in sections 3(2) and 3(33) of the Employee Retirement Income Security Act of 1974 [29 USC § 1002(2), (33)]) . . . , the right to pension benefits of a person reemployed under this chapter [38 USC §§ 4301 et seq.] shall be determined under this section.

(2) (A) A person reemployed under this chapter [38 USC §§ 4301 et seq.] shall be treated as not having incurred a break in service with the employer or employers maintaining the plan by reason of such person's period or periods of service in the uniformed services.

(B) Each period served by a person in the uniformed services shall, upon reemployment under this chapter [38 USC §§ 4301 et seq.], be deemed to constitute service with the employer or employers maintaining the plan for the purpose of determining the nonforfeitability of the person's accrued benefits and for the purpose of determining the accrual of benefits under the plan.

[Underlining added.]

USERRA authorizes the Secretary of Labor to prescribe rules to implement the act. The Department of Labor ("DOL") regulations relating to the USERRA requirements are found in 20 Code of Federal Regulations ("C.F.R.") Part 1002. With respect to persons who are laid off while they are on military leave, 20 C.F.R. § 1002.42 provides, in pertinent part, as follows:

§ 1002.42 What rights does an employee have under USERRA if he or she is on layoff, on strike, or on a leave of absence?

(a) If an employee is laid off with recall rights, on strike, or on a leave of absence, he or she is an employee for purposes of USERRA. If the employee is on layoff and begins service in the uniformed services, or is laid off while performing service, he or she may be entitled to reemployment on return if the employer would have recalled the employee to employment during the period of service. Similar principles apply if the employee is on strike or on a leave of absence from work when he or she begins a period of service in the uniformed services.

(b) If the employee is sent a recall notice during a period of service in the uniformed services and cannot resume the position of employment because of the service, he or she still remains an employee for purposes of the Act. Therefore, if the employee is otherwise eligible, he or she is entitled to reemployment following the conclusion of the period of service even if he or she did not respond to the recall notice.

(c) If the employee is laid off before or during service in the uniformed services, and the employer would not have recalled him or her during that period of service, the employee is not entitled to reemployment following the period of service simply because he or she is a covered employee. Reemployment rights under USERRA cannot put the employee in a better position than if he or she had remained in the civilian employment position.

Discussion

PBGC provides pension insurance in accordance with the Employee Retirement Income Security Act of 1974, as amended ("ERISA"). If the sponsor of a qualified, defined-benefit pension plan can no longer support its plan, PBGC becomes the plan's trustee and pays benefits as defined in the plan, subject to the limitations and requirements set by Congress under ERISA.

Records available to the Appeals Board show that the Plan terminated on January 10, 2005 and PBGC became the Plan's trustee on February 1, 2005.

PBGC's records also indicate that: (1) you were hired by US Airways on [] 1999, as an [] (2) you became a [] on February [] 2000; (3) you went on military leave on February [] 2003; (4) you were placed on involuntary furlough status on June [] 2003; (5) you were honorably discharged from active duty on May [] 2004; and (5) you voluntarily terminated your employment with US Airways on May [] 2006 after the FA Plan terminated.

Based on section 1002.42 of the DOL's regulations, quoted above, we have concluded that you did not have a right to reemployment when you completed your active military service in 2005 because you were not recalled from your involuntary furlough before the end of your military service. We have, therefore, found that you are not entitled to Service under the FA Plan for any portion of your military service from February [] 2003 to May [] 2004 because you were not reemployed (that is, you did not return to active service with US Airways).

Under PBGC's regulation (29 C.F.R. § 4022.11) regarding USERRA, if you had been recalled by US Airways before or after the Plan terminated and you returned to active employment upon recall, you would have been given credit for your period of military service up to the Plan's termination date. As the record shows that you were never recalled from furlough and, thus, you did not return to active service when recalled, you were never reemployed and cannot receive credit for your military service under USERRA. And, in accordance with section 2.1(W)(4) of the FA Plan, you incurred a Severance Date and your Service (for vesting), ended on February [] 2003, the first date of your military service.

As of February [] 2003, you had earned less than five years of Service and, therefore, you are not entitled to a vested benefit under the FA Plan.

Decision

Having applied the terms of the FA Plan and the law to the facts in this case, the Appeals Board found that your appeal did not provide a sufficient basis for changing PBGC's determination. Therefore, we must deny your appeal. This decision is PBGC's final action regarding your non-entitlement to a vested benefit under the FA Plan. If you wish, you may seek review of this decision in an appropriate federal district court.

We regret the delay in responding to your appeal and appreciate your patience while we completed our review. If you have other questions, you may call PBGC's Customer Contact Center at 1-800-400-7242 and ask to speak to the authorized representative assigned to the FA Plan (Case 203572).

Sincerely,

A handwritten signature in black ink that reads "Michel Louis". The signature is written in a cursive style with a large initial "M" and a long, sweeping underline.

Michel Louis
Appeals Board Member