

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA
ANDERSON DIVISION

**KENNETH WALTON GEORGE, DENNIS
REED BOWEN, CLYDE FREEMAN,
GEORGE MOYERS, JIM MATTHEWS,
and HENRY MILLER, on their own behalf
and on behalf of a class of persons similarly
situated,**

Plaintiffs,

vs.

**DUKE ENERGY RETIREMENT CASH
BALANCE PLAN and DUKE ENERGY
CORPORATION,**

Defendants.

Case No.: 08:06-cv-00373-RBH

**MEMORANDUM OF DUKE
ENERGY RETIREMENT CASH
BALANCE PLAN AND DUKE
ENERGY CORPORATION IN
SUPPORT OF MOTION
FOR SUMMARY JUDGMENT ON
CLASS CLAIMS**

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NATURE OF THE CASE AND INTRODUCTION

Effective January 1, 1997, Duke Energy Corporation (“Duke”) adopted a cash balance design for the Duke Energy Retirement Cash Balance Plan (the “Plan”). Plaintiffs pursue two claims under the Employee Retirement Income Security Act of 1974 (“ERISA”) on behalf of classes of participants in the Plan. Plaintiffs allege that defendants did not properly calculate lump sum benefits paid by the Plan (Count Three) and that interest credits applied to hypothetical cash balance accounts during 1997 and 1998 were not properly determined (Count Four). Defendants are entitled to summary judgment on these claims.

The lump sum claims in Count Three seek to impose “whipsaw” liability on Duke. At times, a whipsaw payment has been required of other cash balance plans that had an interest crediting rate greater than a rate used to discount future income streams to present value, as mandated by section 417(e) of the Internal Revenue Code of 1986 (“Code”). *See* IRS Notice 96-8, 1996-1 C.B. 359 (hereafter “Notice 96-8”) (unpublished citations at Group Exh. A); *see also Berger v. Xerox Corp.*, 338 F.3d 755, 762 (7th Cir. 2003). The interest crediting rate under Duke’s cash balance plan was the 30-year Treasury-bond rate (“30-year Rate”). The 30-year Rate was also the applicable discount rate specified by Code § 417(e). Under Duke’s plan, a whipsaw calculation would not generate a benefit greater than the cash balance account, because it would project forward and discount back under the same index. As such, the Plan has appropriately paid the cash balance account when making a lump sum distribution.

Plaintiffs advance two claims for a whipsaw calculation of lump sum distributions made by the Plan before August 16, 2006, when ERISA was amended by the Pension Protection Act of 2006 (the “PPA”), to eliminate whipsaw for all cash balance plans. Each of plaintiffs’ claims fails under the applicable law and the undisputed facts.

Plaintiffs first argue that a provision contained in a 1999 amendment and restatement of the Plan (the “1999 Plan”) adding Section 5.04(c) should be interpreted to require a discount rate of 4%. Because 4% is less than the applicable interest crediting rate, plaintiffs claim this provision requires a whipsaw calculation entitling them to a lump sum greater than the cash balance account.

This construction is foreclosed by the plain language of the plan provision. Section 5.04(c) of the 1999 Plan provides the interest crediting rate to be used to calculate a lump sum payment, *i.e.*, the interest rate applicable to project interest credits to normal retirement age. The Plan administrator never interpreted the provision as a substitute for the § 417(e) discount rate. The administrator’s construction, which flows from the express language of the provision, is fully reasoned and entitled to deference.

Plaintiffs advance an alternative whipsaw claim, based on the fact that the interest crediting rate was reset each quarter, while the § 417(e) rate designated under the Plan is reset annually. Plaintiffs argue a whipsaw calculation is required for any participant who elected to receive a lump sum during a quarter when the interest crediting rate exceeded the § 417(e) discount rate.

This claim is not sound either. Both the crediting rate and discount rate are derived from the same index and no whipsaw liability arises in such circumstances. The Plan appropriately paid the cash balance account when a participant elected a lump sum, as the IRS concluded after a recent review of the Plan.

In Count IV, plaintiffs claim that Duke adopted the wrong dates for the determination of the 1997 and 1998 interest crediting rates. This claim also fails under the undisputed facts. Duke has at all times selected the appropriate determination date for the 30-year Rate used to set

interest credits. The provisions contained in the Plan adopted effective January 1, 1997 and the restated Plan effective July 16, 1997 were reasonably interpreted by the Plan administrator, whose interpretation can be challenged only for an abuse of discretion. Plaintiffs' contrary construction of those provisions cannot defeat the reasoned determination of the Plan's administrator as to the determination date for setting quarterly interest credits.

UNDISPUTED FACTS

I. THE CASH BALANCE PLAN

A. The Adoption of the Cash Balance Plan

Duke has sponsored a defined benefit pension plan since 1943. (Am. Cmplt., ¶ 32). The Plan – for its first five-plus decades – was a final average pay plan (the “Prior Plan”). (*Id.*). Participants received a lifetime annuity based on years of credited service (up to 30 years) and qualifying compensation. (*Id.*) (Affidavit of Richard Jefferies (Class Claims), “Jefferies Aff.,” ¶ 5).

In the late 1990's, Duke revised its employee benefits programs, including its defined benefit plan. The defined benefit plan was amended to adopt a cash balance design. (Jefferies Aff., ¶ 6). A cash balance plan mimics a defined contribution plan, such as a 401(k) plan. (Am. Cmplt., ¶ 36). A hypothetical account is established, and pay and interest credits are added to the account. (*Id.*).

B. The Provisions for Computation of Lump Sums and Section 5.04(c)

Plaintiffs' whipsaw claim advances two whipsaw theories. The first is pursued under the 1999 Plan: that is the version of the Plan that added Section 5.04(c). (Jefferies Aff., ¶ 7).

Section 5.04(c) was added to avoid any potential whipsaw exposure. The Plan has always had a 4% floor for interest credits. (January 1, 1997 Plan, § 3.9; July 16, 1997 Plan,

§ 3.9; 1999 Plan, § 2.38).¹ Duke wished to assure that it would not need to perform a whipsaw calculation for a lump sum payment if the 30-year Rate dropped below 4%. (February 5, 2008 Rule 30(b)(6) Deposition of defendants, “Feb. 30(b)(6) Dep.,” pp. 159-60) (Group Exh. B); Jefferies Aff., ¶ 8). In such an event, the statutory discount rate – tied to the same Treasury bond rate as the interest crediting rate – would be less than the minimum 4% interest crediting rate.² To avoid whipsaw under those circumstances, in 1999 Duke amended the Plan to add a provision stating:

Notwithstanding anything herein to the contrary, if a Participant elects to receive a lump sum distribution prior to his Normal Retirement Date, the Monthly Interest Rate applied for purposes of determining the lump sum distribution shall be the lesser of 4% or the “applicable interest rate” specified in Code Section 417(e) and Treasury Regulation 1.417(e)-IT.

(1999 Plan, § 5.04(c)).

Plaintiffs’ other whipsaw claim, tied to timing differences between the determination dates for the interest crediting rate and the § 417(e) discount rate, challenges lump sum distributions under both versions of the 1997 Plan and the 1999 Plan: each sets the interest crediting rate quarterly, and the discount rate annually. (January 1, 1997 Plan, §§ 1.4 and 3.9; July 16, 1997 Plan, §§ 1.4 and 3.9; 1999 Plan, § 2.38 and App. A ¶ 1; Amend. 9, ¶ 1(a)).

C. The Determination Date Provisions

Interest credits are based on 30-year Treasury bonds. (January 1, 1997 Plan § 3.9; July 16, 1997 Plan § 3.9; January 1, 1999 Plan § 2.38). Because the Treasury bond rate fluctuates, it was necessary to identify what day’s price for the bond would be used. The goal was to tie “the

¹ The Duke Plans cited herein are attached as exhibits to the Affidavit of Richard Jefferies.

² Because the 30-year Rate never dropped below 4% before whipsaw was legislatively abolished, this concern of a possible whipsaw never came to fruition. (Jefferies Aff., ¶ 8).

interest crediting rate as closely to the quarter as possible.” (Feb. 30(b)(6) Dep., p. 143) (Group Exh. B).

The January 1, 1997 Plan provided:

The interest factor for a particular month shall be the average yield on 30-year Treasury Bonds published in the Federal Reserve Statistical Release H.15 for the end of the third full business week prior to the beginning of the calendar quarter preceding the first day of the calendar quarter in which the particular month occurs.

(January 1, 1997 Plan, § 3.9; Am. Cmpl., ¶ 55).

The Plan’s administrator construed the phrase “prior to the beginning of the calendar quarter preceding the first day of the calendar quarter in which the month occurs,” to point to the month just before the quarter for which the rate was to apply. In this construction, both uses of the term “calendar quarter” refer to the quarter immediately preceding the period for which the interest rate will apply. (Feb. 30(b)(6) Dep., pp. 142-43) (Group Exh. B). Thus, the rate for the first quarter of 1997 was set at the end of the third full business week of December, 1996.

In an attempt to provide additional clarity in the Plan document – but not to alter the determination date – the language was changed in a July 16, 1997 plan amendment. (Feb. 30(b)(6) Dep., pp. 144-45 (Group Exh. B); Jefferies Aff., ¶ 9). The second iteration provided:

The interest factor for a particular month shall be the average yield on 30-year Treasury Bonds published in the Federal Reserve Statistical Register H.15 for the end of the third business week prior to the beginning of the calendar quarter in which the particular month occurs.

(July 16, 1997 Plan, § 3.9; Am. Cmpl., ¶ 56). The redundant second reference to “calendar quarter” was removed. Consistent with the intent to set the crediting rate as close in time to the quarter as possible and with the normal understanding of the phrase “full business week,” the administrator interpreted the provision to point to the third full business week, counting forward

from the start of the month, *i.e.*, the same determination date as the January 1, 1997 Plan.

(Jefferies Aff., ¶ 9).

In 1997, Duke issued the Summary Plan Description (“SPD”) for the cash balance plan, which provided that the “interest crediting rate in effect for the quarter will equal the average annual yield on 30-year Treasury Bonds at the end of the third full business week of the last month of the preceding quarter.” (Jefferies Aff., ¶ 10, Exh. 1, p. 4). It also provided an example:

[I]f the annual yield on 30-year Treasury Bonds was 6.63% at the end of the third week in December, the annual interest crediting rate for the quarter beginning the following January would be 6.63%.

Id.

The language used in the 1997 SPD – although not the example – was incorporated into the January 1, 1999 amendment and restatement of the Plan. (1999 Plan, § 2.38; Am. Cmpl., ¶ 57). This change in the wording, like the first change, did not alter the actual date selected for determination of the interest crediting rate or how the Plan was administered. (Feb. 30(b)(6) Dep., p. 144 (Group Exh. B); Jefferies Aff., ¶ 9). It merely mirrored the language in the SPD. (Feb. 30(b)(6) Dep., pp. 144-45) (Group Exh. B).

II. THE ADMINISTRATIVE CLAIMS

Counts Three and Four involve claims for benefits under the terms of the Plan, and plaintiffs were required to pursue and exhaust the administrative claims process set forth in the Plan before filing suit. (1999 Plan, § 11.01). Claims proceed to the Benefits Division and, if denied, can be appealed to the Claims Committee. (*Id.*, Amend. 9, Art. XI).

A. The Bowen and Freeman Claims

The only plaintiffs to exhaust their administrative remedies through the Plan's claim and appeal process were Messrs. Bowen and Freeman. Neither articulated a claim that defendants had used the wrong determination date during 1997 and 1998 to set interest credits.³

Messrs. Bowen and Freeman did assert a claim identifying a "whipsaw issue" under Section 5.04(c). The whipsaw claim that was raised by them – at a time when they were already represented by class counsel – was the polar opposite of their current claim. Messrs. Bowen and Freeman asked whether "this [5.04(c)] language mean[s] that a Plan participant's account balance, for purposes of determining the accrued benefit on which the lump sum will be based, will be *projected forward* at this lesser [4%] rate. If not, what does it mean? If so, doesn't this create a *negative whipsaw* if the applicable IRC 417(e) rate is greater than 4%?" (Bowen Dep., Exh. 102) (emphasis added) (Group Exh. C).

The Benefits Department's response stated that the Plan did not "perform a 'whipsaw' calculation" and that "Section 5.04(c) [was] inapplicable to the determination of Mr. Bowen's benefits under the Plan." (*Id.*, Exh. 103) (Group Exh. C). This decision was appealed to the Claims Committee. As to the whipsaw issue, Messrs. Bowen and Freeman again did not advance the Section 5.04(c) claim now asserted. In fact, they merely asked for information, advancing no claim at all:

³ This Court earlier held that a generic challenge to the lump sum calculations by Mr. Freeman satisfied the exhaustion requirement for this claim or that, alternatively, exhaustion was futile. (Order of June 2, 2008, p. 39) (Doc. No. 195). Mr. Freeman is not a class representative. (September 4, 2009 Order, p. 28) (Doc. No. 251). Duke has asserted that no class representative has standing to assert the claims in Count Four by virtue of the failure of each to exhaust administrative remedies. (*See* Defs.' Mot. for Judgment on the Pleadings, p. 36) (Doc. No. 83-2).

Issue Four: Mr. Braden’s letter of November 30, 2004 gives no explanation of what rates were used to determine the lump sum payment calculations under the Plan. Specifically, we received no information on the interest rate used for projecting interest credits forward. Also the discount rate was not specified. The response only stated that “reasonable assumptions” or appendix A procedures were used. We request that the calculation worksheets illustrating the determination of the lump sum amount be provided to us in order to confirm that the projection of interest accruals and discounting of benefits was appropriate with respect to § 411(d)(6), § 417(e), and the pertinent plan document provisions.

(*Id.*, Exh. 104).

The Claims Committee met on April 6, 2005 to consider this appeal. (*Id.*, Exh. 105).

The Committee’s letter denying the appeal contains a three-page discussion of whipsaw, identifying all Plan terms considered by the Committee as well as applicable statutes and regulations. (*Id.*, pp. 7-9). Based on its review, “the Committee concluded that under the Plan a ‘whipsaw’ calculation is not required.” (*Id.*, p. 9).

B. The George Claim

Mr. George asserted a benefits claim to the first level of review – the Benefits Department – on October 28, 2005. In direct contrast to the earlier claims made by Messrs. Bowen and Freeman, the claim advanced by Mr. George asserted that Section 5.04(c) should apply to generate a positive whipsaw, and not a “negative whipsaw.” “[W]hen we apply section 5.04(c) to determine the lump sum amount of this accrued benefit using the mortality table and 4%, the lump sum exceeds the cash balance account.” (George Dep., Exh. 93) (Group Exh. D).

This claim was denied. (*Id.*, Exh. 94) Duke explained:

Section 5.04(c), which was not applied in determining Mr. George’s benefit, specifies that the interest crediting rate, not the discount rate, is 4%. Accordingly, Section 5.04(c) would not require the use of a 4% discount rate even if a whipsaw calculation was required under the Plan. Therefore, the Benefits Division has determined that “Claim Two” must be denied.

The letter informed Mr. George of his right to appeal the denial to the Claims Committee. (*Id.*) Duke received no appeal of this denial (Jefferies Aff., ¶ 12), and Mr. George does not remember the claim. (George Dep., pp. 238-39) (Group Exh. D).

III. THE DETERMINATION LETTER PROCESS

Duke filed an application with the Internal Revenue Service (“IRS”) for a determination letter in connection with its January 1, 1999 amendment and restatement of the Plan.⁴ (January 14, 2010 Rule 30(b)(6) Deposition of Defendants “Jan. 30(b)(6) Dep.,” p. 20) (Group Exh. E). A determination letter provides advance assurance from the IRS that a benefits plan satisfies the requirements of Section 401(a) of the Internal Revenue Code. (*Id.*, Exh. 2, Tab 43, Feb. 23, 2009 determination letter, DE 182354-182360).

The IRS issued a favorable determination letter, the effectiveness of which was “subject to” Duke’s adoption of a retroactive Plan amendment.⁵ (Jan. 30(b)(6) Dep., Exh. 2, Tab 43, Feb. 23, 2009 determination letter, DE 182354-182360). Section 5.04(c)’s reference to a 4% minimum rate was eliminated by that amendment and replaced with a statement that a lump sum distribution would equal the account balance. (*Id.*, Ex. 2, Tab 43, March 20, 2009 Plan Amendment, DE 182350-182353). This language was also amended into four other sections of the Plan. (*Id.*) Duke was not required to recalculate any lump sum payments, as it had always paid the account balance.

⁴ Duke had earlier received a favorable determination letter for the July 16, 1997 Plan restatement. (Exh. F).

⁵ In this litigation, Duke does not contend that the March 30, 2009 amendments to the 1999 Plan moot plaintiffs’ whipsaw claims.

ARGUMENT

I. THE SUMMARY JUDGMENT STANDARD

Summary judgment is appropriate when “the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(c). “While the evidence is to be construed in the light most favorable to the non-movant, there must be sufficient evidence favoring the non-moving party for a jury to return a verdict for that party. If the evidence is merely colorable, or is not significantly probative, summary judgment may be granted.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249-50 (1986).

In adjudicating the claims in Counts Three and Four, this Court must apply the deferential standard of review appropriate to consideration of a determination made by an administrator of a benefits plan. The Plan grants the administrator full discretionary authority to interpret Plan provisions and determine benefit claims. (1999 Plan, §§ 10.05, 10.06, 10.08).⁶ Where such authority is granted, a court reviews the administrator’s decision under an abuse of discretion standard. *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 111 (1989). This means the court reviews the decision for reasonableness. *Stup v. UNUM Life Ins. Co. of America*, 390 F.3d 301, 307 (4th Cir. 2004). “An administrator’s decision is reasonable ‘if it is the result of a deliberate, principled reasoning process and if it is supported by substantial evidence.’” *Id.* (quoting *Bernstein v. CapitalCare, Inc.*, 70 F.3d 783, 788 (4th Cir. 1995)). This

⁶ The 1999 Plan was in place when the administrative claims of Messrs. George, Bowen and Freeman were adjudicated. The earlier versions of the Plan likewise grant the administrator full discretionary authority. (January 1, 1997 Plan, §§ 10.4, 10.12; July 16, 1997 Plan, §§ 10.4, 10.12).

Court cannot substitute its judgment for the administrator's. *Hickey v. Digital Equip. Corp.*, 43 F.3d 941, 945 (4th Cir. 1995). Issues decided by a plan administrator are not reviewed *de novo* but, rather, under the *Booth* factors which guide the abuse of discretion review. *Booth v. Wal-Mart Stores, Inc. Associates Health & Welfare Plan*, 201 F.3d 335, 342-43 (4th Cir. 2000). The abuse of discretion standard is applied even in instances where the administrator purportedly has a conflict of interest. *Metropolitan Life Ins. Co. v. Glenn*, 128 S. Ct. 2343, 2350 (2008). A conflict is merely one factor to evaluate and of significance only “when the other factors are closely balanced” and “circumstances suggest a higher likelihood that [the conflict] affected the benefit decision.” *Id.*

II. DEFENDANTS ARE ENTITLED TO SUMMARY JUDGMENT ON THE WHIPSAW CLAIMS (COUNT III)

A. The Nature of Whipsaw Liability

Where a cash balance plan permits a lump sum distribution before normal retirement age – as most do – that payment must be the “present value” of the annual benefit at normal retirement age. ERISA § 205(g)(1); 29 U.S.C. § 1055(g)(1). According to IRS proposed guidance, if a plan does not condition the right to future interest credits on continued employment, future interest credits on each pay credit accrue at the time the pay credits are added to the account. Notice 96-8; 1 C.B. 360. A lump sum payment made before normal retirement age must include the estimated value of these future interest credits projected to normal retirement age. *Id.* at 361. The estimated normal retirement benefit is then discounted to present value. *Id.* An employer has discretion to set interest credits at any rate, but the maximum discount rate is set by § 417(e). *Berger*, 338 F.3d at 759; *see also* Notice 96-8; 1 C.B. 361.

The *Berger* court held that if a plan's interest crediting rate exceeded the statutory discount rate, the value of a lump sum payment of the accrued benefit would be greater than the amount in a participant's hypothetical cash balance account. *Berger*, 338 F.3d at 761. However, where a plan "specifies a variable index equal to the [statutory maximum discount] rate . . . no impermissible forfeiture would result from projecting that the rate used to determine future interest credits for an employer is no greater than the applicable interest rate under Section 417(e)(3)." Notice 96-8; 1 C.B. 362. In the case where the interest crediting rate and § 417(e) discount rate are derived from the same index, the act of projecting forward and discounting back results in a wash.

B. The Plain Language of Section 5.04(c) Defeats Plaintiffs' Whipsaw Claim

Plaintiffs argue that the addition of Section 5.04(c) to the Plan as of January 1, 1999, compels a whipsaw calculation. According to plaintiffs, Section 5.04(c) provides a 4% discount rate to be used to discount to present value benefits that were projected to normal retirement age at the applicable interest crediting rate. (Am. Cmplt., ¶ 71).

Under its plain language, Section 5.04(c) cannot be so construed. The 4% rate, if applicable, is unambiguously a rate used to project interest credits forward, not a rate applicable to reduce a future income stream to present value. Section 5.04(c) is one of three subsections of the "Interest Credits" provisions set forth in Section 5.04 of the Plan. "Interest credits means the credits *added to* Participant's Cash Balance Accounts as described in Section 5.04." (1999 Plan, § 2.3) (emphasis supplied). That Section 5.04 defines the credits "added to" accounts is reinforced by Section 5.01, which provides that "a Participant's Cash Balance Account shall be the sum of the Opening Balance (if any) plus Pay Credits in accordance with Section 5.03 *plus Interest Credits* credited in accordance with Section 5.04." (1999 Plan, § 5.01) (emphasis

supplied). *See also id.* § 5.04(b) (“Interest Credits for each month for each Participant shall equal the balance in the Participant’s Cash Balance Account as of the last day of the preceding month multiplied by the Monthly Interest Rate . . .”).⁷

Section 5.04(c) was, in fact, included to prevent the possibility of a whipsaw calculation. (Feb. 30(b)(6) Dep., pp. 159-60 (Group Exh. B); Jefferies Aff., ¶ 7). While the Plan uses the 30-year Rate that was provided safe harbor status by the IRS, it also has a 4% minimum interest crediting rate. If the 30-year Rate dipped below the minimum interest crediting rate of 4%, the interest crediting rate could exceed the applicable § 417(e) discount rate. To prevent that result and ensure that the interest crediting and discount rates would always be the same, Section 5.04(c) provides “if a Participant elects to receive a lump sum distribution prior to his Normal Retirement Date, the Monthly Interest Rate applied for purposes of determining the lump sum distribution shall be the lesser of 4% or the ‘applicable interest rate’ specified in Code Section 417(e).” For example, assuming the 30-year Rate was 3.5% at the time a lump sum was elected, the 3.5% rate would be used as the interest crediting rate to project benefits to normal retirement age and would be the same as the applicable discount rate.

Plaintiffs nevertheless argue that Section 5.04(c) – despite its unambiguous language and its inclusion in the Interest Credits provisions of the Plan – does not address the interest crediting rate. First, they argue that Duke’s construction can lead to an illegal “negative whipsaw.” Specifically, plaintiffs contend that Section 5.04(c) is not expressly limited to instances where the 30-year Rate drops below 4%. Thus, if the 30-year Rate was 5%, interest credits would be projected to normal retirement age at 4% (“the lesser of” 4% or the 30-year Rate) and then

⁷ Moreover, the Plan at all times relevant defined the Accrued Benefit as the Cash Balance Account (1999 Plan, § 2.03), and provided for payment of that Accrued Benefit as a lump sum. (*Id.*, § 7.02(a)).

discounted to present value at 5%. Discounting to present value at this higher rate would generate a projected account balance that is *lower* than a participant's current account balance; *i.e.*, a negative whipsaw. But, in fact, such a situation never occurred. Moreover, Duke never intended the provision to apply where the 30-year Rate exceeded 4% and the administrator's interpretation is the only reasonable construction of the Plan as it avoids this illogical result.

Under Section 5.04(b), a participant receives interest credits equal to the 30-year Rate, unless that rate falls below 4%, in which case the minimum 4% rate applies. (1999 Plan, §§ 5.04(b), 2.38, 2.39). Section 5.04(c), which immediately follows, provides that, “[n]otwithstanding anything herein to the contrary,” if a participant elects to receive a lump sum distribution prior to the normal retirement date, the Monthly Interest Rate applied to calculate the lump sum shall be the *lesser of* 4% or the 30-year Rate. (1999 Plan, § 5.04(c)). Thus, Duke construed Section 5.04(c) to apply only in the event the 30-year Rate dropped below 4%.⁸ In such circumstances, Section 5.04(c) would have used a lower interest crediting rate to project future interest credits until a participant reaches normal retirement age so the interest crediting rate was identical to the 30-year Rate (the discount rate).

Second, plaintiffs argue that Section 5.04(c) could not lawfully be applied as defendants intended, because any attempt to use an interest crediting rate lower than the 4% minimum rate supplied under the Plan solely for purposes of a lump sum calculation would be an illegal cut-back prohibited by ERISA. Indeed, a similar provision, when applied, was found to generate an impermissible forfeiture in *Berger*, 338 F.3d at 762-63.

⁸ Duke never relied on Section 5.04(c) to set a lump sum payment because the 30-year Rate never dropped below 4% while the provision was in place. (*Cf.* Feb. 30(b)(6) Dep., p. 159-60) (Group Exh. B).

Section 5.04(c), however, has never been used in the calculation of a lump sum, and thus no forfeiture claim is before this Court. Nor will there ever be such a claim; the provision is no longer in Duke's plan. (Jan. 30(b)(6) Dep., Exh. 2, Tab 43, March 30, 2009 Plan Amendment, DE 182350-182353) (Group Exh. E). In any event, even if the provision as drafted was violative of ERISA, the remedy is to void the provision, as was done in *Berger*. 338 F.3d at 762-63. Plaintiffs, however, seek to use the alleged invalidity of the provision to argue that it does not mean what it unambiguously says, and rather than establishing an interest crediting rate in instances of a lump sum payment, it instead provides for a discount rate. The potential invalidity of the provision – had it ever been applied and had the Fourth Circuit agreed with the IRS and the reasoning of *Berger*⁹ – does not alter its plain language. “[T]he plain language of an ERISA plan must be enforced in accordance with its literal and natural meaning.” *Kress v. Food Employers Labor Relations Ass’n*, 391 F.3d 563, 568 (4th Cir. 2004) (citation omitted). Section 5.04(c) governs interest credits, not the rate to discount to present value. Indeed, Mr. Bowen recognized this in his administrative claim:

Section 5.01(c) (*sic* 5.04) provides that, for a lump sum payable prior to normal retirement, the interest credit will be the lesser of 4% or the “applicable rate.”

2. Does this language mean that a Plan participant's account balance, for purposes of determining the accrued benefit on which the lump sum will be based, will be projected forward at this lesser rate? If not, what does it mean? If so, doesn't this create a negative whipsaw if the applicable IRC 417(e) rate is greater than 4%?”¹⁰

⁹ The Fourth Circuit has never addressed the whipsaw or forfeiture issues decided in *Berger*.

¹⁰ Mr. Matthews testified that he also understood Section 5.04(c) to address the interest crediting rate and not to say anything about a discount rate. (Matthews Dep., p. 57) (Exh. G).

The language of Section 5.04(c) cannot be construed to establish a discount rate, and thus plaintiffs do not have a cognizable whipsaw claim.

C. The Plan Administrator’s Reasonable Construction Cannot Be Overturned

The Plan administrator is the Benefits Committee. (1999 Plan, § 10.06). The Benefits Committee is vested with “full power, authority, discretion to control and manage the operation and administration of the Plan and to construe and apply all of its provisions.” (*Id.*, § 10.08).

“All discretionary powers conferred upon the Benefits Committee shall be absolute.” *Id.* The authority of the Benefits Committee shall include, but not be limited to, the following:

(1) to construe and interpret the Plan and Trust Agreement and to determine all questions arising in the administration, interpretation and operation of the Plan,

* * *

(3) to determine the benefits of the Plan to which any Participant, Beneficiary or other person may be entitled.

Id.

The Benefits Committee is empowered to appoint a “Claims Committee.” (*Id.*, § 10.05). The Claims Committee handles benefit claims and “shall have full power, authority, discretion to construe and apply all provisions of the Plan.” (*Id.*). The Claims Committee administered the claims of Messrs. Bowen and Freeman, each of whom raised claims regarding whipsaw calculations for lump sum payments.

The Claims Committee’s construction of the Plan is reviewed under an abuse of discretion standard. *Firestone*, 489 U.S. at 111; *Booth*, 201 F.3d at 341; *Carden v. Aetna Life Ins. Co.*, 2007 WL 3274279, at *2 (D.S.C. Nov. 2, 2007), *aff’d*, 559 F.3d 256 (4th Cir. 2009). The abuse of discretion “standard draws a line – or rather, demarcates a region – between the unsupportable and the merely mistaken, between the legal error, disorder of reason, severe lapse

of judgment, and procedural failure that a reviewing court may always correct, and the simple disagreement that, on this standard, it may not.” *Evans v. Eaton Corp. Long Term Disability Plan*, 514 F.3d 315, 327 (4th Cir. 2008). “[I]n ERISA cases, “the standard equates to reasonableness” and the court may not “forget its duty of deference and its secondary rather than primary role in determining a claimant’s right to benefits.” *Id.* at 322, 323. As the Fourth Circuit has emphasized:

The abuse of discretion standard in ERISA cases protects important values: the plan administrator’s greater experience and familiarity with plan terms and provisions; the enhanced prospects of achieving consistent application of those terms and provisions that results; the desire of those who establish ERISA plans to preserve at least some role in their administration; and the importance of ensuring that funds which are not unlimited go to those who, according to the terms of the plan, are truly deserving.

Id. at 323.

In addressing the reasonableness of the administrator’s construction, this Court is guided by the “non-exclusive” factors recited in *Booth*, 201 F.3d at 342-43. Those factors are:

(1) the language of the plan; (2) the purposes and goals of the plan; (3) the adequacy of the materials considered to make the decision and the degree to which they support it; (4) whether the fiduciary’s interpretation was consistent with other provisions in the plan and with earlier interpretations of the plan; (5) whether the decisionmaking process was reasoned and principled; (6) whether the decision was consistent with the procedural and substantive requirements of ERISA; (7) any external standard relevant to the exercise of discretion; and (8) the fiduciary’s motives and any conflict of interest it may have.

Id. These factors support the administrator’s construction.

1. The decision of the administrator is firmly grounded in the language of the Plan

As already noted, Section 5.04 is entitled “Interest Credits,” and subsection (c) is one of three subsections of Section 5.04 that address Interest Credits. “Interest Credits means the

credits added to Participants' Cash Balance Accounts.” (1999 Plan, § 2.37; *see also id.* §§ 2.38, 2.39). A “Participants' Cash Balance Account shall be the sum of the Opening Balance (if any) plus Pay Credits credited in accordance with Section 5.03 plus Interest Credits credited in accordance with Section 5.04.” (*Id.*, § 5.01). The Plan, moreover, at all relevant times defined the Accrued Benefit as the Cash Balance Account (1999 Plan, § 2.03), and provided for payment of that Accrued Benefit as a lump sum, which is what was done. (*Id.*, § 7.02(a)).¹¹ The Claims Committee's construction of Section 5.04(c) is solidly grounded in the Plan's terms.

Plaintiffs, in contrast, have not advanced a consistent alternate construction of Section 5.04(c). On the one hand, during the administrative claims process, Mr. George contended that Section 5.04(c) should generate a whipsaw payment, while on the other hand, Messrs. Bowen and Freeman argued the opposite, claiming it could create a “negative whipsaw.” It is the administrator's job to construe language in the Plan that is allegedly capable of more than one construction, and its decision in such a case cannot be overturned under an abuse of discretion standard of review. *Colucci v. AGFA Corp. Severance Pay Plan*, 431 F.3d 170, 176 (4th Cir. 2005) *abrogated on other grounds by Glenn*, 128 S. Ct. at 2343 (“[W]hen the plan's terms are ambiguous in the sense that its language gives rise to at least two different but reasonable interpretations and when the plan confers discretion on the administrator to interpret the plan and resolve ambiguities, a court defers to the administrator's interpretation by reviewing it only for abuse of discretion.”); *DeNobel v. Vitro Corp.*, 885 F.2d 1180, 1188 (4th Cir. 1989) (“[W]here plan fiduciaries have offered a ‘reasonable interpretation’ of disputed provisions, ‘courts may not

¹¹ The definition of accrued benefit was retroactively amended on March 30, 2009. (Jan 30(b)(6) Dep., Exh. 2, Tab 43, DE 182350-182353) (Group Exh. E). That same retroactive amendment provided, in five provisions, that Duke should pay the account balance when a participant elects a lump sum distribution. (*Id.*)

replace [it] with an interpretation of their own.’’) (citation omitted).¹² Where, as here, a plan affords the administrator the “power to construe disputed or doubtful terms” the reasonable interpretation of the administrator “will not be disturbed.” *Firestone*, 489 U.S. at 111.

2. The decision of the administrator advances the purposes and goals of the Plan

One of the articulated goals of the cash balance amendment was to decrease the incentive for early retirement inherent in Duke’s final average pay plan. (Shaw Dep., pp. 9-10, 47-48) (Group Exh. H). Creating an unnecessary whipsaw obligation would be counterproductive to this goal. Whipsaw provides a windfall to participants who retire early and take a lump sum: they get the present value of future interest earnings on the account balance and can reinvest the lump sum and again reap those investment earnings. *Fry v. Exelon Corp. Cash Balance Pension Plan*, 571 F.3d 644, 646 (7th Cir. 2009) (whipsaw “gave employees a big incentive to quit early and claim lump sum distributions”).¹³ It is undisputed that Section 5.04(c) was intended as a prophylactic to assure there would be no whipsaw should the minimum interest crediting rate ever apply. (Feb. 30(b)(6) Dep., pp. 159-160) (Group Exh. B). The Claims Committee’s construction is the only reasonable reading that advances the purposes and goals of the Plan and the amendment adding Section 5.04(c). *Vaughan v. Celanese Ams. Corp.*, 339 Fed. Appx. 320, 325 (4th Cir. 2009) (unpublished opinion) (administrator reasonably applied construction that avoided creation of “windfall contrary to the Plan’s goals.”).

¹² Defendants do not agree that any reasonable reading of Section 5.04(c) could generate a positive whipsaw. Rather, the only arguable ambiguity is whether the provision applies only if interest rates fall below 4% or whether it applies in all instances, thereby generating a “negative whipsaw.” Neither possible construction would generate any additional benefit payments to plaintiffs.

¹³ Indeed, commencing in August of 2006, Congress legislatively eliminated whipsaw by enacting the PPA.

3. The materials considered by the administrator were adequate and support the decision

In adjudicating plaintiffs' claims, the Claims Committee considered the language of the Plan, the relevant statutes and guidance from the Treasury Department. (Bowen Dep., Exh. 105) (Group Exh. C). "[T]he committee read and reviewed the language of Plan Sections 5.04 (interest credits to the Cash Balance Account) and 2.38 (interest credits are determined using the average yield on 30-year Treasury bonds)." (*Id.*, p. 9). It reviewed Notice 96-8, which requires a whipsaw payment only if "the 'project forward' interest credit is greater than the 'discount back' 30-year Treasury bond rate." (*Id.*, p. 8). The Committee secured a lengthy opinion from legal counsel. (Jefferies Aff. ¶ 15). It had the Plan's actuary check all calculations. (*Id.*; Bowen Dep., Exh. 105) (Group Exh. C). The Committee's "decision is supported by substantial evidence and results 'from a deliberate, principled reasoning process.'" *Carden*, 2007 WL 3274279, at *8 (quoting *Brogan v. Holland*, 105 F.3d 158, 161 (4th Cir. 1997)).

4. The interpretation was consistent with other provisions in the Plan and earlier interpretations

The Claims Committee's interpretation considered the Plan as a whole: tying together the definitions of Accrued Benefit (§ 2.03), Interest Credits (§ 2.38), and Monthly Interest Rate (§ 2.39), as well as the provisions of § 5.01 (which cross-references the definition of Interest Credits to Section 5.04) and the provisions governing Optional Forms of Payment (§ 7.02). (Bowen Dep., Exh. 105, pp. 7-9) (Group Exh. C). In addition, the Claims Committee considered the Appendix A actuarial factors. (*Id.*, p. 8). The Claims Committee's conclusion was also consistent with past practices: the Plan has never performed a whipsaw calculation. The decision of the Claims Committee harmonizes all Plan provisions and reflects a position that has been consistently advanced since the cash balance conversion. *Scipio v. United Bankshares*,

Inc., 119 Fed. Appx. 431, 437-38 (4th Cir. 2004) (unpublished opinion) (administrator did not abuse its discretion where it considered plan terms, past benefit calculations and Treasury regulations).

6. The process was reasoned and principled

The facts showing that this factor supports deference have already largely been discussed. The claims and appeals processes articulated in the Plan were followed. The Claims Committee engaged in a thorough analysis. It received input from counsel and the Plan's actuaries. (*Jefferies Aff.*, ¶ 15). It considered the Plan provisions, ERISA, the Code and relevant regulations. (*Bowen Dep.*, Exh. 105) (Group Exh. C). It provided a detailed analysis of the reasons for its decision. (*Id.*). No improper matters were considered, and the claim denial was well-reasoned and principled. This genuine and thorough consideration of the relevant materials supports the Claims Committee's decision. *Donnell v. Metropolitan Life Ins. Co.*, 165 Fed. Appx. 288, 294-95 (4th Cir. 2006) (unpublished opinion).

7. The decision complied with ERISA's procedural and substantive requirements

The Claims Committee followed the administrative claim procedures required by ERISA and the Plan. (1999 Plan, Amend. 9, Art. XI). The Committee identified all matters considered – a voluminous list – and it had all calculations confirmed by the Plan's actuary. (*Bowen Dep.*, Exh. 105) (Group Exh. C). Its denial of the claim stated a clear basis and informed the claimants of their rights under § 5.02(a) of ERISA. (*Id.* at 11). Virtually identical facts led the Fourth Circuit to find compliance with this element in *Vaughn*, 339 Fed. Appx. at 327.¹⁴

¹⁴ The Benefits Department, similarly, complied with all relevant procedural and substantive requirements in its denial of Mr. George's claim. (*George Dep.*, Exh. 94) (Group Exh. D). It specifically articulated the basis for denial and informed Mr. George of his right to appeal to the Claims Committee. (*Id.*)

8. There are no applicable external standards

The Fourth Circuit at one time employed the doctrine of *contra proferentem* in an abuse of discretion analysis. *Carolina Care Plan Inc. v. McKenzie*, 467 F.3d 383, 388-89 (4th Cir. 2006). However, the Supreme Court's opinion in *Glenn*, 128 S. Ct. at 2343, foreclosed use of that doctrine. *Carden v. Aetna Life Ins. Co.*, 559 F.3d 256, 260 (4th Cir. 2009). Thus, no external standards of review are applicable.

9. Motives and conflict of interest

The Claims Committee has no conflict of interest that would permit this Court to override its determination. There is an inherent conflict when the same entity administers and pays claims. *Glenn*, 128 S. Ct. at 2348. But the Plan's assets are held in a trust, and are not commingled with Duke's assets. "That plan administrator's decisions have had a favorable impact on the balance sheet of the trust itself, however, suggests no 'conflict of interest.'" *DeNobel*, 885 F.2d at 1191 (citation omitted). As the *DeNobel* court noted:

Fiduciaries are obligated to act not only in the best interests of beneficiaries, but with due regard for the preservation of trust assets. Adverse benefits determinations may well have saved considerable sums, but that may simply reflect that the trustees, bearing in mind the interests of *all* participants and beneficiaries, 29 U.S.C. § 1104(a)(1), made a considered decision to preserve the corpus of the trust, rather than grant a doubtful claim.

Id.; see also, *Lance v. Ret. Plan of Int'l Paper Co.*, 331 Fed. Appx. 251, 255 (4th Cir. 2009) (unpublished opinion) (any alleged conflict of interest recedes "to the vanishing point" where benefits are funded by a separate trust).

In any event, even if the administrator was deemed to have a "conflict," it would be of little weight when balanced against the remaining factors, which each support deference to the

Claims Committee. *Vaughn*, 339 Fed. Appx. at 328. There is no need here for this Court to overturn the judgment of the Claims Committee. *Glenn*, 128 S. Ct. at 2351.

* * *

The Claims Committee's conclusion that no whipsaw calculation was required by virtue of Section 5.04(c) was fully consistent with the language of the Plan and the requirements of ERISA. Section 5.04(c) provided an interest crediting rate to be used for projections if the § 417(e) rate ever fell below 4%. The Claims Committee gave the provision an appropriate and correct limited construction, eliminating any potential for negative whipsaw.

Plaintiffs convinced this Court to salvage their § 5.04(c) whipsaw claim in response to defendants' motion for judgment on the pleadings by promising that factual evidence would support their textually unsupported construction of Section 5.04(c). (Response to Motion for Judgment on the Pleadings) (Doc. No. 96, p. 31). This is not the case. There is no parol evidence that supports plaintiffs' position. The reasonable construction of the Plan administrator cannot be overturned.

D. Plaintiffs Are Not Entitled to a Whipsaw Calculation Based on the Quarterly Resetting of the Interest Crediting Rate

The applicable § 417(e) rate is reset annually under the actuarial provisions of the Plan. (January 1, 1997 Plan, § 1.4; July 16, 1997 Plan, § 1.4; 1999 Plan, Exh. A ¶ 1; Amend. 9, ¶ 1(a)). The interest crediting rate, however, resets quarterly. (January 1, 1997 Plan, § 3.9; July 16, 1997 Plan, § 3.9; 1999 Plan, § 2.38). Even though the interest crediting rate and discount rates are based on the same index – 30-year Treasury bonds – the interest crediting rate in any given quarter may be more or less than the then applicable discount rate. Plaintiffs argue that a

whipsaw calculation is required for any lump sum distribution made in a quarter where the interest crediting rate exceeds the applicable § 417(e) rate.¹⁵

These minor variations due to differing determination periods do not compel a whipsaw calculation. Indeed, Notice 96-8 makes clear that the Plan need only specify one of several scheduled indices to avoid any whipsaw obligation, notwithstanding those indices do not generate identical interest rates. 1996-1 C.B. 362. Moreover, Notice 96-8 provides that a cash balance plan can choose an index with an associated basis point margin. *Id.* A plan with an interest crediting rate equal to “the sum of one of the standard indices and a margin not greater than the specified margin” will not generate a forfeiture “from projecting that the rate used to determine future interest credits for an employee is no greater than the applicable interest rate under section 417(e)(3).” *Id.* These basis point margins permit plans to have interest crediting rates within ranges deemed to correspond reasonably closely to the § 417(e) rate, but obviously not all rates in the allowable ranges can be *identical* to the applicable § 417(e) rate.

In addition, Notice 96-8 expressly states that the proposed regulation would “apply without regard to how frequently the rate used to determine interest credits is compounded.” *Id.* Compounding of the interest credits could result in a much greater difference between the projection-forward and discount-back rates than would the differences in 30-year Rates measured quarterly versus annually. Yet this difference would not, under Notice 96-8, generate whipsaw liability. There is no reason to treat the variation caused by market fluctuation of the 30-year Rate over time any differently.

¹⁵ Plaintiffs do not assert that a negative whipsaw arises for distributions made in those quarters where the § 417(e) rate exceeded the interest crediting rate.

Furthermore, the IRS has twice confirmed that the Plan has no whipsaw obligation under Notice 96-8. The IRS reviewed the provisions of Duke's Plan prior to issuance of favorable determination letters in 1998 and 2009. When issuing a favorable determination letter in 1998, the IRS did not conclude that the determination dates for interest credits or any other Plan provision required Duke to perform a "whipsaw" calculation. Thereafter, when Duke applied for a favorable determination letter for the 1999 Plan, the agency expressly considered whether a whipsaw calculation was required by virtue of the timing difference for determination of the applicable interest crediting rate and the § 417(e) rate. (Jan. 30(b)(6) Dep., pp. 69-70) (Group Exh. E). The IRS thereafter issued a favorable determination letter subject to Duke's adoption of retroactive plan amendments that provided that Duke pay only the account balance as a lump sum distribution. (*Id.*, Exh. 2, Tab 43, DE 182354-182360). This determination by the IRS, after having considered the very issue before this Court, is entitled to deference. *McGuiggan v. CPC Int'l, Inc.*, 84 F. Supp. 2d 470, 479 (S.D.N.Y. 2000) ("IRS Revenue Rulings...and Determination Letters are generally accorded some deference by the courts.").

In sum, no exact matching – at every point in time – of the interest crediting rate and the § 417(e) rate is required to be permitted to pay the account balance in a lump sum distribution. The projection of the interest crediting rate to normal retirement age is an "estimate." *Berger*, 338 F.3d at 760. When "estimating" the project-forward and discount-back rates over a period of time, the minor fluctuations arising from differing determination dates will offset. So long as the same index is involved in both calculations, there is no whipsaw liability.

III. DEFENDANTS APPLIED THE APPROPRIATE DETERMINATION DATE FOR SETTING QUARTERLY INTEREST CREDITING RATES (COUNT IV)

The initial version of the Plan, effective January 1, 1997, defined the determination date for establishing any quarter's interest crediting rate as: "the average yield on 30-year Treasury bonds . . . for the end of the third full business week prior to the beginning of the calendar quarter preceding the first day of the calendar quarter in which the particular month occurs." (January 1, 1997 Plan, § 3.9(a)). The intent was to set a determination date as close in time as possible to the quarter for which the rate applied. (Feb. 30(b)(6) Dep., p. 143) (Group Exh. B). The language, as reasonably construed by the administrator, achieved that goal. The provision pointed the reader to the month just before the quarter at issue. For example, December is the determination period for the January-March quarter "prior to the beginning of the calendar quarter preceding the first day of the calendar quarter." (January 1, 1997 Plan, § 3.9(a)). Then, within the specified month, the language points to "the end of the third full business week," meaning the Friday of the third week in the month that includes a Monday. (*Id.*). This is, indeed, the determination date that the Plan has always used for setting the Plan's interest crediting rate.

Plaintiffs posit a different construction. They argue that the phrase "prior to the beginning of the calendar quarter preceding the first day of the calendar quarter" required Duke to look to the last month of the calendar quarter two quarters before the period to which the interest rate applied. Thus, if Duke was setting the interest crediting rate for the first quarter of 1997, it would need to look to September, 1996, the month immediately preceding the fourth quarter of 1996. (Am. Cmplt., ¶ 58). Within that month, plaintiffs assert that Duke had to count three business weeks backward from the end of the month. (*Id.*).

This construction is so convoluted that class counsel could not articulate it in a comprehensible fashion during questioning of Duke's 30(b)(6) witness:

Q. I'm trying to just break this into sections and – and it says from the end of the third full business week. But before we do that, it's got to be the third full business week prior to the beginning of the calendar quarter that precedes the first day of a calendar quarter. So the calendar quarter in which the particular month occurs is January, right? Can we agree on that? Let's go – we have to kind of go at this backwards from the beginning. It makes it easier to explain it.

A. Okay. January is the beginning of the calen – yeah.

Q. Can we agree that the – the first day of the calendar quarter in which the particular month occurs is January of '97?

A. Yes, for the calculation of the –

Q. All right. So let's –

A. – first quarter interest rate.

Q. Let's underline that part of it. Calendar quarter preceding the first day of the calendar quarter in which the month occurs is going to be January. Now we got to use the end of the third full business week prior to the beginning of a calendar quarter that precedes – well, no. Wait a minute. Let's – let me go back. What's the calendar quarter that precedes the first day of the calendar quarter in January? Wouldn't that be the –

A. And that – that's the part where I think my interpretation is a little different. I – I think calendar quarter used – the beginning of the calendar quarter and calendar quarter used first day of the calendar quarter are representing the same thing so – so that the first reading of calendar quarter and the second reading of calendar quarter all are referring to the first quarter of 1997 is how I would read this.

Q. How can a calendar quarter precede itself and be the same thing because it's the calendar quarter preceding the first day of the calendar quarter? Now you can't be talking about the same two calendar quarters, can you?

(Feb. 30(b)(6) Dep., pp. 141-43) (Group Exh. B). At this point class counsel abandoned any effort to articulate his position. (*Id.*).

Duke's construction identifies a date that makes sense, being in close proximity to the quarter to which the rate applies. It also conforms to the description in the SPD that Duke provided to Plan participants. (Jefferies Aff., Exh. 1, p. 5). Duke's construction is decidedly simpler than plaintiffs' construction, as class counsel's unsuccessful attempt to articulate plaintiffs' construction showed. Finally, as explained more fully below, plaintiffs' claim that business weeks should be counted backward from month-end is contrary to the fundamental tenet of construction that words and phrases be accorded their common understanding. *See, e.g., Norfolk S. Railway Co. v. Kirby*, 543 U.S. 14, 31 (2004) (citation omitted).

On July 16, 1997, Duke amended the language to state that the interest crediting rate is "the average yield on 30-year Treasury bonds . . . for the end of the third full business week prior to the beginning of the calendar quarter in which the month occurs." (July 16, 1997 Plan, § 3.9). Duke amended the language to add clarity and it was not a substantive change: for the first quarter of a calendar year Duke still used the rate from the end of the third full business week in December. (Feb. 30(b)(6) Dep., p. 144) (Group Exh. B).

Plaintiffs agree that Duke correctly identified what month should be used for the determination date under the July 1997 Plan. Plaintiffs' only argument regarding the July 1997 Plan is that the "third full business week" must be counted backwards from the end of December. (Am. Cmpl., ¶ 58). Plaintiffs' interpretation defies common sense: the first business week of a month is not determined by counting backwards from month-end, starting with the last full business week with a Friday in it. Common usage of the term "third full business week" compels that one look forward from the start of the month; not backward from its end.

No plaintiff raised any challenge to the determination date in an administrative claim. As a result, the Claims Committee never articulated its position on the applicable determination date in a claim denial decision. However, the administrator construed the first two iterations of the Plan to point to the same date as specified in the SPD and the 1999 Plan document; this is how interest credits were always applied to cash balance accounts. Under the *Booth* factors, the construction afforded by the administrator cannot be overturned.¹⁶

1. The decision of the administrator is firmly grounded in the language of the Plan

Duke’s construction of the determination date was reasonable. A court may not disturb an administrator’s reasonable construction which reflects “careful attention to ‘the language of the plan.’” *Evans*, 514 F.3d at 322 (quoting *Bernstein*, 70 F.3d at 788; *see also DeNobel*, 885 F.2d at 1187 (4th Cir. 1989) (“what follows from the applicability of the abuse of discretion standard is that the trustee’s interpretation of relevant provisions of the plan documents . . . ‘will not be disturbed if *reasonable*.’”) (emphasis in original) (citation omitted). A court cannot impose a contrary construction – even if reasonable – because the administrator was properly charged to resolve any ambiguity. *Colucci*, 431 F.3d at 176.

2. The decision of the administrator advances the purposes and goals of the Plan

The undisputed intent of the determination date provision was to set the interest crediting rate for each quarter at a point as close as possible to that quarter. (Feb. 30(b)(6) Dep., p. 143) (Group Exh. B). This reasonable goal was met by the administrator’s construction. Plaintiffs’

¹⁶ Because this issue was never raised by a plaintiff in an administrative claim, certain *Booth* factors that relate to the claims adjudication process are not applicable. Specifically, “the adequacy of the materials considered to make the [claims] decision,” “whether the decision-making process was reasoned” and “whether the decision was consistent with” ERISA’s procedural requirements for claims (factors 3, 5 and 6) are not relevant.

convoluted construction of the January, 1997 Plan points to a distant determination date that does not advance the purpose of the determination date provision. Their idiosyncratic definition of “full business week,” likewise, moves the determination date further away from the period to which it applies.

3. The administrator’s construction has been consistent

The administrator has, at all times, applied a consistent construction to the determination date provisions. The description of the method to derive the relevant 30-year Treasury bond date – complete with an example derived from the first quarter of 1997 – was recited in the 1997 SPD distributed to every participant. (Jefferies Aff., Exh. 1, p. 5). It is the Plan administrator’s responsibility to prepare the SPD. *See* 29 C.F.R. § 2520.102-2. Thus, the administrator’s selection of the determination date is entirely consistent with the administrator’s intent and its interpretation of the Plan.

4. External standards support the administrator’s construction

As noted above, the 1997 SPD describes the determination date that will be used. It clearly points to the date selected by the administrator. Plaintiffs do not contend otherwise. The SPD is the central document for communicating plan terms to participants. *See, e.g., Hodel v. Prudential Ins. Co. of America*, 2009 WL 914415, at *4, n.1 (S.D. W.Va. Mar, 30, 2009). The SPD and its terms “are accorded special weight by courts in interpreting the terms of ERISA benefit plans.” *Id.*¹⁷ The SPD supports, with more clarity, the provisions of the Plan. Because

¹⁷ Indeed, the SPD can control even in cases where the provisions of the SPD conflict with the plan. *Martin v. Am. Bancorporation Ret. Plan*, 407 F.3d 643, 648 n.13 (4th Cir. 2005). This Court earlier held the SPD controls in the event of a conflict only if its provisions are more favorable to the participant. (Order of June 2, 2008, pp. 35-36) (Doc. No. 195). Defendants do not argue there is a conflict; rather, the SPD is consistent with the administrator’s construction of the Plan terms.

all participants received the SPD, the determination date selected was precisely what was communicated to each participant and what each reasonably would have expected.

5. Motives and conflict of interest

The administrator intended nothing more than to meet the goal of applying a determination date close in time to the relevant quarter. (Feb. 30(b)(6) Dep., p. 143) (Group Exh. B). No interpretation of the provisions could be predicted in advance to result in higher or lower rates: only hindsight could establish that. The construction afforded by the administrator, moreover, led to Duke's decision to recalculate opening balances using the lower first quarter of 1997 interest crediting rate of 6.63%. This, in turn, led to an aggregate increase of \$432,000 in those balances. (*See* Defs.' Mem. in Support of Mot. for Summary Judgment on Fiduciary Duty Claims, filed April 1, 2010, p. 3). Had Duke adopted plaintiffs' construction of the determination date, these increases to account balances would have never been made, because under plaintiffs' reading of the provision, the applicable first quarter rate was over 7%. The administrator's interpretation thus had nothing to do with minimizing (or maximizing) potential cost to the Plan. It was simply identifying a date.

Duke reasonably construed both the January 1, 1997 and July 16, 1997 Plan provisions. Its choice of a determination date for setting interest credits should not be disturbed, and defendants are entitled to summary judgment.

CONCLUSION

For the reasons stated herein, defendants Duke Energy Retirement Cash Balance Plan and Duke Energy Corporation move this Court for an order granting summary judgment in their favor and against plaintiffs and the classes on Counts Three and Four of the Amended Complaint.

Respectfully submitted,

/s/ Robert O. King

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Dated: April 1, 2010

CERTIFICATE OF SERVICE

Robert O. King, an attorney, hereby certifies that he caused copies of the foregoing **MEMORANDUM OF DUKE ENERGY RETIREMENT CASH BALANCE PLAN AND DUKE ENERGY CORPORATION IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT ON CLASS CLAIMS** to be served on all counsel through the Court's ECF system on this 1st day of April 2010.

/s/ Robert O. King