



INTERNATIONAL ASSOCIATION OF FIRE FIGHTERS

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STAFF REPRESENTATIVES PENSION PLAN

DECISION

IN

APPEAL OF HAROLD A. SCHAITBERGER

This appeal concerns only a single issue: whether Harold Schaitberger should have his pension suspended to recover allegedly overpaid benefits from the International Association of Firefighters Staff Representatives Pension Plan (“IAFF Staff Pension Plan” or “Staff Plan”), the pension plan under which he earned a vested pension for his more than 24 years of service to the International Association of Fire Fighters (“IAFF”) before being elected General President of the IAFF in 2000.

SUMMARY OF DECISION

After he was elected General President in early August 2000, Mr. Schaitberger commenced receiving retirement benefits from the IAFF Staff Pension Plan, effective September 1, 2000. In March 2020, the Executive Board of the IAFF was advised by legal counsel that Mr. Schaitberger had not “retired” or had a “severance of employment”¹ when his pension benefits began in 2000, and that he was, therefore, not eligible to receive the pension benefits that had been paid to him from September 2000 until at least January 2016.²

The Executive Board, on the advice of legal counsel, decided to suspend Mr. Schaitberger’s future monthly pension benefits pending correction of the failure with the IRS. The formal notice of the suspension that was sent to Mr. Schaitberger on March 30, 2020, informed him that “[t]he IAFF believes it will be necessary to recover the impermissible benefit payments from you” and that the “IAFF will propose to the IRS that to the extent possible, the impermissible

¹ The requirement to “retire” is synonymous with having a severance of employment in this context.

² Although a definitive determination as to when Mr. Schaitberger was eligible to begin receiving his pension benefits was never made, it has been suggested by Staff Plan Counsel that pension benefits Mr. Schaitberger received on or after January 1, 2016, “should be permitted” as the Staff Pension Plan was amended effective January 1, 2016, to permit in-service distributions at age 62. (Memorandum of Opinion by Staff Plan Counsel, March 6, 2020).

benefit payments would be recovered by offset against your future benefit payments from the Staff Plan.” (The March 30, 2020, letter to Harold Schaitberger from General Secretary-Treasurer Edward A. Kelly, is attached hereto as Exhibit 1).

The allegation that Mr. Schaitberger was ineligible to commence pension benefits because he had not “retired” in 2000 derives from IRS rulings that a participant must have a “severance of employment” before he is able to receive benefits from a qualified pension plan such as the Staff Plan.³ Consistent with the IRS’s rule, Section 5.10 of the 1996 Staff Plan provides that “Benefits . . . may not commence to be paid prior to . . . retirement upon Early Retirement Age. . . .”

Having reviewed Mr. Schaitberger’s appeal, and the allegations, relevant facts, other information and applicable law, we conclude, for the reasons described below, that Mr. Schaitberger’s pension should not be suspended, and the overpayment to him, if any, resulting from the commencement of his Staff Plan benefits in 2000 cannot be recovered from him. Therefore, the decision of the IAFF Executive Board to suspend Mr. Schaitberger’s pension benefits is reversed.⁴

The Claims Committee reaches these conclusions because we find that under the principles of equity, as incorporated into the Employee Retirement Income Security Act of 1974 (“ERISA”), it would be improper to hold Mr. Schaitberger financially responsible for the allegedly overpaid pension benefits he received as a result of the commencement of his pension in 2000.⁵ Our determination is due in no small part to the amount of time that has passed since the events at issue and the significant prejudice to Mr. Schaitberger resulting from the passage of time and the wasting of evidence.

Our decision disposes of Mr. Schaitberger’s appeal, and therefore it is not necessary for us to resolve the issue of whether Mr. Schaitberger was entitled to commence receiving Staff Pension Plan benefits in 2000 (i.e., whether he had a severance of employment), nor is it necessary for us to address the various arguments made by Mr. Schaitberger and his attorney in their appeal.⁶

³ See, e.g., Rev. Rul. 56-693; Rev. Rul. 74-254 (“[A] pension plan fails to meet the requirements for qualification under . . . the Code if it permits employees to withdraw prior to normal retirement any part of the funds accumulated on their behalf . . . prior to the severance of employment or the termination of the plan.”).

⁴ We note that our determination of this appeal does not limit the IAFF’s ability to submit to the IRS for correction any operational failure (overpayment to Mr. Schaitberger) resulting from the IAFF’s commencement of benefits to Mr. Schaitberger in 2000.

⁵ Throughout this opinion, we generally refer to the pension benefits that Mr. Schaitberger is alleged to have been paid in error as an “alleged overpayment.” We do so because it was not necessary for the Claims Committee to determine whether Mr. Schaitberger had a severance of employment when he commenced receiving his pension benefits in 2000, and thus no conclusion has been made as to whether Mr. Schaitberger received benefits to which he was not entitled as a result of the commencement of his pension in 2000.

⁶ The fact that this decision does not address certain arguments made by Mr. Schaitberger and his attorney does not constitute adoption or endorsement of those arguments.

Our decision that it would be inequitable to recover the alleged overpayments from Mr. Schaitberger derives in part from the fact that the delay from the commencement of Mr. Schaitberger's benefits in 2000 until this issue came to light in 2020 has deprived Mr. Schaitberger (and the IAFF) of the ability to avoid or greatly minimize the situation now at hand.

Also contributing to our decision is the fact that the Executive Board affirmed its intent for Mr. Schaitberger to be able to collect pension benefits while serving as General President when it adopted Amendment 4 in 2002, and our determination, based on the evidence before the Committee, that Mr. Schaitberger did not engage in dishonest or improper acts in order to collect pension benefits, did not knowingly seek to commence pension benefits to which he was not entitled, and, if there was an error in commencing his benefits in 2000, that error was made in the administration of the Plan without any contribution from Mr. Schaitberger.

Moreover, given what we do know and given the actions that were taken by the Executive Board in 2002, the Claims Committee believes that, had General Secretary-Treasurer Vincent J. Bollon ("GST Bollon") and the Executive Board determined, in 2000-2002, that Mr. Schaitberger had not had a severance from employment, and was not eligible to commence pension benefits under the Plan as it then existed, they would have considered alternative arrangements to provide for Mr. Schaitberger to receive the pension benefits he had earned – including appropriate amendments to the Staff Plan to allow him to receive those benefits.

Indeed, although we do not know if the IAFF ever considered, prior to 2020, whether Mr. Schaitberger had a severance from employment – it is apparent that the Executive Board amended the Plan's suspension of benefits provisions,⁷ effective January 1, 2001, because they intended for Mr. Schaitberger to be able to receive his pension benefits while serving as General President, and they believed that the existing suspension provisions precluded Mr. Schaitberger from doing so.

In these circumstances, where the passage of time, and the apparent failure of the IAFF to determine that Mr. Schaitberger did not have a severance from employment until almost 20 years after the events at issue, have so prejudiced the Participant as to render unavailable a remedy that would have avoided the failure that has now been alleged (and avoided or greatly diminished the substantial overpayment at issue), and where every indication that we have, 20 years later, is that the remedy would have been deployed if the severance issue had been a concern, it would not be equitable, nor consistent with the principles of ERISA, for the Executive Board to recoup the alleged overpayment from Mr. Schaitberger.

⁷ Section 5.14(a) of the 1996 Staff Plan provides that retirees who return to work for the IAFF will have their pension benefits suspended, as permitted by Section 203(a)(3)(B) of ERISA. This plan provision is not related to the decision by the Executive Board in 2020 to "suspend" Mr. Schaitberger's pension benefits in order to recover an alleged overpayment.

FACTS & HISTORY

2000

On August 3, 2000, after more than 24 years of service to the IAFF, culminating in 12 years in the position of Executive Assistant to the General President⁸ (then Alfred K. Whitehead), Harold A. Schaitberger was elected to the position of General President of the IAFF.

A memorandum dated August 31, 2000, from GST Bollon⁹ to Don Copley, IAFF Comptroller, noted, among other staffing changes, that Mr. Schaitberger had been elected to the position of General President and that the effective date of his employment as General President would be September 1, 2000.¹⁰

A later memorandum dated September 27, 2000, from GST Bollon to Don Copley, documents that “Harold Schaitberger’s last day of employment as Executive Assistant to the General President was August 31, 2000,” and enumerates the terminal pay (vacation, floating holiday, sick leave, severance) to which Mr. Schaitberger was entitled as of August 31, 2000, in addition to requesting that Mr. Copley forward the check to GST Bollon once it was processed.

By August 31, 2000, the date Mr. Schaitberger’s employment as Executive Assistant to the General President ended, it is undisputed that Mr. Schaitberger had accrued a vested benefit under the Staff Plan based on more than 24 years of employment with the IAFF, and that he had satisfied the age and service requirements for an Early Retirement because he was past age 53, the earliest age under the 1996 Staff Plan (the Plan that was in effect when Mr. Schaitberger retired in 2000) at which a participant with at least 10 years of service could retire and receive the full amount of his accrued pension benefits in the form of an Early Retirement.¹¹ It is also

⁸ In 2000, the position of Executive Assistant to the President was most similar to the current position of Chief of Staff to the President.

⁹ GST Vincent J. Bollon served as IAFF General Secretary-Treasurer from 1988-2010. He is known for his firefighting career with the FDNY that began in 1959, and was also known for his IAFF labor career, and particularly for his expertise in pension funds. GST Bollon was an elected IAFF officer in the FDNY for the Uniformed Firefighters Association (UFA) Local 94, and was also President of the Uniformed Fire Officers Association (UFOA) Local 854. In addition to serving on both IAFF FDNY Locals, he served as first vice-chairman of the largest fire fighter pension fund in the United States and Canada from 1980-1988 and was director and a pension trustee for the National Fire Prevention Association. He was posthumously awarded GST Emeritus status of the IAFF.

¹⁰ Mr. Schaitberger’s attorney argues that the actual date that Mr. Schaitberger took office as General President was September 2, 2000. For our purposes, the exact date that he became General President is immaterial.

¹¹ Section 5.05 of the 1996 Plan provides:

EARLY RETIREMENT BENEFIT: Any Participant who meets the age and Service requirements for Early Retirement shall be eligible to retire and to receive his or her Accrued Benefit, as determined under Section 5.01. If a Participant separates from Service before satisfying the

undisputed that, as General President, Mr. Schaitberger would not earn any additional pension benefits under the Staff Plan.

After he was elected General President, Mr. Schaitberger put in for his retirement from the Staff Representatives Pension Plan. He testified that, to his recollection, there was no formal application process to commence retirement benefits at the time. This is consistent with the recollections of others that the Claims Committee interviewed, and, indeed, IAFF General Counsel has verified that currently there is no formal retirement application to be completed.

GST Bollon processed Mr. Schaitberger's retirement, and ultimately appears to have been the party to approve the pension and put it in pay status. GST Bollon sent a letter to Mr. Schaitberger on September 29, 2000, that said: "[w]e have calculated your retirement benefits under various payment options effective September 1, 2000 based on your salary through August 31, 2000." The letter set forth the calculation of Mr. Schaitberger's pension benefits and the amount payable under various annuity options (forms of payment) and advised Mr. Schaitberger that "[Y]ou must elect one of the options to begin your pension payments."

Mr. Schaitberger's Early Retirement pension was effective for the month of September 2000.

No evidence before this Committee indicates that any concern was expressed – to Mr. Schaitberger or to anybody else – about the commencement of Mr. Schaitberger's pension in 2000. This Claims Committee interviewed former Staff Plan Trustees, former District Vice Presidents James Ferguson and William Taylor, former General President Alfred K. Whitehead, the former Plan Attorney, and former staff members Mike Crouse and Erick Genser, and no one we interviewed could recall any expressions of concern about payment of Mr. Schaitberger's pension in 2000.

2001-2002

In December of 2001, the then-attorney for the Staff Plan met with then-counsel for the IAFF, Erick Genser, concerning the preparation of revised Summary Plan Descriptions for the Employees' Pension Plan¹² and the Staff Plan. A letter from the Plan Attorney to Mr. Genser dated January 11, 2002, recounts a discussion during their meeting:

At the meeting at your office on December 7, 2001, we discussed whether the Staff Representatives Plan required an individual who has satisfied the early retirement requirements to actually terminate

age requirement for Early Retirement, but has satisfied the Service requirement, the Participant will be entitled to elect an Early Retirement Benefit upon satisfaction of such age requirement.

Early Retirement Age is defined as "Any date coincident with or next following the Participant's attainment of age 53 and completion of 10 Years of Service." See Section 1.21.

¹² The International Association of Fire Fighters Employees' Pension Plan is a separate pension plan that covers OPEIU bargaining unit employees.

employment in order to receive benefit payments. I reviewed the applicable plan document and it clearly requires a termination of employment, in almost all situations, in order to receive payments under the plan. Certainly, the early retirement benefit section (Section 5.05) requires a person to “retire”. If an individual retires and begins to receive benefit payments, Section 5.14 of the Staff Representatives Pension Plan (“Plan”) outlines the impact of reemployment upon benefits. The subsections of this section recite the suspension of benefits rule contained in Section 203(a)(3)(B) of the Employee Retirement Income Security Act of 1974 (“ERISA”). Essentially, if a Plan adopts this rule (adoption is not required by ERISA or the Internal Revenue Code), a retiree’s benefits are required to be suspended if the retiree works more than 40 hours in a month.¹³

Mr. Genser was an attorney for the IAFF through late December 2001. He then began employment as IAFF Human Resource Director under GST Bollon in February of 2002 (he did not work during January 2002).¹⁴ While Mr. Genser does not remember the January 11, 2002, letter, he was certain that GST Bollon would have received the letter.

Approximately 8 weeks after the Plan Attorney’s letter dated January 11, 2002, the Executive Board adopted Amendment 4 to the Staff Pension Plan at its meeting held March 7-8, 2002.¹⁵ The Minutes of the Executive Board meeting document the following with respect to Amendment 4:

Staff Representatives’ Pension Amendment: General Secretary-Treasurer Bollon distributed to the board the Fourth Amendment to the Staff Representatives’ Pension Plan. The Amendment allows an employee, who has met the age and service requirement to collect a pension and was then elected to a position of a principal officer, to

¹³ Although the Plan attorney’s reference to Section 5.14 is the section of the 1996 Plan document that addressed suspension of benefits, her description of the Plan’s suspension provisions, and her statement about “if the Plan adopts this rule [i.e., the suspension provision]. . . .” indicate that she was most likely referencing the suspension provisions that were ultimately adopted in the 2002 Plan Document, not the 1996 plan document.

¹⁴ Interview of Mr. Genser.

¹⁵ GST Bollon and the following District Vice Presidents were present and voted unanimously to approve Amendment 4: Kevin Gallagher, First District; Louie Wright, Second District; A. Michael Mullane, Third District; William V. Taylor, Fourth District; Joseph M. Conway, Fifth District; Terry A. Ritchie, Sixth District; Paul Harvey, Seventh District; Thomas H. Miller, Eighth District; Michael D. McNeill, Ninth District; James T. Ferguson, Tenth District; Ernest “Buddy” Mass, Eleventh District; Dominick F. Barbera, Twelfth District; Bruce Carpenter, Thirteenth District; Danny Todd, Fourteenth District; James A. Fennell, Fifteenth District; and Nick Davila, Sixteenth District. Notably, Harold Schaitberger did not vote on Amendment 4, as the General President does not vote on matters before the Executive Board other than to break a tie vote or cause a tie vote, neither of which happened with respect to Amendment 4, as the vote was unanimous in favor of adoption.

collect a pension under the Staff Plan. **Motion** was made by General Secretary-Treasurer Bollon to Adopt the Fourth Amendment to the Staff Representatives' Pension Plan. **Motion** was Seconded and **Adopted** unanimously.

Amendment 4¹⁶ revised the Plan's suspension of benefits provisions¹⁷ to provide that a participant who has retired, begun to receive pension benefits, and is reemployed as a principal officer of the IAFF would not have his pension suspended.¹⁸ (Amendment 4 is attached hereto as Exhibit 2).

Regardless of any possible concerns about the commencement of Mr. Schaitberger's early retirement benefits in September 2000, it is apparent that by early 2002, GST Bollon had come to the conclusion that Mr. Schaitberger's pension would be required to be suspended, unless the Plan's suspension of benefits provisions were amended. In order to avoid the suspension of Mr. Schaitberger's pension, GST Bollon brought Amendment 4 to the Executive Board, and the

¹⁶ While a signed version of Amendment 4 has not been located, the Claims Committee believes that the unsigned version of Amendment 4 that was located in May 2020, is the same Amendment 4 that was adopted by the Executive Board. We reach this conclusion, in part, because the change that was made by the unsigned version of Amendment 4 was carried over almost word-for-word into the 2002 Plan Document.

¹⁷ The decision to suspend Mr. Schaitberger's pension benefits resulted from an alleged overpayment due to a determination that Mr. Schaitberger did not have a severance from employment when he began receiving his pension benefits. It was not a decision to suspend benefits under the Plan's suspension of benefits provisions and Section 203(a)(3)(B) of ERISA.

¹⁸ Specifically, Amendment 4 provides:

Paragraph (a) of Section 5.14 is amended by deleting the heretofore existing language and substituting the following in lieu thereof:

5.14 REEMPLOYMENT OF RETIRED PARTICIPANTS:

- (a) If a Participant returns to the employ of the Employer after the commencement of benefits under this Plan, such Participant's benefit payments shall be suspended; provided, however, that benefit payments shall not be suspended for any Participant who retires, commences to receive benefit payments, and is subsequently reemployed as a principal officer of the International Association of Fire Fighters. For any Participant whose benefit payments have been suspended pursuant to this subsection or subsections (b) or (c), such Participant's right to future benefits under the Plan shall be subject to redetermination upon any subsequent termination of employment or retirement under the Plan in accordance with any Plan provisions then in effect and the provisions of subsections (b) and (c).

Executive Board voted, unanimously, to approve the Amendment.¹⁹ By so doing, the Executive Board created an exception to the Plan's suspension rules, whereby a retiree who returned to employment with the IAFF as a principal officer would be able to collect his or her pension while serving in the role of principal officer for the IAFF.²⁰

At the time Amendment 4 was adopted, Mr. Schaitberger was the only former staff member serving as an IAFF Principal Officer, and the only person who could possibly be impacted by the amendment. This Committee therefore finds that the Executive Board knew, when it voted to approve Amendment 4, that Amendment 4 was designed to permit Mr. Schaitberger to receive his pension benefits while serving in the position of General President.²¹

2020

On March 11, 2020, nearly twenty years after the commencement of Harold Schaitberger's pension benefits, the Administrative Committee of the IAFF Executive Board held a meeting in which one of the agenda items was in-service distribution payments made to Harold Schaitberger and to former General Secretary-Treasurer Thomas H. Miller, who had also received pension benefits from the Staff Plan while serving as a Principal Officer.

The Administrative Committee was advised by counsel that Mr. Schaitberger was not eligible to begin receiving pension benefits from the Staff Plan in 2000 because he had not had a "severance" or "termination" from employment at that time, and, therefore, he had received pension benefits which did not satisfy the Internal Revenue Code's requirement for a severance from employment and were contrary to the terms of the Plan. As Counsel to the IAFF Administrative Committee explained:

[A]s you know the General President doesn't participate in the Staff Plan as an active participant. . . . So you have a situation where the General President is not accruing a benefit under the Staff Plan, has sufficient service to receive retirement benefits under the Staff Plan, made an application, the application was approved, the benefits were paid or the benefits commenced.²² Okay. So, that's sort of the background. That creates two issues. . . they're interrelated. One is an

¹⁹ Prior to Amendment 4, the Plan's suspension provisions provided, in relevant part: "If a Participant returns to the employ of the Employer after the commencement of benefits under this Plan, such Participant's benefit payments shall be suspended." 1996 Staff Plan, Section 5.14(a).

²⁰ The Committee believes that Amendment 4 was prepared by the Plan's attorney, likely at the behest of GST Bollon. This would be consistent with what we understand to have been general practice with respect to amending the Pension Plans. It is certainly the case that the 2002 Plan Document, which contained the same relevant language as in Amendment 4, was prepared by the Plan's attorney.

²¹ The only other former Staff Plan Participant who ever became a Principal Officer was Thomas H. Miller, and he did not become a Principal Officer until 2010, 8 years after the Amendment was adopted.

²² There had previously been a discussion wherein it was acknowledged that the Administrative Committee did not know whether there was a formal retirement application. Instead, it was acknowledged that there was an internal process in place whereby the pension had been approved.

issue under the Internal Revenue Code and the second is an issue under the Plan. The Plan itself, based on my reading of the 2015 version of the Plan says that you cannot have in-service distributions or at least. . . [u]p until . . . [the Plan was amended in 2016 to provide for in-service distributions at age 62] you couldn't have in-service distributions . . . So, you have a plan document violation but the thing that is of greater concern is that in-service distributions have to meet the terms of the Internal Revenue Code, and there are basically two ways that you can do it. One, is there's a provision in the tax code that says at 62 you get in-service distribution – you can amend the plan and put in-service distributions – which is what we did in 2016, okay. The other way is . . . there's a regulation that says you can make payments while someone is in-service if they work beyond what's called normal retirement age. . .

So long story short, those distributions [to Mr. Schaitberger] even though they were made, I certainly think they were made in good faith, and I certainly think that they were probably made based on a misapplication of the plan document, are nonetheless violate [sic] the terms of the plan document as in effect at the time they were made and violates the Internal Revenue Code . . . So that is sort of the issue in a nutshell.

In discussing the in-service distribution issue, the Administrative Committee had before it the written opinions of three attorneys, two of whom were present at the meeting of the Administrative Committee.

One of the opinions focused, generally, on “the permissibility of distributions from the . . . [Staff Plan] to a participant while employed by the IAFF.”²³ The analysis is based almost entirely on current plan provisions (i.e., from the 2015 Plan document) and on current law and guidance, with a focus on statutory and regulatory changes that were made in 2006 and 2007, all of which is after Mr. Schaitberger commenced receiving his pension benefits.

The other two opinion letters addressed distributions to Mr. Schaitberger and to former GST Miller, both of whom had received benefits from the Staff Plan while serving as a principal officers.²⁴ Those opinions concluded that pension benefits had been improperly paid to Mr. Schaitberger and Mr. Miller, and discussed correction of the overpayments.²⁵ Both of the opinions recommended, as an interim measure, that pension payments from the Staff Plan to

²³ Opinion by Counsel to the IAFF Administrative Committee.

²⁴ One legal opinion was from Staff Plan Counsel and was addressed to the three Staff Pension Plan Trustees, Danny Todd, Mark Woolbright, and Ed Kelly. The other opinion was from a third attorney and was addressed to Edward A. Kelly, General Secretary-Treasurer of the IAFF.

²⁵ The opinion by Staff Plan Counsel noted that “[c]orrection of improper payment of benefits . . . is complicated . . . I cannot yet advise IAFF or the Trustees as to how to proceed. Correction might include a reduction of future Staff Plan benefit payments to make up for improper past payments.”

Mr. Schaitberger and Mr. Miller be suspended. One opinion concluded that “there were payments made from the Plan that should not have been made (“overpayments”) and, therefore, at this time, the fiduciaries must suspend benefit payments to both individuals pending investigation and correction.”²⁶

Following the meeting of the Administrative Committee, a meeting of the Executive Board was convened on the same day. Immediately following the roll call, GST Edward Kelly offered the following motion:

I would like to offer a motion on advice of . . . IAFF Staff Plan Counsel. I make a motion that the benefit payments to the current general president and former general secretary treasurer be suspended effective 60 days after notice of the suspension is given to the participant; that the participant be given the right to appeal the suspension in accordance with ERISA, that IAFF General Counsel work with outside legal counsel to prepare an application to the IRS under the Voluntary Correction Program to . . . obtain a resolution of any operational errors associated with the payment of pension benefits to [Harold Schaitberger] and [Thomas Miller] which still employed [sic] ---while still employed.

In discussing the motion, one member of the Executive Board asked whether “if the errors were administrative errors by the organization . . . can the organization make the Plan whole or is it the Participant’s responsibility?” Counsel did not directly answer the question but indicated that the IRS rules “are not that specific. The IRS will look at all the equities of the situation and we’ll negotiate with the IRS over how the Plan has to be made whole.”

Thereafter, less than five minutes into the meeting of the Executive Board, the vote was called, and the Executive Board voted unanimously to approve the motion by GST Kelly.

It is worth noting here that none of the attorneys based their opinion on the 1996 Plan Document, which is the version of the Plan document applicable to Mr. Schaitberger.²⁷ Nor is there any indication that the attorneys who addressed the issue of whether Mr. Schaitberger received impermissible benefits limited their review of legal authorities and guidance concerning severance of employment requirements, and what constitutes a severance, to those authorities that were in existence in September of 2000.²⁸

²⁶ This memorandum also noted that the “first step to correcting the Plan is to suspend further retirement benefits to . . . [Harold Schaitberger and Thomas Miller] pending further investigation of the amounts of the overpayment and the steps for plan correction.”

²⁷ The 1996 Plan Document was not located until well after the March 11, 2020 meeting.

²⁸ The available legal authorities and guidance concerning what constitutes a severance has expanded significantly since 2000, but none of the authorities that became available after Mr. Schaitberger commenced receiving pension benefits would be applicable to an evaluation of whether he satisfied the severance requirement in September 2000.

We must also note that it is not the case that the Plan’s fiduciaries “must suspend benefit payments . . . pending investigation and correction” of the overpayment, as advised by one of the legal opinions before the Administrative Committee. The IRS does not require plan fiduciaries or sponsors to take steps to “correct” an overpayment failure before the correction method has been approved by the IRS.²⁹

Mr. Schaitberger was formally notified of the suspension of his benefits by letter dated March 30, 2020.³⁰ The letter informed Mr. Schaitberger that “the pension benefits paid to you from the Staff Plan prior to January 1, 2016 were not permitted” under the terms of the Plan document or applicable law. For this reason, “[t]he IAFF believes it will be necessary to recover the impermissible benefit payments from you.” The letter informed Mr. Schaitberger that “the IAFF will request relief under the IRS Voluntary Correction Program (“VCP”). As part of the requested relief, the IAFF will propose to the IRS that to the extent possible, the impermissible benefit payments would be recovered by offset against your future benefit payments from the Staff Plan.” The reason for the decision to suspend Mr. Schaitberger’s pension was “[t]o maximize the future benefit payments available for offset.” No information was provided as to the amount of the impermissible benefits or as to how long Mr. Schaitberger’s pension would be withheld. The March 30th letter started the running of a 60-day notice period for Mr. Schaitberger to appeal the suspension of his benefits.

On April 8, 2020, the Executive Board established this three-person Claims Committee, as authorized under section 14.02 of the 2015 Staff Representatives Pension Plan document.³¹ The three members of the Claims Committee assigned by the Executive Board are Frank Lima, IAFF 10th District Vice President, Thomas Thornberg, IAFF 5th District Vice President, and Mike Carter, IAFF 6th District Vice President.³²

On April 17, 2020, another letter was sent to Mr. Schaitberger from GST Kelly notifying him that the Staff Representatives Pension Plan document in effect at the time of his retirement (i.e., the 1996 Plan Document) had been located, but the letter did not convey any change in the decision to suspend Mr. Schaitberger’s pension benefits.³³ (The April 17, 2020, letter to Harold

²⁹ See Rev. Proc. 2019-19. The VCP requires the Plan Sponsor to propose a method of correction to the IRS. Once the IRS and the Plan Sponsor reach agreement as to the method of correction, the Plan Sponsor must implement the correction. *Id.*, at § 10.01.

³⁰ Exhibit 1.

³¹ This is the first time that a Claims Committee has been appointed since the Staff Pension Plan was established in 1975, and the first time the Executive Board has received an appeal from an adverse benefit determination.

³² Neither General President Schaitberger nor GST Kelly had any role in appointing the members of the Claims Committee. Senior District Vice President Danny Todd recommended the members of the Claims Committee to the Executive Board, and the recommendation was ratified by unanimous vote of the Executive Board.

³³ The 1996 Plan Document was ultimately found in a file in the Human Resources office.

A. Schaitberger from General Secretary-Treasurer Edward A. Kelly is attached hereto as Exhibit 3).

The Claims Committee, in accordance with the Staff Pension Plan, must afford Mr. Schaitberger a “full and fair review of the claim and the denial”³⁴ and must “determine, in its sole and complete discretion, whether to uphold all or a portion of the initial claim denial.”³⁵ “Any such decision by the Claims Committee shall be final.”³⁶

On May 16, 2020, Mr. Schaitberger and his attorney filed an appeal with the Claims Committee, challenging the suspension of his pension benefits. The Claims Committee recommended to the Executive Board that it delay the suspension of Mr. Schaitberger’s pension benefits, pending the outcome of his appeal. The Executive Board unanimously approved the Committee’s recommendation.

Although neither the Plan nor ERISA requires a hearing on an appeal, a hearing at which Mr. Schaitberger and his legal counsel appeared was held at IAFF Headquarters in Washington, DC on July 16, 2020.

MARCH 11, 2020: CORRECTION OF OVERPAYMENT

The Amount of the Overpayment

At the March 11, 2020, meeting of the Administrative Committee, there was discussion about an estimated calculation that had been performed by the Plan’s actuary of the amount of the overpayment to Mr. Schaitberger. The Claims Committee believes, however, that the estimate was overstated.

In 2005, Mr. Schaitberger’s former spouse began receiving a portion of his pension benefit under a Qualified Domestic Relations Order (“QDRO”). The March 30, 2020, suspension letter to Mr. Schaitberger indicates that the “payments under the QDRO were probably permissible, and therefore do not need to be recovered or suspended.” Since the effect of the QDRO was not known until after the meetings of March 11, 2020, the portion of Mr. Schaitberger’s pension benefits that were paid to his former spouse do not appear to be overpayments.

Equally important, however, is that the 1996 Staff Plan document allowed Mr. Schaitberger to receive in-service distributions at Normal Retirement Age and, therefore, any pension benefits that were paid to him after he turned age 65 in June 2010 are not overpayments, regardless of whether he had had a severance of employment at that point.³⁷

³⁴ Section 14.05 of the 2015 Staff Pension Plan.

³⁵ Section 14.06 of the 2015 Staff Pension Plan.

³⁶ Section 14.01(b) of the 2015 Staff Pension Plan.

³⁷ The IRS has long permitted pension plans to provide for in-service distributions at normal retirement age, and permissible in-service distributions are protected from cutback under Section 411(d)(6) of the

Correction of the Overpayment

The advice to the Executive Board on March 11, 2020, pertaining to correction of the overpaid benefits to Mr. Schaitberger, focused primarily on recouping the overpayment from Mr. Schaitberger's future monthly pension benefits:

What the IRS is likely to say, and we're still very early in this process, is that, okay, you are entitled to a pension from this plan. The pension you're entitled to has a value. You have been erroneously prepaid a portion of the value of your pension. And so, that erroneous value, we think likely the IRS will say, needs to be offset from the remaining value of your pension.³⁸

The only option presented to the Executive Board, though there was some acknowledgment that other scenarios were possible, was to correct the overpayment by recovering the value of the overpaid pension benefits from Mr. Schaitberger's future monthly pension benefits.

However, the IRS does not require that a pension plan collect an overpayment from the participant who received the overpayment, nor does it require offset against a participant's future benefit payments. Indeed, the IRS provides at least two options for correcting the overpayment that would not require recovery from Mr. Schaitberger (and acknowledges that there could be other options as well). Specifically, the IRS explicitly allows an overpayment of the type at issue here to be corrected by having the employer make the Plan whole, as suggested by a question at the Executive Board meeting, and it also contemplates correction by a retroactive plan amendment to conform the plan's terms to its operations:

An Overpayment from a defined benefit plan is corrected in accordance with rules similar to the Return of Overpayment and Adjustment of Future Payments correction methods described in section 2.04(1) of Appendix B [providing for recovery by offset against a participant's future benefits] or any other appropriate correction method. Depending on the nature of the Overpayment, *an appropriate correction method may include* using rules similar to the correction method described in section 2.04(1) of Appendix B but *having the employer or another person contribute the amount of the Overpayment (with appropriate interest) to the plan instead of seeking*

Internal Revenue Code. Rev. Ruls. 71-24, 73-448; I.R.C. § 411(d)(6), *see also* Treas. Regs. § 1.411(d)-4, Q/A 12 and 72 F.R. 28604, 28606 (May 22, 2007). As a result, a subsequent version of the Plan document cannot eliminate Mr. Schaitberger's ability to commence in-service distributions at Normal Retirement Age.

³⁸ Staff Plan Attorney to Mr. Schaitberger, March 11, 2020 Meeting of the IAFF Administrative Committee.

*recoupment from a plan participant or beneficiary. Another example of an appropriate correction method includes a Plan Sponsor adopting a retroactive amendment to conform the plan document to the plan's operations (subject to the requirements of section 4.05).*³⁹

The VCP also provides the Plan Sponsor the ability to negotiate a correction method other than the three discussed, including the ability to negotiate over any amount that must be returned or contributed to the Plan to correct an overpayment.

Thus, in correcting overpayments, the VCP provides options for securing compliance with the Internal Revenue Code, not a single mandate to recover overpaid benefits by withholding future benefits. The IRS does not tell pension plans and their Sponsors which option or approach is best, or even which might be lawful, or available to a Plan Sponsor, in a particular circumstance.

In determining whether a plan participant should bear the financial responsibility for an overpayment, Plan Sponsors have broad latitude to take into account the particular facts and circumstances at issue. With respect to this appeal, the Claims Committee looks to ERISA and the principles of equity in determining that it would be improper, under the circumstances, to assign financial responsibility for the alleged overpayment to Mr. Schaitberger.

ANALYSIS OF THE EQUITIES

The 1996 Staff Plan document, which is the version of the Staff Plan under which Mr. Schaitberger's pension benefits are determined, contains no provisions permitting the recovery of overpayments made by the Plan.⁴⁰ Nevertheless, courts generally recognize that the administrator of an ERISA plan may, as a matter of equitable restitution, take action to recover overpaid benefits even in the absence of specific language in the governing plan document.⁴¹

ERISA does not specifically address the ability of plans to recoup, however, the Supreme Court has directed that a body of common law be developed to fill in the gaps of ERISA. . . . When a plan does not specifically allow for recoupment, but nevertheless it does so, it exercises extra-statutory devices to do so. By reducing the Plaintiffs'

³⁹ Rev. Proc. 2019-19, § 6.06(3) (emphasis added).

⁴⁰ See *Longuski v. Iron Workers' Local No. 25 Pension Plan*, No. 11-11595, 2012 WL 1247172, at *3-*4 (E.D. Mich. Apr. 13, 2012) (plan provisions regarding recovery of overpayment not applicable to participant whose service under plan ended before effective date of amendments).

⁴¹ See *Luby v. Teamsters Health, Welfare & Pension Trust Funds*, 944 F.2d 1176 (3d Cir.1991); *Heller v. Fortis Benefits Ins. Co.*, 142 F.3d 487, 494-95 (D.C. Cir. 1998); *Phillips v. Mar. Ass'n-I.L.A. Local Pension Plan*, 194 F. Supp. 2d 549, 555 (E.D. Tex. 2001).

monthly benefits to recoup past overpayments, [the plan] has availed itself of the common law remedy of restitution.⁴²

Even though an ERISA plan administrator has a right to pursue restitution, that right is limited by the doctrines of equity: “[r]ecoupment will not follow automatically upon a mere showing that a plaintiff has tendered more than required, but only when the equities favor it.”⁴³ Thus, a Plan Administrator’s ability to recoup overpayments may be constrained by equitable considerations, and courts prohibit plan fiduciaries from recovering overpayments if it would be inequitable for the plan to do so.⁴⁴

Courts weigh a variety of factors in determining whether it would be equitable for a fiduciary to recoup overpaid benefits from a plan participant.⁴⁵ Common considerations include the amount of time which has passed since the overpayment was made, the nature of the mistake by the administrator, the amount of the overpayment, and the effect that recoupment would have on the participant.⁴⁶ The Claims Committee is not bound to apply any particular factors in making a decision on this appeal. Because “[e]quity, after all, is meant to be flexible,” the Claims Committee “consider[s] whatever factors it may reasonably believe shed light on the fairness of [repayment], and weigh[s] those factors against the backdrop of general equitable considerations and the guiding principles and purposes of ERISA.”⁴⁷

⁴² *Phillips*, 194 F. Supp. 2d at 555 (citations omitted).

⁴³ *Kwatcher v. Massachusetts Serv. Employees Pension Fund*, 879 F.2d 957, 967 (1st Cir. 1989) (internal quotations and citations omitted).

⁴⁴ *Phillips*, 194 F.Supp. 2d 549; see also *Johnson v. Ret. Program Plan for Employees of Certain Employers at U.S. Dep’t of Energy Facilities at Oak Ridge, Tennessee*, No. 3:05-CV-588, 2007 WL 649280, at *6 (E.D. Tenn. Feb. 27, 2007) (“[I]n upholding [ERISA] fiduciary duties as they relate to the collection of overpayments, a plan fiduciary must balance the impact of overpayments upon plan beneficiaries at large against the equitable treatment of the individuals from whom overpayments are sought.”) (citing *Wells v. United States Steel & Carnegie Pension Fund, Inc.*, 950 F.2d 1244 (6th Cir.1992)); cf. *Crossey v. Pennsylvania State Educ. Ass’n Pension Plan*, 2019 WL 4187480 (E.D. Pa. Sept. 4, 2019) (“it appears possible that . . . a Board’s wrong application of, or a failure to apply, equitable principles before exercising recoupment of Plan overpayments and assessing interest could constitute the abuse of discretion necessary to support a claim for benefits under 29 USC § 1132(a)(1)(B).”)

⁴⁵ See *Richardson v. IBEW Pac. Coast Pension Fund*, No. C19-0772JLR, 2020 WL 3639625, at *7 (W.D. Wash. July 6, 2020) (compiling factors used by different courts); see also *Hoffa v. Fitzsimmons*, 673 F.2d 1345, 1354 (D.C. Cir. 1982) (“recovery may not be permitted where the beneficiary has changed his position in detrimental reliance on the correctness of the overpayment”); *Heller v. Fortis Benefits Ins. Co.*, 142 F.3d 487, 495 (D.C. Cir. 1998) (“Generally, restitution is an appropriate remedy where there is unjust enrichment: three elements encompass the equitable remedy of unjust enrichment and quasi-contract: the plaintiff must show that (1) he had a reasonable expectation of payment, (2) the defendant should reasonably have expected to pay, or (3) society’s reasonable expectations of person and property would be defeated by nonpayment”) (citations omitted).

⁴⁶ *Richardson*, No. C19-0772JLR, 2020 WL 3639625, at *7 (W.D. Wash. July 6, 2020).

⁴⁷ *Dandurand v. Unum Life Ins. Co. of Am.*, 150 F. Supp. 2d 178, 186 (D. Me. 2001).

At the outset we note that our efforts to determine facts and revisit the events and circumstances of nearly 20 years ago have been greatly hampered by the significant passage of time and poor recordkeeping with respect to the Staff Pension Plan. In the intervening years, a key witness has died, the memories of other witnesses have faded, and the documentation and records pertaining to the Staff Pension Plan are not as robust as one would expect.

Responsibility For Commencing Benefits

The initial, threshold question for determining whether it is equitable for the Pension Plan to recover allegedly mistaken overpayments is “who bears responsibility for the mistake?”

In general, a plan participant whose actions contribute to errors made by an ERISA plan (for example, a participant whose misstatement or omission triggers an overpayment) has no defense against the plan’s right to recover an overpayment.⁴⁸

In this case, the facts and the evidence available to the Committee demonstrate that Mr. Schaitberger did nothing to contribute to the alleged mistake, and therefore should not bear any responsibility for the error.

As provided for under Article VIII, Section 13 of the Constitution and Bylaws of the IAFF (“IAFF Constitution”), the General Secretary-Treasurer of the IAFF has the authority and responsibility to establish and maintain the Staff Representatives Pension Plan benefits.⁴⁹ The IAFF General Secretary-Treasurer holds an elected office that is substantially independent of any supervision or direction by the General President.⁵⁰

By all accounts GST Bollon and his office possessed broad responsibility and authority for the day-to-day administration of the Staff Representatives Pension Plan (and also for the administration of the Employees’ Pension Plan and the Principal Officers’ Retirement Trust). The Staff Plan’s former attorney confirmed that she and the Staff Plan’s actuary reported to GST Bollon and had been selected and hired by him.

Moreover, GST Bollon was one of three Staff Pension Plan Trustees, along with District Vice Presidents William Taylor and James Ferguson, and was Chair of the Trustees.⁵¹ Under the

⁴⁸ See, e.g., *Pohl v. McCaffrey*, No. 04 C 6223, 2006 WL 208710, at *7 (N.D. Ill. Jan. 25, 2006) (recoupment permitted where participant contributed to error); *Trustees of AFTRA Health Fund v. Biondi*, 303 F.3d 765, 775 (7th Cir. 2002) (recovery from participant who defrauded plan is consistent with purposes of ERISA).

⁴⁹ Maintenance of records and materials on behalf of the IAFF was clearly part of that responsibility, as provided for in Section 2 of the Constitution.

⁵⁰ IAFF Constitution, Article VI, Sections 1 and 2.

⁵¹ Section 1.46 of the 1996 Plan Document defined the Plan Administrator as the Trustees “unless another Plan Administrator is appointed by the Plan Sponsor.” Trustees were in turn defined as “[t]he Trustee or Trustees appointed by the Executive Board pursuant to Article 10.” Section 1.66 of the 1996 Staff Pension Plan.

terms of the 1996 Plan, the Trustees were the named fiduciary of the Plan and the Plan Administrator,⁵² and their duties included:

(a) appointing the Plan’s attorney, accountant, actuary, or any other party needed to administer the Plan; (b) directing payments from the Fund; (c) communicating with Employees regarding their participation and benefits under the Plan, including the administration of all claims procedures; (d) filing any returns and reports with the Internal Revenue Service, Department of Labor, or any other governmental agency . . . and (g) construing and resolving any question of Plan interpretation. The Plan Administrator’s interpretation of Plan provisions including eligibility and benefits under the Plan is final, and unless it can be shown to be arbitrary and capricious will not be subject to “de novo” review.⁵³

GST Bollon clearly played a substantial role in processing Mr. Schaitberger’s pension benefits and putting them in pay status. Indeed, GST Bollon sent the letter to Mr. Schaitberger that described his payment options and was very likely the person who directed that Mr. Schaitberger’s pension be put in pay status. On balance, the evidence indicates that the decision to approve Mr. Schaitberger’s pension in 2000 was made by GST Bollon, with full knowledge that Mr. Schaitberger had been elected General President and would continue to serve in that position while receiving benefits.

As the newly elected General President, Mr. Schaitberger had no responsibilities with respect to the Staff Pension Plan. There is no evidence, in documents before the Claims Committee, or in the recollections of former Staff Plan Trustees or others we interviewed, that Mr. Schaitberger exerted any undue influence or pressure on GST Bollon, or on anyone else, to approve his benefits, nor has there been any suggestion of any such behavior.

Moreover, Mr. Schaitberger testified at the appeals hearing on July 16, 2020, that he was not advised by anyone that there might be a problem with him retiring under the terms of the Staff Plan in 2000, or of anyone later “raising an issue or a problem with my retirement status.” The Claims Committee finds his testimony credible and consistent with the recollections of others the Committee interviewed. Indeed, no one that was interviewed recalled any issue or concern being raised with respect to Mr. Schaitberger being eligible to commence pension benefits in 2000. Some were clearly surprised at the line of inquiry. Even the Plan’s Counsel,

⁵² ERISA § 3(16), 29 U.S.C. § 1002(16), defines Plan Administrator as “the person specifically so designated by the terms of the instrument under which the plan is operated,” or the plan sponsor, if the plan document makes no such designation. ERISA imposes certain specific responsibilities on the administrator, including the filing of annual reports (Form 5500) with the Department of Labor.

⁵³ Section 10.01 of the 1996 Staff Pension Plan; see also Articles 7 and 8 of the 2002 Plan (Bollon, Taylor and Ferguson were the Trustee, and the Trustee was the Plan Administrator, unless another Plan Administrator was appointed). Based on our interviews with former Plan Trustees, it appears that GST Bollon (and his office) handled some of these duties directly, without involving the other Trustees, unless there was an issue or concern that had to be addressed. It also appears that the Trustees acted in an advisory capacity to the Executive Board with respect to some of the duties of the Plan Administrator.

on numerous occasions, indicated to the Claims Committee that he felt there was no malfeasance by the General President and that he did nothing wrong with respect to the commencement of his pension benefits in 2000.

Counsel to the IAFF Administrative Committee also concluded that Mr. Schaitberger bore no responsibility for this error:

Counsel: this is a situation that is truly there is no harm and no foul. There is no foul intent, and truthfully, there's been no harm to the Plan. . . . I think we have to sort of put our heads together, find a good narrative to the IRS that explains that there was no harm intended, no malfeasance, and try to work with the service to have sort of a . . . minimally painful resolution

Harold Schaitberger: Well, I want to make sure that your statement is on the record. Because we live in a political world, and you heard a lot of discussion earlier today about optics, you know, and there's a lot of suggestion out there that this is—I took an illegal pension. There's suggestions out there like it was some kind of malfeasance of which it's not and it wasn't. And so, I just want to make sure that your statement is captured on the record and in the minutes.

Counsel: absolutely.

Staff Plan Counsel commented to Mr. Schaitberger, to the same effect, “[y]ou were not the person running the pension plan.”

As the administration of the Plan lay with the office of the GST, any error in connection with the commencement of the appellant's pension benefits was made by GST Bollon and his staff in administering the Plan. In fact, it would appear that the commencement of Mr. Schaitberger's pension was consistent with the expectations of those involved in the administration of the Staff Plan at the time, as some of the people the Claims Committee interviewed noted that it was typical for IAFF Officers and District Vice Presidents to receive a pension that they had earned in their previous roles as firefighters in their respective municipalities.

Moreover, it would not be reasonable to expect Mr. Schaitberger, or any Participant, to be aware of or understand the severance of employment requirement. Certainly, one would not expect him to be familiar with the relatively few legal authorities that had been issued by the IRS or to understand how those authorities might apply to his transition from IAFF staff member to elected Principal Officer. Nor, as a Plan participant, could Mr. Schaitberger have been expected to question whether he was eligible to retire based on the requirement of the 1996 Plan that “Benefits . . . may not commence to be paid prior to . . . retirement upon Early Retirement Age”⁵⁴

⁵⁴ 1996 Staff Plan, Section 5.10.

Under ERISA, Plan Participants are not tasked with determining their own eligibility for benefits. They do not have the authority to interpret the Plan. Instead, the Plan Administrator is tasked with construing the plan document and resolving questions of plan interpretation, with hiring attorneys, auditors and actuaries to ensure compliance with ERISA and the Internal Revenue Code, and with directing payments from the Plan. Thus, any error in commencing Mr. Schaitberger's pension benefits in 2000 was an error of plan administration and the responsibility of the IAFF, for which Mr. Schaitberger was not responsible.

These circumstances indicate Mr. Schaitberger was not responsible for any error in commencing his benefits in 2000 and had no reason to know that he might not have been eligible to receive benefits at that time due to not having had a severance of employment.

Amendment 4

Regardless of whether any thought was given to the severance issue in 2000, it is apparent that by early 2002 GST Bollon had come to the conclusion that, without an amendment, the Plan would be required to suspend Mr. Schaitberger's pension. This is evidenced by the fact that approximately 8 weeks after the Plan Attorney's letter of January 11, 2002, GST Bollon presented Amendment 4 to the Executive Board for adoption.

Amendment 4 was clearly intended to allow Mr. Schaitberger to continue receiving his pension benefits while serving as General President. The minutes of the Executive Board meeting describe Amendment 4 as allowing "an employee, who has met the age and service requirement to collect a pension and was then elected to a position of a principal officer, to collect a pension under the Staff Plan."

At the time Amendment 4 was adopted, there was only one person to whom it could have applied: Harold Schaitberger. The Claims Committee finds that the Executive Board knew that Amendment 4 was intended to permit Mr. Schaitberger to collect pension benefits while serving as General President.⁵⁵

Because the IAFF is now (and was then) solely responsible for funding the Staff Pension Plan, by adopting Amendment 4 the Executive Board assented to the IAFF bearing the cost of providing pension benefits to Mr. Schaitberger while he served as General President. This was not something that the Executive Board had to do. The Executive Board could have rejected the Amendment, and, had it done so, Mr. Schaitberger's pension would have been suspended.⁵⁶

The adoption of Amendment 4 does not resolve the issue of whether Mr. Schaitberger had a severance from employment or whether he should have been allowed to commence benefits in

⁵⁵ There is no evidence that the severance issue was ever raised with the Executive Board or that the Executive Board was ever made aware that there may have been a problem with allowing Mr. Schaitberger to commence receiving pension benefits in 2000.

⁵⁶ If the Executive Board had rejected Amendment 4, the Plan, and by extension the IAFF, would not have incurred the cost of providing Mr. Schaitberger's pension benefits until at least his Normal Retirement Age or, if earlier, the date he retired.

2000. It also does not resolve any potential overpayments, due to impermissible in-service distributions. However, what it does do is evidence a clear intent of the Executive Board to permit Mr. Schaitberger to receive his Staff Plan pension benefits while serving as General President. It also evidences a clear knowledge and intent for the Staff Plan, and ultimately the IAFF, to bear the cost of those pension benefits.

Passage of Time and Prejudice to Appellant

In the 20 years since Mr. Schaitberger commenced receiving his pension benefits, key witnesses, including GST Bollon, have died⁵⁷ or moved on, memories have faded,⁵⁸ and Plan records have been lost, misplaced, or inadequately maintained. ERISA places the responsibility for retention of records relating to a participant's benefit entitlement on the employer, not on plan participants.⁵⁹ The IAFF Constitution puts the responsibility for maintaining Staff Plan records solely with the GST. As the GST and his office handled the day-to-day administration of the Staff Plan, it is entirely logical for the GST to have the sole responsibility for maintaining records related to the Staff Plan.

Thus, it is not consistent with ERISA's statutory scheme, or with the principles of equity, to hold Mr. Schaitberger to account for the incompleteness of historical records pertaining to the Staff Plan and his pension benefits (or for the absence of such records and evidence to, ultimately, contribute to a decision, 20 years later, that he was not eligible to commence pension benefits).

Moreover, there is no evidence before the Claims Committee that Mr. Schaitberger was ever made aware of any question about a severance with respect to his pension benefits until the Administrative Committee began to consider the issues that led to the decision to withhold Mr. Schaitberger's benefits on March 11, 2020. Although he may have had contemporaneous awareness of the suspension issue that ultimately led to Amendment 4, he would have understood that Amendment 4 had confirmed his right to receive pension benefits while serving as General President.⁶⁰

Perhaps the most important factor for our determination that it would be inequitable to recover any potential overpayment from Mr. Schaitberger is that he has been deprived of the opportunity to address the severance issue, or to ameliorate the amount of any alleged overpayment, for nearly 20 years, and as a result, in 2020, he is left with none of the opportunities to remedy the situation that would have been available 20 years ago.

⁵⁷ See Bogert's *The Law of Trusts and Trustees*, § 949.

⁵⁸ *Id.* (The court will take judicial notice that even though all parties and witnesses are living, their memories of distant events are likely to be uncertain.)

⁵⁹ ERISA § 209(a), 29 U.S.C. § 1059(a).

⁶⁰ Although Mr. Schaitberger was almost certainly aware that Amendment 4 was about his pension, and although he presided at the March 2002 Executive Board meeting at which Amendment 4 was adopted, he testified that he has no independent memory of the suspension issue or Amendment 4 more than 18 years later.

If Mr. Schaitberger had been aware of the severance requirement 20 years ago, he or the IAFF might have taken steps that would have allowed him to collect his pension benefits or to otherwise avoid the situation now at hand. For example, had Mr. Schaitberger known about the severance requirement before he retired, he might have undertaken, before the election of August 3, 2000, to modify his conduct to ensure a severance. If he was not successful in that undertaking, or if he acted only after becoming General President, Mr. Schaitberger might have delayed the start of his pension (and thereby not incurred an overpayment), or perhaps he or GST Bollon would have brought the matter to the Executive Board to seek a compromise.

Most importantly, had GST Bollon been concerned that Mr. Schaitberger had not had a severance from employment, he could have taken a plan amendment to the Executive Board that would have allowed Mr. Schaitberger to receive in-service distributions while serving as General President.⁶¹ Specifically, the Staff Pension Plan could have been amended to provide for Mr. Schaitberger to be able to receive in-service distributions in 2000. This would have required an amendment incorporating attainment of age 53 with 10 Years of Service into the definition of Normal Retirement Age (“NRA”) (in essence, this would be incorporating the definition of Early Retirement Age into the definition of Normal Retirement Age).⁶² Paired with Amendment 4,⁶³ and given that the 1996 Plan allowed in-service distributions at Normal Retirement Age,⁶⁴ such an amendment would have been legally permissible at the time, and it would have permitted Mr. Schaitberger to collect pension benefits while serving as General President.

As all indications are that GST Bollon and the Executive Board supported the ability of Mr. Schaitberger to be able to collect pension benefits while serving as General President, and that they adopted Amendment 4 believing that it would allow him to receive his pension benefits, the Claims Committee thinks it likely that, had GST Bollon and the Executive Board been concerned about the severance requirement, they would have amended the Plan to allow Mr. Schaitberger to receive in-service distributions (i.e., to collect his pension benefits) while serving as General President.

Finally, were no other remedy considered, it is likely, based on the action taken by the Executive Board in 2002, and GST Bollon’s continued presence as the GST, that had the severance requirement been known, and had Mr. Schaitberger not commenced his benefits in 2000, the Executive Board would likely have amended the Plan in 2007, consistent with a change to the Internal Revenue Code,⁶⁵ to allow Mr. Schaitberger to receive his pension benefits at age 62 without having incurred a severance of employment.

⁶¹ In our interview of the Plan’s former attorney, she indicated that they felt they had broad authority with respect to handling the affairs of the Plans, as long as it was legal.

⁶² As Mr. Schaitberger argues in his appeal, in 2000 pension plans were permitted to set their Normal Retirement Ages at an early age, and, as explained above, the 1996 Plan already allowed in-service distributions at Normal Retirement Age.

⁶³ An alternative to Amendment 4 would have been to amend the Plan’s Suspension provisions so that only employment in service covered under the Staff Plan caused a Suspension of Benefits.

⁶⁴ See 1996 Staff Plan, Sections 5.10; 1.40.

⁶⁵ The Pension Protection Act of 2006 added Section 401(a)(36) to the Internal Revenue Code.

In sum, had the severance issue been raised earlier by the IAFF, a number of options would have been available to avoid or greatly minimize the situation now at hand. None of these were available, however.

Instead, the severance issue lay seemingly unaddressed (or, if it was addressed, GST Bollon concluded that Mr. Schaitberger satisfied the “retirement” requirement of the 1996 Plan) and was not raised until more than 19 years after Mr. Schaitberger started collecting his benefit. Due to the extended delay in raising the issue, Mr. Schaitberger was unable to do any of these things, or take any other actions with respect to his pension, and was, instead, told that he had been overpaid until at least December 31, 2015.

CONCLUSION

Mr. Schaitberger was not involved in the decision to approve or commence payment of his pension benefits from the Staff Pension Plan in 2000, and no questions or concerns regarding severance of employment or eligibility to retire under the Plan were raised to Mr. Schaitberger at the time his benefits commenced in 2000 or in the subsequent 19 years.

Mr. Schaitberger had no role in the administration of the Staff Pension Plan and was not at fault for any mistake in connection with his retirement. The IAFF’s failure to identify the severance issue for nearly 20 years has foreclosed Mr. Schaitberger from taking action that could have remedied the situation and avoided altogether, or greatly diminished, the more than 15 years of overpayments that Mr. Schaitberger is now alleged to have received.

In 2002, the Executive Board amended the Staff Plan’s suspension of benefits provisions with the clear intent of permitting Mr. Schaitberger to receive pension benefits from the Staff Plan while serving as General President. While there is no evidence before the Claims Committee that the Executive Board was aware of any issue with respect to Mr. Schaitberger’s eligibility to commence pension benefits due to not having had a severance of employment, the adoption of the amendment to the Staff Plan’s suspension provisions clearly affirmed the Executive Board’s intent for Mr. Schaitberger to receive his pension benefits, and for the Pension Plan and the IAFF to bear the cost of those benefits.

In light of the Executive Board’s action in 2002, and the fact that other options available to the Staff Plan, to the IAFF, and to Mr. Schaitberger could have avoided or minimized the overpayment now alleged, all indications are that had there been any concern about the severance requirement in 2000-2002, GST Bollon and the Executive Board would have acted to allow Mr. Schaitberger to avoid or minimize the overpayment now at hand, possibly by amending the Plan to allow Mr. Schaitberger to receive in-service distributions while serving as General President.

Given the nearly 20-year delay in the surfacing of this issue, and the substantial prejudice to Mr. Schaitberger resulting from the delay, in the circumstances where many years of alleged overpayments could have been avoided altogether, or could have been greatly minimized, had

the severance issue been raised earlier, and where the failure to raise the issue was not the fault or responsibility of Mr. Schaitberger, the Claims Committee concludes that it would be inequitable, and inconsistent with the principles and purposes of ERISA, to hold Mr. Schaitberger financially responsible for the alleged overpayment that resulted from an error in plan administration.

The Claims Committee believes that the interests of the plan participants can be protected by the terms of a correction that can be negotiated by the IAFF with the IRS, if appropriate, and that forgoing recovery of the alleged overpayment from Mr. Schaitberger in the circumstances of this case is consistent with the obligations of the Plan's fiduciaries under ERISA.

For the above reasons, the Claims Committee reverses the decision of the Executive Board and determines that any overpayment resulting from the commencement of pension benefits to Mr. Schaitberger in 2000, cannot be recovered from him.

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