IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

RICHARD TOBIAS	:	
	:	CIVIL ACTION
	:	
v.	:	NO. 03-5861
	:	
PPL ELECTRIC UTILITIES CORPORATION, et. al.	:	

MEMORANDUM AND ORDER

Juan R. Sánchez, J. **April 15, 2005**

After a bench trial on Richard Tobias's claim that PPL Electric Utilities Corporation violated his rights under the Employee Retirement Income Security Act (ERISA), 29 U.S.C. §§ 1001-1461, this Court finds for the defendant, PPL Electric, for the following reasons.

PPL Electric's parent corporation decided to cut costs by reducing employment under a plan called the Operational Improvement Assessment (OIA), which charged each business line with identifying positions which to be eliminated. Separated employees at retirement age were to receive increased benefits. Tobias, a right-of-way agent, believes he should have been offered the enhanced early retirement. PPL Electric says it only intended to canvass right-of-way agents in the East region, not the West where Tobias worked. Tobias's expectation of benefitting from the plan was fueled by an e-mail sent to him in error. PPL Electric corrected its error and removed Tobias's name from the list of affected employees. Tobias's name re-appeared on the list of affected employees but the error was corrected before Tobias received the prepared materials. Tobias was not offered the enhanced benefits; his appeal was denied, and he filed this suit.

FINDINGS OF FACT

Richard Tobias had worked at PPL Electric for 42 years when he retired on April 1, 2003 at the age of 60. (N.T., 2/9/05, p. 15). Tobias started as a laborer and was promoted to right-of-way representative in 1984. (N.T., 2/9/05, p. 17). When PPL Electric promoted Tobias to right-of-way representative, the company paid his moving expenses from Lititz to Schuylkill County. (N.T., 2/9/05, p. 17). In 1987, Tobias's job title was changed to division right-of-way agent.

The work of right-of-way agents is the same in all of the company's regions and takes them into each other's regions. Right-of-way agents at PPL Electric secured rights of way, negotiated payments for any damages caused and patrolled easements acquired for future rights of way. (N.T., 2/9/05, p. 29). In 1997, a PPL Electric document describes fifteen right-of-way agents and their five managers as a team to reduce the right-of-way backlog without differentiating between East and West employees. (N.T., 2/9/05, pp. 31-2; Exhibit 30). An organization chart prepared in August, 2001, lists nine right-of-way agents-West reporting to L.R. Fairhurst, system agent in Field Services Support – West. (Exhibit 45; N.T., 2/9/05, p. 55). Tobias's work history identifies him as an employee of Field Services West from 2001 to 2003 and his performance evaluation, received in February 2002, lists him as an employee of "Field Services - West." (Exhibits 14 and 16, production number page 13).

Tobias argues the designation of right-of-way agents by geographic region is arbitrary and essentially meaningless. During the 20 years Tobias was a right-of-way agent PPL Electric changed the designations of geographic divisions and regions six times. (Exhibit 24). During a major reduction in force in 1995, Tobias became an area right-of-way agent and was transferred to the Cocalico Service Center. (N.T., 2/9/05, p. 18). The transfer from the Schuylkill service area to the

Cocalico service area had the effect of moving Tobias from the East area to the West. (N.T., 2/9/05, p. 21). Tobias had spent 10½ years working in the East region. (N.T., 2/9/05, p. 21).

A year later, in 1996, PPL Electric transferred Tobias again from Cocalico to Sinking Spring and renamed the division from East and West to North, Central and South. (N.T., 2/9/05, p. 26). That designation lasted until 2001 when the Lehigh, Northeast and Central service areas comprised the East and the Lancaster, Harrisburg and Susquehanna service areas aligned as the West. (N.T., 2/9/05, p. 27). Tobias was reassigned from Sinking Spring to Cocalico office, both in the West region, in 2002. (N.T., 2/9/05, pp. 27, 71). PPL Electric eliminated the designations of East and West in 2004. (N.T., 2/9/05, p. 27).

When Tobias was 59, he began to think about retirement at age 60. (N.T., 2/9/05, pp. 34-5). He talked to at least three supervisors about his plans, including L. R. Fairhurst. (N.T., 2/9/05, p. 35). In May PPL Electric told its supervisors, including Fairhurst, it anticipated a reduction in force plan, called the Operational Improvement Assessment (OIA), in mid-June. (Exhibit 2). Fairhurst told Tobias about the anticipated staff reductions. (N.T., 2/9/05, p. 35).

The OIA was released June 12, 2002. The OIA is an employee benefit program for ERISA purposes. In the OIA 2002 "[b]usiness lines determined their appropriate staffing requirements and organizational structure(s) . . . . There will be no 'open' canvass for volunteers across the Company or through a business line." (Exhibit 1, p. 2). The plan also provided "[f]or incumbents in an identified grouping of related positions as determined by the company, management may canvass employees to determine whether they have an interest in separating from employment." (Exhibit 1, p. 3). In the plan the company also "reserves the right to modify, discontinue or otherwise change any portion of this program at any time and nothing contained in this program statement should be

construed as a contract of employment." (Exhibit 1, p. 9).

PPL Corporation charged PPL Electric managers with establishing the groupings of related positions and determining the employees to be separated for their business lines. Thomas Stathos, General Manager, Field Service Operations East, assumed the manager's role for all of the Field Services, East and West, because his supervisor had assumed responsibility for implementing the OIA throughout PPL Electric. Stathos determined the groupings of employees and how many employees in each grouping in Field Services would be affected. (N.T., 2/10/05, p. 10-11). The foresters, for instance, were put into a single group and to be reduced by one. (N.T., 2/10/05, pp. 37-8). No single rule applied to creating the groupings. (N.T., 2/10/05, p. 81). For the right-of-way agents, Stathos decided to release the contract employee in the West and to reduce by one the agents in the East. (N.T., 2/10/05, p. 12). Stathos testified the company wanted to avoid the expense of relocating any employee. (N.T., 2/10/05, p. 13). Stathos submitted his implementation plan, the canvass groupings, to Cynthia Wukitsch, the company's manager of corporate staffing, who approved it. (N.T., 2/9/05, p. 144).

PPL Electric told its employees about the OIA in stages, moving from the general announcement to specific offers to employees. On June 7, 2002, PPL Electric in a statement to employees outlined the benefits employees separated under the OIA could expect, including transition pay, severance pay and increased retirement benefits. (Exhibit 3). The letter says the Program will be "effective May 1, 2002 until December 31, 2002." (Exhibit 3). On June 12, 2002, Tobias added a note to the bottom of the letter, stating "[p]er Mike McGinley - Effected people will know before the General Anouncement of Wed.[sic]" (Exhibit 3; N.T., 2/9/05, p. 37). Tobias was not so notified and was not canvassed. (N.T., 2/9/05, p. 65).

On June 19, 2002, PPL Electric supplemented the first letter and posted on the company's internal web site a description of the procedure planned to determine which employees would be separated. (Exhibit 4). Also on June 19, Stathos talked to the right-of-way agents in the East about the OIA to begin the canvassing process. (N.T., 2/10/05, p. 15-16). Tobias was not included. (N.T., 2/10/05, pp. 16-18.) The attending right-of-way agents signed an attendance sheet and received individualized packets of the benefits available to each of them. (Exhibit 44). Tobias was not invited to that meeting and did not attend. (N.T., 2/10/05, pp. 16-18). However, an individualized packet of benefits was prepared for him, but not delivered. (Exhibit 25).

Tobias did receive an e-mail two days later, with the subject "[a]dditional Information for Canvassed Employees Age 55 and Over," containing an estimate of the benefits employees in two different salary ranges could expect if separated under the OIA. (Exhibit 13; N.T., 2/9/05, p. 39). Susan [Paule] McLaughlin, an employee benefits consultant in 2002, testified she addressed the e-mail to a list of people on a spread sheet used by Roselle Shamory in Human Relations. (N.T., 2/9/05, pp. 110-11). Tobias's name appeared on an "Individual Grouping Information," which identified him as a "Potentially Affected Employee[]." (Exhibit 26, as amended).

Tobias's name appeared on the lists of affected employees through clerical error. After Stathos made his determination of affected employees, he gave the list to Janis Thomas, Human Resources Manager for PPL Electric, who in turn prepared tracking sheets for all of the employees. Thomas testified she prepared the tracking sheets which included the generic description of the proposed reduction of a right-of-way agent, level 19. (N.T., 2/10/05, p. 59). Thomas testified Tobias's name appeared on the list of potentially affected employees through error. (N.T., 2/10/05, p. 61). Thomas said she prepared the list by "click[ing] and dragg[ing] names and cut and pasted."

(N.T., 2/10/05, p. 61). Thomas testified the notes accompanying the mistaken entry of Tobias's name reflect a canvass of "Incumbents East Only" and "Work redistributed to gain efficiencies in East." (Exhibit 17; N.T., 2/10/05, p. 62)..

Thomas said Stathos called her to say there was a mistake, a West employee had "inadvertently gotten picked up and put into the document." (N.T., 2/10/05, p. 62). Thomas said Stathos told her it was Tobias. (N.T., 2/10/05, p. 62). The tracking sheet was corrected at Revision 7. (Exhibit 19). By Revision 9, on June 4, 2002, Tobias's name re-appears. (Exhibit 20; N.T., 2/10/05, p. 64). Thomas testified the re-appearance of Tobias's name was a mistake on her part. (N.T., 2/10/05, pp. 64-5). Thomas said she pulled up the wrong version of the document file. (N.T., 2/10/05, p. 65). Tobias's name carried over to revisions 10 and 11, the final document. (Exhibits 21 and 22; N.T., 2/10/05, p. 65-6). Thomas supplied the information from her tracking sheets to Rosell Shamory, a supervisor in the company's Human Relations Department, for the preparation of information packets, where the error was repeated. (N.T., 2/10/05, pp. 67, 68). McLaughlin testified she prepared the individualized packet for Tobias from the list Shamory supplied. (N.T., 2/9/05, p. 113). All the documents in the packets were generated electronically, merging the spreadsheet names with the prepared form letters. (N.T., 2/9/05, p. 117).

On the day PPL Electric announced the OIA, Tobias's supervisor Fairhurst, told him he was not included. Fairhurst said the company had released a contract employee in the West and the canvass of the right-of-way agents in the East resulted in the separation of a person "with a little less seniority." (N.T., 2/9/05, p. 40). Tobias said he was "devastated . . . I could hardly talk . . . . I was stunned. I got sick. I had to go to the doctors. I just felt terrible." (N.T., 2/9/05, p. 40). Tobias expressed his dismay in an e-mail to Ronald Schwarz, copied to six other managers, and then

appealed his omission from the canvass group on June 24, 2002. (Exhibits 10 and 11).

On the day Tobias appealed Shamory prepared a Revised Individual Grouping Information, which did not include Tobias's name. (Exhibit 26; N.T., 2/9/05, p. 95). Tobias suggests the final revision of the Individual Grouping Information was created after he filed his appeal. Shamory said she did not know then that Tobias had filed an appeal. (N.T., 2/9/05, p. 106).

On July 11, 2002, Tobias's appeal was denied because "[m]anagement decided not to canvass all Right of Way Agents in order to avoid the risk of having to unnecessarily relocate employees to meet staffing requirements." (Exhibit 12). Tobias's was one of fifteen appeals filed, all of which were denied. (N.T., 2/9/05, p. 137). Tobias was not the only employee who wanted to retire but was not canvassed; his supervisor Fairhurst was in the same position. (N.T., 2/9/05, p. 68). Another employee, Frank Michael, a location field coordinator, received enhanced benefits under the OIA as late as October 1, 2003. When Tobias retired in April, 2003, he was replaced. (N.T., 2/10/05, p. 20).

Tobias filed suit in this Court, alleging violations of the Age Discrimination in Employment Act (ADEA), 29 U.S.C. §§ 621-34; ERISA, 29 U.S.C. §§ 1001-1461, and the Pennsylvania Human Relations Act (PHRA), 42 Pa.C.S. § 951 *et seq.* On PPL Electric's Motion for Summary Judgment, the ADEA and PHRA claims were dismissed and the parties proceeded to a bench trial on the remaining ERISA claim. This Court has previously held Tobias exhausted his administrative remedies and the OIA is an employee benefits plan subject to ERISA.

CONCLUSIONS OF LAW

This Court has jurisdiction under 29 U.S.C. §§ 1132(e)- (f). The OIA is a plan for the purposes of ERISA. 29 U.S.C. § 1003(a)(1). If "the benefit plan gives the administrator or fiduciary

authority to determine eligibility for benefits or to construe the terms of the plan," an "arbitrary and capricious" standard applies. *Firestone Tire & Rubber Co. v. Bruch,* 489 U.S. 101, 115, 109 S.Ct. 948, 103 L.Ed.2d 80 (1989). Under the arbitrary and capricious standard, a court may overturn the decision of a plan administrator "only if it is without reason, unsupported by substantial evidence or erroneous as a matter of law." *Abnathya v. Hoffmann-LaRoche, Inc.,* 2 F.3d 40, 45 (3d Cir.1993) (citation omitted). "This scope of review is narrow, and the court is not free to substitute its own judgment for that of the [administrator] in determining eligibility for plan benefits." *Mitchell v. Eastman Kodak Co.*, 113 F.3d 433, 439 (3d Cir. 1997).

A fiduciary has a duty to act for the exclusive benefit of trust beneficiaries. ERISA § 404(a)(1)(A), 29 U.S.C. § 1104(a)(1)(A). The fact that a fiduciary's action incidentally benefits an employer does not necessarily mean the fiduciary has breached his duty. *Trenton v. Scott Paper Co.*, 832 F.2d 806, 809 (3d Cir. 1987). As an employer, a company may design a plan which reserves the right to determine that the early retirement of certain employees was not in its best interest. *Berger v. Edgewater Steel Co.,* 911 F.2d 911, 918-19 (3d Cir.1990). However, when the employer is *administering* the plan and paying out benefits, it acts as a fiduciary and must act in the interest of the plan's participants. ERISA § 404, 29 U.S.C. § 1104 (establishing fiduciary standards under ERISA); *Noorily v. Thomas & Betts Corp.,* 188 F.3d 153, 158 (3d Cir. 1999). An employer can create a plan that furthers its business interests, and it can act according to these interests in amending or terminating the plan. *Noorily,* 188 F.3d at 158.

To the degree that the plan gives an employer discretion, the employer is not a fiduciary when it makes determinations according to the plan's terms that affect employees' eligibility for benefits. *Berger,* 911 F.2d at 918. There is nothing wrong under ERISA with a system that gives plan

administrators discretion. Subject to a few explicit rules in the statute, an employer may design a pension or welfare plan with features of its choosing, provided it is willing to pay the cost. *McNab v. General Motors Corp*., 162 F.3d 959, 961 (7th Cir. 1998). ERISA allows an the employer to provide its employees with benefits on a case by case basis, "as long as that limitation is explicitly stated as part of the plan." *Hamilton v. Air Jamaica, Ltd.,* 945 F.2d 74, 77-78 (3rd Cir.1991), *cert. denied,* 503 U.S. 938 (1992).

A higher standard is required when reviewing benefits denials by companies paying ERISA benefits out of their own funds. *Pinto v. Reliance Standard Life Ins. Co.*, 214 F.3d 377, 390 (3d Cir. 2000) (reviewing a denial of long term disability benefits). If a benefit plan gives discretion to an administrator or fiduciary who is "operating under a conflict of interest, that conflict must be weighed as a factor in determining whether there is an abuse of discretion." *Bruch,* 489 U.S. at 115, 109 S.Ct. 948 (citation omitted).

The Third Circuit expects "district courts to consider the nature and degree of apparent conflicts with a view to shaping their arbitrary and capricious review of the benefits determinations of discretionary decisionmakers." *Pinto,* 214 F.3d at 393. The Court established a "sliding scale method, intensifying the degree of scrutiny to match the degree of the conflict," so that the arbitrary and capricious standard is "more penetrating the greater is the suspicion of partiality, less penetrating the smaller that suspicion is." *Id.* at 379, 392-3 (citation omitted).

The first step is to determine if there is an apparent conflict of interest which would necessitate a heightened standard of review. In *Smathers,* the Third Circuit extended the holding of *Pinto,* which involved an insurance company that both funded and administered a benefits plan, to employers who fund and administer their own benefits plans. *Smathers v. Multi-Tool, Inc./Multi-*

Plastics, Inc. Employee Health and Welfare Plan, 298 F.3d 191, 196-97 (3d Cir. 2002) (holding an unexplained denial may be arbitrary and capricious under heightened standard). Although the court recognized "the risk of a conflict of interest is decreased where the administrator and funder of the plan is the employer," it emphasized the possibility that a conflict of interest could still exist in a situation where the employer is both the administrator and funder.*Id.* at 197. The court went on to find a conflict in the case "because the employer [was] directly funding a portion of the plan and [was] benefitted by denying the claims." *Id.* at 199.

Courts applying the heightened arbitrary and capricious standard thus far have been on the "mild end" when they find "no evidence of conflict other than the inherent structural conflict," *Lasser v. Reliance Standard Life Ins. Co.*, 344 F.3d 381, 385 (3d Cir.2003), and have been on the "far end of the arbitrary and capricious range" when they find numerous "procedural anomalies." *Pinto*, 214 F.3d at 394.

Where voluntary benefits are denied on the ground that an employee is necessary to the company's business, and the evidence supports this assertion, the denial "cannot be deemed arbitrary or capricious." *Murphy v. International Business Machines Corp.*, 23 F.3d 719, 721 (2nd Cir. 1994).

The award of benefits under an early retirement plan is determined by the plan's design. The degree of flexibility in administering the plan is determined by the plan's language. The plan in *Air Jamaica*, for instance, reserved the right to determine benefits on a case-by-case basis. *Hamilton v. Air Jamaica, Ltd.*, 945 F.2d 74, 77 (3d Cir. 1991). The *Air Jamaica* plan provided:

> Although it is our present intention to continue these pay practices, employment policies and benefits, we reserve the right, whether in an individual case or more generally, to alter, reduce or eliminate any pay practice, policy or benefit, in whole or in part, without notice. Moreover, personnel actions taken or decisions made will not necessarily be reversed or modified if these policies or procedures are not

followed.

Id. at 76. The Third Circuit held "nothing in ERISA prevents Air Jamaica from providing its employees with benefits on a case by case basis – as long as that limitation is explicitly stated as part of the plan." *Id.* at 78.

Similarly, the Third Circuit held nothing in ERISA prevents an employer from limiting early retirement benefits to plants which it determined were overstaffed. *Trenton v. Scott Paper Co.,* 832 F.2d 806, 810 (3d Cir. 1987). The Third Circuit also approved a plan which reserved the right to grant early retirement benefits "so long as the company deems such retirement to be in its interest." *Hlinka v. Bethlehem Steel Corp.*, 863 F.2d 279, 283 (3d Cir. 1988). The Bethlehem Steel plan provided:

> who considers that it would be in his Employing Company's interest to retire, and his Employing Company considers that such retirement would likewise be in its interest and approves an application for retirement under mutually satisfactory conditions, shall be eligible to retire . . . , and shall upon his retirement . . . be eligible for a pension . . . .

Id. at 280. The court held "[t]he broad grant of discretion provided by . . . [the] plan is not prohibited by ERISA." *Id.* at 283. The Third Circuit also affirmed the individualized application of a plan which provided an employee "who considers that it would be in his interest to retire, and the Company considers that such retirement would likewise be in its interest and it approves an application for retirement under mutually satisfactory conditions." *Berger v. Edgewater Steel Co.*, 911 F.2d 911, 914 (3d Cir. 1990). In *Berger,* the Court held "only the employer determines whether an employee's retirement is in the company's best interest. Neither the plan administrator nor the pension board have the authority to override the company's business decision." *Id.* at 918.

While ERISA permits discretionary plans, it does not permit discretionary administration of

the plan. Once a plan is established, the administrator is obliged to administer the plan "solely in the interest of the participants and beneficiaries and . . . for the exclusive purpose of . . . providing benefits to participants and their beneficiaries." 29 U.S.C. § 1104.

The OIA benefits were paid out of PPL corporate funds. The inherent conflict of interest arises when a company has a financial motive to deny an increased benefit. Thus, we must consider PPL Electric's decision not to canvass Tobias under a heightened arbitrary and capricious standard. *Pinto*, 214 F.3d at 393. To determine where on the scale our scrutiny should rest, we look for other signs of irregularity. *Lasser*, 344 F.3d at 385.

Tobias argues irregularities are demonstrated in several instances: the inclusion and exclusion of his name in those to be canvassed, the decision to canvass several groupings, such as the foresters, across geographic boundaries, and the belated decision to grant Michael enhanced benefits on his retirement in 2003. Because PPL Electric both funds and administers the plan, Tobias argues, the decision not to canvass him fails a heightened scrutiny.

Tobias's argument is countered by the facts. Once PPL Electric decided it had one right-of-way agent too many, the company had no financial incentive to deny Tobias enhanced benefits. Another right-of-way agent accepted the early retirement and PPL Electric replaced Tobias when he retired. PPL Electric neither saved the cost of the enhanced benefits nor the cost of a right-of-way agent. Tobias educed no evidence of any manager's or the company's personal animosity to explain the denial of benefits. We find PPL Electric's conflict of interest as both administrator and funder of the plan virtually non-existent because the concept of conflict is premised on fear a plan administrator might try to save money at the expense of the beneficiaries. Therefore, we consider the decision not to include Tobias on a slightly heightened arbitrary and capricious standard.

As an employer, PPL Electric had discretion to design its plan for reduction in force based on its best business decision. This Court, even were we to disagree, may not second guess a company's business judgment. ERISA is not offended when a plan reserves to the company the discretion to pick and choose among its employees those to whom it offers benefits. The OIA retained in PPL Electric the discretion to create groupings of related employees in any way it chose and then to decide what its staffing needs were in each grouping. If those two steps resulted in a perceived over-staffing, the company then retained the discretion in the plan to either canvass employees within any grouping for volunteers for separation or to interview employees to select those to be separated. Only if more employees volunteered after a canvass would seniority become a factor in the decision of who would benefit.

PPL Electric divided the right-of-way agents into two geographic regions for their work assignments and for the OIA. The company decided to reduce each region by one right-of-way agent. In the West, Tobias's region, the reduction in force was accomplished by releasing a contract worker; in the East by canvassing the right-of-way agents. PPL Electric's grouping of right-of-way agents into East and West survives scrutiny under a slightly heightened arbitrary and capricious standard since the agents worked in East and West regions, they were sufficient in number to support two groups, and the company wanted to avoid paying moving expenses.

The only remaining question is whether PPL Electric, by its actions, promised Tobias enhanced benefits. For some length of time, Tobias's name appeared on the company's internal documents in the Human Resources department as an employee to be canvassed. The evidence clarified this was an error Thomas and Stathos corrected as soon as they saw it. Tobias received only one e-mail based on this error. Tobias's name was picked up in error a second time, but he did not

receive any documents generated after that error. On the day the OIA was announced, Tobias's supervisor told him he would not be included. A general e-mail sent in error can not be binding on PPL Electric.

Accordingly, judgment will be entered in favor of Defendants PPL Electric Utilities Corporation, PPL Corporation, and Employee Benefit Plan Board of PPL Corporation and PPL Retirement Plan.