



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

August 20, 2004

Re: Case 192187, Duro-Test Corporation
Pension Plan (the "Plan")

Dear

The Appeals Board has reviewed your appeal of PBGC's March 31, 2004 determination that you are not entitled to a benefit under the Plan. As explained below, the Board changed PBGC's determination by finding that you are entitled to a deferred vested benefit.

A Review of Correspondence Prior to PBGC's Formal Determination

In an April 9, 2001 letter, you requested information from the PBGC about your benefit entitlement, stating that you worked for the Duro-Test Corporation ("Duro-Test") from August 1993 until it closed in February 2000. In a June 26, 2001 letter, PBGC informed you that it had no information indicating you were a participant in the Plan.

On July 3, 2001, you completed and signed a "Plan Participation Information" form. You stated that you were a Sales Representative in the Puerto Rico Division of Duro-Test from August 2, 1993 to February 16, 2000. You also authorized the PBGC to obtain your earnings for the years 1993 through 2000, as reported to the Social Security Administration ("SSA"). Examination of that data shows that your earnings for 1993 through 1999 were reported to the SSA by the Duro-Test International Corporation ("Duro-Test International").

In a February 14, 2002 letter, PBGC informed you that you were entitled to an estimated monthly benefit of \$123.71 commencing at age 65. PBGC's estimate appears to have been based on your SSA earnings and on the information that you supplied on PBGC's Plan Participation Information form. PBGC, however, noted its estimate was subject to change if PBGC's audit of the Plan produced different results.

PBGC's Benefit Determination and Your Appeal

PBGC's March 31, 2004 benefit determination letter stated: "We have finished our review of the plan and your records, and we have determined that you are not entitled to a PBGC benefit. We do not have documentation indicating you were a participant in this Plan."

In your April 19, 2004 appeal, you stated that your General Manager, Mr. Raul Torrens, gave you a copy of a Duro-Test document (which you enclosed) entitled "Group Benefit Program for Puerto Rico Employees." This document provides brief summaries of a number of group benefit programs, including the following:

Pension: You are automatically enrolled on the pension plan after one year of service and at least 21 years of age. Vesting is after five years of continuous service.

In your appeal, you also stated that you were one of the Company's "Top Producers" in sales from 1993 through 2000.

Coverage of Employees of the Duro-Test International Corporation

After completing its final Plan audits and its actuarial valuation, PBGC concluded that employees who resided in Puerto Rico were employed by Duro-Test International (rather than Duro-Test) and that Duro-Test International employees were not covered under the Plan. In support of this position, PBGC stated that the Puerto Rico employees were never included in the Plan sponsor's annual census or the Plan's actuarial valuation.

Under Sections 1 and 2 of the Plan, participants (referred to in the Plan as Members) were those ". . . employed by the Company in a sales, supervisory, professional or salaried capacity." Section 1.3 defined "Company" as the Duro-Test Corporation and ". . . any of its subsidiaries or affiliated companies which adopts this Plan with the approval of the Corporation as provided in Section 10." Section 10 provided for adoption of the Plan by a subsidiary or affiliate, and it also provided that the Duro-Test Corporation could extend the Plan to any division, plant or location.

The Plan's 1976 Summary Plan Description ("SPD") states:

The Pension Plan summarized in this booklet covers the eligible employees of: Duro-Test Corporation, Tungsten Products Corporation, Jewel Electric Products, Inc., Duro-Test International Corporation, Arc Ray Electric

Corporation, Luxor Lighting Products, Inc., Duro-Lite Lamps, Inc. (Underlining added.)

In addition, the Plan's 1980 SPD states:

The Benefit Program outlined in this booklet is available to eligible employees of Duro-Test and each of its related firms. So, when we use the word "Company", we mean: Duro-Test Corporation, Tungsten Products Corporation, Arc-Ray Electric Corporation, Luxor Lighting Products, Inc., Duro-Test International Corporation, Duro-Lite Lamps, Inc. (Underlining added.)

The Board also noted that the material you submitted with your appeal states that Duro-Test would provide group benefits (including eligibility for a pension benefit) to its Puerto Rico employees.

The Board reviewed the Plan's records and found two former sales representatives who worked in Puerto Rico for Duro-Test International and who were treated as Plan participants by Plan officials prior to PBGC's trusteeship of the Plan (January 31, 2001). We note that one of these two employees was included in the Plan's 1997 and 1999 actuarial valuations. Thus, the Board's study of Plan practice does not support the conclusion that Duro-Test International employees were **never** included in the Plan's records or the Plan's actuarial valuations.

The Board found that the Plan covered eligible employees of the Duro-Test International Corporation, because (1) the Plan's Summary Plan Descriptions explicitly stated that the Plan covered eligible employees of the Duro-Test International Corporation, (2) the material on group benefits that you enclosed with your appeal provided further support for that conclusion, and (3) our review of Plan practice does not contradict that conclusion.

Independent Contractors vs. Employees

In an internal communication supporting its formal determination, PBGC stated that it was quite possible that the sales representatives working in Puerto Rico for Duro-Test International were independent contractors, rather than employees.

PBGC's Participant Data Audit ("PDA") discusses membership in the Plan, as quoted below:

"It may be necessary in the future to verify a person who maintains that he was covered under the plan is not a

independent salesman. These persons were utilized by Duro-Test in an effort to save expenses and were not eligible to be covered under any of the fringe benefits such as health insurance and retirement plans. . . . The Independent Sales Representative program was ended December 31, 1998."

As noted, the Board has identified two sales representatives who worked in Puerto Rico for Duro-Test International and who were treated by former Plan officials as participants in the Plan. From this, we conclude that the sales representatives who worked in Puerto Rico for Duro-Test International were not necessarily independent contractors, rather than employees.

In addition, we note that Duro-Test International reported your earnings to the SSA and that this is more characteristic of an employer-employee relationship than of an employer-contractor relationship. Similarly, the "Group Benefit Programs for Puerto Rico Employees" that you submitted with your appeal describes a number of fringe benefits that are inconsistent with the description of the Independent Sales Representative program found in PBGC's PDA.

In summary, based on the preponderance of evidence, the Board found that you were an employee of Duro-Test International rather than an independent contractor.

Your Entitlement to a Deferred Vested Pension


Section 7 of the Plan provided that a participant became entitled to a deferred vested benefit after completing five years of Service. On PBGC's "Plan Participation Form", you stated that you were a Sales Representative in the Puerto Rico Division of Duro-Test from August 2, 1993 to February 16, 2000. Your SSA earning report shows that you worked for Duro-Test International from 1993 through 1999. Thus, the Board found that you completed the required five years of service for entitlement to a deferred vested benefit.

Decision

The Board found that you are entitled to a deferred vested benefit under the Plan. PBGC will send you a new benefit determination implementing this decision.

The new determination will be subject to appeal with regard to matters not covered by this decision. If you have any questions about your benefit, please contact PBGC's Authorized Representative at 1-800-400-7242.

Sincerely,

Handwritten signature of William D. Ellis in cursive script.

William D. Ellis
Acting Chair, Appeals Board