

Pension Benefit Guaranty Corporation

76-76

June 8, 1976

REFERENCE:

[*1] 4041 Termination by Plan Administrator

4003(e)(1) Investigatory Authority; Cooperation with other Agencies; Civil Actions Maintainable by PBGC

4048 Date of Termination

OPINION:

Thank you for your letter of May 18, 1976. You asked three questions concerning * * * (the "Plan"), to which I will respond serially: 1) the position of the Pension Benefit Guaranty Corporation (the "PBGC") with respect to the requirements of trustees under the Employee Retirement Income Security Act (the "Act") in terminating a pension plan; 2) the PBGC's position if a notice of termination is not approved by the trustees of a pension plan; and 3) an explanation of whether a notice of termination at this time would help employees receiving benefits and employees with long periods of creditable service, but who are not vested.

Our answers are as follows:

1) A fiduciary n1 to a plan is obligated by § 404(a)(1) of the Act, 29 U.S.C.A. § 1004(a)(1) (1975), to discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and --

(A) for the exclusive purpose of:

(i) providing benefits to participants and their beneficiaries; and

(ii) defraying reasonable expenses of administering [*2] the plan. . . .

n1 Defined by § 3(14)(A), 29 U.S.C.A. § 1003(14)(A) (1975), to include an administrator, who by § (16)(A)(i) is the "person" designated by the plan document, such as the Trustees under Art. V, § 1 of your Plan.

Subsection (D) provides that these duties must be fulfilled "in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of this title."

Section 4041(a) of the Act, 29 U.S.C.A. § 1341(a), mandates that a plan administrator (the Trustees under Art. V, § 1 of your Plan) "shall file" a notice of termination with the PBGC before the effective date of termination. The PBGC's position is, as the Act states, that filing a notice of termination is a mandatory requirement. In addition to the PBGC's authority to sue for involuntary plan termination, the PBGC may at the same time sue to redress violations of Title IV, § 4003(e)(1), 29 U.S.C.A. § 1303(e)(1), which would include a failure to terminate as required by the Act.

2) Article VII, S 2 of the Plan appears to charge the Trustees with responsibility for terminating the Plan. By Art. XI § § 4-6 of the Agreement and Declaration [*3] of Pension Trust of * * * (the "Trust Agreement"), specific procedures governing actions taken by Plan Trustees are set forth. n2 If the Trust Agreement so provides, unanimity is not required.

n2 Art. V, § 1 of the Plan incorporates by reference the provisions of the Trust Agreement with respect to administration of the Plan.

3) The most critical question, as addressed in your several phone conversations with Case Officer * * * and in our May 17, 1976 conversation, is how the Trustee's filing a notice of termination will affect your fiduciary responsibilities to both the vested and non-vested employees.

We must refer you to the Department of Labor to answer any questions you might have whether the Trustees' submitting an appropriate notice of termination under § 4041 will subject you to liability for breach of fiduciary duties for following the mandatory requirements of the Act. Filing a notice of termination cannot, and will not, however, cut

off any participants otherwise qualified for receiving PBGC guarantees.

The PBGC will make a determination based on the facts and circumstances of the case as to when the Plan terminated. The criteria for this determination include [*4] date (or dates) the employees ceased work, the date benefit accruals ceased, and the date employer contributions ceased, as well as the date proposed by the Trustees. Furthermore, the Trustees' delay in filing a notice and thereby causing the PBGC to proceed under the provisions for involuntary termination, § 4042, 29 U.S.C.A. § 1342 will not ultimately change the date the PBGC assigns to the termination. Section 4048(2), 29 U.S.C.A. § 1348(2). Section 4048(3) also provides that, when the PBGC or Plan Administrator (the Trustees) cannot agree on a date of termination, a court may fix the date. While we cannot prejudge what date a court would assign, the PBGC will take the position that the date of termination in this case is not deferrable in order to wait for more employees to vest. Therefore, the PBGC will contend in any court proceeding that the Trustees' actions in deferring filing a notice of termination or in awaiting the PBGC to terminate involuntarily this Plan do not extend the date of plan termination to such time as additional employees can vest.

I hope that this explanation has satisfied your inquiries. You should be aware that the PBGC and the Trustees can agree [*5] to termination and appointment of a trustee under § 4042(c), 29 U.S.C.A. § 1342(c). If the Trustees want to proceed by agreement, notify me, and we can discuss the wording of an agreement for signature by the PBGC and Plan Trustees.

Christine O. Cook
Attorney
Office of the General Counsel