



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

April 24, 2007



Re: [redacted], Case 196053, [redacted]
Mosler Pension Guarantee Plan (the "PGP")

Dear [redacted]:

The Appeals Board has reviewed your May 9, 2005 appeal of PBGC's March 25, 2005 determination of [redacted] benefit from the Mosler Pension Guarantee Plan (the "PGP"). For the reasons explained below, we are granting your appeal.

Benefit Determination and Appeal

PBGC determined that [redacted] was entitled to a \$86.64 per month benefit if it were paid starting March 1, 2009, as a Straight Life Annuity. PBGC's Benefit Statement, which was enclosed with its determination, showed that the \$86.64 monthly amount equaled his \$298.67 accrued PGP benefit less a \$212.03 offset for his ESOP benefit. The Benefit Statement further explained:

"Because you participated in your plan's Employee Stock Ownership Program, your monthly benefit is offset by an amount that is actuarially equivalent to your shares in the Stock Ownership Program."

Your appeal stated that [redacted] "never received any benefit from the ESOP." You further asserted that "the use of the value of the ESOP as an offset against his pension benefit would not be consistent with applicable law."

You did not cite any particular law, regulation, or legal ruling. As explained below, we decided to grant your appeal based on our analysis of the facts and plan provisions.

Pension Plan Terms

The PGP, which is a defined-benefit pension plan, is part of a floor-offset arrangement with the ESOP. The ESOP is a separate, "individual account" pension plan that is not covered by PBGC's insurance program. Under the floor-offset arrangement, the benefit payable by the PGP is the amount that remains, if any, after the offset for the participant's ESOP benefit.

The PGP plan document in effect when [] terminated employment is the "Mosler Pension Guarantee Plan as Amended and Restated as of July 1, 1994" (the "1994 Plan"). A participant's vested accrued benefit under the PGP (if any) is defined under section 6 of the 1994 Plan, which sets forth a multi-step benefit formula.

The first step of the formula is to calculate a maximum benefit using one of two formulas, whichever produces the higher benefit. See 1994 Plan § 6(a)(1). Next, the offset element is calculated. The offset element is the sum of: (i) the participant's "ESOP Benefit,"¹ if any, and (ii) the participant's American Standard Plan (a predecessor plan) benefit, if any. See 1994 Plan § 6(a)(2). Once the offset element has been determined, the third and final step is to subtract the offset element from the maximum benefit. See 1994 Plan § 6(a).

Section 6(b)(4) of the 1994 Plan describes the "ESOP Benefit" as follows:

For purposes of this Section 6, the term ESOP Benefit shall mean the vested benefit under the ESOP. Such benefit shall be expressed as the life annuity Actuarial Equivalent payable at the Participant's Normal Retirement Date determined using 100% of the value of such Participant's nonforfeitable shares allocated to his account under the ESOP as of the valuation date preceding the earliest date as of which a distribution is available from the ESOP and including in such value any prior distributions made to the Participant. (Underlining added)

The participant's ESOP benefit rights are defined under the terms of the "Mosler Stock Ownership Plan as Amended and Restated as of July 1, 1994" ("1994 ESOP"). That document provides that a

¹ The 1994 PGP Plan document defines the ESOP on page 5, as "the Mosler employee Stock Ownership Plan, which is a stock bonus plan under Section 401(a) of the Code."

participant's "Capital Accumulation"² will be distributed following his "termination of Service," unless the participant elects to keep his funds in the ESOP. 1994 ESOP § 13(a). The ESOP's terms also provided that distribution of funds from a participant's ESOP account could be made through cash payments over a five-year period.³

The Summary Plan Description ("SPD") for the Mosler Retirement Program (which covers both the PGP and ESOP) provides as follows:

After the June 30th allocation to participants' accounts, all accounts will be "valued." The value of each share is determined by an independent appraiser. Following the appraisal, the value and the current worth of the accounts will be determined. Any gains will be added and losses will be subtracted from each person's account.

PGP's Determinations of ESOP Benefit Offset Amounts

Consistent with the ESOP's terms, the ESOP's Administrative Committee annually valued the ESOP's stock prices based on the work of an independent appraiser. This independent appraisal occurred as of each June 30th, which was the last date of the ESOP's plan year. The Administrative Committee, upon approving the independent appraiser's work, then used the appraiser's stock values (i.e., their price per share as of June 30th) for the entire 12-month period of the following plan year.

The ESOP's administrators also performed a quarterly accounting of the number of stock shares allocated to each participant's account. Thus, for example, the stock dividends that accrued on Mosler's preferred stock were credited to ESOP accounts on a quarterly basis.

The PGP's administrators, in calculating the amount of the ESOP Benefit offset to the PGP benefit, used the account balances provided by the ESOP. For participants such as [] who terminated employment before their normal retirement age (age 65), the PGP's administrators determined the ESOP Benefit offset amount based on the participant's ESOP account balance as of the quarter before the participant terminated employment.

² The term "Capital Accumulation" refers to a participant's vested, nonforfeitable interest in his or her ESOP account. ESOP § 2.

³ We note that section 409(o)(1)(C) of the Internal Revenue Code permits ESOP distributions to occur, after termination of employment, through installments payments over a five-year period.

ESOP distributions generally occurred semi-annually, at the end of December and June. Further, information available to the Appeals Board indicates that the ESOP's practice was to make the first ESOP installment payment in the same plan year that the participant terminated employment, if the participant timely elected to receive the ESOP distribution. Thus, for a participant such as [redacted] who terminated employment in November 2000, the ESOP's administrators recognized an obligation to make the first ESOP payment by the end of the plan year (i.e., by June 2001), if he elected to receive an ESOP distribution.

Information available to the Appeals Board also indicates that the ESOP was already postponing scheduled payments when [redacted] employment terminated in November 2000. For example, an October 26, 2000 Mosler letter addressed to "ESOP Participant" stated that the ESOP payment scheduled for December 2000 was being postponed to no later than June 30, 2001.⁴ The Appeals Board further found, based on PBGC records and information provided by appellants, that only a few ESOP distributions were made in December 2000, and no ESOP distributions were made after that date.

For participants who terminated employment after June 30, 2001, the PGP determined that the amount of the ESOP offset was \$0, presumably because Mosler then was on the verge of filing for bankruptcy.⁵ We further note that Mosler filed for Chapter 11 bankruptcy on August 6, 2001. The PGP, however, did not change its calculation of the ESOP offset for participants who terminated employment prior to June 30, 2001, but had never received an ESOP distribution.

⁴ This letter, which was provided by another PGP participant who appealed, stated as follows:

"Mosler Inc.'s Management has determined that Mosler needs to maintain a limited amount of working capital in order to continue its normal operations. As a result, Mosler needs to postpone the ESOP payment scheduled for December 2000.

Mosler's Employer Stock Ownership Plan requires that the scheduled payment be made during the fiscal year that expires on June 30, 2001. Mosler intends to make the payment originally scheduled for December 2000 on or before June 2001.

Mosler management appreciates your cooperation during this temporary postponement of payment."

⁵ This is reflected in the benefit statements the PGP prepared for participants who terminated employment after June 30, 2001, which show that Mosler stock was valued as \$0 after that date.

Discussion

As discussed above, the plan document governing the PGP states that the ESOP Benefit offset amount is to be determined "as of the valuation date preceding the earliest date as of which a distribution is available from the ESOP." Furthermore, for participants in [] situation, the PGP's consistent interpretation was that the ESOP Benefit offset was based on the participant's ESOP account balance as of the quarter before termination of employment. For this reason, the PGP had concluded that the ESOP Benefit offset to [] PGP benefit should be based on his ESOP account balance when he terminated employment, which was \$15,942.45.⁶

In a previous appeals decision, the Appeals Board upheld the PGP's practice for PGP participants who received at least one cash distribution from the ESOP. For such participants, the Appeals Board concluded that the PGP's consistent practice of not revaluing the ESOP Benefit offset after the first ESOP payment was made clearly was in accordance with the PGP's terms.

[] situation, however, is different because the available information supports the finding that he never received a single ESOP distribution. We further note in this regard that we have not identified a single PGP participant who terminated employment after June 30, 2000, and who received an ESOP distribution. Thus, in [] case, the relevant question is whether an ESOP distribution ever was "available" to him, within the meaning of the PGP's terms, in light of the fact that he never received an ESOP payment.

Our examination of the PGP's and the ESOP's practices indicates that the ESOP's administrators generally recognized an obligation to make the first ESOP payment in the same plan year as when the ESOP Benefit offset was determined, if the participant timely had elected to receive an ESOP distribution. Here, there is no evidence that [] sought to postpone an ESOP distribution. The available records also establish that the ESOP's administrators had recognized an obligation to make an ESOP distribution to [] by the end of the plan year in which he terminated employment (i.e., by June 30, 2001). We therefore found that [] did not receive a scheduled ESOP distribution because of Mosler's

⁶ PBGC, which accepted the PGP's practice, then converted his \$15,942.45 ESOP account balance into an ESOP Benefit offset of \$212.03, based on the PGP's terms. PBGC therefore determined [] was entitled to a net benefit of \$86.64 per month (\$298.67 - \$212.03).

failure to provide the ESOP with the necessary funds to make the payment, rather than for any other reason.


The Appeals Board concluded, based on the facts and circumstances of this case, that the earliest date as of which an ESOP distribution was available to [] did not occur on or before June 30, 2001, because the ESOP was unable to make an ESOP distribution to him on or before that date due to Mosler's financial condition. Accordingly, we decided that a \$0 ESOP Benefit offset should be used for [] which is consistent with PBGC's treatment of PGP participants who terminated employment after June 30, 2001, and who also had not received any payments from the ESOP.

Decision

Having applied the terms of the Plan and the provisions of ERISA to the facts in this case, we are granting your appeal. [] Normal Retirement Benefit under the PGP \$298.67 per month if paid as a Straight Life Annuity starting March 1, 2009. If you or [] need other information from PBGC, please call the Customer Contact Center at 1-800-400-7242. [] also should call the Customer Contact Center about four months before he is ready to start receiving benefits.

This is PBGC's final action on PBGC's March 25, 2005 determination. Thank you and [] for your patience while we carefully reviewed your appeal.

Sincerely,



Charles W. Vernon
Chair, Appeals Board

cc: []