

Pension Benefit Guaranty Corporation

83-22

September 15, 1983

REFERENCE:

[*1] 4044(b)(5) Allocation of Assets. Mandatory Contributions
4044(d)(2) Allocation of Assets. Distribution of Residual Assets Attributable to Employee Contributions

OPINION:

This is in reference to the allocation of residual assets resulting from the termination of the above-referenced pension plan ("Plan"). You state that contributions made by participants were voluntary and therefore no participant may share in excess assets pursuant to Section 4044(d)(2) of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1344(d)(2) (1976 and Supp.V 1981). You also state that since Plan Section 7.4 allows for a reversion to the Plan sponsor, * * *, Inc. * * * all excess assets should revert to * * *. We have carefully examined the Plan provisions and have determined that Section 4044(d)(2) of ERISA precludes the complete reversion of excess Plan assets to the employer.

Section 4044(d)(2) of ERISA provides that

Notwithstanding the provisions of [§ 4044(d)(1)], if any assets of the plan attributable to employee contributions remain after all liabilities of the plan to participants and their beneficiaries have been satisfied, such assets shall be equitably distributed to the employees [*2] who made such contributions (or their beneficiaries) in accordance with their rate of contributions.

The enactment history of Section 4044(d)(2) evinces a clear Congressional intent to require the return to contributing employees of excess assets attributable to employee contributions upon termination of a pension plan. Under the allocation of assets section of the House Bill, any assets which remained after satisfaction of all plan liabilities and which were attributable, under regulations of the Secretary of Labor, to accumulated investment earnings on employee contributions were to be ratably distributed to the employee contributors according to their rate of contribution. H.R.2, as passed by the House, 93d Cong., 2d Sess. § 112(d)(1) (February 28, 1974). In addition, the Senate Committee on Labor and Public Welfare commented that "The Committee believes it is unfair to permit the complete recapture by employers of surplus funds in terminated contributory plans, without regard to the fact that contributions by the workers helped to generate the surplus." S. Rep. No. 127, 93rd Cong., 1st Sess. 30 (April 18, 1973).

We must interpret Section 4044(d)(2) of ERISA in a way which [*3] will implement the Congressional intent of providing equity to employees who made contributions to pension plans. Section 2.1 of the Plan provides that all participants are eligible to receive a basic benefit without making any contributions to the Plan. However, Section 2.2 of the Plan provides a supplemental pension benefit derived from employer contributions for participants who contribute five percent of annual earnings in excess of the Social Security wage base. The supplemental benefit is clearly not derived entirely from employee contributions. We conclude that these contributions are mandatory and that the excess assets are subject to the distribution requirements of ERISA Section 4044(d)(2) and PBGC's Allocation of Asset Regulation, 29 C.F.R. Part 2618.

Section 4044(b)(5) of ERISA defines mandatory contributions as

amounts contributed to the plan by a participant which are required as a condition of employment, as a condition of participation in such plan, or as a condition of obtaining benefits under the plan attributable to employer contributions. For this purpose, the total amount of mandatory contributions of a participant is the amount of such contributions [*4] reduced (but not below zero) by the sum of the amounts paid or distributed to him under the plan before its termination. (emphasis supplied).

In this case, the contributions made to the Plan were a precondition to receiving benefits derived from employer contributions. Further support for considering employee contributions in this Plan as mandatory can be found in Treasury Regulation § 1.411(c)(4) which interprets I.R.C. Section 411(c)(2)(C). I.R.C. Section 411(c)(2)(C) contains in pertinent part the same definition for mandatory contributions as ERISA Section 4044(b)(5). The Treasury Regulation defines

mandatory contributions as inter alia "amounts contributed to the plan . . . as a condition of obtaining benefits (or additional benefits) under the plan attributable to employer contributions" (emphasis supplied).

Accordingly, the contributions are mandatory within the meaning of Section 4044(b)(5) of ERISA and the excess assets are subject to the distribution rules of Section 4044(d)(2) of ERISA and 29 C.F.R. Part 2618.

If you should desire reconsideration of this determination, you may file a request for reconsideration addressed to:

Office of the General Counsel [*5] Pension Benefit Guaranty Corporation 2020 K Street, NW, Mail Code 210
Washington, DC 20006

All of the requirements pertinent to a request for reconsideration are set forth in Subparts A and C of the PBGC's Administrative Review regulation (a copy of which is enclosed).

A purpose of the reconsideration process is the examination of information not already submitted and of issues not already raised. If you do not file a request for reconsideration it is possible that any judicial review of this determination will be limited to grounds which the PBGC has had an opportunity to consider.

You must file the request for reconsideration within 30 days after the date of this determination. An extension of time within which to file may be available; § 2606.4 of the enclosed regulation contains the provisions governing extensions of time.

I trust this responds to your inquiry. If you have any questions, please call * * * of my staff at (202) 254-4895.

Henry Rose
General Counsel