

Pension Benefit Guaranty Corporation

96-2

July 8, 1996

REFERENCE:

[*1] § 4021(b)(2)

OPINION:

We write in response to your request for reconsideration of PBGC's initial determination dated September 13, 1995, regarding coverage of the above-referenced pension plan (Plan) under Title IV of the Employee Retirement Income Security Act of 1974, as amended (ERISA). Pursuant to section 4021(b)(2) of ERISA, the initial determination held that the Plan is not a governmental plan, and is covered by Title IV.

We have considered your request for reconsideration and concluded that the Plan is a governmental plan, and is not covered by Title IV of ERISA. Accordingly, your request for reconsideration is granted.

Background

We have assumed that the following facts and representations made in your submission are accurate and complete. The Plan sponsor is the * * *

The Company was formed on or about June 25, 1956, as a non-profit corporation under the laws of the state of California, for the sole purpose of operating the * * *

California and Pacific Grove drafted the Company's articles of incorporation and by-laws. Any disputes concerning the articles and by-laws must be resolved in favor of California, and those documents may not be amended without the state's [*2] consent. The Company's board of directors is appointed by a state agency, and all of its officers must be chosen from the board. Under California law, the board is considered a state entity whose meetings must generally be open to the public, and the Company's books and records are subject to public disclosure. Also, the top officer's salary is determined by state law.

California owns the conference facility and surrounding property on which the Company conducts its operations, and uses it as a state park. The Company is licensed to operate the facility in accordance with the terms of a concession agreement with the state. n1 The state is the Company's single largest customer and exercises significant control over its operations and finances. The state determines who can use the conference facilities and prescribes the fees that the Company may charge for their use. In practice, the state sets the user fees at a level that merely covers the Company's operating costs; i.e. the Company does not make a profit. All revenue from operation of the facility must be deposited into a state-controlled trust account for the operation and maintenance of the conference facility. The state [*3] sets the level of cash the Company may have on hand, and receives any excess cash from operations. Moreover, the Company may not borrow money without state approval.

n1 According to your submission, California terminated the concession agreement effective January 31, 1995. However, the state legislature has authorized the Company to continue operating the conference facilities until a successor is chosen.

In 1975, the National Labor Relations Board ruled that the Company was a governmental entity exempt from the National Labor Relations Act. The Internal Revenue Service (IRS) has ruled that the Company is a government instrumentality for purposes of the Internal Revenue Code. Similar findings have been made as a matter of state law by a California appellate court and the state's attorney general. The Company has also generally conducted its employee relations in accordance with state laws applicable to public employees. However, the California Public Employees' Retirement System (CALPERS) has determined that the Company does not qualify as a public agency for purposes of participation in the state employees' retirement plan. Under that state law, CALPERS found that the individual [*4] directors of the Company also had to be public agencies.

The Pension Plan

The Plan is a defined benefit pension plan established and maintained by the Company for its employees. The Plan became effective July 1, 1966 and was last amended and restated effective July 1, 1987. The Company is the named Plan administrator and funds the Plan. Although the Plan document authorizes the appointment of a committee as the Plan administrator, none has ever been appointed. Rather, all decisions regarding the Plan are made by the Company's board of directors.

The Company has never made PBGC premium filings or payments. In fact, the Plan's agents have confirmed that the Plan has been administered from its inception as a governmental plan. The Plan administrator annually filed IRS Form 5500-G, Annual Report for Government and Certain Church Plans, until that reporting requirement was discontinued in 1982.

Legal Standard

Section 4021(b)(2) of ERISA excludes from Title IV coverage any plan "established and maintained for its employees by the Government of the United States, by the government of any State or political subdivision thereof, or by any agency or instrumentality of the [*5] foregoing...." There is no definitive statutory or regulatory definition of the term "governmental instrumentality." The PBGC, however, has considered a number of non-exclusive factors in determining whether a plan is or is not the plan of a governmental instrumentality. These include: (i) whether the plan or the plan sponsor is controlled by a governmental entity; (ii) whether the officers or members of the plan sponsor represent, or are selected by, a governmental entity; (iii) whether the plan or the plan sponsor is funded by a governmental entity; (iv) whether the plan's participants are treated as governmental employees; (v) whether the plan sponsor is treated under state or federal law as a governmental entity; (vi) whether there are any private interests involved; and (vii) whether a governmental entity has the powers and interests of any owner. See e.g., PBGC Opinion Letters No. 83-16 (July 12, 1983), No. 81-40 (December 9, 1981), No. 81-37 (November 16, 1981), No. 81-31 (September 22, 1981), No. 81-30 (September 22, 1981), No. 81-13 (May 13, 1981), No. 79-6 (April 10, 1979), No. 78-25 (October 31, 1978), No. 77-152 (July 13, 1977), and No. 76-95 (August 2, 1976).

The [*6] Department of Labor and the IRS have considered similar factors in interpreting section 3(32) of ERISA and section 414(d) of the Internal Revenue Code, respectively. See ERISA Opinion Letter 90-09 (April 25, 1990); ERISA Opinion Letter 89-16 (August 4, 1989); Rev. Rul. 89-49, 1989-1 C.B. 117.

Discussion

Upon reviewing your request for reconsideration and applying the relevant factors, we have determined that the Plan is excluded from Title IV coverage as a governmental plan. Your submission demonstrates that the state of California exercises significant control over the Company. For example, the articles of incorporation and by-laws of the Company were subject to state approval and the state has final veto power over any proposed changes to the Company's governance. The board of directors is appointed by a state agency, and all officers are chosen from the board. The top officer's salary is also determined by state law.

The conference facility in which the Company conducts its operations is owned by the state and was established under state law to function as a governmental facility. The state decides who may use the facility and [*7] sets user fees. All revenue must be deposited into a trust account over which the state has control. The state also controls the Company's operating budget and receives any excess cash flow from operations.

Moreover, with the exception of the CALPERS' determination, the Company has generally been treated as a governmental entity or instrumentality under both state and federal law. CALPERS' determination, however, was based on the fact that the Company's directors are not themselves public agencies. That particular fact is not determinative for purposes of coverage under Title IV of ERISA.

Conclusion

For the reasons discussed above, and on the basis of the information provided to us, we conclude that the Plan is a governmental plan within the meaning of section 4021(b)(2) of ERISA, and is not covered by Title IV of ERISA.

David Smith
Chief, Administrative Review & Technical Assistance Branch