

PCASB95B7-3DBB-4135-B



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



MAR 31 2004

Re: [redacted] Case 185923, [redacted] A.P.S.,
Inc. Employees' Retirement Plan (the "Plan")

Dear [redacted]

The Appeals Board has reviewed your appeal of PBGC's corrected benefit determination letter of February 24, 2003. For the reasons given below, the Board changed PBGC's determination and found that [redacted] benefit should be determined using an Average Monthly Compensation ("AMC") figure of \$14,453.98. The Board, however, found no basis for changing PBGC's determination that [redacted] Maximum Guaranteed Benefit ("MGB") should be offset by the amount of an annuity purchased on his behalf by the Plan in connection with a 1992 spin-off/termination transaction ("Spin-Off Benefit").

Determination and Appeal

In a determination letter dated September 27, 2002, PBGC informed your client, [redacted] that he was entitled to a monthly payment of \$439.72, payable on September 1, 2009, in the form of a Straight Life Annuity ("SLA"). By letter dated November 11, 2002, [redacted] filed an appeal in which he contended (1) that PBGC should not have considered his Spin-Off Benefit in determining his MGB and (2) that PBGC used an incorrect AMC figure in computing his Plan benefit. By letter dated February 12, 2003, you supplemented [redacted] appeal.

In a corrected determination letter dated February 24, 2003, PBGC informed [redacted] that he is entitled to a monthly payment of \$498.35, payable on September 1, 2009 in the form of a SLA. On March 24, 2003, you appealed PBGC's corrected benefit determination since it did not fully resolve the issues raised in your February 12, 2003 appeal.

Average Monthly Compensation

PBGC's September 27, 2002 benefit determination used an AMC amount of \$11,600.95. PBGC's February 24, 2003 corrected benefit determination used an AMC amount of \$13,715.04. In your appeal filings, you and [] contend that [] correct AMC amount should be \$14,453.98.

After reviewing the Plan's provisions, the Appeals Board concluded that [] correct AMC should be based on gross wages amounts on the W-2 statements that [] submitted even though [] gross wage figures during 1990 and 1992 included contributions to his 401(k) plan which were excluded from his W-2 income. The Board found that the Plan intended those contributions to be included in his Compensation. Therefore, the Board accepted your contention that [] AMC should be \$14,453.98.

Reduction of PBGC's MGB by the Spin-Off Benefit

The original Plan document was effective and adopted on July 1, 1974, and was amended from time to time thereafter. The final Plan document was amended and restated effective July 1, 1989, and was adopted at some point in 1994 (the "Restated Plan"). PBGC's determination of [] Plan benefit was based on these documents. The Plan terminated as of January 12, 1999.

As you note in your appeal, on April 1, 1990, the Plan was divided into two separate plans as part of a "spin-off/termination" transaction. The two parts consisted of the Plan, which covered active employees, and the A.P.S., Inc. Retirement Plan for Retirees and Terminated Vested Employees (the "Spin-Off Plan"), which covered former employees. The Spin-Off Plan was terminated as of May 15, 1990.

Because [] was an active employee at the time of the spin-off termination, none of his benefits were provided by the Spin-Off Plan. The Plan, however, purchased a joint annuity contract from New York Life Insurance Company to provide [] with the benefits he had accrued as of May 15, 1990. In your appeal, you refer to the annuity purchase as the "Spin-Off Benefit." The Plan, in purchasing the annuity, followed the implementation guidelines for spin-off terminations that were issued by PBGC, the Department of Labor, and the Internal

Revenue Service in PBGC News Release No. 84-23, May 23, 1984 (the "Implementation Guidelines").

Section 4022(a) of ERISA, 29 U.S.C. § 1322(a), provides that PBGC shall guarantee payment of all nonforfeitable benefits under a covered single-employer plan that terminates, subject to the limitations in section 4022(b), 29 U.S.C. § 1322(b). The MGB provision in ERISA section 4022(b)(3) states that "the amount of monthly benefits . . . provided by a plan, which are guaranteed under this section with respect to a participant" cannot exceed the value of \$750 per month (in the form of a life annuity commencing at age 65), adjusted for changes in the Social Security contribution and benefit base. The maximum guaranteed benefit for a plan terminated in 1999 is \$3,051.14. In its benefit determination, PBGC applied this MGB provision to [redacted] entire Plan benefit, which included both the portion of his benefit that was provided by the purchased annuity and the portion that was payable from the Plan's trust.

In your appeal, you contend that under the express terms of the Plan, a participant has an accrued benefit only to the extent that the benefit calculated under either formula "A" or formula "B" of Section 5.1(a), whichever is larger, exceeds his Spin-Off Benefit. In effect, you argue that [redacted] full Plan benefit is his Section 5.1(a) benefit, that this benefit does not include his Spin-Off benefit, and that, as a result, it should be fully guaranteed because it does not exceed PBGC's MGB.

The Plan's terms, however, do not support your suggestion that the Spin-Off Benefit is not part of [redacted] Plan benefit. Section 2.1 of the Restated Plan states that the Spin-Off Benefit satisfied the "Plan benefits of each Member which were accrued as of May 15, 1990" Thus, Section 2.1 explicitly identifies the Spin-Off Benefit as a Plan benefit and as part of a participant's accrued benefit.

Furthermore, Section 2.1 explains that because the Spin-Off Benefit has been purchased and because the Spin-Off Benefit covered Plan benefits accrued through May 15, 1990, the purpose of the Restated Plan is "to provide retirement and incidental benefits for periods of employment with the Employer from and after May 16, 1990 . . ." and that such benefits will be paid from the Plan's Trust Fund. Accordingly, the benefit set forth in Section 5.1(a) of the Restated Plan only covers that part of the Plan benefit which the Member accrued after May 15, 1990; it

does not cover the Member's full Plan benefit as accrued over the entire course of his employment with the Employer.

Your appeal also states that "Section 4022 of ERISA and the regulations promulgated thereunder, which govern the PBGC's guarantee of benefits, do not contain any provision relating to the offset of benefits annuitized as part of a 'spin-off/termination' transaction." In addition, you contend that "There is no statutory or regulatory authority that permits the PBGC to use benefits for which its guarantee has been extinguished (the Spin-Off benefits) to offset its guarantee of benefits for which its guarantee has not been extinguished (the accrued benefits under the Plan)."

In Opinion Letter 86-28 (enclosed), PBGC rejected a similar argument in a case that also involved a pension plan's purchase of insurance annuities. PBGC stated in the Opinion Letter as follows:

The fact that the Plan assets used to purchase the annuity contract for [a participant] are not available to pay other outstanding Plan liabilities upon Plan termination does not affect the application of 29 U.S.C. § 1322(b)(3) to benefits under the Plan. The irrevocable commitment exclusion [in PBGC's regulation at 29 C.F.R. 4044.3] pertains only to the allocation process; it does not change the amount of [the Plan's] regular retirement benefit. . . . It is that benefit which is subject to the maximum guarantee of Section 4022(b)(3) of ERISA. I note that a conclusion that Title IV's maximum guarantee limitation does not apply to [the] full accrued benefit under Plan Section 4.3 would ultimately result in the use of PBGC funds to ensure that a participant in an underfunded pension plan receive a benefit of more than \$3,000 per month. Such a result is inconsistent with both the statute's maximum guarantee limitation and with the PBGC's statutory mandate, set forth in Section 4002(a)(3) of ERISA, 29 U.S.C. § 1302(a)(3), to maintain premiums at the lowest level consistent with its obligations.¹

¹ For the pension plan addressed in Opinion Letter 86-28 (which terminated in 1985), the Maximum Guaranteed Benefit was \$1,687.50 per month.

Furthermore, PBGC's position in Opinion Letter 86-28 was upheld by the court's decision in Lami v. PBGC, No. 86-1709 (W. D. Pa. July 18, 1989). We have enclosed a copy of this unpublished decision for your reference. PBGC believes that the principles articulated in Opinion Letter 86-28 and in the Lami decision reflect a sound interpretation of ERISA.

Finally, you state that the Implementation Guidelines require plan sponsors to treat spin-off/termination transactions consistently with complete plan terminations. In particular, you contend that if instead of a spin-off/termination transaction, the Plan sponsor had completely terminated the Plan on May 15, 1990, and had subsequently established another plan for which PBGC had assumed trusteeship, the PBGC could not use the annuitized benefits under the Plan to offset its guarantee with respect to benefits under the subsequent plan. Thus, you conclude that a spin-off termination transaction in accordance with the Implementation Guidelines should not produce a different result.

While the Implementation Guidelines establish certain rules, they do not provide that spin-off terminations must be treated identically by PBGC as transactions in which a new plan is created. In any event, the hypothetical you constructed would not necessarily result in a different outcome from a spin-off termination. For example, section 3 of the Implementation Guidelines addresses the situation where a plan sponsor would create a new plan that PBGC would deem to be a successor to a terminated plan. In such a case, PBGC applies a single MGB limit to the combined benefits under the two plans. See ERISA § 4021(a), 29 U.S.C. § 1321(a) (for purposes of Title IV of ERISA, "a successor plan is considered to be a continuation of a predecessor plan").

In sum, the Board found no basis presented in your appeal for treating annuities that a pension plan purchased as part of a spin-off/termination transaction differently than benefits that are paid directly from the Plan's trust.

Decision

The Board found that [redacted] benefit should be determined using an Average Monthly Compensation figure of \$14,453.98. The Board, however, found no basis for changing PBGC's determination that calculation of [redacted] Maximum Guaranteed Benefit should include an offset for the amount of

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his Spin-Off Benefit. PBGC will issue a new determination incorporating the Board's decision.

This is the agency's final action regarding the issues raised in your appeal. You may, if you wish, seek court review of this decision. If you need other information from PBGC, please call the Customer Contact Center at 1-800-400-7242.

Sincerely,



Michel Louis
Acting Chair, Appeals Board

cc:

Enclosures