

Pension Benefit Guaranty Corporation

77-124

January 21, 1977

REFERENCE:

[*1] 4041 Termination by Plan Administrator

OPINION:

This is in response to your letter to * * * and subsequent telephone conversations with * * * concerning the above named pension plan ("Plan"). You indicated the view that the Plan had terminated on or about * * * and requested the opinion of this Office on that matter.

As I understand the pertinent facts, the Plan was established on * * *, and favorable Internal Revenue Service determination letters were obtained on * * * and * * *. In the period * * * ("Employer") experienced heavy operating losses. Since a contribution of approximately * * * was needed for the plan year commencing * * * the feasibility of continuing the Plan was questioned.

On * * * a meeting attended by a representative of the insurance company holding the Plan assets, * * *, and * * * a member of your law firm, was held. At that meeting, * * * expressed the opinion (orally, it appears) that the Plan be terminated and that the decision to terminate the Plan, if made, should be reflected in the corporate minutes at the next Board of Directors' meeting. Evidently, no record of the * * * meeting is available, nor is there any record of a decision to terminate the Plan in [*2] the corporate minutes. Further, the * * * meeting does not appear from your description to have resulted in any decision to terminate the Plan.

Although the local insurance agent states that he had in * * * informed the home office that the Plan was to terminate in * * * the home office did not act on his information, nor, according to your letter, is there any record of the receipt of such information by the insurance company.

The last contribution from the employer to the Plan appears to have been made in * * * in the amount of * * *. Subsequent to * * * only one participant has retired, and he is receiving the benefit which accrued and vested to * * *. The Internal Revenue Service had never been notified of any decision to terminate the Plan as required by 26 C.F.R. § 1.401-1(b)(2) and 1.404(a)-2(a)(2)(vi) (1974), both effective in 1973.

The Plan provides, in § 10.2, that "the employer may terminate this plan . . . at any time by an instrument in writing executed in the name of the employer by an officer or officers duly authorized to execute such an instrument and delivered to the Pension Committee." Further, § 10.2 requires that in the event of termination or of complete [*3] discontinuance of contributions, the Pension Committee shall have the funds held by the insurance company applied to the purchase of annuities in accordance with the priorities established in § 10.2(a)-(d). However, no formal written instrument as required by the Plan was presented to the Pension Committee, nor did the Pension Committee treat the cessation of contributions to the Plan as a complete discontinuance of contributions by following the applicable procedure of § 10.2. The Plan Administrator has filed Premium Payment Declarations subsequent to the enactment of ERISA in September, 1974.

Whether a plan is terminated is generally a question to be determined with regard to all the facts and circumstances in a particular case. Based on the above fact situation, we cannot agree with your conclusion that the Plan terminated prior to September, 1974. Consequently, we cannot refund the premiums paid.

In view of the above, you may wish to consider advising the employer to proceed with the termination of the Plan in accordance with the provisions of Title IV of ERISA.

If you need further assistance in this matter, please contact * * * of this Office at * * *

Henry Rose
General [*4] Counsel