Pension Benefit Guaranty Corporation

86-18

August 19, 1986

REFERENCE:
[*1] 4217(a)(2) Applicability of MPPAA to Certain Pre-1980 Withdrawals. Work Performed at a Facility

OPINION:

Dr. Utgoff has asked me to respond to your letter to her, dated June 6, 1986, in which you requested the withdrawal of PBGC Opinion Letter 86-2. That opinion, issued on January 31, 1986, discussed the meaning of the term "facility" for purposes of the Multiemployer Pension Plan Amendments Act of 1980 (MPPAA). You asserted that,

In stating his opinion on the meaning of the term "facility," the PBGC's General Counsel attempted to transform the opinion into a regulation having the force and effect of law, seeking thereby to create new duties for plan fiduciaries . . . . By issuing an opinion letter that purports to preclude all plan fiduciaries from adopting and/or enforcing provisions in the documents and instruments governing plans, the PBGC has delegated to itself power far beyond that ceded by the Congress. [footnotes omitted]

You also objected to "the agency's threat to intervene where plan fiduciaries do not adhere to PBGC opinions, without regard to whether the fiduciaries have been had notice of such opinions". All this, you alleged, contravenes the requirements of due process [*2] under the Administrative Procedure Act (APA). You concluded with the intimation that your organization will seek unspecified "judicially imposed remedies" if the offending letter is not withdrawn.

Let me begin by stating, as clearly as I can, the PBGC's view of the force and effect of opinion letters issued by its General Counsel. The Corporation believes that it is entirely appropriate for it to respond to inquiries about the meaning of terms used in Title IV of the Employee Retirement Income Security Act of 1974, as amended (ERISA). Your letter, indeed, refers to this practice as "laudable" and cites, without apparent disapproval, a number of PBGC opinion letters defining terms other than "facility". Opinion letters are based on the PBGC's view of the proper interpretation of the statute, a view that, according to judicial authorities, is entitled to great deference. Belland v. PBGC, 726 F.2d 839 (D.C. Cir. 1984), cert. denied U.S. , 105 S. Ct. 245 (1984); United Steelworkers of America v. Harris and Sons Steel Co., 706 F.2d 1289, 1296 (3d Cir. 1983); and Concord Control, Inc. v. International Union, UAW, 647 F.2d 701, 704 (6th Cir. 1981), cert. [*3] denied, 454 U.S. 1054, 102 S. Ct. 599, 70 L. Ed.2d 590 (1980).

As your letter correctly pointed out, the PBGC can exercise its authority to issue regulations under Title IV of ERISA only in accordance with the procedures set forth in the APA. You did not, however, advance any serious argument for extending APA requirements to the issuance of opinion letters, nor did you distinguish Opinion Letter 86-2 from the numerous other opinions that the PBGC's General Counsel has issued over the years interpreting other provisions of Title IV.

Your objection to the legality of this particular letter seems to rest upon the fact that it "purports to preclude all plan fiduciaries from adopting and/or enforcing [plan] provisions" that are inconsistent with the PBGC's definition of "facility". Such a purported prohibition would indeed be erroneous if MPPAA gave plans broad leeway to define "facility" and the PBGC were attempting to limit that freedom. The facts, however, are somewhat different. As Opinion Letter 86-2 pointed out, Congress decided not to allow plans to adopt their own definitions of "facility". We recognize that, as a practical matter, prior to the PBGC's defining this [*4] term many plans would have needed to develop their own definitions of "facility" in order to implement certain of the statutory rules, e.g., sections 4205(b)(2)(A)(ii) and 4217(a)(2). However, since Congress chose not to give plans the authority to adopt their own definitions of "facility", once the PBGC issued its interpretation of the term, plans should be precluded from using their own, possibly inconsistent definitions. The restriction that you complain of thus arises from the statute, not from a PBGC opinion letter.

Equally unfounded is your objection - on unspecified grounds - to the PBGC's "threat" to support its interpretation of the statute by intervening or filing amicus briefs in appropriate cases. The PBGC's ability to take these actions is unrelated to its issuance of opinion letters, arising rather from its responsibility to see that Title IV of ERISA is properly interpreted. See ERISA, § 4301(g). I should note that the PBGC's intervention or filing of an amicus brief is not a

punitive action. No litigant has ever suggested, nor has any court ever hinted, that the PBGC may intervene or file as amicus in a case only if the parties have "notice" [*5] of a pertinent opinion letter.

In summary, you have not presented any persuasive grounds for reconsideration of Opinion Letter 86-2. If you wish to pursue this matter further, please contact the responsible attorney, Steven Rothenberg of the Corporate Policy and Regulations Department. His telephone number is (202) 956-5050.

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General Counsel