

1-866-586-138-8550C-432F-B

#1719370



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

[Redacted]

MAR 22 2004

Re: [Redacted]
Case 176357, GSGSB, Inc. Pension Plan (the Plan)

Dear [Redacted]

The Appeals Board reviewed the appeal you filed on behalf of your client, [Redacted] of PBGC's September 26, 2002 determination of his benefit under the Plan. For the reasons stated below, the Board denied the appeal in part and granted the appeal in part, by deciding that [Redacted] Actual Retirement Date is November 1, 1997. As a result, your client's final PBGC monthly benefit (before recoupment) is \$166.72 payable as a Straight Life Annuity (SLA).

Determination and Appeal

PBGC determined that your client was entitled to a PBGC monthly benefit starting on September 1, 1993 of \$97.91 payable as an SLA, which provides a benefit for his lifetime and no survivor benefit. PBGC also determined that because [Redacted] has been receiving estimated payments of \$675.69 per month, he received \$29,116.19 too much, and that PBGC would reduce his final \$97.91 benefit amount by \$9.79 until the overpayment has been repaid, without interest. As you know, the estimated \$675.69 payments have continued while the appeal has been pending and the total overpayment has grown.

[Redacted] October 1, 2002 letter to PBGC stated that he was receiving his correct benefit of \$675.59 per month as agreed to in 1997, between his lawyers and pension advisors. With his letter, he included correspondence from October 1997.

On March 12, 2003, PBGC's Insurance Operations Department (IOD) responded to [Redacted] letter, explaining that PBGC calculated a smaller late factor based on a retirement date of September 1, 1993 and that Sedgwick Noble Lowndes (SNL) did not correctly apply the Plan's vesting provisions in effect when his employment ended. IOD also advised your client that if he still disagreed with the September 26, 2002 determination, he should send a letter to the Appeals Board within 30 days stating the specific

166586138-B3DC-43EF-B

#1719370

reason why the determination was wrong.

After several extensions of the appeal period, your July 9, 2003 appeal letter suggested that the Appeals Board should change PBGC's determination based on six "issues" listed on pages 4 through 6 of your appeal letter, which you described as:

1. Effects of PBGC Delay.
2. Initial Claim for ERISA-Protected Normal Retirement Benefits Was Ignored.
3. Effect of Plan Termination.
4. Vested Interest.
5. Inconsistent, Inaccurate and Confusing Documents.
6. Gravity of Financial Harm.

The Board addresses these "issues" below in the same order in which you raised them.

Discussion

1. Effects of PBGC Delay

Your letter states that "(r)ecords and sources of information that may have been available in 1997, 1998 or even 1999 are no longer available" and that "after such a long period of time memories fade, details blur and facts become fuzzy."

While the Appeals Board does not disagree with the above statements, the Board notes that PBGC's determination accepted all of the personal data upon which SNL based their calculation of your client's monthly benefit. Thus, it appears that there is no disagreement as to the facts.

2. Initial Claim for ERISA-Protected Normal Retirement Benefits Was Ignored

PBGC records show that the Plan's former administrator did not consider [redacted] to be vested either in 1991 when he first inquired or in 1993 when he became 65 years old. It also appears that it was only after negotiations in 1997 that [redacted] date of termination of employment was changed from March 27, 1987 (the date on which he was terminated by GSGSB) to April 30, 1988. Before this change in his date of termination of employment, your client did not have the five years of service required to entitle him to a vested benefit.

In any case, however, the Appeal Board found that even if [redacted] initial claim was "ignored," it has no effect on

196506138-B5DC-4577-B

#1719370

the amount of his benefit payable under the Plan and guaranteed by PBGC.

3. Effect of Plan Termination.

Your appeal letter stated that "(c)ontrary to the PBGC defined benefit plan single-employer plan termination rules as I understand them; and acknowledging that the procedures have changed from what was required in 1993, it was still a requirement that affected participants and beneficiaries receive various notices regarding the Plan termination. According to [redacted] he received nothing." You also said that you "do not know if the Plan terminated in a PBGC-defined Standard or Distress Termination. . . . If the Plan terminated in a Distress Termination then the PBGC would have had early involvement in the Plan and the lack of notice to [redacted] and enormous discrepancy between estimated benefits and final benefits and the length of time in determining benefits is inexcusable."

As you suggested in your appeal, PBGC provides pension insurance in accordance with the Employee Retirement Income Security Act of 1974, as amended (ERISA). If a plan sponsor is unable to support its pension plan, PBGC becomes trustee of the plan and pays pension benefits as defined in the plan subject to limitations set by Congress under ERISA.

Please note that there are two ways by which PBGC can become trustee of a single-employer plan. One way is under the distress termination procedures in ERISA § 4041. PBGC may also initiate termination proceedings under ERISA § 4042, if as in this case, PBGC determines that a plan will be unable to pay benefits when due.

When PBGC institutes proceedings under ERISA § 4042, it sends a Notice of Determination to the plan sponsor, stating that it intends to become trustee of the plan. Enclosure 1 is a copy of the Plan's November 24, 1997 Notice of Determination. Enclosure 2 is a copy of the Trusteeship Agreement under which PBGC became trustee of the Plan on April 22, 1998. The Trusteeship Agreement reveals that the date of the Plan's termination, August 31, 1993, was the date on which the Plan's sponsor permanently ceased all business operations, and therefore, the date on which participants' reasonable expectations of the Plan's continuance were extinguished.

When PBGC becomes trustee of a terminated plan pursuant to ERISA § 4042, it notifies interested parties of PBGC's trusteeship in accordance with ERISA § 4042(d). Enclosure 3 is a copy of the

#1719370

-4-

notice that was sent to [] on July 16, 1998.

When PBGC becomes trustee of a terminated plan, it pays pensions on an estimated basis. Estimated payments are intended to minimize financial hardship for retirees while PBGC prepares formal benefit determinations. Records available to the Appeals Board show that your client started receiving the benefit calculated by SNL in early 1998, the year in which PBGC became trustee. So, PBGC continued to pay that benefit amount on an estimated basis when PBGC took over benefit payment activities.

During the period of time during which PBGC pays estimated benefits, PBGC completes several tasks, including: (1) the audit of plan records; (2) the calculation of PBGC benefits; and (3) the preparation and mailing of benefit determination letters and statements.

Please note that the length of time during which a participant receives an estimated benefit from PBGC has no effect on the final PBGC benefit amount.

4. Vested Interest.

Your appeal letter indicated that you are not disputing [] employment termination date of April 30, 1988 or that he had five years of vesting service or that he was 25% vested under the Plan's regular vesting schedule.

Although your appeal letter suggested that the Plan might have been top-heavy, the Form 5500 that the Plan filed with the Internal Revenue Service for 1991 stated that the Plan was never top-heavy.

Your appeal letter stated that "from the 1992 Plan year Form 5500 filing, it appears that a partial termination, for which 100% vesting of participants is required, may have occurred in that year or earlier. If so, [] would have been, on the date of the Plan termination, already fully vested and his full benefit would be guaranteed."

Please note that PBGC does not guarantee benefits that become vested as the result of a partial termination of a plan.

Please also note that the Plan's Fifth Amendment, which became effective on October 31, 1992 and was adopted on October 6, 1992, changed the vesting schedule from five-year cliff vesting to 100 percent immediate vesting. However, since [] date of termination of employment was April 30, 1988, his vesting percentage is based on the 5-15 graded vesting schedule, the vesting schedule in effect on his date of termination of

#1719370

employment. The Plan changed its vesting schedule from the 5-15 graded vesting schedule to the five-year-cliff vesting schedule effective April 1, 1989, almost a year after [redacted] date of termination of employment.

5. Inconsistent, Inaccurate and Confusing Documents.

Your appeal letter stated that the Form 5500 filings for the 1993 and 1994 Plan years were "clearly inaccurate" because the forms indicated that the plan had not terminated during 1993 or 1994 or in any prior year.

As noted in item 3 above, the Plan's date of termination was set by the Trusteeship Agreement (see Enclosure 2), and thus, would not have been known by the Plan administrator when they filed the 1993 and 1994 Forms 5500.

Your letter also stated that "there is a crazy quilt of Plan restatements and amendments that appear to overlap." The Appeals Board regrets any confusion that the prior Plan administrator may have caused by the use of retroactive amendments that may have been required by ERISA. The Board found, however, that it is clear that the 5-15 graded vesting schedule applies to the calculation of your client's benefit.

6. Gravity of Financial Harm.

Your appeal letter stated that [redacted] "expended significant sums in pursuing legal remedies against the Plan and its fiduciary and retaining experts to assist him and his attorneys in preparing for his ERISA litigation. He also reported on his annual income tax return the annual pension income he received based on \$675.59 per month. By reporting this larger amount, which the PBGC now proposes to reduce by almost 90%, [redacted] was pushed into a higher tax category which, it appears, impacted his Social Security benefits by subjecting them to income taxation (both Federal and State). Therefore, [redacted] may be losing as much if not more than the PBGC, yet he had and has no recourse to recoup these sums."

Your letter asked that "the Appeals Board review the particulars of [redacted] case and follow its own stated goal of carrying out its duty to recoup overpayments in a method designed to effectively accomplish its goal with minimum hardship to participants."

As noted in Item 3 above, when PBGC is appointed trustee of a terminated plan, it pays pensions on an estimated basis. Estimated payments are intended to minimize financial hardship for retirees

#1719370

while PBGC prepares formal benefit determinations. When PBGC issues formal benefit determinations, however, ERISA and PBGC regulations (see 29 Code of Federal Regulations § 4022.81) allow PBGC to recover any previous overpayments, and it is PBGC's policy to do so. The Appeals Board has no authority to change PBGC policy in this matter.

Please note that ERISA does not authorize PBGC to pay benefits larger than those provided under the terms of a terminated plan.

7. Your Client's Annuity Starting Date.

On page 3 of your appeal letter, you said that you understood that "the Plan factor used by the Plan's actuary was being changed [by PBGC] to a reduced factor but for a longer period of time" but that it was "not clear how these adjustments impact his benefits or how the factors were determined."

PBGC's March 12, 2003 letter stated that "When PBGC determined [your client's] final benefit amount, we took into consideration our policy that the benefit must start on the first of the month after the GSGSB Date of Plan termination (DOPT) which is August 31, 1993. We determined [your client's] Actual Retirement Date as September 1, 1993, the first of the month following DOPT. Covering a shorter period of five months, the Late Retirement Factor we used was 1.0518. The change in the Late Retirement Factor resulted in a smaller amount but also provided [your client] with an underpaid period which extends from September 1, 1993 until November 1, 1997. This underpaid period will reduce the total amount of [your client's] overpayment."

Enclosure 4 is a copy of the late retirement factors produced by PBGC based on the Plan's definition of actuarial equivalence. It shows that the late retirement adjustment factor for a September 1, 1993 ARD is 1.0518 while the late retirement factor for a November 1, 1997 ARD is 1.7569. **Enclosure 5** shows the calculation of your client's PBGC benefit based on the two commencement dates.

The Appeals Board reviewed applicable PBGC policy and decided that PBGC policy did not require a change in your client's ARD. Therefore, the Board decided that your client's Actual Retirement Date is November 1, 1997.

As a result, your client is entitled to a final PBGC monthly benefit of \$166.72 (before reduction for recoupment) payable as an SLA starting on November 1, 1997. **Enclosure 5** shows the details of the calculation of your client's PBGC monthly benefit.

#1719370

Decision

Having applied Plan provisions, the law and PBGC rules to the facts in this case, the Appeals Board denied the appeal in part and granted the appeal in part, by deciding that [redacted] Actual Retirement Date is November 1, 1997. As a result, his final PBGC monthly benefit (before recoupment) is \$166.72 payable as an SLA.

This is the agency's final decision on the issues you raised. [redacted] has exhausted his administrative remedies, and may, if he wishes, ask a court to review this decision.

When IOD receives a copy of this decision, they will recalculate the total overpayment and monthly recoupment amount before adjusting your client's monthly benefit in accordance with this decision.

In the meantime, if your client needs more information about his benefit, he may call PBGC's Customer Contact Center at 1-800-400-7242.

Sincerely,



Michel Louis
Acting Chair, Appeals Board

Enclosures (5)

cc:

[Redacted box for cc information]