

Pension Benefit Guaranty Corporation

78-13

June 30, 1978

REFERENCE:

4004(f)(4) Temporary Authority. Waiver of Employer Liability

OPINION:

We have reviewed your request of April 29, 1975, on behalf of * * *, that the Pension Benefit Guaranty Corporation (the "PBGC") waive, pursuant to Section 4004(f)(4) of the Employee Retirement Income Security Act of 1974 ("ERISA"), the employer liability imposed pursuant to Section 4062 of ERISA as a result of the termination of the * * * Pension Plan. In the course of this review, we have considered the information submitted in connection with the termination of the pension plan, additional written submissions from you, and information presented by you during meetings with PBGC staff. The information submitted concerned the overall financial condition of * * * and the partnership that owned * * * prior to and during the plan termination.

Section 4004(f)(4) gives the PBGC authority to waive or reduce employer liability resulting from the termination of a pension plan during the first 270 days after enactment of ERISA if the PBGC determines (1) that the employer was unable as a practical matter to continue the plan and (2) that a waiver or reduction is necessary to avoid unreasonable hardship. [*2] We have concluded in this case that the liability of the employer should be reduced, based on the factors and considerations set forth below.

* * * located at * * * * * was an acute care hospital operated by a general partnership, the members of which are * * * * * and * * * maintained a pension plan for its employees, which was terminated on May 15, 1975. As of the date of plan termination, the value of guaranteed benefits under the plan exceeded the value of plan assets allocable to such benefits by \$135,891. Consequently, pursuant to Section 4062 of ERISA, was liable to the PBGC in that amount. Information submitted to PBGC shows that in 1973 the employer failed to make a contribution of \$45,000 to the plan. In 1974 it made a contribution of only \$24,150, and for the four months of 1975 that the plan was in effect it made no contribution. In light of the facts set forth below, the PBGC has determined that * * * was not able, as a practical matter, to continue its pension plan.

At the time of plan termination, * * * was in a declining financial condition with scant prospects for a financial turnaround.

Specifically, * * * was located in a rapidly declining inner-city [*3] neighborhood of * * *. The hospital has stated that: "Because of the change in the background of the residents of the area surrounding the hospital there has been a sharp decline in patient census." Added to the effect on patient census produced by demographic changes in the area was the fact that there was a surplus of hospital beds in the * * * metropolitan area. This decline in patient census resulted in a relative decline in cost reimbursements from Blue Cross, Medicaid and Medicare (the principal source of hospital revenues), and as a consequence, * * * had experienced operating losses during three of the four years preceding plan termination; also the hospital earned no return on assets during this period.

Other factors, too, show a declining financial condition. In slightly more than three years preceding plan termination (December 31, 1971 - March 31, 1975), * * * working capital declined from a deficit of \$70,464 to a deficit of \$138,012. While the current ratio remained essentially the same during this period (approximately .81), the quick ratio declined from .73 to .58. It further appears that at the time of plan termination, * * * could not obtain bank credit since [*4] it was not profitable and had a negative cash flow. Finally, it is noted that the equity account of the partnership itself was in a deficit position during the four-year period preceding termination.

* * * prospects were made even more bleak by the fact that due to the age of the hospital, the facility was not in compliance with applicable * * * Department of Health requirements. * * * has alleged that it would have been necessary to construct a new facility in order to achieve compliance with the * * * standards. At the time of plan termination, * * * was operating under a temporary waiver granted by the State Department of Health.

In light of the above, it is apparent that at the time of plan termination * * * financial condition was precarious, and

it appeared unlikely that the hospital would be able to restore profitability and a sound financial condition. This very poor financial condition existed independently of the imposition of any employer liability under Section 4062 of ERISA. It follows that the waiver or reduction of this liability would not appreciably improve this gloomy financial forecast. As noted above, a prerequisite to granting relief under Section 4004(f)(4) [*5] of ERISA is a finding that a waiver or reduction of liability is necessary to avoid unreasonable hardship.

However, in determining what is an "unreasonable hardship," we are mindful of the fact that in the instant matter, because we are dealing with a general partnership and not a corporation, any liability imposed by PBGC will ultimately be borne by the partners directly; the liability does not rest solely with a business entity - a corporation. Because of the personal liability of general partners for partnership debts, we believe that consideration must be given to the impact of the imposition of employer liability on the partners themselves, and not just on the business entity operated by the partnership. n1 In this connection, we note that the business operated by the partnership was losing money, and that the two general partners were incurring further liabilities. As of the date of plan termination, the partnership deficit was \$125,000. Imposition by the PBGC of employer liability in the amount of \$135,891 would obviously substantially increase the partners' liabilities.

n1 This conclusion is limited to the facts of this case. We need not and we do not decide at this time whether, in the case of a limited partnership or a corporation owned by a few people, we would look beyond the business entity involved to the individuals who control that entity in order to apply the "unreasonable hardship" test of Section 4004(f)(4). [*6]

Turning to the financial condition of the partners, it appears that as of the date of plan termination, (who held 95 percent of the partnership) had a net worth of \$ *** net of partnership deficit. At that time, *** was nearly *** years old and was employed as of the hospital. (*** was not, however, a participant in the pension plan.) Because of *** age, it would be reasonable to assume that *** future earning potential was rather limited, and that therefore she would be forced to rely on *** savings in order to support herself in the future. It also appears that *** is a few years older than ***, and it is possible that ***, too, will have to rely on *** savings for *** future support.

Finally, consideration should be given to the purpose of Section 4004(f)(4) in the context of the statutory scheme created by Congress. Specifically, Congress recognized that the imposition of employer liability, even though limited to thirty percent of an employer's net worth, could create hardship. In order to minimize this hardship, Congress, in Section 4067, gave the PBGC authority to permit deferred payment of employer liability. Additionally, in providing in Section [*7] 4004(f)(4) for the waiver or reduction of liability with respect to plan terminations occurring during the first 270 days after enactment of ERISA, Congress obviously intended to provide even greater relief from the hardship employers might have experienced during the early days of the new law.

The PBGC has adopted a flexible approach in permitting deferred payment of employer liability pursuant to Section 4067, and we recognize that similar flexibility is appropriate in fashioning relief under Section 4004(f)(4). Under the former provision, in the case of a corporate employer with capital value of some \$550,000, the PBGC would typically permit deferred repayment of a liability of \$135,000. We would not require the liquidation of twenty-five percent of the corporation's capital assets in order that it could pay its employer liability immediately; rather, an attempt would be made to enable the employer to finance the payment of employer liability more from income. This is achieved by permitting payments to be spread over a period of years, typically no more than ten. Similar equitable considerations should be taken into account in determining the amount of a reduction in employer [*8] liability under Section 4004(f)(4).

In view of the foregoing factors, the PBGC has determined that it should reduce the \$135,891 liability of * * * * * Hospital by \$50,000, in order to avoid unreasonable hardship. By waiving this amount, the remaining liability under Section 4062 is \$85,891. n2

n2 We note that this liability is probably close to the amount of contributions that the employer failed to make to the pension plan during the 1973-1975 period.

This constitutes the final action of the PBGC with respect to the request of * * * for a waiver, pursuant to Section 4004(f)(4) of ERISA, of its employer liability under Section 4062.

Matthew M. Lind
Executive Director