

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION**

Dennis Black, *et al.*,

Plaintiffs,

v.

Pension Benefit Guaranty Corporation, *et al.*,

Defendants.

Case No. 2:09-cv-13616

Hon. Arthur J. Tarnow

Magistrate Judge Donald A. Scheer

**SUPPLEMENT TO PLAINTIFFS' OPPOSITION TO
THE PBGC'S SUMMARY JUDGMENT MOTION**

On December 22, 2009, this Court held a hearing on Plaintiffs' Motion for a Preliminary Injunction against the PBGC. At the hearing, the Court requested that the parties file supplemental briefs, addressing the legality of the PBGC's termination of the Delphi Retirement Program for Salaried Employees (the "Plan"), including the extent to which the administrative record supported that determination. *See* Transcript on hearing on Motion for Preliminary Injunction at 47-48 (attached as Ex. A). In response, the PBGC filed its Motion for Summary Judgment on Count Four of Plaintiffs' Complaint. Dkt. No. 45. Plaintiffs filed their response to the PBGC motion on January 19, 2010. Dkt. No. 94. Plaintiffs hereby supplement their Response to the PBGC Motion for Summary Judgment with what is the 2008 Enrolled Actuary Certification of Adjusted Funding Target Attainment Percentage for the Delphi Retirement Program for Salaried Employees (the "AFTAP Certification").¹ The AFTAP Certification is

¹ Plaintiffs were unable to provide the AFTAP Certification in their Opposition to the PBGC Motion for Summary Judgment because they have only recently come into possession of this report. Plaintiffs previously advised the Court of their belief that the report existed at the February 18th Status/Settlement (footnote continued on next page)

attached as Exhibit B. The AFTAP Certification, prepared by the consulting firm Watson Wyatt at the request of Delphi Corporation, is dated June 30, 2009, and is the most recent actuarial valuation of the Plan performed prior to the Plan's termination. The AFTAP Certification states that for the plan year beginning October 1, 2008 and ending September 30, 2009, the Plan was 85.62% funded.

The PBGC has repeatedly sought to justify its actions in terminating the Plan by portraying it as "severely underfunded." *See, e.g.*, PBGC's Response to Pls.' Supp. Br., Dkt. No. 93 at 1. The AFTAP Certification directly contradicts this assertion of "underfunding." In fact, when compared to other large pension plans, its funding level was actually *greater* than the average funding of the hundred largest pension plans during the same time period. The AFTAP Certification:

(1) refutes the PBGC's assertion that the Plan termination was justified because it was "severely underfunded";

(2) demonstrates the incompleteness of the administrative record which the PBGC relies upon in support of its termination of the Plan (since the AFTAP Certification was not included in that record); and

(3) demonstrates the dangers of allowing the PBGC to bypass ERISA's procedural safeguards (*i.e.*, the requirement that the PBGC obtain a court decree in order to accomplish termination and requiring plan administrators to act as fiduciaries in termination matters).

I. THE AFTAP CERTIFICATION IS A CONGRESSIONALLY AUTHORIZED STANDARD FOR ASSESSING A PENSION PLAN'S FUNDING LEVEL

In connection with the Pension Protection Act of 2006, Congress created the Adjusted Funding Target Attainment Percentage ("AFTAP"), a new standard to measure the pension

(footnote continued from previous page)

Conference. Plaintiffs were ultimately able to obtain the AFTAP Certification directly from the consulting firm of Watson Wyatt.

funding levels for all defined pension plans. *See* Dec. of Jim DeGrandis, ¶ 4 (attached as Ex. C). The AFTAP is a ratio of a plan's actuarial value of assets to the plan's liabilities or the present value of benefits. *Id.* Because the IRS mandates the key actuarial assumptions used in calculating liabilities under the AFTAP, it provides regulators with a standardized measurement to judge a plan's funded status, as well as allowing them to compare the funded status of a given plan in relation to other defined benefit plans. *Id.* A plan is considered "underfunded," and thus subject to benefit restrictions, if its AFTAP is less than 80%. *Id.* ¶ 6.

According to the AFTAP Certification, Watson Wyatt determined that the Plan's liabilities as of October 1, 2008 were \$3,497,701,000 based on the October 2008 IRS yield curve and the IRS mandated mortality table. Ex. B at 3. Watson Wyatt determined the actuarial value of the Plan's assets as of the same date to be \$2,994,788,000. *Id.* Thus, Watson Wyatt certified that the AFTAP ratio (that is the relationship of plan assets to plan liabilities) for the plan year beginning October 1, 2008 and ending September 1, 2009 was 85.62 %. *Id.* at 1. In 2009, the average AFTAP of the hundred largest pension plans was found to be 81.7%. Ex. C ¶ 7.

Accordingly, in 2009, a plan with a funding level of 85.62% could not be considered underfunded, in either an absolute or relative sense of the term.²

II. THE ABSENCE OF THE AFTAP CERTIFICATION IN THE ADMINISTRATIVE RECORD IS FURTHER EVIDENCE OF THE RECORD'S DEFICIENCY

Plaintiffs do *not* concede that the PBGC's termination decision can be upheld simply if it is supported by the administrative record; rather, ERISA requires the PBGC to prove that

² While this still represents a deficit of approximately \$500 million between promised obligations and assets available to pay those assets, this figure is a far cry from the \$2.7 billion dollar figure bandied about in the administrative record. *See* AR34. Moreover, the PBGC had approximately \$200 million worth of liens on valuable Delphi foreign assets in place at the time of the Plan's termination (*see* Declaration of Neela Ranade, ¶ 7, Dkt. No. 37).

termination is warranted in a *de novo* proceeding in a federal court. *See* Pls.’ Supp. Br. at 25-31, Dkt. 47. Nonetheless, even assuming termination can occur through agency fiat that is only subject to judicial review (as the PBGC asserts), the PBGC’s termination of the Plan still must fail if it is arbitrary and capricious based on a review of the whole administrative record. *Id.* at 31-45. The absence of the AFTAP Certification only proves further that the PBGC’s decision to terminate the Plan cannot be upheld under traditional judicial review standards.

“[A] complete administrative record includes *all materials before the agency* at the time the decision was made, as well as ‘*all materials that might have influenced the agency’s decision*, and not merely those on which the agency relied in its final decision.’” *Sara Lee Corp. v. Am. Bakers Ass’n Ret. Plan*, 512 F. Supp. 2d 32, 38-39 (D.D.C. 2007) (quoting *Amfac Resorts, LLC v. U.S. Dep’t of Interior*, 143 F. Supp. 2d 7, 12 (D.D.C. 2001) (emphasis added). It is incumbent upon the agency to file an inclusive record, as “[a] full and complete administrative record is essential to meaningful judicial review.” *Pension Benefit Guaranty Corp. v. LTV Steel Corp.*, 119 F.R.D. 339, 342 (S.D.N.Y. 1988). “[I]f the record before the agency does not support the agency action, if the agency has not considered all relevant factors, or if the reviewing court simply cannot evaluate the challenged agency action on the basis of the record before it, the proper course, except in rare circumstances, is to remand to the agency for additional investigation or explanation.” *Fla. Power & Light Co. v. Lorion*, 470 U.S. 729, 744 (1985).

The AFTAP Certification, dated June 30, 2009 and performed for Delphi for the plan year beginning on October 1, 2008, does not appear in the administrative record, despite the fact that it was the most current actuarial valuation of the Plan’s funding level available at the time of the Plan’s termination. Instead, the actuarial valuation upon which the PBGC’s administrative record relies incorporates actuarial valuations (of both assets and liabilities) as of October 1,

2007 (the prior plan year). *See* AR323. The administrative record indicates that the PBGC was receiving actuarial updates from Watson Wyatt as late as May 11, 2009, (*see* AR351); as such, it is hard to understand why the AFTAP Certification, dated June 30, 2009, is not included in the administrative record, or to believe that it was not “material[] before the agency at the time the [termination] decision was made,” in July 2009. *Sara Lee Corp.*, 512 F. Supp. 2d at 39.

Moreover, because the AFTAP Certification is directly relevant to this Court’s determination of “whether or not involuntary termination was proper, as it would demonstrate whether there were factors in existence that should have diminished [the] PBGC’s fears,” the administrative record must be deemed insufficient without the AFTAP Certification. *Pension Benefit Guaranty Corp., v. Rouge Steel Co.*, Case No. 03-75092, 2006 U.S. Dist. LEXIS 2685, at *14 (E.D. Mich. Jan. 10, 2006).

III. THE FACT THAT THE PBGC WAS ABLE TO TERMINATE A HEALTHY PENSION PLAN DEMONSTRATES THE NECESSITY OF ERISA’S REQUIREMENT THAT THE PBGC OBTAIN A COURT DECREE PRIOR TO TERMINATING A PENSION PLAN SUPPOSEDLY IN DISTRESS

ERISA § 4042, 29 U.S.C. § 1342, requires that a court adjudicate a plan’s termination. Plaintiffs have argued at length that this is a necessary procedural safeguard, designed to ensure that the PBGC only terminate a pension plan in cases of necessity. The facts before the Court help demonstrate the necessity of this safeguard.

The PBGC is statutorily charged with encouraging the continuation and maintenance of voluntary private pension plans for the benefit of their participants. 29 U.S.C. § 1302(a). Despite the fact that the most current actuarial valuation available prior to the Plan’s termination revealed a well-funded and viable pension plan, the Plan was terminated over ten months ago, on the grounds that it was significantly underfunded. AR37. The termination was done hastily, behind closed doors, and with the unprecedented involvement of the Treasury Department, a

superior agency not usually involved in the internal decision-making of the PBGC. Since February 2010,, the Plan’s participants have been receiving significantly reduced benefits. Nevertheless, to this day, the PBGC has never been required by any court or outside authority to justify or substantiate its actions.

WHEREFORE, for all of these additional reasons, Plaintiffs respectfully request that the Court deny the PBGC’s Motion for Summary Judgment.

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CERTIFICATE OF SERVICE

I hereby certify that on May 26, 2010, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following e-mail addresses:

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