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Comptroller General
of the United States

United States Government Accountability Office
Washington, DC 20548

Decision

Matter of: Pension Benefit Guaranty Corporation—Reimbursement for Financial Analysis Services

File: B-307849

Date: March 1, 2007

DIGEST

The Pension Benefit Guaranty Corporation (PBGC) may not retain a reimbursement for financial analysis services associated with a request for waiver from claims arising under title IV of the Employee Retirement Income Security Act. Absent statutory authority to the contrary, amounts received by government corporations are subject to the miscellaneous receipts statute, 31 U.S.C. § 3302(b), and must be deposited into the general fund of the Treasury.

DECISION

The General Counsel of the Pension Benefit Guaranty Corporation (PBGC) requests an advance decision, asking whether PBGC may retain a reimbursement for financial analysis services received from a major United States corporation (MUSC).¹ Letter

¹ Our practice when rendering decisions is to obtain the views of the relevant federal agency to establish a factual record and to elicit the agency's legal position on the subject matter of the request. GAO, *Procedures and Practices for Legal Decisions and Opinions*, GAO-06-1064SP (Washington, D.C.: Sept. 2006), available at www.gao.gov/legal/d061064sp-web.pdf (last visited Feb. 13, 2007). In this instance, we engaged in a telephone conversation with PBGC attorneys regarding authority to charge and collect fees, the nature of PBGC's revolving and trust funds, and reapportionment of credited receipts. Telephone conversation between Philip Hertz, Deputy General Counsel; Tim Callaghan, Assistant General Counsel; and Bryan Downey, Attorney, PBGC; and Thomas H. Armstrong, Assistant General Counsel; and Faisal Amin, Attorney, GAO, Sept. 13, 2006 (Hertz Conversation). On a separate occasion, PBGC responded to our questions regarding PBGC's enforcement authorities under the Employee Retirement Income Security Act. E-mail from Bryan Downey, Attorney, PBGC, to Thomas H. Armstrong, Assistant General Counsel,

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from Judith R. Starr, General Counsel, PBGC, to David M. Walker, Comptroller General of the United States, Apr. 25, 2006 (Starr Letter). We conclude that PBGC has no authority to retain the reimbursement: the amount at issue may not properly be characterized as a gift and PBGC has identified no agency-specific authority to charge a fee for this purpose and to retain the amount collected. Absent statutory authority to the contrary, the miscellaneous receipts statute requires agencies to deposit moneys received for the government into the federal Treasury. 31 U.S.C. § 3302(b).

BACKGROUND

PBGC is a wholly owned government corporation charged with protecting the pensions of American workers in single employer and multiemployer defined benefit plans. PBGC was established by the Employee Retirement Income Security Act of 1974, Pub. L. No. 93-406, 88 Stat. 829 (Sept. 2, 1974) (ERISA), and its mission is:

- “(1) to encourage the continuation and maintenance of voluntary private pension plans for the benefit of their participants,
- (2) to provide for the timely and uninterrupted payment of pension benefits to participants and beneficiaries . . . , and
- (3) to maintain premiums established by [PBGC] . . . at the lowest level consistent with carrying out its obligations”

29 U.S.C. § 1302(a). In discharging its duties regarding defined benefit plans, PBGC performs two distinct functions, one of insurer and one of trustee. *See* B-289219, Oct. 29, 2002; B-223146, Oct. 7, 1986; B-217281-O.M., Mar. 27, 1985. In its corporate capacity, PBGC insures the pension plans covered by the laws it administers. 29 U.S.C. § 1322, 1322a. To that end, PBGC has broad authority to promote the viability of pension plans. For example, PBGC may bring a civil action against an employer to enforce provisions requiring payment of premiums established by PBGC. 29 U.S.C. § 1303(e). PBGC also has significant discretion to undertake investigations. 29 U.S.C. § 1303(a).

ERISA also grants PBGC the power to serve as trustee for terminated pension plans with unfunded benefit liabilities. 29 U.S.C. § 1322; B-286026, June 12, 2001. When serving as trustee, “PBGC is treated as if it were a private fiduciary acting on behalf of the [plan] beneficiaries and possesses the same authority and duty to act as would a nongovernmental party if it were appointed to that position.” B-223146, Oct. 7, 1986. When acting in that capacity, PBGC maintains broad authority to protect the interests of plan beneficiaries and trust assets. 29 U.S.C. § 1342. *See* B-223146,

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GAO, *Subject: GAO’s Request for Additional Information*, Nov. 21, 2006 (Downey E-mail).

Oct. 7, 1986 (permitting PBGC to utilize trust assets to enter a contingent fee arrangement with counsel hired to represent PBGC as trustee of terminated plans); B-217281-O.M., Mar. 27, 1985 (permitting PBGC to obtain the services of investment managers without regard to federal procurement regulations when acting as trustee of terminated plans).

Intending to divest itself of one of its subsidiaries, the MUSC determined that the value of the subsidiary would be diminished unless PBGC waived potential claims against the subsidiary arising under title IV of ERISA.² Starr Letter. The corporation contacted PBGC to request a waiver of any such claim. *Id.* In order to decide whether to grant or deny the waiver request, PBGC contracted for a sophisticated financial analysis of the proposed transaction and waiver at a projected cost exceeding \$2 million.³ *Id.*

PBGC noted in its most recent annual report that “the agency is dealing with a growing number of high profile risks . . . that involve increasingly complex financial analyses and legal issues.” *Pension Benefit Guaranty Corporation: 2005 Annual Report* at 5, available at www.pbgc.gov/about/annreports.html (last visited Feb. 13, 2007). Generally, PBGC performs relevant financial analyses in-house. Hertz Conversation. However, in the particular situation presented here, the financial analysis was far more complex than that normally handled by PBGC. *Id.* PBGC therefore contracted for the analysis. *Id.* The MUSC has indicated that it will reimburse PBGC for that financial analysis.⁴ Starr Letter. PBGC plans to credit the amount received to PBGC’s revolving funds. Hertz Conversation. PBGC considers the financial analysis to be an administrative expense, and thus subject to annual limitations imposed by Congress.⁵ *Id.*

² Title IV of ERISA concerns defined pension benefit plans and, *inter alia*, plan termination insurance. See 29 U.S.C. §§ 1301–1461.

³ PBGC, in fact, did not waive or release any rights under title IV. Downey E-mail. Nevertheless, based on its “due diligence” regarding the sale, PBGC told the MUSC that it “did not have the grounds to terminate the MUSC’s pension plans pursuant to 29 U.S.C. § 1342 . . . or to treat the sale of the subsidiary as a transaction to evade liability pursuant to 29 U.S.C. § 1369.” *Id.* PBGC’s discretionary authority to institute civil proceedings (29 U.S.C. §§ 1303(e), 1342(a), 1369) includes “the authority to decide not to bring an action.” *Id.*

⁴ The MUSC has not yet paid the reimbursement to PBGC. Hertz Conversation.

⁵ PBGC is subject to a complicated funding structure primarily involving reimbursements using trust funds to credit expenditures made from revolving funds. Hertz Conversation. PBGC’s revolving funds are available for expenditure without annual appropriations as long as expenditures do not exceed available resources. 29 U.S.C. § 1305(b)(2); see GAO, *Pension Benefit Guaranty Corporation: Statutory Limitation on Administrative Expenses Does Not Provide Meaningful Control*, GAO–03-301 (Washington, D.C.: Feb. 28, 2003), at 26. Congress, however, imposes an
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DISCUSSION

At issue here is PBGC's authority to charge and retain a fee for financial analysis services in relation to a request for waiver from claims brought under title IV of ERISA. The miscellaneous receipts statute requires federal agencies receiving money for the government to deposit amounts collected into the general fund of the Treasury. 31 U.S.C. § 3302(b). PBGC argues that as a wholly owned government corporation, it is not subject to the miscellaneous receipts statute. Starr Letter. We disagree.

Although wholly owned government corporations like PBGC enjoy significant financial flexibility relative to most agencies, we have held that government corporations are subject to the miscellaneous receipts statute; exception to the requirement that collected amounts be deposited into the Treasury only applies if the government corporation has specific statutory authority permitting retention. 52 Comp. Gen. 54 (1972) (Overseas Private Investment Corporation has explicit statutory authority to deposit its revenues into its accounts and thus did not have to deposit them into the general fund of the Treasury as miscellaneous receipts); 5 Comp. Gen. 1004 (1926) (United States Shipping Board Emergency Fleet Corporation does not have statutory authority to credit interest earned on appropriated money; the interest must be deposited into the Treasury as miscellaneous receipts). An example of explicit statutory authority allowing a government corporation to keep receipts is 33 U.S.C. § 984(a)(10), permitting the Saint Lawrence Seaway Development Corporation to retain and reinvest toll revenues collected in the management of the seaway between Montreal and Lake Erie.

We first considered whether PBGC has specific authority to retain a reimbursement for the type of financial analysis services procured in this case. Legislation establishing PBGC's revolving funds permits broad retention of certain receipts, and section 4005 of ERISA permits PBGC to credit to its revolving funds "receipts from any other operations under [title IV]." 29 U.S.C. § 1305(b)(1)(G). ERISA's legislative history identifies several forms of receipts, including "premiums, penalties, interest, and other charges; employer liability payments; amounts borrowed from the Treasury; and interest earned by fund assets." H.R. Conf. Rep. No. 93-1280, at 5146 (1974). There is no discussion in the legislative history, however, clarifying the language, "receipts from any other operations." We asked PBGC whether it believes that section 1305(b)(1)(G) permits PBGC to charge and retain a fee for financial

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annual limitation on the use of funds for administrative expenses. *See, e.g.*, Departments of Labor, Health and Human Services, and Education, and Related Agencies Appropriations Act, 2006, Pub. L. No. 109-149, 119 Stat. 2833, 2837 (Dec. 30, 2005).

analysis services. PBGC declined to assert such authority from the statutory language.

While PBGC does not cite specific statutory authority, it cites two cases issued by this Office to assert that the provisions of the miscellaneous receipts statute do not apply to PBGC: B-223146, Oct. 7, 1986 and B-217281-O.M., Mar. 27, 1985. Starr Letter. PBGC maintains that these decisions reflect PBGC's "different posture [compared with] most agencies, with respect to the general requirements of the Miscellaneous Receipts Statute." *Id.* As explained below, because these decisions considered PBGC's actions as a trustee rather than in its corporate capacity, they are inapposite here.

The 1986 decision concerned a contingent fee arrangement that PBGC wished to enter into with a private law firm. The firm agreed to represent PBGC in its capacity as trustee for terminated plans in a suit against two employers. B-223146, Oct. 7, 1986. We did not object to PBGC's proposal to enter a contingent fee arrangement, because "the laws applicable to expenditure of appropriated funds by wholly-owned Government corporations do not apply to PBGC *when it is acting in its trustee capacity.*" *Id.* (emphasis added).

In 1985, we advised the chairman of the House Select Committee on Aging of PBGC's authority to obtain investment manager services. B-217281-O.M., Mar. 27, 1985. Reasoning that PBGC "possesses all of the powers and duties a private party would possess *when serving as a trustee,*" we determined that PBGC need not follow federal procurement regulations when contracting for the services. *Id.* (emphasis added). However, we cautioned that when PBGC acts as insurer of pension plans and utilizes its revolving funds, PBGC may not be exempted from federal procurement regulations. *Id.*

The cases cited by PBGC are buoyed by a consistent theme: when acting as a trustee of terminated pension plans, PBGC is granted broad authority to serve the interests of plan participants and beneficiaries. That rationale does not apply here. When contracting for the financial analysis at issue here, PBGC acted in its capacity as insurer of defined benefit plans, rather than trustee of terminated plans. It therefore may not sidestep the provisions of the miscellaneous receipts statute simply because it is a government corporation funded with revolving and trust funds.

Without explicit authority to charge a fee for financial analysis services, the only remaining avenue by which PBGC may seek to collect the reimbursement from the MUSC is application of the user charge statute. 31 U.S.C. § 9701. The user charge statute generally permits federal agencies and wholly owned government corporations⁶ to charge and collect fees in exchange for the provision of services to

⁶ In the 1982 codification of the statute, the original statutory language, "Federal agency (including wholly owned Government corporations as defined in the Government Corporation Control Act of 1945)," was replaced by the current

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individuals “when there is no independent statutory source for the charging of a fee or where a fee statute fails to define fee-setting criteria.” *American Medical Ass’n v. Reno*, 857 F. Supp. 80, 84 (D.D.C. 1994). Stating a public policy that “each service or thing of value provided by an agency . . . to a person . . . is to be self-sustaining to the extent possible,” 31 U.S.C. § 9701(a), the user charge statute authorizes agency officials to prescribe regulations to establish and define charges for distinct benefits conferred upon distinct entities. 31 U.S.C. § 9701(b). The provision requires charges assessed pursuant to its authority to be “fair,” and “based on[:] (a) the costs to the government; (b) the value of the service or thing to the recipient; (c) [the] public policy or interest served; and (d) other relevant facts.” *Id.*

Federal court cases have further shaped the application of the user charge statute. User charges are permitted “if there is a sufficient nexus between the agency service for which the fee is charged and the individuals who are assessed.” *Seafarers International Union of North America v. United States Coast Guard*, 81 F.3d 179, 183 (D.C. Cir. 1996). More specifically, fees must relate to “specific charges for specific services to specific individuals or companies.” *Federal Power Commission v. New England Power Co.*, 415 U.S. 345, 349 (1974).

However, the user charge statute is not available to recover costs of executing an agency’s statutory responsibilities. *See* B-272254, Mar. 5, 1997 (Export-Import Bank, a government corporation, may not charge its customers a fee to cover employee travel expenses); 61 Comp. Gen. 419 (1982) (Merit Systems Protection Board may not accept reimbursement for hearing officer travel expenses from other agencies, employees, or unions). “The inadequacy of [the entity’s] appropriations to enable it to carry out its function in a manner most economical to the Government as a whole does not change the law.” 61 Comp. Gen. at 422–23. PBGC considers the financial analysis here to constitute the performance of “due diligence regarding the MUSC’s sale of one of its subsidiaries.” Downey E-mail. The user charge statute, therefore, is not available to collect a reimbursement for the procured services.

Even if the user charge statute were to apply here, PBGC may not retain the amounts collected pursuant to that authority. The user charge statute provides agencies with the authority to charge fees for specific services provided to distinct beneficiaries. However, the statute does not provide any authority to retain fees. B-300826, Mar. 3, 2005; B-300248, Jan. 15, 2004. In fact, the statute instructs that its provisions “[do] not affect a law of the United States . . . [directing] the disposition of [collected amounts].” 31 U.S.C. § 9701(c). Instead, PBGC would be required to submit those amounts to the general fund of the Treasury.

PBGC asserts that the financial analysis services that it procured constituted an administrative expense paid from its revolving funds. Revolving funds are

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language: “agency (except a mixed-ownership Government corporation).” Pub. L. No. 97-258, 96 Stat. 877, 1051 (Sept. 13, 1982).

appropriations, and consequently, the legal principles governing appropriations also apply to revolving funds. 63 Comp. Gen. 110, 112 (1983); B-247348, June 22, 1992. The statute establishing PBGC's revolving funds creates a permanent indefinite appropriation. 29 U.S.C. § 1305. *See* B-197742, Aug. 1, 1986 (“[A permanent indefinite appropriation] has no fiscal year limitations, there is no limit on the amount of the appropriation, and there is no need for Congress to appropriate funds to it annually or otherwise.”). The principle underlying the miscellaneous receipts statute remains consistent, whether an appropriation is a permanent indefinite appropriation or annual appropriation: augmentation of a permanent indefinite appropriation such as a revolving fund is restricted in the same manner as augmentation of other appropriations. Crediting a revolving fund with a particular type of receipt not contemplated by the statute establishing the revolving fund would result in an improper augmentation of that fund. B-271894, July 24, 1997. Without authority to do so, collecting the reimbursement for the purpose of crediting PBGC's revolving fund would amount to an improper augmentation of PBGC's appropriation.

We considered, also, whether PBGC's gift acceptance authority would permit PBGC to retain amounts proffered by the MUSC. Government corporations may be granted statutory authority to accept and retain gifts. *See* B-300218, Mar. 17, 2003. Indeed, PBGC has such statutory authority. 29 U.S.C. § 1302(b)(5). However, PBGC's gift acceptance authority is inapplicable to the reimbursement for financial analysis services at issue here. In B-300218, the African Development Foundation (ADF) formed strategic partnerships with Botswana, Namibia, Guinea, and the state of Jigawa, Nigeria, whereby those governments agreed to share financial responsibility for ADF development programs in their respective states. B-300218, Mar. 17, 2003. Noting ADF's gift acceptance authority, we recognized ADF's authority to retain and expend those funds collected from the strategic partnerships. *Id.* In characterizing the monetary contributions as gifts, we emphasized that the cooperating governments received no consideration in exchange for their gifts. *Id.* PBGC does not consider the proposed reimbursement a gift (Hertz Conversation); neither do we. The reimbursement is to defray costs incurred by PBGC.

Finally, PBGC asks that we review its request for decision in light of our decision in B-306860, Feb. 28, 2006, involving a settlement agreement between the Office of Federal Housing Enterprise Oversight (OFHEO) and Freddie Mac. Starr Letter. In the case cited, OFHEO brought administrative charges against Freddie Mac and former executive officers for the undue compensation of those officers. B-306860, Feb. 28, 2006. As part of an agreement to settle charges brought against Freddie Mac, including a dispute regarding adequacy of discovery production, Freddie Mac agreed to pay the costs associated with formatting certain discovery documents in a manner agreeable to both parties. *Id.* We found no improper augmentation of appropriations, as the settlement agreement satisfied a prosecutorial objective. *Id.* More importantly, “Freddie Mac [was] not defraying an obligation of OFHEO.” *Id.* The same rationale does not apply here. Retention of the reimbursement paid by the MUSC to PBGC would serve to defray an obligation of PBGC. A cost that would usually be borne by PBGC would instead be borne by the company requesting waiver

from title IV liability. The holding in B-306860, therefore, has no bearing on our decision here.

Absent statutory authority permitting retention of a fee, the governing rule is the miscellaneous receipts statute, 31 U.S.C. § 3302(b), which requires money received for the government to be deposited into the general fund of the Treasury. B-272254, Mar. 5, 1997. Consequently, PBGC may only retain the reimbursement for financial analysis services if it has statutory authority to do so. We are not aware of any authority permitting PBGC to retain the funds at issue, nor has PBGC identified any such authority.

CONCLUSION

PBGC may not credit to its appropriation a reimbursement for financial analysis services associated with a waiver request for claims under title IV of ERISA. Absent statutory authority to the contrary, amounts received by government corporations are subject to the miscellaneous receipts statute, 31 U.S.C. § 3302(b), and must be deposited into the general fund of the Treasury. PBGC has not identified any specific authority to charge a fee for this purpose and to retain the amount collected. Should PBGC think that the authority to charge and retain a fee like the one at issue is important to the proper functioning of the government corporation, we urge PBGC to seek that authority from Congress.

A handwritten signature in black ink, appearing to read "Gary L. Kepplinger". The signature is fluid and cursive, with a long horizontal stroke extending to the right.

Gary L. Kepplinger
General Counsel