

# LEGAL SERVICES FOR THE ELDERLY

130 W. 42nd Street, 17th Floor

New York, N.Y. 10036-7803

TEL: (646) 442-3316

FAX: (212) 719-1939

Gary Steven Stone

Senior Attorney

**By fax and mail**

November 19, 2004

Appeals Board  
Pension Benefits Guaranty Corporation  
1200 K Street N.W. Suite 480  
Washington, D.C. 20005-4026

Re: Herbert Mack National  
Business Journals,  
Inc. Pension Fund  
PBGC Case Number  
131577

To the Appeals Board:

I am writing in support of Herbert Mack's appeal of the formal determination issued on August 3, 2004.

The challenged determination is based on a conclusive presumption that Mr. Mack received the lumpsum check that was allegedly sent to him at the termination of his employer's pension plan. The presumption has been imposed in contravention of the most fundamental principles underlying the Due Process Clause of the United States Constitution, the fairness requirements embodied in the Administrative Procedure Act, the purposes of ERISA, and, in particular, the duty of PBGC to stand as protector of the rights of participants of terminated pension plans, including the specific stricture of Opinion Letter 91-1, in which PBGC acknowledges its continued obligation to ensure payment of guaranteed benefits not properly paid in a standard termination.

 LSC

## FACTS

The pertinent facts can be briefly stated. Mr. Mack worked for National Business Journals, Inc., from 1977 to its dissolution in 1989. At the time his employment ended, he was a vested participant in the National Business Journals, Inc., Pension Plan.

During 1989, Mr. Mack received a Notice of Benefit Commitment. The notice was in the form of a preprinted form, dated "May 1989," although it was apparently not distributed at least until the end of June. The form stated that he could elect either for a "deferred pension guaranteed for your life, payable at your normal retirement age," the amount of which "will be provided on request," or its actuarial equivalent in the form of a lumpsum payment. His normal retirement age was set at age sixty-five, a date that would be reached in slightly less than twelve years in December 2000. Mr. Mack signed the form, but did not check the box for either option. With respect to the lumpsum payment, the form did not supply a month or year, but merely declared that payment would be made "as soon as" the termination plan was approved. The extent that he can recall, he assumed he could not be paid until he reached retirement age.

Sometime after he became sixty-five, Mr. Mack began to make inquiries about any retirement benefits he might be owed, and was ultimately referred to my office. Based on calls, letters, and papers received through an FOIA request, we were able to learn that the plan had hired PFR Planning, Inc., to conduct the paperwork and make needed benefit distributions in connection with the plan's termination.

PFR has alleged that it timely filed the post-distribution certificate, indicating that all distributions had been made. If this was done, PBGC did not receive it. Accordingly, on October 21, 1992, PBGC notified PFR that the post-distribution certificate had gave informed PFR, in accordance with ERISA § 4041(b)(2)(D), that "if no response to the letter was received within 15 days, the termination would be void and the plan would be treated as an ongoing plan for all purposes."

Not fifteen days later, but nearly eight months later, on June 10, 1993, PBGC again wrote PFR and reminded the firm of its previous warning. Noting PFR's continued failure to comply with section 4041(b)(2)(D), PBGC announced that "the proposed termination of the above referenced-plan is null and void," and that "[y]ou must notify participants that the plan had not terminated and inform that crediting of their service will resume under plan retroactive to the proposed termination date."

Apparently without legal authority, PBGC then refused to acknowledge the effect of section 4041(b)(2)(D), and without any basis for doing so, accepted PFL's self-serving, unsupported and unsworn assertion that it had actually made timely filing of the post-distribution certification, even though PFL was unable to explain why PBGC had not received it.

By contrast, PBGC has issued a determination which, although cursory and conclusory, represents an implicit repudiation not only of Mr. Mack's request for the benefits which he credibly maintains he never received but of even his request, if his claim is disputed, of a hearing where he may testify under oath, be examined and cross-examined, and have a fair evaluation made of his credibility.

### DISCUSSION

The failure of PBGC to receive papers that PFL alleged to have mailed to it is of obvious relevance to the present case in which Mr. Mack did not receive papers that PFL is assumed to have mailed to him. Despite its relevance, PBGC employees with whom I have discussed Mr. Mack's situation, failed to inform me of what had happened, and, in fact, the first I learned of this was when I very recently the agency file pursuant to an FOIA request. This lack of candor is obviously disturbing. Also disturbing is the lack of evenhandedness that the PBGC has shown in its attitude toward, on the one hand, PFL, and on the other Mr. Mack. The former has always been considered to be truthful in its claims to make mailings, even when the agency's own experience contradicts those claims. On the other hand, Mr. Mack is conclusively presumed to have not to be truthful when he states that, like PBGC, he has not received PFL mailings. Of course no corroborating evidence has been demanded of PFL, whereas Mr. Mack has been refused even an opportunity to supply a so-called woodwork affidavit, in the absence of corroborating tax records which PBGC knows he no longer has and which PBGC knows the IRS has destroyed.

The approach is utterly inconsistent with the duties imposed on PBGC by ERIA, APA, and, most fundamentally, by the basic principles of fairness that must determine the fulfillment of those duties that are dictated by the Due Process Clause of the Fifth Amendment

Very truly yours,

Gary Stone

**AFFIDAVIT OF HERBERT MACK**

STATE OF NEW YORK        }  
COUNTY OF NEW YORK    } ss.:

HERBERT MACK, being duly sworn, deposes and says:

1. I worked for National Business Journals, Inc., from 1977 to 1989. I was then a vested participant in the National business Journals, Inc., Pension Plan.
2. In that year, I was sent a "NOTICE OF BENEFIT COMMITMENT." The form was somewhat confusing to me. It said that my ordinary retirement date would be in December 2000, when I would turn sixty-five.
4. I did not remember seeing a box I could check to get a lumpsum payment. From what I can make out from my copy of the form, I do not seem to have checked either box. As I recall, I assumed that I would not be eligible for any benefit until I reached retirement age.
5. As was pointed out to me many years later, the form referred to \$1,896 as the lumpsum amount, but did not say what amount I would get if I waited till I reached age sixty-five. The form also did not give a month or date in which a lumpsum would be paid. It just said that payment would be made "as soon as" the termination plan was approved
4. To the best of my memory, that notice was the last I ever received from the company, the Plan or PBGC on this matter.
5. On March 21, 2002, I met with Gary Stone, a lawyer from Legal Services for the Elderly, who agreed to help me gets the money the notice said I was owed.
6. On or about November 14, 2002, Stone told me that, according to PBGC, the Plan had been "terminated" on March 12, 1990. He had also been told that PFR Planning, Inc., which had been hired to handle the termination, claimed it made lumpsum distributions on or about August 28, 1989.
7. I have absolutely no memory of ever having received any payment

from the Plan, National business Journals, PFR Planning or PBGC. I have searched through all of my own papers and also could not find any record of having received the money.

8. Stone told me that, according to Stephen Fishman of PFR Planning, who had worked on the matter, it had destroyed all of the Plan's records. For its part, PBGC told him that it only had a "certification" from PFR Planning that all the pension checks had been distributed, but had no other evidence that I had actually received the payment.

9. During the period when PFR Planning is supposed to have sent out the checks, my mail service at the apartment building I had resided in had been interrupted due to a fire in the building's lobby and my ability to receive mail then was at best irregular. Much of my mail was lost during that period.

10. I have tried to get my tax returns for 1989 through the Internal Revenue Service but have been told the IRS that they do not keep copies of returns more than 7 years, so that I cannot prove that I either did or did not receive the pension payment.

11. I know that some people would consider the amount of money involved in this case to be small, but for me it matters a great deal. My sole income is the \$781 I receive from Social Security, and \$521 of this must go for rent, plus \$50 per month to pay off rent arrears. I would like to work but nobody will hire somebody as old as me. I am also responsible for co-pays for medicine and medical treatment, which have recently come to more than \$100 per month, in the wake of recent surgery at Lennox Hill Hospital concerning thyroid cancer that had been detected and to remove a gall stone. Next, the doctors want to operate on my prostate.

12. My debt and poverty have added to the stress and depression I feel. In three weeks I will be seventy-one. I have no contract with family and no friends. I live alone. Aside from church on Sunday and a social worker at a local senior center, I live without human contact. I have become sadder and sadder, sometimes find myself crying, and often feel there is no point in my going on.

13. In light of the circumstances of my case, I am asking that I finally be sent the money that the Plan promised me, with interest to make up for the delay of all these years. On the other hand, if PBGC has doubts about whether I received the check, I am asking that I be given a hearing where I can answer questions under oath, and be watched as I testify, so a fair evaluation of my credibility can be made.

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HERBERT MACK

Sworn to before me this 18<sup>th</sup> day  
of November, 2004