3(5)
3(14) ✓

September 13, 1976

Dear :

This is in response to your letter to of our Los Angeles office regarding the Employee Retirement Income Security Act of 1974 (ERISA).

According to your letter, the (named) Council of (city) (the Council) was formed to negotiate a labor agreement with the Local Executive Board of (city), which is comprised of two local unions. The Council retained Mr. (x) to conduct negotiations on behalf of the Council and gave him the title of Executive Director of the Council. A training trust fund was negotiated and the employers and the unions agree that Mr. (x) is a logical choice to conduct the training on a contract basis with the training trust. However, the attorney for the trust feels that Mr. (x) might be considered a party in interest because he negotiates for the employers, even though he is not an employer and does not own or operate any restaurants or hotels. You ask whether Mr. (x) would be considered to be a party in interest under ERISA and, if he is a party in interest, whether it would be lawful for the trust to contract with him to conduct training under the "other services necessary" exception in section 408(b)(2) of ERISA. Also, you assume that if Mr. (x) is not a party in interest, he may contract with the trust.

The term "party in interest" is defined in section 3(14) of ERISA to include, among others, an employer any of whose employees are covered by an employee benefit plan [section 3(14)(C)], and an employee, officer or director (or an individual having powers or responsibilities similar to those of officers or directors) of such an employer (section 3(14)(H)). Under section 3(5) of ERISA, the term "employer" is defined to include any person acting directly as an employer, or indirectly in the interest of an employer, in relation to an employee benefit plan, including a group or association of employers acting for an employer in such capacity. From

the information set forth in your letter, it appears that the Council, by acting in the interest of its member employers in negotiating the establishment of the training trust fund (the Plan), is a group or association of employers and, therefore, an "employer" within the meaning of section 3(5) of ERISA. Accordingly, under section 3(14)(C) of ERISA, the Council is a "party in interest" with respect to the Plan, and, in view of Mr. (x)'s position with the Council as described in your letter, he is also a party in interest with respect to the Plan under section 3(14)(H) of ERISA.

Section 406(a)(l)(C) of ERISA generally prohibits the furnishing of services between a plan and a party in interest. Section 408(b)(2) of ERISA, however, provides an exemption from such prohibition for the provision of services to a plan by a party in interest if certain conditions are met. The Department has recently published proposed regulations designed to clarify the scope of, and the conditions for, the availability of this exemption (29 CFR 2550.408b-2, 41 FR 31874, July 30, 1976). A copy of the proposed regulation is enclosed.

Under proposed §2550.408b-2, a party in interest may provide services to an employee benefit plan, provided that (i) such services are necessary for the establishment or operation of the plan, (ii) such services are furnished under a contract or arrangement which is reasonable, and (iii) no more than reasonable compensation is paid for the furnishing of the services. A service is deemed to be necessary for the establishment or operation of a plan within the meaning of the proposed regulation and section 408(b)(2) of ERISA if it is of a type which is customarily furnished to employee benefit plans of the kind in question in the ordinary course of the establishment or operation of such plans [§2550.408b-2(b)(2)]. No contract for the furnishing of such services is deemed to be reasonable for purposes of the proposed regulation and section 408(b)(2) of ERISA unless it permits the plan to terminate it without penalty to the plan on reasonably short notice under the circumstances [§2550.408b-2(b)(3)]. Whether the compensation paid for the furnishing of the above described services is not in excess of reasonable compensation for such services for purposes of the

proposed regulation and section 408(b)(2) of ERISA generally depends on the particular facts and circumstances of each case [§§2550.408b-2(b)(4) and 2550.408c-2(b)(l)].

Whether the contract or arrangement for services to be provided by Mr. (x) to the Plan satisfies the conditions described above is a determination that must be made by the fiduciaries with respect to the Plan. Further, the provisions of the proposed regulation have only recently been published and may be modified as a result of the submission of public comments with respect thereto.

In addition, you may wish to note that section 414(c)(4) of ERISA provides a transitional exemption from the prohibitions of section 406 of ERISA until June 30, 1977, for the provision of services to plans by parties in interest if certain conditions are met. The Department has recently published a proposed regulation designed to clarify the scope of, and the conditions for, the availability of this transitional exemption (29 CFR 2550.414c-4, 41 FR 31874, July 30, 1976. This proposed regulation was issued in conjunction with the proposed regulation under section 408(b)(2) of ERISA discussed earlier and is included in the enclosure.

Proposed §2550.414c-4 provides that section 406 of ERISA shall not apply before June 30, 1977, to the provision of services between a plan and a party in interest if the three requirements of section 414(c)(4) of ERISA are met.

The first requirement is that such services must be provided either (1) under a binding contract in effect on July 1, 1974 (or pursuant to renewals of such contract), or (2) by a party in interest who ordinarily and customarily furnished such services on June 30, 1974. The second requirement is that the services be provided on terms that remain at least as favorable to the plan as an arms-length transaction with an unrelated party would be. The third requirement is that the provision of services must not be or have been, at the time of such provision, a prohibited transaction within the meaning of section 503(b) of the Internal Revenue Code of 1954 or the

corresponding provisions of prior internal revenue law. If these three requirements of section 414(c)(4) of ERISA are met, section 406 of ERISA will apply neither to services provided before June 30, 1977 (both to customers to whom such services were being provided on June 30, 1974, and to new customers) nor to the receipt of compensation therefor.

The facts and circumstances described in your letter are insufficient to enable us to determine whether the transitional exemption of section 414(c)(4) of ERISA would be available to Mr. (x). In any case, we wish to emphasize that the transitional relief provided by section 414(c)(4) of ERISA extends only until June 30, 1977.

Finally, you should be aware that our consideration of the questions raised in your letter does not relate to any provisions of ERISA not discussed herein. Thus, for example, we have not considered the prudence of the proposed arrangements under section 404(a) of ERISA.

Sincerely,