ERISA OPINION 166

(Same letter as P/O 77-04)

March 24, 1977

Dear :

Your letter of July 6, 1976, addressed to the Secretary of Labor has been referred to this Office for reply. Your letter states that, on behalf of Local # , affiliated with the (union) (Local #), you are advising the Department of Labor that (Company) has failed to make contributions for the month of March, 1976, to the Insurance Trust Fund Local # (Insurance Plan) and the Local # and Local # Severance and Retirement Trust Fund (Severance Plan). Your letter states that such contributions are required under section 18 an addendum of the collective bargaining agreement between (Company) and Local # , a copy of which you enclosed with your letter, and that the amounts involved are $5,175 owed to the Insurance Plan and $575 owed to the Severance Plan. Finally, your letter expresses your "hope and expectation that [the Department] will facilitate the necessary contributions and assess the appropriate penalty" under section 502(i) of the Employee Retirement Income Security Act of 1974 (the Act).

Section 406(a) of the Act provides, as here relevant, that, except as provided in section 408 of the Act (relating to administrative and statutory exemptions from the prohibited transaction restrictions), a fiduciary with respect to a plan shall not cause the plan to engage in a transaction, if he knows or should know that such transaction constitutes, among other things, a direct or indirect lending of money or other extension of credit between the plan and a party in interest, or a direct or indirect transfer to, or use by or for the benefit of, a party in interest, of any assets of the plan.

Section 502(i) of the Act authorizes the Department to assess civil penalties against parties in interest which engage in prohibited transactions with plans, unless the plan is a plan described in section 4975(e)(1) of the Internal Revenue Code of 1954 (the Code). In addition,

sections 409 and 502(a) of the Act authorize the Department to seek appropriate relief against plan fiduciaries for causing a plan to engage in a prohibited transaction.

On March 26, 1976, the Department and the Internal Revenue Service issued a class exemption, Prohibited Transaction Exemption 76-1 (41 FR 12741), under section 408(a) of the Act and section 4975(c)(2) of the Code covering, among other things, delinquent employer contributions to multiple employer plans. The preamble to the class exemption clarifies the circumstances under which the failure of a participating employer in a multiemployer plan (as defined in section 3(37) of the Act) or other multiple employer plan to make a contribution to the plan when such contribution is due, or the failure of the plan to collect such a delinquent contribution, constitutes a prohibited transaction under section 406 of the Act. In addition, an exemption is provided to cover certain prohibited transactions which frequently occur as a result of delinquent employer contributions. A copy of Prohibited Transaction Exemption 76-1 is enclosed.

As indicated in the enclosure, the mere failure of a participating employer in a multiemployer or multiple employer plan to make a contribution to the plan when such contribution is due does not in and of itself constitute a prohibited transaction under sections 406 and 407(a) of the Act or section 4975(c)(1) of the Code because such delinquent contribution does not come within the types of transactions (e.g., extension of credit between a plan and a party in interest) described in those sections. Thus, such a delinquent participating employer would not, by reason of the mere failure to make a contribution to the plan, be subject to the civil penalty which may be assessed under section 502(i) of the Act or the taxes imposed by section 4975(a) and (b) of the Code for prohibited transactions. A prohibited transaction (e.g., lending of money or other extension of credit between a plan and a party in interest) may occur, however, if, in connection with a delinquent employer contribution, the plan fails to make systematic, reasonable and diligent efforts to collect the contribution, or the plan agrees to delay collection, reduce the amount it will accept, or write off the delinquent contribution.

Because participating employers have little, if any, control over the contribution collection efforts made by plans, which efforts are central to a determination of whether a prohibited transaction has occurred in connection with a delinquent employer contribution, the class exemption granted by the Department and the Internal Revenue Service provides that participating employers will not be subject to *the* civil penalty under section 502(i) of the Act or the taxes imposed by section 4975(a) and (b) of the Code for prohibited transactions relating to delinquent contributions, except in the case of arrangements, agreements or understandings between the plan and the employer which are clearly unreasonable. Thus, unless the Plans and (Company) have entered into a clearly unreasonable arrangement, agreement or understanding regarding the late payment, or nonpayment, of {Company)'s contributions, the failure of (Company) to make a required contribution to the Plans for March, 1976, would not subject (Company) to the civil penalty which may be assessed under section 502(i) of the Act or the taxes imposed by section 4975(a) and (b) of the Code.

In addition, in our view, section 404 of the Act (relating to general fiduciary duties) imposes an obligation on multiple employer plan fiduciaries to secure compliance with lawful plan provisions and to pursue appropriate remedies against employers who fail to make required plan contributions. Accordingly, it may be appropriate under section 404 of the Act for the fiduciaries of the Plans to take action, including, where necessary and appropriate, legal action, to secure payment of delinquent plan contributions by employers.

Because your letter raises questions under section 4975 of the Code and under Prohibited Transaction Exemption 76-1, which, as noted above, was granted jointly by the Department and the Internal Revenue Service, we have conferred with representatives of the Internal Revenue Service concerning this matter and they concur in the views set forth above as they apply to section 4975 of the Code and the Prohibited Transaction Exemption 76-1.

Sincerely,