P/OPINION 77-33

403(c)(1)
404(a)(1)(B)

April 4, 1977

Dear :

In your letter of October 23, 1975, you have requested rulings on behalf of the (named) Health and Welfare Trust Fund; the (named) Pension Trust Fund; and the (named) Savings Trust Fund (the Funds). The rulings requested are whether, upon failure of an employee to repay an over-payment he received from a Fund or to provide requested information to the Fund, it is permissible for the trustees of (1) the Fund involved either to deny the recalcitrant employee's eligibility to participate in the plan until he cooperates, or to withhold or offset against any benefits due to the employee by way of recoupment, and (2) a sister fund, upon demand of the Fund involved, either to deny the recalcitrant employee's eligibility in the sister fund to participate in the plan until he cooperates, or to withhold or offset against any benefits due to the employee by way of recoupment and to pay said amounts over to the Fund involved.

You explain that in the day-to-day operations of the Funds, overpayments may arise from mistakes made by the Fund administrator in making payment or by the participant in providing information to the administrator. You advise that the Funds try to recoup these overpayments but for a variety of reasons either elect not to bring the matter to judgment (due to lack of collectability) or are in fact unable to collect the amounts owed to the Fund. Also, the Fund needs, from time to time, to police its accounting and record and to obtain specific information regarding a participant, such as determining whether a recipient of a Fund disability benefit is still eligible for social security disability benefits or has returned to work. In

both situations, you believe that the simplest form of redress and that which brings the most cooperation is either to refuse to recognize the employee's eligibility for benefits or to refuse to pay any benefits which are due to the employee until he repays the erroneous amount or furnishes the information requested.

Although you did not submit copies of the plans under which the Funds are maintained, you indicate that each plan permits the Fund to use either of two specified remedies if a participant fails to repay any unauthorized benefit he or his dependent(s) received or fails to provide any requested information "which is pertinent to the Fund's operations, whether by way of individual inquiry, questionnaire, form or otherwise, and whether or not the information is requested under oath." The specified remedies are (1) to terminate the participant's (or his dependent's) eligibility for benefits until the amount due is repaid in full or until the information is supplied, or (2) to offset the unpaid amount due against any benefits due to or for the participant (or his dependents) until the Fund is repaid in full or to delay or withhold payment of any benefit until the information is supplied. These remedies may be used in addition to the remedies available to the Fund at law or in equity and such other self-help remedies the Fund may pursue. The plans also excuse the Funds from any liability relating to exercising the remedies. The Funds were all established pursuant to the same collective bargaining agreement. You believe that each Fund qualifies under section 302(c) of the Labor-Management Relations Act and that employees are eligible to participate in all three plans.

You state that it is proposed to amend the plan for each related Welfare Fund, Pension Fund and Vacation Savings Fund to provide that the trustees of each Fund are authorized and empowered to honor the demand of its sister Fund, either for reimbursement or to deny eligibility or

benefits until the participant cooperates. For example, if an employee secures an overpayment of welfare benefits but fails to repay the Welfare Fund, it is proposed to authorize the trustees of the Pension Fund and Vacation Savings Fund, upon proper demand of the trustees of the Welfare Fund, to either pay from the benefits accrued to the participant in the Pension Fund or Vacation Fund the amount demanded, or to deny the participant's eligibility or benefits in the Pension Fund or Vacation Fund until he settles the matter with the Welfare Fund.

Section 404(a)(1)(A) and (B) of the Employee Retirement Income Security Act of 1974 (ERISA) provides that, subject to certain sections not relevant to this case, a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries, for the exclusive purpose of providing benefits to participants and their beneficiaries and defraying reasonable expenses of administering the plan, and with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims.

Section 403(c)(1) of ERISA provides that, with certain exceptions not relevant to this case, the assets of a plan shall never inure to the benefit of an employer and shall be held for the exclusive purposes of providing benefits to participants in the plan and their beneficiaries and defraying reasonable expenses of administering the plan.

For discussion purposes, we are dividing the first ruling requested into three questions:

A. If a participant or beneficiary fails to repay an erroneous payment he received from the Fund, may the unpaid amount due from him as reimbursement be offset against any plan benefits due to or for the participant or beneficiary until the Fund is repaid in full?

B. If a participant or beneficiary fails to repay an erroneous payment he received from the Fund, may his eligibility for plan benefits be terminated until the amount due is repaid in full?

C. If a participant or beneficiary fails to furnish information requested by the Fund which is pertinent to the Fund's operations, may the Fund delay payment of any benefits or may the participant's or beneficiary's eligibility for plan benefits be terminated until the information is supplied?

With respect to question A, we note that in accordance with section 404(a)(1)(B) of ERISA, a fiduciary must attempt, with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims, to collect money owed to the plan, including recovery of erroneous payments made from a plan. We believe that, depending on the facts and circumstances relating to each erroneous payment, reducing future benefits payable by a fund to a participant or beneficiary, in accordance with the provisions of the plan, may be prudent if other reasonable attempts to collect the erroneous amount have failed. In this regard, payment of the erroneous amount to the participant or beneficiary may be viewed as an advance payment of benefits due him under the plan.

With respect to question B, we note that terminating the participant's or beneficiary's eligibility for benefits until the erroneous amount paid by the Fund to the participant or beneficiary is repaid in full may result in denying benefits otherwise due under the plan in an amount exceeding the amount owed by him. We believe that denying benefits due under the plan in an amount exceeding the amount owed would not be in the interest of the participants and beneficiaries and for the exclusive purpose of providing benefits to them and defraying reasonable expenses of administering the plan. Such denial and any

plan provision permitting same would, therefore, contravene the requirements of section 404(a)(1) of ERISA.

With respect to question C, we believe that section 404(a)(1)(B) of ERISA requires a fiduciary to determine in a prudent manner that a participant or beneficiary has satisfied all plan requirements for payment of benefits before any benefits are paid to such participant or beneficiary. Therefore, if a participant or beneficiary fails to furnish information requested by the Fund which is necessary to determine whether such participant or beneficiary has satisfied all requirements for payment of benefits, the Fund is required to delay payment of benefits until the requested information is furnished, provided the Fund has previously attempted, unsuccessfully, to obtain such information with the prudence described in section 404(a)(1)(B). However, we believe that after the requested information is furnished and the fiduciary determines that the participant or beneficiary has met the requirements for payment of benefits as of a given date, determined as if the participant or beneficiary had furnished the requested information timely, payment must be made for benefits due from such date until the date payments actually began (as well as for later benefits due). For example, if the plan would have paid monthly benefits commencing January 1 for a participant who had furnished timely the requested information necessary to establish his right to receive such payments, but such participant did not furnish this information until June 15, the Fund must pay such participant the benefits due for January through June, as well as benefits due for later months. Forfeiture of benefits for January through June would violate the requirement of section 404(a)(1) that a fiduciary shall discharge his duties solely in the interest of the participants and beneficiaries and for the exclusive purpose of providing benefits to participants and their beneficiaries and defraying reasonable expenses of administering the plan. We are not commenting on the issue of whether such forfeiture would be permitted under the vesting provisions of section 203(a) of ERISA and section 411(a) of the Internal Revenue Code of 1954, because this issue is within the primary jurisdiction of the Internal Revenue Service, from whom you have requested identical rulings.

According to your letter, the plans provide the remedies mentioned in question C in the event the participant or beneficiary fails to furnish requested information "which is pertinent to the Fund's operation," which may include items other than information required to establish a participant's right to receive benefit payments--his telephone number, for example. If the requested information is not required to establish a participant's right to receive benefit payments, delaying payments until such information is furnished would also violate the above mentioned requirements of section 404(a)(1).

With respect to the second ruling requested, it appears that delaying or reducing benefits under a plan to remedy a participant's or beneficiary's failure to repay erroneous amounts received from another plan or to provide requested information regarding the operation of another plan would be primarily for the convenience of the fiduciary of such other plan, rather than for the benefit of the participants and beneficiaries of the plan under which the remedies are applied. Problems relating to another plan have no relevance to the plan in question, even if both plans are established and maintained pursuant to the same collective bargaining agreement and cover many of the same employees. Therefore, applying remedies to participants or beneficiaries of the plan in question for problems relating to another plan would not be in the sole interests of the participants and beneficiaries of the former and would not be for the exclusive purpose of providing benefits to them and defraying reasonable expenses of administering the former. Accordingly, applying remedies in this fashion would violate the requirements of section 404(a)(1) of ERISA.

Furthermore, if the plan pays amounts to another plan to reimburse the other plan for erroneous payments made by the other plan to a participant or beneficiary, such reimbursement would not constitute a use of plan assets for the exclusive purpose of providing benefits to participants in the plan providing the reimbursement and

their beneficiaries and defraying reasonable expenses of administering the plan providing the reimbursement. Therefore, such payment would contravene the requirements of section 404(a)(1)(A) and section 403(c)(1) of ERISA.

We sincerely regret the delay in replying to your letter. If we may be of any further assistance, please contact us.

Sincerely,