U.S. DEPARTMENT OF LABOR
Pension and Welfare Benefit Programs
Washington, D.C. 20216

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Shimmel, Hill, Bishop & Gruender, P.C.

111 West Monroe, 10th Floor
Phoenix, Arizona 85003

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OPINION 77-45

Attn: Daniel F. Gruender

406(b)(2)
408(c)(3)

Re: Exemption Application No. D-154

Gentlemen:

You have requested two rulings on behalf of the following funds (hereinafter referred to as "the Funds"):

(1) Operative Plasterers' and Cement Masons' International Association Local Union 394, Health and Welfare Trust Fund;

(2) Operative Plasterers' and Cement Masons' International Association Local Union 394, Pension Trust Fund;

(3) Operating Engineers Local 428, Health and Welfare Trust Fund;

(4) Operating Engineers Local 428, Pension Trust Fund;

(5) Operating Engineers Local 428, Vacation Savings Trust Fund;

(6) Arizona State Carpenters, Health & Welfare Trust Fund;

(7) Arizona State Carpenters, Pension Trust Fund;

(8) Arizona State Carpenters, Vacation Savings Trust Fund;

(9) Laborers, Teamsters and Cement Masons #395, Health and Welfare Trust Fund;

(10) Laborers, Teamsters and Cement Masons #395, Pension Trust Fund;

(11) Laborers and Cement Masons #395, Vacation Savings Trust Fund;

(12) Cement Masons #394, Joint Apprenticeship Fund.

The rulings requested are:

1. That the custodial (trust and banking) services provided by Great Western Bank & Trust to each of the Funds is an exempt transaction under section 408(b)(2) of the Employee Retirement Income Security Act of 1974 (ERISA) and not a prohibited transaction, assuming for the purposes of the ruling that no more than reasonable compensation is paid by the Fund therefore; and

2. That Mr. J. Snead Parker may serve as a trustee of each Fund and at the same time serve as a director of Great Western Bank & Trust Company (the Bank) so long as neither the Fund nor the Bank engage in any prohibited transactions and confine their relationships to those approved under ERISA or which are exempted from the application of the prohibited transactions provisions of ERISA, including, expressly, the Bank's providing a custodial service to the Fund.

You state that the Bank is employed to perform a custodial function (i.e., to keep safe and preserve the Fund's assets) by Funds (1) through (4) and (6) through (10) above, as a temporary depository (to receive deposits and transmit moneys to other banks which issue certificates of deposit) by Funds (5) and (11), and to receive deposits and forward moneys to Fund (12). You explain that in performing these duties the Bank has no discretionary functions and no investment advisory functions and acts solely upon the instructions of the Chairman and Secretary (or alternates) of the Funds. You describe the Bank's services as the usual custodial services performed by banks, and the fees received by the Bank as the usual and customary fees for said services charged generally by banks performing similar functions in the Phoenix, Arizona area. You explain that each Fund has engaged the services of an investment advisor. You note that the Bank may be a fiduciary with respect to the Funds because it has limited control respecting the disposition of Fund assets.

You advise that Mr. J. Snead Parker is a trustee of each Fund and also became a member of the Bank's board of directors sometime after the Bank became employed by the Funds. You explain that members of the Bank's board of directors serve in the traditional role of directors and are not merely honorary or advisory members and that they exercise the ultimate control of the Bank although day-to-day operations and management of the Bank and its banking functions (including trust functions) are conducted by the officers of the Bank.

You state that Mr. Parker is not a member of any of the committees which control or direct the trust function (although ultimate responsibility for the trust function rests with the board of directors of which Mr. Parker is a member); that he does not personally (i.e., acting alone) direct any trust function and as a general matter does not have contact with or communication with any trust officer (although he might have occasional contact with such an officer of the bank); that as a general policy matter, when acting as a trustee of a Fund, he does not participate in discussions of the trustees concerning the Bank and abstains from voting on any matter pertaining to the Bank; that when functioning as a director of the Bank, he refrains from discussions or voting concerning any of the Funds for which he serves as trustee; and that he is paid no fee for acting as a trustee of the Funds but he is paid the customary director's fee for acting as a director of the Bank. Finally, you state that each Fund and the Bank are advised that Mr. Parker is a member of the Bank's board of directors and is also a trustee of the Fund.

Section 3(14)(A) of ERISA provides that a fiduciary of an employee benefit plan is a party in interest with respect to that plan. In addition, section 3(14)(B) provides that a person providing services to an employee benefit plan is a party in interest as to such a plan. Since the Bank performs custodial services for the Funds, the Bank is a party in interest, within the meaning of section 3(14)(B), with respect to the Funds. If the Bank is also a fiduciary of any Fund, it is a party in interest with respect to that Fund under section 3(14)(A). Mr. Parker, as a trustee of each Fund, is a fiduciary with respect to each Fund.

Section 406(a)(1)(C) of ERISA prohibits a fiduciary with respect to a plan from causing the plan to engage in a transaction, if he knows or should know that such transaction constitutes the furnishing of goods, services or facilities between a plan and a party in interest of the plan. Section 406(a)(1)(D) prohibits a fiduciary from knowingly causing a plan to engage in a direct or indirect transfer to, or use by or for the benefit of, a party in interest of a plan, of any assets of the plan. Further section 406(b) provides that a fiduciary with respect to a plan shall not deal with the assets of a plan in his own interest or for his account, shall not in his individual or in any other capacity act in any transaction involving the plan on behalf of a party (or represent a party) whose interests are adverse to the interests of the plan or the interests of its participants or beneficiaries, and shall not receive any consideration for his own personal account from any party dealing with such plan in connection with a transaction involving the assets of the plan.

Section 408(c)(3) provides that nothing in section 406 shall be construed to prohibit a person from "serving as a fiduciary in addition to being an officer, employee, agent or other representative of a party in interest."

With respect to your second inquiry, a person serving as a director of a fiduciary or a provider of services would be deemed to be a representative of a party in interest within the meaning of section 408(c)(3). Therefore, Mr. Parker would not be subject to liability under section 406 merely because he serves as a trustee of each fund while at the same time he serves as a director of the Bank.

You should note, however, that section 408(c)(3) states merely that service as a fiduciary by a representative of a party in interest, without more, is not prohibited under section 406. In particular, section 408(c)(3) does not deal with possible prohibited transactions which might occur under section 406(b), depending on the factual situation, when a fiduciary of a plan is involved in the appointment or retention of a corporation of which such fiduciary is a director as a provider of services to the plan.

Moreover, section 408(c)(3) of the Act relates only to the construction of section 406 of the Act. In particular, section 408(c)(3) has no bearing on the applicability of the fiduciary duties set forth in section 404(a)(1) of the Act.

With respect to your first inquiry, the Department of Labor and Internal Revenue Service issued proposed regulations (29 CFR 2550.408b-2 and 26 CFR 54.4975-6, published in the Federal Register on July 30, 1976) as to the statutory exemption for the provision of services contained in section 408(b)(2) of ERISA and section 4975(d)(2) of the Internal Revenue Code. We are enclosing herewith a copy of the proposed regulation under section 408(b)(2). The agencies are currently working on final regulations under these sections, and it is expected that they will be issued in the near future. Accordingly, it will not be possible for us at this time to respond substantively to the question you have raised. If, after these regulations under section 408(b)(2) become final, you continue to have a question regarding the application of section 408(b)(2), please resubmit your question to us for a substantive reply.

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

Sincerely,

Fred W. Stuckwisch
Director
Office of Regulatory Standards
and Exceptions

Enclosure